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BAIL AND PERSONAL LIBERTY UNDER INDIAN CRIMINAL LAW: A CONSTITUTIONAL AND BNSS PERSPECTIVE

By- **Dr. Bhupender Kumar Jodhta** [1]

ABSTRACT

Bail jurisprudence in India lies at the intersection of criminal procedure and the constitutional guarantee of personal liberty under Article 21. Because pre-trial detention precedes any determination of guilt, it raises enduring questions of presumption of innocence, fair procedure and speedy trial. From the Supreme Court's foundational declaration in State of Rajasthan v. Balchand that "bail is the rule and jail is the exception," through Maneka Gandhi v. Union of India, Hussainara Khatoon v. State of Bihar and Satender Kumar Antil v. CBI, Indian courts have progressively transformed bail from a discretionary concession into a constitutional entitlement bounded by identifiable justifications. The replacement of the Code of Criminal Procedure, 1973 by the Bharatiya Nagarik Suraksha Sanhita, 2023 has altered the statutory landscape, most significantly through Section 479's differentiated release threshold for first-time offenders. Yet special statutes such as the Prevention of Money Laundering Act, 2002, the Unlawful Activities (Prevention) Act, 1967 and the Narcotic Drugs and Psychotropic Substances Act, 1985 continue to impose stringent conditions that sit uneasily with Article 21 - a tension recently addressed by the Supreme Court in Manish Sisodia v. Directorate of Enforcement and Javed Gulam Nabi Shaikh v. State of

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Maharashtra. This paper argues that statutory reform under the BNSS is a necessary but insufficient response to India's undertrial crisis, and that a durable solution requires courts, investigating agencies and prison administration to internalise a constitutional culture in which detention before conviction remains the exception it was always meant to be.

KEYWORDS: Bail; Personal Liberty; Article 21; Bharatiya Nagarik Suraksha Sanhita, 2023; Undertrial Prisoners; Speedy Trial; Presumption of Innocence.

INTRODUCTION

The law of bail occupies a central position in the administration of criminal justice. Arrest and detention represent the most direct exercise of coercive State power against an individual, and although imprisonment following conviction is a recognised consequence of criminal liability, detention before a determination of guilt stands on a fundamentally different footing. An accused person is ordinarily presumed innocent until proved guilty in accordance with law, and pre-trial detention is therefore intended primarily to secure the administration of justice rather than to constitute punishment in itself.

The constitutional significance of bail becomes particularly apparent when pre-trial detention is prolonged. The criminal justice system must simultaneously protect the interests of victims, witnesses and society, facilitate investigation and trial, and guard against arbitrary deprivation of liberty. Bail law therefore cannot be treated merely as a technical branch of procedure; it is the constitutional mechanism through which the competing claims of State power and individual liberty are reconciled.

Article 21 of the Constitution supplies the foundational guarantee: no person shall be deprived of life or personal liberty except according to procedure established by law.[2]

[2] The Constitution of India, art. 21.

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Judicial interpretation has transformed that phrase from a bare requirement of enacted procedure into a substantive demand of fairness, reasonableness and non-arbitrariness. It is against this backdrop that the Supreme Court, in *State of Rajasthan* v. *Balchand*, articulated the now-celebrated proposition that "bail is the rule and jail is an exception."[3] The proposition does not mean that every accused is automatically entitled to release; rather, it establishes liberty as the starting constitutional value and detention as a restriction that requires legal justification. The legislative transition from the Code of Criminal Procedure, 1973 to the Bharatiya Nagarik Suraksha Sanhita, 2023 ("BNSS") marks a significant stage in this development.[4]

Chapter XXXV of the BNSS deals with bail and bonds, while Section 479 addresses the maximum period for which an undertrial prisoner may be detained. This paper examines whether these statutory changes sufficiently advance the constitutional promise of personal liberty and speedy trial, and considers the continuing tension between ordinary bail principles and the stringent requirements imposed by special criminal statutes. It argues throughout that the administration of bail must maintain a constitutionally appropriate balance between the interests of investigation and societal security, on the one hand, and the individual's right to liberty and a speedy trial, on the other.

CONSTITUTIONAL FOUNDATIONS OF BAIL AND PERSONAL LIBERTY

Article 21 occupies a foundational position within the Indian constitutional framework. In *Maneka Gandhi* v. *Union of India*, the Supreme Court expanded the meaning of personal liberty and held that any procedure depriving a person of liberty must itself satisfy requirements of fairness, reasonableness and non-arbitrariness.[5] The

[3] State of Rajasthan v. *Balchand*, AIR 1977 SC 2447.

[4] The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023). The Act came into force on 1 July 2024.

[5] Maneka Gandhi v. *Union of India*, AIR 1978 SC 597.

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constitutional significance of bail lies precisely here: a court considering bail is not merely deciding whether to extend a statutory concession to an accused, but determining whether continued State custody is constitutionally justified pending trial.

The presumption of innocence is a cardinal principle of criminal jurisprudence. It means that an accused person is not to be treated as guilty merely because proceedings have commenced against him, and that pre-trial detention must consequently rest on a legitimate procedural justification - such as preventing absconding, protecting the integrity of investigation, preventing witness intimidation, or addressing a demonstrable risk of obstruction of justice. In *Gudikanti Narasimhulu* v. *Public Prosecutor*, Krishna Iyer J. emphasised that the issue of bail involves liberty, justice, public safety and the burden on the public treasury, and that bail jurisprudence consequently demands a socially sensitised judicial approach, since detention affects not only the accused but also the family and economic circumstances surrounding him.[6]

EVOLUTION OF BAIL JURISPRUDENCE IN INDIA

The *Balchand* formulation became the foundation for later judicial development precisely because it reflects a presumption that pre-trial incarceration should not ordinarily be used as a substitute for punishment. That presumption acquired an additional, temporal dimension in the *Hussainara Khatoon* series, where the Supreme Court recognised speedy trial as an essential component of Article 21.[7] Where the State is unable to bring an accused to trial within a reasonable period, continued incarceration becomes correspondingly more difficult to justify.

More recently, in *Satender Kumar Antil* v. *Central Bureau of Investigation*, the Supreme Court addressed unnecessary arrests and mechanical remand and bail practices,

[6] Gudikanti Narasimhulu v. *Public Prosecutor*, AIR 1978 SC 429.
[7] Hussainara Khatoon (I) v. Home Secretary, State of Bihar, (1980) 1 SCC 81.

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issuing directions intended to rationalise arrest and bail proceedings.[8] The decision reaffirmed that arrest should not automatically follow the registration of an FIR, and that custodial interrogation must be justified by the actual circumstances of the case rather than assumed as a matter of course.

Statutory Framework under the Bharatiya Nagarik Suraksha Sanhita, 2023

The BNSS represents a major restructuring of India's criminal procedural framework. Chapter XXXV, comprising Sections 478 to 496, establishes the principal statutory architecture concerning bail and bonds.[9] Section 478 substantially corresponds to the former Section 436 of the CrPC and governs bail in bailable offences: where a person accused of a bailable offence is prepared to furnish bail, release follows as a statutory entitlement subject to law.[10]

Section 480 governs bail in non-bailable offences.[11] It recognises judicial discretion while requiring the court to consider the nature and gravity of the accusation, the possibility of absconding, the risk of interference with witnesses or evidence, and other circumstances relevant to justice. Such discretion must remain constitutionally informed; it cannot be allowed to collapse into arbitrariness.

SECTION 479 AND THE RIGHTS OF UNDERTRIAL PRISONERS

Section 479 BNSS deals with the maximum period for which an undertrial prisoner may be detained.[12] An undertrial who has undergone detention for one-half of the maximum period of imprisonment specified for the offence is generally entitled to release on bail, subject to statutory conditions; for a first-time offender, the relevant threshold is one-third of that maximum period. In this respect Section 479 advances the relief earlier available under Section 436A of the CrPC by introducing a

[8] Satender Kumar Antil v. Central Bureau of Investigation, (2022) 10 SCC 51.
[9] The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), ss. 478–496.
[10] Ibid., s. 478 (corresponding to s. 436 of the Code of Criminal Procedure, 1973).
[11] Ibid., s. 480 (corresponding to s. 437 of the Code of Criminal Procedure, 1973).
[12] Ibid., s. 479.

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differentiated, more protective threshold for first offenders and by dispensing with the requirement of sureties for such offenders in specified circumstances.

The provision is significant because it recognises that prolonged undertrial detention may itself become disproportionate, and the special treatment of first-time offenders is particularly important from the standpoint of socio-economic justice. Section 479 also places an obligation on the Superintendent of Jail, in specified circumstances, to move the court for release. At the same time, the threshold it fixes is properly understood as a beneficial ceiling and not a floor: it must operate alongside ordinary bail principles and the constitutional guarantee of personal liberty, rather than becoming, in practice, a minimum period of imprisonment that every accused must first serve before release can even be considered.

Default bail performs a related but distinct constitutional function. Section 187 BNSS, replacing Section 167 of the CrPC, retains the basic statutory time limits for completion of investigation.[13] Where investigation is not completed and the police report is not filed within the prescribed period, the accused acquires an enforceable statutory entitlement to default bail, subject to the requirements of law. The statutory time limit thereby acts as a check against investigative delay, reinforcing the principle that criminal procedure cannot become an instrument for indefinite deprivation of liberty while investigation remains open-ended.

SPECIAL CRIMINAL STATUTES AND CONSTITUTIONAL TENSION

The general principles described above have been significantly modified by special criminal statutes. The Prevention of Money Laundering Act, 2002, the Unlawful Activities (Prevention) Act, 1967 and the Narcotic Drugs and Psychotropic Substances Act, 1985 each contain provisions imposing additional restrictions on release.[14] Section

[13] Ibid., s. 187 (corresponding to s. 167 of the Code of Criminal Procedure, 1973).

[14] The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967); The Narcotic Drugs and Psychotropic Substances Act, 1985 (Act 61 of 1985).

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45 of the PMLA is illustrative: the court must be satisfied that there are reasonable grounds for believing the accused is not guilty of the offence and that he is not likely to commit any offence while on bail.[15] These "twin conditions" are considerably more demanding than the ordinary principles applicable under general criminal procedure, and in effect invert the presumption of innocence at the bail stage.

The constitutional difficulty arises when such a stringent statutory provision interacts with an exceptionally prolonged trial. If the trial is unlikely to conclude within a reasonable period, continued incarceration begins to raise a direct Article 21 concern, and the Supreme Court has repeatedly treated constitutional liberty as relevant even where special legislation imposes stringent bail conditions.

JUDICIAL RESPONSE TO PROLONGED INCARCERATION: MANISH SISODIA AND JAVED GULAM NABI SHAIKH

In *Manish Sisodia* v. *Directorate of Enforcement*, the Supreme Court considered prolonged incarceration in proceedings involving the PMLA and the Prevention of Corruption Act.[16] The appellant had remained incarcerated for about seventeen months while trial had not commenced, owing to the sheer volume of documents and witnesses involved. The Court held that the right to speedy trial is a fundamental right and that prolonged incarceration cannot be justified indefinitely merely by invoking the stringent conditions of Section 45

PMLA; that provision must instead be read harmoniously with Article 21 and with Section 483 of the BNSS.[17] The judgment does not create an automatic rule that prolonged incarceration always results in bail; rather, it demonstrates that statutory

[15] The Prevention of Money Laundering Act, 2002 (Act 15 of 2003), s. 45.

[16] Manish Sisodia v. *Directorate of Enforcement*, 2024 INSC 595 : [2024] 8 SCR 1061.

[17] The Bharatiya Nagarik Suraksha Sanhita, 2023, s. 483 (corresponding to s. 439 of the Code of Criminal Procedure, 1973).

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restrictions must be applied in harmony with Article 21, with due regard to the realistic possibility of the trial being completed within a reasonable time.

A comparable approach informed *Javed Gulam Nabi Shaikh* v. *State of Maharashtra*, where the accused had been in custody for more than four years in a prosecution under the UAPA, with the trial court yet to frame charges and the prosecution proposing to examine some eighty witnesses.[18] The Supreme Court declined to adjourn the matter merely because the investigating agencies sought further time, and granted bail subject to conditions, reiterating that bail is not to be withheld as a punitive measure and that the seriousness of an offence does not, by itself, operate as a blanket embargo on personal liberty once the trial proceeds at a pace that offends constitutional guarantees.

Read together, these decisions confirm that the seriousness of an allegation remains a relevant factor but cannot, by itself, serve as an absolute justification for indefinite pre-trial detention. Bail adjudication under special statutes must account for the actual duration of custody already undergone and the realistic progress of the trial, rather than resting on the statutory label attached to the offence.

BAIL, SOCIO-ECONOMIC INEQUALITY AND THE PRESUMPTION OF INNOCENCE

A less visible dimension of bail jurisprudence concerns the relationship between poverty and incarceration. A court may formally grant bail, yet if the accused cannot arrange the required surety or comply with excessive financial conditions, he may remain in custody notwithstanding the grant - a phenomenon commonly described as "bail poverty." Formal liberty and effective liberty may thus diverge, and the constitutional guarantee of equality under Article 14 reinforces the need to calibrate bail conditions to the actual circumstances of the accused.[19] This problem is

[18] Javed Gulam Nabi Shaikh v. *State of Maharashtra*, 2024 INSC 645 : [2024] 7 SCR 992.
[19] The Constitution of India, art. 14.

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compounded by prison overcrowding: undertrials constitute a large majority of India's prison population, a crisis exacerbated by the
mechanical authorisation of remand at the level of the subordinate magistracy and the imposition of onerous, uncalibrated bail conditions.

Section 479's removal of the surety requirement for eligible first-time offenders is a direct legislative response to this problem, but the broader discretionary power under Section 480 for other accused persons must equally be exercised with heightened sensitivity to socioeconomic status. A bail condition should facilitate the administration of justice, not operate as an indirect mechanism of continued detention. As the Supreme Court observed in *Sanjay Chandra* v. *Central Bureau of Investigation*, the object of bail is to secure the presence of the accused at trial, not to punish him in anticipation of conviction - a principle of particular force in cases involving economic offences, where the necessity of custody is often comparatively weak.[20]

The presumption of innocence carries an important procedural consequence: detention before conviction must remain justified by legitimate purposes of the criminal process, without implying that an accused facing serious allegations must always be released. Consistent with the caution in *Dataram Singh* v. *State of Uttar Pradesh* that the liberty of a person facing trial ought not to be interfered with lightly,[21] courts may usefully structure bail adjudication around concrete factors - whether custodial interrogation is necessary, whether there is a reasonable possibility of absconding, whether a credible risk of witness intimidation or evidence tampering exists, how far investigation has progressed, how long the accused has already been in custody, and how long the trial is realistically expected to continue. Such an approach transforms bail adjudication from a mechanical assessment of the seriousness of an offence into a structured constitutional exercise.

[20] Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 40.
[21] Dataram Singh v. State of Uttar Pradesh, (2018) 3 SCC 22.

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RIGHT TO SPEEDY TRIAL AND THE EXERCISE OF JUDICIAL DISCRETION

Delay in criminal trials arises from numerous causes, including large numbers of coaccused, voluminous evidence, repeated adjournments, shortage of judicial officers, procedural challenges and institutional limitations. In *A.R. Antulay* v. *R.S. Nayak*, the Supreme Court laid down guidelines requiring courts to weigh the nature and reasons for delay, the conduct of the accused, the complexity of the case and the likely time required for completion, rather than treating every delay as automatically entitling an accused to bail or to termination of proceedings.[22] An accused should not ordinarily bear the entire burden of systemic delay, but the constitutional principle stops short of an automatic rule in his favour.

This calibrated approach extends even to statutes with express bail restrictions. In *Union of India* v. *K.A. Najeeb*, the Supreme Court held that constitutional courts retain the power to grant bail under the UAPA where trial delay renders continued incarceration disproportionate, and that statutory restrictions on bail do not oust this constitutional jurisdiction.[23] Discretion of this kind must nonetheless be structured by consistent constitutional principle, so that similarly situated accused persons receive broadly consistent treatment, subject to material differences in fact and law. Because most bail applications are decided at the subordinate judicial level, the practical protection of Article 21 depends substantially on the first judicial decision concerning continued custody - clear reasons, proportionate conditions and periodic review can meaningfully reduce unnecessary incarceration without compromising the legitimate interests of the criminal process.

FROM CRPC TO BNSS: A CRITICAL ASSESSMENT

[22] A.R. Antulay v. R.S. Nayak, (1992) 1 SCC 225.
[23] Union of India v. K.A. Najeeb, (2021) 3 SCC 713.

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The transition from the CrPC to the BNSS is not merely a change of statutory terminology. Section 479's reduction of the release threshold from one-half to one-third for first-time offenders is potentially significant, but a statutory text of this kind cannot achieve reform on its own: it requires effective identification of eligible prisoners, consistent judicial implementation and sustained institutional monitoring. Absent the administrative machinery to identify eligible undertrials in practice, the provision risks remaining a paper safeguard rather than a lived entitlement.

The underlying problem of prolonged trials cannot be solved through bail law alone; it requires adequate judicial strength, infrastructure, technology and prosecutorial capacity.

The BNSS is therefore best understood as one component of a broader programme of criminal justice reform, not as a complete solution to undertrial incarceration. As the Supreme Court cautioned in *Arnab Manoranjan Goswami* v. *State of Maharashtra*, Article 21 cannot be reduced to a mere formality[24] - courts retain an institutional responsibility to enforce liberty even where legislative and administrative reform remains incomplete.

SUGGESTIONS FOR REFORM

1. Periodic undertrial review: each prison should maintain an updated, accessible record of undertrial prisoners approaching or completing the statutory thresholds under Section 479.
2. Automatic judicial review of prolonged custody at fixed intervals, rather than only upon an application being moved on the accused's behalf.
3. Bail conditions proportionate to the accused's actual financial capacity, rather than uniform monetary benchmarks that disregard indigence.
4. A proactive role for Legal Services Authorities in identifying undertrials who remain in custody solely because they cannot satisfy bail conditions.

[24] Arnab Manoranjan Goswami v. State of Maharashtra, (2021) 2 SCC 427.

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5. Consistent compliance by investigating agencies with the directions in Satender Kumar Antil, distinguishing the need to investigate from the need to arrest and detain.
6. Integrated digital monitoring of custody periods, statutory eligibility and trial progress across courts and prison administration.
7. Continuous judicial training on constitutional principles governing arrest, remand, bail and speedy trial, with particular emphasis on the subordinate judiciary.
8. Periodic review of stringent bail provisions in special statutes where trials become exceptionally prolonged, consistent with the approach in Manish Sisodia and Javed Gulam Nabi Shaikh.

CONCLUSION

Bail jurisprudence in India is ultimately a jurisprudence of constitutional liberty. The power of the State to arrest and detain is essential to criminal justice, but that power is not unlimited: Article 21 places substantive constitutional boundaries around any deprivation of personal liberty. The judicial evolution traced in this paper - from *Balchand* through *Maneka Gandhi*, *Hussainara Khatoon* and *Satender Kumar Antil*, to *Manish Sisodia* and *Javed Gulam Nabi Shaikh* - demonstrates a continuing constitutional commitment to ensuring that pre-trial detention does not become punishment before conviction.

The BNSS, particularly Section 479, represents an important legislative response to prolonged undertrial incarceration, but statutory reform alone cannot resolve India's bail and undertrial crisis. Its effectiveness will depend on judicial implementation, administrative monitoring, the responsible exercise of police power, the availability of legal aid, and the timely completion of trials. The constitutional principle at stake is therefore neither that every accused must be released nor that serious allegations

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justify indefinite detention: it lies in the balance between individual liberty and the legitimate requirements of criminal justice.

The continuing relevance of the maxim that bail is the rule and jail is the exception lies precisely in this balance. It reminds the criminal justice system that detention before conviction must remain legally justified, proportionate and connected to a legitimate purpose. The transition from the CrPC to the BNSS offers an opportunity to move toward a more liberty-conscious system of criminal procedure - but its success will depend not merely on the words of the statute, but on the manner in which courts, police authorities, prosecutors, prisons and legal services institutions translate those words into effective constitutional protection.

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