

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi Disciplinary
Peer Reviewed

www.ijlra.com

DISCLAIMER

No part of this publication may be reproduced, stored, transmitted, or distributed in any form or by any means, whether electronic, mechanical, photocopying, recording, or otherwise, without prior written permission of the Managing Editor of the *International Journal for Legal Research & Analysis (IJLRA)*.

The views, opinions, interpretations, and conclusions expressed in the articles published in this journal are solely those of the respective authors. They do not necessarily reflect the views of the Editorial Board, Editors, Reviewers, Advisors, or the Publisher of IJLRA.

Although every reasonable effort has been made to ensure the accuracy, authenticity, and proper citation of the content published in this journal, neither the Editorial Board nor IJLRA shall be held liable or responsible, in any manner whatsoever, for any loss, damage, or consequence arising from the use, reliance upon, or interpretation of the information contained in this publication.

The content published herein is intended solely for academic and informational purposes and shall not be construed as legal advice or professional opinion.

**Copyright © International Journal for Legal Research & Analysis.
All rights reserved.**

ABOUT US

The *International Journal for Legal Research & Analysis (IJLRA)* (ISSN: 2582-6433) is a peer-reviewed, academic, online journal published on a monthly basis. The journal aims to provide a comprehensive and interactive platform for the publication of original and high-quality legal research.

IJLRA publishes Short Articles, Long Articles, Research Papers, Case Comments, Book Reviews, Essays, and interdisciplinary studies in the field of law and allied disciplines. The journal seeks to promote critical analysis and informed discourse on contemporary legal, social, and policy issues.

The primary objective of IJLRA is to enhance academic engagement and scholarly dialogue among law students, researchers, academicians, legal professionals, and members of the Bar and Bench. The journal endeavours to establish itself as a credible and widely cited academic publication through the publication of original, well-researched, and analytically sound contributions.

IJLRA welcomes submissions from all branches of law, provided the work is original, unpublished, and submitted in accordance with the prescribed submission guidelines. All manuscripts are subject to a rigorous peer-review process to ensure academic quality, originality, and relevance.

Through its publications, the *International Journal for Legal Research & Analysis* aspires to contribute meaningfully to legal scholarship and the development of law as an instrument of justice and social progress.

PUBLICATION ETHICS, COPYRIGHT & AUTHOR RESPONSIBILITY STATEMENT

The *International Journal for Legal Research and Analysis (IJLRA)* is committed to upholding the highest standards of publication ethics and academic integrity. All manuscripts submitted to the journal must be original, unpublished, and free from plagiarism, data fabrication, falsification, or any form of unethical research or publication practice. Authors are solely responsible for the accuracy, originality, legality, and ethical compliance of their work and must ensure that all sources are properly cited and that necessary permissions for any third-party copyrighted material have been duly obtained prior to submission. Copyright in all published articles vests with IJLRA, unless otherwise expressly stated, and authors grant the journal the irrevocable right to publish, reproduce, distribute, and archive their work in print and electronic formats. The views and opinions expressed in the articles are those of the authors alone and do not reflect the views of the Editors, Editorial Board, Reviewers, or Publisher. IJLRA shall not be liable for any loss, damage, claim, or legal consequence arising from the use, reliance upon, or interpretation of the content published. By submitting a manuscript, the author(s) agree to fully indemnify and hold harmless the journal, its Editor-in-Chief, Editors, Editorial Board, Reviewers, Advisors, Publisher, and Management against any claims, liabilities, or legal proceedings arising out of plagiarism, copyright infringement, defamation, breach of confidentiality, or violation of third-party rights. The journal reserves the absolute right to reject, withdraw, retract, or remove any manuscript or published article in case of ethical or legal violations, without incurring any liability.

BAIL AND LIBERTY UNDER BNSS, 2023: CONTINUITY, CHANGE AND CONSTITUTIONAL CONCERNS

AUTHORED BY - DR. SUMBUL FATIMA

ABSTRACT

The Code of Criminal Procedure, 1973 (CCP) has been superseded by the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS). The debate over the connection between criminal proceedings and India's constitutional guarantees of individual liberty has been reignited after the enactment of this legislation. This paper will critically assess the extent to which BNSS reforms the law of bail and whether the provisions of BNSS are in furtherance of the guarantees contained in Article 21 of the Constitution. It uses a doctrinal research methodology by matching the provisions of BNSS with the developing bail jurisprudence of the Supreme Court, starting from *State of Rajasthan v. Balchand* to *Satender Kumar Antil v. Central Bureau of Investigation*. The analysis shows that the BNSS mostly maintains the current system of routine, anticipatory and default bail, including minor but significant revisions. Special emphasis is placed on Section 479, which loosens the requirement for the police keeping of first offenders but does not apply to cases where there are multiple proceedings concerning the release of the individual, and Section 187, which authorises police custody in part and has raised concerns about how default bail is applied. The paper contends that it represents a long-standing gap between the legislative agenda and constitutional protections, together with the typically absent statutory guidelines on the use of the bail authority. It requires appropriate bail conditions, efficient administrative enforcement of the law, and judicial interpretation that supports liberty. Ultimately, the BNSS is just a partial reform, and the exercise of personal liberty will determine its viability.

Keywords: Bail, Personal Liberty, Bharatiya Nagarik Suraksha Sanhita, 2023, Article 21, Undertrial Prisoners, Default Bail, Anticipatory Bail.

I. INTRODUCTION

Behind each criminal prosecution is the decision to be made at the time of arrest, remand or at the first hearing to determine the place of stay while awaiting trial for the accused: to be at home or in prison. That decision is governed by the law of bail and where the Constitution's guarantee of personal liberty collides with the State's interest in investigation and trial. The

decision is taken on a vast scale in India. As of December 31, 2022, 434,302 prisoners, or 75.8% of the 573,220 prisoners in Indian jails, have never been found guilty of any crime, according to NCRB data.¹ The question of whether they were guilty never even came up for the majority of them. While the State took years to find out, the question was whether they could obtain their release.

The Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS) was introduced in India on 1 July 2024, to replace the Code of Criminal Procedure, 1973 (CrPC), which had ruled Indian criminal procedure for the past 50 years.² Bail and bonds law is now in Chapter XXXV, sections 478-496.³ The new Code has been presented as a project for modernisation and decolonisation of the criminal procedure and a closer approach to constitutional and human rights norms,⁴ and the scholarship that has ensued has been lavish in enumerating the bail reforms in the new Code: a definition of bail, a mandatory release of the indigent, a lower threshold for early release of first-time offenders, and a stronger anticipatory-bail regime.⁵

The system of regular, anticipatory and default bail has been transferred almost verbatim. A number of the renowned reforms are of old law: the safeguard for indigent accused remains as it was earlier, and the notice requirement for anticipatory bail does not apply to anticipatory bail as it was previously. The really new thing is a narrow thing, and not everything new helps the accused. This is a real advance in the first-time-offender threshold in section 479, but with a new restriction on release when more than one case is pending that has the most impact on those who are the longest in custody. The ability for police custody to be used in stages has now been included in section 187, and a minor amendment to the default-bail clause has led to conflicting interpretations of the time an investigation can run before the accused should be released.

II. Doctrinal and Constitutional Foundation

A. From Statutory Remedy to Constitutional Value

In India, the term 'bail' had been statutory even before it became constitutional. The first Code of Criminal Procedure (1861) took the English system of bail from English law onto the Indian statute book, and the plan was re-enacted in 1872 and 1898.⁶ As in the past, the 1973 Code distinguished between the bailable and the non-bailable offences and did not define bail.⁷ In 1923, H.S. Gour claimed that the only objective of court arrest is apprehension, that the purpose of bail is to secure the presence of the accused, whereas Sir Muhammad Shafi replied that such a threat might be a proper consideration in deciding whether to grant or refuse bail.⁸ The conflict between attendance and the protection of the process is never outside the law.

There is no mention of bail in the Constitution. Its influence has manifested itself in Article 21. In *A.K. Gopalan v. State of Madras*⁹, the Supreme Court interpreted “procedure established by law” as one which mandates only that a deprivation of liberty must be authorised by competent law. In *Maneka Gandhi vs. Union of India*¹⁰, It held that the process must be reasonable, fair, and just. This modification subjected all limitations on freedom, including bail conditions, to constitutional reasonableness. The modern principle of bail was developed during the following ten years.¹¹ In *State of Rajasthan v. Balchand*¹², with the following exceptions, the norm was stated as "bail, not jail": (1) if there is a genuine risk of flight; (2) if there is a risk of obstruction of justice; (3) if the accused has committed repeated offences; and (4) if there is a risk of witness intimidation. In the *Gudikanti Narasimhulu v. Public Prosecutor case*,¹³ Narasimhulu Gudikanti advocated for a "socially sensitized approach" and stated that bail was an engagement of liberty, justice, public safety, and public money. Surety requirements which discriminate against the poor were denounced by *Moti Ram vs. State of Madhya Pradesh*¹⁴. *Hussainara Khatoon v. Home Secretary, State of Bihar*,¹⁵ which highlighted that undertrials are being detained beyond the maximum period for the alleged crimes, found the right to speedy trial in Article 21. And *Gurbaksh Singh Sibbia v. State of Punjab*¹⁶ did not introduce the restrictions on regular bail into the anticipatory bail provision, but rather that it is a liberty-protecting remedy that is not subject to limitations. In *Sanjay Chandra vs CBI*¹⁷, the court held that bail could only be granted for the purpose of conducting the trial and not merely as a punishment before the trial and that a serious charge alone would not be a ground for the rejection of bail. *Arnesh Kumar v. State of Bihar*¹⁸ ordered the police and the magistrates to make arrest an exception in offences punishable up to 7 years imprisonment. *Satender Kumar Antil vs CBI* classified offences under bail, fixed a maximum period of two weeks for disposal of bail applications and six weeks for anticipatory bail and urged the Government of India to think of a dedicated Bail Act.¹⁹

B. Is Bail a Right?

Whether bail is a “right” admits of no single answer. It may be best characterized as a remedy at law, under a constitution: a remedy at law, under constitution.²⁰ It is not a privilege that can be bestowed by the Court. The discretion has grown to a constitutional entitlement with specific and clear justifications, and the human-rights approach, based on Article 21 and international norms, goes the furthest in this direction. There are three layers that can be differentiated to reconcile these positions. Firstly, for bailable offences, it is a right of the individual to be released.²¹ Second, in non-bailable offences, bail is discretionary, but the discretion is

constitutionally qualified: It shall be denied when there is an identifiable purpose for it, e.g., preventing flight, tampering with evidence or intimidation of witnesses; but this does not mean that bail is the right of every accused. Third, some releases are presented as compulsory after a time-based release condition has been fulfilled: default release at the end of the investigation period and release after 10% of the available maximum sentence.²²

III. Change: What the BNSS Alters

Subject	CrPc 1973	BNSS 2023	Nature of Change
Definition of bail	Not defined; only “bailable offence” and “non-bailable offence” defined (§ 2(a)).	Defined: to be set free from the jurisdiction of the law upon execution of bond or bail bond (§ 2(1)(b)).	New (definitional only, no presumption or standard).
Bail in bailable offences	§ 436; release as of right; indigent accused may be released on bond without sureties.	§ 478; indigent proviso retained.	Substantially unchanged.
Bail in non-bailable offences (courts other than High Court and Court of Session)	§ 437 (discretionary; exceptions for offences punishable with death or life sentence where the guilt is reasonably believed; exceptions for certain previous convictions; relaxation for persons under sixteen, women, and sick and infirm).	§ 480; same construction and exceptions.	Substantially unchanged.
Anticipatory bail	s 438 of the CrPC – whether there is a statutory list of criteria in the present text – High Court/Court of	§ 482. The gang-rape exclusion is expanded in (4) to include a woman under eighteen years old, in an effort to exclude	Majorly unchanged; the exclusion was expanded.

	Session. (4) for certain crimes of rape; same remedy; no statutory list of factors; sub-s.	accusations under BNS § 65 and § 70(2).	
Special powers of High Court and Court of Session	§ 439.	§ 483.	Substantially unchanged.
Undertrial detention	§ 436A (inserted 2005); release on personal bond after detention for half the maximum sentence; excludes offences punishable with death; no duty on jail authorities.	§ 479(1): half the maximum sentence; one-third for a first-time offender (never convicted), on bond; excludes offences punishable with death or life imprisonment. § 479(2): no release under the section where investigation, inquiry or trial is pending in more than one offence or in multiple cases. § 479(3): Superintendent of Jail to apply to the court on completion of the period. Hearing the Public Prosecutor, the Court can keep him in custody after making his detention, subject to the maximum sentence.	Amended: reduced the threshold for first-time offenders, and introduced jail duty, but new restrictions on the list of offences eligible and a reduced threshold for multiple offences.
Default bail	§ 167(2); 60 or 90 days depending on the offence.	§ 187(3); 60 or 90 days depending on the offence.	Not changed in time; keeps its entitlement.

A. Definitions

The definition of “bail” is introduced in the BNSS: bail of a person accused or suspected of an offence is the release of that person from the custody of law upon the execution of a bond or bail bond, in accordance with the conditions imposed upon them.²³ An undertaking for release with surety is called a “bail bond”; an undertaking for release without any surety is a “bond”²⁴. The BNSS adopted the concept of bailable offence and non-bailable offence as it was stated in the CrPC.²⁵ The new definitions are not that important. Since the distinction between the definitions of "release on a personal bond" and "release with sureties" is now textual, they address the terminology problems that underpin sections 478 and 479. They make no assumptions in favor of release or discuss the purpose of bail. The definition does not make a right out of a mechanism.

B. Bailable Offences and the Indigent Accused

A person accused of a bailable offence, who is willing to give bail, shall be “released on bail”, so provides Section 478. It provides that if a person is unable to provide surety, the officer or the court shall discharge him upon a bond for his appearance; and an Explanation is provided that if a person cannot give a bail bond within a week after his arrest, then indigence shall be presumed.²⁶ There is a tendency to portray the impoverished bail as a new trend in the “Section 481”. It's a misnomer. The indigence proviso is now in section 478(1), which is an abridgement of section 436 of the CrPC, and section 481 is about bond to be filed before the next appellate court.²⁷ Sections 479 and 482 are similarly referred to as "bailable offences" and "bail bonds", while they deal with "undertrial detention" and "anticipatory bail". The mistake is not a mere typographical one. It gives credibility to the reformist BNSS and hides the changes that are occurring.

C. Non-Bailable Offences

Section 480 is similar to section 437 of the CrPC. A person accused of a non-bailable offence may be released by the police or the court (apart from the High Court or the Court of Session), unless there appear reasonable grounds for believing that he is guilty of an offence for which death or life imprisonment is a possible punishment, or where he is a child, a woman or a sick or infirm person, the court may still release a child, a woman or a sick or infirm person.²⁸ The only significant text change is the alteration of the proviso, which was originally for a person “under the age of sixteen years”, to “child”. Further, section 480 provides no purposes of detention, no presumption, and no factors; it leaves discretion to judicial development. The

BNSS did not say that bail is a right for the non-bailable offences, but the CrPC did not say anything about that either; it only said that the person may be released on bail, as per section 437 of the CrPC. Here there is no regression and no advance.

D. Anticipatory Bail

Section 482 is reproduced as section 438 of the CrPC, which was in operation. A person who suspects he may be arrested for any non-bailable offence may apply to the High Court or Court of Session for the purpose of asking for his release on bail in the event of his arrest, which may attach conditions, such as his being available for interrogation if he chooses to be arrested.²⁹ Sibbia is still the government, and the Constitution Bench in *Sushila Aggarwal v. State (NCT of Delhi)* held that anticipatory-bail protection need not be time-bound in general.³⁰

Two anticipatory bail issues need to be corrected. The BNSS “removed” seven days' notice to the Public Prosecutor, and section 482 has excluded factors which were listed under an “amended” section 438(1) for the court's consideration. The two claims stem from the new section 438(1) in the Code of Criminal Procedure (Amendment) Act, 2005, which added a requirement for a seven-day notice in sub-section (1A), added an applicant-presence requirement in sub-section (1B) and added factors such as the nature and gravity of the accusation and the applicant's antecedents.³¹ The Government kept the amended section in abeyance following objections from the legal profession, and the Law Commission noted it had not yet been brought into force in December 2007. Those provisions were not included in the Code before the BNSS, and it is not possible to say that they have been removed by section 482. Nor does section 482(1) broaden discretion: ‘if it thinks fit’ is the wording of section 438(1) in 1973. It is the removal in sub-section (4) of the old section 482 which is the most significant change in the new section 482.

E. Special Powers of the Superior Courts

Section 483 is similar to section 439. It authorises the High Court and the Court of Session to set aside, vary or grant bail to anybody in custody, and to order the arrest and commitment of a person of whom bail has been granted. It introduces the additional requirement of notice within 15 days and the presence of the informant in offences under sections 65 and 70(2) of the Bharatiya Nyaya Sanhita, 2023. It carries the requirement of giving notice to the Public Prosecutor in offences that are exclusively triable by the Court of Session, or that carry a life sentence.³² These are cross-references that have been updated but are not new policy.

IV. WHAT HAS CHANGED

A. Section 479: Maximum Detention of Undertrial Prisoners

The most important bail provision in the BNSS is the one in section 479. Provided that a person who has been detained during investigation, inquiry or trial for not more than one-half of the maximum term of imprisonment provided for the offence shall be released on bail, the proviso being that a first-time offender, “who has never been convicted of any offence in the past”, shall be released on bail after one-third of the imprisonment provided for the offence. A person may not be detained beyond the maximum period for the offence, and the Superintendent of the jail shall apply on completion of the relevant period to the court by writing with reasons for the release, or for the issue of the bail bond instead of a personal bond. The time is not computed as a result of delay by the accused.³³ When the maximum sentence for the offence is seven years, the first-time offender threshold is two years and four months, and the one-half is three years and six months. The development could be important to thousands of people who are awaiting trial on offences of moderate gravity.

Section 479 also limits the availability of Section 436A. Section 436A deems that only death-punishable offences are excluded, whereas 479(1) excludes offences for which death or life imprisonment is “one of the punishments”. Further, sub-section (2) stipulates that “where the investigation, inquiry or trial of any two or more than two offences or in multiple cases has been pending against any person, he shall not be released on bail by the Court notwithstanding the provisions of sub-section (1) and subject to the final proviso.” In Part V, the constitutional problems arising out of the bar are discussed.

The main challenge has been implementation. All cases pending where the undertrial is present irrespective of the date of registration of the case would fall under section 479, the Supreme Court wrote on 23 August 2024, while directing jail superintendents to process cases that would be eligible for the provision.³⁴ Follow-up orders expressed concern over lack of compliance by States, and called for special efforts to identify eligible women prisoners.³⁵ Absent administrative machinery that determines who is eligible to be incarcerated in the section, it may never become effective, and the thresholds set in the section are a maximum, not a minimum, time in custody.

B. Section 187: Police Custody and Default Bail

Section 187 replaces section 167. The default-bail provision remains the same: Where the investigation relates to an offence punishable by death or life imprisonment or imprisonment for ten years or more, then, at the expiration of the period of ninety days, the accused shall be

released on bail “if he is willing to and does furnish bail”.³⁶ The Supreme Court has accorded this entitlement the status of indefeasibility and as a part of Article 21.³⁷

There are two noteworthy changes to section 187. The first is about police custody. A Magistrate may make an authorisation for detention in police custody for up to 15 days “in the whole or in the parts” at any time during the first 40 or 60 days of the 60 or 90 day period under s 187(2).³⁸ The Supreme Court, under the CrPC, had limited the police custody for remand to the initial 15 days.³⁹ The period of 15 days is extended, but the window for the police to establish a need to interrogate someone while he's in custody is extended.

The second, which has greater repercussions, is a drafting change. Section 167(2) referred to offences punishable with “imprisonment for a term of not less than 10 years”, which Rakesh Kumar Paul interpreted as offences with a minimum sentence of 10 years. The term is 187(3)(i) ‘ten years or more’.⁴⁰ The Karnataka High Court has interpreted it as a play on words, stating that the minimum punishment is ten years, and the Supreme Court rejected a special leave petition filed against this decision without stating any law on 8 January 2025.⁴¹ If the 30 days are extended, the accused, who has been found guilty of an offence punishable by a maximum term of 10 years, may be arrested for a further period of 30 days before his final conviction or acquittal, before default bail would be set.

C. Section 482(4): The Widened Exclusion

Section 438(4) of the CrPC denied anticipatory bail to rape charges under sections 376(3) and 376DA of the IPC, which dealt with rape of a girl below 16 and below 12 years, and sections 376AB and 376DB of the IPC, which implemented the amendments made by the Indian CrPC Act in the Indian Penal Code. Section 482(4), on the other hand, bars a prosecution under sections 65 and 70(2) of the Bharatiya Nyaya Sanhita. The net extension in section 70(2) is to the gang rape of girls between the ages of sixteen and eighteen. The exclusion is general and based on the seriousness of the offence and is not assessed on an individual basis. This paper does not take a stance on its proportionality, but highlights that regular bail under section 480 and 483 continues to be available following arrest.

D. Arrest-Side Safeguards

Bail law assumes the presence of arrest, and the BNSS has changed that too. Section 35 brings together the notice of appearance provisions of sections 41 and 41A of the CrPC, which Antil called a facet of Article 21 of the Constitution, and introduces a new provision to the law, in sub-section (7), that states that in a case in which a person is infirm or aged above 60 years, the

police must obtain an officer's approval before arresting them in an offence punishable by less than three years' imprisonment.⁴² Section 43(3) allows for handcuffing, having regard to the nature and gravity of the offences, in certain types of cases which pose a risk to dignity.⁴³

V. CONSTITUTIONAL CONCERNS

A. Multiple-Case Bar in Section 479(2).

The BNSS's most troubling bail provision is the bar on release when more than one case is pending under the section. As cases usually carry multiple charges, the bar may drastically reduce the benefit of the section, and it is a constitutional inconvenience. There are three objections that can be alluded to.

The distinction between the types is made based on the number of pending proceedings, and not based on any risk that the accused poses. The presumption of innocence is consistent with the liberty afforded under section 480(1) to those accused of crimes for which a fixed term of imprisonment has been prescribed. Under section 479(2), the liberty afforded to the accused is not based on a presumption of innocence, but on pendency, which is not a reliable indicator of risk. A classification that is not linked to the object of the statute can be subjected to the test of non-arbitrariness in the light of the principles enunciated in *Maneka Gandhi's case*.⁴⁴ Second, the literal meaning of “more than one offence” should include a single case where multiple sections are invoked, this being typically the case in serious investigations. Third, the bar punishes accused who are most likely to be detained for a long time.

The difficulties of reading are avoided in the better reading. Sub-section (2) starts with “notwithstanding anything in sub-section (1)” and prevents release “under” the entitlement it establishes, meaning that it does not have to be interpreted as prohibiting any bail. The effect of this text is that the discretionary jurisdiction under section 480 and 483 of the CrPC remains unaffected, but the entitlement to bail under section 479 of the CrPC is not excluded, and no denial has been made of the constitutional jurisdiction recognised under the *Union of India v. K.A. Najeer* decision that a constitutional court can grant bail when delay is disproportionate.⁴⁵

B. Fragmented Police Custody, Article 21 and 22

The concern about section 187(2) is that if the police have not finished their stipulation of 15 days, then they would be denied bail for the rest of the time.⁴⁶ It is not that extreme: section 187(3) presumes that bail will be granted for the lesser duration of sixty or ninety days, and there is no exception for when police custody is not used.⁴⁷ The indirect concerns are more defensible. If the prosecution can establish that the custodial interrogation has not yet been

completed, that is a persuasive argument against granting regular bail, putting the arrested person under pressure for a longer period of time. Article 22(2)⁴⁸ and Article 21⁴⁹ thus impose on the Magistrate the obligation to make a reasoned judicial decision on each occasion of police custody and to not treat it as a formality.

C. Special Statutes

The BNSS does not affect any special statutes. Section 45 of the Prevention of Money Laundering Act, 2002 lays down the conditions for granting bail to the accused where there are reasonable grounds to believe that the accused is not guilty and not likely to commit any offence; section 43D(5) of the Unlawful Activities (Prevention) Act, 1967 states that he should not be released if there are reasonable grounds to believe that the accused is prima facie guilty of the offences; section 37 of Narcotic Drugs and Psychotropic Substances Act, 1985 prescribes conditions as similar as that provided under section 45 of Prevention of Money Laundering Act, 2002.⁵⁰ The Supreme Court's answer seems measured. In *Nikesh Tarachand Shah v. Union of India*⁵¹, the twin conditions of section 45 as then in force were held to be unconstitutional, whereas in *Vijay Madanlal Choudhary v. Union of India*⁵², they were sustained as remodelled. At the same time, *Javed Gulam Nabi Shaikh vs State of Maharashtra*⁵³ held that even these statutes would not bar bail in case of prolonged incarceration without trial, as the seriousness of the allegation would not outweigh the right of speedy trial. None of these makes an automatic rule of release.

The BNSS might have established this jurisprudence. It is not just the offences for which a death sentence or life sentence is a potential punishment that fall within Section 479(1) but rather a large number of offences under special statutes, as may be pointed out to Antil by the text of the section.⁵⁴ However, the multiple case bar will usually not apply to accused persons who have been charged under special statutes, as the charges are generally multi-offence.

D. Poverty and the Cost of Release

If the accused is unable to fulfil the conditions of bail, the grant of bail is meaningless. There can be a difference between formal and effective liberty, and that difference is referred to as "bail poverty". Some of the tools the BNSS offers include the "indigence proviso" of section 478, which allows for the presumption of indigence in the event of a week-long failure to pay, and the ability to release first-time offenders under section 479 on a personal bond, which is determined by the amount of the bond, which is itself subject to section 484(1) of the BNSS.⁵⁵ However, section 485 still includes the machinery of sureties, and the BNSS does not eliminate

reliance on monetary conditions. The BNSS does not follow the direction of Antil and also does not take the responsibility of bailing out undertrials who are unable to comply with the bail conditions because they are unable to comply with the bail conditions set by High Courts, as directed by Antil under section 440 of CrPC (now section 484).⁵⁶

VI. RECOMMENDATIONS

First, section 479(2) should be altered or interpreted to have only a section 479 entitlement, and not a section 480 or 483 or the constitutional jurisdiction. Second, Section 187(2) should mandate reasoned orders and clarify that unused police custody does not imply a delay in default bail. Section 187(3)(i) should be revised to restore the explicit formula for the ninety days.

Third, the definition of custodial periods should be implemented through the existence of integrated digital monitoring of custody periods and eligibility, regular reporting by the prison authorities and the proactive engagement of legal-services authorities. Fourth, bail conditions should be proportionate to the means of the accused and, except in the case of indigent persons, personal bonds should be applied, and a bail fund provided in case they are unable. Fifth, in cases of unduly prolonged trials, the bail should be subject to review from time to time by means of strict rules of bail in the special statutes. Sustained training for the subordinate judiciary, prosecutors and police on arrest and bail is critical, as the bulk of bail decisions are made at the first level.

VII. CONCLUSION

The Bharatiya Nagarik Suraksha Sanhita, 2023 is a step taken in the right direction but not a radical shift from the bail jurisprudence laid down by the Code of Criminal Procedure, 1973. The definition of bail in the statute, and the lowering of the threshold for the granting of bail for the first time, are positive steps, but the provisions on regular, anticipatory and default bail are largely unchanged. More significantly, Sections 479 and 187 give rise to concerns related to extended pre-trial detention and the dimensions of the statutory entitlements and the safeguarding of personal liberty enshrined in Article 21 of the Constitution.

The effectiveness of these provisions will depend on how they are interpreted and applied. The courts' approach must be liberty-focused, and restrictions on release must be based on legitimate concerns, not just the pending or severity of charges. Simultaneously, the jail administration should decide independently who qualifies for undertrial release, and the terms

of bail should consider the accused's financial circumstances. If these protections are not provided, statutory entitlements could be out of reach for those who most need them. Finally, effective bail reform will need a legislative body that explicitly acknowledges pre-trial release as the standard and detention as the exception and provides for the reasons behind that detention. The BNSS's ability to restore liberty before it is destroyed, rather than after it has been destroyed, will be its true influence rather than what it will alter.

¹ Nat'l Crime Recs. Bureau, Ministry of Home Affairs, Prison Statistics India 2022 (2023); see also Jahnvi Raj & Ganga Rane, Unravelling the Impact of BNSS, 2023 on Bail Jurisprudence in India, 8 Int'l J.L. Mgmt. & Human. 390, 394–95 (2025).

² Bharatiya Nagarik Suraksha Sanhita, 2023, No. 46 of 2023, India Code (2023) [hereinafter BNSS]; Code of Criminal Procedure, 1973, No. 2 of 1974, India Code (1974) [hereinafter CrPC]; see N. Charu Bala, Evolution of Bail Jurisprudence Under Bharatiya Nagarik Suraksha Sanhita, 4 J. Emerging Trends & Novel Rsch., no. 8, at a653 n.2 (2026).

³ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, §§ 478–496 (India).

⁴ Saif Ali & Axita Shrivastava, Bail as a Human Right: A Critical Examination of Bail Reforms Under BNSS, 5 Int'l J. Hum. Rts. L. Rev. 196, 199 (2026).

⁵ Sonam Diki Dolma Bhutia, An Overview on the Paradigm Shift in Bail Proceedings Under BNSS, 2023 for Time Bound Delivery of Criminal Justice, 7 Int'l J. Multidisciplinary Rsch., no. 3, at 1, 3–4 (2025).

⁶ Rudraksh Jain, Safeguarding Liberty: A Constitutional Analysis of Bail Jurisprudence in India, 8 Int'l J.L. Mgmt. & Human. 2437, 2441 (2025).

⁷ Code of Criminal Procedure, No. 2 of 1974, § 2(a) (India).

⁸ Jain, *supra* note 8, at 2441–43.

⁹ A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27 (India)

¹⁰ Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248 (India).

¹¹ Yash Jalonha, Right to Bail in India: Statutory Provision or Constitutional Right, 8 Indian J.L. & Legal Rsch. 4798, 4799, 4802 (2026).

¹² State of Rajasthan v. Balchand, (1977) 4 S.C.C. 308 (India), A.I.R. 1977 S.C. 2447; see Law Comm'n of India, Rep. No. 203, Section 438 of the Code of Criminal Procedure, 1973 as Amended by the Code of Criminal Procedure (Amendment) Act, 2005 (Anticipatory Bail) ¶ 6.1.8 (2007).

¹³ Gudikanti Narasimhulu v. Pub. Prosecutor, (1978) 1 S.C.C. 240 (India); see Bhupender Kumar Jodhta, Bail and Personal Liberty Under Indian Criminal Law: A Constitutional and BNSS Perspective, 2 Lex Lumen Rsch. J., no. 4, at 273, 276 (2026).

¹⁴ Moti Ram v. State of M.P., (1978) 4 S.C.C. 47 (India)

¹⁵ Hussainara Khatoon (I) v. Home Sec'y, State of Bihar, (1980) 1 S.C.C. 81 (India)

¹⁶ Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 S.C.C. 565 (India)

¹⁷ Sanjay Chandra v. CBI, (2012) 1 S.C.C. 40 (India)

¹⁸ Armesh Kumar v. State of Bihar, (2014) 8 S.C.C. 273 (India)

¹⁹ Satender Kumar Antil v. CBI, (2022) 10 S.C.C. 51 (India)

²⁰ Jalonha, *supra* note 11, at 4812–14.

²¹ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 478(1) (India).

²² Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, §§ 187(3), 479 (India); Code of Criminal Procedure, No. 2 of 1974, §§ 167(2), 436A (India).

²³ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 2(1)(b) (India).

²⁴ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 2(1)(d)–(e) (India).

²⁵ Code of Criminal Procedure, No. 2 of 1974, § 2(a) (India); Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 2(1)(c) (India).

²⁶ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 478(1) & Explanation (India); Code of Criminal Procedure, No. 2 of 1974, § 436(1) & Explanation (India).

²⁷ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, §§ 478(1), 481 (India); Code of Criminal Procedure, No. 2 of 1974, §§ 436(1), 437A (India).

- ²⁸ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 480(1) & provisos (India); Code of Criminal Procedure, No. 2 of 1974, § 437(1) (India).
- ²⁹ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 482(1)–(3) (India); Code of Criminal Procedure, No. 2 of 1974, § 438(1)–(3) (India).
- ³⁰ Sushila Aggarwal v. State (NCT of Delhi), (2020) 5 S.C.C. 1 (India).
- ³¹ Code of Criminal Procedure (Amendment) Act, 2005, No. 25 of 2005, § 38, India Code (2005);
- ³² Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 483(1)–(2) (India); Bharatiya Nyaya Sanhita, No. 45 of 2023, §§ 65, 70(2) (India).
- ³³ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 479(1) Explanation (India).
- ³⁴ In re Inhuman Conditions in 1382 Prisons, W.P. (C) No. 406 of 2013 (India Aug. 23, 2024)
- ³⁵ In re Inhuman Conditions in 1382 Prisons, W.P. (C) No. 406 of 2013 (India Oct. 22, 2024) (order)
- ³⁶ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 187(3) (India).
- ³⁷ Uday Mohanlal Acharya v. State of Maharashtra, (2001) 5 S.C.C. 453 (India); Rakesh Kumar Paul v. State of Assam, (2017) 15 S.C.C. 67 (India)
- ³⁸ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 187(2) (India).
- ³⁹ Cent. Bureau of Investigation v. Anupam J. Kulkarni, (1992) 3 S.C.C. 141 (India).
- ⁴⁰ Narayana Pisharadi, Default Bail Under BNSS: Sixty Days or Ninety Days—The Confusion Continues, LiveLaw (Jan. 30, 2025), <https://www.livelaw.in/top-stories/bnss-right-to-default-bail-under-bharatiya-nagarik-suraksha-sanhita-282457>.
- ⁴¹ Id.
- ⁴² Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 35(3), (7) (India); Code of Criminal Procedure, No. 2 of 1974, §§ 41, 41A (India); Satender Kumar Antil v. CBI, (2022) 10 S.C.C. 51 (India).
- ⁴³ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 43(3) (India).
- ⁴⁴ India Const. art. 14; Maneka Gandhi, (1978) 1 S.C.C. 248.
- ⁴⁵ Union of India v. K.A. Najeeb, (2021) 3 S.C.C. 713 (India)
- ⁴⁶ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 187(2) (India).
- ⁴⁷ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 187(3) (India).
- ⁴⁸ INDIA CONST. art. 22(2).
- ⁴⁹ INDIA CONST. art. 21.
- ⁵⁰ Prevention of Money Laundering Act, 2002, No. 15 of 2003, § 45, India Code (2003); Unlawful Activities (Prevention) Act, 1967, No. 37 of 1967, § 43D(5), India Code (1967); Narcotic Drugs and Psychotropic Substances Act, 1985, No. 61 of 1985, § 37, India Code (1985)
- ⁵¹ Nikesh Tarachand Shah v. Union of India, (2018) 11 S.C.C. 1 (India)
- ⁵² Vijay Madanlal Choudhary v. Union of India, (2023) 12 S.C.C. 1 (India)
- ⁵³ Javed Gulam Nabi Shaikh v. State of Maharashtra, (2024) 9 S.C.C. 813 (India)
- ⁵⁴ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, § 479(1) (India).
- ⁵⁵ Bharatiya Nagarik Suraksha Sanhita, No. 46 of 2023, §§ 478(1), 479(1), 484(1) (India).
- ⁵⁶ Satender Kumar Antil v. CBI, (2022) 10 S.C.C. 51 (India).