



INTERNATIONAL JOURNAL OF HUMAN RIGHTS LAW REVIEW

An International Open Access Double Blind Peer Reviewed, Referred Journal

Volume 5 | Issue 1 | 2026

Art. 14

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Recommended Citation

Saif Ali and Dr. Axita Shrivastava, *Bail as a Human Right: A Critical Examination of Bail Reforms under BNSS*, 5 IJHRLR 196-218 (2026).
Available at www.humanrightlawreview.in/archives/.

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Bail as a Human Right: A Critical Examination of Bail Reforms under BNSS

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Manuscript Received

21 Jan. 2026

Manuscript Accepted

24 Jan. 2026

Manuscript Published

04 Feb. 2026

ABSTRACT

Bail occupies a pivotal position in the criminal justice system, mediating the State's coercive power to arrest and detain against the constitutional presumption of innocence and the protection of personal liberty. Traditionally perceived as a procedural mechanism to secure the presence of the accused at trial, bail has, through evolving constitutional jurisprudence, acquired the character of a substantive right closely linked to human dignity and liberty under Article 21 of the Constitution of India. The enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), replacing the Code of Criminal Procedure, 1973, marks a significant moment in the rearticulation of Indian bail law. This study critically examines bail as a human right in the context of the BNSS, assessing whether the new statutory framework meaningfully advances constitutional promises of liberty or merely reconfigures existing procedural norms without dismantling entrenched structural inequities. Anchored in the lived realities of pre-trial detention, the study recognises that denial or delay of bail often results in punitive incarceration without conviction, disproportionately affecting economically disadvantaged and socially marginalised groups in a system where undertrial prisoners constitute a substantial share of the prison population. Situating bail within comparative constitutional practice and international human rights law, particularly norms under the ICCPR and the UDHR, the paper reinforces the principle that pre-conviction detention must remain exceptional. It traces the

historical evolution of bail under the CrPC, highlighting the limitations of discretionary regimes, onerous surety requirements, and systemic delays that undermined equal access to liberty. Against this backdrop, the BNSS is analysed for its reformist potential, including provisions on mandatory bail for indigent accused, continuity of default bail, enhanced recognition of anticipatory bail, and an emphasis on judicial accountability. While acknowledging these as deliberate steps towards a rights-oriented criminal process, the study adopts a cautious stance, noting the persistence of wide judicial discretion, the risk of restrictive conditions justified by public interest or security, and the absence of clear normative standards. It concludes that recognising bail as a human right is a constitutional imperative, and that the transformative promise of the BNSS will ultimately depend on sensitive implementation, judicial training, and sustained institutional reform, reaffirming liberty rather than incarceration as the governing principle of a democratic legal order.

KEYWORDS

Bail, Liberty, BNSS, Dignity, Justice

INTRODUCTION

Any democratic society's criminal justice system is based on a careful balance between the state's right to uphold law and order and the fundamental rights of those who are accused of crimes. The idea of bail has a place of great constitutional and human relevance among the different procedural processes that control this equilibrium. Bail establishes whether an accused person will continue to be deprived of their personal freedom while their case is being investigated and tried, or if they will be permitted to live freely with reasonable legal restrictions. Bail is essentially a practical manifestation of the presumption of innocence, which is at the core of criminal jurisprudence, and a safeguard against arbitrary incarceration.

Bail has long been a topic of scholarly discussion and judicial concern in India, especially in light of the startling number of undertrial inmates housed in the nation's jails. A significant section of the jail population is made up of people who have not been found guilty of any crime but are still behind bars as a result of being denied bail, not being able to provide sureties, or protracted delays in the investigation and trial. Prolonged pre-trial imprisonment effectively amounts to punishment without

adjudication, undermining the rule of law and the fundamental concepts of justice, fairness, and liberty. This poses major constitutional problems.

Article 21 of the Indian Constitution, which states that no one shall be deprived of life or personal liberty except in accordance with a legally mandated procedure, upholds the right to personal liberty. The Indian Supreme Court has construed Article 21 broadly over time, encompassing the rights to fair trial, dignity, and protection from arbitrary imprisonment and arrest. Despite being procedural in nature, bail has thus gained substantive constitutional significance, transforming from a statutory concession into a privilege inextricably related to individual freedom and human dignity. Judicial rulings have consistently upheld that incarceration before to conviction should remain the exception rather than the rule and that the denial of bail must be supported by strong arguments.

In the past, India's bail laws were governed by the Code of Criminal Procedure, 1973 (CrPC), which was derived from colonial legal customs. Although the CrPC had comprehensive provisions about anticipatory bail, default bail, discretionary bail, and bailable and non-bailable offenses, its actual application exposed significant structural disparities. Although crucial, the courts' discretion frequently led to uneven bail rulings, and the over-reliance on financial bonds and sureties disproportionately impacted the poorer segments of society. As a result, the bail system's fundamental class bias was revealed when poverty—rather than guilt—became the deciding factor in obtaining freedom.

The shortcomings of the current legal system were further highlighted by the undertrial incarceration issue. There have been many cases where accused individuals have been imprisoned for longer than the maximum sentence allowed for the claimed offense. The judiciary was forced by these circumstances to step in with progressive interpretations, stating that "bail is the rule and jail is the exception." The issue continued in spite of these judicial initiatives, demonstrating the necessity of comprehensive legislative reform as opposed to piecemeal judicial rectification.

In light of this, the passing of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) is extremely important. The BNSS, which was introduced to replace the CrPC, is an attempt to modernize and decolonize India's criminal justice system while bringing it closer to current human rights norms and constitutional principles. A number of bail reforms are introduced by the BNSS, such as mandatory bail for impoverished accused individuals, continuity and clarity of default bail, increased recognition of anticipatory bail, and a focus on well-reasoned court rulings. These modifications represent a legislative recognition of the long-

standing issues with arbitrary imprisonment and unequal bail availability.

However, the preservation of human rights is not always ensured by the mere insertion of new law measures. The language of the legislation, how it is interpreted, how it is applied, and how it interacts with other criminal justice procedures all affect how successful bail changes are. There are still questions about whether the BNSS actually turns the bail system into a rightsbased framework or if it keeps the CrPC's enforcement issues and discretionary ambiguities. Even under the new legal system, worries about court subjectivity, strict bail requirements, and possible abuse of arrest authority still exist.

This study aims to investigate bail from a human rights perspective, concentrating on the changes implemented under the BNSS. It seeks to determine if these changes only provide symbolic change without addressing practical issues or whether they successfully uphold the fundamental promise of human liberty. Additionally, by referencing international norms that forbid arbitrary imprisonment and highlight the unique characteristics of pre-trial incarceration, the paper places bail within the larger context of international human rights law. The study aims to highlight alternative strategies that prioritize liberty while defending society interests by comparing bail policies in countries like the United States and the United Kingdom. Additionally, this study discusses the socioeconomic aspects of bail, namely the effects of pretrial imprisonment on marginalized and impoverished populations. It contends that in order for a bail system to be truly humane, it must acknowledge the real-life experiences of those who are charged and guarantee that their ability to exercise their right to liberty is independent of their financial situation or social standing. The article also assesses the function of judicial discretion under the BNSS, raising concerns about whether sufficient protections are in place to avoid arbitrariness and guarantee uniformity in bail judgments.

This analysis is essentially based on the idea that bail is a fundamental human right derived from the constitutional guarantee of personal liberty rather than just a procedural tool. This study aims to add to the current conversation on criminal justice reform in India by critically analyzing bail reforms under the BNSS. It emphasizes the necessity of a justice system that puts liberty, dignity, and justice first and restates the idea that, in a democratic society where the rule of law is upheld, incarceration prior to conviction should be the exception rather than the rule.

HISTORICAL AND LEGAL BACKGROUND OF BAIL AS A HUMAN RIGHT

The long-standing conflict between the authority of the state and individual liberty is where the idea of bail originated. In the past, bail developed as a legal tool to guarantee that an accused person might stay free while awaiting trial while still being forced to appear in court as needed. Its origins can be found in English common law, where bail served as a defense against the Crown's arbitrary arrest. This idea eventually made its way to colonial legal systems, such as those in India, where it formed a crucial component of criminal proceedings.

From a philosophical perspective, bail is based on the notion that a conviction shouldn't come before a person is found guilty. Therefore, pre-trial detention is only intended to facilitate the efficient administration of justice rather than to punish. This comprehension is closely related to the presumption of innocence doctrine, which regards all accused individuals as innocent until and unless they are proven guilty by an appropriate court of law.

Bail is now seen as a crucial element of individual liberty in the contemporary human rights framework, and its importance has grown beyond procedural convenience. By highlighting protection against arbitrary arrest and detention, international human rights treaties support this understanding. The Universal Declaration of Human Rights establishes fundamental principles that acknowledge the right to liberty and security of person and forbid arbitrary detention, even though it is not legally binding.

The International Covenant on Civil and Political Rights, which states that pre-trial detention should be the exception rather than the rule and that release may be contingent upon promises to appear in court, gave these ideas legally binding force.¹ Additionally, the Covenant emphasizes the presumption of innocence and indirectly mandates that States refrain from unnecessarily detaining accused individuals prior to their conviction. This stance is further reinforced by comparative human rights jurisprudence, especially as it relates to the European Convention on Human Rights, which mandates that detention prior to trial be supported by strong grounds, such as a threat to public order, a risk of absconding, or evidence tampering. The acceptance of bail as a component of the more general human right to personal liberty is supported by these international standards taken together.

Bail is not specifically acknowledged as a fundamental right under the Indian constitution. Nonetheless, bail has been firmly established by court interpretation as being under Article 21 of the Constitution, which protects the right to life and personal freedom. Any process that deprives someone of their freedom

¹ International Covenant on Civil and Political Rights, 1966.

must be fair, equitable, and reasonable, according to the Supreme Court of India's repeated rulings. Therefore, it has been believed that arbitrary or protracted pre-trial detention violates Article 21.

Indian bail law has developed as a result of important rulings that highlight the idea that "bail is the rule and jail is the exception." Courts have acknowledged that denials of bail should not be made arbitrarily; instead, they must be justified by factors that outweigh the person's right to freedom. The judiciary has also recognized the socioeconomic realities of India, where longterm incarceration causes disproportionate suffering for undertrial inmates, many of whom come from marginalized homes.

The Criminal Procedure Code of 1973 ruled bail in India before the Bharatiya Nagarik Suraksha Sanhita was passed. The CrPC divided offenses into two categories: bailable and nonbailable. For bailable offenses, the right to bail was almost unqualified, while for non-bailable offenses, the judges had discretion. In order to shield people from arbitrary detention, anticipatory bail was also introduced. Despite this structure, the bail system's actual operation showed significant flaws. Liberty was severely restricted beyond what was allowed under the constitution as a result of overcrowding in prisons with undertrial inmates, delays in the investigation and trial process, and inconsistent judicial practices. The gap between the theoretical commitment to personal liberty and its practical protection on the ground was brought to light by these systemic failings.

In response to persistent complaints of the bail system, the Bharatiya Nagarik Suraksha Sanhita, 2023 is an attempt to modernize and overhaul India's criminal justice system. Clearer definitions of bail-related terms, such as bail and bail bonds, which were previously dispersed and frequently misinterpreted, are among the significant modifications brought about by the BNSS. The BNSS aims to minimize needless pre-trial detention by simplifying procedural requirements and tying bail eligibility to specified deadlines. A move toward acknowledging liberty as a priority is seen in the introduction of statutory bail for first-time offenders who have been detained for a predetermined amount of the maximum permitted sentence. This clause recognizes that incarcerating undertrials for extended periods of time, particularly those who have no prior criminal history, compromises both justice and human dignity.

Additionally, the BNSS reexamines the anticipatory bail structure in an effort to improve consistency across jurisdictions. The new regime enhances protection against abuse of arrest powers by narrowing the opportunity for arbitrary exclusions caused by differing state amendments under the previous statute. Furthermore, as delays have historically been a significant factor in extended detention, the emphasis on time-bound inquiry and

procedural efficiency is strongly related to the right to bail. Electronic summonses and reduced paperwork are two examples of the digital improvements implemented under the BNSS that are meant to speed up proceedings and indirectly speed up the review of bail requests.

However, there are some restrictions on the BNSS's recognition of bail as a human right. The necessity to strike a balance between individual liberty, social interests, and public safety is reflected in the law's continued preservation of judicial discretion in major and egregious offenses. Such discretion is not intrinsically incompatible with human rights standards, but in order to prevent arbitrariness, its application must be regulated by certain principles. Furthermore, the execution of bail reforms is crucial to their efficacy. In practice, structural issues including poor judicial infrastructure, a lack of knowledge about legal assistance, and unequal access to the internet could weaken the BNSS's rights-oriented goals.

BAIL AS A HUMAN RIGHT THEORETICAL AND INTERNATIONAL PERSPECTIVE

Conceptual Understanding of Bail as a Right

Fundamentally, bail is a system that permits an accused individual to remain free while criminal procedures are pending, subject to reasonable conditions. Its main goal is to ensure that the accused appears in court rather than to penalize them. Detention effectively takes on a punitive nature when bail is refused without a strong reason, which goes against the assumption of innocence.

Seeing bail as a human right entails acknowledging that freedom cannot be unjustly or unreasonably restricted. Only in situations when it is absolutely necessary—such as when there is a flight risk, a threat to witnesses, or a significant harm to society—should pre-trial detention be permitted. Continued confinement compromises justice and human dignity in all other situations.²

International Human Rights Law on Bail

The idea that detention should be the exception rather than the rule is strongly supported by international human rights standards. It is specifically stated in Article 9 of the International Covenant on Civil and Political Rights (ICCPR) that people awaiting trial should not generally be held in detention. The worldwide agreement that pre-trial detention must be extraordinary and supported by strong arguments is reflected in this clause.

² UN Human Rights Committee.

In a similar vein, the Universal Declaration of Human Rights (UDHR) forbids arbitrary arrest and detention while guaranteeing the right to life, liberty, and personal security. These international standards place a strong emphasis on the need for criminal procedures to protect people's freedom and dignity.

India has a moral and constitutional duty to align its national legislation with international human rights norms as a signatory to these agreements. Therefore, bail must be viewed as an integral part of the right to liberty rather than only as a statutory concession.

Human Dignity and Social Impact of Pre-Trial Detention

The ramifications of pre-trial custody go well beyond incarceration. Incarceration prior to conviction frequently results in psychological anguish, social stigma, disturbance of family life, and loss of livelihood. Even if the accused is finally found not guilty, these effects are frequently irrevocable. By ensuring that incarceration is used sparingly and responsibly, the recognition of bail as a human right aims to reduce such harm.

Article 21 and the Right to Personal Liberty

According to Article 21 of the Indian Constitution, no one may be deprived of their life or personal freedom unless a legally mandated process is followed. The Supreme Court has broadened the definition of this clause throughout time to include substantive due process, which mandates that any process that restricts someone's freedom must be reasonable, fair, and just.

This constitutional structure directly affects bail. The spirit of Article 21 is violated by arbitrary or protracted detention without sufficient grounds. As a result, bail serves as a constitutional protection against the overuse of state power during the pre-trial phase.

Judicial Interpretation of Bail under Article 21

The Supreme Court has often connected personal freedom and bail. The Court stressed in *Gudikanti Narasimhulu v. Public Prosecutor* that bail determinations must be based on constitutional principles rather than arbitrary judgment. The judiciary has also acknowledged that denying bail without a valid justification constitutes a violation of fundamental rights. The Court ruled in *Maneka Gandhi v. Union of India* that any legislation impacting individual freedom must be reasonable, fair, and just. Laws and procedures pertaining to bail are subject to the same concept. Therefore, the exercise of judicial power in bail issues must promote liberty rather than limit it.

Bail as an Extension of Human Dignity

The right to a dignified life has been regarded as part of Article 21.

People who are detained needlessly lose their dignity due to overcrowding in jails, subpar living conditions, and social exclusion. Maintaining dignity during the criminal justice process is ensured by acknowledging bail as a constitutional right.

BAIL UNDER THE CODE OF CRIMINAL PROCEDURE, 1973: A CRITICAL BACKGROUND

For many years, the foundation of India's procedural criminal law was the Code of Criminal Procedure, 1973 (CrPC). Its bail system was created to control how the interests of justice and the accused's freedom were balanced. Although the CrPC had complex bail provisions, its actual implementation frequently exposed serious structural flaws and contradictions. Bail regulations under the CrPC were mainly divided into bailable and non-bailable categories based on the type of offense. While Section 437 gave courts discretion over non-bailable offenses, Section 436 required bail in bailable offenses as a matter of right. Courts were further empowered by Sections 438 and 439 to issue exceptional bail and anticipatory bail, respectively. Theoretically, this framework represented a liberal strategy meant to avoid needless detention.

The CrPC's actual operation, however, revealed a disconnect between social realities and legal principles. Under non-bailable offenses, judicial discretion frequently operated unevenly, producing arbitrary results. Bail decisions were often impacted by a number of factors, including the accused's socioeconomic background, local customs, and the judges' subjective opinions. Bail was essentially turned into a privilege rather than a right when monetary sureties became a major obstacle for the impoverished.

Furthermore, the issue of extended detention was made worse by CrPC procedural delays. Despite the lack of a definitive verdict of guilt, suspected individuals were detained during investigations and trials that frequently lasted several years. Consequently, pre-trial incarceration began to take on a punitive aspect, which went against the fundamental tenets of criminal law. Bail reforms under the BNSS were made possible by these systemic flaws in the CrPC, which eventually required legislative and judicial reconsideration.

Supreme court jurisprudence on bail

The Indian Supreme Court's constant emphasis on the fundamental concept of individual liberty has had a significant impact on bail jurisprudence. The Court has made it clear through a number of significant rulings that bail is an essential part of the right to life and liberty under Article 21 and not a discretionary favor.

The Supreme Court emphasized that social fairness and constitutional concerns must guide bail judgments in *Gudikanti Narasimhulu v. Public Prosecutor*. The Court emphasized that liberty should not be restricted unless there are compelling grounds to do so and warned against the arbitrary denial of bail. With this ruling, a rights-oriented perspective on bail replaced a simply procedural one.

In *Hussainara Khatoon v. State of Bihar*, the Court further reinforced this concept by highlighting the concerning situation of undertrial inmates who are kept in cells for years without being given a chance to stand trial. The ruling stressed that extended incarceration of undertrials was unlawful and acknowledged a timely trial as a fundamental right under Article 21. In order to redress this unfairness, bail became an essential solution.

The Supreme Court reiterated in *Sanjay Chandra v. CBI* that the purpose of bail is to ensure that the accused appears at trial rather than to penalize them prior to conviction. The Court noted that personal liberty must be given proper consideration and that rejection of bail should not be based solely on the gravity of the accusations.

In a more recent case, *Satender Kumar Antil v. CBI*, the Court offered extensive directions to encourage a liberal bail regime and avoid needless arrests. The ruling acknowledged that the criminal justice system's legitimacy is damaged when undertrial inmates are incarcerated excessively. When taken as a whole, these rulings show the Supreme Court's persistent efforts to change bail from a procedural requirement to a substantive constitutional protection.

Undertrial prisoners and poverty and poverty a structural injustice

The large number of undertrial inmates in Indian jails is one of the most unsettling aspects of the country's criminal justice system. Those who have not been found guilty of any crime make up a sizable percentage of the jail population. This behavior reveals a serious fundamental flaw in the bail system.

A major factor in this dilemma is poverty. Due to their inability to provide bail bonds or sureties, many undertrial inmates are kept behind bars. Economically disadvantaged groups are disproportionately impacted by the financial requirements of bail, which essentially criminalizes poverty. In many situations, incarceration results from socioeconomic hardship rather than criminal activity.

This unfairness has been recognized by the Supreme Court on several occasions. The Court made it clear in *Hussainara Khatoon* that poverty shouldn't be a justification for detention. Due to strict bail requirements and limited access to legal assistance, the issue

still exists despite this judicial understanding.

The societal ramifications of undertrial detention are extensive. It upends livelihoods, breaks up families, and exposes them to cramped, frequently cruel prisons. Even after release, the stigma attached to incarceration endures, further marginalizing those who are already at risk. From the standpoint of human rights, this situation shows a failure to respect the Constitution's tenets of equality and dignity.

In order to address the undertrial dilemma, institutional procedures and judicial mindset must change in addition to statutory changes. In order to prevent poverty from impeding access to justice, bail must be acknowledged as a human right.

Default bail as a fundamental right

Because default bail directly maintains constitutional discipline on investigating agencies, it holds a special place in Indian criminal jurisprudence. It occurs when the State is unable to finish the investigation within the legally mandated time frame, giving the accused the right to be released on bond.

According to Section 167(2) of the CrPC, the accused obtains an unalienable right to bail if the investigation is not finished within a certain amount of time. This clause protected against arbitrary and protracted detention and was more than just procedural. The State cannot deny someone their freedom permanently under the pretense of an investigation thanks to default bail.

Default bail is derived from Article 21, the Supreme Court has often ruled. The Court explained in *Uday Mohanlal Acharya v. State of Maharashtra* that the right to default bail becomes enforceable as soon as the statutory term ends and cannot be defeated by submitting the charge sheet later. This reading reinforced default bail's constitutional nature.

Similarly, the Supreme Court reiterated in *Rakesh Kumar Paul v. State of Assam* that default bail is a fundamental right associated with individual liberty rather than a discretionary remedy. Any discrepancy in the bail conditions must be interpreted in the accused's favor, the Court stressed.

Thus, default bail functions as a potent instrument to safeguard freedom and stop the abuse of governmental authority. Detention must be warranted, circumscribed, and reasonable; this is reinforced by holding investigative agencies accountable. In India's changing criminal justice system, default bail is still relevant as a constitutional protection, as evidenced by its continued use under the BNSS.

DETAILED ANALYSIS OF BAIL PROVISIONS UNDER THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023

The colonial-era Code of Criminal Procedure, 1973 has been replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), a major legislative endeavor to reorganize India's criminal justice system. The BNSS's bail provisions have been reformed, improved, and, in certain cases, increased to fit modern realities and constitutional norms, even if it still substantially upholds the fundamental principles of the CrPC. Sections 479 through 482, which address bailable offenses, non-bailable offenses, impoverished accused, and bail bonds, respectively, include the majority of the BNSS's bail-related provisions.

To determine if BNSS actually promotes bail as a human right or still mostly depends on judicial discretion, a section-by-section analysis of these provisions is required.

Section 479 BNSS: Bail in bailable offences

The colonial-era Code of Criminal Procedure, 1973 has been replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), a major legislative endeavor to reorganize India's criminal justice system. The BNSS's bail provisions have been reformed, improved, and, in certain cases, increased to fit modern realities and constitutional norms, even if it still substantially upholds the fundamental principles of the CrPC. Sections 479 through 482, which address bailable offenses, non-bailable offenses, impoverished accused, and bail bonds, respectively, include the majority of the BNSS's bail-related provisions.

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Nevertheless, despite the provision's clarity, practical difficulties still exist. Even for offenses that are subject to bail, detention is sometimes prolonged due to procedural delays, ignorance, or insistence on sureties. Although BNSS maintains the right-based aspect of bail in these situations, its efficacy is mostly dependent on judicial attention and appropriate execution.

Section 480 BNSS: Bail in non-bailable offences

Section 437 of the CrPC is equivalent to Section 480 BNSS, which addresses bail in nonbailable offenses. In contrast to offenses that are susceptible to bail, bail in non-bailable cases is still up to the judge. The clause gives judges the authority to grant bail after taking into account a number of variables, including the type of offense, the seriousness of the sentence, the possibility that the accused may evade justice, and possible tampering with witnesses or evidence.

Section 480's preservation of discretionary bail is indicative of a careful legislative approach. The State acknowledges its interest

in upholding law and order and making sure that investigations are conducted effectively. However, there are also worries about arbitrariness and inconsistency due to the judges' extensive discretion.

The Supreme Court has underlined again and time again that, unless there are strong reasons for detention, discretion must be used carefully and in favor of liberty. Because there are no specific statutory rules for using discretion under BNSS, results may still differ greatly based on socioeconomic variables, local practices, and court attitudes. Because of this, even while Section 480 offers flexibility, it also runs the risk of maintaining unequal access to bail.

Anticipatory bail under BNSS

A prophylactic measure known as anticipatory bail shields people from needless detention and arrest. Anticipatory bail is still acknowledged under BNSS as a crucial protection of individual freedom, largely upholding the structure created by Section 438 of the CrPC.

Anticipatory bail is intended to protect people against arbitrary detention, humiliation, and abuse of police authority. Subject to acceptable criteria, it permits an individual to approach the court in anticipation of being arrested and request protection. In situations involving political rivalry, fabricated allegations, or personal grudges, this clause is especially crucial. When granting anticipatory bail under BNSS, judges are still able to impose restrictions on travel, cooperation with investigations, and non-interference with witnesses. Excessive or irrational conditions may undermine the whole goal of anticipatory bail, even though these requirements are meant to strike a balance between liberty and investigative requirements. Whether anticipatory bail under BNSS serves as a shield for liberty or becomes laden with restrictive terms will be determined in large part by judicial interpretation. To guarantee that anticipatory bail continues to be an effective constitutional remedy rather than a symbolic provision, a rights-oriented approach is crucial.

Section 481 BNSS: Mandatory bail for indigent accused

One of India's bail law's most progressive and human rights-focused changes is Section 481 BNSS. This clause requires that accused people who are impoverished and unable to provide sureties be granted bail. It immediately confronts a long-standing injustice in which long-term incarceration was justified due to poverty.

The constitution's dedication to equality and dignity is shown in the acceptance of indigence as a valid reason for required bail. It is consistent with the Supreme Court's findings in Hussainara

Khatoon v. State of Bihar, where the Court emphasized that no one should be imprisoned just because they are unable to provide bail.³

The stark truth that monetary bail disproportionately impacts the impoverished and underprivileged is acknowledged in Section 481. BNSS aims to remove the financial obstacles that have historically prevented vulnerable groups in society from exercising their right to liberty by requiring bail for impoverished defendants.

However, judicial sensitivity and precise indigence identification are necessary for this provision to be successful. The benefits of Section 481 can remain restricted in the absence of explicit guidance and effective implementation. However, this clause is a major step in the direction of acknowledging bail as a human right as opposed to a financial luxury.

Section 482 BNSS: Bail bonds and sureties

The BNSS's Section 482 addresses sureties, bail bonds, and release conditions. Although the genuine goal of bail bonds is to ensure the accused's presence, their overuse or strict enforcement might compromise freedom.

The clause upholds the custom of demanding bonds and sureties, which has historically disadvantaged groups with lower incomes. BNSS does not completely remove the dependence on monetary conditions, even though it offers considerable flexibility. Therefore, judges must use caution to prevent bail bonds from being used as instruments of exclusion. The Supreme Court has frequently urged judges to, whenever feasible, favor personal connections over sureties. In order to maintain reasonable and proportionate bail requirements, a liberal reading of Section 482 is necessary.

JUDICIAL DISCRETION UNDER BNSS: BALANCING LIBERTY AND STATE INTEREST

Under BNSS, judicial discretion is still a key component of bail, especially in cases involving anticipatory and non-bailable bail. Unchecked discretion has the potential of being arbitrary and unfair, even though it enables courts to react to the particular facts of each case. The exercise of discretion is mostly left up to court interpretation because BNSS does not provide specific statutory guidelines. As a result, courts have a strong obligation to respect constitutional principles while making bail decisions. Unless there are exceptional circumstances that warrant detention, liberty must be prioritized and bail denials must be justified.

³ *Hussainara Khatoon v. State of Bihar*, (1980).

Under BNSS, judicial discretion must be guided by the Supreme Court's persistent emphasis on "bail as the rule." In order to prevent pre-trial detention from becoming punitive, courts must avoid considering bail as an exception.

Evaluation of BNSS bail reforms

From a human rights standpoint, BNSS is a hybrid reform. Mandatory bail for impoverished defendants is one example of a progressive change, but the CrPC's structural continuity is seen in the continuous use of discretion and sureties. The actual effects of BNSS will be determined by how judges and law enforcement authorities interpret and apply the statute, not just by its wording.

Critical analysis of bail reforms under BNSS

The introduction of the Bharatiya Nagarik Suraksha Sanhita, 2023 promised to make India's criminal justice system more effective, citizen-focused, and legally compliant. Because they have a direct impact on individual freedom during the pre-trial phase, bail reforms are an essential component of this change. However, a critical analysis shows that although BNSS adds certain progressive components, it still keeps a number of structural constraints that were carried over from the CrPC.

The fact that BNSS explicitly acknowledges economic fragility by requiring bail for impoverished defendants is one of its best features. Poverty should not be used as a justification for incarceration, according to this reform. In non-bailable offenses, however, BNSS mostly maintains the discretionary aspect of bail without establishing strong legal guidelines. Because of this, bail decisions could still be reliant on judges' subjective judgments rather than consistent rights-based criteria.

The ongoing use of sureties and bail bonds is another issue. While BNSS promotes flexibility, it does not eliminate the monetary system that has traditionally kept the poor out. Furthermore, the lack of stringent deadlines and accountability procedures for bail hearings runs the risk of sustaining delays that defeat the goal of bail.

BNSS is essentially a gradual reform as opposed to a radical change. Although it does not fully institutionalize bail as a basic human right, it does indicate legislative desire to humanize bail.

Human rights impact of BNSS Bail provisions

Bail serves as a safeguard against arbitrary detention and overbearing state power from the standpoint of human rights. By upholding default bail, acknowledging indigence, and keeping anticipatory bail as a precaution against abuse of arrest authorities, BNSS has a positive influence on human rights.

However, BNSS's effects on human rights are still inconsistent.

Inconsistent implementation of the discretionary framework controlling non-bailable offenses may lead to the unfair treatment of accused individuals in comparable circumstances. The equality before the law premise protected by Article 14 is undermined by such contradiction.

Pre-trial detention continues to have severe consequences for human dignity. Loss of Undertrial inmates are disproportionately affected by family disturbance, psychological trauma, social shame, and livelihood. Although BNSS recognizes these realities in theory, court sensitivity, assistance for legal help, and enforced punishment are necessary for its practical efficacy. Therefore, BNSS has the potential to improve the protection of human rights, but unless liberty-oriented interpretation becomes the rule rather than the exception, this promise will not be realized.

COMPARATIVE PERSPECTIVE BAIL LAWS IN THE UNITED KINGDOM AND THE UNITED STATES

United Kingdom

The UK's bail system is governed by the Bail Act, 1976, which was a significant step toward placing human liberty at the core of criminal procedure. The Act's goals were to prevent the overuse of pre-trial custody and to highlight the notion that an accused person should not be deprived of their freedom until it is absolutely necessary. The Act reflects the basic criminal law principle that all individuals are presumed innocent until and until proven guilty. One of the most significant features of the Bail Act, 1976 is the statutory presumption in favor of bail. The legislation states that release on bond is the norm and that incarceration prior to trial is only permitted in certain, limited circumstances. Bail may only be denied if the court is persuaded that there are reasonable suspicions that the accused would escape, tamper with witnesses or evidence, commit additional crimes, or if incarceration is otherwise required in the interest of justice. This systematic approach ensures that bail decisions are predictable, logical, and not arbitrary.

The UK framework also places a high priority on judicial discretion that is protected by statutory safeguards. Judges must take into account a variety of factors, including the seriousness of the offense, the accused's prior conduct and background, and their connections to the community. Importantly, even in situations when concerns are voiced, judges often choose conditional bail—such as reporting obligations, residency requirements, or mobility restrictions—over immediate imprisonment. The last resort is considered to be custody.

By putting a clear presumption of bail into laws, the UK approach successfully strikes a compromise between the necessity for

effective law enforcement and public safety and the preservation of individual liberty. As a comparative model, it offers useful data for India, where undertrial incarceration is still widespread. The UK experience demonstrates that a robust legal commitment to bail, supported by exacting standards and judicial accountability, may significantly reduce unnecessary incarceration without jeopardizing the administration of justice.

United States

The Eighth Amendment, which prohibits the imposition of excessive bail, and other constitutional provisions have a major influence on the American bail system. This clause reflects American constitutional doctrine, which states that pretrial custody shall not be utilized as a form of punishment. Although the Constitution does not grant an absolute right to bail in every scenario, it does mandate that bail conditions remain proportionate to both the alleged offense and the accused's personal circumstances, which places a considerable limit on judicial authority.

But in reality, the American bail system has frequently been criticized, particularly due to its emphasis on the idea of financial payment. In this situation, an accused person's release is sometimes contingent upon their ability to pay a sum of money established by the court. Due to their inability to pay bond, financially disadvantaged individuals may be detained for small or non-violent crimes while affluent accused individuals are able to be released quickly. This has brought up serious concerns regarding justice and equity. As a result, incarceration is often determined by economic capacities rather than being mandated by legislation.

Furthermore, the cash bail system has been linked to overcrowding in jails and lengthy pretrial incarceration, which disproportionately impacts marginalized and minority groups. In response to these concerns, several U.S. states have enacted bail reform initiatives, including the use of risk-based assessment tools, heightened pre-trial surveillance, and the partial or whole abolition of cash bail for specific categories of offenses. These reforms aim to bring bail processes into conformity with constitutional principles by prioritizing public safety and the risk of flight over an accused person's financial circumstances.

The United States' experience highlights the persistent gap between constitutional ideas and how they are actually applied when it comes to bail administration. Comparatively speaking, it offers India important insights, particularly with regard to the need to make sure that monetary bail terms do not serve as barriers to freedom and that judgments about pre-trial detention are based on fair, reasonable, and nondiscriminatory criteria

rather than economic inequality.

Canada

The Canadian bail system is based on the constitutional protections offered by the Canadian Charter of Rights and Freedoms, particularly Sections 7, 9, and 11(e). When taken as a whole, these provisions provide a robust framework designed to protect personal liberty and prevent unjustified imprisonment during the pre-trial stage.

A person's right to life, liberty, and security is protected by Section 7, which only authorizes deprivation of liberty when it complies with basic justice principles. Section 9, which prohibits arbitrary arrest and detention and requires that any restrictions on freedom be reasonable, lawful, and justified, further upholds this protection. Most importantly, Section 11(e) expressly recognizes an accused person's right to reasonable bail in the absence of a valid basis. Judges now have a clear constitutional duty to advocate for release and to only employ compelling, well-defined reasons for incarceration.

In reality, the Canadian bail system is predicated on a strong presumption of release; incarceration is only permitted where it is necessary to guarantee the accused's attendance in court, protect public safety, or preserve public confidence in the administration of justice. When denying bail, courts are expected to make thoughtful decisions in order to maintain accountability and transparency. A key element of the system is the "ladder principle," which requires courts to consider progressively less restrictive forms of release before imposing harsher terms or mandating incarceration.

When all is said and done, Canada's bail system is a rights-based approach that carefully balances personal liberty with legitimate social concerns. In comparison, it teaches India valuable lessons about how constitutional guarantees can be transformed into well-organized, ethical bail procedures that reduce unnecessary pre-trial incarceration while maintaining the presumption of innocence.

Lessons for India

By contrasting the bail laws of the US, Canada, and the UK, one can gain a better understanding of the evolution of Indian bail jurisprudence. One important lesson these systems impart to us is to reiterate the presumption in favor of release. Pretrial incarceration must remain the exception rather than the rule, and any limitations on freedom prior to conviction must be supported by strong evidence. The common practice of bail is closely related to the constitution's presumption of innocence and individual liberty.

Another crucial lesson is that bail applications must be examined promptly and meaningfully. Untrial detainees are occasionally detained for long periods of time because to procedural delays, sometimes for offenses with very mild sentences. Prompt bail hearings can prevent pretrial incarceration from becoming punitive and solve long-term jail overcrowding in addition to safeguarding individual freedom.

Comparative experience emphasizes the importance of strict judicial control in bail decisions. Instead of just authorizing an arrest or extended detention, courts must assess whether custody is truly necessary in each case. Well-reasoned bail rulings that are grounded in constitutional principles and human rights standards not only serve as an essential check against arbitrary incarceration, but they also support the criminal justice system's ongoing impartiality, fairness, and human rights focus.

SUGGESTIONS

Several doable actions can assist improve the effectiveness of India's bail system and better safeguard individual liberty in light of the BNSS's analysis and the difficulties encountered during its implementation:

1. **Bail requirements for minor offences:** Pretrial detention should only be used in extreme cases, and bail should be the norm for minor or non-serious offenses. This tactic ensures that crimes that don't actually pose a threat to society are never punished with incarceration.
2. **Explicit deadlines for bail decision:** Courts should be required to decide bail requests by specific deadlines. This will reduce jail congestion, avoid unnecessary delays, and safeguard the accused's right to a timely release decision.
3. **Bail legal aid access:** Many undertrials, particularly those from low-income households, struggle to navigate the legal system. Offering free or affordable legal aid for bail applications ensures that everyone can adequately exercise their rights and prevents detention based only on lack of representation.
4. **Bail guidelines standard:** To ensure equity and consistency, courts should use the same criteria when granting or denying bail. The kind of offense, flight danger, prior criminal history, and socioeconomic status are some of the factors that these regulations may consider. Increased transparency and public confidence in the legal system are two benefits of standardization.
5. **Judicial oversight is stronger:** To ensure that imprisonment is truly necessary, courts must actively evaluate police requests for detention. Requiring explicit, reasonable directives when bail is denied helps protect the

fundamental right to liberty and prevent the misuse of arrest authorities.

CONCLUSION

An important turning point in the development of India's criminal justice system is the Bharatiya Nagarik Suraksha Sanhita's analysis of bail as a human right. Bail has progressively taken on a much deeper constitutional and human rights importance, having started out as a procedural tool to ensure the accused's presence at trial. International human rights standards and constitutional law complement contemporary legal theory, which acknowledges that individual liberty cannot be carelessly compromised during the pre-trial phase. The denial of freedom prior to conviction undermines the presumption of innocence and runs the risk of turning the criminal justice system into a kind of punishment. In this situation, bail becomes a significant defense against arbitrary state authority and wrongful detention rather than just a question of judicial discretion or legislative grace.

This study has shown that the recognition of bail as a human right is based on fundamental constitutional foundations, especially Article 21 of the Indian Constitution, which protects the right to personal liberty and life. By requiring that arrests and detentions adhere to a fair, just, and reasonable process, judicial interpretation has played a significant role in broadening the extent of this right. A judicial commitment to safeguarding liberty from regular or mechanical detention is reflected in the idea that "bail is the rule and jail is the exception," which is consistently articulated. However, as seen by the high number of undertrial inmates, drawn-out investigations, and systemic injustices that disproportionately impact the impoverished and marginalized, the actual criminal justice system has frequently fallen short of this goal. These facts highlight the discrepancy between normative promises and real-world results, making bail reform both desirable and essential. By rethinking the bail process in India, the Bharatiya Nagarik Suraksha Sanhita is an attempt at legislation to close this gap. The BNSS aims to change the criminal justice system to one that is more rights-oriented by implementing timelinked safeguards against extended imprisonment, statutory bail provisions for specific groups of accused individuals, and clearer definitions. An acknowledgement of the human costs of pre-trial detention can be seen in the focus on decreasing needless incarceration, especially for first-time offenders and undertrials who have spent large sections of the maximum prescribed sentence in custody. Pretrial imprisonment is viewed as an extraordinary measure rather than the norm, and these revisions bring Indian criminal procedure closer to international human rights standards.

However, this analysis shows that the intrinsic conflicts surrounding bail as a human right are not resolved by the BNSS. The State's duty to safeguard victims' rights, public order, and the integrity of the legal system is reflected in the law's continued preservation of judicial discretion in cases of grave and egregious crimes. Human rights theory is not incompatible with such discretion, but if it is not guided by clear principles, it runs the risk of being inconsistent and arbitrary. The judiciary's ongoing influence on bail jurisprudence is highlighted by the permanence of discretion. In addition to interpreting the new legislative framework, courts are now tasked with making sure that its implementation upholds the fundamental principles of liberty, equality, and dignity. As a result, the judiciary's role has both increased and deepened in the post-BNSS age. Whether the reforms result in significant change will depend on the judiciary's awareness of the human rights implications of detention, particularly for accused individuals who are vulnerable and from low-income backgrounds.

The propensity of judges to consider liberty as the default position and to demand strong cause for prolonged incarceration determines how effective statutory bail measures are. In order to ensure that bail reforms are more than just symbolic, the judiciary must also actively address systemic delays, uphold procedural timetables, and stop the abuse of arrest authority. Even the most progressive legislative provisions run the risk of being compromised in practice in the absence of such judicial action. The significance of approaching bail from a more comprehensive theoretical perspective that takes into account the concepts of proportionality, due process, human dignity, and substantive equality is further highlighted by this study. Pretrial custody has serious social, financial, and psychological repercussions and frequently causes irreversible harm to the lives of those who may be found not guilty. Therefore, a bail system that prioritizes human rights must go beyond formal legality and address systemic injustices that restrict bail availability. Although the BNSS takes preliminary steps in this direction, its effectiveness will depend on additional changes including bolstering legal aid, enhancing judicial infrastructure, and encouraging accused individuals to become more aware of their rights.

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