

LAW VISION

Bail, stay on bail, and the judicial discretion



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The principal use of bail in modern legal systems is to secure the freedom, pending trial, of one arrested and charged with a criminal offence. However, it may also be used in some cases to secure release pending an appeal of a conviction. Subject to jurisdictional variations, its use in civil cases has diminished along with the decline of imprisonment for debt.

In legal systems that have a bail procedure, its operation, by and large, revolves around discretionary powers of the authority. For instance, in the United States, granting bail involves a certain degree of discretionary power, primarily exercised by judges. Discretionary authority allows judges to consider various factors when determining whether to grant bail to an individual or not. Here's how discretionary power is typically used in the bail process:

Judges evaluate the gravity of the alleged offence. The use of discretion is necessary to safeguard the public from potential damage. If a judge determines that a defendant's release could threaten society, bail may be denied or granted at a high amount. Also, judges consider the defendant's ties to the community— as those with strong ties are typically less likely to abscond.

Personal characteristics, such as the defendant's character, reputation, and behaviour during previous court appearances, can also impact the judges' decisions on bail. Although not explicitly used to deny bond, the judges should consider the defendant's financial resources when deliberating on bail.

In our neighbouring country Sri Lanka, a distinct legislation, defining the ambit and features of Bail regarding both civil and criminal matters, has been enacted, namely the Bail Act, 1997. Section 5 of the Act allows the Court to release a person suspected or accused of committing a non-bailable offence on Bail. Section 13 states that a High Court judge must grant Bail to anyone, even if they are suspected or accused of committing a death or life-sentence offence. Furthermore, Section 16 states that no person shall be jailed for more than twelve months from the date of arrest unless convicted and sentenced. This law ensures practice of utmost judicious discretion and reduces the burden on the accused.

Across jurisdictions, the purposes of bail pending trial in criminal cases are to avoid inflicting punishment upon an innocent person (who may be acquitted at trial) and to encourage the unhampered preparation of his defence. The amount of bail is generally set taking into account the gravity of the offence charged and the likelihood of flight.

However, some consider other factors, such as the strength of the evidence, the character of the accused, and the ability of the accused to secure bail. Failure to consider financial ability generated much controversy in the mid-20th century, for bail requirements may discriminate against poor people and disproportionately impact certain minority groups who are thus deprived of an equal opportunity to secure their freedom pending trial.

When a person is granted bail, they essentially get released from physical custody (such as being held in jail or detention) and placed under the Court's or relevant authorities' legal supervision for the duration of their trial or legal proceedings. When out on bail, an accused individual is still subject to specific terms that the Court sets. These requirements may include attending all court sessions, avoiding specific activities, or guaranteeing that they are present throughout the legal processes.

It must be noted that bail ought to be the rule, and refusal of bail ought to be the exception. It amounts to violation of fundamental right when bail is refused in bailable offences. Hence, the order of bail should be kept from being suspended or delayed by either the subordinate or higher judiciary. In Bangladesh, regrettably, a concerning trend has emerged whereby the Appellate Division has been issuing stays on such orders despite the High Court Division granting bail. This practice raises concerns regarding the potential infringement of the accused individuals' constitutional rights.

Upon examining Indian case laws, it becomes evident that while the legal framework has similarities, India has adopted a more progressive stance on this issue. For instance, in *Rasiklal v Kishore* (2009) 4 SCC 446, the Indian Supreme Court held that 'the right to claim Bail granted by Section 436 (Indian CrPC Corresponding section in CrPC in Bangladesh is S. 496 & 497) of the Code in a bailable offence is an absolute and indefeasible right. In bailable offences, there is no question of discretion in granting Bail, as the words of Section 436 are imperative. The only choice available to the officer or the Court is as between taking a simple recognisance of the accused and demanding security with surety.'

It is crucial to remember that the determination of whether or not to stay a bail order can be challenging and depends on the particulars of each case. Having said that, the Court's primary goal is to strike a balance between the rights of the accused and the proper administration of justice. Hence, the granting of bail is a matter of utmost significance, and a stay order (as is now the case with the Appellate Division) on the same demolishes the true objective of bail.

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RIGHTS ADVOCACY

Reshaping mental health legislation in Bangladesh

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Bangladesh is party to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Under this Convention, an array of obligations is imposed on state parties. These obligations include duty to provide suitable training regarding disability issues to those involved in the administration of justice, a concrete programme to help people with disabilities and their careers, and general obligations on states to raise awareness of disability issues. But regrettably, mental health has been one of the most disregarded sectors within the Bangladesh legal system ever since its independence.

According to the National Mental Health Survey of Bangladesh 2018-2019, 16.8% of adults and 13.6% of children in Bangladesh suffer from mental health illnesses, which represents a country-wide prevalence of 21.5 percent. The lack of knowledge and taboo surrounding mental health conditions are further obstacles to receiving mental health care in the country. In light of this, Bangladesh launched its first-ever National Mental Health Policy (NMHP) in 2022. In order to secure the rights of those with mental illnesses, the controversial Lunacy Act of 1912 has been replaced by the Mental Health Act 2018 (MHA). However, the Act has several shortcomings.

Section 6 of the MHA elucidates that matters related to health, property, dignity, education, and other rights of people affected by mental illness need to be ensured. However, given the present state of mental healthcare and the scarcity of mental health professionals, these rights cannot be adequately realised.

Despite experiencing similar socioeconomic realities with Bangladesh, India appears to have a much more progressive mental health legislation than us. Unlike the mental health legislation of India, the MHA does not include a provision for an 'advance directive,' which would allow people to designate how they 'wish to be' and 'wish not to be treated'. Electroconvulsive therapy for minors is outright forbidden under section 95(l) (b) of the Indian Mental Health Act 2017. Even for adults, the therapy has been administered while using safety precautions. The Act of Bangladesh should likewise contain such a clause.

Counselling is a *sine qua non* to guarantee universal mental health support. However, as per the MHA, mental illness is a medical condition that can only be managed by medical interventions. The specifics of patient confidentiality concerns and associated responsibility of medical professionals for breaching patient privacy are also not clearly covered in the Act. As was found by the WHO-AIMS study on the mental health system in Bangladesh, there is no human rights review committee to look into the frequent abuses of people's human rights caused by mental illness.

To uphold the principles of equality and non-discrimination, the Act should include a clear provision that people with mental illnesses have a right to receive the same level of care as patients who are physically ill at the time of treatment, including emergency services, ambulance services, etc. Moreover, the patient or his/her guardian should have the right to be informed of all aspects of the treatment for which he/she undergoes, including details on any side effects. By allowing the adoption of NMHP in all districts, the Act can better implement the right to mental health treatment. Only if all these concerns are satisfactorily addressed, can the rights of people with mental health illnesses be truly upheld in Bangladesh.

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LAW VIEWS

Navigating legal waters: Independent contractors' status in Bangladesh

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In today's rapidly evolving business landscape, the role of independent contractors has become increasingly significant. These professionals are self-employed individuals who provide valuable services to organisations without the formalities of traditional employment. While this arrangement offers flexibility and specialisation, it also comes with some legal risks. Therefore, the legal framework governing these contracts deserve our attention.

Bangladesh Contract Act 1872 regulates the engagement between independent contractors and their hirers. The Act sets out



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the fundamental principles for establishing valid contracts, ensuring the legal soundness of contracts. Generally, for a valid contract there must be (i) an offer and acceptance, where both parties unequivocally

agree to the terms and conditions, (ii) capacity of contracting parties (thereby excluding minors, those of unsound mind, and those disqualified by law from entering into binding agreements, (iii) consent of the parties to the contract being free from coercion, undue influence, fraud, misrepresentation, or mistake, and (iv) lastly, lawful consideration and object.

The application of these principles to agreements involving independent contractors is quite fascinating. Take, for instance, non-compete clauses that seek to limit an individual's ability to engage in a similar profession. While these clauses may appear restrictive, Indian case law offers insights into their legality. Notably, the Supreme Court of India has held such clauses void, safeguarding an individual's right to earn a living. However, there are exceptions to this rule as seen in the *Niranjan Golikari v The Century*

Spinning and Mfg. (1967) case, where contracts limiting the ability to work elsewhere during employment were upheld.

Distinguishing independent contractors from regular employees becomes pivotal, as the latter enjoy distinct legal protections under the labor laws of Bangladesh. The Bangladesh Labour Act, 2006 and the Bangladesh Labour Rules, 2015 apply exclusively to 'workers', defined as individuals engaged in manual, technical, or clerical work, which means employees who discharge their duties in accordance with instructions from their superiors, have virtually no authority to deviate, and who have no authority to hire or fire other employees. This distinction underscores the importance of clarity in categorising engagements.

The ambiguity surrounding independent contractor status is

not ignored by the courts. Case law emphasises that the determination hinges on factual considerations. The *Suraiya Rahman v Skill Development for Underprivileged Women* and others (1997) case elucidates that the nature of control and supervision exercised by the hirer defines the relationship. The degree of power wielded by the hiring organisation over the contractor's work process thus was identified as a decisive factor.

Amidst these intricacies, misclassifying someone's employment status can have significant consequences. Although there isn't a direct penalty for erroneously classifying an independent contractor, the courts possess the power to apply labour laws if misclassification occurs. This shift retroactively awards workers the rights and benefits they would have otherwise been entitled to, compelling employers to provide gratuity, earned leave, and other benefits, proving the far-reaching ramifications of misjudgment.

In the dynamic interplay of modern business relationships, the legal and regulatory framework governing independent contractors is a symphony of rights, responsibilities, and consequences. Navigating these waters with clarity and precision is not only a legal necessity but also a strategic imperative. As our professional landscape continues to evolve, a deep understanding of these principles will empower organisations and contractors alike, fostering relationships that thrive within the bounds of legality and equity.

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