

UNFULFILLED RIGHTS TO LEGAL AID, BAIL, AND SPEEDY TRIAL FOR UNDERTRIAL: THE UNFRUITFUL JUDICIAL ACTIVISM

"It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."—Nelson Mandela, 1995

By

—Prof. Y.P. RAMA SUBBAIAH*

—M. UMAMAHESWARARAO**

The ever-increasing number of prison population and the seemingly never-ending stay of undertrial in prisons, inspite of several endeavors made by the judiciary and reforms introduced by the Legislature, has become perpetual challenge to the Indian Judicial System. Moreover, this problem has a visibly disproportionate impact on the socially and economically backward communities of the society¹. In this article the authors would like to substantiate their arguments that the measures brought about by both the Legislature and judiciary for prison reformation, specially relating to the undertrial prisoners, have failed miserably, *firstly*, due to the lax attitude of the police who get remand orders for the arrested and do not follow up the cases promptly with their investigations. *Secondly*, owing to the indifference of the police officers and the Courts to ensure proper legal aid services to the poor undertrial prisoners which makes it impossible for them to appear before the Court to get bail and/or fight their cases. Their inability to hire a lawyer leaves them to be at the mercy of the police officers and the Courts. *Thirdly*, because of the '*callousness of the legal and judicial system*' as

pointed out by the Supreme Court in *Hussainara Khatoon's case*² 40 years back. Obviously, the situation is going from bad to worse since then. One finds no better reason than the one given by the Supreme Court to explain the number of undertrial far exceeding the number of convicts and the class, caste biases reflected in the inmates of prisons all over India³. Had there been a proper follow up of the guidelines given by the Courts and the implementation of the reforms so far brought about in this direction, there would have been lot of improvement in the fate of the undertrial prisoners. The judiciary seems to be happy with writing down hundreds of pages of eloquent judgments.

Therefore, this paper contends that judicial activism does not stop with listing guidelines, the judiciary can play even more active role in getting their instructions properly implemented. Unless the law enforcement agencies including the police, the prosecution and the judiciary strive with commitment to enforce the human rights of the undertrial, including the most important ones right to legal aid, right to bail and right to speedy

* LL.M., Ph.D., Professor, P.G. Department of Legal Studies, Acharya Nagarjuna University, Guntur, India.

** B. Tech., IIM-B, LL.B., LL.M., Ph.D., (Ph.D., Candidate) P.G. Department of Legal Studies, Acharya Nagarjuna University, Guntur, India.

1. This phenomenon is not unique for India. Poverty is a curse for people in many ways, all over the world. See, *Dylan Matthews*, 'Want to stay out of prison? Choose rich parents' -Boys from the poorest families are 20 times likelier to end up in prison than boys from the richest families. 14th March, 2018. <https://www.vox.com/identities/2018/3/14/17114226/incarceration-family-income-parents-study-brookings-rich-kid-poor-kid>
2. 1979 AIR 1369 1979 SCR (3) 532 1980 SCC (1).
3. 'Poor, young and illiterate: Why most Indian prisoners fight long lonely battles for justice', *India Today*, <https://www.indiatoday.in/india/story/undertrial-prisoners-indian-jails-ncrb-report-prison-statistics-Supreme-Court-1618588-2019-11-15>; Blame poverty and bias: 53% of all prisoners in India are Dalits, Muslims and tribals, First Post. 24th November, 2014. <https://www.firstpost.com/india/53-of-all-prisoners-in-india-are-dalits-muslims-and-tribals-blame-poverty-and-bias-1818635.html>.

trial, with proper sensitivity and due respect for the rule of law this perennial problem of overcrowding of prisoners with the 'presumed-innocent undertrial', remains a problem forever.

1. Introduction

*No person shall be deprived of his life or personal liberty except according to procedure established by law.*⁴ By virtue of this Constitutional guarantee, every citizen has the fundamental right to life and liberty, the enjoyment of which is subject to the rule of law. If anyone violates the rule of law the first consequence he/she has to face is deprivation of his/her right to personal liberty since the violators of criminal law are arrested and brought before the Courts of law for further proceedings⁵. The Courts then following the procedure established by law⁶, if the person is accused of a bailable offence, inform him that *he has a right* to be released on bail⁷, and release him after he furnishes the bail requirements⁸. In case the person produced before the Court is accused of a non-bailable offence, still *the Courts have discretion* to release the accused on bail if the Court is satisfied that the said accused would not abscond and would appear before the Court as and when required⁹. This is because, history tells us that the concept of bail came into existence for three basic purposes, namely, to maximize release of persons arrested/ detained while at the same time maximizing appearance of those accused in the Court, and thirdly public safety¹⁰.

The prison statistics of not only the recent years, but of past several decades display the lax attitude of the law enforcement agencies in granting bail as well as a biased attitude towards the accused basing on the caste, class/status, literacy considerations. Scores of celebrated judgments of the Higher Courts declared for the protection of the human rights of the undertrial prisoners, evidently, remained unfruitful. The Superior Courts have time and again ruled that Article 21 of the Constitution comes to the rescue of the poor and needy accused persons to have legal assistance at the expense of the State. The right to legal services empowers the poor for securing rights to bail and speedy trial. But this too has remained unmet leaving the lakhs of poor undertrials in hopeless conditions. Before embarking upon discussions relating to these points it is worth have a look at the recent prison statistics.

2. Numbers of Under-trial Prisoners Goes from bad to worse Over Decades

Indian prison population consisted of 54 percent undertrial in 1978. This number rose upto 68 percent by 2017 and 70 percent in 2020. What is more disturbing and is in gross violation of human rights is that, the report of the National Crime Records Bureau (NCRB) revealed that by the end of 2017, a minimum of 3.08 lakhs people, who spent long periods of incarceration were not held guilty at the end of the day. This amounts to unjust deprivation of their right to liberty,

4. Article 21 of the Constitution of India 1950. Protection of life and personal liberty.

5. Sections 56 and 76 of the Code of Criminal Procedure, 1973 provide that the arrested person should be brought before the nearest Magistrate within 24 hours.

6. Procedure established by law means 'the correct procedure laid down by the laws duly enacted by the Legislature.'

7. Section 50 of the Code of Criminal Procedure, 1973; *Stefan Mueller v. State of Maharashtra* in Writ Petition No.2939 of 2009 dated 23.6.2010.

8. Section 436 of the Code of Criminal Procedure provided for bail in bailable offences. Under this section, bail is the right of person. It is mandatory for a police official as well as the Court to release the accused on bail if the offence alleged against such person is bailable in nature.

9. Under Section 437 of the Code of Criminal Procedure, 1973

10. *Timothy R. Schnacke*, Fundamentals of Bail: A Resource Guide for Pre-trial Practitioners and a Framework for American Pre-trial Reform (2014). <https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf>

as well all the rights falling under the umbrella of the right to life¹¹. It is a disgraceful thing for the legal system that, the number of actual convicts of crime in the prison is always much less than that of prisoners who were not guilty¹².

According to the latest statistics as of September, 2020, the criminal cases that were lying in Courts, for more than a year awaiting trials and judgments are to the tune of 1.6 crores¹³. This is the state of affairs all across the country including all District and Taluka Courts. The cases against 22 lakhs undertrials have been pending for more than 10 years. By the end of 2019, the number of prison inmates that have completed atleast one year of waiting for their trials is one lakh¹⁴. There is a sharp increase in the number of undertrial than those who were convicted between 2001 and 2019. Out of a total 3.28 lakhs prisoners only 1.42 lakh got convicted and the rest of them are still languishing in the prisons pending proof of their guilt¹⁵. Ironically, this is the plight of the people who are accused/suspected of commission of crime in a criminal justice system that is modelled on accusatorial method of criminal justice where the primary principle of a fair trial is *presumption of innocence*.

Another malady that shows no sign of change over the years is the socio-economic profile of prison inmates. A majority of the undertrial prisoners continue to comprise of young, less-literate or completely illiterate, poor and belong to socially backward communities¹⁶. That makes the biased

treatment of the down trodden in the legal system very clear.

3. Statistics of Prison Inmates Portraying Caste, Class and Literacy Biases

*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*¹⁷. And 'prohibition of discrimination on grounds of religion, race, caste, sex or place of birth' is guaranteed under Article 15 of the Constitution. Unfortunately, however, these guarantees do not seem to be true for everyone, specially, in case of the people who are accused of crime. A cursory glance at the latest reports of the National Crime Records Bureau shows great socio-economic disparities between prison inmates. Illiterates and people belonging to the Scheduled Castes, Scheduled Tribes and Other Backward Classes form more than 65 per cent of undertrial prisoners. According to the latest prison statistics, the inmates of Indian prisons comprise of two-thirds of Dalits, other backward classes and tribal and 19 percent of Muslims. And atleast 66 percent of the inmates, on the whole, are either illiterates or studied less than 10th Class¹⁸. Experts explain the exorbitantly high number of inmates in the prison belonging to weaker sections of the Indian society is due to caste prejudices and over policing in those communities¹⁹.

Surprisingly, the duration of stay in prison for the under trails is neither decided by legal provisions of the bail nor remand nor by the serious nature of the crime they have committed, nor the danger they pose to the society but sadly and surprisingly it is the

11. Rights to human dignity, peaceful and happy pursuit of life, healthy environment, livelihood etc.

12. *Id.*, Note 3.

13. Data | 70% prisoners in India are undertrial, *The Hindu*, 19th September, 2020. <https://www.thehindu.com/data/data-70-prisoners-in-india-are-undertrial/article32569643.ece>

14. *Id.*

15. *Id.*

16. *Id.*, *supra* note 11.

17. Article 14 of the Constitution of India 1950, Equality before law

18. 'Majority prisoners in Indian jails are Dalits, Muslim', *Deccan Herald*, 1st January, 2020. <https://www.deccanherald.com/national/north-and-central/majority-prisoners-in-indian-jails-are-dalits-muslims-790478.html>

19. *Shreebani Palit*, 'Seven in 10 Indian prisoners are awaiting trial – one in three jail inmates is Dalit or Adivasi', *IndiaSpend.com*, 9th September, 2020. <https://scroll.in/article/972458/seven-in-10-indian-prisoners-are-awaiting-trial-one-in-three-jail-inmates-is-dalit-or-advasi>

money²⁰, that they can shell out to get their release on bail by paying any amount directed by the Court to be deposited as surety and hire a lawyer of their choice. Many of the detainees in the prison stay unreasonably longer periods constrained by their poverty, not being able to pay bail fee and Advocate's fee. Added to their poverty if they are illiterates too their suffering gets doubled as they are neither aware of, nor understand the laws to claim their fundamental right free legal aid, right to bail, and the right to speedy trial and get released from their unreasonable and undue detention²¹. Their waiting often gets pronged upto several years. The most touch aspect of all this is, the dependent of spouse, children and elderly parents of the undertrial go through unimaginable social, economical and emotional trauma.

4. The Indifference of the Police and the Magistrates towards Rights of Undertrial

Obviously, the supervisory role of the Magistrates as envisaged by the Code of Criminal Procedure, if carried out meticulously on police investigations the picture of the prisons today would have been completely different. The Magistrates though cannot interfere with the police investigations on a day-to-day basis they certainly have overriding powers on the investigating agencies even during pendency of investigation. These powers have been clearly spelt out by the Allahabad High Court in the case of *Gulab Chand Upadhyaya v. State of U.P.*²², viz., (1) A Magistrate can release the accused by refusing remand²³, (2) he can grant bail to accused²⁴, (3) he can release seized property²⁵, (4) during progress of investigation by police, the Magistrate is empowered by Section 164 to record any

confessional statement and also to record on oath any statement other than confession, and that statement would form an important part of investigation, (5) if investigation is in progress and in the meantime a criminal complaint is filed the Magistrate can require the 'investigating officer' to submit a report under Section 210(1). The Court in *Gulab Chand's* case (supra), reiterated that *arrest* is no doubt a part of investigation but the Magistrate is empowered to put restriction upon the power of arrest of police.

Further, in *Raj Pal Singh v. State of Uttar Pradesh*²⁶, the Court observed that, *remand* order must not be done in a routine and mechanical manner but should be done by proper application of mind. From these observations of the Court and the provisions of the Code of Criminal Procedure it becomes clear that, the police as well as the Trial Courts are violating the Supreme Court's orders and are liable to face Contempt of Court proceedings²⁷.

In the case of *Gudikanti Narasimbulu and others v. Public Prosecutor the High Court of Andhra Pradesh*²⁸, the Supreme Court has observed that in the case of *avoidable incarceration*, inherently, there is an unwarranted 'cruelty and expensive custody' making refusal of bail 'unreasonable.' The Supreme Court stated that in a huge number of cases, pre-trial detention is avoidable and is unnecessary. Police by using their wide powers usually make indiscriminate arrests that lead, in most of the cases, to denial of bail. This in turn results in great injustice to the accused due to lack of legal awareness, lack of access to justice, inability to provide surety, and finally in inordinate delay in trial²⁹. These are the main reasons that have lead to the

20. Money, Not Crime Decides Period in Jail, Poor, young and illiterate: Why most Indian prisoners fight longlonely battles for justice, *India Today*, 16th November, 2019. <https://www.indiatoday.in/india/story/undertrial-prisoners-indian-jails-ncrb-report-prison-statistics-supreme-court-1618588-2019-11-15>

21. *Id*

23. Section 167 of the Cr.PC, 1973

25. Section 457 of the Cr.PC, 1973

27. *Id*, at 19

29. *Madhurima Dhanuka*, 'Undertrial Prisoners and the Criminal Justice System Published by: Supreme Court Cases', (2 SCC 2010, 25-32) Commonwealth Human Rights Initiative, <https://www.humanrightsinitiative.org/download/1457162682Undertrial%20Prisoners%20and%20the%20Criminal%20Justice%20System.pdf>

22. 2002 Cri. IJ 2907.

24. Section 437 of the Cr.PC, 1973

26. (1996) III LLJ 756 Allahabad.

28. AIR 1978 SC 429

unnecessary detention of large number of undertrial. The police officers, prosecutors as well as the judicial officers at different levels need to be sensitized as they should realize that their irresponsible attitude is resulting not only in violation of thousands of helpless undertrial prisoners but in the failure of the system itself³⁰.

5. Highly Celebrated, Yet Unfruitful Judicial Activism Relating to Undertrial

There are several cases in which the Higher Courts of India, in their decisions, have laid down very promising and pragmatic guidelines to protect the human rights of prison inmates specially the undertrial³¹. Deeply concerned about the tragic condition of the alarming number of undertrial in the prison³², the Supreme Court of India observed in the case of *Hussainara Khatoon and others v. Home Secretary, State of Bihar*³³, that 'it is a crying shame on the judicial system, for not being able to even commence trials of many prisoners. The Court went on to comment describing them as 'unfortunate forgotten specimens of humanity' and vividly explaining their pathetic condition of the large number of men and women who are waiting patiently or rather impatiently in the dark cells of prisons, but in vain, for justice. Further, the Court pointed out that 'law' which is supposed to be the instrument of justice, for these helpless victims of the 'callousness of the legal and judicial system', has become 'instrument of injustice'.³⁴

a. Bail is the Rule Jail is the Exception

The Supreme Court laid down, in the case of *State of Rajasthan, Jaipur v. Balchand @ Baliya*³⁵, the legal principle 'Bail is rule jail is an exception', basing upon the fundamental rights alongwith that have been guaranteed under the Article 21 of the Constitution. It is the opinion of the Court that if the primary purpose of detention *i.e.*, to ensure the availability of the accused in person for the criminal proceedings initiated against him without causing any inconvenience, there is no need for the accused to be detained in prison. Thus, the Court held that, the arrest as well as bail provisions of the Code of Criminal Procedure, 1973 must be construed to mean arrest and detention must be resorted to only if it becomes indispensable³⁶.

In 2014 September, the Supreme Court ordered the release of several thousands of undertrial based up on two requirements: (a) those of them that have already completed detention of half the period of the maximum term of punishment for the crime they are accused of warranted, and (b) if the crime they were accused of is not punishable with death penalty. The Supreme Court required, by the same order, that Magistrates, Chief Judicial Magistrates and Sessions Judges would visit prisons and identify the undertrial to be released according to the above said criteria and send reports to the Supreme Court through their respective High Courts within a two months period that followed such orders³⁷. Again

30. *Shreehari Paliath*, 'Seven in 10 Indian prisoners are awaiting trial – one in three jail inmates is Dalit or Adivasi', *India Spend.com*, 9th September, 2020. <https://scroll.in/article/972458/seven-in-10-indian-prisoners-are-awaiting-trial-one-in-three-jail-inmates-is-dalit-or-adviasi>

31. According to, Delhi Government's Senior Standing Counsel *Rabul Mebra* and Delhi State Legal Services Authority (DSLISA) see, Over 1400 undertrial can be released from jail: AAP Government to High Court, *Economic Times*, 10th January, 2016, https://economictimes.indiatimes.com/news/politics-and-nation/over-1400-undertrial-can-be-released-from-jail-aap-government-to-high-court/articleshow/50517339.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

32. Years Changed, But Indian Jails Didn't. Much has changed in the last 40 years but the plight of undertrial in Indian jails has only worsened as their number continues to swell.

33. 1979 AIR 1369 1979 SCR (3) 532 1980 SCC (1)

34. *Id.*

35. 1977 AIR 2447

36. *Id.*

37. 'Supreme Court orders release of thousands of undertrial languishing in jails', *The Hindu*, 5th September, 2014. <https://www.thehindu.com/news/national/Supreme-Court-orders-release-of-thousands-of-undertrial-languishing-in-jails/article11121896.ece>

on 13th November, 2014, the Supreme Court had said that the prisons were for convicts and not the undertrial³⁸. The Court further stated that arrests should not be made unless required and mechanical detentions should be avoided by the Courts. 1,460 undertrial prisoners could be released in Delhi alone according to the said orders of the Apex Court³⁹.

A Supreme Court-appointed committee, to study and report on the reform of prisons, observed that as the prisons are under staffed⁴⁰ overcrowding becomes serious problem. It is quite unfortunate that even the unavailability of police guards for escort and transportation of the undertrial to produce them before the Courts makes it impossible and causes unreasonable delays in the procedures in violation of the human rights of the detainees⁴¹. Who has to be blamed for this situation—Government? Or prison administration? How can the untold suffering of the undertrial prisoners waiting behind the prison bars for his hearing goes unnoticed for so many long years by all of those officers who know the laws relating to the maximum periods of remands *i.e.*, the prosecutors, the prison authorities, the Judges and specially the police who got them remanded assuring the Court that they would come back with adequate evidence for the commencement of the trial. To remedy

this problem the Committee recommended *‘the use of video-conferencing for trial’*⁴². Further, suggested that atleast one lawyer for every thirty prisoners and the Courts should make sure speedy trials which is the only best way to combat the overcrowding of prisons⁴³ as well as delivering the undertrial from their tragic situation.

* *Prisoner Releases Due to Corona v. The Rights of the Victims of Crime*

Finally, and ironically though, Corona virus did what the authorities concerned could not do. The most serious challenge of overcrowding of prisons that is beyond human control came in the form of COVID-19. Tragically, the pandemic has magnified the hazards of the jam-packed prisons all over the world⁴⁴. A quick decision had to be taken by the Apex Court of India, as an immediate remedy to release the prisoners on parole. This caused an inevitable miscarriage of justice to the victims of the crimes committed by those who had to be released for humanitarian reasons because of the pandemic. Over 61,000 prisoners, including the already infected inmates as well as the others, were released amid COVID-19 leaving many more of them exposed to the deadly virus in these overcrowded facilities⁴⁵. Different States in India released prisoners on parole, under the directions of the Supreme Court, issuing

38. Over 1400 undertrial can be released from jail: AAP Government to High Court, Economic Times, 10th January, 2016, https://economictimes.indiatimes.com/news/politics-and-nation/over-1400-undertrial-can-be-released-from-jail-aap-government-to-High-Court/articleshow/50517339.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

39. *Id.* According to, Delhi Government’s Senior Standing Counsel *Rabul Mebra*.

40. The Prison Department has a perennial average of 30%-40% vacancies.

41. ‘Supreme Court panel recommends several prison reforms’, *The Hindu*, New Delhi, 6th February, 2020. <https://www.thehindu.com/news/national/supreme-court-panel-recommends-several-prison-reforms/article30746675.ece>

42. *Id.*

43. *Id.*

44. The Marion Correctional Institution in *Ohio* was estimated to be at 153% of its official capacity. Release of several hundreds of prisoners resulted in mixed response from different directions. While the amnesty International is not happy about the release as in its opinion thousands of them are still exposed to the risk and most of them are victims of unfair trials and convictions, several prisoners were not happy as they are homeless and do not know where to go. And the public are panicky about unleashing dangerous criminals into the society. After a month of such releases, roughly 80% of the American prison’s tested positive for COVID-19; Nearly 1,30,000 prisoners had been released in *European countries*. In *Iran*, thousands of prisoners released temporarily, many received full pardons. *Turkey* reduced its prison population by roughly a third in this process.

45. ‘How prison populations can be protected from Covid-19’, *The Print*, 5th July, 2020. <https://theprint.in/features/how-prison-populations-can-be-protected-from-covid-19/453095/>

orders to contain the spread of the virus⁴⁶. This is, unfortunately, a paradoxical situation between the rights of the victims and the rights of the inmates of the prison.

b. Inconsequential Legal Aid Services

The Constitutional Commitment to Free Legal Aid was introduced through 42nd Amendment by inserting Article 39-A in the Constitution. The Legal Services Authorities Act 1987 lays down the legal framework for the providence of free legal aid to the poor and needy. The major contribution in advocating free legal aid services to the poor in India is mainly attributable to Justices *P.N. Bhagwati* and *V.R. Krishna Iyer*, the pioneers of the concept of State sponsored legal aid in India. In the case of *Madhav Hayawardhanarao Hoskot v. State of Maharashtra*⁴⁷, the Supreme Court read Articles 21, 39-A and 142 of the Constitution alongwith Article 142 and Section 304 of the Code of Criminal Procedure and declared with emphasis on the duty of the Government to provide legal aid to the convicts and accused persons. As Justice *Krishna Iyer* stated in this case, '*right to free legal aid is the duty of the State and not Government's charity.*' Thereafter, the Indian judiciary has always been endeavoring to support free legal aid in all the Courts both civil, criminal and in various Tribunals too.

No doubt, there have been various judgments that have proven effective in promoting the legal aid program⁴⁸. However, the number of cases piled up in the Courts and the undertrial languishing in the prisons

awaiting someone to represent their case in the Courts, make it loud and clear that there is lot more to be done by the judiciary in this regard. Unfortunately, the Indian legal system is against the poor is a well-known fact with sufficient proof⁴⁹. A study that was conducted over a period of 15 years revealed that out of 373 death row convicts 75 percent of them were from religious minorities and socio-economically backward classes. The major reason behind this bitter truth is that they were not able to employ a competent lawyer to fight for their justice. According to the study, 93.5 percent of them that were sentenced to death for terror crimes were Dalits or religious minorities⁵⁰.

Evidently, the legal aid services in India are not really effective⁵¹. The police and the Courts need to inform the accused about this facility and see to it that he/she be assigned a competent lawyer to be represented in the Court. However, by and large the police, the Courts and even Advocates do not seem to be really interested in assuring that a poor litigant gets legal services. There are instances where the Courts assign lawyers for free legal aid without even considering their experience and capability to handle the cases properly. The Bombay High Court has directed Trial Court Judges saying that sufficiently experienced lawyers should be provided for conducting the cases of the accused and they should be appointed only after ensuring the competency of such lawyers to their satisfaction⁵². In a recent case the Gujarat High Court got furious

46. Nearly 18,000 prisoners released on parole amid COVID-19 pandemic: Uttar Pradesh officials, The Indian Express, 26th June, 2020. <https://www.newindianexpress.com/nation/2020/jun/26/nearly-18000-prisoners-released-on-parole-amid-covid-19-pandemic-uttar-pradesh-officials-2161760.html>

47. AIR 1978 SC 1548

48. *State of Haryana v. Darsana Devi*, 1979 SCR (3) 184; *Khatri v. State of Bihar*, 1981 (1) SCC 627; *Sheela Barse v. Union of India*, 1986 SCALE (2) 230 and *Suk Das v. Union Territory of Arunachal Pradesh*, 1986 SCC (Cri.) 166, etc., just to quote some of them.

49. Here is the proof that poor get gallows, rich mostly escape', *The Times of India*, 21st July, 2015. <https://timesofindia.indiatimes.com/india/Heres-proof-that-poor-get-gallows-rich-mostly-escape/articleshow/48151696.cms>

50. *Id*

51. Mashika, 'How Effective is Legal Aid Service in India, impleaders, 10th November, 2017'. <https://blog.impleaders.in/legal-aid-services/>

52. 'Legal Aid for accused should not be for Name Sake, Experienced Lawyers should be Provided for Conducting His Case: Bombay HC', Live Law.in, 27th December 2017. <https://www.livelaw.in/legal-aid-accused-not-namesakeexperienced-lawyers-provided-conducting-case-bombay-hc-read-judgment/>

about the assigning of a double murder case punishable with death to a junior inexperienced lawyer stating that, “It is the duty of the Sessions Judge that sufficiently experienced lawyer should be provided for conducting the case of accused person...

“The panel of lawyers which is being prepared for the purpose of legal aid is not a platform to provide training to young lawyers or give them an opportunity to gain experience as regards conduct of a sessions case. The cross-examination of the witnesses in a serious offence like murder is not a child’s play. It is very unfortunate to note that in the case on hand there is practically no cross-examination. This is not just one case on hand. We have come across so many appeals in which there is no cross-examination worth the name by the defence Counsel appointed by the Legal Services Authority”⁵³.

Therefore, after all these long years of campaigning by the judiciary, access to legal services remained an unfulfilled promise for a substantial segment of the population in India due to infrastructural, financial and other resources related constraints. There is a growing need for legal aid in India as legal representation is expensive and is a great challenge for the disadvantaged litigants. The failure of the main stream legal aid services has added to the problem, particularly for the weaker sections at the Panchayat levels⁵⁴. One of the strong reasons for this situation is that the incentives given by the Government for the legal aid services is meagre and is not really motivating to the lawyers generally and much less to the senior and experienced lawyers where there services are significant.

c. Right to Speedy trial

Once again, it’s the magic of the judicial activism that has brought right to fair trial, right to speedy trial under the purview of Article 21 of the Constitution. Particularly the Post-Emergency judicial pronouncements has evolved new regime of fundamental rights by expansive interpretation of the express provisions of Fundamental Rights. It was in *Maneka Gandhi v. Union of India*⁵⁵ that Article 21 got its one of the best interpretations that further got expanded in *Hussainara Khatoons case*⁵⁶. It was declared by the Supreme Court that unless a reasonably quick trial is ensured the procedure cannot be regarded as reasonable and fair trial and that such procedure does not fall within Article 21 of the Constitution. Therefore, speedy trial is part and parcel of the fundamental right to life and liberty guaranteed in Article 21. This was followed by a series of judgments that emphasized that the right to speedy trial is an essential part of the right to life and liberty under Article 21⁵⁷.

However, obviously, by just looking at the abovementioned facts about undertrial it is very clear that inordinate delays in granting bails, conducting trials and in providing proper legal aid services have become common features of the Indian Legal System which shows that the umpteen numbers of judgments aimed at eliminating delayed justice have remained unfulfilled promises. Such delays in disposal of cases may vary from State to State. However, according to the India Justice Report, 2019, the average pendency time can be anywhere in the range of two years to nine years in the district judiciary. Naturally, twenty years can include

53. Cross-Examination is not a Child’s Play, Purpose of Legal Aid is not to Provide Platform for Young Lawyers: Gujarat High Court, Live Law.in. 19th March, 2019. <https://www.livelaw.in/news-updates/purpose-of-legal-aid-is-not-to-provide-platform-for-young-lawyers-143676>

54. Richa Kachhwah, Legal Aid in India: An Unfulfilled Promise? Live Law.in. 15th March, 2018. <https://www.livelaw.in/access-legal-aid-india-unfulfilled-promise/>

55. AIR 1978 SC 597

56. AIR 1979 SC 1369.

57. *State of Bihar v. Uma Shankar Ketrival*, (1981) 1 SCC 85; *Maharashtra v. Champalal Punjaji Shab*, (1981) 3 SCC 610; *Kadra Pabadiya v. State of Bihar*, (1983) 2 SCC 104; *Mantoo Majumdar v. State of Bihar*, AIR 1980 SC 847; *Salim Khan v. State of Uttar Pradesh*, (1983) 2 SCC 347. *Sheela Barse v. Union of India*, (1986) 3 SCC 632; *Abdul Rahman Antulay v. R.S. Nayak*, (1992) 1 SCC 225; *All India Judges’ Association v. Union of India*, (2002) 4 SCC 247; *Moti Lal Saraf v. State of Jammu and Kashmir*, 2006 Cr. IJ 4765 (SC) and *Vakil Prasad Singh v. State of Bihar*, AIR 2009 SC 1822, etc.

multiple generations of litigants, enormous cost and frustration. This situation is an indication of an inefficient and ineffective judicial system. Whatever *justice* is done after a long span of 20 years would lose its true meaning⁵⁸.

Pendency of cases both civil and criminal is a nationwide problem. It may take 20 years for a case to make its way from the Subordinate Court to the Supreme Court, most of the times in violation of the procedural safeguards ensured by the laws. Further, the unreasonably long periods of delay can include several generations of litigants, exorbitant costs, and serious violation of human rights. Therefore, there is great responsibility on the judiciary to do constant follow up of the enforcement of not only the laws enacted by the Legislature but all those Judges made laws complementing the enacted laws.

6. Conclusion and Suggestions

The primary objective of the provisions providing for the bail should not be to detain and arrest an accused person but to ensure his appearance at the time of trial and to make sure if the accused is held guilty and is available to suffer the consequence of the offence. It would be unjust and unfair to deprive the alleged accused of his liberty during the pendency of the criminal proceeding against him. Police, prosecutors, judicial officers and the prison administrators should function in perfect coordination, with sensitivity and respect to their human rights.

The Court must make it a point to issue directions to all the District Judges to hold consultations with police, prosecutors, prison authorities and the prison inmates as well

and make sure the legal requirements are being fulfilled promptly by all concerned, including speedy trial.

The National Legal Services Authority must take it seriously and appoint more lawyers to render legal aid services to the poor by revising their remuneration and ensure prompt payments for their services. It is very important to develop a strong monitoring mechanism for ensuring the effective functioning of the legal aid lawyers by making them accountable for the quality of their services. The Courts and prison administration must arrange regular awareness programs in prisons to ensure that all undertrial are informed about their legal rights, including access to legal aid, procedural safeguards and bail.

The States must develop computerized tracking system for prisoners all over India to alert prison authorities on undertrial prisoners eligible for release which will be maintained and updated from time to time.

We as a Nation, judiciary and police and all the Government should always remember one thing, it is just not the undertrial, but their innocent spouses, children and helpless elderly parents, who will go through the pain and trauma of irrational delays, detention of the undertrial. We should recall what Madras HC has stated in 2020, *Balamurugan v. State*, 2020 SCC Online Mad. 2165, decided on 8.9.2020, “1000 culprits can escape, but one innocent cannot be punished”. It is important to strike a balance between two important aspects stated by the elite judiciary, one is “Justice delayed is the justice denied” and “Justice hurried is justice buried”.

58. Justice Delayed is Justice Denied, *Hindustan Times*, 13th November, 2019. <https://www.hindustantimes.com/india-news/justice-delayed-is-justice-denied/story-dhIOSGMCpfRIFii8o6hQdM.html>