# CHAPTER VI
# SYNTHESIS, CONCLUSIONS AND RECOMMENDATIONS

## 6.1 Chapter outline

In this chapter the findings obtained in the previous chapters are summarized, synthesized and further analyzed; certain issues are further explored; some further questions are asked and finally recommendations are made.

## 6.2 Effecting changes in procedural systems: A note

Before going on to synthesize and analyze findings and consequently suggesting reforms for the Criminal Justice System, a preliminary note regarding a conceptual issue is in order. Procedural systems are *complex* systems that is to say, they straddle multiple goals and objectives. For example, the criminal justice system can be seen to have a number of goals such as:

(a) Punishment for the guilty;
(b) Arriving at the factual truth in criminal cases;
(c) Ensuring that the innocent are not punished or made to suffer;
(d) Imposition of the rule of law;
(e) Ensuring that every trial is a fair trial;
(f) Special protection for women and the disadvantaged;
(g) Retribution and compensation for the victims;
(h) Protecting State interests by punishing for crimes that involve economic or security interests;
(i) Speedy and inexpensive criminal process; &
(j) Reduced costs for the State and the judiciary in running the system.

These objectives or goals can sometimes be *conflicting* and the criminal justice system often needs to *reconcile*conflicting goals whilst designing its procedures. For example, speedy punishment for the guilty is a goal of criminal justice; so is ensuring adequate appellate remedies. Criminal procedure can be manipulated by reducing the number of appellate remedies available to the accused- this would surely go a long way in bringing criminals to book faster- however, some innocent accused may also suffer due to the lack of appellate remedies. Designing a procedural system with more appellate remedies will result in more protection for the accused but result in delayed punishment; on the other hand, if less appellate remedies are provided, then punishment will be speedy but some innocent accused may suffer. Which option should be chosen? Clearly, this question cannot be answered unless we also answer the question: what are the *background policies and justifications of our Criminal Justice System*? If our criminal justice system, understood in the light of our constitutional ethos, is attuned *more* towards the protection of the innocent and *less* towards the punishment of the guilty at any cost, then we would obviously have to ensure adequate appellate remedies. Thus, no changes in procedures can be understood, evaluated or suggested unless one first clarifies the background policies and justifications that underlie the criminal justice system, in the light of what our constitution requires.

Another example can be given: providing for quashing of criminal proceedings upon the expiry of a time-limit of say, five years, would surely protect the right to speedy trial of the accused and minimize his anguish. But this procedural device may also have the effect of letting several guilty accused go free without trial. Should this procedural change be brought about or not? We would be unable to answer this question without some *background assumptions* about what our constitution and criminal justice system require and the trends indicated thereby. The same question would

be answered in the United States unhesitatingly in *favour* of time-limits since the Anglo-Saxon tradition of criminal jurisprudence bends over backwards to ensure that a single innocent man is not harassed or convicted, even though several guilty may go free. However, this question may be very differently answered in say, China[556].

Having seen that we cannot understand, analyze or tinker with procedural systems without some *assumptions of background justifications*,the next question is: what are the background justifications and policies of the Criminal Justice System in India?

It is submitted that India has inherited its criminal justice system from England, and has continued to foster the Anglo-Saxon, Anglo-American traditions of criminal jurisprudence after Independence. Reference and reliance upon English and American judgments is a feature of our court system even today. Ever since Independence, radical change of our criminal procedural system has neither been advocated nor implemented[557]. The only exceptions were the recommendations of the *Committee on Reforms of the Criminal Justice System*[558]which, lamenting the fact that conviction rates were decreasing and crime rates were increasing, had advocated minimizing the right to silence, substitution of the standard of "proof beyond reasonable doubt" with the "clear and convincing standard" of proof, and making the system more inquisitorial and less adversarial, with more emphasis on getting to the truth than on being overprotective about the accused's rights.

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[556]This theme has been further explored in :
*Inquisitorial Techniques of Fact-Finding in Indian Civil Proceedings,* MPhil Thesis, Nanda Kishore, National Law School of India University, Bangalore, 2009.

[557] The Indian Evidence Act, 1872, has been lauded as a "commendable piece of legislation" – Letter of Chairman P.B. Gajendragadkar, to the Law Minister whilst submitting the *69th Report on the Indian Evidence Act, 1872*, May 1977; the Act is seen as "an embodiment of all that is truly excellent"- Para 100.17, *69th Report on the Indian Evidence Act, 1872*, May 1977.

[558]March 2003.

However, these suggestions were never implemented. Our constitution is sympathetic to, and borrows from, the traditions of British and US constitutions. Our basic criminal law concepts such as the presumption of innocence, proof beyond reasonable doubt, fair trial, *mens rea* andthe right to be heard, are all borrowed concepts. Articles 20, 21 and 22 of the Constitution also rest on the plank of Anglo-American concepts and doctrines. The Criminal Procedure Code, 1973, and the Indian Evidence Act, 1872, have been drafted by the British and have suffered little radical change after Independence. The Law Commissions of India have indeed frequently lauded the procedural systems inherited from the British and have held that "the ship is well-designed, fundamentally sound"[559]. Suggestions to make the system more inquisitorial like the Continental European systems or to follow indigenous traditions have been rejected on the ground that now the system has become ingrained in our country[560].

In the light of the fact that we continue to foster Anglo-American jurisprudential trends, it is clear that we would have to consider and evaluate procedural changes in the light of Anglo-American traditions. This tradition emphasizes the principle articulated in the 19th century by Blackstone: better that ten guilty persons escape than that one innocent suffer."[561] This tradition places more emphasis on protecting the accused from the power of the State with concepts such as fair trial, than on bringing criminals to justice by whatever means necessary. Keeping this in mind, we can now proceed to analyze our findings.

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[559] From the statement of Lord Kilbrandon in *Other People's Law* (1966) pages 3-4, Para 1.B.3, *54th Report on the Code of Civil Procedure 1908*, February 1973.
[560] See Paras 11 to 15, *27th Report on the Code of Civil Procedure, 1908*; Para 3, Chapter 4 of the *14th Report on Reform of Judicial Administration*, 1958; Paras 1.11, 3.1, *77th Report on Delay and Arrears in Trial Courts*, November 1978.
[561] *Commentaries on the Laws of England*, William Blackstone, William Hardcastle Browne, West Publishing Company, 1897.

## 6.3 Summary of findings, further synthesis and analysis, further questions

### (a) Empirical signposts

Whilst Chapter 1 dealt with an overview of the thesis, Chapter 2 looked at important *empirical* aspects in the face of which the right to speedy trial has to be articulated. Constitutional rights cannot be articulated in a vacuum -but have to be put forward by judges as *feasible* solutions to perceived social realities. Indeed, any history of the Supreme Court of India would show how the court has had to move parallel to existing social, political and economic leanings in order to retain its impact and relevance. In *A.R. Antulay*the Supreme Court was not in favour of time-limits for criminal proceedings, given the *feasibility* of enforcing such time-limits under existing conditions[562]. Thus, statistical and social realities, as perceived, are the skeletal bones upon which the court must flesh out concrete rights, if these rights are to be meaningful and useful – especially where rights require *positive* action from the State in terms of increased spending, infrastructure and so on. By questioning the statistical and social assumptions often underlying judicial dicta, we can see where the courts have faltered.

In Chapter 2 it was seen that, as generally believed, the prison system in India is being run largely for the housing of under-trials rather than convicted prisoners. Incarcerated under-trials made up a shocking 67.6% of India's

[562] See Para 86, proposition (10), *AR Antulay vs. RS Nayak* (1992) 1 SCC 225,where the Supreme Court held that it was neither advisable nor practicable to fix time-limits for conclusion of trials.

jailed population by the end of 2013[563], India having the second-largest population of incarcerated under-trials in the world after the United States. The same trend was seen for the past 10 years, with under-trials ranging from 64.7% to 67.6% of the total inmate population over the past 10 years. In absolute terms, under-trials grew from 2,17,130 incarcerated at the end of the year 2004 to 2,78,503 incarcerated at the end of the year 2013, with an increase by 28.3% over the past decade. Whilst little consolation can be taken from the fact that the occurrence of large incarcerated under-trial populations appears to be a trend in all developing countries, the fact that the percentages and numbers of incarcerated under-trials are only increasing each year, give little reason for optimism. The large numbers of incarcerated under-trials remain *in spite of* the huge numbers of persons released each year on bail, acquittal and the like[564]. Why is this so?

In the absence of disaggregated data showing whether the incarcerated under-trials have applied for bail and then been rejected, or whether they have been unable to furnish bail in spite of having been granted bail, or whether bail applications have not been made for them at all, a study of the *types of crimes* that incarcerated under-trials have been charged with reveals a *probable* reason why there are so many under-trials in jail[565]: a large majority of incarcerated under-trial prisoners are accused of serious or heinous crimes such as murder, attempt to murder, rape, dowry deaths, kidnapping and abduction, or offences under enactments that involve national security or national economic concerns such as the Arms Act, NDPS Act, TADA, FERA and so on. Between 67% to 69.4% of all incarcerated IPC under-trials were accused of heinous or serious crimes over the past decade,

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[563] *Prison Statistics India2013*

[564] See para 2.4.

[565] Since there is no available data to show whether the incarcerated under-trials have applied for bail and been rejected, or whether they have failed to apply for bail, etc., we can only make reasonable assumptions in this regard.

whilst between 67.1% to 72.7% of all incarcerated SLL under-trials were accused of serious offences over the past decade[566]. This would perhaps explain *why* they are incarcerated – their bail applications might have been refused by the courts: trial judges would obviously be hesitant about releasing such persons on bail. Another reason for the large incarcerated under-trial population could well be that several under-trials have not been able to afford bail- even though granted by the courts[567]. Studies by the CHRI suggest that there may also be under-trials who are so poor or ignorant that no bail applications have been on their behalf[568]. The break-up of incarcerated under-trials on the basis of the crimes they are accused of provides a valuable roadmap for the manner in which the right to speedy trial has to be articulated.

The break-up of incarcerated under-trials on the basis of the accusations made against them reveals another heartening fact: the reckless claims sometimes made in the media and elsewhere that the system by-and-large locks up people accused of *small* offences are largely incorrect.

When the demographic profile of incarcerated under-trials is looked at, we see that :

(a) Incarcerated under-trials who were either illiterate or uneducated ranged from 71% to 82.9% of the total incarcerated population over the last decade[569];

(b) SC/ST/OBC/MINORITIES ranged from 71.9% to 77.8% of the total incarcerated under-trial population over the last decade[570];

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[566]See para 2.4.
[567]Ibid.
[568]See para 2.10.
[569]Para 2.7.
[570]Ibid.

(c) Studies by the Commonwealth Human Rights Institute further show that the majority of incarcerated under-trials belong to the poorer sections of society[571].

These statistics confirm the distressing fact that the majority of incarcerated under-trials are uneducated, belong to disadvantaged groups, and are poor. Any Marxist might immediately point out the obvious: the jail system in India is being used mostly for the incarceration of the poor, the impoverished and the marginalized, whilst spouting the eloquent rhetoric of constitutionalism, equality, human rights and the rule of law. *Baxi*[572]has pointed out how the model of legal liberalism adopted by India can be critiqued with Max Weber's ideas: legal liberalism tries to convince the property-less that the legal order is fundamentally just; there is the progressively equal distribution of legal rights to people with grand declarations of fundamental rights – but the *de jure* grant of equal rights is coupled with a *de facto* regime of inequality; the notion of the rule of law which is widely propagated, camouflages the arbitrary exercise of power that exists in reality[573].

The fact that 89% of incarcerated under-trials were between the ages of 18 and 50 years[574] in 2013 also shows that incarceration would have a serious impact on the economic condition of the under-trials and their families.

A study of the periods for which under-trials have been incarcerated over the years reveals some very exciting statistics:

(a) Hearteningly, most under-trials are released in less than a year: between 77.4% to 81.4% of incarcerated under-trials were released within one year during the last decade;

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[571] See para 2.10. Curiously, NCRB data does not contain any references to the income groups of prison populations- which is obviously an important demographic.
[572] Chapter 1, *The Crisis of the Indian Legal System*, Upendra Baxi, 1982.
[573]However, I stop short of making any sociological claims here, confining myself to the four corners of the thesis.
[574] Prison Statistics 2013.

(b) Between 11% to 12.9% of under-trials were detained for periods between 1 to 2 years;

(c) Between 6.9% to 9.7% of incarcerated under-trials were detained for periods between 2 to 5 years; &

(d) Only between 0.6% to 1.1% of incarcerated under-trials were detained for periods exceeding 5 years.

These percentages provide invaluable clues as to the *practicalities* of setting time-limits for conclusions of trials. If only between 0.6% to 1.1% of under-trials are incarcerated for more than 5 years, can the system not impose a time-limit of 5 years' incarceration and speed up the trial of these cases? The excuse that there is inadequate judge-strength and infrastructure is not acceptable here because the system can easily ensure speeding up of 1 or 2% of its cases, even with existing resources. The same argument could probably be made even with regard to the 6.9% to 9.7% of cases that exceed 2 years of incarceration but involve less than 5 years of incarceration. Thus, the system might, without much addition by way of resources, be able to ensure speedy trial within a time-limit of 2 years of incarceration for all cases, since around 90% of the cases are being disposed of within 2 years of incarceration, in any event. Therefore, the anxiety of the Supreme Court[575]that imposition of time-limits would result in the collapse of the system, with large numbers of accused being let off, is unfounded. Time-limits imposing a maximum incarceration period of 5 or even 2 years, within which time the trial must be concluded, might not be impractical. The next question is what the time-limits should be for the trial of cases where the accused is *not* incarcerated. Here, even more leeway can be afforded to the prosecution authorities. The *245th Report*[576]has discussed several different strategies that can be used to calculate practical time-limits that can be set to

[575]See *AR Antulay vs. RS Nayak* (1992) 1 SCC 225, where this anxiety was obviously present.

[576] On *Arrears and Backlog: Creating (Additional) Judicial Wo(manpower)*, July 2014.

determine when a case becomes "old". The current Chief Justice of India, Justice H.L. Dattu, recently stated out-of-court that a time-limit of 5 years would be imposed for criminal cases; even though his priority was that no criminal case should go on beyond 2 years[577].

**(b) The Code of Criminal Procedure, 1973**

In chapter 3, by a study of the provisions of the Code of Criminal Procedure, 1973, it was seen that even though the right to speedy trial runs through the veins of criminal procedure in India, our courts may well be at fault for not infusing more rigour and vitality into the provisions so as to make the right a more effective one.

Insofar as the right to speedy trial *de hors* the right to bail is concerned, at thearrest stage section 57 mandates that the accused shall be produced before the Magistrate within 24 hours from the time of his arrest. At the investigation stage Section 167(5) provides for stopping investigations that have not been concluded within 6 months. However, the time-limit only applies to summons-cases triable by Magistrates and the time-limit is further watered down by the fact that the Magistrate or Sessions Judge can nonetheless permit the investigation to continue. Section 173 provides weakly, that the investigation into the rape of a child *may* be completed within 3 months. At the trial stage, section 309 sets a 2-month time-limit only for the trial of sexual offences, to be adhered to "as far as possible". This delicate injunction does not even apply to all cases. Thus, the CrPC is quite *weak* in advocating time-limits for conclusion of trials. It is no wonder therefore, that the judiciary has had to read time-limits *into* the provisions in

[577]Deccan Herald Newspaper, Bengaluru, Monday, 06-04-2015, page 1.

several cases- but the judiciary also ultimately took a U-turn in *Ramachandra Rao*[578]by overruling earlier cases in which time-limits had been imposed. The Law Commission of India has approved and advocated the setting of time-limits for conclusion of trials- but this has not been heeded by the law-makers.

*De hors* the question of time-limits, we see that the CrPC is indeed quite sturdy in providing for quick termination of proceedings where an adequate case is not made out against the accused, at every stage of the criminal process. However, some decisions of the Supreme Court are questionable, since they fail to provide interpretations that minimize delay and bring proceedings to a close.

**(c) The right to bail**

In Chapter 3 it was further seen that the right to bail whilst being *a part of* the right to speedy trial, does not *entirely* exhaust the right: the accused's right to bail has to be treated as being *a part of* the right to speedy trial, but only as *one of theincomplete remedies* for violation of the right, insofar as the accused is concerned.

With regard to the right to bail, it was seen that sections 436, 437 and 439 CrPC provide for *regular* bail, i.e., bail upon consideration on merits, whilst sections 57, 167, 436A and 437(6) provide for *default* bail, i.e., bail due to the lapse of the time-limits prescribed. Even though it is commendable that default bail has been provided at different stages of the criminal process to protect the liberty of the individual, default bail has been qualified by various

[578]*P. Ramachandra Rao vs. State of Karnataka* (2002) 4 SCC 578.

pre-conditions and the courts are authorized to *nonetheless* continue the detention of the accused in spite of the lapse of the time-limits prescribed for detention. Thus, large numbers of under-trials may continue to be incarcerated. For example, a person accused of murder, which is an offence punishable by death, cannot get the benefit of release under section 436A – which provides for default bail upon incarceration of up to half the maximum period of imprisonment prescribed for the offence, except for offences for which death sentence is one of the prescribed sentences.

Whilst it is notable that Parliament introduced provisions for release on bond without sureties in sections 436 and 436A CrPC, and also for the presumption of indigence in section 436 CrPC, similarly effective insertions have not been made in the other provisions relating to bail. Consequently, the old property-oriented regime of bail continues, in spite of our Constitutional ethos of social justice, judicial exhortations to bring about radical changes to the existing bail system and in the face of the fact that India's jails mostly incarcerate people from the poorest strata of society.

It is seen that even though Indian criminal procedure does appreciate the plight of the indigent and the poor, the law treats the poor badly when it comes to the question of bail. A foray into the discourse on Bail Reform being conducted in other countries shows that India is yet to take advantage of modern techniques that tend to minimize reliance on the finances and property of the accused, and that maximize the freedom of the accused. India is yet to move away from its Victorian legacy of property-oriented bail. It is submitted that no person should remain in jail solely due to his inability to provide bail. If bail has been refused, that is another matter- but if bail has been *granted* for a non-bailable offence, it does not make much sense to say that the accused should remain in jail even though he is unable to pay the bail amount.

It is submitted that the court could employ a *rebuttable* presumption of indigence where the accused, even in a non-bailable offence, has remained in jail for several weeks without satisfying bail. The presumption could be held rebutted where the court upon enquiry, finds that there is evidence to show that the accused is not indigent.

### (d) Blanket bail orders

Supreme Court directions granting bail to various classes of accused have been rendered largely redundant since Parliament has stepped in and provided for release on bail as a matter of right in section 436A CrPC, once a person has undergone incarceration for a period up to ½ the maximum period of punishment prescribed for the offence[579]. Granting bail *en masse* to whole classes of accused, contrary to the existing statutory provisions and irrespective of whether the trial judge has refused bail, is a judicial practice that does not commend itself to the rule of law. It is submitted that in view of Parliamentary intervention, this practice need not be resorted to, except with regard to enactments such as TADA where judicial intervention is still required to water-down the drastic effects of the legislation.

### (e) The Supreme Court and its oscillation with time-limits

In **Chapter 4** we saw that the 7-judge bench in *P. Ramachandra Rao*[580] could have done a lot more to protect the right to speedy trial by upholding the

[579] Does not apply where death sentence is one of the prescribed punishments.
[580] *P. Ramachandra Rao vs. State of Karnataka* (2002) 4 SCC 578.

decisions in *Common Cause (I and II)*[581] and *Raj Deo Sharma (I and II)*[582]. Merely making rhetorical statements about the existence of such a right, without giving effect to it in concrete cases to the affected under-trials, is not a praiseworthy approach:

(g) The judges in *P. Ramachandra Rao* could have saved the decisions in *Common Cause (I and II)* and *Raj Deo Sharma (I and II)* to a large extent. *A.R. Antulay* had specifically stated that with regard to the setting of time-limits, the considerations would be different for minor offences. *Common- Cause (I and II)* and *Raj Deo Sharma (I and II)* in fact, dealt mostly with minor offences. At least the directions relating to such minor cases could have been held valid. Secondly, as rightly pointed by Justice M. Srinivasan, *A.R. Antulay* had frowned upon time-limits in the context of an assumption that the only remedy for exceeding the time-limits would be quashing of the proceedings, letting the guilty go free. But *Raj Deo Sharma(I)* did not lay down any outer time-limits providing for putting an end to the prosecution itself, should the limits be breached. Only the prosecution *evidence* would be treated as closed and the prosecution would go on to the next stage i.e., questioning of the accused or accused's evidence. Therefore, *P. Ramachandra Rao* could have upheld the earlier cases if these subtleties had been gone into.

*(h)* The seven-judge bench did not examine in detail the question whether setting of time-limits would be valid, simply on the ground that it would be contrary to the Constitution Bench decision in *A.R. Antulay.* However, the instant bench was a 7-judge bench, having the power to differ from and *overruleA.R. Antulay* if so required. The 7-judge bench did not even examine the different pros and cons of setting time-limits

[581] 1996(4) SCC 33 and 1996(6) SCC 775.
[582] 1998(7) SCC 507 and 1999(7) SCC 604.

but simply followed the decision of the smaller bench. This does not speak much for the jurisprudence of the court.

*(i)* Even if we evaluate the court's approach in the light of social and statistical realities, it is clear that it is in fact, *feasible and advisable* to lay down time-limits for proceedings. Without these time-limits, the right to speedy trial becomes mere rhetoric for the large numbers of poor incarcerated under-trials. A gradually progressive, step-by-step approach to laying down time-limits would be feasible and advisable. Initially, given the current state of resources and infrastructure, time-limits could be set for the most disadvantaged categories within under-trials: women, children, the mentally ill and the sick. Since these categories of inmates do not constitute a huge percentage of the under-trial population, fixing of time-limits for such persons would not unduly strain the existing system. So also, the fixing of time-limits for persons accused of minor crimes would not greatly strain the system since the majority of under-trials are incarcerated for serious and heinous crimes. Again, other categories of inmates for whom time-limits could be laid down are persons accused of terrorist activities or offences against national security, persons holding high offices in the government, etc. Society requires that the trial of such persons be concluded quickly. As India's judicial infrastructure and judge-to-population ratio gets better, the courts could consider time-limits for the remaining categories of inmates.

*(j)* The 7-judge bench's timid stand that it did not have the *power* to lay down time-limits (dissented to by Justice Raju) is rather curious given the extraordinarily activist history of the Supreme Court of India!

*(k)* The court failed to appreciate the most compelling argument for time-limits: another 7-judge bench in *Maneka Gandhi* had categorically held that *any* procedure will not suffice to satisfy article 21; the procedure must be *reasonable, just and fair*, which would obviously mean that the

procedure must be reasonably expeditious. Can a procedure that takes 5 years be held to be reasonable? Or a procedure that takes 10, 15 or even 25 years?! It would be contrary to logic and common-sense to suggest that a procedure which takes so long is in conformity with article 21. Judges and scholars may quibble about the *precise* length of time that would be deemed reasonable, but no one could deny that a procedure which takes say, more than 7 years, is an unreasonable procedure. Thus understood, it is clear that some concept of time-limit is *inbuilt* into the right to speedy trial. To put it philosophically, everything in life has an expiry date, as does life itself! Therefore, time-limits are *inevitably* a part of reasonable, just and fair procedure under Article 21. Thus understood, *A.R. Antulay*, which failed to recognize this reality is in fact, contrary to the larger 7-judge decision in *Maneka Gandhi,* since by failing to incorporate time-limits into criminal procedure, the procedure remains unfair, unjust and unreasonable and violates Article 21. *P. Ramachandra Rao* should have followed *Maneka Gandhi* and overruled *A.R. Antulay*.

(l) Merely because India may not have the judicial resources to complete trials within a reasonable time, we cannot simply repeat the rhetoric of speedy trial without further enumeration and assume that the right has been protected. The more honest approach would be to accept that the right is infringed in a large number of cases and then address the question of resources. In other words, the question of *feasibility* must be differentiated from the question of *constitutionality*.

### (f) The dual-faced approach of the Supreme Court

When we look at the *practical manner* in which the "facts and circumstances" approach is applied in the individual cases that come up seeking quashing

before the Supreme Court, it becomes apparent that in a large number of cases, the Supreme Court has quashed proceedings on the ground that they violate the accused's right to speedy trial: but all these cases relate to *minor offences*. Wherever serious or heinous crimes are involved, the Supreme Court never lets go of the accused that easily. The nature of the offence charged thus appears to be the single most determinative factor in holding that the accused's right to speedy trial has been violated.

What can be said about the dual-strategy of the Supreme Court: strict enforcement of the right when minor offences are involved but the attitude of "a crime never dies" when major ones are involved? Further, when the trend of the Supreme Court clearly shows that the right will be strictly enforced for minor offences, what harm can be caused by laying down time-limits for the trial of cases involving minor offences, as was sought to be done in *Common Cause (I and II)?* Third, whilst appreciating the enforcement of the right with regard to minor offences, what about the *innocent* person involved in a major offence? If the courts ultimately find the accused guilty of a major offence, then the undue delay can perhaps be justified on the ground that he will get set-off under section 428 CrPC i.e., the period of sentence will be reduced by the period of detention undergone as an under-trial. But if the accused is ultimately acquitted, how can the long period of incarceration be justified? For example, if an under-trial is incarcerated for 20 years and then *acquitted* by the court, how can the State justify itself before such a person? Was not the detention for 20 years excessive? How does the State compensate such a person for the loss of 20 years of his life? This troubling issue is unfortunately not addressed by the Janus-faced approach of the Supreme Court.

### (g) Defining the right to speedy trial

In Chapter 4 it was seen that the right to speedy trial in India is not defined by any time-limits, but a "facts and circumstances" approach is adopted, wherein a multitude of factors are looked at to determine whether the right has been infringed in a particular case, including: the seriousness of the crime alleged; the length of delay; the reasons for the delay - especially whether the accused was himself to blame; the prejudice caused to the Defendant; & the integrity of the evidence against the accused, i.e., the merits of the prosecution case. The accused's assertion of his right does not seem to have been granted any relevance in the Indian context, even though it is quite relevant in the USA[583].

Given the trend of decided cases wherein only in matters involving minor/smaller offences the court has quashed proceedings, one may say with some confidence that if the accused is alleged to have committed a relatively small offence and the period of incarceration or trial is long, he has *better* chances of getting the proceedings quashed than an accused charged with a serious or heinous crime. However, when *exactly* the matrix of facts presented to the court will invoke the judicial response of quashing or a finding that speedy trial rights have been violated, is not susceptible to articulation. One could link this aspect with what appears to be a general characteristic of judicial law-making in India: avoidance of strict rules in favour of discretionary, case-by-case approaches. In Dhavan's PhD thesis : *The Supreme Court of India – A Socio-Legal Critique of its Juristic Techniques*[584], Dhavan argues that the manner in which Indian judges interpret and apply the law whilst deciding cases that are before them is "technically unpredictable, not uninfluenced by imitative cosmopolitan habits,

[583]The researcher has not come up against any case where this factor has been deemed relevant.
[584]Rajeev Dhavan, N.M. Tripathi Pvt Ltd, 1977.

conditioned by native instinct to a depth not yet predictable by the psychologist or documented even by novelist, the dramatist or the fiction-writer, and suffering from an over-sensitive opinion of their lonely and unparalleled position."[585] In short, our judges seem generally averse to decision-making with fixed rules and prefer case-by-case discretionary approaches.

This lack of definition obviously has side-effects. Only if the right is precisely defined say, by imposing time-limits of 5 years for conclusion of trials, can it really be made really effective. Only then the system will respond to the thousands of under-trials in India's jails. If the right is left inchoate, then little enforcement of the right will take place. Every hapless under-trial would have to file section 482 CrPC petitions or writs in the High Courts and Supreme Court seeking a finding that his right has been infringed, on the "facts and circumstances" of his case. These section 482 CrPC and writ petitions would themselves take several years to be concluded. Further, it is obvious that few under-trials would have the resources to approach the High Courts and Supreme Court to enforce their rights. Thus considered, it is clear that the Supreme Court's approach to defining the right to speedy trial is not a happy one for India's incarcerated.

### (h) Fair trial and speedy trial

The Supreme Court has distinguished the concept of fair trial from that of speedy trial. In *P.Ramachandra Rao vs. State of Karnataka*[586] it was held that there was a qualitative difference between the concepts of speedy trial and fair trial: unlike the accused's right to a fair trial, denial of right to speedy

[585]Page 461.
[586]2002(4) SCC 578

trial does not *per se* prejudice the accused in defending himself. This has been reiterated in other cases too.[587] It is clear that once a trial is delayed to the point where due to loss of evidence and the like, the accused is unable to defend himself effectively, the delayed trial also becomes an *unfair* trial.

### (i) To whom the right belongs

Supreme Court dicta indicate that the right to speedy trial is not just the right of the accused- even though it is usually only the accused who approaches the court. The right is equally the right of the victim or her relatives, as well as the right of the State. There is thus, a *triangular* set of interests. The accused has a stake in ensuring speedy trial since he wants to minimize the incarceration and anxiety that accompanies criminal prosecution. The victim or her relatives have a stake in ensuring that they get retribution and compensation for the wrong committed to them – within a reasonable period of time. Thirdly, society or the State has a stake in ensuring that the objects of the criminal justice system are enforced and that the guilty are brought to book expeditiously. However, the researcher is yet to encounter a case where the State or victims have sought to enforce the right.

An interesting constitutional issue arises at this stage: Article 21 states that no person shall be deprived of his life or personal liberty except according to procedure established by law: this obviously relates only to the rights of the *accused*. How can *victims* and the *State* trace their right to speedy trial to this Article unless the language of Article 21 is wholly ignored? Historically too, it is clear that the constitutional guarantees under Articles 20 to 22 are concerned with the accused's rights and the protection of accused persons

[587] See for example *State of Maharashtra vs. Champalal Punjaji Shah* [1981(3) SCC 610].

from persecution by the State. Can a *victim* prefer say, a petition under articles 226, 227 or 32, seeking speedy trial against the perpetrator of a crime? To which fundamental right could such relief be traced? Even though this has not been squarely addressed by the Supreme Court, it is submitted that the rights of the victims to speedy trial could be traced to Article 14, since the victims could argue that the State, being constitutionally and statutorily bound to prosecute offenders and bring them to justice, has failed to act non-arbitrarily, speedily and as per the mandate of law, thereby affecting the life of the victim concerned.

It is submitted that the right to speedy trial *should* be defined to be a right not just of the accused- but equally that of the State and the victim. The voice of the victim is increasingly being recognized in India and in other jurisdictions. The *Committee on Reforms of the Criminal Justice System* observed that there were two types of rights that victims could be seen to have:

(i) The right to *participate*i.e., be impleaded in the proceedings, to know about the proceedings, to be heard when proceedings take place and to assist the court in the search for truth;

(ii) The right to receive compensation for injuries and for interim reliefs as well.[588]

It was noted that the plight of the victim was pitiable in India- with no right to lead evidence, challenge the accused's evidence through cross-examination or to advance arguments. Even at the stage of investigation, the victim's role is limited and he has a role only if the police feel it is necessary. The counsel engaged by the victim may be given a limited role in the conduct of the prosecution, that too with the permission of the court. The only other privilege is that he may submit, again with the permission of the court, written arguments after the closure of evidence. The UN has made a declaration of

[588]Paras 6.3 and 6.7.6.

*Basic Principles of Justice for Victims of Crime and Abuse of Power*[589] recognizing several of the basic rights of victims. In the light of these developments, it is clear that right to speedy trial should equally be recognized as the right of the victim also, and this would be a further step towards ensuring the participatory and compensatory rights of victims in the criminal process. This would be even more apt in cases involving legislation that is *victim-centred*. For example, offences under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989, seem to have been defined primarily for the benefit and protection of the victims of these crimes – but the effect of the legislation would be lost if it takes several years to bring the guilty to justice[590].

Insofar as the State is concerned, at first blush it might seem paradoxical that the State might itself want to assert the right to speedy trial – when the prosecution is in its own hands. However, it is clear that the trial process involves several entities and actors, all of whom must play their parts well in order that the trial is concluded quickly: the police and other investigation authorities must act efficiently; the public prosecutors must perform well; the defense counsel should avoid delaying the matter and even the trial judge must also do his bit in ensuring that justice is done speedily. Why should failure on the part of the investigation authorities or the judge to ensure expeditious disposal not give a cause of action to the State (the prosecution) to seek directions in a writ court[591]? After all, the State is the voice of the entire community, seeking speedy justice for persons who have violated the community's standards. This may be particularly apt in cases involving the

[589] In its 96th Plenary Meeting on 29-11-1985.
[590] I am thankful to Professor Dr. S. Japhet, Professor of Sociology-cum-Director, Centre for the Study of Social Exclusion & Inclusive Policy (CSSEIP), NLSIU, Bangalore, for making me privy to various discussions held by the Centre, on the reforms needed to the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.
[591] Writ proceedings between State entities *inter se* have been recognized as being maintainable.

trial of persons holding public offices- the entire community is interested in getting to the truth of the matter expeditiously[592].

### (j) At what stage the right attaches

As held by *A.R. Antulay* and affirmed by *P. Ramachandra Rao*, the right to speedy trial encompasses all stages i.e., investigation, inquiry, trial, appeal, revision, re-trial and execution of the sentence.

At the stage of execution of a death sentence, it is seen that the jurisprudence of the Supreme Court is particularly problematic. Whilst in *TV Vatheeswaran*[593] some guidelines were sought to be laid down to determine exactly when the condemned person would be entitled to a lesser sentence, in *Triveniben*[594]the Constitution Bench overruled *Vatheeswaran* and upheld *Sher Singh*[595], reiterating that no fixed time-limits could be laid down to determine when delay in execution of death sentence would violate the right to speedy trial. *Triveniben* thus prophesied the attitude to time-limits that would be adopted in the subsequent decision of *AR Antulay*[596]. Recent decisions such as that of *Devender Pal Singh vs. State (NCT of New Delhi)*[597] have reiterated the "facts and circumstances" approach to decide whether delay in execution should mitigate the punishment. Some commentators have observed that the Supreme Court's approach has made the question whether delay in execution of death sentence will lead to commutation, a cruel lottery.

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[592]The trial of Ms Jayalalitha, the former Chief Minister of Tamil Nadu is a case in point.
[593]1983 (2) SCC 68
[594]1988(4) SCC 574
[595] 1983 (2) SCC 344
[596]*Triveniben* preceded *AR Antulay*.
[597]2013 (6) SCC 195

### (k) The US experience with the right to speedy trial

What can we take away from the US experience with the right to speedy trial? It is submitted that:

(i) The severe criticism that is made of the US approach of dismissal of charges with prejudice as the *only* remedy for speedy trial violation, is fortunately not to be made with regard to the Indian approach to speedy trial violation. Indeed, in *A.R. Antulay* the court specifically held that in addition to quashing, other remedies such as compensation and reduction of sentence could be explored;

*(j)* Whilst the 6th Amendment and the Speedy Trial Act, 1974, require that the defendant must *assert* his right in order to avail of it, failing which the right is deemed to have been *waived*, this doctrine has fortunately not become a part of the Indian law on the subject; it would indeed be reckless to import this requirement into the Indian law since the majority of incarcerated accused in India are poor, ignorant and uneducated;

(k) Whilst the 6th Amendment right suffers from the fact that it only applies when a person is an "accused" that is, *after* trial has commenced, and consequently the accused have to rely on the applicable statute of limitations or the 5th Amendment to agitate pre-trial delay, the Indian right to speedy trial encompasses *all* stages of the criminal proceedings;

(l) Whilst the judges of the United States were equally reluctant as the Indian judges in advocating any fixed time-limits for determination of the right, and preferred a case-by-case approach (which approach has also been followed by the Indian courts),[598] intervention by the

[598]See *AR Antulay vs. RS Nayak* 1992(1) SCC 225.

legislature in the US vide the Speedy Trial Act, 1974, has resulted in specified time-limits, and the Act is seen to *exceed* constitutional guarantees;

(m)The US Speedy Trial Act, 1974, gives us a template and an example, upon which we could also model time-limits in Indian cases, should we wish to do so, including the exceptions that need to be provided for and the manner and circumstances under which the trial judge may authorize a delayed trial to continue;

(n) It is indeed noteworthy that the Speedy Trial Act, 1974, not only addresses *legal doctrine*, but also issues relating to planning, finance and administration of the criminal justice system to enforce this right i.e., the *institutional* aspect of the right; this is something India should borrow;

*(o)* Comparing the Indian and US approaches, it would be necessary to bear in mind the vast difference in functioning of the two judiciaries insofar as *efficiencies* are concerned: the US system is efficient when compared to the Indian one therefore, time-limits can probably only be implemented progressively and gradually in India; &

(p) Criticism by scholars in the US show that whilst time-limits may help, they cannot be expected to magically solve the problem of delays and arrears: other factors such as judge strength and infrastructure have great bearing on the question of delays and arrears.

**(l) The question of judge-strength and resources**

In chapter 5 it was argued that:

i. Scholarly sources confirm that one of the major reasons for delays in criminal cases is the inadequate funding for the judiciary in India and consequently, the inadequate judge-strength and infrastructure;

j. Historically, very little investment was made in the judiciary since colonial times, and this trend has unfortunately continued even after Independence;

k. Little attention has been paid in Independent India to court budgeting, manpower planning and infrastructure and this remains a much-ignored area of study;

l. International law and the law in countries like the USA recognize and require adequate funding for the judiciary as an important aspect of the *separation of powers* doctrine;

m. Indian courts have also of late, gradually begun to recognize and articulate their powers under the *inherent powers* doctrine, to ensure adequate funding for the judiciary; Indian courts have now begun to enforce the right to speedy trial by demanding adequate judges, staff and funding to meet this right;

n. Judicial Impact Assessment has now become a part of the judicial discourse in India and is a first step towards broader court budgeting and management techniques;

o. Scholars confirm that if there is enhancement of judge-strength and resources, the problem of delays and arrears is not an *insoluble* problem, as is sometimes sought to be made out;

p. Enforcing *proactively*, the institutional aspect of the right to speedy trial is indeed the way forward; the most useful manifestation of this right is the power it confers on courts to require sufficient funding from the State, in order to give effect to this right. If the executive branch of the State by itself fails to ensure adequate funding for the judiciary, the judiciary will have no option but to step in and exercise its inherent powers.

## 6.4 Gradual and progressive adoption of time-limits in specified categories would be the way forward

As seen earlier, the Supreme Court's blanket refusal to adopt time-limits for *all* criminal cases is not an approach that is appreciable. Failure to lay down any absolute standards and reliance instead on a discretionary, case-by-case approach is a rather timid and ineffective way of giving effect to the right to speedy trial. How many poor incarcerated persons will actually be able to approach the High Court (under section 482 or articles 226 and 227) or the Supreme Court (under article 32) seeking evaluation of their case on the "facts and circumstances" approach? How many accused actually approach the courts in this manner? It is obvious, as borne out by *CHRI* and other reports, that the large majority of incarcerated under-trials being poor and un-educated, are not even able to defend themselves adequately in the trial courts- let alone approach the High Court or Supreme Court. For such persons, the right to speedy trial is mere rhetoric unless the law firmly steps in and ensures justice for them.

The failure to lay down any time-limits whatsoever goes against the grain of reason and common-sense. Can it be said that the right to speedy trial has not been violated for a person whose trial has taken 15 years- without any fault of his? Some concept of time-limit is indeed *inherent* in the right to speedy trial and in article 21.

Further, the failure to lay down time-limits smacks of a system where administration, oversight, control and performance standards are lacking. Time-limits are a recognized necessity for good management of any enterprise or project- let alone the criminal justice system. A system without time-limits is like a rudder-less ship, adrift in the sea.

In an ideal state of affairs, time-limits would be set for all types of offences and the State would have enough resources, judges and infrastructure to complete all cases within the time-limits set. But given existing constraints of finance and infrastructure, how should the Supreme Court go about progressively enforcing time-limits? Which types of criminal cases need to be tried *first*? The following categories could be recognized for giving effect to time-limits, in the first instance:

(a) **Cases involving relatively small offences**

We have seen earlier that the Supreme Court *does* in fact regularly quash proceedings on the ground of violation of the right to speedy trial where the offences charged are minor in nature. The decisions studied show that the Supreme Court has no hesitation in this regard. Indeed, the decisions in *Common Cause (I and II)* and *Raj Deo Sharma (I and II)* laid down time-limits mostly for minor offences, which aspect had been specifically left open in *A.R. Antulay*. Therefore, the courts *should* adopt specific time-limits for smaller offences, in keeping with the ratio in *Maneka Gandhi* that procedure should be just , fair and reasonable. As India's judicial infrastructure and judge-to-population ratio improves, time-limits for serious and heinous crimes might also be considered.

**(b) Cases where incarceration has exceeded 5 years**

We see that only around 1% of India's incarcerated under-trials suffer detention for periods exceeding 5 years. Can not the system handle these cases expeditiously? It is clear that time-limits can and should be set for such cases also. Indeed, it may even be feasible to lay down time-limits for cases where incarceration has exceeded 2 years- since these cases constitute less than 10% of the incarcerated population.

### (c) Specially vulnerable categories of accused

Not all the accused are the same: some accused may require special treatment since they are particularly vulnerable and the sufferings of prison life may be heightened in their cases:

#### 1. Women

Women do require special treatment, especially women with children. The Constitution of India makes special provision for women and children[599]. Women constituted only 4.6% of under-trials in 2013[600].

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[599] See for examples:

(a) The State not to discriminate against any citizen on grounds only of religion, race, caste or *sex*, etc. (Article 15 (1));
(b) The State may make any special provision in favour of women and children (Article 15 (3));
(c) Equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State (Article 16);
(d) The State to direct its policy towards securing for men and women equally the right to an adequate means of livelihood (Article 39(a)); and equal pay for equal work for both men and women (Article 39(d));
(e) To promote justice, on a basis of equal opportunity and to provide free legal aid by suitable legislation or scheme or in any other way to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities (Article 39 A);
(f) The State to make provision for securing just and humane conditions of work and for maternity relief(Article 42);
(g) The State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation (Article 46);
(h) The State to raise the level of nutrition and the standard of living of its people (Article 47);
(i) To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women (Article 51(A) (e));
(j) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat (Article 243 D(3)); &
(k) Not less than one- third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women (Article 243 D (4)).

Shockingly, some 1,252 women under-trials had their children numbering 1,518 residing with them in jails[601]. Time-limits set for women would go a long way towards ameliorating the plight of these accused. Since the overall figures of women are not huge, the system should be able to handle time-limits for this category of accused. *TheCommittee on the Reforms of the Criminal Justice System* had noted that vulnerable sections of society like women, children and persons belonging to scheduled castes or tribes suffer more when the criminal justice system fails to deliver[602]. The *135th Report of the Law Commission of India on Women in Custody*[603]suggested the addition of a separate chapter in the CrPC incorporating safeguards to protect women in custody. It recommended that a presumption in favour of release on bail be incorporated in section 437 CrPC, where the accused is a woman, sick or infirm[604]. It further recommended that the High Court on the administrative side should ensure that female prisoners are properly looked after[605]. It also observed that the numbers of women prisoners should be reduced[606]. The special vulnerability of women to sexual offences whilst in custody was noted[607]. In the case of *AR Antulay* Ram Jethmalani arguing for the State of Bihar had contended that the concept of delay must be totally different depending upon the class and character of the accused and

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(ix) Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in everyMunicipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality (Article 243 T (3)).
(x) Reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the legislature of a State may by law provide (Article 243 T (4)).
[600]Prison Statistics India 2013, page (i).
[601]Ibid.
[602]Para 1.25 to para 1.28.
[603]September 1969.
[604]Para 2.23.
[605]Para 2.26.
[606]Para 8.5.
[607]Para 3.1

the nature of his offence. This seems obvious in the case of women under-trials in prison- their cases would need to be taken up on priority basis.

## 2. The mentally ill

Needless to state, the mentally ill form yet another vulnerable category who would greatly benefit from time-limits. 2410 incarcerated under-trials were supposedly mentally ill in 2013[608]. *Minds Imprisoned: Mental Health Care in Prisons*[609] published by the *National Institute of Mental Health and Neurological Sciences* involved the evaluation of 5024 prisoners from Central Prison, Bangalore. The study noted that mental illness, including substance-use disorders, pose major challenges in prisons all over the world; the prevalence of mental illness is disproportionately high amongst prison inmates due to factors such as violence, lack of privacy, lack of social networks, lack of meaningful relationships, poor health services and so on. People with pre-existing mental disorders are subject to more discrimination and isolation after incarceration. The poor levels of health care and psychiatric care available in prisons was noted.

Sections 328 to 339 CrPC contain provisions relating to the treatment of accused persons of unsound mind. Under section 329, where the court trying the accused is satisfied that the accused is suffering from unsoundness or incapacity of mind, it shall record a finding to that effect and *postpone* further proceedings in the case. This is a

[608]Prison Statistics India 2013, page 70. They constitute around 0.8% of incarcerated under-trials.
[609]2011, Editors: Suresh Bada Math, Pratima Murthy, Rajani Parthasarathy, C. Naveen Kumar and S. Madhusudhan, NIMHANS, Deemed University, Publication No. 79

significant provision because the law refuses to try a person who is mentally unfit to defend himself and will indefinitely postpone the trial until he becomes capable of standing trial. Under section 330, after postponing the case, the court *shall* order release of the accused on bail, provided that a friend of relative undertakes to provide regular outpatient treatment and to ensure that the accused does not harm himself or any others, and provided that inpatient treatment is not required. If bail is not granted or if an appropriate undertaking is not furnished, the court shall order the accused to be kept in such a place where regular psychiatric treatment can be provided. Under section 331, the trial will resume once the accused has ceased to be a person of unsound mind. Under section 329, if there appears to be no *prima facie* case made out against the accused, the court instead of postponing the enquiry, shall discharge the accused. Whilst it is noteworthy that the CrPC does afford a right to bail to persons of unsound mind and also the possibility of early discharge if no *prima facie* case is made out, it is still apparent that there is great potential for excessive detention in the absence of specific time-limits. If an accused found to be suffering from unsoundness of mind is not released on bail and the trial is postponed, then until and unless the accused regains his mental capacities, the trial and his incarceration remain pending *indefinitely*. Given the poor levels of psychiatric care in prisons, it would not be surprising if some accused never recover and spend their whole lives in prisons. Crucially, the prison authorities must oversee efficiently the mental health of the under-trial and promptly take him before court once he regains his capacities. Under section 337 CrPC if the accused is of unsound mind and detained in jail, the Inspector General of Police is required to certify that the person is capable of making his defense, for the trial to re-commence. Under section 39 of the Mental Health Act, 1987, the Inspector

General of Prisons (where the accused is detained in a jail) and the visitors (where the accused is detained in a psychiatric hospital or nursing home) shall, once every 3 months, visit the accused and make a report on the state of mind of such person. The Medical Officer in charge of a psychiatric hospital or nursing home is required to report every 6 months on the mental condition of the accused. If the accused is detained in jail, he shall be visited once every 3 months by a psychiatrist and a report shall be furnished.

It is startling to note that every year, quite a few under-trials are designated as being "mentally-ill" by NCRB data. For the year 2013, 2410persons were listed under the category of "mentally-ill" under-trials. The same trend obtains for previous years.[610]There are several questions that arise regarding these persons of unsound mind detained in prisons pending trial:

(i) Why are they in prisons instead of being in psychiatric hospitals or nursing homes? Even though the CrPC and the Mental Health Act, 1987, do not seem to bar the detention of the mentally ill in prisons, (since their provisions contain express references to the mentally ill in prisons), this does not appear to be in keeping with best practices around the world[611]. Clearly, prisons are the last place where the mentally ill should be housed.

(ii) Has their bail been rejected in spite of the liberal bail provisions in section 330 CrPC? Or have they been unable to satisfy the financial requirements of bail? Have they been unable to provide the undertaking of a friend or relative to obtain bail?

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[610]See *Prison Statistics 2004 to 2013.*

[611]See *Mental Health in South Asia : Ethics, Resources, Programs and Legislation*, Jitendra Kumar Trivedi and Adarsh Tripathi (Editors), Springer Publications, 2015.

(iii) What is the level of psychiatric care provided to these persons and is it sufficient? Does not the State have an obligation to ensure the speediest recovery for such persons, at its own cost, so that they may stand trial expeditiously?

(iv) Does not the State have a particularly onerous responsibility of ensuring that the mentally ill housed in its prisons are given effective treatment and provided an expedited trial?

The imposition of time-limits for the trial of the mentally ill is problematic: how to conclude the trial within a time-limit if the accused has not regained his capacities by then? It seems obvious therefore, that the time-limits would have to *exclude* any periods of incapacity. A person intermittently suffering from mental illness would benefit from time-limits as would a person who has recovered from mental illness and is now fit to stand trial. In this particularly problematic area, the imposition of time-limits (which exclude periods of incapacity) would have to be strongly supplemented by the remedy of efficient psychiatric care, the costs of which would have to be borne by the State.

### 3. Juveniles

Much has been written about the rights of children caught up in the criminal justice system and this topic need not detain us for long. The Juvenile Justice (Care and Protection of Children) Act, 2000, expressly has as one of its objectives, the speedy disposal of cases involving juveniles in conflict with the law within a time-limit of 4 months[612]. Under section 12, there is a right to bail subject to certain exceptions. If bail is not granted then the juvenile has to be housed in

[612]The Statement of Objects and Reasons to the Act states that one of the objects is to ensure speedy disposal of cases by the authorities within a time-limit of 4 months.

an observation home – not a prison. Under section 14 the inquiry shall be completed within a period of 4 months from the date of its commencement, unless the period is extended by the Juvenile Justice Board having regard to the circumstances of the case, and in special cases after recording the reasons for such extension in writing. The Chief Judicial Magistrate is further required to review the pendency of cases of the Board every 6 months and direct the constitution of additional Boards. If the Board ultimately comes to the conclusion that the juvenile has committed the offence, it cannot impose any sentence of death, imprisonment, etc., that can be imposed upon adults[613]. Only the steps enumerated in section 15 can be ordered, which range from admonition to custody in a special home for a maximum period of 3 years. It is heartening to note that statutorily imposed time-limits for conclusion of proceedings are already in place insofar as juveniles are concerned. However, section 14 does contain an escape clause empowering extension of the time-period.

#### 4. Civil prisoners

These are persons who are accused of civil crimes such as default on sureties, non-payment of dues, etc., who have obviously not committed any heinous crimes. They constitute a very small percentage of the total under-trial population[614].

### (d) Trial of persons holding public offices

[613]Section 16.

[614] They were to the tune of 0.2% of total incarcerated under-trials by the end of 2013. See Table No. 1.

*The 239th Report of the Law Commission on Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities* had proposed that given the tendency of the high-and-mighty in India to treat courts with disdain, the right to speedy trial is particularly important to the State and the democratic set-up in the country in such matters. It was noted that "the slow motion becomes much slower motion when politically powerful or high and influential persons figure as accused"[615] In *Re Special Courts Bill 1978*[616] Justice Krishna Iyer had held that it was not impermissible to set up Special Courts to investigate offences committed by persons holding high public or political offices and that this would not violate Article 14[617] : " ...leaving VVIP accused to be dealt with by the routinely procrastinating legal process is to surrender to interminable delays as an inevitable evil. Therefore we should not be finical about absolute processual equality and must be creative in innovating procedures compelled by special situations."[618] In the *239th Report* it was recommended that investigations should be completed within 3 -6 months from the date of FIR; charge-sheet should be filed within 1 month thereafter; the Investigating Officer and police authorities who fail to ensure completion of investigation within the time-limits should face disciplinary action unless they establish diligence. In *Dr. Subramaniam Swamy vs. Dr. Manmohan Singh*[619] it has been held that whenever sanction is required of the government for prosecution

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[615] *Ganesh Narayan vs. S. Bangarappa* (1995) 4 SCC 41, cited at para 2.7 of *the 239th Report of the Law Commission on Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities.*

[616] 1979(1) SCC 380

[617] The constitutional validity of the Special Courts Bill 1978 setting up Special Courts for the trial of offences committed during the Emergency period was substantially held. However, the rationality of such classification for offences committed *prior to* the Emergency period was not approved.

[618] Cited at para 2.7, *239th Report of the Law Commission on Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities.*

[619] 2012(2) SCALE 12

of public servants, the sanction should be considered within a period of 3 to 4 months.

When persons occupying high and powerful positions are accused of crimes, it is in the best interests of the democratic process and effective governance in the country that the truth be arrived at as soon as possible.

**(e) Death sentence cases**

Where the accusedhas been convicted and sentenced to death, his case could be expedited at all the appellate levels by the imposition of time-limits. Delay in execution of death sentence is recognized as being cruel, inhuman and degrading treatment. How then, can appeals be allowed to go on for years when the lower court has sentenced the person to death?

As the judge-to-population ratio gets better and the capacities of the judiciary increase, the courts can consider the adoption of time-limits for more and more categories of accused, until all accused are assured trial within specified time-limits.

## 6.5 Remedies for violation of the right and techniques to prevent violation

Once the conclusion has been arrived at, whether by adopting fixed time-limits or on the "facts and circumstances" of the case, that the accused's right to speedy trial has been violated, what reliefs can and should be

granted to the accused? What remedies are available in general, to address the violation of speedy trial rights?

In the United States, courts have consistently held that the *only* remedy for violation of speedy trial rights is quashing of the proceedings with prejudice[620]. However, the Indian Supreme Court in *AR Antulay*[621] held that quashing was not the only remedy- other remedies such as expedition of trial and reduction of sentence could also be granted. In the light of this, we need to consider the merits and demerits of each remedy available for speedy trial violation. It is submitted that this is an area which gives scope for much creativity and novelty.

### (a) Quashing

Quashing of criminal proceedings as the *only* remedy for speedy trial violation has been severely critiqued in the United States. *Amar*[622] argues that the 6th Amendment right to speedy trial essentially protects three clusters of rights: (a) a *physical liberty* interest in avoiding prolonged pre-trial detention, (b) a *mental liberty* and *reputational* interest in minimizing unjust accusation and (c) a *reliability* interest in assuring that the accuracy of the trial itself is not undermined by an extended accusation period. The 6th Amendment is further stated to have the effect of pursuing truth and protecting innocence. He severely criticizes the US approach of treating dismissal of charges with prejudice as being the *only* remedy for violation of the right. He points out that as matter of logic, there are many other possible remedies for violation of the right; as a matter of history, alternative remedies

[620] *Strunk vs. US*, 37 L Ed 2d 56.
[621] *AR Antulay vs. RS Nayak* (1992) 1 SCC 225.
[622] *The Constitution and Criminal Procedure: First Principles*, Akhil Reed Amar, Yale University Press, New Haven and London, 1997.

have deep roots in the common-law, and even as a matter of constitutional text and structure, the remedy of dismissal of indictment with prejudice does not make sense. Dismissal of charges with prejudice (i.e., without the state having the right to file fresh charges) provides a windfall for the guilty whilst leaving the innocent accused uncompensated. He further points out that since the only remedy for speedy trial violation is held to be dismissal of the charges and discharge of the accused without trial, judges in the United States are loath to admit that there are speedy trial violations- thereby several accused are made worse-off because their constitutional rights are not adequately enforced. *Amar* concludes that dismissal with prejudice is appropriate only where due to the lapse of time, the holding of a trial would be unreliable to ascertain the truth due to loss of evidence; in all other cases, compensatory and punitive damages, injunctive and habeas corpus reliefs, and sentencing off-sets would be more appropriate.

In the Indian context, how appropriate or necessary is the remedy of quashing? If the accused person is innocent, then quashing may not fully compensate the accused. Let us assume a person has been incarcerated for 3 years on the accusation of cheating under section 420 IPC, and then the proceedings are quashed on the ground of delay. If he is truly innocent of the charge, then even though he would be happy about the quashing, he would still of have lost 3 years of his life over a baseless charge. In *Kashmira Singh vs. State of Punjab*[623]the Supreme Court asked: "It would indeed be a travesty of justice to keep a person in jail for a period of 5 or 6 years for an offence which is ultimately found not to have been committed by him. Can the courts ever compensate him for the incarceration which is found to be unjustified?" Only *additional* compensatory damages for the excessive period of incarceration might do him *some* good. On the other hand, if the person is

[623]1977(4) SCC 291

in reality, guilty of the charge, then quashing might be a big bonus for him. Upon conviction, he would have suffered a sentence of say, 7 years but now, even though guilty, on the ground of violation of speedy trial, he is getting off with only 3 years of incarceration, that too as an under-trial and not as a convict undergoing rigorous imprisonment.

In spite of the inequity in quashing i.e., the guilty get rewarded whilst the innocent are not fully compensated, it is clear that quashing still remains the most effective remedy available for violation of the right to speedy trial. The State having the onerous responsibility of ensuring speedy trial and bringing the guilty to book within a reasonable time, failure on its part to do so, would justify quashing since the interests at stake are deemed so important in our constitutional democracy- the physical and mental liberty of the individual.

We have seen in Chapter 3 that the Supreme Court has followed a trend of quashing the proceedings where the offences are relatively minor and considerable time has elapsed from the date of the offense. In these kinds of situations, the Supreme Court has boldly held that the right to speedy trial has been violated and readily quashed the criminal prosecutions-thus allowing the accused, whether innocent or guilty, to go free. But when it comes to serious and heinous crimes, the Supreme Court steadfastly refuses to let a single guilty man walk free without a trial, often remanding matters for *de novo* trial even several decades after the date of the offence. Is this approach justified? If a person has been incarcerated for 25 years due to no fault of his in delaying the trial, would not the court be obliged to quash the proceedings irrespective of the gravity of the offence? Courts in the US do not seem to hesitate much even to quash the trial of serious crimes if a violation of speedy trial is found. But the Supreme Court is extremely reluctant to do so. Part of the reason, one suspects, is that the criminal justice system in India is seen to be largely dysfunctional in failing to ensure

that criminals are brought to book. Affluent and powerful criminals manage to easily escape the system. In these circumstances, it is understandable that the Supreme Court is reluctant to let a single accused in a serious crime go free without trial. Once the system becomes more functional and successful in convicting criminals and reducing crime, the Supreme Court might change its stance. For now, we cannot afford to let a single guilty man accused of a serious crime go free without trial, it seems. However, this approach encounters a serious practical problem: after 20 or 25 years, would it at all be possible to obtain a conviction of the accused given the loss of witnesses and other evidence that is bound to have taken place? Would he not inevitably be acquitted if a trial is held after such long delays since he would get the benefit of the doubt? What point does the *de novo* trial serve after several decades from the date of the crime? Is the Supreme Court's reluctance to quash proceedings involving heinous crimes even after several decades a fruitful approach given the loss evidence? Holding of a trial after such a long gap of time would be meaningless[624].

### (b) Set-off

Set-off is already incorporated in section 428 of the CrPC:

**Section 428. Period of detention undergone by the accused to be set off against the sentence of imprisonment**

**Where an accused person has, on conviction, been sentenced to imprisonment for a term, not being imprisonment in default of payment of fine, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment**

[624]No data is available about what happens to the cases that have been remanded for *de novo* trial after several decades, by the Supreme Court.

**on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him.**
**Provided that in cases referred to in section 433A, such period of detention shall be set off against the period of fourteen years referred to in that section.**

Set off is a remedy that is available only upon suffering a conviction and being sentenced to a term of imprisonment. It is to be noted that under-trial detention is different from imprisonment after conviction. As an under-trial, the accused enjoys several benefits not afforded to a convicted prisoner: he need not work, he is entitled to his own food and clothing, he has wide access to relatives and other visitors, etc. A convicted prisoner undergoing rigorous imprisonment however, leads a much harsher life in prison. These aspects can make the relief of set off inequitable: a person "X" who is sentenced to 10 years imprisonment but has already undergone 7 years' incarceration as an under-trial is much better off than an accused "Y" who is sentenced to 10 years, but whose incarceration pre-trial is only 3 years. Whilst "X" undergoes rigorous imprisonment for 3 years on the whole, "Y" whose trial was speedier, undergoes 7 years of rigorous imprisonment. Thus, it is advantageous for the guilty to delay the trial. Nonetheless, it is noteworthy that the CrPC expressly recognizes pre-trial delay.

### (c) Compensation

Compensation awarded against the State for delayed trial can clearly be a useful remedy, whether alone or in combination with other remedies. The CrPC contains several provisions relating to payment of compensation:

(a) Under section 250, upon acquittal of the accused, if the court is of opinion that there was no reasonable cause for the accusation it can direct compensation to be paid by the complainant or the informant;

(b) Under section 357 CrPC when a court imposes a sentence of which fine forms a part, the fine amount can be used to pay compensation for any loss or injury caused by the offence to the victims;

(c) Sections 357A to 357C provide for victim compensation schemes, etc.

(d) Section 358 provides for compensation to be paid for groundless arrest, by the person causing the arrest, to the person who was arrested;

(e) Section 359 provides for recovery of costs by the complainant from the accused, upon conviction of the accused, in a non-cognizable case.

Thus, the CrPC is not new to statutorily recognized compensation. Why should a similar provision not be inserted for compensation for excessive detention or pre-trial delay by the State? Indeed, such a provision could even make the concerned police and prosecution authorities personally liable for delaying the conduct of trial to the detriment of the concerned accused, wherever they have been found to be at fault. Trial judges could, as a matter of practice, award compensatory damages for delayed trial whenever the accused is ultimately acquitted, but has nonetheless spent a long time in jail due to the fault of the prosecution- *some* appeasement to the accused who has spent a large number of years in jail. Indeed, the Supreme Court in several cases *has* awarded *ad hoc* compensation to accused who have been incarcerated for long periods[625]. This *ad hoc* practice could be made a part of the routine of the trial judge.

In several countries, compensation for excessive detention is statutorily fixed and paid. In Germany, the accused upon acquittal is entitled to compensation of 25 euros per day of pre-trial detention, payable by the

[625]See for examples: Daulat Ram vs. State of Haryana 1996(11) SCC 711; DG and IG of Police vs. Prem Sagar 1999(5) 700; and Bhuwaneshwar Singh vs. Union of India 1993(4) SCC 327.

State[626]. In France, a pre-trial detainee who is finally acquitted is entitled to be compensated for his material losses[627]. English law provides that if a conviction has been reversed or the person has been pardoned on the ground of miscarriage of justice, the State shall pay for the miscarriage of justice[628].

The *National Committee to Review the Working of the Constitution*[629] lamented the fact that the State had managed to escape damages actions in the past on the ground of exercise of *sovereign functions*, in several instances. This was based on the principle that "the King can do no wrong". Harm caused in the course of the discharge of sovereign functions such as defense, foreign affairs, maintenance of law and order and administration of justice was not actionable against the State on the basis of this principle. But, it was pointed out, the principle was shrouded in much confusion and had been significantly watered down in several judgments of the Supreme Court. In *N. Nagendra Rao vs. State of Andhra Pradesh*[630]the Supreme Court noted that the distinction between sovereign and non-sovereign powers had largely disappeared. In *State of AP vs. Challa Ramakrishna Reddy*[631] the Supreme Court approved the decision of the Andhra Pradesh High Court holding that where fundamental rights had been violated, the plea of sovereign immunity would not be available. An arrested person had been lodged in jail; he expressed his apprehension that his enemies may attack and kill him in prison; however the police failed to provide adequate security to him; subsequently he was shot dead in prison by his enemies. His heirs filed a

[626]Section 7, para 3 of the German Code of Compensation for Measures of Prosecution, See Pre-trial Detention Comparative Research, Fair Trials International.
[627]Article 149 Criminal Procedure Code, Ibid.
[628]Section 133 Criminal Justice Act, 1988, Ibid.
[629]Vide its consultation paper on *Liability of the State in Tort*, based on a paper prepared by Sri P.M. Bakshi, former Member, Law Commission of India.
[630]AIR 1994 SC 2663
[631]AIR 2000 SC 2083

suit against the government seeking damages. This was dismissed by the trial court on the ground that the arrest and detention was in exercise of sovereign functions; but the High Court reversed the judgment and the Supreme Court also affirmed the High Court order holding that where fundamental rights had been violated, the plea of sovereign immunity would be unavailable. Thus, the plea of sovereign immunity would not be a serious obstacle to making compensation a regular feature for excessive detention.

### (a) Punitive damages and disciplinary action against authorities

Where the investigating and prosecution authorities are found to be at fault for delayed conduct of the prosecution, the court can, whilst passing judgment, levy punitive damages on them or direct the relevant authorities to initiate disciplinary action against the erring officials. Under section 3162 of the US Speedy Trial Act, 1974, the court is empowered to punish even counsel who willfully delay the conduct of the trial by imposing fines, denying the right to practice before that court for a period not exceeding 90 days or by filing a report with the appropriate disciplinary authorities. The *239th Report*[632] had recommended that the Investigating Officer should be held personally responsible for the failure to ensure speedy trial and should be made to face disciplinary action unless he establishes that reasonably diligent steps had been taken by him[633].

This remedy might not afford immediate relief to the concerned under-trial whose trial has been delayed, but might be quite efficacious in ensuring diligent performance of duties by investigating and prosecution authorities.

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[632]On the Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities
[633]Para 2.7

### (a) Release on bail and personal bonds

As has been discussed earlier in detail[634], release on bail or personal bond is best seen as one of the remedies for violation of the right to speedy trial. Whilst substantial relief can be granted to the accused by letting him out of jail whilst the trial is pending, the anxiety and expense of a delayed trial continue to plague him whilst he is out on bail. A person who is out on bail, but whose trial has gone on in violation of his right to speedy trial, would also be entitled to claim damages and the like.

### (b) Expedited trial

If a person's right to speedy trial has been violated, then the court can grant an expedited trial to such a person i.e., order expeditious conclusion of the pending case as per its directions. As we have seen, this is a remedy that is frequently resorted to by the Supreme Court[635]. But it is submitted that this is appropriate not so much as a *remedy* for speedy trial violation as it is as a measure that should be undertaken to *prevent further* speedy trial violation. After a person's right to speedy trial has been held to have been violated, it would be a rather meek response to say only that *now* the case should be expedited. The expedited case at this stage, would only prevent furtherspeedy trial violation and would afford little by way of remedy to the accused whose constitutional guarantees have been violated. Thus, it is submitted, this technique is best seen as a preventive measure that can help *avoidfurther* violation of

[634] See Chapters 3 and 4.
[635] For example: *AR Antulay vs. RS Nayak* 1992(1) SCC 225.

the right to speedy trial, rather than as a remedy for speedy trial violation. For example, if a person has been excessively detained for 20 years awaiting trial, an expedited trial ordered in the 20th year would prevent further violation of his right- but would not compensate for the 20 years of his life lost as an under-trial.

Thus considered, expedited trial is indeed an effective tool to avoid violation of the right to speedy trial. The High Courts and the Supreme Court have been regularly resorting to this technique, as we have seen, under section 482 CrPC and Articles 226, 227 and 32 of the Constitution. But all accused cannot afford to come to the High Courts and Supreme Court. If expedited trial is ordered as a matter of course by the trial court, where a case crosses certain time-limits, then this might prove to be a very helpful technique to avoid speedy trial violation. For example, suppose a time-limit of 5 years is fixed for the trial of heinous crimes and the instant case has already taken 4 years, then the trial judge could order an *expedited* trial (to be completed in 1 year) for such a case, since it is on the verge of crossing the 5-year limit. This would have the effect of putting the case on fast track and giving it priority; it would warn prosecution and investigative authorities of the impending time-limit; it would act as an effective mechanism to oversee and control the conduct of the case. If, in spite of the order for expedited trial the prosecution authorities fail to bring the proceedings to a close within the 5th year, then they could be held liable for damages and disciplinary action.

Many such solutions can be found by creatively mixing and matching the different remedies and techniques available to address speedy trial violation.

### (c) Better living standards for under-trial prisoners

This is yet another technique to minimize the suffering caused by delayed trials. Inhumane living conditions amplify the ill-effects of delayed trials. The suffering of the accused living in sub-human conditions is a side-effect of a delayed trial. One way in which the State can minimize the consequences of delayed trials therefore, is by ensuring decent conditions of living for prisoners undergoing trial. This would go a long way in minimizing the suffering of the accused and consequently, his claim for compensation against the State.

As we have seen earlier, under-trial prisoners are presumed innocent until proven guilty: this is the cardinal principle of criminal jurisprudence in India. There is no reason why they should be subject to excessive physical and mental deprivations until they have been found guilty by a court of law. Consequently, modern guidelines for under-trial inmates require a better standard of treatment for under-trials, since they cannot be treated alike with convicts.For example, under-trials must be permitted to wear their own clothing, they must be segregated from other prisoners such as convicts and detenues, they cannot suffer any reduction in diet as a penal measure, they may be allowed food from outside the prison on a day-to-day basis, there should be no restrictions on the number of interviews sought by under-trial prisoners for the sake of legal assistance; rules relating to interviews with family members are more liberal; every under-trial prisoner is to be permitted to purchase or receive from private sources food, clothing, bedding and other items of necessity subject to some restrictions; under-trials cannot be forced to work but can be given work if they ask for it; all under-trials should be produced effectively before the courts on the dates of hearing; on the initial admission of an under-trial prisoner, a printed card should be sent to his family with his details and a brief summary of the rules applicable to him;

and women under-trials prisoners shall be lodged separately[636]. However, whether these standards are being maintained *in practice*, is a big question that is consistently answered in the negative by various reports and studies, as we have seen.

*Baxi*[637] has observed that post-Emergency, great strides have been made in ensuring prison justice for *all* categories of prisoners by Supreme Court judgments. Before the Emergency period, the view that prisoners are non-persons and that assured fundamental rights were not available to them, received much support from the decision in *AK Gopalan vs. State of Madras*[638] where the judges refused to read the fundamental rights together and consequently held that where a person is totally deprived of his personal liberty under a procedure established by law, the fundamental rights are not available. Post-emergency, several decisions were rendered recognizing that prisoners would not lose any of their fundamental rights other than their personal freedom, even when incarcerated. In *Md. Giasuddin vs. State of AP*[639]Justice Krishna Iyer issued directions to assign work to the convict "not of a monotonous, mechanical degrading type but of a mental or intellectual type". Directions were also issued to ensure reasonable rates of wages were paid to prisoners. In *Hiralal vs. State of Bihar*[640] periodic parole was prescribed; In *MH Hoskot vs. State of Maharashtra*[641]it was held that prison authorities cannot deprive prisoners of their fundamental right of appeal; in

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[636]See *Standards Behind Bars: Prescribed Rules and Recommendations for Prisons*, CHRI 2010, which is a compilation of the standards laid down by the *Rajasthan Prison Manual 1951*, the *All India Committee on Jail Reforms 1980-83 (Mulla Committee)* and the *Model Prison Manual 2003* prepared by the *All India Model Prison Manual Committee*, approved by the Central Government in 2004.
[637] The Crisis of the Indian Legal System, Upendra Baxi, 1982, Chapter 8.
[638]AIR 1950 SC 27
[639]AIR 1977 SC 1926
[640]AIR 1977 SC 2236
[641]1978 (3) SCC 544

*Inder Singh vs. State(Delhi Administration)*[642]it was held that work in prison should be satisfying, not degrading; in *Lingala Vijay Kumar vs. PP*[643] directions were issued regarding prison brutality; in the landmark case of *Sunil Batra vs. Delhi Administration*[644]the court held that prisoners are entitled to all fundamental rights consistent with their incarceration and that the legal regime of prisons is equally subject to the constraints of legality and constitutionality. By this time of course, *Maneka Gandhi* had put *AK Gopalan* to rest. The court issued various directions relating to solitary confinement. These and other decisions subsequently rendered by the Supreme Court uphold the rights of prisoners and try to ensure decent standards of living.

However, it is sad to note that in spite of these judgments over the years, Indian jail conditions continue to be abysmal. If the government takes adequate steps to improve conditions of detention – then that by itself would ameliorate considerably the plight of under-trials whose trials have been delayed[645]. Should not the Supreme Court take upon itself the task of overseeing the funding and maintenance of prisons though writs of continuing mandamus, given its duty to minimize delayed trials and their ill-effects?

### 6.6 List of suggestions and recommendations

The Supreme Court should read time-limits for conclusion of trials *into* the Code of Criminal Procedure, 1973, especially section 309 CrPC, as was

[642]1978 (4) SCC 161
[643]1978 (4) SCC 196
[644]AIR 1978 SC 1675
[645]An inspiring story is provided by Bedi, Kiran, *It's Always Possible: One Woman's Transformation of Tihar Prison*, Himalayan Institute Press, 2006.

done in cases prior to *P. Ramachandra Rao*, in order to make the right a more effective one, in appropriate categories of cases.

Decisions of the Supreme Court that fail to provide interpretations that minimize delay and bring proceedings to a close, should be re-considered.

The Supreme Court could provide interpretations to the CrPC that plug loopholes in the provisions regarding grant of default bail, in order to make the right to bail a more effective one.

The provisions for release on bond without sureties and the presumption of indigence in section 436 CrPC, should be read into all the other provisions relating to bail. No person should suffer detention solely due to his inability to satisfy bail. It is submitted that the court could employ a *rebuttable* presumption of indigence where the accused, even in a non-bailable offence, has remained in jail for several weeks without satisfying bail. The presumption could be held rebutted where the court upon enquiry, finds that there is evidence to show that the accused is not indigent.

The Supreme Court and other organs of the State should seriously consider the question of Bail Reform, to take advantage of modern techniques to ensure court-attendance by the accused - without reliance on the age-old property-oriented system of bail.

It is submitted that in view of Parliamentary intervention vide insertion of section 436A CrPC, the practice of granting blanket bail to whole classes of accused need not be resorted to, except with regard to enactments such as TADA where judicial intervention is still required to water-down the drastic effects of legislation.

The 7-judge bench in *P. Ramachandra Rao* should be re-considered taking into account the fact that *P. Ramachandra Rao* and *A.R. Antulay* are contrary to the 7-judge decision in *Maneka Gandhi* by failing to incorporate time-limits into criminal procedure, and thus ensuring that the procedure remains fair, just and reasonable, in conformity with Article 21. The question of feasibility should be kept separate from the question of constitutionality.

After assessing carefully the capabilities of the judiciary with existing resources and judge-strength, the right to speedy trial should be defined *clearly* with reference to specific time-limits in the case of certain specific categories of accused: those being charged for relatively small offences, specially vulnerable under-trials, those incarcerated for more than 5 years, persons holding public offices and those who have suffered conviction and imposition of death sentence. As India's judge-to-population ratio and judicial resources improve, time-limits should be imposed for all criminal cases. Gradual and progressive adoption of time-limits, with suitable remedies available upon the expiry of the specified time-limits, would be the way forward.

The various remedies available upon violation of the right to speed trial should be creatively put into action upon expiry of the specified time-limits. In some cases quashing may be appropriate whilst in some others, expedited trial with compensation awarded may be the right option. Expiry of the time-limits specified may also be seen to invoke a *presumption* that the accused's right to speedy trial has been violated. The public prosecutor would then have to *rebut* the presumption, in order to continue with the trial.

The Supreme Court should enforce *proactively*, the institutional aspect of the right to speedy trial; requiring sufficient funding from the State, in order to give effect to the right. If the executive branch of the State by itself, fails to

ensure adequate funding for the judiciary, the judiciary should step in and exercise its inherent powers.

The Supreme Court should continue its tradition of enhancing the rights and living conditions of under-trials, as a way of minimizing the ill-effects of delayed trial.

The Supreme Court's next grand phase of judicial activism should involve the evolution of the court as a *managerial* court as well; using practices such as the increased use of technology, data management, manpower planning, court and case management and continuing mandamus to ensure that the right to speedy trial does not remain mere rhetoric.

### 6.7 The way forward: the emergence of the managerial court

The Supreme Court and indeed all the courts in the system, are now being called upon to take an increasingly proactive stance towards the *management* of the judicial system to ensure efficiency, speed and justice. Several modern practices and social trends have indeed affected the manner of working of courts, especially the Supreme Court[646]. For example, the Supreme Court now runs its own website, publishes statistics periodically, and makes efforts to collect and aggregate data about the institution and pendency of cases in every part of the country[647].

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[646]These trends are not presented as part of a sociological thesis – but only as pointers or clues about where the Supreme Court and other courts might be heading. Hence they are identified but no attempt is made to substantiate them extensively.

[647]See Court News on the Supreme Court of India website. http://supremecourtofindia.nic.in/courtnews.htm.

Courts can now have at their disposal information technology that promises to bring much change to age-old practices of record-keeping and storage of information. Increased use of technology, especially information technology has been consistently emphasized in the Law Commission Reports[648].

There is now the urgent need to ensure statistical data collection and aggregation at all levels of the judicial hierarchy about the institution, disposal and pendency of cases. *The 245th Report on Arrears and Backlog: Creating Additional Judicial Wo(manpower)* had advised that the trends in institutions and disposals should be constantly monitored by the High Courts in order to meet the evolving needs of the judiciary. The courts should put in place reliable and regular data collection and management systems[649]. In the United Kingdom, the Lord Chancellor's Office has the practice of publishing the *Judicial Statistics Annual Report* describing in detail the criminal and civil cases in the courts of England and Wales and also providing a commentary on the trends. Courts in the United States also publish such reports annually containing information about the flow of cases. *The Report of the Task Force on Judicial Impact Assessment*[650] strongly recommended that India should also follow the trend in these countries. In order to publish such reports, a judicial database would be required which would contain details regarding the numbers of cases filed daily, and other details, entered at the point of institution of the case[651]. It is indeed noteworthy that the High Courts, the Supreme Court and the E-Committee for the courts have of late, started gathering statistics and publishing them periodically on their websites[652].

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[648]See for example, the *79th Report on Delay and Arrears in High Courts and Other Appellate Courts* para 5.1; *The 124th report on High Court Arrears-A Fresh look*, 1988, para 5.1; *213th Report on Fast Track Magisterial Courts for Dishonoured Cheque Cases,* para 5.3.
[649]Chapter 3
[650]2008
[651]See Chapter 2
[652]After the constitution of the E-Committee the Supreme Court has started publishing Quarterly Reports online; the E-Committee gets its data from the High Courts.

There is also increased pressure to apply modern case-management and court-management techniques to ensure greater efficiency in the justice system. The *14th Report*had pointed out in detail the managerial steps to be taken to ensure an efficient judiciary. It noted that supervision and control of the subordinate judiciary was necessary[653]. It recommended *inter alia*, the following[654]:

(a) Subordinate courts should be required to submit periodic returns showing pendency figures and explanations;

(b) Returns by the subordinate courts should be periodically scrutinized by High Court judges;

(c) Supervision at the district level should be undertaken by the district judges, who should inspect subordinate courts; &

(d) All judicial officers should be required to maintain a judicial diary showing the work done by them in court every day;

*The 79th Report on Delay and Arrears in High Courts and Other Appellate Courts*[655] noted that the internal management of the High Courts was the exclusive responsibility of the Chief Justice and other judges. It was recommended that a committee be formed for the purposes of court management[656]. The *245thReport*[657]noted that good management practices such as timeliness and performance benchmarks were essential. It recommended the creation of a new professional- the Court Executive – who would ensure that management policies would be executed[658]. It also recommended that management consultants should be used. A National

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[653]Para 10
[654]Para 54
[655]May 1979
[656]See also para 4.3, *The 124th Report on the High Court Arrears – A Fresh Look*, 1988.
[657] See also the *Report of the Committee on Reforms of the Criminal Justice System*, March 2003, para 1.1, where the committee was *inter alia* entrusted with the task of suggesting a sound system of managing on *professional* lines, the pendency of cases at at investigation and trial stages. See also paras 9.4, 9.9, 9.12 and 12.1.
[658]Para 3.28

Judicial Centre was advocated for the co-ordination and development of court staff, their conditions of service, training procedures, standardization of court facilities and computerization[659]. The Chief Justice of India issued directions on the administrative side in the year 2012[660], whereby the *National Court Management Systems: Policy and Action Plan*[661] was released. It was noted that Law Commission Reports had not even been properly discussed- let alone implemented by the Government[662]; it had become imperative therefore to re-visit the recommendations and implement those which promote Court Management, Case Management and improve the Administration of Justice[663]; that many of the recommendations of the Law Commissions do not require legislative or executive intervention and could straightaway be implemented by the judiciary[664] (on the administrative side). The main themes of the *Scheme of National Court Management Systems for Enhancing Timely Justice*were:

(a) Addressing the inadequate judge strength so that no case is more than 5 years old;

(b) Upgradation of data systems from manual to computerized; it was noted that effective administration of the justice system was not possible without a well-developed system of judicial statistics;

(c) Setting of measurable performance standards for Indian courts, addressing issues of quality, responsiveness and timeliness;

(d) Systems for monitoring and enhancing performance standards;

(e) Case-management systems;

(f) Court Development Planning Systems to provide systematic 5-year plans for the future development of the Indian judiciary; &

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[659]Para 3.30
[660]27-09-2012
[661] http://supremecourtofindia.nic.in/ncms27092012.pdf.
[662]See however Baxi, who argues that LCI Reports have been extensively implemented.*The Crisis of the Indian Legal System*, Upendra Baxi, 1982.
[663]Para 1.2
[664]Para 1.3

(g) Human Resource Development Strategy setting standards for selection and training of judges of subordinate courts.

In the year 2013 a Results Framework Document was released by the Department of Justice wherein the mission was stated to be adequacy of judges, modernization of courts and procedures and policies for judicial reforms towards improved justice delivery.

There is also increased attention to manpower planning. *The 120th Report on Manpower Planning in the Judiciary: A Blueprint*[665]had noted that judicial services are a crucial aspect of the services that the modern Indian State should provide its citizens. It had asked: If the bureaucracy and the police employ detailed manpower planning why not the judiciary? *Judicial Impact Assessment* has now become a technique used by the Department of Justice[666].

In the recent case of *Imtiyaz Ahmed vs. State of U.P.*[667]the Supreme Court issued directions to the Registrars of all the High Courts to furnish reports containing statistics of cases pending in the High Courts where stays had resulted in pendency of matters relating to murder, rape, kidnapping and dacoity. The statistics were analyzed by the court and several administrative directions were issued. The Supreme Court thus assumed a managerial role in the Criminal Justice System.

In addition to the trends discussed above, the following trends can be identified:

(a) Greater transparency, scrutiny and accountability of judges and the workings of the system being demanded;

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[665]1987
[666]See the Department of Justice Website : http://doj.gov.in/?q=node/106.
[667]2012(2) SCC 688

(b) India's large emergent middle-class demanding better governance in all areas, including the judiciary;

(c) Globalisation and the exchange of technology and ideas warranting comparable standards of governance in the judiciary;

(d) The growth of judicial review, especially techniques such as continuing mandamus;

(e) The increasing focus on judicial financial needs and autonomy.[668]

These trends make it imperative that the Supreme Court and other courts ensure better governance of the civil and criminal justice systems. Indeed, any study of the manner in which courts now work and articulate their concerns[669] would show that these pressures have already begun to play upon the judges of the country. The courts now cannot simply confine themselves to deciding cases and shut their eyes to the administrative side of things. Judges, especially the Supreme Court and High Court judges, will have to increasingly take on more and more administrative responsibility or at least delegate it to more competent professionals such as court managers. They will have to use techniques such as the continuing mandamus to monitor and administer the flows of cases and to ensure the right to speedy justice. It is in this light that time-limits are a step forward towards better management, goal-setting and accountability.

Indeed, scholars on judicial activism have been looking only at ways in which the Supreme Court decides the particular cases that come up before it. But if the executive continues to fail in ensuring a functional and efficient judiciary, the next grand phase of judicial activism may well have to be partly *outside* the courtroom- in *managing* the system like able administrators- to ensure that the rhetoric of speedy justice is translated into reality.

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[668]See Chapter 5.

[669]Through conferences, websites, journals, etc.