

Objectives and Scope of Bail Under BNSS, 2023 an in-Depth Analysis

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ABSTRACT

Bail represents a vital intersection between individual liberty and societal interest in the Indian criminal justice system. With the enactment of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, which replaces the Code of Criminal Procedure, 1973, the bail jurisprudence has been revisited with clarity and purpose. This paper offers a doctrinal and analytical study of regular bail, anticipatory bail, default (mandatory) bail, interim bail, and post-conviction bail. It draws upon statutory interpretation, constitutional principles, and judicial pronouncements, highlighting the evolution of bail law in India and its present application under BNSS. Special emphasis is given to recent reforms, procedural safeguards, and balance of interests.

Keywords: Bail, BNSS 2023, Anticipatory Bail, Interim Bail, Default Bail, Post-Conviction Bail, Judicial Discretion, Article 21, CrPC, Judicial Precedents, Bail Cancellation, Criminal Justice Reform

INTRODUCTION

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), enacted to replace the Code of Criminal Procedure, 1973 (CrPC), represents a paradigm shift in India's criminal justice framework. Among its key reforms are the provisions governing bail, a critical mechanism to balance personal liberty with the demands of justice. Rooted in Article 21 of the Indian Constitution, which guarantees the right to life and liberty, bail ensures that an accused person is not unduly deprived of freedom pending trial. This article provides an exhaustive examination of the bail provisions under the BNSS, exploring their legislative intent, procedural nuances, judicial interpretations, challenges, and implications for India's criminal justice system.

Historical Context and Rationale for Reform

The CrPC, enacted in 1973 as a successor to colonial-era laws, served as the procedural backbone of India's criminal justice system. Despite amendments, it struggled to address modern challenges such as prison overcrowding, judicial delays, and inconsistent bail practices. Statistics from the National Crime Records Bureau (NCRB) in 2022 revealed that over 70% of India's prison population comprised undertrial prisoners, many detained due to stringent bail conditions or lack of legal representation. The Supreme Court's landmark principle that "bail is the rule, and jail is the exception," articulated in *State of Rajasthan v. Balchand* (1977) and reiterated in **Sanjay Chandra v. CBI** (2011), underscored the need for reform.

Introduced on August 11, 2023, the BNSS was later refined as the Bharatiya Nagarik Suraksha (Second) Sanhita, 2023 (BNSS2) following recommendations from the Standing Committee on Home Affairs. The BNSS aims to streamline bail procedures, reduce judicial discretion's arbitrariness, and align with constitutional and international human rights standards, including Article 11 of the Universal Declaration of Human Rights, which emphasizes the presumption of innocence.

Definitions And Legislative Framework

The BNSS provides precise definitions to eliminate ambiguities present in the CrPC. Under Section 2(b), "bail" is defined as the release of an accused or suspected person from custody, subject to conditions imposed via a

bond or bail bond. Section 2(c) and 2(d) define “bail bond” and “bond,” respectively, ensuring procedural clarity. These definitions standardize bail practices, fostering transparency and consistency across jurisdictions.

Bail provisions are detailed in Sections 478 to 496, replacing Sections 436–450 of the CrPC. Offenses are categorized as bailable and non-bailable:

Bailable Offenses: Under Section 478, bail is a matter of right, typically granted by police or courts upon furnishing a bail bond.

Non-Bailable Offenses: Sections 480 and 483 govern these, requiring judicial discretion based on factors like offense severity, evidence, and public interest.

Types Of Bail Under Bnss

The BNSS recognizes four main types of bail, each tailored to specific stages of criminal proceedings:

1. Regular Bail

Regular bail applies to individuals in custody, whether under arrest or judicial detention. Applications may be filed before Magistrates, Sessions Courts, or High Courts, depending on the case’s complexity. Section 479 introduces a groundbreaking reform: the Superintendent of Jail must proactively apply for bail for undertrial prisoners who have served one-third (for first-time offenders) or one-half of the maximum sentence for their offense, except in cases punishable by death or life imprisonment. This provision, inspired by **Satender Kumar Antil v. CBI** (2022), aims to decongest prisons and protect vulnerable undertrials.

2. Anticipatory Bail

Governed by Section 482, anticipatory bail allows individuals apprehending arrest for non-bailable offenses to seek pre-arrest relief. Unlike the CrPC’s Section 438, which outlined specific criteria (e.g., likelihood of false accusation), the BNSS omits such guidelines, granting courts unfettered discretion. This change has drawn criticism for potentially enabling inconsistent rulings. The BNSS also removes the CrPC’s requirement for the Public Prosecutor’s mandatory hearing and the applicant’s presence, simplifying the process but raising concerns about procedural fairness. The Supreme Court in **Dhanraj Aswani v. Amar S. Mulchandani** (2024) clarified that anticipatory bail remains available even for those in custody for unrelated offenses, reinforcing the presumption of innocence.

3. Interim Bail

Interim bail provides temporary release pending a final bail decision, often granted in cases involving humanitarian concerns, such as medical emergencies or family crises. While not explicitly codified, the BNSS retains this practice through inherent judicial powers. The Supreme Court in **Umarmia v. State of Gujarat** (2023) emphasized that interim bail applications must be disposed of expeditiously, recommending timelines of one week for subordinate courts and two to three weeks for High Courts.

4. Statutory (Default) Bail

Under Section 187(2), if the police fail to file a chargesheet within 60 days (for offenses punishable by up to seven years) or 90 days for (for graver offenses), the accused is entitled to statutory bail, provided they furnish a bail bond. However, the BNSS allows 15 days of police custody to be distributed over the initial 40 or 60 days of detention, unlike the CrPC’s fixed 15-day limit. This change could delay statutory bail, particularly if police custody is strategically staggered, raising concerns about its impact on undertrials’ rights.

5. Bail After Conviction

Granted to a person who has been **convicted and sentenced**, pending the outcome of an appeal.

- **Statutory Basis:** Section 474 BNSS (corresponds to Section 389 CrPC).
- Authority: Appellate Court or the Trial Court under specific conditions.
- Suspension of sentence is a prerequisite.

Key Reforms In Bail Provisions

The BNSS introduces several reforms to modernize bail procedures and address systemic inefficiencies. Below is a detailed overview of the key changes:

1. Mandatory Bail for Undertrials

Section 479(1) and (3): Requires jail authorities to initiate bail for undertrials who meet detention thresholds, a proactive measure to reduce prison overcrowding. The Supreme Court, in response to a public interest litigation in 2024, directed that this provision applies retroactively to cases registered before July 1, 2023, ensuring broader relief.

Impact: This reform aligns with the Court's guidelines in **Hussainara Khatoon v. State of Bihar** (1979), which condemned prolonged detention of undertrials. It particularly benefits first-time offenders and economically weaker sections, who often languish in custody due to inability to secure bail.

2. Flexible Police Custody Period

Section 187: (1) Permits 15 days of police custody to be spread over 40 or 60 days, a significant departure from the CrPC's Section 167, which mandated continuous custody within the first 15 days.

Impact: While intended to aid investigations in complex cases, this provision risks prolonging detention without bail, particularly for serious offenses. Legal experts argue it could be misused to harass accused persons, undermining the principle of liberty.

3. Restrictions on Bail for Multiple Charges

The CrPC allowed bail for those detained for half the maximum sentence for an offense. The BNSS restricts this facility for individuals facing multiple charges, requiring courts to consider all pending cases.

Impact: This change aims to prevent premature release in complex cases but may disproportionately affect undertrials involved in overlapping investigations, exacerbating prison overcrowding.

4. Handcuffing Provisions

The BNSS permits handcuffing in specific cases, including economic offenses and terrorism-related charges, under Section 43(3). This contradicts Supreme Court rulings like **Prem Shankar Shukla v. Delhi Administration** (1980), which deemed routine handcuffing a violation of dignity and human dignity.

Impact: The provision has sparked legal challenges, with critics arguing it regresses from established human rights standards. Courts will likely scrutinize its application to ensure compliance with constitutional norms.

5. Bail in Serious Offenses

For heinous crimes under Sections 65 (rape) and 70(2) (gang rape) of the Bharatiya Nyaya Sanhita, 2023, the BNSS mandates notifying the Public Prosecutor and ensuring the informant or victim's presence during bail hearings.

Impact: Enhances victim representation and public interest in serious cases, aligning with victim-centric reforms. However, it imposes stricter scrutiny on bail applications, potentially limiting access for accused persons.

6. Cancellation of Bail

Section 483: Grants courts the power to cancel bail if conditions are violated, new evidence emerges, or the accused influences witnesses.

Impact: Strengthens judicial oversight but requires careful application to prevent arbitrary cancellations, as cautioned in **State v. Sanjay Kumar** (2023), where the Supreme Court emphasized proportionality in bail decisions.

7. Electronic Monitoring and Modernization

The BNSS encourages electronic submissions for bail applications (Section 480(4)) and integrates forensic evidence, allowing courts to consider forensic reports before granting bail.

Impact: Promotes efficiency and scientific rigor but may challenge accessibility for rural or digitally disadvantaged litigants, necessitating infrastructure support.

Judicial Principles and Human Rights Alignment

The BNSS aligns with constitutional mandates and international human rights standards, particularly Article 21 of the Indian Constitution and Article 11 of the Universal Declaration of Human Rights, which emphasize liberty and the presumption of innocence. Key Supreme Court rulings have shaped these principles:

- **Kashmira Singh v. State of Punjab (1977):** Established bail as a fundamental right, subject only to reasonable restrictions.
- **Satender Kumar Antil v. CBI (2012):** Provided guidelines for categorizing bail applications to expedite processing, a framework reflected in the BNSS's undertrial provisions.
- **Arnab Goswami v. State of Maharashtra (2020):** Reaffirmed that personal liberty is non-negotiable unless compelling evidence justifies detention.
- **Jalaluddin Khan v. Union of India (2023):** Upheld the right to speedy bail hearings, aligning with the BNSS's timelines for disposal.

The BNSS's focus on undertrial relief, statutory bail, and victim representation reflects these principles. However, provisions like extended police custody and handcuffing raise concerns about potential human rights violations, requiring judicial vigilance to ensure compliance.

Comparative Perspective: Bail In Other Jurisdictions

To contextualize the BNSS, a brief comparison with bail systems in other jurisdictions is pertinent:

- **United States:** Bail is governed by the Eighth Amendment, which prohibits excessive bail. Cash bail systems, prevalent in many states, have faced criticism for disproportionately affecting low-income defendants, similar to India's pre-BNSS challenges. The BNSS's mandatory undertrial bail offers a more equitable alternative.
- **United Kingdom:** The Bail Act 1976 presumes bail unless specific risks (e.g., flight or reoffending) justify detention. The BNSS's discretionary anticipatory bail aligns with such flexibility but lacks the UK's structured risk assessment framework.
- **Australia:** Bail decisions consider community safety and victim interests, akin to the BNSS's provisions for serious offenses. However, Australia's use of electronic monitoring for bail conditions surpasses the BNSS's limited technological integration.

The BNSS's reforms, particularly for undertrials and default bail, position India as a progressive, though its discretionary provisions require refinement to match global best practices.

Challenges and Criticisms

Despite its progressive elements, the BNSS faces several challenges:

1. Discretionary Anticipatory Bail:

The absence of criteria under Section 482 risks inconsistent judicial outcomes, as highlighted by legal scholars like Faizan Mustafa.

2. Extended Police Custody:

The flexible 15-day custody period may delay statutory bail, particularly in cases with staggered police custody, disproportionately affecting undertrials with limited legal aid.

3. Handcuffing Provisions:

Contradicting judicial precedents, this provision risks undermining human dignity, potentially leading to constitutional challenges.

4. Multiple Charges Restriction:

Denying bail for those with multiple charges may exacerbate prison overcrowding and prejudice undertrials in complex cases.

5. **Implementation Gaps:** Effective implementation requires judicial training, digital infrastructure, and public awareness, which are challenging in India's diverse socio-legal context.

6. **Victim-Centric Provisions:** While enhancing victim representation is laudable, it may tilt the balance against the accused, necessitating careful judicial calibration.

Broader Implications For The Criminal Justice System

The BNSS's bail provisions have far-reaching implications:

- **Prison Decongestion:** Mandatory bail for undertrials and first-time offenders could significantly reduce India's undertrial population, addressing a chronic issue highlighted in NCRB reports.
- **Judicial Efficiency:** Timelines for bail disposal and electronic submissions streamline processes, though judicial training is essential to ensure uniformity.
- **Victim Empowerment:** Provisions for serious offenses enhance victim participation, aligning with global trends toward victim-centric justice.
- **Human Rights Compliance:** While progressive in parts, provisions like handcuffing and extended custody require scrutiny to align with constitutional and international standards.
- **Socio-Economic Equity:** By prioritizing undertrials and first-time offenders, the BNSS addresses systemic biases against marginalized groups, though implementation gaps could undermine this goal.

RECOMMENDATIONS FOR EFFECTIVE IMPLEMENTATION

To maximize the BNSS's potential, the following measures are recommended:

1. **Judicial Guidelines:** The Supreme Court should issue guidelines for anticipatory bail to ensure consistency, drawing from CrPC precedents.
2. **Infrastructure Development:** Invest in digital platforms and forensic facilities to support electronic bail applications and evidence-based decisions.
3. **Legal Aid Strengthening:** Expand legal aid services to ensure undertrials, particularly from marginalized communities, access bail provisions.
4. **Public Awareness Campaigns:** Educate citizens about their bail rights to enhance compliance and reduce exploitation.
5. **Monitoring Mechanisms:** Establish oversight bodies to review the application of contentious provisions like handcuffing and extended custody.

CONCLUSION

The Bharatiya Nagarik Suraksha Sanhita, 2023, marks a transformative step in reforming India's bail framework, replacing the outdated CrPC with a modern, rights-based approach. Its provisions for undertrials, statutory bail, and victim representation reflect a commitment to equity and justice. However, challenges such as discretionary anticipatory bail, extended police custody, and handcuffing provisions necessitate judicial oversight and potential amendments to align with constitutional and human rights norms. By addressing implementation gaps and fostering stakeholder collaboration, the BNSS can fulfill its promise of a fairer, more efficient criminal justice system. Legal practitioners, policymakers, and civil society must work together to ensure that bail under the BNSS upholds the principle that liberty is the default, not the exception.

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