Law of
BAIL

R K Naroola
Udayan Mukerji

A PREVIEW

Foreword by
Justice A K Sikri
Former Judge, Supreme Court of India

Introduction by
Prof. (Dr) M C Sharma
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2020

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FOREWORD

The problem of Jail or Bail in India has a colonial origin, when people were locked up in chambers even for petty offences by their masters. The law enforcement system in our country had probably engrained and adopted this practice as an inevitable part of investigation.

An accused could be tortured in custody for numerous reasons – for admittance of crime, for extortion of a confession, for the imputation of evidence. Reports have shown this has also been done for the refusal to pay bribes or on account of personal grudges, and sometimes, merely for the show of power and authority.

Though in last few decades, the societal contexts, its relations, pattern of crimes has changed along with the arbitrariness in exercising judicial discretion while granting bail.

The concept of bail has been recognized in the various international covenants and instruments upholding human values. For Instance, if we talk about the International Covenant on Civil and Political Rights, 1966 Article 9(3) of ICCPR states that the general rule shall not be detention in custody of persons awaiting trial and release may be conditioned on the guarantees to appear at the trial. Similarly, Article 10 (2) (a) of ICCPR also refers to the same principle as it states that accused must not receive same treatment as a convict.

Above all, Article 14 (2) cardinally provides for the presumption of innocence until proven guilty as an axiomatic principle of law. This principle imposes

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on the prosecution the burden of proving the charge, ensures that the accused has the benefit of doubt and obliges public authorities to refrain from prejudging trial outcome. It shifts the burden of proof on the prosecution and postulates for an unbiased trial.

Thereafter coming to the Indian Statute, Section 49 of Code of Criminal Procedure provides that an arrested person shall not be subjected to more restraint than is necessary to prevent his escape.

Personal liberty and the rule of law find its rightful place in the Constitution in Article 22 which includes measures against arbitrary and indefinite detention. Article 22 further provides for four basic rights to the arrested persons. An individual has to be informed of the grounds of arrest, should be made available with legal counsel and should be produced before the Magistrate within 24 hours of arrest. Article 20 protects the prisoners against self-incrimination. Article 21, which seeks to ensure a dignified life for the citizens, includes in its ambit the right against torture.

The bedrock of criminal jurisprudence lies on the principle – 'there is a presumption of innocence, till a person is found guilty.' In this backdrop, the issue whether a person accused of crime should be granted bail pending trial or not assumes significance. This issue is not confined to criminal law simpliciter. It has overtones of right to liberty, which is a fundamental right granted to every person in this country under Article 21 of the Constitution. It is this right to liberty of human beings which brings its significance of concept of bail in the criminal jurisprudence as well. While on the one hand assumption of innocence till proven guilty confers right upon a person to get bail pending trial, there are few pressing circumstances which would

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warrant denial of bail to an undertrial as those circumstances would tilt the scales in the interest of society at large and to ensure fair trial at the same time. In this whole process, striking a fine balance between the right to liberty of a person accused of an offence and the public interest, becomes a difficult task. The provisions of bail contained in the Code of Criminal Procedure (and special provisions in particular statutes) strike such a balance. At the same time, notwithstanding these provisions the fact situations in particular cases make it difficult for the judiciary to choose between bail or jail. Justice V.R. Krishna Iyer, in one of his judgments[1] has captured the dichotomy in the following words:

> ""Bail or jail?" — at the pre-trial or post-conviction stage — belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the Bench, otherwise called judicial discretion. The Code is cryptic on this topic and the Court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case-flow, ad hoc response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of "procedure established by law". The last four words of Article 21 are the life of that human right.
>
> 2. 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 the 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.
>
> 3. What, then, is "judicial discretion" in this bail context? In the elegant words of Benjamin Cardozo [The Nature of the Judicial Process — Yale University Press (1921)] :
>
> > "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

[1] *Gudikanti Narasimhulu v. Public Prosecutor*, High Court of A.P., (1978) 1 SCC 240

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> 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."

Even so it is useful to notice the tart terms of Lord Camden that [1 Bovu, Law Dict., Rawles' III Revision p. 885 — quoted in Judicial Discretion — National College of the State Judiciary, Rano, Nevada p. 14]

> "the discretion of a Judge is the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable...."

After spelling out the judicial discretion, which is an appeal to judicial conscience of a Judge, this judgment also lays down the test that should be applied while examining as to whether bail to an accused should be granted or not, pending trial.

Justice Krishna Iyer was not the first Judge who had laid down the test for grant of bail. Law on this subject had been discussed by the apex Court as well as High Courts in umpteen number of judgments before that as well, which stood crystallised in the aforesaid judgment.

There have been umpteen number of judgments even thereafter reinforcing the principles laid down in the aforesaid judgment. The principle of law that firmly stands established is that an accused, in order to get a bail pending trial has to meet the following circumstances which is given the nomenclature of "triple test":

1. There is no likelihood of tampering with the investigation and/or evidence, or
2. Influencing the witnesses, thereby impinging upon the fair trial, and

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3. The accused will not flee the justice and would continue to participate in the criminal trial.

At the same time, there have been certain pronouncements of the apex Court which lay down that bail can be denied in certain circumstances where the charges are very serious and grave. The Supreme Court in *Ram Govind Upadhyay*, laid down that the nature of offence is one of the basic considerations for acceptance or rejection of bail application. In that the Court dealing with the application for bail is required to exercise its discretion in a judicious manner and not as a matter of course. In *Prahlad Singh Bhatti*, the Court revealed following well-settled principles regarding circumstances to consider while granting or refusing bail. The Court noted:

> "**8.** The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it (*sic* itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce *prima facie* evidence in support of the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

The same principles were summoned up in case of *UP v Amarmani Tripathi*, in following terms:

> "**18.** It is well settled that the matters to be considered in an application for bail are
> (i) Whether there is any *prima facie* or reasonable ground to believe that the accused had committed the offence;
> (ii) Nature and gravity of the charge;
> (iii) Severity of the punishment in the event of conviction;

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(iv) Danger of the accused absconding or fleeing, if released on bail;
(v) Character, behaviour, means, position and standing of the accused;
(vi) Likelihood of the offence being repeated;
(vii) Reasonable apprehension of the witnesses being tampered with; and
(viii) *Danger, of course, of justice being thwarted by grant of bail'*

The position that emerges is that in a given case, the Court is to strike a balance between the two sets of principles viz,, triple test on the one hand and gravity of the offence on the other hand and apply it to the fact situation in the given case, in order to exercise its discretion as to whether the accused should be granted bail or not.

However, in real practice, it is seen that the courts may lean in favour of one set of principle as against the other. It generally happens that many a time, the courts dealing with the bail matters initially go by the gravity of charge and deny the bail. It is also seen that in this situation, even initial bail is denied to an accused on the ground that charges are serious, the said accused is granted bail after some time on the satisfaction of triple test, even when the requirement of triple test stood met at the initial stage as well, when the bail was denied. Two classical examples of adopting such a course are 2G trial cases, where bail was granted after a period of 8 to 9 months and most recent case of Mr. P. Chidambaram, who again, has been granted the bail after he remained in jail for a period of 105 days. It would be interesting to note that in both the cases, the reasons given by the Court in its Orders granting bail were the reasons which were applicable at the initial stage as well. It has created some uncertainty insofar as bail jurisprudence is concerned.

The irony is that even after more than 40 years from the said judgment, the law on bail remains in *limbo*, when it comes to applying the laid down tests in a given case and the legal position remains blurred. This can be so

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discerned from the judgments on bail pronounced by various courts from time to time which would reflect the judicial approach of taking one step further and two steps backward. Some judgments on bail jurisprudence by the courts in last couple of years, including the aforementioned two cases. would be a testimony to the aforesaid statement and would prove that law on the subject remains blurred.

In such a scenario, discussing the 'Law of Bail' at this juncture assumes paramount importance. Time has come to instil clarity and consistency in the approach by the courts while dealing with the application of bail of the undertrials since the very concept of bail is rooted in Article 21 and 22 of the Constitution and touches upon the personal liberty of a person. It is to be taken seriously and needs clarity. In the process, it is the need of the hour to comprehensively revamp the bail jurisprudence.

It is for this reason that I feel immense pleasure to introduce you to the book themed on "LAW OF BAIL" authored by Mr. R K Naroola and Udayan Mukerji which is going to hit the stands. Though essentially this book has been written for legal practitioners, budding Law Graduates and other law enthusiasts, I believe it will be equally beneficial for the teachers and judges.

The Chapters to the book have very well taken care of all the aspects to the concept of Law of Bail, discussing the fallacies and suggestions to overcome them. The learned authors in the present book have comprehensively dealt with all the aspects of Bail with comprehensive coverage of Default Bail, Anticipatory Bail, Special Powers of High Courts as to Bail , Whither Bail, etc. All these aspects are dealt with elaborately taking note of finer nuances,

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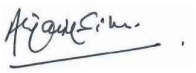
with the support of necessary and relevant case laws. The beauty of the book is that it has been made so easy to understand and therefore it will serve as a useful tool for understanding this subject by not only those who are the practitioner or enforcer of the concerned provisions, but also those categories of persons who are supposed to follow these provisions, even if they do not possess any legal background. I am confident that the book proves to be an enlightenment for all the readers looking forward to it.



New Delhi
5 December 2019

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Former Judge, Supreme Court of India

Prof (Dr) Mool Chand Sharma
Prof Emeritus, BML Munjal University

Formerly:
Full-time Member Law Commission of India
Vice-Chairperson, UGC
Director (Vice Chancellor) National Law Institute University Bhopal
Advisor (Policy-Research) to the Hon'ble President of India Mrs Patil
National Research Advisor NHRC
Joint Registrar Research - Supreme Court of India

Introduction

Challenges of Introducing "Law of Bail"

I felt extremely honoured and elated when was asked by MR RK Naroola (Advocate) and Mr Udayan Mukherjee (Sr IPS Officer Retd, presently practitioner of law) to write a brief Introduction to their work ***Law of Bail*** and being published by Oakbridge Publishing for publishing a work on contemporary issues. I had known Mr Naroola as an expert in commercial laws, arbitration laws and constitutional laws and was deeply stuck by learning the kind of jobs Mr Mukerji handled in some of very challenging areas as an IPS officer, but, going through 'Law of Bail' revealed me the depth of knowledge, faculties of superb craftsmanship as writers, finer research skills and scholastic approach the authors possess. The simplicity, clarity and brevity of language the authors bring along with them in writing their work, could be the matter of envy to many in the profession of law as well as academics. Congratulations and best compliments to both, Mr Naroola and Mr Mukherjee for producing "Law of Bail".

My pride and happiness got further elated by many folds, when was told that Honorable Mr Justice A K Sikri (Former Judge, Supreme Court of India) a rarest of rare judges who possesses critical legal thinking, have judicial conviction combined with judicial courage and judicial craftpersonship to unfold, fold and create laws and legal techniques to meet the requirements of assuring social and economic justice without transgressing boundaries of jurisprudence, has agreed to Foreword the Work "Law of Bail" of Mr Naroola and Mr Mukerji. Let me confess candidly that while feeling elated, also I got nervous and pondered whether it would be possible for me to do justice with the task assigned to me especially knowing of the 'excellence' which is deeply weaved into Justice Sikri's judicial persona whether he is writing judgments he gave on different subjects of law including on the subject of bail (while talking of his superb contribution to the development of bail law in India one can cite number of cases, but as an example I am reminded of the judgment he wrote on his behalf and on behalf of another juristic judge, Mr Justice Rohinton F Nariman[1] which

1. *Bhadresh Bipinbhai Sheth v. State of Gujarat*, delivered on September 1, 2015 in the Criminal Appeal Nos 1134-1135 of 2015.

dealt with various nuances of anticipatory bail. It not only clarified the confusion prevailing but was path breaking in many ways, which the authors of "Law of Bail" have so beautifully analyzed. As I was pondering, suddenly I was reminded of a saying that neither a job is small, nor it is big-all depends upon the hard work, sincerity and integrity with which one takes the task assigned to him. I collected the courage and let me assure the readers and especially to the authors of Law of Bail and Justice Sikri of the sincerity and integrity of the efforts I have roped in performing the task, it is for them to judge how far I have succeeded and if failed I ask for forgiveness right in advance.

Constitution, Constitutionalism and Constitutional Morality and the "Bail Law"

It is noon, have just come to use the IIC library from the UGC where I was invited to give a lecture to the entire University Grants Commission fraternity, from the highest echelons of the administrative structure to the facilitators and others. Being the Constitution Day the lecture was to highlight the importance, growth and dynamics of India's Constitution, its making, constitutional philosophy and constitutionalism; constitutional morality and conventions that guided the Founders of India's Constitution to give us the text, which by any reckoning has been admired as on the of the most dynamic Constitution in the world. The role that Dr Ambedkar, Nehru, Maulana Azad, Sardar Hukam Singh, Sir Alladi Krishnaswami and others played in framing the Constitution, how they reconciled and balanced the differences amongst themselves on various aspects of the document. I was especially asked to emphasise the relationship amongst the trio comprising the Preamble, Fundamental Rights and Directive Principles of State Policy; and the Chapter on Fundamental Duties which was added in 1976. As I prod and try to collect some thoughts as to how to introduce the subject of Bail, I recalled what I had said in the morning at the UGC. Paying my tributes to Dr Ambedkar who was the Chairman of the Drafting Committee and who worked tirelessly sometimes working 24 hours, studied almost every important Constitution available, constitutional conventions, constitutional morality, had long interactions and exchange of ideas with stalwarts like Nehru, K M Munshi, Alladi Krishnaswami, Maulana Azad; Judges from US, UK and other western countries; had meetings with jurists and scholars from around the world and completed the draft and on 26th November 1949 presented the draft to the Chairman of the Constituent Assembly, Dr Rajendra Prasad, who felt too proud of Dr Ambedkar for having come out with so detailed text of the Constitution. Many thought that looking at the violence, tension, hatred amongst various communities and atmosphere of unease created by the partition, the need of the hour was to come out fast, not spending too much time, with the text of the Constitution especially the part dealing with the subject of civil rights that enunciates the general principles like the constitution of US which has a very short chapter of Civil Rights, to be precise only three provisions. It was pleaded by many of them that the Chapter on Civil Rights has to be couched in flexible language so that it can be developed through judicial interpretation or by interpretation of other institutions responsible for that to meet the

Preface

The subject of bail is of paramount interest to any civilised society which firmly believes that pre-conviction incarceration, but for a few cases, should be the exception rather than the rule. Jail imposes its own trauma and a lasting shadow on the psyche of any person especially one who undergoes imprisonment only to be acquitted subsequently. Bail is also a subject of great interest to lawyers who, as a community, have generally tended to favour a just and humane law and dispensation. However, the global outrage over economic crimes, the lowered threshold of tolerance towards violence caused by terrorist acts and a perceived increase in criminality in an aspirational but impatient generation have all led to a curbing of the liberal spirit and a hardening of attitudes towards law breakers of any kind. All of this has led to the establishment of changed legislative paradigms followed by the enactment of special laws (or provisions in existing laws) which have rendered bail increasingly elusive. The guiding principle of "bail not jail", famously enunciated by Justice V R Krishna Iyer, in the closing years of the seventies, now seems to be headed the way Shakespeare predicted when he said "And enterprises of great pith and moment; with this regard their currents turn awry; and lose the name of action."

The changes that have been ushered in by new interpretations, laws and mores impelled the authors of this book to attempt a serious study of the law of bail aimed at achieving clarity in how the law of bail operates currently in the context of different laws, judicial pronouncements and legislation. Although there are numerous books, on different criminal laws, the authors going by their own experience, found that the law of bail merits independent as well as thorough expounding and elucidation.

Unlike in the nineteenth and for much of the twentieth century, when statues (or the common law) maintained an unchanging steadfastness and breadth of application over the years; the decades after 1950, in India, have seen a proliferation of legislation as well as the micromanaging and enactment of laws or amendments to address narrow or specific requirements. Consequently, the authors found changes in legislation and judicial interpretation, in regard to the law of bail, even as they were writing this book. Every possible effort has been made to keep this book as up to date and contemporaneous as possible but with with our national penchant for legislation (the Prevention of Money Laundering Act, for instance, has seen amendments almost every other year since its notification in 2005), it is distinctly possible that another edition may be needed one year down the line.

What this book hopes to engender among the practitioners and students of law is a clearer understanding of the fact that bail - be it subject to whatever conditions the law may prescribe - is an adjunct to the fundamental right to life and liberty assured under Article 21 of the Constitution of India. Doubtless the life and liberty of an individual may be taken or curtailed respectively, by the State, under certain circumstances but it

must be done according to the "procedure established by law" and, over the years, the judicial dictum has been that such a procedure must be "just, fair and reasonable". The objective of the authors of this book has been to explore and explain the different facets of the "law of bail" and developments that have shaped the evolution of this law, in the light of the overarching principle of personal liberty.

R K Naroola and Udayan Mukerji
Delhi

About the Authors

R K Naroola has 36 years of experience in Indian industry with specialisation in laws relating to mining, ports, power, infrastructure, environment, banking, labour laws and industrial relations. During this time he has been involved in setting up of companies and Joint Ventures both in India and abroad. He has acquired highly specialised experience in Collaborations, Joint Ventures, Banking, Industrial Relations, Labour Law, International Financial Institutions, Foreign Trade, Contract Law and Negotiations. Mr. Naroola is also a Certificated Associate of the Indian Institute of Bankers (CAIIB) and Life Member of the Indian Institute of Bankers. Besides, he is a Life Member of the Indian Council of Arbitration and Member of the SCBA and HCBA. He had a distinguished academic career with distinctions in both, the Bachelor of Laws and Master of Laws degrees.

Udayan Mukerji retired from the Indian Police Service after more than three decades of service. During his career, Udayan Mukerji functioned at various levels and garnered immense experience as well as thoroughgoing expertise in areas dealing variously with homeland security, the security of Indian Missions abroad, internal security, communications security and investigations into security deficiencies. He is the recipient of the prestigious Indian Police Medal for Meritorious Service and the President's Medal for Distinguished Service. Udayan Mukerji is a Membe of the Supreme Court Bar Association and has handled litigation/legal counselling in diverse areas including criminal matters, torts, writ petitions under the Chapter on Fundamental Rights in the Constitution, personal laws, arbitration and contracts.

General Contents

Detailed Contents

SCHEDULE

Chapter I

CONCEPT AND MEANING OF BAIL

The word "Bail" is not defined in the Criminal Procedure Code, 1973 (CrPC). Chapter XXXIII of the CrPC deals with "Provisions as to Bail and Bonds" elaborately explaining the process and conditions of bailment without defining the word itself. Black's Law Dictionary, however, defines bail as follows,

> *To procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself to the jurisdiction and judgment of the court. To set at liberty a person arrested or imprisoned, on security being taken for his appearance on a day and a place certain, which security is called "bail," because the party arrested or imprisoned is delivered into the hands of those who bind themselves for his forthcoming, (that is, become bail for his due appearance when required,) in order that he may be safely protected from prison.*

Bail is therefore the setting of an accused person on liberty subject to such safeguards as may be needed to ensure that his presence is ensured when required. The biggest justification for bail is that it preserves a person (who is to be tried for an offence) from the rigours of confinement, more so if he is subsequently found to be not guilty of the offence charged.

Lord Denning, in his book "Freedom Under the Law",[1] stressed the importance of balancing personal freedom with social security,

> *Powers may be abused, and, if those powers are abused, there is no tyranny like them. It leads to a state of affairs when the police may arrest any man and throw him into prison without cause assigned. It leads to the search of his home and belongings on the slightest pretext—or on none. It leads to the hated gestapo and the police State. It leads to extorted confessions and to trials which are a mockery of justice. The moral of it all is that a true balance must be kept between personal freedom on the one hand and social security on the other.*

Judicial view on Bail: Justice V R Krishna Iyer's Approach

Perhaps the best exposition of the principle, logic, necessity for and philosophy of bail was made by Justice V R Krishna Iyer in *Gudikanti Narasimhulu & Ors v. Public Prosecutor, High Court of Andhra Pradesh.*[2] In his opening remarks, Justice Iyer said,

1. Lord Denning, *Freedom Under the Law*, Steven & Sons Ltd, 1949.
2. 1978 SCR (2) 371.

> *Bail or jail? - at the pre-trial or post- conviction stage - belongs to the blurred area of the criminal justice system and largely binges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitized judicial process.*

Justice Iyer was clear in his view that bail was an essential tool to assure the personal liberty envisioned in the Indian Constitution. Thus, bail was not just a routine legal direction given at the discretion of the court but a means to ensure the Constitutional obligation that nobody was deprived of his personal liberty unless such deprivation was fully justified by the exceptions/ safeguards to the fundamental rights contained in the Constitution. To this effect he said,

> *Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Art. 21 that the curial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community.*

Justice Iyer acknowledged that historically, down to contemporary law, enlargement on bail was at the discretion of the judge; but he quoted Lord Camden to say,

> *the discretion of a judge is the law of tyrants: it is always unknown, it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature is liable…*

Justice Iyer cited authorities to contend that bail cannot be withheld as a punishment and that the requirements of bail (or denial thereof) are merely to ensure the presence of the prisoner at the trial. Therefore, bail should be first option and may be declined only if there were reasonable, evident and strong grounds (e.g. being accused of a crime that invites major punishment) to conclude that the prisoner would abscond from the trial. Thereby, Justice Iyer stated,

> *Reasonableness postulates intelligent care and predicates that deprivation of freedom-by refusal of bail is not for punitive purpose but for the bi-focal interests of justice-to the individual involved and society affected.*

Very perceptively, Justice Iyer pointed out that the machinery of the prosecution would use the means at its disposal to have the bail denied but emphasised that it is for the court to sift the facts and decide. Justice Iyer observed,

> *Police exaggerations of prospective misconduct of the accused, if enlarged, must be soberly sized up lest danger of excesses and injustice creep subtly into the discretionary curial technique. Bad record and police prediction of criminal prospects to invalidate the bail plea are admissible in principle but shall not stampede the court into a complacent refusal. Realism is a component of humanism which is the heart of the legal system. We come across cases where parties have already suffered 3, 4 and in one case (the other day it was unearthed) over 10 years in prison. These persons may*

Chapter IX

WHITHER BAIL

The lofty visions of personal liberty, in the context of bail, that have featured so frequently and prominently in judgments delivered by the Supreme Court, from time to time, have unfortunately not resulted in the conundrum of "Bail or Jail" being answered in favour of the former alternative through the length and breadth of the justice delivery system. The Annual Report of "Prison Statistics in India" for the year 2016, published by the National Crime Records Bureau (NCRB) presents a dismal picture.

Year	No. of Convicts*	No. of Undertrial Prisoners*	No of Detenues*	No. of Other Inmates*	Total No. of Prisoners*
2014	1,31,517	2,82,879	3,237	903	4,18,536
2015	1,34,168	2,82,076	2,562	817	4,19,623
2016	1,35,683	2,93,058	3,089	1'173	4,33,003

Thus, as on 31 December 2016, as many as 2,93,058 of the total number of 4,33,003 prisoners, lodged in jails throughout India, were undertrial prisoners. This means that a full 67.68% of those confined to jails were persons whom our judicial system generally regards as "innocent until proven guilty". Evidently, despite the presumption of innocence being a cornerstone of our criminal jurisprudence (but for certain Special Acts), our jails continue to be filled beyond capacity by persons who would probably have been enlarged on bail only if they had the wherewithal in terms of sureties and were not financially challenged.

Another aspect of concern, emerging from the NCRB Report, was the age of the undertrial prisoners in jails as reflected in the following table:

16-18 years		18-30 years		30-50 years		50 years and above		Total	
No. of Under-trials	% Share	No. of Under-trials	% Share	No. of Under-trials	% Share	No. of Under-trials	% Share	No. of Under-trials	% Share
33	0.0	141838	48.4	120201	41.0	30986	10.6	293508	100

* Figures are as on 31st December of each year.

"Bail not jail," as expounded by Justice V R Krishna Iyer, is the central theme of discussion in this publication. ***Law of Bail***, while tracing the history of the concept of bail in India and other jurisdictions, delves into the legislative provisions governing bail. The authors analyse the relevant provisions of the Code of Criminal Procedure, 1973 in the context of legislative developments and judicial interpretation accorded to it by the superior courts. The comparative analysis of parameters considered in matters of regular bail and anticipatory bail, especially in view of the new-found rigour with which perpetrators of economic offences are being pursued and prosecuted, has been presented in a tabular format for ease of reference and understanding. The aim is to review the legislative and judicial developments relating to bail on the anvil of Article 21 of the Constitution of India, which recognises the right to life and personal liberty as a fundamental right.

The commentary also examines the bail provisions under special statutes including The Unlawful Activities (Prevention) Act, 1967; The Prevention of Money Laundering Act, 2002; Narcotic Drugs and Psychotropic Substances Act, 1985; Protection of Children from Sexual Offences Act, 2012; and Juvenile Justice (Care and Protection of Children) Act, 2015. The last chapter in the book encapsulates the law relating to bail as it stands today, identifies lacunae in the existing legal framework, and expounds the course that bail provisions should take in the future. The book will be of immense value to practitioners, judges, police officers, enforcement officers, policy makers, academicians and researchers.

"Having browsed through the work, I find it to be very lucidly written, well researched and comprehensive. I'm sure it will be useful to both legal practitioners and academics alike, in comprehending the complexities of bail. I wish the book every success."

Hon'ble Justice S Ravindra Bhat, *Supreme Court of India*

"The axiom "bail not jail" postulated by Justice V.R. Krishna Iyer, has undergone gradual and nuanced changes with the growth of offences like terrorism and organised crime besides the greater awareness, within society, of the need to punish gross injustice to the weaker or vulnerable sections. This traverse of the law of bail, in its many facets, has been lucidly brought out by the authors with detailed explanations and citations. I am sure the book will fully meet the demand for a definitive book on the subject."

Dr Justice Meena V Gomber, *Former Judge, High Court of Rajasthan*

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