



Bail under the Bharatiya Nagrik Suraksha Sanhita, 2023: A critical analysis

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Abstract

The Bharatiya Nagrik Suraksha Sanhita, 2023 (BNSS) represents a transformative step in India's criminal procedural law, replacing the colonial-era Code of Criminal Procedure, 1973. Among its most constitutionally significant aspects are provisions governing bail, which directly engage with the guarantee of personal liberty under Article 21 of the Constitution. This paper critically examines bail under the BNSS, focusing on statutory design, constitutional compatibility, and judicial interpretation. It evaluates whether the BNSS upholds the principle that "bail is the rule and jail is the exception" or introduces structural mechanisms that may legitimize prolonged pre-trial detention. Using doctrinal research methodology, the study incorporates statutory texts, Supreme Court judgments, constitutional principles, empirical under trial statistics, and scholarly literature to assess both the progressive and problematic dimensions of the new bail regime.

Keywords: Bharatiya nagrik suraksha sanhita, 2023, bail jurisprudence, article 21, personal liberty, under trial prisoners, constitutional criminal procedure, judicial discretion

Introduction

Bail is among the most vital safeguards of personal liberty in criminal jurisprudence, ensuring that pre-conviction detention remains exceptional. Indian jurisprudence has consistently emphasized that the presumption of innocence must translate into practical liberty until conviction. Historically, the Code of Criminal Procedure, 1973, despite multiple amendments, reflected procedural assumptions that prioritized state convenience over individual rights. The BNSS, 2023, seeks to modernize this framework by codifying default bail, introducing sentence-based eligibility for under trials, and expanding judicial discretion.

India currently faces a profound crisis in pre-trial detention. According to the National Crime Records Bureau (2022), nearly two-thirds of the prison population are under trials, often detained for periods exceeding the maximum sentence for their alleged offence. The BNSS recognizes this systemic failure, yet its design, including multiple-case exclusions and undefined discretionary conditions, reveals the tension between reformist intent and procedural control. This paper undertakes a critical examination of whether the BNSS genuinely advances liberty or risks normalizing prolonged detention^[1].

Concept and Philosophy of Bail

Bail allows an accused to remain at liberty during proceedings while ensuring court attendance. Its philosophical foundation lies in the presumption of innocence, a cornerstone of constitutional morality. Supreme Court jurisprudence has emphasized that pre-conviction detention must be proportional, non-punitive, and guided by fairness. Deviations from these principles transform criminal procedure from a protective mechanism into an instrument of coercion, undermining public confidence in justice.

Bail Provisions under the Bharatiya Nagrik Suraksha Sanhita, 2023

1. Default (Statutory) Bail

Section 187(3) provides default bail if investigation exceeds 60–90 days, codifying a constitutional right recognized in

Article 21. This mechanism prevents indefinite detention due to procedural delays and aligns with judicial precedents emphasizing the primacy of liberty.

2. Under trial Bail and Sentence-Based Eligibility

Section 479 introduces a sentence-based framework for under trial bail, distinguishing first-time offenders from others. While this addresses systemic delays, the multiple-case exclusion risks circumvention by investigative authorities, undermining constitutional proportionality and the presumption of innocence^[2].

3. Judicial Discretion and Bail Conditions

Courts may impose conditions, yet the absence of statutory guidelines risks inconsistent application. Economic disparity often translates into inequitable bail outcomes, where the poor are effectively detained due to financial incapacity.

Bail and Constitutional Provisions: A Comparative Analysis

1. Article 21 – Right to Life and Personal Liberty

BNSS provisions must satisfy the "just, fair, and reasonable" standard (*Maneka Gandhi v. Union of India*). Multiple-case exclusions and procedural thresholds that delay bail challenge this standard and risk converting procedural technicalities into substantive punishment^[3, 4].

2. Article 14 – Equality before Law

Excessive conditions disproportionately affect marginalized accused, making bail effectively conditional upon wealth and social status. BNSS does not sufficiently address these systemic inequalities.

3. Article 22 – Safeguards against Arbitrary Arrest

Judicial oversight is constitutionally mandated. Mechanistic remand orders without individualized assessment undermine personal liberty and violate Article 22 safeguards.

Judicial Pronouncements on Bail

- **State of Rajasthan v. Balchand (1977):** "Bail, not jail^[5]."

- **Gudikanti Narasimhulu v. Public Prosecutor (1978):** Bail must reflect humane judgment ^[6].
- **Hussainara Khatoon v. State of Bihar (1979–80):** Established speedy trial and bail as integral to Article 21 ^[7].
- **Sanjay Chandra v. CBI (2012):** Gravity of offence alone cannot justify denial of bail ^[8].
- **Satender Kumar Antil v. CBI (2022):** Arrest and denial of bail must align with Article 21 principles ^[9].

Critical Analysis of Bail under the BNSS

The BNSS reflects a legislative acknowledgment of prolonged pre-trial detention but introduces mechanisms that may inadvertently restrict liberty. Default bail and sentence-based eligibility are progressive steps, yet multiple-case exclusions create procedural loopholes allowing undue prosecutorial leverage. Discretionary conditions, if unguided, perpetuate socio-economic inequities, with indigent accused often unable to meet financial sureties. Comparative perspectives from Canada and the UK indicate that structured guidance and periodic review of under trial detention significantly enhance liberty while balancing societal interests—a dimension currently underdeveloped in the BNSS. Judicial interpretation will therefore be pivotal in either realizing or undermining the statute’s reformist potential ^[10, 11].

Recommendations

1. **Narrow Interpretation of Multiple-Cases Exclusion:** Courts should assess whether cases stem from distinct facts or fragmented allegations, preventing abuse of prosecutorial discretion.
2. **Structured Bail Conditions:** Financial and procedural conditions must be proportional, transparent, and sensitive to socio-economic realities. Non-monetary alternatives should be prioritized.
3. **Mandatory Reasoning for Denial:** Denial orders must cite evidence and constitutional principles, discouraging mechanical reliance on “gravity of offence.”
4. **Periodic Judicial Review:** Regular reassessment of under trial detention ensures that incarceration remains exceptional rather than default ^[12].
5. **Reform Arrest Procedures:** Greater reliance on summons, notices, and personal bonds to reduce unnecessary detention.
6. **Judicial Training and Sensitization:** Emphasize liberty-centric interpretation and constitutional morality to mitigate systemic biases.
7. **Technological and Monitoring Support:** Digital tracking and case monitoring can prevent prolonged detention due to procedural inefficiency.

Conclusion

The BNSS marks an ambitious effort to reform India’s criminal procedural framework, yet its treatment of bail

remains uneven. While recognizing systemic delays, the statute preserves exclusions and discretionary powers that risk normalizing pre-trial detention. Judicial interpretation, guided by Articles 14, 21, and 22, will be decisive in shaping the BNSS as either a liberty-affirming instrument or a coercive procedural mechanism. Empirical evidence and comparative insights underscore the need for structured conditions, periodic review, and transparent reasoning to ensure equitable application. Bail must continue to be the rule and jail the exception, preserving liberty as the cornerstone of criminal justice in India ^[13].

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