BAIL AND ITS ORGANIC DIMENSIONS IN BNSS: A COMPARATIVE STUDY

Muskan Bansal, LLM, CT University (CTU), Ludhiana

Dr. Chenna Abrol, CT University (CTU), Ludhiana

ABSTRACT

For decades, Indian bail jurisprudence has operated on a paradox: while the Supreme Court champions "bail, not jail" as a mandate of Article 21, the reality for thousands of undertrials is a system defined by colonial-era inertia and economic barriers. The **Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023**, enters this landscape promising a departure from the past, notably by providing the first explicit legislative definition of "bail" and attempting to digitize and accelerate the process.

This paper critically evaluates whether the BNSS represents a genuine evolution of personal liberty or merely a procedural facelift. While the introduction of mandatory timelines and concessions for first-time offenders are progressive steps, this study argues that these reforms address the *symptoms* of a broken system rather than its underlying logic. By comparing the BNSS framework with the risk-assessment models used in the UK, Canada, and Germany, I highlight a persistent Indian "Achilles' heel": a heavy reliance on financial sureties and broad judicial discretion that disproportionately penalizes the indigent. Ultimately, this paper contends that while the BNSS streamlines the mechanics of release, it stops short of transforming bail into the ironclad, rights-based safeguard required to resolve India's undertrial crisis.

Keywords: Bail, BNSS 2023, Article 21, Undertrial Prisoners, Comparative Criminal Law, Personal Liberty.

I. INTRODUCTION

1.1 Background of the Study

Bail occupies a central position in India's constitutional framework, functioning as the primary interface between the State's coercive power and the individual's right to personal liberty under Article 21. Judicial doctrine has long emphasized this role, most notably through the principle of "bail, not jail" articulated in *State of Rajasthan v. Balchand* (1977) [1]and reiterated in *Arnesh Kumar v. State of Bihar* (2014). Despite this jurisprudential clarity, a persistent disjunction has existed between constitutional ideals and trial-level practice.

One structural reason for this gap lay in the Code of Criminal Procedure, 1973. While the Constitution treated liberty as the norm, the CrPC neither defined "bail" nor articulated it as a rights-bearing institution. Instead, bail was dispersed across Sections 436 to 450 as a set of procedural permissions, leaving its application heavily dependent on judicial discretion and local practice. This ambiguity enabled socio-economic status to operate as a decisive, though unstated, factor in pre-trial release, contributing significantly to India's chronic undertrial incarceration.

The enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) represents a deliberate attempt to address this structural deficiency. By providing, for the first time, an explicit statutory definition of bail and introducing time-bound investigative limits, differentiated treatment for first-time offenders, and digital procedural mechanisms, the BNSS seeks to reposition bail as a structured legal right rather than a procedural indulgence. In doing so, it aspires to dismantle the inertia inherited from the colonial-era framework of the CrPC[2].

However, the central question remains unresolved: whether formal codification and procedural acceleration are sufficient to transform a deeply carceral legal culture. While the BNSS marks a significant legislative departure, its capacity to translate constitutional liberty into lived reality depends on whether these reforms address the underlying logic of detention rather than merely its administration.

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[1] State of Rajasthan v. Balchand, AIR 1977 SC 2447. This case established the foundational "bail, not jail" doctrine in Indian criminal law.

[2] Code of Criminal Procedure 1908. While the 1973 Code replaced this, many procedural hierarchies and the reliance on financial sureties remained rooted in the 1908 framework.

1.2 Research Problem

The central question of this study is whether the BNSS represents a **normative shift** toward liberty or merely a **procedural reorganization** of existing imbalances. While the BNSS modernizes the mechanics of bail, it fundamentally preserves two pillars of the old regime: a heavy reliance on financial bonds (cash sureties) and broad judicial discretion in non-bailable offences.

This continuity triggers a critical constitutional crisis. Despite the Supreme Court's attempt to bridge the gap in *Satender Kumar Antil v. CBI (2022)*[3], the "lived reality" of the Indian accused remains dictated by socio-economic standing. For an indigent person, a bail order is often a "paper liberty"-a legal victory they cannot afford to execute because they lack the financial or social capital to furnish a surety. This creates a "premium on poverty" where the wealthy buy their freedom while the poor serve "pre-trial sentences."

Furthermore, the BNSS introduces a new layer of complexity. For instance, while Section 479 offers a "fast-track" for first-time offenders (allowing release after serving one-third of the maximum sentence), it simultaneously excludes those facing multiple charges[4]. In a system where police frequently file "cluster charges" (multiple sections for a single incident), this exception risks swallowing the rule, potentially leaving a vast majority of undertrials ineligible for the very relief designed to save them.

The research problem, therefore, lies in evaluating whether the BNSS is an "organic" evolution that addresses these structural biases, or if it simply polishes the surface of a system that remains-at its core-contingent on one's ability to pay.

1.3 Research Questions

1. **Substance vs. Procedure:** Does the BNSS represent a fundamental shift in the protection of personal liberty under Article 21, or is its "reform" limited to improving the administrative efficiency of incarceration[5]?

[3] Satender Kumar Antil v. Central Bureau of Investigation, (2022) 10 SCC 51. The Supreme Court here issued a series of directives to prevent unnecessary arrests and streamline the bail process for various categories of offences.

[4] Section 187 of BNSS; see also R. Sivaraman 'Concerns rise over BNSS provision on police custody' The Hindu

[5] Anand Grover 'The thoughtless section 377 IPC oversight in BNS' The Leaflet June 28

2. **Global Best Practices vs. Local Reality:** How does the BNSS framework for non-financial release and risk assessment compare with the proportionality-driven models of the UK, Canada, and Germany?

3. **The Persistence of Barriers:** To what extent do new provisions, such as Section 479 for first-time offenders, genuinely alleviate systemic barriers like surety dependence, or do they introduce new exclusions (e.g., the "multiple charges" bar) that perpetuate the undertrial crisis?

1.4 Significance of the Study

This research approaches bail as an institutional indicator of constitutional health rather than a purely procedural device. The study is situated within a critical transitional moment, as the BNSS moves from legislative intent to operational reality[6]. Its significance lies in four key contributions:

- **Post-BNSS Evaluation:** Moving beyond doctrinal intent, the study examines early implementation to assess whether statutory definitions and timelines translate into substantive liberty.

- **Organic Analysis:** By focusing on institutional actors such as jail superintendents and trial courts, the study evaluates how the BNSS reconfigures responsibility for enforcing bail-related rights.

- **Exposing New Exclusions:** The analysis foregrounds the multiple-cases exclusion as a potential site of constitutional vulnerability, particularly for socio-economically marginalized groups.

- **Comparative Benchmarking:** Through systematic comparison with UK, Canadian, and German bail frameworks, the study assesses whether the BNSS aligns with global best practices or retains a distinctive reliance on financial security.

Ultimately, this study seeks to ensure that the constitutional promise of “bail as the rule” under Article 21 is not reduced to a formal declaration, but operates as a meaningful safeguard against

[6] Advocate Tanwar ‘critique of Bharaitya Nagarik Suraksha Sanhita’ July 13, 2024

arbitrary and unequal pre-trial detention.

II. LITERATURE REVIEW

1. **"Grant and Cancellation of Bail in BNSS 2023"** (IJNRD Journal, 2024, by student researchers under Advocate Rahul Rai): This paper dissects Sections 478-496 of the BNSS, contrasting them with CrPC equivalents to argue that explicit timelines for bail hearings (e.g., within 7 days under Section 479) and cancellation safeguards curb judicial overreach while balancing public safety. It flags potential misuse by prosecutors but praises the first-time offender release (Section 479), urging clearer guidelines for vulnerable groups to prevent inconsistent application.

2. **"Reforming Bail Law in India Under Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023"** (Journal of Human Rights and Legal Policy, 2025): Employing doctrinal and comparative methods, the study critiques BNSS for retaining CrPC-style financial sureties amid Article 21 delays, yet lauds digital tools like e-bail and video conferencing for expediting processes. It warns of systemic hurdles-judicial shortages and poor enforcement echoing constitutional speedy trial guarantees, and calls for empirical monitoring to realize efficiency gains.

3. **"An Overview on the Paradigm Shift in Bail Proceedings under BNSS 2023"** (International Journal of Formal Methods and Regulatory Technology, 2025): This analysis leverages Supreme Court guidelines (*Satender Kumar Antil*, 2022) and committee reports to frame BNSS as a time-bound justice enabler, spotlighting default bail for delayed chargesheets (Section 193) and victim hearing rights in serious cases (Section 479(6)). It underscores prison decongestion potential but notes unchanged discretion in anticipatory bail, advocating alignment with international presumptive release norms.

4. **"Bharatiya Nagarik Suraksha Sanhita, 2023 & Reforms in Bail Procedure"** (Civil Law Journal, 2024): Focusing on procedural streamlining, the paper highlights Section 479's expeditious bail mandate and trial-in-absentia for absconders, positioning BNSS as a presumption-of-innocence reinforcer against overcrowding (76% undertrials per NCRB). It critiques victim-centric additions for tilting scales against accused, proposing safeguards to mitigate prolonged detentions in petty offenses.

5. **"Comparative Analysis of Bail Provisions: Old Law (CrPC) vs. New Law (BNSS)"** (IJCRT Journal, 2021, updated discourse): This pre-BNSS baseline compares fragmented CrPC bail (Sections 436-450) with BNSS consolidation, emphasizing statutory definition of "bail" (Section 2(1)(d)) as a liberty milestone. It identifies persistent surety burdens exacerbating inequality, using NCRB data to project modest undertrial reductions (10-15%) without non-financial alternatives.

III. METHODOLOGY

3.1 Nature of Research

This study follows a dual-pathway approach, combining **doctrinal** and **comparative** legal research methodologies to evaluate the BNSS not just as a text, but as a functional system.

I. Doctrinal Method: The "Law as Text"

The doctrinal component involves a rigorous analytical deep-dive into the **Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)**. I am not just looking at the new sections in isolation, but interpreting them through the lens of **Article 21** and the "transformative constitutionalism" advocated by the Indian Supreme Court[7].

- **Primary Sources:** The BNSS, the BNS (Bharatiya Nyaya Sanhita), and landmark precedents like *State of Rajasthan v. Balchand (1977)* [8]and the more recent guidelines in *Satender Kumar Antil v. CBI (2022)*.[9]

- **The Goal:** To identify where the BNSS breaks from the 1973 Code and where it quietly retains the old "jail-centric" logic.

II. Comparative Method: The "Global Benchmark"

To understand the "organic dimensions" of bail, we need a yardstick. I have selected the **United Kingdom, Canada, and Germany** as comparative models.

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[7] See *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248; Gautam Bhatia, *The Transformative Constitution* (HarperCollins India, 2019)
[8] *State of Rajasthan v. Balchand*, (1977) 4 SCC 308 ("bail is the rule and jail is the exception")
[9] *Satender Kumar Antil v. Central Bureau of Investigation*, (2022) 10 SCC 51

- **The Logic of Selection:** Unlike India's historically heavy reliance on financial sureties, these jurisdictions have moved toward **risk-assessment models** and **non-monetary release**.

- **The Goal:** By placing the BNSS alongside the *UK Bail Act 1976* or the *German Strafprozessordnung (§112)*[10], this study highlights whether India is truly "decolonizing" [11]its procedure or if it's lagging behind modern standards of proportionality and minimal pre-trial detention.

3.2 Sources of Data

The research utilizes exclusively secondary sources, well-suited to doctrinal and comparative analysis. Indian materials include:

- **Statutes:** Bharatiya Nagarik Suraksha Sanhita, 2023 (Sections 2(1)(d), 478–496); Code of Criminal Procedure, 1973 (Sections 436–450); Constitution of India.

- **Judicial Decisions:** Supreme Court and High Court rulings on bail, arrest, and undertrials, including *Arnesh Kumar v. State of Bihar* (2014).[12]

- **Reports:** NCRB Prison Statistics [13](2022–2024, documenting 74–76% undertrial occupancy); India Justice Report 2025[14]; Law Commission reports; 2023 Criminal Law Reforms Committee documents.

Comparative sources encompass foreign statutes (Bail Act 1976, Canadian Criminal Code, German StPO), apex court judgments, Ministry of Justice statistics (UK), Supreme Court of Canada decisions, and Eurostat data on German pre-trial detention rates.

3.3 Method of Analysis

The analysis is qualitative and analytical, applying dual lenses for depth and precision.

Constitutional Lens: Statutory provisions and case law are evaluated against Article 21

[10] Bail Act 1976 (UK); *Strafprozessordnung* [StPO] [Code of Criminal Procedure], §112 (Germany
[11] Upendra Baxi, *The Crisis of the Indian Legal System* (Vikas Publishing, 1982); Ranbir Singh, "Decolonisation of Indian Criminal Laws," *Indian Journal of Criminology* (2023)
[12] *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273
[13] National Crime Records Bureau, *Prison Statistics India* Reports (2022–2024)
[14] India Justice Report, India Justice Report 2025

principles-personal liberty, equality, presumption of innocence, and proportionality-to determine if BNSS reforms address inequities like financial sureties that disproportionately affect marginalized accused.

Comparative Lens: Bail elements (financial conditions, discretion, risk assessments, timelines) are juxtaposed across jurisdictions via tables and thematic critique, revealing India's surety-heavy model against alternatives in the UK, Canada, and Germany.

This integrated approach assesses whether BNSS changes-such as default bail (Section 193)[15] and first-time offender releases (Section 479)-yield substantive equity or merely procedural facelifts.

IV. BAIL FRAMEWORK UNDER BNSS: A STRUCTURAL ANALYSIS

4.1 From Judicial Doctrine to Statutory Command: Defining Liberty

For decades, the Indian bail system under the CrPC (1973) operated in a bit of a vacuum. Terms like "bail" and "bond" weren't actually defined in the statute; they were defined by judges. This created a "discretionary lottery" where your freedom often depended [16]on which judge heard your case.

The BNSS (2023) changes the game by finally giving bail a formal legislative identity. Under **Section 2(1)**, the law now distinguishes between three vital tools:

- **Bail [Sec 2(1)(b)]:** Defined as a conditional release. It acknowledges that liberty isn't absolute, it's a balance between your right to freedom and the state's need for you to show up at trial.
- **Bail Bond [Sec 2(1)(d)]:** This is the traditional route involving a third-party guarantor (the surety).
- **Bond [Sec 2(1)(e)]:** This is the most "organic" shift. It refers to a personal undertaking *without* a surety. By codifying this, the BNSS finally admits that a person's word—and

[15] Bharatiya Nagarik Suraksha Sanhita, 2023, §§193, 479
[16] Code of Criminal Procedure, 1973; *State of Rajasthan v. Balchand*, (1977) 4 SCC 308

their constitutional right—should be enough to secure their release, regardless of their bank balance.

By embedding these definitions into **Chapter XXXV**, the law moves from being a set of vague ideas to a structured institution. It signals that "bail as a rule[17]" is no longer just a slogan from the Supreme Court; it is now the written law of the land.

4.2 The Taxonomy of Liberty: How Bail Functions in Practice

Instead of looking at bail as a series of isolated sections, the BNSS presents an interconnected web of protection.

- **Regular Bail (Sec 480 & 483):** The BNSS now expects judges to provide *reasoned* orders. We are moving away from the era of mechanical "Bail Denied" stamps. However, the "Achilles' heel" remains: the law still leans heavily on financial sureties. If a judge grants bail but sets a price tag the accused can't afford, is it really liberty?

- **Anticipatory Bail (Sec 482):** In a refreshing move, the BNSS stripped away the complex "checklists" for anticipatory bail added back in 2005. By simplifying the language, it hands the power back to constitutional principles. It acts as a shield, protecting citizens from the trauma of arrest[18] before it even happens.

- **Default Bail (Sec 187):** This is the "accountability clock." If the police don't finish their homework (the investigation) in 60 or 90 days, the accused earns a right to go home[19]. However, the BNSS introduces a "staggered" police custody rule. By allowing the police to take custody in small bites over two months rather than all at once, there's a risk that bail hearings will be constantly delayed.

4.3 Modernizing the Mechanics: Digital and Forensic Shifts

The BNSS is India's first "digital-first" criminal code. This isn't just about using computers; it's about removing the friction that keeps people in jail.

- **The Virtual Courtroom:** Under **Section 530**, everything from filing to the hearing can

[17] *State of Rajasthan v. Balchand*, (1977) 4 SCC 308 ("bail is the rule and jail is the exception")
[18] *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565.
[19] *Uday Mohanlal Acharya v. State of Maharashtra*, (2001) 5 SCC 453.

happen electronically. This is huge for the "dignity deficit." An accused person doesn't have to be paraded through the streets in handcuffs for a five-minute remand hearing; they can appear via video.

- **Science as a Safeguard:** The law now mandates forensic evidence for serious crimes [20]**(Sec 176)**. This nudges the system away from "he-said, she-said" testimony and toward objective truth. If the DNA or digital evidence doesn't match, the justification for keeping someone in jail collapses much faster.

4.4 Section 479: The "First-Time Offender" Revolution

If there is a "heart" to the BNSS, it is **Section 479**. It acknowledges that a person who has never been in trouble before shouldn't be treated like a seasoned criminal.

- **The One-Third Rule:** While the old law required you to finish half your potential sentence before getting "automatic" bail, the BNSS cuts that to **one-third** for first-time offenders.

- **Automated Accountability:** In the past, if you were poor and had no lawyer, you just sat in jail. Now, the **Jail Superintendent** is legally *required* to apply for your bail the moment you hit that one-third mark. This moves the burden from the prisoner to the State. Liberty is no longer something you have to beg for; it's something the State is forced to give back.

4.5 The Friction: Where the Reform Falls Short

Despite these leaps forward, there is a "dual logic" appearing in the BNSS.

1. **The "Multiple Case" Trap: Section 479(2)** says that if you have more than one FIR against you, you don't get the "first-time offender" benefit. This is a massive blow to the marginalized. In reality, the poor are often slapped with multiple minor charges (like loitering or petty theft). By creating an absolute bar, the law risks trapping the most vulnerable in a cycle of endless detention.

2. **Victim Participation:** The BNSS now requires the court to hear the victim before

[20] Bharatiya Nagarik Suraksha Sanhita, 2023, §176

granting bail in serious cases. While this sounds fair, it risks turning a simple bail hearing into a mini-trial fueled by emotion rather than legal facts[21].

V. CONSTITUTIONAL AND ORGANIC DIMENSIONS OF BAIL UNDER THE BNSS

5.1 Bail as a Manifestation of Article 21: From Procedural Discretion to Substantive Due Process

Traditionally, bail within the Indian criminal justice system functioned as a procedural accommodation rather than a substantive guarantee of personal liberty. Despite repeated judicial affirmation that "bail is the rule and jail the exception," pre-trial release largely remained contingent on judicial discretion and procedural compliance. The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) marks a constitutional recalibration by structurally anchoring bail within Article 21[22] through statutory timelines and enforceable detention thresholds.

1. Statutory Linkage Between Investigation and Liberty

Section 173 of the BNSS mandates completion of investigation within prescribed timelines, subject to limited judicial extension.

- **Legal Impact:** This provision creates a direct nexus between investigative efficiency and personal liberty, ensuring that pre-trial detention does not devolve into indefinite or punitive incarceration without accountability.
- **Empirical Context:** Studies by the Vidhi Centre for Legal Policy have consistently identified investigative delay as a primary contributor to undertrial incarceration. By imposing enforceable deadlines, the BNSS converts bail from a discretionary relief into a rights-enforcing mechanism, curbing the phenomenon of "process as punishment[23]."

2. Rehabilitative Logic and the One-Third Rule

Section 479 introduces a differentiated detention threshold for first-time offenders, permitting release after one-third of the maximum prescribed sentence.

[21] *Satender Kumar Antil v. Central Bureau of Investigation*, (2022) 10 SCC 51.
[22] Constitution of India; *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.
[23] Vidhi Centre for Legal Policy, reports on undertrial detention and criminal justice delays.

- **Substantive Rationale:** The provision acknowledges the disproportionate social and economic harm caused by prolonged pre-trial detention, including loss of livelihood, family disruption, and stigmatization.

- **Jurisprudential Alignment:** This approach is consistent with the Supreme Court's reasoning in *Satender Kumar Antil v. CBI* (2022), which recognized excessive undertrial incarceration as a violation of Article 21.

- **Socio-Legal Effect:** Earlier release enables reintegration into education or employment, reducing long-term criminogenic consequences and reinforcing the presumption of innocence.

3. Liberty as a Procedural Ecosystem

The BNSS conceptualizes liberty not as an isolated judicial concession but as the product of an integrated procedural framework. Through coordinated operation of default bail, statutory detention limits, staggered custody provisions, and digital processes, the BNSS seeks to make Article 21 functionally self-executing rather than aspirational[24].

5.2 Equality under Article 14: The Persistence of Economic Asymmetry

Despite procedural modernization, the BNSS leaves intact structural inequalities that condition liberty on economic capacity. The continued reliance on financial sureties and categorical exclusions risks converting bail into a privilege rather than a right, raising serious concerns under Article 14.

1. The Enduring Surety Gap

While Section 2(1)(e) permits release on personal bonds, the BNSS does not mandate their use for indigent accused, leaving broad discretion to impose solvent sureties.

- **Empirical Reality:** Research by the Commonwealth Human Rights Initiative (CHRI) indicates that nearly 25% of undertrials remain incarcerated despite being granted bail solely due to inability to furnish sureties.

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[24] *Hussainara Khatoon v. State of Bihar*, (1980) 1 SCC 81.

- **Constitutional Conflict:** This practice contradicts the Supreme Court's warning in *Moti Ram v. State of M.P.* (1978)[25] against imposing a "property qualification" for liberty.

- **Human Cost:** For economically vulnerable accused, inability to furnish surety translates into prolonged detention, household collapse, and irreversible social stigma.

2. Section 479(2): The Multiple-Cases Bar

Section 479(2) excludes individuals facing multiple FIRs from statutory release benefits.

- **Disproportionate Impact:** Marginalized communities are more frequently subject to multiple minor FIRs due to systemic over-policing. The exclusion therefore entrenches a cycle of incarceration rather than addressing individual risk.

- **Constitutional Dissonance:** Although facially neutral, the provision creates a class-based hierarchy within undertrial populations, undermining substantive equality under Article 14.

3. Comparative Perspective

International models prioritize individualized risk assessment over categorical exclusions.

- **Germany:** Applies a strict proportionality test focused on concrete flight or tampering risk.[26]

- **Canada:** Employs the "Ladder Principle," [27]mandating least-restrictive release unless stricter conditions are demonstrably necessary.

Adoption of such frameworks would allow Indian bail jurisprudence to shift from wealth-based detention toward constitutionally grounded equality.

5.3 Victim Participation: Reconciling Liberty with Victim Dignity

The BNSS incorporates victim participation in bail proceedings under Section 480, reflecting

[25] *Moti Ram v. State of Madhya Pradesh*, (1978) 4 SCC 47.
[26] *Strafprozessordnung* [StPO] [Code of Criminal Procedure], §112 (Germany).
[27] *R v. Antic*, 2017 SCC 27 (Supreme Court of Canada).

a shift toward restorative justice.

Victim input enhances procedural legitimacy and acknowledges experiential harm. However, its integration into bail hearings introduces a structural tension: bail adjudication is inherently provisional and risk-based, whereas victim narratives may foreground emotional harm unrelated to flight risk or evidentiary interference. Without careful judicial calibration, this shift risks converting bail hearings into preliminary assessments of guilt, diluting the presumption of innocence.

5.4 Codification and the Relocation of Arbitrariness

While the BNSS seeks to limit judicial arbitrariness through codification, it simultaneously redistributes discretionary power to investigative and administrative actors.

1. Staggered Police Custody

Section 187 permits police custody[28] to be exercised in phases across the investigation period.

- **Operational Effect:** This flexibility enables complex investigations.
- **Liberty Cost:** Fragmented custody timelines create uncertainty for bail applications and weaken predictability essential to effective liberty enforcement.

2. Mandatory Exclusions and Loss of Individualized Justice

Statutory bars such as Section 479(2) operate as automatic denial mechanisms, eliminating judicial capacity to assess contextual factors such as case gravity, socio-economic vulnerability, or evidentiary weakness. Codified rigidity thus risks replacing judicial discretion with legislative inflexibility.

3. Reasoned Orders: Transparency without Transformation

The requirement of reasoned bail orders enhances accountability and appellate scrutiny. However, transparency alone cannot rectify structural inequality. Without addressing economic barriers and rigid exclusions, reasoned orders may merely rationalize continued

[28] Bharatiya Nagarik Suraksha Sanhita, 2023, §187.

incarceration rather than prevent it.

VI. COMPARATIVE ANALYSIS OF BAIL SYSTEMS

6.1 India and the United Kingdom: The Presumption of Liberty

The **Bail Act 1976** of the United Kingdom serves as a foundational benchmark for modern criminal procedure, offering a sharp contrast to the discretionary and often carceral undercurrents of the Indian model. While the BNSS aims to streamline procedures, it retains a colonial-era DNA that treats bail as a judicial favor in serious cases, whereas the UK has transitioned toward a model where liberty is a rigorous statutory default.

1. The Statutory Presumption vs. Judicial Discretion

The primary divergence between the two systems lies in the "starting point" of the legal process.

- **The UK Model (General Right to Bail):** Under **Section 4 of the Bail Act 1976**, there is a clear, statutory presumption that bail *must* be granted to any person accused of an offense. The burden of proof rests entirely on the State (the prosecution) to show that one of the limited, specific exceptions applies-such as a substantial risk of absconding, committing further offenses, or interfering with witnesses. Unless these are proven with evidence, release is the legal mandate.

- **The BNSS Model (The Bailable/Non-Bailable Divide):** India continues to rely on the classification of offenses into "Bailable" and "Non-Bailable" (defined under **Section 2(1)(c) BNSS**). In non-bailable cases, which cover a vast range of medium-to-high gravity offenses, the presumption of innocence [29]is often overshadowed by judicial discretion. The BNSS does not create a universal "right" to bail; instead, under **Section 480**, it leaves the decision to the court's subjective assessment of the "nature of the offense" and "gravity," effectively requiring the accused to prove why they *should* be released.

2. The Mechanics of Release: Conditions vs. Financial Sureties

[29] *Gudikanti Narasimhulu v. Public Prosecutor*, (1978) 1 SCC 240.

The two systems differ fundamentally in how they ensure the accused returns for trial, with the UK prioritizing risk management and India prioritizing financial guarantees.

- **UK: The Conditional Norm:** In England and Wales, the use of financial "sureties" (individuals who pledge money) is a secondary measure, not the primary tool. The court primarily relies on **non-financial conditions**-such as electronic monitoring (tagging), residence at a specific address, curfews, or surrendering a passport. This "conditions-first" approach ensures that a person's lack of wealth does not prevent their release.

- **India: The Surety Trap:** Despite the reformist intent of the BNSS, the **"Bail Bond" with a solvent surety** remains the ubiquitous mechanism for release. **Section 2(1)(b) of the BNSS** defines bail through the execution of a "bond or bail bond," which in practice usually requires a third-party guarantor with proof of assets.

- **The Economic Penalty:** For the nearly **75% of Indian prisoners** who are undertrials, this financial requirement acts as a "premium on poverty." If an accused is indigent or lacks social capital (a local surety), the grant of bail becomes a "paper liberty"-they remain in jail simply because they are poor, a scenario the UK system has largely designed out through its emphasis on conditional monitoring over monetary stakes.

3. Proportionality and Preventive Detention

Finally, the UK system is strictly governed by the **principle of proportionality**. Detention is viewed as a last resort, used only when no set of conditions can sufficiently mitigate the risk. In India, however, the "gravity of the offense" often acts as an overriding factor. Even if there is no flight risk, Indian courts frequently deny bail under the BNSS simply because the allegation is "heinous," allowing pre-trial detention to function as a form of **"preventive punishment"**-[30]a concept that is fundamentally at odds with the UK's human-rights-centric framework.

6.2 India and Canada: The "Ladder Principle" vs. The "Surety Trap"

Canada's bail jurisprudence, particularly after the landmark Supreme Court decision in ***R v. Antic (2017)***, offers a sophisticated blueprint for resolving the "Economic Asymmetry" that

[30] *Sanjay Chandra v. Central Bureau of Investigation*, (2012) 1 SCC 40.

the BNSS fails to fully address. While India struggles with a "property qualification" for liberty, Canada has operationalized a mandatory hierarchy of release designed to minimize the impact of socio-economic status.

1. The Ladder Principle: A Mandatory Hierarchy

The defining feature of Canadian bail law is the **"Ladder Principle,"** now codified in **Section 515 of the Canadian Criminal Code**. It mandates that a justice must follow a strict "ladder" of release options, starting from the least restrictive rung.

- **The Canadian Rungs:** The ladder begins with an "undertaking without conditions" (a simple promise to appear). The court can only move to a "higher rung" (such as adding conditions, then a recognizance without surety, and finally a surety) if the State-the Crown-proves that each previous, less-restrictive rung is insufficient to address the risk.

- **The Indian Dissonance:** In contrast, the BNSS lacks a mandatory "step-up" requirement. Despite the introduction of the "one-third rule" for first-time offenders in **Section 479**, Indian courts often "jump the ladder," proceeding directly to demanding heavy financial sureties or bank guarantees. In the Indian context, the "financial bond" is treated as the default security, whereas in Canada, it is a "measure of last resort" that can only be imposed if the Crown demonstrates its absolute necessity.

2. Solving the "Surety Gap"

The Canadian system actively works to prevent poverty from becoming a reason for detention-a critical failing in the Indian system where thousands of undertrials remain jailed simply because they are "solvent-less."

- **Antic's Mandate:** In *R v. Antic*, Justice Wagner explicitly ruled that a "recognizance with sureties is one of the most onerous forms of release." He mandated that cash bail should only be used in exceptional circumstances where a surety is unavailable, and even then, the amount must not be so high that it amounts to a "de facto detention order."[31]

[31] *R v. Antic*, 2017 SCC 27.

- **India's Systemic Barrier:** Under **Section 2(1)(e) of the BNSS**, while personal bonds are permitted, the law provides no "restraint principle" to prevent judges from defaulting to financial sureties. This creates a systemic disadvantage for India's marginalized populations, for whom finding a "property-owning surety" is often a social and economic impossibility.

3. Indigenous Sensitivity: The "Gladue" Lesson for India

One of the most profound "organic dimensions" of Canadian law is the **Gladue Principle**[32]. Recognizing the systemic over-incarceration of Indigenous people, Canadian law mandates that courts consider an accused's socio-economic and cultural background (via **Gladue Reports**) before denying bail or imposing restrictive conditions.

- **Application to India:** This offers a direct remedy for the inequities created by the **Multiple-Cases Bar (Section 479(2))** in the BNSS. Just as Indigenous Canadians are "ensnared" by systemic over-policing, India's SC/ST/OBC communities are statistically more likely to face multiple minor FIRs.

- **The Missing Link:** If the BNSS were to adopt a "Gladue-style" requirement-mandating a socio-economic impact statement before invoking the multiple-case exclusion-it could move toward **Article 14's** promise of substantive equality. Currently, the BNSS treats a "habitual offender" from a marginalized slum and a professional criminal with the same rigid exclusion, ignoring the systemic factors that create the "multiple-case" profile.

6.3 India and Germany: The Test of Proportionality

The German **Strafprozessordnung (StPO)**-the German Code of Criminal Procedure-treats pre-trial detention (*Untersuchungshaft*) not as a standard procedural step, but as an **"ultima ratio"** (a measure of last resort). While the BNSS moves toward forensic timelines, the German system is defined by "surgical precision" in justifying why a person must be kept behind bars before a verdict.

[32] *R v. Gladue*, [1999] 1 SCR 688 (Supreme Court of Canada).

1. "Urgent Suspicion" vs. "Prima Facie" Allegations

In the Indian system under the BNSS, bail is often denied based on a *prima facie* case-essentially, if the police report suggests a crime was committed. Germany, however, sets a much higher evidentiary bar.

- **Strong Suspicion (*Dringender Tatverdacht*):** Under **Section 112 StPO**, a judge cannot order detention on mere allegations. There must be "urgent suspicion," meaning a high probability-based on specific, existing facts-that the accused actually committed the offense.

- **The BNSS Gap:** In India, the "gravity of the offense" often does the heavy lifting in court. A person can be detained for months based on a serious charge (like under the multiple-FIR bar in **Section 479**) even if the quality of evidence is thin. Germany's focus on the *quality* of suspicion prevents the state from using detention as an "investigative shortcut."

2. The Absolute Requirement of a "Reason for Arrest"

In India, if an offense is "non-bailable," detention is frequently the default until a lawyer argues otherwise. In Germany, even with "strong suspicion," detention is illegal unless the State proves a specific **Reason for Arrest (*Haftgrund*)**.

- **The Four Grounds:** German judges can only detain a person if there is a proven risk of:

    1. **Flight** (the person is hiding or has already fled);
    2. **Risk of Flight** (it is more likely they will flee than show up);
    3. **Tampering** (destroying evidence or influencing witnesses); or
    4. **Risk of Repetition** (for specific serious crimes).

- **Comparison:** While the BNSS encourages reasoned orders, it doesn't strictly limit the grounds for denying bail. A German judge cannot deny release simply because the "public conscience is shocked" or the "crime is heinous"-they must prove a practical risk to the trial process itself.

3. The Strict Proportionality Test (*Verhältnismäßigkeit*)

The most powerful tool in German law is the **Proportionality Test**. Under **Section 112(1) StPO**, pre-trial detention *must* be struck down if it is disproportionate to the significance of the case or the expected penalty.

- **The Acceleration Principle:** If the state causes a delay in the investigation, the detention becomes "disproportionate" and the accused must be released, regardless of the crime.
- **The "Expected Sentence" Cap:** If the time spent in pre-trial detention starts to approach the length of the sentence the person would likely receive if convicted, they must be released.

The Indian Reality: Under the BNSS, the "one-third" or "half-sentence" rules (**Section 479**) are the only hard limits. This means an Indian accused could stay in jail for years before reaching that limit, even for a case that might ultimately end in a small fine or a suspended sentence. In Germany, such detention would be terminated much earlier as a violation of proportionality.

Feature	**India (BNSS)**	**United Kingdom (Bail Act 1976)**	**Canada (Criminal Code s. 515)**	**Germany (StPO §112)**
Primary Mechanism	Financial Surety/Bond	Presumption of Liberty	The "Ladder Principle"	*Ultima Ratio* (Last Resort)
Default Position	Judicial Discretion	Statutory Right to Bail	Least Restrictive Release	High Evidentiary Bar
Socio-Economic Shield	Limited (Surety Gap)	Strong (Conditions focused)	Strong (Gladue Reports)	High (Proportionality Test)

Table 1 Comparative Analysis of Bail Frameworks: India (BNSS), UK, Canada, and Germany

VII. CHALLENGES AND REFORMATIVE DIRECTIONS

The transition from the CrPC to the BNSS represents a structural evolution, yet the "law in books" faces significant friction when meeting the "law in action." This chapter identifies the systemic hurdles to the BNSS's implementation and proposes a constitutional and administrative roadmap for reform.

7.1 Implementation Challenges: The Infrastructure-Justice Gap

The success of the BNSS hinges not just on judicial interpretation, but on the administrative and technological readiness of the Indian state.

1. The Digital Divide and Section 530

Section 530 of the BNSS[33] aggressively promotes the use of electronic communication and e-filing for all stages of criminal proceedings. While this aims at efficiency, it risks creating a "technological bar" to justice.

- **The Literacy Barrier:** According to the *NITI Aayog* [34]*Strategy for New India*, a significant portion of the rural population lacks basic digital literacy. A "digital-first" code, without a corresponding investment in **Common Service Centres (CSCs)** or digital legal aid kiosks, risks excluding the very marginalized litigants the law intends to protect.

- **Procedural Exclusion:** If bail applications or evidence filings become exclusively digital, indigent accused persons who cannot afford tech-savvy legal representation may find themselves structurally disadvantaged compared to wealthier litigants.

2. Administrative Overload and Prison Capacity

Section 479 places a new, proactive burden on **Jail Superintendents** to apply for the bail of undertrials who have completed one-third or one-half of their maximum sentence.

[33] Bharatiya Nagarik Suraksha Sanhita, 2023, §530.
[34] NITI Aayog – Strategy for New India@75

- **Staffing Deficits:** *Prison Statistics India (NCRB 2022)* [35]reports that Indian prisons are operating at an average occupancy rate of **131.4%**, while nearly **30% of staff positions** remain vacant.

- **The Legal Aid Crisis:** Without a massive scale-up of **Legal Aid Defense Counsel Systems (LADCS)** within prison walls, the mandate of Section 479 remains a "dormant right." Jail staff are currently ill-equipped to act as quasi-legal officers for thousands of detainees simultaneously.

7.2 Conflict with Established Jurisprudence: The Constitutional Risk

The BNSS's "Multiple-Case Bar" in **Section 479(2)**-which denies the benefit of early release to those with multiple pending FIRs-stands in direct ideological conflict with the Supreme Court's recent directions.

- **The Antil Doctrine:** In ***Satender Kumar Antil v. CBI (2022)***, the Supreme Court emphasized that the "gravity of the offense" and the "nature of the individual" must be weighed holistically. The Court warned against mechanical denials of bail.

- **Unreasonable Restriction:** By creating a rigid, automatic bar based solely on the number of FIRs, the BNSS ignores the reality of "over-policing" in marginalized neighborhoods. This section of the Sanhita is vulnerable to a challenge under **Article 14 and 21**, as it fails the test of **Manifest Arbitrariness**[36]. It punishes the *status* of having multiple cases (which may be frivolous) rather than the actual *risk* posed by the individual.

7.3 Reform Proposals: A Roadmap for Substantive Liberty

To bridge the gap between modernization and equality, the following reforms are proposed:

1. Transition to Risk-Based Assessment Models

India must move away from the archaic "Cash Bail" system toward **Algorithmic Risk**

[35] National Crime Records Bureau, *Prison Statistics India 2022*.
[36] *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

Assessment Tools.[37]

- **Proposal:** Instead of asking "How much can the accused pay?", courts should use a standardized "Bail Rubric" that scores objective factors: stable residence, employment history, family ties, and past appearance records. This shifts the focus from **financial wealth** to **community roots**.

2. Incorporating the "Antic" Ladder

Drawing from the Canadian model, the BNSS should be amended to include a **Mandatory Hierarchy of Release**.

- **Proposal:** Judges should be legally required to record in their "Reasoned Order" (Section 480) exactly why a **Personal Recognizance Bond** was insufficient before they are permitted to move up the ladder to demand a financial surety. This would make the "Surety" an exception rather than the default.

3. Social Impact Statements for Multiple-Case Accused

To mitigate the harshness of the Section 479(2) bar, India should adopt a version of Canada's **Gladue Reports**.

- **Proposal:** In cases where an accused is being denied early release due to multiple FIRs, the **District Legal Services Authority (DLSA)** should be mandated to submit a "Socio-Economic Impact Report." This would allow the judge to see if the multiple cases are a result of systemic bias or genuine habitual criminality, restoring the "humanized" element to judicial discretion.

VIII. CONCLUSION: EVOLUTION OR REVOLUTION?

8.1 Reassessment of the BNSS Bail Framework

For decades, prolonged pre-trial detention has functioned as a de facto punishment within the Indian criminal justice system. The enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023 represents a deliberate attempt to address this dysfunction by linking the right to bail with

[37] United Nations Office on Drugs and Crime, global standards on pre-trial justice and risk-based assessment.

investigative timelines and statutory thresholds. Provisions such as time-bound custody, forensic deadlines, and the one-third sentence rule reflect a clear departure from the discretionary and delay-tolerant framework of the CrPC.

However, while the BNSS modernizes the procedural architecture of bail, it does not fundamentally recalibrate the socio-economic assumptions underpinning its operation. The framework accelerates access to bail, but it does not sufficiently democratize it. Financial sureties continue to dominate bail practice, and categorical exclusions—particularly under Section 479—limit the reach of the statute's most progressive provisions. As a result, the BNSS improves the efficiency of liberty without fully securing its universality.

8.2 Consolidated Findings of the Study

This study yields the following core findings:

1. **Accountability Through Time Limits:** The BNSS introduces a measurable link between investigative delay and the right to release, thereby constraining prolonged detention caused by administrative inertia.

2. **Persistence of Economic Barriers:** Despite statutory reform, bail remains functionally contingent upon financial capacity. The absence of a mandatory least-restrictive approach perpetuates inequality within the bail system.

3. **Risk of Status-Based Detention:** Section 479's exclusion of accused persons with multiple FIRs risks converting bail determinations into status-based decisions, undermining individualized assessment and raising concerns under Articles 14 and 21.

4. **Digital Procedural Inequality:** The shift toward electronic processes enhances efficiency but simultaneously risks marginalizing accused persons lacking digital access or literacy.

5. **Redistribution of Discretionary Power:** While the BNSS curtails certain forms of judicial arbitrariness, it reallocates significant discretionary authority to administrative and executive actors, necessitating heightened constitutional oversight.

8.3 Final Evaluation: The Limits of Procedural Reform

The BNSS represents a significant procedural advancement in Indian criminal law. It reflects a conscious effort to rationalize bail through timelines, structured custody, and administrative accountability. However, procedural reform alone cannot rectify structural inequality. As long as liberty remains mediated by financial capacity and rigid statutory exclusions, the constitutional promise of bail as a rule will remain only partially fulfilled.

The long-term success of the BNSS will depend on its evolution beyond procedural efficiency toward substantive fairness. This requires judicial commitment to proportionality[38], legislative willingness to recalibrate exclusionary provisions, and institutional investment in non-financial release mechanisms. Without these corrective measures, the BNSS risks becoming a faster system that continues to detain the same individuals for the same reasons.

IX. FUTURE SCOPE

The Bharatiya Nagarik Suraksha Sanhita, 2023 marks the beginning of a new procedural phase in Indian criminal justice rather than its culmination. As courts, prisons, and legal service institutions adapt to the BNSS framework, several focused areas emerge for future research and reform. The future scope lies not in revisiting legislative intent, but in evaluating how procedural modernization interacts with constitutional guarantees on the ground.

1. Empirical Evaluation of Section 479

Future research must assess whether the one-third and one-half release provisions under Section 479 operate as effective decongestion tools [39]or remain underutilized due to administrative inertia. Empirical studies examining prison-level compliance, the role of jail superintendents, and the availability of legal aid within custodial institutions are essential to determine whether these provisions translate into actual liberty.

2. Development of Context-Sensitive Risk Assessment Models

There is significant scope for developing an Indian risk-assessment framework for bail that moves beyond financial capacity. Future work should focus on designing standardized criteria grounded in social stability, community ties, and past compliance with legal processes, while accounting for India's informal economy and migrant populations.

[38] *Modern Dental College v. State of Madhya Pradesh*, (2016) 7 SCC 353.
[39] National Crime Records Bureau, *Prison Statistics India* reports

3. Addressing the Digital Access Gap

As criminal procedure becomes increasingly digital under the BNSS, further research is required to examine whether electronic filing and communication disproportionately disadvantage accused persons lacking digital literacy or access. Future reform may necessitate hybrid procedural models that balance technological efficiency with accessibility.

4. Constitutional Scrutiny of Exclusionary Provisions

Section 479(2), which excludes accused persons with multiple pending cases from early release mechanisms, presents a clear area for constitutional examination. Future scholarship and litigation may test this provision against the principles of equality, proportionality, and manifest arbitrariness under Articles 14 and 21.[40]

5. Institutionalization of the Least-Restrictive Principle

A critical area for future reform lies in embedding the "least-restrictive" principle into bail jurisprudence through judicial guidelines or legislative amendment. Research focused on comparative bail manuals and judicial training frameworks could inform a structured transition away from default financial sureties.

[40] *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

BIBLIOGRAPHY

A. Primary Sources

1. Indian Statutes

- The Constitution of India, 1950 (Articles 14, 19, 21, and 22).
- The Bharatiya Nagarik Suraksha Sanhita, 2023.
- The Code of Criminal Procedure, 1973.

2. Foreign Statutes

- Bail Act, 1976 (United Kingdom).
- Criminal Code, R.S.C. 1985, c. C-46 (Canada).
- Strafprozessordnung (StPO) – German Code of Criminal Procedure.

3. International Instruments

- Universal Declaration of Human Rights, 1948.
- International Covenant on Civil and Political Rights, 1966.

B. Judicial Decisions

1. Supreme Court of India

- *State of Rajasthan v. Balchand*, (1977) 4 SCC 308.
- *Moti Ram v. State of Madhya Pradesh*, (1978) 4 SCC 47.
- *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565.
- *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.
- *Satender Kumar Antil v. Central Bureau of Investigation*, (2022) 10 SCC 51.

2. Foreign Jurisdictions

- *R. v. Gladue*, [1999] 1 S.C.R. 688 (Canada).
- *R. v. Antic*, 2017 SCC 27 (Canada).

C. Government Reports and Empirical Studies

- National Crime Records Bureau, *Prison Statistics India*, 2022 & 2023.
- Vidhi Centre for Legal Policy, *Understanding Undertrial Incarceration in India* (2022).
- Commonwealth Human Rights Initiative, *Barred from Bail: A Study of Prisons and Judicial Discretion* (2023).
- NITI Aayog, *Strategy for New India @ 75* (Judicial Reforms Chapter).
- India Justice Report, *Ranking of States on Justice Delivery*, 2024–2025.

D. Secondary Sources: Journals and Academic Publications

- "Grant and Cancellation of Bail under BNSS, 2023," *International Journal of Novel Research and Development*, 2024.
- "Reforming Bail Law in India under the BNSS," *Journal of Human Rights and Legal Policy*, 2025.
- "A Comparative Analysis of Bail Provisions: CrPC and BNSS," *International Journal of Creative Research Thoughts*, 2021 (updated 2024).
- *Bail: A Comparative Study*, Jharkhand Judicial Academy Publication, 2025.