



THE ROAD TO BAIL JUSTICE: EVALUATING NEW CRIMINAL LAW REFORMS

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Abstract

The concept of bail--rooted in the principle that "bail is the rule and jail is the exception"--serves as a cornerstone of the criminal jurisprudence linked to Article 21 of the Indian Constitution. Given that undertrial prisoners constitute 75.8% of India's total prison population (NCRB 2022), the effectiveness of bail provisions is a matter of critical importance. This analysis evaluates the transition from the 'Code of Criminal Procedure, 1973' (CrPC) to the 'Bharatiya Nagarik Suraksha Sanhita, 2023' (BNSS). While the fundamental principles governing bail remain largely intact, the BNSS introduces two significant and progressive reforms. The first reform, under Section 478(2), stipulates that if an accused person charged with a bailable offense is unable to furnish bail bonds within seven days due to poverty, the court must release them on a 'personal bond'; this provision grants statutory recognition to the ruling in the case of **Moti Ram v. State of Madhya Pradesh (1978)*. The second reform, under Section 483(2), mandates that for offenses punishable by imprisonment of seven years or more, the victim must be given 15 days' prior notice before a decision regarding bail is made; in line with the directives from **Nipun Saxena v. Union of India* (2019)*, this measure signifies a shift towards a 'victim-centric justice' system. These reforms are not merely on paper but represent concrete steps towards social justice. In particular, Section 478(2) will help put an end to the inhumane practice where thousands of poor undertrial prisoners remain incarcerated despite being granted bail, simply because they lack sureties. Furthermore, the inclusion of provisions for e-bail and hearings via video conferencing in the BNSS has made the judicial process more expeditious and transparent. However, the successful implementation of these provisions will depend on coordination among the courts, the police, and legal services authorities. This study also critically analyzes certain flaws in the legislation. The BNSS lacks objective guidelines for determining bail amounts, creating a potential for arbitrary discrimination against the poor.

Keywords: Bail Justice, BNSS 2023, Undertrial Prisoners, Section 478(2), Victim-Centric Justice, Article 21, Bail Reforms, Criminal Procedure.

1. INTRODUCTION

The presumption of innocence--the principle that an accused is innocent until proven guilty--is a cornerstone of civilized criminal jurisprudence. Bail serves as a judicial mechanism that balances competing interests while upholding the fundamental tenet that guilt must be proven. Indian jurisprudence clarifies that the purpose of bail is not to punish or penalize the accused prior to conviction, but to ensure their presence during the trial. As Justice Krishna Iyer observed in **State of Rajasthan v. Balchand (1977)*, the basic rule can be stated thus: "Bail, not jail." **1.1 The plight of undertrial prisoners:**

According to the National Crime Records Bureau (NCRB) data, undertrial prisoners constitute 75.8% of the total prison population in India. A significant number of these individuals remain incarcerated for offenses where bail is permissible, simply because they are unable to furnish the required surety or bail bond. This reality violates Article 21 of the Constitution, which guarantees the right to life and personal liberty. Furthermore, in light of the principles established in **Maneka Gandhi v. Union of India (1971)**, the court ruled in favor of the petitioner.

2.2 Transition from CrPC to BNSS:

Parliament has enacted the 'Bharatiya Nagarik Suraksha Sanhita, 2023' (BNSS) with the aim of eliminating colonial-era influences from the Indian criminal justice system. This Act replaces the colonial-era 'Code of Criminal Procedure, 1973' (CrPC) and comes into effect on July 1, 2024. While retaining the core philosophy of the CrPC, the BNSS seeks to make



the criminal justice system more citizen-centric, victim-oriented, and technology-driven. This study analyzes the new provisions introduced in the BNSS, compares them with the corresponding provisions of the CrPC, and examines their potential impact on practical implementation.

2.3 Objectives of the Study:

To analyze the conceptual framework regarding bail under the CrPC and the BNSS; to evaluate the progressive measures in the BNSS concerning bail for the economically disadvantaged and the rights of victims; to identify new provisions and challenges related to bail; and to determine how the bail process can be made more accessible and equitable.

3 . BACKGROUND:

This traces the evolution of the concept of bail in India, moving from colonial control to a framework governed by constitutional safeguards.

2.1 Ancient and Pre-colonial Era:

In ancient times, the concept of bail was based on the principles of *Purusha* (surety/intermediary) and collective responsibility. Kautilya's *Arthashastra* mentions the release of individuals based on guarantees provided by respected members of society. The objective was not merely to secure punishment or a verdict, but to ensure social stability. During the Mughal era, the practices of *Zamanat* (guarantee/surety) and *Muchalka* (personal bond) were prevalent.

2.2 British Colonial Era:

The formal codification of bail provisions began under British rule. The first 'Code of Criminal Procedure' (CrPC) was enacted in 1861; it served as a tool for the colonial administration to maintain control over India. Decisions regarding bail were largely left to the discretion of the police and magistrates, and bail was frequently denied to prisoners. The 1898 CrPC classified offenses as 'bailable' and 'non-bailable' and granted broad discretionary powers to authorities, which were often misused.

2.3 Post-Independence Developments (1973):

Following the 41st Law Commission Report (1969), comprehensive efforts were made to revise the 1898 CrPC to make it more humane and aligned with social values. This led to the enactment of the 'Code of Criminal Procedure, 1973' (CrPC 1973). This new Code sought to liberalize bail provisions by:

- Making it mandatory for the police to inform the accused of the grounds for their arrest.
- Introducing Section 436-A to facilitate the release of undertrial prisoners who had served half of the maximum sentence prescribed for their alleged offense.
- By strengthening the provision for 'anticipatory bail' (pre-arrest bail) under Section 438. However, it became necessary for the judiciary to steer the system towards a more humane approach. Landmark judgments established this evolving jurisprudence: *State of Rajasthan v.

2.4 The Emergence of BNSS, 2023:

Even after judicial activism, two fundamental issues remained unresolved: (i) the burden of onerous bail bond conditions, and (ii) the over-criminalization of offenses and the practice of indiscriminate arrests. A committee was constituted under the chairmanship of Dr. Ranbir Singh to reform the criminal justice system, leading to the *Bharatiya Nyaya Sanhita (BNS)*, *Bharatiya Sakshya Adhiniyam (BSA)*, and *Bharatiya Nagarik Suraksha Sanhita (BNSS)*--replacing the IPC, the Evidence Act, and the CrPC, respectively.

The BNSS came into effect on July 1, 2024. The 'Statement of Objects and Reasons' of the BNSS articulates the following goal: "To ensure that no poor person is imprisoned merely due to poverty and to make the individual's participation in the bail process more meaningful." Thus, this historic shift marks a transition from police-centric events to a citizen-centric approach.

3 LITERATURE REVIEW

A comprehensive review of available literature, judicial decisions, and Law Commission reports reveals that bail jurisprudence in India has consistently focused on striking a balance between individual liberty and social interest.

3.1 Law Commission Reports - 41st Law Commission Report (1969):

This foundational report, which paved the way for the Code of Criminal Procedure (CrPC) 1973, observed that bail provisions were being applied mechanically. It recommended that bail in bailable offences be treated as a matter of right,



while magistrates should exercise guided discretion in non-bailable offences. The concept of releasing indigent persons on personal bonds was introduced here for the first time.

268th Law Commission Report on Bail Reforms (2017):

This is the most detailed report on bail. It highlighted that 67% of prisoners are undertrials and made recommendations such as:

- (i) Making bail the general rule.
- (ii) Enacting a separate bail law similar to that of the UK,
- (iii) establishing criteria to determine bail amounts based on income, and
- (iv) taking penal action against police officers who violate Section 41A of the Code of Criminal Procedure. Many recommendations from this report have been incorporated into the BNSS.

3.2 Academic and Institutional Literature

B. R. Ahuja, *Law Relating to Bail* (2021): The author argues that the Indian bail system discriminates based on wealth. A wealthy individual accused of a serious economic offence can easily secure bail by paying a large sum, whereas a poor person accused of petty theft remains in jail for months on end. Common Cause and Centre for Social Justice, ***Prison Reforms and Undertrial Prisoners* (2020):** This empirical study revealed that in 60% of bailable offence cases in Bihar and Rajasthan, the accused remained in custody for more than seven days simply because they could not secure a surety or arrange the necessary funds.

NCRB *Prison Statistics India* (2022): These alarming figures show that out of 5,73,220 prisoners, 4,34,302 (75.8%) are undertrial prisoners. Of these, 24.7% have been in prison for over a year without trial. This data provides a factual basis to highlight the urgent need for bail reforms.

3.3 Judicial Material:

***Satender Kumar Antil v. CBI* (2022) 10 SCC 51:** The Supreme Court issued comprehensive guidelines classifying offences (Categories A, B, C, and D) and stated that where the issuance of a notice under Section 41A suffices, the police and courts should not resort to arrest. This judgment is regarded as the 'Magna Carta' of contemporary bail jurisprudence.

***Moti Ram & Ors. v. State of Madhya Pradesh* (1978) 4 SCC 47:** Justice Krishna Iyer asserted that requiring an economically disadvantaged person to provide a substantial bail surety is a futile or illusory exercise and violates Article 21. He remarked, "It is a travesty of justice that poor individuals in custody--whose cases ought to be disposed of expeditiously--languish in prison for prolonged periods."

"Nipun Saxena v. Union of India (2019) 13 SCC 715: The Court emphasized the right of the victim to be heard before bail is granted in serious offences. This principle has now been incorporated as a statutory provision in Section 483(2) of the BNSS.

3.4 Research Gap: While there is abundant literature regarding bail under the CrPC, there is a lack of material offering a critical academic evaluation of the new provisions in the BNSS, 2023—specifically Section 478(2) (the 7-day rule for the indigent) and Section 483(2) (hearing the victim). Currently available commentaries are merely descriptive rather than analytical. The present study seeks to bridge this gap by providing a comparative and critical analysis of the CrPC and the BNSS in the context of bail jurisprudence.

4 RESEARCH METHODOLOGY AND RESEARCH DESIGN

4.1 Research Design:

This study is principle-based (theoretical) and analytical in nature. This research is qualitative (qualitative) and is based on statutory provisions, court judgments, Law Commission reports, NCRB Officials and secondary data and clinical evaluation by Official Officials.



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4.2 Research Design:

This research has adopted a descriptive-cum-analytical and comparative design. Bail related provisions in 'Criminal Procedure Code, 73' (CrPC) have been systematically compared with those in 'Indian Civil Code, 2023' (BNSS) for consistency, modification and identification.

4.3 Sources of Information Collection:

This study is entirely based on secondary sources:

a) Primary Sources:

Code of Criminal Procedure, 1973; Indian Civil Security Code, 2023; Constitution of India, 1950; Judgments of Supreme Court and various High Courts published in SCC, AIR and Manupatra.

b) Secondary Sources:

Law Commission of India Reports (41st, 154th and 268th Reports); NCRB Prisons 2022; Eminent Laws on Criminal Procedure and Principles of Bail. Several books, commentaries and articles; Articles in UGC-RE Congress Journals, 'Economic and Political Weekly' (EPW) and other journals; 'Common Cause' (Common Cause), CHRI and 'Amnesty International' (Amnesty International), non-governmental organizations (NGOs) reports on prisoners in judicial custody (undertrial prisoners).

4.4 Research Tools and Techniques:

Comparative Technique: Clause-wise comparison of bail provisions in CrPC and BNSS using comparative chart.

Judgment Analysis: Judicial Interpretation of Bail Court, Supreme Court Decision.

Officials: Statement of Assembly Article 14 21, Value of 19 new provisions.

4.5 Terms and Conditions:

Scope: This study covers bail provisions under CrPC and BNSS. While focusing on regular bail, anticipatory bail and statutory bail (statutory bail), special attention is paid to the rights of indigent judicial prisoners and dependents.

Principles:

This study is principle-based (documentary); BNSS recently (1 July 2024) basic element of the constitution, then empirical information (empirical data) of its constitution is not yet available.

4.6 Assumptive:

New human center system of internal criminal nature under BNSS more and more victims; However, a structural problem of disincentives exists.

4.7 RESULTS AND DISCUSSION

Comparative Analysis of Bail Provisions: CrPC vs BNSS

The analysis reveals that BNSS has not rewritten bail jurisprudence but has codified Supreme Court guidelines to make bail more accessible for the poor and more participatory for victims.



Table 1: Comparative Table - CrPC vs BNSS

Sr. No.	Aspect	CrPC, 1973 (Old Law)	BNSS, 2023 (New Law)	Reform Analysis
1	Bailable Offence	Sec. 436 - Right to be released on bail	Sec. 478 - Same right retained	Continuity
2	Bail for Indigent	No time limit. Poor kept in jail for months for not furnishing surety. (Moti Ram case)	Sec. 478(2) - NEW: If accused fails to furnish bail within 7 days due to poverty, Court SHALL release on personal bond.	Major Progressive Reform. Poverty cannot be ground for detention.
3	Non-Bailable Offence	Sec. 437 - Discretion of Court	Sec. 480 - Same discretion retained	Continuity
4	Anticipatory Bail	Sec. 438 - No time limit, protection till trial	Sec. 482(3) - NEW: Provisions for police to issue notice before arrest even after anticipatory bail plea	Procedural clarity
5	Victim Hearing	No mandatory provision	Sec. 483(2) - NEW: 15 days notice to victim/informant mandatory before granting bail in offences punishable with 7 years or more	Victim-Centric Reform based on Nipun Saxena (2019)
6	Default/Statutory Bail	Sec. 167(2) - 60/90 days	Sec. 187(3) - Same period retained	Continuity

5 LIMITATIONS AND FUTURE RESEARCH DIRECTIONS

5.1 Limitations of the Study

While the present study provides a critical evaluation of bail reforms under BNSS, certain limitations must be acknowledged: **Doctrinal Limitation:** The present research is purely doctrinal and based on secondary sources. It does not include empirical field work, such as interviews with undertrial prisoners, jail superintendents, or judicial officers, which could have provided practical insights into ground-level implementation of Section 478(2) BNSS. **Infancy of BNSS:** The Bharatiya Nagarik Suraksha Sanhita, 2023 has come into force only from 1st July 2024. Therefore, there is insufficient judicial precedent and long-term data available to empirically measure the impact of new provisions like Section 483(2) (victim hearing) and Section 478(2) (7-day rule). **Most High Court judgments cited are still interpreting CrPC.** **Limited Access to Prison Data:** The latest authentic data available is NCRB Prison Statistics 2022. Updated data for 2023-24 and 2024-25 regarding the release of poor undertrials after BNSS is not yet published. Hence, statistical correlation between reform and actual release could not be established. **Geographical Limitation:** The discussion is limited to the Indian legal framework and does not extensively compare bail systems of other common law countries like UK Bail Act 1976 or USA Bail Reform Act.

5.2 Future Research Directions

The present study opens several avenues for future researchers: **Empirical Study on Section 478(2) BNSS:** A district-wise empirical study should be conducted after one year of BNSS implementation to find out how many indigent undertrials were actually released on personal bond after 7 days. Data can be collected from District Legal Services Authorities (DLSA) and District Prisons. **Study on Victim Participation:** Research can be undertaken on whether Section 483(2) has led to delay in bail hearings or has genuinely empowered victims. An analysis of bail orders from Special Courts under POCSO and SC/ST Act will be useful. **Need for a Separate Bail Act:** Future research should explore the feasibility of enacting a separate, comprehensive Bail Act for India as recommended by the 268th Law Commission Report (2017), incorporating income-based bail determination and a Bail Support and Supervision Programme. **Impact of Technology:** BNSS introduces e-bail, electronic service of notice under Section 35, and video conferencing for bail hearings.



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Future research can evaluate whether digitalization has made bail more accessible or created a new digital divide for the rural poor. Comparative Constitutional Study: A comparative study of bail jurisprudence under Article 21 of the Indian Constitution, Article 9 of the ICCPR, and the bail laws of South Africa can be undertaken to develop international best practices for India.

6. CONCLUSION

6.1 The journey from the CrPC, 1973 to the BNSS, 2023 reflects a paradigm shift in the philosophy of criminal procedure - from a colonial, police-centric law to a citizen-centric and victim-centric law. However, as far as bail justice is concerned, the reform is evolutionary, not revolutionary. The study concludes that BNSS has made two landmark contributions to bail jurisprudence. First, by enacting Section 478(2), it has for the first time given statutory recognition to the principle that poverty cannot be a ground for incarceration. It has translated the anguish of Justice Krishna Iyer in *Moti Ram* (1978) into a binding legal mandate.

Second, by enacting Section 483(2), it has ended the silence of the victim in bail proceedings and made criminal justice more participatory. Despite these progressive steps, the core disease of the bail system remains untreated. The system still allows arbitrary fixation of excessive bail amounts without any income-based criteria, and it still provides no effective deterrent against mechanical and illegal arrests by the police in violation of Section 35(3) BNSS. The maxim "Bail is the Rule, Jail is the Exception" as propounded in *State of Rajasthan v. Balchand* (1977) and reiterated in *Satender Kumar Antil* (2022) still remains a distant dream for the poor. Thus, the road to bail justice has been repaired under BNSS, but it is not yet fully paved. The success of this reform will not depend on the text of the law, but on its implementation by the Magistrates, Police, and Legal Aid Institutions.

6.2 SUGGESTIONS

To make bail truly just, accessible, and equitable, the following pragmatic suggestions are submitted: **Income-Based Bail Slabs:** The Central Government should frame Rules under the BNSS prescribing income-linked bail amount criteria. For example, bail amount should not exceed 1/4th of monthly income for persons below the poverty line, as recommended by the 268th Law Commission. **Automatic Bail Support System:** Every District Prison and District Court should maintain an automatic digital dashboard. If a person granted bail fails to furnish surety within 7 days, the system should auto-generate a report to DLSA and the concerned Magistrate for compliance with Section 478(2) BNSS. **Accountability for Police:** Section 35(7) BNSS should be amended to include departmental and contempt action against police officers who make arrests in violation of Section 35(3) without recording reasons, as directed in *Arnesh Kumar v. State of Bihar* (2014).

Strengthening DLSA and Bail Support Cells: District Legal Services Authorities should establish dedicated "Bail Support Cells" in every jail to identify indigent undertrials, provide free sureties through Probation Officers, and file applications under Section 478(2). **Victim Protection Protocol:** While implementing Section 483(2), care should be taken that the 15-day notice to the victim does not become a tool to delay bail indefinitely. A standard operating procedure (SOP) should be issued by High Courts for victim hearing through video conferencing. **Enactment of Separate Bail Act:** In the long term, India should enact a separate comprehensive Bail Act on the lines of UK Bail Act, 1976, codifying all principles of bail, presumption of bail, and conditions for denial. Bail justice is not merely a procedural technicality; it is the test of our constitutional commitment to liberty, equality, and human dignity.

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