

V.2 UNDER THE HIGHER COURTS' JUDGEMNT

As stated in the introductory chapter that in India the judiciary has been playing a significant role towards protecting the human rights of the people living in the country and citizen in particular. It is due to the active and supervisory role of the judiciary the basic rights of the people are protected till date. The Hon'ble Supreme Court of India and the Hon'ble High Courts by their reasoned judgments have evolved a new dimension in the Indian judiciary. By way of liberal and harmonious interpretation and construction of the constitutional provision many rights which were not directly designated as fundamental right has been recognition as fundamental rights. The rights which have been evolved or propounded by the Hon'ble Supreme Court of India and other High Courts and which relates to the subject matter of this research are narrated below.

1. RIGHT TO SPEEDY TRIAL

In the Constitution of India right to speedy trial has not been expressly guaranteed as a fundamental right. But, by following the liberal interpretation of the constitution, it is now established that it is implicit in Article 21. In *Hussainara Khatoon v. Home Secretary*,

State of Bihar,¹ Bhagwati J.² delivering the judgment for himself and Khoshal J. in a bench comprising three Judges observed that after the dynamic interpretation placed by the Special Bench of the Supreme Court on Article 21 in *Maneka Gandhi v. Union of India*³ that a procedure which keeps large numbers of people behind the bars without trials so long cannot possibly be regarded as reasonable, just or fair so as to be in conformity with the requirements of Article 21. No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair and just. Therefore, it has been held that there can be no doubt that speedy trial, is an integral and essential part of the fundamental right to life and liberty enshrined in article 21.

In another case namely *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*,⁴ His Lordship Hon'ble Mr. Justice P.N. Bhagwati, once again emphasized that the state cannot avoid its obligation to provide speedy trial to the accused by pleading financial or administrative inability. The state is under constitutional mandate to ensure speedy trial and whatever is necessary for this has to be done by the state. It is also the constitutional obligation of the Supreme court, as the guardian of the fundamental rights of the people, as sentinel on the *qui vive* to

enforce the fundamental right of the accused to speedy trial by issuing the necessary direction to the state which may include positive action, such as augmenting and strengthening the investigative machinery, setting up new court, building new court houses, providing of additional judges and other measures calculated to ensure speedy trial.

It is reiterated that right to life is sacrosanct. It cannot be detained within the four walls of jail or court room. There are instances that for furnishing copies as required under section 207 Cr. P.C. the accused person is remanded to judicial custody for a period of 14 days. Nowadays, in all courts Photostat machines have been provided for copy branch. It can be done within a period of one hour. But for the fault of the ministerial staff and overlooking by the presiding officer, the copies are not furnished promptly. Therefore, the courts of law must be sensitive while remanding the accused in jail. Otherwise, the right to speedy trial would be vitiated.

2. RIGHT TO HAVE LEGAL ASSISTANCE

The right to provide legal assistance or legal aid was also recognized as implicit in Article 21 of the constitution of India. *In M.H.Hoskot v. State of Maharashtra*⁵ delivering the judgement

Krishna Iyer⁶, J. observed that Article 39-A which provides for equal justice and free legal aid is an interpretative tool of Article 21. Partial statutory implementation of the mandate is found in Section 304 of the Cr.P.C. and in other situations courts cannot be inert in the face of Articles 21 and 39- A. The legal position beyond doubt is that where prisoner is disabled from engaging a lawyer, on reasonable grounds such as indigence or incommunicado situation, the court shall, if the circumstances of the case, gravity of the sentence and the ends of justice so requires, assign competent counsel for the petitioner's defence, provided that the party does not object to that lawyer. The state which prosecuted the prisoner and set in motion the process which deprived him of his liberty shall pay to the assigned counsel such sum as the court may equitably fix. These beings prescriptions operate by force of Article-21 (strengthened by Article 19 (1) (d) from the lowest to the highest court where deprivations of life and personal liberty is in substantial peril.

In *Hussainara Khatoon (IV) V. Home Secretary, State of Bihar*,(supra) Bhagwati, J. emphatically observed that free legal service is an unalienable element of 'reasonable, fair and just' procedure because without it a person's suffering from economic or

other disabilities would be deprived of the opportunities for suffering from economic or other disabilities would be deprived of the opportunities for securing justice. The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Article 21.

Justice Bhagwati, also recommended to the Government of India and the State Governments to introduce in the Country a comprehensive legal service programme. He emphasized that this is not only a mandate of equal justice implicit in Article 14, and the right to life and liberty guaranteed in Article 21, but also the compulsion of the constitutional directive embodied in Article 39-A. Thus while in Hoskot's case right to legal aid as implicit in Article 21 was recognized for prisoners or in prison situations, in Hussainara Khatoon (iv)'s case right to legal aid as implicit in Article 21 in general was recognized for persons accused of an offence. Thus the scope of right to legal aid was broadened in the latter case.

Another important notable point here is as to whether it is necessary for the accused to ask for legal aid from the court. This question was answered by Bhagwati, J. in Khattri (II) v. State of

Bihar⁷. Answering the question, Bhagwati, J. observed that since 70 per cent of the people in rural area are still illiterate and even more than that percentage of people are not aware of the rights conferred on them by law, it would make a mockery of the legal aid if it were left in a poor, ignorant and illiterate accused to ask for free legal services. Legal aid would then become a paper promise and it would fail of its purpose. The Magistrate or the Sessions Judge before whom the accused appears must be held to be under legal 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.

The next pertinent question in this connection is if in a case the accused is not informed of this right and is convicted, whether the trial would be held to be vitiated and would be liable to be set aside. This question arose for consideration in *Sukh Das v. Union of India*⁸. In this case, the Additional Deputy Commissioner did not inform the appellants that they were entitled to free legal assistance and did not enquire from them whether they wanted a lawyer to be provided to them at State costs. Chief Justice Bhagwati, who delivered the judgment held that this was clearly a violation of the fundamental right of the appellants under Article 21 and the trial

must accordingly be held to be vitiated on accounts of a fatal constitutional infirmity and the conviction and sentence recorded against the appellants must be set aside. Reaffirming the rule laid down in M.H. Hoskot's case Bhagwati, C.J., added that it may now be taken as settled law that free legal assistance at State cost is a fundamental right of a person accused of an offence which may involve jeopardy to his life or personal liberty and this fundamental right is implicit in the requirement 'reasonable, fair and just' procedure prescribed by Article 21.

In *State of Maharashtra v. Manubhal Pragji Vashi*⁹, the Supreme Court recommended that with a view to enable the State and other authorities to provide free legal aid and to ensure that opportunities for securing justice are not denied to any citizen on account of any disability the State should render grant in aid to private law colleges. The Apex Court further observed that Article 21 read with Article 39-A of the Constitution mandates or casts a duty on the State to afford grant in aid to recognized private law colleges. This duty cast on the State to afford grant in aid to recognized private law colleges. This duty cast on the State cannot be whittled down in any manner, either by pleading paucity of funds or otherwise.

3. RIGHT NOT TO BE SUBJECTED TO TORTURE OR TO CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

This right finds mention in Article 7 of the international Covenant on Civil and Political Rights, 1966 directly but has not been expressly enumerated in Part-III of the Indian Constitution. However, The Hon'ble Supreme Court of India through its judicial activism in protecting the fundamental right pertaining to life and liberty transformed that right in reality to our legal system and guaranteed the same to the people living in this country. In the case of *Kishore Singh v. State of Rajasthan*¹⁰ the apex court held that use of third degree method by police is violative of Article 21 of the constitution of India.

No person takes birth as criminal. They become criminal or tend to criminality for several reasons such as poverty, lack of parental guiding, compelling circumstances, environment in which he lives, immaturity, political conflicts etc.. Some persons may even be dragged to law on false accusations. Therefore, merely on receipt of an allegation against a person if his basic human dignity are curtailed by the police authorities by way of their ill behaviour, physical or mental torture, use of handcuffing etc. will definitely

amount to degrading treatment to them. Therefore, if the courts of law are prone to human rights then definitely, on production of an accused before the court, the court will enquire about the violation of human rights, if any. On such enquiry by the court the police or other investigating authorities would by and large be alert on the continuing and contemplated violation of human rights.

4. RIGHT AGAINST SOLITARY CONFINEMENT

In *Sunil Batra v. Delhi Administration*¹¹ the Hon'ble Supreme Court of India observed that solitary confinement has a degrading and dehumanizing effect on prisoners. Constant and unrelieved isolation of a prisoner is so unnatural that it may be bred insanity. Special isolation of a prisoner represents the most destructual abnormal environment. Results of long solitary confinement are disastrous to the physical and mental health of those subjected to it.

In that case the Full Bench of the Supreme Court was interpreting Section 30 of the Prisoners Act, 1894. Section 30 (2) of the Act provides that every prisoner under sentence of death shall be confined to a cell apart from all other prisoners and shall be placed by day and night under the charge of a guard. In the instant

case Sunil Batra since the date of his conviction was being kept in solitary confinement. Considering the miserable condition that was suffered by the convict, it has been held that if Section 30 (2) enables the prison authority to impose solitary confinement on a prisoner under sentence of death not as a consequence of violation of prison discipline but on the sole ground that a prisoner is under sentence of death, then it would offend Article 20 in the first place and also Articles 14 and 19 vis a vis Article 21 of the constitution.

5. RIGHT AGAINST HANDCUFFING

In the case of *Prem Shankar v. Delhi Administration*¹² the Hon'ble Supreme Court of India held that hand-cuffing is prima facie, unreasonable, ever harsh and at first flush an arbitrary. Absence of fair procedure and objectives monitoring to infliction, is to resort to zoological strategies repugnant to Article 21 of the constitution. It has been held that unless exceptional circumstances exist, resort to handcuff shall not be made. It has been held that even in extreme cases handcuffing is to be put on prisoner, the escorting authority must record simultaneously the reasons for doing so otherwise under Article 21 the procedure would be unfair and bad in law.

As stated above, a person may be accused of an offence *malafide*. Mere lodging an accusation itself violates the dignity of the person accused off. That apart if immediately on receipt of such accusations, he is subjected to handcuffing this would further degrade his status, position, reputation and quality in the society. Therefore, use of handcuff should not be resorted as a general rule. However, if at all the same is required to be effected, then it must be made on genuine ground and to that effect an endorsement must be made. Herein, the role of the subordinate courts come into play in as much as the accused are produced not before any High Court, rather, before the subordinate courts.

6. RIGHT AGAINST DELAYED EXECUTION

In the case of *T.V. Vatheeswaran v. state of Tamilnadu*¹³ the Hon'ble Supreme Court of India held that if execution of sentence of death is delayed for two years or more and the prisoner is subjected to living death, the prisoner under sentence of death is entitled to invoke the jurisdiction of the Supreme Court and demand the quashing of death sentence.

However, in *Triveniben v. State of Gujrat*¹⁴ the apex court has expressly overruled the above judgment and held that the question of inordinate delay may be considered in the light of all the

circumstances of the case to decide whether the execution of death should be carried or should be converted into the imprisonment for life. Moreover, the time taken in disposing of the mercy petition has also to be taken into account. Thus, although a person can be detained in the jail for his execution till death, yet, before such execution he must be provided with the basic human rights which he possesses. He should not be treated as a wild animal.

7. RIGHT TO COMPENSATION FOR UNLAWFUL ARREST AND DETENTION

This right is not recognized statutorily in the constitution. However, this right has also been recognized as a fundamental and basic human right by the judicial interpretation of the Hon'ble Supreme Court of India. In *Rudul Shah v. State of Bihar*¹⁵, the petitioner Rudul Shah was detained in the jail for a period of 14 years after the acquittal in a full dressed trial. He filed a writ of *habeas corpus*, hearing which, the Hon'ble Supreme Court of India held that his detention was wholly unjustified. Thereafter, he claimed for compensation for his unlawful detention. The apex court held that the state must repair the damage done by its officers to the petitioner's right. The same principle was also followed in the case of *Sebastian M. Hongray v. Union of India*¹⁶.

What transpires from the above proposition is that the courts of law under whose orders people are detained in custody should not be detained unnecessarily. It is the duty of the court to see that the accused persons are not remanded to custody without justified reason and without the authority of law. And when any unlawful detention is reported, the court is required to strive for providing adequate compensation from the fund of the state.

8. RIGHT TO HAVE TRIAL IN CAMERA

Section 327 of the Code of Criminal Procedure provides for holding trial in camera when the offence relates to rape. The section did not provide the guidelines in detail. But, the Hon'ble apex court through its liberal interpretation gave the required guidelines in such case. In the case of *Sakshi V. Union of India and others*¹⁷ the Hon'ble Supreme Court while disposing the writ petition made the following directions :-

- 1) The provisions of Sub Section (2) of Sec. 327 Cr.P.C. shall, in addition to the offences mentioned in the subsection, would also apply in enquiry or trial of offences under sections 354¹⁸ and 377¹⁹ I.P.C.
- 2) In holding trial of child Sex abuse or rape :-

- (i) A screen, or some such arrangement may be made where the victim or witnesses (who may be equally vulnerable like the victim) do not see the body or the face of the accused;
- ii) The question put in cross-examination on behalf of the accused, in so far as, they relate directly to the incident should be given in writing to the Presiding Officer of the Court who may put them to the victim or the witness in a language which is clear and not embarrassing;
- iii) The victim of child abuse or rape, while giving testimony in Court should be allowed sufficient breaks as and when required.

The above guidelines are meant not only for the investigating agencies but also for the trial courts. Thus, if the trial courts before whom the victims of rape, molestation and similar offences are produced, remain sensitive enough and know the directions aforesaid, then definitely, the human rights including right to privacy of the victims would be protected.

9. RIGHT OF PREGNANT WOMEN AND CHILDREN STAYING WITH THEIR MOTHER DETAINED IN JAIL

There are occasions where women either as under trial prisoner or as a convict are detained in jail. Simultaneously, the

breast sucking babies are also required to be sent to jail with their mothers. Definitely the child did not commit any offence but for the compelling circumstances, he has been made to stay in prison. Such act created a menace in prison system in our country. The Hon'ble Supreme Court of India took the matter under consideration. In the case of *R.D. Upadhyay v. State of Andhra Pradesh*²⁰, the apex court, amongst others, gave the following direction.

1. A child shall not be treated as an under-trial/convict while in jail with his/her mother. Such a child is entitled to food, shelter, medical care, clothing, education and recreational facilities as a matter of right.
2. When a woman prisoner is found or suspected to be pregnant at the time of her admission or at any time thereafter, the lady Medical Officer shall report the fact to the Superintendent. As soon as possible, arrangement shall be made to get such prisoner medically examined at the female wing of the District Government Hospital for ascertaining the state of her health, pregnancy, duration of pregnancy, probable date of delivery and so on. After ascertaining the necessary particulars, a report shall be sent to the Inspector General of Prisons, stating the date of admission, term of sentence, date of release, duration of pregnancy, possible date of delivery and so on.

3. As far as possible and provided she has a suitable option, arrangements for temporary release/parole (or suspended sentence in case of minor and casual offender) should be made to enable an expectant prisoner to have her delivery outside the prison. Only exceptional cases constituting high security risk or cases of equivalent grave descriptions can be denied this facility.

4. Births in prison, when they occur, shall be registered in the local birth registration office. But the fact that the child has been born in the prison shall not be recorded in the certificate of birth that is issued. Only the address of the locality shall be mentioned.

5. Female prisoners shall be allowed to keep their children with them in jail till they attain the age of six years.

6. Children in jail shall be provided with adequate clothing suiting the local climatic requirement for which the State/UT Government shall lay down the scales.

7. The children of female prisoners living in the jails shall be given proper education and recreational opportunities and while their mothers are at work in jail, the children shall be kept in crèches under the charge of a matron/female warder. This facility will also be extended to children of warders and other female prison staff.

8. It is noted that since an average Indian mother produces approximately 600-800 ml milk per day (depending on her own nutritional state), the child should be provided at least 600 ml of undiluted fresh milk over 24 hours if the breast

milk is not available. It recommends the following portions for children in the ages of 6-12 months, 1-3 years and 4-6 years, respectively: cereals and millets—45, 60-120 and 150-210 gm respectively; pulses—15, 30 and 45 gm respectively; milk—500 ml (unless breastfed, in which case 200 ml); roots and tubers—50, 50 and 100 gm respectively; green leafy vegetables—25, 50 and 50 gm respectively; other vegetables—25, 50 and 50 gm respectively; fruits—100 gm; sugar—25, 25 and 30 gm respectively; and fats/oils (visible)—10, 20 and 25 gm respectively. One portion of pulses may be exchanged with one portion (50 gm) of egg/meat/chicken/fish. It is essential that the above food groups be provided in the portions mentioned in order to ensure that both macronutrients and micronutrients are available to the child in adequate quantities.

As per the Notification of the Hon'ble Gauhati High Court the District and Sessions Judges, Chief Judicial Magistrates and the Sub-Divisional Judicial Magistrates in *mufassal* areas are required to visit the jail once in a month and to submit their reports. Their visit to the jail or other detention homes have changed the scenario of the prison system in the state of Assam. The situation has been changed to a great extent. The living condition, supply of the essential commodities, surroundings, behaviour of the attending staffs etc. have been improved much then earlier. However, during filed verification, it is reported that such authorities use to visit

normally in the last part of the month. If the judicial officers use to visit the jails or other detention homes in such a way that one officer would visit in the first week, the other in the second week, the next in the third week and the other in the last week of the month, then there would be more vigilance on the prison system, and resultantly, human rights of the prison inmates and children with mother would be protected more and more.

R E F E R E N C E

1. AIR 1979 SC 1360.
2. Prafullachandra Natwarlal Bhagwati (born December 21, 1921) was the 17th Chief Justice of India, serving from 12 July 1985 until his retirement on 20 December 1986. He was awarded the Padma Vibhushan, India's second highest civilian award, in 2007.
3. AIR 1978 SC 597.
4. (1980) 1 SCC 98.
5. (1978) 3 SCC 544.
6. Vaidyanathapura Rama Krishna Iyer (born November 1, 1915), popularly known as Justice V. R. Krishna Iyer, is a former judge in the Supreme Court of India. He was born at Vaidyanathapuram near Palakkad, in Malabar region of Kerala in a Tamil Brahmin family, but grew at Koyilandi, also in the erstwhile Malabar district. In 1952, he was elected to the Kerala Legislative Assembly; in 1957, he became a minister in the first Communist government in Kerala, serving until 1959. Having been the minister of law, power, prisons, irrigation and social welfare in the Government of Kerala, he was instrumental in bringing about many significant changes in these sectors. In 1973, he was sworn in as a Judge of the Supreme Court of India; as of 2011, he is the last Supreme Court judge to have previously served as a politician. He was conferred with Padma Vibhushan in the year 1999. He is one of the oldest judges in India.
7. AIR 1981 SC 625.
8. (1978) 4 SCC 494.
9. (1995) 5 SCC 730.
10. AIR 1981 SC 643 .
11. AIR 1980 SC 1535.
12. AIR 1980 SC 1535.
13. AIR 1981 SC 643.
14. AIR 1989 SC 2299.
15. (1983) 4 SCC 141.
16. AIR 1984 SC 1026.
17. (1984) 1 SCC 339..
18. Section 354 of the Indian Penal Code provides that whoever assaults or uses criminal force to any woman intending to outrage or knowing it would likely that he will thereby outrage her modesty shall be punished with imprisonment of either description for a term which may extend to five years or with fine or both.

19. Section 377 of the Indian Penal Code provides that whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.
20. (2004) 5 SCC 518.
21. (2007) 15 SCC 337.
