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## BAIL UNDER BNSS: AN ANALYSIS

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### ABSTRACT

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), which came into force on 1 July 2024, represents a landmark overhaul of India's criminal procedural law, replacing the Code of Criminal Procedure, 1973 (CrPC). Among its most consequential provisions are those governing bail the legal mechanism by which an accused person is conditionally released from custody pending trial. This paper provides a comprehensive doctrinal and analytical examination of the bail framework under the BNSS, encompassing the five principal types of bail (regular bail, anticipatory bail, default bail, interim bail, and undertrial bail), the procedural architecture through which they operate, and the critical reforms introduced vis-à-vis the antecedent CrPC regime.

Drawing upon statutory interpretation, constitutional jurisprudence under Articles 21 and 22, landmark Supreme Court decisions, comparative law perspectives, and empirical data from the National Crime Records Bureau (NCRB), the paper critically evaluates the legislative intent behind key provisions such as Sections 187, 479, 480, 481, 482, and 483 of the BNSS. Special attention is devoted to the controversial extension of police custody under Section 187, the liberalisation of anticipatory bail under Section 482, the novel undertrial relief mechanism under Section 479, and the persistent structural barriers including poverty, legal aid deficits, and judicial backlogs that continue to frustrate effective bail access.

The paper concludes that while the BNSS marks meaningful progress towards a rights-oriented bail jurisprudence grounded in the constitutional principle that liberty is the rule and detention the exception, several provisions introduce new risks of executive overreach and socio-economic discrimination that demand further reform, including the enactment of a dedicated Bail Act as recommended by the 268th Report of the Law Commission of India.

**Keywords:** Bail, BNSS 2023, CrPC, Anticipatory Bail, Default Bail, Undertrial Prisoners, Article 21, Judicial Discretion, Criminal Procedure Reform, Police Custody, Section 479, Section 482

## I. INTRODUCTION

The administration of criminal justice in any democratic society rests upon a delicate equilibrium between two competing imperatives: the state's interest in ensuring that accused persons appear for trial and do not obstruct justice, and the fundamental right of the individual to personal liberty. Bail the conditional release of an accused from custody upon furnishing security is the primary legal instrument through which this equilibrium is maintained. As the Supreme Court of India declared in *State of Rajasthan v. Balchand* (1977), "the basic rule is bail, not jail," a principle that has since become the cornerstone of India's bail jurisprudence.

On 1 July 2024, India's criminal procedure landscape underwent its most transformative overhaul since independence, when the *Bharatiya Nagarik Suraksha Sanhita, 2023* (BNSS) enacted by Parliament on 25 December 2023 replaced the Code of Criminal Procedure, 1973 (CrPC). The BNSS, comprising 531 sections (compared to the CrPC's 484), purports to modernise India's criminal procedure, decolonise its legal framework, and place the citizen at the centre of the justice system. Its provisions on bail, contained principally in Chapter XXXV (Sections 478–498), reflect both continuity with established jurisprudence and a series of significant, occasionally controversial, departures from the CrPC regime.

This paper undertakes a systematic examination of the bail provisions of the BNSS. Part II grounds the discussion in the constitutional framework. Part III traces the legislative history from the CrPC to the BNSS. Part IV analyses the new definitional framework. Parts V and VI examine, respectively, the types of bail and the procedural architecture. Parts VII and VIII provide a comparative analysis and critical evaluation of key reforms. Part IX examines the empirical reality of undertrial detention. Part X situates the BNSS within comparative perspectives. Part XI advances reform recommendations, and Part XII concludes.

## II. CONSTITUTIONAL FOUNDATIONS OF BAIL IN INDIA

### A. Article 21: Right to Life and Personal Liberty

Article 21 of the Constitution of India guarantees that "no person shall be deprived of his life or personal liberty except according to procedure established by law." In *Maneka Gandhi v. Union of India* (1978), the Supreme Court gave this provision its most expansive interpretation, holding that the procedure established by law must be fair, just, and reasonable not arbitrary,

fanciful, or oppressive. Applied to bail, this means that pre-trial detention must be justified by a procedure that is not merely technically legal but substantively fair.

The Supreme Court has derived at least three core propositions from Article 21 in the bail context. First, personal liberty is the norm; detention is the exception. Second, the presumption of innocence, while not expressly stated in the Constitution, is inherent in Article 21 and demands that the accused not be treated as convicted before trial. Third, pre-trial custody cannot become a form of administrative punishment. In *Hussainara Khatoon v. Home Secretary, Bihar* (1979), the Court condemned the practice of detaining undertrial prisoners for periods exceeding the maximum sentence prescribed for their alleged offences as a flagrant violation of Article 21.

### **B. Article 22: Safeguards Against Arrest and Detention**

Article 22 provides specific procedural safeguards: the right to be informed of the grounds of arrest, the right to consult a legal practitioner, and the right to be produced before a magistrate within 24 hours. While Article 22(1) and (2) apply to ordinary arrests, clauses (3) to (7) govern preventive detention, placing bail largely beyond reach in cases under special legislation such as the Unlawful Activities (Prevention) Act, 1967 (UAPA) and the Prevention of Money Laundering Act, 2002 (PMLA). This dual regime—ordinary bail under the BNSS and the “twin conditions” of bail under special laws—creates a significant structural asymmetry that the BNSS does not address.

The relationship between Article 21 and the bail provisions of the BNSS was authoritatively addressed in *Satender Kumar Antil v. CBI* (2022), where the Supreme Court directed courts to liberally grant bail, avoid unnecessary arrests, and ensure that the prison system is not burdened with persons awaiting trial for minor offences. This judgment, decided under the CrPC, continues to govern bail jurisprudence under the BNSS by virtue of the continuity of constitutional principles.

## **III. LEGISLATIVE HISTORY: FROM CrPC TO BNSS**

The law of criminal procedure in India has colonial antecedents. The Criminal Procedure Code, 1861, enacted after the 1857 uprising, was designed primarily to consolidate British administrative control over criminal justice. It was replaced by the CrPC of 1898 and

subsequently by the CrPC of 1973, which incorporated significant reforms including the introduction of anticipatory bail (Section 438) and provisions for bail in non-bailable offences (Section 437). The 2005 amendment to the CrPC added further prescriptions to the anticipatory bail provision, requiring courts to consider specified factors, that were widely criticised by the legal community as restricting judicial independence.

The impetus for the BNSS arose from a political desire to replace colonial-era laws with legislation rooted in Indian values and traditions. The Bharatiya Nagarik Suraksha Sanhita Bill was introduced in Lok Sabha on 11 August 2023 and referred to the Parliamentary Standing Committee on Home Affairs, which submitted its report in November 2023 recommending several modifications. The Bharatiya Nagarik Suraksha (Second) Sanhita, 2023 passed both Houses of Parliament in December 2023, received Presidential assent on 25 December 2023, and entered into force on 1 July 2024.

The BNSS introduces 531 sections, amends 107 provisions, incorporates 9 entirely new sections, and deletes 9 sections of the CrPC. With respect to bail specifically, the most significant legislative interventions are: (i) the introduction of statutory definitions of ‘bail,’ ‘bail bond,’ and ‘bond’; (ii) the liberalisation of undertrial bail under Section 479 by lowering the threshold for first-time offenders from one-half to one-third of the maximum sentence; (iii) the restructuring of anticipatory bail under Section 482; and (iv) the controversial extension of intermittent police custody under Section 187.

#### **IV. DEFINITIONAL FRAMEWORK UNDER THE BNSS**

A notable advance of the BNSS over the CrPC is its introduction of express statutory definitions for the key concepts of bail law, thereby eliminating interpretive ambiguity that had generated significant litigation. Section 2(1) provides three foundational definitions:

##### **A. Bail Section 2(1)(b)**

“Bail” is defined as “the 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.” This definition expressly includes “suspected” persons, acknowledging that bail may be sought even before formal charges are framed, and clarifies that the release is conditional, subject to the execution of an appropriate

security instrument.

### **B. Bail Bond Section 2(1)(d)**

A “bail bond” is defined as “an undertaking for release with surety.” This is a bond executed by the accused person together with one or more sureties who undertake to pay a specified sum if the accused fails to appear as required. Suretyship remains a significant barrier to bail access for economically disadvantaged accused persons, as the financial requirements can be prohibitive.

### **C. Bond Section 2(1)(e)**

A “bond” is defined as “a personal bond or an undertaking for release without surety.” This is the instrument of personal recognizance, by which the accused person alone undertakes to appear, without the requirement of a surety. The availability of release on personal bond is particularly significant for indigent accused persons and first-time offenders.

## **V. TYPES OF BAIL UNDER THE BNSS**

The BNSS recognises five principal categories of bail, each addressed to a distinct stage of criminal proceedings and a different set of factual circumstances. These are: (i) regular bail in bailable offences; (ii) regular bail in non-bailable offences; (iii) anticipatory bail; (iv) default (statutory) bail; and (v) undertrial bail. Interim bail, while not separately defined in the BNSS, is a judicially evolved protective device routinely granted pending disposal of main bail applications.

### **A. Regular Bail: Bailable Offences (Sections 478 & 480)**

#### **1. Bail as a Matter of Right**

Section 480 provides that where a person accused of a bailable offence is arrested or detained without warrant by a police officer, or appears or is brought before a court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before the court to give bail, such person shall be released on bail. The use of the word ‘shall’ is significant: bail in a bailable offence is an absolute, non-discretionary right. The accused does not need to make out a case for bail; the officer or court is obligated to release upon execution of the

requisite bond.

## **2. Mode of Release**

The release may be effected by the officer in charge of the police station without the necessity of judicial intervention. Where the accused is unable to furnish surety, Section 486 provides for release on personal bond. Where the accused is an indigent person unable to provide a bond, Section 486 BNSS specifically requires that bail not be denied on financial grounds alone. The officer or court may impose conditions on the bail, such as requiring the accused to surrender their passport or report to the police station at specified intervals.

### **B. Regular Bail: Non-Bailable Offences (Section 481)**

#### **1. The Triple Test**

Judicial discretion in granting bail in non-bailable offences has been structured by the Supreme Court through what is commonly referred to as the 'triple test': (i) Is the accused likely to flee and evade the processes of law? (ii) Is there a likelihood that the accused will tamper with witnesses or evidence? (iii) Is the accused a danger to society? These factors, while not expressly codified in the BNSS, continue to guide judicial decision-making by virtue of their deep embedding in precedent.

#### **2. Mandatory Bars**

Section 481(1) provides that bail shall not be granted in non-bailable cases where there are reasonable grounds to believe that the accused has been guilty of an offence punishable with death or imprisonment for life, or where the accused is a repeat offender previously convicted of an offence punishable with death, life imprisonment, or imprisonment for seven or more years, or twice previously convicted of a cognizable offence punishable with imprisonment of three to seven years.

#### **3. Special Exceptions**

Notwithstanding the mandatory bars, Section 481 contains a proviso that women, persons under the age of sixteen, sick or infirm persons, and persons accused of offences in which the maximum punishment does not exceed three years may be released on bail even where the

ordinary bars apply. This protective provision reflects a commitment to differential treatment of vulnerable groups.

## **C. Anticipatory Bail (Section 482)**

### **1. Scope and Eligibility**

Section 482(1) provides that when any person has reason to believe that they may be arrested on an accusation of having committed a non-bailable offence, they may apply to the High Court or the Court of Session for a direction that, in the event of such arrest, they shall be released on bail. The provision is not limited to persons against whom an FIR has been registered; the Supreme Court in *Gurbaksh Singh Sibbia v. State of Punjab* (1980) held that the mere apprehension of arrest, without an FIR, is sufficient to invoke the provision.

### **2. Key Departures from Section 438 CrPC**

Section 482 of the BNSS makes several significant departures from its CrPC antecedent. First and most importantly, it removes the guiding factors that Section 438(1) CrPC (as amended in 2005) required courts to consider, including the nature and gravity of the accusation, the criminal antecedents of the applicant, and the possibility of fleeing from justice. The Chhattisgarh High Court in 2024 expressly observed that this removal widens the discretionary powers of courts in deciding anticipatory bail applications, allowing for more case-specific determinations based on facts rather than pre-defined criteria.

Second, Section 482 eliminates the controversial proviso to Section 438(1) CrPC that had permitted the police to arrest the applicant without warrant even while the anticipatory bail application was pending. Third, it removes Sub-section (1B) of Section 438 CrPC, which had allowed the accused to be arrested in court upon rejection of the application. The BNSS also removes the requirement for the mandatory presence of the applicant at the final hearing, simplifying the process for obtaining anticipatory bail.

### **3. Remaining Restriction: Gang Rape of Minors**

Section 482(4) introduces a categorical bar: anticipatory bail is not available to persons accused of gang rape of women under eighteen years of age under Sections 65 and 70(2) of the Bharatiya Nyaya Sanhita, 2023. This reflects the legislative policy of treating sexual violence

against minors as so grave that the ordinary presumption in favour of liberty is displaced.

#### **4. Retrospective Application State Amendments**

One of the most legally significant effects of the BNSS has been the displacement of state-level amendments to Section 438 CrPC that had restricted anticipatory bail for certain categories of offences. The Allahabad High Court in *Sudhir Kumar Chaurasia v. State of U.P.* (2025) held that Section 482 BNSS applies retrospectively to pending cases, creating significant jurisprudential consequences for offences committed before 1 July 2024. However, this interpretation has not been uniformly adopted across High Courts, and the Supreme Court is yet to provide a definitive ruling.

### **D. Default (Statutory) Bail (Section 187)**

#### **1. Constitutional Basis and Jurisprudence**

Default bail, also known as statutory bail or compulsive bail, is a constitutionally significant provision that automatically entitles an accused person to release if the investigating agency fails to complete its investigation and file a chargesheet within the statutorily prescribed period. The right to default bail was described by the Supreme Court in *Rakesh Kumar Paul v. State of Assam* (2017) as an “indefeasible right” that arises automatically upon the expiry of the investigation period without filing of a chargesheet, and that cannot be defeated by a belated or incomplete chargesheet. In *Ritu Chhabaria v. Union of India* (2023), the Court further held that even an incomplete chargesheet does not defeat the right to default bail.

#### **2. Prescribed Timelines Under Section 187**

Section 187(3) of the BNSS prescribes two investigation timelines for the purpose of default bail: ninety days for offences punishable with death, life imprisonment, or imprisonment for not less than ten years; and sixty days for all other offences. These timelines correspond to those in Section 167(2) CrPC and remain unchanged.

#### **3. The Controversial Section 187(2): Intermittent Police Custody**

The BNSS introduces a significant and deeply controversial departure from the CrPC in Section 187(2), which provides that 15 days of police custody can be utilised not continuously within



the first 15 days post-arrest (as the Supreme Court had interpreted the CrPC in *CBI v. Anupam Kulkarni* (1992)), but intermittently in whole or in part at any time during the initial 40 or 60 days of the total custody period, depending on the offence.

The effect is alarming to civil liberties advocates: under the BNSS, police may seek custody in fragments five days initially, then three days after the accused is moved to judicial custody, then seven days again. The People's Union for Civil Liberties (PUCL) described this provision as effectively creating a "harassment tool" that weaponises custody against the accused. This provision also directly affects the calculation of default bail, since staggered police custody over 40 or 60 days may delay the accrual of the right to default bail for accused persons.

## **E. Undertrial Bail (Section 479)**

### **1. The Structural Reform: Lowering the Threshold for First-Time Offenders**

Section 479 of the BNSS is widely regarded as the most progressively important bail reform in the statute. It replaces and substantially improves upon Section 436A CrPC. Section 479(1) introduces a bifurcated standard for undertrial bail based on prior criminal history. For an accused who has never been convicted of any offence in the past (a first-time offender), the detention threshold for mandatory release is reduced from one-half to one-third of the maximum sentence. For other accused persons, the entitlement to release arises upon serving one-half of the maximum sentence.

### **2. Superintendent of Jail: Active Duty**

Section 479(3) introduces a duty upon the Superintendent of the Jail to make an application for the release of an undertrial prisoner when the detention threshold is reached. This transforms the Superintendent from a passive custodian into an active participant in securing bail for qualifying prisoners, thereby ensuring that those who may be unaware of their rights or unrepresented by counsel receive institutional assistance. In August 2024, the Supreme Court directed that Section 479 applies retrospectively to cases filed before the BNSS came into force on 1 July 2024.

### **3. Exceptions and Criticisms**

Section 479 does not apply to persons accused of offences punishable with death or life

imprisonment, or to persons facing investigation, inquiry, or trial in multiple cases or multiple offences. The second category of exclusion has attracted sharp criticism. The practice of investigating agencies filing multiple overlapping FIRs against the same accused to frustrate default bail and extend custody is well-documented. Section 479(2) effectively incentivises this practice by making multiple FIRs a self-executing bar to undertrial bail.

## **F. Interim Bail**

Interim bail refers to a temporary grant of bail pending the hearing of a regular or anticipatory bail application. It is not expressly codified under a separate section in the BNSS but is recognised as an inherent power of the court derived from the general bail provisions and the court's inherent jurisdiction under Section 528 BNSS (corresponding to Section 482 CrPC). Interim bail is typically granted when urgency demands immediate release. The Supreme Court in *M.C. Abraham v. State of Maharashtra* (2003) held that while interim anticipatory bail can be granted, it must not be used to stall investigation or frustrate judicial process.

## **VI. BAIL PROCEDURE: A STEP-BY-STEP ANALYSIS**

### **A. Police-Level Bail**

For bailable offences, the officer in charge of the police station must release the accused on bail once the accused is prepared to comply with the bail conditions. This is the first and most accessible tier of bail access. In practice, however, police-level bail is frequently undermined by demands for unreasonable sureties, by delays in processing, and by the registration of multiple overlapping offences to include a non-bailable charge.

### **B. Magistrate-Level Bail**

Section 480 confers general bail powers upon Magistrates for cases pending before them. Section 481 empowers Magistrates to grant bail in non-bailable offences, subject to the mandatory bars and the exercise of judicial discretion informed by the triple test. In practice, the quality of bail decision-making at the Magistrate level has been a persistent concern: the Supreme Court in *Satender Kumar Antil v. CBI* (2022) noted the prevalence of mechanical remand orders passed without individual application of mind, and directed Magistrates to engage substantively with bail applications.

### **C. Sessions Court and High Court Bail (Section 483)**

Section 483 of the BNSS (corresponding to Section 439 CrPC) confers special bail powers upon the High Court and the Court of Session. These courts may direct that any person accused of an offence and in custody be released on bail. For offences exclusively triable by the Court of Session, or punishable with imprisonment for life, the Public Prosecutor must be given notice before bail is granted. The section also enables the High Court and Sessions Court to cancel bail already granted by a Magistrate, or to enhance conditions of bail, where circumstances so warrant.

### **D. Procedure for Bail in Non-Bailable Offences**

The typical procedural sequence for a bail application in a non-bailable offence proceeds as follows:

- The accused or their counsel files a bail application setting out the grounds for release, personal background, the nature of the offence, and conditions proposed to be accepted.
- Notice is served upon the prosecution (and, in cases under Section 483, the Public Prosecutor).
- The prosecution files its reply opposing bail, typically citing gravity of the offence, flight risk, risk of tampering with evidence, and criminal antecedents.
- The court hears arguments from both sides and applies the triple test.
- If bail is granted, the court specifies the bail amount, number and qualifications of sureties, conditions relating to passport surrender, territorial restrictions, and reporting obligations.
- The accused or their surety executes the bail bond or bond in the prescribed form.
- Upon execution of the bond, the accused is released from custody.

### E. Cancellation of Bail (Section 484)

Section 484 of the BNSS provides for the cancellation of bail by the court that granted it, or by a superior court, upon application by the prosecution, on grounds including: breach of bail conditions, flight risk, tampering with evidence, commission of further offences, or other compelling circumstances. The power to cancel bail is exercised with greater stringency than the power to grant it, requiring the court to be satisfied that there has been a definite misuse of the freedom granted or a genuine apprehension of interference with justice.

## VII. COMPARATIVE TABLE: BNSS vs. CrPC BAIL PROVISIONS

*Table 1: Section-wise Comparison of Bail Provisions*

| Subject                                | CrPC Section   | BNSS Section    | Key Change                                                                                                         |
|----------------------------------------|----------------|-----------------|--------------------------------------------------------------------------------------------------------------------|
| Bail in Bailable Offences              | Section 436    | Section 478/480 | Retained; explicit bail right confirmed                                                                            |
| Bail in Non-Bailable Offences          | Section 437    | Section 481     | Minor textual refinements; protection for sick/infirm retained                                                     |
| Bail by High Court/Sessions Court      | Section 439    | Section 483     | Substantially retained; prosecution notice requirement retained                                                    |
| Anticipatory Bail                      | Section 438    | Section 482     | Guiding factors removed; problematic 2005 provisos deleted; new bar for gang rape of minors                        |
| Default Bail (Investigation Timelines) | Section 167(2) | Section 187(3)  | Timelines unchanged; police custody now intermittent over 40-60 days (controversial)                               |
| Undertrial Bail                        | Section 436A   | Section 479     | First-time offenders: threshold lowered to 1/3; Jail Superintendent duty introduced; multiple-case exclusion added |
| Cancellation of Bail                   | Section 437A   | Section 484     | Largely retained; grounds for cancellation unchanged                                                               |
| Bond Without Surety                    | Section 441    | Section 486     | Right to release on personal bond for indigent retained                                                            |

## VIII. CRITICAL ANALYSIS OF KEY REFORMS AND CONTROVERSIES

### A. The Liberalisation of Anticipatory Bail: Promise and Peril

The removal of the structured guiding factors from Section 482 BNSS (previously required by Section 438(1) CrPC post-2005) has been characterised both as an enhancement of personal liberty and as a source of inconsistency. The enhancement argument runs as follows: by eliminating the prescriptive list of factors, the BNSS empowers courts to fashion anticipatory bail conditions appropriate to the unique facts of each case, unconstrained by a statutory checklist that may not capture all relevant considerations. Legal scholar Faizan Mustafa and others have expressed the counter-concern: the removal of guiding factors creates a risk of inconsistent outcomes across High Courts and Districts, with anticipatory bail becoming a function of the predisposition of the individual judge rather than established legal principles.

The practical evidence since 1 July 2024 is mixed. The Allahabad High Court, freed from the restriction of the Uttar Pradesh state amendment to Section 438(6) CrPC, has adopted a comparatively liberal approach, granting anticipatory bail even in cases involving offences punishable with life imprisonment. Meanwhile, courts in other jurisdictions have maintained more cautious approaches. The *Dhanraj Aswani v. Amar S. Mulchandani* (2024) decision, in which the Supreme Court held that anticipatory bail remains available even to persons in custody for unrelated offences, is a significant pro-liberty development.

### B. Section 187(2) Fragmented Police Custody: A Regression?

Section 187(2) of the BNSS is, by virtually all accounts, the most controversial innovation in the statute. The Supreme Court's decision in *CBI v. Anupam Kulkarni* (1992) had established the principle that police custody could only be authorised during the first 15 days from arrest, and that once an accused was committed to judicial custody, they could not be re-transferred to police custody. This principle was widely understood as a fundamental safeguard against custodial torture and coercion.

Section 187(2) BNSS permits the Magistrate to authorise police custody "in whole or in part" at any time during the initial 40 days (for lesser offences) or 60 days (for serious offences) of the custody period. This enables the police to request custody in fragments throughout the investigation period, effectively subjecting the accused to repeated custodial interrogation even

after they have been in judicial custody or even released on bail. The Law Commission's own recommendation had been to limit extended police custody to exceptional cases with judicial oversight a recommendation that the legislature disregarded.

### **C. The Multiple-Case Exclusion Under Section 479(2): Institutionalising Injustice?**

Section 479(2) of the BNSS, which bars undertrial bail for persons facing multiple FIRs or pending investigations in multiple cases, has been identified by practitioners and scholars as potentially the most dangerous provision in the bail reform package. By making multiple FIRs a categorical bar to undertrial bail, Section 479(2) perversely incentivises investigating agencies to maintain or add FIRs against accused persons who would otherwise qualify for mandatory release under Section 479(1). A first-time offender who has served one-third of the maximum sentence and should be entitled to release under Section 479(1) can be kept incarcerated simply by virtue of an additional FIR, even if that FIR arises from the same transaction or incident.

### **D. The Implementation Gap: Promise vs. Practice**

The Supreme Court's direction in August 2024 that Section 479 applies retrospectively and its request for compliance affidavits from states and UTs exposed the vast gap between legislative reform and administrative implementation. As of October 2024, only 19 of 36 states and UTs had submitted the required affidavits. On 19 November 2024, the Court reiterated its directive with specific emphasis on identifying women undertrials eligible for bail. This pattern reflects a structural challenge that extends beyond Section 479: legal reform in India is routinely undermined by administrative inertia, judicial backlogs, lack of awareness among undertrials and their families, absence of legal representation, and inadequate digital infrastructure.

## **IX. THE UNDERTRIAL CRISIS: EMPIRICAL DATA AND THE PROMISE OF SECTION 479**

### **A. Quantitative Overview**

According to the National Crime Records Bureau (NCRB) Prison Statistics India 2022 report, out of 5,73,220 persons incarcerated in Indian prisons, 4,34,302 representing 75.8% were undertrial prisoners awaiting trial or completion of legal proceedings. This is among the highest undertrial proportions in the world, far exceeding the global average. The Prison Statistics India

Report 2024 reveals that despite a marginal decline in the national prison occupancy rate, India's prisons continue to hold 5.11 lakh inmates against a sanctioned capacity of 4.53 lakh, running at 113% of capacity with undertrials constituting approximately 73% of all inmates. Approximately 8.6% of undertrials have been incarcerated for more than three years.

## **B. Demographic Disparities**

The undertrial crisis is not socio-economically neutral. The 268th Report of the Law Commission of India (2017) documented that poverty is the single greatest barrier to securing bail, as the majority of undertrial prisoners lack the financial resources to furnish sureties, pay court fees, or retain legal counsel. The NCRB data for 2022 indicates that 66% of undertrial prisoners belong to Scheduled Castes, Scheduled Tribes, and Other Backward Classes. Muslims, comprising approximately 15% of India's population, accounted for approximately 21% of undertrial prisoners in 2022. Only 15% of undertrials had access to free legal aid, leaving the vast majority without effective legal representation.

## **C. Judicial Infrastructure Deficit**

The undertrial crisis is sustained by a profound judicial infrastructure deficit. India has approximately 21 judges per million population, far below the Law Commission's recommended ratio of 50 judges per million. As of 2024, there are over 4.5 crore (45 million) cases pending across all levels of the Indian judiciary. The average disposition time for bail applications at the High Court level was 23 days, with some High Courts averaging 56 to 156 days for bail disposal. This structural delay directly translates into prolonged undertrial detention for accused persons who cannot afford bail and cannot access expedited hearings.

## **D. Section 479 in Context**

Against this background, Section 479's reduction of the detention threshold for first-time offenders from one-half to one-third of the maximum sentence is a meaningful, if partial, reform. The Jail Superintendent's active duty under Section 479(3) addresses one of the systemic failures of the Section 436A CrPC regime: the fact that eligible undertrials often remained incarcerated simply because no one filed the required application on their behalf. However, the exclusion of multiple-case undertrials under Section 479(2) can be expected to substantially reduce the number of eligible prisoners, since a high proportion of long-term

undertrials face multiple FIRs.

## **X. COMPARATIVE PERSPECTIVES: BAIL IN OTHER JURISDICTIONS**

### **A. United Kingdom: Structured Discretion**

The Bail Act 1976 (UK) establishes a presumption of bail, with the burden resting on the prosecution to justify detention. The Act specifies exhaustive grounds for withholding bail, including likelihood of failure to surrender, commission of further offences, and interference with witnesses a structured framework that the BNSS lacks for anticipatory bail. The UK also employs electronic monitoring (tagging) as a condition of bail, enabling geographic monitoring without incarceration. The BNSS makes no provision for electronic monitoring, representing a missed opportunity for reform.

### **B. United States: Risk-Based Assessment**

The Eighth Amendment to the US Constitution prohibits excessive bail. The federal Bail Reform Act 1984 introduced risk-based assessment as the primary framework for bail decisions, replacing the earlier cash-bail-only system. However, cash bail systems in many US states have attracted severe criticism for their discriminatory impact on low-income defendants, mirroring the surety-based challenges in India. The BNSS's failure to address the structural dependence on financial sureties and bonds a central recommendation of the 268th Law Commission Report represents a missed convergence with global best practices.

### **C. The Case for a Standalone Bail Act**

The 268th Report of the Law Commission of India (2017) recommended the enactment of a dedicated Bail Act for India, following the model of the UK Bail Act 1976. Such a statute would consolidate bail provisions from the BNSS, the UAPA, the PMLA, and other special laws into a single coherent framework; introduce risk-based assessment criteria for bail; provide for electronic monitoring as a bail condition; establish a statutory right to bail review at specified intervals; and create accountability mechanisms for unjustified bail denial.

## **XI. REFORM RECOMMENDATIONS**

On the basis of the foregoing analysis, this paper advances the following recommendations for



strengthening the bail framework under the BNSS:

### **1. Enact a Dedicated Bail Act**

Parliament should enact a standalone Bail Act consolidating all bail provisions currently dispersed across the BNSS, UAPA, PMLA, and other special laws. Such an Act should establish uniform risk-assessment criteria, proportionality principles, and review mechanisms, and should override the “twin conditions” provisions in special laws.

### **2. Restore Structured Guidelines for Anticipatory Bail**

The Supreme Court should issue comprehensive guidelines under Article 142 of the Constitution specifying the factors to be considered in anticipatory bail applications under Section 482 BNSS, drawing upon the vast jurisprudence developed under Section 438 CrPC. Such guidelines would reduce inconsistency across High Courts while preserving flexibility for case-specific determinations.

### **3. Reform Section 187(2): Restrict Intermittent Police Custody**

Section 187(2) should be amended to require that police custody beyond the initial 15 days be authorised only by a Sessions Judge upon a specific showing of exigent circumstances, and only in exceptional cases such as terrorism, organised crime, or heinous offences. A cap on the total number of episodes of police custody should be introduced, and the Magistrate should be required to record specific reasons justifying each grant of custody beyond the first episode.

### **4. Revise the Multiple-Case Exclusion Under Section 479(2)**

Section 479(2) should be amended to require judicial scrutiny of whether multiple FIRs filed against an accused arise from the same transaction or are the product of an abuse of process. The amendment should also empower courts to direct consolidation of FIRs arising from a common criminal transaction for the purpose of computing the Section 479 detention threshold.

### **5. Introduce Electronic Monitoring as a Bail Condition**

The BNSS should be amended to include electronic monitoring (ankle tagging or GPS tracking) as an available condition for bail in serious offences where the risk of flight or reoffending is a genuine concern, significantly expanding bail access without compromising the integrity of the

judicial process.

## **6. Institutionalise Legal Aid for Undertrial Prisoners**

The National Legal Services Authority (NALSA) and State Legal Services Authorities should be mandated by legislative direction to provide proactive legal assistance to all undertrial prisoners within 30 days of their arrival in custody, including automatic filing of bail applications in appropriate cases.

## **7. Digital Infrastructure and Case Management**

Investment in real-time digital case management systems capable of automatically flagging cases approaching Section 479 detention thresholds, generating alerts for Jail Superintendents, and tracking bail application outcomes is essential for effective implementation.

## **8. Judicial Capacity Building**

The Law Commission's recommendation of a judge-to-population ratio of 50 per million should be treated as a policy target with a defined legislative timeline. Regular judicial training on BNSS bail provisions, the triple test, and the constitutional dimensions of pre-trial detention should be institutionalised through the National Judicial Academy.

## **XII. CONCLUSION**

The Bharatiya Nagarik Suraksha Sanhita, 2023 represents both a genuine step forward and a missed opportunity in the arc of India's bail reform. Its strengths are real and significant: the introduction of statutory definitions for bail, bail bond, and bond provides conceptual clarity; the reduction of the undertrial detention threshold for first-time offenders under Section 479 addresses a long-standing injustice; the Jail Superintendent's proactive duty transforms prison administration from passive custody to active participation in justice; and the liberalisation of anticipatory bail under Section 482, particularly through the removal of the problematic provisions introduced by the 2005 amendment, expands pre-arrest protection for individuals apprehending groundless prosecution.

Yet the BNSS also embeds within it provisions that risk undermining these advances. Section 187(2)'s introduction of intermittent police custody over 40 to 60 days removes a key

constitutional safeguard against custodial coercion and harassment. Section 479(2)'s categorical exclusion of multiple-case undertrials from the benefit of undertrial bail incentivises the very practice of multi-FIR harassment that the Supreme Court has repeatedly condemned. Section 482's removal of structured guiding factors for anticipatory bail, while liberating, risks producing judicial inconsistency that disadvantages precisely those accused persons who most need predictable access to pre-arrest protection.

Most fundamentally, the BNSS does not address the structural determinants of undertrial detention: poverty as a barrier to bail, legal aid deficits, judicial backlogs, and administrative inertia. These are the factors that ensure that India's prisons continue to hold more than 73% of their populations as undertrial prisoners, many of whom have been incarcerated longer than the maximum sentence prescribed for their alleged offences.

The Supreme Court's observation in *Jalaluddin Khan v. Union of India* (2024) that "bail is a rule and jail is an exception" captures the constitutional aspiration that the BNSS must ultimately serve. Whether the BNSS fulfils this aspiration will depend not on the text of its provisions but on the culture of liberty that courts, prosecutors, police, and prison officials bring to their implementation. The BNSS has changed the statute. The culture must follow.

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