

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

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Volume 6 | Issue 2

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2023

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# Delayed Justice is Injustice: The Ugly Truth of Pretrial Detention

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## ABSTRACT

*The current topic has come to light after our President Smt. Draupadi Murmu's speech on Constitution Day, draws concern over the rising number of undertrial prisoners. The presumption on which the principle of our justice system is based is "innocent until proven guilty" which has come into question now due to the prolonged periods of imprisonment of undertrial prisoners. Without conviction, they are serving prison sentences and in many cases, these sentences exceed the punishments prescribed in the code. The statistical report highlights the increase in the share of undertrial prisoners in the total prison population over the years. The paper investigates the factors responsible for the prolonged detention of undertrial prisoners such as delay in trials and investigations, poor economic conditions, deprivation of legal representation, biasness of the bail system towards the rich and privileged classes, low judge-population ratio and illiteracy. The research, further, explores the negative impacts on the lives of undertrial prisoners taking a heavy toll on their physical as well as mental health, sometimes leading to unnatural deaths; discrimination by society and extreme financial hardships. The study, thereafter, highlights the fundamental and legal rights guaranteed to them by the Constitution of India, 1950 and the Code of Criminal Procedure, 1973 supported by various landmark judgments, which in this case are clearly violated. Lastly, the paper presents a set of suggestions that could reform the prevailing criminal justice system of India.*

**Keywords:** *Undertrial prisoners, bail, injustice, detention.*

## I. INTRODUCTION

An undertrial prisoner is a person who is accused of doing some wrong against the public is kept in judicial custody until his case is heard in the court, i.e. waiting to appear before the magistrate. The said person is generally detained during the period of investigation, inquiry, or trial because they are considered as a potential flight risk, danger to public and could tamper the evidence.

The recent reports in the daily newspapers reveal a surge in delayed trials. In one newspaper

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report<sup>2</sup>, 121 innocent Adivasis were acquitted after five years of jail by a special court of the National Investigation Agency in Chhattisgarh. Whereas, in another report<sup>3</sup>, a Kashmiri man arrested under UAPA terror law got acquittal after 11 years of jail. The fate of undertrial prisoners lies on the outcome of the trial but the long years of wait make their lives miserable. Justice is compromised with a person’s well-being and denial of basic human rights.

**Statistical analysis**

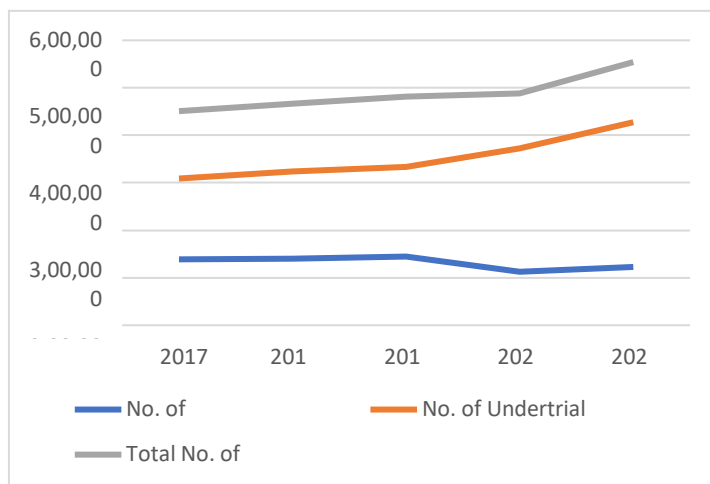


Fig. 1

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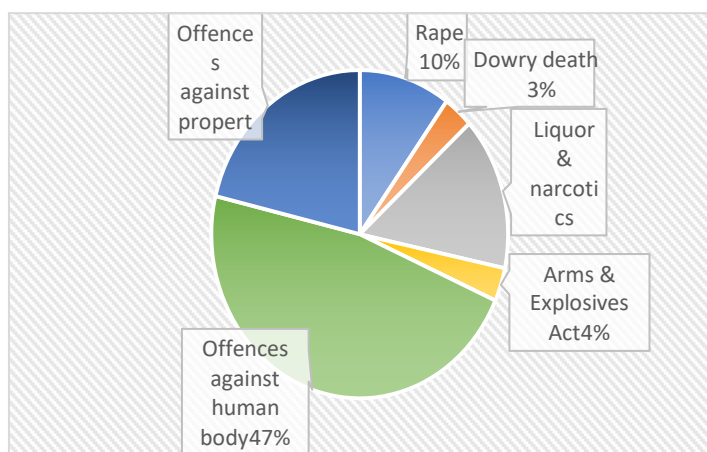


Fig. 2

As per NCRB’s Prison Statistics Report of 2021, out of 5,54,034 prisoners, 4,27,165 comprised undertrial prisoners accounting for 77.1% of the total number of prisoners while only 22.2% got convicted.

On comparing the statistical data of 2017 with 2021’s data, there is a 38.4% increase in the share of undertrial prisoners. (See Fig. 1)

2.2% of total undertrial prisoners are waiting in jails for more than 5 years whereas 13.2% are confined for more than 2 years.

Fig. 2 illustrates various offences under which they are lodged. Under Indian Penal Code, the highest number of undertrials are detained for ‘Offences against the human body’ while under Special and Local Laws crimes based on Liquor & Narcotics Drug is at the highest followed by offences committed against women.

**II. FACTORS CAUSING PROLONGED DETENTION**

As per NCRB’s Survey report of 2021, 77.1% of prisoners constitute undertrial prisoners. There

<sup>2</sup> Chhattisgarh Court Acquits 121 Adivasis After 5 Years in a Maoist case <https://www.thequint.com/news/india/chhattisgarh-court-acquitted-121-adivasis-after-spending-five-years-in-jail-uapa-case#read-more>

<sup>3</sup> 11 Years In Jail Under Anti-Terror Law, Kashmir Man Acquitted Of Charges <https://www.ndtv.com/india-news/11-years-in-jail-under-anti-terror-law-kashmir-man-acquitted-of-charges-2477244>

<sup>4</sup> The Prison Statistic Report 2021 by National Crime Records Bureau. <https://ncrb.gov.in/sites/default/files/PSI-2021/Chapters-2021.html>

are multiple factors that lead to their prolonged detention. One of the main reasons behind this is the slow justice delivery system. The trial courts are overburdened with an enormous number of cases which leads to the postponement of hearings and the cases remain pending for a long period of time. According to PRS Legislative Report<sup>5</sup>, in High Courts, 21% of cases are pending for over ten years while in subordinate courts, 23% of cases are pending for over five years. Between 2019 to 2020, the pending cases have increased by 20% in High Courts and 13% in subordinate courts. In 2020, the restrictions imposed in the COVID-19 pandemic accelerated the pendency of cases as the disposal rate was way slower than the rate of new cases filed.

Most of the undertrial prisoners belong to disadvantaged and economically weaker sections of the society. Even if they somehow fetch bail, they neither have the means to furnish bail bonds or securities nor have money to hire and pay fees to counsellors.

In a report submitted by NALSA to the Supreme Court of India in the case<sup>6</sup>, 5000 undertrial prisoners were stuck in jail after bail was granted to them. The main reason was they all were poor and couldn't afford the bail. There are a lot of procedural complexities in the system which is beyond the understanding of a common man. Illiteracy multiplies their struggle. Due to lack of legal knowledge and awareness, they fail to arrange legal assistance for themselves. As per the NCRB report (supra), 64.27% of undertrial prisoners comprise illiterates (25.3%) and those whose educational qualification is below matriculation (39.4%).

Despite, the minor nature of the crime committed, they remain behind bars as they are unable to avail bail fees and a good lawyer whereas the rich and powerful undertrial prisoners easily get bail without any suffering proving that the bail system is prejudiced towards the rich. Delays in investigation also result in long waiting time. Other factors aggravating their arrest are political vendetta, casteism, and preference towards one community causing unfairness and biasness in the delivery of justice.

### **III. THE STRUGGLES OF UNDERTRIAL PRISONERS**

According to the NCRB Report (supra), there are a total of 1319 prisons all over India having an actual capacity of 4,25,609 prisoners but are occupied by 5,54,034 prisoners. The prolonged periods of detention of persons without trial have led to overcrowding in jail which has a range of negative consequences including physical abuse, poor sanitary facilities, and lack of basic amenities like nutritious food, clean water and medical care. They are forced to live in small

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<sup>5</sup> PRS Legislative Report on Pendency and Vacancies in the Judiciary. <https://prsindia.org/policy/vital-stats/pendency-and-vacancies-in-the-judiciary>

<sup>6</sup> Re Policy Strategy for Grant of Bail SMW (Cri.) No. 4/2021, 2023 LiveLaw (SC) 76

and dingy cells in jail which severely affect their living conditions. Due to the unavailability of basic necessities and unsanitary conditions in prisons, they are often malnourished and are more prone to infections and diseases. In addition to the impact on physical health, their mental health is severely impacted.

Not only that, as same-sex people are housed together, undertrial prisoners become victims of sodomy or homosexual abuse and are assaulted by both prison staff and other inmates. Due to the unavailability of their natural partners and the dire need to satisfy their sexual urges, they target young and weak undertrial prisoners, who are mostly below 30 years of age as an alternative to the sexual drives. Transgender undertrial prisoners are more vulnerable to rape and sexual assault as they are forced to stay in jails that do not correspond to their gender identity. They suffer from mental trauma which compels them to commit suicide. Also, women and foreign national undertrial prisoners are tortured and ill-treated by inmates and staff.

In an article published by Tihar Jail psychiatrists<sup>7</sup> in the Delhi Journal of Psychiatry, there were 20 suicides in Tihar Jail between 2001 and April 2012. All of them were pre-trial verdict inmates.

The families of undertrial prisoners are largely affected. As they undergo through social stigma, people discriminate against them and their reputation and dignity in the society are lost. Children associated with undertrial prisoners face difficulty in getting admission to educational institutions and already enrolled students are asked to drop out of schools and colleges. Family members face difficulty in occupying jobs. Their problem worsens if the undertrial prisoner is the sole bread earner of the family, as the whole family depends on him for monetary benefits and they suffer from financial crisis.

#### **IV. THE CONSTITUTIONAL RIGHTS OF UNDERTRIAL PRISONERS**

The undertrial prisoners just like other people are protected by fundamental rights enshrined under the Constitution of India, 1950. These are basic and inalienable rights that safeguard every person irrespective of any discrimination.

Article 14 provides equality before the law and equal protection of the laws. Article 15 enlists grounds against discrimination. As discussed above, we witnessed that poor undertrial prisoners suffer in jail whereas the rich and powerful easily get bail. Due to their financial incapacity and poor economic conditions, they rot in jails for longer durations. Scheduled Classes, Scheduled Tribes, and Muslims are placed at greater vulnerability as they face more unfairness and

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<sup>7</sup> Tihar Jail's Suicide Record by Joanna Sugden, <https://www.wsj.com/articles/BL-IRTB 18183>

arbitrariness in getting justice. This violates the basic principles and notions of an egalitarian society. There cannot be a quasi-caste system among prisoners in the egalitarian context of Article 14.<sup>8</sup>

Article 20 (3) provides the right against self-incrimination wherein the accused at all stages including the trial stage, cannot be compelled to testify against himself. It is made to protect the accused from unwarranted police torture.

Article 21 envisages the right to life and personal liberty. The living condition of undertrial prisoners is inhumane, they have an inadequate supply of basic necessities and face torture and abuse from other inmates and prison staff. Like any other person, they are entitled to the right to live with human dignity and so have the right against handcuffing as a part of Article 21.

In *Prem Shanker v. Delhi Administration*<sup>9</sup>, the Supreme Court ruled that firstly, handcuffing an undertrial prisoner on the basis that he is poor and is not a “better class undertrial prisoner” is discriminatory and thus is unjust and unfair. Secondly, handcuffing an undertrial prisoner is inhuman. This harms his dignity and degrades and undervalues the soul of the constitution by violating Article 21. Thirdly, the slight freedom of movement, which even a detainee is entitled to under Article 19, cannot be infringed by the application of handcuffs. The Supreme Court further in *Maneka Gandhi v. Union of India*<sup>10</sup>, held that any “procedure established by law” for limiting life and personal liberty enshrined under Article 21 should be fair, just and reasonable. This means a state cannot restrict one’s enjoyment of life or personal liberty without following a reasonable procedure.

In *DK Basu v. State of West Bengal*<sup>11</sup>, the apex court decreed that custodial abuse or torture in lock-ups and police custody is a violation of Articles 21 and 22 of the Constitution of India, 1950 and Article 5 of the Universal Declaration of Human Rights, 1984. In addition, it observed that the right to live with human dignity is included in Article 21 which safeguards against torture or abuse inflicted by the State or its functionaries.

*Hussainara Khatoon v. Home Secretary, State of Bihar*<sup>12</sup> was one of the first PIL cases considered by the Supreme Court wherein a large number of undertrial prisoners were languishing in jail for a long duration of time without commencement of trial, the apex court, held that undertrial prisoners are entitled to the right to speedy trial which is a fundamental right

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<sup>8</sup> Prem Shanker v. Delhi Administration, 1980 AIR 1535

<sup>9</sup> Ibid.

<sup>10</sup> Maneka Gandhi v. Union of India, AIR 1978 SC 597

<sup>11</sup> DK Basu v. State of West Bengal 1997 (1) SCC 416

<sup>12</sup> Hussainara Khatoon v. Home Secretary, State of Bihar, 1980 (1) SCC 108

enshrined under Article 21 of our constitution.

In *Abdul Rehman Antuley v. R S Nayak*<sup>12</sup>, the Supreme Court acknowledged that the right to speedy trial applies to convicts as well as undertrial prisoners under investigation, inquiry or appeal but denied the provision of a stipulated time for the conclusion of trial.

Article 21 together with Article 39A ensures the right to legal aid. Article 39- A is enshrined under part IV of the Constitution of India entitled as the Directive Principles of State Policy wherein it directs the state to provide free legal aid by certain legislations or schemes to the ones who are denied justice due to financial reasons or other such disabilities. In *Hussainara Khatoon v. Home Secretary, State of Bihar (supra)*, the Supreme Court held that the right to legal aid is explicitly stipulated in Article 21. Free legal service to the economically weaker sections of the society is a significant element of legal aid, expenses to be borne by respective state governments.

Article 22 protects against arbitrary arrest and detention. Article 22 (1) makes it mandatory to inform the arrestee of the grounds of his arrest. In *Joginder Kumar v. State of Uttar Pradesh*<sup>13</sup>, the court laid out certain requirements adhering to Article 22. Firstly, at the request of the arrestee, a third person is required to know about his arrest and place of detention. Secondly, on arrival at the police station, the rights of an arrestee are to be informed by the police officer, and thirdly, the name of the third person who has been informed is to be recorded in a diary.

Article 22 (1) also provides the arrestee, the right to seek counsel and get defended by a lawyer of one's own choice. Clause 2 of Article 22 ensures a detainee's right by producing him before the magistrate within twenty-four hours of arrest.

When the abovementioned fundamental rights are violated, one can directly move to the apex court to seek remedy under Article 32 or a High Court under Article 226 of the Constitution of India.

## **V. REMEDIES UNDER THE CODE OF CRIMINAL PROCEDURE, 1973**

Chapter XXXIII of the Criminal Procedure Code lists provisions for bail and bonds. After viewing the prolonged detention conditions of undertrial prisoners in jails, an amendment was made to the code in 2005 which brought Section 436-A. It sets the maximum time limit for which an undertrial prisoner can be detained. If he has been detained for one-half of the maximum period of sentence, he should be discharged on his personal bonds with or without sureties.

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<sup>13</sup> *Abdul Rehman Antulay & Ors v. R.S. Nayak & Anr*, 1992 1 SCC 225

In *Bhim Singh v. Union of India*<sup>14</sup>, the Supreme Court directed jurisdictional Magistrate/ Chief Judicial Magistrate/ Sessions Judge to hold one sitting a week in each jail for two months and identify the undertrial prisoners who have either completed one-half of the maximum period or maximum period of imprisonment followed by their immediate release.

In *Supreme Court Legal Aid Committee v. Union of India*<sup>15</sup>, the Supreme Court relied on *Hussainara Khatoon (supra)* and directed the release of undertrial prisoners charged under the Narcotics Drug and Psychotropic Act as they have completed one-half of their maximum term mentioned in the act.

Section 57 of the Code of Criminal Procedure, 1973 mandates that the police officer who arrests a person without a warrant shall not detain him in his custody for more than 24 hours without the special permission of a magistrate under section 167 of the same code. In *Sharifbai v. Abdul Razak*<sup>16</sup>, if a police officer fails to produce the arrestee before a magistrate within 24 hours of the arrest, it would be considered wrongful detention.

## VI. REFORMING THE CRIMINAL JUSTICE SYSTEM

Despite, all the rights and legislations, undertrial prisoners are still stuck in prisons. This is a big failure of our justice delivery system. There is a dire need for prison reforms for their welfare by ensuring their safety and security. This can be initiated by providing them with separate prisons away from hardened convicts, specifically transgender undertrial prisoners should be provided with separate accommodations where they have a common gender identity. Government should take steps for the protection of their fundamental rights. Efforts should be made to create legal awareness about their individual rights. Furthermore, the legal system should ensure access to free legal aid to all those who cannot afford the legal fees.

The National Legal Services Authority (NALSA) and other legal services authorities should undertake more legal aid programs. Implementation of a unified system that tracks the maximum time-limit for punishment for each undertrial prisoner to prevent unnecessary and prolonged incarceration by taking advantage of Section 436-A of the Criminal Procedure code. There should be encouragement among young lawyers to take up pro bono cases. The judge should consider certain grounds while granting bail, if he finds that the accused has been charged with a petty offence, he is old and suffering from a medical condition or committed a lesser gravity of violence, then bail may be granted after ensuring public safety. The bail should

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<sup>14</sup> Joginder Kumar vs State of U.P, 1994 SCC (4) 260

<sup>15</sup> Supreme Court Legal Aid Committee v. Union of India, (1994) 6 SCC 731

<sup>16</sup> Sharifbai v. Abdul Razak, AIR 1961 Bom 42



be provided in accordance with the economic condition of the accused as the majority of them are poor. Thus, more reforms in bail-related law is required. Also, the judge-population ratio should be increased. Taking such steps can strengthen the justice delivery system and ensure justice is served to all.

## VII. CONCLUSION

The prolonged incarceration of undertrial prisoners is a grave concern that violates the basic Principle of '*innocent until proven guilty*'. They undergo punishment before conviction. Another concept of natural justice which is not followed is "*Audi alteram partem*" which means hear the other side or no man should be condemned unheard. Due to the delayed trials, investigations and adjournments, the undertrial prisoners do not a chance to defend themselves. The legal rights and constitutional rights to which they are entitled are lost during the process. The statistical analysis shows that undertrial prisoners constitute more than two-thirds of total prisoners which have led to overcrowding in prisons. Their condition in prison is inhumane. There is a need for prison reforms in the criminal justice system as William Edward Gladstone said, "Justice delayed is Justice denied".

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