
BEHIND BARS, BEYOND JUSTICE: INDIA'S UNDERTRIAL CRISIS

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ABSTRACT

“Behind bars, beyond justice” is not only a phrase but the reality of undertrials in India. Among all the prisoners, 2/3rd of them are undertrials in jails throughout India, due to reasons like poverty, their inability to obtain bail and the delay in justice. Again, we come across a well-known legal maxim, “Justice delayed is justice denied”. Most of them are still unaware of their rights and have been detained in prisons for years without any trial or legal aid. This situation in the undertrials points to corruption, politics, and the failure of the Indian judicial system.

The National Legal Services Authority (NALSA) has been directed by the Supreme Court to coordinate with the respective state authorities throughout the country to establish undertrial review committees, and the duty was to provide recommendations under the benefit of section 436A of the Criminal Procedure Code (read as Section 479 of Bharatiya Nagarik Suraksha Sanhita) to release the undertrials. The article further stated that the Supreme Court has issued landmark judgments on the rights of undertrials whose rights have been infringed. It has emphasised the sections and articles involved in establishing the rights of prisoners and undertrials, and compared these strategies with those of other countries.

Keywords: Undertrials, NALSA, 436A CrPC (read as Sec 479 of BNSS), Legal aid, Justice.

I. INTRODUCTION

Everyday five people die in custody due to violence in 2019 as per the report of National Campaign Against Torture (NCAT). An accused is been in police custody means he was locked up in the police station. The police cannot detain him longer, as police has the duty to produce the accused before the magistrate within 24 hours. Custodial violence includes torture, harassment, death and other forces used by the police upon the arrested person either in police custody or in jail that can be physical or mental. It also includes illegal detention and arrest, handcuffing, solitary confinement, and denial of fundamental rights to the accused persons. The law commission of India stated that, “crime by a public servant against the arrested or detained person who is in custody amounts to custodial violence.” This custodial violence was prevalent in India by the Britishers in 1894. An Act was passed called “Prison Act” in the same year of 1894. “There is a great responsibility on the police or prison authorities to ensure that the undertrials in the custody is not deprived of his right to life. His liberty is in the very nature of the things circumscribed by the very fact of his confinement and therefore his interest in the limited liberty left to him is rather precious. The wrongdoer is accountable and the state is responsible if the person is in custody of the police is deprived of his life except according to the procedure established by law.”

Speedy trial is not a new concept in India but is evolved from the medieval period. But the concept of speedy trial originated in USA is a modern one which balance between rights of the accused and the justice of the victims and constitutionally guaranteed right under the sixth amendment. Unlike USA constitution, speedy trial is not only a fundamental right, it is implicit in the content of Article 21 as interpreted in *Maneka Gandhi case*.¹ To be regarded as ‘reasonable, fair or just’ there must be reasonable quick trial. It is the essence of criminal justice.

Under Article 14 of the Indian constitution everyone shall be entitled to be tried and defend himself by himself or through an advocate of his choice. In case he is unable to have a legal assistance, he has a right to have a legal assistance assigned to him by the state without any payment if he has no reasonable means to pay. But this is not a fundamental right under Part III of constitution. Free legal aid is one of the Directive Principle of State Policy under Article 39A by the Forty-second Amendment. The accused has a right to be defended by a lawyer

¹ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597 (India).

under section 340 of Bharatiya Nagarik Suraksha Sanhita, 2023 provides, “Any person accused of an offence before a criminal court, or against whom proceeding are instituted under this Sanhita, may of right defended by an advocate of his choice.”

Custodial violence involves some kind of torture that has been inflicted on a person. The universally accepted definition of torture states: “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him for a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having , or intimidating or coercing him or third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²

There is no clear mention of any safeguards in the Indian constitution against brutal treatment and inhuman treatment with the persons who are deprived of their personal liberty in prisons. Handcuffing is considered to be inhuman and unreasonable prima facie. Handcuffing should be done if there is any serious threat is there from the person arrested. Handcuffing should be done by analysing the gravity of the offence committed by the person and the circumstances of the situation. To handcuff a person who is accused of any offence they must have the reasonable cause and permission by the court to do the same.

Being held in solitary confinement is, for most prisoners, a stressful experience with potentially harmful health effects. The prisoner is socially isolated from others, his human contacts reduced with staff and infrequent contact with family and friends. He is almost completely dependent on prison staff – even more than is usual in the prison setting – for the provision of all his basic needs, and his few movements are tightly controlled and closely observed. Confined to a small furnished cell with little or no view of the outside world and with limited access to fresh air and natural light, he lives in an environment with little stimulation and few opportunities to occupy himself.

Protection against illegal detention and arrest was mentioned under Article 22 of the constitution. Which specifies right to be informed ‘as soon as may be’ of grounds of arrest, the right to consult and to be represented by an advocate of his own choice, the right to be produced

² Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

before a magistrate within 24 hours, and the freedom from detention beyond the period except by the order of the magistrate.

This right of accused is given to the arrestee or the person who is detained under police custody. That no one can be compelled to give witness against themselves. It means no accused of any offence shall be compelled to be a witness against himself, which means one cannot be forced to give testimony which may expose himself to prosecution for the crime. The accused has the right to make any statement or admission, voluntarily without any coercion during the trial or custody.

II. LEGAL & CONSTITUTIONAL FRAMEWORK

The Constitution of India provides protection to the accused against custodial violence with Articles 14, 19, 20, 21, 22 and 39A which is the core principles of the constitution. Article 14 of the constitution guarantees equality before law to the citizens and permits reasonable classification among prisoners. Article 19 has given freedoms those are subject to limitations, which lawfully deprive the convicts of certain rights. Article 21 protecting life and liberty of the persons, has been interpreted by the supreme court in various landmark judgements and impliedly recognised various other rights such as right to speedy trial, right to fair trial, right to get free legal aid, protection against inhuman treatment, right to live with human dignity and so on. Article 22 provides safeguards against arbitrary arrest and detention and gives right to be informed about the grounds of the arrest and have access to get an advocate of his choice to the accused. Also a similar provision of constitution mandate to free legal aid to the citizen which includes accused under Article 39A.

Bharatiya Nagarika Suraksha Sanhita (BNSS) being the procedural law provides wide protections to the persons in custody, and promotes the speedy disposition of cases in criminal matters in various sections like investigating Custodial Deaths, violence against undertrials and more. Section 197(1) mandates inquiry in cases where a person dies, raped, harassed, or disappear in police custody and empowers National human rights Commission (NHRC) to do inquiry. Section 47 gives right to the accused should be informed about the grounds of the arrest and get a bail in case of a bailable offence. For the speedy disposal of the case section 258, requires the session court to conclude a case within 30 days after the arguments of the parties, which can be extendable till 45 days. Section 479 (1) states that certain undertrial prisoners should be released who have undergone detention for half the maximum term for the

said offence, to prevent overcrowding.

Bharatiya Nyaya Sanhita (BNS) imposes restrictions on solitary confinement under Section 11 of BNS. The provision specifies that solitary confinement cannot exceed 14 days at a time with an interval of equal duration between successive periods. In cases where the sentence extends beyond three months solitary confinement may be imposed for a maximum of 7 days in a month again separated by an equal interval. Section 12 reinforces the principle of humane treatment and proportional punishment within the criminal justice system. Section 127 pertains to the offence of wrongful confinement. It involves deliberate restriction of a person's freedom of movement in such a way that they are completely prevented from leaving a particular area or set of boundaries. In essence, the individual is confined in all directions and is not allowed to move beyond the defined limits under Section 127 of BNS. The punishment depends on the duration of confinement where upto 1 year for basic confinement, 3 years if the confinement lasts 3 days or more, 5 years if the confinement lasts 10 days or more.

III. JUDICIAL INTERVENTIONS & CASE LAWS

In *Hussainara Khatoon vs. Home Secretary, State of Bihar*,³ “a petition for a writ of habeas corpus was filed by number of undertrial prisoners who were in jails in the State of Bihar for years waiting for their trial. The Supreme Court held, the “right to a speedy trial”, a fundamental right, is implicit in the guarantee of life and personal liberty enshrined in Article 21 of the constitution. If he has failed to demand a speedy trial in that case also he cannot be denied for Right of speedy trial.”

In case of *Raj Deo Sharma vs. State of Bihar*,⁴ “the Supreme Court after having recognised that the speedy trial is the right of the accused, issued certain direction for effective enforcement of this right. The court directed that in cases where the trial is for an offence punishable with imprisonment for a period not exceeding seven years, whether the accused is in jail or not, the court shall close prosecution evidence on completion of a period of two years and if the offence of the undertrial is punishable with imprisonment for a period exceeding seven years, the court shall close prosecution evidence on completion of three years from the date of recording the pleas of the accused on the charge framed, whether the prosecution has examined all the witnesses or not within the said period. However the court is not obliged to close the

³ Hussainara Khatoon v. State of Bihar, 1979 A.I.R. 1360 (India).

⁴ Raj Deo Sharma v. State of Bihar, (1999) 7 SCC 604, 1999 Cri LJ 3524, 39 All Cri Cas 665 (SC).

prosecution evidence if the inability for completing prosecution evidence was attributable to the conduct of the accused.”

In *M.H. Hoskot vs. State of Maharashtra*,⁵ “the Supreme Court held that the right to free legal aid is an essential ingredient of reasonable, fair and just procedure for a person accused of an offence and is implicit in Article 21 of the constitution. The majority opinion of court in the above case found it a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as indigence or incommunicado situation is under a mandate to provide a lawyer to the accused if the circumstances of the case and needs of justice so requires, provided the accused doesn’t object to the provision of such lawyer. If a prisoner is unable to exercise his constitutional and statutory right of appeal including special leave to appeal for want of legal assistance, there is implicit in the court under Article 142 read with Articles 21 and 39A of the constitution, the power to assign counsel to the prisoner provided he does not object to the lawyer named by the court. Equally, is the implication that the state which sets the law in motion must pay the lawyer an amount fixed by the court.”⁶

The Supreme Court in case of *Charles Sobraj vs. Superintendent, Central Jail, Tihar, New Delhi*,⁷ “it was recognised that the ‘Right to life’ is more than mere animal existence, or vegetable substance. Even in prison a person is required to be treated with dignity and one enjoys all the rights specified in Articles 19 and 21. In this case the petitioner had contended that barbaric and inhumane treatment was hurled at him and international discrimination was done with him. The court restricted such treatment and regarded it as a violation of the right to life guaranteed under Article 21 of the constitution.”

In *Sunil Batra vs. Delhi Administration (No.1)*, “the practise of keeping undertrials with convicts in jail was regarded by the Supreme Court inhumane. The court held that it offended the test of reasonableness in Article 19 and fairness in Article 21. The punishment of solitary confinement, like Sobraj case,⁸ was regarded as violative of Article 21 of the constitution by stating that the liberty to move, mix, mingle, talk, share company with no prisoners, if substantially curtailed by keeping a prisoner in the solitary confinement, would be violated of

⁵ Madhav Hayawadanrao Hoskot v. State of Maharashtra, 1978 A.I.R. 1548 (India).

⁶ Madhav Hayawadanrao Hoskot v. State of Maharashtra, AIR 1978 Supreme Court, p. 1556. (India).

⁷ Charles Sobraj v. Superintendent, Central Jail, 1978 A.I.R. 1514 (India).

⁸ Charles Sobraj v. Supdt., Central Jail, 1978 A.I.R. 1514 (India).

Article 21, unless the curtailment has the backing of law.⁹”

In the landmark case of *D.K. Basu vs. State of west Bengal*, “where a number of directions were issued which were required to be followed in all cases of arrest or detention which included that a person who has been arrested or detained and is being held in custody in a police station or interrogation centre or other lockup shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed, as soon as practicable, that he has been arrested and is being detained at the particular place, unless the attesting witness of the memo arrest is himself such a friend or a relative of the arrestee. It was also directed by the court that the person arrested must be made aware of this right to have someone informed of this arrest or detention as soon as he is put under arrest or detention.¹⁰”

IV. COMAPRATIVE VIEW OF UNDERTRIAL SYSTEMS

Compared to earlier periods India and United Kingdom both has progressed towards more humane and effective prison system. India has taken measures in recent years to prevent overcrowding and improve conditions in prisons. The government has invested to improve the prison system and upgrade infrastructures, renovating facilities, improving sanitation, and enhancing medical care. Indian prison facilities includes central jails, District jails, Sub jails, Women’s jails, Open jails, Juvenile homes, and borstal school. Similarly United Kingdom has evolved throughout the years and introduced private prisons, it has focused on enhancing the living conditions of inmates by giving them proper education and health care facilities by providing rehabilitation programmes. Her Majesty’s Prison and Probation Service (HMPPS) it’s an agency of Ministry of justice which is responsible for managing prisons in UK. Its prison includes of category A, B, C, and D prisons, Young Offender Institution, women’s prisons, Immigration detainees.

The rights that are available in India to the prisoners includes Right to privacy which is confidentiality of lawyer contracts, Right to family life which is allowing hospital visits or family visits, protection from routine solitary confinement and other degrading treatment as held in Sunil Batra case, right to life and dignity as interpreted in Maneka Gandhi case. Prisoners cannot be deprived of healthcare treatments, they have access to education and

⁹ Sunil Batra v. Delhi Administration, AIR 1978 SC 1675 (India).

¹⁰ D.K. Basu v. State of West Bengal, (1997) 1 S.C.C. 416 (India).

vocational training. In case of *PUCL vs. Union of India*¹¹ court affirmed that prisoners retain the franchise in many cases under trial detainees and certain prisoners can vote and authorities have been directed to facilitate voting in prisons.

In UK, Her Majesty's Prison and Probation Service (HMPPS) oversees prisons where inmates are entitled to dignity, healthcare, legal aid, privacy, fair disciplinary hearings, education, work with pay, family contact, and religious freedom. Court of UK had struck down practices like strip searches, unlawful restrictions on religious dress in prisons. UK's debate over prisoner voting promoted by *Hirst vs. United Kingdom*¹² and subsequent ECHR found ban incompatible with the convention, despite international criticism UK law retains ban and reforms proposed since have not been enacted, leaving the issue unresolved.

V. CONCLUSION

The undertrials has the right to life too, keeping them in jails without trial is violative of Article 21. "Speedy trial is an essential ingredient of 'reasonable, fair, and just' procedure guaranteed by Article 21 and it is the constitutional obligation of the state to ensure such a procedure of speedy trial to the accused. The Supreme Court held that detention in jail for a period longer than what they would have been sentenced if convicted is illegal as being in violation of their fundamental right under Article 21 of the constitution. The court directed to release all such undertrials. In accordance with the direction of the court, seventy undertrial prisoners were released."

Nowadays the Indian criminal justice system is focusing more into reformatory theory rather than retributive theory also making a progressive way forward for the society to evolve. The retributive theory of punishment which says "eye for an eye" has been outdated in this modern society, similarly the way of dealing with undertrials should also need to be reformed. It is next to impossible to stop the crime rates in India but the justice system can make correctional measures, rehabilitation programmes, reformatory homes and modernised framework to deal in a better way with the day to day crime. To overcome the loopholes of the justice system in India, it has a long way to go.

¹¹ *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301 (India).

¹² *Hirst v. United Kingdom* (No. 2), 2005-IX Eur. Ct. H.R. 187.

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