CHAPTER 6

Undertrial Prisoners
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UNDERTRIAL PRISONERS

One of the most neglected aspects of criminal justice system is the delay caused in the disposal of cases and detention of the accused pending trial. These undertrial prisoners are detenus put in prison mainly under non-bailable offences and persons who are unable to produce sufficient sureties in cases of bailable offences. It is the result of an arrest for an alleged offence not followed by grant of bail. Sometimes they are denied justice for long stretch of time.¹ They are separated from their family for the best part of their life eventhough they may be innocent. In different Indian prisons they are found in a sizeable number. In certain cases they have to live in prison for a longer period than the period of imprisonment which would be awarded to them if they were found guilty.²

¹ In India, the violation of the basic human rights of the suspect or the accused is most prevalent at the undertrial stage. See Manjula Batra, Protection of Human Rights in Criminal Justice Administration (1989), p.90. The 78th Report of the Law Commission (1979) says that on January 1, 1975 out of 220146 prisoners, 126772 (57.6 percent) were undertrials.
The law enforcement authorities are doing these without any legal authority because prisons are primarily meant for lodging convicts and not for housing persons under trial. The evils of contamination in jail are well-known.

There are various problems for the undertrial detention. The problem is not confined to India alone. It has been reported even from countries like USA and England. In certain countries, the feeling has been growing that the decision of the court on the merits may sometimes itself depend on the detention or release of the accused pending trial. The problem of persons in prison has received attention at length even in United Nations.

Article 21 - The Harbinger of Undertrial Prisoners

Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty


except according to the procedure established by law. If a person is deprived of his liberty under a procedure which is not reasonable, fair or just such deprivation would be violative of his fundamental right. He can enforce such fundamental right and secure his release. An undertrial prisoner can effectively invoke this article against the authorities who unnecessarily detains him in prison.\(^5\)

Speedy trial is not specifically enumerated as a fundamental right. But the broad interpretation given to Article 21 in Maneka Gandhi v. Union of India\(^6\) include it as

5. The Supreme Court of India in Madhav Hatawaimarao v. State of Maharashtra, A.I.R. 1978 S.C. 1548 had declared that where the prisoner is disabled from engaging a pleader on reasonable grounds the court shall assign the service of a competent counsel for the prisoner's defence and the State shall bear the expenses for the same.

6. (1978) 1 S.C.C. 248; A.I.R. 1978 S.C. 597. Bhagwathi, J. held that Article 21, though couched in negative language, confers the fundamental right to life and liberty. It does not exclude Article 19. Even if there is a law prescribing procedure for depriving a person of personal liberty and there is consequently no infringement of the fundamental right conferred by Article 21, such law in so far as it abridges or takes away any fundamental rights under Article 21 would have to meet the challenge of Article 21. Such law would also be liable to be treated with reference to Article 14. The expression personal liberty in Article 21 is of the widest amplitude and covers a variety of rights which go to constitute the personal liberty of men and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19(1). Thus articles 19(1) and 21 are not mutually exclusive. Id., p.
also within the purview of Article 21. So a procedure which does not ensure a reasonably quick trial cannot be regarded as reasonable, fair and just and it falls within the ambit and scope of Article 21.

Reasons for Unlawful Detention

There are large number of persons in the Indian jails undergoing incarceration even before a trial. Various reasons are attributed for this detention. One of the reasons of this long pre-trial detention is our highly unsatisfactory bail system. Persons who are undergoing imprisonment for lack of furnishing proper bail are mostly poor and illiterate. The bail system here is controlled by the financial capacity of the accused. It is based on the

7. The Government of India concerned at the large number of undertrial prisoners in Indian Jails, has brought to the notice of the Law Commission the need for undertaking suitable judicial reforms and changes in the law, in order to deal with the problem posed thereby. See Law Commission of India, 78th Report on Congestion of Undertrial Prisoners in Jails (1979). In India, one of the major reasons for aggravating the problem of overcrowding of undertrial prisoners in jails is that there are no separate detention centres for accommodating them. As such lunatic, non-lunatic offenders, victims of offences, women and children are all lodged together in jails under the general category of undertrial prisoners. See Manjula Batra, op.cit., p.142.

8. Sections 436-450 of the Criminal Procedure Code deals with the procedure of granting bail. "Most of the research studies undertaken have revealed the fact that these undertrial prisoners have been languishing in jails either because they were denied bail by the court on account of their involvement in grave offences or simply because they were not in a position to furnish bail owing to their poverty or illiteracy". Manjula Batra, op.cit.,
erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. This system of bails operate very harshly against the poor. The rich people are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties. The reason is that the amount of bail fixed by the courts are very excessive. This thrusts a lot of persons behind bars. The Legal Aid Committee appointed by the Government of Gujarat under the Chairmanship of Mr. Justice Bhagwathi has expressed this glaring inequality.

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Position in England

When compared to India the plight of undertrial prisoners is highly satisfactory in countries like England and USA. In England unconvicted prisoners are kept out of

9. The report has been quoted in Hussainara Khatoon v. Delhi Administration, (1980) 1 S.C.C. 80 at pp.85, 86. According to the committee 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 situated would be able to secure their freedom because they can afford to furnish bail. This discrimination arises even if the amount of the bail is 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.
contact with convicted prisoners as far as this can be reasonably be done. If this practice is adopted it will prevent the innocent undertrial prisoners coming into contact with hardened criminals. The seeds of criminality will develop easily at this stage in the mind of undertrial prisoners. That may be the reason for adopting such a practice there. The unconvicted prisoner should not be detained in a wrong place, in a manifestly unauthorised manner or in a manner plainly inconsistent with his status as a prisoner awaiting some disposal such as trial or removal from the country. Unconvicted prisoners are entitled to certain special facilities also.

Hussainara Cases - A Milestone in India

The general apathy of the criminal justice administration towards the inhumane conditions of the undertrials lodged in jails was brought to the notice of

11. Ibid.
12. At his own or his friend's expense, an unconvicted prisoner may have food sent in from outside the prison. An unconvicted prisoner may be visited and treated by a doctor or dentist at his own expense, in consultation with the prison medical officer. He can use books, newspapers, writing materials and other means of occupation. Id., pp.815, 816.
the Supreme Court for the first time by a public spirited lady lawyer in Hussainara Khatoon Cases. Section 468 of the Code of Criminal Procedure has been used by the courts to release large number of prisoners who had been imprisoned for long periods of time without a trial. These cases are the most significant decisions with regard to the treatment of undertrial prisoners inside the jails in India. There were a series of cases of the same issue. A series of coincidences have brought about these cases before the court.


14. Section 468 of the Code of Criminal Procedure 1973 provides that no court can take cognisance of an offence after the following time periods have expired: (1) six months for offences punishable with a fine only, (2) one year for offences punishable with imprisonment of one year or less; (3) three years for offences punishable with imprisonment of three years or less. Section 468 does not apply to offences punishable with imprisonment of more than three years or to certain economic offences. Also, a court may extend the time period if the delay had been properly explained or it is necessary in the interest of justice to do so.

15. Dr. Upendra Baxi has pointed out that a strange combination of circumstances in early 1979 brought unexpected national attention to the plight of prisoners awaiting trial. These four coincidences have brought new and basic changes in criminal justice as well as the constitution. First of these was the distribution of 'tour notes' by R.K. Rustomji, Member of the National Police Commission among a select group of people. A second coincidence was that a major English daily, The Indian Express decided to publish two articles out of these notes. A third coincidence was that a lawyer, Mrs. Kapila Hingorani shocked by the horror of the situation moved the Supreme Court for habeas corpus.
Hussainara disclosed a shocking state of affairs in regard to administration of justice inside the prison in the State of Bihar. A large number of people including women and children were put behind bars for years for trivial offences. They were put in such condition for periods ranging from three to ten years.

The Supreme Court issued notice to the State of Bihar to furnish details regarding the allegations of illegal detention. No one appeared on behalf of the State. The court then proceeded on the basis of the allegations contained in the issue of the Indian Express which were incorporated in the writ petitions as correct. Some of the undertrial prisoners whose names are given in the newspaper cuttings have been in jail for as many as nine years and a few of them, even more than ten years without their trial having begun.

The court made an impassioned plea in exceptionally strong terms for the administration of social justice through a 'revamped and restructured legal and judicial system to remedy the inequality and injustice of indefinite pre-trial incarceration'.

17. Id., p.84.
the immediate release of the undertrials on their personal bond, without sureties and without any monetary obligation. While disposing of the petitions Justice Bhagwathi has vehemently criticised the existing system of bail in India, Justice Bhagwathi held: 18

"Even under the law as it stands today the courts must abandon the antiquated concept under which pre-trial release is ordered only against bail with sureties. That concept is outdated and experience has shown that it has done more harm than good. The new insight into the subject of pre-trial release which has been developed in socially advanced countries and particularly the United States should now inform the decisions of our courts in regard to pre-trial release. 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 be absolved it can safely release the accused on his personal bond".

The criteria adopted by Justice Bhagwathi to determine whether an accused has roots in the society are

factors like length of residence in the community, family ties and relationships, employment status etc. In that case again the poor and illiterate will be at a disadvantageous position. Ordinarily a poor individual will not have any employment status or social status worthy to be noted. So even after the decision in Hussainara such persons will not be materially benefitted. So eventhough some guidelines have been formulated with regard to the release of undertrial prisoners the benefits they get out of this decision are negligible. Only persons of middle class will be benefitted. On the other hand if the Supreme Court has given a directive to the lower judiciary to apply their mind subjectively, the consequence of this case would have been more significant.

The Supreme Court has given a free hand to the lower court to a certain extent within limited area. The Supreme Court held: 19

"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....But even while releasing the accused on personal bond it is necessary to caution the court that the amount of the bond which it fixed should not be based merely on the nature of the charge. The decision as regards the amount of the bond should be an individualised decision depending on the individual financial circumstances of the accused and the probability of his absconding".

Justice Pathak even went to the extent of holding that there is an urgent need for a clear provision enabling the release, in appropriate cases, of an undertrial prisoner on his bond without sureties and without any monetary obligation. 20

In Hussainara II 21 the court reviewed and clarified orders passed in Hussainara I. The court also ordered withdrawal of cases against undertrials held for

more than two years. Women and children were released on personal bond and the jail authorities were directed to make suitable arrangements for their care.

There were some women prisoners who were in Bihar jail without even being accused of any offence. They were put in jail under protective custody. Some of them were victims of an offence; and some others were required for the purpose of giving evidence in some cases. The Supreme Court in Hussainara III\(^22\) held that this so called 'protective custody' is nothing short of a blatant violation of personal liberty guaranteed under Article 21 of the Constitution, because there is no provision of law under which a woman can be kept in jail by way of 'protective custody' or merely because she is required for the purpose of giving evidence.\(^23\) The court also directed the state government to release such persons against whom no charge-sheet has been filed within the period of limitation in Section 468 Criminal Procedure Code.\(^24\)

\(^{22}\) (1980) 1 S.C.C. 92.
\(^{23}\) Id., p.96.
\(^{24}\) Section 468 reads: "(1) Except as otherwise provided elsewhere in this Code, no court shall take cognizance of an offence of the category specified in sub-section (2), after the expiry of the period of limitation. (2) The period of limitation shall be-(a) Six months, if the offence is punishable with fine only; (b) One year, if the offence is punishable with imprisonment for a term not exceeding one year; (c) Three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years".
Several undertrials have been kept imprisoned for periods longer than the maximum sentence that can be imposed on them if they were convicted for the charge for which they are being held. The Supreme Court ordered the Bihar Government to provide revised charts showing year-wise break-up of the particulars of the undertrial prisoners in the jails after dividing them broadly into two categories, one of minor offences and the other of major offences.

In Hussainara IIV the Supreme Court issued directions for supplying free legal aid service to enable undertrials to secure their release on bail. The Supreme Court said:

"The right to free legal services to the poor and the needy is an essential ingredient of 'reasonable, fair and just' procedure for a person accused of an offence and it must be held

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25. One Lambodar Gorain has been in Ranchi Jail since June 18, 1970 for an offence under Section 25 of the Arms Act for which the maximum punishment is two years, with the result that he has been in jail as an undertrial prisoner for 8½ years for an offence for which even if convicted, he could not have been awarded more than two years imprisonment. (1980) 1 S.C.C. 93 at p.97.
26. Ibid.
28. Id., p.105.
implicit in the guarantee of article 21. This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as 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 require, provided of course the accused person does not object to the provision of such lawyer".

The court said: 29

"The State cannot avoid its constitutional obligation to provide speedy trial to the accused by pleading financial or administrative inability. The State is under a constitutional mandate to ensure speedy trial and whatever is necessary for this purpose has to be done by the State".

The court also gave directions to the State for augmenting and strengthening the investigative machinery, setting up

29. Id., p.107 per Bhagwathi, J.
new courts, building new court houses, providing more staff and equipment to the courts, appointment of additional judges and other measures calculated to ensure speedy trial.

The need for speedy trial was also highlighted by the Supreme Court in this case. Justice Bhagwathi pointed out that speedy trial is an essential ingredient of 'reasonable, fair and just' procedure guaranteed by Article 21 and it is the constitutional obligation of the State to device such a procedure as would ensure speedy trial to the accused.30

In Hussainara V 31 the court considered the extent to which directions in Hussainara IV had been complied with. The court passed further directions and gave more time where necessary. In Hussainara VI 32 the Supreme Court requested further details from the High Court and also directed the State Government to file affidavit in reply.

30. Id., p.107.
The Impact of Hussainara

Whatever the reason may be the truth is that the cumulative effect of the absence of the right to speedy trial, bail, any legal aid and the virtual non-availability of free legal aid to the suspect or the accused has resulted in the erosion of human rights of the undertrials and thereby caused a major dent in the criminal justice system of the country.\(^{33}\) The presence of an excessive number of undertrial prisoners in jails has led to an increasing public and professional concern about the non-observance of human rights in these institutions.

The Hussainara cases have made some impact upon the fate of undertrial prisoners in Indian jails. At the time of the decision of these cases Bihar State in its sixtyfive jails, contained twentytwo thousand undertrial prisoners.\(^{34}\) For the first time the problem of undertrials was subjected to serious judicial scrutiny. The review of undertrial cases in all parts of India featured prominently. The Union Home Ministry convened a meeting of Chief Secretaries of States and Union Territories in April

\(^{33}\) Govt. of India, Ministry of Home Affairs, Report of the All India Committee on Jail Reforms (Chairman: Justice A.N.Mulla), 1980-83, Vol.1, p.70.
1979 to consider the problem of jail conditions. There has been some compliance by the executive.

Apart from all these, approximately one lakh undertrial prisoners were languishing in Indian jails at that time. Majority of these undertrials were in the States of Bihar and Uttar Pradesh only. In consequence of the Hussainara Khatoon's Supreme Court judgment, the State of Bihar released many undertrial prisoners but it retained quite a few and added many latter.

Through these cases Justice Bhagwathi has not only brought forth the case of travesty of justice caused by non-availability of bail to the undertrials, but has also given the reason for the sorry state of affairs. The learned judge has said the obvious reason when he observed that the bail procedure is beyond their meagre means. The observation of the judge points out about the need for restructuring the bail law, its procedure and practice. The undertrial prisoners should be released by taking liberal view of the concept of bail, which will be an

35. Supra, n.2.
36. Supra, n.2; also see Surendra Yadav, "Undertrials Need Bail Reforms", 1982 Cr.L.J. 25.
important solution for solving their problem. By changing the practice and attitude of the courts and by reforming and liberalising the bail provisions under the Criminal Procedure Code, the number of them in our jails can be minimised, thereby improving the situation. Thus Hussainara has given rise to the emergence of the right of speedy trial and bail as integral parts of the fundamental right to personal liberty in Article 21. This judicial enthusiasm against the systemic injustice towards the undertrials has been continued by the court in subsequent cases as well. After the decision of Hussainara Khatoon there was a flood of litigation regarding the undertrial prisoners.

Khatri v. State of Bihar illustrate another point in this context. There were mainly two issues in


38. A.I.R. 1981 S.C. 928. This case is notorious as Bhagalpur blinded prisoner's case.
this case. The importance of these was whether the right to legal aid is clearly an essential ingredient of reasonable, fair and just procedure guaranteed in Article 21. Following the decision in Hussainara the court held that the State Government cannot avoid its constitutional obligation to provide free legal services to a poor accused by pleading financial or administrative inability. The Court further widened the scope of Hussainara. The court held:

40. A.I.R. 1981 S.C. 928 at 930 per Bhagwathi, J. The High Court of Kerala followed the above dictum in two decisions, Chandran v. State of Kerala, 1983 K.L.T. 315 and Unnikrishnan v. State of Kerala, 1983 K.L.T. 586. These decisions have brought to light the urgent necessity of framing rules by the High Court under sub-section (2) of Section 304 of the Code of Criminal Procedure. The matter engaged the attention of the Rule Committee. In exercise of the powers conferred the High Court of Kerala with the previous approval of Government of Kerala made a rule in G.O.Ms.76/92/Home dated 8th April, 1992. The Rule provided for giving legal aid in all criminal cases where the accused is disabled from engaging a lawyer on account of indigence or being in judicial custody or other reasonable grounds. See 1993(1) K.L.T. Kerala State I.
41. Id., p.930 per Bhagwathi, J.
"Moreover, this constitutional obligation to provide free legal services to an indigent accused does not arise only when the trial commences but also attaches when the accused is for the first time produced before the magistrate. That is the stage at which an accused person needs competent legal advice and representation and no procedure can be said to be reasonable, fair and just which denies legal advice and representation to him at this stage".

In another order Justice Bhagwathi in the same case suggested to make efforts to find out institutions where blinded prisoners are rehabilitated. If any such institution can be found, the blinded prisoners should be taken and kept in such institutions at the cost of the State Government. Justice Bhagwathi also directed that if for any reason the blinded prisoners have to go back to the jail, they should be given proper vocational training in the jail, so that even in the jail, they can engage themselves in productive activity and earn money for themselves and the members of their families and on discharge from the jail, become useful members of the society.42 By this attitude Justice Bhagwathi has given

42. Id., p.934.
effect to the rehabilitative objective of imprisonment. To a certain extent he has followed the ideas of Justice Krishna Iyer in this respect. Justice Bhagwathi's eagerness to protect the rights of undertrial prisoners is evident in this case.

The Supreme Court assumed the role of the guardian and mentor of wrongs. Lost sight could not be restored, but the victims could be helped to rehabilitate themselves. Through the medium of directions, the court provided treatment, technical training to ensure a living and a sum from the state to aid in establishing in themselves in some vocation, trade or occupation. The content of personal liberty was thus realised.

In Sunil Batra v. Delhi Administration the Supreme Court has held that keeping of undertrial prisoners with the convicts was a violation of human rights. Justice Krishna Iyer held:

"We have the fact that a substantial number of the prisoners are undertrial who have to face

44. Id., p.1584."
their cases in court and are presumably innocent until convicted. By being sent to Tihar jail they are by contamination, made criminals - a custodial perversity which violates the test of fairness in Article 21."

Justice Krishna Iyer even went to the extent of comparing prisoners sent to jail as patients going to a hospital for medical treatment. By putting an undertrial prisoner along with hardened convicted prisoners he will be spoiled. "How cruel would it be if one went to a hospital for a check-up and by being kept along with contagious cases came home with a new disease?".\textsuperscript{45} Prison reform is now a constitutional compulsion and its neglect may lead to drastic court action. If the judges are dynamic they can give new dimensions to the constitutional protection of individual rights. Legal aid shall be provided to the undertrial prisoners who are poor to defend their cases in courts of laws. If the lawyer's service is not available to them, the decisional process becomes unfair and unreasonable. If the chains of communication between the undertrial prisoners and the courts are not kept

\textsuperscript{45} Id., p. 1585.
open, all of their other rights become valueless. Those undertrial prisoners who are indigent and languishing in jail, legal aid shall be extended to them for the protection of equal justice.

The impact of Hussainara was reflected in Kadra Pehadia v. State of Bihar. The Supreme Court expressed anxiety over the pathetic situation of undertrial prisoners even after their direction to improve the situation in Hussainara. This is a highly disturbing state of affairs and it discloses a sense of callousness and disregard of civilized norms. Undertrial prisoners should not be forced to work. If they are forced to work it would be in flagrant violation of prison regulations and contrary to the I.L.O. Conventions against forced labour.

Here the Supreme Court held that, a right to speedy trial is a part of the fundamental right envisaged under Article 21 of the Constitution. The delay in disposal of cases is nothing but denial of justice. So, the court shall adopt necessary steps for speedy disposal

of cases. The speedy disposal means, the expeditious trial and quick disposal of it. The State has no right to detain the undertrial prisoners in prison for longer period than the term if they would have been convicted. Pre-trial release is also a freedom under the law. Long delay of cases in various courts without limitation of adjudication is the infringement of fundamental rights. In USA speedy trial is one of the constitutionally guaranteed rights. 47

Pre-trial release in the present setup in criminal administration of justice is a rule rather than exception. The accused shall avail of his right to release on bail before conviction. The undertrial prisoner should get fair and free chance to exercise his right before the court. It is to be economic conditions of their family may be ruined. Detention, even for a shorter period is bound to cause disruption in their private life.

There were instances where innocent women and children are detained as undertrial prisoners though they have not committed any crime. In Kamaladevi Chathopadhyaya v. State of Punjab 48 several children and women were rounded

47. The Sixth Amendment declares that, in criminal prosecution, the accused shall enjoy the right to speedy and public trial.
up in the army action within the precincts of Golden Temple, Amritsar. They were kept in jails along with the convicts. When the matter came before the Supreme Court it directed the District Judges of Ludhiana and Amritsar to personally visit the jails and to verify whether any children were detained in the jails and if so to forthwith take steps for their removal from the jails and further to arrange for their safe custody and wellbeing. There was no response to this order from the government. District Judge, Ludhiana reported the sad state of affairs of the court. On the basis of this report all the detenus were directed to be released. The Supreme Court applied Article 21 in this case. According to the court there was not the slightest justification for detaining these innocent persons inside the jail.49

In the case of young undertrial prisoners there is a chance of spoiling them if they are put in the prison along with hardened criminals. Supreme Court by a significant decision suggested certain standards to be observed by prison authorities with regard to the detention

49. Id., p.42.
of juvenile undertrial prisoners.  

There are circumstances when warrant sent by the court does not indicate the age of the prisoner authorised to be detained in the jail. This is a very wrong practice. The Supreme Court in Sanjay Suri directed the magistrates that every warrant authorising detention to specify the age of the person to be detained. Judicial mind has to be applied in cases where there is doubt about the age and every warrant must specify the age of the person to be detained.

In Mohammed Salim Khan v. State of U.P. the petitioners were detained for three years without trial.

50. In Sanjay Suri v. Delhi Administration, 1988 Cr.L.J. 705 also A.I.R. 1988 S.C. 414, a news reporter and a trainee sub-editor moved the Supreme Court for appropriate direction to the Delhi Administration and the authorities of the Central Jail at Tihar, pointing out features of maladministration within jail relating to juvenile undertrial prisoners. The warrant sent by the court did not indicate the age of the prisoner. Allowing the petition court gave specific directions to the prison administrators for the treatment of undertrial prisoners. The Supreme Court called upon the authorities in the jails throughout India not to accept any warrant of detention as a valid one unless the age of detainee is shown therein. It shall be open to the jail authorities to refuse to honour a warrant if the age of the person remanded to jail custody is not indicated. It would be lawful for such officers to refer back the warrant to the issuing court for rectifying the defect before it is honoured.

Several serious cases were alleged to have been pending against him. No charge sheet was submitted. The court held that the State was not justified in acting in casual manner where liberty of the subject is involved. The petitioners were released on bail furnishing a bond.

The rules applicable to superior and ordinary classes of convicts are attracted to undertrial prisoners as well. This will necessarily bring in the application of all the rules of the transfer of convicts from one prison to another. In Balram Singh Yadav v. State of U.P.\(^\text{52}\) the transfer of undertrials from one jail to another for temporary accommodation to avoid overcrowding was held to be legal. Apart from that the detention in an environment natural to him in point of climate, language, food and other incidence of life and living were held to be reasonable.\(^\text{53}\) Once it is found that the detention of the petitioners is supported by valid orders of remand and there are valid custody of warrants issued against them, the mere transfer of the petitioners from one jail to another would not per se render the detention illegal.

\(^{52}\) 1991 Cr.L.J. 903.
\(^{53}\) Id., p.909.
Prison Visitors

While undergoing detention circumstances compel an undertrial prisoner to communicate with outside world. He has to engage a lawyer and make necessary arrangements for getting bail. So he must be given all reasonable facilities for communicating with their legal advisors.\(^{54}\) Paper and writing materials have to be supplied to all the undertrial prisoners for the purpose of communicating with friends or for preparing a defence. If that right is not granted the constitutional protection guaranteed to an accused will not be satisfied. So it will be a denial of justice.

In *Zoi Nath Sarmah v. State of Assam*\(^{55}\) an advocate who was also a minister was refused to interview an undertrial prisoner who was his client. The court held that the refusal of the Superintendent to allow the petitioners to meet the prisoners was invalid.\(^{56}\) The court to a great extent relied on the decision of *Sunil Batra*\(^{57}\) in which the Supreme Court has held:\(^{58}\)

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\(^{55}\) 1992 Cr.L.J. 2072.

\(^{56}\) Id., p.2073.


\(^{58}\) Id., p.
"We see no reason why the right to be visited under reasonable restrictions should not claim current constitutional status, we hold, subject to considerations of security and discipline, that liberal visits by family members, close friends and legitimate callers are part of prisoner's kit of rights and shall be respected".

In Zoi Nath the instruction given by the Inspector General to the Superintendent of the prison not to allow interview with the "extremist prisoners" by politicians is a clear-cut case of unlawful dictation interfering with the exercise of statutory discretion of the Superintendent. Apart from that the restrictions under the impugned circular is unreasonable and excessive restriction. The circular directs to all the political leaders including a political leader who is a relative, friend or lawyer of an extremist prisoner. Therefore the relative friend or lawyer of such a prisoner who is ordinarily entitled to interview is also restricted as he happens to be a political leader. Such restrictions impose an unreasonable and excessive restriction upon the persons who are ordinarily entitled to interview an undertrial prisoner. Undertrial prisoner should get privilege to
write letters and have visits by relatives to whom interview can freely be allowed. Any interview to outsiders or visitors of jail can freely be made to ascertain the correctional position as well as treatment under present set up of the jails. He should not be discarded from the outer world. So we should encourage and attach high value to cultural education as that is capable of ennobling the traits of human personality.

Thus it is evident that the administrative authorities cannot impose excessive restrictions on the rights of undertrial prisoners. Some objective standards have to be laid down and only on the basis of those only the essential rights can be denied to the undertrial prisoners.

Compensation for Unlawful Detention

Whether an undertrial prisoner can ask for compensation if he has sustained some loss due to his unlawful detention? Originally the courts were reluctant to grant such reliefs. In Rudul Shah v. State of Bihar 59 the accused had been acquitted but had suffered incarceration for 14 years on an unsubstantiated ground of

insanity. The Supreme Court ordered the release of the prisoner and directed to pay Rs.35,000 as compensation for the unlawful detention. Rudul Shah has not only enriched the content of the right to personal liberty in Article 21; it has revolutionised the remedial jurisprudence of Article 32 as well. In normal course the release of the petitioner from detention would render the continuance of the writ proceedings under Article 32 and the issuance of the writ of habeas corpus as infructuous. But in the circumstances of the present case the court, transcending the procedural orthodoxies, awarded compensation in the writ proceedings under Article 32 itself.

In Ramkonda Reddy v. State⁶⁰ the Andhra Pradesh High Court also took a positive aspect in this regard. This is a landmark case in which the conflict between the concept of "sovereign power or function" and "Personal liberty" are dealt with. The question for determination before the Hon'ble Court was whether the state was liable to pay compensation when an undertrial prisoner in jail lost his life due to failure or neglect of its officers to perform their duties.

The defence of the State was that the prisoner was put in jail in accordance with the procedure prescribed by law. It was in exercise of sovereign function and therefore the State was under no obligation to pay compensation. It was held that the State could not avail of the defence of immunity of sovereign functions. "The theory of sovereign function does not clothe the State with the right to violate the fundamental right to life and liberty guaranteed by Article 21 and no such exception can be read into it by reference to Article 300(1). An undertrial prisoner though deprived of liberty by virtue of sovereign function is still entitled to the protection of life".  

This case has ensured that the State officials do not act with gross negligence and do not abuse their powers.

61. Here the prisoner brought to the notice of the authorities that he apprehended danger to life while in jail and requested to arrange for extra guards but they did not pay heed to it. On the contrary because of the negligence of the guards on duty bomb was hurled at the prisoner and he died. A suit against the State was held to be maintainable for the default of its officers. Compensation of Rs.1,44,000/- was awarded.
to the detriment of life and liberty of citizens. Concept of sovereign power is not an exception to the right to freedom of life.\textsuperscript{62}

These decisions are telling testimonies of the Court's readiness to recognise the basic rights that are inherent in every individual.

Rights under the Kerala Prison Rules

Under the Kerala Prison Rules, undertrial prisoners are classified into two classes, viz., special and ordinary.\textsuperscript{63} This classification is made by the court subject to the approval of the District Magistrate. The former class are those who by social status, education and habit of life have been accustomed to a superior mode of

\textsuperscript{62} In advanced countries like England, United States and Australia the trend and tendency is to whittle down the rigour of sovereign immunity and pave a smooth and sailing way for laying actions against the Government for torts suffered or injuries caused to the citizens at the behest of the governmental machinery by means otherwise than through procedure established by law. Id., p.254.

\textsuperscript{63} Kerala Prison Rules 1958, Rule 734.
All able bodied undertrial prisoners are provided with some items of unskilled labour like gardening, coir making, spinning etc.

If an undertrial prisoner is unduly detained in a jail the procedure to be adopted by the prison authorities are given in the Kerala Prison Rules. In such a situation the Superintendent has to address to the Sessions Judge concerned with a view to the speedy disposal of their cases or the exercise by them of the power of releasing the prisoner on bail. If prolonged detention continue even after the attention of these officers has been drawn to it, the matter should be reported to the Inspector General who shall if necessary bring it to the notice of the government.

The New Trend

The Hussainara cases has revealed that the plight of undertrial prisoners are pathetic in India. Thousands

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64. Ibid.
65. Id., Rule 746.
66. This rule was not applied in the case of Cheruman Velan, an undertrial lunatic in Kerala Jail. There was a neglect of duty on the part of administration. The Kerala High Court ordered the release of the detene Cheruman Velan on 6.2.1987 who has been imprisoned in three mental hospitals in Tamil Nadu and Kerala for a period of forty years. For a detailed discussion of the case, see.
of them are languishing in jails for years because of the bottleneck of formed procedures choking the system. It delays the processing of their cases. Poverty and illiteracy deprive them from knowing their rights. Many such prisoners have spent more time in jail than their sentences they will get if they were convicted. Thus an absurd situation has been created in which prisoners have a credit balance of jail time, yet continue to remain behind bars.

It is the constitutional obligation of the state to devise a procedure which would ensure a speedy trial for the accused. It is also the obligation of the Supreme Court as the guardian of the fundamental rights of the people to enforce the fundamental right of the accused, by issuing the necessary directions to the state. The powers of the Supreme Court in the protection of the constitutional rights are of the widest amplitude. Some positive steps have been made by the Supreme Court to alleviate the miseries of undertrial prisoners. The court in Hussainara ordered the release of all prisoners who were being held without trial for more than two years unless the prosecution could institute a case within three months. It further initiated procedural reforms to ensure early
hearings and ordered that prisoners who could not afford legal fees be provided with legal aid at the expense of the State.

Active participation of society is essential for the true welfare of the unfortunate undertrials detained inside the prisons. General attitude of the community has to be changed. The stereotype prevalent in the Indian reality consider them as convicts or men with doubtful character, and cast social stigma effecting them personally and their family members. Frequently they are found as the victims of "justice delayed". After acquittal they find themselves as outcasts and in the midst of a broken family life.

It is true that Constitution of India confers rights on individuals, but they would be mere paper rights unless the government departments discharge their duties and secure those rights for individuals. When that duty is not discharged by the government departments or the rights are encroached upon or deprived by them, it becomes the duty of the judges to enforce them without fear or favour.