

# **An Overview on the Paradigm Shift in Bail Proceedings Under Bnss, 2023 for Time Bound Delivery of Criminal Justice**

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## **Abstract**

Under the Bharatiya Nagarik Suraksha Sanhita, 2023, for the first time, under the Criminal Law, the term bail has been defined under Section 2 clause (b) as ‘release of a person accused of or suspected of commission of an offence from the custody of law upon certain conditions imposed by an officer or Court on execution by such person of a bond or a bail bond’.

Indian Criminal jurisprudence follows the principle of “innocent until proven guilty” further every person has the fundamental right to life and personal liberty enshrined under Article 21 of Indian Constitution, which according to Justice V.R. Krishna Iyer is “the procedural magna carta protective of life and liberty”, but a person’s liberty is jeopardized when he/she is accused and arrested for allegedly committing an offence bailable or non-bailable. In such cases he has the option of applying for bail which in case of bailable offence is the matter of his right, while in non-bailable case it is the discretion of the Court to grant or refuse the bail, which is in consonance with Article 21 as it strikes harmonious balance among the concept of innocent until proven guilty, an individual’s personal liberty and the justice & safety of society at large.

The present paper deals with paradigm shift of bail proceedings under the Bharatiya Nagarik Suraksha Sanhita, 2023, for time bound delivery of Criminal Justice in India, further making an in-depth study on the changes, taking the help of literature available, various committee reports, and ruling of various courts and guidelines of Supreme Court.

## **1. INTRODUCTION:**

Indian Criminal jurisprudence follows the principle of “innocent until proven guilty” further every person has the fundamental right to life and personal liberty enshrined under Article 21 of Indian Constitution, but a person’s liberty is jeopardized when he/she is accused and arrested for allegedly committing an offence. In such cases he has the option of applying for bail which in case of bailable offence is the matter of his right, while in non-bailable case it is the discretion of the Court to grant or refuse the bail, which is in consonance with Article 21 as it strikes harmonious balance among the concept of innocent until proven guilty, an individual’s personal liberty and the justice and safety of society at large.

The Right to Protection of Life and personal liberty is the main object of Article 21, which lays down that no person shall be deprived of his life or personal liberty except according to procedure established

by law<sup>1</sup>, it is to prevent encroachment upon personal liberty and deprivation of life except according to procedure established by law and incorporates principles of natural justice. Article 22(1) and (2) are also for the rights of an arrested person, stating that no one can be arrested without the information that why he is being arrested. As per the provisions of Criminal law and Constitution of India, a person who is arrested cannot be denied to be defended by a lawyer of his choice and he should be produced before a magistrate within 24 hours of his arrest and he can avail or file for a bail before the court, in both bailable and non-bailable offences.

Several guidelines have been laid down from the time of Joginder Kumar 1994 to D.K Basu, 1997 to the latest Arnesh Kumar's, 2014 and Antil's 2021 cases for procedure of Arrest and bail of an accused which the investigating agencies needs to comply with and further arrest<sup>2</sup> should be an exception, in cases where the punishment is less than seven years imprisonment. But the story of illegal arrest does not stop with these guidelines and instructions; the aggrieved is always in situations where he is arrested or either being tortured in the name of arrest.

**Bail and its Purpose:** The term "bail" finds its roots in the old French word "Bailor," signifying delivery or handover, another view is the word is derived from the Latin term Bajulare, which means to bear a burden<sup>3</sup>. Black's Law Dictionary (4th ed.) p 160, defines bail as "procure the release of a prisoner from legal custody, by undertaking that he/she shall appear at the future time during his trial in the court." The system of bail in some form or other was prevalent in ancient India, Kautilya's Arthashastra also advocated speedy trial of an accused. The bail system was prevalent in the form of Muchalka i.e personal bond and Jamanat i.e Bail on furnishing surety during Mughals Period<sup>4</sup>.

The main purpose of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question, whether bail should be granted or refused is whether it is credible that the person on bail will appear to take his trial and that it is beyond doubt that bail is not to be withdrawn as a punishment.<sup>5</sup>

In the case of **Gurbaksha Singh v State of Punjab 1980**<sup>6</sup>, the purpose of granting bail is set out with great felicity and the SC held that grant of bail means "to set a liberty a person arrested or imprisoned on security being taken off his appearance in the court on a particular day".<sup>7</sup>

The norm is to grant bail, making rejection an exception, as emphasized in the Satendar Kumar Antil v. Central Bureau of Investigation (2022) case.

Bail and Bail Bonds were not defined under the old Code of Criminal Procedure, 1973 and now under the BNSS it has provided specific definitions for the terms 'bail', 'bond' and 'bail bond' and for this, new provisions have been inserted in clauses (b), (d) and (e) of Section 2 and for the first time according to the new Bharatiya Nagarik Suraksha Sanhita under Section 2: Clause (b) defines "bail" as "bail" means release of a person accused of or suspected of commission of an offence from the custody of law upon certain conditions imposed by an officer or Court on execution by such person of a bond or a bail bond. Clause (d) defines "bail bond" as, "bail bond" means an undertaking for release with surety. Clause (e) defines "bond" as "bond", which means a personal bond or an undertaking for release without

<sup>1</sup> Prof . M.P Jain, "Indian Constitutional law", fifth edition, Wadhwa and company Nagpur,( 2006), p1079.

<sup>2</sup> Arrest means to take someone into custody by a competent authority for committing an offence forbidden by law.

<sup>3</sup> M.R Mallick, "Bail, Law and Practice", Eastern Law House, 1999, p.2.

<sup>4</sup> ibid

<sup>5</sup> Nagendra Nath Chakravarti, 1923, SCC online Cal.318, AIR 1924 Cal 476.

<sup>6</sup> Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC, 565.

<sup>7</sup> Sanjay Chandra v. CBI, (2012) 1 S.C.C. 40 : (2012) 1 S C.C. (Cri.) 26 : (2012) 2 S.C.C. (L&S) 397.

surety.

There are two form of Offences, (any act or omission made punishable by any law for the time being in force), bailable offences and non-bailable offences are defined under Sec.2 (c) of BNSS 2023, wherein “bailable offence means an offence which is shown as bailable in the First Schedule or which is made bailable by any other law for the time being in force and non-bailable offence means any other offence”. Bailable offence is less serious in nature, like, for example, cases of bribery, public nuisance, trespass, defamation, etc. Whereas the non-bailable offences are offences which are more serious and heinous offence, like rape, murder, organized crimes, terrorism etc under the Bharatiya Nyaya Sanhita, 2023.<sup>8</sup>

## 2. THE PARADIGM SHIFT IN BAIL PROCEEDINGS UNDER BNSS,2023:

Lord Denning's in the first Hamlyn Lecture, titled, 'Freedom under Law':<sup>9</sup> quoted, **‘Whenever one of the King's judges takes his seat, there is one application which by long tradition has priority over all others. Counsel has but to say ' My Lord, 'I have an application which concerns the liberty of the subject ' and forthwith the judge will put all other matters aside and hear it...’**

Between July 2021 and June 2022, around 4.3 lakh bail applications were filed before the various High Courts in India and it reflects that there is a rise in the numbers since 2015-2016. In the High Courts of India in 2023, there are 3 types of bail mostly filed like Regular bail, Anticipatory Bail and application for Cancellation of Bail in a year. Around 68 % of regular bails are recorded amongst the bail filed and such involve questions to justice or biased application of conditions of bail.<sup>10</sup> It is stated that bail case should be listed and given relief/decided swiftly since there are rarely difficult issues of law or facts concerned, but the awaiting cases since 2015-2016 are creeping upwards and accumulating the not disposed cases each year has added to the backlog of bail cases. Further the Year 2020-2021 and 2021-2022 high courts had peaked pending bail cases as the court functioning was interrupted by Covid -19 Pandemic<sup>11</sup>, the solution for the same has come under the new BNSS,2023 as the court system has been digitalized and can function through e-court now, but that also isn't reflecting the reduction in pendency of the bail cases in the court.

### 1 Focusing on Change for Better Understanding

Chapter-XXXV (Sections 478 to 496) of the Bharatiya Nagarik Suraksha Sanhita, 2023 deals with various provisions as to bail and bonds. The old Cr.P.C. provided for bail for an accused who has been detained for half of the maximum imprisonment for the offence under section 436A subject to certain restrictions regarding the punishment provided for the offence, this section was added through the 2005 Amendment, wherein under-trial prisoner was allowed to get bail if they have been in jail for half of the maximum punishment for their crime/offence committed (except for crimes punishable by death).

The new BNSS now denies this facility for any accused person facing multiple charges against them. As many cases involve charges under multiple sections, this may limit such bail and there lies a shift. Moreover, an additional exemption has been provided for those offenders accused of offences (not being an offence for which the punishment of death or punishable with life imprisonment has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the

<sup>8</sup> Section 2(c) of BNSS 2023

<sup>9</sup> Sir Alfred Denning, Freedom under the Law”, the Hamlyn Lectures, First Series, available at [https://law.exeter.ac.uk/v8media/facultysites/hass/law/hamlyn/Freedom\\_Under\\_the\\_Law\\_1.pdf](https://law.exeter.ac.uk/v8media/facultysites/hass/law/hamlyn/Freedom_Under_the_Law_1.pdf)

<sup>10</sup> Chart: DAKSH, 2023 IndiaSource: DAKSH High Court , <https://database.dakshindia.org/bail-dashboards/visited> on 13th March 2025.

<sup>11</sup> ibid

maximum period of imprisonment specified for that offence under that law, then he shall be released by Court on Bail<sup>12</sup>.

Another change they brought was for the first-time offenders (who have never been convicted of any offence in the past); new provision has been included in the S.479 BNSS allowing their release on bond, if he has served the detention period up to one-third of the maximum imprisonment period, the focus is on first-time offender, providing them access to justice and allowing them to defend their case freely from outside the prison and helping further in decongestion of jails. In **Bhim Singh v. Union of India**,<sup>13</sup> it was observed that Central Government must take steps in consultation with the State Governments in fast tracking all types of criminal cases especially under trial prisoners so that criminal justice is delivered timely and expeditiously.

The cases of **Satendar Kumar Antil v. Central Bureau of Investigation**, now known as landmark case on bail has provided several guidelines regarding bail, wherein the High Courts are directed to undertake the exercise of finding out the under-trial prisoners who are not able to comply with the bail conditions and after doing so appropriate actions will have to be taken in light of Section 440 of the CrPC, 1973 facilitating the release.<sup>14</sup>

In **Hussainara Khatoon and others v. Home Sec, State of Bihar, AIR 1979 SC 1369** case, the Supreme Court has cautioned that pre-trial detention is not to be encouraged nor is encourage able pre-trial release on sureties, that if the court is satisfied after taking into consideration that the accused has his roots in the community and is not likely to abscond he can safely be released on his personal bond.

**2 Legal obligation and accountability of Prison Authority:** The Superintendent of the jail has furthermore been empowered to without delay submit a written application to the Court for proceeding under section 479(3) of the BNSS upon completion of one-half or one third of the specified detention period of the accused person, for his release on bail.

Significant changes have also been made with respect to the provisions of Anticipatory Bail under section 482, BNSS. The words 'bond without sureties' used in various sections of the Cr.P.C, have been replaced in the BNSS with only 'bond'.<sup>15</sup> When someone believes/expects to be arrested for a cognizable offence, they can apply for anticipatory bail before court of Session Court/High Court to avoid detention under the BNSS 2023. Under the new BNSS 2023, there's slight change brought in Anticipatory Bail compared to the old Criminal Procedure Code 1973, except for a specific omission.

The law now prohibits Anticipatory Bail for those accused involved in gang rape involving women under 18 years old, expanding on the Cr.P.C. provision that disallows Anticipatory Bail for those accused of gang rape involving women under 16 years old (Section 376DA) or 12 years old (Section 376DB) under Section 438(4) of the Criminal Procedure Code, 1973. This alteration broadens the scope by denying anticipatory bail to those accused of gang rape on women under the age of 18 years, whereas the Cr.P.C. had set this limit at 16 years, making the laws more stringent towards crimes against girl child less than 18 years.<sup>16</sup>

<sup>12</sup> Section 479, BNSS, 2023.

<sup>13</sup> *Bhim Singh v Union of India and ors* , W.P Criminal No 310/2005.

<sup>14</sup> *Satendar Kumar Antil v. Central Bureau of Investigation* Misc Application, No. 1849 of 2021.

<sup>15</sup> "Analytical Report on Trainings of Trainers programme on New Criminal Law" , West Bengal Judicial Academy, Rajarhat, Kolkata, (2024).

<sup>16</sup> As sub-section 4 of Section 482 of BNSS says, "Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under section 65 and sub-section (2) of section 70 of the Bharatiya Nyaya Sanhita, 2023."

In **Balchand Jain v. State of M.P.**, <sup>17</sup>case, the Supreme Court has characterized anticipatory bail to mean ‘a bail in anticipation of arrest’. When a competent court (High Court or Session Court) grants “Anticipatory Bail”, it issues an order at the event of the arrest the person shall be released on bail.

**3 Extended police custody beyond the preliminary 15 days of arrest now is not a legitimate ground for denying bail:** Earlier under the old Criminal Procedure Code, 1973, during hearings for the accused’s regular bail application, the prosecution often argued against bail by stating that the accused’s custody is required to assist the investigative agencies to reach to a prima facie case and further investigation<sup>18</sup>.

The transformation under BNSS 2023: The new Criminal law slightly changed the existing rule by stating that if the court sees the accused needs to be in custody for more than fifteen days to identify witnesses during the investigation, shall not be sufficient ground to deny bail, if he otherwise entitled to be released on bail and gives an undertaking that he will comply with such directions as may be given by the court, they can further obtain/apply for regular bail.<sup>19</sup>

The process of investigation under the BNSS has been more digitalized and involvement of forensic expert team for dealing with cases of seven years imprisonment or more brings into light that, the investigation may take more time as many police stations in remote areas don’t have forensic facility for which they need to use the facility of the other areas or states, so denial of bail is an infringement of their fundamental right under the constitution, as the very basic evidence which proves the accused guilty hasn’t been submitted in the court as its under process of being tested in a forensic facility.<sup>20</sup>

The change in the regular bail has provided a clear timeline for the police custody required for identifying witnesses during the investigation, thereby preventing indefinite detention of the accused; it maintains the effectiveness of the legal process and ensures that the rights of an accused are protected.<sup>21</sup>

**4 Bail in case of non-bailable offences under Sec 480 BNSS, Old Section 437, CrPC, 1973:**

Process of bail in case of non-bailable offence, is laid down under Section 480 of the Sanhita. The court has a discretionary power under this section (other than High court or Court of Session) to let go an accused on bail in a non-bailable case. Exceptional cases where regular bail is not granted in non-bailable cases under BNSS 2023, are discussed in brief:-

- The question of reasonable grounds for believing arise when that such person has been guilty of an offence punishable with death or imprisonment for life,
- A person being involved in a cognizable offence and previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more.
- A person who has been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years<sup>22</sup>.

<sup>17</sup>AIR 1977 SC 2447.

<sup>18</sup> Proviso 3 to Section 437 of Cr.P.C, 1973

<sup>19</sup> Anirudh Nikhare, Bail under BNSS 2023, <https://blog.finology.in/Legal-news/Bail-provisions-in-BNSS>

<sup>20</sup> Proviso 3 of Section 480 of BNSS 2023<sup>20</sup>, highlights when bail may be taken in case of non-bailable offence as "Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court."

<sup>21</sup> Vibhu Bakshi Advocate- Delhi High Court, “Comparative Analysis Of Bail Provisions – Old Law (Crpc) Vs. New Law (BNSS)”, VIPS, GGSIPU, INTERNATIONAL Journal of creative Research Thoughts (IJCRT), [www.ijcrt.org](http://www.ijcrt.org), Volume 13, Issues 1 January (2025), ISSN:2320-2882

<sup>22</sup> Section 480, BNSS, 2023 further, but if the said accused is a child or is a woman or is sick or infirm can be directed by the court to be released on bail.



### 3 SPECIAL POWERS OF HIGH COURT AND SESSION COURT REGARDING BAIL

The High Court and Session Court has special powers under the Criminal law with regard to Bail. Section 483 BNSS earlier (Sec.439 CrPC) gives Special powers to High Court or Court of Session regarding grant of bail. The court has the power to direct that any person accused of an offence and in custody be released on bail if it's fair and justified.

- It may impose any condition which it considers necessary for the purposes mentioned in that sub-section.
- The court may impose or set aside any conditions imposed under the provision by a Magistrate when releasing or set aside or customized.

When the offence is trial able exclusively by the Court of Session, the high Court or the Session Court before granting bail to a person, give notice of the application to the Public Prosecutor for bail unless it is, for reasons to be recorded in writing, and further is of opinion that it is not practicable to give such notice application to the Public Prosecutor. Section 483 clauses 3 the High Court or Court of Session may also direct that any person who has been released on bail under this Chapter be arrested and commit him to custody<sup>23</sup>.

It is worth to mention here that the Supreme Court in the year 2022, cancelled bail of a rape accused over 'Bhaiyaa is back' posters which went viral online, were put up to celebrate his release.<sup>24</sup> The Apex court cancelled the bail granted by the Madhya Pradesh High Court to rape accused student youth wing leader after it was brought to the court's attention that the accused was greeted with poster reading Bhaiyaa is back and 'Welcome to Role Janeman', the accused was asked to surrender in a week's time. This incident reflects on the prompt action of the Apex Courts with regard the courts power to cancel a bail.

### 4 CONCLUSION

The last few years it's seen the rise of reform movements within Criminal foreign courts that seek to rehabilitate defendants who plead guilty including restorative justice and therapeutic jurisprudence<sup>25</sup>, the new Criminal law in India is also focusing to work towards providing Suraksha to the innocent who are entangled in criminal proceeding, making the journey during the trial easier by providing them bail, when required and safeguarding their personal right.

No matter the Criminal justice system has shifted from the Colonial law CrPC, 1973 to the Bharatiya Nagarik Suraksha Sanitha, shifting majorly on equal justice, speedy trial and time framed trial to the over populated population of India, it totally depends upon the lower courts judges for grant of a bail without being prejudice and solely following the guidelines of the Apex Courts and not taking the route of punishment until they are found guilty.

Valay Singh, lead, (India Justice Report), apprised that there is a mechanism of (Under trial Review Committee) UTRC should be made responsible for decongestion of prison or reducing the number of under trials languishing in prison, they should mandatorily identify prisoners who can be released.<sup>26</sup> The

<sup>23</sup> Section 483 BNSS, 2025

<sup>24</sup> India Today, "Supreme Court cancels bail of rape accused over : Bhaiya is back' Poster", 5<sup>th</sup> May 2022.assessed on 3<sup>rd</sup> March,2025.

<sup>25</sup> Max Travers- Emma Colvin, Isabelle Bartkowiak- Theeron, Rick Sarre-Andrew Day Christine Bond, "Rethinking Bail Court Reform or Business as Usual?", p 18

<sup>26</sup> Amrutha Moorthy, "What's going wrong with India's bail scheme for poor prisoners, @IndiaSpend", assessed on 12<sup>th</sup> March 2025.

proposal for a separate new Bail law is also a good idea as the issue of overcrowding of the prison can be dealt in a better manner with added provisions for compensation for innocent under trial prisoners who suffered.

Though the BNSS makes an attempt to make a balance between the rights of an accused and victim further it has brought in many changes like speedy trial, promoting bail to first time offender and avoiding unnecessary arrest and even involving the superintendent of police for applying of bail for the under trials, denying anticipatory bail to rape accused involving a child, but the back story scenario of crowded prison with under trial prisoners, the practice of punishment the poor, the non-availability of lawyers to the poor prisoners, lack of awareness regarding the new changes in bail laws, these lacuna has to be met with by the government through rigorous training and awareness among the functionaries in all the parts of India regarding the processes arrest and bail and rights of the accused. The connection between the police, courts and prison authorities should be such where in broader perspectives in considering how to develop a better criminal justice system and where it might be going should be at the same level of understanding and further hope new paradigm shift brought in through the BNSS, 2023 for bail procedure show some results in years to come in the procedure for bail in Indian criminal courts.

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