

**IS JAIL A REALITY AND BAIL AN
EXCEPTION? : BAIL AND POOR**

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ABSTRACT:

The main objective of this paper is to understand the question whether the bail provisions in India is anti poor. In the paper the author has explained the legal provisions as well as the factual condition of bail in India. The aim of the paper is also to point out that although we have strong legal precedents on bail provisions but still the poor suffers. The paper inspects the reason behind class discrimination in the grant of bail. The main focal point of the paper is the issue; whether the provisions of law regarding bail are anti poor or there is problem in executions which has made the bail system in India discriminatory. The author has substantiated the reality of bail with the latest figures released by Nation Crime Record Bureau and other reports. The paper is concluded by suggesting the reforms needed to be brought in Indian bail system.

INTRODUCTION

“It is a crying shame upon our adjudicatory system which keeps men in jail for years on end without a trial”¹

When we see a bird flying in the azure sky, the first thing comes in our mind is “If I were a bird”. A flying bird is the symbol of liberalization and the inherent nature of human being is to remain free. That is why whenever we think about ‘jail’ we feel uncomfortable and would never like to imagine ourselves inside it even in our dreams! It is scary, isn’t it? It might be

scary to think about a jail but the truth is that imprisonment is the most popular form of punishment awarded to serious offences where fines and community services are not sufficient.² Incarceration is justified as retribution and enforced as a deterrent.³ The author agrees with the justification that punishment contributes to the retribution and enforced as a deterrent but the punishment must be within the framework of law, you cannot treat an accused and a convict equally. What can be worst than spending many years behind the bars that too without vindication of guilt? According to the latest figures released by the National Crime Records Bureau (NCRB) for 2014, almost 68 per cent of all inmates in 1,387 jails across the country are undertrials. Over 40 per cent of all undertrials remain in jail for more than six months before being released on bail.⁴

The law under section 167 of The Code of Criminal Procedure, 1973 states that when charge sheet has not been filed, a person can be detained in police custody for the maximum period of 15 days. In the judicial custody an undertrial can be detained for ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment not less than 10 years .When the investigation is for any other offences the maximum period of detention cannot be more than sixty days. On the expiry of above period if the investigation is not concluded, bail becomes the right of the accused devoid of the nature of crime alleged committed by him. In practicality, people are lodged in jail for years without bail.

² Robert Taylor, *Why has prison emerged as a prominent form of punishment for most crime and what are its functions in relation to wider society?*, (September 3, 2016), http://www.internetjournalofcriminology.com/Taylor_Prison_and_its_Functions_IJC_August_2011.pdf

³ *Idib.*

⁴ *Crime in India Compendium*, (September 1, 2016) <http://ncrb.nic.in/StatPublications/CII/CII2014/Compendium%202014.pdf>

¹ *Kadra Pahadiya v State of Bihar AIR 1982 SC 116*

The Supreme Court has recognised this for years and has been devising ways and formulae to secure the release of under-trial prisoners on bail.⁵ Our government has also understood the gravity to the situation and relaxed the provision of bail, the amendment made to Cr.p.c. in 2005⁶ is an example of the same. Arguing that the non-implementation of the existing legal provisions is a major reason for the large undertrial population lodged in prisons, this paper explores the legal dispensation of bail under the Cr.p.c., analyses the current data regarding undertrials and also explains that the poor is the biggest victim of this system.

The paper has been divided into four segments. In the first segment the author has explained the legal provisions related to bail in India. In the second part author has shown the factual condition of bail in India. She has substantiated the same with the latest figure released by Nation Crime Record Bureau and other reports. In third part the author has elaborated the ground reality which shows the harsh reality of bail provisions for the poor and unprivileged section of the society. In the Fourth and last part the author has concluded the paper by suggesting some of the reforms needed to be brought in Indian bail system.

⁵ There is plethora of judgements: *State of Rajasthan vs. Balchand* AIR 1977 SC 2477; *Gudikanti Narasimhulu and Ors. v. Public Prosecutor, High Court of Andhra Pradesh* AIR 1978 SC 429; *Moti Ram and Ors. V. State of Madhya Pradesh* AIR 1978 SC 1594; *Hussainara Khatoon and Ors v. Home Secretary, Bihar, Patna* AIR 1979 SC 1360; *Supreme Court Legal Aid Committee v. Union of India and Ors* 1994(3) Crimes 644(SC); *Common Cause, A Registered Society Through Its Director v. Union of India and Others* (1996) 4 SCC 33.

⁶ Section 436 was amended. In section 436 of the principal Act, in sub-section 1, in the first proviso, for the words "may, instead of taking bail", the words "may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail" was substituted; after the first proviso, the following Explanation inserted, namely:- Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso."

New Section 436 A was inserted according to which Maximum period for which an undertrial prisoner can be detained during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one- half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties.

BAIL IN INDIA: THE RIGHT AND THE DISCRETION

The term 'bail' is defined in Black Law Dictionary as "procure the release of a person from legal custody, by undertaking that he/she shall appear at the time and place designated and submit him/herself to the jurisdiction and judgment of the court."⁷ While Stroud's Judicial Dictionary of Words and Phrases defines bail as, "the temporary release of a person pending a further decision of court."⁸ Thus, we can say bail, in legal terminology, means procurement of release from prison of a person awaiting trial or an appeal, by deposit of security to ensure his submission at the required time and place to the legal authority.

According to code of criminal procedure, a bail can be either right of a person or the discretion of court. There are two types of offences, i.e. bailable and non bailable. Under CrPC and bail provisions in respect of them are governed by sections 436 and 437 of the Criminal Procedure Code, 1973 respectively. Bail is a right in respect of bailable offences while it is discretion of the Court in respect of non-bailable offences. The aspect of bail in bailable offences came under scanner of the Hon'ble Supreme Court in case of *Rasiklal v/s Kishore, s/o Khanchand Wadhwani*⁹, where the Hon'ble Supreme Court in clear words held that in case of bailable offences, right to claim bail is an absolute and indefeasible right and if the accused is prepared, court/ police officer is bound to release him on bail and only choice available is in demanding security in surety and if the accused is willing to abide by reasonable conditions which may be imposed on him.

The demand of security is criticized as capable of causing discrimination against poor and

⁷ Black's Law Dictionary 177 (4th ed.)

⁸ Stroud's Judicial Dictionary of Words and Phrases, 243 (7th ed.)

⁹ (2009) 4 SCC 446

underprivileged groups. The argument is given that a rich can easily pay the security amount and walk free while a poor person is also expected to serve a surety even though they have been charged with a bailable offence where the accused is entitled to secure bail as a matter of right. As a result, a poor man languishes behind bars, subject to the atrocities of the jail authorities rubbing shoulders with hardened criminals and effectively being treated as a convict.¹⁰ True! Money must not be the sole criterion for denial of bail when bail is a right, because a person had to remain in jail for his inability to furnish bail, till the case is disposed off and we cannot predict how many years it takes to dispose a case. This provision was highly anti poor till 2005 amendment. Section 436 (1) is, therefore amended in 2005 to make a mandatory provision that if the arrested person is accused of a bailable offence and is indigent and cannot furnish security, the Court shall release him on execution of a bond without sureties.¹¹ Also section 440 of the Act clearly states that *the amount of every bond executed under this chapter shall be fixed with due regards to the circumstances of the case and shall not be the excessive.*

Through plethora of judgments, various courts have held that conditions relating to securities should not be excessive as it would virtually amount to denial of bail itself.¹² In the case of *Moti Ram & Ors vs. State of M.P.*¹³ the Apex Court clearly held that:

“Social Justice is the signature tune of our Constitution and the little man in peril of losing his liberty is the consumer of social justice. And the grant of bail can be stultified or impossible

¹⁰ Urvashi Saikumar, *Indian System of Bail - Anti Poor*, (September 4, 2016), http://www.legalserviceindia.com/articles/bail_poor.htm

¹¹ Surendra Malik & Sudeep Malik, *Supreme Court on Bail, Anticipatory Bail and Quashment*, A-155, (2nd Ed. Eastern Book publication, 2011)

¹² Princep's commentary on the code of criminal procedure, 1973, 1859, (19th ed. Delhi Law House, 200

¹³ *Moti Ram & Ors vs. State of M.P.*, 1978 SCC (4)47

inconvenient and expensive if the Court is powerless to dispense with security or to receive an Indian bailor across the district borders as well or the sum is so excessive that to procure a wealthy surety may be both exasperating and expensive. The problem is plainly one of human rights, especially freedom for the lowly and thus necessitates the Supreme Court to interdict judicial arbitrariness in relation of liberty and ensure "fair procedure" which has a creative connotation after Maneka Gandhi [1978] 2 SCR 621.”

Hon'ble Supreme Court has given several judgements in which the consideration to economical condition of accused has been made mandatory. For example in the case of *Keshab Narayan Banerjee v State of Bihar*¹⁴ the condition imposed by the High Court for enlarging appellant on bail, namely, that he should furnish security for rupees one lakh in cash or in fixed deposit of any nationalized bank in Bihar with two sureties residing in the state of Bihar each for like amount was held to be excessively onerous condition amounts to denial of bail.

What is the legal position when a person is accused of committing non bailable offence? Does Court has uncontrolled wide discretion while granting or refusing bail under section 437?

When accused of committing non-bailable offence, a person can only be released on bail by the court if it is satisfied that the person shall attend the court to stand trial; will not tamper with evidence or influence witnesses or obstruct police investigation in any manner; will not commit any other offence or hinder the interest of justice.¹⁵

¹⁴ *Keshab Narayan Banerjee v State of Bihar*, AIR 1985 SC1666

¹⁵ *State of Rajasthan vs. Balchand* AIR 1977 SC 2477 where it was held the “basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner”.

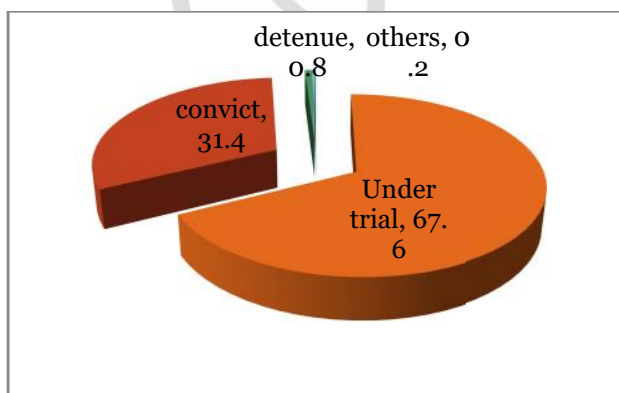
Thus, the bail provisions sounds to be fair and not 'anti-poor'. Then why data released by various research agencies cry to tell us that approx seventy percent of total prisoners are undertrial and many of them have been detained for more than the permissible time limit? In the next section of the paper we are going to discuss the various issues related to undertrials.

BAIL IN INDIA: THE ILLUSION AND THE DISTANT DREAM!

Undertrial prisoners form significant part of our prison population. According to 78th Law Commission Report, the 'undertrial' is the person in judicial custody on remand during investigation, means these are the people who have not been granted bail.

According to the figure released by the National Crime Records Bureau in 2014¹⁶, 68% of total prison inmates are undertrials while convicts constitute 31% and 1% is the remaining category.

The worst part is more than twenty percent of these under trials are in the prison for a period of more than a year without bail.¹⁷ Following is the pictorial representation for the same.¹⁸



¹⁶ Supra note 4
¹⁷ Id.
¹⁸ Prison Statics India 2014, chart-3.1, (September 7, 2016) <http://ncrb.gov.in/StatPublications/PSI/Prison2014/Graphs-2014.pdf>

The state trends are also interesting. Percentage of under trials in 15 states is more than the national average. This percentage is more than 70% in 12 states. Topping the percentage of under trials is Meghalaya with 91.2% followed by Arunachal Pradesh (88%), Manipur (87.2%), Bihar (85.6%) and Jammu & Kashmir (83.3%). Four of the top 10 states are from the North East.¹⁹

According to prison Statics India 2014²⁰ the majority that is 82% of total undertrials are alleged of the commission of IPC offences while remaining 18% are booked under special legislations. Those who are booked under IPC, majority of them have been booked for serious charges like murder (27.3%), theft (11.2%), attempt to murder (10.3%), Rape (9.7%). An argument can be given that most of them are charged for non bailable offence and thus they cannot claim bail as right. Although they are charged of non bailable offence, they must be given fair opportunity of availing bail. In most of the cases they are unable to get bail. In coming sections we will discuss the reason for why. The concept of bail emerges from the conflict between the police power to restrict the liberty of man who is alleged to have committed a crime and the presumption of innocence in the favour of alleged criminal. The perfect balance between these two things results in satisfaction of justice.

Under trial prisoners, especially those belonging to the weaker section of society are devoid of the benefits they are entitled to receive. Our law is well equipped with the provision like section 436 A of the Criminal Procedure Code which states that those who have completed more than half of the maximum punishment can be set free on bail by jail authorities. This is backed by judicial pronouncement. Hon'ble Supreme

¹⁹ Rakesh Dubbudu, *Indian Prisons Are Overcrowded & 2/3rd Of The Inmates Are Under Trials*, (September 5, 2016) <https://Factly.in/Indian-Prisons-Are-Overcrowded-23rd-Of-The-Inmates-Are-Under-Trials>
²⁰ Supra note 16

Court in the case of *Bhim Singh Vs Union of India & Others*²¹ relating to under trial prisoners, has directed for effective implementation of Section 436A of the Code of Criminal Procedure by directing the jurisdictional Magistrate/Chief Judicial Magistrate/Sessions Judge to hold one sitting in a week in each jail/prison for two months commencing from 1st October, 2014 for the purposes of effective implementation of section 436A of the Code of Criminal Procedure. In its sittings in jail, the above judicial officers shall identify the under-trial prisoners who have completed half period of the maximum period of imprisonment provided for the said offence under the law and after complying with the procedure prescribed under Section 436A pass an appropriate order in jail itself for release of such under-trial prisoners who fulfil the requirement of section 436 A of the said code.

If the order of *Bhim Singh* and other provisions regarding bail that we have discussed in the previous section would have been followed, the majority of these under trial prisoners would have been benefited but neither the prison administration nor the state government implement these legal provisions.²²

The majority of under trial prisoners belong to the weaker section of the society and they are unaware of the amendments made to the laws related to bails and judicial interpretations. The prison statistical data 2014 has given the figure that 71.4% of the total under trials are either illiterate or semi literate. Schedule caste, Schedule Tribe and Backward class constitute 62.7% of the total under trials.²³ The lack of education and

²¹ *Bhim Singh v. Union of India, Writ Petition(s)(Criminal) No(s). 310 of 2005, decided on 05.09.2014*

²² *India, callous with under trials who are more than fifty percent of its prison population, (september 5, 2016) <https://sabrangindia.in/indepth/india-callous-under-trials-who-are-more-50-its-prison-population>*

²³ *Prison Statics India 2014, chart-5.3, (September 7, 2016)*

poor background make them more vulnerable to the system because they are unaware of laws, unable to pay for bail and contact good lawyers.

In previous section we have discussed that our legal system is well equipped with legal provisions and precedents but in this section we have seen that the purpose of bail has at large extent been defeated in India and unprivileged groups are the biggest victims. This is evident from the number of under trial prisoners in Indian jails. A large number of the poor people, Dalits and people from the minority communities are languishing in jail as undertrials.²⁴

Why they are not able to get bail despite we have legal mechanism? How can we assure fair and levelled playing field for everyone in the grant of bail? These issues we are going to address in the next section.

WHY POOR HAVE TO FACE DISCRIMINATION IN THE BAIL PROVISION?

Despite we have strong legislation and legal precedent on Bail provision; all recent figures state the story of plight. There is a system for justice but a huge section of society does not have the access to the same. Let us have a look on the ground realities of Indian system which ultimately result in huge discrimination against the poor and people without means and made the bail system 'anti-poor'.

The problem lies in practice of criminal law in our country. Indiscriminate arrest by police, ignorance of legal rights, delay in trial, reluctance of the courts to

<http://ncrb.gov.in/StatPublications/PSI/Prison2014/Graphs-2014.pdf>
²⁴ *Muslims, dalits and adivasis are three of the most vulnerable sections of indian society and make up more than half of india's prison population. Though the proportion of these three communities in india adds up to about 39%, their share amongst prisoners is considerably higher at 53%. (subodh verma, muslims, dalits and tribals make up 53% of all prisoners in india, (september 6, 2016) <http://timesofindia.indiatimes.com/india/muslims-dalits-and-tribals-make-up-53-of-all-prisoners-in-india/articleshow/45253329.cms>*

grant bail, inability to provide surety, are some reasons that have led to 'jail the rule and bail the exception'.

Suppose a person is accused of committing a crime and is apprehended. He is either released on bail or is detained in the police lock up pending his production before the Court. Use of discretion by the police to grant or refuse bail arises at this stage. In the case of bailable offence, bail is a matter of right. It must be granted by police officer but the practice is marked with certain dishonest and inefficient features as the discretion is often influenced by influential recommendations or through some settlement of pecuniary gains.²⁵ Many poor people are detained in prison for alleged involvement in bailable offences primarily because they are unable to furnish security. This is a serious concern because in such cases bail is a matter of right and people end up spending long period in jail merely because they are poor.²⁶

The arrested person is detained in the lockup for unduly long period of time for standing his trial. Many times there is no registration of formal case and in that situation the arrest is not entered into formal records although some paper work is shown to be done. The arrested person is not produced before the Magistrate on the expiry of twenty four hours.²⁷ The weaker sections of society are the biggest victim. They formed the large number of these arrested persons and they are semi literates or illiterates with limited means of income and influence and are thus unable to avail the opportunity to communicate with a lawyer, friend or relative to arrange for legal aid or for standing sureties.

Amount of security for the bail bond and requirement of professional surety are another challenge before the poor and unprivileged. No doubt, our Hon'ble

Supreme Court has given its guidance on the quantification of bail bond and has laid emphasis that the economical condition of accused must be taken into consideration.²⁸ At the same time there is no statutory limit existing on the amount of bail bond or the number of sureties that may be required. The entire matter is left to the discretion of Court without any statutory guidelines and this in practice has resulted in detrimental impact on the poor. Sometimes the lower court imposes huge amount as security ignoring the precedents set by Higher Courts. The Court's power to impose huge sum as bail bond on the grant of bail has frustrated the very purpose of bail. The extent and limit of the court's power and discretion have to be mapped out keeping in view the need of security to assure the presence of accused so that he does not run away from the net of justice as well as the economical and social condition of accused.²⁹

We have already discussed that most of these undertrials are poor and illiterate and sometimes they have to remain in jail for long period of time in the want of legal aid. We have sound law for free legal aid. Article 39A mandates the state to provide free legal aid to those who cannot afford bail only on the ground of their economic condition.³⁰ In the case of *Hussainara Khatoon vs. State of Bihar*³¹, it was held that if any accused is unable to afford legal services then he has a right to free legal aid at the cost of the state. Free legal aid also comes under the arena of right to life under Article 21 of the Constitution. We have Nation Legal Service Authority Act, 1987 which extensively talks about legal aid.³²

²⁸ *Supra* note 5

²⁹ *Supra* note 19 at p. 174

³⁰ Section 39 A: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities

³¹ *Hussainara Khatoon vs. State of Bihar*, AIR 1979 SC 1377

³² Section 4 of the Act, 1987; 4(e) organise legal aid camps, especially in rural areas, slums or labour colonies with the dual purpose of educating

²⁵ M.Afzal Wani, *Right to Bail*, 176, (1st Ed. 2000, Indian law institute)

²⁶ Madhurima Dhanuka, *Undertrial prisoners and the criminal justice system*, Supreme Court Cases (2 SCC 2010, 25-32)

²⁷ 24a Ann. Hum. Rts. Rep. Submitted to Cong. by U.S. St. 2325 1999, also *id*

Despite all these legal aid systems, India has not been able to accomplish the objective set in respect of the same. The biggest obstacle to the legal aid movement is lack of awareness among the people regarding their legal rights. Again, it is an open secret that good lawyers are usually not on the panel of legal aid, and many of them do not take their cases seriously. Law does not mandate the State Legal Services Authority, jail superintendent or the trial court to inform the accused about this law³³. There is immense requirement to focus on legal awareness programs to get the significant and permanent solution for non implementation of law and making law poor friendly. When citizens, particularly marginalized or underprivileged groups know what the law has to offer them, they can recognize and challenge injustices much more forcefully. In the case of illegal detentions, a legally literate can fight for their right to bail and other safety valves which our legislation and judiciary has granted.³⁴

Also huge pendency of cases in the Courts is another big issue which has impact on the grant of bail. We remember the awkward moment when the Chief Justice of India had broken down in front of the Prime Minister of India. Justice Thakur was most vexed about India's overworked judiciary and bemoaned that the common man's faith in the justice system is at an all-time low.³⁵

Our judicial system is beset with massive problems of delay, cost, and ineffectiveness. India has just 13

the weaker; 4(i) monitor and evaluate implementation of the legal aid programmes at periodic intervals and provide for independent evaluation of programmes and schemes implemented in whole or in part by funds provided under this Act; Section 15, 16 and 17 Talks about establishment of central, state and district legal aid funds.

³³ *Supra Note 26 at page 6*

³⁴ *Jananeethi, Legal Literacy: Social Empowerment for Democracy and Good Governance, (September 6, 2016) <http://www.hurights.or.jp/archives/asia-pacific/section1/08Jananeethi.pdf>*

³⁵ *An overworked chief justice ts thakur breaks down in front of pm modi, (september 6, 2016) <http://timesofindia.indiatimes.com/india/an-overworked-chief-justice-ts-thakur-breaks-down-in-front-of-pm-modi/articleshow/51964732.cm>*

judges for every ten lakh people as against 35-40 in other developing nations and 50 in a developed country. There are more than 2.18 crore cases pending in district courts across the country.³⁶ This has led to ineffectiveness in the working of the judiciary and more often courts fail to implement the crucial provisions like that of bail. Thus, inmates who have been accused of committing a petty criminal offence have languished in custody for years.³⁷ They have no other option but to face prolonged investigations, delayed trials and tortures.

The object and purpose of bail is always an intelligible concept in criminal law jurisprudence. There must be a perfect balance between the interests of individual and that of state. It is the biggest pain when the liberty of a person is curtailed because of being unprivileged. Sadly, in our system despite of huge developments in bail jurisprudence, the provision of bail is anti poor.

“He does not stay in jail because he is guilty,

He does not stay in jail because any sentence has been passed,

He does not stay in jail because he is any more likely to flee before trial,

He stays in jail for one reason only – because he is poor...”³⁸.

CONCLUSION: THE WAY FORWARD

We have seen in the paper that unprivileged classes have to face discrimination. We have laws on bail but

³⁶ *More than 2 crore cases pending in India's district courts: Report, (September 6, 2016), <http://indianexpress.com/article/india/india-news-india/indian-judiciary-shortage-judges-ts-thakur-2-crore-cases-pending-in-indias-district-courts-report-2842023/>*

³⁷ *MARC GALANTER & JAYANTH K. KRISHNAN, "Bread for the Poor": Access to Justice and the Rights of the Needy in India, 55 Hastings L.J. 789 2003-2004*

³⁸ *Supra Note 26, at pg.2*

they are poorly drafted giving various agencies to mould it according to them. Our judiciary has interpreted it widely in the interest of the people but it could not have an upper hand against the malfunctioning of administrative machinery. There is huge disparity in law enforcement mechanism and it has widely affected the working of the bail system in our country.

There is need of huge reform in bail system to make it work efficient and to provide levelled playing field for all. The ambiguity in the legislative provision regarding surety and bail bond amounts is required to be removed. The guidance of Apex Court in various cases providing the safety valves to the poor and unprivileged in the bail system should be given legislative backing by making desirable amendments in the Code. There is requirement of strict scrutiny of Police power because it is essential for the maintenance of fairness in the bail provisions. Speedy trial is another important area for reform. Together with all these reforms the mass scale work is required to be done in the area of legal aid and legal awareness. Legal aid is the necessary constituent of a fair procedure implicit in Article 21.

In sum, no doubt the 'bail provision' is one of the grey areas of criminal justice system and it is highly detrimental to poor and unprivileged classes. At the same time we cannot deny the extraordinary interpretation done by our judiciary to establish equality and fairness.