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"BAIL AS A RULE, JAIL AS AN EXCEPTION: A CRITICAL EXAMINATION OF CONSTITUTIONAL LIBERTY AND BAIL JURISPRUDENCE IN INDIA"

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ABSTRACT

If you look at the numbers from the National Crime Records Bureau, roughly 75 to 76 percent of the people sitting in Indian prisons on any given day have not been convicted of anything.[1] That figure has stayed almost flat for the better part of two decades. It has not moved despite Parliament enacting Section436Aofthe Code of Criminal Procedure in 2005, despite the Supreme Court issuing detailed directions through the *Satender Kumar Antil* judgments in 2021 and 2022, and despite Section 479 of the Bharatiya Nagarik Suraksha Sanhita,2023cominginto force on 1 July 2024 with even clearer language than its predecessor. The law keeps changing. The numbers do not.

This paper argues that the legal framework is not really a problem. The problem is that the framework is not being used. Three separate failures, operating at three different points in the criminal process, account for most of the gap. First, police continue to arrest people in situations where the Supreme Court's directions in *Arnesh Kumar v. State of Bihar*[2] required them only to issue an appearance notice. Second, under trial prisoners who are legally eligible for bail under Section 479 have nobody to file an application on their behalf. Third, when applications do get filed, magistrates dismiss them using one or two standard sentences about the 'gravity of the charge'—language that checks the written-reasons box without reasoning through the individual case. Moreover, a large category of undertrial prisoners — those facing NDPS, UAPA, or PMLA charges — cannot use Section 479 at all, because separate statutory bail bars effectively override it.

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I. INTRODUCTION

Start with a situation that, unfortunately, is not hypothetical. A man gets arrested in Kanpur for alleged theft. The maximum sentence for the offence he is charged with is three years. He is brought before a magistrate the next morning, sent to judicial custody, and has no lawyer. Nobody tells him that Section 479 BNSS gives him a right to bail once he has served one-third of the maximum sentence — that is four months, in his case — because he has no prior convictions. Fourteen months have passed. Eventually, a legal aid application is filed on his behalf. The magistrate dismisses it in a single line: 'nature and gravity of the alleged offence.' By the time that order is passed, this man has spent nearly five times the period after which the law says he had to be released.[3]

The legal position on this kind of situation has actually been clear since 1979. The Supreme Court said in *Hussainara Khatoon v. Home Secretary, State of Bihar,* that keeping an unconvicted person in jail for longer than any sentences he could have received upon conviction is a travesty of justice.[4] That was forty-six years ago. Section 436A CrPC 2005. The *Satender Kumar Antil* directions came in 2021 and 2022. Section 479 BNSS arrived in 2024. The undertrial proportion — 75 to 76 percent of the prison population — has not moved. This paper tries to work out why, and what can actually be done about it.

The argument here is not that the law is broken. The law is fairly clear. The problem is that three things keep going wrong, at three different stages of the process. First, police are still arresting people in cases where the Supreme Court's directions in *Arnesh Kumar v. State of Bihar* only permitted them to send an appearance notice. Second, eligible undertrials sit in custody because there is simply no lawyer available to file a bail application for them. Third, when a bail application does get filed, magistrates dismiss it using boilerplate language that technically satisfies the requirement of recording reasons but does not actually engage with the facts of the individual case.

And separately, a very large group of undertrial— those charged under the NDPS Act, UAPA, or PMLA — are effectively locked out of Section 479 altogether by statutory provisions that override it.

This matters beyond the legal compliance question. Scholars working on criminal justice in India have pointed out for decades that pretrial detention does not just delay freedom — it

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destroys livelihoods, breaks up families, and imposes punishment on people before any court has decided they are guilty of anything.[6] Upendra Baxi put it plainly when he wrote that the gap between the law on paper and the law in practice is widest precisely for those who have no money and no connections.[7] The undertrial crisis is one of the clearest examples of that gap in the entire Indian legal system.

The paper draws on NCRB prison data from 2015 to 2023, NALSA's Under Trial Review Committee reports, the India Justice Report from 2022 and 2025, and a comparison with the UK's Bail Act 1976. No original field research was conducted. All factual claims have citations. Where the evidence is thin, that is stated openly.

II. THE LEGAL FRAMEWORK

A. *The Constitutional Foundation*

Article 21 of the Constitution says that no person can be deprived of her life or personal liberty except by procedure established by law. The Supreme Court clarified in *Maneka Gandhi v. Union of India*[8] that this is not just about having some procedure written down somewhere — the procedure has to be fair, just, and reasonable. When that principle is applied to pretrial detention, it means the State has a positive duty to make sure people are not kept in custody beyond what the law permits. The Court made this concrete in *Hussainara Khatoon*[9] — prolonged detention of undertrials who cannot afford to bail violate Article 21 directly. That was 1979. The problem is still very much with us.

Article 39A requires the State to ensure that equal justice is not denied because of economic disability, and that free legal aid is available to those who need it. The Legal Services Authorities Act, 1987 was enacted to give this provision teeth—it created NALSA and its state-level counterparts, all of which are supposed to provide free legal services to undertrial prisoners regardless of income.[10] The Supreme Court went further in *Suk Das v. Union Territory of Arunachal Pradesh*[11] and held that the right to free legal aid is part of the right under Article21 itself — if an accused is not told about this right, any trial that follows is vitiated.

B. *Section 436A CrPC and the Proviso That Became a Loophole*

Section 436A was added to the Criminal Procedure Code in 2005 through the Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005). The structure of the provision was straightforward: once an undertrial had spent half the maximum sentence in custody — except

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in capital offence cases — the court *shall* release her on personal bond. The word 'shall' was not accidental. Parliament was responding to a documented reality: people were routinely sitting in custody for longer than any sentence a conviction could have produced, which is exactly the situation *Hussainara Khatoon* had called a travesty of justice twenty-six years earlier.

The provision came with a proviso that allowed courts to continue detention if they recorded reasons in writing after hearing the public prosecutor. This was supposed to be a narrow exception for genuine cases where release would be dangerous. In practice, what courts were doing — and this is visible in the pattern of High Court decisions — was writing one sentence: 'the nature and gravity of the alleged offence is such that release is not appropriate.' That sentence satisfies the formal requirement. It does not come close to satisfying it in substance. It says nothing about the specific accused — her background, whether she has appeared in court before. What evidence there is that she might tamper with witnesses, whether bail conditions could address any of those concerns. The Supreme Court eventually said this directly in *Satender Kumar Antil v. Central Bureau of Investigation* (2022).[12]

C. *Section 479 BNSS: What Changed and What Did Not*

Section 479 of the Bharatiya Nagarik Suraksha Sanhita, 2023 came into force on 1 July 2024. The basic half-sentence rule stayed for accused persons generally. But for first-time offenders — people with no prior convictions — the threshold was reduced to one-third of the maximum sentence. That is a genuine improvement. A person who has never been convicted before does present a different situation from a repeat offender, and it makes sense for the law to recognize that distinction.

Section 479 also says it applies to special statute cases subject to any contrary provision' in those statutes. That phrase does a lot of heavy lifting. It is the reason why Section 37 of the NDPS Act, Section 43D (5) of the UAPA, and Section 45 of the PMLA continue to shut out large numbers of undertrials from the mandatory release rule. As for whether Section 479 has made a practical difference since July 2024 — the answer, based on NALSA data comparing the first seven months after commencement with the same period a year earlier, is essentially no.[13]

D. *The Satender Kumar Antil Trilogy*

The Supreme Court decided on three judgments under the name *Satender Kumar Antil v. Central Bureau of Investigation*. The first, on 7 October 2021,[14] held that people who were not

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arrested during investigation should not automatically be arrested just because a chargesheet has been filed — police need to independently think about whether arrest is necessary. The second, on 16 December 2021,[15] essentially repeated that position with more specificity. The third, on 11 July 2022,[16] is the one that mattered most. It categorized accused persons by charge type, directed courts to decide to bail applications within two weeks, and — this is important — required states to file quarterly compliance affidavits. The fact that the Court felt it necessary to ask for affidavits tell you something about how confident it was that its directions were being followed.

Table 1 below how's the under-trial figures from 2015 to 2023. The share was 75.8 percent in 2022 — after all three *Antil* judgments — and around 76 percent in 2023. Whatever the directions achieved in individual cases, they have not moved the aggregate numbers.

Table 1. Undertrial Population Share, India 2015–2023

Year	Total Prison Population	Undertrials	Share (%)	Note
2015	4,19,623	2,82,879	67.4	S.436A CrPC in force
2017	4,50,696	3,23,537	67.9	S.436A CrPC in force
2019	4,78,600	3,30,487	69.1	Five years after Arnesh Kumar
2021	5,54,034	4,27,165	77.1	COVID-19 court disruption
2022	5,73,220	4,34,302	75.8	Post-Antil trilogy
2023	~5,80,000	~4,39,000	~76	Pre-BNSS (est.)

Source: NCRB, Prison Statistic India, annual editions 2015-2023. Figures are stock counts on 31 December of each year, not annual flows.

III. THREE REASONS THE LAW IS NOT BEING FOLLOWED

a. *Unlawful Arrests: Detention Before Bail Even Arises*

The undertrial problem starts at the very first step — the arrest. If the arrest itself was not legally necessary, then every day of custody that follows is built on that original error. The Supreme Court tried to address this squarely in *Arnesh Kumar v. State of Bihar.* which came out of the practice of police routinely arresting people accused under Section 498A IPC — matrimonial cruelty, maximum sentence three years— without stopping to ask whether arrest was needed in a particular case.

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What the Court said was straightforward: for any offence with a maximum sentence of seven years or less, the police officer must first satisfy herself of the criteria laid down in Section 41 CrPC before making an arrest. If those criteria are not met, she must issue a Section 41A CrPC notice instead — asking the accused to appear rather than physically taking her into custody. The notice gets the person before the investigating officer just as effectively for most purposes. The arrest does something extra: it takes away someone's liberty. That extra step needs a specific, recorded reason.

The problem is that more than a decade later, this direction is still being ignored on a systematic basis. The Allahabad High Court, between 2019 and 2023, repeatedly found that investigating officers in Uttar Pradesh had made arrests without producing any Section 41 satisfaction record — and imposed costs on the state government in several of those cases.[18] The same pattern appears in Bombay and Kerala High Court decisions.[19] These are just the reported cases. They cannot tell us how often this happens in police stations across the country — but the fact that it keeps showing up in High Court judgments year after year in multiple states says this is not a one-off failure.

The structural explanation is obvious once you look at how police performance is evaluated. In most state police departments, arrest numbers feed into performance metrics. A Section 35 BNSS appearance notice — which is what Section 41A CrPC has become under the new code — does the same investigative job as an arrest in most bailable cases, but it does not count as an 'arrest' for the purpose of performance records. Until those changes, the *Arnesh Kumar* directions will keep being disregarded regardless of how many times the courts repeat them. Pratiksha Baxi's work on arrest as a performance of state authority rather than a necessary investigative tool explains why this incentive structure is so difficult to dislodge through judicial directions alone.[20]

b. *No Lawyer, No Application, No Bail*

Even if the arrest was perfectly legal, an undertrial who qualifies Section 479 bail still needs a lawyer to file an application. Without one, the mandatory release simply does not happen There is nobody triggering the process. NALSA data consistently shows a gap between the number of prisoners who meet the Section 479 threshold and the number for whom applications actually get filed.[21] The reason is simple: in a lot of prisons, there is no legal aid lawyer available.

The India Justice Report 2022 found that per-prisoner legal aids pending was negligible in most states.[22] CHRI's 2023 prison study found prisons that had no dedicated legal aid lawyer at all.[23] India Justice Report 2025 noted some improvement in a handful of states but nothing that

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amounts to a national shift.[24] The consequence follows directly: if there is no lawyer in the prison, there is no bail application.

There is also a separate problem with surety conditions that compound this. Section 479 BNSS is supposed to work through personal bonds, and the Supreme Court in *Satender Kumar Antil* (2022)[25] specifically directed courts to prefer personal bonds over monetary conditions. Despite that, what often happens is that magistrates set surety amounts that seem modest on paper but are completely beyond the reach of the typical undertrial. Someone earning Rs. 400 to 500 a day as casual labor—and often not earning anything at all after months in custody—cannot produce Rs. 25,000 surety in cash..[26] The Supreme Court said in *Arnab Goswami v. State of Maharashtra* that bail conditions cannot be turned in to a' disguised form of continued detention.'[27] That principle is not consistently reaching the magistrate courts that set these conditions.

c. *Magistrate Bail Denials: Discretion Without Oversight*

The third failure happens at the moment of the decision. Section 479 application that gets filed against the magistrate must determine whether the time threshold has been crossed — and if it has, either release the accused or invoke the proviso with written reasons specific to the case. In practice, the pattern in reported decisions is that the proviso gets invoked through one or two standard lines 'the gravity and nature of the alleged offence' without any engagement with the particular accused, her record of court appearances, whether she is a flight risk, or why bail conditions would not work.

The National Judicial Data Grid tracks case pendency but does not publish bail grant or denial rates by court.[28] This means a magistrate whose Section 479 orders all use identical language faces no monitoring whatsoever unless someone individually challenges each order before the High Court. Most accused people cannot afford to do that. Most orders are never reviewed.

In *Re: Inhuman Conditions in 1382 Prisons*,[29] the Supreme Court found large numbers of undertrials being held past the Section 436A threshold and issued fresh directions. Those directions were essentially what the Court had already said in *Hussainara Khatoon* in 1979. The same direction, issued twice, four decades apart, producing the same inadequate result — that is not a problem with the law. That is a problem with accountability. The Supreme Court put it well in *Sanjay Chandra v. Central Bureau of Investigation*: bail is the rule, jail is the exception, and courts cannot flip that principle around by routinely invoking how serious the charge is.[30]

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SPECIAL STATUTORY BAIL BARS: WHERE SECTION 479 CANNOT REACH

The three failures described above affect most ordinary criminal cases. But there is a large category of undertrial prisoners for whom the problem is different — Section 479 does not even apply to them or applies in such a diluted way that it might as well not. The seared accused persons under the NDPS Act, the UAPA, and the PMLA, and they are not a marginal group.

E. NDPS Act, Section 37: The Twin Conditions Test

Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 applies to offences under Chapters IV and V. Before bail can be granted, the court must be satisfied of two things: first, that there are reasonable grounds to believe the accused is not guilty of the alleged offence; and second, that she is not likely to commit any offence while on bail. Both conditions have to be met. This completely inverts the normal structure of bail law. Instead of the prosecution having to justify why the accused should stay in custody, the accused must demonstrate something close to probable innocence — and do it before the trial has even started. NDPS offences make up a disproportionately large share of prosecutions in Punjab, Haryana, and Himachal Pradesh.[31] Many accused in those states have served well past the Section 479 threshold but stay in custody because they cannot clear the Section 37 test.

There is one development worth highlighting here. The Supreme Court held in *Tofan Singh v. State of Tamil Nadu*[32] that confessions recorded by NCB officers under Section 67 NDPS are not admissible as evidence. In cases where the prosecution's prima facie case was built substantially on such confessions, courts should be revisiting the Section 37 analysis — without the confession, do the 'reasonable grounds to believe guilt' threshold still stand? Whether this is actually happening at the district court level is unclear, but it is alive and important legal question.

d. ***UAPA, Section 43D (5): A Constitutional Minimum That Is Inconsistently Applied***

Section 43D (5) of the Unlawful Activities (Prevention) Act, 1967 says bail cannot be granted if the court, on looking at the case diary, finds reasonable grounds to believe the accusation is prima facie true. Again, the burden is essentially on the accused to show there is no credible case against her — and she must do this without full access to prosecution materials and often without any effective legal representation.

The Supreme Court held in *Union of India v. K.A. Najeeb*[33] that Section 43D (5) does not override Article 21. Where the State has caused substantial delay and the period of detention have become disproportionate to whatever sentence a conviction could produce; bail can be

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granted even with the prima facie test in the way. Article 21 sets out a floor where ordinary legislation cannot be removed.

The problem is that lower courts are not applying *Najeeb* consistently. Some read it as allowing bail wherever delay is clearly the prosecution's fault. Others only apply it in case so very long detention — five years or more — and even then, narrowly. What this means in practice is that UAPA accused keep sitting in jail well past any proportionate period. The death of Father Stan Swamy on 5 July 2021, while his bail application was still pending before the Bombay High Court after nine months in custody, is perhaps the starkest recent illustration of what Section 43D (5) means for accused persons who are not flight risks and pose no ongoing threat but simply cannot clear the prima facie test.[34]

e. *PMLA, Section 45: Post-Amendment Difficulties*

The original Section 45 of the Prevention of Money Laundering Act, 2002 imposed twin bail conditions similar to those in the NDPS Act. The Supreme Court struck it down as unconstitutional in *Nikesh Tarachand Shah v. Union of India*.[35] Parliament amended it. The amended version was upheld in *Vijay Madanlal Choudhary v. Union of India*.[36]

So, bail in PMLA cases remains considerably harder than in ordinary criminal matters. Whether a PMLA accused who has served on the Section 479 BNSS threshold can actually invoke the mandatory release rule — or whether Section 45 PMLA is the 'contrary provision' that knocks it out — is not settled at the lower court level. This is going to produce increasing litigation as PMLA prosecutions expand.

Across all three statutes — NDPS, UAPA, and PMLA have made a deliberate choice to place certain categories of accused outside the ordinary bail framework.

The constitutional floor from *Najeeb* is the only real protection that remains, and based on reported decisions, it is being applied inconsistently at best.

A NOTE ON THE UK'S BAIL ACT 1976

This section compares the Indian framework with the UK's Bail Act 1976, but with a very specific and limited purpose. The comparison is not meant to suggest that India should simply copy the UK model. Caseloads are incomparably different; legal aid funding is not in the same league, and institutional cultures cannot be transplanted by legislation. The point is narrower: the accountability mechanisms this paper recommends — putting the burden on the prosecution, requiring a conditions analysis before ordering detention, mandating genuine written reasons — are not just theoretical proposals. They already exist and function in another

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jurisdiction.

Section 4 of the Bail Act 1976 gives every accused a general right to bail, which can only be overridden on specific grounds: a substantial risk of absconding, committing further offences, or interfering with witnesses.[37] The prosecution has to establish one of these — the accused does not have to justify her own release. Before ordering remand, the court must think about whether conditions like curfew, reporting requirements, or surrendering a passport could manage the identified risk. Written reasons are compulsory for any remand order.

The difference in outcomes is significant. Ministry of Justice statistics show that the remand population as a share of the total prison population in England and Wales has stayed between 16 and 22 percent over the past decade.[38] India's figure is 75 to 76 percent. The UK number is not an ideal benchmark — it reflects a different system in almost every respect. But the gap is too large to be explained only by differences in caseloads or legal aid. It reflects, at least partly, the structural effect of requiring the state to justify detention rather than requiring the accused to justify release.

Each of the Bail Act's features maps onto one of the failures identified in Section III. The prosecution burden makes it harder to get away with 'gravity of offence' boilerplate — that is not one of the statutory grounds.

The conditions analysis pushes courts to consider alternatives before ordering detention, which directly addresses the surety of trap. The written reasons requirement, combined with the right to go to the Crown Court, creates the kind of structured oversight that India's magistrate courts currently lack entirely. These things work. That makes the case for comparable mechanisms here considerably stronger than if they were purely theoretical.

IV. COUNTERARGUMENTS

a. *Public Safety*

The most serious objection to the argument in this paper is that magistrates may, in many of these cases, actually be right. Witness intimidation in India is a real and documented problem. Some accused persons with resources do abscond. India does not publish comprehensive failure-to-appear statistics by jurisdiction, which means this paper cannot say with any statistical confidence that denial rates are currently too high. That is a genuine gap in the evidence, and it is acknowledged as such.

But the response to that concern is not to abandon case-specific reasoning — it is to do case-specific reasoning. Section 479 proviso is there for exactly those cases where public safety genuinely justifies keeping someone in custody. The problem is when the proviso is invoked

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for every case, using the same language, without engaging with what is actually different about this particular accused. A magistrate who genuinely believes someone is a flight risk should be able to point out something: a previous history of non-appearance, specific evidence of contact with witnesses, resources that would make absconding feasible. 'Nature and gravity of the alleged offence' does not answer any of those questions.

b. *Investigative Delay*

A second objection is that the real driver of undertrial accumulation is not judicial bail denial but investigative delay. Police are understaffed, and forensic laboratories have been backed up for years. Courts extending custody are responding to a genuine operational problem, not acting arbitrarily.

This is partly true, but it does not actually address the Section 479 argument. Section 479 BNSS does not say 'unless the investigation is still ongoing. It says 'shall.' Once the time threshold is crossed, the mandatory release rule applies regardless of where the investigation stands. There is also Section 187 BNSS — the successor to Section 167 CrPC — which gives default bail as of right if no chargesheet is filed within 60 or 90 days of arrest. Failing to apply default bail when that deadline passes is a separate and distinct judicial failure that police delay cannot excuse.

c. *Underfunded Courts*

The strongest counterargument is structural. A magistrate handling two or three thousand cases simultaneously cannot realistically give every Section 479 application the attention it requires. A legal aid system funded at negligible per-prisoner levels cannot provide meaningful representation. These are failures of investment and political will, not individual failures.

That diagnosis is accepted here. But the conclusion that follows it is not that targeted reform issues less — it is that reform needs to happen at multiple levels simultaneously. Some of the failures identified in this paper do not require additional money. Invoking the Section 479 proviso with individualized reasoning rather than boilerplate does not cost anything. Enforcing Section 187 BNSS default bail does not cost anything. These require the exercise of existing powers, subject to oversight that currently does not exist. The India Justice Report shows meaningful variation between states in bail outcomes,[39] which means that what individual states do with existing resources matters. Structural investment and targeted legal accountability are not alternatives — both are needed.

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V. WHAT SHOULD BE DONE

The proposals below are arranged roughly in order to determine how difficult it is to implement things that can be done through a practice direction tomorrow to things that require sustained political commitment. None of them require a constitutional amendment or new primary legislation.

d. *Structured Bail Reasoning for Section 479 Denials*

The most direct fix is to require magistrates to invoke the Section 479 proviso to answer specific questions in writing: Is there a documented history of non-appearance? Is there specific evidence — not just an inference from the charge — of flight risk or witness interference? Why would bail conditions not adequately address the concern? If the order does not address these questions, it should be deficient on its face and open to challenge without needing separate grounds of appeal.

This requires no legislative amendment. The Supreme Court can implement it through a practice of direction under Article 141, and High Courts can do it under Article 227. The direction would specify a minimum content for Section 479 for denial orders — not a prescribed format, but a set of questions that must be addressed. A precedent for structured reasoning requirements exists in the Supreme Court's approach to revision applications under Section 397 CrPC in *Gurucharan Singh v. State of Punjab*, where the Court imposed similar minimum content requirements to prevent the revision jurisdiction being misused.

e. *Monitoring Through the National Judicial Data Grid*

The NJDG is already tracking most court orders. With a modest technical addition — a mandatory field recording whether each bail application was granted or denied and on what ground — it could generate quarterly reports flagging courts with unusually high Section 479 denial rates for review by the High Court. A magistrate whose denial orders read identically across fifty cases presents a materially different situation from one whose orders show genuine individual engagement.

The mechanism would work like this: automated quarterly reports go to each High Court's Suo motu bench; courts above a defined denial-rate threshold are required to submit a self-assessment; the High Court decides whether further inquiry is warranted under Article 227. This is supervisory oversight, not interference with individual decisions. It is exactly the kind of accountability that Article 227 was designed to enable.

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f. ***Legal Aid Treated as Infrastructure***

Every prison should have at least one dedicated legal aid lawyer with a caseload that is manageable. Right now, in many states, a single lawyer is nominally assigned to hundreds of prisoners. That is not legal aid — it is legal aid on paper.

The cost of doing this properly is not prohibitive. If one dedicated legal aid lawyer is allocated to each of India's approximately 1,300 prisons at a salary comparable to a junior government advocate, the total annual cost is well under Rs. 500 crores. That number should be weighed against the cost — in lost productivity, family welfare dependency, and institutional housing — of keeping over four lakh unconvicted people in custody every year. The Finance Commission devolution framework already includes legal services authority allocations. The question is whether state government Streat legal aid as a constitutional obligation or as alineitem to be cut.

g. ***Section 479 Alerts Through eCourts***

If prison management data were connected to eCourts case records, the system could automatically flag when an undertrial crosses the Section 479 eligibility threshold, generating a mandatory hearing notice without depending on prison staff or a legal aid lawyer to catch it. The Integrated Criminal Justice System project has been working toward this kind of integration for years.

Maharashtra and Tamil Nadu already have partial prison-court data linkages under their-prison pilots. Mandating that these pilots generate Section 479 threshold alerts — and that such alerts trigger a notice to the relevant legal aid authority — requires a circular from the State Legal Services Authority, not new legislation. States where partial integration exists should be required to implement this immediately.

h. ***Special Statute Review Mechanism***

NDPS, UAPA, and PMLA accused need a separate solution because Section 479 does not reach them. The period is reviewing panel—a Sessions Judge, a prosecution representative, and a legal aid lawyer from the State Legal Services Authority — should convene every six months in each sessions division to look at cases where detention has exceeded two years without trial conclusion. The panel should be empowered to grant bail where continued detention has become disproportionate to any sentence that could realistically result, consistent with what the Supreme Court held in *Union of India v. K.A. Najeeb*.

This does not override Parliament's choices in those statutes. It operationalizes the

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constitutional floor that *Najeeb* has already identified as non-negotiable. The model is not novel

i. the Juvenile Justice Act's Child Welfare Committees and the periodic review boards under the Mental Healthcare Act 2017 for involuntary patients working on exactly the same logic. Systematic review replaces individual litigation, which most accused persons in this category cannot afford.

V. CONCLUSION

Three out of every four people in Indian prisons have not been convicted of anything. The law has been saying this is unacceptable since 1979. Section 479 BNSS says it again, with the word 'shall' and a lower threshold for first-time offenders. The proportion of undertrials has not moved.

The reason is not that the law fails to address the problem. The law addresses it quite clearly. There as on is that the law is not being followed—at the point of arrest, at the point of bail application, and at the point of judicial decision. And for a large subset of under trials, the law as it stands simply does not reach them at all, because NDPS, UAPA, and PMLA bail bars operate as effective overrides to Section 479, with the constitutional minimum from *Najeeb* applied only inconsistently by lower courts.

The counterarguments in this paper — public safety, investigative delay, underfunded courts — have been taken seriously, not dismissed. They are real. But they do not, individually or together, justify leaving someone in custody for longer than any sentence they could have received upon conviction, with no lawyer, on the basis of a bail denial order that was written identically for the fifty cases before theirs.

The proposals in Section VII are not ambitious in the sense of requiring revolutionary change. They are ambitious only in the sense that they require institutions to do what the law already requires them to do — and to be accountable when they do not. As Upendra Baxi observed about structural legal failure in India more broadly, the problem is rarely the absence of law. It is the absence of the will to enforce it. The undertrial crisis has been demonstrating forty-six years.

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2 Arnesh Kumar v. State Bihar (2014) 4 SCC 41.

Keywords: Section 479 BNSS, Section 436A CrPC, undertrial detention, Arnesh Kumar v. State of Bihar, Satender Kumar Antil, NDPS Section 37, UAPA Section43D, PMLA Section 45, magistrate discretion, legal aid, pretrial detention1 reform.

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3 This is a composite illustration based on patterns documented in NALSA Under Trial Review Committee Reports (2022–2024) and India Justice Report 2022. It does not describe any specific individual. The details are drawn from documented conditions, not invented.
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