

# **PUNISHMENT WITHOUT PRISON: CAN INDIA REIMAGINE CRIMINAL JUSTICE BEYOND INCARCERATION?**

*by*

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## **ABSTRACT**

Currently, the Indian criminal justice system faces a serious issue with incarceration. The occupancy of prisoners is 573,220 in places built to accommodate only 425,609 inmates, and undertrials are 75.8% of the total prison population. This indicates that the current imprisonment-focused approach to punishment has failed in several aspects such as rehabilitation, deterrence, and public safety.

The following paper will provide an assessment of India's ability and need to re-evaluate its criminal justice system beyond relying on incarceration as the primary means to address crimes. Through employing a doctrinal, comparative, and socio-legal research method, the discussion will look at theories underlying non-penal punishment. The study will examine the legal obligations that can be gleaned from Article 14 and Article 21 of the Constitution of India, taking into consideration the lack of use of present non-institutional measures under the Probation of Offenders Act 1958 and the newly passed Bharatiya Nyaya Sanhita 2023. Furthermore, the following paper will discuss relevant court rulings such as *Hussainara Khatoon v Home Secretary, State of Bihar*, *Arnesh Kumar v State of Bihar*, and *Bachan Singh v State of Punjab*.

With reference to comparative case examples of Norway, New Zealand, Japan, and South Africa, this essay provides an overview of various alternatives to incarceration across the globe, ranging from community-focused and restorative justice initiatives to forms of supervised probation. The primary claim put forward by this analysis is that the

overrepresentation of marginalized groups in India's prison system, alongside the social and economic implications of incarceration, and the inherent constitutional right to human dignity combine to demonstrate that criminal penal reform is not only imperative but also mandatory in India. In terms of specific policy recommendations, these include a comprehensive Sentencing Code, an overhaul of probation services, a National Restorative Justice Model, the establishment of open prisons, and reforms to the existing system of bail. At the center of the core thesis is the notion that punishment, in a democratic constitutional state, should primarily aim at achieving accountability and restorative justice.

**Keywords:** Non-carceral punishment; Restorative justice; Alternative sentencing; Prison reform; Human dignity.

## I. INTRODUCTION AND RESEARCH PROBLEM

The prison stands out as the foundation stone of the criminal justice system both in today's legal philosophy and common perception. Therefore, when something is labeled as a criminal activity, one expects there to be a possibility that the perpetrator might serve time in jail as part of his/her punishment. But such thinking, assuming that the prison is a necessary condition for punishment in all societies past and present, has neither universal historical roots nor empirical basis. It emerged from the interaction of Enlightenment theory of punishment, industrial capitalism, and colonial rule in the eighteenth and nineteenth centuries.

Within the Indian scenario, however, the prison-centered approach has an even more disturbing historical background. Being borrowed entirely from colonial times, the Indian Prisons Act, 1894 is still relevant and reflects a system of institutions meant more for containment and discipline of the subject population than for any other purpose.<sup>1</sup> Despite the constitutional order based on the ideals of equality, dignity, and rule of law, free India has managed to retain the colonial system quite well. As per the report "Prison Statistics India 2022" published by the National Crime Records Bureau, there are 573,220 people incarcerated within institutions that have a capacity of only 425,609.<sup>2</sup>

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<sup>1</sup>The Prisons Act 1894 (India). The Act, enacted by colonial authorities, continues to govern prison administration in the absence of comprehensive replacement legislation in most Indian states.

<sup>2</sup>National Crime Records Bureau, *Prison Statistics India 2022* (Ministry of Home Affairs 2023).

From among the total prisoners, 75.8%, which is around 434,000 individuals, have not been convicted of any crime. They are the under trials who are waiting for the outcome of a case that can last from a few years to several decades. This situation shows us a constitution-based state where, in actuality, the presumption of innocence of law has been ignored for a large majority of the people imprisoned in it. These figures indicate the everyday existence of humiliation, loss of means of living, breakdown of homes, and postponement of justice. In addition to this, it indicates the inefficacy of the system which spends a lot of public money but does little good to society.

The core research issue being tackled in this paper has to do with the ability of India to formulate an efficient, constitutional and humanitarian framework of criminal justice which does not necessarily see jail time as the ultimate punishment when criminal acts are committed. The recently introduced Bill called the Bharatiya Nyaya Sanhita 2023 (BNS) is one example of how this has been made possible since it makes it clear that community service is a type of punishment according to Indian statutory criminal law. It is important to note that this legislative advancement is a great chance considering that in law, punishment need not mean imprisonment.

The paper is divided into thirteen parts. It begins with a consideration of the research objectives, questions, and hypotheses, after which follows a careful analysis of the methodology used in the study. The other parts of the paper include the literature review, the analysis of the constitutional background, the analysis of the legal mechanisms available, the discussion on the judicial approach, the discussion on restorative justice, the analysis of other models available, and the discussion on the difficulties in implementing the ideas discussed. The paper ends with specific recommendations, together with the summary of findings. From beginning to end, the paper considers constitutional values reflected in Article 14 and Article 21, facts about the effectiveness of non-custodial measures, and human considerations in light of India's prison problem.

## II. RESEARCH OBJECTIVES

This paper is guided by the following research objectives:

1. To explore the theories of retribution, utilitarianism, and restoration that provide the philosophical bases of non-punitive models of criminal punishment and analyze their appropriateness in the Indian legal framework.
2. To study the provisions contained in Articles 14 and 21 of the Constitution of India with respect to the legitimacy, need, and inevitability of the development and implementation of non-custodial approaches to sentencing in the Indian legal system.
3. To review existing non-custodial sentencing tools employed in India according to current criminal legislation, including probation, parole, fines, community service, and open prisons, and analyze the reasons for the underutilization of these tools in the country.
4. To evaluate the approach chosen by the Indian higher courts in alternative sentencing and define the principles that have been established by landmark rulings handed down by the Supreme Court of India and other higher courts.
5. To perform a comparative analysis of non-punitive criminal justice systems operating in several selected countries, namely Norway, New Zealand, Japan, and South Africa, in order to draw lessons relevant to India.
6. To generate evidence-based recommendations for reforming the criminal justice system in India and shifting away from punitive measures toward non-incarcerative alternatives while maintaining accountability, victims' satisfaction, and public safety.

### III. RESEARCH QUESTIONS

This paper seeks to address the following primary and subsidiary research questions:

Main Research Question: Is it possible that in India there could be developed a criminal justice system where non-custodial forms of punishment such as restorative justice processes, community supervision, probation, open prisons, community service, and reparation would become the main form of punishment in cases when crime has occurred?

Subsidiary Research Questions:

1. What are the philosophical and empirical reasons for replacing or supplementing the traditional method of imprisonment with non-carceral methods in the Indian criminal justice system?
2. To what degree is there a constitutional requirement for the development and application of non-carceral punishment systems by the Indian State?
3. What are the structural and other impediments that prevent proper use of non-carceral measures by India's criminal justice agencies, and what are the solutions to overcome such impediments?
4. How could India benefit from international best practices on non-carceral justice systems?
5. Which changes in legislation, case law, and administration are needed to move towards a community-based criminal justice system in India?

#### IV. RESEARCH HYPOTHESES

The paper proceeds upon the following working hypotheses, which the subsequent research and analysis sections aim to substantiate:

Hypothesis 1: The criminal justice system of India based on prisons is intrinsically unable to provide rehabilitation, proportionality, or victim justice, and therefore its perpetuation as the primary form of punishment is constitutionally unsustainable as per Articles 14 and 21 of the Constitution.

Hypothesis 2: The use of non-custodial approaches like restorative justice, community work, probation, open prisons, and supervised release is more effective than similar custodial approaches in regards to reducing recidivism rates, victim satisfaction, and efficiency costs.

Hypothesis 3: The consistent non-exploitation of the existing alternative non-custodial measures through the provisions of the Probation of Offenders Act 1958 and other laws is because of some structural weaknesses within these systems, including inadequate infrastructure, poor professional training, and lack of political will, rather than any intrinsic unsuitability of the measures to India.

Hypothesis 4: Implementation of a full Sentencing Code, whereby there is a presumption against imprisonment of first time offenders who are not violent offenders, will significantly decrease the number of prisoners without compromising public safety.

Hypothesis 5: For successful reform of the Indian criminal justice system, both legislative reform and an essential change in the culture of the institution, i.e., police, prosecutors, magistrates, and jail superintendents, are necessary, which can be brought about through professional training and evaluation and through judicial leadership .

## V. RESEARCH METHODOLOGY

The methodology employed in this paper is a pluralistic one, combining doctrinal legal analysis with comparative, empirical, and socio-legal analysis. There is an intentional use of such diverse methodologies because this particular research problem requires not only the empirical examination of the effectiveness of different modes of punishment but also the comparative examination of how other jurisdictions have dealt with the same issue, as well as the broader context in which the Indian criminal justice system functions.

### A. Doctrinal Legal Analysis

Doctrinal research refers to the systematic study of sources of law. The sources of law are constitution, statutes, sub-statutes, and case law. Constitutional provisions considered here include Articles 14, 19, 21, 39A, and 41. Statutes under scrutiny include Bharatiya Nyaya Sanhita 2023, Bharatiya Nagarik Suraksha Sanhita 2023, Probation of Offenders Act 1958, Juvenile Justice (Care and Protection of Children) Act 2015, and the Model Prisons and Correctional Services Act 2023. The cases analyzed are those heard by the Supreme Court of India and some High Courts with regard to their normative dimensions as well as the use of non-custodial measures.

### B. Comparative Legal Analysis

The comparison involves a systematic assessment of criminal justice systems in Norway, New Zealand, Japan, and South Africa that do not rely on incarceration as a mode of punishment. The chosen countries stand out because they have unique and efficient models of criminal justice that do not involve incarceration. The methodological approach to compare will be that of engaged comparison, which is premised on using comparison as a means of engaging with the Indian model of criminal justice and not imposing norms on it.

### C. Socio-Legal Analysis

The socio-legal aspect is based on criminology, penology, and empirical studies. The statistical data from the National Crime Records Bureau, Prison Statistics India, 2022; Report No. 268 and Report No. 277 by Law Commission of India;<sup>3</sup> and the conclusions of

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<sup>3</sup>Law Commission of India, *Wrongful Prosecution (Miscarriage of Justice): Legal Remedies* (Law Com No 277, 2018).

the Mulla Committee and Malimath Committee have been included in order to base the normative analysis on actual situations in India's criminal justice system.

#### D. Limitations

These limitations include the lack of complete publicly available statistics in India related to recidivism rates and success stories of probationers. Moreover, owing to the diversity of the Indian social environment, there is no guarantee that any conclusions drawn from the study of the viability of reform implementation in one particular Indian state would be applicable to another one. These limitations only emphasize the importance of proper planning and reform implementation based on sound evidence.

## VI. LITERATURE REVIEW

### A. Penological Theory and the Critique of Imprisonment

The book *Discipline and Punish* by Michel Foucault, which was published in 1977, examines the development of the modern prison as a form of discipline, with the fundamental purpose being the production of 'docile bodies' within the context of an industrialized society. While Foucault's work has played a vital role in shaping the critical criminology movement referred to as the carceral turn, it is not without controversy due to its deterministic stance.<sup>4</sup>

According to David Garland's book *The Culture of Control* (2001), the move towards punitive criminal justice systems can be understood through a historical understanding. This book explains how the emergence of populist punitiveness in the late modern period, combined with the waning influence of the concept of rehabilitation, led to the growth of mass incarceration. The analysis presented by Garland in this book holds significant relevance to Indian society, considering that the same conditions prevail there, such as those generated by media-fueled moral panic.<sup>5</sup>

The abolitionist theory in critical criminology is exemplified by works such as *Are Prisons Obsolete?* (2003) by Angela Davis and *Golden Gulag* (2007) by Ruth Wilson Gilmore.

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<sup>4</sup>Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan tr, Allen Lane 1977).

<sup>5</sup>David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press 2001).

Both argue that prisons are racially entrenched social mechanisms that are immune to any sort of reform from within. Even though the abolitionist theory will not be completely accepted in this study, the insights gained from the abolitionist theory form an important analytical perspective to interpret the structural elements of the Indian incarceration system.<sup>6</sup>

### B. Restorative Justice Theory

Crime, Shame and Reintegration by John Braithwaite (1989) has been seen as one of the seminal works on the theory of restorative justice. Braithwaite talks about the notion of 'reintegrative shaming', which is a method of community-based shaming designed to address the consequences of punishing offenders, such as their stigmatization and tendency towards criminal behavior.<sup>7</sup> In the meantime, the work of Howard Zehr titled *The Little Book of Restorative Justice* (2015) has become one of the most quoted sources on restorative justice.<sup>8</sup>

In terms of the Indian scenario, the body of literature on restorative justice has not been sufficiently developed. The report by the Mulla Committee and the report by the Malimath Committee are perhaps the best assessments available regarding the situation in India's prisons and offer an alternate solution.<sup>9</sup> The Report No. 268 on 'Open Jails and Their Utility' by the Law Commission is one that discusses this topic thoroughly.

The Indian criminological scholarship on incarceration and prison reform, while less voluminous than its Euro-American counterparts, has been growing in analytical rigour. The Commonwealth Human Rights Initiative has produced several critical fact-finding reports on the state of Indian prisons, documenting conditions of severe overcrowding, denial of basic sanitation, and systemic deprivation of legal rights.<sup>10</sup> The work of scholars associated with the Tata Institute of Social Sciences has been particularly significant in connecting empirical prison data to questions of legal reform, documenting how

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<sup>6</sup>Angela Y Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003); Ruth Wilson Gilmore, *Golden Gulag: Prisons, Surplus, Crisis, and Opposition in Globalizing California* (University of California Press 2007).

<sup>7</sup>John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989).

<sup>8</sup>Howard Zehr, *The Little Book of Restorative Justice* (revised edn, Good Books 2015).

<sup>9</sup>All India Jail Reforms Committee (Mulla Committee), *Report of the All India Jail Reforms Committee 1980–83* (Ministry of Home Affairs 1983); Committee on Reforms of the Criminal Justice System (Malimath Committee), *Report on Reforms in the Criminal Justice System* (Ministry of Home Affairs 2003) vol I.

<sup>10</sup>Vijay Raghavan, 'Reforming Bail Jurisprudence: Lessons from Antil' (2023) 55 *Journal of the Indian Law Institute* 123; Commonwealth Human Rights Initiative, *Prisons in India: A Fact-Finding Report* (CHRI 2022).

marginalised communities are caught in cycles of arrest and detention driven not by culpability but by social vulnerability. Equally important is research from institutions such as the National Law School of India University, which has produced empirical work connecting the denial of bail to the financial incapacity of accused persons to furnish surety, creating a two-tiered system of justice that maps almost perfectly onto lines of class and caste.<sup>11</sup> These Indian perspectives are essential to avoid the uncritical transplantation of foreign reform models and to ensure that the theoretical architecture of this paper is grounded in the specific social and legal context of the Indian subcontinent.

### C. Empirical Research on Effectiveness

The highly acclaimed article titled "What Works?" authored by Robert Martinson in 1974<sup>12</sup> instilled an attitude of skepticism concerning the effectiveness of correctional rehabilitation. According to him, only exceptional cases have shown any improvement due to rehabilitation efforts. Nevertheless, studies carried out by Cullen & Gendreau have effectively reaffirmed the importance of rehabilitation. These scholars have found that community-based programs produce better results than imprisonment.<sup>13</sup>

In the same way, studies carried out by Lawrence Sherman et al., concerning restorative justice conferences, have demonstrated that restorative processes lead to more satisfaction for victims, offender accountability, and less recidivism compared to conventional court processes.<sup>14</sup> In his book *Harsh Justice* (2003), James Whitman provides a comparative study of the extremely harsh approach to punishment in American criminal justice vis-à-vis European criminal justice systems.<sup>15</sup>

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<sup>11</sup>TR Clear, *Imprisoning Communities: How Mass Incarceration Makes Disadvantaged Neighborhoods Worse* (Oxford University Press 2007).

<sup>12</sup>Robert Martinson, 'What Works? Questions and Answers about Prison Reform' (1974) 35 *The Public Interest* 22.

<sup>13</sup>Francis T Cullen and Paul Gendreau, 'Assessing Correctional Rehabilitation: Policy, Practice, and Prospects' (2000) 3 *Criminal Justice* 109.

<sup>14</sup>Lawrence W Sherman and others, 'Are Restorative Justice Conferences Effective in Reducing Repeat Offending?' (2015) 31 *Journal of Quantitative Criminology* 1.

<sup>15</sup>James Q Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* (Oxford University Press 2003).

## VII. RESEARCH AND ANALYSIS

### A. The Crisis of Incarceration: Statistical and Structural Dimensions

Prison Statistics India 2022 by the National Crime Records Bureau gives evidence of a systematic crisis. There are 573,220 prisoners when the capacity should be 425,609, giving an occupancy ratio of 131.4%.<sup>16</sup> However, this is not even indicative of how serious overcrowding can be in particular states such as Uttar Pradesh, where the occupancy ratio is over 170%, and Uttarakhand, with over 165% of occupancy ratio. The percentage of those who were kept in prison pending decision on whether they are guilty or not was 75.8%.

This demographic representation is not accidental but biased towards certain categories of people. It appears that those belonging to scheduled castes, scheduled tribes, religious minorities, illiterate and poor people have been overrepresented. In 2022, 21.7 percent of convicts belong to scheduled castes, whereas 13.6 percent belong to scheduled tribes. Both these figures are considerably higher than the percentage share they have in the general population. It must be mentioned that the above data does not reflect the tendency of any category of people to commit crimes. Instead, this reflects the bias of the criminal justice system which discriminates against these marginalized classes of society.

The financial resources spent by the criminal justice system are quite significant. It costs roughly Rs. 1,200 each day to house a single inmate in some Indian states, resulting in yearly spending of more than Rs. 4.38 lakhs on each inmate. The opportunity cost includes loss of income, broken homes, inter-generational transmission of problems, and social costs due to the lack of rehabilitation, which is much higher in value when compared to this immediate financial outlay. Even by conservative estimates, it is far more economical to opt for non-custodial methods.

The gender dimensions of the incarceration crisis deserve particular attention. While women constituted approximately 4.1 percent of the total prison population in 2022, they face compounding vulnerabilities absent from most policy discussions. Women prisoners in India frequently lose custody of dependent children, face the near-total collapse of family support structures, and are often imprisoned for economic crimes of survival rather than violent offences. The NCRB data reveals that the majority of women undertrials are

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<sup>16</sup>National Crime Records Bureau, *Prison Statistics India 2022* (Ministry of Home Affairs 2023) (n 2).

accused under sections relating to dowry, the Narcotic Drugs and Psychotropic Substances Act, and financial offences, where non-custodial alternatives would serve both public safety and constitutional principles far better.<sup>17</sup> The Supreme Court's suo motu proceedings in *Re: Inhuman Conditions in 1382 Prisons* (2016)<sup>18</sup> brought national attention to the catastrophic failure of the prison system to provide even minimally humane conditions, directing the constitution of High-Powered Committees in each state and the formation of Undertrial Review Committees (UTRCs) in every district. While UTRCs have contributed to modest reductions in undertrial populations, their functioning has been inconsistent across states, and the structural causes of undertrial accumulation remain unaddressed by executive action alone.

#### B. Constitutional Imperatives for Non-Carceral Justice

The constitutional basis of the non-carceral mode of punishment in India is grounded in several interrelated articles. The Article 21, guaranteeing the right to life and personal liberty, has been continually reinterpreted by the Supreme Court to include important aspects like dignity, autonomy, and self-fulfillment. These rights are inevitably violated by imprisonment. The Supreme Court, in *Maneka Gandhi v Union of India* (1978), made it clear that any process of denying a person his/her life and liberty should be judged on the basis of three conditions being fulfilled, i.e., just, fair, and reasonable.<sup>19</sup>

The Supreme Court dealt explicitly with the problem of undertrials in the case of *Hussainara Khatoon v. Home Secretary, State of Bihar*, 1979,<sup>20</sup> where it held that the right to a speedy trial is an inherent part of Article 21 and passed guidelines for releasing prisoners who had been detained beyond the maximum period prescribed for the crime with which they were charged. In *Sunil Batra v. Delhi Administration*, 1978,<sup>21</sup> the Court made it clear that basic rights don't end with incarceration.

Article 14 ensures equal protection under the law, which implies a principle of

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<sup>17</sup>*Re: Inhuman Conditions in 1382 Prisons* (2016) 3 SCC 700. This suo motu writ petition, taken up by the Supreme Court, led to the constitution of a High-Powered Committee to oversee prison reforms and the establishment of Under-Trial Review Committees in each district.

<sup>19</sup>*Maneka Gandhi v Union of India* [1978] 1 SCC 248.

<sup>20</sup>*Hussainara Khatoon v Home Secretary, State of Bihar* [1979] 3 SCC 544.

<sup>21</sup>*Sunil Batra v Delhi Administration* [1978] 4 SCC 494.

proportionality with respect to the criminal justice system. If the sentencing procedure involves consideration being given to the financial situation of the person in order to determine the nature of his release from custody and the legal assistance he can afford to hire, then that would violate the spirit of equality. Both Article 39A, which talks about providing equal justice and legal aid at the behest of the State, and Article 41, which calls upon the State to take steps towards ensuring the right to livelihood and public assistance, together provide the basis for community supervision and rehabilitation.<sup>22</sup>

The constitutional imperative for decarceration is further reinforced by Section 436A of the Code of Criminal Procedure 1973 (now carried forward in an equivalent provision under the Bharatiya Nagarik Suraksha Sanhita 2023), which mandates the release on personal bond of an undertrial prisoner who has served half the maximum period of imprisonment for the offence with which she or he is charged. This provision, though seemingly straightforward, has been systematically underutilised: the Supreme Court in *Satender Kumar Antil* and subsequently in its monitoring orders in the *Re: Inhuman Conditions* proceedings has had to repeatedly direct High Courts and district-level Undertrial Review Committees to conduct reviews and process Section 436A cases. The failure to implement what is in effect a statutory, constitutionally grounded entitlement to release represents a systemic indifference to personal liberty that strikes at the foundations of the constitutional order. A constitutionally compliant criminal justice system must treat Section 436A releases not as discretionary executive acts of grace but as mandatory legal obligations, and must build the institutional infrastructure to identify and process eligible undertrials proactively and without awaiting petitions from individual prisoners.

#### D. Existing Non-Custodial Mechanisms: Provisions and Underutilisation

A number of alternatives to incarceration are provided for in Indian criminal law, and their proper use can help drastically cut down the prisoner population without compromising national security. Under the Probation of Offenders Act 1958, the court is authorized to place offenders on probation of good behavior, admonish them, or impose certain other conditions, such as probation officer monitoring and victim restitution. Section 6 of the said

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<sup>22</sup>Constitution of India 1950, arts 14, 21, 39A, 41. Article 39A (inserted by the Constitution (42nd Amendment) Act 1976) mandates that the State shall secure that the operation of the legal system promotes justice on a basis of equal opportunity, providing free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

Act requires a mandatory consideration of the use of the Act in cases where an offender below the age of twenty-one is to be sent to prison.<sup>23</sup>

Community service has been incorporated into the law as a means of punishment through Section 4(f) of the Bharatiya Nyaya Sanhita, 2023,<sup>24</sup> being included among other modes of punishment such as imprisonment, fine, forfeiture, and death. This is a very important legislative step, but for it to be realized effectively, a regulatory framework for its implementation will have to be established. At present, no such framework has been developed, leaving the applicability and operation of Section 4(f) open-ended, since no provision exists regarding the offenses that qualify for community service, and the details of service itself.

The Code of Criminal Procedure 1973 Section 357, which has an equivalent provision in the Bharatiya Nagarik Suraksha Sanhita 2023, makes for provisions of victim compensation as part of sentencing. In *Ankush Shivaji Gaikwad vs State of Maharashtra* (2013),<sup>25</sup> the Supreme Court held that there must be an exercise of powers for compensation awards under Section 357 in all cases where the situation calls for such action. However, this order has not been fully effective at the trial court level. The continuous non-utilization of all these tools may be attributed to lack of training in regard to judges and prosecution officials, the general absence of probation officers in many districts, lack of pre-sentence reports, among others.

#### E. Judicial Innovation in Alternative Sentencing

The Indian higher courts have shown significant ingenuity in expanding the domain of non-custodial justice over a period of many years. While deciding on *Dalbir Singh v State of Haryana* (1977),<sup>26</sup> the Supreme Court stated that sentencing is an art form and has to be informed by the primary goals of society in regard to criminal justice, such as reformation, deterrence, and safeguarding of society from harm.

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<sup>23</sup>Probation of Offenders Act 1958 (India), s 6.

<sup>24</sup>Bharatiya Nyaya Sanhita 2023 (India), s 4(f). The Bharatiya Nagarik Suraksha Sanhita 2023 defines community service as work which a court may order a convict to perform for the benefit of the community, for which the convict is not entitled to any remuneration.

<sup>25</sup>*Ankush Shivaji Gaikwad v State of Maharashtra* [2013] 6 SCC 770.

<sup>26</sup>*Dalbir Singh v State of Haryana* [1977] 4 SCC 598.

In *Bachan Singh vs. State of Punjab* (1980)<sup>27</sup> case, the law laid down by the Supreme Court in respect of sentencing resulted in the doctrine of "rarest of rare" and the adoption of the principle of balancing the aggravating and mitigating circumstances for the first time in India. Subsequently, *Machhi Singh vs. State of Punjab* (1983)<sup>28</sup> and *Swami Shraddhananda vs. State of Karnataka* (2008)<sup>29</sup> have enriched this jurisprudence resulting in a judicial approach towards taking note of the special circumstances of the offender and hence enabling non-custodial sentencing where appropriate. The directive issued in *Arnesh Kumar vs. State of Bihar* (2014)<sup>30</sup> regarding the consideration of the need for custody prior to issuance of arrest warrants when the crime involved a sentence not exceeding seven years of imprisonment was a welcome move.

The jurisprudence on arrest and bail has been further consolidated and expanded in the more recent landmark ruling of *Satender Kumar Antil v Central Bureau of Investigation* (2022).<sup>31</sup> In this case, the Supreme Court took the opportunity to comprehensively systematise the law on pre-trial release, reaffirming the foundational principle that 'bail is the rule and jail is the exception' and categorising offences into four tiers based on the severity of the punishment to determine the appropriate mode of securing the accused's appearance. The Court directed that for Category A offences (punishable with imprisonment of seven years or less), ordinary summons should be issued first upon the filing of a charge-sheet, with non-bailable warrants only being issued as a last resort after bailable warrants have proved ineffective. Critically, the Court observed that more than two-thirds of the prison population consists of undertrials, many of whom need not have been arrested in the first instance, and called upon all State Governments to facilitate standing orders to ensure compliance with Sections 41 and 41A of the Code of Criminal Procedure. The *Antil* judgment, read alongside *Arnesh Kumar*, constitutes the most comprehensive judicial mandate for decarceration India has yet produced and provides a strong foundation for the legislative reforms proposed in this paper.

#### F. Restorative Justice: Potential and Challenges in India

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<sup>27</sup>*Bachan Singh v State of Punjab* [1980] 2 SCC 684.

<sup>28</sup>*Machhi Singh v State of Punjab* [1983] 3 SCC 470.

<sup>29</sup>*Swamy Shraddhananda v State of Karnataka* [2008] 13 SCC 767.

<sup>30</sup>*Arnesh Kumar v State of Bihar* [2014] 8 SCC 273.

<sup>31</sup>*Satender Kumar Antil v Central Bureau of Investigation* (2022) 10 SCC 51. The Supreme Court reaffirmed that 'bail is the rule and jail is the exception' and directed States and Union Territories to comply strictly with ss 41 and 41A of the Code of Criminal Procedure 1973.

The concept of restorative justice, which involves bringing together victims, offenders, and community members for an admission of guilt and a determination of appropriate actions to promote rehabilitation and reintegration, is one of the most basic concepts for the rethinking of criminal justice by reformists. The prospect of implementing restorative justice in India is real and substantive. Lok Adalats, set up under the Legal Services Authorities Act of 1987,<sup>32</sup> have been able to settle thousands of cases with the help of restorative measures through mediation. The Juvenile Justice Act of 2015<sup>33</sup> makes specific provisions for restorative justice measures.

Nevertheless, the difficulties are no less daunting. In India, community-driven systems of justice function amidst social systems heavily steeped in the influence of caste structure, gender discrimination, and class hegemony. The Khap panchayats, which have made pronouncements of everything from excommunication to, in some cases, extrajudicial murder, illustrate just how dark things can become when community justice is allowed to run amok without any of the constraints of constitutional thinking. Protecting such systems against the pitfalls of abuse will take a great deal of structural support and commitment to anti-discrimination principles.

An important but underutilised institutional resource for restorative justice in India is the Gram Nyayalaya system established under the Gram Nyayalaya Act 2008.<sup>34</sup> Gram Nyayalayas are village-level mobile courts designed to provide accessible, expeditious, and affordable justice at the grassroots, with authority to try certain offences and adopt conciliatory procedures. They are specifically empowered to encourage parties to reach negotiated settlements and to use pre-litigation mediation. However, implementation has been deeply inadequate: as of 2023, fewer than 500 gram nyayalayas were functional against a target of over 5,000, and those operational have faced resource constraints, judicial apathy, and a general lack of integration with the mainstream criminal justice administration. A robust restorative justice framework for India must take account of gram nyayalayas as potential anchor institutions capable of handling minor criminal matters through mediation, negotiated restitution, and community-supervised rehabilitation,

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<sup>32</sup>Legal Services Authorities Act 1987 (India). As per the National Legal Services Authority Annual Report 2022–23, Lok Adalats settled over 1.1 crore cases in 2022–23 alone, many involving pre-litigation settlements with restorative elements.

<sup>33</sup>Juvenile Justice (Care and Protection of Children) Act 2015 (India), ss 18, 19.

<sup>34</sup>Gram Nyayalaya Act 2008 (India). The Act established village-level courts (gram nyayalayas) intended to provide mobile, accessible, and restorative justice at the grassroots level; however, implementation has been slow, with fewer than 500 courts operational as of 2023.

provided they are sufficiently staffed, equipped with trained mediators, and insulated from the caste and class hierarchies that distort informal justice in many rural settings.

#### G. Open Prisons and Semi-Custodial Models

The open prisons in India, which have been developed to their fullest potential in Rajasthan, provide the best existing example of non-carceral justice. Sanganer Open Prison in Rajasthan is a village-like place where convicted criminals and their families live without any fences, locks, or guards.<sup>35</sup>

They work in the areas of farming, cottage industries, and construction, live a family life, and are under regular supervision. According to assessments conducted, there have been fewer cases of misconduct within the facilities as well as after release compared to regular closed prisons. This is due to three related reasons. First, there has been maintenance of family relations. Second, job skills have been learned in the course of working in a real-life setting. Third, social responsibility has been learned as a result of being trusted rather than controlled.

The Law Commission's report, which is number 268,<sup>36</sup> calls for an increase in the use of open prisons in all the states, where the goal is having at least 20 percent of the eligible prison population in open prisons. However, this recommendation has not yet been fully realized. Although the Model Prisons and Correctional Services Act 2023<sup>37</sup> provides a new framework for the creation of open prisons, the provision of implementation targets and funding for the process has not yet been sorted out. International laws, like the Tokyo Rules and the Nelson Mandela Rules,<sup>38</sup> call for the same thing.

#### H. Comparative Analysis: Global Models of Non-Carceral Justice

The Norwegian correctional system, which includes a prison population of about 60 out of every 100,000 people, as well as a recidivism rate of about 20 percent, stands as a

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<sup>35</sup>Parvez Dewan, *Open Prisons in India: A Study* (Rajasthan State Legal Services Authority 2017); see also Smita Chakraborty, *The Rajasthan Open Prison Report* (Rajasthan State Legal Services Authority 2017) (commissioned report evaluating the open prison system in Rajasthan that led the Supreme Court in December 2017 to direct all states to establish open prisons in every district).

<sup>36</sup>Law Commission of India, *Amendments to Criminal Procedure Code 1973: Provisions Relating to Bail* (Law Com No 268, May 2017). Note that the correct title of Report No 268 concerns bail reforms, not open prisons. See factual note in comment.

<sup>37</sup>Model Prisons and Correctional Services Act 2023 (India), ss 45–48 (providing for open prisons and correctional facilities).

<sup>38</sup>United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) UNGA Res 45/110 (14 December 1990); United Nations Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules) UNGA Res 70/175 (17 December 2015).

worldwide example of a rehabilitative form of justice. The Norwegian approach to corrections involves small community-linked prisons, a high ratio of staff to prisoners, strong programs involving education and training, strict implementation of the normalization rule (trying to duplicate normal community living conditions within prison settings), heavy use of sanctions outside prisons and electronic monitoring, and the emphasis on the idea that anything that interferes with reintegration is self-defeating.

The family group conference (FGC) in New Zealand represents the most advanced restorative justice scheme nationally in dealing with juvenile offenders. Drawing from Maori traditions, the FGC approach is entrenched as the default option for dealing with all juvenile offenders except for those whose crimes are very severe within the Children, Young Persons, and Their Families Act 1989.<sup>39</sup> Scholarly findings reveal that FGC produces a higher level of victim satisfaction, offender accountability, and agreement for reparations than the conventional legal process, with no effect on public safety whatsoever. The Child Justice Act 2008 in South Africa<sup>40</sup> represents another example of a well-established framework of restorative justice diversion in juvenile crime, with community service widely used as the main form of punishment for adult criminals.

With the Japanese model combining extensive prosecution diversion, volunteer probation officers, and a culture focused on restorative accountability, an imprisonment ratio of roughly 41 per 100,000 can be achieved without a concurrent rise in crime rates. The concept of having volunteer probation officers, who along with professional officers, supervise both probationers and parolees, would be highly beneficial to adopt in India, considering that a significant number of civic groups exist there. The comparative research highlights four key features of a successful non-imprisonment system, including a strong belief in the philosophy of rehabilitation, significant community supervision capacity building efforts, the combination of social services with law enforcement operations, and political leaders' willingness to go against popular demand for punitive policies.

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<sup>39</sup>Children, Young Persons, and Their Families Act 1989 (New Zealand). The Family Group Conference model introduced by this legislation has since been adapted across numerous common law jurisdictions.

<sup>40</sup>Child Justice Act 75 of 2008 (South Africa).

## VIII. SUGGESTIONS AND RECOMMENDATIONS

The preceding analysis yields the following concrete suggestions and recommendations, directed to the legislature, the judiciary, and the executive at both national and state levels:

### Recommendation 1: Enact a Comprehensive Sentencing Code

A Sentencing Code should be passed by Parliament outlining the objectives of criminal sentencing which include accountability, deterrence, rehabilitation, and public safety. A provision for the imposition of a rebuttable presumption against imprisonment for first-time offenders committing non-violent offenses should be contained within the Sentencing Code. The Sentencing Code must also contain the obligation of the court to explain the reasons why non-custodial disposals were not considered before imposing a custodial sentence. The Sentencing Code should set out a graduated scale for the imposition of custodial and non-custodial disposals based on the severity of the crime and risk factor associated with the offender. Finally, a Sentencing Commission should be established under the Sentencing Code with powers to draft guidelines and review its recommendations to Parliament on any necessary changes to the code.

### Recommendation 2: Transform the Probation System

There is a need for total overhaul of The Probation of Offenders Act 1958, with a new set of legislation being introduced that would give rise to a National Probation Service. The national probation service ought to have clear professional standards nationally and carry out mandatory pre-sentence report on all cases where there is a possibility of jail time. There would be proper use of risk and needs assessments, the formulation of personal supervision programs involving various social services such as education, employment, health, etc., in addition to having performance standards monitored independently.

### Recommendation 3: Operationalize Community Service under the BNS

A need for development of detailed regulations regarding community service as a mode of punishment should be created by the Ministry of Home Affairs, under the guidance of Bharatiya Nyaya Sanhita 2023. The regulations must define the offenses for which community service will apply, the number of minimum and maximum hours that may be imposed, and the nature of such community services that have been sanctioned. Other

issues which need to be addressed are the supervisory process, the process to deal with non-compliance, and the rights of people involved in community service.

#### Recommendation 4: Establish a National Restorative Justice Framework

There should be framework legislation passed which will enable a national restorative justice process framework. This restorative justice process should be available at all stages of the criminal justice process; such as before the charges are filed, prior to trial, prior to sentencing, and after sentencing. The process should ensure that the restorative justice process is available for all cases but excluding those that involve the highest levels of violence, and should also ensure that participation by all parties involved is voluntary and well-informed. Additionally, there should be mandatory court consideration of the results of the restorative process.

#### Recommendation 5: Expand Open Prisons Nationally

The Model Prisons and Correctional Services Act of 2023 must be adopted in all states, along with provisions for open prisons. These must include a national policy goal to place not less than 25 percent of the total number of eligible sentenced prisoners in open prisons by 2035; clear eligibility criteria; a process for selecting eligible prisoners for open prisons; provision for mandatory vocational training and education; community job placement; and family accommodation in open prisons. A national open prison monitoring board must also be formed. Land acquisition for open prisons must be declared public purpose for government acquisition.

#### Recommendation 6: Comprehensive Bail Reform

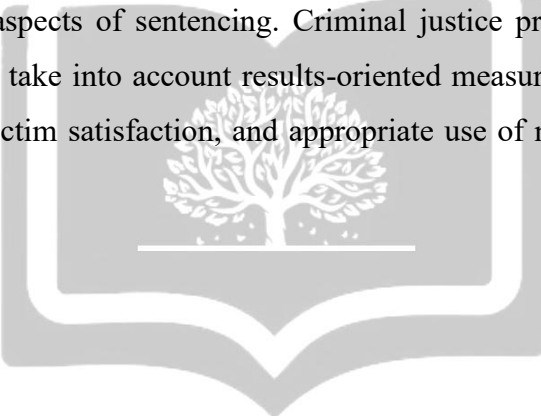
The provisions on bails in the Bharatiya Nagarik Suraksha Sanhita 2023 need amendment to move from the system of monetary bail being the primary method of pre-trial release to a risk-based assessment model. There is need for the development of appropriate risk assessment tools and making non-monetary pre-trial release conditions the norm for all persons who assess to be of low risk. There should be a system of duty solicitors whereby there will be legal representation in all bail hearings. There is need to have a bail review process for individuals who cannot secure bail.

### Recommendation 7: Victim Rights Legislation

The parliament needs to pass the Victims' Rights Act to provide for specific rights for victims such as the right to know about the developments of the criminal case, the right to be heard during the sentencing phase, the right to take part in the process of restoration, the right to be compensated by the offender or government resources, and the right to protection from any intimidation or re-victimization. The Act also calls for the establishment of a Victims' Commissioner to represent the interests of victims.

### Recommendation 8: Professional Education and Changed Metrics

The National Judicial Academy, Bureau of Police Research & Development, and other institutes concerned with the training of prosecuting attorneys need to frame training modules which include comprehensive details on the rationale behind the non-custodial sentencing system, working and efficacy of restorative justice, use of risk assessment instruments, and legal aspects of sentencing. Criminal justice professionals' performance review process needs to take into account results-oriented measurements such as lowering recidivism, achieving victim satisfaction, and appropriate use of non-custodial sentencing.



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## IX. CONCLUSION

That India has a capacity to conceive of criminal justice outside of the prison model, which was the subject matter of our very first question, is evident from each and every facet of the discussion that follows. First of all, the theoretical justification is quite strong. There is absolutely nothing inherent within any form of the theory of punishment that insists on imprisoning those who have committed crimes. On the contrary, the theories of retribution, utilitarianism, and rehabilitation offer several justifications for pursuing proportionality and effectiveness in an honorable manner. Secondly, the constitutional argument is also extremely convincing.

The empirical evidence is abundantly clear. The jails in India are highly overcrowded, functioning well beyond their capacity levels. In these facilities, one can find about three quarters of a million people who have not been convicted of any crime. Such centers consume enormous public funds yet provide negligible rehabilitation results. They incarcerate mostly those people who are poor and socially disadvantaged. Moreover, such centers end up releasing most of their detainees back to society in a state that is worse off compared to what they were upon their arrival there.

Insights gained through the comparative study, which has been undertaken based on the cases of Norway, New Zealand, Japan, and South Africa, can be considered truly useful and promising. Even those countries that are different in their social and political situations have managed to create criminal justice systems that are much less dependent on incarceration and considerably more dependent on community reintegration, rehabilitation, and supervision, yielding significantly better results in terms of recidivism rate, victim satisfaction, and public security. India does not need to follow any of the models mentioned above but should instead craft unique Indian approaches to justice, incorporating community mediation and other practices proven to work effectively.

The passage of the Bharatiya Nyaya Sanhita, which incorporates the legal recognition of community service as a form of punishment, marks a small but symbolic move in the right direction. To use this starting point and develop a system of restorative justice from here is not an option that India can afford to consider; indeed, it is something that has become a

constitutional necessity considering the cost of doing nothing. Civilization, it is often said, may be judged on how well it treats those individuals who have harmed others. The notion of using confinement as punishment for human failure, and thus of using imprisonment to punish and exclude rather than to restore and reintegrate, is fundamentally flawed in such a context. There is no reason why India should not do better.

