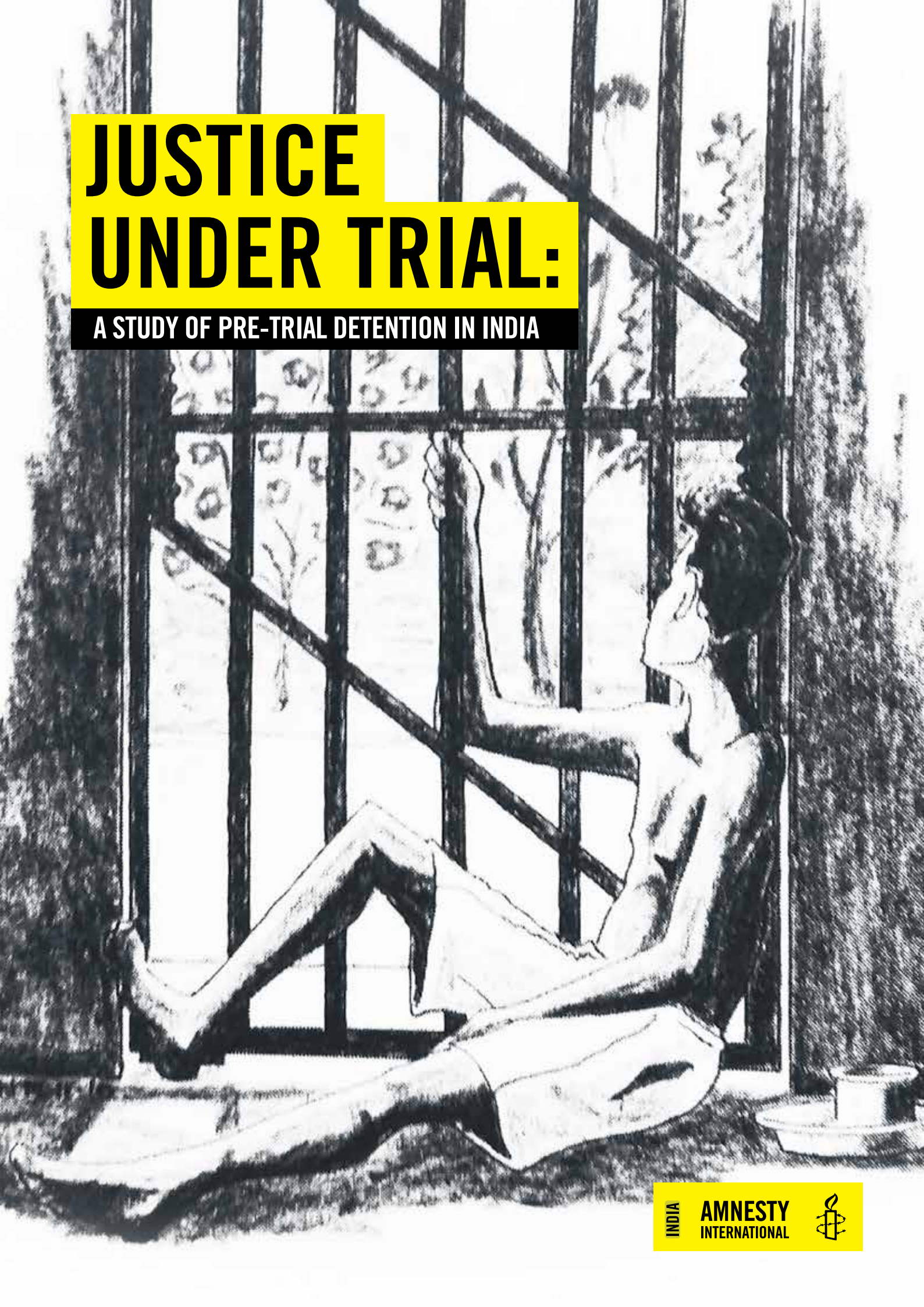


# JUSTICE UNDER TRIAL:

A STUDY OF PRE-TRIAL DETENTION IN INDIA



INDIA

AMNESTY  
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INDIA

AMNESTY  
INTERNATIONAL



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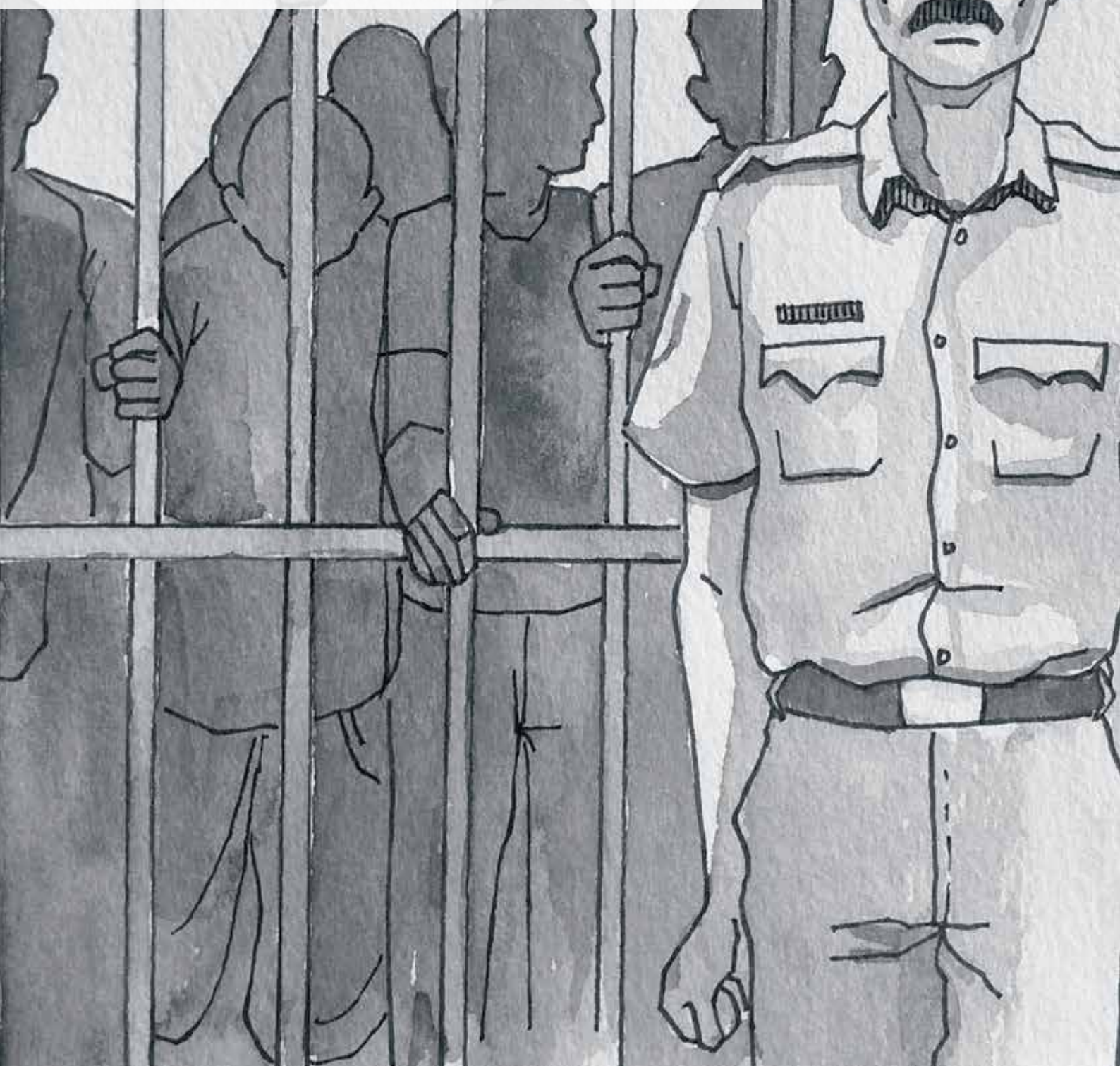
Sketches: Bonzer Muivah

Front & Back Cover Sketches: Arun Ferreira

Designer: Mohammed Sajjad

**“** I was then produced before a magistrate. As all law students know, this measure has been introduced into legal procedure to give detainees the opportunity to complain about custodial torture- something I could establish quite easily since my face was swollen, ears bleeding and soles so sore that it was impossible to walk. But from the deliberations in court, I gathered that the police had already accounted for injuries in the story they'd concocted about my arrest. In their version I had fought hard with the police to try to avoid capture.”

Arun Ferreira, *Colours of the Cage*



# BACKGROUND

India has one of the highest undertrial populations in the world. As of December 2015, 67% of prisoners in India's prisons were 'undertrials' – people who were awaiting trial or whose trials were still ongoing, and who have not been convicted.<sup>1</sup> In other words, there are twice as many undertrials in India's prisons as there are convicts. Figure 1 below shows the state-wise population of undertrials and prison occupancy rates.

**Figure No. 1**

State/Union Territories	Number of Undertrials	Number of Prisons	Occupancy Rate
Andhra Pradesh	2737	11	88.9
Arunachal Pradesh	136	8	86.8
Andaman & Nicobar	72	0	40
Assam	5476	28	109.7
Bihar	20372	38	75.2
Chandigarh	339	1	61.4
Chhattisgarh	7738	16	233.9
Dadra & Nagar Haveli	0	0	276.7
Daman & Diu	0	0	28.8
Delhi	10465	8	226.9
Goa	88	1	38.6
Gujarat	5405	11	95.5
Haryana	10489	19	109.3
Himachal Pradesh	579	4	110.7
Haryana	10489	19	109.3
Jammu & Kashmir	1783	12	77.9
Jharkhand	12071	22	114.3
Karnataka	7829	27	95.9
Kerala	2388	14	118.3
Lakshwadweep	0	0	37.5
Madhya Pradesh	16121	50	139.8
Maharashtra	21227	37	112.8
Manipur	533	4	67.1
Meghalaya	862	4	177.9
Mizoram	608	7	94.9
Nagaland	390	11	33.8
Odisha	5144	14	88.6
Puducherry	91	1	45.9
Punjab	12016	16	117.8
Rajasthan	10871	33	102.4
Sikkim	140	2	99.2
Tamil Nadu	5020	18	63.6
Telangana	2732	10	87.8
Tripura	256	3	47.8
Uttar Pradesh	62203	62	168.8
Uttarakhand	1316	8	136.4
West Bengal	10673	19	102.9

1. Ministry of Home Affairs, National Crime Records Bureau 2015, 2016, Available at <http://ncrb.nic.in/StatPublications/PSI/Prison2015/PrisonStat2015.htm> (hereinafter: PSI 2015)

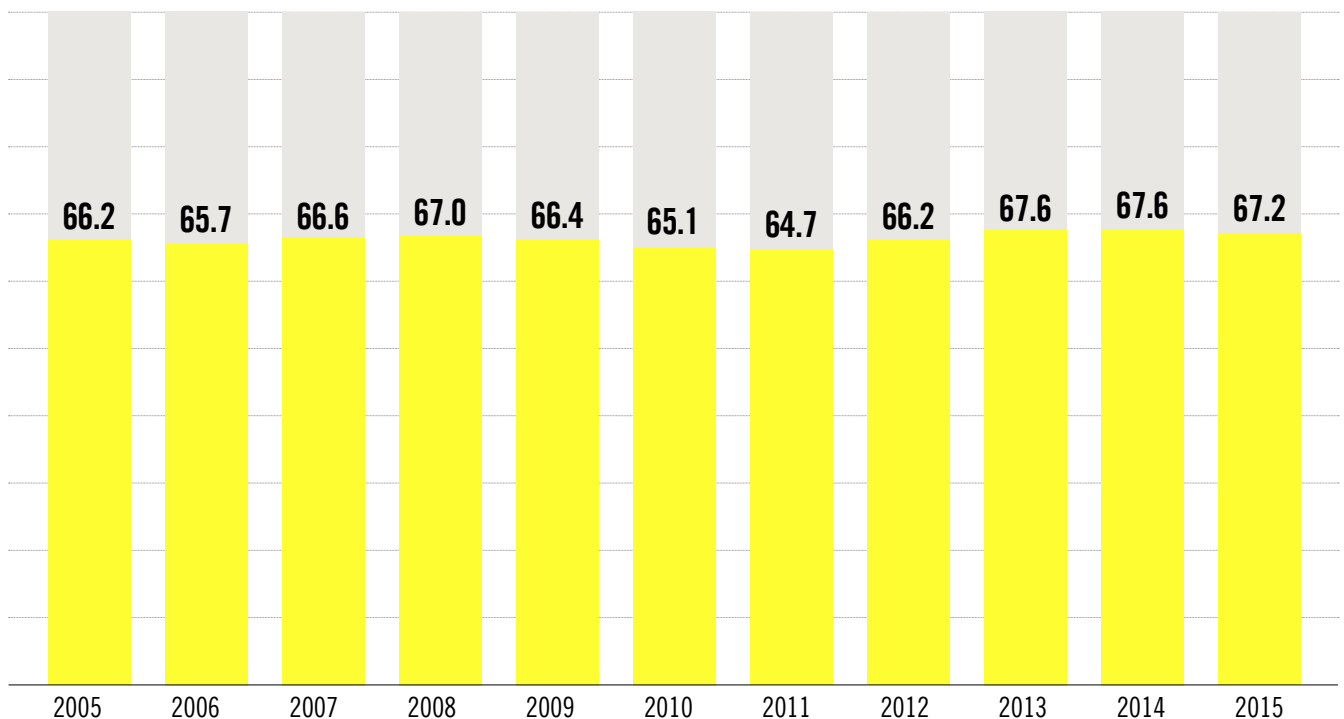
Despite executive guidelines, legal reforms, and Supreme Court judgments, the proportion of undertrials in prison population has stubbornly hovered around this level over the last decade.

**Figure No. 2**

## Proportion of undertrials in Indian prison population



% of undertrials in overall prison population



Source: National Crime Records Bureau

India's undertrial population is estimated to be the 18th highest in the world and the third highest in Asia.<sup>2</sup> In the US, which is estimated to have the highest incarceration rate in the world, only 20% of prisoners are undertrials.<sup>3</sup>

India's undertrial population has a disproportionate number of Muslims, Dalits and Adivasis. About 53% of undertrials are from these communities, which make up 39% share of the population of India. 29% of undertrials are not formally literate, while 42% had not completed secondary education.<sup>4</sup> A quarter of all undertrials have been in prison for more than a year.<sup>5</sup>

Most prisons in India are overcrowded, partly as a result of excessive undertrial detention. The average occupancy rate in Indian prisons is 114%, and is as high as 233.9% in states such as Chhattisgarh.

- International Centre for Prison Studies, Highest to Lowest - Pre-trial detainees / remand prisoners, Available at [http://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field\\_region\\_taxonomy\\_tid=All](http://www.prisonstudies.org/highest-to-lowest/pre-trial-detainees?field_region_taxonomy_tid=All)
- W. Dobbie et al., The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges, 2016, Available at [https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy\\_bail\\_0.pdf](https://scholar.princeton.edu/sites/default/files/wdobbie/files/dgy_bail_0.pdf)
- PSI 2015.
- PSI 2015.

All detainees have a right to trial within a reasonable time or to release. Prolonged undertrial detention can violate their rights to liberty and fair trial, and adversely impact their lives and livelihood. The overuse of undertrial detention effectively ends up punishing people before they are convicted, and makes a mockery of their right to be presumed innocent until proven guilty. Prolonged undertrial detention can also increase the risk of torture or other ill-treatment.

Under international human rights law, the right to liberty requires that deprivation of liberty should always be the exception, and imposed only if it is justified, necessary, reasonable, and proportionate in the circumstances of the case. Undertrial detention may be warranted if there is an assessed risk that an arrested person may, for example, intimidate a witness or tamper with evidence. All possible non-custodial measures, such as bail or the accused giving and undertaking to appear, must be explored by the judicial authority before making a decision to remand the accused person in custody. In India, however, undertrial detention is more often the rule than the exception.

Under India's Constitution, prison management is the responsibility of state governments. To assess the effectiveness of various legal safeguards to prevent excessive undertrial detention, between 2014 and 2016, Amnesty International India filed nearly 3000 Right to Information applications to every district and central prison in the country and to various state government departments.

The applications sought information broadly under four categories: (a) the implementation of section 436A of the Code of Criminal Procedure (CrPC) (b) the rate of production of undertrials in court for their hearings (c) the adequacy of legal

aid provided, and (d) adherence to guidelines on undertrial detention issued by the Union Home Ministry in 2005.<sup>6</sup> In addition, researchers interviewed undertrial prisoners at the Bengaluru Central Prison, legal aid lawyers, public prosecutors, academics, and civil society organizations.

While several prisons did not respond to the RTI applications, the responses from those that did revealed major failures in the treatment of undertrials by the criminal justice system. Since states with varying undertrial populations face different challenges, for the purpose of analysis in three of the four sections that follow, states have been classified into 'large', 'medium' and 'small', based on their undertrial populations. Large states have more than 10000 undertrials, medium states have between 2000 and 10000 undertrials and small states have less than 2000 undertrials.

Safeguards under law to protect undertrials are regularly ignored across the country. Few prisons appear to know how to accurately determine which undertrials are eligible for release under section 436A. Legal aid lawyers do not visit prisons regularly. A shortage of police escorts leads to thousands of undertrials not being produced in court for their hearings, effectively prolonging their detentions. Home Ministry guidelines are virtually ignored by many prisons.

State governments and the central government in India have failed to respect the fair trial rights of undertrial prisoners. Successive governments have acknowledged the problem of excessive undertrial detention, but have not done enough to address it. Unless existing laws and policies are strictly enforced, and the legal aid system is reformed, the rights of thousands of undertrials will remain at risk.

The laxity with which we throw citizens into prison reflects our lack of appreciation for the tribulations of incarceration; the callousness with which we leave them there reflects our lack of deference for humanity. It also reflects our imprudence when our prisons are bursting at their seams. For the prisoner himself, imprisonment for the purposes of trial is as ignoble as imprisonment on conviction for an offence, since the damning finger and opprobrious eyes of society draw no difference between the two. The plight of the undertrial seems to gain focus only on a solicitous inquiry by this Court, and soon after, quickly fades into the backdrop.

*Supreme Court, Thana Singh vs Central Bureau Of Narcotics, (2013) 2 SCC 603*

6. While appeals were filed in some cases where no response was received, in the interests of consistency in this paper, only the initial responses or lack of responses to RTI applications have been considered.

## HUMAN RIGHTS SAFEGUARDS FOR UNDERTRIAL DETAINEES IN INDIAN LAW

The police in India have wide ranging powers to make arrests. Once a person suspected of a criminal offence is arrested, they are supposed to be brought before a Magistrate within 24 hours by the police.<sup>7</sup> This safeguard is intended to protect the accused from the possibility of custodial torture or other ill-treatment.<sup>8</sup> Courts have held that a failure to produce an accused person before a magistrate during this stipulated time period makes the detention wrongful.<sup>9</sup>

Once the accused person is brought before a magistrate, the magistrate may extend the period of detention in police or judicial custody for up to fifteen days if she determines that the investigation cannot be completed within 24 hours.<sup>10</sup> If further investigation is required, the accused person may also be remanded in judicial custody – in 15-day periods – for up to 60 or 90 days, depending on the nature of the offence.<sup>11</sup> During this period, the accused person has a right to be released on bail, if they are accused of an offence categorized as ‘bailable’. If the offence is categorized as ‘non-bailable’, the court can decide whether to grant bail or not, considering circumstances such as the gravity of the offence and the probability of the accused person absconding, or tampering with evidence, or intimidating witnesses. The Supreme Court has ruled that bail, not jail, should be the norm, and that if the appearance of the accused person in court can be secured through other means, then it is not necessary to detain them.<sup>12</sup> Once the court takes cognizance, remand can be extended in 15 day periods.<sup>13</sup>

Article 39A of the Constitution of India states that free legal aid must be provided to ensure that access to justice is not denied because of economic or other disabilities. The Supreme Court of India has stated that the right to free legal aid is part of the right to life and personal liberty under Article 21 of the Constitution.<sup>14</sup>

In the landmark 1979 case of *Hussainara Khatoon v. State of Bihar*, a petition brought before the Supreme Court revealed that an alarmingly large number of people were in prison for years awaiting trial. The Court observed that several undertrials accused of minor offences were being detained for periods even longer than their formal convictions. It ruled that every undertrial had a right to a

fair and speedy trial, and recommended that states build a comprehensive legal aid framework to tackle the issue of excessive undertrial detention.<sup>15</sup>

In 2005, the CrPC was amended to insert section 436A, which states that if an undertrial has served half the maximum sentence of the offence for which he has been charged, he can be released on a personal bond, as long as the offence is not punishable with a death sentence. In the same year, a public interest litigation was filed before the Supreme Court in the *Bhim Singh v. Union of India* case, seeking effective implementation of section 436A. In 2012, the Ministry of Home Affairs issued a set of directives to reduce overcrowding of prisons by ensuring that states conduct periodic monitoring to identify undertrials eligible for release under section 436A.<sup>16</sup>

In 2013, R.C. Lahoti, a former Chief Justice of India, wrote to the then Chief Justice Altamas Kabir, about what he described as the inhuman condition of prisoners in 1382 prisons across the country. The letter was taken up by the Supreme Court as a public interest writ petition. The social justice bench of the Supreme Court directed the relevant authorities to procure information pertaining to overcrowding of prisons and living conditions of prisoners. The Court reiterated the Home Ministry’s directives.<sup>17</sup>

In an interim order passed in 2016, the Court stated, “Unfortunately, even though Article 21 of the Constitution requires a life of dignity for all persons, little appears to have changed on the ground as far as prisoners are concerned and we are once again required to deal with issues relating to prisons in the country and their reform.”<sup>18</sup>

In February 2017, the Union Minister for Law wrote to Chief Justices of all High Courts stating that all stakeholders “need to take collective responsibility for ensuring that institutional mechanisms work seamlessly to ensure access to justice for the undertrial population”.<sup>19</sup> In April 2017, the Law Ministry launched three new programmes aimed at extending legal aid to marginalized people.

In May 2017, the Law Commission of India recommended in a report that provisions on bail in the CrPC be amended to facilitate a reduction in the number of undertrials in prison.<sup>20</sup>

7. See section 57 of the Code of Criminal Procedure, 1973.

8. See article 22(2) of the Constitution of India.

9. Bombay High Court, *Sharifbai v. Abdul Razak*, AIR 1961 Bom 42.

10. See section 167(2) of CrPC.

11. See section 167(2) of CrPC.

12. Supreme Court, *State of Rajasthan v. Balchand alias Baliya*, AIR 1997 SC 2447.

13. See section 309(2) of CrPC.

14. Supreme Court, *M.H Hoskot v. State Of Maharashtra*, AIR 1978 SC 1548.

15. Supreme Court, AIR 1979 SC 1369.

16. Ministry of Home Affairs, Use of section 436A of the Cr.P.C to reduce overcrowding of prisons (No. V-13013/70/2012-IS(VI), 2013, Available at

[http://mha1.nic.in/PrisonReforms/pdf/AdvSec436APrison-060213\\_0.pdf](http://mha1.nic.in/PrisonReforms/pdf/AdvSec436APrison-060213_0.pdf)

17. Supreme Court, *Re – Inhuman Conditions in 1382 Prisons*, WPC 406 of 2013.

18. Supreme Court, order dated 5 February, 2016, *Re – Inhuman Conditions in 1382 Prisons*, WPC 406 of 2013.

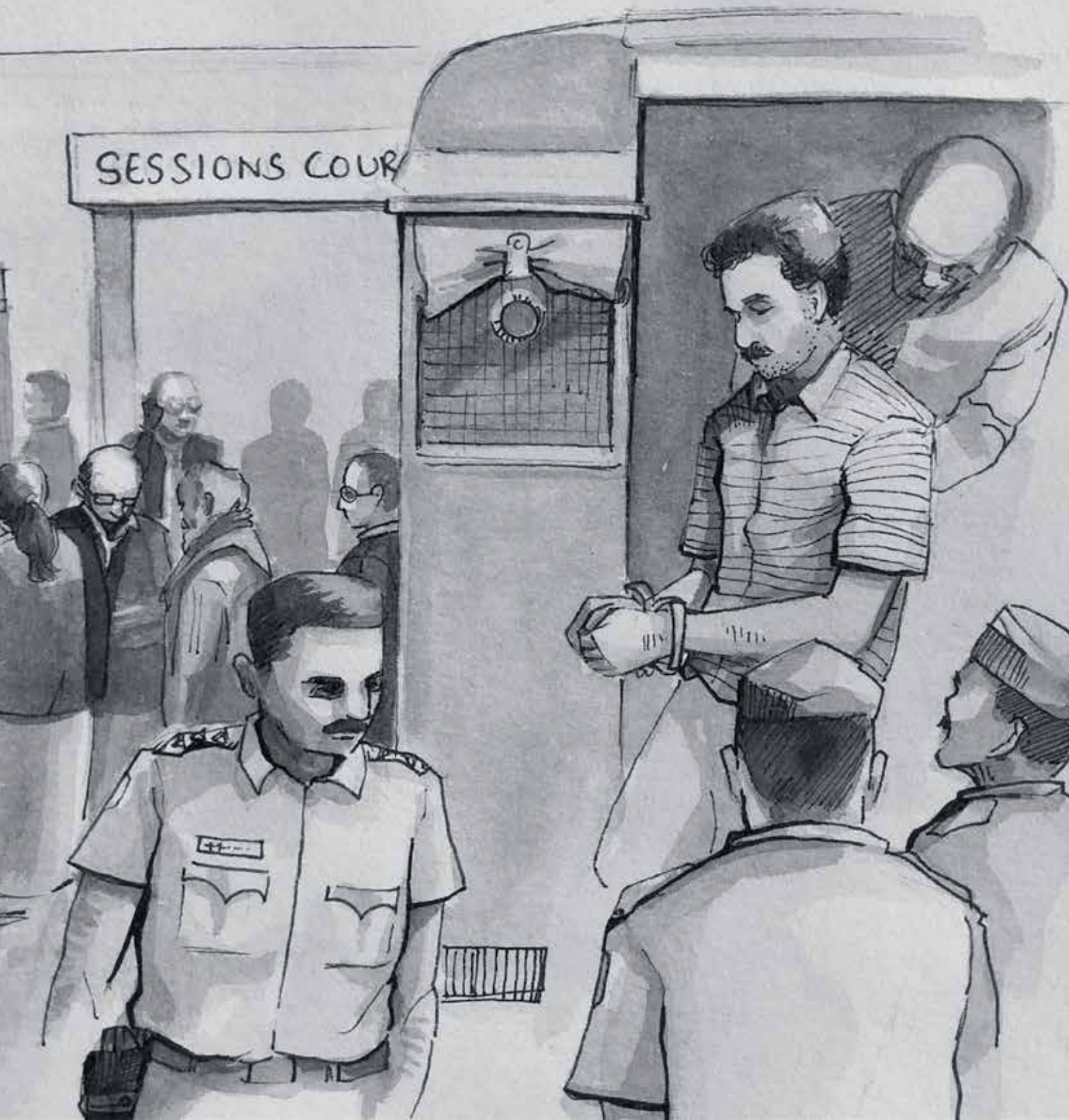
19. U.Anand, ‘Law Minister to HCs: Act on your own to free undertrials’, *Indian Express*, 13 February, 2017, Available at <http://indianexpress.com/article/india/ravi-shankar-prasad-cross-border-undertrials-free-high-courts-justice-chief-4521489/>

20. Law Commission of India, Report No. 268: Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail, 2017, Available at <http://lawcommissionofindia.nic.in/reports/Report268.pdf> (Hereinafter: Law Commission Report)

## UNDERTRIAL PRODUCTION IN COURT

**“** *Bengaluru Police has an acute manpower shortage. Any policeman cannot be a police escort, only armed reserve police can be escorts. There's not just a shortage of escorts, there's also a shortage of vehicles and drivers. Only a designated driver can drive the vehicle in which the undertrials are to be transported, to court".*

*ST Ramesh (Former Inspector General Prisons, Karnataka)*







Information sought: Undertrial non-production due to shortage of police escorts and video conferencing facility between September 2014 and February 2015

Response rate: Police escorts - 61%; Videoconferencing - 61%

Figure No. 3

## Availability of police escorts for undertrials

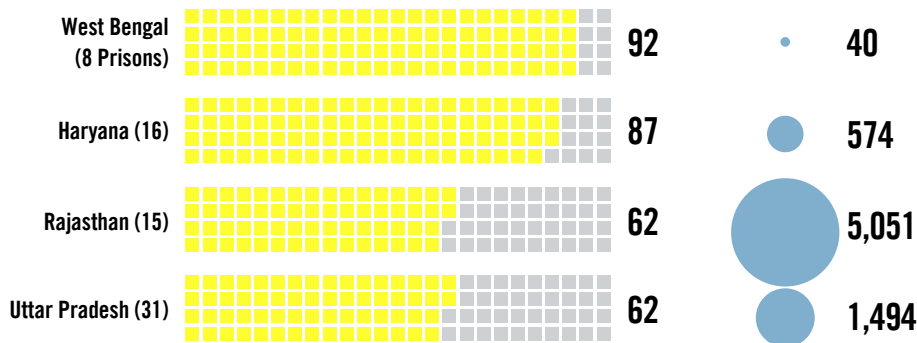


Police escorts sent for every 100 requested

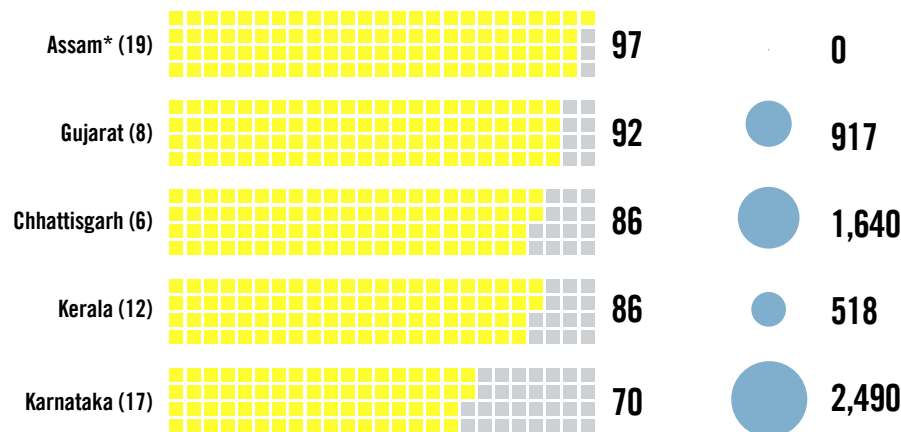


Monthly average of non-production of undertrials due to shortage of police escorts

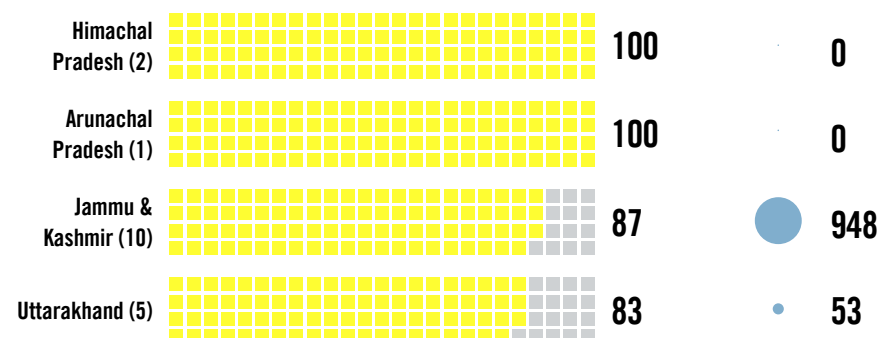
### States with large undertrial population



### States with medium undertrial population



### States with small undertrial population



States arranged in decreasing order of police escorts sent for every 100 requested within respective state set (best to worst)

\* In Assam, Goalpara District Prison is an outlier as the number of police escorts sent is more than the number of police escorts requested, and has therefore been excluded here

Data for the period from September 2014 to February 2015

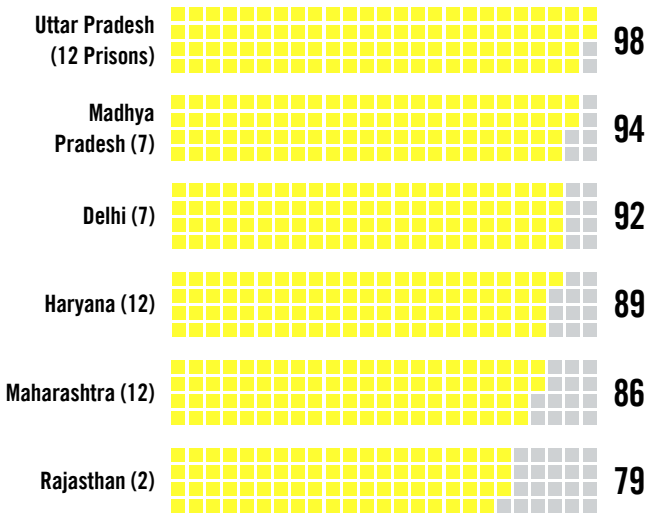
Data source: Responses to RTI applications made by Amnesty International India to all District and Central prisons in India

**Figure No. 4**

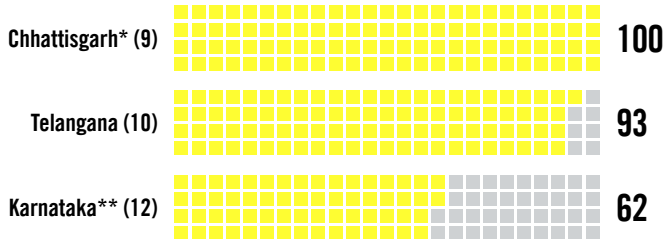
# Usage of video-conferencing facility by undertrials

Undertrial production per 100 video-conferencing requests

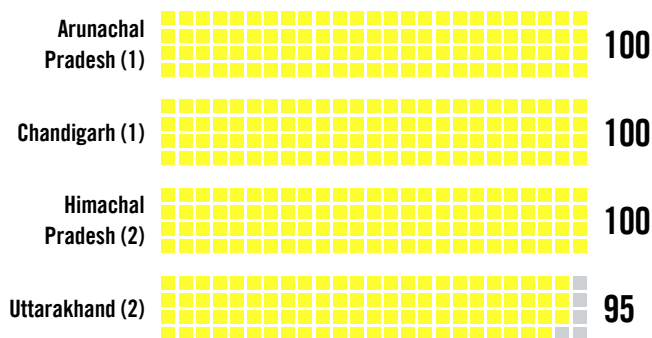
## States with large undertrial population



## States with medium undertrial population



## States with small undertrial population



States arranged in decreasing order of undertrial production per 100 video-conferencing requests within respective state set (best to worst)

\* In Chhattisgarh, Raipur Central Prison is an outlier, and has been excluded

\*\* In Karnataka, Mysore Central Prison is an outlier and has been excluded

Data for the period from September 2014 to February 2015

Data source: Responses to RTI applications made by Amnesty International India to all District and Central prisons in India

A Magistrate cannot remand an accused person in custody unless the accused is produced before her.<sup>21</sup> In 2008, the CrPC was amended to include video-conferencing as a method to produce an accused. The production of an accused person before a magistrate is an important fair trial requirement because it gives the magistrate an opportunity to enquire whether the accused has legal representation, to determine the age of the accused, enquire about their health, and make a reasoned decision on the need for further confinement.<sup>22</sup> Physical production at court is preferable to video conferencing since physical production can more easily reveal instances of custodial torture or other ill-treatment.

The Supreme Court of India has ruled that an inordinate delay in bringing an accused person to trial violates the right to personal liberty guaranteed by Article 21 of the Constitution of India. Article 14(3)(c) of the International Covenant on Civil and Political Rights (ICCPR), to which India is a state party, says that an accused person has the right to be tried without undue delay and that criminal proceedings should be started and completed within a reasonable time. Undertrials need to be brought before court regularly for their trials to progress and a decision to be made in their cases.

To facilitate the production of undertrials before a magistrate, each state police department appoints armed police personnel to travel to prisons and accompany undertrials to court for their hearings. Prisons usually send request for these police 'escorts' to the office of the relevant senior police official office a day before the date of hearing. Police escorts are sent to prison based on their availability. However former police officials told Amnesty International India that the police often prioritize other competing demands for deployment of personnel (including security for state exams, VIP security, and political and religious rallies) over requests for escorts for undertrials. As a result, thousands of undertrials are not able to attend their court hearings, and are remanded in custody by magistrates without being brought before them.

Amnesty International India filed RTI applications to all district and central prisons in India asking for information on the number of police escorts requested by prisons, and the number of police escorts actually sent to prisons, in every month for a six-month period between September 2014 and February 2015.

The RTI applications also asked about the number of non-productions due to shortage of police escorts, the number of prisons with video conferencing facilities, and the number of non-productions because of the non-availability of video conferencing facilities.

For purposes of analysis, researchers classified states into three

categories, based on the number of undertrials being held in detention in each state. Only those states where at least 50% of prisons responded to RTI applications are represented in the analysis.<sup>23</sup>

Figure 3 shows the average number of cases of non-productions due to a shortage of police escorts every month. It also shows the average percentage of police escorts sent to prisons, as a proportion of the number of escorts requested, every month.

These responses, while incomplete, nevertheless reveal that thousands of undertrials are not being produced in court for their hearings, in violation of their fair trial right to be tried without undue delay, potentially contributing to prolonged and excessive undertrial detention.

The number of instances in which undertrials were not produced in court due to a shortage of police escorts between September 2014 and February 2015 across India – in the prisons which responded to RTI applications - was a staggering 82,334 (from 154 prisons). The actual number in India is likely to be much higher, since many prisons did not respond to the RTI requests.

Many, but not all of the states with low ratios of compliance with police escort requests also appeared to have high numbers of non-production of undertrials. States with relatively fewer undertrials had higher rates of undertrial production, with the exception of Jammu and Kashmir.

Figure 4 also shows the average monthly percentage, per state, of requests for production before a judge through videoconferencing facilities and actual productions. Some outliers have been excluded from the analysis.<sup>24</sup>

The RTI responses indicate that in a period of six months from September 2014 to February 2015, there were 27,691 instances (from 28 prisons) where undertrials who were supposed to be produced before magistrates through video-conferencing were not produced.

According to the RTI responses, among states with the largest undertrial populations, Uttar Pradesh has the highest production rate of undertrials through videoconferencing. Arunachal Pradesh, Chandigarh, Chhattisgarh and Himachal Pradesh said they had produced all the undertrials required to be produced through videoconferencing.

The high rate of undertrial non-production, despite requests for police escorts or video-conferencing appointments, is a serious failing, and points to a lack of political will by state governments to protect undertrials' rights. The practice by magistrates of remanding undertrials in custody in their absence has become almost normalized in many states.

21. See section 167(2)(b) of CrPC.

22. Commonwealth Human Rights Initiative, Conditions of detention in the prisons of Karnataka, 2010, Available at [http://humanrightsinitiative.org/publications/prisons/conditions\\_of\\_detention\\_in\\_the\\_prisons\\_of\\_karnataka.pdf](http://humanrightsinitiative.org/publications/prisons/conditions_of_detention_in_the_prisons_of_karnataka.pdf)

23. Large: More than 10000 undertrials, medium: between 2000 and 10000 undertrials and small: less than 2000 undertrials.

24. In Mysore Central Prison, Karnataka, 8569 undertrials were supposed to be produced through videoconferencing between September 2014 and February 2015, and only 289 were actually produced. In Raipur Central Prison, Chhattisgarh, 10,678 undertrials were supposed to be produced through videoconferencing between September 2014 and February 2015, and only 19 were actually produced.

“

*I have been doing legal aid for thirteen years but never gone to collect the case amount.”*

*Legal aid lawyer, Bengaluru*

---



Legal aid clinic

“

*Two years ago, a case that went on for three years got me only Rs.500.”*

*Legal aid lawyer, Patna High Court*

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Figure No. 5

# Legal aid lawyers and their visits to prisons

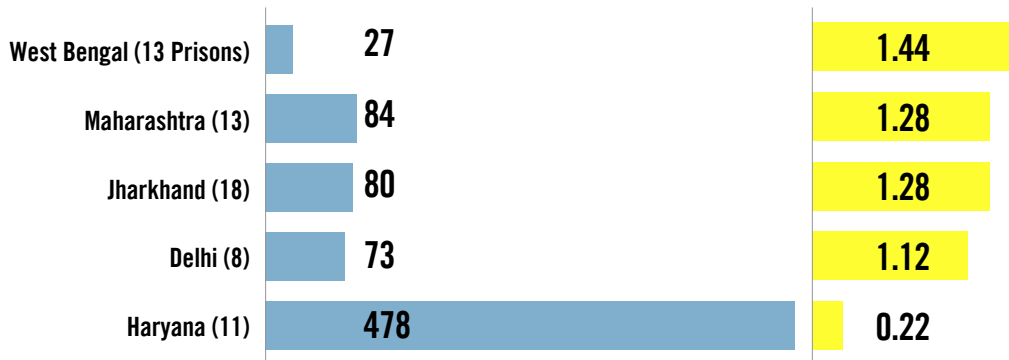


Number of legal aid lawyers

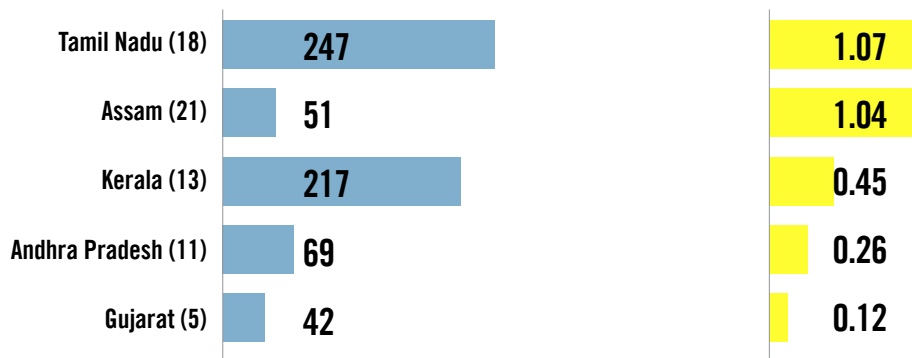


Average monthly visits per prison per lawyer

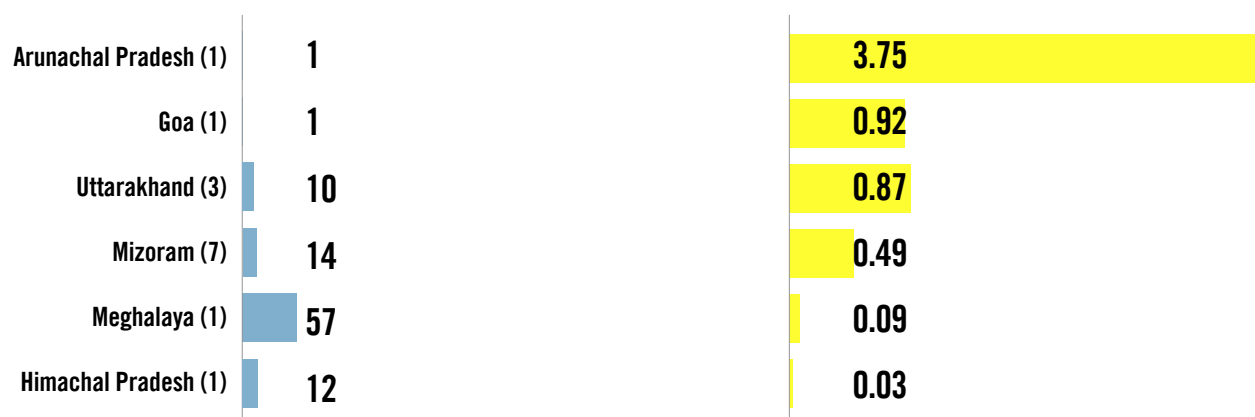
## States with large undertrial population



## States with medium undertrial population



## States with small undertrial population



States arranged in decreasing order of average monthly visits within respective state set (highest to lowest)

Data for the period from March 2014 to March 2015

Data source: Responses to RTI applications made by Amnesty International India to all District and Central prisons in India

## Information sought: Number of legal aid lawyers and frequency of visits between March 2014 and March 2015

Response rate: 46%

A person accused of a criminal offence has a right to free legal assistance, including when they are first produced before a magistrate. Article 39A of the Constitution provides that the

state should provide legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

The Legal Services Authority Act, 1987 was enacted towards providing “free and competent legal services” to people from vulnerable sections of society. It empowers relevant authorities to frame schemes, and utilize funds for dispensing equitable legal aid. The CrPC also provides that when an accused is presented before a criminal court, he is to be provided with legal representation if he cannot afford a lawyer.<sup>25</sup>

In 1980, in the case of *Hussainara Khatoon v. State of Bihar*, the Supreme Court ruled that the right to free legal services is implicit in the right to life and personal liberty guaranteed under Article 21 of the Constitution, as an “essential ingredient of ‘reasonable, fair and just’ procedure for a person accused of an offence”.<sup>26</sup> The Court said that states should work towards building an effective legal aid system which could be easily accessed by the poor. Soon after this, in *Katri v. State of Bihar*, the Supreme Court directed Magistrates and Sessions Judges to inform accused persons about their right to free legal representation.<sup>27</sup> The Supreme Court has also set aside convictions on the ground that the accused did not have access to free legal representation. The Supreme Court has also detailed guidelines that would allow NGOs and other organizations to avail government support for their legal aid initiatives.<sup>28</sup>

More recently, in a 2016 order passed by the Supreme Court in the *Re-Inhuman Conditions in 1382 Prisons* case, the Court directed legal aid lawyers to engage with the system in order to release undertrials. The Court remarked that the State and District Legal Service Authorities should empanel competent lawyers, in order to prevent ‘legal aid for the poor’ from becoming ‘poor legal aid’.<sup>29</sup>

The NALSA lays down policies for making legal services available and effective. It also allocates funds and grants to State Legal Services Authorities (SLSAs) and NGOs for implementing legal aid schemes. In every state, an SLSA is expected to implement policies as directed by NALSA to provide legal services and conduct Lok Adalats (alternative dispute redressal mechanisms). Legal services authorities are supposed to be set up at the district, and taluk (sub-district) levels. The Supreme Court and High Courts also have legal services committees to provide legal assistance to people from vulnerable groups.

Despite this elaborate structure for the provision of legal aid, few people accused of criminal offences are represented by legal aid lawyers. Legal aid is not always provided at the time of arrest, or when the accused person is brought before a magistrate. India’s Law Commission noted in a 2017 report that in practice, legal aid was provided only after charge-sheets were filed. This practice limits the access of poor detainees - who cannot afford private lawyers - to legal assistance in the crucial pre-charge stage.<sup>30</sup>

Amnesty International India filed RTI applications to all central and district prisons asking for information about the number of legal aid lawyers in each prison, and the frequency of their visits to prison every month between March 2014 and March 2015. 46% of prisons responded to the requests for information.

For purposes of analysis, researchers classified states into three categories, based on the number of undertrials being held in detention in each state. Only those states where at least 50% of prisons responded to RTI applications are represented in the analysis.

Figure 5 shows the number of legal aid lawyers per prison and the frequency of visits to prison per legal aid lawyer per month. The number of legal aid lawyers varies significantly between states. Among the states with the largest undertrial populations, Haryana has the highest number of legal aid lawyers but each lawyer visits prison on an average 0.22 times a month, while West Bengal has the least number of legal aid lawyers, but each lawyer visits prison on an average 1.44 times a month. The frequency of visits by lawyers is low in many states – in most states, legal aid lawyers visit prisons less than once a month. Significantly, 23 prisons reported having no legal aid lawyers. It is therefore not only the number of lawyers but frequency of visits that must also be improved.

25. Supreme Court, See section 304 of the Code of Criminal Procedure, 1973.

26. Supreme Court, AIR 1979 SC 1369.

27. Supreme Court, 1981 SCC (1) 627.

28. Supreme Court, *Center For Legal Research v. State Of Kerala*, AIR 1986 SC 1322.

29. Supreme Court, order dated 5 February, 2016, *Re – Inhuman Conditions in 1382 Prisons*, WPC 406 of 2013.

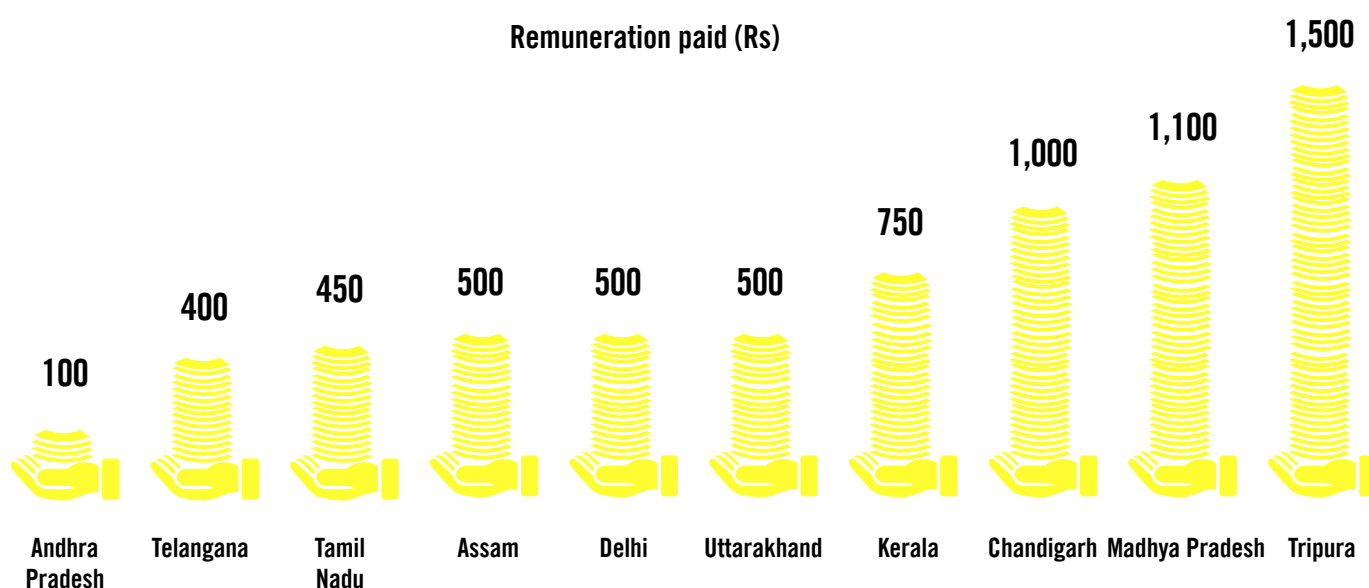
30. Law Commission Report.

The relatively low number of legal aid lawyers in many states (compared to the undertrial population), coupled with the low frequency of lawyer visits, creates a situation where many undertrials are unable, and sometimes unwilling, to access legal aid. These findings are borne out by other studies. In a 2015-16 study by the NGO Daksh on the state of the Indian judiciary, only 2% of litigants surveyed across around 300

district courts were being represented by legal aid lawyers.<sup>31</sup> A 2012-14 study published by the National Law University, Delhi, which analyzed the functioning of the legal aid system in 11 district courts in Delhi and the Delhi High Court found that most people who received free legal aid had little faith in their lawyers, and that a majority opted for it because they could not afford a private lawyer.<sup>32</sup>

**Figure No. 6**

## Remuneration paid to legal aid lawyers per bail application



States arranged in increasing order of amount paid (lowest to highest)

Data for the period from March 2014 to March 2015

Data source: Responses to RTI applications made by Amnesty International India to all District and Central prisons in India

According to the NALSA's official journal, Nyaya Deep, as of 31 March 2016, nationally only about 520,000 people in custody had accessed legal aid in the 30 years since the establishment of state legal services authorities. Delhi, despite being a relatively smaller state, has had the largest number of people in custody accessing legal aid – over 120,000 – nearly twice as many as the next-highest state, Madhya Pradesh.<sup>33</sup>

Amnesty International India also filed RTI applications to State Legal Services Authorities asking for details of the remuneration paid to legal aid lawyers for different types of work. The

responses indicate that the remuneration varies significantly between states, but is low in most states. A legal aid lawyer in Tripura is paid Rs. 1500 for filing a bail application, while a lawyer in Andhra Pradesh is paid only Rs. 100 for the same work. Legal aid lawyers interviewed said that the remuneration was inadequate, payments are often delayed, and can be obtained only by going through lengthy and complicated procedures.

31. Daksh, Access to Justice Survey, Daksh 2015-2016. Available at <http://dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf>.

32. Dr. Jeet Singh Mann, *Impact Analysis of the Legal Aid Services Provided by the Empaneled Legal Practitioners on the Legal Aid System in City of Delhi, 2012-2014, 2017.*

33. NALSA, Nyaya Deep, October 2015 (Page 211).



# HOME MINISTRY GUIDELINES



*All the stakeholders — the Government of India, the judiciary, including the Legal Services Authority — need to take collective responsibility for ensuring that institutional mechanism, such as UTRC and legal aid system, work seamlessly to ensure access to justice for the undertrial population"*

*Ravi Shankar Prasad, Union Law Minister  
13 February, 2017*

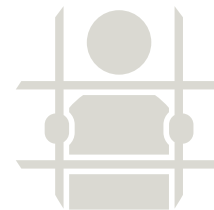


Information sought: Compliance with Home Ministry guidelines

Response rate: 20%

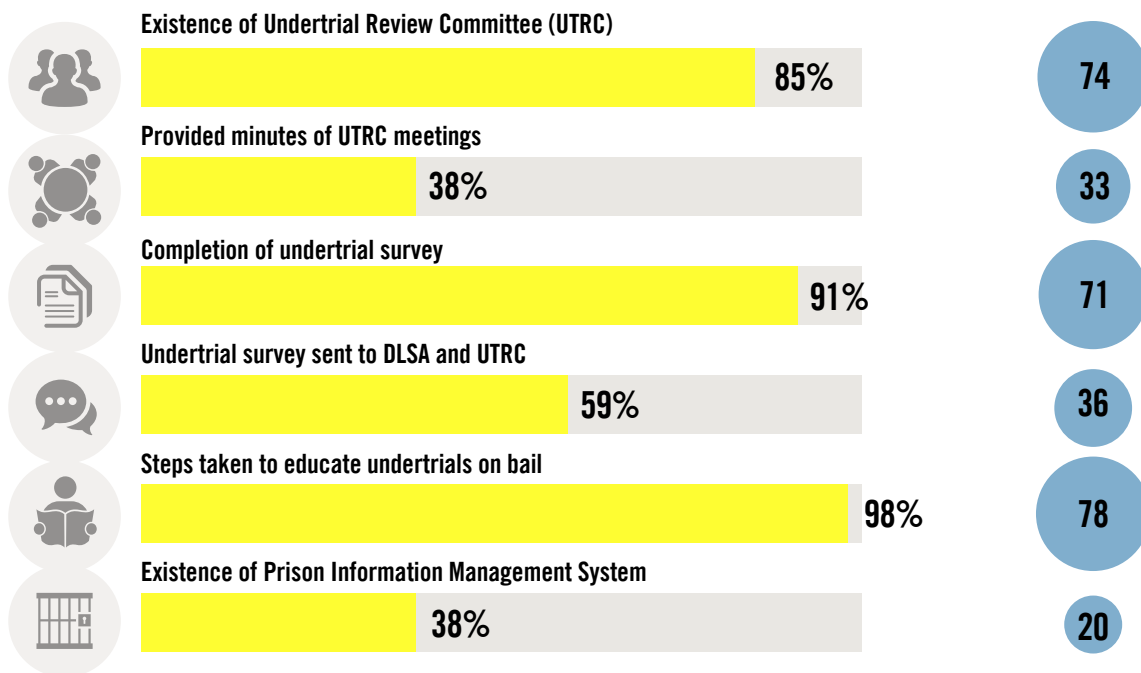
Figure No. 7

## Compliance by prisons with Home Ministry directives



■ Prisons that responded 'yes' (%)

● Number of prisons that responded 'yes'

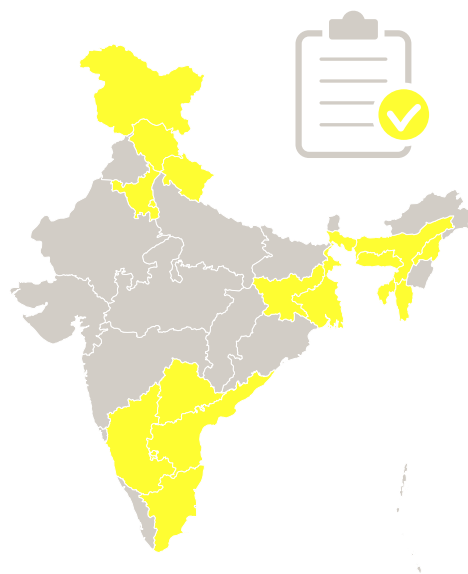


Data for the period from February 2015 to December 2015

Data source: Responses to RTI applications made by Amnesty International India to all District and Central prisons in India

### States that responded (in alphabetical order)

1. Andhra Pradesh (12 Prisons)
2. Assam (22)
3. Chandigarh (1)
4. Delhi (6)
5. Haryana (9)
6. Himachal Pradesh (4)
7. Jammu & Kashmir (7)
8. Jharkhand (4)
9. Karnataka (2)
10. Meghalaya (4)
11. Mizoram (7)
12. Nagaland (1)
13. Puducherry (1)
14. Tamil Nadu (2)
15. Telangana (8)
16. Tripura (1)
17. Uttarakhand (1)
18. West Bengal (8)



On 17 January 2013, the Ministry of Home Affairs issued a set of guidelines on the use of section 436A to reduce overcrowding in prisons.<sup>34</sup> The guidelines stated: “Invariably it has been found that only the poor and indigent who have not been able to put up the surety are those who have continued to languish as under-trials for very long periods and that too for minor offences. The lack of adequate legal aid and a general lack of awareness about rights of arrestees are principal reasons for the continued detention of individuals accused of bailable offences, where bail is a matter of right and where an order of detention is supposed to be an aberration.”

Accordingly, the Ministry directed state governments to consider taking the following actions:

1. Constitute a Review Committee in every district with the District Judge as Chairman, and the District Magistrate and District Superintendent of Police as members to meet every three months and review the cases.

2. The Prison Superintendent should conduct a survey of all cases where the undertrial prisoners have completed more than one-fourth of their maximum sentence.
3. Prison authorities may educate undertrial prisoners on their right to bail.
4. Home Department may also develop management information system to ascertain the progress made prison-wise in this regard.

In 2015, Amnesty International India researchers filed RTI applications to all district and central prisons in India asking for information on the implementation of these four guidelines. However, only 20% of prisons (100 prisons) responded. No prisons in the states of Uttar Pradesh, Madhya Pradesh, etc. replied to the RTI applications. Since there were only 10 states where more than 50% of the prisons responded to the RTI applications, this data is not categorized by state, and represents the information received from all prisons that responded.<sup>35</sup>

## RE-INHUMAN CONDITIONS IN 1382 PRISONS

The Supreme Court in its order in *Re-Inhuman Conditions in 1382 Prisons* dated 24 April 2015, directed the National Legal Services Authority (NALSA), the Ministry of Home Affairs and State Legal Services Authorities (SLSAs) to ensure that Undertrial Review Committees (UTRCs) were formed in every district of the country, and met every quarter. This order also directed the UTRCs to review cases where undertrials granted bail were not released because they were not able to furnish sureties.<sup>36</sup>

In a subsequent order in the same case on 5 February 2016, the Court ordered that an e-prisons application be designed so that all essential prison information could be centrally aggregated. The Ministry of Home Affairs filed an affidavit on 22 January 2016 in this writ petition, stating that a detailed evaluation of the software for the e-prisons project had been completed and guidelines had also been circulated to all the states for their proposals, and for exercising their option for selecting the appropriate software. However there appears to have been little progress on prison management software since this hearing.<sup>37</sup>

Figure 7 presents the responses received in response to the RTI applications. Even though 85% of the prisons that responded said they had functioning UTRCs, only 38% provided minutes of their meetings. This lack of response raises questions about the efficacy of these committees in fulfilling their objective of regularly reviewing the cases of prisoners awaiting trial, and taking appropriate corrective steps to ensure that no undertrial is detained for an unjustifiably long period.

91% of the prisons that responded stated that they had completed the undertrial survey, but only 59% of them said they had sent the survey results to the UTRC and DLSA. The objective of the undertrial survey is defeated if the results are not sent to the UTRC and DLSA to enable the release of eligible undertrials.

98% of prisons that responded stated that they had taken steps to educate undertrials on bail. The implementation of prison information management systems appears quite poor. Only 38% of the prisons that responded stated that they were using prison information management systems. The software applications

are not standardized and differ from state to state. The e-prisons suite developed by the state-run National Informatics Centre (NIC) is being used by a majority of prisons, but other applications like PRISM by Goa Electronics Ltd., PHOENIX by Invader Technologies (in Haryana) and eGujcops by Tata Consultancy Services (in Gujarat) are also in use.<sup>38</sup>

In 2016, Commonwealth Human Rights Initiative, a prominent NGO, published a report on the formation and functioning of the UTRCs. The report also concluded from information obtained through RTI applications that there were several gaps in the working of UTRCs. 60% of the districts did not comply with the mandate of holding quarterly meetings. Only 54 districts followed the full mandate and reviewed all the three categories of cases as directed.

The poor implementation of the Home Ministry's guidelines suggests that several state governments have not yet recognized the potential of these mechanisms to reduce excessive undertrial detention.

34. Ministry of Home Affairs, Use of section 436A of the CrPC to reduce overcrowding of prisons (No. V-13013/70/2012-IS(VI), 2013, Available at [http://mha1.nic.in/PrisonReforms/pdf/AdvSec436APrison-060213\\_0.pdf](http://mha1.nic.in/PrisonReforms/pdf/AdvSec436APrison-060213_0.pdf)

35. These states are Andhra Pradesh, Assam, Chandigarh, Delhi, Himachal Pradesh, Jammu and Kashmir, Meghalaya, Mizoram, Puducherry and Telegana.

36. Supreme Court, order dated 5 February, 2016, *Re-Inhuman Conditions in 1382 Prisons*, WPC 406 of 2013.

37. Commonwealth Human Rights Initiative, EPIC: Evaluation Of Prisoner Information And Cases, 2016, Available at <http://www.humanrightsinitiative.org/download/1475562359EPIC-%20EVALUATION%20OF%20PRISONER%20INFORMATION%20AND%20CASES.pdf> (hereinafter: EPIC)

38. EPIC.

## SECTION 436A

**“** With regard to the undertrial prisoners who could be considered for release under the provisions of section 436A of the CrPC, some progress had been made except in the States of Assam, Bihar, Chhattisgarh, Goa, Karnataka, Meghalaya, West Bengal, and the Union Territories of Dadra & Nagar Haveli and Lakshadweep.”

*Order dated February 5, 2016 in Re Inhuman Conditions in 1382 Prisons (WP (CIVIL) NO.406/2013)*



Figure No. 8

# Undertrials eligible for release under section 436A of CrPC

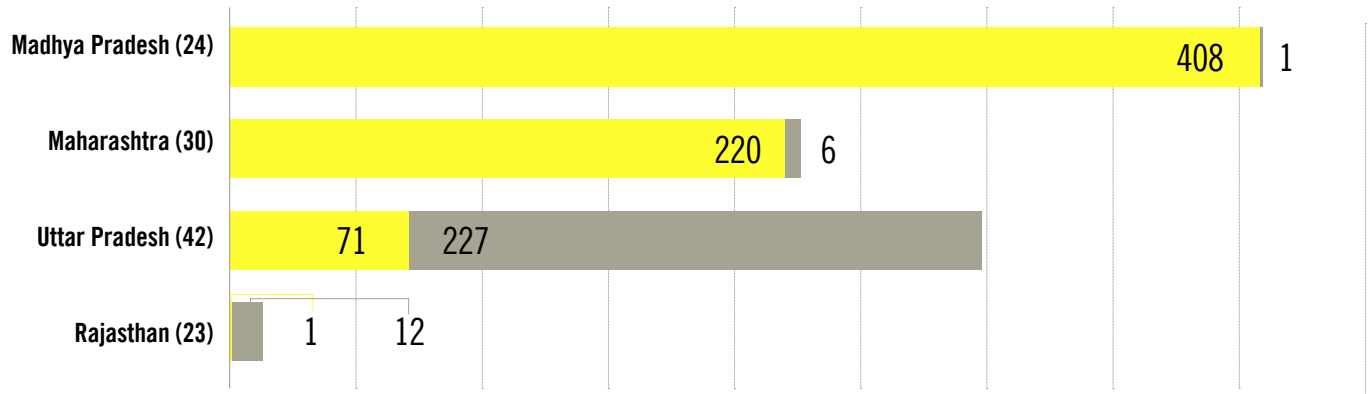


Incorrect determination of eligibility by prisons



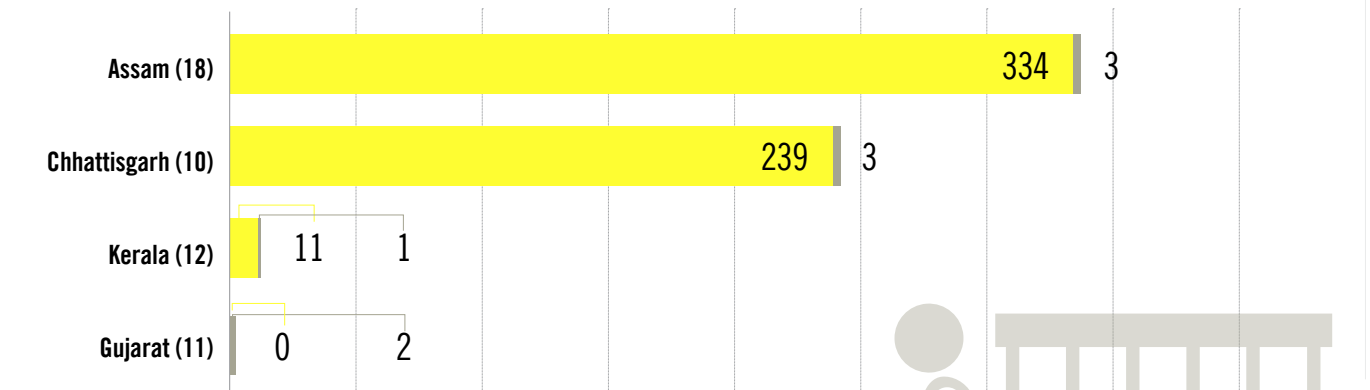
Actual eligibility figure calculated by Amnesty International India

## States with large undertrial populations



Note: Prisons of Karnataka and Delhi said they have no undertrials eligible for release under Section 436A

## States with medium undertrial populations



Note: Prisons of Andhra Pradesh, Himachal Pradesh, Goa and Sikkim said they have no undertrials eligible for release under Section 436A



## States with small undertrial populations



States arranged in decreasing order of incorrect determination of eligibility by prisons within respective state set (highest to lowest)

Data for undertrials who were eligible for release under section 436A as on February 28, 2015

Data source: Responses to RTI applications made by Amnesty International India to all District and Central prisons in India

## Information sought: Undertrials eligible for release under section 436A, as of 28 February 2015

Response rate: 51% of all central and district prisons

Section 436A of the CrPC provides that where an undertrial has been detained for a period equal to half of the maximum sentence specified for the offence for which they are charged, they are eligible for release on personal bond, with or without sureties.

In 2014, the Ministry of Home Affairs issued detailed guidelines to the governments of all states and union territories on how eligibility for release under section 436A was to be determined. The guidelines clarified that where an undertrial is accused of multiple offences, the “half-time” is to be calculated for the offence that has the longest sentence. If the undertrial is accused of multiple offences and his dates of arrest are different, then the dates of detention will be calculated separately for each offence.<sup>39</sup>

Amnesty International India filed RTI applications to all district and central prisons in all states and union territories, asking for information about the number of undertrials in each prison who were eligible for release under section 436A as of 28 February 2015, the offence/s they were accused of, and their date of admission into the prison.

About 47% of prisons (233 prisons) responded to the requests for information. No prison from Bihar, Haryana, etc responded to the requests for information.

For purposes of analysis, researchers classified states into three categories, based on the number of undertrials being held in detention in each state. Only those states where at least 50% of prisons responded to RTI applications are represented in the analysis.<sup>40</sup>

To ensure that state-specific findings were not overly influenced by responses from a few prisons, researchers removed from the analysis those states where fewer than half the prisons had responded to the RTI applications. Using the information received about the offences each undertrial was suspected of, researchers independently calculated the maximum sentence that each undertrial faced, and whether they had been in prison for at least half that time and were therefore eligible for release under section 436A. These figures were then compared to the information given by the prison authorities, to determine if prisons had correctly applied section 436A.

In many instances, prison authorities appear to have a poor understanding of what section 436A entails (See Figure 8).

Out of the 1544 prisoners that 254 prisons had said were eligible for release, researchers found that prison authorities had wrongly calculated the eligibility of 1286 undertrials.

In some instances, undertrials accused of offences for which the maximum penalty is death - and who were therefore not eligible for release under section 436A - were also included in the list of undertrials eligible for release. For example, in Madhya Pradesh, RTI responses from 24 prisons stated that 409 undertrials were eligible for release under section 436A, but independent calculations by researchers indicated that only one undertrial was actually eligible for release.

RTI responses from Uttar Pradesh prisons said that 227 undertrials were eligible for release under section 436A. Some prisons stated that some of the eligible undertrials had not been released because of “other pending cases” or because they had been convicted in other cases.

The sheer number of incorrect determinations indicates that many prison officials across states are still unaware of how section 436A is to be applied, despite the Home Ministry's guidelines. Some states, including Haryana and Jharkhand did not respond to the RTI applications, making it difficult to determine their awareness of the law.

Some legal scholars have suggested that section 436A may not be a solution to the problem of excessive undertrial detention, partly because many undertrials are in detention for relatively short periods.<sup>41</sup> A definitive assessment of this issue is difficult given the poor response rates, and would require more accurate and comprehensive information from prisons. However, Amnesty International India's research indicates that prison officials often seem to often be unable to provide this information, or even arrive at accurate assessments of the number of people eligible for release under section 436A.

39. Ministry of Home Affairs, Guidelines on reckoning half-life of time spent in judicial custody of under-trial prisoners under section 436A of Cr.P.C. (No. V-17013/24/2013-PR), 27 September, 2014, Available at [http://mha1.nic.in/PrisonReforms/pdf/GuidelinesForReckoningHalfLife\\_161014.pdf](http://mha1.nic.in/PrisonReforms/pdf/GuidelinesForReckoningHalfLife_161014.pdf)

40. Large: More than 10000 undertrials, medium: between 2000 and 10000 undertrials and small: less than 2000 undertrials.

41. S. Krishnaswamy and S. Bail, 'Freeing the undertrial', *The Hindu*, 2014, <http://www.thehindu.com/opinion/lead/freeing-the-undertrial/article6432209.ece>

# RECOMMENDATIONS

A combination of structural and implementation-related issues within the criminal justice system have contributed to the stubborn persistence of excessive undertrial detention

in India. Tackling this issue requires a holistic approach and concerted efforts from both the central government and state governments.

## Amnesty International India makes the following recommendations:

### To the National Legal Services Authority:

- Standardize the remuneration paid to legal aid lawyers across India, and ensure that lawyers are paid competitive salaries in a timely manner.

### To the Union Ministry of Law and Justice:

- Set up a computerized database and tracking system for prisoners in all prisons, which will regularly alert prison authorities on undertrials eligible for release which will be maintained and updated at the state-level.

### To State Legal Services Authorities:

- Appoint more legal aid lawyers according to the needs of the state.
- Strengthen the monitoring of legal aid lawyers' effectiveness to ensure accountability and quality representation. Ensure that legal aid lawyers at the state, district and taluk levels are required to submit regular reports on the status of their cases, and hold lawyers failing to do so accountable.
- Ensure that legal aid lawyers are paid on a monthly basis.
- Undertake regular awareness programs in prisons to ensure that all undertrials are informed about their legal rights, including access to legal aid, procedural safeguards and bail.

### To State police departments:

- Collaborate with state legal services authorities to ensure that legal aid is provided at the time of arrest.
- Create a separate reserve of police personnel dedicated to providing escorts for undertrials to be taken to court.
- Ensure that alternatives to undertrial detention are used as early as possible, and that undertrial detention is used only as a last resort, and shall not last any longer than necessary.

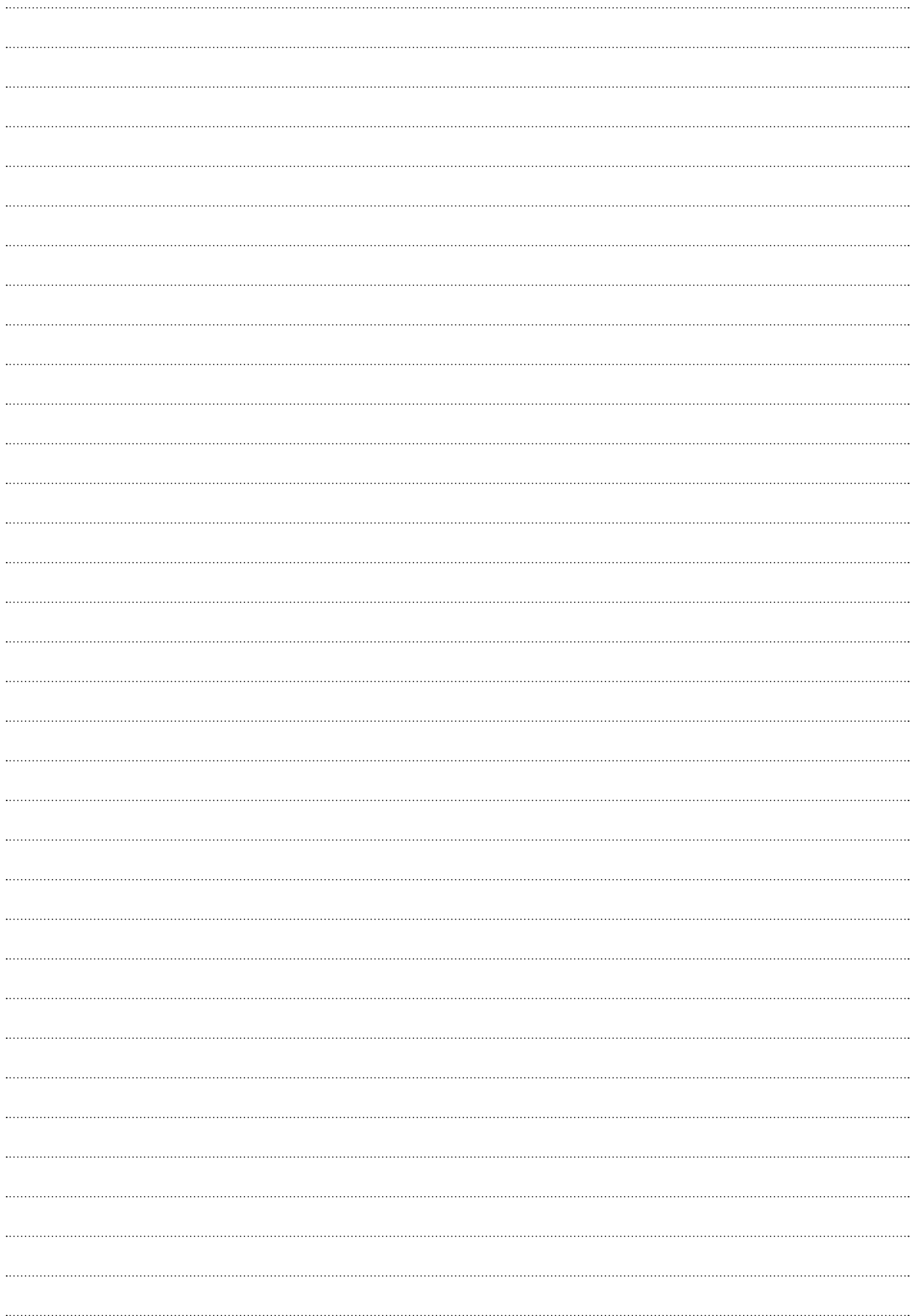
### To State governments:

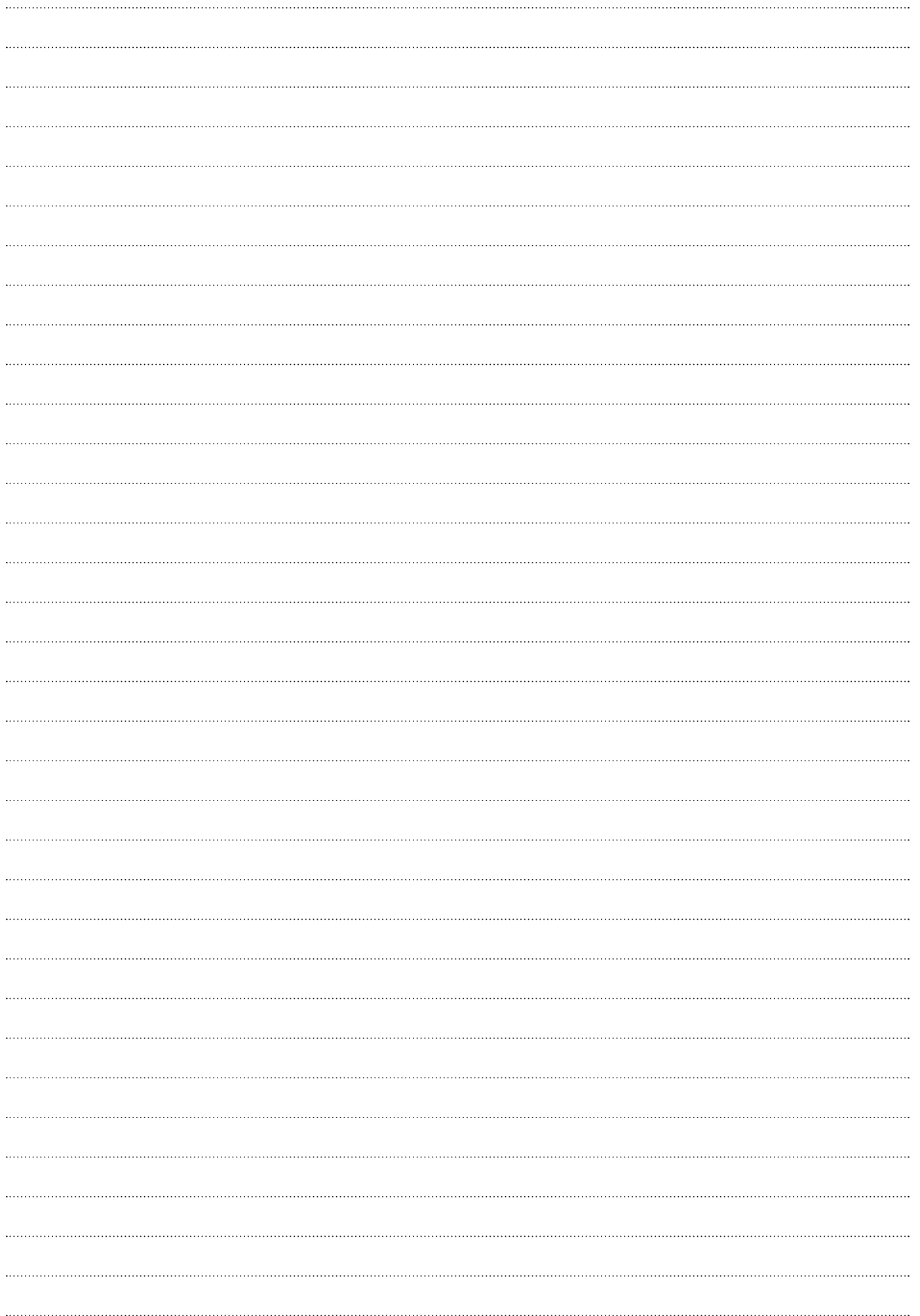
- Monitor the implementation of the Home Ministry guidelines, and hold accountable officials who fail to meet their obligations.
- Ensure that district and central prisons maintain updated lists of undertrials and the details of the cases against them, which are sent to district prosecution officers, the Prisons Department, the Undertrial Review Committee and the relevant legal services authority, and made available to all non-official visitors.

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