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# **THE CODE OF CRIMINAL PROCEDURE, 1973 To the BHARATIYA NAGARIK SURAKSHA SANHITA, 2023: A CRITICAL ANALYSIS OF THE EVOLVING BAIL FRAMEWORK IN INDIA**

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## **ABSTRACT**

The transformation from the CrPC to the BNSS has been one of the most remarkable developments in the Indian criminal justice system especially in the field of bail jurisprudence. Through the BNSS, 2023, the Government of India attempts to modernize the Indian criminal justice system by incorporating advanced technology and improving the process of investigation and trial. Given that the right to bail in India is directly associated with the fundamental right to personal liberty enshrined under Article 21, the emerging changes regarding bail laws under the BNSS have become subject to intense discourse. In the present study, an attempt is made to analyze whether or not the BNSS 2023 strikes a balance between the rights of accused individuals and their duties towards maintaining public order.

Through comparative analysis of the bail laws in the CrPC, 1973 and BNSS, 2023, the paper explores the concept of regular bail, anticipatory bail, and default bail. In this respect, there have been criticisms raised about increased discretionary power of the executive, stringent procedural requirements and potential for prolongation of detention in some types of cases. The present study also considers the implications of these measures for undertrial prisoners and marginalized groups, alongside exploring how far this new legal paradigm protects judicial checks on arbitrary arrest and detention.

This study also takes into consideration the influence of the Supreme Court of India in developing the jurisprudence of bail through constitutional doctrines like “bail is the rule and jail is the exception.” By studying judicial precedents, legislative changes and international human rights norms, this paper critically examines the effectiveness and inefficiencies of the new BNSS framework for granting bail. It is expected that even though the new framework has the potential for streamlining and improving criminal procedures, the future success of this system will depend on how effectively it would be applied.

**Keywords:** Bail, CrPC, BNSS

## INTRODUCTION

The introduction of the CrPC has been a landmark step in the history of criminal justice in India since it provided a complete procedural structure for investigation, arrest, trial, and bail. The CrPC has been the heart of the criminal system in India for many years as it ensured the balance between the power of the State and individual rights. One of the most important parts of the CrPC is the bail provision. It is one of the most critical laws as it guarantees the right to liberty of the person, and according to Article 21 of the Constitution of India, the law is a part of the right to life and personal liberty. Several judicial decisions have confirmed that the bail must be the rule, and imprisonment prior to conviction should be an exception.<sup>1</sup>

However, the operation of the CrPC has faced criticism because of various factors like procedural delay, prison overcrowding, lengthy investigations, and increasing numbers of undertrial prisoners. Crimes involving cyber activities, organized crimes, and other offenses affecting national security have led to certain gaps in the current process. While this was happening, there were also growing worries about the abuse of powers of arrest, disparities in granting bail, and differential access to justice for those who were not economically and socially privileged. It is because of such problems that the need for reform was felt in order to introduce an efficient and modern procedure of criminal procedure that would ensure a sense of accountability and equality before the justice delivery process.<sup>2</sup> In addition to this, the bail system in the BNSS should also be understood in the context of the UDHR, especially Article 9 that protects people against arbitrary arrest, detention, and exile.

It was out of these issues that the Indian government came up with the BNSS with a view to replacing colonial criminal procedure laws with an updated and indigenous criminal procedure laws that would modernize criminal procedure through technological interventions and digitization of criminal cases, conducting investigations in a time bound fashion, and adopting e-evidence and procedural safeguard in criminal cases. Though many sections dealing with bail are drawn from the CrPC, there are some significant amendments introduced by the BNSS which might impact the granting of bail.<sup>3</sup>

In this context, the current study will conduct a comprehensive study of the transition from CrPC to BNSS with particular emphasis on the changing contours of the bail system in India.

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<sup>1</sup> Jahnvi Raj & Ganga, Unravelling the Impact of BNSS, 2023 on Bail Jurisprudence in India, IJLMH (2025)

<sup>2</sup> Anshika Pandey, Revisiting Bail Laws in India, IJAMSR (2025)

<sup>3</sup> <https://www.vintagelegalvl.com/post/evolution-of-bail-law-from-crpc-to-bnss>

The study shall critically analyze the points of continuity and discontinuity among the two statutes, the constitutionality of the provisions, and the impact of such changes on the criminal administration of justice through Supreme Court judgments in India. This study, by identifying both the advantages and disadvantages of BNSS, seeks to ascertain whether BNSS manages to achieve an optimal balance between effective crime control and maintenance of basic rights in a democracy.

### **STATEMENT OF THE PROBLEM**

The substitution of the CrPC by the BNSS has led to substantial modifications in the Indian criminal justice system, especially with respect to bail, arrests, detentions, and investigations. Even though the BNSS seeks to update the criminal procedure system in order to achieve speedier disposal, doubts are still raised regarding its ability to address the constitutional guarantees of the accused. Such concerns arise due to the growing number of undertrial detainees, inconsistencies in judicial rulings on bail, complicated processes, and even the potential expansion of the executive branch's discretion. These factors have brought into question the effectiveness of the current bail system, which has made it imperative to examine the issue of whether the BNSS manages to reconcile the needs for effective criminal management and public safety with the preservation of individual freedom, given that "bail is the rule, and jail is an exception."

### **OBJECTIVES OF THE STUDY**

- To examine the evolution of bail provisions from the CrPC to BNSS and analyze the key procedural changes introduced under the new law.
- To critically analyze the effect of BNSS on constitutional principles in relation to personal liberty, due process, and the rights of accused and undertrial persons in India.
- To examine the role of judicial interpretations in shaping and protecting the evolving bail jurisprudence under the new criminal procedural regime.

### **EVOLUTION OF BAIL JURISPRUDENCE IN INDIA**

The concept of bail is an integral part of criminal law, ensuring that a person who has been charged with an offense is not deprived of his liberty until he is found guilty. With regard to bail laws, the CrPC classified offenses as either bailable or non-bailable and conferred discretionary power to the court in awarding bail on the basis of the nature of the offense. Section 436, 437, and 439 were related to regular bail, whereas Section 438 provided for

anticipatory bail. The Indian judiciary has always attached considerable importance to personal liberty while dealing with issues relating to bail. Some landmark decisions by Supreme Court have stated that pretrial detention cannot be a punitive measure.<sup>4</sup>

Structure of BNSS is similar to that of bail provisions found in CrPC, but it has some procedural changes. It includes electronic proceedings, summons, and other technologically based methods to help in speeding up both investigations and the entire criminal trial process. Nevertheless, some people claim that some of its provisions could lead to more stringent bail conditions.

## **COMPARATIVE ANALYSIS OF BAIL PROVISIONS UNDER CRPC AND BNSS**

The shift from the CrPC towards BNSS preserves the essential format of the bail legislation in India but adds new elements to the framework designed to update the management of criminal cases in the country. The classification of bail in bailable and non-bailable offences as well as the rules concerning the use of discretionary powers stay almost unchanged. Though, some of the provisions are organized in a new way; technologies are involved, and time frames become critical aspects affecting bail.

In CrPC, bail in the case of bailable offences was regulated by the provisions included in Section 436. According to that law, bail was considered the matter of right. Section 478 of BNSS covers the issue of bail in bailable offences and obligates to release a person who committed a crime under that category upon giving bail or bonds. Both acts recognize the fact that detentions in such minor crimes should not be arbitrary.<sup>5</sup>

Section 437 of the Code of Criminal Procedure provided for bail in non-bailable offences in Magistrate courts, whereas Section 480 of the BNSS is a parallel section of the code. Both codes allow the courts to consider issues such as the severity of the crime, probability of absconding, chance of interference with the evidence, and history of criminal activity before issuing a bail order. The BNSS lays a strong focus on procedural efficiency and timelines for investigation processes, which might impact the court's decision in cases involving serious crimes.

The law concerning anticipatory bail as stipulated in Section 438 of the Code of Criminal Procedure has been included under Section 482 of the BNSS. Anticipatory bail serves as a

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<sup>4</sup> BNSS vs CrPC <https://jurigram.com/advocates/resources/new-laws/bnss-vs-crpc-bail-provisions>

<sup>5</sup> Bhateri, D. (2026). The Judicial Analysis of Bail Relating to Special Offences. *Indian Journal of Law*, 4(1), 1–10

crucial measure to protect individuals from the abuse of arrest and power by the police. The court will still maintain its discretion when examining the nature of the charge, previous history of the accused, and potential misuse of freedom granted. However, controversies have persisted about the scope of anticipatory bail under the BNSS.<sup>6</sup>

Default bail, which safeguards the accused from arbitrary detention during investigations, was provided in Section 167(2) CrPC, and now finds its mention in Section 187(3) BNSS. Both the statutes take into consideration the legal right of an accused person to be bailed when investigation has been concluded within the stipulated time. This provision ensures the protection of the constitutional principle of personal liberty and the right to speedy investigations. Nevertheless, there are still problems associated with delay in filing of charge sheets.

Another important aspect of the BNSS Act is the use of technologies in criminal system. There will be electronic communication, electronic summonses, electronic record keeping, and audio/video proceedings of the case. While it would enhance the effectiveness of the procedure, it can also pose obstacles for those who lack the necessary skills required for dealing with technology. It is, therefore, important for BNSS Act reforms to be carried out with caution to avoid making technology a hindrance in the path of justice.<sup>7</sup>

P. Chidambaram v. ED (2019)<sup>8</sup>: In this prominent case, Court of India ordered bail for P. Chidambaram, who was the Finance Minister of India at one point in time. The court ruled that the rights to bail is a necessary part of the right to personal liberty according to Article 21 and that bail must be allowed unless there are sufficient grounds for refusing it. The court ruled as follows: "Fundamental Right to life and liberty conferred by Art 21 includes the right to bail. Depriving a person of his liberty is itself a punishment except when it is necessary to ensure that an accused person appears for his trial when required."

In Arnab Manoranjan Goswami v. State of Maharashtra<sup>9</sup>, the Court made it abundantly clear that while deciding the question of personal liberty, the Court must adhere strictly to the constitutional importance of the same and grant interim bail to the petitioners. The Court made it very clear that the High Court did not exercise its jurisdiction in this regard in the correct manner, and hence, there was no other way than upholding the principle that Courts are to safeguard the liberties of the citizens as per Article 21. Further, the Court made some

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<sup>6</sup> Deshmukh, S., & Kamble, P. (2025). IndianBailJudgments-1200: A Multi-Attribute Dataset for Legal NLP on Indian Bail Orders. arXiv preprint arXiv:2507.02506.

<sup>7</sup> Sarraf, S., & Mishra, S. P. (2025). Objectives and Scope of Bail Under BNSS, 2023, IJRIAS (2025.)

<sup>8</sup> P. Chidambaram v. ED CrI. Appeal No. 1340/2019.

<sup>9</sup> (2020) 17 SCC 1

critical observations that criminal laws cannot be employed as a means of harassing people and depriving them of their basic right of liberty without a strong cause for doing the same. The Court emphasized on the point that liberty is not any privilege that needs to be granted to a citizen but rather a fundamental right available to all. Furthermore, the Court noted that the issue of arbitrary arrest and detaining of the accused prior to trial should be prevented at all costs, lest it leads to a decline in people's faith in the criminal justice system.

In *Manish Sisodia v. CBI*<sup>10</sup>, the Supreme Court adopted a strongly liberty-oriented approach to bail in a high-profile corruption prosecution arising from the Delhi excise policy case. The Court held that prolonged pre-trial incarceration, especially where trial progress is uncertain and charges are not conclusively tested, offends the guarantee of personal liberty under Article 21. It emphasized that the gravity of an offence, while relevant, cannot be the sole basis for denying bail indefinitely, and that the presumption of innocence must retain practical meaning in bail adjudication. Importantly, the Court scrutinized the delay in trial and the absence of exceptional circumstances justifying continued custody, reinforcing that “punitive detention” before conviction is constitutionally impermissible. The decision is significant in the evolving bail framework because it pushes courts toward stricter judicial review of investigative delays and strengthens the principle that bail decisions must balance societal interest with individual liberty rather than defaulting to prolonged incarceration in economic offences.

Through the comparison of bail in the CrPC versus the BNSS, it is clear that while the philosophy of bail has remained more or less the same, there has been a lot of change in the procedural aspect of bail. The BNSS tries to find the balance between efficiency in criminal procedure and constitutional protections concerning individual freedom. The success of the BNSS will depend on how well the courts apply constitutional doctrine through judicial interpretation.

## **CONSTITUTIONAL AND HUMAN RIGHTS PERSPECTIVE**

The right to bail is associated with the provision of Article 21 of the Indian Constitution. This constitutional philosophy is premised on the belief that all individuals presumed guilty of any crime are presumed to be innocent until proven otherwise. Pre-trial detention is thus antithetical to the philosophy of bail and negatively impacts people’s lives and freedom. In its ruling, the Supreme Court underscored that the concept of bail should be premised on

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<sup>10</sup> 2024 SCC OnLine SC

principles of fairness, reasonability, and proportionality. In one of the landmark cases, State of Rajasthan vs. Balchand, the court upheld the notion that “bail is the rule and jail is the exceptions.”

According to Article 9 of U.D.H.R, no individual should be arbitrarily arrested or detained. Similarly, the UN promotes procedural justice measures that guarantee the exceptionality of detention before conviction.

### **CHALLENGES IN THE EXECUTION OF THE BNSS BAIL SYSTEM**

However, despite the rehabilitative intentions behind the BNSS, there are a few practical hurdles that could pose problems when implementing the same. The issue of judicial backlog and congested prison conditions is one such potential hurdle. Even with changes in procedure, it is possible that investigations and hearings could still lead to undertrial prisoners spending lengthy periods in jail. The next potential hurdle that could hinder the implementation of the BNSS would be that of differential access to legal aid. Underprivileged communities might experience difficulties when accessing competent legal aid for their bail applications and adhering to other procedural requirements.<sup>11</sup>

Furthermore, an inconsistent interpretations of bail provision by the judiciary may result in uncertainties and inequalities. For the BNSS to succeed, it is essential for the judiciary to be sensitive to the situation, have the necessary infrastructure, and implement the program effectively.

### **CONCLUSION**

Moving from CrPC to BNSS denotes a considerable step in the evolution of the Indian criminal procedure frameworks. The BNSS tries to achieve modernization of the criminal justice process through the use of technology, efficiency, and timely investigations. Although the core concepts underlying the bail process largely remain unchanged, there have been some procedural changes that could greatly impact the dynamics between state power and individual freedoms.

The research suggests that the BNSS can be an effective tool for improving the efficiency of the process while avoiding some pitfalls related to discretionary bail, executive action, and unjustified detention.

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<sup>11</sup> Srivastava, P. K., et al. (2025). IBPS: Indian Bail Prediction System. arXiv preprint arXiv:2508.07592.

The ultimate success of the BNSS will depend on its effective implementation in courts, policing bodies, and legal institutions. An approach aimed at balancing the interests of national security and human rights is required for this purpose.

The BNSS must enhance its oversight framework to ensure that no cases of undertrial detention exist in petty cases, and also introduce mandatory reviews for custodial status after surpassing certain limits. In the absence of such improvements, the change from the CrPC to BNSS may not make any substantial difference to India's undertrial problem.

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