Undertrials being taken to Ghaziabad Prison.
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Exclusion from Access to Legal Justice

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> *'…The economically and socially disadvantaged sections, therefore, do not in that sense "access" the legal system to seek redress. They engage with it nevertheless, negatively. They are drawn into it unwittingly in situations of* conflict *with the law, as complainants, suspects, "encroachers" or defendants.* These *situations accentuate the denial of access to justice, to basic legal services, resulting in grave violations of their liberty.'*
>
> —Justice S. Muralidhar, Delhi High Court (2005)

1. Introduction: Legal Justice as a Public Good for those in Conflict with the Law

Contemporary understandings of what legal justice in India constitutes derive from constitutional provisions, legal jurisprudence as well as international covenants. Broadly, legal justice as a public good would imply both equal access to fair grievance redress mechanisms as well as access to fair process for those in conflict with the law.[2] This essay, however, is in the context of the latter, which includes fair access to bail, and related substantive and procedural laws for persons charged under bailable offences in particular, but also for those charged under some specific Special and Local laws and all crimes more broadly. We are considering the following elements to be necessary entitlements for the accused—the presumption of innocence, rights upon arrest and bail, right to counsel, and fair trial guarantees including protection from undue delays—all of which are essential to living a life of dignity, and being able to access other essential public goods.[3]

Article 21 of the Constitution of India guarantees to every person that he/she shall not be denied his/her right to life and personal liberty, except according to procedure established by law. The Code of Criminal Procedure (Cr. P.C.) provides the framework for denial of personal liberty if a person is suspected of committing a crime. Provisions in relation to arrest, search, remand, and sentencing stipulate the powers that the State has under criminal law. Within these provisions lies an important dilemma—where and how to draw the line between the need for public order, and the need for individual liberty (Chandra & Satish, 2016).

One of the powers that the State has is to detain, during the pendency of the trial, a person suspected of having committed the crime that he/she is being tried for. It was 36 years ago that the Supreme Court lamented

> '…[i]t is high time that…the Government [and] the judiciary begin to realise that in the dark cells of our prisons there are large numbers of men and women who are waiting patiently, impatiently perhaps, but in vain, for justice — a commodity which is tragically beyond their reach and grasp. Law has become for them an instrument of injustice and they are helpless and

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> despairing victims of the callousness of the legal and judicial system. The time has come when the legal and judicial system has to be revamped and restructured so that such injustices do not occur and disfigure the fair and otherwise luminous face of our nascent democracy.'[4]

The court articulated that 'justice' was a commodity or public good that the hapless undertrial prisoner was being deprived from. This reform called for by the Supreme Court in 1980 has still not been achieved.

The failure to achieve any change led, in part, to the enactment of Section 436A of the Cr.P.C. in 2005 to ensure that undertrial prisoners, who had served out half of the maximum sentence that they would get if they were to be convicted, are released on bail. Failure to implement that provision led to the Supreme Court issuing guidelines in *Bhim Singh v. Union of India*[5] in 2014. These measures indicate the major issue that continues to challenge the Indian criminal justice system—that of extended and unwarranted pre-trial detention. The undertrial prisoner, sometimes unnecessarily arrested,[6] languishes in jail for months and sometimes years at end. 'Justice', that abstract public good is beyond their grasp. The presumption of innocence, a basic human right, and a core principle of criminal law, also suffers. At the same time, incarceration leads to the accused losing access to various other externalities and public goods such as education, health, livelihood, and legal aid.

Inadequate access to this good implies not just a difficulty in accessing other positive externalities but also severely impedes human dignity, and gives rise to stigma within communities and beyond. It is indisputable that equal access to legal justice is necessary in order to minimize differential impact on individuals and communities with respect to their bonds of livelihood, shelter, education and health (both physical and mental).

Access to legal justice is inextricably tied to access to legal systems, which consists of the complex interweave of law enforcement agencies, prosecutors, the courts, defence lawyers, and correctional institutions. Each of these stakeholders is indispensable in ensuring that justice delivery takes place in a fair and equitable manner. While lawyers, aside from those responsible for providing free legal aid services, function most often as private players within the legal system, the onus is finally on the State as represented by the courts, to ensure that justice is delivered.

The role of the State is therefore as a direct provider of the public good—and it is imperative that necessary checks be in place at all levels of the judicial hierarchy to ensure that violations of the right to liberty and presumption of innocence do not take place, and that the legitimacy of State institutions responsible for justice delivery is strengthened. In terms of the traditional, neo-classical economic definition of a public good, legal justice is a pure public good due to its perfectly non-excludable and non-rivalrous nature, the source of which is derived from various provisions outlined in the Constitution, jurisprudence based on judgements of the Supreme Court of India, as well as international covenants.

1.1 Constitutive Elements of Legal Justice

1.1.1 Presumption of Innocence

Article 11(1) of Universal Declaration of Human Rights (UDHR) states: 'Everyone charged with a penal offence has the right to be presumed innocent until proven guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.' Further, Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR), which India ratified in 1979 states: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.'[7] The presumption of innocence is thus an important human right,

recognized by the UDHR and the ICCPR. This is critical in the context of pre-trial detention, since extended and arbitrary detention of a person pending trial can possibly violate the presumption of innocence, by punishing the person before he/she has been found to be guilty by a court of law.

The Supreme Court of India has also recognized the presumption of innocence to be a human right, although not a fundamental right.[8] While most of the cases where the Court emphasized that presumption of innocence is a human right dealt primarily with issues of burden of proof,[9] the principle applies as strongly to pre-trial detention and bail law. This was noted by the Supreme Court in the case of *Vaman Narain Ghiya*,[10] where the Court recognized that the concept of bail emerges from the conflict between the power of the State to detain a person alleged to have committed an offence, and the presumption of innocence in favour of that person.[11] It also noted that the aim of pre-trial detention is not punitive.[12] A balance needs to be maintained between the power of the police to investigate a crime, and the personal liberty of the individual detained on suspicion of having committed that crime.[13] Similarly, in *Siddharam Satlingappa Mhetre v. State of Maharashtra*,[14] the Supreme Court noted that the law of bail dovetails two conflicting interests—the preventive function of criminal law that would advocate detaining a person to prevent him/her from reoffending when on bail, and the 'absolute adherence' to the presumption of innocence, which is a fundamental principle of criminal law.[15] This understanding of bail law is also reflected in the bail jurisprudence of the Supreme Court.

1.1.2 Access to Bail

The primary object of pre-trial detention of a person is to ensure his/her presence at the trial, and further to ensure that he/she surrenders to serve out his/her sentence if convicted by the court.[16] If the person's presence at the trial can be reasonably guaranteed without requiring his/her detention pending trial, it would not be necessary to detain the person pending, and during the trial. The provisions relating to arrest and bail are tailored to ensure that the person being tried is present at the trial, without unjustifiably curtailing his/her liberty, recognizing that he/she is presumed to be innocent until convicted by a court of law (Pillai, 2014). The Supreme Court has recognized that denial of bail amounts to curtailment of personal liberty, and hence the power that the Code provides for granting/rejecting bail should be exercised judiciously.[17]

The Cr.P.C. demarcates all offences into bailable and non-bailable offences. Section 436 of the Code deals with 'bailable offences'. Section 436(1) states that if a person accused of committing a bailable offence is in the custody of a police officer, or is brought before a court, and he/she is prepared to furnish bail, such a person should be released on bail. The Court or the police officer may release the person on his/her executing a bond without sureties ('personal bond') for appearance before the officer or court, when required. In case the person is indigent, it is mandatory that sureties are not sought, and that the person is released on the basis of a personal bond.[18] A person is considered indigent if he/she is unable to furnish bail within a week of being arrested.[19]

The deprivation and exclusion that results from long periods of pre-trial detention was noted by the Supreme Court in *Moti Ram v. State of Madhya Pradesh*.[20] It observed that '…the consequences of pre-trial detention are grave.'[21] The conditions in prison are onerous, the detainees often lose their jobs, they are unable to contribute to their legal strategy, and their families are also impacted, since they bear the brunt of the person's detention.[22] The Court also held that imposing large surety amounts, and insisting on local sureties, has a disproportionate impact on the poor, especially migrants.[23] Hence, it ruled that as far as possible, the

poor should be released on their own recognizance, after imposing reasonable conditions.[24]

Subsequently, in *Hussainara Khatoon (I) v. Home Secretary, State of Bihar*,[25] the Court opined that the 'highly unsatisfactory bail system'[26] is the cause of extended pre-trial detention. It reiterated its earlier assertion that the bail system follows a property oriented approached, relying on monetary sums to ensure presence of accused at trial. It noted that such a system '…operates very harshly against the poor.'[27] The Court further observed that the existing bail system

> …is a source of great hardship to the poor and if we really want to eliminate the evil effects of poverty and assure a fair and just treatment to the poor in the administration of justice, it is imperative that the bail system should be thoroughly reformed so that it should be possible for the poor, as easily as the rich, to obtain pre-trial release without jeopardizing the interest of justice.[28]

More recently, in *Sanjay Chandra v. CBI*,[29] the Court again reiterated that pre-trial detention causes great hardship.[30] It further held that indefinite pre-trial detention violates Article 21 of the Constitution, since '…[e]very person, detained or arrested, is entitled to speedy trial.'[31]

The Court has noted that the '…basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like.'[32] In *Gudikanti Narasimhulu v. Public Prosecutor*,[33] the Supreme Court held that the nature of the charge against the accused, the nature of evidence, the punishment which the person would be liable to if convicted, the likelihood of reoffending when out on bail, and the possibility of interfering with the investigation/ trial, are factors that the court should consider while deciding the application for bail.[34] The Court, however, warned that although the prior criminal record of the accused is relevant in determining whether bail should be granted or not, the court should not be 'complacent' in denying bail only on those grounds.[35]

Access to bail based on current procedural requirements necessitates access to counsel for the accused, and in the case of those who are unable to source a private lawyer, access to free legal aid.

1.1.3 Right to Counsel and Legal Aid

The right to legal representation and counsel is guaranteed by Article 22 of the Constitution. Article 22(1) states: 'No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.' Further, Section 303 of the Cr.P.C. states that 'Any person accused of an offence before a criminal court, or against whom proceedings are instituted, may of right be defended by a pleader of his choice.'

In *Hussainara Khatoon (IV) v. State of Bihar*,[36] the Court read the right to legal aid into Article 21 of the Constitution. It held that a procedure that does not provide legal services to an accused person because of his/her poverty and thus leads to the person proceeding through the trial without legal assistance, is not '…just, fair and reasonable.' It ruled that the right to legal services is a part of Article 21 rights.[37] Subsequently, in *Khatri v. State of Bihar*,[38] the Supreme Court held that the right to legal aid commences from the time the person is first produced before a Magistrate.[39] In *Suk Das v. State of Arunachal Pradesh*,[40] the Court ruled that it is not essential for the accused to make an application for legal aid—it is the responsibility of the Magistrate to provide legal aid. If an accused is convicted in a trial in which he/she was not provided legal aid, the conviction would be set aside as being in violation of Article 21 of the Constitution.

Additionally, the right to legal representation has extended to presence during interrogation.[41] Thus, legal representation from the time of arrest is a core fundamental right of the accused. Not being able to consult, and seek advice from one's lawyer is a violation of the fair trial guarantee. Extended pre-trial detention contributes to violating this right. As the Supreme Court's jurisprudence on the right to counsel indicates, the impact is especially grave in the context of the poor, to whom legal aid is illusory in nature.

Another issue that arises in this context is whether the right to legal assistance extends to effective legal assistance. This issue arose in *Navjot Sandhu*,[42] where the Supreme Court ruled that the right to counsel '…cannot be taken thus far.'[43] Subsequently, in *Noor Aga v. State of Punjab*, the Court held that ineffective assistance is a '…systematic violation of [the] accused's core constitutional right.'[44] More recently, in *Ashok Debbarma v. State of Tripura*,[45] the Court ruled (in the context of capital sentencing) that ineffective assistance of counsel can be considered a mitigating factor if it is shown that prejudice was caused to the accused because of the counsel's ineffectiveness.[46]

1.2 The Dilemma of Plea Bargaining

Plea bargaining is one of the methods of case disposal known by the umbrella term Alternative Dispute Resolution or ADR.It was introduced in the Cr.P.C. by an amendment in 2006,[47] with the assumption that it would allow those languishing in jail to seek early release upon conviction by voluntarily admitting to their guilt. Other advantages considered during the parliamentary debates included faster disposal of cases and dispensation of criminal justice, and a decrease in arrears.[48] It was also meant as a means to provide compensation to the victims, an aspect which did not eventually make it into the text of the amendment. The debates included a reference to recommendations of the 142nd Law Commission Report of 1991, which suggested the use of plea bargaining in India.

According to the Cr.P.C., an application for plea bargaining may be made by an accused against whom a charge-sheet has been filed or against whom a private complaint has been filed, of which a Magistrate has taken cognizance. Plea bargaining is restricted to offences where the punishment is imprisonment for less than seven years. It is unavailable for offences which affect the socio-economic condition of the country, offences against women, and offences against children under the age of fourteen.[49] Plea bargaining is an option available only to individuals who have not been convicted for the same offence earlier.[50] When an application is filed, notices are issued by the court to the public prosecutor or the complainant, to arrive at a mutually satisfactory disposition with the accused.[51] In addition to the prosecutor, the investigating officer, and the victim are also permitted to participate in the meeting/s to arrive at a mutually satisfactory disposition.[52] If a mutually satisfactory disposition is reached, and the court is satisfied that the accused arrived at such disposition after exercising free and informed consent, he/she may proceed to dispose the case.[53] The court then sentences the accused in accordance with the framework provided by the law.[54] If an accused pleads guilty and is sentenced using the procedure in the Cr.P.C., he/she relinquishes his/her right to appeal. Appeal is only possible by special leave to the Supreme Court.[55]

There is reason to believe, however, that this form of sentence bargaining is not necessarily a just process. A major concern with the plea bargaining system, and with ADR more broadly, is the question of whether it truly results in just outcomes, and the possible disparate impact that it has on poorer sections of society (Fiss, 1984). With the possibility of release on bail being meagre due to lack of access to counsel, the accused opt to plea bargain, often sacrificing their basic rights. The system does not

take into consideration the power differential between the State/complainant/prosecutor and the accused.[56]

In 1999, Chief Justice A.S. Anand wrote a letter to Chief Justices of all High Courts, proposing Jail Lok Adalats (JLAs) as a means to secure release for prisoners through plea bargaining within the jail premises, in order to address the issue of the high undertrial population and overcrowding. While specific procedures for JLAs have not been codified, the procedures for plea bargaining under Chapter XXIA of the Cr.P.C. apply. This letter spurred the use of JLAs across jails in the country, a process which will be examined in further detail under Sections 2 and 3 of this chapter.

1.3 Dilution of the Public Good

We argue in this paper that the public good is in its very nature being diluted. Pratiksha Baxi has emphasized the critical difference between 'access' to justice and access to 'justice', wherein she states that '…judicial reform must be in critical engagement with how substantive and procedural law translates into everyday practices of state law, rather than expand the legitimacy of the notion of the rule-of-[good]-law.' (Baxi, 2007)

In current times, we seek to understand the everyday usage of criminal justice provisions, with an emphasis on whether individual liberty is given its due with respect to Constitutional provisions. Aparna Chandra and Mrinal Satish have evidenced how in the pursuit of security and law and order, the Supreme Court has narrowly interpreted the right to counsel, presumption of innocence and rights at the time of arrest and bail, by disallowing vitiation of trial based on ineffective assistance of counsel, effectively imposing presumption of guilt against the accused through its doctrine of reverse onus clauses, and allowing for special provisions based on types of offences which erode rights relating to arrest and bail, respectively (2016).

Using empirical evidence, this chapter seeks to probe whether a person is more likely to experience inequitable legal outcomes if they come from a particular demographic background. We also attempt to understand the processes through which violations of the law take place in order to uphold the notion of the 'rule-of-law', including but not limited to the taking away of due process rights through procedures such as plea bargaining, and the simultaneous denial of legal aid and access to bail.

In order to understand who is excluded from access to legal justice in the case of both bailable and select non-bailable petty offences, we will closely examine findings of a study undertaken by the Centre for Equity Studies in collaboration with the National Human Rights Commission titled 'Access to Justice in Uttar Pradesh: A Pilot Study in Five Districts'. The study aimed to fill a gap in existing research—to explore whether a correlation exists between demographic backgrounds of undertrial prisoners (UTPs) and unequal legal outcomes resulting from structural factors within the legal system. The study examined the nature of the offence, along with other variables. It also sought to understand the processes through which exclusion from access to legal justice may occur at the stages of arrest and in particular, during pre-trial detention.

More specifically, the study had a four-fold objective in linking demographic data (wherever available) with legal justice outcomes: first, to understand the socio-economic background of all undertrials in Uttar Pradesh and second, to examine access to justice (pertaining to processes of arrest, access to bail, and disposal of cases) for persons charged with bailable offences alone, where accessing bail from the police station or court is a matter of right. The study also sought to establish whether a correlation exists between demographic variables in a district and spending longer than seven days in jail for bailable offences. Third, to

examine 'access to justice' (pertaining to processes of arrest, access to bail, and disposal of cases) received by those accused under certain sections of Special and Local Laws in Uttar Pradesh, including but not limited to the UP Excise Act of 1910, the Arms Act of 1959, the Narcotics, Drugs and Psychotropic Substances (NDPS) Act of 1985, and the Uttar Pradesh Prevention of Cow Slaughter Act of 1955.[57] Lastly, to study the use of plea bargaining as a means of early release and case disposal by the judiciary for offences carrying a maximum punishment of up to seven years, and understand the role of the District Legal Aid Services Authority (DLSA) in the provisioning of legal aid. The data seeks to examine who (as a demographic group) is statistically more likely to undertake the option of plea bargaining as a means of securing early release from prison, as opposed to accessing the option of getting out on bail.[58]

The sites of study included five districts (and five corresponding district jails, as well as one corresponding sub-jail).[59] The jails were selected based upon their distribution across western, central and eastern Uttar Pradesh, with variations in the district's contiguity with state or country borders, variations in the occupancy rates and populations of UTPs in the jail, and the distances from the capital of the district. The data on bailable and select non-bailable offences was collected from each police station in the five districts, totalling 92, as well as at the respective jails and district court complexes. In-depth interviews with one officer in every police station in each of the five districts were also conducted(with diversity maintained within each district for interviewing officers across the hierarchy), as well as with 60 undertrial prisoners and numerous officers and staff at the jails, DLSAs and District Courts. This chapter has a conspicuous absence of data on women and children, who certainly face exclusion at the time of arrest as well as at other stages of the criminal justice process, but were beyond the scope of the primary work being discussed due to the nature of offences selected for the CES study.

2. Understanding Who is Excluded: Individuals and Communities

Data from the *Prison Statistics in India 2015,* indicates that almost two-thirds, i.e., 65.56 per cent of all undertrials are from SC, ST or OBC communities and 30.24 per cent are from (religious) minority communities.[60] Muslims constitute 20.94 per cent of the undertrial population.[61] In the most populous state of Uttar Pradesh, 2014 data reveals that 28.57 per cent of all undertrials were Muslim, compared to a state-wide population figure of 19.26 per cent (Census of 2011), indicating an over-representation of the community in the undertrial population by nine percentage points.[62] 28.55 per cent of undertrial prisoners (UTPs) in India are illiterate.[63] The NCRB, which publishes the Report, does not provide data on the economic backgrounds of inmates—either through estimates of individual or family income or categories of occupation, due to the inconsistencies in data collection by states.

While the unequal representation of some demographic groups compared to their national averages is evident, such as Muslims being overrepresented at the national level by almost seven percentage points,[64] these proportions alone do not allow us to conclude that individuals belonging to these groups have been unjustly incarcerated, either due to institutional biases, and/or inadequate access to legal representation and other legal justice entitlements. To establish this, further evidence and lines of inquiry are required, some of which have been described below. The figures do, however, indicate that a large proportion of the undertrial population consists of individuals from communities that face different kinds of socio-economic and political disadvantage, a factor which may impact their ability to seek legal justice once in conflict with the law.

2.1 Who is Excluded from Safeguards at the Time of Arrest?

Arrest entails curtailment of personal liberty, the possibility of adverse effects on the individual's material conditions, and an unquantifiable impact on dignity. Giving this due consideration, several landmark judgements delivered by the Supreme Court, such as *Joginder Kumar v. State of UP*[65] and *D.K. Basu v. State of West Bengal*[66] have cautioned against avoidable arrest and emphasized the importance of following due process if a person is arrested (Centre for Equity Studies, 2016, p. 31).

A study conducted by the Tata Institute of Social Sciences in 2011 on Muslim over-representation in Maharashtra jails, concluded that there is an anti-Muslim bias in policing in the State (Raghavan & Nair, 2013, pp. 12–17; Raghavan & Nair, 2011). Other work pointing to profiling by the police indicates that official instructions for discriminatory policing are still part of police manuals in various states, which require the surveillance of particular individuals and communities. This has further implications for arrest, bail, and sentencing (Satish, 2011, pp. 133–160). The CES study findings reinforce these profiling practices. In 1999, Dilip D'Souza and Susan Abraham documented acts of profiling and police brutality towards De-Notified Tribes such as the Kheria Sabar in West Bengal and the Pardhi community in Maharashtra, as a continuation of institutionalized practices followed by the British (D'souza, 1999, pp. 1751–53; Abraham, 1999).

Rich qualitative evidence points to the fact that it is most commonly the poor—daily wage earners and migrants, women, youth, Adivasis, Dalits, Muslims, the elderly, children, transgenders, and the mentally ill, who are excluded from access to legal justice (Subramanian, 2016, pp. 8–17; Ramanathan, 1996, pp. 199–233; Report of Law Commission of India, 2015, pp. 149; Muralidhar, 2004; Centre for Equity Studies, 2016, p. 12). However, peculiarities of local context and demographic compositions may present other disadvantaged individuals or groups.

Significantly, bias against specific communities or demographic groups—namely the poor, religious minorities and disadvantaged castes—was clear in many of the 92 interviews conducted across the five districts in the CES study; in particular in response to when police officers were asked who commits the most crime in an area. While responses to this question were most relied upon for deducing their perceptions towards crime and criminality, due to the open-ended nature of the questionnaire, other responses which were relevant to this topic were also considered. The researchers have clarified that while they attempted to interview police personnel from a range of demographic backgrounds, the majority of interviewees happened to be Hindu and belonged to relatively dominant castes. As socio-economic data on arrestees was not recorded across police stations, the demographic profiles of arrestees could not be examined, which was a limitation of the study. The report considers that due to some of the discretionary aspects of policing, perceptions of the police towards certain communities maximizes the possibility of persons belonging to these groups being arrested. It, in turn, will have a bearing on the treatment meted out to them as well (Centre for Equity Studies, 2016, p. 43).

Among various factors, poverty and illiteracy had a strong bearing on police perceptions of the criminality of individuals. Interviews with police officers and UTPs indicated that arrests made under the Arms Act and Excise Act are closely linked to class-based profiling**.** Across the sites of study, personnel across the institutional hierarchy termed those poor or illiterate as committing crime due to 'greed and family disputes', 'lack of willingness to work', or due to their 'unreasonable' nature. Thus, they adopted an entirely normative lens to assess the criminal behaviour of these communities, while discounting other possible factors for the commission of crime (ibid.). Migrant labourers in

Mau were singled out as being responsible for the production and consumption of country-made liquor, while another police officer pointed out that it is usually the owners of brick-kilns, where the labourers work, who provide the means and encourage the production of alcohol but remain largely untouched (ibid., p.44). As incidence of poverty is higher among disadvantaged caste and religious groups, it is not surprising that specific Dalit sub-castes, OBCs and Muslims were usually perceived as 'criminal' by interviewees. However, due to bias against each of these groups having a distinct history, the CES paper examined them as separate categories (ibid.).

2.1.1 Religion

Police officers in every district consistently displayed discriminatory attitudes towards Muslims in interview responses. In certain instances, their prejudice was couched as a comment on the socio-economic condition of Muslims. An SHO in Kheri commented, 'Illiteracy is highest among Muslims and results in unemployment and criminal behaviour.' In Saharanpur, discriminatory attitudes were found to be particularly pronounced. The district had seen a number of localized incidents of communal conflict in the recent past, and Muslims comprise over 41 per cent of the population in the district. Here, their participation in crime was often attributed to inherent 'criminal traits', such as 'aggression': 'Muslims get aggressive very fast… they react. They are trained from childhood to stay together.' The sub-inspector further stated: 'If we go to their neighbourhoods, they would butcher us… they are those sorts of people.'(ibid.). In another interview, the officer said that Muslims have an 'inclination to steal', as they have large families and they need to steal in order to fulfil their needs during festivals (ibid., p. 45). Based on interviews in Saharanpur, Kheri and Mau, the researchers suggested that this bias is likely to contribute to the unjust arrest and imprisonment of Muslims under the Prevention of Cruelty to Animals Act (1910) and the UP Prevention of Cow Slaughter Act (1955). A Constable in Kheri stated as a matter of fact that '…when Muslim individuals are transporting cows, we know they are being taken for slaughter.' Similarly, an SHO in Mau remarked, '…people from a certain religious group can think only within the boundaries of that religion…a Muslim person taking cow for using the milk to give his daughter will always be interpreted as a case of slaughter if they pass a Hindu village' (ibid.).

In Kheri, some interviewees reportedly displayed biases against Sikhs, who constitute 2.35 per cent of the population in the district, which is considerably higher than the Uttar Pradesh state average of 0.35 per cent. Here again, poorer segments of the population were perceived as a threat: 'There are two types of Sikhs in the district—one owns massive plots of land, which they call "farms", they live abroad mostly; the other type labours on farms and are criminal types…they've mixed with the population here to such an extent that even Hindus change their names to Balwinder, Gurpreet, etc.… one can't tell who is a Sikh and who isn't by their name anymore' (ibid.).

2.1.2 Disadvantaged Castes and Tribes

The UP Police Manual, like police manuals of numerous other States, continues to contain instructions for profiling of former Criminal Tribes, later de-notified when the Criminal Tribes Act was repealed. Although the Act was replaced by the Habitual Offenders Act, this too, was repealed in Uttar Pradesh but there was no manifestation of any such change in the UP Police Manual (ibid., p. 46). Prejudice against the Kewat or Mallah community, a de-notified tribe, was especially evident throughout the interviews in Banda: 'People from the Kewat community, who live at the banks of the river, consider the manufacture of alcohol to be their home industry…no matter how much we try to stop it' (ibid.). Across Banda,

Saharanpur, and Mau, officers stated openly that specific castes—in particular Dalits, and also 'backward classes' in Mau—were responsible for crimes in their area (ibid., p. 47). Another SHO in the district stated that he believed all persons from the Nat community were 'thieves'. (There were only four Nat families residing in the area at the time, employed as agricultural labourers.) (ibid., p. 46)

In order to conduct further analysis on profiling through FIRs and other police records to look into the basis of arrest and its possible correlation with caste, it is imperative that the police record the caste/community of persons being arrested, as they are required to in the Crime Register, which can then be used to determine access to bail and other outcomes. The fact that these details were unrecorded was determined by inspecting the Crime Registers in each police station. The unfilled details included 'age', 'occupation', 'education', 'monthly income' and 'caste' in the five districts, other than a few police stations where select details were filled such as the age or religion of the accused (ibid., p. 13). The interviews, however, no doubt indicate widespread prejudice towards disadvantaged communities amongst police personnel.[67]

2.2 Who is Excluded from Access to Bail?

2.2.1 Bailable Offences

The CES study reported that for police stations where bail data for the period of study starting on 1 January 2014 was available, the percentage of those securing bail at the police station for bailable offences ranged from 97.14 per cent in Banda to 61.11 per cent in Mau.[68] In Ghaziabad District Jail, between the 15-month period of 1 January 2014 and 31 march 2015, 31 inmates charged under only bailable offences spent longer than seven days in jail (the longest period being 86 days), indicating the lack of use of release on personal bond under Section 436(1) of the Cr.P.C.[69] A regression was run to deduce whether there was a statistically significant correlation between demographic variables and the likelihood of getting out on bail before or after seven days. None was found. However, in interpreting data it should be kept in mind that this does not mean that such a correlation does not exist at all; it was just not found for this data set. The representation of Muslims increased by about 10 percentage points in the group spending more than seven days in jails, while representation for social groups/castes did not change by a large margin. The proportion of those from a state other than UP increased by 8 percentage points in the category spending more than seven days in jail, compared to the aggregate population entering jail for bailable offences.[70] With respect to education, there was an increase of seven percentage points each for those with no education as well as those formally schooled up to Class 10 or 11.[71]

In Saharanpur, a total of 63 inmates spent longer than 7 days in jail for bailable offences between 1 January 2014 and 31 March 2015, the highest number being 119 under section 294 IPC[72] (for which the maximum period of punishment is three months, which is significantly shorter than the period spent by the UTP in jail).[73] In 10 cases, UTPs spent more than 30 days in prison for bailable offences.[74] For this data set as well, a regression was run to deduce whether there was a statistically significant correlation between demographic variables and the likelihood of getting out on bail before or after seven days.[75] None was found. However, again, in interpreting data it should be kept in mind that this does not mean that such a correlation does not exist at all, it was just not found for this data set. There was a higher representation by nine percentage points of Muslims who spent more than seven days in jail, compared to the aggregate population of UTPs entering jail for bailable offences.[76] There was also an increase of about 12 percentage points for those from out of the state in the category of those spending more than seven days in jail, higher than that in Ghaziabad. This may indicate potential

difficulties for those from out of the state in accessing bail through production of required sureties.[77] No major variations in percentages were found for education or occupational groups. Within the study period of 1 January 2014 to 31 March 2015, a total of 3, 7 and 6 UTPs from Deoband Sub-Jail, Kheri District Jail and Mau District Jail spent longer than seven days in jail for (only) bailable offences.

2.2.2 Non-Bailable Offences

The CES study collated data on select non-bailable offences pertaining to 'preventive' offences under Special and Local Laws used widely in each of the districts, to understand access to bail and case disposal in greater detail. The table below provides information on the demographic characteristics of undertrials charged under specific Act/Section combinations in different districts from 1 January 2014 to 31 May 2015.

Dalits and OBCs represented a large portion of the UTPs entering jail for these offences, and relative to district populations, Muslim UTPs were also present in disproportionately larger numbers for all categories barring one in Mau district. The mean age was particularly low for those charged under s. 4 r/w s. 25of the Arms Act (which entails illegal/unlicensed possession of a knife, beyond the size permitted by government notification). There was a high incidence of low education across almost all categories and particularly high proportions of highly informal work for available data across the Section/Act combinations (Centre for Equity Studies, 2016, p.88).

Enormous variations were found for the

Table 2.2.2: Select Demographic Variables for those in Ghaziabad, Saharanpur, Kheri and Mau District Jails under Different Section/Act Combination[78]

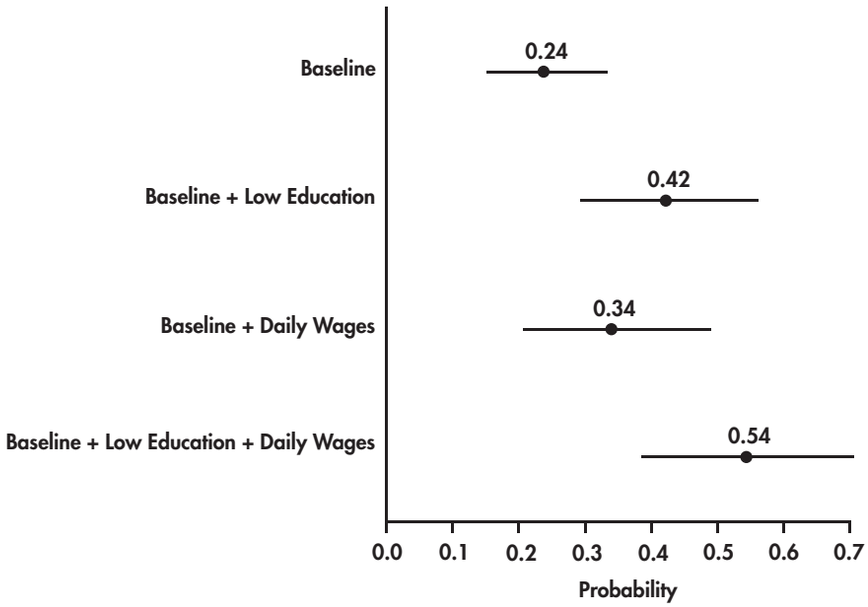
District Jail	Section/Act	Mean Age (n)	SC+OBC in per cent (n)	Muslims in per cent (n)	Domicile (Out of District & State in per cent) (n)	Nil or <Class 5 Education in per cent (n)	Highly Informal Work (n=data for known categories)
Ghaziabad	S. 4 r/w S.25 Arms Act	25 (485)	70 (458)	33 (486)	43 (486)	48 (486)	64.7 (51)
Saharanpur	S. 4 r/w S. 25 Arms Act	27 (251)	82 (236)	51 (247)	29 (249)	57 (251)	86.90 (83)
Lakhimpur Kheri	S. 3 r/w S. 25 Arms Act	31 (138)	67 (130)	26 (136)	8 (145)	56 (145)	78.38 (37)
Mau	S. 3 r/w S. 25 Arms Act	28 (37)	72 (36)	16 (37)	24 (37)	32 (37)	31.58 (19)
Ghaziabad	S. 3 r/w S. 5 r/w S. 8 Cow Slaughter Act	32 (19)	89 (19)	95 (19)	47 (19)	68 (19)	100 (16)
Lakhimpur Kheri	S. 3 r/w S. 5 r/w S. 8 Cow Slaughter Act	30 (77)	73 (86)	100 (87)	13 (87)	83 (87)	79.25 (53)
Mau	S. 3 r/w S. 5 r/w S. 8 Cow Slaughter Act	30 (44)	84 (43)	30 (44)	50 (44)	59 (44)	100 (9)

Source: Reproduced from CES study, p. 90.

number of days required by each UTP to secure bail under these offences. Days for release on bail u/s. 4 r/w s. 25 Arms Act ranged from 2 to 113 in Ghaziabad (average of 17 days), and 2 to 393 days in Saharanpur (average of 20 days); for release on bail u/s 3 r/w s. 25 Arms Act, days ranged from 2 to 378 days in Kheri (average of 18 days), and 2 to 116 days in Mau (average of 15 days); and for release on bail u/s. 3 r/w s. 5 r/w s. 8 Cow Slaughter Act days ranged from 5 to 206 days in Ghaziabad (average of 73 days), 4 to 408 days in Kheri (average of 52 days), and 4 to 40 days in Mau (average of 12 days). However, no statistically significant relationship was found between demographic characteristics including social group, religion, occupation, education, age or domicile, and the length of time a UTP spent in jail for each District and Section/Act pairing (ibid., p. 91). A UTP's ability to access bail, is however, no doubt dependent on their access to legal representation—for which financial means are imperative to be able to pay the lawyer's fees, present stipulated sureties, and handle the costs family members need for going to court and to visit family members in jail. In the absence of means, UTPs from socio-economically disadvantaged backgrounds are forced to rely on legal aid.

Not one of the 11 UTPs interviewed who were charged under s. 4 r/w s. 25 Arms Act in Ghaziabad had access to a lawyer at the time of the interview to apply for bail, and each of them had spent more than two months in jail at the time of the interview. They had all resolved to plea bargain through the Jail Lok Adalat (JLA), which would occur on a weekly basis in Ghaziabad District Jail (ibid.). Their decisions to plea bargain were based on a combination of reasons including not having the means to access a lawyer to apply for bail, not knowing they had the right to access a legal aid lawyer, being given advice by other inmates that plea bargaining was a more fool-proof way of getting out rather than hoping that the legal aid lawyer would assist them in accessing bail, facing significant social pressure from jail writers[79] and staff to plea bargain, and/or believing that the stipulated bail requirements would be beyond their means.[80]

Figure 2.1: Ghaziabad District: Likelihood of Conviction through Plea-bargaining based on Demographic Factors for S. 4 r/w S. 25 between 01.01.14 and 31.05.15[81]



Source: Reproduced from CES study, p. 102

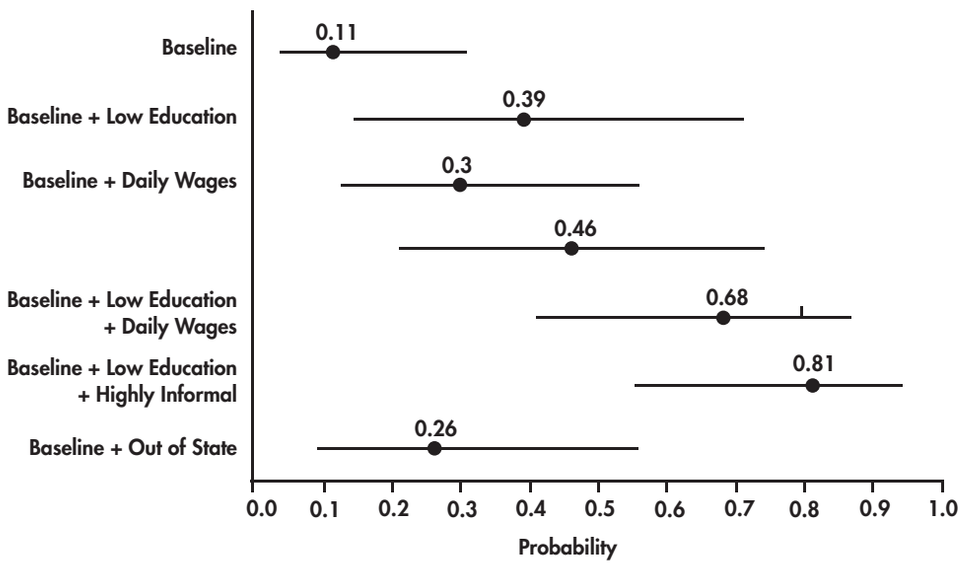
2.2.3 Inequitable Legal Outcomes

The major quantitative finding of the CES study pertains to convictions through plea bargaining versus release on bail for the offence of Sec. 4 r/w Sec. 25 of the Arms Act. Under a section titled 'Who is More Likely to Plea Bargain', the report delineates outcomes of a regression analysis conducted using data from two district jails for UTPs , charged with cases under s. 4 r/w s. 25 of the Arms Act between 1 January 2014 and 31 May 2015, to understand whether certain demographic characteristics of UTPs would make it more likely that a person would secure release through plea bargaining (thereby being convicted, and no longer having the chance to prove their innocence) or through access to apply for bail.

To have a point of comparison, the baseline for the statistical analysis was arrived at based on an assumption of socioeconomic factors which would put someone in a favourable position to access legal justice. It is described as the probability of someone who is from within the District, from the General category, ie., Hindu, has some education, and is employed in a professional line of work. The probability of someone in that category receiving a conviction through plea bargaining in Ghaziabad District Jail within the stipulated time period is 24 per cent. The analysis showed that low education, daily wage work, and the combination of low education and daily wage work had a statistically significant impact on the likelihood of someone plea bargaining (rather than securing release through bail). For those doing daily wage work, the likelihood of plea bargaining went up to 34 per cent, and for those with low education, their likelihood of plea bargaining went up to 42 per cent. Those performing daily wage work and having low education were 2.25 times more likely to plea bargain compared to the baseline.

In Saharanpur, the effects of demographic factors were found to be even greater in magnitude. The baseline here was set at 11 per cent. Low education, daily wage work, highly informal occupations and domicile all had highly significant effects on the

Figure 2.2: Saharanpur District: Likelihood of Conviction through Plea-bargaining based on Demographic Factors for S. 4 r/w S. 25 between 01.01.14 and 31.05.15[82]

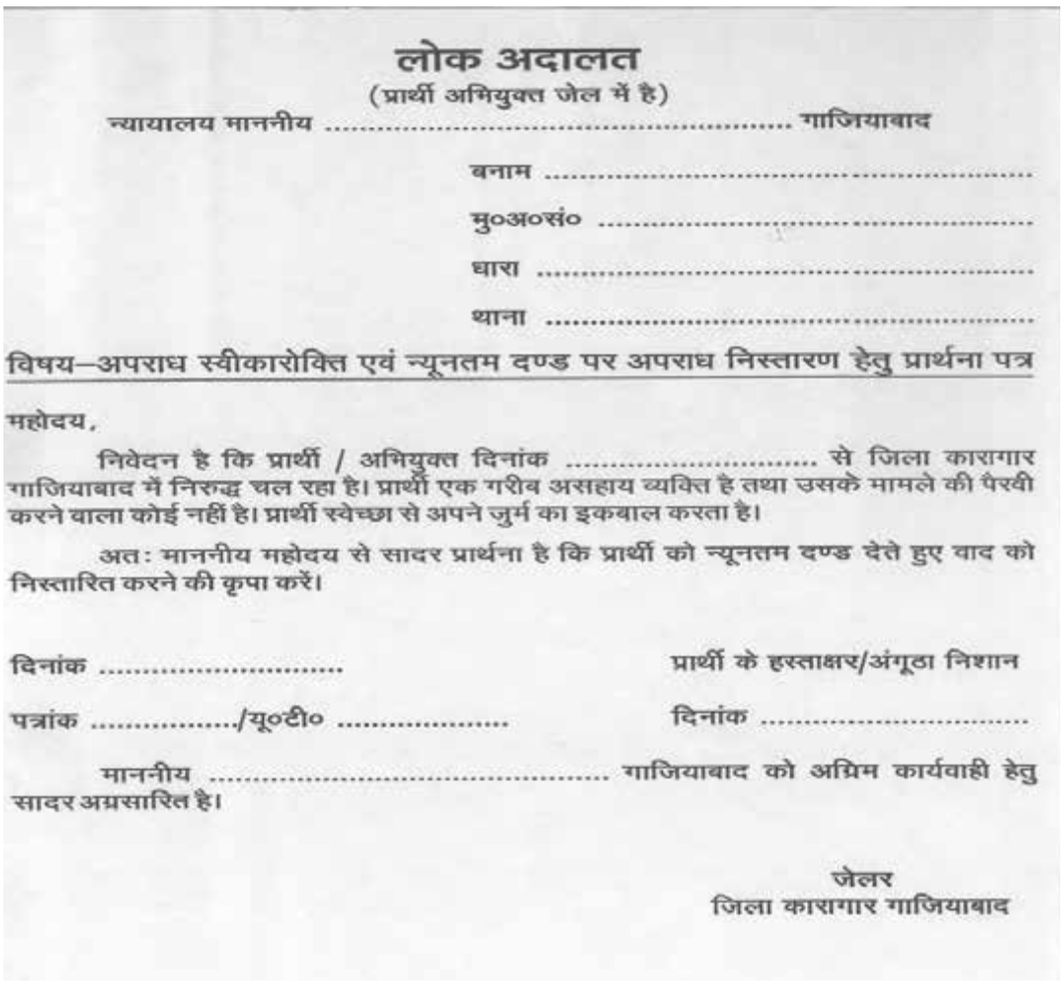


Source: Reproduced from CES study, p. 104.

probability of a UTP plea bargaining vs. getting out on bail. All other factors remaining constant, someone from out of the state is 2.36 times more likely to plea bargain than someone who is from within the state. Similarly, the baseline combined with daily wage work implied a likelihood of plea bargaining of 30 per cent, and the likelihood went up to 39 per cent when the baseline was combined with low education, implying that someone with low education is 3.55 times more likely to plea bargain than someone who has education greater than low education, all other factors being equal. In the case of highly informal occupations, the likelihood went up to 46 per cent, making them 4.18 times more likely to plea bargain. The baseline combined with low education and daily wage implied a likelihood of plea bargaining of 68 per cent. It went up even further, 70 percentage points above the baseline to 81 per cent, when the baseline was combined with both low education as well as highly informal occupations. This implies that within the study period, someone with low education working in a highly informal occupation was 7.36 times more likely to plea bargain, all other factors remaining unchanged.[83]

While the act of plea bargaining is meant to be a voluntary one, the official proforma for the application for plea bargaining through the Jail

Image 1: Pro Forma for Jail Adalat (Ghaziabad District)



लोक अदालत

(प्रार्थी अभियुक्त जेल में है)

न्यायालय माननीय ..... गाजियाबाद

बनाम .....

मु०अ०सं० .....

धारा .....

थाना .....

विषय–अपराध स्वीकारोक्ति एवं न्यूनतम दण्ड पर अपराध निस्तारण हेतु प्रार्थना पत्र

महोदय,

निवेदन है कि प्रार्थी / अभियुक्त दिनांक ..... से जिला कारागार गाजियाबाद में निरुद्ध चल रहा है। प्रार्थी एक गरीब असहाय व्यक्ति है तथा उसके मामले की पैरवी करने वाला कोई नहीं है। प्रार्थी स्वेच्छा से अपने जुर्म का इकबाल करता है।

अतः माननीय महोदय से सादर प्रार्थना है कि प्रार्थी को न्यूनतम दण्ड देते हुए वाद को निस्तारित करने की कृपा करें।

दिनांक .....

प्रार्थी के हस्ताक्षर/अंगूठा निशान

पत्रांक ...../यू०टी० .....

दिनांक .....

माननीय ..... गाजियाबाद को अग्रिम कार्यवाही हेतु सादर अग्रसारित है।

जेलर

जिला कारागार गाजियाबाद

Source: Annexure XII, CES study.

Lok Adalat in Ghaziabad District Jail (designed by the jail authorities, and used not simply as a forwarding letter but sent as the undertrial's application to court) contained the following two sentences (translated from Hindi to English): 'The applicant is a poor, vulnerable person and there is no one to assist with his/her case. The applicant would like to accept his guilt voluntarily' (Centre for Equity Studies, 2016, p.196). This language, with minor variations, was used in applications sent by each of the jails visited, indicating that the judicial authorities were abdicating their rights-protective role under the Constitution and the Cr.P.C. Instead of taking steps to provide the undertrial with legal aid as required by the law, they were instead unconcerned with the lack of legal assistance and are sustaining this highly inequitable practice. It reinforces what the statistical analysis has shown—that those with certain disadvantageous demographic characteristics related closely with a lack of financial resources and less formal schooling may be left with no choice but to plea bargain, in the absence of quality legal aid. It is also on average a very young male population that is resorting to plea bargaining for the most common offences in two jails under s. 4 r/w s. 25 of the Arms Act. This population may thereafter continue to be criminalized after becoming 'history sheeters' on the rolls of the police.

3. Processes of Exclusion

3.1 Institutional Bias in the Implementation of Law and Policy

3.1.1 Misuse of Powers of Arrest

The extent of powers of arrest conferred on the police under Chapter V of the Cr.P.C. and areas of their misuse has been discussed extensively by Law Commissions, National Police Commissions, other governmental bodies and civil society organizations.[84] In the CES study, some such practices were voiced by police officers across districts as being intrinsic to policing in order to ensure remand of those they perceived as criminals, thereby controlling further crime. This includes the excessive use of Sec. 151 Cr.P.C., which empowers the police to arrest a person without a warrant, who (according to them) is likely to commit a cognizable offence (Centre for Equity Studies, 2016, pp. 37–47 & 50–60). Special Acts are also used to charge people with the possession of unlawful materials—unlicensed arms; narcotics; and quantities of liquor above one and a half litres. A matter of concern was the admission, by police officers, of the use of these Acts to apprehend persons in the absence of other evidence against them when they are suspected of some other crime, or in order to 'punish' those perceived as habitual offenders, or as acknowledged by the Superintendent of a District, because the paperwork takes less time than an actual investigation.[85] Analysis of 98 FIRs from three districts also indicated a great similarity in narrative, thus bringing into question the credibility of the basis of arrest, and also raising questions about the use of search procedures in public places. In over 50 per cent of the FIRs, the report contained a near-identical description of personnel encountering offenders by chance during their patrol. The remaining offenders were apprehended through tip-offs from confidential informants. In one police station in rural Saharanpur, two FIRs filed 20 days apart for the same offence were found identical in language, and as per almost all the FIRs of the Arms Act and Excise Act which were reviewed across districts, the documented reason for suspecting the accused was that they quickened their pace on seeing the officers or tried to avoid crossing their paths, largely described using one of two long phrases (ibid., pp. 51–54). In some of the interviews with undertrials, and subsequently verified upon meeting their family members, it emerged that they were charged with offences they had not actually committed but were apprehended at the behest of their family members or others who requested or paid the police to do so—including

due to property or other disputes (as in the case of an 85-year-old man, charged with possession of marijuana under the NDPS Act, as admitted by his nephew; he wanted to seek revenge for not being given land by his impoverished uncle), or due to inability of the family to deal with the person's poor mental health (ibid., pp. 61, 65 and 81). It is apparent from the CES study that unnecessary arrests are a major reason for violation of rights, as well as exclusion.

3.1.2 Blatant Violations of Laws Relating to Arrest

All five UTPs charged with bailable offences in the sample of 60 interviewees across the five districts were informed neither about the charges against them, nor about their right to bail (ibid., p. 62). Instances of torture were also reported during and after arrest (ibid., pp. 61–65).

3.1.3 Biased Application of Bail Law by Police and Judiciary

The police admitted to intentionally withholding the right to bail for bailable offences at police stations. They justified this abuse of power with the following reasons: past criminal record of the arrestee, wanting to 'prevent future disturbances' or based on their assessment of the arrestee's 'criminal character' (ibid., pp. 66–67).

Further, within the judiciary, there was a great disconnect between the design of the law under Section 436(1) Cr.P.C. (a provision which allows for release on personal bond if the accused is declared indigent upon non-payment of surety within seven days), and what was practised by judicial officers across the five district courts. Aside from minor differences in their perceptions of law, each of the district judges said they do not use the provision except in the rarest of cases to avoid the risk of the person absconding (ibid., p. 83). No data was available at the courts on the numbers of people released on personal bond through Section 436(1). However, all jail and court staff interviewed also suggested that personal bond is rarely utilized.

3.1.4 Prejudice towards Disadvantaged Communities and Lack of Diversity in Positions of Authority

Both the TISS and CES studies have delineated perceptions of prejudice against certain demographic communities from the perspectives of undertrials themselves and police personnel, respectively. This is impacted in part by the composition of the police force, which is often represented by dominant caste individuals in positions of authority. A study on caste and public institutions in Allahabad conducted in 2012 revealed that a large share of police officers, High Court judges, lawyers, and executive committee members of the Bar Association were from dominant castes (Agarwal, Dreze & Gupta, 2015, pp. 45–51). It would be worth it to probe their argument on how this would reinforce caste and class divisions, by gathering relevant data with respect to the criminal justice system.

3.1.5 Misplaced Accountability and Flawed Monitoring Mechanisms:

In 2005, the Supreme Court in *Bhim Singh v. Union of India*[86] ruled that Undertrial Review Committees should be set up in each district to monitor unnecessary incarceration during pre-trial detention. However, in UP, these committees were constituted in 2015, only after the Supreme Court in *Re Inhuman Conditions in 1382 Prisons*[87] sought status of compliance of its ruling in the *Bhim Singh* case. The CES study showed that district courts have been asking prisons for monthly data on UTPs eligible for release under Sections 436A and 436(1) Cr.P.C., as also under *Bachchey Lal v State of UP and Others*[88] (which provided that in those cases where UTPs have been granted bail but are unable to produce the bail amount after two months, they may be released on personal bond). Precise data in fact

is available only with courts and not with the prisons. Further, not providing detailed criteria for how this data should be compiled contributes to further possibilities for numerous inaccuracies (Centre for Equity Studies, 2016, p. 85).

3.1.6 Denial of Quality Legal Aid

The CES study reported grossly inadequate and poor quality legal aid provisioning across the five districts.[89] The UPSLSA responded to an RTI application saying they had 'no information available' for the following questions: the number of persons who had availed legal advice in UP from legal aid schemes across police stations, courts and prisons; the number of legal awareness camps organized for UTPs during that period; whether DLSAs constitute a separate panel of senior lawyers, law firms, retired judicial officers, etc., as mandated under Regulation 9 of the NALSA (Free and Competent Legal Services) Regulations, 2010; whether surveys have been conducted to determine how many people were eligible for release under s. 436(1) Cr.P.C between 1 January 2014 and 31 May 2015, the frequency of the meetings of the Undertrial Review Committees in each district during the period from 1 January 2014 to 31 May 2015 and the outcome of these meetings—that is, the number of cases reviewed and outcomes of the same (ibid., pp. 94–95). When the questions were asked, the absence of data was evident across districts.

A majority of the work being undertaken across the five DLSAs surveyed was organizing family mediation sessions at the court for marital dispute cases and somewhat ironically, in facilitating the Jail Lok Adalats (rather than representing UTPs in their applications for bail in court). The DLSA offices were largely opaque in their dealings or inaccessible, appointments of legal aid lawyers had been delayed, legal aid panels were inactive, and in some cases allegedly not carrying out their duties due to non-payment of fees by the DLSA (ibid., pp. 94–100). Offices were managed solely by the single clerk assigned to the DLSA office, with the exception of Ghaziabad where the Secretary of the DLSA did not have dual charge, i.e., he/she did not preside over a court, unlike in other districts.[90] Deoband Sub Jail was not assigned a DLSA at all, implying that other than JLA hearings being held there once a month, UTPs had no access to legal aid services (presumably other than through the courts).[91]

As documented by numerous civil society reviews, this performance is not an anomaly for legal aid services across the country (GoI, UNDP and Multiple Action Research Group, 2012; TISS report PRAYAS, 2014; Bihar Legal Services Authority, 2015). As reported by the CES study, barriers to providing free legal aid as observed in the five districts included: inadequacy of human and material resources, low remuneration by the State for legal services, coupled with a near-absence of DLSA office resources, lack of monitoring and accountability, and most of all, the apparent lack of will on part of the state government and judiciary to make the system function optimally (Centre for Equity Studies, 2016, p. 100).

Table 3.1.7: Number of Cases Delayed for Select SLLs across District Courts[94]

Case pending for > 3 years	Banda	Ghaziabad	Kheri	Mau	Saharanpur
Excise Act	277	483	3963	548	312
Arms Act	2657	9109	6537	792	1343
NDPS Act	91	897	59	244	11

Source: Data (collected in 2015) calculated from Annexure XIV, CES study.

3.1.7 Delays in Trial[92]

The number of trials delayed for cases under the Excise Act, Arms Act and NDPS Act was high across Banda, Ghaziabad, Kheri, Mau and Saharanpur districts.[93]

With respect to the Excise Act, cases in Kheri were pending from as long ago as 1986. In Ghaziabad and Kheri, cases under the Arms Act were pending from 1985.[95] The oldest NDPS case was pending since 1987 in Kheri.

In Saharanpur, magistrates spoke specifically about why Arms Act cases in particular go on for long periods—they tend to be given low priority by magistrates themselves. There are procedural delays too in the presentation of evidence as witnesses (often police officers) are transferred to other districts and do not appear in court on time; there are also delays in presentation of physical evidence which may get misplaced in stores (ibid., p. 113). These reasons could just as well apply to delays for cases under the Excise Act and NDPS Act. Delays in trial become relevant as the fact of a large number of cases pending in court is often cited as an argument for the usage of plea bargaining.

3.1.8 Lack of Awareness of Police and Others on Aspects of Procedural Law

The CES study reported knowledge on classification of offences as bailable or non-bailable, to be inconsistent among SHOs, SIs, and HCPs alike, which in some instances meant that bail was withheld for bailable offences (ibid., p. 68). A possible reason for not granting bail in these cases (in addition to those mentioned in Section 3.1.3) was the incorrect conflation of conditions mentioned in Sec. 41(1) (b) Cr.P.C. This provision states five conditions under which arrest may be made for offences carrying seven or less years of punishment, such as the possibility that the arrestee would abscond or commit a further offence, or the belief that he/she may not cooperate with the investigation.[96] Interview responses of police officers indicated that this was found to be incorrectly applied by some officers to withhold bail.[97] No special efforts are being made for dissemination of knowledge across the police force when new laws are enacted. Trainings are confined to senior officers alone. This impacts the quality of policing.[98]

3.1.9 Illegal Practices in Prison

Interviews with UTPs and staff across all the jails studied (six total) in UP revealed a corrupt and extractive system—'*ginti*'. Undertrials are made to pay amounts ranging from INR 1200 to INR 3300 (an amount usually standardized within a jail) on entering the prison so that a fixed barrack is assigned to them. If they were unable to pay, they were assigned to work in the central area leading to the barracks or in the kitchen, often in very harsh conditions. Noteworthy though is that jail manuals of most states prohibit undertrials from being made to work against their will.[99] In one jail, a destitute, disabled man was given his barrack for 'free.' In return, he swept the barrack he was assigned to every day, out of gratitude. He was not paid for his work. Other UTPs complained of having to pay extra for a place to sleep flat at night. The need for payment of bribes was alleged to be a common feature across the institutions of the criminal justice system, for almost every interaction with a functionary. Each of these practices would have a disproportionate class impact on those who are economically weaker, impacting their ability to access quality legal assistance.

3.1.10 Staff Vacancies

Nationally, 35.5 per cent of sanctioned positions of officers, 32.71 of jail cadre staff, 37.65 of medical staff and 38.89 of correctional staff remained vacant.[100] In 27 of 35 states and UTs there was not a single sanctioned position for psychologists or psychiatrists, in 18 there was no post for a probation/welfare officer, and in 22 there was

no position of a social worker. In Uttar Pradesh, 34 per cent or one-third of positions of jail cadre staff[101] were vacant at the end of 2015.[102] Further, in the entire state of Uttar Pradesh, there was not a single post sanctioned for either social workers or psychiatrists/psychologists. There was one sanctioned position of probation/welfare officer post for the entire state. Of importance here is the fact that the correctional staff provides the much needed space for redress of legal justice grievance of prisoners, including for the most disadvantaged. They also carry out the much-needed functions pertaining to reform and rehabilitation. The nation-wide absence of positions for these posts indicates the lack of priority to reform within the custodial system.

3.2 Faulty Design of Law and Policy

3.2.1 Unjust Practice in the Name of Judicial Reform

A binary of acquittal versus conviction presupposes that fair process has been followed during investigation/trial. However, JLAs are not open to the public. There is therefore less accountability on whether procedural safeguards have been followed during the process. The CES study found that all plea bargains recorded u/s. 4 r/w s. 25 Arms Act took place at the weekly JLA held in Ghaziabad District Jail and monthly JLA in Saharanpur District Jail. The UPSLSA stated that in the 17-month period between 1 January 2014 and 31 May 2015, 5938 cases were resolved through the JLAs, implying 5938 convictions for that period in UP alone.[103] It was established through observations of three JLA proceedings in Ghaziabad, Saharanpur and Mau District Jails and through interviews with the presiding magistrate, that there were procedural limitations and inaccuracies during the process. For instance, in Saharanpur UTPs were not even presented before the Magistrate. The Magistrate looked only at the case files. Cases were observed where UTPs were convicted in the JLA for the same offence more than once in clear contravention of the law. There appeared to be lack of information and confusion among those accepting a plea bargain—both on what the consequences would be, as well as what it meant to confess to one's guilt voluntarily.

In complex cases involving mental illness and potential juvenility, there was no clear process being followed (Centre for Equity Studies Report, 2016, pp. 114–115; Commonwealth Human Rights Initiative Report, 2009, p. 44). This is further corroborated in a study by the Commonwealth Human Rights Initiative in 2009, which assessed procedural compliance through interviews with jail staff and through RTIs. The study across 10 states while finding disparities in the frequency of JLAs, also found discrepancies in determining eligibility for plea bargaining, ambiguity around the term 'petty offences', non-conformity with the provisions under Chapter XXIA for the proceedings of the JLA, and inconsistencies in sentencing practice(Commonwealth Human Rights Initiative Report, 2009, pp. 33–39). Plea bargaining in its current form is a distortion of justice, in that in the absence of fair procedure being followed it produces inequitable outcomes for those belonging to disadvantaged socio-economic backgrounds.

3.2.2 Codified Exclusionary Police Practice

The UP police manual calls for listing and surveillance of de-notified tribes and their locations in the jurisdiction based on the 'Criminal Tribes Manual'. As documented in Section 2.1, this continued institutionalization of bias against de-notified tribes is likely to contribute to unjust policing.

3.2.3 Variations in the Value of Bail Bond and Surety Requirements

Interviews of police officers across districts, in the CES study, revealed that the value of the bail

bond is determined based on factors like gravity of the offence, the penalty it carries, the amount of illegal material recovered in the case of SLLs and the economic condition of the accused. In some instances, officers stated that amounts were fixed so as to 'bind' people down and make it difficult for arrestees to secure bail (Centre for Equity Studies, 2016, pp. 68–69). Local surety (from within the district) was required in a majority of police stations across Saharanpur, Kheri, Ghaziabad and Mau, making it challenging from those outside the district to get bail from the police station (ibid., p. 69).

3.2.4 Loopholes in the Design of Sec. 436(1) Cr.P.C.

The provision states that the accused may be released on personal bond seven days after (s) he is granted bail, if (s)he is unable to furnish the surety amount. In practice, the date of next hearing is usually scheduled by magistrates at the outer limit of 15 days, which is what is permissible under Section 167 Cr.P.C. This period for remand could be much shorter but depends on the discretion of the magistrate. This implies that it is possible that if the undertrial to whom Sec. 436(1) Cr.P.C. could apply, does not have a lawyer to file an application for release on personal bond, the provision will be overlooked until the date of the next hearing, at which point the UTP would have then spent an additional seven days in prison.

3.2.5 Application-intensive Processes of the Court

The CES study found that in Dasna jail, although applications for release on personal bond for those who are eligible after the seven-day point are sent by the jail authorities to the respective courts, the applications are rarely considered, unless the undertrial has a lawyer who can argue the case (ibid., p. 82). It is unlikely that an individual without means to produce the stipulated surety would have the means to secure a lawyer. Such a person would therefore be at a disadvantage with respect to the law, if the state were not to provide a lawyer at the time of first production itself (ibid., p. 85).

3.2.5 Poor Infrastructure

Large physical distances of some jails from the main town/city, coupled with poor public transport connectivity creates a further disincentive for lawyers to meet their clients at the jail, and it also makes is difficult for family or friends to visit the inmate (ibid., p. 30).

4. Consequences of Exclusion

For the individual, incarceration results in a loss of social attainments and capabilities, and may also affect their future outcomes. The costs for human dignity are unimaginable, for the individual as well as their families. As in the case of a number of UTPs interviewed in the CES study (ibid., pp. 81, 108, 111 and 116), incarceration results in a break in the bonds of livelihood (which are often precarious to begin with, for those engaged in informal work), worsening of mental and other health conditions, as well as potentially affecting access to education and shelter for the families of those who are incarcerated. A denial of the right to bail and legal justice more broadly may, therefore, result in perpetuating cycles of poverty and widening inequalities (between both individuals and for entire communities). Consequences for families are particularly grave when the sole earner is in prison, or if the inmate is a single parent. This necessitates having to leave children in the care of others, sometimes in unsafe environments. Social oppression based on identity that exists in society on the basis of caste, community, religion, class, disability and/or gender is also often reinforced within the prison (ibid., pp. 89 and 110).

In addition to economic and ecological implications, legal outcomes may also be adversely

impacted due to incarceration. As discussed earlier, the Supreme Court has noted that a person on bail is in a better position to prepare or present his/her case and potentially prove their innocence when compared to one in custody. If someone accepts a plea bargain, it is unlikely that they can gain formal or government employment in the future due to a conviction in their record.[104] Arrest and incarceration also impacts the perceptions of others, including institutions and individuals within the criminal justice system. Even if the first arrest was unjust, if caught a second time on account of being on the police's rolls, the accused is viewed as a repeat offender.[105] At this scale, unjust practices by institutions of the criminal justice system may result in the criminalization of entire communities. There is a deep moral cost for the society as well with regard to a system that allows differential access to it; while it could help prove one's innocence, it can also facilitate inequitable outcomes based on the demographic background of the accused.

5. Resistance and Good Practice

Amartya Sen and Jean Drèze propose a concept of public action which entails action from above (by the State) and below (by class and mass organizations, political parties, individuals and non-governmental groups) (Sen & Dreze, 1989). While it is the State's imperative to put in place correctives and make the criminal justice system fair and just, redefining the scope of the public good—i.e., legal justice—is also contingent on robust public action. Grassroots action for improving access to legal justice is a challenging idea—those accused of crime are bound strictly by the rules of the system, and there is little room to negotiate actions of the State which may be unjust.[106]

A model of action from below—in reinforcing the wide scope of legal justice based on rights and entitlements for the accused by emphasizing opportunities for rehabilitation—is *Prayas*, a field action project of the Tata Institute of Social Sciences. *Prayas* works on access to legal rights and rehabilitation for undertrial prisoners in Mumbai and its suburbs and in Bharuch, Gujarat. The project's emphasis is on building support systems for families through an active court, Juvenile Justice Board and client-social worker-lawyer relationships that emphasize long-term rehabilitation focused around livelihood. There is no bar on the type of offence the inmate is alleged to have/has committed. Since its inception in 1990, *Prayas* has made incremental yet significant progress in working with the prison and court administration and producing both a change in outcomes for individuals in conflict with the law as well as knowledge production on the criminal justice system which has enabled reform (TISS Report, PRAYAS, 2015). Various organizations across the country such as the Commonwealth Human Rights Initiative in Rajasthan and West Bengal, the Vanangana Trust in Uttar Pradesh which works specifically with women prisoners, and the Bandi Adhikar Andolan, most active in Bihar have been working with the prison system through a rights-based approach. Instances of prisoners themselves being able to organize are rare. However, Soni Sori's hunger strike along with women inmates of Raipur Central Jail in Chhattisgarh to protest against their stripping and to demand decent food and health services stands out as one such example (BBC Hindi Report on Soni Sori, 2016; Hard News Media Report on Soni Sori's Hunger Strike, 2012).

6. Moving Forward: Ideas for Reform[107]

Based on the grave exclusions that exist as a result of lack of access to bail and related legal justice outcomes (in particular for petty offences), we have proposed possible recommendations. Some of these ideas are meant to serve not as the last word on how reform should be carried out, but to respond to the

constitutional, legal, policy and moral concerns that emerge from the evidence of exclusion. The attempt is to start a conversation on changes in institutional practices which may benefit those disadvantaged in their attempts to access legal systems. In doing so, we are guided by the ideas of Prof. Marc Galanter and Justice Muralidhar. The former wrote in 1974, about what is required for redistributive justice within criminal justice systems. He illustrated that equalizing access and breaking the advantage of the 'haves' in the system would not necessarily come about through a changing of the rules as the rules are not easily accessed, but by a significant increase in institution-building and the provisioning of services which can benefit everyone (Galanter, 1974). In the Indian context this could perhaps apply to the overall functioning of the criminal justice system and the impact that greater provisioning could have on ensuring more reasonable, just, and fair processes of trial.

Justice Muralidhar argues that improving the system to make it one that more adequately serves the interests of justice and equity is not merely possible with an increase in resources as much as it is on the will (of the institutions of the criminal justice system) to adapt and change (Muralidhar, 2005). Aparna Chandra has similarly argued that while the judiciary certainly suffers from a resource problem which affects access to courts, the emphasis of access to justice must be (as a perspective) one that informs '…decision making on substantive rights, to construction of procedural norms, to fashioning remedies, to the very administration of the judicial set-up' (Chandra, 2016).

6.1 Modifying the use of Plea Bargaining by Ensuring Safeguards

Our primary concern is with promoting and encouraging Alternative Dispute Resolution methods in the name of speedy justice for the poor. This must not continue, especially in the absence of institutionalized safeguards for those who plea bargain (Commonwealth Human Rights Initiative Report, 2009; Galanter & Krishnan, 2004). The following measures should be undertaken, contiguous with strengthening legal aid provisioning:

Plea bargaining through Jail Lok Adalats should be immediately stopped and the role of ADR in criminal cases more generally, should be re-evaluated. The procedure prescribed in Chapter XXIA of the Cr.P.C. should be strictly followed.[108] The UTP must also be informed of his/her right to free legal aid on first production before a magistrate. It must be a prerequisite that UTPs be offered legal representation (both for accessing bail and for the duration of their trial) before they submit applications for plea bargaining.

A video should be prepared by NALSA in conjunction with the NHRC (and translated into all local languages).This should be shown every day in prison to all inmates who have entered prison on that very day. The video should describe in detail the UTP's right to access a lawyer as well as other legal and other rights prescribed in the jail manual and through Supreme Court decisions. If plea bargaining is continued, it must be stated clearly in the video that a plea bargain would result in conviction which cannot later be appealed.

If plea bargaining is conducted, it should be in the court premises, again with full knowledge given to the undertrials about the implications. Any proforma by way of application signed by the accused must be revised to state that the applicant has understood that the plea bargain results in a conviction which cannot be appealed. Also, a standardization of procedure must be developed, with an in-person interaction between the judge and undertrial being imperative.

In light of evidence available on the shortfalls of plea bargaining in India, the Law Commission could be requested to inquire into its fair use and efficacy going forward.

6.2 Ensuring Access to Legal Aid

State Legal Services Authorities (SLSAs) must ensure implementation of the National Legal Services Authority (Free and Competent Legal Services) Regulations, 2010 and National Legal Services Authority (Legal Aid Clinics) Regulations, 2011. The central government should consider making necessary amendments to the NALSA (Free and Competent Legal Services) Regulation, 2010 for provisioning of salary payments for retainer lawyers with the District Legal Services Authority, commensurate with salary payments for prosecution officers, while also reassessing the prerequisites for empanelment as legal aid lawyers. SLSAs should make requests to the State Government for higher budgetary allocations in order to have greater parity in pay for those serving as State Prosecutors and those serving as Legal Aid retainers through salaried payments, along with a commensurate rise in the experience required to be empanelled.

The role of SLSAs needs to be re-conceptualized from the current scenario, with provisioning of legal aid lawyers and higher quality work as a priority. Separate judges should be assigned to take on the sole responsibility of Secretary-ship of the DLSAs rather than it being a dual charge. Jail visits by legal aid lawyers to meet the accused should take place at least twice a week as per the 'Standard Operating Procedures for Representation of Persons in Custody'[109] as circulated by NALSA in May 2016 (Commonwealth Human Rights Initiative Report, 2016). Further, this and other required practices including the institution of Legal Aid Clinics in each district and protocols for jail-visiting lawyers must be closely monitored by the respective DLSAs.

Designated jail visitors should go directly to barracks to provide assistance, and emphasize release on bail rather than encouraging inmates to undertake plea bargaining for petty offences. DLSAs should affirm that legal aid cannot be denied for petty offences and in fact must be encouraged. All jails not currently covered by a DLSA must be assigned to one. As discussed, under the first set of recommendations on plea bargaining, a video on legal and custodial rights should be jointly prepared by NALSA and the NHRC to be shown to undertrials after their entry into prison. State Police must implement legal aid availability at the stage of arrest under the Paralegal Volunteer (PLV) (Suryanarayan, n.d.), beyond the weekly *Thana Samadhaan Diwas*, to address the needs of those who are accused of crime and held in police custody. Further, the empanelment of PLVs by paying a monthly retainer rather than an honorarium should be piloted. In the event that PLVs are used within jails for legal aid programmes, NALSA should also prepare a similar training video of the responsibilities of the NALSA and respective DLSAs. PLVs should be told not to encourage plea bargaining practices before counselling the undertrial on their right to access legal aid. Finally, Undertrial Review Committees must also function based on the revised mandate in directions issued by the Supreme Court in February and May 2016 in *Re Inhuman conditions in 1382 prisons*.[110]

6.3 Carrying Out Legal Reforms

Surety practices should be streamlined by High Courts through an illustrative list of factors which make surety reasonable, while also ensuring that those who cannot provide surety do not languish in prison and are released on personal bond. Land registration papers and bank account details should not be made mandatory surety requirements at any court due to the disparate access that certain demographic groups may have to these means. Non-local surety should be allowed by all lower courts for surety amounts less than INR 100,000 while simultaneously requesting the police forces for an increase in resources for verification.

S. 436(1) Cr.P.C. should be factored into the

computerization of court records, to ensure that after seven days in jail, the court is notified that there are persons who are fit for release on personal bond. Ideally, an acknowledgement by the courts is needed that those who may abscond may be a small fraction of those who would benefit from retaining their personal liberty by remaining connected to their access to shelter, livelihood and other positive externalities while also remaining present in the court for their trials. Courts should as a matter of practice, allow release on personal bond for those eligible for release u/s. 436(1) Cr.P.C. and those who have been granted bail but are unable to furnish bail requirements within two months of such an occurrence.

The repeal of outdated colonial laws such as s. 4 r/w s. 25 Arms Act and other provisions under Special and Local Laws—which may be misused, operationalized in a disparate manner, and result in over-criminalization—should be debated.

The Supreme Court in *Arnesh Kumar v. State of Bihar*,[111] has already mandated that Magistrates while remanding a person to custody, using powers under Section 167 Cr.P.C., should ensure that the requirements of Section 41 are followed. Although the directions of the Supreme Court apply to arrests made for offences punishable with imprisonment for less than seven years,[112] it is recommended that Magistrates should ensure that they independently verify the need for arresting the person, before granting remand.

District Courts should pay special attention to the disposal of petty cases through trial. Trials should commence as soon as possible so that there are no undue delays in cases on account of police personnel being transferred to other districts, evidence getting lost, etc. The High Court should encourage compounding of eligible petty offences under the Excise Act and Gambling Act.

State governments should ensure the implementation of the Probation of Offenders Act, 1958 in order to create more opportunities for release on probation for those offenders who are eligible for it. This would in part involve assigning probation officers which have largely been moved to other government departments. For instance, the Delhi High Court in *Mithilesh Kumar Kushwaha v. State*[113] instructed the Delhi Government to put in place amended Rules under the Prisons Act, to take into account the necessary qualifications, training and appointment of probation officers. While this was from the perspective of the pre-sentencing stage in the case of a capital offence, the judgment recognizes that the contribution of a pre-sentencing report by a professionally trained probation officer is an 'extremely valuable tool for assessing the possibility of reform and rehabilitation of a person'. In the case of Uttar Pradesh, the UP Prisoners' Release on Probation Act, 1938 must also be implemented.

The lower judiciary should maintain all databases as required by the Supreme Court/ High Court, e.g., Sec 436A Cr.P.C., etc., instead of relying on jails to collate this data. There should be a clearer articulation of the roles of courts, jails, and police in pre-trial detention and release measures, with individual courts taking on greater responsibility and accountability. In the event that data is to be collected from prisons, instructions from court to prison staff on what is required must contain clear guidelines rather than it being assumed that prison staff are aware of the updates in the law, e.g., instructions pertaining to which offences are bailable versus non-bailable offences, how to determine eligibility under Sec 436A, etc. Overall, there is a need for individual courts to take responsibility for granting bail and disposing of cases without the need for oversight.

Budgetary and staffing issues including longstanding vacancies, and the need for better coordination within the criminal justice system must be addressed too.

For a court to consider, and be made aware

about a person being entitled to bail, it is essential to file an application. The CES study found that the access to legal aid remains poor in prisons. Until the issue of accessing effective legal aid is rectified, PLVs should be trained to draft bail applications. These applications may then be forwarded by the prison to the court, which may assign a lawyer to assist in the case.

6.4 Police Reforms

State police must establish respect for the rights of the accused by strictly enforcing the requirement that a completed arrest memo should be read out to the arrestee and that a copy of the FIR should be given to him/her free of charge. The police manual should be updated to include a clause mandating the arresting officer to read the suspect's rights contained in the Supreme Court's D.K. Basu judgement, in Joginder Kumar vs. State of UP 1994 AIR 1349, 1994 SCC (4) 260 and the Cr.P.C. The recitation should include a clear description of the nature of the charge and the suspect's rights to consult a lawyer, inform others of detention, seek medical examination, as well as their right to bail from the police station when arrested for a bailable offence. The manual should also include a definition of acceptable interrogation techniques, prohibiting the use of torture and threats to elicit information or confessions. This information should also be presented visibly on the notice board of each police station.

Due to the grave consequences of arrest and incarceration, it is imperative that senior police officers closely monitor arrests under Special and Local Laws to ensure that individuals are not being arrested under false charges.

A circular/notification should be issued by all state police clarifying the difference between bailable and non-bailable offences as classified in the Cr.P.C. and the right to bail for bailable offences at the police station. The circular should also provide a complete list of applicable bailable offences within the IPC and all Special Acts. SHOs must ensure that arrests under Special and Local Laws are not being made under incorrect pretexts. Magistrates should provide proper oversight of the process as required by the law.

There is also the need to consider standardizing the validity of non-local surety across districts rather than leaving it to the discretion of the officer-in-charge at individual police stations and encourage release on personal bond alone for bailable offences. It is equally important to provide a list of illustrative factors, for each state to be considered, while setting bail conditions at the police station. Along with the list it is imperative to emphasize that for petty offences, the number and amount of sureties should be commensurate with economic status of the arrestee, as also the gravity of the alleged offence such that they may be able to furnish surety as per their means.

Police Complaints Authorities (PCAs) need to be established wherever they are not currently active at the state and district level as mandated by the Supreme Court in *Prakash Singh and Ors. v. Union of India and Ors,* to ensure that a certain level of external accountability exists. Rectify codified practices of profiling (including within the content of training at police academies) and unnecessary surveillance within the police manuals of all states, and conduct trainings to discourage these practices. Remove clauses in the police manual that refer to the Criminal Tribes Act and Habitual Offenders Act, wherever they exist, and amend/delete the language in clauses pertaining to the creation of history sheets in order to account for the potential for reform for all offences.

Particulars of age, religion, social category/caste, education, occupation and monthly income should be recorded in the Crime Register, as should all bail details in the Bail Register if bail is accessed at the police station.

In the course of the CES study, researchers observed that police personnel were working with poor infrastructure and in difficult conditions, which is likely to affect both their morale and performance (Centre for Equity Studies, 2016, p. 72). In light of this, we propose the following improvements to working conditions for police personnel:

a. Consider the following changes in recruitment, training and deployment of personnel—Recruit officers at only two levels, i.e., Constables and I.P.S., as recommended by the 5th National Police Commission, to allow Constables opportunities for promotion and necessitate in-service training on investigative techniques and the law. Promotions can be based on the completion of relevant trainings, tests and work experience.

b. Hire civilian staff for clerical and administrative work at police stations and increase the number of investigative positions, as recommended by the Padmanabhaiah Committee on Police Reforms in 2000.

c. Instate a committee/working group in each state to develop a feasibility and implementation plan for the separation of investigative and law and order personnel and develop a plan to reduce the proportion of vacancies, particularly for sub-inspectors and below.

d. Establish a workplace grievance redress body for police personnel, comprising non-police personnel.

e. Develop a plan to reduce law and order duties related to VIP security/escorting along with devising a set of guidelines to determine how much police protection is required when requested (for both VIPs and civilians, i.e., also in the case of witness protection).

f. SHOs should post a work schedule each month that includes shifts and duty rotation, time for rest and recreation, and planned leave. Mandate a weekly day off for all police personnel at and below the rank of sub-inspector.

g. Finally, respective state governments must consider increasing budgetary allocations and capacity building for staff across all police departments.

6.5 Prison Department Reforms

State governments, prison departments and jail authorities must work together to ensure the following measures to make the custodial system more open and less exploitative:

a. State governments should fill non-custodial staff vacancies in prisons immediately, create posts for welfare and other correctional officers at each prison, and constitute the Board of Visitors under the Prison Act 1894 with immediate effect wherever they are not so far in place. Board of Visitor rules should be drafted for all states and the list of inquiries that visitors are responsible to establish answers for, must include special problems of youth, persons with disability, women, and other disadvantaged groups.

b. Prison authorities must also ensure that the illegal practice of *ginti*, that is prevalent in the jails of Uttar Pradesh and elsewhere, ends with immediate effect.

c. Prison authorities should encourage entry of jail visitors and legal aid lawyers to the barracks and not restrict them to the jailor's office or central *chakkar* area to ensure that there is greater access to legal aid visitors for UTPs.[114]

d. Jail authorities should also conduct regular reviews of UTPs imprisoned for petty offences and forward relevant cases to the

respective DLSA and District Judge for appropriate action, including granting of timely legal aid and facilitating release on personal bond wherever possible, instead of encouraging plea bargaining.

e. In the absence of a functioning DLSA performing the designated role, the jail authorities must provide information to UTPs about the consequences (including a formal legal conviction) of pleading guilty prior to acceptance of their application for the Jail Lok Adalat. This can be done by facilitating screenings of the proposed video at regular intervals.

f. Finally, the state government and prison department should develop greater avenues for rehabilitation of inmates following their release and provide access to civil society organizations working for this purpose. It must not be forgotten that no period of incarceration is too short to have an effect on someone who is socio-economically disadvantaged. State governments must also ensure that they have in-house de-addiction facilities at prisons while incarcerating drug addicts. They should also ensure timely payments for those working in prison.

As noted in the CES study, some jails are on the outskirts of cities, and thus sometimes difficult to access. This could hamper both visits by families as well as those by lawyers, which could in turn impact UTPs' access to legal assistance. State governments must do all they can to ensure that jails are well connected via public transport.

6.6 Addressing Data Gaps and Inaccuracies

Massive data gaps currently exist across police, custodial and court settings. Police must record demographic information for arrestees as well as complete bail information for those who have been released on bail from the police station. Once prison entry records are computerized, NCRB should expand the scope of their data collection to include aspects such as the duration of stay of the inmates under incarceration based on the type of offence they have been charged under.

Related to data gaps is the issue of public authorities being given the allowance to fix the fee to be paid, with a request for information under the Right to Information Act. The Allahabad High Court, for instance, has an application fee of INR 500 per question, with an additional charge of INR 15 for per page of information provided, which is prohibitive for most citizens in need of basic information.[115] This must be reconsidered across High Courts where differential fees exist above the INR 10 requirement otherwise asked for, with a simultaneous need to increase human resource infrastructure to address supply side concerns and also create systems for recording information which should be publicly available.

Jails must also be given information on how to collect data required by the NCRB—categories such as 'No. of prisoners to whom legal aid was provided' must be explained to the jail authorities before data is collected, and those explanations must also be provided when the data is published.[116] Accuracy of NCRB data was called into question in the CES study, where the NCRB annual Crime in India report (2014) provided an annual total figure of 725 as the number of cases under all Special and Local Laws disposed of through plea bargaining nationally[117] with numbers of cases disposed through plea bargaining under the Arms Act, NDPS Act, and Excise Act (1944) being reported as 8, 9 and 48, respectively.[118] These numbers are far too low to be considered accurate, after determining what the numbers of cases resolved through plea bargaining were for the period from 1 January 2014 to 31 May 2015 across four districts in Uttar Pradesh alone.[119] The cases reported, under the Excise Act, as convictions through plea bargain

from the subordinate courts (which provided data) were 6492, with an additional 638 reported under the Arms Act, and 68 under the NDPS Act.[120]

6.7 Civil Society Imperatives

Interested individuals, academic institutions and social sector organizations can play an important role in making criminal justice institutions less opaque, by being involved through initiatives such as PLV programmes and other legal aid initiatives, participating in the Board of Visitors for jails and in judicial and police training initiatives, and developing rehabilitation programmes. Due to the high likelihood of jail populations being invisibilized, there remains a need to build solidarities across labour, feminist, Dalit and other progressive movements around issues of those disadvantaged in their access to legal justice.

Endnotes

1. The authors would like to thank Sana Das and Vijay Raghavan for their careful review of this chapter, Harsh Mander for his contributions to the recommendations section, IXR collaborators for their inputs at various stages of the writing process, and Rajanya Bose for all her help in coordinating the drafts of the chapter.
2. For a study on systemic factors that affect the extent to which litigants in India are able to enforce their rights in court, please see: Krishnan, J. et al. (2014).
3. In this essay, our emphasis is on evaluating the inclusive nature of formal legal systems. Informal institutions and networks are not under its purview.
4. Hussainara Khatoon (I) v. Union of India, (1980) 1 SCC 81, 83.
5. (2015) 13 SCC 605.
6. Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273. See also: Sibiddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694.
7. India ratified the convention while making certain declarations which deferred to the Constitution of India regarding certain articles.
8. Noor Aga v. State of Punjab, (2008) 16 SCC 417.
9. See Ibid.
10. Vaman Narain Ghiya v. State of Rajasthan, (2009) 2 SCC 281.
11. Ibid., 287.
12. Ibid. See also: Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240, 245.
13. Ibid.
14. (2011) 1 SCC 694.
15. Ibid., 709.
16. Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra Pradesh, (1978) 1 SCC 240, 244.
17. See: Gudikanti Narasimhulu v. Public Prosecutor, (1978) 1 SCC 240, 242.
18. Proviso to Section 436(1).
19. Explanation to Section 436(1).
20. (1978) 4 SCC 47.
21. Ibid., 52.
22. Ibid.
23. Ibid., 49–50.
24. Ibid., 57.
25. (1980) 1 SCC 81.
26. Ibid., 85.
27. Ibid.
28. Ibid., 86.
29. (2012) 1 SCC 40.
30. (2012) 1 SCC 40, 52.
31. (2012) 1 SCC 40, 63.
32. State of Rajashtan v. Balchand, (1978) 4 SCC 308, 308.
33. (1978) 1 SCC 240, 242.
34. Ibid., 244.
35. Ibid., 246.
36. (1980) 1 SCC 98.
37. (1980 1 SCC 98, 103.
38. (1981) 1 SCC 627.
39. Ibid., 631.
40. (1986) 2 SCC 401.
41. See: Nandini Satpathy v. P.L. Dani, (1978) 2 SCC 44, D.K. Basu v. State of West Bengal, (1997) 1 SCC 416, State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600, Directorate of Revenue Intelligence v. Jugal Kisore Samra, (2011) 12 SCC 362.
42. State (NCT of Delhi) v. Navjot Sandhu, (2005) 11 SCC 600.
43. Para. 167.

44. Noor Aga, para. 71.
45. (2014) 4 SCC 747.
46. Debbarma, para 39.
47. Chapter XXIA, Cr.P.C.
48. Lok Sabha Debates: Motion for consideration of the Criminal Law (Amendment) Bill, 2005 on 22 December, 2005.
49. Section 265A(1), Cr.P.C.
50. Section 265B(2), Cr.P.C.
51. Section 265B(4), Cr.P.C.
52. Section 265C, Cr.P.C.
53. Sections 265C, Cr.P.C.
54. Section 265E, Cr.P.C.
55. Section 265G, Cr.P.C.
56. Section 265A(1), Cr.P.C. See also Commonwealth Human Rights Initiative, 2009.
57. When police personnel were asked across districts about their perceptions regarding the purpose of arrest, their responses indicated two broad aims: first, arrest for the prevention or control of crime (including through preventive detention provisions in the Cr.P.C. such as u/s. 151 Cr.P.C. but also through targeted arrests for offences under Special Acts such as the Excise Act, Arms Act, NDPS Act and UP Prevention of Cow Slaughter Act which they consider as being 'preventive' as they are 'the root of crime' or 'lead to larger crimes'). Second, arrest to ensure remand. Practices encouraging arrests under these Acts as targets for police stations were also reported by a few interviewees, including sub-inspectors. Recording information under these offences was therefore brought under the ambit of this study. For more details, please see: CES study pp. 37–43 and 50–60.
58. For methodology and data sources, please see pp. 16–35 of the CES study cited above.
59. The districts covered were Saharanpur and Ghaziabad in the west, Banda and Kheri in central UP and Mau in east UP. Six jails were covered—the District Jails in each of the district, as well as the Sub Jail in Deoband, Saharanpur.
60. Calculated from Govt. of India. (2015). NCRB Prison Statistics in India: 'Table 5.2 – Demographic Profile of Undertrial Prisoners at the end of 2015 (Continued)'p. 103. Religion-wise population: 69.77 (Hindu); 20.94 (Muslim); 3.87 (Sikh); 3.67 (Christian); 1.76 (Others) Caste-wise population: 21.67 (Scheduled Caste); 12.41 (Scheduled Tribe); 31.48 (Other Backward Classes); 34.43 (General). Retrieved December 22, 2016, from http://ncrb.nic.in/StatPublications/PSI/Prison2015/TABLE-5.2.pdf
61. Ibid.
62. Calculated from figures in Item 3.4 from UP Prison Statistics provided in Annexure II of Centre for Equity Studies (2016).
63. Calculated from Govt. of India. (2015). NCRB Prison Statistics in India: 'Table 5.2 – Demographic Profile of Undertrial Prisoners at the end of 2015' p. 102. An undertrial prisoner is one against whom there is a charge of violation of law, but against whom this charge has yet not been proven, and who is being kept in judicial custody and has not been released on bail. The individual remains in prison till he or she is released on bail, or is discharged or acquitted in the case, or is convicted and released on completion of sentence, payment of fine, admonition, or probation.
64. Muslims constituted 14.23 per cent of the national population based on Census of India 2011 figures.
65. AIR 1994 SC 1349.
66. AIR 1997 SC 610.
67. Centre for Equity Studies (2016).
68. Ibid., p. 66. A range of reasons for the variation in percentages of those securing bail at the police station were provided by police personnel across districts, some of which were reported across districts, and others unique to specific practices and local contexts.
69. Ibid., p. 74. Offences included s. 60 Excise Act (possession of more than 1.5 litres of liquor), s. 13 Gambling Act, s. 279, 304A and 338 IPC, s. 279 and 338 IPC, s. 309 IPC, s. 323, 325 and 504 IPC, and s. 60 r/w s. 72 Excise Act.
70. Ibid., p. 75.
71. Ibid., p. 76.
72. Section 294, IPC punishes doing an obscene act, or uttering/singing/reciting an obscene song/ballad/words, in public.
73. Ibid., p. 77 Offences included s. 3 r/w s. 4 of the Gambling Act, s. 60 Excise Act, s. 294 IPC, s. 143 Railways Act, and s. 145 and 156 Railways Act.
74. Ibid., p. 78.
75. Ibid., p. 77.
76. Ibid., p. 79.
77. Ibid.
78. Reproduced from CES study, p. 88.
79. Writers are undertrials and convicts who work in undertrial and convict offices in the respective jails where they are incarcerated. It is a position that is vied for, as it enables the inmate to assist in office work while also getting access to certain informal privileges. A strong culture was observed across jails of persons in relative positions of power within the prison encouraging inmates to plea bargain. See CES study, pp. 109–110.

80. Ibid., pp. 91–92.
81. For the given period, out of the 486 UTPs u/s. 4 r/w s. 25 Arms Act, 347 secured release through bail, 132 obtained convictions and secured release through plea bargaining, and the remaining 7 UTPs were still in jail at the time of data collection. The percentage of those plea bargaining was 27.58.
82. For the given period, out of the 251 UTPs charged u/s. 4 r/w s. 25 Arms Act, 167 UTPs secured release through bail, and 84 UTPs secured release by obtaining convictions through plea bargaining. The percentage of those plea bargaining was 33.47.
83. Centre for Equity Studies (2016).
84. For more details, see: Bureau of Police Research and Development. (1980). *Report of the Third National Police Commission*; Law Commission of India. (1994). *One Hundred and Fifty Second Report on Custodial Crimes*. New Delhi: GoI; Law Commission of India. (1996). *One Hundred and Fifty Fourth Report on The Code of Criminal Procedure*. New Delhi: GoI as cited in Centre for Equity Studies. (2016). *Access to Justice in Uttar Pradesh: A Pilot Study in Five Districts.* p. 31.
85. Ibid., pp. 42 and 56.
86. (2015) 13 SCC 605.
87. Writ Petition (Civil) No. 406/2013.
88. Allahabad High Court Crl. PIL no. 2357 of 1997.
89. This was based on data gathering from the UP State Legal Aid Services Authority (UPSLSA), and DLSA offices, as well as interviews with jail staff and inmates.
90. The position of Secretary DLSA is usually assigned to a judge of the rank of Civil Judge (Senior Division).
91. Centre for Equity Studies (2016), p. 99.
92. The 245th Law Commission Report titled 'Arrears and Backlog: Creating Additional Judicial (wo) manpower' defines 'Delay' as 'A case that has been in the Court/judicial system for longer than the normal time that it should take for a case of that type to be disposed of.' Applied to cases pertaining to petty offences under the Excise Act, Arms Act and NDPS Act which are tried in subordinate courts, we have assumed a reasonable trial completion period of three years. The cut-off period for calculating delays based on year-wise pendency figures would therefore be cases pending since 2011 and earlier, as data collection took place in the year 2015.
93. Data calculated from Annexure XIV of Centre for Equity Studies (2016). Data from select courts in each district was unavailable.
94. Data from select courts in each district was unavailable.
95. Case of Mohan, p. 110.
96. Section 41(1)(b)(ii), Cr.P.C.
97. See also Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273.
98. Centre for Equity Studies (2016), pp. 38 and 71.
99. Ibid., p. 89.
100. Figures calculated from Govt. of India. (2015). *NCRB Prison Statistics in India*: Table 11.1 – Sanctioned and Actual Strength of Jail Officers/Staff as on 31 December 2015. New Delhi. Pp. 146–149.
101. Including 'Head Warder', 'Warder', and 'Others'.
102. Centre for Equity Studies (2016), p. 30.
103. Ibid., p. 95.
104. See Pawan Kumar v. State of Haryana and Anr1996 SCC (4) 17.
105. Centre for Equity Studies (2016), p. 112.
106. The authors suggest that action may be 'collaborative', through civic cooperation, or 'adversarial', through political opposition and social criticism.
107. Many of these recommendations are a subset of those included in the CES study, pp. 126–132.
108. Emphasized also in Pawan Kumar v. State of Haryana and Anr1996 SCC (4) 17.
109. Standard Operating Procedures available on the NALSA website at http://nalsa.gov.in/sites/default/files/document/SOP-%20Persons%20in%20Custody.pdf
110. Detailed analysis of the Supreme Court orders are available on the Commonwealth Human Rights Initiativewebsiteathttp://www.humanrightsinitiative.org/download/1475562698Guiding%20Note%20on%20the%20expanded%20mandate%20of%20the%20UTRC.pdf
111. (2014) 8 SCC 273.
112. Section 41(1)(b), Cr.P.C.
113. Crl. A. No. 249/2011.
114. Centre for Equity Studies (2016), p. 96: The jail visitor in Banda reported that he was not allowed to go into the barracks and usually met inmates in the Superintendent or Jailor's office.
115. Allahabad High Court (Right to Information) Rules, 2006: http://www.allahabadhighcourt.in/rti/. As referenced in Centre for Equity Studies (2016), p. 117.
116. Govt. of India (2015) NCRB Prison Statistics in India 2015: Table M.6 'Rehabilitation of Prisoners during the Year 2015'. The figure provided for total number of people being provided with legal aid was 94,673, without an explanation of what 'legal aid' entails or how the data was tabulated at the prisons.
117. NCRB Crime Stats 2014, Table 4.7: 'Disposal of SLL Criminal Cases by Courts During 2014'. as cited in Centre for Equity Studies (2016), p. 125.

118. Ibid.
119. Ghaziabad, Kheri, Mau and Saharanpur.
120. Centre for Equity Studies (2016), pp. 117–125. We concur that the additional five-month period of the CES study data cannot possibly account for the number of cases exceeded over the estimate provided by the NCRB.

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