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## ***ABOUT US***

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **FUNDAMENTAL RIGHTS GUARANTEE** **TO THE UNDERTRIALS**

AUHTORED BY – RISHIT

## **Ch – I: Abstract**

This project deals with the problems faced by undertrials in India and its solutions.

No criminal justice system in any country is meant just for protecting the rights of the victims. It also has a duty to protect the convicts, prisoners and undertrials. They cannot be deprived of their fundamental and human rights.

According to 78th Report of the Law Commission of India (1979), undertrials are people who are in a judicial custody or remand during investigation. They are detained in prison during the period of investigation, inquiry or trial for the offence they are accused to have committed.<sup>1</sup> In other words, an undertrial is a person who has been arrested for some crime until his appearance before the magistrate.

India has world's 18<sup>th</sup> and Asia's 3<sup>rd</sup> highest undertrial prisoners' population.<sup>2</sup> People from socially and educationally backward communities constitute 53% of the population of undertrial prisoners against 39% share in the population of India. Around 29% of them are illiterate, while 42% haven't completed secondary education.<sup>3</sup> A huge chunk of them is downtrodden and poor who are either not able to furnish the bonds for release or are unaware about their rights as undertrials.

All those who are detained in prisons have a right to trial within a reasonable period of time. Prolonged detention and delay in trials violates the right to liberty guaranteed to every person under Article 21<sup>4</sup> and amounts to denial of human rights to the undertrials. Long detention may adversely impact the lives of the undertrial prisoners. The excessive use of undertrial detention results in punishing the people before they are convicted and proves the words of the former Chief Justice of India (CJI) Nuthalapati Venkata (N.V.) Ramana, "*Process is the punishment in our*

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<sup>1</sup> Law Commission of India, 78th Report on Congestion of Under-Trial Prisoners In Jails

<sup>2</sup> International Centre for prison studies, Highest to lowest - pre-trial detainees / remand prisoners

<sup>3</sup> Justice Under Trial - A Study of Pre-Trial Detention in India - Amnesty International (2017)

<sup>4</sup> The Constitution of India, 1950

*criminal justice system.*”<sup>5</sup> It pushes their right to be presumed innocent until proven guilty out of the window. The longer they stay in prison, the more increases the risk of them facing ill-treatment and torture inside the prisons. The protection of an individual from oppression and abuse is essential in a free and egalitarian society. It also causes major harm through loss of reputation. Denying a person of his liberty is no small matter.

## **Ch – 2: On what grounds an undertrial may be warranted in prison?**

The SC has held in *Joginder Kumar vs State of UP*<sup>6</sup> that no arrest can be made just because its lawful for a police officer to do so and he must be able to justify it apart from that.

An undertrial may be warranted in prison on the following grounds:<sup>7</sup>

1. in case of a very grave offence
2. if the person arrested is likely to interfere with witnesses or impede the course of justice
3. if the person arrested is likely to commit the same or any other offence
4. if he may fail to appear for trial.

The criminal justice system in our country is based on two principles i.e. any person arrested is presumed to be innocent unless proven guilty and secondly the duty of the state and the court to see that justice is done to the people and the victim. To achieve these principles the process of investigation and trial should be completed without any delay. But they are not being achieved and undertrials keep on languishing in jail for years.

India’s criminal justice system functions mainly on two basic principles i.e. presumption of innocence of the accused until proven guilty and the duty of the state and the court to ensure justice to the people and the victim. To achieve these principles, it is essential to ensure the completion of the processes of investigation and trial without any delay. But on the contrary, undertrials languish in jail for years and these principles remain confined to paper in many cases.

It becomes really difficult for the under trials with weak economic background to furnish bail even without sureties as the court fixed amount is quite excessive. Thus, in many cases the poor aren’t

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<sup>5</sup> Process is the punishment in our criminal justice system: CJI - AMIT ANAND CHOUDHARY / TNN / Jul 17, 2022

<sup>6</sup> *Joginder Kumar vs State of UP* 1994 AIR 1349

<sup>7</sup> The Human Right Of Under Trail Prisoners - Khan Akib, <https://www.legalserviceindia.com/legal/article-4537-the-human-right-of-under-trail-prisoners.html>



able to satisfy the police or the court regarding their solvency regarding the amount of the bail and when the bail is with sureties, which is the case more often than not, it becomes practically impossible for the poor to find persons solvent enough to qualify as sureties.<sup>8</sup>

Because of all this they have to remain in jail until the time their case come up for trial before the court which leads to grave consequences such as:<sup>9</sup>

- In spite of being assumed innocent, they are exposed to mental and actual privations in jail.
- Pre-trial detention disrupts their family life leading in most cases to economic disasters for the family.
- It doesn't allow them to contribute to the preparation of their defence.

The following are the reasons for the overflow of undertrials in prisons :<sup>10</sup>

- Indiscriminate arrests:

The very wide power of the police to arrest leads to even those people who are cooperating with the investigation and are not likely to evade trial being arrested. This results in unnecessary detentions.

- Failure to pay Bail Bond/Surety:

Right to bail is denied even in genuine cases due to inability of prisoners to pay the bail amount due to being poor.

- Slow investigation by police:

Investigation by police is slow due to shortage of police personnel and no separation between investigative and law & order functions.

- Lack of use of provisions:

Even though the provisions to avoid unnecessary detention of prisoners have been in existence for years, they are not implemented because of most prisoners being unaware of their right to seek release and also too poor to furnish surety and lack of sympathy by the administration.

State parties and judiciary should and must try its level best to cater to at least all the fundamental rights which are necessary and incidental during the investigation, inquiry and trial of an undertrial.

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<sup>8</sup> P.N. Bhagwati - Human Rights in the Criminal Justice System

<sup>9</sup> The Human Right Of Under Trail Prisoners - Khan Akib, <https://www.legalserviceindia.com/legal/article-4537-the-human-right-of-under-trail-prisoners.html>

<sup>10</sup> The Rights of Undertrial: A Critical Study - Viyomesh Budholia, [http://ijrar.com/upload\\_issue/ijrar\\_issue\\_867.pdf](http://ijrar.com/upload_issue/ijrar_issue_867.pdf)

## Ch – 3: The Undertrial Problem in India

Undertrials form the major part of the crowding in Indian jails.

Problems faced by under trials in Indian prisons include but is not limited to the following:

- No separate prison for undertrials:

Being imprisoned alongside hardened criminals that too in the absence of any rational classification method to keep both of them separate, it facilitates the possibility of first time and circumstantial offenders turning into criminals. The Model Prison Manual states that no convicted prisoner shall be kept in the same area as the undertrial prisoners, or given the opportunity to come in contact with undertrial prisoners but this is only present on paper and never practically implemented.<sup>11</sup>

- Prisons are dangerous for undertrials:

There is a strong possibility of first-time offenders being subjected to group violence and even mishandling by the police. The most cruel and inhuman example of the same was the Bhagalpur Blinding Case<sup>12</sup> which blatantly breached human rights as well as the Article 2 of the Universal Declaration of Human Rights which states that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>13</sup>

In the Bhagalpur Blinding Case, the Supreme Court dealt with the blinding of undertrial prisoners by the police in Bhagalpur, Bihar, where police blinded 31 individuals under trial by pouring acid into their eyes.

- Overcrowding in the prisons:

The shortage of adequate space in prisons leads to severe compromise with safety and health conditions. As has been stated earlier, majority of the prisoners including the undertrials come from disadvantaged sections of the society where there is a prevalence of diseases, malnutrition and inadequacy or absence of medical services. As a result, cramping together of such people in unhealthy conditions, leads to the spread of infectious and communicable diseases.<sup>14</sup> A study by the National Human Rights Commission of India showed 76% deaths in Indian prisons were a

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<sup>11</sup> P.N. Bhagwati - Human Rights in the Criminal Justice System

<sup>12</sup> Model Prison Manual (2003)

<sup>13</sup> Universal Declaration of Human Rights

<sup>14</sup> Khatri & Ors. V. State of Bihar, AIR 1981 SC 928

direct result of Tuberculosis.<sup>15</sup>

- Challenges faced by mentally ill prisoners:

They are a largely forgotten one. They are ignored by both the outsiders as well as insiders. The nature of their illness and the prevalent social attitude regarding the same, make them the most hapless victims of human rights violations.<sup>16</sup>

- Homosexual Abuse:

In prisons, same-sex people are lodged together. Separation from their partners force them to look for alternative ways to satisfy their sexual urge. This often leads to targeting of young and feeble prisoners. Resistance subjects them to violence. They may even become victims of massive homosexual gang rapes. This leads to trauma often resulting in commitment of suicides.

- Effect on families:

If the under trial is the bread winner of the family, their absence leads to the family being forced into destitution and social outcast. It prevents them from seeking help from their kin and friends and even when asked for, it is more often than not, refused. It can lead to the children in such families turning towards delinquency and getting exploited by others.

In the famous case of *Charles Sobraj through Marie Andre's v. The Superintendent, Tihar Jail*<sup>17</sup>, the Supreme Court Judge Justice Krishna Aiyer held that:

*"..imprisonment does not spell farewell to fundamental rights although, by a realistic re-appraisal, Courts will refuse to recognise the full panoply of Part III enjoyed by a free citizen"*.

The Supreme Court of India in its landmark judgements of *DBM Patnaik v. State of Andhra Pradesh*<sup>18</sup> and *Sunil Batra v. Delhi Administration*<sup>19</sup> has stated that it must be realised that a prisoner is a human being as well as a natural person or legal person. If a person gets convicted for a crime, it does not reduce him to the status of a non-person whose rights could be snatched away at the whims of the prison administration.

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<sup>15</sup> National Human Rights Commission ANNUAL REPORT 2003-2004

<sup>16</sup> Dr. T. Giri and T.S.R. Praneetha - Problems of Undertrials in India

<sup>17</sup> *Charles Sobraj through Marie Andre's v. The Superintendent, Tihar Jail* AIR 1983 SC 1092

<sup>18</sup> *DBM Patnaik v. State of Andhra Pradesh* 1974 AIR 2092

<sup>19</sup> *Sunil Batra v. Delhi Administration* 1978 AIR 1675

## Ch – 4: Fundamental Rights of Undertrials

As has been established, the treatment of under trials in prisons is not at all satisfactory. They are deprived of their basic and inalienable rights available to every person by virtue of being born as a human. By virtue of Article 15, fundamental rights are available to all human beings without any discrimination based on sex, caste, ethnicity, language, etc but in the case of undertrials, there has been and continues to be blatant breach of their rights under A. 15.<sup>20</sup>

Every person so arrested has a right to be produced before the magistrate within 24 hours of his arrest flowing from Article 22(2) of the Constitution of India<sup>21</sup> and Section 57 of CrPC<sup>22</sup> which states that no police officer shall detain a person arrested without warrant for a longer period than twenty-four hours in the absence of a special order of a Magistrate under section 167 which provides for the procedure to be followed when investigation cannot be completed in twenty-four hours inclusive of the time taken for travelling from the place of arrest to the Magistrate's Court. It is intended to protect the person under custody from ill- treatment and torture while in the custody of police. This right is important to ensure that police cannot keep people in custody arbitrarily.

The Supreme Court in the case of *Sharifbai v. Abdul Razak*<sup>23</sup> held that it is essential to produce the accused before the magistrate within the stipulated time otherwise the detention will be held to be wrongful. Also, the accused person so arrested cannot be detained without informing him of the grounds for the arrest and must be informed about his legal right to bail as provided by Article 22(1)<sup>24</sup> of the Constitution and Section 50(1)<sup>25</sup> of CrPc. These rights ensure that the arrested person has an opportunity to apply for bail and prepare for other defences in time. In *State of Rajasthan V. Balchand alias Baliay*<sup>26</sup>, the Supreme Court held that it isn't necessary to detain the accused person if his appearance can be secured by some other way. The court also stated that bail is the norm and jail is the exception. Article 22(1) also provides the right to consult and to be defended by a legal practitioner of one's choice. But as most of the undertrials are poor therefore they are unable to engage a lawyer. As a remedy to this issue, Article 39A<sup>27</sup> provides for free legal

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<sup>20</sup> The Constitution of India, 1950

<sup>21</sup> The Constitution of India, 1950

<sup>22</sup> The Code of Criminal Procedure, 1973

<sup>23</sup> *Sharifbai v. Abdul Razak* AIR 1961 BOM 42

<sup>24</sup> The Constitution of India, 1950

<sup>25</sup> The Code of Criminal Procedure, 1973

<sup>26</sup> *State of Rajasthan V. Balchand alias Baliay* 1977 AIR 2477

<sup>27</sup> The Constitution of India, 1950

aid. It aspires to ensure access to justice to everyone regardless of their economic condition. It directs the state to provide free legal aid, by means of legislation or schemes. The Supreme Court has held in *M.H. Hoskot v. State of Maharashtra*<sup>28</sup> and *Hussainara Khatoon v. State of Bihar*<sup>29</sup> that disabling an accused person's access to legal services due to being too poor to afford a lawyer and thereby forcing him to go through the trial without legal assistance is violative of Article 21.<sup>30</sup> It also said that prisoners who expect their liberation through the judicial process can't be deprived of legal services.

An undertrial prisoner shall not be subjected to handcuffing. The Supreme Court in the case of *Prem Shankar Shukla v. Delhi Administration*<sup>31</sup> condemned the use of handcuffs for chaining prisoners and held that handcuffing prisoners should neither be a norm nor should it be done just for the convenience of the custodian. Even when, in circumstances where handcuffs become necessary, the escorting officer is required to record the reasons for the same and show it to the presiding judge for his approval.

An effective criminal justice system inevitably needs to ensure that accused stands trial for the crimes they are alleged to have committed. Therein lie the historical roots of incarcerating people accused of committing crimes.

Save a few exceptions, all are entitled to be released on bail. The Code of Criminal Procedure (Cr.P.C.) 1973 doesn't define the term "bail" although offences are classified asailable and non-ailable. Section 436 describes cases in which bail can be taken.<sup>32</sup>

The familiar dicta "justice delayed is justice denied" and "bail not jail" are often upheld as the bulwarks of fair trial but the profile of the prison population gives it the lie.

The National Crime Records Bureau of the Government of India has reported that thousands of under-trials had been incarcerated for a period of five years or more.<sup>33</sup>

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<sup>28</sup> *M.H. Hoskot v. State of Maharashtra* 1978 AIR 1548

<sup>29</sup> *Hussainara Khatoon v. State of Bihar* AIR 1979 SC 1360

<sup>30</sup> The Constitution of India, 1950

<sup>31</sup> *Prem Shankar Shukla v. Delhi Administration* 1980 AIR 1548

<sup>32</sup> The Code of Criminal Procedure, 1973

<sup>33</sup> Prison Statistics India 2018 - National Crime Records Bureau

Under-trial prisoners constitute a significant majority of the prison population (65.7%). All the 2,45,244 persons who are within prisons as under-trials are deemed to be innocent in the eyes of the law. How can a system that calls itself just and fair, justify depriving 2,45,244 “innocent” people of their liberty?

## **Ch – 5: Role Of The Judiciary And The Legislature**

Judiciary has tried multiple times over time to improve the condition of the undertrials through directives in its judgments. In *Sheela Barse V. State of Maharashtra*<sup>34</sup>, the Supreme Court had before it the issue of the treatment of women prisoners in lock ups. It issued directions in order to improve the conditions of women prisoners and provide them adequate protection. In the first *Sunil Batra*<sup>35</sup> case, the court observed that if a prisoner is subjected to bar fetters for an unreasonable period of time without due regard to his safety or the security of the jail, it would amount to violation of his human dignity which is violative of Article 21<sup>36</sup>. The court also opined that solitary confinement has traumatizing and dehumanizing effect on the prisoners again violating their right under Article 21. In 2005, the parliament amended CrPC by inserting Section 436A<sup>37</sup> which provides for an undertrial prisoner to be released on a personal bond if he has served half of his sentence. It was meant to address the problem of prolonged detention of undertrial. But it isn't applicable in cases dealing with the offences punishable by death. The court can pass an order providing for continued detention of such person for a longer period instead of personal bonds. Also, such person can't be detained while the process of investigation, inquiry or trial is ongoing for any duration longer than maximum period of imprisonment as provided for the said offence under the law. The delay in proceedings, if any, caused by the accused is excluded from the total period of detention for the purpose of granting bail.

In 2005, a Public Interest Litigation was filed in the Supreme Court in the case of *Bhim Singh v. Union of India*<sup>38</sup>, seeking practical implementation of section 436A<sup>39</sup>. In 2012, the Ministry of Home Affairs issued directives to reduce overcrowding in prisons. One way of doing this is through periodic monitoring which should be conducted by the states to identify those undertrial prisoners who are eligible for release under section 436A.

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<sup>34</sup> *Sheela Barse V. State of Maharashtra* **JT 1988 (3) 15**

<sup>35</sup> *Sunil Batra v. Delhi Administration* **1978 AIR 1675**

<sup>36</sup> The Constitution of India, 1950

<sup>37</sup> The Code of Criminal Procedure, 1973

<sup>38</sup> *Bhim Singh v. Union of India* **AIR 1986 SC 494**

<sup>39</sup> The Code of Criminal Procedure, 1973

## **Ch – 6: Connection between Article 22 and other Fundamental Rights**

### 6.1. CONSTITUTIONAL SAFEGUARDS

Article 22 which provides constitutional safeguards to persons under trial has a close connection with Article 21 and Article 19.

Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law.<sup>40</sup>

Article 19(1)(a) to (g) guarantee six freedoms to the citizens – speech and expression, peaceable assembly, association, free movement, residence and practicing any profession and carrying on any business. Article 19(2) to (6) impose reasonable restrictions on these freedoms.<sup>41</sup>

#### A.K. Gopalan vs State of Madras

An attempt was made in the case of A.K. Gopalan vs State of Madras<sup>42</sup> to establish a link between these articles. The case challenged the validity of the Preventive Detention Act, 1950<sup>43</sup> and a question arose as to the interpretation of the words ‘procedure established by law’. The main question was if Article 21 envisaged any procedure laid down by a law enacted by a legislature and whether the procedure should be fair and reasonable.

The intention of the petitioner was to persuade the Supreme Court to hold that the Courts could adjudicate upon the reasonableness of any law depriving a person of his personal liberty.

The Supreme Court held that the word law in Article 21 doesn’t include within its scope rules of natural justice but only state-made laws. Nowhere in the Constitution is the word law intended to mean natural law as those are vague and indefinite and the Constitution couldn’t be interpreted as laying down a vague standard. Therefore, the term ‘procedure established by law’ would mean procedure as laid down in an enacted law.

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<sup>40</sup> The Constitution of India, 1950

<sup>41</sup> The Constitution of India, 1950

<sup>42</sup> A.K. Gopalan vs State of Madras **1950 AIR 27**

<sup>43</sup> Preventive Detention Act, 1950

## 6.2 THE CONNECTION

In order to convince the court to adjudicate the rationality of the Preventive Detention Act<sup>44</sup>, it was argued from the petitioner's side that on being detained, several rights of a person under A. 19 are affected and thus the procedure under this law should be reasonable in the context of A. 19(2) to (6).

The court rejected this argument and held that the word 'personal liberty' in A. 21 was in itself comprehensive enough to include freedom from arrest or detention as well as freedoms guaranteed under A. 19 while A. 19 doesn't deal with freedom from detention and similarly, A. 21 doesn't include the freedoms included in A. 19. The Court held that Articles 20 to 22 constituted a comprehensive code on life and personal liberty and weren't affected by A. 19. Therefore, a law depriving personal liberty had to be checked in accordance with A. 20 to 22 and not A. 19. A. 19 could only be invoked by a freeman and only for a right included under it.

## 6.3 SUBSEQUENT EFFECT

The delinking of Articles 19, 21 and 22 in Gopalan was the prevalent view for quite a while even leading to some anomalous results.

### Ram Singh vs Delhi<sup>45</sup>

A person was detained under Preventive Detention Act<sup>46</sup> for speeches capable of disrupting public order. The court refused to check the validity of the detention order under A. 19 and stuck to A. 21 and 22.

This view softened with time starting with the R.C. Cooper or Bank Nationalization case.

### R.C. Cooper vs Union of India

In this case<sup>47</sup>, Article 19(1)(f) was applied to a law enacted under A. 31(2), the erstwhile article which provided right to property<sup>48</sup> until it was struck down by the 44<sup>th</sup> amendment to the constitution. The Court linked A. 19 to A. 31 in order to provide some protection to private property. After this case, it could be reasonably argued that if A. 19 could be linked to A. 31, there was no reason to not link it with A. 21 and 22.

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<sup>44</sup> Preventive Detention Act, 1950

<sup>45</sup> Ram Singh vs Delhi **1996 AIR 196**

<sup>46</sup> Preventive Detention Act, 1950

<sup>47</sup> R.C. Cooper vs Union of India **1970 AIR 564**

<sup>48</sup> The Constitution of India, 1950



Shambhu Sarkar vs State of West Bengal<sup>49</sup>

The SC conceded that the approach taken by it in R.C. Cooper has held the reasoning of A.K. Gopalan to be incorrect.

Bennett Coleman vs Union of India<sup>50</sup>

The SC held that a law affecting freedom of speech can be assessed under A. 19 even though it was not enacted to control the freedom of speech.

West Bengal vs Ashok Dey<sup>51</sup>

The SC linked A. 19, 21 and 22 in this case while interpreting the rationality of WB law of preventive detention.

## **Chapter: 7 - Conclusion**

Undertrial prisoners are people accused of some crime and waiting for their trial before the court. They cannot be called convicts because Indian criminal system follows the principal of innocent until proven guilty. The majority of undertrial prisoners are poor thereby not being able to furnish bail for release. Their obliviousness regarding their legal rights isn't resolved by the police as they are legally obliged to do. These rights include the right to free legal aid, the right to get the legal practitioner of their choice, the right to bail etc. They are forced to live in sub-human conditions in prisons, with no access to adequate medical care. They are severely tortured and exploited by hardened criminals which also creates a possibility of them themselves turning into criminals. A long-time detention of the undertrials amounts to violation of their right to liberty and denial of human rights to them when they need protection, care and consideration from the side of law. The government has taken steps to solve this problem but they have proven to be inadequate and have not resulted in the desired outcomes due to improper implementation. Our judicial system is oppressive and discriminatory against the poor undertrials and treat them with inequality when compared to the non-poor. Overcrowding of prisons leads to varied health problems and diseases. In spite of the courts judgements upholding the fundamental rights of undertrials, there is no improvement in the way they are treated. The way forward to reduce the quantity of undertrials in prisons is through speeding up of the trial, simplifying the bail procedure and a regular review of the undertrials cases. Ideally, there should also be a separate prison for undertrial prisoners.

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<sup>49</sup> Shambhu Sarkar vs State of West Bengal **2001 (2) BLJR 943**

<sup>50</sup> Bennett Coleman vs Union of India **1973 AIR 106**

<sup>51</sup> West Bengal vs Ashok Dey **1972 AIR 1660**

