

TAKING BAIL SERIOUSLY: THE STATE OF BAIL JURISPRUDENCE IN INDIA

(2020) Edited by Salman Khurshid, Sidharth Luthra, Lokendra Malik, and Shruti Bedi, Published by LexisNexis, Gurugram, India, Pp xx+ 512. Price Rs. 995.

IN THE words of great Justice V.R. Krishna Iyer, “The doctrine of police power, constitutionally validates punitive processes for the maintenance of public order, Security of the state, national integrity and the interest of public generally. Even so, having regard to the solemn issue involved, deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious considerations relevant to the welfare objectives of society, specified in the Constitution.”

What then, is ‘judicial discretion’ in this bail context? In the elegant words of Benjamin Cardozo, “*The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness.*” He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to ‘the primordial necessity of order in the social life’. Wide enough in all conscience is the field of discretion that remains.

The book titled ‘Taking Bail Seriously’ portrays this concept that bail is a very important subject in criminal justice system of a country. For a reasonably long time, *Bail has been concerned as a Rule, and Jail an exception in the Indian criminal justice system* but this book conquest market at the times when judiciary and especially the constitutional courts have somewhat diminished this principle. The main object of bail is to ensure presence of accused before the court of law where he/she faces the trial and makes himself/ herself available to the court for serving the sentence if convicted. The book goes on to narrate that in a constitutionally-controlled criminal justice system like ours, there has always been a balancing approach between the liberty of the accused and the collective interests of the society which requires a fearless environment. Both are equally important considerations. The book is a compilation of essays which attempt to present the actual state of affairs of bail jurisprudence in the country in the light of recent judicial and constitutional developments. A number of renowned scholars, academicians and active practitioners have authored their papers on a variety of important issues pertaining to Bail jurisprudence which has seen *Dim Dawn* in the rise of Indian constitutionalism. Issues pertaining to bail such as bail by police, bail by magistrate, regular bail, anticipatory bail, cancellation of bail, default bail,

constitutional jurisprudence relating to bail etc. have been covered by the various contributors of the book.

The book begins with a somewhat unique foreword by Justice H.S. Bedi. Justice Bedi has not only analyzed the judgments of the apex court but has also written at length about his experience as a judge while dealing with a bail plea. He puts forth that, the law relating to Bail should not be read in isolation but must be read with the constitutional goals and mandates. In his article titled '*India's Bail Jurisprudence: Need for Urgent and Comprehensive Revamp*', Abhishek Manu Singhvi has traced the loopholes of criminal jurisprudence, and its vital subset *viz.*, bail jurisprudence. The author advocates for bail reforms by relying on the 268th Report of the 21st Law Commission of India and argues that the existing system of bail in India is 'inadequate' and 'inefficient' to accomplish its purpose. The author reiterates the famous remark of Lord Denning, in his inimitable style, which gave bail jurisprudence pride of place in the pantheon of liberty issues.¹ Anurag Deep, in his paper by focusing on the role of police *i.e.*, the state has discussed the Law of Bail across the jurisdictions of commonwealth. The author comments that personal liberty is the central pillar of the constitutional democracy and argues that the first line of protection of personal liberty is the state in any jurisdictions.

Ashish Bansal in his paper has argued the inception of getting a bail starts with the fear of arrest. The author discusses the recent trend that has led to a new debate of *essential versus non-essential*. The imbalances in adjudication of bail petitions is one of the reasons for overcrowding of prisons across the country and giving rise to another set of challenges to prison administration and the 'State'. In her piece, Charu Mathur has reiterated that Bail is a fundamental component of the criminal justice delivery system by analyzing various judgements of the Supreme Court of India. She traces the origins of bail to clause 39 of Magna Carta which read: "*No free men shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land*".

Chirag Balyan subscribing to the philosophy of Justice Krishna Iyer describes the antinomies of bail jurisprudence in the Liberal theories. The learned author discusses the two conflicting values in Bail—Liberty and Security and concludes that the law relating to bail is often meant to balance two conflicting interests, presumption of innocence of an accused and

¹ Lord Denning, *Freedom under the Law*, 3 (Sweet and Maxwell Ltd 1968).

requirement of shielding the society from the hazards of those committing crimes. In her paper Dipa Dube discusses the judicial discretion in grant of bail. She argues that the concept of bail, which takes the central stage in the criminal justice process, is rooted in the supreme notion of life and liberty of human beings. The author concludes by saying that the notion of personal liberty is sacrosanct and high in the scale of constitutional values and the court should be meticulous that the liberties of citizens are not undermined in the application of criminal justice process.

In the chapter on A Comparative Survey of the Law of Bails in India and Canada, Khagesh Gautam and Sebastien Lafrance make a comparative analysis of the Law of Bails between both the countries. This chapter opines that it would be more in consonance with the legislative mandate to hold that an accused must be held to have availed of his indefeasible right, the moment he files an application for being released on bail and offers to abide by the terms and condition of the bail. To interpret the expression 'availed of' to mean actually being release on bail after furnishing the necessary bail required would cause great injustice to the accused and would defeat the very purpose of the proviso to section 167(2) of [the code] and further would make an illegal custody to be legal, inasmuch as after the expiry of the stipulated period the magistrate has no further jurisdiction to remand and such custody of the accused in without an valid of remand.

In their paper Shuvro and Prakesh Sharma have argued for infrastructural planning to reduce the delay in the dispensation of justice. They have relied upon the 120th Report of the Law Commission of India, which highlighted upon the problem of delays, arrears, judicial staff and infrastructural planning. Senior Advocate, Sidharth Luthra in his joint paper with Aayushi Sharma Khazanchi, advocates for consistency in the bail jurisprudence. The book puts forth that 67 percent of the prison population awaiting trial are the poor and illiterate and argues that it is the need of the hour that overcrowding in jails be reduced, and this can only be done when all arms of the criminal law machinery working in tandem, including not making of unnecessary arrests, expedited investigation, and grant of bail where reasonable grounds are made out.

As pointed out in the preface of the book, in a unique paper, Saumya Devraj discusses the new trends of Electronic Monitoring of offenders released on bail in the light of global practices and provision. She suggests its implementation in the country to enhance the human development of people who are in conflict with law due to different reasons. She concludes that the ideals of liberty as well as that of ensuring justice are deeply entrenched in the mechanism of bail. For this, electronic monitoring of accused may be an added protection in

such cases to ensure compliance of the conditions, which effectively operate to secure the aforesaid interests of the society.

In his chapter Talha, delves into the philosophical enquiry of the Law of Bails. The legal system, as inherited by us, is largely driven by notions of legalism and rules of positivism. It provided for a set of rules which were required to be followed and simply implemented. The article then touches upon the grassroots of socio-economic state of Indian society, and states that poverty should not be a barrier in getting bails and necessary changes should be made in the status to make the bail system humane. The author also advocates more use of release of offenders on personal bond.

In the other essays of the book as well, as one by Justice S S Saron, the same has been reiterated by way of the mentioning of Supreme Court judgments. Justice Saron, in his piece, dives deep into the origins, significance, and judicial trends pertaining to bail jurisprudence in India. He argues for the maintenance of uniformity in the grant of concession of bail which avoids arbitrariness and allegation of bias. In fact, uniformity in criminal justice administration is the touchstone of a strong judicial system, which is so very relevant for the dispensation of Justice to the litigant. Shriya Maini, in her piece, throws light on the transit bail and remands. She favors the transit bail mechanism and opines to minimize the misuse of remand so that the constitutional protection of personal liberty of individuals facing the trial could be ensured.

Professor Yogesh Pratap Singh, in his chapter, critically examines the anticipatory bail provision in light of the judicial directions and statutory developments. He states that judicious exercise of discretion has to enhance people's trust in the judicial system. He further recommends constituting a committee to examine the anticipatory bail system and suggest necessary guidelines which could be followed by the Courts equitably. Lokendra and Shailendra, in their joint chapter on bail, focus on key bail jurisprudence issues from personal liberty point of view in the constitutional scheme of India. The essay suggests that lower judiciary and police should be sensitised towards the liberty of people because the socio-economic conditions of poor and indigent people despite being aggrieved most of the times handicap their *right* to appeal in higher courts. Senior Advocate Salman Khurshid also subscribes to Justice Krishan Iyer's version of Law of Bail. In his scholarly piece he has advocated for a pro liberty approach regarding Law of Bail in the country. Case analysis of prevention of money laundering cases particularly the famous *Nikesh Tarachand Shah* judgement delivered by the apex court is done by Shruti Bedi in her article.

The most interesting part of the book is the scholarly epilogue by Professor Upendra Baxi, which discusses the Anticipatory Bail verdict of the Supreme Court of India in P. Chidambaram's case. Professor Baxi points out that a delicate balance has to be established between two rights— safeguarding of the personal liberty of an individual and the societal interest. But how such 'balancing' should be done to avoid facile and fallacious adjustment of conflicting interests in a given situation? Professor Baxi argues that, the constitutional response must be in the negative, but the learned Court, in Chidambaram, seems to think otherwise. He further says that Harvard Dean Roscoe Pound lived and died insisting that courts ought to place the interests in conflict at the same level. Professor Baxi concludes by saying that, "*life of individual in society is one thing, not two*".

The book has argued for social interest in individual liberty and life, or free and fair trial. It's a must read for academics, practitioners, students, judges and legislators. Overall, from all the essays and the arguments provided therein, it can be concluded that there is simply no magic bullet by which one may set timelines for successful investigation. All that may be said is quite general in character: investigation should not take 'unreasonable time', and the denial of bail is no punishment. One more thing which should be pointed out is that, all of the essays are not only scholarly but these essays also contain critical analysis of the various judgement(s) of the Supreme Court of India. Investigation should be efficient but also a fair investigation, from the standpoint of suspects and for wider society, who has a stake in efficient and equitable investigation. And it is this stage that fairness discipline comes to fore in bail proceedings, where courts must decide these issues in situations of pre-trial custodial detention of the suspect while investigation is going on.

Written and expressed in an interesting style, which also includes the personal experiences and well-researched writings, the book aims to provide insight to the society on the working and substance of a significant aspect of the criminal justice system. Indeed, this Volume, contains a wealth of information and provides some solutions to the unsatisfying questions on the subject of Bail, as understood in its practical sense in the country. The word 'Bail' conjures up images of grief-stricken people languishing in the unhygienic conditions of the Indian jails. The reality is far more serious and challenging both for the courts and the law and order machinery. The solution for challenge demands the best human character coupled with empathy and sensitivity towards other human beings.

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