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SEPARATING CRIME FROM PUNISHMENT: WHAT INDIA'S PRISONS MIGHT TELL US ABOUT ITS CRIMINAL PROCESS

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SEPARATING CRIME FROM PUNISHMENT: WHAT INDIA'S PRISONS MIGHT TELL US ABOUT ITS CRIMINAL PROCESS

—Abhinav Sekhri*

Abstract — Since the 1980s, the judiciary has perceived prisons in India as a site of rehabilitation and has focused on addressing prison reform through piecemeal managerial directives. Simultaneously, the criminal process has steadily incarcerated more persons as undertrials. Worryingly, these trends have been progressively worsening for the last decade that has rendered prison reform infructuous. Through an analysis of prison populations and crime rates in India, it is evident that the stable rise in prison population is not a mere consequence of managerial inefficiency but a reflection of a systemic preference for undertrial incarceration. This is premised on the manner in which the criminal justice system allows for liberal arrests and illiberal bail. As a consequence, prisons symptomatise how this preference for incarceration of undertrials hollows out the presumption of innocence and renders notions of guilt or innocence irrelevant. Thus, prison reform must be based on a recognition that prisons are not sites of rehabilitation but instead serve as warehouses for the innocent.

I. INTRODUCTION

Ten days before India underwent a national lockdown, on March 16, 2020, its Supreme Court instituted *suo motu* proceedings calling upon various state governments to inform the Court about how they plan on mitigating the risk of a coronavirus outbreak across prisons in which, on average, occupancy

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overshot available capacity.[1] The Court ultimately passed directions calling upon each state to constitute a Committee, which was to involve the High Courts, to guide the decongesting of prisons to pre-empt a crisis from emerging within prisons.[2]

Besides advising trial courts to be liberal in considering bail requests for relatively minor offences, one other tactic for decongesting prisons that emerged as a result, was directions to grant bail only for a limited duration in some cases, but to keep extending it from time to time owing to the risk of overcrowding. At the time of writing this piece, there has been litigation around this extension of temporary bails in the case of Delhi, the result of which remains inconclusive.[3] While going through the details of this litigation, I was dumbstruck by some of the facts on display.

In its Minutes dated October 24, 2020, the Delhi High-Powered Committee, constituted pursuant to orders of the Supreme Court, noted that till October there had been 4,934 persons who had been released from prison on account of the relaxation in granting bail/parole, etc. during the pandemic.[4] Despite this, the prisoner population inside Delhi's prisons was close to 15,900 persons, almost six thousand persons more than the maximum capacity of 10,026.[5] If one considered the data for 2019 to be indicative of current numbers, it would be likely that almost 80% of the 15,900 persons were undertrials, i.e. persons presumed to be innocent of the allegations against them.[6]

The data for Delhi's prisons would seemingly suggest that not even a pandemic could quell the use of arrest powers by police officials. I argue that there are extremely good reasons for this, as the Delhi data is but a microcosm of how the criminal process has been transformed in India over the past quarter of a century. I have argued elsewhere that the criminal process in India is no longer premised upon adjudicating guilt and delivering punishment.[7] Here,

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1 *In Re: Contagion of Covid-19* (2020) 5 SCC 313.

2 *In Re: Contagion of Covid-19* (2020) SCC OnLine SC 344.

3 The Delhi High Court directed on October 20 that since courts had resumed functioning for all practical purposes, its earlier directions extending temporary bail would no longer hold and prisoners at liberty on account of such orders would have to surrender. The order was challenged in the Supreme Court, which on October 29 stayed the operation of these directions by the Delhi High Court. The proceedings in the Supreme Court are, as yet, pending. See, *Court on its Own Motion v State* (2020) 275 DLT 414; *National Forum on Prison Reforms v Government of NCT Of Delhi & Ors* Special Leave Petition (Civil) Diary No(s). 23367/2020 (Order dated 29-10-2020) (SC).

4 Minutes of Meeting dated 24 October, 2020 at 11:00 a.m. through Video Conferencing (Cisco Webex) under the Chairpersonship of Hon'ble Ms Justice Hima Kohli, Judge, High Court of Delhi and Executive Chairperson, Delhi State Legal Services Authority Minutes of the High-Powered Committee 8.

5 ibid 10.

6 National Crime Records Bureau, *Prison Statistics India 2019* (2020) 47, Table 2.2.

7 Abhinav Sekhri, 'The Disintegration of the Criminal Justice System' *The Hindu* (October 7, 2020) <https://www.thehindu.com/opinion/lead/

drawing upon data made available by the National Crime Records Bureau ('NCRB'), I argue that the sense of crisis we feel today has been long in the making. The criminal process has steadily incarcerated more persons as undertrials, rendering notions of guilt or innocence irrelevant. Worryingly, these trends have been progressively worsening for the last decade. While the lack of data renders it almost impossible to establish a cause-and-effect relationship to explain the varying statistics of undertrial prisoners, I argue that notwithstanding these specific causes, a primary cause behind the general trend is the structural design of the criminal justice system.

The structure of the paper is as follows. Part two considers the data trends for Indian prisons to highlight the variation in the prisoner population over time, in terms of total numbers, the category of prisoners (convict/undertrial), length of incarceration suffered by undertrials, the kinds of offences for which persons are imprisoned, and any significant geographical trends, and also places this in the larger context of data for disposing of criminal trials. The stable rise in prison population suggests that the increase is not down to specific tweaks, such as changes in bail laws, but is arguably a reflection of a systemic preference for these outcomes.

Part three develops the argument about systemic preferences. I argue that the high rate of undertrial prisoners is not only a result of socio-political issues such as poor state capacity of the justice delivery system, but a direct consequence of the manner in which the legal regime governing arrest and bail is designed. The law confers upon the police wide powers of arrest without warrant, privileges custody for investigative purposes, does not carry any clear presumption of bail but rather enables granting custody to serve as a default option for judges. As a result, our prisons are not reformatories but more akin to warehouses, where undesirable classes are stocked for varying lengths of time.

Part four concludes the paper. It turns to the consequences of a criminal process premised upon incapacitation on the idea of a presumption of innocence. Staggering rates of undertrial incarceration have led to hollowing out the presumption of innocence and have brought upon us a system wherein arrests are the most critical stage, and the harshness of imprisonment is no longer softened by the knowledge that it is the result of a trial and its attendant guarantees of due process.

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the-disintegration-of-the-criminal-justice-system/article32785928.ece> accessed 7 December 2020.

II. PART TWO: INDIA'S OVERCROWDED PRISONS, A QUARTER-CENTURY HISTORY

The NCRB data on prisons in India, i.e. the Prison Statistics India ('PSI') reports, is available from 1995 and runs till 2020, and is the only source of widescale primary data available on prisons in India. In this section, though, we begin at an earlier point in time: the late 1970s, till 1986. Despite insufficient data, I pick this period because it was a time when prisons and prison conditions had occupied the consciousness of the state in a manner that had not yet been seen in its history, and has arguably not been witnessed since.[8] After considering this initial period, I then turn to the quarter-century from 1995 till 2019, focusing on the PSI reports as well as the Crime in India reports. Here, I draw upon the comprehensive 2018 study by Chandra and Medarametla wherein data from 2000 till 2015 was examined,[9] and continue engagement with macro-level trends that the data suggests.

A. The Early Years—1978 to 1986

Justice (Retd.) H.R. Khanna and Shanti Bhushan were prominent adversaries of the internal Emergency of 1975-77 in their own ways.[10] Both were responsible for bringing out the 78th Law Commission Report which was concerned with congestion of under-trial prisoners in Indian jails—a fact which achieved notoriety following the excesses of Emergency being documented in periodicals at the time.[11] The Report noted that as of January 1, 1975, Indian prisons housed 2,20,146 inmates out of which under-trial prisoners were 1,26,772—57.58%.[12] The figures as of April 1, 1977 reflected that out of a total of 1,84,169 prisoners, 1,01,083 were undertrials (54.9%).[13] This, according to the Law Commission's Report, indicated that undertrials constitute a

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[8] On the Supreme Court's intervention in prisons, *see*, P Leelakrishnan, 'Prisoner Rights and the Discretion of the Prison Administration' (1981) Cochin University Law Review 140; Upendra Baxi, *The Crisis of the Indian Legal System* (1982) 144-243; S Muralidhar, 'Public Interest Litigation' (1997-98) Annual Survey of Indian Law 525.

[9] Aparna Chandra and Keerthana Medarametla, 'Bail and Incarceration: The State of Undertrial Prisoners in India' in Harish Narsappa and others (eds) *Approaches to Justice in India: A Report by Daksh* (2018) <https://dakshindia.org/Daksh_Justice_in_India/16_chapter_06.xhtml#_idTextAnchor068> accessed 5 December 2020. The authors considered data from 2000 till 2015 for their study.

[10] Justice Khanna penned the only dissenting opinion in *ADM Jabalpur v Shivakant Shukla* (1976) 2 SCC 521 : AIR 1976 SC 1207, where the majority held that the writ of *habeas corpus* could be suspended during a Proclamation of Emergency. Shanti Bhushan was a member of the coalition of politicians opposing the government and became Law Minister in the Janata Party coalition that won the 1977 parliamentary elections in India.

[11] Law Commission of India, *78th Report on Congestion of Under-trial Prisoners in Jail* (February 1979). Shanti Bhushan was Law Minister, while Justice HR Khanna was the chairperson of the Law Commission at the time.

[12] ibid para 1.5.

[13] *78th Report* (n 11) para 1.5.

"large percentage of the total jail population".[14] This was the context—with 50% of prisons constituting convicts—in which Justice Krishna Iyer spoke avidly about prisons being the site of reform and rehabilitation.[15] It was also the context in which the Supreme Court made its much-lauded interventions into prisons as a result of a letter petition in what became the *Hussainara Khatoon* cases.[16] The long detention suffered by undertrials in the State of Bihar shocked the conscience of the Court to such an extent that it passed various orders for "cleaning the Augean stables".[17]

The efforts of courts and governments arguably bore some fruit, going by the data collected by the All Indian Jail Reforms Committee for its report published in 1984.[18] According to this, at the end of 1980, India's 1200 prisons housed 64,090 convicts and 92,276 undertrials.[19] These numbers, if believed, suggest a decarceration from 1978—from 1,84,169 prisoners, jails now housed 1,59,692.[20] Even so, the share of undertrial prisoners had marginally increased further, touching 60%.[21] While the recommendations made by the All Indian Jail Reforms Committee were yet to be implemented, another committee (called a 'group' this time) was constituted to consider issues of prison administration.[22] Data gathered by this Group suggested that as of 1986, the total prison population was on the rise again: 1,65,930 total prisoners, out of which 1,05,832 were undertrials and 55,131, convicts.[23]

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[14] *78th Report* (n 11) para 1.5.

[15] *See*, eg *Mohd Giasuddin v State of AP* (1977) 3 SCC 287 : AIR 1977 SC 1926; *Lingala Vijay Kumar v Public Prosecutor* (1978) 4 SCC 196 : AIR 1978 SC 1485.

[16] The orders in *Hussainara Khatoon v State of Bihar* have been reported as (1980) 1 SCC 81, (1980) 1 SCC 91, (1980) 1 SCC 93, (1980) 1 SCC 108.

[17] ibid. The "Augean Stables" comment came in *Rudul Sah v State of Bihar* (1983) 4 SCC 181:

> The Bhagalpur blindings should have opened the eyes of the prison administration of the State. But that bizarre episode has taught no lesson and has failed to evoke any response in the Augean Stables. Perhaps, a Hercules has to be found who will clean them by diverting two rivers through them, not the holy Ganga though. We hope (and pray) that the higher officials of the State will find time to devote their personal attention to the breakdown of prison administration in the State and rectify the grave injustice which is being perpetrated on helpless persons.

Although not the focus of this essay, it is important to note that decongesting prisons was arguably not purely an administrative task in the eyes of the court initially, but the *consequence* of recognizing that prisoners too, enjoyed the protections of Part III of the Constitution of India. *See also* Abhinav Chandrachud, 'Due Process' in Sujit Choudhry, Madhav Khosla, and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016).

[18] Ministry of Home Affairs (Govt of India), *All Indian Jail Reforms Committee Report (1980 – 1983)* (1984).

[19] ibid 19.

[20] The Committee also had data up till June 30, 1981, which suggested a continued decarceration with total inmates at 1,41,761 persons. *All Indian Jail Reforms Committee Report* (n 18) 32.

[21] *All Indian Jail Reforms Committee Report* (n 18) 19.

[22] Ministry of Home Affairs (Govt of India), *Report of the Group of Officers on Prison Administration* (1987).

[23] ibid 483-84.

The period between 1977 and 1987 thus suggests that even though there was briefly a dip in total prison population in India, the share of undertrial prisoners concerningly remained close to 60% throughout. The government reports also confirmed that there were notable variations in prison populations across the country.[24] Delhi's Tihar Central Jail—which had attracted the Supreme Court's ire on multiple occasions during this period for its specific practices—had almost 80% undertrial prisoners, which was much higher than the national average.[25]

B. The Quarter-Century from 1995 to 2020

From 1995 till 2020, there is sufficient data available for making an analysis of macro-level trends, due to the PSI reports of the NCRB. Like other government data in India, the NCRB data suffers from its own flaws and must be treated with a degree of scepticism. Unfortunately, it is also the only available source for data points relevant to our analysis, and one can only hope that charting trends spanning a quarter-century helps insulate analysis from the risks of bad data for specific sets in specific years. It needs to be clarified that the PSI reports capture the occupancy rates in prisons based on the number of inmates at the end of a given year, which are obviously a fraction of the total inmates admitted to prisons yearly, and those year-end figures are what I engage with. This is a static figure drawn at the end of a year which obscures the fluctuations that might be witnessed in the prison population during the course of the year itself. Unfortunately, the PSI reports do not even provide consistent information on the number of persons admitted to prisons each year for the period between 1995-2020, let alone engage with that data. As a result, year-end data is the best possible alternative to identify macro-trends.

1. *1995 to 2000*

According to NCRB data, at the end of 1995, India's 729 active prisons held 2,61,552 inmates.[26] Out of these, 55,342 were convicts, and undertrials were just over two lakh.[27] Most states had close to 80% undertrial prisoners,[28] and most of these persons spent less than one year in custody.[29] By 1998, prisons housed 66,414 convicts and 2,02,564 undertrial prisoners besides middling numbers of detenus, mentally ill persons, and civil prisoners.[30] This meant that

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[24] *All Indian Jail Reforms Committee Report* (n 18) 170.

[25] In 1977, Delhi had 2,106 undertrial prisoners out of 2,373 inmates. In 1986, Delhi had 3,135 undertrial prisoners out of 3,914 total inmates. *See*, *78th Report* (n 11) Appendix 230; *Report of the Group of Officers on Prison Administration* 483-84.

[26] National Criminal Records Bureau, *Prison Statistics in India 1995* (1998) 1, 7 ('PSI 1995').

[27] The number is an estimate as the report itself has double-counting errors. ibid 13.

[28] Tamil Nadu had 49% prisoners in the "other" category making it difficult to assess its data. PSI 1995 (n 26) 15.

[29] PSI 1995 (n 26) 17.

[30] National Criminal Records Bureau, *Prison Statistics in India 1998* (1999) 19-21 ('PSI 1998').

around 73% of the inmates in all prisons were persons awaiting trial.[31] There were, of course, variations: Madhya Pradesh had less than 60% undertrial prisoners while in Delhi, this figure stood at a dizzying 84.5%.[32] A greater degree of nuance was provided by the PSI reports of 1998 in identifying the period of detention suffered by undertrials. Thus, while the vast majority were still in prison for less than one year, it now appeared that within this, a substantial majority of undertrial prisoners were in prison for up to three months.[33] A similar scenario could be observed at the turn of the millennium, when India's 1058 prisons housed 272,170 inmates,[34] 71.2% of whom were undertrials,[35] of whom over 40% were in prison for up to three months.[36] It is difficult to clearly ascertain the kinds of offences for which undertrial prisoners were suffering custody,[37] beyond stating that a large proportion of these persons were in jail for alleged murder, alleged arms violations, or for allegedly breaking liquor/narcotics laws.[38] It bears mentioning that during this period, despite the rise in prisoner population, the prison population rate did not increase by much.[39] Further, crime rates appeared to be declining too.[40] At the same time though, all kinds of cases took much longer to be disposed of by courts, with total pending cases for general crime jumping from forty-one lakh to forty-nine lakh between 1995 to 2000.[41]

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31 ibid 22-23.

32 PSI 1998 (n 30) 22-23.

33 PSI 1998 (n 30) 31-32.

34 National Criminal Records Bureau, *Prison Statistics in India 2000* (2001) 1-2, 12-13 ('PSI 2000').

35 This came to 1,93,627 prisoners. ibid 18-19, 22.

36 PSI 2000 (n 34) 27-28.

37 This is largely because the reports classified almost 1/5th of the total undertrial prisoners as being in the "others" category when it came to identifying the alleged offences committed. See eg PSI 1998 (n 30) 26; PSI 2000 (n 34) 24.

38 See eg PSI 1998 (n 30) 26; National Criminal Records Bureau, *Prison Statistics in India 1999* (2000) 24; PSI 2000 (n 34) 24.

39 This is the ratio of persons in prison to the total population of the country and is treated as an indicator of the rate of incarceration in a society. The prison population rate calculates the number of prisoners per 1 lakh of the national population. The prison population rate increased from twenty-three in 1995 to twenty-seven in 1998, only to return to twenty-six in 2000. This is likely explained due to increase in the total population outpacing any increase in prisoner population. *See*, World Prison Brief, India <https://www.prisonstudies.org/country/india> accessed 5 December 2020.

40 Arvind Verma and others, 'How Real is the Crime Decline in India?' (November 2019) 54(45) Economic and Political Weekly 37, 39. The authors argue that while the decline in crime rates during this period — part of an extended period as per their survey — appears real, it is difficult to pin it down to very specific reasons. A combination of factors is apparently responsible for this phenomenon, not least the data reporting practices, within which the share of responsibility attributable to improvements in policing is debatable.

41 PSI 1995 (n 26) 134; PSI 2000 (n 34) Table 20.

2. *2001 to 2009*

The 2001 PSI report suggests that the total inmates had increased to 3,13,635 persons, out of which 2,20,817 (or 70.5%) were undertrial prisoners, and only 24.1% persons were convicts.[42] By the end of the decade, this number was at 3,76,969 inmates, out of which 2,50,204 (66.4%) persons were undertrial prisoners and 1,23,941 (32.9%) were convicts.[43] These changes are remarkable, and merit a closer look to determine trends within the decade itself. Below is a table presenting the year-on-year changes:

Year	**Total Prison Population**	**Classification (Undertrial/ Convict)**	**Prison Population Rate**
2001	3,13,635	Undertrials: 2,20,817 (70.5%) Convicts: 75,663 (24.1%)	27
2002	3,22,357	Undertrials: 2,23,038 (69.2%) Convicts: 82,121 (25.5%)	30
2003	3,26,519	Undertrials: 2,17,658 (66.7%) Convicts: 91,766 (28.1%)	27
2004	3,31,391	Undertrials: 2,17,130 (65.5%) Convicts: 98,527 (29.7%)	30
2005	3,58,368	Undertrials: 2,37,076 (66.2%) Convicts: 1,08,572 (30.3%)	30
2006	3,73,271	Undertrials: 2,45,244 (65.7%) Convicts: 1,16,675 (31.3%)	32
2007	3,76,396	Undertrials: 2,50,727 (66.6%) Convicts: 1,20,115 (31.9%)	31
2008	3,84,753	Undertrials: 2,57,928 (67%) Convicts: 1,23,307 (32%)	33
2009	3,76,969	Undertrials: 2,50,204 (66.4%) Convicts: 1,23,941 (32.9%)	30

A total increase of barely 60,000 inmates over a decade reveals some peculiar year-on-year trends. According to the 2005 data, a spurt in undertrial prisoner population was reported in higher rates for all kinds of crime, where most notable was a 17.6% increase over previous years in the total number of prisoners held on robbery charges.[44] This year contributed disproportionately to the decadal increase in numbers. At the same time, the decrease in undertrial prisoner population was not witnessed across the country as well, and some

[42] *National Criminal Records Bureau*, *Prison Statistics in India 2001* — "Snapshots," (2002) <https://ncrb.gov.in/sites/default/files/SNAPSHOTS-2001.pdf> accessed 5 December 2020.

[43] *National Criminal Records Bureau*, *Prison Statistics in India 2009* — "Snapshots," (2010) <https://ncrb.gov.in/sites/default/files/Snapshots-2009.pdf> accessed 5 December 2020 ('PSI 2009').

[44] *National Criminal Records Bureau*, *Prison Statistics in India 2005* — "Snapshots," (2006) <https://ncrb.gov.in/sites/default/files/Snapshots_16.pdf> accessed 5 December 2020.

areas continued to defy the trend even during this decade.[45] These variations in prison data during this decade demands a much closer scrutiny of related trends to better appreciate the causes behind the fluctuating prison population. There were amendments codifying judicial norms regarding arrest discretion, along with the introduction of plea-bargaining as a legal device, but there is no basis to conclude that these amendments contributed to reduction in prison populations.[46] In any case, this exercise goes beyond the scope of this paper.

Here, I restrict myself to only flag three trends. *First*, data for length of pre-trial incarceration suggests that till 2005, the share of undertrials remained largely consistent, i.e., around 40% were in prison for up to three months, 18% up to one year, 11% up to one-two years and 4.8% up to two-three years (if anything, length of custody marginally reduced between 2001 to 2005). By 2009, this trend was on the reverse, with 37.9% in prison up to three months, 12% up to one-two years, and 5.8% in prison up to two-three years. *Second*, case pendency continued to skyrocket, with total pending IPC cases in trial courts going from around fifty lakh cases in 2000 to seventy lakh in 2009, and cases for special laws going from around thirty-eight lakh to fifty-one lakh cases.[47] Finally, throughout this period, even though there were many years with comparatively minimal incarceration, the crime rate did not shoot up indicating that the decline in crime was perhaps not a derivative of the kinds of arrest and bail practices being adopted.[48]

3. *2010 to 2020*

The relative decline in prison populations continued from 2008 till 2010. Data indicates that prisons housed 3,68,998 total inmates at the end of 2010, out of which 2,40,098 were undertrials and 1,25,789 were convicts, bringing the prison population rate down from thirty-three to thirty per one lakh people.[49] Perhaps this was only the after-effect of the legislative changes brought about in 2008. In the years since, there has been a continuous increase in prison populations driving the total inmates up to 4,78,600 in 2019,[50] which comprised of 3,30,487 undertrial prisoners (69%) and the prison population rate touching thirty-five.[51] Considering that this report used 2017 data for West

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45 PSI 2009 (n 43) 75.

46 *See*, Criminal Law (Amendment) Act 2005 (introduction of plea bargaining by inserting ch XXI-A in the Criminal Procedure Code 1973); Criminal Law (Amendment) Act 2008 (amendment of provisions regulating the power of arrest).

47 PSI 2000 (n 34) Tables 20, 23; PSI 2009 (n 43) Tables 4.9, 4.13.

48 Verma and others (n 40).

49 National Criminal Records Bureau, *Prison Statistics in India 2010* (2011) 9-11 ('PSI 2010').

50 As per the national prison portal for India, as of December 2, 2020, there were 4,93,378; available at <https://eprisons.nic.in/public/DashBoard.aspx> accessed 2 December 2020.

51 World Prison Brief, *India* <https://www.prisonstudies.org/country/india> accessed 5 December 2020.

Bengal, one of India's largest states, it is reasonable to assume that the numbers would be higher.[52]

The increase in prisoner population driven by more persons being detained as undertrials suggests that the gains of the previous decade have slowly been eroded. This overall increase does not appear to be a result of specific states/union territories hyper-incarcerating and in turn contributing disproportionately to the national figures; rather, it seems that multiple states/union territories are now holding more undertrials in prison on average than they were in 2010.[53]

State/UT	% of Undertrials at the end of 2010 (approx.)	% of Undertrials at the end of 2019 (approx.)
Assam	59	66
Bihar	80	78.5
Gujarat	59	65
Karnataka	68	72
Maharashtra	65	75
Punjab	61	66
Rajasthan	62	71
Tamil Nadu	53	63
Uttar Pradesh	65	72.5
Delhi	72.5	82

Data between 2001-2009 suggested that there was a gradual increase in the duration of undertrial incarceration. Data from 2010-2019 suggests that this trend has only exacerbated. Figures for the share of prisoners held up to three months, between three to six months, and between six months to one year, all indicate a decline.[54] Instead, figures for persons held between one to two years went up almost 1%, from 12.5% to 13.4%, as did figures for those held between two to three years (5.8% to 6.8%). Prisoners held for three to five years went up from 2.9% to 4.3%. Perhaps most worryingly, the share of undertrial prisoners in jail for over five years doubled from 0.7% to 1.5%.[55] While these statistics appear to be trifling figures, in actual terms they represent increases in terms of thousands of prisoners.

C. Summing up

The quarter-century between 1995 to 2020 suggests that, barring some exceptional years during the decade between 2000-2010, Indian prisons have

[52] National Criminal Records Bureau, *Prison Statistics in India 2019* (2020) xi ('PSI 2019').
[53] *See*, PSI 2010 (n 49) 34; PSI 2019 (n 52) 47.
[54] *See*, PSI 2010 (n 49) 112; PSI 2019 (n 52) 153.
[55] *See*, PSI 2010 (n 49) 112; PSI 2019 (n 52) 153.

witnessed an inexorable rise in prison populations, predominantly on account of very high incarceration rates for undertrial prisoners. Never did this figure come below 65% of the total prison population in the period since 1995. This data should give some indication as to how far we have come from the heady days of prisons being seen as reformatories by the Supreme Court, with courts going ahead to try and usher prison management reforms. Before long, however, it was clear that the gains from judicial intervention were marginal as implementation of directives was bereft of political will.[56] This did not stop courts from continuing to make intermittent forays into this field in the decades since;[57] but the changing dynamic of prison occupancy evidently made this task more unmanageable for court-led reform, which continued to suffer from the same travails. The data presented in this section does not suggest these interventions as having brought about any consistent reductions in the incarceration trends.

The steady rise in prisoner populations does not appear to have been tied to any specific legislative changes in the law of bail or otherwise. Perhaps the only synergy in this respect is arguably in context of crimes against women—increased scrutiny of such crimes has led not only to higher crime reporting (and thus higher crime rates) but also higher proportion of such cases constituting the undertrial prisoner population.[58] That undertrial prisoners have gradually begun to spend longer inside jail is clear. However, PSI reports do not indicate the average time spent in custody by categorising undertrials along the kinds of charges they face, and thus we do not know whether persons are in custody simply because they are unable to post bail bonds, or because the charges are so serious that courts have persistently denied them bail. Thus, while almost 10% of the total undertrials at the end of 2019 remained people accused of a non-serious offence such as theft, it is not possible to discern the average length of custodial remand that is suffered by such persons. This is only one of the many limitations in working with this data, and also working backwards to adumbrate about the pendulum swings of prisoner populations in India about which precious little scholarship exists, which make it almost impossible to do better than speculate about the 'whys' behind the changes in prisoner populations over the quarter-century. Nevertheless, the fact that data on the length of time spent in custody "begins with up to three months" speaks volumes about how the system views incarceration: a day behind bars is not important enough for the system to keep track of. Equally important is another

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[56] *See*, Upendra Baxi, *Crisis* (Vikas 1982) 242-43; Upendra Baxi, 'Who Bothers About the Supreme Court? The Problem of Impact of Judicial Decisions' (1982) 24(4) Journal of the Indian Law Institute 848.

[57] See, eg, *Rama Murthy v State of Karnataka* (1997) 2 SCC 642; *Re-Inhuman Conditions in 1382 Prisons* (2017) 10 SCC 658.

[58] Verma and others (n 40).

statistic which the data does not clearly capture: how many of those arrested and incarcerated persons are ultimately acquitted of the charges they faced.[59]

III. PART THREE: WHO (OR WHAT) IS TO BLAME?

On an earlier occasion, I argued that high undertrial prisoner population is an indicator of a 'disintegrating' criminal justice system in India.[60] However, data clearly suggests otherwise: locking up who might be a criminal appears integral to how our criminal process operates. To keep arguing that our system is broken because it has over 65% undertrial prisoners behind bars, despite the evidence that it has consistently done so for nearly close to forty years, is mistaking the symptom for the problem. In this part of the paper, I argue that the scandalous level of undertrial incarceration is not a flaw, but a feature of the criminal process in India.

A. Undertrial Incarceration: A Feature and Not a Flaw

In a 2016 study,[61] Bhandari placed high rates of undertrial prisoner population in India under the scanner — rates that have only increased further in the five years since. By and large, her argument characterised the arrest and bail regime as "liberal"[62] and identified insufficient state capacity and low levels of institutional willingness to comply with norms as being the primary drivers behind the problem. Thus, endemic corruption in the criminal justice system, lack of prosecutorial oversight, accompanied by an understaffed judiciary which contributes to case delays, lends to higher levels of undertrial incarceration. That all of these actors operate in a context wherein norms regarding due process around arrest and bail are routinely ignored contributes to worsening the crisis.[63] I agree with many of the observations made by Bhandari regarding systemic factors causing undertrial incarceration. However, where I disagree with her is the characterisation and problematisation of the legal regime itself. Rather than consider the high undertrial prisoner population as a flaw, I view it a product of the legal system's very design. This, in turn, feeds off of the systemic factors that have been identified by Bhandari in her essay, such as endemic trial delays and communication-gaps between different branches of state.

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[59] Studies suggest that this rate hovers around one acquittal in four, which when blown up to fit the size of the undertrial prisoner population, could mean that upwards of one lakh persons are ultimately declared innocent.

[60] Sekhri (n 7).

[61] Vrinda Bhandari, 'Pretrial Detention in India: An Examination of the Causes and Possible Solutions' 11 Asian Criminology 83 (2016).

[62] ibid 86.

[63] Bhandari (n 61) 86, 90-106.

1. *Liberal Arrests and Illiberal Bails*

The legal regime governing arrest and bail warrants closer scrutiny to develop the argument, and a brief explanation is helpful. Arrest and bail in the Indian criminal process are decisions that are not pegged to independent legal rules as such (more on that later), but governed chiefly by the kind of offences being alleged by the police. All offences are categorised as being either cognizable or non-cognizable, and bailable or non-bailable:[64] cognizable offences permit arrests without warrant, and non-bailable offences do not permit release on bail as a matter of right.[65]

a. Classification of Offences

In this manner of classification lies the first contributor to high undertrial incarceration. No statutory or constitutional scheme exists to determine which kinds of offences ought to be classified as 'cognizable' and/or 'non-bailable'.[66] The absence of clear rules determining what kinds of offences should permit arrest without any prior warrant and/or deny a presumption of bail enables the easy deprivation of liberty for non-serious crimes. The possibilities for which are apparent considering that out of the total offences within the Indian Penal Code, at least 280 are cognizable, and 190 are *both* cognizable and non-bailable.[67] A perusal of the latter list makes it clear that there is no clear logic at play here, as simple offences such as theft are classified as cognizable and non-bailable.[68] This classification of theft directly contributes to over thirty thousand undertrial prisoners as per 2019 data.[69] The categorisation of IPC offences coexists with state and central legislatures passing statutes where any infractions are punished by way of cognizable and non-bailable offences. They can choose to do this specifically, as is done under the Electricity Act 2003, for instance. But in most cases, there is no such need, as what enables this is, again, an arbitrary marker in the Criminal Procedure Code, 1973 which provides for offences in all special laws to be treated as cognizable and/or non-bailable, as long as the *maximum* punishment is a jail term of three years or above.[70] It was this arbitrary marker which contributed to the erst-

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[64] The classification for offences is contained in the First Schedule to the Criminal Procedure Code 1973.

[65] *See*, Criminal Procedure Code 1973, s 2(c) (defines 'cognizable offence'); Criminal Procedure Code 1973, s 2(a) (defines 'bailable offence').

[66] *See*, Abhinav Sekhri, 'Arrests, Bail, and the Criminal Procedure Code' (*The Proof of Guilt*, 28 November, 2014) <https://theproofofguilt.blogspot.com/2014/11/arrests-bail-and-criminal-procedure-code.html> accessed 5 December 2020.

[67] These are estimates calculated upon a reading of the Schedule and are not exact figures owing to the fact that state governments can choose to classify offences differently from the prescribed format, and I have not double-checked the status for each offence separately.

[68] Indian Penal Code 1860, s 378 defines theft, and different forms of theft are punishable under ss 379 and 380 of the Code.

[69] PSI 2019 (n 52) Chart 5.7.

[70] *See*, Pt II, First Schedule to the Criminal Procedure Code 1973.

while Section 66-A of the Information Technology Act, 2000 working as a cognizable and non-bailable offence.

There has been no revisiting of the classification of offences in the Penal Code for reasons best fathomable to those in Government, despite this having been identified as an issue as long ago as the 78th Law Commission Report of 1979.[71] At the same time, a cursory glance at the statutes passed by state and central legislatures creating offences over the past quarter-century reveals that, as a norm, offences were made both cognizable and non-bailable, even when the issue did not concern bodily injury or specific threats of dangerousness by a suspect remaining at large. A recent example of this was the spate of state laws purportedly punishing forceful conversions;[72] and at the central level, one could turn to the Aadhaar Act or even the draft Personal Data Protection law.[73] This preference for adopting liberty-depriving standards as the norm gives a clear signal about the legislative preference for incapacitation.

The arbitrary classification of offences as cognizable and/or non-bailable across the general and special realms of criminal law is coupled with an additional problem of overlaps in offence definitions. The Penal Code follows a clear strategy of defining criminal conduct in one provision and then creating distinct offences for purposes of punishment, depending on certain aggravating or mitigating factors. For instance, 'cheating' is defined under Section 415 of the Penal Code, and then Sections 416 to 420 punish different *forms* of cheating, where the offence is differentiated on the basis of the means adopted and the kind of property fraudulently obtained. Within the same *genus* we find different *species* of crime, and here's the twist: each specie might be differently classified on the cognizable/non-bailable spectrum.[74] What this means is that some forms of cheating are not only punished more severely than others, they also attract greater jeopardy at a *pre-trial* stage as well.

This technique of offence classification was introduced in 1860 as part of legal experimentation in the Indian colony with codification of law, and it is understandable that its links with today's crisis of undertrial prisoner populations are not apparent at first blush. Understanding this requires some background information about how criminal investigations by police proceed. The genesis in all cases is by way of a document called the 'First Information Report' ('FIR') by which a police officer translates allegations of victims into

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71 *78th Report* (n 11) 29.

72 See, eg, 'From 5-Year Jail Term to Non-Bailable Offence: What States Say on Ordinance against 'Love Jihad', *Hindustan Times* (21 November 2020) <https://www.hindustantimes.com/india-news/from-5-year-jail-term-to-non-bailable-offence-what-states-say-on-ordinance-against-love-jihad/story-0JwKeeXzMFCTZBA38OVU5H.html> accessed 5 December 2020.

73 Aadhaar (Targeted Delivery of Financial and other Subsidies, Benefits and Services) Act 2016, s 34; Personal Data Protection Bill 2019 (Bill No. 373 of 2019), s 83.

74 Indian Penal Code 1860, ss 417 and ss 418 are non-cognizable and bailable offences, whilst ss 419 and 420 are cognizable and non-bailable offences.

legally defined offences.[75] This transformation of a spoken allegation into official document is a critical moment; labelling allegations accurately is important for victims as well as accused persons. At the same time, it is important to note that this transformation is not done automatically, but by the police. Victims, at least those without prior access to legal counsel, approach the police with a narrative of what they are aggrieved by, without having the wherewithal to spell out what kinds of offences that grievance possibly involves. She might tell the police that she was the victim of an online fraud but formalising this grievance and locating it within the realm of various criminal laws will fall to the police officer handling the victim's complaint. This confers a natural element of discretion upon the police officer, who decides whether or not to place those allegations as those attracting cognizable and non-bailable offences.[76]

The knock-down effect of classifying the *species* of a general kind of criminal conduct differently along the spectrum of police powers is that, ultimately, it empowers the police to choose the offence definition which allows them to arrest without warrant and deny a right of bail.[77] These aren't instances of pure malice where false cases are slapped on persons; very often there will be genuine allegations. But having overlapping offence definitions allows the police to investigate that allegation with the most liberty-depriving process at hand. In this fashion, the law itself enables other problems such as corruption and gaming of directives issued by the Supreme Court regulating arrest.[78]

b. The Legal Regime Governing Arrest and Bail

This brings us to the legal rules governing the decisions to arrest and/or grant bail, which is the other chief contributor to the undertrial prisoner population and was also considered as such by Chandra and Medarametla in their 2018 study.[79] Let's begin with the regime for arrest powers. A look at Section 41 which sets the standards regulating arrest-discretion for a police officer makes it apparent that the scope is practically boundless and tailored to the

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[75] Criminal Procedure Code 1973, s 154.

[76] This issue of determining the level of discretion, if any, that police officers have in the exercise of registering a FIR was the issue before a Constitution Bench of the Supreme Court of India in *Lalita Kumari v State of UP* (2012) 4 SCC 1.

[77] An interesting side-issue meriting study in this regard is to examine whether or not police officers apply their mind in fixing the proper labels to the allegations where victims *themselves* provide for the labels in their complaints to a police station.

[78] An example that this author has witnessed often is the addition of forgery allegations in cases where initially only allegations of cheating might have been levelled. Even the most serious offence of cheating is punishable only up to seven years imprisonment, which brings it within the scope of certain judicial guidelines imploring police to not arrest at the outset. Using forged documents for purposes of cheating, however, is punishable with terms beyond seven years, and in this manner the police can circumvent the judicial guidelines.

[79] Chandra and Medarametla (n 9) 4.

subjective belief of the officer.[80] There is no room left to argue against the exercise of this discretion except insist that all technicalities were observed. This might well be justified if one subscribes to a logic that, since the legislature itself defined a crime as one permitting arrest without warrant, surely an officer must be given broad discretion to give effect to legislative intent.[81] Whatever may be the justifications, having such broad discretion creates a situation where there is little to nothing standing between the existence of arrest powers and their exercise.

Even if a person is arrested it does not automatically seal her fate as someone who will languish in custody: a judge might refuse to extend custodial remand and she can get bail. This arguably makes the bail regime most critical as a gatekeeper for keeping undertrial prisoner populations low. Across India, a presumption of bail does not exist for offences classified as non-bailable, and we have seen how this even includes cases where the offence might be punishable up to only three years imprisonment. Such a context effectively means that the role of the bail regime as gatekeeper has been reduced to that of the trial judge hearing bail applications in individual cases. The opportunity to grant bail obviously arises when accused persons apply for bail. But even beyond that, since custodial remands can only be extended for up to two weeks at a time,[82] theoretically it allows judges to review the need for further custody at regular intervals and serve as gatekeepers to curtail unnecessary jail time.

The discretion to grant or refuse bail is ordinarily extremely wide. However, there are two kinds of statutory exceptions to this wide-ranging judicial discretion in all matters bail. *First*, there are provisions creating a reverse presumption, leading judges to ordinarily refuse bail unless an accused can show reasons for a judge to decide otherwise.[83] More important for us is the second exception which acts a time-keeper on pre-trial custodial remand. If a person is arrested during an investigation, a judge can sanction custodial remand for up to two weeks at a time, for a total of either sixty or ninety days (again, depending on the kind of offences alleged). At the end of this period, further custodial remand can only be granted if police complete the investigation and conclude that the arrested person should be tried.[84] If the investigation cannot be completed at the expiry of this time-limit, the person earns a statutory

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[80] The language in s 41 confers near-total discretion on the police officer with minimal scope for *objective* basis to determine need for arrest. *See*, Criminal Procedure Code 1973, s 41.

[81] In a different context altogether, Indian courts have consistently upheld the need for broad discretion with the officers on the ground facing practical emergencies. *See*, eg, *Virendra v State of Punjab* AIR 1957 SC 896.

[82] Criminal Procedure Code 1973, s 167.

[83] See, eg, Companies Act 2013, s 212(6).

[84] Criminal Procedure Code 1973, s 167(2).

reprieve, and now must be released on bail as a matter of right if she can post a bond, regardless of what the alleged offence might be.[85]

With this in mind, let us return to the data regarding the length of incarceration suffered by undertrial prisoners. There is the tragic minority of persons incarcerated for longer than five years—the kinds of cases which attract judicial scrutiny and condemnation. There is also the rising level of cases where persons are incarcerated for more than a year as undertrials.[86] Both of these suggest imprisonment for nothing more than imprisonment's sake: the system forgets those it locked up. But these are still, only a handful of cases: for the quarter-century period from 1995 to 2020, the substantial majority of undertrials spent less than one year in jail within which, the major share of cases was persons who spent up to three months—90 days—in jail.[87] On top of which, arrest figures have seemingly decreased over the past few years while undertrial prisoner populations have swelled.[88] I argue that these circumstances suggest that judges are extending custodial remands for the whole duration of the investigative period, regardless of whether or not bail applications are filed and regardless of whether any investigative purpose will be served through granting such custody. The sixty/ninety-day rule is no longer a maximum time-limit for investigations but is transformed into a statutorily approved minimum time-limit for which an accused *should* suffer prison, in a system where the actual-censure and sanction accompanying a finding of guilt are extremely delayed.

The ease with which judges can extend custodial remands and refuse bail applications (when these are filed of course) is due in large part to the legal regime governing how bail decisions are made in run-of-the-mill cases. A preference has been made for loose standards which confer judges with the widest possible discretion,[89] which has meant that there are no clear rules within statutes to guide exercise of power, both in respect of the grant of custodial

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[85] Criminal Procedure Code 1973, s 167(2). *See also*, *Rakesh Kumar Paul v State of Assam* (2017) 15 SCC 67.

[86] *See*, PSI 2010 (n 49) 112; PSI 2019 (n 52) 153.

[87] *See*, pt II of this paper.

[88] The data in this regard is curious. 2017 figures suggest approximately thirty-seven lakh persons arrested for Penal Code offences. In 2018, this figure is down to approximately thirty-three lakh persons. The primary reason for which seems to be the numbers from the State of Bihar, which reported a stark decline of around three lakh persons. There are no public reports indicating that there was any policy advocating for such a decline which renders it suspicious. What's more, arrest figures publicly posted by the Bihar police for 2018 do not match the Crime in India data for 2018. *See*, National Crime Records Bureau, *Crime in India 2017* (2018) 1197-98; National Crime Records Bureau, *Crime in India 2018* (2019) 1197-98; 'Achievement of Bihar Police for the year 2018' <http://webcache.googleusercontent.com/search?q=cache:vZQi6YeJ5z8J:biharpolice.bih.nic.in/CRIME%2520FIGURE%25202018/17%2520Crime%2520figure%2520for%2520April%2520-2018.pdf+&cd=1&hl=en&ct=clnk&gl=in&client=safari> accessed 5 December 2020.

[89] *See*, Criminal Procedure Code 1973, s 437, s 439; *P Chidambaram v CBI* (2020) 13 SCC 337 : (2019) SCC OnLine SC 1380.

remand and the related issue of considering bail. The only guidance comes in the form of Supreme Court decisions. In respect of custodial remand, they implore judges to examine requests for any extensions of custody strictly,[90] and in respect of bail, they ask judges to not only consider the likelihood of flight or of an obstruction of justice by the accused but also consider the gravity of the alleged offences involved.[91] A failure to implement such guidelines has been flagged by both Bhandari and Chandra and Medarametla as a criticism,[92] but one must not forget that Supreme Court decisions are a bad source for securing any regulation to begin with. Not only are there too many of them, but they are verbose, and frankly simply do not have a reach comparable to that of statutes or executive directions.[93]

Treating judicial discretion as desirable is not problematic *per se*; although a totally hands-off approach is far from the only option available if this is what the system wants to pursue. Unfortunately, securing discretion on the decision-making aspects has been conflated with the process by which decisions are made. The result is that there is no standard process regulating the extensions of custody remand or hearing of bail applications and it leads to the following kinds of outcomes:[94]

- Police are not required to file applications clearly detailing the reasons, if any, for seeking custody remands and any extensions to it thereafter. Ordinarily, cyclostyled applications are filed across the board;
- Magistrates are not required to pass orders with reasons for why custody remand is being extended on each occasion. While some scrutiny can often be seen at the initial stage of police custody remands, with investigating officers available with their files, hardly any scrutiny occurs once an individual goes to prison;
- A similar absence of scrutiny is equally seen in the duration for which custody remands are extended. Where each day is treated with care at the police custody stage, remand is routinely extended

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90 *See*, eg, *Manubhai Ratilal Patel v State of Gujarat* (2013) 1 SCC 314.

91 *See*, *P Chidambaram v Directorate of Enforcement* (2020) 13 SCC 791 : 2019 SCC OnLine SC 1549.

92 Bhandari (n 61); Chandra and Medarametla (n 9).

93 *See*, Upendra Baxi, 'Who Bothers About the Supreme Court? The Problem of Impact of Judicial Decisions' (1982) 24(4) Journal of the Indian Law Institute 848; Apar Gupta and Abhinav Sekhri, 'Section 66A and Other Legal Zombies' (October 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3275893> accessed 5 December 2020.

94 The following are observations from personal experience of the author practising in the courts of Delhi. Some of these scenarios have been recently observed in 2020 research regarding bail decision making in specific districts in Karnataka. *See*, Centre for Law and Policy Research, *Re-Imagining Bail Decision Making: An Analysis of Bail Practice in Karnataka and Recommendations for Reform* (2020) <https://clpr.org.in/wp-content/uploads/2020/03/BailReport_AW_Web_Final.pdf> accessed 5 December 2020.

for the maximum period—two weeks at a time—once a person is sent to jail;

- The 'automatic' bail rule triggered on expiry of sixty/ninety days is not so automatic in practice, as there are no rules necessitating scrutiny or *compelling* courts to grant bail when the clock is run. Absence of clear process permitting a release from custody if no sufficient grounds for extending remand exist means that judges ordinarily never exercise discretion to grant bail without applications for bail being filed, creating a barrier for those who do not have legal counsel to file such applications;
- Bail hearings follow a standard routine; applications are almost always opposed by flagging risks of (i) flight, (ii) tampering, (iii) claiming the investigation is in initial stages, and (iv) citing the gravity of a crime by referring to its punishment. Nothing regulates the basis upon which such averments are made by police and there is rarely any material filed in support thereof, nor is evidence taken at this stage;
- Judges are not required to adhere to any time-limits while deciding bail applications nor are they required to pass detailed orders reasoning why bail applications are refused; however, reasons are expected where bail applications are allowed.

B. Summing Up

The steadily high numbers of undertrial prisoner populations in India for a quarter-century and beyond indicate that there are systemic factors at play which contribute to this outcome. The poor institutional capacity of the justice delivery system—including poorly staffed police stations, courts, as well as legal aid networks—certainly contributes to this outcome. But it would be a mistake to think that the legal regime itself is free from fault and is being held hostage to these institutional crises. As has been demonstrated above, the law governing arrests, custody remand, and grant/refusal of bail is deeply problematic and is designed in ways which directly contribute to the problem of high undertrial prisoner populations.

What is clear from these specific instances is the existence of an undercurrent in the criminal process while dealing with non-bailable cases. Not only is there no presumption of bail here, but the process clearly installs a preference for what is the easier path to follow for judges: grant extensions to custody remand, rather than release persons on bail. This undercurrent means that ideas such as bail is the rule and jail the exception for the Indian criminal process are reduced to little more than a homily. Granting custody remand unthinkingly might not seem significant in a single case, but repeated over millions of cases each year for twenty-five years, in a system where trials keep slowing

down, almost guarantees an outcome where undertrial prisoners constitute a majority of the prison population.

IV. CONCLUSIONS: AN IRREVERSIBLE DRIFT FROM THE PRESUMPTION OF INNOCENCE?

High levels of undertrial incarceration has been a long-term feature of the criminal process, and in light of how the legal regime enables such practices, this feature is here to stay. In this final section of the paper, I ponder about what this means for the identity of the criminal process. I first engage with the presumption of innocence, arguing that a systemic preference for incarceration of undertrials hollows out the presumption. I then turn to how this feature connects with debates about the larger *purpose* served by the criminal sanction. I argue that, perhaps, it is time we move past the sunny disposition of the 1980s with its promises of reformation, and face up to a colder reality of the present where all that seems to be expected of the process is locking up persons for the sake of it.

A. The Forlorn Presumption of Innocence

Indian law has enjoyed a peculiar relationship with the presumption of innocence in the time since the country became independent. There is no statutory or constitutional affirmation of the same and the only recognition comes by way of judicial decisions. In 2008, when the Supreme Court was asked to observe that a legal system respecting the presumption of innocence was guaranteed as a fundamental right to persons, it declined to do so. It instead held, curiously, that the presumption was not a fundamental right but only a human right.[95] This decision came in context of a provision—one among many today—by which the presumption of innocence is explicitly taken away in context of trial, which perhaps serves as the clearest indication of such a presumption existing in the ordinary course.[96]

What is clear then, is that Indian law ordinarily recognises a presumption of innocence for those accused of crimes at least at trial. There is no clarity beyond this minimum consensus, which requires that we spend some time imagining the contours of what the presumption of innocence can mean.[97] At its barest, the presumption of innocence operates as a rule of evidence which places the burden upon a prosecution in the criminal trial to adduce evidence

[95] *Noor Aga v State of Punjab* (2008) 16 SCC 417.

[96] Narcotic Drugs and Psychotropic Substances (Prevention) Act 1985, s 35; Protection of Children from Sexual Offences Act 2012, s 29.

[97] Foremost here is the scholarship by Andrew Ashworth. *See*, Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (7th edn, 2016); Andrew Ashworth and Lucia Zedner, *Preventive Justice* (OUP 2014); *See also*, Henrique Carvalho, *The Preventive Turn in Criminal Law* (OUP 2017).

and prove allegations of wrongdoing, rather than place the burden on an accused to furnish proof of her innocence. Failure on part of the prosecution to discharge its burden and to displace the presumption should warrant an acquittal for the accused. A broader conception of the presumption would drag it outside the courtroom to the police station, and act as a premise underlying the investigation itself. To some extent, one can argue that with Indian law recognising a right against self-incrimination extending to the police station, it affirms the presumption applies in this context too.[98] In this version the presumption demands that, unless exceptional circumstances exist, bail ought to be granted as a matter of right, and no collateral consequences must be visited upon an accused simply because she is the subject of an investigation. At its broadest, the presumption of innocence is a principle which underpins the very fabric of society, defining our interactions with fellow citizens.[99]

In any legal system where the presumption of innocence goes beyond merely being a rule of evidence, undertrial incarceration can undermine its very foundations. To sustain the presumption, it is necessary that any pre-conviction incarceration suffered by persons must be held to a high standard of scrutiny by giving clear justification as to why *despite there being* a presumption of innocence a person must be held in custody.[100] It is not difficult to think of such reasons: a person might pose risks of flight, of tampering with evidence, or a threat to the safety of others. Permitting undertrial incarceration on terms which involve engagement with the merits of allegations not only threatens the presumption of innocence, but also undermines the very fabric of the criminal process itself as it has evolved over time.[101] Recognising the unique harshness of incarceration gradually led legal systems to require that only those proven guilty after a trial should be sent to prison, where the trial served as a process where accused persons could test the prosecution case. Instead of imprisonment being a consequence of being held to account by way of trial, allowing for undertrial incarceration based on *prima facie* findings of the merits of a case severs this link and consigns the adjudicatory process to irrelevance. What is lost is not only the criminal trial as a means to hold persons to account for wrongdoing, but also the due process guarantees that such trials carried which secured the fairness of any penal sanctions which might ensue.[102]

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98 *See*, *Nandini Satpathy v PL Dani* (1978) 2 SCC 424.

99 Ashworth and Zedner (n 97) chs 1, 3.

100 Ashworth and Zedner (n 97) chs 3.4, 6.3.

101 It was not always this way; criminal trials with defence counsel and a presumption of innocence have, at best, only been dominant since the 19th century. For instance, *see*, JH Langbein, 'The Criminal Trial Before the Lawyers' (1978) 45 University of Chicago Law Review 263.

102 To be clear, it is not my case that simply jailing more undertrials while maintaining a guise of respecting the presumption of innocence is a desirable option: any legal system where more than half of the prison population constitutes undertrials arguably does not care too much about the presumption of innocence.

This hollowing out of the presumption of innocence is the collateral damage that the Indian criminal process has suffered, and continues to suffer, on account of not simply imprisoning a large number of undertrials, but doing so while encouraging courts to engage with the merits of a case and the gravity of allegations at the pre-trial stage of bail.[103] The attendant delays in disposal of criminal trials has resulted in a situation where, quite rationally, it becomes inconsiderate to expect victims and the general public to patiently wait for the adjudication of guilt or innocence before censure or sanctions can be inflicted upon an accused. In this version of reality, the impetus is to provide justice-delivery primarily at the front end of the criminal justice shop by enabling arrests whilst making it difficult to secure bail, to send a signal that only those 'clearly' innocent have been released. This creates the perverse situation where the most serious threats to personal liberty are not posed by proof of guilt, but by untested allegations and the clamour for expediency. The perpetual increase in both the number of undertrials as well as the duration of their incarceration, together with rising delays, serves up a spiral of endless woe where the presumption of innocence is not left with any space to operate except possibly as a rule of evidence at trial.

B. From Crime and Punishment, to Crime or Punishment

The slow but steady erosion of the presumption of innocence warrants deeper inquiry into what purpose we expect is being served by imposing censure and sanctions through the criminal law. "What is the purpose of criminal law" is a question that has kept societies occupied for centuries with no real consensus having emerged over time.[104] A growing recognition of the connections between political power and law-making has brought about a growing realisation that criminalisation and the creation of penal statutes is not driven by any enlightened theoretical concerns, but utilised for achieving whatever purposes the state might find convenient.[105] At the same time, societies remain reticent in providing for *imprisonment* as the sanction for all kinds of legal violations, even those that might be called offences. This indicates that while there is lower scrutiny for labelling violations as 'crimes', there is still a higher standard of scrutiny on decisions to permit incarceration of individuals. Scholars, laypersons, and politicians all attempt to use certain concepts, such as securing deterrence, to justify the choice for possibly inflicting imprisonment to varying levels of sophistication.[106]

How do we try and identify the aims and objectives being pursued by the law through crime and punishment? Pursuit of any objectives is, naturally, an exercise of political will and so an obvious source to turn to is the conduct

[103] *See*, *P Chidambaram* (n 91). The Supreme Court clearly rejected a submission that the gravity of the allegations was not a factor to be considered at the stage of bail.

[104] *See*, eg., Ashworth and Horder (n 97) ch 1.

[105] *See*, eg., William J Stuntz, *The Collapse of American Criminal Justice* (2011).

[106] *See*, eg., Ashworth and Horder (n 97) ch 1.5.

of legislative and executive branches—by analysing statutes, parliamentary debates, committee reports, and police action. Judges play a unique role in defining how the criminal law functions, especially on the issues of bail and sentencing, which makes courts a source of information as well. In India, the majority of official policy documents since independence have pursued an idea of punishment through the criminal process as serving a reformative object. This can be seen at its most vivid in the report of the All India Jail Reforms Committee[107] and opinions of Justice Krishna Iyer, where he sought to push a reformative idea of punishment from his time on the bench.[108] However, along with this general support for using criminal law for reformation and rehabilitation since the 1970s coexists a trend where even official policy and judicial decisions support minimal liberty and harsh punishments for various socio-economic crimes, offences against the state, and now crimes against women and children as well.[109]

Nevertheless, these attempts at justifying the choice to permit incarceration engage with the imposition of jail time *as a consequence* of someone being guilty of a crime, and then imagine the role that prisons might serve in the process. The conversation about punishments and their purpose presupposes the existence of a judgment whereby a person has been declared guilty of criminal conduct. It does not make sense to adopt such an approach in a legal system like India where prisons are not occupied by convicts but by undertrials as a rule, and trials suffer lengthy delays steadily divorcing imprisonment from questions of innocence or guilt. Continuing to *only* engage with the concepts of criminal law, punishment and prisons blinds us to 70% of the persons who *actually* inhabit our prisons, none of whom are adjudged guilty of any offence. Our reality demands a different scholarship on the criminal process, to help us navigate the terrain and the complex relationships between citizens and police powers, and to understand what purpose we imagine the criminal process and the labelling of some persons as *criminals* fulfils for society. Such an approach will force us to confront those aspects of the criminal law enterprise that were conceived of at a time when the sun never set on the British Empire as well as others which have come with the pursuit of different national projects. I would venture forth to suggest that it will help us confront the harsh truth that the Indian criminal process has retained surprisingly similar attitudes across time: it was, and is, an instrument of repression cultivating tin-pot despots throughout its terrain.

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[107] All Indian Jail Reforms Committee, Preface.

[108] *See*, eg., *Mohd Giasuddin v State of AP* (1977) 3 SCC 287 : AIR 1977 SC 1926; *Lingala Vijay Kumar v Public Prosecutor* (1978) 4 SCC 196 : AIR 1978 SC 1485.

[109] *See*, eg., Law Commission of India, *29th Report on Proposal to Include Certain Social and Economic Offences in the Indian Penal Code* (1966); Prevention of Black Marketing and Maintenance of Essential Supplies Act 1980; Terrorist Affected Areas (Special Courts) Act 1984; Terrorist and Disruptive Activities Act: 1985 and 1987; Narcotics, Drugs and Psychotropic Substances (Prevention) Act 1985; Protection of Children from Sexual Offences Act 2012.