



Research Article

# Bail Under the Bharatiya Nagarik Suraksha Sanhita, 2023: A Constitutional and Judicial Analysis of Personal Liberty and Criminal Justice

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## Abstract

Bail constitutes one of the most important safeguards within the criminal justice system, as it seeks to reconcile the individual's right to personal liberty with the legitimate interests of society and the State in ensuring a fair and effective criminal process. The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), which replaced the Code of Criminal Procedure, 1973, introduced a new statutory framework for criminal procedure while retaining several established principles relating to arrest, custody and bail. The law of bail assumes particular significance because detention before conviction directly affects the constitutional guarantee of life and personal liberty under Article 21 of the Constitution of India. This article examines the statutory framework of bail under the BNSS and analyses its relationship with constitutional principles and judicial interpretation. It discusses the distinction between bailable and non-bailable offences, regular bail, anticipatory bail, default bail and bail in cases involving prolonged detention of undertrial prisoners. The article also examines the discretionary role of courts in determining bail applications and the factors relevant to the exercise of such discretion. The jurisprudence developed by the Supreme Court of India demonstrates that pre-trial detention should not ordinarily operate as punishment and that personal liberty must receive meaningful judicial protection. At the same time, the grant of bail cannot be divorced from considerations such as the seriousness of the accusation, possibility of absconding, tampering with evidence, influencing witnesses and repetition of the offence. The article argues that the effectiveness of the BNSS bail regime depends not only upon statutory provisions but also upon their constitutional interpretation and practical implementation. A balanced bail system must therefore protect individual liberty while preserving the integrity of investigation, trial and the broader administration of criminal justice.

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**KEYWORDS:** Bail; BNSS; Personal Liberty; Anticipatory Bail; Criminal Justice.

## I. INTRODUCTION

The criminal justice system operates upon a fundamental tension between the power of the State to investigate and prosecute offences and the individual's right to personal liberty. Arrest and detention represent some of the most serious forms of State interference with individual freedom. Consequently, the law relating to bail occupies a central position in every modern criminal justice system.

The principle underlying bail is that an accused person should not ordinarily be deprived of liberty merely because criminal proceedings have been initiated against him or her. The presumption of innocence remains an important principle of criminal jurisprudence until guilt is established through a lawful trial. At the same time, unrestricted release of an accused may adversely affect investigation, the safety of witnesses, the preservation of evidence and the administration of justice.

The Bharatiya Nagarik Suraksha Sanhita, 2023 represents a significant legislative development in Indian criminal procedure. It replaced the Code of Criminal Procedure, 1973 and came into operation as part of the broader restructuring of India's criminal laws. The provisions relating to bail seek to regulate the circumstances in which an accused person may be released from custody and the conditions that may accompany such release.

The constitutional dimension of bail cannot be overlooked. Article 21 of the Constitution protects life and personal liberty and requires deprivation of liberty to be in accordance with a procedure established by law. Judicial interpretation has transformed Article 21 into a powerful constitutional protection against arbitrary and unnecessary deprivation of liberty.

The Supreme Court has repeatedly emphasised that bail is generally preferred to incarceration before conviction, subject to the facts and circumstances of each case. The contemporary law of bail must therefore be examined through three interconnected dimensions: statutory provisions, constitutional guarantees and judicial discretion.

## II. OBJECTIVES OF THE STUDY

**The principal objectives of this article are:**

To examine the statutory framework relating to bail under the BNSS, 2023;

To analyse the constitutional basis of bail with particular reference to Article 21;

To examine the distinction between bailable and non-bailable offences;

To analyse the principles governing regular, anticipatory and default bail;

To examine the judicial approach of the Supreme Court towards personal liberty and pre-trial detention; and to identify the challenges associated with the practical implementation of bail provisions.

## III. RESEARCH METHODOLOGY

The present study adopts a doctrinal and analytical research methodology. The article primarily relies upon statutory provisions, constitutional provisions, judicial decisions and

relevant legal literature. The BNSS, 2023 forms the principal legislative source, while decisions of the Supreme Court of India are examined to understand the development of bail jurisprudence and the constitutional protection of personal liberty.

## IV. CONCEPT AND SIGNIFICANCE OF BAIL

Bail may broadly be understood as the release of an accused person from custody subject to an undertaking to appear before the investigating authority or court whenever required.

The primary objective of bail is not to determine whether an accused is guilty or innocent. Its principal purpose is to secure the presence of the accused during investigation and trial while avoiding unnecessary detention.

In *State of Rajasthan v. Balchand*, the Supreme Court famously articulated the principle that bail is the rule and jail is the exception.<sup>1</sup> The principle reflects the understanding that incarceration before conviction should not ordinarily become punitive.

However, the principle does not mean that every accused is entitled to release irrespective of circumstances. Bail involves judicial evaluation of competing interests, including personal liberty, the seriousness of the offence, the possibility of interference with investigation and the interests of victims and society.

## V. CONSTITUTIONAL FOUNDATION OF BAIL

### A. Article 21 and Personal Liberty

Article 21 provides that:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

Although the Constitution does not expressly use the term "bail", judicial interpretation has established a strong relationship between bail and personal liberty.

In *Maneka Gandhi v. Union of India*, the Supreme Court held that the procedure affecting personal liberty must be fair, just and reasonable.<sup>2</sup> This constitutional interpretation provides an important foundation for evaluating laws relating to arrest and detention.

Therefore, the power to detain an accused cannot be exercised without regard to constitutional safeguards.

### B. Presumption of Innocence

The presumption of innocence is a fundamental principle of criminal jurisprudence. A person accused of an offence is not to be treated as guilty merely because an FIR has been registered or prosecution has been initiated.

Consequently, pre-trial detention should ordinarily serve a legitimate procedural purpose and should not become a substitute for punishment.

### C. Right to Speedy Trial

The constitutional importance of speedy trial was recognised by the Supreme Court in *Hussainara Khatoon v. Home Secretary, State of Bihar*.<sup>3</sup> The Court recognised speedy trial as an essential component of Article 21.

Where an accused remains in custody for an excessively long period because of delays in investigation or trial, continued detention raises serious constitutional concerns.

## VI. STATUTORY FRAMEWORK OF BAIL UNDER THE BNSS

The BNSS contains provisions dealing with bail and bonds and maintains the basic distinction between bailable and non-bailable offences.

The statutory framework may broadly be examined under the following categories:

- Bail in bailable offences;
- Bail in non-bailable offences;
- Anticipatory bail;
- Default or statutory bail; and
- Release of undertrial prisoners after prescribed periods of detention.

## VII. BAIL IN BAILABLE OFFENCES

In a bailable offence, bail is ordinarily a statutory right of the accused, subject to compliance with the requirements prescribed by law.

The distinction between a bailable and non-bailable offence is therefore significant. In a bailable offence, the discretion of the authority is considerably restricted because the legislature has itself recognised the accused's entitlement to release on bail.

The object is to prevent unnecessary detention where the nature of the alleged offence does not justify continued custody.

## VIII. BAIL IN NON-BAILABLE OFFENCES

The expression "non-bailable offence" does not mean that bail cannot be granted. Rather, it means that bail is not available as an automatic statutory right and that the court exercises judicial discretion in accordance with law.

While deciding an application for bail, courts ordinarily consider several factors, including:

- nature and gravity of the accusation;
- severity of the punishment;
- prima facie material against the accused;
- possibility of absconding;
- possibility of tampering with evidence;
- possibility of influencing witnesses;
- criminal antecedents;
- likelihood of repetition of the offence; and circumstances surrounding the investigation and trial.

The Supreme Court in *State v. Captain Jagjit Singh* recognised the importance of considering relevant circumstances while exercising judicial discretion in bail matters.<sup>4</sup>

At the same time, the court should avoid conducting a detailed examination of evidence at the stage of bail because such an exercise may prejudice the eventual trial.

## IX. ANTICIPATORY BAIL UNDER THE BNSS

Anticipatory bail provides protection to an individual who has reason to believe that he or she may be arrested for a non-bailable offence.

The provision relating to anticipatory bail represents an important safeguard against unnecessary deprivation of liberty. It allows the competent court to direct that, in the event of arrest, the person shall be released on bail subject to appropriate conditions.

The Supreme Court's landmark decision in *Gurbaksh Singh Sibbia v. State of Punjab* recognised anticipatory bail as an important mechanism for protecting personal liberty.<sup>5</sup> The Court rejected the approach of imposing rigid restrictions upon the exercise of this jurisdiction.

The power must nevertheless be exercised carefully because anticipatory bail cannot be used to obstruct a legitimate investigation.

## X. DEFAULT BAIL

Default bail, also known as statutory bail, arises from the failure of the investigating agency to complete investigation within the period prescribed by law.

The provision serves as an important check upon prolonged investigative detention. The investigating agency cannot indefinitely retain an accused in custody without completing the investigation within the statutory period.

In *Uday Mohanlal Acharya v. State of Maharashtra*, the Supreme Court examined the nature and significance of the right arising from failure to complete investigation within the prescribed period.<sup>6</sup>

Default bail therefore represents a legislative balance between the investigative powers of the State and the liberty of an accused person.

## XI. BAIL AND PROLONGED DETENTION OF UNDERTRIAL PRISONERS

Prolonged detention of under trial prisoners remains one of the significant challenges facing the criminal justice system.

The BNSS contains provisions relating to release of certain under trial prisoners who have undergone detention for the prescribed proportion of the maximum period of imprisonment provided for the offence, subject to the statutory conditions and exceptions.

The principle behind such provisions is straightforward: a person awaiting trial should not remain incarcerated for an excessive period merely because the criminal proceedings have not concluded.

In *Satender Kumar Antil v. Central Bureau of Investigation*, the Supreme Court emphasised the need to reform the approach towards arrest and bail and to prevent unnecessary incarceration.<sup>7</sup>

The constitutional principle of personal liberty requires courts to pay particular attention to cases involving prolonged pre-trial detention.

## XII. JUDICIAL PRINCIPLES GOVERNING GRANT OF BAIL

Indian bail jurisprudence has developed through several important decisions of the Supreme Court.

### A. Bail Is Not Punishment

In *Sanjay Chandra v. Central Bureau of Investigation*, the Supreme Court emphasised that the object of bail is primarily to secure the attendance of the accused at trial and that detention should not become punitive before conviction.<sup>8</sup>

### B. Presumption of Innocence

In *Dataram Singh v. State of Uttar Pradesh*, the Supreme Court reiterated the importance of the presumption of innocence and the need to protect individual liberty.<sup>9</sup>

**C. Balance Between Liberty and Social Interest** The court must strike a balance between the liberty of the accused and the interests of the criminal justice system. Neither personal liberty nor public interest can be treated as an absolute consideration in every bail application.

**D. Bail Conditions Must Be Reasonable**

Conditions imposed while granting bail should have a rational relationship with the purpose of ensuring the accused's presence and protecting the integrity of the investigation and trial.

Excessively onerous conditions may effectively transform an order granting bail into an order denying bail.

### XIII. ROLE OF JUDICIARY IN BAIL MATTERS

The judiciary performs a crucial role in maintaining the constitutional balance between State power and individual liberty.

A court considering bail must apply its judicial mind to the circumstances of the particular case. Mechanical rejection or mechanical grant of bail may both undermine the administration of justice.

The judicial approach should therefore consider:

Gravity of offence → Prima facie case → Risk of absconding → Witness protection → Evidence tampering → Criminal antecedents → Length of custody → Stage of investigation/trial → Constitutional liberty.

This approach ensures that bail remains a judicial remedy rather than a purely discretionary favour.

### XIV. BAIL AND THE RIGHTS OF VICTIMS

Modern bail jurisprudence cannot focus exclusively on the accused. The rights and interests of victims must also be considered.

Where release of an accused creates a genuine possibility of threatening or influencing witnesses, tampering with evidence or repeating the alleged offence, courts may impose appropriate safeguards.

However, protection of victims cannot justify indefinite detention without adequate legal grounds. The judicial task is to maintain a fair equilibrium between the rights of the accused and the legitimate interests of victims and society.

### XV. CHALLENGES IN THE IMPLEMENTATION OF BAIL PROVISIONS

Despite statutory safeguards, several practical difficulties continue to affect the effective implementation of bail.

#### 1. Delay in Investigation and Trial

Long delays may result in accused persons remaining in custody for substantial periods before their cases are finally decided.

#### 2. Economic Barriers

An accused may obtain an order of bail but remain in custody because of an inability to furnish sureties or satisfy financial conditions.

#### 3. Excessive Bail Conditions

Conditions that are disproportionate to the circumstances of the case may undermine the practical value of bail.

#### 4. Uneven Judicial Approach

Differences in judicial interpretation may result in inconsistent outcomes in similar circumstances.

#### 5. Lack of Legal Awareness

Persons belonging to economically or socially weaker sections may not be adequately aware of their statutory and constitutional remedies.

These challenges demonstrate that effective bail reform requires not only legislative provisions but also institutional and procedural reforms.

### XVI. CRITICAL ANALYSIS

The BNSS retains the fundamental architecture of Indian bail jurisprudence while introducing the new procedural framework. Its provisions recognise the importance of release in appropriate circumstances and continue important safeguards such as anticipatory bail and statutory bail.

However, the mere existence of statutory rights cannot ensure meaningful protection of liberty. The effectiveness of bail depends upon the manner in which police authorities, prosecutors and courts exercise their respective powers.

The constitutional principle of proportionality should guide the imposition of bail conditions. Detention should have a legitimate purpose and should not be continued merely because the offence is serious.

There is also a need for greater emphasis on the position of under trial prisoners. The criminal justice system should ensure that delay in investigation or trial does not effectively convert pre-trial detention into punishment.

The judiciary therefore has a continuing responsibility to interpret the BNSS consistently with Article 21 and established principles of fairness, reasonableness and natural justice.

### XVII. SUGGESTIONS

The following measures may strengthen the bail system:

Early consideration of bail applications should be encouraged to minimise unnecessary detention.

Reasonable bail conditions should be preferred over excessive financial requirements.

Under trial review mechanisms should function effectively.

Speedy investigation and trial should be promoted.

Legal aid mechanisms should be strengthened for persons unable to afford legal representation.

Courts should provide clear and reasoned orders while granting or refusing bail.

Bail jurisprudence should remain consistent with the constitutional guarantee of personal liberty under Article 21.

Greater use of technology and case-management mechanisms may help reduce procedural delays.

## XVIII. CONCLUSION

Bail is not merely a procedural mechanism for releasing an accused person from custody; it is an important instrument for protecting personal liberty within the criminal justice system. The BNSS, 2023 provides a statutory framework through which the competing interests of individual liberty, investigation, trial and public interest may be balanced.

The constitutional philosophy underlying bail requires courts to ensure that pre-trial detention does not become punishment before conviction. At the same time, the liberty of an accused must be balanced against legitimate concerns relating to the administration of justice, including the possibility of absconding, witness intimidation and interference with evidence.

The jurisprudence developed by the Supreme Court establishes that the power to grant bail must be exercised judicially, rationally and on the basis of the circumstances of each case. The principles of presumption of innocence, speedy trial and personal liberty remain essential to the operation of the criminal justice system.

The success of the BNSS bail framework will ultimately depend upon its practical implementation. A progressive bail system must ensure that liberty is protected without compromising the integrity of criminal investigation and trial. The true measure of the effectiveness of the BNSS will therefore lie not merely in the wording of its provisions but in whether those provisions are applied in a manner that advances constitutional justice, fairness and the rule of law.

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