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# **AN ANALYSIS OF BAIL PROCEDURE: REFORMS AND BALANCING INDIVIDUAL RIGHTS WITH PUBLIC SAFETY**

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## ***Abstract:-***

*The institution of bail represents a critical juncture in criminal procedure – a space where individual liberty and societal interests collide. On the one hand, an accused person’s right to personal liberty under Article 21 of the Constitution of India demands that pre-trial detention be the exception, not the rule. On the other hand, the state’s duty to maintain public safety, prevent flight, tampering with evidence, and safeguard victims calls for judicious restraint. In India, concerns such as overcrowded prisons, prolonged under-trial detention, variable judicial discretion and socio-economic inequality have compounded the challenge. With the enactment of the Bhartiya Nagarik Suraksha Sanhita, 2023 (BNSS) and companion reforms, the bail framework is in flux. This article examines the constitutional foundations, historical evolution, present challenges, reform initiatives (particularly under BNSS), and advocates a rights-based, risk-sensitive framework aimed at achieving a sustainable balance between individual rights and public safety.*

**Keywords:** *Bhartiya Nagarik Suraksha Sahita, Code of Criminal Procedure, Article 21, Bail Procedure, etc.*

## **➤ Introduction**

The maxim “bail, not jail” holds an honored place in Indian jurisprudence. Courts have often emphasized that detention prior to conviction should not become a default mode of dealing with accused persons. Yet the reality reveals a stark contrast.

*As one commentator put it: “Millions of under-trial prisoners, often from marginalized backgrounds, continue to face prolonged detention due to poverty, lack of legal aid, and discretionary bail decisions”.*

Under-trial prisoners constitute a large portion of the prison population in India, raising serious questions of fairness, equality and efficiency in the criminal justice system. Simultaneously, the public demand for safety, swift justice, and accountability—particularly in serious offences—cannot be ignored. The challenge is to design a bail regime that upholds individual rights without compromising the legitimate concerns of the state and society. The BNSS, which replaces the older *Code of Criminal Procedure, 1973 (CrPC) in criminal procedure*, brings several innovations in bail law. This article analyses those reforms, identifies persisting lacunae, and proposes ways forward.

❖ **The Types of bail under Indian law: -**

1. **Regular Bail:** - Granted to a person already under arrest and in custody. **Sections 480 and 483<sup>1</sup>**. Applied for after arrest. For bailable offenses, it must be granted; for non-bailable offenses, the court evaluates factors like offense severity and flight risk.
2. **Anticipatory Bail:** - A "pre-arrest" bail sought by individuals who reasonably apprehend being arrested for a non-bailable offense. **Section 482<sup>2</sup> (formerly Section 438 of the CrPC)**. Generally, remains in effect until the end of the trial unless revoked. It is typically not available for certain serious crimes, such as gang rape of minors under 18 years.
3. **Interim Bail:** - A temporary form of bail granted for a short period while an application for regular or anticipatory bail is pending to prevent unnecessary detention during procedural delays or to address urgent needs like medical emergencies. Expires upon the court's final decision on the main bail application.
4. **Default Bail (Statutory Bail):** - An absolute right to release if the investigating agency fails to file a chargesheet within the legally prescribed timeframe. **Section 187(2)<sup>3</sup>(formerly Section 167(2) of the CrPC)**. Typically, 60 days for most offenses and 90 days for grave crimes punishable by death or life imprisonment. Note that under BNSS, police custody can be staggered within these periods, which may impact the timing of default bail applications.
5. **Special Provisions (BNSS 2023 Reforms):-**
  - a. **First-Time Offend:** - A new mandate under **Section 479<sup>4</sup>** allows first-time offenders (who have never been convicted before) to be released on a personal bond after serving one-third of the maximum sentence as an undertrial.

<sup>1</sup> Bhartiya Nagrik Suraksha Sahita, 2023

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> ibid

- b. Undertrial Bail: General undertrials can apply for release after serving one-half of the maximum sentence.
- c. Restrictions: Mandatory release for undertrials is generally not available to those facing multiple charges or offenses punishable by death or life imprisonment.

## I. Constitutional and Legal Foundations of Bail: -

### A. Right to Liberty under Article 21 & 22<sup>5</sup>:-

- Article 21 guarantees that “No person shall be deprived of his life or personal liberty except according to procedure established by law”. The right to a fair and prompt trial as well as protection from arbitrary arrest and detention are included in this clause, according to the Supreme Court's repeated rulings. The right to be released pending trial is firmly based on the Court's observation that incarceration cannot be used as a replacement for punishment in the context of bail.
- Article 22 guarantees that “safeguards against arbitrary arrest and detention, mandating prompt judicial examination and access to legal counsel”. This guarantees that incarceration, including pre-trial confinement, complies with legal requirements and is not oppressive. In *Maneka Gandhi vs. Union of India*<sup>6</sup>, the court held that expanded the ambit of personal liberty, indirectly reinforcing bail's importance as vital to preventing illegal or prolonged pre-trial detention.

### B. Presumption of Innocence and Bail: -

The presumption of innocence, a pillar of criminal law, is closely related to bail. Detention prior to trial cannot be justified simply because an accused person is presumed innocent unless and until proven guilty. In *Hussainara Khatoon v. State of Bihar*<sup>7</sup>, the Supreme Court observed that an under-trial's right to bail flows from Article 21 and the requirement that “bail not become a device for detention.”

### C. Public Safety, State's Duty and Judicial Discretion: -

While personal liberty is fundamental, it is not absolute. The state has an obligation to maintain law and order, protect victims and society, ensure that investigations are not frustrated, and prevent accused persons from absconding or tampering with evidence.

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<sup>5</sup> Indian Constitution, 1950

<sup>6</sup> AIR 1978 SC 597

<sup>7</sup> AIR 1979 SC 1369

The judicial function in bail applications is to assess the nature and gravity of the offence, the strength of the prima facie case, previous criminal history, likelihood of flight, tampering with evidence, and danger to society. The discretion exercised must be fair, transparent and based on articulable reasons, not arbitrary.

## **II. Historical Evolution of Bail in India: -**

### **D. The CrPC Era: -**

*Under the Code of Criminal Procedure, 1973, the provisions governing bail (Sections 436–450 and Sections 437–438 for non-bailable and anticipatory bail) provided judicial discretion in granting bail.* The basic idea was to let people go unless there was a good reason not to. But over time, several issues came up like delays in trials, too many people in jail, differences in wealth and social status, and different decisions made by people in power—showing that there were big problems in the system.

For example, in *Arnesh Kumar v. State of Bihar*<sup>8</sup>, the Court emphasized that officers must comply with guidelines when making arrests in cognizable offences or face disapproval, highlighting arrest as the “norm” exception and bail as the rule.

### **E. Judicial Trends and Criticisms: -**

Despite these established principles, critics point out that the practice often diverged from ideals. Historically, delays in filing charge-sheets, repeated adjournments, lack of digital case management and poor legal aid resulted in many under-trials languishing in custody much beyond reasonable periods. *As one article notes:*

*“The gap between the expression of the right to personal liberty under Article 21 and practical realities of bail law necessitates a critical constitutional analysis”.* Judicial discretion, while flexible, also led to inconsistent outcomes—depending on geography, socio-economic status, and resource availability.

## **III. Problems in the Existing Bail System: -**

### **i. Under-trial Detention and Jail Overcrowding: -**

According to one study, 75.8 % of India’s prison population comprises under-trial prisoners who remain in jail due to procedural lapses and arbitrary refusal of bail. The

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<sup>8</sup> AIR 2014 SC 2756

proliferation of accused persons in jails before trial raises serious questions of fairness and equality. Prolonged detention often acts as de facto punishment—even though the person has not been convicted.

**ii. Socio-economic Disparities: -**

Access to legal representation, capacity to furnish sureties, social and economic capital often influence bail outcomes. Those from marginalized backgrounds are disproportionately disadvantaged. Institutional capacity, legal aid availability, and regional disparities further compound this problem.

**iii. Delay, Procedural Rigidities and Case Backlog: -**

Structural issues—investigation delays, adjournments, overloaded courts, lack of digital infrastructure—inhibit timely decisions on bail and trials. The result: accused persons spend long periods in custody without commensurate progress in their cases.

**iv. Judicial Discretion: Blessing and Curse: -**

While discretion allows flexibility, lack of clear statutory criteria means decisions sometimes appear unpredictable or opaque. *A critical article states: “The doctrine of judicial discretion in bail is a critical aspect ... however ... one of the most contentious and sensitive areas of judicial decision-making”.* The absence of standardized risk assessment tools, non-monetary bail conditions, and uniform practices means that the bail system at times fails to deliver a fair, predictable, rights-based outcome.

**IV. Reform Initiatives: The BNSS and Beyond: -**

**a. The BNSS and its Bail Provisions: -**

The Bhartiya Nagarik Suraksha Sanhita, 2023 represents a paradigm shift in India’s procedural criminal law. Among its key features is a dedicated chapter on bail and bonds. Notable innovations includes *Statutory definitions of “bail,” “bond,” and “bail bond” under Section 2, which were previously absent.*

A presumption in favor of bail for first-time offenders: after serving one-third of the maximum sentence prescribed, a first-time offender is eligible for bail under **Section 479**. Revamped anticipatory bail (Section 482) with a more structured framework. Clearer grounds for cancellation of bail if conditions are breached. Emphasis on digital

infrastructure—e-FIRs, e-summons, electronic case records—to increase efficiency in bail processing. These reforms reflect an effort to modernize the bail process, make it more transparent, and align it with international best practices.

**b. Judicial Interpretations and Retroactive Effect:-**

The judiciary has already responded to the BNSS bail regime. The Supreme Court of India held that the relaxed bail provisions for first-time offenders under BNSS will apply retrospectively even to offences committed before its enactment. Additionally, high courts have begun to interpret anticipatory bail under Section 482 of BNSS free of the prior restrictive regime under CrPC. These decisions signal a judicial intent to give real effect to the reform ethos.

**c. Comparative Reforms and International Trends:-**

Internationally, jurisdictions such as the UK and US have experimented with risk-based pre-trial assessment, non-monetary conditions, supervised release, and bail review mechanisms. While India's reform is distinctly domestic, lessons from these systems—such as using pre-trial services, objective risk assessment tools, community supervision—can help in calibrating Indian bail reform.

**V. Balancing Individual Rights with Public Safety:-**

**F. Risk-based / Rights-based Framework:-**

The twin imperatives of liberty and public safety require a framework that is both rights-based and risk-sensitive. In other words:

Rights-based: The default should favour bail unless there is a clear, articulable reason to deny it; the presumption of innocence must be honoured; conditions and duration of pre-trial detention should be proportionate; socio-economic status of the accused should not disadvantage them.

Risk-sensitive: Courts must assess risk of absconding, possibility of tampering with evidence or influencing witnesses, impact on victims and society, nature and gravity of offence, strength of the prosecution case. Conditions of bail must protect the public interest.

**G. Criteria for Judicial Decision-making:-**

When adjudicating bail, courts may consider a structured checklist:

1. Nature & seriousness of the offence: heinous offences may warrant stricter scrutiny.
2. Strength of the prima facie case: weaker case may favour release; a strong case may justify caution.
3. Likelihood of absconding / tampering with evidence or witnesses.
4. Previous criminal antecedents or record, if any.
5. Conduct of the accused after arrest.
6. Socio-economic background and ability to furnish surety or comply with bail conditions.
7. Humanitarian grounds: age, health, gender, special vulnerability.
8. Public interest / victim safety: whether bail would endanger victims or public at large.
9. Alternative mechanisms: non-monetary bail, reporting obligations, electronic monitoring, community service.

This checklist helps convert discretion into reasoned decision-making, reducing arbitrariness and ensuring transparency.

#### **Procedure for Granting Bail:-**

- Application: Bail applications are made before courts competent in criminal jurisdiction—usually Magistrate or Sessions Courts for regular bail, and High Courts or Sessions Courts for anticipatory bail.
- Judicial Discretion: Courts evaluate the nature of offence, severity, possibility of absconding, tampering with evidence, and societal concerns before granting or denying bail.
- Bail Conditions: Conditions may include surrendering passports, periodic reporting to police, court attendance, or prohibiting interference with witnesses.
- Role of Public Prosecutor: The prosecution may oppose bail citing investigation needs, flight risk, or public safety.
- Cancellation of Bail: Courts may cancel bail if terms are violated or if new evidence suggests risk to justice.

#### **H. Role of Bail Conditions and Monitoring:-**

Bail is not guarantee of freedom without responsibility. Conditions such as surrender of passport, reporting to police, prohibition on contacting victims/witnesses, electronic

tagging (where available) and community supervision ensure that bail serves both liberty and public safety. Courts should increasingly adopt non-monetary conditions rather than heavy monetary sureties, which disproportionately affect the poor.

**I. Release and Review Mechanisms:-**

The bail regime must include periodic review of bail orders, ensuring that conditions are complied with and that bail remains appropriate as case progresses. Likewise, mechanisms for bail revocation must be clear, fair and prompt if the accused violates conditions. At the same time, processes should guard against retail denial of bail by default or overcrowded prisons becoming a substitute for treatment of accused as convicts.

**VI. Challenges and Implementation Concerns:-**

**A. Institutional Capacity and Infrastructure:-**

The promise of reform under BNSS will only be realized if the bedrock institutions—courts, police, digital infrastructure, legal aid—are strengthened. Many jurisdictions still lack robust e-case-management, under-trained officials, or sufficient judges to hear bail applications quickly.

**B. Socio-economic and Regional Disparities:-**

Even under a reformed law, disparities will persist unless legal aid is strengthened, regional inequalities addressed and non-monetary bail options scaled up. A bail regime that effectively favor's only those who can afford sureties or legal counsel will perpetuate injustice.

**C. Monitoring and Data-Driven Reforms:-**

Data on bail decisions—grounds for granting/denying bail, time taken to decide, demographic profile of accused, length of pre-trial detention—is crucial. Without it, reform remains aspirational. Journals emphasize the need for empirical tracking of bail outcomes.<sup>2312</sup>

**D. Balancing Leniency and Safeguards:-**

There is a genuine public concern that too lenient a bail regime may endanger victims or embolden crime. The reform challenge is to calibrate bail policy so that neither

victims' safety nor accused's liberty is compromised. Judicial oversight, clear criteria, structured bail conditions and victim safety mechanisms are vital.

## **VII. Recommendations for Moving Forward:-**

### **A. Standardized Guidelines and Risk-Assessment Tools: -**

While discretion is essential, developing a standardized bail-decision framework—incorporating risk assessment tools, checklists, timelines—can aid uniformity and fairness. Courts and police should be trained on these tools.

### **B. Emphasise Non-monetary Bail Conditions: -**

Encourage personal bonds, reporting conditions, community supervision, electronic monitoring (subject to infrastructure), instead of defaulting to high monetary surety. This helps reduce socio-economic disparity.

### **C. Strengthen Legal Aid and Under-trial Review Mechanisms: -**

Under-trial review committees should periodically identify persons eligible for bail and facilitate their release; legal aid must be free, prompt and informed. Institutionalize periodic review of under-trial detention and bail status.

### **D. Digitalization and Efficient Case-management: -**

Ensure timely hearing of bail applications (within fixed timelines), digital filing of applications, e-bail portals, and real-time monitoring of bail orders. Use data analytics to highlight bottlenecks and monitor compliance.

### **E. Victim & Public Safety Safeguards: -**

While promoting liberty, ensure mechanisms safeguarding victims and witnesses: safe-houses, witness protection, bail conditions restricting contact with victim/witness, tracking of bail-evaders, prompt revocation of bail where warranted.

### **F. Accountability and Transparency: -**

Courts should publish reasoned orders on bail decisions (grant or denial) to build transparency. The government should publish bail statistics: number of applications, granted/denied, time taken, demographic breakdowns.

### **G. Periodic Review of Reform Impact: -**

Given the novelty of BNSS and evolving jurisprudence, it is imperative to conduct periodic evaluations of its impact on under-trial detention rates, jail overcrowding, bail decision-times, demographic biases and recidivism of bail-released accused.

#### ➤ **Judicial Evolution and Landmark Judgments: -**

*Maneka Gandhi vs Union of India*<sup>9</sup>: Expanded the scope of Article 21, thus deepening bail's constitutional relevance. Detention without due process violates personal liberty.

*Gudikanti Narasimhulu vs Public Prosecutor*<sup>10</sup>: Clarified bail philosophy emphasizing liberty as the rule and jail as an exception. Bail should be granted liberally barring compelling reasons.

*Siddharth vs State of Uttar Pradesh*<sup>11</sup>: Advocated against automatic arrests in economic offence cases. Arrest must be necessary, not routine.

*Satender Kumar Antil vs CBI*<sup>12</sup>: Laid down detailed principles to govern granting or rejection of bail, warning against judicial reluctance to grant bail unduly imprisoning accused.

*Arnab Goswami Case*<sup>13</sup>: Affirmed that liberty cannot be denied arbitrarily even in high-profile cases, reiterating bail as protective of democratic freedoms.

#### ➤ **Conclusion:-**

The bail process marks a critical interface between two pillars of justice: the right to individual liberty and the duty to safeguard society. The reforms embodied in BNSS 2023 signal a welcome shift in India's criminal procedure toward a rights-respecting, efficiency-oriented and technology-enabled framework. However, legal reform alone is not sufficient—implementation, institutional capacity, training, data-monitoring and cultural change in decision-making are equally vital. A bail regime that honor's the presumption of innocence, treats poor accused with dignity, responds promptly, avoids detention as default, while also ensuring the safety of victims and the public, will strengthen faith in our justice system. As

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<sup>9</sup> AIR 1978 SC

<sup>10</sup> AIR 1978 SCC (2) 371

<sup>11</sup> AIR 2021

<sup>12</sup> (2022) 10 SCC 51

<sup>13</sup> (2021) 2 SCC 427

practitioners, policymakers and scholars, our endeavor must be to insure that reform translates into reality so that bail becomes a meaningful right, not a lottery.

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