CHAPTER III


The courts in India have inherited common law practice and also have time and again relied upon and applied the principles laid down by the U.S. Supreme Court. As such, it is desirable to look into the procedure prevailing in countries where common law system is in vogue and the way in which those countries respond to the problem of delay in criminal trials. Three jurisdictions - America, Australia and England, are examined here.

AMERICA

In the United States, speedy trial is one of the constitutionally guaranteed rights. The Sixth Amendment to the Constitution provides that,

“In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of their nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defense.”

This is in addition to the Fifth Amendment which inter alia declares that “no person shall be deprived of life, liberty or property, without due process of law.”
Most of the fifty States have, in their respective Constitutions, provisions similar in effect to that of the Sixth Amendment. Moreover, most of the states have enacted statutes which provide for speedy trial of offences. Though most such statutes can be traced to the 18th century and even earlier, the Speedy Trial Act was enacted only in the year 1974\(^1\) more as a response to growing protest against crimes being committed by accused out on bail.\(^2\)

The Speedy Trial Act divides the pre-trial stage into three and there are different limits for each stage. The first interval is from arrest to filing of the charge/information with the court, for which the prosecution has 30 days. In the event the accused is not arrested, this period begins to run from the time accused is summoned. The second interval is from filing of the charge till arraignment for which the limit is 10 days. From arraignment till commencement of trial, further 60 days is provided.\(^3\) Thus, once the accused is served with the summons or is arrested, the trial has to commence within 100 days. (On a comparison, under the Indian system, these stages roughly correspond to filing of the final report under Section 173 of Cr.P.C., or earlier proceedings, framing and reading over of charges and commencement of trial respectively)

If the delay occurs in the first two stages, that is, between arrest and the arraignment, the termination of the prosecution is automatic. But, once he is arraigned, the accused has to make a demand for dismissal.\(^4\) The court has the discretion to dismiss the prosecution with or without the liberty to bring a fresh prosecution. However, such fresh prosecutions may be barred by limitation. This discretion is to be exercised with reference to three factors.\(^5\)

i) Seriousness of the offence

ii) Facts and circumstances leading to the dismissal.
iii) Impact of the dismissal on the administration of justice.

These factors were considered and interpreted by their Supreme Court in *United States v. Taylor*. In that case lack of malice on the part of the prosecution in causing the delay, and gravity of the offence (drug trafficking) were considered to justify the grant of leave to bring a fresh prosecution while dismissing the case. The court held that these questions warrant detailed and reasoned decisions by the trial court, for they will be considered as questions of law for the purpose of review by the higher courts.

A few important features of the Act have to be noted. First, it was implemented in a phased manner. The Act initially imposed a time limit of 180 days for the first year after it was enforced. In the second year, this was reduced to 120 days, and from the third year onwards, the limit is 100 days. A presiding officer of the court can ask for exempting his court from the purview of the Act, if he feels that his court is not in a position to meet the requirements of the Act on account of heavy workload.

Secondly, there are provisions which enable the courts to exclude delays arising on account of certain specified factors like absconding or non-availability of the accused or a key witness, delays caused by other preliminary proceedings like those held to determine the mental fitness of the accused, etc.

The third notable feature of the Act is that an elaborate administrative set-up has been created by the Act to collect statistical data regarding implementation and impact of the time limits imposed by the Act on the administration of justice. Researchers relying on such data have found that there is frequent invocation of the time-exclusion provisions in the Act, and at least 10 per cent of the total cases take more than one year to conclude. For example, in *Taylor*, a delay of more
than 200 days was thus excluded by the court. The 14 days non-excludable delay was held to warrant only a dismissal without prejudice for fresh prosecution.

Also, the accused in America can invoke the right under 6th Amendment, independently of the limit prescribed by the Speedy Trial Act or its State equivalents. In such an event, the courts will apply the rule laid down by Justice Powell in *Barker v. Wingo*. The courts will consider four factors, length of the delay, reason for the delay, defendant’s assertion of the right and prejudice to the defendant caused by the lapse of time. These factors are often referred to as the “balancing test” in the sense that the actions are to be taken together, and not in isolation. The actions of the prosecution and accused are balanced against each other to determine whether there was a delay resulting in violation of the right.

The basic principles underlying the right were concretized in the following terms in *Richard M. Smith v. Fred M. Hooey*.

“Suffice it to remember that this constitutional guarantee has universally been thought essential to protect at least three basic demands of criminal justice, in the Anglo-American legal system:

(1) To prevent undue and oppressive incarceration prior to trial,

(2) To minimize anxiety and concern accompanying public accusation, and,

(3) To limit the possibilities that long delay will impair the ability of an accused to defend himself.”

**AUSTRALIA**

There is no express legal provision in Australia governing the time which may be taken for completion of criminal proceedings. The right to speedy trial is
a creation of the courts. This right is a spin-off from the "abuse of court’s proceedings" doctrine, as enunciated by the English House of Lords in _Connelly v. DPP_17 and _DPP v. Humphrys_18 and developed by the High Court of Australia in _Barton v. The Queen_.19

None of these cases deal with delay. All that was laid down in these cases is that the courts have the power to dismiss prosecutions for abuse of their process.20

But relying on these decisions, the lower courts in the country developed a proposition that mere efflux of time will amount to an abuse of their process.21 This was reversed by the High Court of Australia in _Jago v. District Court of New South Wales_.22 In _Jago_, the accused, an ex-company director was indicted of an offence related with misuse of company funds, committed between April 1976 and June 1979. The High Court found that there is no common law right to a speedy trial in Australia. However, a proceeding may be permanently stayed if abuse of proceedings is proved as a matter of fact. Whether delay amounts to abuse is a question to be decided on a case to case basis.23

The court expressly laid down that permanent stay orders granting immunity from trial is undesirable and ought to be the last resort. It was realistically accepted by the court that delay, especially in complex cases, is inevitable and on facts, found that _Jago_ did not involve unreasonable delay.24

**ENGLAND**

The English system recognized accused’s right as far back as 1679 in the _Habeas Corpus_ Act. Section 6 of the Act25 provided for release on bail or discharge of persons detained on accusation of high treason or felony in the courts of Assizes or Sessions, if indictment could not take place in the second term after
committal. Assizes Relief Act 1889, Section 3\textsuperscript{26} provided for release on bail of persons committed for trial to courts of Sessions if they are not tried in the next Sessions. The Criminal Justice Act 1925, Section 14 (5) which was replaced by section 10 (3) of Magistrates Courts Act, 1952 (Now, Bails Act, 1976) also provided for release on bail of persons who could not be tried at the next quarter sessions. These provisions only limit the pre-conviction custody of the accused.\textsuperscript{27}

Some steps to regulate and limit the actual duration of the prosecution process was made in the Crown Court Rules and Indictment Rules, which are statutory regulations, issued in 1982 and 1983. Under these rules, the bill of indictment is to be prepared within 28 days of committal\textsuperscript{28} and the trial is to commence within 8 weeks of committal.\textsuperscript{29} Both these limits may be extended by the court.\textsuperscript{30}

The Prosecution of Offences Act 1985 was a further step in this direction. Section 22 of the Act enables the Secretary of State to prescribe custodial and overall time limits, in respect of preliminary stages of a trial. “Preliminary stage” means, in Crown Court, proceedings prior to arraignment, and in summary trials, proceedings prior to taking of evidence for the prosecution.\textsuperscript{31} The actual time limit has to be prescribed by the Secretary of State through delegated legislation.\textsuperscript{32}

The consequence of non-adherence with custodial time limits is bail.\textsuperscript{33} Consequence of non-adherence with overall time limits is acquittal.\textsuperscript{34} However, till date only the former have been enforced. According to the provisions now in force, the custodial limit vary between 58 to 112 days, depending on whether the offence is triable summarily or indictable and other factors, like place of trial.\textsuperscript{35} The courts have the power to extend time limits on a case to case basis, depending on factors like “good cause,” where prosecution has “acted with all due
expedition etc., and where the accused escapes or jumps bail, such orders are appealable, except when the accused is convicted.

The principle of Speedy trial has been authoritatively extended by the Privy Council to the Commonwealth countries as well in 1985 in *Bell v. Director of Public Prosecutions of Jamaica.* That was a case from Jamaica and the relevant provision of law was in the following terms:

> “Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law……”

However, the Privy Council observed as under on general principles as well:

> “Their Lordships do not in any event accept the submission that prior to the Constitution the law of Jamaica, applying the common law of England, was powerless to provide a remedy against unreasonable delay, nor do they accept the alternative submission that a remedy could only be granted if the accused proved some specific prejudice, such as the supervening of the death of a witness. Their Lordships consider that, in a proper case without positive proof of prejudice, the courts of Jamaica would and could have insisted on a date of trial and then, if necessary dismissing the charges for the want of prosecution. Again, in a proper case, the court could treat the renewal of charges after the lapse of a reasonable time as an abuse of the process of the court……..”

From an analysis of the above position, three models of the right to speedy trial emerge. First is the *per se* doctrine, which holds that mere efflux of time would amount to violation of the right without the accused having to prove anything further. This doctrine is applied by the Speedy Trial Act in America to
the first two stages of the proceedings, and by the Australian courts before Jago. The Second is the approach whereby each case is approached on its own facts. This is the view taken by the U.S. Supreme Court in Barker. Under this approach, there is a burden cast upon the accused to prove that he has been prejudiced by the lapse of time.

The third is a sort of hybrid of the above two approaches, exemplified by the U.S. Speedy Trial Act at the third stage of proceedings and English Prosecution of Offences Act. Lapse of specified period of time raises a rebuttable presumption as to the violation of the right. Burden of defeating the presumption lies on the prosecution. It will also be noticed that all jurisdictions, which did not adopt the third approach, ultimately adopted it. This switch over was inevitable, because a choice between the models showed the relative importance a jurisdiction placed on the various interests involved in the criminal justice system.

Having looked into the prevailing practices in existence in U.S.A., U.K., and Australia, an attempt is made to study the Indian scenario regarding the stages of trial at which the right to speedy trial is available to an accused. The different stages at which the right is available are discussed hereunder.

1. **RIGHT TO SPEEDY TRIAL DURING POLICE INVESTIGATION**

What does a speedy public trial in a criminal prosecution truly connote? Does it include within it the preceding Police investigations in the case also or is it confined only to the period of time when the portals of the court are entered in a regular trial? Investigation is the foundation of criminal justice system. Investigation is basically an act of unearthing the truth for the purpose of successful detection and prosecution. As such in the majestic sweep of the
fundamental right of a speedy public trial in the context of a criminal prosecution, initiated at the State’s instance, it necessarily connotes all the period from the date of the leveling of the criminal charge to the date of the rendering of the judgment in court. Otherwise, the cherished fundamental right herein would be whittled down to a teasing mirage, where the investigation of the offences itself may protract on for years and thus rendering the very concept and purpose of a speedy trial purely illusory. Therefore, a speedy trial in a criminal prosecution includes within it both the police investigation of the crime and the later adjudication in the court based thereon. The right to speedy public trial is applicable not only to the actual proceedings in the court but includes within its sweep the preceding police investigation in a criminal prosecution as well.

In Ramdaras Ahir it was held that the word ‘trial’ in this concept is not technically confined to the completion of the proceedings in the original trial court alone, but, equally includes the subsequent substantive appeal there from. Thus, if the word ‘trial’ herein includes the later appeal as well, then on a parity of reasoning, it must equally include the preceding police investigation. In a criminal prosecution initiated by the State, the trial is primarily adjudication on the basis of the result of the preceding investigation. In a criminal prosecution launched by the State the preceding investigation and the trial are a closely intertwined integral whole, which is not to be hyper-technically bifurcated.

In Sheela Barse v. Union of India the rule of Speedy trial under Article 21 itself their Lordships have not only included the period of investigation within the time frame but indeed have gone on to provide a specific time frame for the investigation itself. It was held that for juvenile offences punishable up to seven years the maximum time permissible for investigation would be six months from the filing of the complaint or lodging of the first information report with regard of
the future cases. As regards pending cases the investigation must be completed within a period of three months and if it was not so done the prosecution should be quashed.\textsuperscript{52} It is thus manifest that not only police investigation is within the mandate of rule of Speedy trial under Article 21 but an inordinate delay in the police investigation itself may equally attract the rule.\textsuperscript{53}

In \textit{Robert Dean Dickey v. the State of Florida},\textsuperscript{54} Mr. Justice Brannan and Mr. Justice Marshall, in their concurring opinion, observed as under:

"Does the speedy trial guarantee apply to all delays between defendants arrest and his sentencing? The view that it does is not without support in the wording of the Sixth Amendment. The Constitution says that an ‘accused’ is entitled to a speedy trial in all criminal prosecutions. Can it be that one becomes an ‘accused’ only after he is indicted, or that the Sixth Amendment subdivides ‘prosecution’ into various stages, granting the right to speedy trial in some and withholding it in others?\textsuperscript{55} In related contexts involving other clauses of the Sixth Amendment, we have held that the prosecution of an ‘accused’ can begin before his indictment; for example, in \textit{Escobedo v. Illinois},\textsuperscript{56} we spoke of the time when ‘investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect.’ And as regards realization of the purposes of the Speedy Trial Clause, the possibility of harm to interests protected by the clause is certainly great whenever delay occurs after arrest."

In fact, the court went further to observe that the speedy trial guarantee even covered a delay prior to the arrest or indictment of the accused in the following words:

"Accordingly some of the interests protected by the Speedy Trial Clause can be threatened by delay prior to arrest or indictment. Thus, it may be that for
the purpose of the clause to be fully realized, it must apply in all the criminal process that occurs after the Government decides to prosecute and has sufficient evidence for arrest or indictment."57

The court went on further to hold:58

"The police and prosecutor are not the only Governmental officials whose conduct is governed by the Speedy Trial Clause; it covers that of court personnel as well. E.g., Pollard v. United States,59 Marshall v. United States.60 And the public officials responsible for delay may not even be associated with law enforcement agencies or the courts. Delay, for example, may spring a refusal by other branches of government to provide these agencies and the judiciary with the resources necessary for swift trials."61

Then, finally, on this aspect, it was concluded as follows:

"Arguments of some force can be made that the guarantee attaches as soon as the Government decides to prosecute and has sufficient evidence for arrest or indictment; similar arguments exist that an accused does not lose his right to a speedy trial by silence or inaction, that Governmental delay that might reasonably have been avoided is unjustifiable, and that prejudice ceases to be an issue in speedy trial cases once the delay has been sufficiently long to raise a probability of substantial prejudice. In so far as these arguments are meritorious, they suggest that the speedy trial guarantee should receive a more hospitable interpretation than it has yet been accorded."62
2. **SPEEDY TRIAL FOR CAPITAL OFFENCE**

The constitutional right to speedy public trial under Article 21 of the Constitution would also include in its majestic sweep the capital crime punishable with death. Capital crime punishable with death is not treated as a class apart by itself and thus beyond the scope of speedy trial under Article 21 and a broad time frame for the original trials of capital offences could be indicatively spelt out.

In the context of capital crime, particularly, the rule of speedier trial is clearly in the interest of the accused, in the interest of the aggrieved relations of the victim and what is more so in the larger societal interest. It is well settled that the grave delay caused by the fading memories and many other factors would hamper a fair trial and hinder the prosecution case. It is true that sometimes the accused persons if on bail impede and prolong the trials for ulterior motives of gaining over witness but it is equally in their interest and that of justice that trials of capital charges hanging over them be completed as early as possible. The societal interest in a speedy trial is indeed the largest and the more vital leaving out the sectional interest of the prosecutor or the accused. It is meet and just that serious crime is brought to book immediately which apart from justice betwixt the parties also satisfies the innate sense of justice of the society as a whole and equally buttresses the rule of deterrence and retribution in major crime.\(^6^3\)

No finical distinction has been drawn in American Jurisprudence betwixt the applicability of the Right of Speedy Public Trial to capital crimes and the minor ones. Unhesitatingly, it has been there extended to all offences and in particular to the more serious ones.\(^6^4\) Reference in this context may be made to *Barker v. Wingo,\(^6^5\)* which expressly was the case of a murder trial. Equally there is the long line of unbroken precedent of the United States Supreme Court.\(^6^6\) Equally
so is the precedents of the Supreme Courts of the federating States wherein the right has always been extended and applied to capital offences as well. There seems thus little matter of doubt that in the country of its origin the constitutional right to a speedy public trial has always been extended to serious and capital offences equally.\textsuperscript{67}

In \textit{Sunil Batra v. Delhi Administration},\textsuperscript{68} their lordships have held principle that even a person sentenced to death does not lose the protection of Article 21 whilst in jail custody. Now if that be so, the scope of Article 21 does not stop at the prison gates and it seems to follow somewhat logically that the "umbrella of speedy trial rule which is an integral part of Article 21, is equally available to the accused during investigation, trial and even the post trial field of capital offences punishable with death."\textsuperscript{69}

The concept of the constitutional right of speedy trial was initially elaborated in \textit{Ramdaras Ahir's} case\textsuperscript{70} in the context of capital crimes punishable with death. The reconsideration of the matter by the full bench in \textit{Maksudan Singh's} case\textsuperscript{71} was again rooted in murder trials and the reversal of acquittals therein. With commendable judicial restraint the matter was thus sought to be confined to delays in the context of an acquittal on a capital charge and the pendency of Government appeals against them. There is little manner of doubt that both the Division Bench and the Full Bench had unreservedly extended and applied the rule to capital offences and indeed had considered in that context alone.

It is somewhat plain from the ratios of \textit{Ramdaras Ahir}\textsuperscript{72} and \textit{Maksudan Singh's}\textsuperscript{73} cases that the principle of presumptive prejudice after the passage of ten years in an analogous context on capital charges had been firmly laid down. That
this rule of presumptive prejudice was not to be narrowly confined only to the acquittals but was equally attracted to original trials was later exhaustively explained and expanded by the Full Bench in Madheswardhari Singh’s case.⁷⁴

In the context of capital crime, it was held in Suryanarayana Singh and others v. State of Bihar⁷⁵ that the graver the offence, the greater becomes the need for speedier trial. This is more so in capital offences where the horror of hanging hangs over the head of the accused person like the “proverbial sword of democles” and that a callous and inordinately prolonged delay of ten years or more (which does not arise from the default of the accused or is otherwise not occasioned by any extraordinary or exceptional reasons) in the investigation and original trials of pending cases for capital offences punishable with death would plainly violate the constitutional right to a speedy public trial under Article 21.⁷⁶

It is not to be understood that in a lesser period than the one indicated above for presumptive prejudice an accused person may not in a peculiar case be able to establish circumstances pointing to the patent prejudice which may entitle him to invoke the guarantee of speedy public trial under Article 21. However, as pointed out by the Privy Council in Bell v. Director of Public Prosecutions of Jamaica,⁷⁷ the weight to be attached to such circumstances and other factors might well vary from jurisdiction to jurisdiction.

It is instructive to refer by way of analogy to the quantum of delay which has been held sufficient to invoke the constitutional right of a speedy trial in the analogous American jurisprudence. Directly in the context of capital crime in Barker v. Wingo,⁷⁸ on a murder charge a delay of five years to bring the accused to trial was held sufficient to entitle him to the relief for the violation of his constitutional rights. In Robert Dean Dickey v. State of Florida,⁷⁹ the delay was
around seven years on a charge of armed robbery to provide the foundational base for invoking the rule of Speedy trial. In *Clarence Eugene Strunk v. United States*, patently on a minor charge even a delay of a little more than ten months in the circumstances was held to be a violation of constitutional guarantee of a speedy trial for which the only appropriate relief was found to be vacation of the sentence and the dismissal of the indictment.

3. **SPEEDY TRIAL FOR MINOR OFFENCES**

The question whether the fundamental right to a speedy public trial is available in all criminal prosecutions or is it confined to only the ones on a capital charge punishable with death or imprisonment for life was considered in *Madheswardhari Singh v. State*. The fundamental right of a speedy trial is in a way a legacy from the letter of the American Constitution. It is, therefore significant to notice that in that jurisdiction it has throughout been extended to all criminal prosecutions, irrespective of the nature of the offences and the charges leveled.

In *Richard M. Smith v. Fred M. Hooey*, the charge leveled against the accused was merely one of theft. In *Peter H. Klopfer v. State of North Carolina*, the charge, far from being a serious one, was that of a misdemeanor of a criminal trespass, alleging no more than that the accused-defendant had entered a restaurant, and, after being ordered to leave the said premises, he had willfully and unlawfully refused to do so, knowing that he had no license there for. In *Robert Dean Dickey v. State of Florida*, the allegation against the accused was that of robbery.
The American precedent which is the fountainhead of the concept of speedy public trial, has now consistently been extended without limitation to all offences and all criminal prosecutions.  

Even on principle it would seem somewhat obvious that on the plain language of the Sixth Amendment to the American Constitution the fundamental right to a speedy public trial is not confined to any particular category of offences. The language employed is unfettered and without any such restriction. In terms it says “in all criminal prosecutions the accused shall enjoy the fundamental right to a speedy public trial.” Thus it plainly covers the field of all criminal prosecution without exception. Plainly enough, such a criminal prosecution may be with respect to any offence and not necessarily the more serious and the capital ones.  

Indeed the significance of the fundamental right to speedy trial might well come more meaningfully to the fore in relatively minor cases. There can be no rationale or public interest in prolongation of investigation or the trial in the relatively insignificant crimes. In fact, the prolongation of such trials leads to greater hardship and the accused may sometimes be made to suffer more than what the law provides by way of a sentence in the shape of either light imprisonment or fines. This aspect has rightly been highlighted in the Hussainara Khatoon’s cases. 

In Hussainara Khatoon v. The State of Bihar, in which Article 21 of the Constitution was in a way precedentially expanded to include the right of speedy trial within its sweep, the offences were not at all capital ones, but pertained to petty and minor offences, for which the under-trials were allowed to rot in the jails in Bihar for a long time. Their Lordships enunciated the whole concept of speedy trial, not in the context of a capital offence, but indeed for minor offences.
Therefore, from the very inception, this fundamental right has been extended to all offences by the Final Court and not restricted to either serious or the capital ones.

In *State of Bihar v. Uma Shanker Kotriwal*,91 which pertained to a case far from being a capital offence, and was indeed an offence of misappropriation of GC sheets meant for distribution to quota holders under S. 7 of the Essential Commodities Act. Equally, *S. Guin v. Grindlays Bank Ltd.*,92 was also a case of a wholly minor offence of obstructing the officers of the Bank from lawfully entering the premises of the branch of the Bank and also obstructing the transaction of normal banking business by them under S. 341 of the Indian Penal Code, read with S. 36-AD of the Banking Regulations Act, 1949.

Whilst in capital crimes there may be some justification, because of the heinousness of the offence to carry the trial to its logical conclusion, in minor offences injustice is more patent when harassment and hardship is inflicted for waiting for trial for periods longer than what the law envisages as the maximum punishment.93

The argument that the right to a speedy public trial is confined to capital crimes stems from a plain misconstruction and misapprehension of the true ratio in *State of Bihar v. Ramadaras Ahir*94 and *State of Bihar v. Maksudan Singh*.95 Therein both the Division Bench and the later Full Bench rightly noticed that they were breaking fresh ground and, therefore, narrowly confined themselves to the specific issues before them, namely, the reversal of acquittal on a capital charge. It was rightly held therein that in constitutional matters it is “safer not to stray into academic field, but to remain on the *terra firma* of a particular case” and the facts thereof. Consequently, in both the cases, the court focused itself on the right of a
speedy public trial in the context of capital crimes and more particularly with the reversal of acquittal there-for. However, this cannot remotely be any warrant for even suggesting that this right has any limitation with regard to the nature of the offences.

Indeed, in the State v. Maksudan Singh, Shamsul Hassan, J., in his concurring judgment observed as follows:

“As regards application of the aforesaid principle to the trial for lesser offences Hon’ble Chief Justice, has rightly not entered into any discussion in this appeal. I may, however, add that if a situation arises, then within the ambit of those sections, the principle of speedy trial can certainly be applicable but that will be for some other occasion.”

Both on principle and precedent, the fundamental right to a speedy public trial extends to all criminal prosecutions for all offences generically, irrespective of their nature. It is not confined or constricted to either serious or capital ones only.

4. SPEEDY DISPOSAL OF APPEAL

The constitutional right of a speedy trial would merely be a teasing mirage in capital offences, if the substantive appeals against convictions are not disposed of for years or a decade and the appellants are meanwhile obliged to rot in jail custody, sometimes even for the whole of the sentence imposed and in any case for a substantial part thereof, till the final hearing of such appeals.
In Ramdaras Ahir’s case,\textsuperscript{100} and its express subsequent affirmance, with further elaboration by not one but two subsequent Full Benches in \textit{State of Bihar v. Maksudan Singh}\textsuperscript{101} and \textit{Madheshwardhari Singh v. State of Bihar}\textsuperscript{102} it has been held as follows:

"Now, once it is held that the constitutional right to a speedy trial is as much within the sweep of Article 21 as it by the express terms of the Sixth Amendment of the American Constitution, it seems to follow that the word ‘trial’ herein is not to be confined to the Procrustean bed of only the actual original trial proceeding. As Chinnappa Reddy, J., in \textit{T. V. Vatheeswaran’s case},\textsuperscript{103} has pithily observed ‘Procedure established by law does not end with the pronouncement of sentence’ alone. It would indeed be no satisfaction to the citizen, if an illusory speedy trial is then hung up in the balance by an inordinately delayed appeal hanging perpetually over his head.

The Code provides in detail the mode of preferring appeals and the manner of their admission and hearing there after. The Code confers a vested and substantive right of appeal in convictions on capital charges. Equally well-settled it is that such appeals are hearing and re-appraisal of the evidence and the appellant is entitled to agitate all questions of fact and law before a court of criminal appeal. It would thus be manifest that the nature of a criminal appeal under the Code — whether against conviction or directed against acquittal — is a re-hearing and a continuation of the trial. The appellate court is not merely a court of error and the moment the appeal is preferred, the finality of the judgment of the trial court disappears and the whole issue is in a flux afresh. Therefore, there seems to be no option, but to hold that the word ‘trial’ in the context of the constitutional guarantee of a speedy trial includes within its sweep a substantive appeal by the Code to the High Court — whether against conviction or against
acquittal. Thus, it would follow that the constitutional right of speedy trial envisages an equally expeditious conclusion of a substantive appeal and not merely a technical completion of the proceedings in the original court alone."

It seems now settled beyond cavil that Article 21 extends to the post-conviction stage as well and it does not stop and end with the pronouncement of sentence in the trial. Indeed, the Constitution Bench in Sunil Batra's case,highlighted the fundamental rights and in particular Article 21 continued to be applicable even to prisoners after all court proceedings have terminated by affirmance of their conviction, right up to the Final Court. O. Chinnappa Reddy, J., in T. V. Vatheeswaran v. State of Tamil Nadu,summed up the legal position in the following words:

"So, what do we have now? Articles 14, 19 and 21 are not mutually exclusive. They sustain, strengthen and nourish each other. They are available to prisoners as well as free men. Prison walls do not keep out Fundamental Rights. A person under sentence of death may also claim Fundamental Rights. The fiat of Article 21, as explained is that any procedure which deprives a person of his life or liberty must be just, fair and reasonable, just, fair and reasonable procedure implies a right to free legal services where he cannot avail them. It implies humane conditions of detention, preventive or punitive. 'Procedure established by law' does not end with the pronouncement of sentence; it includes the carrying out of sentence. That is as far as we have gone so far."

Thus, there remains no doubt that Article 21 of the Constitution would continue to extend its protective shield even at the post-conviction stage.

In Gupteshwar Barhi v. State of Bihar (Crl. Appeal No.317 of 1975 decided on 16.2.1984), where refusal to grant bail had led to a 'travesty of justice' and
person innocent in the eye of law was obliged to undergo the full term of life imprisonment, the Division Bench while acquitting the sole appellant, recorded as under:

"Since this is a case in which nobody has come to support the case of the prosecution, much less the informant himself or the persons said to have been injured during the course of the dacoity in question, and the conviction has been based only on the retracted confession of the appellant himself, which is also admittedly uncorroborated, the conviction of the appellant has accordingly been set aside by an order of this court dated the 8th February, 1984, and the appeal has been allowed."

The appellant therein was arrested on the 4th of January, 1971 and continued throughout in custody for the reason that the bail had been declined or his being unable to furnish bail, for a period of thirteen years and forty three days. It is traumatic for the Judges to acquit a convict only to find that he has already undergone the maximum sentence on a capital charge or a substantial part thereof.

In *Rudal Sah v. State of Bihar,*

the petitioner had remained and continued in incarceration for more than fourteen years even after his acquittal. Their Lordships closed that judgment with the hope that there will be no more *Rudal Sahs* in Bihar or elsewhere.

When criminal appeals remain pending in court whilst the appellants are battering its doors for hearing, the convicts who are denied bail would often enough be obliged to undergo a substantial part of their sentence including the time spent firstly in delayed trials and later on in equally delayed hearing of appeals. A procedure which not only may in actuality lead to the convict suffering the whole or the substantial part of the sentence imposed upon him.
before his substantive appeal is heard and he may thereafter be formally acquitted, is one which cannot stand the test of being reasonable, just and fair. Indeed it would in every sense be the opposite thereof. The right to speedy public trial is not merely a twinkling star in the high heavens to be worshipped and rendered vociferous lip-service only but indeed is an actually meaningful protective provision, then a fortiori expeditious hearing of substantive appeals against convictions is fairly and squarely within the mandate of the said Article.\textsuperscript{108}

The Code and the civil laws as they stand today provide no remedy or compensation in cases where an accused person who has been obliged to undergo the whole or a substantial part of the maximum sentence (even on a capital charge) and is later even honourably acquitted by the superior courts. In reality long incarceration in jail, where after a person is acquitted, is not compensable in money terms at all. Inherently, the lost years of the best part of the citizen’s life spent in incarceration either awaiting trial or judgment in a substantive appeal where after he is acquitted are irreversible and irreparable injuries for which suitable recompense is an impossibility.\textsuperscript{109} Reference in this context may well be made to \textit{Rudal Sah’s} case,\textsuperscript{110} wherein the final court itself has taken that view. However, this aspect was more frontally highlighted in \textit{Maksudan Singh’s} case,\textsuperscript{111} even in the context of a professor-accused, who was not even in custody, as under:

“He laboured under the shadow of death and destitution for more than five years till he was acquitted. However, his deliverance seemed to be short lived and the State appeal against his acquittal was admitted. He applied to the Vice Chancellor, Bihar University, for withdrawal of his suspension order and for being allowed to join his post. However, this prayer was categorically rejected and he was not permitted to join his post because of the pendency of the Government Appeal. This appeal, however, hung over him like the sword of \textit{Democles} for
another eight years. He was deprived of the chance of becoming the principal of his college and to rise further in his profession which was his lifetime ambition. During the pendency of the Government Appeal, he retired from service and even after retirement, he was denied payment of his provident fund, gratuity and other pensionary benefits on the ground that as yet the Government Appeal against his acquittal was pending disposal. In our social conditions and family bonds, his sons and daughters were denied the place of life which was their due and lost good options of marital status because of the horror of a capital charge pending against this respondent and occasioned by the withholding of all financial benefits to him. The loss and prejudice to this respondent is perhaps irretrievable and he is but a broken man and a mere shadow of himself, irrespective of the fact whether today his acquittal is sustained or otherwise.112

It must, therefore, be painfully noticed that though some period of incarceration in capital cases becomes inevitable, yet the raw fact of life cannot be lost sight of that even after an honourable acquittal no recompense for the years lost for ever and gone by in custody can possibly be granted to such a person.113

Apart from the inherent in-compensability of the invaluable years lost in incarceration, what calls for pointed notice is that the Code and civil laws as they stand today, perhaps cannot but, indeed do not provide for any hope for monetary compensation for a person wrongly charged for serious crimes and honorably acquitted thereafter. Thus, the law, as it stands today, even for a lifetime lost in detention during trial and appeal does not entitle an accused person to a penny of compensation — monetary or otherwise — after even an honorable acquittal.114

Added to this is the fact that both for under-trials, and for convicts, the conditions in jails are admittedly sub-human. All these are poignantly prominent
factors to which one cannot possibly turn the proverbial Nelson’s blind eye or to gloss over them as sometime either inevitable or insoluble. Indeed these considerations become even more relevant where prolonged detentions are by the law agency’s own default either by way of inordinately delayed trials extending over years, or in the appellate forum by the High Court’s own inability to dispose of even substantive criminal appeals in capital cases expeditiously. These are factors which directly and pristinely enter into consideration, and more so in the context of now a constitutional right to speedy trial for the purpose of grant of bail during the pendency of a substantive appeal.¹¹⁵

In the case of Harbhajan Singh v. State of Punjab,¹¹⁶ it was concluded:

“I believe that in an issue of this nature, the attitude of this court cannot necessarily remain static. It is not possible to lose sight of the fact that in normal routine at present the criminal appeals filed in the year 1973 are as yet being listed for hearing. Indeed, as many as 40 life sentence appeals of that year are still pending disposal. In order to avoid any invidious distinctions this court has rightly adhered to the practice that normally all these life sentence appeals are to be listed and heard strictly in accordance with their number and in the order in which they are filed. That being so, the case of the petitioners connected as it is with their co-appellants who have been sentenced to life imprisonment is unlikely to be listed for hearing till the passage of another year or two. Nor do we see the chance of any favorable dramatic change in the context of hearing these appeals in the foreseeable future. That being so the petitioners who have been sentenced to seven years imprisonment would have undergone nearly the whole, or in any case, a substantial part of their sentence by that time.”¹¹⁷
In *Kashmira Singh v. State of Punjab*,118 Bhagwati, J. (the learned Chief Justice as he then was) observed as follows:

"The appellant contends in this application that pending the hearing of the appeal he should be released on bail. Now, the practice in this court as also in many of the High Courts has been not to release on bail a person who has been sentenced to life imprisonment for an offence under Section 302 of the Indian Penal Code. The question is whether this practice should be departed from and if so, in what circumstances. It is obvious that no practice howsoever sanctified by usage and hallowed by time can be allowed to prevail if it operates to cause injustice. Every practice of the court must find its ultimate justification in the interest of justice. The practice not to release on bail a person who has been sentenced to life imprisonment was evolved in the High Courts and in this court on the basis that once a person has been found guilty and sentenced to life imprisonment, he should not be let loose, so long as his conviction and sentence are not set aside, but the underlying postulate of this practice was that the appeal of such person would be disposed of within a measurable distance of time, so that if he is ultimately found to be innocent, he would not have to remain in jail for an unduly long period. The rationale of this practice can have no application where the court is not in a position to dispose of the appeal for five or six years. It would indeed be a travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the court ever compensate him for his incarceration which is found to be unjustified? Would it be just at all for the court to tell a person: 'We have admitted your appeal because we think you have a *prima facie* case, but unfortunately we have no time to hear your appeal for quite a few years and, therefore, until we hear your appeal, you must remain in jail, even though you may
be innocent? What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact happened in a few cases in this court, that a person may serve out his full term of imprisonment before his appeal is taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such a person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this court has been following in the past must be reconsidered and so long as this court is not in a position to hear the appeal of an accused within a reasonable period of time, the court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail in cases where special leave has been granted to the accused to appeal against his conviction and sentence.”

It is apt to recall the observations in Kadra Pehadiya's case that 'our justice system has become so dehumanized that the lawyers and Judges do not feel a sense of revolt in caging people in jail for years including those during the pendency of substantive appeals.' In this context, one is equally reminded of the dissent of Lord Atkin in Liversidge v. Sir John Anderson in the following words:

"I view with apprehension the attitude of judges who on a mere question of construction when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the
executive, alert to see that any coercive action is justified in law."

In *Anurag Baitha v State of Bihar*¹²³ it was held that barring exceptions the reasonable period of time for the hearing of substantive appeals on capital charges pending in the High Court must be broadly placed at one year. Once this is so fixed, an appellant would become entitled to claim bail on the ground of the delay in hearing the appeal itself unless there are cogent grounds for acting otherwise.

However, the cases of convicts to whom the primal role in the capital crime is attributed and are held guilty on the substantive charge of murder or other capital offences are undoubtedly on a somewhat different footing and the same concession may not be extended to them in routine.¹²⁴

The court observed, "It cannot be said that inevitably all crimes which are visited by capital punishment are brutal and the most seriously frowned upon by the law. There is a difference of great degree where capital crime may further be horrendously brutal in its nature and shocking to the conscience of the court and society in general. In such a case there is a societal interest involved. Convicts therein would not and, be ordinarily entitled to such concession of bail once they have been held guilty by the trial court of such grievous crime. Not only would it be dangerous to enlarge them on bail but it would also hurt the heart and sentiments of the society and the victims of such crime in particular, that convicted criminals of such crimes should still be enjoying their liberty pending the hearing of their appeals because of the court’s inability to dispose them of in reasonable time. Therefore, the only alternative is that the substantive appeals of this nature for peculiarly heinous crimes, where the grant of bail is inappropriate, should be listed out of turn and disposed of within the time frame of one year or as nearly thereto as would be within the bounds of possibility."¹²⁵
5. WHETHER OUTER LIMIT COULD BE PRESCRIBED BY COURT

Unless the fundamental right to speedy trial is to be whittled down into a mere pious wish, its enforceability in court must at least be indicated by an outer limit to which an investigation and the trial in a criminal prosecution may ordinarily extend. Otherwise, it would be merely paying lip service to a precious right whilst denuding it of the benefits of its actual enforceability. When the investigation and trial have already extended to over nearly 20 years and the end is not yet in sight to still say that even in such a fact-situation no time-limit can be suggested appears as doctrinaire, and an attitude remote from reality. Even trials on capital charges may drag on and on whilst an indigent accused unable to furnish bail may suffer imprisonment more than the maximum prescribed by law. Investigations sometimes drag on in the dossiers of the police, which may well be called archives and not police records, because cases have languished without any charge-sheet or final report for decades on. It should be ensured that the meaningful words of the Constitution are not rendered an idle mockery whilst men sit and hear each other groan in sub-human conditions, which are called our jails.

In *Machander v. Hyderabad State* it was observed:

"While it is incumbent on us to see that the guilty do not escape it is even more necessary to see that persons accused of crime are not indefinitely harassed. They must be given a fair and impartial trial and while every reasonable latitude must be given to those concerned with the detections of crime and entrusted with the administration of justice, limits must be placed on the lengths to which they may go."

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Again in *State of Bihar v. Uma Shankar Kotriwal*, their Lordships have reiterated:

“It may well be that the respondents themselves were responsible in a large measure for the slow pace of the case inasmuch as quite a few orders made by the trial Magistrate were challenged in higher courts, but then there has to be a limit to the period for which criminal litigation is allowed to go on at the trial stage.”

Then again in *Hussainara Khatoon v. The State of Bihar*, Bhagwati, J., as his Lordship then was, indicated a time frame in these words:

“Even a delay of one year in the commencement of the trial is bad enough how much worse could it be when the delay is as long as 3 or 5 or 7 or even 10 years. Speedy trial is of the essence of criminal justice and there can be no doubt that delay in trial by itself constitutes denial of justice.”

In *Ramdaras Ahir’s case* and in *Maksudan Singh’s case* the issue had arisen in the context of a reversal of a clean acquittal on a capital charge. With commendable judicial restraint the matter was thus sought to be confined to delays in the context of an acquittal on a capital charge and the pendency of Government appeals against them. Within that parameter the time frame spelt out was in the following terms in *Ram Daras Ahir’s case*:

“That brings us to the crucial but somewhat sensitive question of reasonably quantifying the delay which would ordinarily infract the fundamental right to a speedy trial. I am not unaware that it is no easy task to precedentially lay down a somewhat inflexible rule about the precise quantum of delay which would entitle the accused for invocation of the constitutional right. Yet, however great be the difficulties, this significant duty cannot be shirked.”
And it was held:

“......that a callous and inordinately prolonged delay of 10 years or more, which, in no way arises from the accused’s default (or is otherwise not occasioned due to any extraordinary and exceptional reasons) in the context of reversal of a clean acquittal on a capital charge would plainly violate the constitutional right to a speedy public trial under Article 21...”

This period of 10 years was reconsidered and reaffirmed in Maksudan Singh's case in virtually identical terms as under:

“...that a callous and inordinately prolonged delay of 10 years or more occasioned entirely by the prosecution’s default in the context of reversal of clean acquittal on a capital charge would be per se prejudicial to the accused.”

It is somewhat plain from the afore quoted ratios of Ram Daras Ahir and Maksudan Singh's cases that the principle of presumptive prejudice after the passage of 10 years in an analogous context on capital charges has already been firmly laid within this jurisdiction. That this rule of presumptive prejudice was not to be narrowly confined only to issue of acquittals but was equally attracted to original trials was later exhaustively explained and expanded by the Full bench in Madheshwardhari Singh's case.

In Madheshwardhari Singh v State, the court while observing that “a criminal prosecution by the State cannot be allowed to become an inquisitorial persecution of the accused. Nor can a fair speedy trial be allowed to become an unending travail for him,” held:
"A callous and inordinately prolonged delay of seven years or more (which does not arise from the default of the accused or is otherwise not occasioned by any extraordinary or exceptional reason) in investigation and original trial for offences other than capital ones would plainly violate the constitutional guarantee of a speedy public trial under Article 21."\(^{139}\)

The court further stated, "A delay of less than seven years would not in any case amount to prejudice. Indeed, what is sought to be laid down is the extreme outer limit where after grave prejudice to the accused must be presumed and the infraction of the constitutional right would be plainly established. But since we are following binding precedent, the same has to be unreservedly accepted. Nor is it sought to be laid down that in a lesser period than seven years an accused person would not be able to establish circumstances pointing to the patent prejudice which may entitle him to invoke the guarantee of speedy public trial under Article 21. That is a question which can be properly considered and adjudicated where it may expressly arise. What indeed is sought to be laid down here is that beyond this period of seven years the continuation of the investigation and trial would bring in the weightiest presumption that the enshrined right of speedy public trial is violated and the prosecution should be halted in its tracks. This would *per se* be indicative of prejudice. Thereafter the burden would automatically shift heavily on to the shoulders of the State to show that such grave delay was either entirely the handiwork of the accused himself or was occasioned by such special and exceptional circumstances so as to merit condonation thereof."\(^{140}\)

The view the Supreme Court took in *Ramdaras Ahir's* case,\(^{141}\) and *Maksudan Singh's* case,\(^{142}\) now stands sanctified and fortified by the judgment of their Lordships in *S. Guin v. Grindlays Bank Ltd.*\(^{143}\) The facts thereof may call for a somewhat pointed notice. The accused persons therein were charged under S.
341, I.P.C., read with S. 36AD of the Banking Regulation Act, 1949 for an offence of obstructing the officers of the Bank from lawfully entering the premises of the branch of the Bank and also obstructing the transaction of normal banking business by them on the 31st of October 1977. There was no delay in investigation and trial and the Magistrate, by his judgment dated the 27th of June, 1978 (i.e., after barely eight months), acquitted the accused persons. An appeal against the acquittal was taken before the Calcutta High Court which was apparently admitted but could not come up for final hearing till nearly six years thereafter. On the 19th December, 1984, the High Court set aside the acquittal and remanded the case for re-trial afresh. On appeal by the accused appellants their Lordships set aside the High Court’s judgment and restored the acquittal with the following unequivocal and categoric observations:

"We are of the view that having regard to the nature of the acts alleged to have been committed by the appellants and other attendant circumstances, this was a case in which the High Court should have directed the dropping of the proceedings in exercise of its inherent powers under S. 482, Criminal Procedure Code, even if for some reason it came to the conclusion that the acquittal was wrong. A fresh trial nearly seven years after the alleged incident is bound to result in harassment and abuse of judicial process." 144

And again,

"We are of the view that following the above principle the High Court should have dismissed the appeal before it even if it disagreed with the view taken by the trial court with regard to the gist of the offence punishable under S. 341, Indian Penal Code, having regard to the inordinate delay of nearly six years that had ensued after the judgment of acquittal, the nature and magnitude of the
offences alleged to have been committed by the appellants and the difficulties that may have to be encountered in securing the presence of witnesses in a case of this nature nearly 7 years after the incident.145

Their lordships in S. Guin v. Grind lays Bank Ltd.,146 did not enter into either the peculiarity of the case or other factors nor the necessities of balancing the apportionment of blame for the delay. They have rightly held that the mere passage of seven years and the hanging of the sword of Damocles over the accused’s head entitled him to be released from the travail of the prosecution. The violation of the fundamental right to speedy public trial seems to be the underlying silent (salient?) rationale of the judgment.147

On larger principle the seal of approval on fixing of time limit has been set by the final court in Sheela Barse v. Union of India.148 Therein not a single but a double time frame has been rightly laid for the trial of juvenile offenders with regard to cases and offences already pending and those which would be committed or registered thereafter in future. A period of three months for investigation and 6 months from the date of filing of charge sheet for trial were fixed as outer limits.

In Suryanarayana Singh and others v. State of Bihar,149 Sandhawalia S.S., C.J., while holding that “a callous and inordinately prolonged delay of ten years and more would violate the constitutional guarantee of a speedy public trial under Article 21,” observed, “The requirement of a broad timeframe is not only necessary on principle but within this jurisdiction is now well settled by precedent as well. Indeed, in the total absence thereof, the constitutional right to a speedy trial can become an “airy nothing” and a “mere twinkling star” to which deep lip service and homage may be paid but no concrete benefit or result would accrue there-from. Without a guideline and a rule of presumptive prejudice, after a

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specific period the golden principle would well be lost in a welter of detail and the individual peculiarities of each case."\textsuperscript{150}

S. Shamsul Hasan, J., in his concurring opinion was of the view that a period of five years is more than sufficient and indicated how the period of 5 years is more than sufficient. "Once an occurrence takes place, either an information is received at the Police Station or on some occasions the Investigation Officer reaches the spot and records the statement. He is then required to commence the investigation straight away by recording the statement of the eye witnesses particularly and other corroborative witnesses generally and then examining the place of occurrence and seizing the incriminating materials etc. There is no reason why this process should not be completed within a week whatever may be the nature of the crime and number of witnesses involved. Then the Police may wait for little time say one or two months, for the post mortem report and other reports of experts if they are required. This process also if proper machinery is provided by the government, should not take more than a month or two."\textsuperscript{151}

He continued, "Once these are all collected, there is no reason why Police should not submit final form one way or the other within two or three months. It is for this reason that S.167, Criminal Procedure Code has provided a period of three months after which if no final form is produced, the accused is entitled to bail. This is based on the concept that if no evidence is available to the Police, it has to submit a final form within three months and if there is no evidence in the case that can be said to be worthy of acceptance in the criminal court of the eyewitnesses and corroborative witnesses not examined by the Police at the earliest point of time and examined after a lapse of time without explanation cannot form the basis of any conviction. Once the final form is received by the court and if some persons have been indicted and sent up, there is no reason why the court should not
complete the commitment proceeding within a month or say two months time. Then the records are received by the sessions court and they have enough time to finish the trial within the specified period. If the prosecution cannot produce evidence by then and ensure an early disposal of the sessions trial then no person, even if he is truly guilty, can be allowed to languish in jail and be under the suspense of protracted trial whatever may be its effect on the right of the victim’s family. The responsibility lies squarely with the prosecuting agency, that is, the government, to provide the instruments for the early disposal of the indictment.”

He added, “An onerous duty is cast on the courts to control the proceeding by ensuring day to day trial of cases insisting on the appearance of the witnesses in sufficient quantity on a date instead of one a day at the capriciousness of the Public Prosecutor and refusing unjustified adjournments which appear to be sought merely to delay the process. The counsel appearing for the defense also must ensure that attempts to delay the process are resisted and they should not become privy to any fact or any step that will stagnate the trial. The counsel owe responsibility to their clients and parties but the courts and counsel together to the society at large.”

In Common Cause v. Union of India, a two-judge bench of the Supreme Court issued two sets of directions fixing time limits: one, regarding bail and the other, regarding quashing of trial. Depending on the quantum of imprisonment provided for several offences under the Indian Penal Code and the period of time which the accused spent in jail and the under-trial accused confined in jails were directed to be released on bail or on personal bond. The other set of directions directed the trial in pending cases to be terminated and the accused be discharged or acquitted depending upon the nature of the offence.
Again in *Raj Deo Sharma*, the three-judge bench issued five further directions purporting to be supplemental to the propositions laid down in *A.R. Antulay*. By dividing the offence into two categories - those punishable with imprisonment for a period not exceeding seven years and those punishable with imprisonment for a period exceeding seven years, the court laid down periods of limitation by reference to which either the prosecution evidence shall be closed or the accused shall be released on bail.

Therefore, if such time frame is not fixed, it will be negation of the right of speedy trial and it will give handle to the prosecution to delay the matter indefinitely acting in a nonchalant way adopting a lackadaisical attitude.

The law provides certain safeguards to the accused person in the form of bail and legal aid. Bail and legal aid are integral and inalienable parts of the right to speedy trial. As such the provisions with regard to bail and legal aid are discussed hereunder.

**RELEASE ON BAIL PENDING TRIAL**

The Bollywood Hero *Salman Khan* could secure bail within three days of his conviction, pending appeal, much against the sentiments of *Bishnois*, (a sect of people who were primarily responsible for getting the Hero convicted in deer hunt case) also he was on bail throughout the period of the trial. But, *Kanchi Sankaracharya* (a religious guru) *Jayendra Saraswathi*, whom most of the Hindus hold in highest respect and reverence, had to remain in prison while making unsuccessful efforts to secure bail pending trial in *Sankararaman's* murder case. The reasons for keeping a fragile old man in prison without granting bail are not known. Such things happen because of the wide discretion given to a Magistrate vide S.437 of the Code of Criminal Procedure, to order release of the accused on
bail in non-bailable offences. Regarding proper exercise of judicial discretion Justice Cardozo says:

“The Judge even when he is free, is still not wholly free. He is not to innovate at pleasure... He is to draw his inspiration from concrete principles. He is not to yield sporadic sentiments to vague and unregulated benevolence. He is to exercise his discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the primordial necessity or order in social life.”

Likewise, Lord Mansfield observes:

“Discretion when applied to a court of justice means, sound discretion guided by law. It must be governed by rules, not by humour; it must not be arbitrary, vague and fanciful, but legal and regular.”

In India the majority of persons brought before the court are so poor that they cannot furnish surety even in small amount and are compelled to stay in jail. One reason for this state of affairs is the irrational law regarding bail which insists on financial security from the accused and their sureties and thus the poor and indigent persons cannot be released on bail as they are unable to provide financial security and, consequently, they have to remain in prison awaiting their trial. Thus, even persons accused of bailable offences are unable to secure bail. The courts ignore the differential capacity of the rich and the poor and treat them equally in matters of bail. Thus, the law of bail creates a discrimination between haves and have-nots. While haves are able to secure their freedom furnishing surety, in a similar situation the have-nots are not able to furnish surety on account of their poverty and are put in disdain.
This is exactly what happened in Bihar, where, a large number of under-trial prisoners were found rotting in jails for years without their trial having commenced. The Supreme Court considered why were they not at bail, particularly those who were charged with offences which were bailable. The court observed that these under-trial prisoners were still in jail presumably because no application for bail had been made on their behalf either because they were not aware of their right to obtain release on bail or on account of their poverty they were unable to engage a lawyer to apply for bail and in quite a few cases, being too poor, they were unable to furnish bail.162

In the adversary system of criminal jurisprudence an accused person is presumed to be innocent till his guilt is proved.163 This presumption is clearly adopted even in socialistic and other European countries. Therefore, he is entitled for release on bail to give him an opportunity to look after his own case, unless the circumstances are such that he should not be released on bail.164 The delicate light of law favours release unless countered by negative criteria necessitating detention.165 It is well established that the object of detention, pending criminal proceedings, is not punishment but only custodial detention for facilitating investigation. So, the law favours grant of bail, which is the rule, and refusal the exception.166

But in fact the law of bail in India is in blurred semantics. Justice Krishna Iyer167 says, “we have to interdict judicial arbitrariness, deprivatory of liberty, and ensure fair procedures which have a creative connotation.”

The primary object of detaining a person being securing his attendance before the court, the consideration in granting bail to such person is to see that he attends the court without fail as and when required. Therefore, the court has to find
out whether there is a reasonable apprehension to believe that the accused is likely to abscond if he is released on bail. If the court is satisfied that there is no reason to believe that he will abscond, it should ordinarily grant bail.\textsuperscript{168} In this regard, Coleridge J., says:\textsuperscript{169}

"I conceive that the principle on which the persons are committed to prison by magistrate previous to trial, is for the purpose of ensuring certainty of their appearing to take trial. ... It is not a question as to guilt or innocence of the prisoner. It is on that account alone that it becomes important to see whether the offence is serious, whether the evidence is strong and whether the punishment for offence is heavy."

A ‘taste of prison’ prior to conviction is no doubt a violation of personal liberty, which is guaranteed as a fundamental right. The concept of bail has been derived from the right to be at liberty, an aspect of the freedom of the person.\textsuperscript{170} When bail is refused a man is deprived of his personal liberty which is protected by Articles 19 and 21 of the Indian Constitution.

Now, one reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pretrial detention is our highly unsatisfactory bail system. It suffers from property oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. Moreover, as if this were not sufficient deterrent to the poor the courts mechanically and as a matter of course insist that the accused should produce sureties who will stand bail for him and these sureties must again establish their solvency to be able to pay up the amount of the bail in case the accused fails to appear to answer the charge. This system of bails operates very harshly against the poor and it is only the non-poor who are
able to take advantage of it by getting themselves released on bail.\textsuperscript{171}

The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the courts is so un-realistically excessive that in a majority of cases the poor are unable to satisfy the police or the Magistrate about their solvency for the amount of the bail and where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties. The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial, leading to grave consequences, namely,

1. though presumed innocent, they are subjected to psychological and physical privations of jail life,

2. they are prevented from contributing to the preparation of their defense and

3. they lose their job, if they have one, and are deprived of an opportunity to work to support themselves and their family members with the result that the burden of their detention almost invariably falls heavily on the innocent members of the family.\textsuperscript{172}

The Legal Aid Committee appointed by the Government of Gujarat under the Chairmanship of Mr. Justice Bhagwati, emphasized this glaring inequality in the following words:

"The bail system, as we see it administered in the criminal courts today, is extremely unsatisfactory and needs drastic change. In the first place it is virtually
impossible to translate risk of non-appearance by the accused into precise monetary terms and even its basic premise that risk of financial loss is necessary to prevent the accused from fleeing is of doubtful validity. There are several considerations which deter an accused from running away from justice and risk of financial loss is only one of them and that too not a major one. The experience of enlightened Bail Projects in the United States such as Manhatten Bail Project and D.C. Bail Project shows that even without monetary bail it has been possible to secure the presence of the accused at the trial in quite a large number of cases. Moreover, the bail system causes discrimination against the poor since the poor would not be able to furnish bail on account of their poverty while the wealthier persons otherwise similarly situate would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail as fixed by the Magistrate is not high, for a large majority of those who are brought before the courts in criminal cases are so poor that they would find it difficult to furnish bail even in a small amount."

The Gujarat Committee also pointed out how the practice of fixing the amount of bail with reference to the nature of the charge without taking into account relevant factors, such as the individual financial circumstances of the accused and the probability of his fleeing before trial, is harsh and oppressive and discriminates against the poor:

"The discriminatory nature of the bail system becomes all the more acute by reason of the mechanical way in which it is customarily operated. It is no doubt true that theoretically the Magistrate has broad discretion in fixing the amount of bail but in practice it seems that the amount of bail depends almost always on the seriousness of the offence. Little weight is given either to the probability that the accused will attempt to flee before his trial or to his individual financial
circumstances, the very factors which seem most relevant if the purpose of bail is to assure the appearance of the accused at the trial. The result of ignoring these factors and fixing the amount of bail mechanically having regard only to the seriousness of the offence is to discriminate against the poor who are not in the same position as the rich as regards capacity to furnish bail. The courts by ignoring the differential capacity of the rich and the poor to furnish bail and treating them equally produce inequality between the rich and the poor.”

The same anguish was expressed by President Lyndon B. Johnsori at the time of signing the Bail Reforms Act, 1966:

“The principal purpose of bail is to ensure that an accused person will return for trial if he is released after arrest. How is that purpose met under the present system? The defendant with means can afford to pay bail. He can afford to buy his freedom. But poorer defendant cannot pay the price. He languishes in jail weeks, months and perhaps even years before trial.

He does not stay in jail because he is guilty.

He does not stay in jail because any sentence has been passed.

He does not stay in jail because he is any more likely to flee before trial.

He stays in jail for one reason only —

Because he is poor…”

This discrimination can be avoided by adopting the United States and British practice of releasing on bail.173

Article 9, clause (3) of the International Covenant on Civil and Political Rights provides that “persons awaiting trial should be released subject to
guarantees to appear for trial” in conformity with Article 28 of the Draft Principles on Equality in the Administration of Justice which lays down that “national laws concerning provisional release from custody pending or during trial shall be so framed as to eliminate any requirement of pecuniary guarantees” and Article 16, clause (2) of the Draft Principles of Freedom from Arbitrary Arrest and Detention which provides that “to ensure that no person shall be denied the possibility of obtaining provisional release on account of lack of means, other forms of provisional release than upon financial security shall be provided.”

These other forms of provisional release may include release into the custody of a responsible person or organization, release on promise not to leave a specified address or to reside in a specified area or to appear at regular intervals before a stated authority, release upon temporary surrender of identity papers or release upon an undertaking to appear before the authorities whenever legally summoned to do so.174

The 8th Amendment to the American Constitution provides among other things that “excessive bail shall not be required nor excessive fine imposed nor cruel and unusual punishment inflicted.” The American Bail Act of 1966 provides that the accused should ordinarily be released in order to appear on his own recognizance unless it is shown that there is substantial risk of non-appearance or there are circumstances, which justify imposition of condition on release.175

According to the International Commission of Jurists, a leading human rights organization there are four grounds on which an accused may be kept in jail and may not be released on bail:

(1) In case of very grave offence;
(2) If the accused is likely to interfere with witnesses or impede the course of justice;

(3) If the accused is likely to commit the same or any other offence;

(4) If the accused may fail to appear for trial.¹⁷⁶

Justice P.N. Bhagwati, observed in Hussainara Khatoon v. State of Bihar,¹⁷⁷ that "Risk of monetary loss is not the only deterrent against fleeing from justice, but there are also other factors which act as equal deterrents against fleeing. Ours is a socialist republic with social justice as the signature tune of our Constitution and Parliament would do well to consider whether it would not be more consonant with the ethos of our Constitution that instead of risk of financial loss, other relevant considerations such as family ties, roots in the community, job security, membership of stable organizations etc., should be the determinative factors in grant of bail and the accused should in appropriate cases be released on his personal bond without monetary obligation. If the court is satisfied, after taking into account, on the basis of information placed before it, that the accused has his roots in the community and is not likely to abscond it can safely release the accused on his personal bond."¹⁷₈

To determine whether the accused has his roots in the community, which would deter him from fleeing, the court should take into account the following factors concerning the accused:

1. The length of his residence in the community,
2. His employment status, history and his financial condition,
3. His family ties and relationships,
4. His reputation, character and monetary condition,
5. His prior criminal record including any record or prior release on
recognizance or on bail,

6. The identity of responsible members of the community who would
vouch for his reliability,

7. The nature of the offence charged and the apparent probability of
conviction and the likely sentence in so far as these factors are relevant
to the risk of non-appearance, and

8. Any other factors indicating the ties of the accused to the community
or bearing on the risk of willful failure to appear.\textsuperscript{179}

The learned Judge stated that "If the court is satisfied on a consideration of
the relevant factors that the accused has his ties in the community and there is no
substantial risk of non-appearance, the accused may, as far as possible, be released
on his personal bond. Of course, if facts are brought to the notice of the court
which go to show that having regard to the condition and background of the
accused his previous record and the nature and circumstances of the offence, there
may be a substantial risk of his non-appearance at the trial, as for example, where
the accused is a notorious bad character or a confirmed criminal or the offence is
serious (these examples are only by way of illustration), the court may not release
the accused on his personal bond and may insist on bail with sureties. But in the
majority of cases, considerations like family ties and relationship, roots in the
community, employment status etc., may prevail with the court in releasing the
accused on his personal bond and particularly in cases where the offence is not
grave and the accused is poor or belongs to a weaker section of the community,
release on personal bond could, as far as possible, be preferred. But even while
releasing the accused on personal bond it is necessary to caution the court that the
amount of the bond, which it fixes, should not be based merely on the nature of the
charge. The decision as regards the amount of the bond should be an
individualized decision depending on the individual financial circumstances of the

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accused and the probability of his absconding. The amount of the bond should be determined having regard to these relevant factors and should not be fixed mechanically according to a schedule keyed to the nature of the charge. Otherwise, it would be difficult for the accused to secure his release even by executing a personal bond."180

He continued, “Moreover, when the accused is released on his personal bond, it would be very harsh and oppressive if he is required to satisfy the court that he is solvent enough to pay the amount of the bond if he fails to appear at the trial and in consequence the bond is forfeited. The inquiry into the solvency of the accused can become a source of great harassment to him and often result in denial of bail and deprivation of liberty and should not, therefore, be insisted upon as a condition of acceptance of the personal bond."181

The Supreme Court observed, “We have no doubt that if the system of bail, even under existing law, is administered in the manner we have indicated in this judgment, it would go a long way towards relieving hardship of the poor and help them to secure pretrial release from incarceration."182

The likelihood of the accused tampering with the evidence against him is also an important factor, which is to be considered by the court in bail matters. But the court must see that the accused is not unnecessarily locked up and hampered in his defense simply because it is alleged that he will tamper with evidence.183

Next important consideration for grant of bail is the danger of the offence being continued or repeated. When the court is satisfied that the accused is likely to commit similar or other serious offences bail may be refused in such a case. Atkin, J., rightly observes:184
“Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail. But some are, and house breaking particularly is a crime which will very probably be repeated if a prisoner is released on bail especially in the case of a man who has a record of housebreaking.”

Justice Krishna Iyer has to say on this point: 185

“It is not only traditional but rational, in this context, to enquire into the antecedents of a man who is applying for bail to find whether he has a bad record — particularly a record which suggests that he is likely to commit serious offences while on bail. In regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on members of society. Bail discretion, on the basis of evidence about criminal record of defendant, is therefore, not an exercise in irrelevance.”

In G. Narasimhulu’s 186 case, the Supreme Court directed that the petitioner could be enlarged on bail on his own bond and to appear to receive sentence in the event of the adverse verdict from the court.

Justice Krishna Iyer, in Moti Ram’s 187 case, suggested that the laws should be amended to protect the indigent from being betrayed by law including bail law. He also recommended that the law of bail should be amended in the direction of releasing the accused on relevant considerations like family ties, roots in the community, membership of stable organizations, and these should prevail for bail bonds to ensure that the ‘bailee’ does not flee justice. The best guarantee of presence in court is the reach of the law, not the money tag.
Influenced by the liberal tendencies of the Apex Court in interpreting the law regarding grant of bail, A lady Munsif Magistrate at Miryalaguda, herself stood surety to an insane woman who was arrested on the charge of possessing liquor. There were nobody to furnish bail to the accused and the accused was sent to the mental asylum on being found insane and brought back to prison after some days. Since charge sheet was not filed within 90 days she remained in prison for a further period of one month. On finding that she was made the scapegoat by some other persons who were caught while manufacturing cheap liquor, the Magistrate herself stood surety to the insane woman and released her on bail.188

LEGAL AID TO THE INDIGENT ACCUSED

Equal justice for all is a cardinal principle on which our entire system of administration of justice is based. It is deeply rooted in the body and spirit of our jurisprudence. This ideal has always stirred the hearts of men over centuries.189

“Indigence should never be a ground for denying fair trial or equal justice...”190

This observation of Justice Krishna Iyer stressed an overwhelming need for providing free legal aid to a person who is too poor to afford a lawyer and who would, therefore, have to go through the trial of the case without legal assistance.191

The widespread insistence on free legal assistance, where liberty is in jeopardy, is obvious from the Universal Declaration of Human Rights.
Article 8 of the Declaration provides, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law."

Article 14 (3) of the International Covenant on Civil and Political Rights guarantees to everyone:

"the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice shall require, and without payment by him in any such case if he does not have sufficient means to pay for it."

However, in India prior to enactment of the Constitution, there was a provision under the Criminal Procedure Code, which embodied the right to counsel. The right to be defended by a pleader is conferred on a person accused of an offence before a criminal court or against whom proceedings are instituted under the Code of Criminal Procedure in any such court. But this provision was always understood to mean that an accused person was entitled to be represented by a pleader, if he had the means to retain one. The right conferred by it was never construed to mean a right to be provided with counsel by the State or by the Police or by the Magistrate when the accused was unable to afford a counsel.

When the Constitution was framed, this statutory right was clothed with Constitutional attire by the enactment of Article 22 (1).

The Law Commission in its Fourteenth Report, Volume I, on the subject, "Reform of Judicial Administration" made certain recommendations for State aid. One of these was that "representations by a lawyer should be made available at
Government expense to accused persons without means in all cases tried by a court of sessions."

Thereafter, in 1969 the Law Commission again strongly recommended that the right of the accused to representation at the cost of government should be placed on statutory footing in relation to trials for serious offences and as a first step in this direction, the Commission proposed that such a right should be available in all trials before the court of session.\(^{196}\)

Agreeing with the Commission, provision has been made in section 304 of the Code of Criminal Procedure, 1973 conferring on the accused the right to legal aid at the expense of the Government in cases triable by a court of session and empowering the State Government to extend this facility to other cases.

The Bar Council of India has also laid down rules under Section 49(1)(c) of the Advocates Act, 1961, for assisting any indigent person who approaches an Advocate in his individual capacity. Which are as under:

"Every Advocate shall in their practice of the profession of Law bear in mind that any one genuinely in need of lawyer is entitled to legal assistance even though he cannot pay for it fully or adequately and that within the limits of an Advocate’s economic condition, free Legal Assistance to the indigent and oppressed is one of the highest obligations an Advocate owes to society."\(^{197}\)

In 1976 a new Article 39-A was inserted\(^{198}\) in Part IV of the Constitution containing Directive Principles of State Policy. It provides that the State shall provide for free legal aid, by suitable legislation or schemes or in any other way. This provision was made to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities. The duty of the
court in relation to the directives came to be emphasized in the later decisions which reached its culmination in *Kesavananda Bharati v. Union of India* laying down certain broad propositions. One of these is that there is no disharmony between Directives and the Fundamental Rights because they supplement each other in aiming at the same goal of bringing about a social revolution and the establishment of a welfare state, which is envisaged in the Preamble.

The Parliament has enacted the Legal Services Authorities Act, 1987, which would constitute legal services authorities to provide free and competent legal services to the weaker sections of the society to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities, and to organize Lok Adalats to secure that the operation of the legal system promotes justice on a basis of equal opportunity. Under section 12 of the Act legal service is available to members of the Scheduled Castes and Scheduled Tribes, victims of trafficking in human being and beggary, women and children, the mentally ill and otherwise disabled persons, victims of mass disaster, ethnic violence, caste atrocity and natural calamities, industrial workmen, prisoners and inmates of destitute homes, mental hospitals and juvenile homes and all those whose income is below a limit prescribed. Filing of an affidavit by the applicant is sufficient proof of income under Section 13 of the Act provided that “the concerned authority has no reason to disbelieve and he is satisfied of the prima facie case to be prosecuted or defended.”

The Code of Criminal Procedure (Amendment) Bill, 1988 which was introduced in Lok Sabha on 13th May, 1988 contains a welcome provision in clause 46 by which section 436(1) is being amended to make a mandatory provision that if the arrested person is accused of a bailable offence and he is an indigent and cannot furnish surety, the court shall release him on his execution of
a personal bond without sureties. After the proposed amendment an indigent accused will get relief and he will not be behind bars only due to his poverty or indigence.

The Law Commission in its Forty Eighth Report also suggested for making provision for free legal assistance by the State for all accused who are undefended by a lawyer for want of means.

Delivery of legal aid to the poor did not improve even after the incorporation of statutory provisions in various Acts. The difficulties in securing access to justice for the poor continued to agitate public mind. As a result of which several committees and commissions were set-up from time to time to examine the best arrangements necessary at the State and Central level to provide legal aid to the poor, but even now it is inadequate to meet the needs of our society. Delivery of legal aid to the poor did not improve even after the incorporation of statutory provisions in various Acts.

Many high-level Indian Committees and Commissions have emphasized the free legal service desideratum as integral to processual fair-play for prisoners. For example, one such committee has stated:

"Prisoners, men and women, regardless of means, are a peculiarly handicapped class. The morbid cell which confines them walls them off from the world outside. Legal remedies, civil and criminal, are often beyond their physical and even financial reach unless legal aid is available within the prison as is provided in some States in India and in other countries. Without legal aid, petitions of appeal, applications for commutation or parole, bail motions and claims for administrative benefits would be well nigh impossible. There is a case for systematized and extensive assistance through legal aid lawyers to our prison population.”
In recent years, it has increasingly been realized that there cannot be any real equality in criminal cases unless the accused gets a fair trial of defending himself against the charge laid and unless he has competent professional assistance. Judicial justice, with procedural intricacies, legal submissions and critical examination of evidence, leans upon professional expertise, and a failure of equal justice under the law is on the cards where such supportive skill is absent for one side. Our judicature, moulded by Anglo-American models and our judicial process, engineered by kindred legal technology, compel the collaboration of lawyer-power for steering the wheels of equal justice under the law.

Free legal services to the needy is part of the English criminal justice system. And the American jurist, Prof. Vance of Yale, sounded sense for India too when he said:

“What does it profit a poor and ignorant man that he is equal to his strong antagonist before the law if there is no one to inform him what the law is? Or that the courts are open to him on the same terms as to all other persons when he has not the wherewithal to pay the admission fee?”

The philosophy of legal aid as an inalienable element of fair procedure is evident from Mr. Justice Brennan’s well-known words:

“Nothing rankles more in the human heart than a brooding sense of injustice. Illness we can put up with. But injustice makes us want to pull things down. When only the rich can enjoy the law, as a doubtful luxury, and the poor, who need it most, cannot have it because its expense puts it beyond their reach, the threat to the continued existence of free democracy is not imaginary but very real, because democracy's very life depends upon making the machinery of justice so effective that every citizen shall believe in and benefit by its impartiality and fairness.”
The U.S. Supreme Court, in Raymond Hamlin has extended this processual facet of poverty jurisprudence. Douglas, J., there explicated.\textsuperscript{210}

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate or those of feeble intellect."

Lee-man Abbot said years ago in relation to affluent America\textsuperscript{211}

"It ever a time shall come when in this city only the rich can enjoy law as a doubtful luxury, when, the poor who need it most cannot have it, when only a golden key will unlock the door to the courtroom, the seeds of revolution will be sown, the fire-brand of revolution will be lighted and put into the hands of men and they will almost be justified in the revolution which will follow."

Mr. Fiedl Castro had questioned:\textsuperscript{212} "When you try a defendant for robbery Honorable Judges, do you ask him how long he has been unemployed? Do you ask him how many children he has? Which days of the week he ate and which he did not? Do you investigate his social context at all? You just send him to jail without
further thought. But those who burn warehouses and stores to collect insurance, do not go to jail even though a few human beings may have gone up in flames. You imprison the poor wretch who steals because he is hungry, but none of the hundreds who steal millions from the Government has ever spent a night in jail."

Justice, then Judge, Blackmun said in *Jackson v. Bishop*:213

"Humane considerations and constitutional requirements are not, in this day, to be measured by dollar considerations..."

Black, J., observed in *Gideon v. Wainwright*:214

"...reason and reflection require us to recognize that in our adversary system of criminal justice, any person held into court, who is too poor to hire a lawyer cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both State and Federal quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That, Government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but is in ours. From the very beginning, our State and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to
face his accusers without a lawyer to assist him.”

The State cannot be permitted to deny the constitutional right of speedy trial to the accused on the ground that the State has no adequate financial resources to incur the necessary expenditure needed for improving the administrative and judicial apparatus with a view to ensuring speedy trial. The State may have its financial constraints and its priorities in expenditure, but, as pointed out by the court in Rhem v. Malclm: ‘The law does not permit any Government to deprive its citizens of constitutional rights on a plea of poverty.’

Is a procedure ‘reasonable, fair and just’ if it does not make available legal services to an accused person who is too poor to afford a lawyer and drives him to go through the trial without legal assistance? In Hussainara Khatoon v. State of Bihar it was held that legal service is an essential ingredient of reasonable, fair and just procedure to a prisoner who is seeking his liberation through the court’s process. The court observed,

“Article 39A of the Constitution, also emphasizes that free legal service is an inalienable element of ‘reasonable, fair and just’ procedure for without it a person suffering from economic or other disabilities would be deprived of the opportunity of securing justice. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of poverty, indigence or incommunicado situation and the state is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so required, provided of course that the accused person does not object to the provision of such lawyer.”

The court in Hussainara Khatoon v. State of Bihar observed, “unfortunately, in our country the poor are priced out of the judicial system with
the result that they are losing faith in the capacity of our legal system to bring about changes in their life conditions and to deliver justice to them. The poor in their contact with the legal system have always been on the wrong side of the line. They have always come across ‘law for the poor’ rather than ‘law of the poor.’ The law is regarded by them as something mysterious and forbidding – always taking something away from them and not as a positive and constructive social device for changing the social economic order and improving their life conditions by conferring rights and benefits on them. The result is that the legal system has lost its credibility for the weaker sections of the community. It is, therefore, necessary that we should inject equal justice into legality and that can be done only by dynamic and activist scheme of legal services.  

The activist approach in Maneka Gandhi v. Union of India,221 by enlarging the ambit of ‘personal liberty’ under Article 21 of the constitution is also notable. The judicial verdict in Maneka has a great impact in the field of human rights. The narrow traditional and mechanical interpretation given by the Supreme Court to the right to life and personal liberty in A. K.Gopalan222 was abandoned. Judicial activism through Maneka has made Article 21 a fundamental source of inexhaustible new rights and procedures for victims of governmental lawlessness. Right to free legal aid is one of those new rights. (Right of appeal, Right to live with human dignity, Right of privacy, Right to livelihood, Right to speedy trial, Right to shelter, etc., are other rights recognized under Article 21 by the Court)  

Read with Article 21, as expounded in Maneka, the Directive Principle in Article 39A has been taken cognizance of by the court in M. H. Hoskot v. The State of Maharashtra,223 State of Haryana v. Darshana Devi,224 and Hussainara Khatoon v. Home Secretary, State of Bihar225 and the right to free legal aid has been treated as an integral part of the fundamental right to life and personal liberty under Article 21.
In *M. H. Hoskot* Supreme Court had to decide the ambit of legal aid to the prisoners in the light of “fair procedure” in Article 21. Relying on Anglo-American criminal justice system the court held that legal aid is “an inalienable element of fair procedure” and “Article 39-A (Article 39-A casts duty on the State to provide free legal aid) the fundamental constitutional directive, is an imperative tool for Article 21.” Following the impact of *Maneka* it was held that court had, under Article 142 read with Article 21 and Article 39-A of the Constitution, the power to assign counsel for such imprisoned individual “for doing complete justice.” The construction of Article 21 was in such a manner as to hold the State responsible for free legal service to the prisoner by way of duty and not charity.

The court in *Khatri v. State of Bihar* went a step further and held that the constitutional obligation of the state to provide free legal services to an indigent accused extends not only at the stage of trial but also at the stage when he is first produced before the Magistrate. Observations of Justice Bhagawati are worth noting.

> “The Magistrate or the Sessions Judge before whom the accused appears, is under an obligation to inform the accused that if he is unable to engage the services of a lawyer on account of poverty or indigence, he is entitled to obtain free legal services at the cost of the state. Necessary directions to Magistrates, Sessions Judges and the State Government with guidelines given.”

In *Kadra Pahadiya and Others v. State of Bihar* the court wanted the State to provide a fairly competent lawyer.

*Sheela Barse v. State of Maharashtra* recognized the right to free legal aid as a fundamental right. The Supreme Court gave the directions to I.G. of Prisons in Maharashtra and State Board of Legal Aid and Advice for providing legal assistance to the poor and indigent accused.
In *Suk Das v. Union Territory of Arunachal Pradesh*, the Supreme Court held that a conviction of an accused given in a trial in which the accused was not provided Legal Aid would be set aside as being violative of Article 21 of the Constitution. The court said that “entitlement of free legal aid by an accused is not dependent on his making application for the same.” The judicial officer is obliged to inform the accused of his right to obtain free legal aid and a conviction reached without giving such information is vitiated. According to Chief Justice Bhagwati, since 50 percent of our people lived in poverty and 70 percent in ignorance, “legal aid would be an idle formality if it was to depend upon a specific application by such poor or ignorant person for such legal assistance.”

The decision has been taken as a warning to the government that unless it provides for a comprehensive legal aid programme, convictions in criminal cases might not be upheld. The decision gives further teeth to the right to legal aid.

The judiciary has attempted to fulfill its constitutional duty to provide socio-economic justice to the citizen of India by playing its activist role in the sphere of free legal aid. It may, however, be emphasized that to expect judiciary to provide a complete answer to the miseries of the teeming millions is an illusion. It is necessary that the two other organs of the State namely, the legislature and the executive must make it a common cause by joining hands with the judiciary on the principle of co-operation, mutual respect and goodwill. An interaction among an activist judiciary, a responsible legislature and an alert administration certainly clears the pitch for the establishment of a just and fair society based on social and economic justice.
Lastly it may be suggested that apart from co-operation by legislature and executive, participation by social workers, lawyers, law students, police authorities, Magistrates, Research Scholars, social action groups, District Legal Aid and Advice Boards etc. is a must for the proper implementation of judicial activism in the field of free legal aid. It is the duty of all concerned to join hands with-judiciary in the direction of the establishment of a just and fair society based on social and economic justice.\textsuperscript{235}
NOTES

1. For an evaluation of the provisions, see Marc I. Steinberg, "Right to Speedy Trial: The Constitutional right and its applicability to the Speedy Trial Act of 1974" 66 J. Crim. L. & C 229 (1975)


9. S. 3161 (h) as quoted by Bridges, Supra N.8

10. Ibid, also see, Julie Vennard, “Court Delays and Speedy Trial Provisions,” 1985 Crim L.R. 73

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13. 33 L.Ed. 2d 101 (1972)

14. Ibid at p. 118


17. (1964) AC 1254

18. (1977) AC 1

19. 147 CLR 75 (1990)


22. 63 ALJR 340 (1989)

23. Ibid
24. *Ibid*

25. Halsbury’s Statutes 2nd ed. V. 6, at p.89

26. *Ibid* V.5, at p.916


29. *Ibid* para 979


31. Prosecution of Offences Act S. 22 (11)

32. *Ibid* S. 22(1) and (2)


34. Prosecution of Offences Act 1985, s. 22 (4)

35. Prosecution of Offences (Custody Time Limits) Regulations, 1987

36. Prosecution of Offences Act 1985, s. 22 (3)

37. *Ibid* S. 22 (5) and (6)

38. *Ibid* S. 22 (7), (8), (9) and (10)

39. (1985) 2 ALL ER 585

41. 63 ALJR 340 (1989)

42. 33 L.Ed.2d. 101 (1972)


44. Ibid at p.403


46. Ibid

47. Ibid para 27 at p.335

48. 1985 Cri LJ 584 (Pat.)


50. Ibid

51. AIR 1986 SC 1773

52. Ibid para 12 at p.1778

53. Suryanarayana Singh and others v. State of Bihar AIR 1987 Pat.219 para 20 at p.228

54. 1970-26 Law ed 2d 26

55. Ibid

56. (1964) 378 US 478, 490; 12 Law Ed 2d 977,986; 84 SCT 1758

58. Ibid

59. (1957) 352 US 354

60. (1964) 119 US App DC 83: 337 F. 2d 119

61. See e.g., King v. United States (1959) 105 US App DC 193,195,265 F 2d 567,569


63. Suryanarayana Singh and others v. State of Bihar AIR 1987 Pat.219 para 21 at p.229

64. Ibid para 8 at p.223

65. (1972) 407 US 514


68. AIR 1978 SC 1675: 1978 Cri LJ 1741
69. Suryanarayana Singh and others v. State of Bihar AIR 1987 Pat. 219 para 11 at p. 225

70. 1985 Cri LJ 584 (Pat.)

71. State of Bihar v. Maksudan Singh AIR 1986 Pat. 38

72. State of Bihar v. Ramdas Ahir 1985 Cri LJ 584 (Pat.)

73. State of Bihar v. Maksudan Singh AIR 1986 Pat. 38

74. Madheswardhari Singh v. State of Bihar AIR 1986 Pat. 324

75. AIR 1987 Pat. 219

76. Ibid para 25 at p. 231

77. (1985) 2 ALL ER 585


79. (1970) 398 US 30, 26 Law Ed 2d 26, 90 SCT 1564

80. (1973) 37 Law Ed 2d 56

81. AIR 1986 Pat. 324 para 20 at p. 332

82. Ibid para 22 at p. 333

83. 1969-21 Law ed 2d 607

84. 1967-18 Law ed 2d 1

85. 1970-26 Law ed 2d 26

86. Madheswardhari Singh v. State AIR 1986 Pat. 324 para 22 at p. 333
87. Ibid para 20 at p.332
88. Ibid para 21 at p.332
89. AIR 1979 SC 1360 and 1369
90. Supra N.89
91. AIR 1981 SC 641
92. AIR 1986 SC 289
93. Madheswardhari Singh v. State AIR 1986 Pat.324 para 21 at p.332
94. 1985 Cri LJ 584 (Pat.)
95. AIR 1986 Pat.38
96. Supra N.95
97. Ibid para 39 at p.52
100. 1985 Cri LJ 584
101. AIR 1986 Pat. 38
102. AIR 1986 Pat. 324
103. AIR 1983 SC 361
104. AIR 1978 SC 1675 : 1978 Cri LJ 1741
105. AIR 1983 SC 361: 1983 Cri LJ 481
106. *Ibid* para 20 at p.366

107. AIR 1983 SC 1086 : 1983 Cri LJ 1644


109. *Ibid* para 12 at p.281-82

110. AIR 1983 SC 1086

111. AIR 1986 Pat .38

112. *Ibid* para 20 (a) at p.47


114. *Ibid* para 13 at p.282

115. *Ibid* para 15 at p.283

116. 1977 Cri LJ 1424

117. *Ibid*

118. AIR 1977 SC 2147: (1977) Cri LJ 1746

119. *Ibid*

120. AIR 1981 SC 939

121. *Ibid* para 2 at p.940

122. 1942 AC 206

123. AIR 1987 Pat. 274 para 27 at p.288

124. *Ibid* para 29 at p.289
125. *Ibid* para 30 at p.289


127. *Ibid*

128. AIR 1955 SC 792

129. AIR 1981 SC 641

130. AIR 1979 SC 1360

131. *Ibid* para 5 at p.1365

132. 1985 CriLJ 584

133. AIR 1986 Pat. 38

134. *Supra N.132*

135. *Supra N.133*

136. *Ibid* para 20 (b) at p.47

137. AIR 1986 Pat.324

138. *Supra N.137*

139. *Ibid* para 52 at p.343

140. *Ibid* para 50 at p.341-42

141. 1985 Cri LJ 584 (Pat)

142. AIR 1986 Pat. 38

143. AIR 1986 SC 289
144. Ibid at p.290

145. Ibid

146. AIR 1986 SC 289

147. Madheswardhari Singh v. State AIR 1986 Pat.324 para 49 at p.341

148. AIR 1986 SC 1773:1986 Cri.LJ 1736

149. AIR 1987 SC 219

150. Ibid at p.225

151. Ibid para 44 at p.238

152. Ibid

153. Ibid

154. AIR 1996 SC 1619:1996 Cri.LJ 2380

155. AIR 1998 SC 3281: 1998 Cri.LJ 4596

156. AIR 1992 SC 1701


158. The Nature of Judicial Process, Yale University Press (1921), at p.141


164. Nagendranath v. Emperor AIR 1924 Cal. 476


172. Ibid


175. Quoted by Bharat Bhushan Das – Bail: Judicial Discretion, Cochin University Law Review 1985 p.350 at p.359


177. AIR 1979 SC 1360 para 4 at p.1363

178. Ibid

179. Ibid at p.1364

180. Ibid

181. Ibid

182. Ibid


186. Supra N.185


189. Dr. R. K. Singh, Legal Aid In India – Still In Its Infancy, AIR 1994 Jour.49


192. S.340 of the Code of Criminal Procedure, 1898


194. As per *Janardhan Reddy v. State of Hyderabad*, AIR 1951 SC 217 and *Tara Singh v. State*, AIR 1951 SC 441. These two decisions were involved in a question of interpretation of S.340 of the Cr.P.C., 1898 which were open to criticism, and correctness of their reasoning has been assailed in numerous articles which have appeared in Law Journals. See also 14th Law Commission of India Report.

195. Article 22 (1) no person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice.

196. 41st Law Commission Report, 1969, 202

197. See Rule 46 of Section VI under Section 49(1)(c) of the Bar Council of India Act

198. The Constitution (42nd Amendment) Act, 1976

199. AIR 1973 SC 1461
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<th>No.</th>
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<tr>
<td>200.</td>
<td>Act No. 39 of 1987</td>
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<td>201.</td>
<td>Bill No. 56 of 1988</td>
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<td>202.</td>
<td>Dr. R. K. Singh, Legal Aid In India – Still In Its Infancy, AIR 1994 Jour.49 at p.50</td>
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<td>203.</td>
<td>In 1971 a committee for Legal Aid to the poor was appointed by the State of Gujarat vide No.LAC-1070 dated 22.6.1970; in 1975 a committee headed by Mr. Justice V.R. Krishna Iyer submitted its report on procedural Justice to people to the Government of India; in the same year a Committee headed by Justice P. Ramakrishnan submitted its report to the State Government of Tamil Nadu; in 1978 Justice P. N. Bhagwati submitted another report on Equal Justice, Social Justice to the Government of India.</td>
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<td>204.</td>
<td>Dr. R. K. Singh, Legal Aid In India – Still In Its Infancy, AIR 1994 Jour.49 at p.50</td>
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<td>205.</td>
<td>Processual Justice to the People, May, 1973, at p. 34</td>
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<td>206.</td>
<td>Archana Sharma, S.K. Sharma and Katif Nadim, Right to Free Legal Aid And Judicial Activism, CULR, 1989, p.75 at p.76</td>
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<td>208.</td>
<td>Justice and Reform, Earl Johnson, Jr, at p.11</td>
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<td>209.</td>
<td>Legal Aid and Legal Education at p. 94</td>
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<td>210.</td>
<td>United States Supreme Court Reports, Vol. 32, at p.530</td>
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211. Quoted by Justice P. N. Bhagwati in *Hussainara Khatoon v. State of Bihar* AIR 1979 SC 1369 at p.1376

212. Quoted by Justice V.H. Bhairavia in International Conference on 'Interpreting South African Bill of Rights' at Potchefstroom University, South Africa on 10.4.1992 AIR 1992 Jour.148

213. 404 F Supp 2d 571


216. 377 F Supp 995

217. AIR 1979 SC 1377

218. *Ibid* at p.1380-81

219. AIR 1979 SC 1369

220. *Ibid* at p.1375-76

221. AIR 1978 SC 597


223. AIR 1978 SC 1548

224. AIR 1979 SC 855

225. AIR 1979 SC 1369

226. AIR 1978 SC 1548

227. AIR 1978 SC 597
228. AIR 1981 SC 928 also see Suk Das v. Union Territory of Arunachal Pradesh AIR 1986 SC 991

229. Ibid at p. 931

230. AIR 1981 SC 939

231. (1983) 2 SCC 96

232. AIR 1986 SC 991

233. Ibid


235. Archana Sharma, S.K. Sharma and Katif Nadim, Right to Free Legal Aid And Judicial Activism, CULR, 1989, p.75 at p.82