*Page 4408 - 4415* **DOI:** *https://doij.org/10.10000/IJLMH.1111964*

# INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

**[ISSN 2581-5369]**

**Volume 9 | Issue 2**

**2026**

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# From Liberty to Liability: Evaluating the Effectiveness of Bail Reforms under BNSS, 2023 in Indian Prison Jurisprudence

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## ABSTRACT

*The Indian justice system considers bail to be very important as it aids in the safety of the citizen and ensures that the justice system works properly, under the Article 21 of the Indian Constitution. With the introduction of new provisions for bail in BNSS 2023, the process of how bail works has been changed, showing their belief in "bail; not jail". This paper studies how the laws about bail have changed from the CrPC to the BNSS and scrutinizes whether the recent changes have really aided in fixing the unfairness in the system for people with financial difficulty who are waiting for their trial.*

*By studying Sections 478 & 496, court decisions and recommendations from the Law Commission, it can be observed that there is a gap between what the law says and what actually happens. Even though there exist rules like making it mandatory for indigent persons to be released on personal bond and setting time limits for release, judicial discretion still results in the perpetuation of socio-economic bias. In India more than 70% of the people in prison are waiting for their trial and the numbers, taken from the NCRB shows that this really affects indigent persons, who cannot pay for bail.*

*The paper also compares the Indian system to countries like the United Kingdom, the United States and the Nelson Mandela Rules while also highlighting the efficacy of the new changes to the bail system in India introduced through BNSS. However, government supervision and judicial discretion is mandatory to ensure that these new laws work properly, particularly with the economic situation of the people requesting bail.*

*Ultimately, India needs to make some changes in the current laws as well. This means that law must make sure that people have efficient legal representation to help them during trial & monitoring courts to ensure that they are not too harsh while granting bail. Without inculcating these changes, pre-trial detention will still continue as an indirect punishment. The Indian bail system needs to be mended so that bail is a right not just in paper, but in reality, as well.*

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# I. INTRODUCTION

The principle of bail implies the juridical process whereby an accused charged with cognizable offences is released from custody on the basis of obtaining security for his future presence in the court and his compliance to its territorial jurisdiction during trial. The mechanism—one of the main functions of the adversarial system—leaves a reconciliation between the presumption of innocence, guaranteed in Article 21 of the Constitution of India, and the imperatives of effective administration of criminal justice[2]. Pursuant to Sections 478 and 480 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), wherein an arrestee is not charged with any non-bailable offence and any unnecessary or irrelevant obstructions to such release is not allowed. That provision is peremptory, the magistrate is required to admit the accused to bail or recognizance upon the issuance of a bond, whether with or without sureties, to ensure his appearance pending inquiry or trial. The accused, ordinarily, will stay free and detention will not be appropriate save in respect of the person’s failure to provide sufficient security for such purpose as meet the requirements of attendance. In other words, bail presumes actual detention and the person in a state not confined by the bounds of legal detainment cannot rely on bail for relief[3].

The founding principle of Indian criminal jurisprudence was consolidated in the judgment of the Supreme Court of India in State of Rajasthan v. Balchand alias Baliay (1977) 4 SCC 308 - where it was held that the deprivation of liberty thereof is intolerable in the absence of a manifest crime. Unless there is an obvious risk that the accused will escape or a threat of intimidation on witnesses, the tampering with evidence or for subverting the course of justice, pretrial imprisonment would not be justified. The residuary rule has a crystallised formulation in Gurbaksh Singh Sibbia v. State of Punjab (1980) 2 SCC 565, which states that bail should be denied unless circumstances except exceptionality, viz., gravity of offending, accused criminal record or the risk of repeating a crime, militate against it[4].

Refusal of bail infringes on the fundamental right to life and personal liberty under Art. 21 and is of the very rare sort and is open for close inspection. As warned in Arnesh Kumar v. State of Bihar (2014) 8 SCC 273, non-literal rejection on the practical level was against constitutional principles. Prolongation in custody, under the shadow of prosecution lags due to systemic failings such as judicial backlog, nullifies justice; accused individuals need to be enlarged on

[2] Maneka Gandhi v. Union of India (1978) 1 SCC 248; Article 21, Constitution of India.
[3] BNSS, 2023, Sections 478 & 480 (India Code).
[4] State of Rajasthan v. Balchand (1977) 4 SCC 308; Gurbaksh Singh Sibbia v. State of Punjab (1980) 2 SCC 565.

bail save in very serious cases[5]. Recent pronouncements, such as the Supreme Court's clarification in Satender Kumar Antil v. CBI (2026 INSC 115) in January 2026, strengthen this notion that in the event of offences with periods of imprisonment up to seven years an order of notice is the standard in terms of Section 35(3) of the BNSS, and to the extent of the exception is for holding any suspect not in law, this would reinforce more forcefully the idea that liberty is the status quo[6].

The move in the CrPC to BNSS, which took effect from 1 July 2024, is to ensure that fundamental bail principles are not eroded and criminal procedure is streamlined by statute. Chapter XXXV of the BNSS (Sections 478–496) integrates and adjusts the old CrPC provisions (Sections 436–450), providing clear provisions for indigent accused persons as well as for release for undertrials within a specified time frame. Section 479 specifically minimizes the threshold for first-time offenders to one-third of the maximum sentence, a welcome shift from Section 436A of the CrPC. However, there remain implementation gaps, particularly for the socio-economically disadvantaged sections — the majority of India's undertrial population[7]. Scholarly literature in this area studies, including reports by the Centre for Law and Policy Research (CLPR) and articles published in the Economic & Political Weekly, reveal that despite doctrinal progress, actual practices on the ground still bear the mark of a "premium on poverty" in bail practices[8].

**Research Gap**

Despite numerous Supreme Court orders (Hussainara Khatoon v. State of Bihar (1979) 1 SCC 81, Moti Ram v. State of M.P. (1978) 4 SCC 47, Rudul Sah v. State of Bihar (1983) 4 SCC 141, etc.), no evidence is available of any systematic empirical or doctrinal work examining the reasons why trial courts continue to be adamant on the necessity of monetary sureties and substantial amounts of bond in the case of the poor, even in lesser cases. The "bail not jail" doctrine is often repeated in the literature but is under-examined for its effective application under the new BNSS, 2023[9]. There is also a paucity of literature on how Sections 478–496 BNSS meet with the entrenched CrPC bail regime at magisterial level. In fact, while National Crime Records Bureau (NCRB) data is frequently quoted to demonstrate the over-representation of undertrial defendants and overcrowding of prison facilities, research rarely connects these statistics to factors influencing bail decisions, including socio-economic status,

[5] Arnesh Kumar v. State of Bihar (2014) 8 SCC 273.
[6] Satender Kumar Antil v. CBI (2026 INSC 115).
[7] BNSS Chapter XXXV, Sections 478–496; PRS India Analysis (2023).
[8] Abhinav Sekhri, "Retaining the 'Premium on Poverty'" (2025) CrimLR; CLPR Bail Report (2020).
[9] Law Commission of India, 268th Report (2017).

affordability of surety and nature of offence[10].

The disproportionate effect of bail conditions on individuals who are illiterate or semi-literate (and below the poverty line) remains grossly underexplored in terms of violations of Articles 14 and 21. Comparative studies usually tend to consider conviction rates or hasty-trial statutes in other countries, yet seldom extract actionable takeaways for India to consider when designing bail and handling undertrial cases[11]. Judicial discretion is recognized in publications including the Law Commission of India's 268th Report (2017), but there is limited detailed analysis into the reality of what criteria are made (or abrogated) by magistrates and sessions courts when balancing liberty, victim interests and community safety[12].

Moreover, although the text refers to compensatory jurisprudence (Rudul Sah) and processual justice (Justice Krishna Iyer Committee, 1987), there is very little integrated accounting of how these doctrines ought to reconstitute the bail conditions, surety ratios and personal bonds for BNSS. The economic cost of maintaining such a large under-trial population in the context of state exchequer is rarely expressed as a normative argument for liberalisation. However, a clear and present-day gap in this knowledge remains in how we look at bail between the two lenses, “distributive justice” and “legislating morality,” and more specifically, how practice in current institutions continues to uphold inequality by putting the poor behind bars while giving the wealthy the money to buy temporary freedom[13].Scholarship tends to divide regular, interim and anticipatory bail as doctrinal chasms rather than parts of an interlocking system for protecting liberty. The links between BNSS bail arrangements, Article 39A's right to free legal aid, and pre-trial legal representation are still to be examined comprehensively[14].It has been relatively recent that we have attempted to map the transition between CrPC and BNSS to establish which reforms actually occurred and whether or not structural inequalities are just replicated as a result. This study helps to fill these gaps by analyzing critically BNSS bail law and practice for the undertrial detainees, particularly for the destitute, and suggests reforms resting on constitutional guarantees and comparative standards[15].

**Statement of Problem**

The total inmate population in Indian prisons remains overcrowded, whereby the undertrial prisoners embracing 73.5-77.9% if the total inmate population as per NCRB prison statistics

[10] NCRB Prison Statistics India 2023.
[11] Penal Reform International, Nelson Mandela Rules Implementation (2020).
[12] Law Commission 268th Report, para 5.15.
[13] CLPR, “Re-imagining Bail Decision Making” (2020).
[14] EPW articles on undertrial prisoners (2025).
[15] User research gap synthesis + TISS studies.

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India 2023(approximately 3.9 -4.5 lakh out of 5.30-5.82 lakh prisoners), the national occupancy stands at120.8-133%, imposing a massive fiscal burden on the state while violating constitutional rights[16]. The marginalized groups are disproportionately represented among undertrials, largely due to inability due to the inability to furnish monetary sureties or high bail bond.[17] However, the concept is that "bail is the rule, jail is the exception" pronouncement, trial courts imposes unrealistic conditions, which converts the pre-trial detention into de facto punishment without conviction.[18]

The BNSS 2023 introduces progressive elements such as the mandatory personal bonds for indigent under section 478 and time bond release under section 479.Yet, ground- level implementation of these provisional practice lags due to the judicial discretion, ineffectiveness of mandatory socio-economic inquiries in bail orders, and lacunae of legal aid at the first-production stage. These lacunae and ineffectiveness lead to inequality, undermines article 14 and 21 of the Indian constitution, and it also contravenes the Nelson Mandela Rules (2015), which mandate pre-trial detention as a last option in relation with individualized, non-discriminatory assessments[19]. The pending over of 5 crore cases in courts due to the Prosecutorial delays, Judicial backlogs and the lack of a comprehensive Bail Act exacerbate the crisis. The problem thereby is not only about the merely administrative but structural, reflecting a social biasness which effects in disproportionately penalizes poverty[20].

## II. THE HISTORICAL EVOLUTION AND JURISPRUDENCE OF BAIL IN INDIA

If we draw back the idea of bail in India isn't something which had come in force by the British Rule. Ancient Hindu law talked about "nantana," and the Mughal courts relied on sureties too. Still, the rules most people would recognize today took shape when the British rolled out the Criminal Procedure Codes of 1861, 1882, and 1898. Those codes split crimes into bailable and non-bailable and, for better or worse, handed magistrates a lot of margins[21]. Post Independence by the 41st Law commission report- incorporated personal bonds and anticipatory bail in section 438 of CRPC, which showcases an liberty-centric shift in the law, accordingly the land supreme court rulings in relation with the jurisprudence of bail under the scope of article 21, such as Moti Ram ( 1978) criticized exorbitant sureties as discriminatory against the poor; Balchand declared ( 1977) ruled that " bail is the rule, jail the exception"; and Sibbia (1980) liberalized

[16] NCRB Prison Statistics India 2023, Executive Summary.
[17] Insights Dataful (2026); NCRB 2023.
[18] Hussainara Khatoon v. State of Bihar (1979) 1 SCC 81
[19] UN Nelson Mandela Rules (2015), Rules 89–94.
[20] Malimath Committee Report (2003); Vijay Raghavan, EPW (2025).
[21] Law Commission 41st Report (1969).

anticipatory bail[22].

The whole rationalizes of bail rest on the presumption of innocence, which reflects in the prohibition of pre-trial punishment, and reconciliation of liberty of Individuals with public interest. Krishna Iyer Committee (1987) and The Mulla Committee (1980-83) recommended for non-monetary bonds reformative justice and advocated for reduction in the undertrial detention. The Malimath Committee (2003) similarly urged the systematic renovation[23]. The law commission 268th report (2017) advocated a dedicated Bail Act to irradicate arbitrariness and poverty bias, proposing risk-assessment tools and presumptive personal bonds[24]. Yet even now, under trials still pack our jails, proving that the recommendation became inactive and still the undertrials ratios are persistently high in India.

## III. Bail provisions under BNSS 2023- key reforms and interactions with CRPC practices

BNSS Chapter XXXV (section 478-496) largely reflects the CRPC chapter XXXIII but introduces targeted reforms. Section 478 of Bnss makes bail mandatory for bailable offences and for indigent persons the section mandates for personal bonds. Section 479 limits the undertrial detention for one third of the maximum offenders and one-half otherwise, requiring jail superintendents to apply for releases[25]. In terms with the non-Bailable offences section 480 guides by the factors such as the offence gravity and other risk elements in relation towards the material possibilities on whether granting bail would affect the possibilities of fair trial of the offence. Then Anticipatory bail is retained under section 482 as same as formerly 438 Crpc, while the inherent power in relation towards the bail is conferred by the high court/ session court is preserved in section 483[26].

These statutory shifts in the criminal procedural law operationalize Arnesh Kumar and Satindra Kumar Antil guidelines by prioritizing least-restrictive conditioned offence categorization. Early post-2024 data, However, reveals uneven adoption: magistrates continue to perform monetary sureties over personal bonds, reproducing CrPc-era inequalities[27]. The notable scholarly analyses in journals such as Indian Journal of Criminology states that without mandatory socio-economic profiling, Bnss risk becoming a procedural finish over substantive

[22] Moti Ram v. State of M.P. (1978) 4 SCC 47.
[23] Mulla Committee (1983); Krishna Iyer Committee (1987).
[24] Law Commission 268th Report (2017), Ch. XI.
[25] BNSS Section 479 (proviso for first-time offenders).
[26] Comparative Table, BPR&D (2025).
[27] JuriGram, “BNSS vs CrPC Bail Provisions” (2026).

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injustice[28].

## IV. Judicial discretion, socio-economic barriers for the poor, and comparative international standards

The judicial discretion under Section 478-480 BNSS, though these provisions are necessary to ensure justice, frequently results in prolonged detention due to risk-averse magistrates, implicit caste/class biases, and inadequate recording of denial reasons. The data published by NCRB 2023 confirms that over 70% of undertrials belong to marginalized groups who are unable to afford sureties, violating Article 14 equality[29]. Despite Article 39A there are several barriers which includes illiteracy hindering bond execution, absence of local sureties, and deficient legal aid practice at remand[30].

While considering the international standards, the first important rules to considered is the Nelson Mandela Rules (89-94) which mandates to limit the scope of pre-trial detention as last resort with individualized risk assessment and non-discriminatory treatment standing, where India lacks in a huge margin in terms with the application of the rules[31]. In the other end while considering Uk and U.S, their UK Bail Act 1976 emphasis community ties and electronic monitoring over cash bail, While U.S jurisdictions increasingly favors the bail concept in assessing with the risk-based tool and abolishes cash bail[32]. The recent studies including, those by the commonwealth Human Right Initiative describes how BNSS implementation has not yet translated into measurable reductions in undertrial population and moreover, the Fiscal cost of undertrial maintenance further underscores the need for liberalization in the law in relation with bail[33].

## V. Conclusion

The shift towards the BNSS 2023 from the CRPC showcases a meaningful legislative shift toward a rights complaint bail regime by codifying indigent safeguarding measures under the provision of section 478 and time bound releases under section 479. These provisions seek to operationalize the constitutional mandate of "Bail not Jail" while elucidating systematic delays. However, as demonstrated through historical tracing, doctrinal analysis, and comparative evaluation, the CrPC-to-BNSS transition as not fully eradicated structural injustices. Judicial

[28] Indian Journal of Criminology papers on BNSS impact (2025)
[29] NCRB 2023, Ch. 3.
[30] ] Article 39A, Constitution of India; NALSA reports.
[31] UNODC, Nelson Mandela Rules (2015).
[32] UK Bail Act 1976; U.S. Pretrial Justice Institute studies.
[33] Commonwealth Human Rights Initiative Prison Monitoring Reports (2024–25).

discretion remains a primary driver of prison overcrowding as seen in the NCRB Data of 2023 (73.5-77.9% undertrials), and the tragical socio-economic barriers continue to obstruct personal bonds even after several supreme court rulings such as Moti Ram and Satender Kumar Antil[34].

This article has addressed the research objectives by tracing bail's Historical origins, analyzing committee report and rationales and It can be addresses in response of the statement of problem that is the scope of BNSS 2023 protects Article 21 but fails equitably for the poor; socio-economic barriers, the increase in overcrowding due to the judicial discretion despite having persisting jurisprudence and the Indian Practices which lags Mandela Rules standards. The study identifies gaps in this ineffectiveness by elucidating NCRB data with bail-decision variables and highlighting distributive justice dimensions. In conclusion it can noted that without the empirical monitoring and deeper reforms, the "Bail not Jail" principle remains aspirational, perpetuating inequality which led to violation of Article 14 and 21 violations. The Bail Jurisprudence must represent a modest shift toward into a unified liberty -protecting framework embracing constitutional values, global best practices, frequent committee reports. Only then the practice of pre-trial detention ceases functioning as de facto punishment.

**Recommendations**

The following requirements could be a key reformative action to increase the effectiveness of the concept of bail, and these measures can play a key role in reducing overcrowding in Jails specifically reduction in the undertrials prisoners, they are as follows:

1. Enact a standalone Bail Act incorporating law Commission 268th report recommendations, mandating statutory bond limitations linked to income, presumptive personal bonds, socio-economic profiling, and integration of Article 39A at first production[35].
2. Incorporate Nelson Mandela aligned risk-assessment tools; and institute periodic monitoring consist of a committee chairing supreme court/high court judges monitoring the compliances effectively in the interest of public and mandate reasoned orders of every denial of bail and strictly enforce Satendar Kumar Antil Categorization.
3. Establish a National Bail Oversight Committee under the Ministry of Home Affairs for Accountability

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[34] NCRB 2023; Satender Kumar Antil (2026).
[35] Law Commission 268th Report, Annexure A.