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PRESUMED INNOCENT, IMPRISONED INDEFINITELY: THE UNDERTRIAL CRISIS IN INDIA

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ABSTRACT

Two-thirds of India's prison population are undertrials. Despite any overcrowding, Indian jails are still packed with undertrial detainees who ought to be elsewhere. In the eyes of the law, they must be considered innocent. A fundamental tenet is the presumption of innocence. A rule in the Indian Criminal Justice System mandates that someone is "innocent unless proven guilty". However, the criminal justice system holds undertrial prisoners in jail, although they are on trial.

The undertrial inmates face extra challenges that contravene their fundamental human rights as well as basic rights like overcrowding, inadequate access to legal representation, unequal access to bail, social stigmatisation, prison violence, etc. India took a long time to understand the rights of detainees and to try to ensure their protection, which was greatly enhanced in 2005 with the addition of *Section 436A* of the CrPC specifying the longest amount of time that an undertrial inmate may be held in custody. The Right to Equality is enshrined in accordance with *Art. 14 of the Constitution,* recommending that the phrase "non-discrimination on economic basis" be added under *Art. 15.*

To contextualise the undertrial issue within a larger critique of socioeconomic exclusion and legislative underperformance, the paper draws on important judicial decisions from Hussainara Khatoon v. State of Bihar to Satinder Kumar Anil v. CBI. It claims that the issue is not simply one of procedural delay, but rather that it is indicative of deeper structural problems, such as the criminalisation of poverty and the lack of an adequate legal assistance system.

Despite the existing framework, implementation remains deeply inadequate. Effective reforms were introduced to counter the stigmatisation of undertrial prisoners.

Keywords: *undertrial, article 14, pre-trial custody, presumption of innocence, section 436A, prison overcrowding,*

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I. INTRODUCTION

Presumptions of innocence within adversarial systems are not only doctrinal conveniences but also the foundation for the legitimacy of criminal proceedings. Both Article 11(1) of the Universal Declaration of Human Rights and Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) provide the basis of the right to a fair trial by including the presumption of innocence as a fundamental characteristic of the fair trial guarantee. Article 21 (right to life and personal liberty) of the Indian Constitution provides the constitutional basis of the presumption in India, with the Supreme Court ruling in ***Maneka Gandhi v. Union of India r****equiring that the due process of law requires that deprivation of liberty by law requires just, fair and reasonable laws.* [1]

The empirical realities of India's prison systems starkly contrast with this foundational commitment; undertrial prisoners currently account for 75.8% of the total prison population (according to the National Crime Records Bureau's Prison Statistics India 2022), with the proportion above 67% for more than two decades[2]. The latest ***UNODC Prison Matters report (2025) s****hows that Southern Asia has the highest percentage of unsentenced detainees in the world, with 63.97% of those in custody not yet receiving an initial conviction*[3].

The issue of the undertrial crisis cannot be narrowed down to the problem of bureaucratic inefficiency, but judicial procrastination is a proximate factor. It is, rather, the combination of systematic failures: the bail system, which mixes surety and liberty, the understaffed legal aid system; the magistracy, which routinely grants the authority to detain without sufficient judicial review, the prison system, which is completely unprepared to accept the number of pre-conviction detainees that it gets.

Part II takes a systematic review of these failures, the constitutional jurisprudence of these failures, and the remedial frameworks, which may respond to them substantially, including both the judicial, legislative, and institutional. The scope and methodology of the inquiry are defined in Part III. Part IV provides the theoretical basis of the research, which will be the theoretical connection between pre-trial detention and punishment. Part V examines the statutory and constitutional provisions of bail and undertrial detention. Part VI is the

[1] Maneka Gandhi v. Union of India, (1978) 1 SCC 248
[2] National Crime Records Bureau, Prison Statistics India 2022
[3] UNODC, Prison Matters 2025: Global Prison Population and Trends; A Focus on Rehabilitative Environments

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substantive part that works with landmark cases and structural criticism. Part VII develops certain reform suggestions, and Part VIII is a conclusion.

II. LITERATURE REVIEW

A considerable amount of literature has been produced within the last decade on the empirical aspects as well as normative implications of undertrial detention in India.

In an article titled **Undertrial Prisoners in India: Issues, Concerns and Remedies (2014), Saurabh Bhattacherjee** was among the first to provide a methodical analysis of the phenomenon, establishing the institutional reasons behind the long-term pre-trial detention, and placing them in a critique of the larger criminal justice machine[4]. His discussion is still anchored on the ground in that the demand of economic collateral turns the right to bail into an entitlement based on financial ability. Bhattacherjee highlighted the issue of the disproportionality of the disadvantaged groups, which has been amplified in the literature that followed.

The case law surrounding the issue of pre-trial liberty in India, according to the article by Richa Malhotra, has changed through the years, with the Supreme Court gradually broadening the concept of a right to bail but bumped up against the barrier of the lower court, which had not internalised this shift accordingly (Bail Jurisprudence in India: A Critical Analysis, 2018). The input of Malhotra is especially useful due to its particular focus on the discretionary architecture of Section 437 of the Code of Criminal Procedure, 1973, and the scope to which the judicial subjectivity at the trial court level leads to systematically unjust results to the undertrial accused.[5]

In an article on the project by **Death Penalty Research, under the title Framing of the Undertrial (2019), Anup Surendra Nath and Shreya Rastogi** took the criminological point of view and discussed the constructed nature of the accused and its management on the institutional level[6]. Their study brought to the Indian society the term penal labelling to show how pre-trial custody takes the shape of a series of social stigmatisation leading to the compromised right to a fair trial and the post-release prognosis thereof. It is especially in line

[4] Saurabh Bhattacherjee, "Undertrial Prisoners in India: Issues, Concerns and Remedies"
[5] Richa Malhotra, "Bail Jurisprudence in India: A Critical Analysis" (2018)
[6] Anup Surendranath & Shreya Rastogi, "Death Penalty Research Project: Framing of the Undertrial" (2019

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with the 2025 results of the UNODC on the application of identity desistance in rehabilitative prison settings.

The most detailed constitutional examination of undertrial detention had been presented so far by the article Prisons, Prisoners, and the Constitution by Aparna Chandra, Sital Kalantry, and William J. Friedman (2020). It said that overwhelming the principles of Article 21 through the systematic imprisonment of innocent individuals goes beyond sporadic infringement up to a pattern of state action warranting a systemic judicial solution. Of particular importance was their approach to the Section 436A provision on bail as something they never use.

Lastly, the article by **Mihir Desai The Bail Trap (2021**), discussed the systemic barriers to pre-trial liberty in the law-political economy nexus. [7]The fees that the bail entails, especially the mandatory posting of surety, personal bonds and the bail becoming progressively more burdensome, Desai maintained, in effect disenfranchise the poor who are by law entitled to a right aimed at protecting the freedom of every citizen. His critique of the Indian bail law, Section 436, as theoretically absolute but practically conditional, is considered one of the most incisive criticisms of the bail laws.

III. RESEARCH SCOPE AND METHODOLOGY

Scope

The current paper will be limited to the phenomenon of undertrial detention in the Indian criminal justice system, specifically in the context of the statutory provisions in the Code of Criminal Procedure, 1973, and its successor laws under Bharatiya Nagarik Suraksha Sanhita, 2023, in the context of the constitutional norms of pre-trial liberty.

As comparison sources are related to international concepts and results of studies by UNODC 2025, the analytical focus is still primarily engaged in the context of India. The paper has not looked at post-conviction detention or imprisonment of juveniles, as they have different normative constructs.

Methodology

This is a normative research paper that is doctrinal. It consists of analytical legal methodology which looks at the main sources of law-constitutional provisions, statutes and judicial

[7] Mihir Desai, "The Bail Trap: Structural Impediments to Pre-Trial Liberty in India" (2021)

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decisions, as well as secondary ones- academic scholarship and empirical data provided by the prison. It uses NCRB Prison Statistics India 2022, UNODC Prison Matters 2025 report, and Law Commission of India reports as the sources of the paper.

The legislative history of Section 436A and the BNSS 2023 is followed in order to determine whether the statutory reform has been substantive in eliminating the undertrial crisis. In situations where empirical information in terms of reports is used, it is addressed in order to contextualise legal analysis as opposed to replacing it.

IV. CONCEPTUAL FOUNDATIONS

The pre-trial detention assumes a unique position in defining and scoping the matter of criminal law. It serves as a pre- trial protection toward ensuring that individual is brought out to trial; to prevent the occurrence of future crimes; and to maintain the integrity of the investigation process and/or the rights of others within the case. But in reality, pre-trial detention is the means of punishment in every but the name of the crime it is applied to; it denies an individual the freedom of movement, disrupts the capacity to find or even hold a job, and in a way that the desistance literature indicates is the effect of using pre-trial detention, it destroys the wholeness of families (i.e. creates an aura of institutional degradation and labels as a criminal) which is the effect the labelling research indicates pre-trial detention produces.

Classical liberal, typified by Benthamite tradition and elaborated by legality theorist Malcolm Feeley, models pre-trial detention as a state intervention that is justified by an instrumental rationale, and which, in addition, is justified by a lapse between the extent of harm caused by the commission of one crime. The theory of preventive detention even stipulates that the liberty of the person can be limited before the conviction, but it stipulates that any limitation can only be imposed based on the following conditions: necessity, proportionality, and for a limited duration. Broadly speaking, this framework has been employed in India, but the application of the framework by the judiciary is not as regular as it ought to be and with the recent curriculum of the prison as the conceptualisation of the UNODC.

In the 2025 version of Prison Matters, UNODC has established that pre-trial detention represents a type of incarceration that can never be compatible with rehabilitative programming. [8]Undertrial detainees are thus at a very huge disadvantage due to the absence of

[8] UNODC, supra

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a sentence structure, the uncertainty regarding the status of a person before the law, and the lack of predictability on the duration of their stay in custody. On top of all this, they also do not receive any rehabilitative programming that is available to sentenced prisoners. To consider the need of the socio-economic profile of the underlying detainees in the Indian context this is simplistic to view in terms of how these structural barriers to rehabilitation are multiplied by the socio-demographic characteristics of the undertrial detainees.

The big population of untried detainees, as Desai points out, belongs to the economically disadvantaged sections of the population in the form of the Scheduled Castes, Scheduled Tribes and Other Backward Class and are systematically discriminated against in terms of getting bail, representation and recourse to the institution against their detention. Thus, the under-trial crisis in India is also a distributive justice crisis since the criminal justice process's weight is unduly placed on those people who have the lowest ability to bear it.

V. LEGAL AND STATUTORY FRAMEWORK

1. *Constitutional Provisions*

Article 21 of the Constitution of India stipulates that no human being shall be deprived of life and personal liberty without due process that is set by the law. The decision of the Supreme Court, in the interpretation of this provision, under the direction of Maneka Gandhi, has been in the broad sense of the word: the procedure prescribed must be fair, just and reasonable and deprivation of liberty must, then, not just pass the test of statutory authorisation but that of constitutional legitimacy.

Article 22 supplements Article 21 by offering procedural protection to persons who have been arrested and detained: the right to be informed of the reasons of arrest, the right to consult and be defended by counsel of his/her own choice and, at least, in the ordinary case of criminal detention, the right to be produced before a magistrate within twenty-four hours of arrest. Article 39A requires the State to provide that a citizen has no opportunity of being denied access to justice due to economic or other disabilities, which constitute the constitutional basis of legal assistance.

2. *The Code of Criminal Procedure, 1973 and the BNSS, 2023*

Code of Criminal Procedure, 1973 (CrPC) postulates the bail, which offers the main framework of statutory provisions of pre-trial liberty. Bail as of right is a section in

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which Section 436 applies to the bailable offences[9]. Section 436A is inserted by the Amendment Act of 2005, giving an undertrial prisoner, who spent at least half of the imprisonment time on a maximum offence in custody, the right to bail, unless the maximum imprisonment term is the death penalty. Discretionary powers to grant bail on non-bailable cases are conferred on the courts of the first instance and the sessions court under sections 437 and 439, respectively.

Although Section 436A, on the face of it, is benevolent, empirical studies and judicial learning have constantly observed the lack of utilisation of the section systematically. Prison administrators, who are not adequately kept on record, are often unaware of who can qualify under the provision; courts are not willing to take the initiative to act in a Suo motto in matters of eligibility; and the inmates, in their lack of effective counsel, cannot do so themselves. [10]

The new BNSS 2023, which takes effect on 1 July 2024, revises the awards in Section 479483. Section 479 of the BNSS includes an analogue to Section 436A, and further extends to allow undertrial prisoners who are not first-time offenders to be released on bail on completion of a third (not half) of the maximum sentence. This is an ameliorative piece of legislation, and its effectiveness will rely completely on how the institutions are put in place.[11]

3. *International Normative Framework*

As a signatory to the International Covenant on Civil and Political Rights ('ICCPR') since 1979, India has obligations under Article 9(3) that require pre-trial detention not to be the general rule and that the release of persons subject to such detention only be guaranteed through ensuring the person appears at trial and does not interfere with the collection of evidence. [12]The 1990 United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) also state that, in appropriate situations, non-custodial alternative measures should be utilised as the preferred option. These international standards are directly relevant to India's current undertrial situation, which is supported by data from the UNODC 2025 report as being one of the worst in the world.

[9] Code of Criminal Procedure, 1973, section 436
[10] Bharat Chugh, "Section 436A: The Bail Provision India Forgot" The Wire
[11] Bharatiya Nagarik Suraksha Sanhita, 2023, sections 479–483.
[12] International Covenant on Civil and Political Rights, art. 9(3)

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VI. ANALYSIS: THE UNDERTRAIL CRISIS – CAUSES, CONSEQUENCES, AND CONSTITUTIONAL IMPLICATIONS

The scale of the problem

The total number of prisoners recorded by NCRB's Prison Statistics India 2022 report was 5,73,220 individuals, and of those, almost 4,34,302, or about 75.8 per cent, were reported to be held under trial or pending trial (undertrial).

The occupancy rate in Indian prisons was reported to be an average of 131.4 per cent above the official capacity—for many states, this figure was significantly higher than that average. The 2025 UNODC report compares these statistics relative to the international perspective, with Southern Asia being recorded as having the highest percentage (64%) of individuals in detention not having been sentenced, and this percentage has increased by 10% from 54% to 64% in the last ten years.

The data captured above is indicative of much more than the numerical quantification of a given act or outcome. They are representative of the lived experiences of hundreds of thousands of individuals who are detained by the State, who should be presumed innocent until proven guilty, according to the provisions of law. In the case of ***Re: Inhuman Conditions in 1382 Prisons***, *the Supreme Court ruled that the overcrowding in Indian prisons, which is largely driven by the high number of undertrial prisoners, represents a systemic violation of the minimum standards necessary to protect human dignity within the legal framework of the Constitution.*[13]

Judicial Delay as Proximate Cause

The most obvious reason why long periods of undergoing trials include long delays is that define the nature of Indian criminal courts. The subordinate courts in India have an accumulated pendency of about 4.5 crore cases, and even though the cumulative pendency is not limited to criminal cases, the impact of pendency on criminal proceedings in India is unique in the sense that personal liberty is lost. The accused, who has been denied bail either due to the non-bailable nature of the offence, weaker discretion of the court, which elects to exercise an adversarial approach, or the financial incapacity of bail, is held in custody until all the adjournments, all the non-appearance witnesses, and all institutional non-appearances have passed.

This is the reality that was directly faced by the Supreme Court in the case of ***Hussainara***

[13] Re Inhuman Conditions in 1382 Prisons, (2016) 3 SCC 700

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Khatoon v. State of Bihar, a string of writ petitions also filed in the 1980s which through the journalistic reportage led to revelations of the presence of undertrial prisoners in Bihar who had served more time in custody than the maximum statutory term allocated to them in the alleged crime(s). The Court stated that the right to speedy trial is part of the right to life in Article 21, and the fact that the State did not grant a speedy trial to the accused in a reasonable time made the further detainment of the accused unconstitutional[14]. The case was visionary in the fact that it acknowledged that structural judicial stalling could indeed amount to a constitutional infraction- not an administrative inconvenience.

The Monetisation of Bail

The Law section under the CrPC 436 makes bail a required activity in the case of bailable offences, but in the version, it has not been considered to mean that unconditional release was mandatory. Surety, or the need to have a third party who could be bonded to appear on a defendant's behalf, has always represented a stumbling block to the improperly or socially capitalised. In the case of the economically marginalised accused, the formal right to bail is often only paper, as they remain in custody not due to the refusal of bail by a court of law, but due to an inability to find the surety specified.

Empirical studies by Malhotra indicate that in the current system, a significant number of the undertrial prisoners in Indian prisons are on record entitled to bail, and yet they are in jail on grounds of failure to provide surety. This arrangement, where the condition of impoverishment succeeds to the act of detention, instead of a court decision on the possibility of hazard, is what Desai has described as criminalising being poor. In Arnesh Kumar v., the Supreme Court gave credit to the fact. State of Bihar, the mechanical recourse of arrest and custody in cases where the penalty is less than seven years of imprisonment is an abuse of the process of law, is the largest modern judgment answer to this situation.

The Failure of Legal Aid Infrastructure

Article 39A of the Constitution, as well as Section 304 of the CrPC, requires that such free legal assistance be provided to individuals who do not have the means to hire an attorney. The top institutional vehicle for this mandate is the National Legal Services Authority (NALSA), which was formed under the Legal Services Authorities Act, 1987. Nonetheless, there is an enormous distance between the formal architecture and the reality of its operations. The study

[14] Hussainara Khatoon v. State of Bihar, (1980) 1 SCC 81

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by Surendra Nath and Rastogi also records that a substantial number of undertrial prisoners, upon arrest, did not know about the right to have an advocate, or even had one who was so cursory as to be nominal.

The ruling by the Supreme Court in the case of ***National Legal Services Authority v. Union of India,*** the constitutional possibility of a true legal assistance system as realised had been realised by the Union of India, but in reality failed to provide such assistance because of the structural deficiencies not directly confronted by the Union of India.[15] With no competent and consistent legal representation in the undertrial environment, the related lack of opportunities to invoke the Section 436A-based or BNSS-equivalent, the inability to successfully contest the reasons behind continued remand, and the inability to undergo pre-release preparation or community reintegration planning are all noted to deny all the qualifying prisoners access to rehabilitative outcomes, none of which are seen as secondary to the quality of rehabilitation services provided by the UNODC 2025 report.

Recent Judicial Developments

In ***Satender Kumar Anil v. Central Bureau of Investigation (2022),*** the decision of the Supreme Court was. Central Bureau of Investigation (2022) is the most detailed current judicial involvement with the undertrial crisis. The Court provided a number of binding guidelines to the trial courts, such as a series of various meanings to review undertrial prisoners who were eligible under the provisions of Section 436A, to keep accurate records of the undertrial detention periods and[16] by Suo motu reviewing arrangements of bail in those cases where the accused had completed half the maximum detention term. It was additionally decided to establish special committees to examine undertrial cases and the creation of undertrial review committees at the district level.

Commons Cause v. Union of India also instructed on pretrial prisoners against a preparatory basis to establish holistic information beyond trials to enable effective judicial surveillance. Most recently,[17] ***Suhas Chakma v. Union of India (2026),*** in which the Supreme Court addressed the legitimacy of Open Correctional Institutions as alternatives to low-risk prisoners, can be extended to the undertrial population in various ways, as incarcerating them is not the predetermined default of persons awaiting trial when the chances of absconding or reoffending are low. [18]

[15] National Legal Services Authority v. Union of India, (2014) 5 SCC 438
[16] Satender Kumar Antil v. Central Bureau of Investigation, (2022) 10 SCC 51
[17] Common Cause v. Union of India, (2017) 7 SCC 1
[18] Suhas Chakma v. Union of India, WP (C) No. 67 of 2023

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The issue of discrimination on basis of caste in prisons- looked into by the Court in ***Sukanya Shantha v. Union of India (2024)-***intersects with the undersigned crisis in a very graphic way, with the applied undertrial prisoners of scheduled castes and scheduled tribes not only showing over representation in the detained population but also positive experiences to the most inhumane conditions of custody. [19] Chandra et al. assert that socially sidelined groups represent a disproportional existence of a disproportional share of the undetermined group of crime, which can no longer be attributed to crime rates alone.

Institutional and Structural Pathologies

Coupled with the limitations of the judicial delay and the bail laws, the undertrial crisis is perpetuated by a chain of institutional pathologies. This is because in India, prison administration generally does not have sufficient capacity to keep prisoner records that will help the courts and legal services authorities trace Section 436A-qualified prisoners. In its 268th Report, the Law Commission of India noted that information exchange between the police, prisons, and courts is so disaggregated that it makes effective monitoring virtually impossible. [20]

The overcrowding, based on the 2025 report of the UNODC, taking statistics of 181 countries, confirms that the overcrowding is predominantly represented in Africa and the Americas at the global scale; the report, however, observes that high proportions of undeterred and lacking infrastructural court systems in Southern Asia produce a particularly intractable configuration. [21]The result of the report that in most of the jurisdictions surveyed around the world, only about 49 per cent of all prisoner-officer ratios are satisfied is precisely relevant to India, where understaffing of custodial facilities exacerbates the lack of rehabilitation-favourable environments to under-trial offenders.

VII. SUGGESTIONS FOR REFORM

The undertrial system needs to be reformed in a concerted effort involving the legislative, judicial system and the administration. The above analysis is presented based on which the following proposals are suggested.

To begin with, the BNSS 2023 requirements of bail must be augmented by creating institutional

[19] Sukanya Shantha v. Union of India, (2024) SC 2693
[20] Law Commission of India, Amendments to Criminal Procedure Code, 1973—Bail Provisions, Report No. 268 (2017).
[21] UNODC, supra note

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procedures that obligate prison authorities to create automated notifications to determine the prisoners who are close to reaching eligibility under Section 479. The lack of this system was the main cause why Section 436A was very dormant during the CrPC regime. It should be within the mandate of NALSA to come up with, with the assistance of the state prison authority, a standardised digital prison record system which can produce such warnings.

Second, the design of suretied bail is to be rethought on a deeper basis. The suggestion that default in cases relating to bailable offences should consist of the release on personal recognisance, with surety, in cases in which a particular flight risk is proved, as is suggested by the Law Commission in its 268th Report, warrants a mandatory enactment. A helpful comparative reference point can be found in the experience of the jurisdictions that have shifted towards being risk-based as opposed to surety-based in terms of determining bail, e.g., the United Kingdom and New Zealand.

Third, the legal aid infrastructure should be adequately provided in accordance with the constitutional duty. The number of legal aid counsellors to the number of people who could use them is entirely unsatisfactory. There would be little, yet some reforms would be to have a small group of undertrial review lawyers who are attached to the district legal services authorities, who would monitor and invoke the provisions of bail on behalf of the qualifying prisoners.

Fourth, the undertrial review committee system to be followed by the Court in the case of Satender Kumar Antil should be put on a statutory basis under the BNSS or the Legal Services Authorities Act, with an obligatory reporting to the High Court periodically, which is quarterly. Courts of law with an accountable role in the statistics of undertrial -on the principle adopted by various High Courts in checking pendency-would be an institutional incentive to obedience.

Fifth, the results of the UNODC 2025 report concerning rehabilitative prison settings ought to inform a particular policy toward undertrial prisoners: as the latter are formally unconverted, the prison regime that is imposed on them ought, in favour of international minimum standards, to be dissimilar to the regime of convicted prisoners, as well as should possess access to legal counsel, family visitation, and, where sentence is ultimately applied, to proper continuity of rehabilitative programmes. [22]

[22] UNODC, supra note

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Lastly, to deal with the caste and socio-economic aspects of the undertrial overrepresentation policy interventions, as well as criminal procedure reform, is not sufficient: policies to increase understanding of legal issues in the population where criminalisation is prevalent, and community integration of social welfare provision and imprisonment release planning should also be enhanced.

VIII. CONCLUSION

Undertrial crisis is a constitutional scandal prevailing in India for decades, across governments and judicial orders across governments. The fact that over three-quarters of individuals in the prisons in India have not been found guilty of any offence is not currently yet an uncertainty of facts; it is a fact that has been documented and estimated and is an established and judicially recognised fact. The fact that this has not led to lasting systemic redress in itself bears a diagnosis of the nature of the institutional failures in question.

There is no shortage of normative frameworks to use to deal with the crisis. The right to pre-trial liberty, which is constitutionally guaranteed by Article 21 as interpreted over decades of Supreme Court jurisprudence, would go a long way in decreasing the number of undertrial defendants. Sub-Heading 436A (and currently 479), of the BNSS offers statutory release vehicles which, on reaching reality, would have an immediate positive effect on the then-large number of prisoners in custody. Article 9(3) of ICCPR and the Tokyo Rules set the international minimum rules that are accepted by but not fully realized by India.

This lack is not the power of law but the institutional will, a certain degree of cross-institutional will to see the undertrial prisoner not as an administrative drag but as a constitutional being, endowed with rights which the State bears an affirmative burden to enforce. The fact that pre-trial detention in Southern Asia remains in the pattern of increasing as a percentage of the overall prison population when the rest of the world is increasingly talking in terms of non-custodial options, should be taken as a herbal salve by India, of how far it still has to go in meeting its own grounds of constitutionally solemn promise.

The reform agenda is not a complex one technologically. It involves the political determination to make the bail as a means of justice, and not of administrative convenience, to provide the means of legal assistance as a constitutional necessity, and not a fiscal expediency, and to realise as the Supreme Courts have again and again realised, and as the literature on prison

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reform is coming to affirm, that the social costs of unnecessary imprisonment are being borne by those least responsible to bear them.

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