

# UNDERTRIAL PRISONERS AND THE CRIMINAL JUSTICE SYSTEM

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# Innocent till Proven Guilty?

*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....*

## Introduction

Under-trial<sup>1</sup> prisoners constitute a significant majority of the prison population (65.7%). All the 2,45,244<sup>2</sup> persons who are within prisons as under-trials are deemed to be innocent in the eyes of the law. How can a system that calls itself just and fair, justify depriving 2,45,244 “innocent” people of their liberty?

“The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.”<sup>3</sup>

An effective criminal justice system inevitably needs to ensure that accused stands trial for the crimes they are alleged to have committed. Therein lie the historical roots of incarcerating people accused of committing crimes. Depending on the gravity of the offence,<sup>4</sup> the police are empowered to keep a person in their custody for 24 hours, after which any further detention must be authorized by the judiciary.<sup>5</sup> Save a few exceptions, all are entitled to be released on bail.<sup>6</sup>

The *Code of Criminal Procedure 1973* (Cr.P.C.) does not define the term “bail” although offences are classified as bailable and non-bailable. The former are less serious offences and any person accused of committing these is entitled to be released on bail as soon as s/he is willing to furnish bail.<sup>7</sup> When accused of committing non-bailable offences, a person can only be released on bail by the court if it is satisfied that the person shall

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<sup>1</sup> In this paper the term ‘undertrial’ denotes an unconvicted prisoner i.e. one who has been detained in prison during the period of investigation, inquiry or trial for the offence s/he is accused to have committed.

<sup>2</sup> As of 2006, Source: National Crime Record Bureau Prison (2006), *Prison Statistics*, Ministry of Home Affairs: <<http://ncrb.nic.in/PSI2006/prison2006.htm>> (accessed on 14 January 2009).

<sup>3</sup> *Moti Ram and Ors. V. State of Madhya Pradesh* AIR 1978 SC 1594.

<sup>4</sup> No person can be detained by the police in a bailable offence if s/he is ready to furnish bail. See section 436 Cr.P.C.

<sup>5</sup> See Article 22 of the Constitution of India and Sec 167 Cr.P.C.

<sup>6</sup> Section 436, 436A, and 437 Cr.P.C. read with the Supreme Court judgments like the one in *State of Rajasthan vs. Balchand* AIR 1977 SC 2477 where it was held that bail and not jail, should be the basic rule.

<sup>7</sup> Section 436 Cr.P.C.

attend the court to stand trial; will not tamper with evidence or influence witnesses or obstruct police investigation in any manner; will not commit any other offence or hinder the interest of justice.<sup>8</sup> Despite sounding fair, the bail provisions and their implementation is highly discriminatory. As far back as 1971, the Legal Aid Committee appointed by the Government of Gujarat noted:

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 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.<sup>9</sup>

The evil of the bail system is that either the poor accused has to fall back on touts and professional sureties for providing bail or suffer pre-trial detention. Both these consequences are fraught with great hardship to the poor. In one case the poor accused is fleeced of his moneys by touts and professional sureties and sometimes has even to incur debts to make payment to them for securing his release; in the other he is deprived of his liberty without trial and conviction and this leads to grave consequences....<sup>10</sup>

The Supreme Court has held that the unwarranted “cruelty and expensive custody” inherent in the case of “avoidable incarceration makes refusal of bail unreasonable and a policy favouring release justly sensible”.<sup>11</sup> Following on from the Supreme Court, this paper argues that in a huge number of cases, pre-trial detention is avoidable and unnecessary. Indiscriminate arrests by police, ignorance of legal rights, delay in trial, reluctance of the courts to grant bail, inability to provide surety, are some reasons that have led to the unnecessary detention of large number of under-trial people. The Supreme Court has recognised this for years and has been devising ways and formulae to secure the release of under-trial prisoners on bail.<sup>12</sup> The union government has also realized the gravity of the situation and amended the Cr.P.C. to incorporate liberal provisions of bail. Arguing that the non-implementation of the existing legal provisions is a major reason for the large undertrial population lodged in prisons, this paper explores the legal dispensation of bail under the Cr.P.C. It further urges the prison authorities and the prison visitors to pay attention to as well as play a positive role in ameliorating the plight of under-trial prisoners.

## I. Undertrials and their Release: exploring the legal dispensation

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<sup>8</sup> *State of Rajasthan vs. Balchand* AIR 1977 SC 2477 where it was held the “basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like, by the petitioner”. Also see [Gudikanti Narasimhulu and Ors. v. Public Prosecutor, High Court of Andhra Pradesh](#) AIR 1978 SC 429.

<sup>9</sup> Report of the Legal Aid Committee appointed by the Government of Gujarat 1971 (headed by Justice P.N. Bhagwati (p. 185).  
<sup>10</sup> *Ibid.*

<sup>11</sup> [Gudikanti Narasimhulu and Ors. v. Public Prosecutor, High Court of Andhra Pradesh](#) AIR 1978 SC 429.

<sup>12</sup> See for example, *State of Rajasthan vs. Balchand* AIR 1977 SC 2477; [Gudikanti Narasimhulu and Ors. v. Public Prosecutor, High Court of Andhra Pradesh](#) AIR 1978 SC 429; *Moti Ram and Ors. V. State of Madhya Pradesh* AIR 1978 SC 1594; *Hussainara Khatoon and Ors v. Home Secretary, Bihar, Patna* AIR 1979 SC 1360; *Supreme Court Legal Aid Committee v. Union of India and Ors* 1994(3) Crimes 644(SC); *Common Cause, A Registered Society Through Its Director v. Union of India and Others* (1996) 4 SCC 33.

An under-trial prisoner's right against unnecessary detention and the procedure to secure his/her release is given under the Cr.P.C.

#### **A. Problem: Indiscriminate arrests**

The power of the police to arrest people is very wide and they arrest people even when they cooperate with the investigation and are not likely to evade trial. This results in unnecessary detentions.

**Solution: Limiting the powers of arrest as proposed by the Code of Criminal Procedure (Amendment) Bill 2006 passed by both the Houses of the Parliament in December 2008 and awaiting the Presidential assent.**

The Code of Criminal Procedure (Amendment) Bill 2006 amends the existing provisions for arrest, i.e. section 41 (and also inserts section 41A into the Cr.P.C). section 41 limits the indiscriminate powers of arrest of police officers. A person cannot be arrested merely because there is a complaint against her/him. It must be a "credible" complaint/information and the police officer must "have reason to believe" that "such person has committed the said offence".<sup>13</sup> In cases involving an offence punishable with imprisonment up to a maximum of seven years, the police officer can arrest a person only under certain specified conditions laid down in the law.<sup>14</sup> The officer must record her/his reasons for arresting in writing. In cases, where the specified conditions are not met, the police officer may, instead of arresting a person, issue to her/him a notice of appearance.<sup>15</sup> This requires the accused to appear before the police officer when required and to cooperate with the police officer in the investigation of the offence.<sup>16</sup> This provision, if properly implemented, will lead to a vast reduction in the number of persons - accused for offences punishable up to 7 years - who would have otherwise ended up being detained in prison during the period of investigation, inquiry or trial of their offence.

#### **B. Problem: Detention in bailable cases owing to poverty**

Many poor people are detained in prisons for alleged involvement in bailable offences primarily because they are unable to furnish surety. This is a serious concern because in such cases bail is a matter of right and people end up spending long periods in jail merely because they are poor.

**Solution: Amended section 436**

Section 436 Cr.P.C., which deals with the right to bail in bailable offences was amended in 2005.<sup>17</sup> It mandates the police or court to release an indigent person on personal bond without asking for any surety.<sup>18</sup> The amendment allows an indigent person to execute a bond that s/he shall appear before the court and stand trial. The section states that the court shall consider any person who is unable to furnish bail within 7 days from the date of

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<sup>13</sup> Section 41, Cr.P.C.

<sup>14</sup> *Ibid.*

<sup>15</sup> Section 41 A, Cr.P.C.

<sup>16</sup> *Ibid.*

<sup>17</sup> The Code of Criminal Procedure (Amendment) Act 2005, Act 25 of 2005, w.e.f. June 23, 2006.

<sup>18</sup> Proviso to section 436 Cr.P.C.

her/his arrest as indigent.<sup>19</sup> Therefore, a person accused for a bailable offence can be detained in prison for a maximum period of 7 days.

### **C. Problem: Delay in investigation**

Many prisoners languish in prisons because the police do not finish investigation, and file the chargesheet in time. This is a very serious matter because such people remain in prisons without any inkling of a police case against them.

#### **Solution: Section 167**

Section 167 Cr.P.C. lays down the maximum period within which the police investigation must be completed and a chargesheet filed before the court. This period is 90 days for offences punishable with death, life imprisonment or imprisonment for a term of not less than ten years, and 60 days for all other offences. Where the investigation has not been completed within the stipulated timeframe, it is mandatory upon the Magistrate to release the accused on bail, provided he is ready to furnish bail. This provision shields the accused from suffering incarceration on account of the inability of the investigating agency to wind up its investigation.

### **D. Problem: Delay in trial in certain cases**

Many prisoners are charged with a non-bailable offence which is not very serious and is triable by a Magistrate. They remain in prisons for long period because of the delay in trial.

#### **Solution: Use section 437(6)**

In a case triable by a Magistrate, section 437(6) makes it mandatory for a person to be released on bail where the trial has not concluded within 60 days from the first date fixed for taking evidence. The magistrate may refuse such release, but only after recording the reasons in writing.

### **E. Problem: Prolonged detention**

Many under-trial prisoners are detained in prisons for long periods, which in some cases extend beyond the maximum period of imprisonment prescribed for the offence with which they are charged

#### **Solution: Use section 436 A**

Section 436A Cr.P.C.<sup>20</sup> lays down the right of an undertrial to apply for bail once s/he has served one half of the maximum term of sentence s/he would have served had s/he been convicted. On a bail application filed under this section, the court shall hear the public prosecutor and may order the-

- 1) Release of such person on a personal bond with or without surety; or
- 2) Release of such person on bail instead of personal bond; or

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<sup>19</sup> Explanation to the proviso to section 436 Cr.P.C.

<sup>20</sup> This section was inserted in the Cr.P.C by the Code of Criminal Procedure (Amendment) Act 2005 vide Act 25 of 2005, w.e.f. June 23, 2006.

3) Continued detention of such person.<sup>21</sup>

This section further proscribes the detention of an undertrial beyond the maximum period of punishment prescribed for the offence that s/he is alleged to have committed.<sup>22</sup> Therefore, in effect, this section prescribes *the* maximum period an undertrial can be detained in any case.

## II. Undertrials and their Release: possible obstructions in effective implementation of the existing provisions

Even though the provisions to avoid unnecessary detention of prisoners have been in existence for years,<sup>23</sup> they are not implemented, resulting in a large number of under-trial population within prisons. The reasons for non-implementation are known. Most prisoners who are unable to use the provisions under section 167 or 437(6) are not only unaware of their right to seek release but also too poor to furnish surety. It is imperative that the legislature amends these sections on the lines of section 436 so that poor people may be released on furnishing personal bonds in such cases where either the police have not been able to make out any case against them or the trial is not concluded within the stipulated time. In the absence of a legislative change, the judiciary must take a proactive role and release such people on personal bonds.

In so far as the non-implementation of the liberalized provisions under section 436 or the bail provisions under section 436 A is concerned, the primary reason is the lack of awareness amongst the under-trial prisoners. The law does not mandate the State Legal Services Authority, jail superintendent or the trial court to inform the accused about this law. Almost 3 years have passed since section 436A was introduced, but it is yet to have the impact that it sought to achieve.<sup>24</sup> At the time of enactment, news reports stated that the introduction of this provision would impact as many as 50,000 under-trial prisoners across India.<sup>25</sup> However, there has been no substantial change in the number of under-trial prisoners who languish in prisons bearing the physical and mental costs for an offence they might not have even committed.

Although some High Courts<sup>26</sup> have issued directions for the release of under-trial prisoners under these sections, substantive results are yet to be seen. A decision of the Patna High Court<sup>27</sup> is instrumental in this regard wherein the Court suo moto initiated a PIL for the efficient and effective implementation of section 436A Cr.P.C. The Court explained the role

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<sup>21</sup> In cases pertaining to (2) and (3) the court is required to record reasons in writing.

<sup>22</sup> This provision is not applicable to persons who are accused of an offence which attracts death sentence as one of the punishments.

<sup>23</sup> Except changes introduced by the Code of Criminal Procedure (Amendment) Bill 2006.

<sup>24</sup> National Human Rights Commission, 2008, 'Issues and Recommendations made at the workshop on Detention' New Delhi, October, available at <<http://nhrc.nic.in/dispArchive.asp?fno=1617>> (accessed on 14 January 2009).

<sup>25</sup> '50,000 undertrials could be freed under India's new criminal laws', (date not provided), available at <<http://infochangeindia.org/200606245038/Human-Rights/News/50000-undertrials-could-be-freed-under-India-s-new-criminal-laws.html>>. (accessed on 14 January 2009)

<sup>26</sup> The High Court of Kerala in November 2006 (Sec 436A Cr.PC), the High Court of Guwahati in September 2008 (Sec 167, 436A Cr.PC), the High Court of Bombay in October 2008 (Sec 436 Cr.PC).

<sup>27</sup> *In the matter of News Report published in the Times of India dated 26<sup>th</sup> June 2006 V State of Bihar*, CWJC No. 7363 of 2006 available at

<<http://patnahighcourt.bih.nic.in/CJJudgements/CWJC%207363%20OF%202006%20 16.10.2006 .pdf>>. (accessed on 14 January 2009)

of the Jail Superintendent, the Inspector General (Prisons) and the legal services authorities for the implementation of this section. In its directives, the Court entrusted the Jail Superintendent with the primary duty to inform the under-trial prisoners of the benefits of section 436A Cr.P.C. The Inspector General (Prisons) was attributed the role as a 'Monitor' for the whole process.

In a disposition regarding section 436 Cr.P.C., the Bombay High Court in October 2008 took up the issue of under-trial prisoners in bailable cases who could not furnish bail.<sup>28</sup> During the proceedings, it was submitted that in one of the prisons within Bombay itself, 1660 out of 2296 inmates were booked in for bailable offences. The Court decided to undertake the task of monitoring the situation for a year and directed all Sessions Judges of the state to call for periodical records from the magistrates and jail superintendents.<sup>29</sup> With regard to the implementation of section 436, the court stated that the state government and jail authorities should not ignore the law and allow such persons to stay inside jails.

An effective implementation of the various provisions and amendments of the Cr.P.C. is vital to ensure a just criminal justice system which assures the presumption of innocence and the right to liberty to an accused, and prevents her/him from suffering the deprivations that incarceration offers.

### **III. Undertrials and their Release: what role can the prison authorities and the prison visitors/monitors play?**

In India, the subordinate courts are assigned the primary task of ensuring the enforcement of the provisions under the Cr.P.C.<sup>30</sup> In addition to the judiciary, prison authorities and prison monitors also have a significant role to play in order to ensure justice to under-trial prisoners.

#### ***Prison Authorities***

The custody and security of prisons and prisoners within it are the fundamental duties and responsibilities of every member of the prison staff.<sup>31</sup> The executive personnel in prison i.e. the superintendents, additional superintendents, deputy superintendents, assistant superintendents and the guarding staff are entrusted with the primary responsibility to ascertain that the human rights which the prisoners are entitled to are not impinged upon and restricted beyond the limit inherent in the process of incarceration itself.<sup>32</sup>

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<sup>28</sup> See 'Poor undertrials in bailable offences to be released on bond' 26 October 2008, available at <<http://www.thehindu.com/holnus/002200810261520.htm>>. (accessed on 14 January 2009)

<sup>29</sup> 'HC order to flush out prisoners unable to pay bail bonds' 23 October 2008 available at <<http://www.expressindia.com/latest-news/hc-order-to-flush-out-prisoners-unable-to-pay-bail-bonds/376861/>>. (accessed on 14 January 2009)

<sup>30</sup> S.S. Upadhyay, 'Role of sub-ordinate judiciary in the protection of Human Rights' available online at <<http://www.ijtr.nic.in/webjournal/6.htm>>. (accessed on 14 January 2009)

<sup>31</sup> Rule 4.05 of the Model Prison Manual, 2003, as prepared by the *All India Model Prison Manual Committee* and approved by the central government in 2004.

<sup>32</sup> Rule 4.07.1 of the Model Prison Manual, 2003.



Under the Prisons Act 1894, the superintendent must maintain a register of all prisoners admitted and a book showing when each prisoner is to be released.<sup>33</sup> The superintendent has easy access to information relating to the period of detention of each under-trial prisoner under his custody, and hence it should be his duty to inform the prisoner when s/he might become eligible to apply for bail under the various provisions of the Cr.P.C. Indeed, the Patna High Court seems to agree with this contention and has directed the superintendent to inform the prisoners of the benefits of section 436A.<sup>34</sup>

Arguably, the prison staff are the primary custodians of prisoners, and have the advantage of being in direct contact with prisoners. They should undertake the responsibility of making prisoners aware of the benefits that might accrue to them under these provisions. They should impart legal information in all forms, written or oral among under-trial prisoners to make them aware of their right of release under the relevant provisions of the Cr.P.C.<sup>35</sup> The prison authorities should also encourage and assist the dispatching of applications for free legal aid to the competent authorities in cases where the prisoner can not afford legal assistance. This paper believes that the prison authorities stand at the forefront for the effective implementation of the provisions of the Cr.P.C. which secure release of undertrial prisoners unnecessarily detained in prisons.

### ***Prison Visitors***

The concept of the Prison Visiting System is found under the Prisons Act 1894.<sup>36</sup> The system was introduced to provide transparency within the prisons and bring some degree of accountability to the prison management. Prison visitors can be classified as either official or non-official. Apart from these, other external visitors to prisons can also be appointed by the courts and the Human Rights Commissions. This system is an effective tool to improve prison conditions as well as ensure observance of prisoners' legal rights.

Prison visitors stand at a unique place within the prison system wherein they have a two-fold role to discharge. On the one hand, they act as the *eyes* and *ears* of the prisoners to the outside world by providing the prisoners knowledge about their legal rights. On the other hand, they also act as the *eyes* of the outside world to scrutinize what goes on within the prison walls. Thus a prison visitor not only acts as an accountability mechanism but also as a custodian for prisoners and their rights.

Prison visitors act as guardians to ensure that humane conditions prevail within the prison walls. A prison visitor<sup>37</sup> is well placed to ensure that the directions issued by the courts, the government and the Human Rights Commissions are properly implemented within the prison. A prison visitor is able to enquire into the complaints of the prisoners and assist them in taking remedial action. Prison visitors may also undertake certain special

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<sup>33</sup> Sec 12 of the Prisons Act 1894 [Act IX of 1894].

<sup>34</sup> *In the matter of News Report published in the Times of India dated 26<sup>th</sup> June 2006 V State of Bihar*, CWJC No. 7363 of 2006 available at <[http://patnahighcourt.bih.nic.in/CJJudgements/CWJC%207363%20OF%202006%2016.10.2006 .pdf](http://patnahighcourt.bih.nic.in/CJJudgements/CWJC%207363%20OF%202006%2016.10.2006.pdf)>. (accessed on 14 January 2009)

<sup>35</sup> The Patna High Court is also in agreement with this argument, see *In the matter of News Report published in the Times of India dated 26<sup>th</sup> June 2006 V State of Bihar*, CWJC No. 7363 of 2006.

<sup>36</sup> Sec 59(25) of the Prisons Act 1894.

<sup>37</sup> See 'Prison Visiting System in India', Commonwealth Human Rights Initiative, available at <[http://www.humanrightsinitiative.org/publications/prisons/prisons\\_visiting\\_system\\_in\\_India.pdf](http://www.humanrightsinitiative.org/publications/prisons/prisons_visiting_system_in_India.pdf)>; Guidance can also be sought from 'Monitoring Places of Detention – A Practical Guide', Association for the Prevention of Torture available at <[http://www.ap.t.ch/component?option=com\\_docman/task,cat\\_view/gid,58/Itemid,59/lang,en/](http://www.ap.t.ch/component?option=com_docman/task,cat_view/gid,58/Itemid,59/lang,en/)>. (accessed on 14 January 2009)

responsibilities with regard to under-trial prisoners. They may *periodically* check the register, enlisting the period of detention for prisoners, which is maintained by the Superintendent under the Prisons Act, or they may ask for such information specifically. Where they find that there are prisoners who can be released under the provisions of the Cr.P.C., they can take steps to assist such prisoners in seeking release. The prison visitors can either inform the prisoner of his rights and ways in which he may apply for release or ask the prison authorities to take appropriate action. In future visits, the prison visitors can follow up these cases to ensure that no undertrial has been unnecessarily detained in prison.

Prison visitors can also take steps to create awareness of legal rights and procedures among both the prisoners and prison staff. They may also try and inform them of the latest amendments that are introduced in the law and keep them updated regarding court guidelines on concerned issues. Therefore, a prison visitor has a vital role to play in ensuring compliance with the numerous guidelines, judgments and legal provisions that are introduced from time to time.

## **Conclusion**

The importance of bail provisions and their underutilization has been reiterated on many occasions. No person should be made to suffer the deprivations of incarceration before s/he has been proven guilty in the eyes of law. By depriving them of their right to liberty through unnecessary detention, the existing system “punishes” the accused in violation of the basic principle of criminal jurisprudence that every person shall be presumed innocent till proven guilty. To ensure justice for under-trial prisoners, it is essential to effectively implement the existing provisions of the Cr.P.C. All the agencies of the criminal justice system including the police, the judiciary, the prosecution, the defence lawyers and the prison department must adopt a concerted and a well coordinated approach to ameliorate the plight of the ‘forgotten souls’ i.e. under-trial prisoners, who languish in prisons unnecessarily.

# **BRIEFING PAPER:**

## **Bhim Singh vs. Union of India and Ors. [W.P. (Criminal.) No. 310/2005]**

**Order on: 05.09.2014**

**Corum: Hon'ble Chief Justice R.M. Lodha, Hon'ble Justice Kurian  
Joseph, Hon'ble Justice Rohinton Fali Nariman**

**Written By: Aphune K. Kezo**

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# INTRODUCTION

The issue of undertrial prisoners is a very serious one impacting the right to a fair trial as borne out by statistics. The National Crime Records Bureau, Prison Statistics in India 2012, shows that the number of undertrials is 2,54,857, as compared to the number of convicts which is 1,27,789.

Parliament sought to address this issue of prolonged detention of undertrial prisoners by amending the Code of Criminal Procedure (the Code) in 2005 and incorporating Section 436A. This section provides for the maximum period for which an undertrial prisoner can be detained under any law, not being an offence for which the punishment of death has been specified as one of the punishments. Under the section, a person who has undergone detention for up to a period of one-half of the maximum sentence of imprisonment specified for that offence under that law, during the period of investigation, inquiry or trial, shall be released by the Court on his personal bond with or without sureties.

The Court may, after hearing the Public Prosecutor and for reasons to be recorded in writing, order the continued detention of an undertrial covered by the section for a period longer than what is specified in the section or release him on bail instead of the personal bond with or without sureties. However, no such person shall be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under the law.

The Bhim Singh judgment addresses the need for the immediate implementation of Section 436A and the release of large numbers of undertrials detained in prisons as mandated by the section.

The Court reiterated the imperativeness of the need to take steps to fast track all types of criminal cases to ensure that criminal justice is delivered timely and expeditiously. In order to provide immediate relief to undertrial prisoners, the Court passed an interim order directing the setting up of a mechanism for the proper implementation of Section 436A and the release of undertrial prisoners (UTPs) from jails in accordance with the provisions of the section.

The order also acknowledged the problems of foreign national prisoners (FNPs) in obtaining 'No Objection' certificate from the concerned State Government and directed State Governments to facilitate their deportation to avoid overstay inside prisons.

### **Section 436 A- Maximum period for which an undertrial can be detained –**

Where a person has, during the period of investigation, inquiry or trial under this code of offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for up to a period of one-half of the maximum sentence of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period of release him on bail instead of the personal bond with or without sureties:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under the law.

Explanation - In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

## **FACTS OF THE CASE**

- This is an ongoing Writ Petition in which the Court has passed orders from time to time. During an earlier hearing of the petition on 01.08.2014, the Court asked the Attorney General, Mr. Mukul Rohatgi, about the Central Government's plan for fast-tracking the criminal justice system. The Attorney General sought three months' time to place a roadmap before the Court for fast-tracking criminal cases.
- The Attorney General further informed the Court that more than 50% of prisoners are undertrials and many may have served the maximum sentence for the offences they have been charged with.
- Considering the gravity of injustice caused by prolonged detention of undertrials, the Court passed directions for the immediate implementation of Section 436A to ensure that undertrial prisoners do not continue to be detained in prison beyond the maximum period provided under the section.

## **ISSUE BEFORE THE COURT**

- The need for implementation of Section 436 A of the Code and fast tracking criminal justice in the country to ensure that no undertrial remains in prison beyond half of the maximum sentence prescribed for that offence.

## DECISION OF THE COURT

Setting up the review mechanism for the implementation of Section 436A, the Court passed the following directions:

- *Composition* - The jurisdictional Magistrate/ Judicial Magistrate/ Sessions Judge will have the authority to review undertrial prisoners for purposes of implementation of Section 436A.
- *Frequency* - The concerned authority shall hold one sitting every week in each jail for two months, commencing from 1st October 2014.
- *Function* - The concerned judicial officer will identify undertrial prisoners who have spent half of their maximum sentences in jail or the maximum period of imprisonment provided for the said offence under the law. The judicial officer will pass an order in the jail itself for the release of such undertrial prisoners who fulfill the requirement of Section 436A..
- *Monitoring Mechanism* - The report of each sitting will be forwarded to the Registrar General of the concerned High Court, and at the end of two months, the Registrar General of each High Court will submit the report to the Secretary General of the Supreme Court. The Jail Superintendent has to provide all necessary facilities for holding the court sittings.

## CONCLUSION

The order of the Court can be summarised as follows:

- i. *Undertrial Review Mechanism* - The Court has set up a review mechanism for the effective implementation of Section 436A of the Code.
- ii. *Applicability* - The Court's directions will apply to all the States irrespective of existing or non-existing provisions of review committees in jail manuals, or absence of jail manuals.
- iii. *Monitoring* - The concerned judicial officer has to submit a report of each sitting to the Registrar General of the concerned High Court, who in turn will submit a report to the Secretary General of the Supreme Court.

- iv. *Foreign Nationals* - The primary reason for undertrial FNPs languishing in jails in India is the delay in receiving 'No-Objection' certificates from the concerned State Government. The State Governments shall send such a certificate within four weeks to the Central Government, who will then take necessary steps for deportation.



## **ABOUT CHRI**

The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan, international non-governmental organisation, mandated to ensure the practical realisation of human rights in the countries of the Commonwealth. CHRI's objectives are to promote awareness of and adherence to the Harare Commonwealth Declaration, the Universal Declaration of Human Rights, and other internationally recognized human rights instruments, as well as domestic instruments supporting human rights in Commonwealth member states.

The Prison Reform Programme of CHRI is focused on increasing transparency of a traditionally closed system and exposing malpractice. The programme aims to improve prison conditions, reform prison management, enhance accountability and foster an attitude of cooperation between the various agencies of the criminal justice system in place of the prevailing indifference and discrimination. It seeks to achieve its goals through research, legal analysis and advice, advocacy, capacity building, network building and conference facilitation.