THE UNDERTRIAL CRISIS IN INDIA: EVALUATING PRE-CONVICTION DIVERSION AS A REFORMATIVE FRAMEWORK

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ABSTRACT

Today's Indian criminal justice system is in a critical state of under-trial with overcrowding in prisons, undue pre-trial detention, delays, systematic inequity, etc. A significant number of people continue to serve prison sentences as a result of being held as presumed to be innocent trial prisoners despite having a low level of economic risk, being charged only a few years after being arrested and having either limited or no bail opportunities, due to restrictive bail practices and the inefficiency of prison system processes. This paper critically reviews the idea of pre-conviction divergent schemes as a different approach to tackle over-dependency on the custodial system. It examines diversionary processes including restorative justice, mediation, community supervision, cautions, specialised problem-solving courts, prosecutorial diversion, and the police. The study also examines the bureaucratic resistance, lack of coordination in providing sufficient infrastructure and orientation of punitive policy, as well as administrative inertia and structural flaws that affected the implementation of diversionary justice in India. The paper compares the experiences of countries around the world, including the U.S., U.K., New Zealand, and Scandinavian countries, to examine best practices internationally for non-custodial justice and decarceration. Finally, the study makes a case for the use of constitutionally based divergent schemes for alleviating the problem of overcrowding, enhancing procedural fairness, individual liberty and an effective, human and more efficient criminal justice administration in India.

Keywords: Pre-conviction diversion, Under-trial crisis, Prison overcrowding, Restorative Justice, Decarceration.

Introduction

The affable attempt by the criminal justice system to synthesise seemingly opposing ends of the spectrum of maintaining the social order and protecting individual freedom is evident. Be that as it may, the contemporary criminal justice administration in the plethora of pre-trial incarceration as an exception now has witnessed a structural imbalance, making it an unsaid norm. The under-trial prisoners, as a phenomenon, in India have created an under-trial crisis in which the majority of prisons are overcrowded with inmates, under-trial prisoners are detained for long durations, held in custody for a period of time before being brought to court for trial, or are kept in trial while the trial process is delayed, and the very essence of procedural justice is denied. In this milieu, the pre-conviction diversion scheme brings light as a significant reformative mechanism that can aid in alleviating unnecessary incarceration and re-envisioning the response of the state to minor and non-violent offences.

Pre-convention diversion: Refers to an institutional diversionary process that seeks to divert an accused individual from the formal criminal process with counselling, rehabilitation, community services, mediation, restitution or supervision. These schemes aim to 'shorten' the derogatory and punitive effect of 'going to jail' as well as achieve accountability and social reintegration. Certain types of offenders, such as first-time offenders, juveniles, those charged with minor offences, drug users and those with mental health issues, are of significant importance for diversionary practices. Diversion schemes are based on theories of reformative justice and restorative justice, in contrast to traditional models that emphasise punishment and retribution, which focus primarily on rehabilitation and retributive justice.

The roots of criminal jurisprudence can be traced back to the move from retributive justice to reformative justice, or to restorative justice, from which we can get insight into the understanding of the philosophical footprints of this divisionary justice. Retributive theories of punishment consider punishment a moral reaction to bad behaviour, and focus mainly on the goals of proportionality and deterrence. On the other hand, reformative theories regard crime as a subject matter of social and behavioural issues that is capable of being corrected through rehabilitation and reintegration. This strand of thinking extended restorative justice by focusing on the need to reconcile with offenders, victims and community. These modern approaches provide one of the bases for the legitimacy of the diversion scheme – that incarceration cannot be the general answer, since it may not be the most appropriate or proportionate response to

the behaviour. This development is a global process that reflects growing acceptance of decriminalisation and decarceration policies which aim to decrease the excessive use of prisons.

The idea of decarceration has gained prominence because of the realisation that overcrowded prisons are directly detrimental to constitutional rights and the effective correctional administration of the penal system. Indian prisons continue to operate over capacity, with significant impact on the quality of life, poor health care, violence, psychological distress and increased vulnerability of marginalised communities in jail. The figures in India definitely reflect the situation of the under-trial prisoners, 73.5% of the total inmates[1]. The overall situation is complicated by the various structural weaknesses, such as delays in investigations, case pendency, absence of a lawyer, difficult conditions, poverty and administrative inefficiency.

The strong constitutional structure of India protects the people from the deprivation of their lives or personal liberties, in a proactive manner, through Article 21 of the Indian Constitution, which reads: "No person shall be deprived of his life or personal liberty except in accordance with the procedure established by law"[2]. Judicial interpretations like Hussainara Khatoon v. State of Bihar , the Supreme Court recognised and laid due emphasis on the right to speedy trial as an elementary component of Article 21 and also shed light upon the deplorable condition of the under-trial prisoners languishing in jail for years without trial. In the same way, in Moti Ram. V. State of Madhya Pradesh[3] , the court emphasises that the jurisprudential basis of granting bail does not provide for discriminating against economically weaker sections. Secondly, in the State of Rajasthan v. Balchand[4], the doctrine “bail is the rule is jail is the exception” was reiterated, emphasising the need for the exercise of liberty during pending trial proceedings.

Even though they are constitutionally and normatively approved, they are not widely and uniformly used in India. Structured diversion programs have been stymied by administrative inertia, institutional conservatism, failures to coordinate with other criminal justice entities, and a preference for punishment. Whereas existing systems like plea bargaining under the code

[1] Prison Statistics India 2023, JAWAHARLAL NEHRU UNIVERSITY LIBRARY, http://libblog.jnu.ac.in/wp-content/uploads/2026/03/PSI-2023-2.pdf (last visited May 18, 2026).
[2] INDIA CONST. art. 21.
[3] AIR 1978 SC 1594.
[4] AIR 1977 SC 2447.

of criminal procedure, probation, loss, compounding of offences and Lok Adalats are limited and inconsistent. Furthermore, the criminal justice system remains hostile to alternatives it sees as "lenient," treating incarceration as punishment as opposed to accountability.

The purpose of this paper is to look into the legal and sociological aspects of the pre-conviction divergent schemes to address the under-trial crisis and overcrowding in the Indian prisons. It explores structural and administrative challenges that hinder diversionary reforms and assesses the capacity of institutional mechanism based on constitutionalism, restorative justice and human rights to mitigate excessive pre-trial detention. The study seeks to join the broader conversation about decarceration and the management of justice in a humane way by placing diversion in the context of wide-ranging debates about liberty, fairness, and criminal Justice reform in India.

The paradox of Innocence: punitive incarceration in pre-trial detention

This situation of the under-trial prisoners is one of the greatest paradoxes of the present Indian criminal justice system. The Indian prisons house thousands of people who are not guilty of any crime but are jailed for the sake of liberty, dignity and freedom.In spite of the constitutional democracy standing for liberty, dignity and presumption of innocence, the Indian prisons are still full of people who have not been convicted of any crime. The most basic understanding of such an under-trial prisoner is a person who has been charged with an offence, who is at the stage of an investigation or enquiry, or is a person or defendant undergoing trial but has not yet been found guilty by a competent court of law. In law they are presumed to be innocent until they are proved guilty, a fundamental principle of criminal law and one that is enshrined in Article 21 of the Constitution, together with Article 14(2) of the International Covenant on Civil and Political Rights[5].

In spite of the constitutional safeguards for pre-trial detention, in reality, it was becoming increasingly punitive, however, there is a real issue of over crowding and most prisoners are under-trials in Indian Prisons. According to the NCRB reports, almost 73.5 per cent of the people in the country are under-trial prisoners[6]. This distressing number shows a widespread problem that incarceration often comes before adjudication. The overcrowding in prisons

[5] International Covenant on Civil and Political Rights art. 14(2), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
[6] *Supra* at 2.

creates conditions that are unfitting for people to live in, such as the absence of cleanliness, no medical care, lack of legal aid services, mental illness, violence and lack of hygiene. The prison has now turned into a space of extended indeterminancy and social marginality amidst the mass of all those waiting for the verdict of the court of law.

The socio-economic status of under trial prisoners also highlights the structural inequalities that are entrenched in the criminal Justice administration. Economically weaker sections, minority groups, migrant populations, scheduled castes, scheduled tribes and other socially marginalised groups form a significant part of under trials. The roots of poverty can be more important in determining who gets locked up than who is to blame for the crime. Those who cannot afford resources are not able to get competent legal representation, provide bail or maneuver through the procedures without legal assistance. In Moti Ram v. State of Madhya Pradesh[7] the Supreme Court, criticized the mechanically applied conditions of excessive bail, and emphasized the jurisprudential foundation of bail taking into account the socio-economic conditions of the accused. The court noted that justice must not be reserved "only" for people with financial parity.

The under-trial problem is mainly due to unparalleled delay in the investigation and trial process. In India, the criminal courts suffer from huge pending cases, underdeveloped infrastructure, less number of judges, poor prosecution efficiency and adjournments of trial. Investigating agencies tend to not get things done in a timely fashion, and witnesses are hostile or uncooperative years later. The accused person, then, remains languishing in prison, with no conviction being imposed on him, despite the presumption of innocence. The Supreme Court in Hussainara Khatoon v. State of Bihar[8] observed that the speedy trial is within the ambit of Article 21 and gave a trenchant criticism on the practice of detention of under-trial prisoners beyond the maximum punishment awarded for the offence committed. The judgement revealed the extremely adverse impact of the delay in the proceedings and was a watershed moment in the history of Indian prisons.

Another aggravating factor in the crisis is the unequal bail. The doctrine "bail is a rule and jail is an exception" was expressed in the case of State of Rajasthan v. Balchand[9], but the mechanism of the bail is not even stirred in the ideal times. Wealthier generally are released

[7] *Supra* at 4.
[8] AIR 1979 SC 1360.
[9] *Supra* at 5.

earlier compared to the poor released for minor offences simply because they cannot provide sureties. It sets up a dual justice system based on the ability to pay, not on legal obligations, so that freedom is dependent on the ability to pay. The Supreme Court in Gudikanti Narasimhulu v. Public Prosecutor[10] reiterated that the deprivation of freedom has to be done for substantive reasons instead of technical grounds, and granting of bail has to show constitutional compassion and fairness.

The effects of long periods of pre-trial detention are personal, social and devastating. Oftentimes, under trial prisoners lose their jobs, families, relationships, education, and social status. Anxiety, depression, trauma and social alienation are all psychological effects of indefinite imprisonment. Families of under trials suffer due to the lack of conviction, but because of economic hardships and social stigma. Detention, therefore, serves not only as a procedural device, but as a state-sanctioned punishment in absence of any adjudication as to guilt.

Women and young people and the marginalised are affected most. Women who are under-trials are exposed to specific vulnerabilities such as lack of healthcare, separation from children, and a high risk of abuse, among other gender-specific vulnerabilities. Even under the guise of protection provided under the juvenile Justice board framework, juveniles are still at risk of being detained and subject to institutional abuse. Marginalised communities have been disproportionately incarcerated, as a result of lack of awareness, systematic discrimination and restricted access to the legal system. Supreme Court stressed on humanizing the treatment of prisoners and highlighted the special position of women in prison cells in Sheela Barsee v State of Maharashtra[11].

Ultimately, under trial crisis, it is a reflection of a wider institutional conflict between State power and personal liberty. It shows the multiplicative effect of procedural inefficiency, economic inequality, and punitive attitude on the erosion of constitutional guarantees. This crisis cannot be solved by building more prisons, it is a crisis that needs to be addressed through structural change, including bail liberalisation, fast-track court processes, access to legal aid and creation of non-custodial measures based on human dignity and restorative justice.

[10] AIR 1978 SC 429.
[11] AIR 1983 SC 378.

Reimagining accountability: Typologies of pre-conviction Diversionary Justice

In the current context of criminal Justice administration, pre-conviction diversion schemes are a paradigm shift, aimed at minimising unnecessary incarceration and at fostering rehabilitative Justice before conviction. Such mechanisms are designed to divert accused persons from the traditional trial process and replace it with other institutional interventions like counselling, treatment, mediation, supervision or community based rehabilitation. The main goal of diversionary justice is to alleviate overcrowding in prison, but the proportionality of the criminal process, based on human and constitutional protections and in line with the tenets of liberty and dignity, is no less important.

The theory of diversion schemes is based on the philosophy of the reformative and restorative theories of punishment. Whereas with retributive options, a focus is placed on the penal consequences, diversionary options acknowledge that many offences – including relatively minor, non-violent and first offence – can be dealt with more effectively through corrective and community-based options. The diversion schemes, therefore, aim to avoid stigmatisation, reduce reoffending, maintain social reintegration, and avoid negative effects of prison sentences. They are especially useful in cases involving juveniles, economically disadvantaged people, drug abusers and people who are psychologically or socially distressed.

One of the earliest forms of diversionary practices, the police-led diversion mechanism. In these schemes, the police have the discretion to issue a warning, caution, counselling referral or a community service order, rather than formal prosecution. These measures are typically set aside for minor offences where prosecution might not seem to be warranted in light of the alleged crime. Police diversion not only lightens the load of the court system, but also helps to break the cycle of extended criminal court proceedings. Such discretion is, however, subject to safeguards against any arbitrariness or discriminatory use.

Another key model is prosecutorial diversion, in which prosecutors delay or drop criminal cases if the guidelines are met. The following can be involved: Rehabilitation programmes, restitution to victims, educational programmes, behavioural counselling. The practice of diverting cases has been extensively adopted in other jurisdictions around the world as a workable tool to alleviate case backlog and to hold offenders to account in order to avoid incarceration. It embodies the notion that prosecution should be for public interest and not as a punishment.

Community-based and restorative diversion models are a more participatory approach to Justice administration. Restorative justice focuses on talking, reconciling and repairing the harm, not punishment. These models include the building of a dialogue between offenders and victims, as well as between families and representatives of the community, in order to promote accountability and social healing. These mechanisms are particularly effective in the reduction of hostility, prevention of re-offending and restoration of communal harmony. Restorative diversion is recognised internationally in instruments that promote alternatives to incarceration at different stages of a criminal process, including the United Nations.

In India, plea-bargaining[12] is a very narrow-spectrum diversionary justice. Pleas bargaining is an accused person charged with an offence who agrees to be granted a lower punishment in return for voluntarily pleading to the charge. Likewise, the conditional and probationary provisions of the Probation of Offenders Act, 1958 allow the court not to lock an offender up, but to release them on a condition of good behavior. These elements and initiatives within the substantive laws recognize that not all justice requires incarceration.

Another emerging facet of diversionary justice is that of specialised problem-solving codes, such as the drug court and the mental health court. These courts are not concerned with "adversarial education adjudication" but rather "treatment and rehabilitation." The drug court's initiative is to deal with substance dependency by providing monitored therapeutic and medical assistance, while the mental health court's initiative is to divert persons experiencing psychological disorders to therapeutic and medical assistance. They recognise the social and medical aspects, emphasise criminal behaviour and strive to avoid punitive action and instead aim to encourage rehabilitative intervention[13].

Pre-conviction diversion also includes mediation and compounding. Under the criminal procedure the parties can settle the offence amicably in certain criminal offences without going through a long trial and thereby avoid the compounding of offence. Mediation also helps with the resolution of disputes without court involvement and speeds up the flow of cases through

[12] Code of Criminal Procedure, 1973, ch. XXI-A, No. 2, Acts of Parliament, 1974 (India).
[13] UNITED NATIONS OFFICE ON DRUGS AND CRIME, HANDBOOK OF BASIC PRINCIPLES AND PROMISING PRACTICES ON ALTERNATIVES TO IMPRISONMENT, https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf (last visited May 18, 2026).

the courts. These mechanisms have reinforced the notion that not all conflicts need to be brought into a formal penal adjudication.

The diversion schemes are especially important for first-time and minor offenders. It often leads to stigmatisation, poverty and criminalisation of such people rather than rehabilitation when they are put under custody. Rather, diversionary alternatives continue to provide opportunities to rehabilitate, and accountability is maintained via proportional and non-custodial measures. Pre-conviction diversion programs are therefore crucial to a humane, efficient and constitutionally balanced criminal justice system that is built around restorative principles, and not too much incarceration.

The punitive stalemate: Administrative challenges in transitioning to restorative justice

Although there is increasing awareness of diversion as an effective strategy for addressing prison overcrowding and the under trial crisis, there has been significant administrative and structural hurdles in the enforcement of pre-conviction diversion schemes in India. The continuity of the custodial use of power is a symptom of procedural inefficiency, but of more fundamental nature. reforms are often restricted to policy debates, and do not get to ground in the meaning of implementation.

Bureaucratic opposition to alternative models is one of the major challenges. CJS institutions have continued operating under a conventional model which focuses on arrest, detention and prosecution. Administrative officials often see diversion as a reduction of the power of the state or an unnecessary amount of leniency for the individual who is being diverted. This institutional conservatism is a barrier to experimentation with alternative approaches that focus on the communities or rehabilitative facilities. However, officials in practice would often prefer to opt for routine custody measures even when it is not necessary and it is not proportionate.

Strongly tied to institutional preference to incarceration as the primary response to crime. The concepts of preventive retention, arrest-driven policing and extended judicial custody have become “normal” in the work of criminal justice administration. In fact, the entire criminal procedure functioned as a punishment, especially in the case of the weaker sections of society, who could not get the bail within a reasonable time. It weakens the basic judiciary dictum enunciated in the State of Rajasthan v. Balchand[14], which states that "bail is rule and jail is

[14] *Supra* at 5.

exception. However, in reality, incarceration is often times before adjudication and remains irrespective of acquittal.

One of the other shortcomings is that the stakeholders are not harmonious in the very intricate Criminal Justice system. Integrated co-operation between police, prosecutors, judiciary, legal aid institutions, probation officers, mental health professionals and community organisations was required for effective diversion schemes. Often these institutions don't communicate with each other or have a common agenda, though. A lack of a coordinated procedure causes delays, duplication and inconsistencies in the use of diversionary measures. This means that people thinking of taking up a diversion scheme are often taken into the mainstream of trial.

It is made even worse by poor infrastructure and lack of financial resources. There are a shortage of judges and forensic institutes, probation officers, Lawyers providing legal aid and rehabilitation centers in India. The investment of counselling, services, treatment programmes, mechanisms and monitoring institutions are essential for diversion schemes. However, the correctional/rehabilitative system is poorly resourced in relation to custodial facilities. This disparity continues to drive further reliance on incarceration as the primary tool of control for the states.

Additionally, challenges to the political structure and public perception impede significant reform. It is common for criminal justice policies to be driven by the popular call for punitive measures, as opposed to evidence-based approaches that promote reform. In politically charged situations, diversionary measures are considered “soft on crime.” When punishment is perceived to be severe, people think that the justice system is effective, and tend to be against other non-custodial options offered by the justice system to the policymaker. This punitive direction delves into the constitutional responsibilities of rehabilitation and human dignity, and forfeits proportionality.

Likewise, a lack of data and monitoring is a critical issue. There is no complete statistical system to permit accurate measurement of under-trial detention, diversion measures, recidivism and institutional performance. Divergent schemes can't be successfully assessed and developed without clear monitoring. Administrative opacity, in turn, thus exacerbates policy inaction and institutional inertia.

Overcriminalization for the intensification on the burden to the justice system. A large number

of minor and regulatory offences remain punishable as crimes, although they do not have a great deal of social harm. “Over-criminalisation” is creating a sizeable captive population of people facing pre-trial detention, at a high cost. Preventive detention laws, which are constitutionally acceptable only in certain circumstances, have often been attacked as depriving any person of liberty without speedy adjudication and for diminishing procedural safeguards.

Finally, an accountability deficit is when criminal justice administration perpetuate systematic in efficiency. Time delays in investigation, unlawful arrests, broken procedures, deceptive practices, and custody abuse often go unnoticed by the institution and have no real impact on the investigation. The Supreme Court have decided that arbitrary arrest without trial is a violation of Article 21 of the Constitution in Hussainara Khatoon v State of Bihar[15]. However, accountability is still limited and disjointed.

Therefore a lack of success of any diversionary reforms should not just be attributed to a lack of legislative means, but rather it's indicative of a wider institutional resistance to move away from a punitive government towards a more rights-based and rehabilitationist criminal system.

Global trends in decarceration: Comparative lessons for India

The world is moving away from imprisonment-based criminal justice system and moving towards divertive and community-based approaches to the administration of criminal justice. Worldwide studies indicate that attempting to make too many people "the problem" does not result in an effective solution of either public safety or effective rehabilitation. Rather, a number of legal systems have embraced the pre-conviction diversion, restorative justice and decarceration policies that aim to balance individual liberty and accountability. The international events and developments are useful and instructive to the under-trial and prison administration system in India for reforming it.

Prosecutorial diversion schemes are a large number of programs that have been implemented to ease the load on the prosecutor's office with the goal of reducing mass incarceration in the U.S., which can admit an accused person without formal conviction to the court, provided that they fulfill certain requirements, such as counselling, rehabilitation, rehab work, restitution

[15] *Supra* at 9.

and/or community service, especially with first offenders and non-violent crimes[16]. There has also been an increase in the use of specialized courts such as drug courts and mental health courts. These problem-solving quotes recognize that many of the crimes that occur are the result of substance abuse and/or mental illnesses that will need to be treated not punished. Although there remains some degree of worry about racial disparities and over-criminalisation of the American justice system, diversion programs have been proving to be effective in reducing recidivism and fostering rehabilitative justice.

Community justice principles which prioritise proportionality and reintegration have also been taken up in the UK. There are police warning systems, diversion and youth diversion programs used routinely to address minor offences. Many would like to avoid short term imprisonment but have community sentences and supervision, have to do unpaid work or treatment or obligations or behaviour programmes. The British way is based on the idea that imprisonment is the final resort, particularly if alternative ways of social rehabilitation exist[17]. Restorative conferencing processes have also been used to mediate some victims and offenders in a way that enables them to hold a dialog with their offender, effecting accountability and reconciliation without the formal adjudication.

New Zealand is one of the biggest jurisdictions for the emergence of restorative justice as a source for practice. In the country, criminal justice system has family group conferencing as an integral part of the country's Diversionary pathway particularly in juvenile justice administration. The conferences bring together the offender, victim, family, social worker and community members to collectively work out the best resolution. It is an indigenous Maori way of thinking and working, and emphasizes the restoration processes and the focus on harmony in the community with a strong emphasis on restoring relationships, not punitive isolation. New Zealand experience has shown that restorative Justice can not only be an alternative process, but a different way of thinking about criminal responsibility; one that is built around participation, healing and reintegrating[18].

[16] BUREAU OF JUSTICE ASSISTANCE**,** https://bja.ojp.gov/program/psrac/implementation/structured-decision-making/diversion (last visited May 18, 2026).
[17] ANDREW ASHWORTH & JULIAN V. ROBERTS, SENTENCING AND CRIMINAL JUSTICE (Cambridge University Press, 7th ed. 2023), https://www.cambridge.org/highereducation/books/sentencing-and-criminal%20justice/E08FEA1BECA17F9001E39AD5BF0E7CA3#overview (last visited May 18, 2026).
[18] JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (Oxford University Press 2002), https://global.oup.com/academic/product/restorative-justice-and-responsive-regulation-9780195158397 (last visited May 18, 2026).

Decarceration policies and human correctional systems and practices in the Nordic countries (Nordic countries) have become internationally renowned. The jurisdictions' rates of incarceration, imprisonment, and welfare-based interventions and community sanctions are relatively low. The Scandinavian model is based on the idea that lack of freedom of movement equals punishment, and so prison conditions are kept human and rehabilitative[19]. The emphasis is on open prisons, education, psychological assistance, rehabilitation and reintegration instead of the rigour of punishment. These systems have been proven to have lower recidivism rates, and higher levels of prisoner welfare.

International norms have been established by the United Nations on alternatives to imprisonment. Tokyo rules[20] encourage the use of non-custodial measures throughout the criminal process including diversion prior to trial; probation; mediation; and community-based measures. Likewise the United Nations places the principle of the presumption of innocence at the core of its principles and urges against the normalisation of pre-trial detention[21]. These instruments can work together to uphold the principle of liberty being limited only when and to the degree it is necessary, and to be proportionate.

The lessons learned from these comparative experiences can be useful to India for achieving a balance between public order and constitutional freedom. First, diversion schemes must be codified – they must be codified in a coherent, not a piecemeal, statutory scheme[22]. The second is to integrate restorative/community based practices into the criminal process. Third, rehabilitation, legal aid and social welfare systems are important investment areas that can help alleviate over-reliance on prisons. Last but not least, comparative jurisdiction shows that justice is not just about punishment, but also the ability of institutions to maintain dignity, fairness and reintegration.

[19] Tapio Lappi-Seppälä, *Penal Policies in the Nordic Countries*, ANTONIO CASELLA, https://www.antoniocasella.eu/nume/Lappi-Seppala_2012.pdf (last visited May 18, 2026).
[20] UNITED NATIONS, https://www.un.org/ruleoflaw/blog/document/united-nations-standard-minimum-rules-for-non-custodial-measures-the-tokyo-rules/ (last visited May 18, 2026).
[21] *Id.* at art. 9(3).
[22] Law Commission of India, *Report No. 268: Amendments to Criminal Procedure Code, 1973 - Provisions Relating to Bail*, **LATEST LAWS,** https://www.latestlaws.com/library/law-commission-of-india-reports/law-commission-report-no-268-amendments-criminal-procedure-code-1973-provisions-relating-bail (last visited May 18, 2026).

Operationalising liberty: Institutional strategies for prison decompression

India's long-standing issue of overcrowding in prisons is symptomatic of a greater structural imbalance in the running of the criminal justice system, in which detention often replaces adjudication, and incarceration trumps constitutional freedom. The solution to this crisis is not just the building of more prisons, it's the creation of institutional systems that reduce unwarranted detention and foster alternative justice systems. The effectiveness of the reforms, however, depends upon concerted legal, administrative and technological measures capable of maintaining public order while ensuring fundamental rights are protected.

The constitutional protection given to the individual under Article 21 against arbitrary state detention has been one of the most important factors involved in bail reform, and it is important to recognize that pre-trial detention must be exceptional, not the norm. However, the economic weaker sections continue to suffer from bail practices in India which hinders their ability to furnish sureties or get through the cumbersome procedures. Judicial decisions like State of Rajasthan v. Balchand[23] and Moti Ram v. State of Madhya Pradesh[24] reiterated the principle of "bail is the rule and jail the exception." Liberalisation of the standards for granting bail, reduction of exorbitant surety requirements and further options for personal bonds, supervised release and community-based alternatives to detention are all parts of meaningful bail reform.

Judicial backlog and under trial incarceration can also be significantly reduced by using technology driven mechanisms. The online case management system, e-filing practices, virtual courtrooms and automated scheduling can speed up the criminal process and minimize procedural delays. Fast-track courts set up for certain types of offences may also help in getting a timely decision, when prolonged detention poses a threat to constitutional rights. Technological integration, moreover, enhances transparency, allows for real-time tracking of the under-trial population and improves coordination between prisons, courts and investigative agencies.

Another vital non-custodial option is community supervision and monitoring systems. The supervised release alternative allows accused persons to stay within the community, while they await trial, and only requires them to report and imposes behavioural conditions, counselling or electronic monitoring if required. These strategies maintain family and financial stability

[23] *Supra* at 5.
[24] *Supra* at 4.

and minimize the criminogenic impact of incarceration. They are also consistent with the reformative goals embraced under the United Nations promoting alternatives to imprisonment at all stages of the criminal process.

Lok Adalats and mediation are also mechanisms of divisions that help to minimise institutional burden. Lok Adalat helps in resolution of compoundable offences or minor conflicts through consensual settlement thus avoiding prolonged criminal litigations. Mediation also helps to promote negotiated solutions and restorative outcomes, especially in cases where there is limited social harm or personal relationship issues. These processes help to support the idea that criminal proceedings do not always lead to custodial sentences.

A similar critical improvement is the enhancement of Legal Aid and Public Defender systems. Many under trial prisoners are still in jail, because they lack adequate legal representation. The Constitution of India provides for equal access to justice and free legal aid to the poor[25]. The Supreme Court, in Hussainara Khatoon v. State of Bihar[26], went on to say that legal aid is a vital aspect of fair procedure enshrined in Article 21. Therefore, strengthening legal aid infrastructure, enhancing legal assistance and speeding up legal aid services are at the heart of minimizing wrongful and extended detention.

Other reforms that are also important for overcrowding include sentencing and charging. Major penalties for minor infractions in the regulation of minor activities, and indiscriminate arrests lead to an excessively large prison population. The use of incarceration can be significantly reduced through rationalising, criminal status and promoting procedural sentences in restaurants and extending non-custodial sentences.

There is also a role for institutional review mechanisms like the Prison Review Committees and the Under-trial Review Boards in determining whether or not prisoners are eligible for release, bail or Divisional treatment. Repeatedly checking prolonged detention cases helps to ensure that the constitutional protection of liberty are adhered to and the arbitrary deprivation of liberty is avoided.

Lastly, the effectiveness of divergent models needs to be assessed based on quantifiable indicators, such as recidivism rates, rates of occupancy in the prisons, rates of rehabilitation,

[25] NDIA CONST. art. 39A.
[26] *Supra* at 9.

procedure efficiency and the protection of the constitutional rights. Diversionary reforms can be symbolic if there is no clarity on the monitoring or empirical evaluation. The remedy for overcrowding in prisons is to move systematically away from punitive excess and move toward a system of justice; one that is based on proportion, rehabilitation and constitutional humanism.

Pathways to reform: Conclusion, final findings and proposed multi-tiered diversion model

The current study shows that not only is the problem of overcrowding in prisons a symptom of the crisis in India, it is also a reflection of structural problems that exist in the administration of the criminal justice system in the country. Custodial classification and delays and socio-economic injustice and institutional inertia towards reform have all combined to make pre-trial detention a tactic of the administrative process, rather than a measure rarely used in comparison to the more common legal ones. The research also confirms that pre-conviction diversion programs have real potential to decrease unnecessary detention, safeguard the constitutional rights of people charged with a crime, and create a more humane and efficient criminal justice system.

The major conclusion of the study is that majority of the prisoners in India are under-trial prisoners who are legally innocent till they are convicted. This is an important paradox between the guarantees of the constitution and the institutions in reality. The right to personal liberty, guaranteed under the ambit of Article 21 of the Constitution, read as liberally as in Hussainara Khatoon v. State of Bihar[27], has been repeatedly violated due to the delays in investigation, pendency in trials and restriction on the granting of bail. The study also reveals that the incarceration disproportionately targets economically and socially marginalised communities like scheduled castes, scheduled tribes, minorities, migrant labourers, women and poor persons whose legal representation is not effective. Therefore, poverty often dictates detention, rather than crime itself.

The study also highlights that the existing diversionary mechanism in India is not robust and is fragmented and under utilised. All such legal provisions like plea bargaining, probation, compounding of offences, Lok Adalat etc. offer only a partial substitute for imprisonment, and are neither coordinated nor co-ordinated by policy. Diversionary justice is not yet developed

[27] *Id*.

into a workable, institutionalized construct that can be a viable alternative to custodial sentences. The reformative efforts continue to be hampered by the bureaucracy's conservatism, the lack of infrastructure, political resistance and popular pressure for punitive measures.

An analysis of the current system shows that Indian criminal justice administration is more prison-oriented than justice-oriented. Arrest and detention are often used as standard practice, even for minor and non-violent offences. Even though progressive judicial pronouncements, bail jurisprudence still continues to be applied unevenly.

This was the time when the Principal had enlightened the State of Rajasthan v. Balchand[28] with the principle that ‘bail is the rule and jail the exception', which the courts below failed to appreciate. Similarly, the congestion of prisons and the abuse of procedures is due in great part to the use of laws of preventive detention and over-criminalisation of regulatory offences.

The study also finds that the coordination of the roles of police, prosecutors, judiciary, prisons, legal aid providers and community welfare institutions is missing, thereby jeopardising the efficiencies of the system. Interdisciplinary co-operation and rehabilitative infrastructure are key elements to diversionary justice. But the current systems are still isolated and under-resourced. Lacks of data and lack of monitoring systems make evidence-based policy making and systematic assessment of non-custodial alternatives difficult as well.

The study recommends that the criminal justice administration be reformed in the light of the above results and based on the principles of the Constitution and Human Rights. First, there needs to be extensive reform of the bail system. Courts should take the view of release on personal bonds, loosen the bail for low-level offences and not impose an unreasonable bail requirement (punitive bail) on the poor man. Mechanisms for the statutory presumption of bail for non-violent and first-time offenders can also help to reduce unnecessary detentions.

Second, diversionary mechanisms need to be institutionalised; there needs to be a specific legal structure for pre-conviction diversion schemes. All such laws should have uniform eligibility criteria, protections, powers, and rehabilitation provisions, however. Police-led cautions, prosecutorial diversion, community service orders, mediation programmes and treatment-

[28] *Supra* at 5.

based interventions should be subject to a statutory structure and accountability and not to piecemeal, discretionary processes.

Thirdly, the study proposes substantial funding for Legal Aid, probation, counselling, institutions and rehabilitation centres, as well as for community supervision mechanisms. Article 39A of the Constitution of India guarantees access to justice to all[29], however, in many instances, the inmates in the prisons are unable to avail proper access to justice. Preserving procedural fairness requires just enforcement, but also a strengthening of public defender systems, in a timely fashion.

Thirdly, criminal justice institutions need to be technologically updated to reduce the delay in the procedure. Efficient and transparent case tracking, virtual hearings, automated scheduling systems and an integrated system connecting prisoners with court records can make a huge difference to efficiency. Under-trial Review Committees have to meet regularly independently and recommend for release as may be appropriate to find cases of prolonged detention.

The study also suggests a model diversion mechanism which is customized to the Indian context. The proposed diversion system is three-part: at arrest, at prosecution, and at trial. Police may consider warnings, counselling and community supervision for any first time offenders and minor offence. At the prosecutorial stage, conditional diversion agreements with restitution and/or rehabilitation or community service may be an alternative to prosecution. Judicial diversion can include probationary supervision, restorative conferencing, treatment programs or conditional discharge. Special consideration must be given to juveniles, women and mentally incompetent and financially at-risk accused persons.

Restorative justice elements are also woven into the proposed model by fostering the likelihood of restorative practice (e.g., victim-offender mediation) and the involvement of communities when appropriate. This not only helps to de-institutionalize care but it also enables reconciliation and social reintegration. Importantly diversion should not be used as a form of coercion or de facto punishment: procedural safeguards, voluntary participation and judicial oversight should continue to be at the heart of diversion.

[29] *Supra* at 26.

In conclusion, the issue of the undertrials in India is a constitutional and humanitarian issue which can't be resolved by merely incarcerating them in jail. Over-incarceration is a violation of the presumption of innocence, diminishes public faith in the justice system, and is a disproportionate harm to the socially vulnerable. The international experiences reveal a successful trend in criminal justice that emphasises diversionary approaches, rehabilitation and community based responses rather than the excess of punishment. The Indian paradigm of dignity, liberty and fairness in a constitution demands a change in the practice of incarceration-based governance to a justice-based approach which envisions incarceration as a last resort and not as a normal practice. When well-designed and well-established within the institution and constitutional framework, pre-conviction diversion schemes can transform criminal justice administration from a custodial to restorative and humane justice system.