
WOMEN UNDERTRIAL PRISONERS: AN INVISIBLE SECTION OF THE JUSTICE SYSTEM, REFORMS

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ABSTRACT

Women undertrial prisoners in India remain a numerically small but structurally neglected population whose experiences expose the blind spots of the criminal justice system. Their overlapping vulnerabilities—gender, poverty, caste, motherhood, and stigma—turn pre-trial detention into a site of compounded rights violations, despite an increasingly progressive constitutional and statutory framework.

Introduction: Gendered Dimensions of the Undertrial Crisis

Undertrial prisoners make up about three-fourths of India's total prison population, a proportion that has remained stubbornly high over the last decade and continues to hover around 74–76%. Within this overall figure, women prisoners account for only around 4–4.5% of inmates, but an overwhelming majority of them—roughly three-fourths—are undertrials rather than convicts.

This statistical pattern reveals that women are less likely to be in prison overall but, once incarcerated, more likely to be stuck in the undertrial category, often for prolonged periods. Typical profiles show women undertrials as poor, low-educated, often from marginalised castes or minority communities, and heavily dependent on legal aid, which is frequently under-resourced or ineffective. Their invisibility arises not only from numbers but from the fact that the prison and policing systems were historically designed around the “male offender,” leaving women’s specific needs and life circumstances as an afterthought.

Socio-Legal Background: Constitutional Promises and Gender-Blind Structures

The Constitution of India guarantees equality before law and equal protection of laws under Article 14, prohibits discrimination on grounds of sex under Article 15(1), and authorises

special provisions for women and children under Article 15(3). Article 21 has been interpreted expansively to include the right to live with dignity, health, privacy, reproductive choice and protection from cruel, inhuman or degrading treatment, all of which apply to prisoners as well.

Yet, the institutional design of prisons and criminal procedure remains largely gender-neutral on paper but gender-blind in practice, failing to account for women's caregiving roles, economic dependence, and heightened risk of abuse. For example, bail provisions may appear neutral, but women undertrials often lack sureties, independent income, or stable addresses, making it harder to secure release even in bailable offences. The result is that formal constitutional guarantees coexist with a reality where women undertrials experience prolonged incarceration, limited legal voice, and routine violations of dignity.

Statistical and Lived Realities of Women Undertrials

NCRB's Prison Statistics India 2022 and subsequent analyses indicate that women undertrials constitute over 76% of the total women prison population, with a significant sub-group remaining in jail for more than one year and a concerning portion beyond three years. In 2023, the occupancy rate among women prisoners was about 70%, lower than in male facilities, but this apparent "spare capacity" often masks deeper problems: women are frequently housed in small, neglected enclosures inside general prisons, with limited access to services.

Studies on lived experiences show that women undertrials struggle with poor sanitary facilities, inadequate menstrual hygiene products, lack of privacy in bathing and toilets, and limited access to gynecological and mental health care. Many are mothers who worry constantly about children left outside with relatives or, in some cases, living inside prison with them, where developmental needs, education and socialisation are difficult to ensure. The emotional burden of separation, coupled with uncertainty about trial outcomes and social stigma, leads to high levels of depression, anxiety and feelings of worthlessness among women undertrials.

Landmark Judicial Interventions: Towards Visibility and Dignity

Sheela Barse v. State of Maharashtra (1983)

Sheela Barse v. State of Maharashtra emerged from a journalist's letter highlighting custodial torture and sexual abuse of women detainees in police lock-ups in Bombay. The Supreme Court treated the letter as a writ petition under Article 32 and issued wide-ranging directions,

requiring segregation of female detainees from male prisoners, presence of female officers during interrogation, regular visits by legal aid lawyers, and mechanisms to address complaints of torture and ill-treatment. The Court emphasised that prisoners are not denuded of their fundamental rights and that women undertrials, in particular, must be protected from custodial violence and sexual exploitation, bringing their plight into the centre of human rights discourse.

R.D. Upadhyay v. State of A.P. (2007)

In *R.D. Upadhyay v. State of A.P. (2007)* 15 SCC 337, the Supreme Court considered the conditions of children living in prisons with their mothers, many of whom were undertrial women. The Court framed detailed guidelines on nutrition, healthcare, vaccination, education, and recreation for such children, and insisted that deliveries should, as far as possible, take place in civilian hospitals instead of jail premises. Importantly, the Court underscored that children are not offenders and must not face the stigma of imprisonment, directing authorities to explore bail, parole or alternative arrangements so that both mother and child can enjoy a dignified life.

Pursuant to this judgment, the Ministry of Home Affairs issued specific guidelines instructing states to treat children of women prisoners as rights-holders entitled to food, clothing, medical care and early education, and clarifying that they must not be described as undertrials or convicts in any prison records. This marked a crucial step in recognising the intertwined rights of women undertrials and their children, and in moving towards a more humane correctional philosophy.

Broader Jurisprudence on Custodial Violence and Reproductive Rights

Other decisions, while not exclusively about women, have strengthened the protection framework for undertrials and are crucial to women's rights. In *D.K. Basu v. State of West Bengal*, the Honourable Supreme Court laid down mandatory guidelines on arrest, custody and interrogation to prevent torture and custodial deaths, which are especially relevant for women suspects vulnerable to sexual abuse. More recent scholarship and case law on the right to procreate behind bars have argued that restrictions on family life and reproductive autonomy must be narrowly tailored and consistent with Article 21, further reinforcing the need for gender-sensitive prison policies.

Recent Reforms: Model Prisons Act and Undertrial-Focused Measures

The Model Prisons and Correctional Services Act, 2023, drafted by the Union Home Ministry, seeks to replace colonial-era prison laws and explicitly adopts a reformative, rehabilitative and rights-based orientation. Chapter X of the Act, dealing with the prison regimen for women, provides for separate accommodation, exclusive women's prisons where necessary, female-only staff inside women's enclosures, dedicated hospital wards, and correctional programmes tailored to women's gender-specific needs.

Parallelly, the new Bharatiya Nagarik Suraksha Sanhita, 2023, introduces Section 479(1), under which undertrials who have spent one-half of the maximum prescribed sentence (or one-third in the case of first-time offenders) in detention are eligible for release on bail, with an absolute cap that no one can be detained beyond the maximum sentence. Although the provision is formally gender-neutral, the Supreme Court has directed prison authorities to make "special efforts" to identify eligible women undertrials, recognising that they are often overlooked even when they meet statutory criteria.

These legal developments are complemented by central advisories on prison reforms, which call for separate women's jails, improved health and hygiene facilities, vocational training, and better coordination between prison, judiciary, and legal services authorities to decongest undertrial populations. However, implementation is highly uneven across states due to resource constraints, patchy monitoring, and the persistence of a custodial mindset that prioritises control over care.

Continuing Challenges: Why Women Undertrials Remain Invisible

Despite progressive judgments and new model laws, women undertrial prisoners continue to experience multiple layers of exclusion. First, access to effective legal aid is limited: many women do not fully understand the charges against them, have minimal communication with lawyers, and are rarely consulted on strategic decisions about plea, bail, or appeal. Second, structural poverty and social stigma mean that families may distance themselves, refuse to act as sureties, or treat female incarceration as a permanent moral taint, making reintegration extremely difficult.

Third, intersectional discrimination—based on caste, religion, disability, or sexual

orientation—exacerbates the hardships of women undertrials, especially Dalit, Adivasi, Muslim, and LGBTQ+ detainees who already face over-policing and bias. Finally, there is a severe data-visibility gap: although NCRB provides gender-wise statistics, granular information on pregnant women, lactating mothers, transgender women, and women with disabilities remains scattered, making it hard to design targeted interventions.

Necessary Reforms for Women Undertrial Prisoners

A first set of reforms must focus on decriminalisation and diversion, particularly for minor, non-violent and poverty-linked offences where women are often swept into the system through family disputes, economic desperation or association with male co-accused. Decriminalising petty offences, expanding community service and restorative justice models, and using pre-arrest screening can prevent unnecessary arrests and reduce the influx of women undertrials into already strained prisons.

Second, bail and undertrial review mechanisms need to be made genuinely gender-responsive. Courts and magistrates should systematically apply undertrial-release provisions (such as those in the Bharatiya Nagarik Suraksha Sanhita, 2023) with a presumption in favour of bail for pregnant women, mothers of young children, first-time offenders and women accused of non-violent crimes, unless there are compelling reasons to the contrary. Periodic district-level undertrial review committees must include women's representatives and legal services authorities, with a specific mandate to identify and recommend release of eligible women undertrials who have completed one-third or one-half of the maximum sentence.

Third, legal aid architecture requires urgent strengthening, with specialised panels for women prisoners and mandatory early access at the stage of arrest and remand. Legal services lawyers should be trained in gender-sensitive counselling, plea-bargaining options, victim-survivor dynamics in domestic and dowry-related cases, and must maintain regular communication with the women they represent rather than meeting only on court dates. Digital tools—such as video-conferencing with legal aid clinics and simplified multilingual information material—can bridge the knowledge gap for women undertrials who often have minimal formal education.

Fourth, prison infrastructure and services must be redesigned in line with the Model Prisons and Correctional Services Act, 2023 to reflect women's specific health and social needs. This

includes adequate and private sanitation, free and regular access to menstrual hygiene products, dedicated gynaecological and mental-health services, safe pregnancy and childbirth arrangements, and child-friendly spaces for women living with their children behind bars. Staff recruitment and training should ensure a sufficient presence of women officers, sensitisation on sexual harassment and caste-based discrimination, and zero-tolerance protocols for custodial violence.

Fifth, social-reintegration and economic-empowerment programmes are crucial to breaking the cycle of incarceration and stigma. Skill development, literacy classes, trauma-informed counselling, and linkages to government welfare schemes can equip women undertrials and released women prisoners to rebuild their lives with some degree of autonomy. Partnerships with civil society organisations and community-based groups can support housing, employment, and child-care arrangements after release, reducing the risk that women return to abusive environments or are re-criminalised due to poverty.

Finally, data and accountability reforms are needed to make women undertrial prisoners visible in official records and policy debates. Prison and police administration should maintain disaggregated data on women undertrials by age, caste, religion, disability, pregnancy status, presence of children, and duration of detention, and this data should be periodically reviewed by high-level committees and courts. Independent inspections by human rights commissions, women's commissions, and judicial officers must focus specifically on compliance with Supreme Court guidelines in *Sheela Barse*, R.D. Upadhyay and related judgments, treating violations as serious derelictions of constitutional duty rather than routine administrative lapses.

Conclusion: From Custodial Margins to Constitutional Centre

Women undertrial prisoners embody a paradox at the heart of India's justice system: they are formally presumed innocent, constitutionally protected, and increasingly recognised in judicial pronouncements, yet in practice they remain among the most invisible and marginalised groups in custody. The jurisprudence of *Sheela Barse* and R.D. Upadhyay, reinforced by subsequent guidelines on children of women prisoners, has laid a strong normative foundation by affirming that the State bears a positive obligation to ensure dignity, safety, healthcare and family life for women undertrials.

The Model Prisons and Correctional Services Act, 2023 and the undertrial-friendly provisions of the Bharatiya Nagarik Suraksha Sanhita, 2023 signal an important shift towards a rights-based and gender-responsive custodial framework, but their promise will remain unfulfilled unless state governments implement them with urgency and sensitivity. Real transformation requires more than legal texts: it demands active judicial monitoring, empowered legal aid systems, gender-sensitive training for prison and police staff, systematic identification and release of eligible women undertrials, and social support structures that help women rebuild their lives after release.

Recognising women undertrial prisoners as a distinct rights-bearing constituency is not merely an act of benevolence but a constitutional necessity flowing from Articles 14, 15 and 21 and from India's commitments under international human rights law. When the justice system treats women undertrials with dignity, ensures speedy and fair procedures, and protects their children from the collateral damage of incarceration, it moves closer to its own founding promise—that liberty may be restrained only by due process, never by neglect or invisibility.