

**THE RIGHT TO LEGAL REPRESENTATION
&
ACCESS TO JUSTICE**

A MICROSTUDY OF PERCEPTIONS OF UNDERTRIALS IN ALWAR PRISON OF RAJASTHAN



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THE RIGHT TO LEGAL REPRESENTATION AND ACCESS TO JUSTICE

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I. Introduction

Right to access to justice is considered as an essential fair trial standard both in international human rights law¹ and in the domestic law of the land. The international community believes that pre-trial detention should be used as a last resort and decided only upon considering the investigation of the alleged offence and the protection of society and the victim from the accused.² This is based on the belief that a person accused of a crime is innocent until proven guilty.³ Accordingly, non-custodial measures should be the rule not the exception to protect the freedoms of a person that is innocent in the eyes of the court.⁴

In India, it is the duty of the state "...to secure to all its citizens – Justice, social, economic and political" as has been enshrined in the Preamble of our Constitution. As an essential common sense corollary to this duty of the state, exists the right of an individual. Though the Constitution guarantees that no person should be deprived of his life and liberty except for the procedure established by law the loss of freedom and dignity have become routine owing to dilatory and perverse practices followed by the agencies of the criminal justice system. Locking up thousands of people who are presumed innocent is not only an encroachment of this right but also violation of international and domestic norms.

The most recent prison statistics show the population of more than 2, 40, 000 prisoners awaiting trial every year in the country, constituting 65% of the total inmates population.⁵ They have been detained in prison during the period of investigation, inquiry or trial. One thing that is common among them is that they are all hard hit by the delay in trial and have been languishing in prisons but the reasons for their detention could be manifold. There are people in custody who are not represented by a defense lawyer due to economic restraints and the legal services authorities have failed to provide them free and effective legal aid.

¹ Article 8 of the Universal Declaration of Human Rights: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law.

Article 14(3) of the International Covenant on Civil and Political Rights guarantees to everyone: "...the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice shall require, and without payment by him in any such case if he does not have sufficient means to pay for it".

² United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules), Rule 6, December 14, 1990.

³ Universal Declaration of Human Rights, Article 11(1) (New York, December 10, 1948)

⁴ For non-custodial measures see: United Nations Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules), G.A. res. 45/110, annex, 45 U.N. GAOR Supp. (No. 49A) at 197, U.N. Doc. A/45/49 (1990).

⁵ *National Crime Research Bureau, Prison Statistics India 2010*, available at http://ncrb.nic.in/PSI_2010/PrisonStat2010.htm last accessed on 17.04.12

Undertrials also constitute petty offenders whose cases are lingering for months together to come to conclusion. There are persons who are charged with serious offences and have been denied bail or have been granted bail but are unable to provide surety/bail bonds. Then there is a lot which is the most vulnerable and the most forgotten like mentally ill and juveniles.

The idea to lock people behind bars is to secure the presence of the person in conflict with law at the time of enquiry or at every stage of the trial and to ensure that he is available to receive sentence in case of conviction. This purpose is lost if the person is detained arbitrarily, excessively or unnecessarily. Trials are often conducted at the conveniences of the court, lawyers, police or prisons, ironically keeping an undertrial, whose liberty is lost, at the lowest in the pyramid of justice.

CHRI conducted the study to understand the perception of a class of prisoners i.e. undertrials in regard to legal aid. It was conducted through an interview schedule framed with the purpose to understand the relationship a client shares with his/her lawyer and to find out the level of accessibility of legal representation for the 345 undertrials languishing in Alwar prison. The focus of the study has been to identify the obstacles to speedy trial and the reasons for the inordinate long delays. The scope of the study extends to fixing accountability to all the stakeholders of the criminal justice system, especially the legal services authority in the state and the district and to find out the best ways to minimize the detention period of the under-trials.

The report aims to target the myriad problems faced by undertrials right at the time of their arrest, throughout their journey to the conclusion of their trials. The report seeks to establish that early and effective access to counsel could be one of the most significant remedy to overcome numerous problems suffered by undertrials. It is significant because a qualified lawyer working in the best interest of his client could challenge the common illegalities through the power of knowledge and advocacy and ultimately could act as a fair trial guarantor and a human rights defender.

A lot has to be done in banishing the barriers and to ensure access to justice to the unprivileged masses. The socially alienated, the marginalized, the lowliest, the lost, and the last, must have the facility and the means to secure judicial remedies and to make the legal process a humane opportunity.⁶

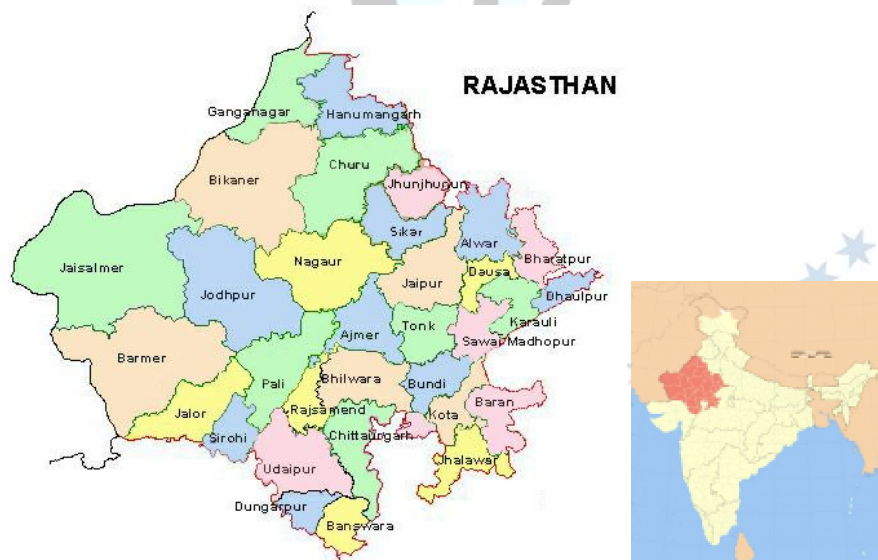
⁶ Foreword by Justice V. R. Krishna Iyer, *Law, Poverty and Legal aid: Access to Criminal Justice* by S. Muralidhar.

II. Overview of the Criminal Justice System in the State of Rajasthan

Rajasthan, located in the Western part of India, is the largest state (by area) in the country. It shares a border with Punjab, Haryana, Uttar Pradesh, Madhya Pradesh and Gujarat and an international border with Pakistan. As on 2 April 2012, there were 11,954 undertrials languishing in Rajasthan prisons. The average detention period of an undertrial in the prison has increased from 224 days in 2005 to 256 days in 2009.⁷ Thus, the average detention period has increased to about 1 month (32 days) from 2005 to 2009.

A glance at the overall prison figures shows more than 100% overcrowding in Rajasthan and in some facilities it exceeds even that. For example, overcrowding at Kota Central Jail stood at around 181 per cent and Jaipur, the capital city, is at about 142 per cent. Down the scale, in district jails and sub-jails matters are much worse. Gangapur city has 230 per cent overcrowding, Chittorgarh has 223 per cent and Hanumangarh houses 180 per cent more prisoners than it should. Also in Baran, Bhilwara, Bundi, Dholpur, Dungarpur, Jaisalmer, Jhalawar, Jhunjhunu, Rajsamand, Sikar and Sirohi prisons the occupancy rate is above 100 per cent.⁸

There is a huge gap between new cases being registered and the number of trials completed. Thus, the appalling number of trials pending as of September 2010 is 17,91,892 in Rajasthan High Court and lower courts.⁹ These prison figures show a bleak picture of the criminal justice system in the state of Rajasthan.



⁷ Jails in Rajasthan: Detention and Overcrowding, presentation by Mr. Omendra Bhardwaj, DG, Prisons, Rajasthan at the workshop on Rights of the Accused and Effective Representation at Jaipur on February 5, 2011.

⁸ http://rajprisons.nic.in/prison_statistics_A.htm last accessed on 19 April 2012

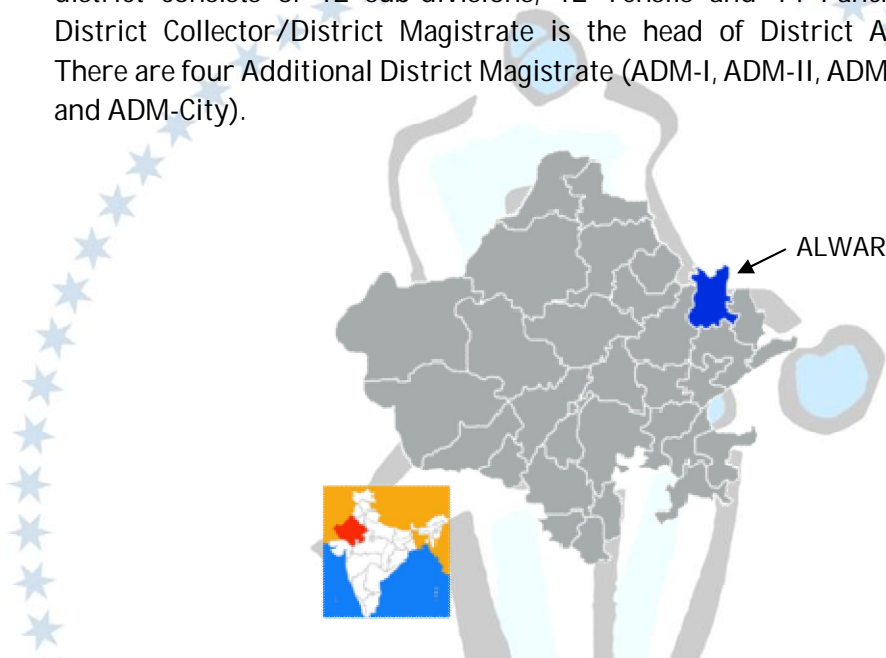
⁹ Bar and Bench, Pending Litigations 2010: 32,225,535 pending cases; 30% Vacancies in High Courts: Government increases Judicial infrastructure budget by four times, 3 June 2011, available at:

<http://barandbench.com/brief/2/1518/pending-litigations-2010-32225535-pending-cases-30-vacancies-in-high-courtsgovernment-increases-judicial-infrastructure-budget-by-four-times->

III. Overview of District Alwar and District Jail Alwar

Profile of District Alwar

Alwar is a city in the north-east of Rajasthan neighboring Bharatpur, Dausa and Jaipur districts of Rajasthan on three sides and State of Haryana on one side. The city is located 160 km south of Delhi and around 150 km north of Jaipur. The district consists of 12 sub-divisions, 12 Tehsils and 14 Panchayat Samitis. District Collector/District Magistrate is the head of District Administration. There are four Additional District Magistrate (ADM-I, ADM-II, ADM-Development and ADM-City).



Profile of District Jail Alwar

Alwar District Prison is the largest district prison in the state of Rajasthan, covering an area of about 44 acres (approximately 2, 11, 000 sq. yards). Both Undertrials and convicted prisoners are housed in the prison which makes the working of the Alwar prison like that of a Central prison. The administrative control of the prison extends to two sub-jails Kishangarhbas and Behror.

In total there are six wards – five wards for male prisoners and one ward for female prisoners. Out of the five male wards, three wards lodge Undertrials and two are for the convicted prisoners. Female prisoners at Alwar prison are only Undertrials. Once they get convicted, they are transferred to Jaipur prison or other prisons.

Total inmate capacity of the prison is 800 and at present, about 400 convicts and 350 Undertrials are residing there. Out of 400 convicted prisoners, about 300 are for life sentence.

The Superintendent heads the administration of the Alwar prison with a Jailor and an Assistant Jailor. Two posts of Assistant Jailors are sanctioned as well but they are unoccupied. Among the security personnel, there are 11 Head Warders and 52 Warders and the post of 15 Warders are unfilled. A doctor and a male nurse comprise a small hospital inside the prison.

IV. Research and Findings¹⁰

The responses from 345 respondents have been consolidated into data, charts and diagrams for a thorough and an in-depth analysis. The entire data is divided into two sections – **Socio-economic background & Impact of Pre-trial Detention**, emphasizing on the problems faced by accused and their families and **Standards v. Non-compliance** which is further sub-divided under various heads to highlight situations where law is often violated and there is a need for the authorities to ensure compliance with the minimum standards.

Socio-economic Background & Impact of Pre-trial Detention in Alwar

Rajasthan has a population of 68 million with a 67 percent literacy rate.¹¹ Most of Rajasthan's population lives in a rural setting and only 24 percent reside in an urban location.¹² Additionally, two thirds of the population makes a livelihood in agriculture which constitutes about 30 percent of the state's economic activity.¹³ Alwar has a population of 29,90,862 people and a 62 percent literacy rate.¹⁴ The majority of Alwar's residents live in a rural area while only 14 percent reside in urban settings.¹⁵ Statistically, Alwar represents a typical state in Rajasthan and therefore is appropriate to be used as a case study in exploring pretrial detention in Rajasthan.

The criminal justice system failures impact the accused, the family of the accused, the community, and the state. Principally, the unnecessary detention of undertrials has a disproportionate socio-economic impact on the economically marginalized and women. The poor slip further into poverty while there is an increased feminization of poverty as women are forced to carry the burden of the entire family. Detaining non-violent or non-threatening persons is unnecessary and has grave social and economic consequences especially for the already marginalized in society.

The demographics of the undertrial prison population at Alwar suggest that the majority of those being held in pretrial detention are young, poor and have little education. Likewise, these people are particularly vulnerable members of society.

¹⁰ DISCLAIMER: The analysis and conclusions of this study are based on the accounts of 345 undertrials who were present at District prison Alwar from 23-29 November 2010. The findings are based on the assumption that the inmates provided the information to the best of their knowledge without any prejudice to the judiciary, police, prison department or the legal aid system in the state.

¹¹ Census of India, *Rajasthan Census Book*, 2011, http://www.censusindia.gov.in/2011-prov-results/data_files/rajasthan/Census%20book.pdf

¹² Census of India, *Rajasthan Census Book*, 2011, http://www.censusindia.gov.in/2011-prov-results/data_files/rajasthan/Census%20book.pdf

¹³ Planning Department, Government of India, http://www.planning.rajasthan.gov.in/memorandum/Memorandum_0910_English.pdf

¹⁴ District Alwar of Rajasthan, <http://alwar.nic.in/stat.htm>

¹⁵ District Alwar of Rajasthan, <http://alwar.nic.in/stat.htm>

Gender

The overwhelming majority of those in pre-trial detention at Alwar are males. Statistically, 92 percent of undertrial prisoners are male and 7.8 percent are female.

Age

About 68 percent of undertrials surveyed at Alwar were under 30 years of age and of that portion a little over 50 percent were between the ages of 21-30. However, 52.4 percent of males were between the ages of 21 and 30 and 17.4 percent were under 20 years of age.

The general male population is fairly young as men 30 years of age or less constituted 69.8 percent of the population while women 30 years of age or less constituted only 48.1 percent of the population. Men over the age of 30 constituted 30.3 percent of the undertrial population while women over 30 made up 51.9 percent. Accordingly, the undertrial male population, on average, is younger than the undertrial female population.

Caste

As a replica to the Indian society, the prison population also showed a mix of communities and castes. Undertrials constitute belonging to Hindu, Muslim and Sikh communities. Fifty-five percent of the undertrials were from scheduled caste, scheduled tribe or another backward caste while 44 percent was from a general caste. This data illustrates that the **majority of undertrials are from already marginalized sections of society.**

Education

Lack of formal education is a common characteristic amongst those in pre-trial detention. Thirty-two percent of undertrials were uneducated while 41.6 percent had below a high school education. Therefore, **73.6 percent of the undertrial population is uneducated or has below a high school education.**

Employment

The largest percentage of undertrials (33 percent) reported earning between Rs. 1,000 and Rs. 5,000 monthly. The second largest percentage (23.8 percent) reported earning between Rs. 10,000 and Rs. 25,000 monthly. There is no uniform method to determine poverty but it is apparent that the majority of undertrial prisoners are financially marginalized.

Under the Planning Commission's 2004-2005 estimate, 34 percent of the population in Rajasthan is living below the poverty line.¹⁶ The estimate by the Planning Commission sought to include a variety of factors in calculating poverty. Factors were based on the amount of consumption; consumption of education, healthcare, household goods etc. The estimate was not based on net income.

¹⁶ Planning Commission of India, http://planningcommission.nic.in/reports/genrep/rep_pov.pdf

Meanwhile, the World Bank has set the level of extreme poverty as an income of \$1.25 U.S. (Rs. 56) per day¹⁷ and Rs. 1,683 per month is in extreme poverty.¹⁸ According to the World Bank benchmark, at least 4.9 percent of undertrial prisoners are in extreme poverty.

However, the World Bank statistic is calculated on a “per head” basis and **over 50 percent of undertrial prisoners are the sole income earners for their families.** Therefore, the amount of undertrials living in extreme poverty is much more startling. For example, if a family of five is living on less than Rs. 5000 per month and there is only one income earner, then the family is living in extreme poverty as the per head income is less than the World Bank benchmark of Rs. 1,683 per month. Therefore, it is likely that much more than 4.9 percent of the undertrial population is living in extreme poverty. The economically marginalized are most susceptible to being thrown further into financial ruin.

Impact of Detention on Undertrials

Economists have shown that the process of incarcerating youth will reduce their future earnings and their ability to remain in the workforce, and could change formerly detained youth into less stable employees.¹⁹ Having been in jail is the single most important deterrent to employment...the effect of incarceration on employment years later [is] substantial and significant”.²⁰ Unfortunately, detention interrupts young people’s education, and once incarcerated, some youth have a hard time returning to school.²¹ Consequentially, interrupting a youth’s education has been found to increase their chances of re-entry into the criminal justice system.²²

Upon release, the former undertrial prisoner may feel like an outsider in their own family or community. They face punishment without being proven guilty of any crime.

One 17 year old at Alwar commented; “the prison world is completely unlike the outside world, I don’t know how I will go back home”.²³

One undertrial prisoner in Alwar had lost complete contact with his relatives. When he was picked by police he was not given a chance to contact his family.²⁴ He was informed by another undertrial who was from his native village that their village has been relocated to make room for a factory. Now he does not know where his wife and children have been relocated.²⁵

¹⁷ World Bank. Poverty, <http://data.worldbank.org/topic/poverty>

¹⁸ Conversion based on exchange rate on 16 June 2011.

¹⁹ Justice Policy Institute, *The Dangers of Detention*, Barry Holman and Jason Ziedenberg.

²⁰ National Bureau of Economic Research, *Area Economic Conditions and the Labor Market Outcomes of Young Men in the 1990’s Expansion*, Cambridge, MA., 1999.

²¹ Justice Policy Institute, *The Dangers of Detention*, Barry Holman and Jason Ziedenberg.

²² Vera Institute of Justice, *Juvenile Detention Reform in New York City: Measuring the Risk through Research*, April 2011.

²³ Rohit Vishvakarma (D.S. No. 328) case study.

²⁴ Put D.K. Basu Guidelines in Annexure

²⁵ Ragbeer (D.S. No. 311) case study.

Impact of Detention on Families

Families gain a financial burden by losing an income earner and becoming responsible for producing legal fees. The loss of one family member's income could be devastating for an already economically marginalized family.

At Alwar, a 60 year old undertrial accused of theft has been left in prison to worry about the debts he has left for his family. The family had just purchased new farm equipment but as a whole only manages to make Rs. 4,000- 5,000 per month. All the property and jewellery of the women of the family has been mortgaged to make payment to a private lawyer.²⁶

An undertrial that identified himself as the sole bread winner earned Rs. 3,000 – 4,000 per month as a motorcycle mechanic. He was supporting his wife, four sisters and mother before being accused of “dishonestly receiving stolen goods”. As a result of his detention, his family was forced to obtain employment in agriculture and his wife has moved back with her father. His wife is extremely distraught and is unable to visit him because she has no money. Last time when he saw her she couldn't stop crying.²⁷

Furthermore, when a woman must step into the shoes of the sole bread winner it is unlikely the family will be able to compensate for the income that was received by a male bread winner. Women in India earn roughly \$ 0.61 for every \$1.00 earned by a man.²⁸ A woman will have to work more or the family will have to do without. In both circumstances the family will be forced to sacrifice. Family members are strained to stretch themselves even thinner financially and some families cannot manage to visit their loved ones in prison. One prisoner said that no one came to visit him because his family had to work in the fields of Punjab.²⁹

Reduced opportunities for education are another unforeseen impact of unnecessary pretrial detention. In addition to young detainees losing out on educational experiences, the children and family members may be forced to leave school in order to supplement the income of the family.

One prisoner expressed his unhappiness that his elder sister was forced to enter the workforce and leave her M.A. program for the family's sake because of his detention.³⁰

²⁶ Majeed (D.S. No. 265) case study.

²⁷ Hakam (D.S. No. 209) case study.

²⁸ World Economic Forum, *The Global Gender Gap Report*. Geneva, Switzerland 2010.
http://www3.weforum.org/docs/WEF_GenderGap_Report_2010.pdf

²⁹ Gulzar Singh, D.S. No. 299.

³⁰ D.S. No. 345

Impact of Detention on State Economy

The cost of detaining so many undertrials is unnecessary especially since more than 93.1 percent of the total prisoners are first time offenders.³¹ On average, India spends Rs. 10,474 per prisoner per year.³² Using the national average, Rajasthan spends Rs. 11,44,59,872 (2.5 million USD) on pre-trial detainees per year.³³

Another state cost associated with undertrial prisoners is the cost of additional staff to account for the rising number of undertrial prisoners. However, if the undertrial prisoner was released, the expense would be left to the accused not the state.

Additionally, undertrials are unable to provide services and are not contributing to the gross domestic product (GDP) of India. For a more conservative estimate, assuming that only 75 percent of the undertrial population are capable of earning the minimum wage for the average detention time of 266 days, Rajasthan has lost around Rs. 24,07,00,128 in revenue.³⁴

Standards vs. Non-compliance

A. Access to Court of Law

a) *First Production before a Magistrate*

A. 22(2) of the Constitution casts a duty on the State to produce every person, who is arrested and detained in custody, before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time of journey. No police officer can detain a person for more than twenty-four hours except for a special order of a Magistrate under Section 167.³⁵ The period of detention may be extended where it appears that the investigation cannot be completed within twenty-four hours and there are grounds to believe that the accusation is well founded.³⁶ This extension in custody (police) can be authorised for up to fifteen days by a magistrate provided that the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police.³⁷

The findings reveal a picture which is completely in contrast to the legal norms. **Only 35.5% of the undertrials admitted to being produced within the statutory limit of 24 hours.** The rest 64.5% had horrifying stories to narrate.

³¹ National Crime Research Bureau, *Crime in India 2011*, available at www.ncrb.nic.in last accessed on 09.08.12

³² National Institute of Mental Health and Neuro Sciences, *Prisons in India: An Overview*.

³³ Calculation: 10 474 * 10 928 = Rs. 114 459 872

³⁴ Calculation: 320 933 504 * .75= 240 700 128

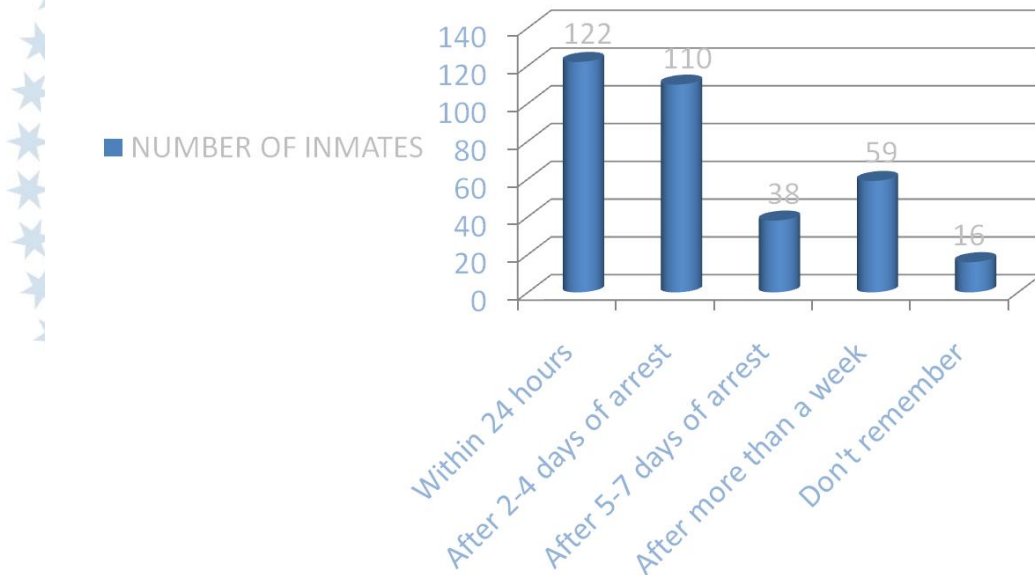
³⁵ Criminal Code of Procedure, 1973, Section 57

³⁶ Criminal Code of Procedure, 1973, Section 167(1)

³⁷ Criminal Code of Procedure, 1973, Section 167(2) and Section 167(2)(b).

Some told that they were first produced before the magistrate after 15 days of arrest and while they were kept illegally at the police lock-ups, they were beaten up by the police forcing them to admit the commission of the offence. Some informed us that they were not even produced in person before the magistrate; they were made to sit in the vehicle outside the house of the magistrate and were brought back to the police station. A bunch of them said that they were picked up from the way and they did not even get the opportunity to inform their family/friend about the arrest which is a clear violation of the D. K. Basu³⁸ guidelines. Some of them complained that the other co-accused were let off because they had 'setting' with the police and even took away whatever money they had without listing it in their belongings.

The chart below shows that about 32% were produced within 2-4 days, 11% were produced within 5-6 days and the most startling fact is that 59 undertrials were produced after more than a week of their arrest which is a serious infringement of their right to liberty.



b) Extension of Remand and Further Productions

The term 'judicial custody' implies that judiciary acts as the custodian of the person sent to prison. It is the responsibility of the police to ensure timely filing of the chargesheet and adequate availability of the police escorts for production in courts. The prison acts as an intermediary to make arrangements for timely productions of undertrials remanded to judicial custody. The interplay between the three agencies, the prison, the court and the police is significant for an undertrial's right to be a part of his own trial at every stage.

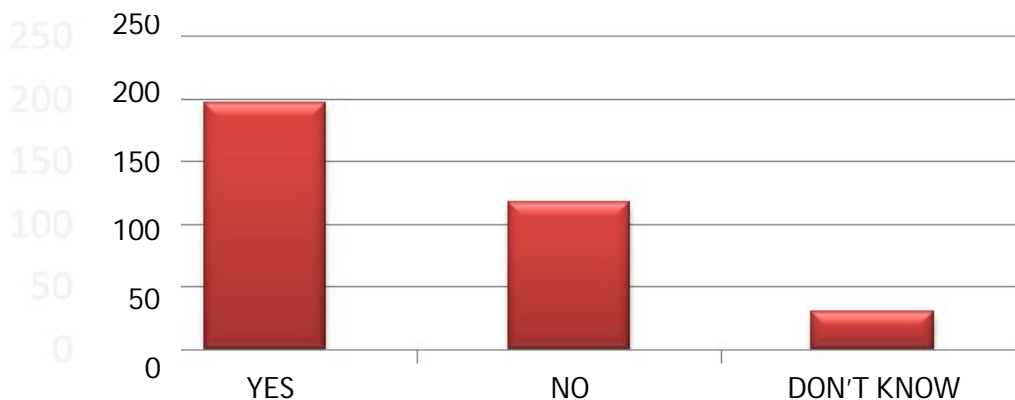
The law insists that the accused has the right to be personally present or be represented by his lawyer on all occasions so that he can consolidate all the arguments in his favour, challenge all the charges against him and gear up the

³⁸ D.K. Basu Vs. State of West Bengal 1997 (1) SCC 416

best possible defense. The Indian law requires the presence of the accused as it provides that the charges framed against the accused must be read and explained to the accused.³⁹ Section 273 of the Code of Criminal Procedure further provides that, “Except as otherwise expressly provided all evidence taken in the course of the other proceeding shall be taken in the presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader.”

The procedural standards further provide that the Magistrate can extend, from time to time, the period of detention of the accused to a term not exceeding 15 days till the statutory limit of filing the chargesheet is over.⁴⁰ Thus, the law provides for the maximum period of extension of remand. It is significant to note here that the courts have become routinized in extending the demand to the maximum of 15 days and several times over. The findings reveal that less than two-fifth of the total cases (37%) the respondents are produced within fifteen days but the extension of remand was never less than 14 days. 26% of the total respondents reported to being produced every 15 days. Another 9% claimed to be produced every month while 5% reported to be able to access Court after more than one month.

Number of Inmates taken to Court on every hearing

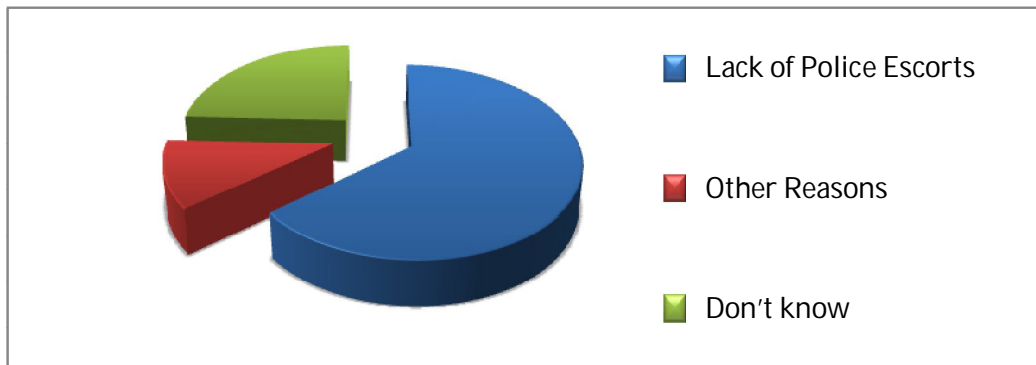


³⁹ Code of Criminal Procedure, 1973, Section 240 – Framing of Charge: (1) If, upon such consideration examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in opinion could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.

⁴⁰ Code of Criminal Procedure, 1973 – Section 167 Procedure when investigation cannot be completed in twenty-four hours

Reasons for Non-Production



A glance at the above charts shows that about 43% of under trials were either not taken to court for every hearing or did not know whether they were taken to court in each hearing. Out of them about 30% court productions do not take place because of lack of Police Escorts.

A serious concern that came to light was that these undertrials when taken to Court, if at all, are not actually produced before the Magistrate. They either are dumped into the Court lock-up or kept waiting in the police van for the entire day. One of the inmates said that he was taken to Court about 30 times but he has never seen the Magistrate. The police escorts appease him by saying that he will be produced when the Magistrate asks for him. An inmate depicted the terrible and inhumane conditions of the under maintained Court lock-up or a pigeon hole as he preferred to call it. "At 46° C heat in Rajasthan, there are no windows, no fans or lights in the room. The walls are peeling and stained, and the corners were laced with cobwebs and dirt. With a toilet placed inside the lock-up, one breathes the stench of urine making it a living hell. Water supply is erratic so there is little use of talking about cleaning the urinal inside the lock-up." While 12 inmates narrated such horrifying tales, some could not differentiate between being taken to Court and effective production and others were scared to speak up against the system.

It is surprising to know that the average detention period of an undertrial in the Rajasthan prisons has increased from 224 days in 2005 to 256 days in 2009⁴¹ even after the introduction of liberal bail provisions in the Code of Criminal Procedure⁴² in 2005 and continuation of the scheme of fast track courts⁴³ 2005 onwards in the country.

B. Effective Legal Representation

a) *Early Access to Lawyer*

Though one of the essential elements of fair trial is the right of the accused to be defended by a competent and a qualified legal practitioner of his or her choice,

⁴¹ Jails in Rajasthan: Detention and Overcrowding, presentation by *Mr. Omendra Bhardwaj*, DG, Prisons, Rajasthan at the workshop on Rights of the Accused and Effective Representation at Jaipur on February 5, 2011.

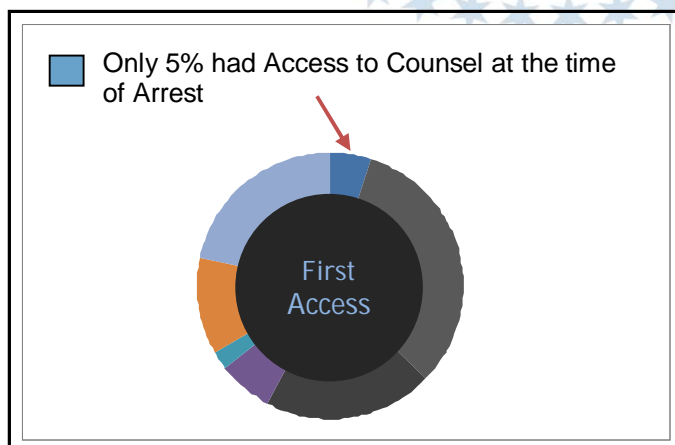
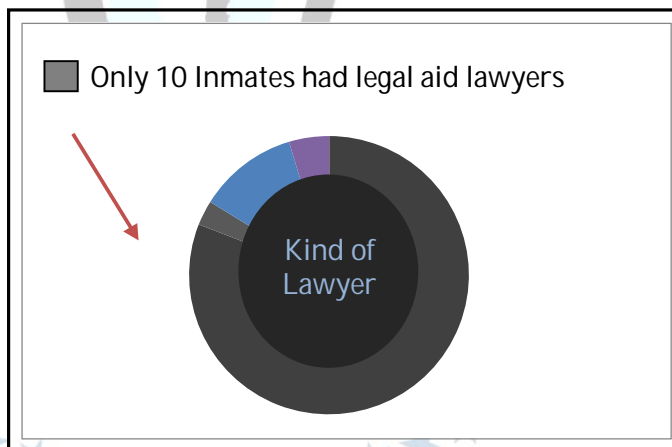
⁴² Code of Criminal Procedure Amendment Act, 2005 - http://www.ebc-india.com/downloads/crpc_amendment_act_2005.pdf

⁴³ <http://mha.nic.in/pdfs/Fastcourts.pdf>

nevertheless this right seemed meaningless to many, if not all the prisoners CHRI interviewed at the District Prison of Alwar.

As about one-third of undertrials were produced before the magistrate within the stipulated time limit of 24 hours, one of the reasons could be early access to a lawyer. The findings show that only 5% of the respondents had access to a lawyer at the time of arrest. Close to 31%, i.e. about 106 out of 345 had first access to their lawyer when they were first produced before a magistrate. This roughly corresponds to the number of people who were first produced (35.5%) following the mandate of law. Therefore, it can be said that early access to lawyer helps an individual to recognize his rights and also realize them.

There were only 3 inmates (1%) who got a lawyer after they were sent to police remand by the magistrate after the first production and only 2 respondents engaged a lawyer at the time of applying for bail. A substantial number of respondents (27.4%) met their lawyer for the first time after being sent to the judicial custody. Out of these 94 respondents, 10 engaged a lawyer at the time of committal of case to the appropriate court while 3 respondents got access to a lawyer at the time of filing of chargesheet by the police and 20 of them took on a lawyer for themselves only at the time of beginning of trial after the charges were framed against them. The rest did not specify a particular stage of trial when they had first access to their lawyer to defend them owing to their ignorance of how courts function and what are the procedures involved during a trial.



b) Lawyer-Client Relationship

It is the duty of an advocate fearlessly to uphold the interests of his client by all fair and honourable means. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused.⁴⁴

A serious problem is that 23%, i.e. about 79, of them did not even know that whether they had a lawyer or not. These figures are grave and shocking which points a finger at the legal services authorities which have failed to perform its duties and is accountable to provide lawyers to any person in custody. If such a large number of people are not aware about the existence of their lawyers, it means that they have neither seen a lawyer nor had the chance to interact with any of them. As a result, about 30 inmates, out of the 36% who were dissatisfied by the services of their lawyers, complained that their lawyers were never present in the Court at the time of hearing. It owes to the lack of communication between them.

It was observed that there is no appointed room/place for the lawyer-client interaction in the Alwar prison premises and therefore the lawyers never come to interview their clients or give information about the case or make them aware about their rights. Many complained that, when taken to Court for production, they are not allowed by the police escorts to interact with their lawyers. It is hard to believe that the only source of communication between a lawyer and his client is the family of an undertrial. Such lack of communication jeopardizes their trust in each other and ultimately impedes the process of fair trial.

There was a peculiar case where one of the ten inmates who had availed the services of a legal aid lawyer grumbled that the lawyer appointed by the state demanded money from him. It is the mandate of the Legal Services Authorities to provide **free and competent** legal advice to any person in custody who cannot afford it. Free legal services include the following:

- Payment of court fee, process fees and all other charges payable or incurred in connection with any legal proceedings;
- Providing Advocate in legal proceedings;
- Obtaining and supply of certified copies of orders and other documents in legal proceedings;
- Preparation of appeal, paper book including printing and translation of documents in legal proceedings etc.
- Pre-litigation settlement by mediation/conciliation etc.⁴⁵

⁴⁴ <http://www.barcouncilofindia.org/about/professional-standards/rules-on-professional-standards/>

⁴⁵ <http://nalsa.gov.in/rti.html>

C. Access to Non-custodial Measures

a) Bail

The purpose of law of bail is mainly to 'procure the release of a person from legal custody, by undertaking that he shall appear at the time and place designated and submit himself, to the jurisdiction and judgment of the court.'⁴⁶ Blackstone's famous formulation that, "*It is better that ten guilty escape than one innocent suffers*⁴⁷", is the underlying principle on which our criminal justice system operates.

Around 13⁴⁸ of the under trial prisoners were granted bail but were still denied freedom because of their inability to furnish the bond amount, even though according to S.442 (1) of Cr.P.C an accused is required to be released as soon as the bail is granted.

Most of the undertrials interviewed, are charged of non-bailable offence, but three undertrials (charged under S.260, 304A and 323, respectively, of the India Penal Code), in spite of being charged of a bailable offence, where they have a right to be released on bail irrespective of the magistrate's discretion, have been wasting themselves in prison since the year 2008. Their inability to have not been able to furnish surety should not have stopped them to be released on personal bond.⁴⁹

With the large number of public officers, including the magistrate and the judiciary at large, showing little concern to the right to life and liberty of these under-trials, leaving them unrepresented and unaided, the right of bail has remained impotent till now.

b) Probation of Offenders

The Probation of Offenders Act was enacted in 1958 with the purpose "to see that young offenders are not sent to jail for the commission of less serious offences mentioned therein because of grave risk to their attitude to life to which they are likely to be exposed as a result of their close association with the hardened and habitual criminals who may happen to be the inmates of the jail."⁵⁰

Majority of the undertrials in Alwar were accused of committing multiple offences. Only three inmates were found to be accused of having committed petty offences. This shows neglect on the part of the probation department of the state and the magistracy to the committed implementation of the Probation of Offenders Act.

⁴⁶ Lectures on Criminal Procedure, K.N Chandrasekharan, 2006, Eastern Book Company, p.109

⁴⁷ Fair Trial Manual-A Handbook for Judges and Magistrates, Ch1,P.1, Fair trial manual, 2010

⁴⁸ Table 32 of the data recorded from the field Research conducted in Alwar Prison by CHRI

⁴⁹ Codified by Section 436 by the Code of Criminal Procedure Amendment Act, 2005 after the holding in *Moti Ram v State of M.P.* 1979 SCR (1) 335.

⁵⁰ *Daulat Ram v. State of Haryana* AIR 1972 SC 2334

D. Undertrials' Awareness about Rights and Law

Every person is duty bound to know the law of the land and it is for the state to make the legal knowledge available in the public domain. The Legal Services Authorities are under the mandate to organize legal aid camps with the purpose of educating the weaker sections of the society. The analysis shows that they have clearly failed to achieve this.

Though Alwar has 62% literacy rate⁵¹, it is interesting to know that, the degree of knowledge was found to be quite low among the undertrials at Alwar regarding the basic legal provisions or the status of their own case. **As high as 53% of the inmates did not know about the right to free legal aid.**

Similarly awareness on other basic legal provisions was found low among inmates. For example, 20% of the inmates were unaware whether their lawyer had ever applied for bail. And those who had applied for bail, through their lawyers, 70% did not know as to why their bail was rejected and the reason for their continued detention.

Due to lack of communication with the lawyer and problem of non-production, 28% were unaware about next date of their hearing. The prison staff reminds the inmates a day before the date of hearing.

V. Conclusion and Recommendations

Access to justice mainly focuses on two aspects – equal access to the criminal justice system and equal protection of the rights of the individuals based on rule of law. Based on this, the aim of the criminal justice system is to ensure to everyone this right through implementation of non-custodial provisions, early and easy access to effective legal representation, speedy adjudication of trials without undue delay, and above all, safeguarding the fundamental rights of people behind bars in order to minimize pre-trial detention.

Keeping liberty as a paramount value, it is significant that all actors of the justice system maintain utmost integrity and adhere to highest standards of ethics to ensure observance of fair trial guarantees to an individual who is in conflict with law. It is high time that the system responds to the calls of those forgotten who are in dire need of help.

Recommendations

- **Check on Arbitrary Arrest and Detention:** The National Police Commission's Third Report states that 60 per cent of the arrests were

⁵¹ District Alwar of Rajasthan, <http://alwar.nic.in/stat.htm>

unnecessary or unjustified; 43.2 per cent of the expenditure in the jails was over such persons who "in the ultimate analysis need not have been arrested at all". Police in all circumstances must strictly comply with the procedures and guidelines as laid down by the Courts, like D. K. Basu guidelines on arrest and so on.

- **Duty Counsel/Solicitor at Court and Prisons:** Early access to lawyer and effective legal representation lays the foundation of the lawyer-client relationship and assures accused's best possible defense in the Court of law. The Legal Services Authorities with its bottom-up approach must well establish the office of Duty Counsel or Duty Solicitor at the Courts as well as in prisons to ensure access to non-custodial provisions like bail and release on probation at the earliest by the accused.
- **Capacity-building for Officers of Courts:** Advocates, in addition to being professionals, are also officers of the courts and owe duty towards the court, the client, their opponents and other advocates in the administration of justice. Bar Councils across India should strive to have well-trained and competent legal professionals to ensure obedience to code of ethics and professional standards laid down which would ultimately benefit the people availing their legal services and skills.
- **Accountable Judiciary:** Progressive magistracy at the lowest level of the pyramid of judiciary ensures compliance and committed implementation of all international norms and domestic laws. Guaranteeing fair trial standards, it creates a level-playing field for both the defense and the prosecution in accessing justice. It is vital to have a pro-active and sensitive judiciary to reinforce the belief of an individual in the criminal justice system.
- **Strict adherence to First Appearance norms:** First production before the Magistrate is one of the most important right of an individual. When produced, it is the duty of the magistrate to see the accused in person to confirm any signs of custodial violence or any human rights violation at the hands of police. The mandate of first production before the Magistrate must be strictly followed as other rights of the accused accrues from that very stage.
- **Remedying the Practice of Maximum Extension of Remands:** Being a custodian of the person sent to judicial custody, it is the responsibility of the Courts to ensure that the person remains behind bars for the barest minimum duration. Therefore, trials must be completed without any undue delay with the minimum extension of duration of further remands.
- **Humane conditions in Court Lock-Ups:** State Human Rights Commission must look into the issue of pathetic conditions of Court lock-ups. Directives must be issued to all District and lower Courts for the maintenance of these lock-ups which primarily comes under the control of the respective Court.
- **Protection of Special Groups:** The system should be extra sensitive and caring to protect the interest of the vulnerable and defenseless like

juveniles in conflict with law and mentally ill undertrials. During the course of the study, four juveniles and two mentally ill undertrials were found among other inmates. Surprisingly, the prison authorities did not know about their presence or ailment and therefore were not given any special treatment as mandated by law.

- **Better implementation of Probation of Offenders Act:** Not a single first time offender accused of having committed a petty offence within the ambit of the law on probation should be put behind bars. The judiciary and the Probation department must effectuate the liberal implementation of the Act.
- **Functioning of Review Mechanisms:** Oversight and review bodies, like the Prison Visiting System and Periodic Review Committees in Rajasthan, must be well-built within the system to act as watch dogs of the public. There is a need to open up the agencies of the system towards more transparency, scrutiny and community participation.
- **Prisons to work as Correctional Centers:** Since prisons are bestowed with the physical custody of the accused they should act as correctional centers. It is their prime duty to ensure that there is proper segregation among the multitudes of groups constituting the prison population. Young and petty offenders must be kept separately from convicts and hardened criminals. Prison rules should cater to the needs of the families of prisoners and should be made flexible balancing the rights of the accused and management of prison administration.
- **Need for Technological Advancement:** The actors of the criminal justice system must keep pace with the dynamic nature of technology. Softwares like EPoD (Evaluation of the Period of Detention) which automatically detect and calculate bail eligibility and E-Courts⁵² must be introduced in every prison and every lower court respectively to keep a check on overstays and unnecessary detention.

The detention period is destroying individuals, families and burdening the economy. Rajasthan must commit to lessening the negative socioeconomic impact of pre-trial detention by abiding to international human rights standards and national criminal law.

⁵² <http://ecourts.nic.in/>