

## UNDERTRIAL PRISONERS IN INDIA

*Ayushi Priyadarshini & Madhurika Durge\**

### *Abstract*

*Around 2/3<sup>rd</sup> of prisoners languishing in Indian jails are undertrials. These undertrials are presumed to be innocent and majority of them remain incarcerated due to their inability to pay the bail amount, a situation which highlights the inherent economic discrimination entrenched in the system. This research paper highlights the failure of the judiciary to implement Section 436A of the Cr.P.C. and questions the same with respect to the Right to Equality enshrined in the Constitution of India under Article 14 by suggesting the inclusion of the term 'non-discrimination on economic basis' under Article 15. The paper then moves on to the legal presumption of 'innocent unless proven guilty', which seems to be denied to the undertrials. With the help of statistics, it seeks to showcase how the bail system is prejudiced towards the rich and the idea of justice rendered is unfair, because the poor are not represented adequately. The paper talks about legal aid, police torture and the degrading quality of life that undertrials lead, including*

---

\*Ayushi Priyadarshini and Madhurika Dubey are second-year students at Symbiosis Law School, Pune. The authors may be reached at ayushipriyadarshini27@gmail.com and durgemadhurika@gmail.com.

*the failure to actualize the segregation between undertrials and convicted criminals. Lastly, through various landmark judgments, the author(s) emphasise on the right to speedy justice and why it is constantly being denied, culminating in the growing number of undertrials. The author(s) thereafter give suggestions to reform the current state of undertrial prisoners. According to them there needs to be a change in the bail system, an improvement in the quality of life of undertrials and an increase in the judge-population ratio. The aim is not solely to ensure dispersal of justice but also ensure equality in the justice dispersed.*

## I. INTRODUCTION

Undertrials are prisoners who have not yet been convicted of the charge(s) for which they have been detained, are facing trials in the competent court, and are presumed innocent in law. They are supposed to be held in ‘judicial custody’ though they are usually held in jails.<sup>1</sup> The purpose of keeping undertrials in custody is to ensure fair hearing so that they are not in a position to influence the witnesses. However, it is the delay in case trials which is the core human rights issue and the main cause of the number of undertrial

---

<sup>1</sup>Human Rights of Undertrial Prisoners, Chapter 6, SHODHGANGA, [http://shodhganga.inflibnet.ac.in/bitstream/10603/20871/11/11\\_chapter-06-human-rights-undertrials.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/20871/11/11_chapter-06-human-rights-undertrials.pdf).

prisoners. A preliminary examination<sup>2</sup> by the National Human Rights Commission has disclosed the appalling nature of the problem posed by the pressure of a large number of undertrial prisoners in Indian jails and the inordinate delay in the conclusion of the trial. These people end up languishing in jail for a much longer period than if they were actually convicted of the same charges. Most undertrial prisoners are poor and unaware of the rights they are granted, and the current situation of the administrative system is tainted with corruption preventing this share of the population from availing their constitutional rights. Lady Justice<sup>3</sup> is supposed to be blindfolded, signifying divine order, objectivity and impartiality; however, there is a huge disparity in the treatment meted out to the *poorer* undertrial prisoners, who cannot afford the bail amount and are consequently deprived of their liberty.

As per NCRB's latest data<sup>4</sup>, there are more than 2.8 lakh undertrials in prison, constituting more than two-thirds of the prison population in India. The Supreme Court has directed<sup>5</sup> the National Legal Services Authorities (NALSA) to coordinate with state authorities and the home ministry to establish *undertrial review committees*, comprising the District Judge, the District Magistrate and the Superintendent of Police in all districts of the country. The duty of the committees is to ruminate and provide recommendations on the release of undertrial prisoners entitled to the benefit of Section 436A of the Criminal Procedure Code<sup>6</sup> (hereinafter referred to as Cr.P.C.). For the past two decades, there have been widespread efforts to decongest Indian prisons and reduce the undertrial population.

---

<sup>2</sup>National Human Right Commission of India, D.O. No. 10/19/2005-PRP&P, Dec. 2006.

<sup>3</sup>Gregory Colomb, *Designs on Truth*, PENN STATE PRESS 50 (1992).

<sup>4</sup>National Crime Records Bureau, *Prison Statistics India*, Ministry of Home Affairs (2015).

<sup>5</sup>Re - Inhuman Conditions in 1382 Prisons, AIR 2016 SC 993.

<sup>6</sup>Criminal Procedure Code, 1973, § 436A.

Despite initiatives such as setting up fast track courts and digitisation of court records, the number of undertrial prisoners continues to be high.

Undertrials in the Indian prisons are kept in the same jail with convicted prisoners. However, it has now been made compulsory for prison officers to provide separate accommodation for them. The *Model Prison Manual* advocates that no convicted prisoner shall be kept with undertrials, or be allowed to have contact with them.<sup>7</sup> Reasons for keeping an undertrial in jail *inter alia* include,<sup>8</sup> *one*, accusation of a heinous offence, *two*, apprehension that the accused will interfere with witnesses or impede the course of justice, and *three*, the anticipation that the accused might commit the same or other offences or fail to appear for the trial.

The aim of writing the paper is to question the significance of Sec. 436A of the Cr.P.C. with respect to safeguarding equality under Art. 14 of the Constitution. The authors thereby suggest the inclusion of the phrase, ‘non-discrimination on the basis of economic status’ under the purview of Article 15. Further, the issue of the detainment of undertrials in custody has been raised in the light of the principles of justice, equity and good conscience.

---

<sup>7</sup>Model Prison Manual (2003), BPR&D, New Delhi, ¶22.45.

<sup>8</sup>Upneet Lalli, Problem of Overcrowding in Indian Prisons – A study of undertrials as one of the factors, Institute of Correctional Administration, Chandigarh, 1 (2000).

## II. STATISTICAL ANALYSIS

The Report by the Home Ministry providing statistics for Undertrial Prisoners released at the end of 2015 delivers to us the following reality<sup>9</sup>:

- The *total number of undertrials* were 2,82,076 (67.2% of the jail population), out of which males constituted 2,70,160 (95.8%) while females formed the rest 11,916 (4.2%).
- *Period of Detention*: Maximum number of undertrials (35.2%) were detained for up to 3 months, whereas 3,599 undertrials (1.3%) were detained in jails for more than 5 years.
- *Release and Acquittals*: The number of released undertrials is 12,92,357, out of which acquittals stand up to 82,585.
- *Literacy level*: Out of the total undertrial population, 80,528 are illiterates with 1,19,082 educated up to Class X; 58,160 having education below graduation; 16,365 graduates and 5,225 postgraduates.
- *Provision of financial assistance*: Only 416 convicts were provided with financial assistance on release; 1,286 convicts were rehabilitated and 94,673 prisoners were provided legal aid.
- *Caste and Creed*: More than 55% of the undertrial population is constituted by people belonging to the Muslim, Dalit or Tribal society.

The following pictorial and graphical representations<sup>10</sup> will help in understanding the statistics better –

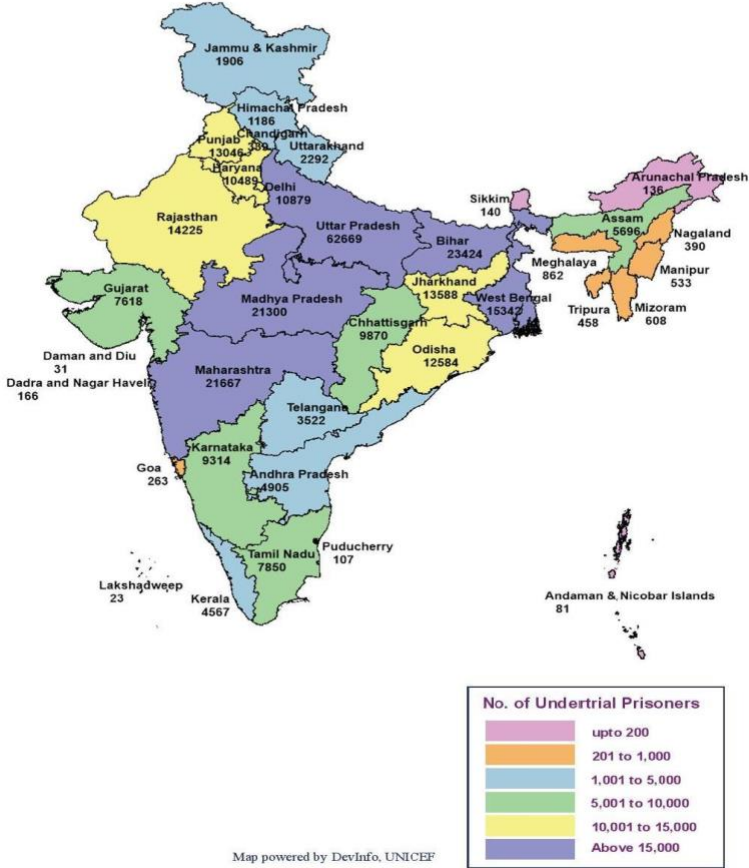
- **Map 1**: State-wise distribution of undertrials in the Indian jails

---

<sup>9</sup>Supra note 4.

<sup>10</sup>Supra note 4.

STATE/UT-WISE UNDERTRIALS IN JAILS  
AS ON 31.12.2015



- The following table shows the percentage distribution of the types of prison inmates (**Table 1**) –

Convicts	32%
Undertrials	67.2%
Detenues	0.6%
Others	0.2%

- These are the top 10 states of maximum percentage of undertrials in the country<sup>11</sup> (**Table 2**) –

State	Percentage of undertrials constituting total prison population
Meghalaya	91.2
Manipur	88.0
Arunachal Pradesh	87.2
Bihar	85.6
Jammu and Kashmir	83.3

---

<sup>11</sup>Supra note 4.

Nagaland	78.2
Jharkhand	77.1
Odisha	75.8
Goa	75.7
West Bengal	73.7

● Period of detention-wise undertrials (Table 3) –

Period of detention	Number of undertrials	Percentage Distribution
Up to 3 months	402201	35.2
3-6 months	59346	21.9
6-12 months	49326	17.8
1-2 years	34448	13.4
2-3 years	17210	6.3
3-5 years	9842	4.1



Above 5 years	3047	1.3
---------------	------	-----

- The following table describes the educational status of the undertrials (**Table 4**) –

Qualification	Percentage
Illiterate	28.5
Below Class X	42.2
Above X <sup>th</sup> , below Graduation	20.6
Graduate	5.8
Post-graduate	1.9
Technical degree / Diploma	1

### A. *Right to Equality*

#### a) Financial and Economic Status

Part III of the Indian Constitution grants fundamental rights to individuals (and citizens). Article 14 endows to every person the

equality before law and the equal protection of the laws.<sup>12</sup> Article 15 further enlists the five grounds on which no person shall be discriminated against.<sup>13</sup>

Looking at the statistics above, coupled with the findings<sup>14</sup> that “it has become the norm for the rich and powerful to get bail with ease, while others languish in prison... decisions about custody or release should not be influenced to the detriment of the person accused of an offence by factors such as gender, race, ethnicity, social status or financial conditions”, it can thus be concluded that undertrials are largely languishing in the jails due to their impoverishment, and it cannot be denied that there is a prevalent discrimination against the citizens with lesser economic security.<sup>15</sup> The issue of the inability of even one of the undertrial to avail the provision of bail due to economic disadvantage must be addressed. This is to say, an undertrial is more likely to remain a prisoner for a longer duration if he is poor enough to not be able to ‘pay’ to get bail than a financially secure individual. It leads to the assumption that the liberty of a rich man holds more importance than that of the masses.<sup>1617</sup> Why should financial incapacity put one in greater danger of being in the prison? The system seems strictly unfair and prejudiced. The numbers reflect a failure of the delivery of justice, but even this is unequally unjust. The disproportionate presence of members of the Scheduled Castes, Scheduled Tribes and Muslims among undertrials echoes the

---

<sup>12</sup>Indian Const. art. 14.

<sup>13</sup>Indian Const. art. 15.

<sup>14</sup>268<sup>th</sup> Law Commission Report, Amendments to Criminal Procedure Code, 1973 – Provisions relating to Bail (2017).

<sup>15</sup>Warren L. Miller, Bail Reform Act of 1966: Need for Reform in 1969, 19 CATH. U. L. REV. 24 (1970).

<sup>16</sup>National Human Rights Commission of India, Copy of Letter, 22 December 1999.

<sup>17</sup>Harry I. Subin, Book Review of R. Goldfarb, Ransom, “A Critique of the American Bail System”, 114(4) UNIVERSITY OF PENNSYLVANIA LAW REVIEW 630-36 (1966).

increasing vulnerability and bias against these groups, apart from a technical breakdown of the system.

The bail system is imbalanced against the poor since they would not be able to furnish bail on account of their indigence while the wealthier persons are able to secure their liberty taking note of their affordability to furnish the same.<sup>1819</sup> This discrimination arises even if the amount of the bail fixed by the Magistrate is not high, for a majority of those who are brought before the Courts in criminal cases are so poor that they find it difficult to furnish bail even in a small amount.<sup>20</sup> Iyer J. carefully laid down that the guarantee of human dignity forms part of a constitutional culture under Articles 14, 19 and 21. “... *Dehumanise him and to violate his very personhood, using the mask of dangerousness and security... There cannot be a quasi-caste system among prisoners in the egalitarian context of Article 14*”.<sup>21</sup> The decision laid to rest the discrimination between the ‘better-class undertrial’ with not so well-off by adjudicating that both be treated equally.

There is also the concept of handcuffing and police-torture prevalent in the society, even where there stands no legal notion of distinction between classes. It cannot be ascertained that a rich undertrial is any different from a poor one in matters of risk so as to handcuff the poor and not the former.<sup>22</sup> Such an incapacitated mechanism, according to Lois Wacquant,<sup>23</sup> is deemed to line with the neo-liberal regime that

---

<sup>18</sup>Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA LAW REVIEW 1125, 1180 (1965).

<sup>19</sup>*Bail and Its Discrimination Against the Poor: A Civil Rights Action as a Vehicle of Reform*, 9 VAL. U. L. REV. 167 (1974).

<sup>20</sup>Government of Gujarat (headed by Justice P.N. Bhagwati) Legal Aid Committee Report, 185 (1971).

<sup>21</sup>*Prem Shankar Shukla v. Delhi Administration*, 1980 AIR 1535.

<sup>22</sup>*Khatri v. State of Bihar*, AIR 1981 SC 1068.

<sup>23</sup>Wacquant L, *Crafting the Neoliberal State: Workfare, Prisonfare and Social Insecurity*, 25(2) SOCIOLOGICAL FORUM, 197–220 (June 2010).

promotes 'restrictive workfare' for the deserving poor and 'expansive prisonfare' for the undeserving ones, who constitute the majority of the 'urban outcasts'. With the widening of the economic gap under this organisation, prisons and custodial institutions become an instrument in the hands of the state to control the 'unruly classes' who are seemed as a threat to status quo and the social order. Currently, world prisons are increasingly being used as tools of social control, aided by disregard to and misuse of the enacted laws, with one of them being preventive detention.

b) Criminal Procedure Code – Sections 436 and 436A

The Cr.P.C. was amended in 2005 to introduce Section 436A, under which, an undertrial prisoner shall be released on own personal bond if he or she has completed half of the period of maximum possible sentence in case of conviction.<sup>24</sup> Section 436 specifies that, if an undertrial arrested in minor offences continues to languish in prison for more than a week after his bail order has been passed, he is assumed to be indigent and therefore should be released on a Personal Recognizance (herein PR) Bond (a written promise signed by the defendant promising that they will show up for future court appearances and not engage in illegal activity while out) by the trial court. Further, in offences serious in nature, if the undertrial has completed more than half of the maximum sentence awarded for the charge, he shall similarly be released on a PR Bond by the trial court.<sup>25</sup> In pursuance to that, the Supreme Court has passed orders to release as many eligible undertrial prisoners and has instructed High Courts and the NALSA to strictly monitor the situation. The amendment clarified the position on the maximum period of detention

---

<sup>24</sup>Criminal Procedure Code, 1973, § 436A.

<sup>25</sup>Vijay Raghavan, Undertrial Prisoners in India: Long Wait for Justice, 51(4) ECONOMIC & POLITICAL WEEKLY (Jan. 2016).

allowed. Though the majority of undertrials have been charged with less serious offences and are thus allowed to be released on the bond under the procedural sections; the judicial system has failed in paying adequate attention to cases under Section 436<sup>26</sup> and 436A, and hence the number of undertrial prisoners continues to increase, a situation worse than a stagnated crisis.

c) *Issues*

Thus three grave issues have been highlighted by the author(s) contributing to the problem of undertrial prisoners: *one*, the inability to afford legal service for defence. State governments provide free legal services to needy people due to which there is lack of quality. These lawyers have been blamed for irregular appearances in courts and lack of communication with clients. A key cause is the poor remuneration paid to the legal aid lawyers. *Two*, the failure of payment of cash bail (PR Bond) or production of surety by the accused renders him languishing in prison till the end of trial. The great economic disparity between the classes of the Indian populace makes it a better option for the poor to continue in jail than getting a bail. Thus the financial system of bail as per the Cr.P.C. sections (including the amendment) has been of little help to the people really needing it. *Three*, the abysmally poor judge-population ratio of 18 judges per million people<sup>27</sup> is a stark difference from the recommended 50.<sup>28</sup> The introduction of fast track courts has substantially reduced the pendency of cases but has been accused of focusing more on disposal of cases than ‘procedure of law’.<sup>29</sup>

---

<sup>26</sup>Criminal Procedure Code, 1973, § 436.

<sup>27</sup>PTI, India Has Eighteen Judges Per Ten Lakh People: Law Ministry, INDIAN EXPRESS, Aug. 4, 2016.

<sup>28</sup>121<sup>st</sup> Law Commission Report, A New Forum for Judicial Appointments (1987).

<sup>29</sup>The Plight of Undertrial Prisoners in India, GENERAL KNOWLEDGE TODAY, <http://www.gktoday.in/blog/theplightofundertrialprisonersinindia/>.

***B. Justice, Equity And Good Conscience***

a) *Locus Standi*

This incessant delay in disposal of cases is a serious violation of human rights of the accused in the face of an undertrial prisoner.<sup>30</sup> It is a blatant abuse of fundamental rights granted in virtue of being a human and a citizen. A major concern is the denial of the right to bring an action in the court against the 'imprisonment' due to not being able to afford receiving legal help, and lack of knowledge and non-awareness of the existence of such remedies. If the accused are not even receiving the opportunity to satisfactorily represent themselves in the court of law, how can we say that justice has been dispensed? A culmination of these issues has led to the erosion of the faith of the common man in the legal system of the country, when he is not permitted to exercise his rightful liberty granted by law simply due to his incapacitation to pay. There has been a growth of the belief of the non-preservation of the right to equality by the very institution which exists to safeguard it. It is an established principle that delay in trial in itself constitutes denial of justice.

If it is the fear of the 'perpetuator' roaming freely in the society which culminates in keeping custody of them as undertrials, then experience has revealed that the extremely poor undertrial prisoners are less likely to abuse the discretion of the court in enlarging them on bail, as they lack in resources for such actions; and thus the very fear which leads to putting these people in detention is eliminated.<sup>31</sup>

b) *Innocent Unless Proven Guilty*

---

<sup>30</sup>Supra note 1.

<sup>31</sup>State of Rajasthan v. Balchand, 1977 AIR 2447.

The Supreme Court has ordered that those undertrials who have completed half of the sentences they would have got if convicted, be released. This leads to the question, why *are* the undertrials in prison? One of the fundamental declared principles of justice is, “*everyone is to be considered innocent unless they are proved guilty*”.<sup>32</sup> If it were truly so, they shouldn’t have been in prison altogether. This order of the apex court gives the impression that the principle practically being followed is totally contradictory, that, *accused are all guilty until proven innocent*, and releasing them after they have been confined for half their term is a protective guard, coming as a respite. The former Chief Justice of India, Justice Dattu, had declared in his judgement in the 2G case,<sup>33</sup> “*the courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and found guilty*”. The *Standard Minimum Rules* of the UN gives special status to the undertrials in the assumption that unconvicted prisoners are presumed to be innocent and shall be treated as such.<sup>34</sup> *Body of Principles*<sup>35</sup> has also emphasised on the treatment of undertrials and says that a detained person charged with a criminal offence shall be presumed innocent and be treated as such until proved guilty according to the law of the land.

Deducing analogically, it follows that the concept of imprisoned undertrials is wrong in itself. They are entitled to be compensated for what they have undergone, regardless of the outcome of the case. There could be certain cases where it is feared that the accused may

---

<sup>32</sup>Woolmington v. DPP, (1935) UKHL 1; Golbar Husain & Ors. v. State of Assam & Anr., (2015) 11 SCC 242; Vinod Kumar v. State of Haryana, (2015) 3 SCC 138.

<sup>33</sup>Sanjay Chandra v. CBI, AIR 2012 SC 830.

<sup>34</sup>Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, Rule 84.

<sup>35</sup>Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, United Nations Organization, 1988, Principle 36.

tamper with the evidence, or intimidate witnesses. Herein, confinement maybe a solution, and for such executive action(s), the reasons and the procedures thereof will have to be clearly specified, so that the option of appealing against this would always be available to the accused, and provisions for such are not taken adverse advantage of.

### ***C. Right To Life And Personal Liberty***

#### ***a) Legal Aid***

Article 39A<sup>36</sup> provides for free legal aid to those who cannot afford it on their own.<sup>37</sup> Legal aid simply means that when an accused has been sentenced by a Court, tribunal or any other authority (competent to pass such a sentence) but is entitled to claim an appeal against the verdict, he can claim legal aid; and if he is indigent, the State is under an obligation to provide him with a counsel. The state government cannot avoid their constitutional obligation to provide free legal service to the poor accused by pleading financial or administrative inability.<sup>38</sup> When an accused person is too poor to afford a lawyer and therefore goes through the trial without legal assistance, the procedure cannot possibly be regarded as “reasonable, just and fair”.<sup>39</sup> The accused has the right to know about all the rights he has, how to enforce them and whom to approach when there is a denial of the grant of those rights.<sup>40</sup> The court has further emphasized that it is the legal obligation of the judge before whom the accused has been

---

<sup>36</sup>INDIAN CONST. art. 39A.

<sup>37</sup>DD Basu, Introduction To The Constitution Of India (20<sup>th</sup> ed. 1992).

<sup>38</sup>Hussainara Khatoon v. State of Bihar, AIR 1979 SC 1373.

<sup>39</sup>Id.

<sup>40</sup>Government of India, Ministry of Home Affairs, Malimath Committee Report on Reforms in Criminal Justice System, Vol I (Mar. 2003).



produced, to inform him of the provision of the legal aid services, in case of his inability to engage an advocate for the same.<sup>41</sup>

The scope of Art. 39A has been included in Articles 14 and 21. The reason for implementation of Art. 39A in Art. 21 is due to the ideology that law should not only be established procedurally but also be just, fair and reasonable.<sup>42</sup> There cannot be any judgment passed without *audi alterem partem*, otherwise the judgment passed will not be just. In order to ensure that provisions of Art.14 (endowment of an equal opportunity of being heard) and Art. 21 (compliance with established procedure of law) are being exercised, legal aid comes under the scope of Art. 21. However, we see that prisoners are languishing in jail for years before a legal counsel is appointed.<sup>43</sup>

The main concern of the author(s) with regard to Art. 39A is two-fold. The first one is the concern of the provision of the remedy to each and all, equally. The fact that majority of the population that lives in rural areas is illiterate and unaware of their rights,<sup>44</sup> coupled with the prevalent corruption in courts<sup>45</sup> renders the remedy unreachable to the masses. The second one being the issue of the quality of the advocate provided by the State under obligation. The opposing party who can afford an advocate will bring in someone of greater expertise while the State is perhaps likely to provide an advocate of lesser expertise leading to an unequal playing field. Besides, there seems to be a deep-seated fear of legal aid lawyers due to their laxity, incompetence and malpractices.<sup>46</sup> There are also complaints against these lawyers about irregular appearances, not informing the client about the status of the

---

<sup>41</sup>MP Jain, *Indian Constitutional Law* 1140 (7<sup>th</sup> ed. 2014).

<sup>42</sup>*Maneka Gandhi v. Union of India*, 1978 AIR 597.

<sup>43</sup>Murali Karman, & Trijeeb Nanda, *Commentary on Condition of Undertrials and Problems in India*, *ECONOMIC AND POLITICAL WEEKLY* (Mar. 2016).

<sup>44</sup>*Suk Das v. Union Territory of Arunachal Pradesh*, AIR 1986 SC 991.

<sup>45</sup>CMS India Corruption Study - Perception and Experience with Public Services & Snapshot View for 2005-17 (2017).

<sup>46</sup>National Law University, Delhi, *Death Penalty India Report*, Vol I (2014).

case and poor defence put by them in the bail and trial stages.<sup>47</sup> The incentive provided for the State advocate is also much lesser which will probably result in the legal aid advocate not putting in all his efforts, a situation leading (again) to a biased result. This goes against the basic tenets of Articles 14 and 21, especially for undertrials who have not even yet been ‘convicted’.

b) Police Torture, Handcuffing and Prison Administration

Torture is the intentional infliction of severe physical or mental pain by a public official for a specific purpose. Torture is not merely physical but may consist of mental and psychological torture calculated to create fright to make the person submit to the demands of the police.<sup>48</sup> There are an approx. 150-200 deaths per year due to police torture.<sup>49</sup> Every undertrial person accused of a non-bailable offence punishable for more than 3 years cannot be handcuffed every time they are transported to and from the Court to the prison.<sup>50</sup> The worst form of prison violence was witnessed in *Khatri v. State of Bihar*<sup>51</sup> where the police had blinded 80 suspected criminals by puncturing their eyes by needles and dousing them by acid. *Ipsa facto*, in *Sunil Batra v. Delhi Administration*<sup>52</sup> the court had already issued a writ directing the authorities that the prisoners shall not be subjected to physical mishandling by jail officials and should be given adequate medical and health facilities.

The law in Article 21 includes the right to live with human dignity. This means that there is an inbuilt guarantee against torture or assault

---

<sup>47</sup>Vijay Raghavan, Undertrial Prisoners in India: Long Wait for Justice, 51(4) ECONOMIC & POLITICAL WEEKLY (Jan. 2016).

<sup>48</sup>Arvinder Singh Bagga v. State of Uttar Pradesh, AIR 1995 SC 117.

<sup>49</sup>Supra note 4.

<sup>50</sup>Prem Shanker v. Delhi Administration, AIR 1980 SC 1535.

<sup>51</sup>AIR 1981 SC 928.

<sup>52</sup>AIR 1980 SC 1579.

by the State. Thus, the State actions also go against the rule of law. No law which authorizes and no procedure prescribed by law promoting torture or any inhuman element can ever stand the test of reasonableness and non-arbitrariness and would defy Articles 14 and 21.<sup>53</sup> It will also go against Article 5 of the Universal Declaration of Human Rights<sup>54</sup> and Article 7 of the International Covenant on Civil and Political Rights.<sup>55</sup> Undertrials are not even declared to be guilty, so when they bear police torture, it goes against the expansive provisions of Articles 14, 19 and 21. The only way when handcuffing will not go against Article 21 is when there is evidence that besides handcuffing, there is no other way to exercise control. Handcuffs must be the last refuge as the notion not only goes against Article 21 but also Article 14 for being unreasonable and arbitrary. The practice of causing physical injury to the prisoners in the name of maintaining discipline is said to be violative of Article 21.<sup>56</sup> The Court has directed the government to set up welfare and rescue homes to take care of women and children especially those who have not been convicted of an offence. Procedural safeguards should be adhered to *and not the crime committed*, in deciding the status of solitary confinement.<sup>57</sup>

The problem with police torture and handcuffing is that they not only defy Article 21, but also that there is neither a set classification nor a procedure for such an exercise. This again makes it arbitrary and discretionary. Police torture and handcuffing go against basic human dignity and are arbitrary and unreasonable for undertrials who are in jail *only* because they cannot afford the bail amount.

c) Quality of Life

---

<sup>53</sup>Coralie Mullin v. Union Territory of Delhi, AIR 1981 SC 746.

<sup>54</sup>Universal Declaration of Human Rights, art. 5, Dec. 10, 1948.

<sup>55</sup>International Covenant on Civil and Political Rights, art. 7, Dec. 16, 1966.

<sup>56</sup>Kumar Chadha, *The Indian Jail* (1983).

<sup>57</sup>Sunil Batra I, AIR 1978 SC 1675.

Article 21 was expanded to include the scope of living a decent and civilized life. This was said to include right to food, water, decent environment, education, medical care and shelter which were said to be basic human rights.<sup>58</sup> It is only secured when one is assured of all facilities to develop himself and is freed from restrictions. Even though prisoners should not get all the freedoms available, they have the provisions of Articles 14, 19 and 21.<sup>59</sup> According to the *Standard Minimum Rules*<sup>60</sup> untried prisoners shall sleep singly in separate rooms. Untried prisoners may, if they so desire, have their food procured at their own expense from outside, either through the administration or through their family or friends. He shall be allowed to wear his own clothing if it is clean and suitable. If he wears prison dress, it shall be different from that supplied to convicted prisoners. An untried prisoner shall always be offered opportunity to work, but shall not be required to work. If he chooses to work, he shall be paid for it. He should also have access to books and doctors among basic necessities.

The conditions of prisons in India are ghastly as prisons meant for 650 people are being used by 2,200 inmates out of which two-thirds are undertrials.<sup>61</sup> Pushing the prisoner into a solitary cell, denial of a necessary amenity, and (more dreadful sometimes) transfer to a distant prison where visits or society of friends or relations may be cut-off, allotment of degrading labour, assigning him to the company of hardened criminals and the like, is an infraction of liberty or life.<sup>62</sup>

---

<sup>58</sup>Chameli Singh v. State of Uttar Pradesh, AIR 1996 SC 1051.

<sup>59</sup>TV Vatheeswaran v. State of Tamil Nadu, AIR 1983 SC 361.

<sup>60</sup>Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, Rule 84.

<sup>61</sup>Bhavna Vij Aurora, The Horror of Indian Jails, INDIA TODAY (June 24, 2011), <http://indiatoday.intoday.in/story/right-to-justice-bill-jails-turn-into-nightmares-for-undertrials/1/142622.html>.

<sup>62</sup>P Bharti v. Union Territory of Pondicherry, (2007) 1 MLJ 345.

There are jails where the toilets are to be cleaned by the prisoners with mud due to non-availability of water.<sup>63</sup>

The basic quality of life is not guaranteed in most prisons of India, including food, water, space, sound sleep, or shelter.<sup>64</sup> Due to the grueling atmosphere, a petty thief might become into a hardened criminal. Article 21 is not fulfilled and most of the prisoners are subject to this being an undertrial. The most disagreeable perspective is that if the person is *actually innocent*, the implications of that can shake one's foundations of justice.

d) Speedy Trial

Deprivation of speedy trial means if the process becomes unduly long, the principles of Article 21 stand violated. The fair, just and reasonable procedure under Article 21 necessitates the right to speedy trial. It also comes within the purview of public and social interest as criminal law is *in rem*. Right to speedy trial is included in all stages, namely, investigation, inquiry, trial, appeal, revision and retrial.<sup>65</sup> The accused should not be subjected to incarceration before his conviction. This not only results in physical restrictions but also mental anguish.<sup>66</sup> The right to speedy trial does not include the time limit to be set once the trial is put into motion as it is not possible for the Court to determine that.<sup>67</sup>

Speedy trial or a reasonably expeditious trial, is a part of Article 21. Financial constraints and priorities in expenditure will not absolve the Government of its duty to provide speedy justice.<sup>68</sup> Not providing speedy justice was held to be '*a crying shame on the judiciary which*

---

<sup>63</sup>Tiruchirapalli Women's Prison, Tamil Nadu.

<sup>64</sup>Supra note 16.

<sup>65</sup>Abdul Rehman Antulay v. R.S. Nayak, AIR 1988 SC 1531.

<sup>66</sup>Supra note 1.

<sup>67</sup>Abdul Rehman Antulay v. R.S. Nayak, AIR 1988 SC 1531.

<sup>68</sup>Hussainara v. Home Secy, Bihar (II), AIR 1979 SC 1369.

*keeps men in jails for years without a trial*'.<sup>69</sup> Whenever the right to speedy trial has not been catered to, the conviction granted in the subsequent judgment can be quashed as it is not just.

The reasons why speedy trial should be ensured besides the enforcement of Article 21 are two. *Firstly*, delaying trials are often sought as a defence tactic. This is unjust in many ways. One of the reasons is that adjournment motions are made unreasonably without genuine reasons. This causes delay which is unjust as the matter remains pending and thus causes monetary, physical and mental anguish to the undertrial. Another reason is that this defence tactic serves as a burden on the court too, as workload increases. *Secondly*, persons accused of petty offences not having much periods of detention if convicted might have to await their trials for long periods. If they are poor and helpless, they languish in jail as there is nobody to bail them out. The main reason that speedy justice is not enforced efficiently is due to pendency of cases and the abysmal judge-population ratio. Another major loophole is the presence of Sections like 309 of the Cr.P.C. which provides for adjournment of the matter on such terms as the court 'thinks fit' and for the time it considers 'reasonable'. This is entirely discretionary due to which adjournment can be sought on a wider basis which as it is, is a recurrent phenomenon.<sup>70</sup> Timely delivery of justice keeps the faith ingrained and establishes the sustained stability.<sup>71</sup> Thus, speedy justice is one thing that should be ensured as justice delayed *is* justice denied.

#### ***D. Precedents and Judicial Understandings***

Over the decades, the Indian Judiciary has evolved to protect the rights of the accused, and even laid the rules for speedy trials. In

---

<sup>69</sup>Kadra Pahidya v. State of Bihar, AIR 1981 SC 939.

<sup>70</sup>V Vasanthakumar v. HC Bhatia, (2016) 7 SCC 686.

<sup>71</sup>Noor Mohammed v. Jethanand, (2013) 5 SCC 202.

*Maneka Gandhi v. Union of India*, the Supreme Court held that the procedure established by law must be reasonable, just and fair.<sup>72</sup> Thereafter in its landmark judgment in *Hussainara Khatoon v. State of Bihar*,<sup>73</sup> speedy trial was held under the purview of Article 21 of the Indian Constitution guaranteeing right to life and liberty.

The case above describes the crises of the numerous people in the prisons of Bihar whose trials had not commenced for years on end. Many of them were held for trivial offences for which they would have been sentenced to jail only for a few months but instead had spent years. It was a case of *habeas corpus* that brought in the issues of prison administration and the abysmal condition of the undertrial prisoners. The main issue was whether the rights to speedy trial and free legal aid are within the scope of Article 21. The Court herein also laid some guidelines to ensure humane prison administration. The laws applied to this case were Article 14 (Right to Equality) and Article 21 (Right to Life and Personal Liberty) along with Article 39A of the Constitution. The right to speedy trial and the right to be represented were thus held to be included in Article 21. It was understood that the bail system had major defects, wherein only the poor stayed in prison as they did not have any property as bail. There were references made as to the discretion that the judges have in release of undertrial prisoners. Procedural defects in the police system were recognised and the prison administration were given new guidelines as to the treatment of undertrials. Thus, there was a major expansion in Article 21 relating to undertrials.

In the famous *Pehadiya*<sup>74</sup> case, the Bench noted that the crisis of undertrials in India describes the instance of the utter callousness and indifference of the legal and judicial system towards the prisoners

---

<sup>72</sup>(1978) 1 SCC 248.

<sup>73</sup>(1980) 1 SCC 98.

<sup>74</sup>Supra note 69.

languishing for unending years in the jails. “*It seems that once a person accused of an offence is lodged in the jail... he becomes a mere forgotten specimen of humanity alienated from the society, an unfortunate victim of a heartless system.*” In *Shabbu v. State of U.P.*<sup>75</sup> a full bench of the Allahabad High Court held that the purpose of Section 428 of the Cr.P.C. was to relieve the undertrials of the anguish associated with the detention by a ‘credit system’ of reduction of the time-period he has already spent in jail.

Later, certain guidelines were laid out to counter the unfair bail system in *Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India*.<sup>76</sup> Firstly, if an undertrial prisoner was accused of an offence where the imprisonment is up to 5 years, he should be released if he has completed half the sentence. Secondly, if the undertrial was accused for an offence of more than 5 years, then a minimum of Rs. 50,000 as bail amount was to be laid out. Thirdly, if the undertrial was accused for an offence of more than 10 years, he should be released after providing Rs. 1 lakh as bail amount and serving a sentence of 5 years. However, the author(s) consider these guidelines to be inadequate as they do not seek to help out the destitute as the amount is still high. Moreover, these provisions have remained ineffective because of lack of awareness and because trial courts press for bail bonds for release.<sup>77</sup>

The Madras High Court in *Jagannath v. The State*<sup>78</sup> made the rule that such undertrial prisoners would be released against whom chargesheets have not been filed within the limitation period provided in Section 468(2) of the Cr.P.C. as further detention would be

---

<sup>75</sup>1982 CriLJ. 1757.

<sup>76</sup>(1995) 4 SCC 695.

<sup>77</sup>Utkarsh Anand, SC: Release Undertrials Who Have Served Half Their Jail Terms, INDIAN EXPRESS, Sept. 4, 2014.

<sup>78</sup>1983 CriLJ 1748.



violative of their fundamental right under Article 21. The issue of pendency and delay in the provision of justice came up before the Supreme Court in a petition filed by an NGO. It was thus first observed in *Common Cause v. Union of India*: “It is a matter of experience that in many cases where the persons are accused of minor offences punishable for not more than three years, the proceedings are kept pending for years. If they are poor and helpless, they languish in jails for long periods either because there is no one to bail them out or because there is no one to think of them.”<sup>79</sup>

Subsequently, the issue of disparity in the financial capacity of the undertrials was first brought to attention when the apex court bench in *Shankara and Ors v. State (Delhi Administration)*<sup>80</sup> categorized the undertrials into the ‘poor’ and ‘non-poor’, wherein the latter were observed to stay in jail only for a couple of hours before getting a bail. Their personal bonds of several lakhs and multiple sureties are furnished within hours whereas the former category is compelled to languish in jail for indefinite periods for not being able to furnish even one surety of minimal amount of Rs. 500-1000. “These are clear instances of depriving the undertrials of their freedom and liberty solely on the ground of poverty... suffering for years for not fulfilling the conditions which were attached to the bail orders because of their extreme poverty and ignorance. No one on their behalf has even bothered to move the courts for relaxing, reducing or waiving the conditions. The poor perhaps have no friends or relations. Consequently, they are languishing in jails for months and years... Another factor which must be taken into consideration is the huge public expense involved in keeping these under trial prisoners in custody.” The Court in its landmark verdict held that in case even after relaxation on the bail bond if any undertrial finds it difficult to furnish a surety, he is granted liberty to move to the court.

---

<sup>79</sup>(1996) 4 SCC 33.

<sup>80</sup>1996 CriLJ 43.

Finally, in February 2016, the Supreme Court in its judgment by Justice Lokur on a writ petition covered a whole lot of issues related to the conditions of the accused and undertrials, and gave guidelines for prison reform to secure their rights in *Re: Inhuman Conditions in 1382 Prisons*.<sup>81</sup> Some of the guidelines included setting up of an Under Trial Review Committee in every district who will collaborate with the District Legal Services Authority. The primary task of the Committee would be to ensure strict implementation of Section 436 and Section 436A of the Cr.P.C. It also placed certain liabilities on police officers to ensure that living conditions of the prisoners is commensurate with human dignity.

### *E. Suggestions*

The author(s) thus urge for a major methodical reform in the Indian prison system. Prison administration and facilities need to be brought up to the basic human standards. In order to do this, the following steps can be undertaken:

1. *Classification of prisoners*: There should be a classification as to the amount of serving time each offence carries and prisoners should be classified according to that. The provision of separate prison or custodial home for undertrials should be facilitated without further delay.
2. *Setting up of autonomous body to overview legal aid*: Additionally, the prerequisite of keeping an undertrial as a prisoner should be the engagement of a legal aid lawyer who should be reportable to an autonomous body (set up to review the administration of legal aid lawyers) to ensure accountability for the quality of work done. This will ensure

---

<sup>81</sup>AIR 2016 SC 993.

that certain minimum standards are ensured to counter the unequal level of expertise.

3. *Reforms in bail-related law*: The system of bail should be revised and carried out at affordable rates, *i.e.*, the introduction of the system of bail amount ‘slabs’ on the basis of the income level of the accused (*a la* the taxation laws in the nation). Further, the recognizance of personal bonds could be made for a wider ambit of offences. In order to counter the fear of absconding of the accused, the non-appearance on a personal bond can itself be made into an offence.<sup>82</sup> The same would be secured only when non-discrimination on the basis of economic status is included under Art.15 of the Indian Constitution.
4. *Enforcement of Section 436 and 436A of the CrPC*: Without further adjournment, undertrial prisoners must be released under Sections 436 and 436A of the Cr.P.C.; basing on the quick and strict implementation of the apex court rule of discharging all those who have served half of the sentence if found guilty of the offence for which they are held in custody. The language of the section must be made unambiguous in communicating that the bail under this section is a matter of right, which cannot be trounced by imposing or demanding unreasonable or excessive sureties.<sup>83</sup> The sureties demanded must be in consonance with Section 440 of the Cr.P.C. according to which sureties would be prescribed with due regard to the circumstances of the case not being excessive.
5. *Provision to rehabilitate undertrials after release*: Thereafter, the State should envision a policy of getting the undertrials back on their feet on release. There should be a scheme of monetary compensation offered to those undertrials who

---

<sup>82</sup>78<sup>th</sup> Law Commission Report, Congestion of Under Trial Prisoners in Jail (1979).

<sup>83</sup>Supra note 14.

emerge to be innocent after the trial. This is similarly adopted vide the European Convention on Human Rights which enables the State to take responsibility for the wrongful arrest and hence the State pays compensation.<sup>84</sup> Section 358 of the CrPC also recognizes the compensation for a wrongful arrest but sets a maximum limit to rupees 1000. To make the justice system fair and for the State to admit its fault, Section 358 could be amended and a scheme of compensation for the same can be devised. The prison departments should also create a cadre of trained social workers to work with prisoners, their families and the acquitted towards promoting their legal rights and rehabilitation. All these would be supplemented by the removal of obsolete laws (*e.g.*, Section 377 IPC) to increase efficiency in trials, decriminalisation of minor offences which could be included in tortious laws (*e.g.*, pickpocketing of amount *say*, worth rupees 100), and implementation of the Probation of Offenders Act which provides for releasing the offender in less serious offences back to the community on a *bond of good behaviour* or under the supervision of a probation officer for a fixed period of time.

6. *Improving the judge-population ratio*: Last, but the most needful action is to increase the judge-population ratio to the standards advised by various committees. The problem of judicial appointment is being nationally debated currently. Barring the deadlock between the discretion of the judicial collegium and final confirmation by the government machinery, the greater problem of undertrials can be solved by appointment of more judges at the *local* level through judicial services examinations, and it thus becomes important to sensitize people of the legal profession to opt for the same.

---

<sup>84</sup>European Convention on Human Rights, art. 5(5), Nov. 4, 1950.

The need of the hour in the Indian criminal judicial system is to disinfect itself by introducing reforms and bringing in people dedicated to serving the people of the nation.

### F. CONCLUSION

The paramount constitutional concern with undertrial detention is that it violates the principle that there should be no punishment before the establishment of guilt by procedure of law. The concept of an incarcerated undertrial is akin to punishment before conviction, as the benefit of doubt *is* provided to him. There is an absence of segregation between undertrials and convicts as they are both lodged in the same prison, and their liabilities are similar along with the services provided, which casts a doubt on the entire system of justice. There is also a demographic similarity among undertrial ‘victims’, namely, they are destitute, uneducated, and from the backward classes. This means that there *may be* an unintentional but a most probable non-justified classification among the undertrials. Whenever there is a question of justice, the only thing that must be taken into account is the establishment of the act committed by the accused *beyond a reasonable doubt*. Invariably, it is always the poor who gets entrenched in the ‘justice system’ available for undertrial prisoners. There is a definite violation of the undertrial’s right to equality and right to life.

Before conviction, pre-trial detention must be minimal and situationally justifiable to each individual case otherwise the authorities stand in breach of their duties, violating the fundamental rights of the undertrial prisoner.<sup>85</sup> The familiar dicta “justice delayed

---

<sup>85</sup>Supra note 14.

is justice denied” and “bail not jail” are often held out as the bulwarks of fair trial, but the profile analysis of the prison population makes it a farce.

The concept of having an undertrial as a ‘prisoner’ in itself can be questioned as our justice system relies on the principle of ‘innocent unless proven guilty’. How can somebody be punished simply on the apprehension that he has committed that offence? And if a person is declared innocent, the years that he has spent in jail are not even compensated by the government and cannot be quantified in monetary terms. However, the question of the hour is, why is there such a high proportion of undertrials in the country? Doesn’t the alarming number of undertrials shows failure of both, Section 436A of the Cr.P.C. and the criminal justice system, to successfully convict an accused in time? There is a serious breach of human rights of the undertrial prisoners. This failure remains unaddressed. Thus, there is a need for substantive reforms to the investigation and trial process in India. The ultimate aim is the restoring of the faith in the Indian justice system.