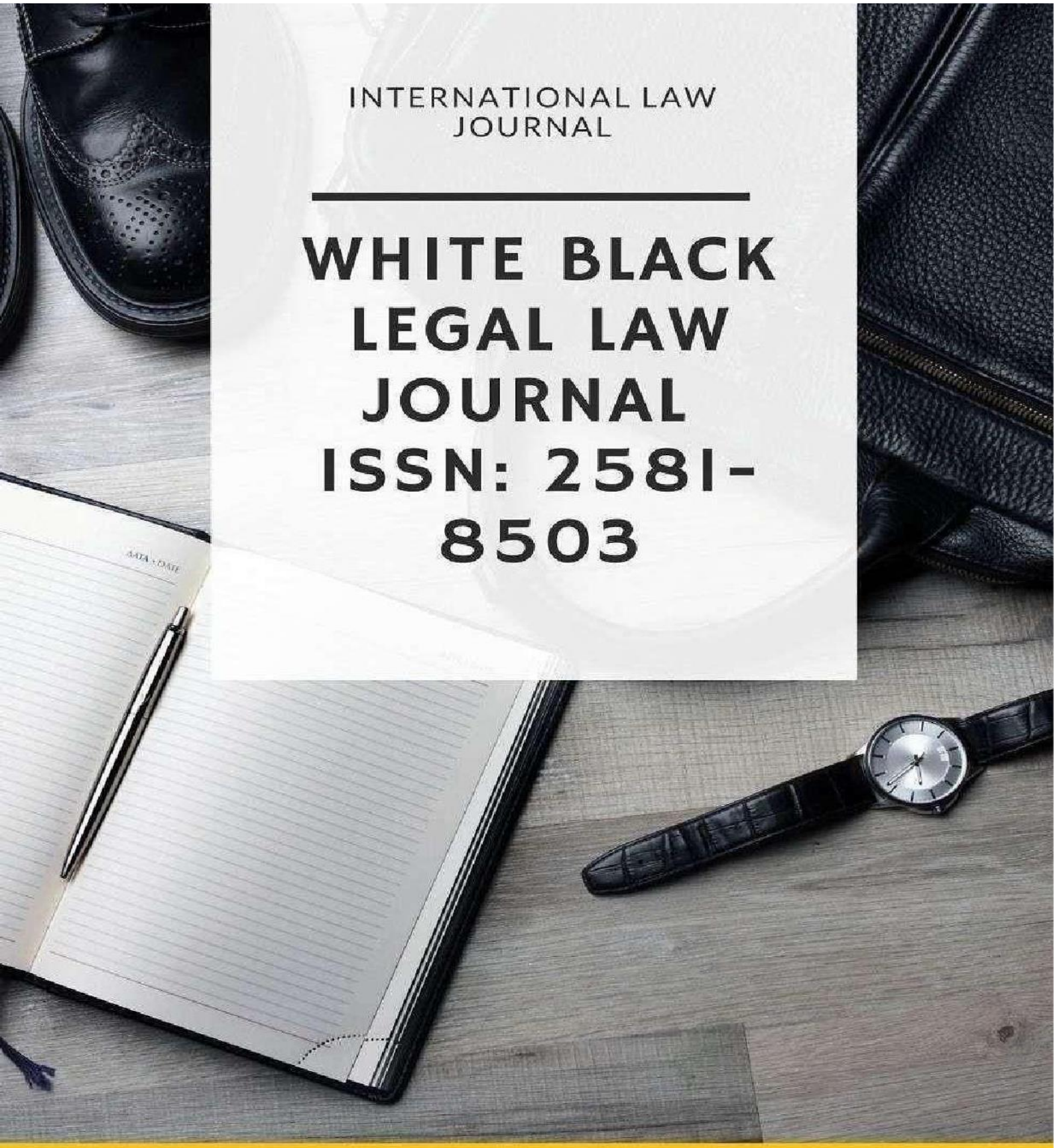


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FREEDOM BEFORE VERDICT: LIMITS ON UNDERTRIAL DETENTION IN INDIA

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ABSTRACT

According to the 2024 report by the National Crime Records Bureau[1], the undertrial population stood at 72.6% out of the total of 5,11,542 inmates in prisons across India. Despite the existence of the provisions in the constitution that ensure presumption of innocence and speedy trial, the country has been unable to jail the undertrial prisoners because there is a statutory limit on detention since 2005 being ignored. The present paper seeks to discuss the reasons behind the continuance of practice of undertrial detention and tries to analyse if Section 479 of BNSS succeeds in improving on Section 436A of the CrPC. The methodology followed is doctrinal where different provisions of laws, statutes, judgments of the Supreme Court, and reports published have been reviewed. The findings indicate that failure lies in implementation of laws. The research argues that Section 479 seeks to shift responsibility onto the jail authorities, which however only results in creation of more exceptions, and just 627 undertrials got released under it as of the year 2024.

Keywords: Undertrial detention, S. 479 BNSS, Right to speedy trial, bail, prison overcrowding

I.INTRODUCTION

The expression "justice delayed is justice denied" suggests that justice will loose its value if postponed for an extended duration. In 2024, the number of inmates in India was 5,11,542, with 3,71,440 undertrial prisoners(72.6% of total inmates).[2] In India, in 1979, the Supreme Court ruled that some of the prisoners held in Bihar had already spent more time than the maximum period of punishment for the crime they were accused of.[3]While this case is commonly referred to as the beginning of the jurisprudence of speedy trial in India, a

[1] National Crime Records Bureau, *Prison Statistics India 2024* (Ministry of Home Affairs, 2026).

[2] National Crime Records Bureau, *Prison Statistics India 2024* (Ministry of Home Affairs, Government of India, 2026).

[3] *Hussainara Khatoon* v. *Home Secretary, State of Bihar*, (1980) 1 SCC 81.

fundamental issue of overcrowding was also observed here. Four decades later, the situation has not changed much.

Detention before trial creates tension with the "presumption of innocence". An accused experiences the primary harm caused by punishment i.e. the deprivation of freedom without any conviction. There are also indirect costs such as losing a job, broken families, being in stigma, and going through jail overcrowding. Malcolm Feeley's statement that "the process is the punishment" accurately describes the situation in India.[4] However, it's impossible to get rid of under trial detention. The State has a right to force accused to appear in court and stop them from threatening witnesses or evidence and from committing further offenses. The question that arises is what limits on detention is actually imposed by the law and whether those limits work.

The article poses three questions. First, why does the number of people held under trial continue to expand despite the existence of the statutory detention ceiling since 2005?[5] Second, does section 479 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)[6], enforced from the July 1, 2024, improved the position or just reiterated it? Thirdly, how could continuous overcrowding influence the reformative aim of the Indian prison legislation?

The main point highlighted in the discussion is that the lack of enforcement, not the law, is responsible. The country has a strong constitutional basis for the legislation, there exists a free legal assistance right and statutory ceiling for detention for those in custody, as well as court orders on the bail process. However, the majority of these provisions are only triggered by an application and decided case by case. It is assumed that a detainee has a lawyer and has enough money for bail and court. In this way, those who really need these provisions are not able to use them. The BNSS improves the situation in part by introducing some missing elements of the procedure.

II. UNDERTRIAL DETENTION

An undertrial prisoner is referred to as a person in connection of a case who has been arrested and is being detained during the time an investigation is being conducted but has yet to be

[4]Malcolm M. Feeley, *The Process is the Punishment: Handling Cases in a Lower Criminal Court* (Russell Sage Foundation, New York, 1979).
[5] The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 436A, inserted by the Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005).
[6] The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 479.

found guilty of committing the alleged crime.[7] In other words, an undertrial prisoner is somebody whose arrest and detention happened during the process of a pre trial investigation to confirm the accusation. It is important to note that only court can authorise a punishment for a person. As it can be deduced from the definition that detention before trial is a form of judicial procedure and its objective is to ensure proper conduct of the process, protecting witnesses from evaders as well as ensuring their attendance and prevent significant harm.

A. CONSTITUTIONAL FRAMEWORK

1. Article 21- Speedy trial

Article 21 is the main constitutional restriction on detention before trial. According to the Maneka Gandhi case, any procedure that deprives someone from freedom should be reasonable, just as well as fair rather than just legal. In Hussainara Khatoon case, the court said that years of detention without trial was not reasonable, just or fair and speedy trial is implied in article 21.[8] Such right is implied at every stage from investigation to revision but refused to decide outer limit of the time.[9] A judgement by a seven judge bench, stated that courts cannot provide the time limit where the legislature does not provide a limit.[10] Judicial limits therefore remain case-specific, and general ceilings are left to Parliament.

2. Article 22- Threshold Safeguards

Article 22 lays down safeguards at the detention time. A person who has been arrested is to be informed of the reasons for his arrest as soon as possible, is permitted to consult a lawyer of their own choice and within 24 hours, should be presented before the magistrate.[11] These safeguards are of importance for person under trial, since the first production is the moment when detention begins. Unlawful detention can be prevented most easily at that point, before it turns into years of routine detention in custody.

3. Article 14

The liberty before trial is not enjoyed equally by all. In the year 2024, around two- third of persons under trial whose caste was recorded were either members of Scheduled Tribe or Scheduled Caste or other backward classes. Moreover, it turns out that 63% of the convicted under trials had not received any formal education beyond 10th standard.

[7] Law Commission of India, *78th Report on Congestion of Under- trial Prisoners in Jails (1979)*: Lavanya B, "A Critical Analysis on Detention of Undertrial Prisoners foe an indefinite period with reference to Tarun Dutt v. Govt. NCT of Delhi" 3(3*) Jus Corpus Law Journal* 17 (2023).
[8] Hussainara, *supra* note 2.
[9] *Abdul Rehman Antulay* v. *R.S. Nayak*, (1992) 1 SCC 225.
[10] *P. Ramachandra Rao* v. *State of Karnataka*, (2002) 4 SCC 578.
[11] The Constitution of India, art. 22(1)–(2).

4. Bail and legal aid

"The presumption of innocence is a fundamental principle of criminal law" even though it is not enshrined in the Constitution. The corollary of it is the dictum given in the case of *State of Rajasthan v. Balchand*[12] by Krishna Iyer, J. stating that the grant of "bail must be the rule and jail the exception". The court held that bail conditions should be done according to the accused's financial means and allowed his personal bond release[13]

Article 39A [14]provides the solution to the problem. In *Hussainara Khatoon (IV)*, it was held that free legal aid of an indigent accused is necessary under Article 21 of the constitution for justice to be delivered.[15] This duty arises when an accused appears before the magistrate for the first time. Moreover, the reaching of this conclusion did not involve the accused applying for the services of a lawyer. Section 12(g) of the Legal Services Authorities Act of 1987[16] throws light on this. Without counsel, an undertrial cannot use the limits the law confers.

Thus, it can be inferred that the overcrowding problem cannot be blamed on the uncertainity of the doctrine as the constitutional problem has been settled for over 40 years. Most of the aforementioned cases were directly related to the claim for right to a remedy by an individual prisoner. The case law guarantees the rights of undertrials but does not give someone the responsibility for seeing that these rights are realized.

B. LEGAL AND STATUTORY FRAMEWORK

The Code of Criminal Procedure was replaced by Bharatiya Nagarik Suraksha Sanhita, 2023. It holds on to the structure of the previous Code, while initiating some modifications. The BNSS defines four limits on the detention of an individual awaiting trial.

1. **Default Bail during the Investigation**

Section 187[17] of the BNSS replicates Section 167(2)[18] of the CrPC by preventing a magistrate to permit the detention of an individual more than 90 days in the case of serious offences, and for 60 days for other cases. If the charge sheet is not filed by the authorities in time, the accused has the right to secure bail, provided he asks and gives bond for it. The Supreme Court has upheld this right as pursuant to Article 21 as well as that a charge sheet filed afterwards does

[12] *State of Rajasthan* v. *Balchand*, (1977) 4 SCC 308.
[13] *Moti Ram* v. *State of Madhya Pradesh*, (1978) 4 SCC 47.
[14] The Constitution of India, art. 39A.
[15] *Hussainara Khatoon (IV)* v. *Home Secretary, State of Bihar*, (1980) 1 SCC 98.
[16] The Legal Services Authorities Act, 1987 (Act 39 of 1987), s. 12(g).
[17] The Bharatiya Nagarik Suraksha Sanhita, 2023, s. 187.
[18] The Code of Criminal Procedure, 1973, s. 167(2).

not invalidate the right.[19]

The only restriction on bail under Indian law, namely, default bail, functions rather mechanically. Its problem is that it ceases to apply as soon as the charge sheet is submitted, regardless of its nature, and does not serve any purpose during the trial proceedings. The BNSS has also disrupted the existing practice concerning police custody. According to the CrPC, the police custody does not last longer than the initial fifteen days post the arrest. However, 'Section 187' extends this period to fifty or sixty days by allowing the use of the initial fifteen days.[20] As a result, it is now possible for people kept in judicial custody to be sent back to the police, and thus magistrates are reluctant to grant bail at an early stage.

2. The Detention Ceiling: Section 436A and 479

The provision of Section 436A in the Criminal Procedure Code (CrPC) was introduced in 2005, and the provision became effective on June 23, 2006. Section 436A speaks of every undertrial who has been incarcerated for "half the maximum sentence for a crime being released on personal bond with or without surety." Moreover, the provision puts limitations on how long one can be detained. The provision excludes those offenses that carry the death penalty.[21] Also, post hearing the public prosecutor and giving reasons, the court can order for the continued undertrial detention but not more than the maximum period of detention laid down by law. In the event of the delay caused by the defendant, the period of detention would not be taken into consideration while calculating the maximum period of detention.[22]

The provision has an arithmetic approach to bail rather than a merit-based approach. It takes into consideration the detention at the time of investigation and trial procedure on the basis of the provision of s. 436A, as it simply counts the period of detention and does not take into account the nature of the crime and the probable punishment for it.

S. 479 of BNSS stays true to its essence but has introduced a few changes. First, for the accused's interest, a person with no previous convictions qualifies as a first offender and is entitled to bond release after completing a term that is "one-third of the maximum sentence duration". The Law Commission proposed one-third for crimes that could lead to maximum seven-year imprisonment and one-half for graver crimes.[23] The legislature accepted the proposal for cases of first-time offenders only. Section 479(3) requires a jailer to make the

[19] *Bikramjit Singh* v. *State of Punjab*, (2020) 10 SCC 616.
[20] The Bharatiya Nagarik Suraksha Sanhita, 2023, s. 187(2).
[21] The Code of Criminal Procedure, 1973, s. 436A, inserted by the Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005).
[22] *Ibid.*, provisos and Explanation.
[23] Law Commission of India, *268th Report on Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail* (2017).

court an application as soon as the prisoner completes the specified period. Under section 436A, the duty was left to the prisoner.

Two changes are unfavorable to the accused. First, s. 479(1) does not include cases that provide for the longest imprisonment term as well as capital punishment from between the offences that will lead to one-third of the prison term. Section 479(2) prohibits the application of section when investigations or judicial proceedings in respect of the accused person concerning multiple offences or cases are in progress. The disqualification provided in this section has no counterpart in s. 436A. The mere registration of several FIRs, a weapon of the police against a person it wants to keep in detention, is punished.

In Re*: Inhuman Conditions in 1382 Prisons*,[24] the Supreme Court noted that the Union conceded the applicability of s. 479 to undertrials in cases that were registered prior to July 1, 2024 and ordered the superintendents to process the petitions from eligible convicts accordingly.

3. Discretionary Bail

Sections 480 and 483 of the BNSS are similar to sections 437 and 439 of the CrPC. These provisions allow magistrates and higher courts to grant individuals accused bail under non-bailable crimes. Although the legislative act does not state the factors, the courts have defined them. In this situation, these include, , the gravity of punishment, nature of crime, the evading risk, and the credibility of the evidence. Prolonged imprisonment without an expectation of trial can be a cause for releasing even within the frame of special laws that provide limited rights for bail.

4. Bail for the Indigent

According s.478 of BNSS, individuals accused in bailable crimes, and who are unable to furnish bail within seven days of arrest, have a status of indigent.[25] In this case, this person can be liberated under a bond without surety. The law is in line with the position of the legal provisions which state that inability to pay must not be the reason for detention.

5. The Common Aspect

Somebody should initiate each of these limits. Default bail needs an application while discretionary bail needs argument, and also section 478 needs someone to initiate indigence. Even section 479 relies on accurate records of jail.

The multiple-offence and multiple-case limitation

[24] *In Re: Inhuman Conditions in 1382 Prisons*, W.P. (C) No. 406 of 2013, order dated 23 August 2024 (SC).
[25] The Bharatiya Nagarik Suraksha Sanhita, 2023, s. 478.

Section 479(2) of the BNSS prohibits being released under this section, regardless of sub-section (1), but subject to its third provision, if the investigations, inquiries or trials related to someone's case are still ongoing related to more than one offense or to various cases. There is no corresponding provision in section 436A. The provision gives rise to four difficulties.

First, its meaning is not clear. "In more than one offence" can indicate that there are several sections in the same FIR, several FIRs related to the same incident or unconnected cases in other places. A wide interpretation of the phrase can lead to excluding most undertrials because when being charged with crimes such as cheating or forgery, many people are charged with several offenses. The presence of the phrase "or in multiple cases" suggests that the Parliament had in mind different legal processes for different offences.

Third, the restriction is also at odds with the pressumption of innocence and article 14. It is based on ongoing charges, not actual convictions. Thus, a first-time offender could lose this advantage due to a subsequent trivial or expired FIR, which is partly dependent on police activity. It can be argued that the classification based on the number of cases is arbitrary and that it imposes additional burdens on poor people who are often subject to multiple FIRs.

Moreover, there are two other limitations are often neglected. On the one hand, according to the third proviso, it cannot be applied for detention beyond the statutory limit and on the other hand, it does not apply to section 479 release and permits release only under sections 480 and 483.

Retrospective application and the functions of the superintendent

Section 479(3) has brought about this significant change. The provision mandates that upon their "completion of one-half or one-third in custodial detention" in whatever mode, the jailer shall make an immediate written application for the release of the inmate. The critical feature is that it is no longer the responsibility of the detainee to start the process but rather the State. Moreover, on August 23, 2024, the Supreme Court while passing its ruling in *In Re: Inhuman Conditions in 1382 Prisons*[26] case acknowledged the position of the Union that the provision applies to all cases of undertrial prisoners pending on that date, including those which have commenced before July 1, 2024. The ruling has helped clear the confusion regarding the interpretation of Section 436A.

Therefore, Section 479 can be seen as a means of mixed reforms. For first-time offenders, it is more lenient but harsher for prison officials and those that are accused of serious offenses or have multiple cases against them.

[26] *Supra* note 21.

III. JUDICIAL INTERPRETATION

For almost five decades now, the rights of undertrial prisoners are perceived by the Supreme Court as an outstanding issue in the Constitutional Context..

The decision in the case of Hussainara Khatoon did not only make it clear that "speedy trial is a fundamental right" but also resulted in the release of the prisoners who had been kept imprisoned for more time than allowed according to the law. Sunil Batra (II) made judicial scrutiny go beyond the prison walls and declared custodial torture unlawful, thus stating that the conditions of imprisonment must respect article 21.[27]

The case of *D.K. Basu v. State of West Bengal* [28]made the right at the moment of detention practical and required that a document confirming the detention, the notification of the arrest to relatives, and of a lawyer being present at the time of investigation.

The Court *in Satender Kumar Antil v. Central Bureau of Investigation*[29] started from the general belief that the Balchand principle of bail not jail is more talked about than practiced. The offenses were divided among four categories for purposes of bail and strict adherence to the limits for detention was insisted upon. It instructed that applications of bail be disposed of in two weeks, that the courts refrain from imposing terms that cannot be complied with by the accused persons, and that undertrials who qualify for bail should be identified and released. The recommendations included the introduction of a Bail Act. The significance of the decision lies in the fact that it is the more coherent pronouncement of the judicial statement on the issue of undertrial detention since Hussainara, but it will achieve efficacy only when the directives are implemented in innumerable courtrooms where the Supreme Court cannot reach.

The most pronounced instance of this is in the case of In Re: Inhuman Conditions in 1382 Prisons.[30]This case has resulted in several orders concerning overcrowding, Undertrial Review Committees, legal assistance, mental health issues, and in the year 2024 an order entailing the application of s. 479 of the BNSS to pending cases. In a related case, *Sukanya Shantha v. Union of India*[31], the Court has ejected caste-based discrimination from prison manuals. The method is known as continuing mandamus: the Supreme Court leaves the case open and keeps issuing orders while demanding compliance reports.

[27] *Sunil Batra (II)* v. *Delhi Administration*, (1980) 3 SCC 488.
[28] *D.K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416.
[29] *Satender Kumar Antil* v. *Central Bureau of Investigation*, (2022) 10 SCC 51.
[30] *Supra* note 24.
[31] *Sukanya Shantha* v. *Union of India*, 2024 INSC 753.

IV. CHALLENGES AND RECOMMENDATIONS

The framework fails in implementation rather than design. The reason so many undertrials remain in prison is not that they are denied bail but that they have no means to pay it.

S. 436A does not work on its own. The courts had to intervene to set up weekly court hearings inside jails in Bhim Singh, and by 2016 the Supreme Court had to order the establishment of Undertrial Review Committees across all states.[32] A number of reasons, jail records did not have the maximum sentence, undertrials did not know of the provision, legal aid was not available, there was no accountability contributed to the effectiveness of the execution of the law.

S. 479 states that the superintendent of jail is accountable for the implementation of the law but narrows down the scope as well. It does not apply to those sentenced to life imprisonment, those accused in multiple cases, and lastly, it assumes individuals can prove their first-time offender status without assistance.

Recommendations

Certain reforms have been recommended for implementation. The first suggestion is to implement digital prison administration systems that would automatically track the completion of the prescribed one-third and one-half periods of undertrials, and prepare the application by the jail superintendent while alerting the Legal Services Authority and the District Judge each month thereby putting section 479(3) into use. Second, sureties need an answer in law, i.e., to include the process as set forth in *In Re: Policy Strategy for Grant of Bail*[33] into the BNSS that would require a court to look into any bail conditions that are not met. Along with this, people should be granted a personal bond if they belong to the group of poor accused persons whose crimes carry up to seven years of imprisonment the Parliament should also examine the Bail Act proposed by Satender Kumar Antil. Section 479(2) ought to recognize the existence of multiple cases as one factor in the determination of eligibility for bail, not as an unfaltering prohibition; moreover, the eligibility rules must be applied to the charges; the Undertrial Review Committees should make quarterly announcements about the number of undertrial prisoners reviewed, those found eligible for bail and those released, because the lawyers of the panels apply only when the superintendents of the jails have shirked their obligations; enforcement of s. 35[34] of the BNSS and of the Arnesh Kumar case[35] can put a stop to

[32] *Bhim Singh* v. *Union of India*, (2015) 13 SCC 605.
[33] *In Re: Policy Strategy for Grant of Bail*, Suo Motu W.P. (Crl.) No. 4 of 2021, order dated 31 January 2023 (SC).
[34] The Bharatiya Nagarik Suraksha Sanhita, 2023, s. 35.
[35] *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

unnecessary remands in case of minor offences. Undertrials ought to have a chance to opt for education, training and counselling voluntarily without implying their guilt and their status as criminals. Also, the implementation of the State occupancy targets should be supervised by the Supreme Court so that the number of prisoners declines.

V. CONCLUSION

There is no lack of laws in India that can limit detention of persons in prison while awaiting trial. The Indian Constitution, its courts, along with its laws emphasize that detention before trial must be an exceptional occurrence. Regardless of this, the state of affairs is that the majority of prisoners fall in the category of undertrial prisoners since the related procedures are flawed in execution, not in concept, eligibility is never monitored, fixed sureties regardless of the financial status of family members or friends of the prisoners, and nobody is responsible for their release. In particular, Section 479 has specified the prison superintendent as the most important official to be assigned this responsibility. However, the exceptions that Section 479 establishes for certain undertrial prisoners once again show the limitations of the application of the law. While the Supreme Court has made sure that the challenge of the issue remains alive in discussions, this is certainly not enough until the solution is created on the local scale in all districts.

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