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## Comparative Analysis Of Bail Provisions – Old Law (Crpc) Vs. New Law (Bnss)

**VIBHU BAKSHI**

**Advocate- Delhi High Court**

**BA LLB – VIPS, GGSIPU**

### ABSTRACT

This research delves into the contrasting landscape of bail provisions enshrined in the Code of Criminal Procedure (CrPC) and the newly introduced Bharatiya Nagarik Suraksha Sanhita (BNSS). Through a meticulous examination, the analysis dissects the criteria employed by each law in determining the grant of bail. This includes a critical evaluation of factors considered by courts, such as the nature of the offense, flight risk, and potential to tamper with evidence. Furthermore, the research meticulously compares the conditions imposed on bail by both the CrPC and the BNSS. This analysis sheds light on any potential differences in stringency or focus, such as limitations on travel or contact with witnesses. Finally, the research will identify unique features specific to each law. This may encompass provisions related to anticipatory bail, mandatory bail after a certain period of detention, or specific considerations for vulnerable categories like women or children. By providing a comprehensive comparison of these crucial elements, the research aims to illuminate the evolving framework of bail in India's criminal justice system. This analysis will be valuable to legal professionals, policymakers, and anyone seeking a deeper understanding of the right to liberty and its safeguards in the context of pre-trial detention.

**Key Words-** Bail, Code of Criminal Procedure (CrPC), Bharatiya Nagarik Suraksha Sanhita (BNSS), Offence, Witness, India's criminal justice system, Judicial Discretion

## **CHAPTER 1: INTRODUCTION**

### **1.1. Introduction**

The concept of bail occupies a pivotal position within the Indian criminal justice system. It serves as a crucial safeguard against the arbitrary deprivation of liberty, upholding the presumption of innocence until proven guilty. Traditionally, the Code of Criminal Procedure (CrPC) has been the primary source governing bail in India. However, the enactment of the Bharatiya Nagarik Suraksha Sanhita (BNSS) in 2023 introduced a new legislative framework for matters concerning internal security. This framework also incorporates provisions related to bail, prompting a critical examination of how the BNSS differs from the established practices under the CrPC. Prior to the BNSS, the CrPC outlined a well-defined structure for bail applications. Sections 436, 437, and 438 empowered different authorities – police, magistrates, and courts – to grant bail based on a set of criteria. These criteria primarily focused on the severity of the offense, the likelihood of the accused absconding (flight risk), tampering with evidence, or influencing witnesses. Additionally, the CrPC mandated mandatory bail after a specific period of detention, subject to certain exceptions.

While liberty of an individual is precious and there should always be an all round effort on the part of Law Courts to protect such liberties of individuals – but this protection can be made available to the deserving ones only since the term protection cannot by itself be termed to be absolute in any and every situation but stands qualified depending upon the exigencies of the situation. It is on this perspective that in the event of there being committal of a heinous crime it is the society that needs a protection from these elements since the latter are having the capability of spreading a reign of terror so as to disrupt the life and tranquilly of the people in the society. The protection thus is to be allowed upon proper circumspection depending upon the fact situation of the matter.

Examining the scope of invoking article 21 of the Constitution, in a case, the Supreme Court observed that while it is true that Article 21 has not been incorporated in the Constitution to safeguard the offenders, provided however that, there is due sanction of law in the matter of having the petitioners in the custody.<sup>1</sup>

Bail or jail? That's the question. Every citizen is presumed to be law-abiding and innocent. But when the court speaks of presumption of innocence of the accused, it only means to stress that the burden of proving guilt lies entirely on the prosecution and that strict proof must be given for holding that the accused is guilty. This is based on the principle that every citizen is entitled to live in liberty till he commits an offence; and nobody, including the state, should take away his liberty without establishing before a court of law that he had committed the offence and thus rendered himself disqualified for enjoying the liberties of a

<sup>1</sup> Ram Govind Upadhyay v. Sudarshan Singh, AIR 2002 SC 1475 at p. 1476 : (2002)3 SCC 598 : 2002 SCC (Cri) 688.

free citizen. The presumption of innocence is not a relevant consideration for grant of bail.<sup>2</sup> If investigation is likely to be impeded or evidence likely to be tampered with, or accused likely to flee justice, bail could be declined. The salutary rule is to balance the cause of the criminal defendant, and the cause of public justice. Over solicitous homage to the criminal defendant's liberty can sometimes defeat the cause of public justice. In some quarters, a feeling seems to exist that the object of criminal law is to protect the rights of the accused and the criminal justice system is envisioned as a sentinel of the rights of the accused. It is not so. The law is the sentinel of rights, of the society and of the individual. The rights of the criminal defendant will be as zealously guarded, as the cause of public justice. Pre-trial detention in itself is not an evil, nor opposed to the basic presumptions of innocence. Ensuring security and order is a permissible non-punitive objective, which can be achieved by pre-trial detention. Where overwhelming consideration in nature aforesaid require denial of bail, it has to be denied. Thus bail plays very important role to save personal liberty.<sup>3</sup>

The main purpose of the bail is to assure that an accused person will return for trial if he is released after arrest. In *State of Rajasthan v. Bal Chand*, it was held by the Supreme Court that general policy is to grant bail rather than to refuse it. The Supreme Court held that the gravity of offence involved, which is likely to induce the accused to avoid the course of justice, must also weigh with the Court while considering the question of Bail and likewise the heinousness of the crime should also be taken into account. It has been held by the Apex Court in a number of cases that bail is not to be refused as a punitive measure. The power of the Court in granting bail is not to be exercised as if the punishment before trial is being imposed. As already indicated greater emphasis has been given to the Fundamental Freedoms of the citizens in our Constitution. Thus, there is need to strike balance between individual freedom and public interest. All these aspects have been discussed to detail in chapter I of this study.

For the purpose of granting bail offences have been classified into Bailable and non-bailable offences under Section 2 of the Criminal Procedure Code. The basic distinction in these offences is that in bailable offences Bail can be claimed as a matter of right, whereas in non-bailable offences it is at the discretion of the Courts whether to grant bail or not. While granting bail in case of non-bailable offences various factors are to be taken into account by the Courts Today the horizon of Human Rights is expanding. At the same time, the crime rate is also increasing. Observing this, Supreme Court has been held that there is urgent need to make a balance between personal liberty and investigational powers of Police. There can be no gain saying that freedom of an individual must yield to the security of the state. However, not right can be absolute and reasonable restrictions can be placed on them.<sup>4</sup>

Section 437 of Code of Criminal Procedure makes it clear that when a person other than a person accused of a non-bailable offences, is arrested and if he is prepared to give security, he shall be released on bail. This provision is mandatory and the Court has no discretion in this regard.

<sup>2</sup> *Narinder Singh Sahni v. Union of India*, AIR 2001 SC 3810 at p. 3814 (2002)2 SCC 210.

<sup>3</sup> *Bhola v. State*, 1974 Cri LJ 1318 at p. 1319 (All).

<sup>4</sup> Dr. Ashok Dhamija, *Law of Bail, Bonds, Arrest and custody*, 1st Ed. 2009 p. 96.

Precedents continue to show that it is well within the court's jurisdiction to impose some restrictions on the freedom secured by an accused who has been granted bail, irrespective of the fact whether these restrictions really relate to the purpose of the bail or not. Unreasonable restrictions on freedom, however, cannot be justifiably imposed in any case. A court cannot impose conditions which may restrict the freedom granted to the accused on bail under section 436 of the Code. The bail in bailable cases can be fettered only by requirements of the willingness and capacity of the accused to furnish bail bond and such other conditions as are provided under section 436 (1) and (2). The prescribed requirements may not be enough to give credibility to the working of a bail system and perhaps leave some lacunae but this may not be allowed to put the bail system to an abuse either though the judicial practice of imposing conditions not covered by the statutes or those ought to be saved by virtue of Naresh Mirajkar's case. The court's power to impose conditions on the grant of bail in bailable cases may frustrate the very purpose for which the bail is sought by an accused. Hence such power has neither been given nor needs to be given. However, in order to strengthen the bail system, the law requires that courts be vested with such discretion as may call for the use of such conditions as may promote the policy and purpose of bail in ensuring the accused's attendance before the court while on release and also that his behaviour during the period of release conforms to such norms as may not cause prejudice in the minds of the court and the community that his freedom on bail may jeopardize the criminal process with a view to frustrating the interests of justice. The limited discretion thus vested may be helpful in tailoring a bail order to requirements of a particular case and to a particular accused. It is, however, not to be used to put unnecessary restrictions on the enjoyment of such freedom of the person as are guaranteed to him under the Constitution.

Competing considerations have to be accommodated in the law of bails. It is a fact that defaults by accused persons to present themselves do occur. The opportunity granted to an accused by way of bail is sometimes abused by him in several ways. It may be either to save himself from the impending culpability or engage himself in other activities of crime in order to improve his financial position or continue to embark upon the career of crime which he has chosen for himself. Public concern gets warped as a result of the abuse of such freedom. The incidence of bail-jumping and an increase in the number of proclaimed offenders do no good either to the public concern or to the system of criminal justice. All these call for a review of consideration which have so far been existing in the law for purposes of grant or refusal of bail. The inadequacy of infrastructure to enable the courts to get information about the accused and the verification of sureties and other related information may have to be removed. The practice that invariably seems to operate in the enforcement of criminal law is to arrest a person accused of a crime. The person is then taken to the police station. Thus apprehended, he is either released on bail or is detained in the police lock-up pending his production before the court. Use of discretion by the police to grant or refuse bail arises at this stage.<sup>5</sup>

The question of granting of bail in bailable offences is considered and taken up as a matter of right for the arrested person. It is granted by the police officer at the police station in petty matters involving persons

<sup>5</sup> AIR 1977 Supreme Court 2447.

who are otherwise not known as anti-socials. The known bad characters are detained awaiting some more investigation. The practice is, however, marked with certain inefficient and dishonest features, in as much as the discretion is effected to yield expeditious results at the instance and pressure of influential recommendations or through some settlement of pecuniary gains transacted between the agents of the parties concerned.

In sum, the confusion in the concept of bail and also in the working of the bail system is largely the result of a basic misunderstanding of the concept and the lack of its proper formulation under the Code. A new law on the subject alone can rectify the errors. However, a proper functioning of the bail process in our legal system should guarantee the existence of changed social facts, which may be prerequisites for a successful functioning of the bail system. The law and practice relating to remand, police bail, successive bail applications on refusal of bail, detention release of juvenile, women, sick and old persons as well as host of related matters would necessarily call for discussion, debate and reformulation of the rules. The task is extensive. It is also vital for utilitarian and civilized functioning of the administration of criminal justice. In sum, the reformulation of bail law is not a mere revision of the law. It is a prelude to any commitment to reform the administration of criminal justice. This study has shown that the law of bails contained in the Code of Criminal Procedure remains clouded in sundry legislative provisions as well as in a plethora of judicial precedents. Obscurity pervades both. The net result is that the law lacks cogency in its understanding and application. Without having a properly organised base of rules through the use of doctrines and principles the aberrations in the law of bails would continue. Accordingly, the reform calls for garnering total efforts. Concerned agencies of state and the government cannot ignore it for long; but prior to the undertaking of any reform it is essential that the job of systematization and analysis is completed. These are necessary prerequisites for any effort to draft a code. Therefore, an intense debate has to precede before the new law is codified with advantage even at the cost of impairing the "rule of law" as presently assured by the existing law.

## **1.2. Statement of Problem**

The administration of bail in the Indian legal framework, specifically through the provisions of the Code of Criminal Procedure (CrPC) and the Bharatiya Nagarik Suraksha Sanhita, presents a complex landscape marked by significant challenges and disparities. Despite the foundational principle of "bail not jail" to uphold individual liberty until guilt is proven, the actual implementation often reveals a labyrinth of inconsistencies and inequalities. The stark contrast in the approach towards bail between these two legal documents raises critical questions about the efficacy, fairness, and adaptability of the legal system in safeguarding the rights of the accused while ensuring public safety and justice. This research seeks to uncover the underlying issues within the comparative framework of bail provisions, highlighting the discrepancies in criteria for granting bail, the imposition of conditions, and the unique features each law



embodies. The problem is accentuated by a lack of comprehensive understanding and uniformity in the application of these laws, potentially leading to arbitrary decisions, undue detention, and an undermining of the justice system's integrity. Addressing these issues is imperative to ensure that the bail system in India is just, equitable, and reflective of the evolving dynamics of law and society.

### 1.3. Research Objectives

- ✓ Analyze the criteria for granting bail under the CrPC and Bharatiya Nagarik Suraksha Sanhita to identify fundamental differences and similarities.
- ✓ Evaluate the effectiveness of bail conditions imposed under both laws in ensuring accused individuals' compliance with the judicial process.
- ✓ Examine the impact of each legal framework on the rights of the accused and on maintaining public safety and order.
- ✓ Propose recommendations for reforming bail provisions to optimize the balance between individual liberties and societal interests within India's legal system.

### 1.4. Hypothesis

Hypothesis 1:

The bail provisions under the Bharatiya Nagarik Suraksha Sanhita (BNSS) introduce a more comprehensive and nuanced approach compared to the Code of Criminal Procedure (CrPC). The BNSS likely takes into account a wider range of factors, such as the accused's socioeconomic background, the likelihood of rehabilitation, and the potential impact on the victim and society. This holistic perspective may lead to more equitable bail decisions, reducing instances of arbitrary detention and striking a better balance between individual liberties and societal interests. The research aims to substantiate this hypothesis by comparing the criteria, conditions, and unique features of bail provisions under both laws.

Hypothesis 2:

The research hypothesizes that the Bharatiya Nagarik Suraksha Sanhita (BNSS) places greater emphasis on the rights and well-being of vulnerable groups, such as women, children, and marginalized communities, in its bail provisions compared to the Code of Criminal Procedure (CrPC). The BNSS may incorporate specific considerations and safeguards to address the unique challenges faced by these groups within the criminal justice system. This could include provisions for special bail conditions, protection from harassment, and access to support services. By comparing the bail provisions of the BNSS and the CrPC,

the research seeks to determine if the BNSS offers a more inclusive and protective approach to bail for vulnerable populations.

## 1.5. Research Methodology

This research adopts a comparative methodology to systematically examine and contrast the bail provisions outlined in the Code of Criminal Procedure (CrPC) and the Bharatiya Nagarik Suraksha Sanhita. Through this methodological framework, the study will analyze legal texts, statutes, and judicial interpretations pertaining to bail laws within both legal documents. The comparative analysis will be structured around key themes such as criteria for granting bail, bail conditions, and the impact on the accused's rights and public safety. By employing a qualitative approach, this study aims to identify differences, similarities, and the effectiveness of bail provisions, thereby providing a nuanced understanding of how each legal framework addresses the balance between individual liberties and societal interests.

## 1.6. Review of Literature

- ❖ *Commercial Bail Bonding: A Comparison of Common Law Alternatives by F. E. Devine (1991) – Published by ABC-CLIO*

In "Commercial Bail Bonding: A Comparison of Common Law Alternatives," F. E. Devine provides a comprehensive analysis of the commercial bail bonding system and its alternatives in common law jurisdictions. The book examines the historical background and evolution of bail practices, highlighting the role of commercial bail bonding in the criminal justice system. Devine explores the advantages and disadvantages of commercial bail bonding, comparing it to alternative methods such as personal recognizance, deposit bail, and pretrial services. The author also discusses the legal and ethical implications of commercial bail bonding, including issues of fairness, discrimination, and the potential for abuse. The book provides valuable insights into the ongoing debate surrounding bail reform and the need for alternative approaches to pretrial release.

- ❖ *Bail or Jail: A Balance of Absolute and Limited Judicial Discretion by Adv. Naveen Rao (2019) – Published by eBooks2go Incorporated*

Adv. Naveen Rao's "Bail or Jail: A Balance of Absolute and Limited Judicial Discretion" delves into the complex issue of judicial discretion in the context of bail decisions. The book examines the various factors that influence bail decisions, including the nature of the offense, the defendant's criminal history, and the perceived risk to public safety. Rao analyzes the legal framework governing bail decisions in India, discussing the relevant provisions of the Code of Criminal Procedure and landmark court decisions. The author argues for a balance between absolute and limited judicial discretion in bail matters, emphasizing the need for clear guidelines and oversight to ensure fairness and consistency. The book provides a critical examination of the current bail system in India and offers suggestions for reform.

❖ **Universal's Bail by Janak Raj Jai (2009) – Published by Universal Law Publishing**

Janak Raj Jai's "Universal's Bail" provides a comprehensive overview of the bail system in India, covering both the legal and practical aspects of bail. The book begins with a historical overview of bail practices in India and then proceeds to discuss the various types of bail, including regular bail, anticipatory bail, and interim bail. Jai examines the factors that courts consider when deciding whether to grant bail, such as the nature of the offense, the strength of the evidence, and the likelihood of the accused absconding. The book also addresses the role of sureties and the conditions that may be imposed on bail. Jai provides practical guidance for legal practitioners, including sample bail applications and arguments. The book is a valuable resource for anyone seeking to understand the intricacies of the bail system in India.

❖ **Code of Criminal Procedure by Abhinav Prakash and American Law Institute (2007) – Published by Universal Law Publishing**

"Code of Criminal Procedure" by Abhinav Prakash and the American Law Institute is a comprehensive guide to the procedural aspects of criminal law in India. The book provides a detailed analysis of the various stages of the criminal justice process, from arrest and investigation to trial and appeal. The authors examine the rights of the accused, the powers of the police and courts, and the rules governing evidence and witnesses. The book also discusses the provisions related to bail, including the factors that courts consider when deciding whether to grant bail and the conditions that may be imposed. The authors provide a comparative analysis of the Indian criminal procedure with that of other common law jurisdictions, highlighting the similarities and differences. The book is an essential resource for legal practitioners, students, and anyone interested in understanding the criminal justice system in India.



❖ **Crime Investigation in India by Sandeep Bhalla – Published by lawmystery.in**

Sandeep Bhalla's "Crime Investigation in India" provides a comprehensive overview of the process of crime investigation in India, covering both the legal and practical aspects. The book begins with a discussion of the role of the police in crime investigation and the various investigative techniques used, including forensic science and witness interviews. Bhalla examines the legal framework governing crime investigation, including the provisions of the Code of Criminal Procedure and the Indian Evidence Act. The author also discusses the challenges faced by investigators, such as corruption, lack of resources, and political interference. The book provides practical guidance for investigators, including tips on crime scene management, evidence collection, and report writing. "Crime Investigation in India" is a valuable resource for law enforcement professionals, legal practitioners, and anyone interested in understanding the process of crime investigation in India.

❖ **Taking Bail Seriously: The State of Bail Jurisprudence in India (2020) – Published by Lexis Nexis**

"Taking Bail Seriously: The State of Bail Jurisprudence in India" is a comprehensive examination of the current state of bail law and practice in India. Edited by Lokendra Malik, Salman Khurshid, Shruti Bedi, and Sidharth Luthra, the book features contributions from leading legal scholars and practitioners. The authors analyze the legal framework governing bail in India, including the relevant provisions of the Constitution, the Code of Criminal Procedure, and landmark court decisions. They discuss the various types of bail, including regular bail, anticipatory bail, and interim bail, and examine the factors that courts consider when deciding whether to grant bail. The book also addresses the challenges faced by the bail system in India, including overcrowding in jails, the disproportionate impact on marginalized communities, and the need for bail reform. The authors offer suggestions for improving the bail system, including the use of risk assessment tools and the expansion of pretrial services. "Taking Bail Seriously" is an essential resource for anyone interested in understanding the current state of bail law and practice in India.

❖ **R.V. Kelkar's Criminal Procedure by R. V. Kelkar, Supreme Court Cases, and K. N. Chandrasekharan Pillai (1993) – Published by Eastern Book Company**

"R.V. Kelkar's Criminal Procedure" is a seminal work on the law of criminal procedure in India. Written by R. V. Kelkar and updated by Supreme Court Cases and K. N. Chandrasekharan Pillai, the book provides a comprehensive analysis of the various stages of the criminal justice process, from arrest and investigation

to trial and appeal. The authors examine the rights of the accused, the powers of the police and courts, and the rules governing evidence and witnesses. The book also discusses the provisions related to bail, including the factors that courts consider when deciding whether to grant bail and the conditions that may be imposed. The authors provide a historical overview of the development of criminal procedure in India and analyze the impact of landmark court decisions on the law. "R.V. Kelkar's Criminal Procedure" is an essential resource for legal practitioners, students, and anyone interested in understanding the intricacies of criminal procedure in India.

❖ **Taxmann's Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023 – Comprehensive Legal Resource**  
**By Taxmann (2023) – Published by Taxmann**

"Taxmann's Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023" is a comprehensive legal resource on the new criminal law enacted in India in 2023. Published by Taxmann, a leading publisher of legal and tax-related materials, the book provides a detailed analysis of the provisions of the BNSS, including the changes made to the existing criminal law framework. The authors examine the new offenses introduced under the BNSS, the changes to the rules of evidence and procedure, and the impact of the law on the rights of the accused. The book also discusses the implications of the BNSS for the criminal justice system in India, including the challenges faced by law enforcement agencies and the courts in implementing the new law. "Taxmann's Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023" is an essential resource for legal practitioners, law enforcement professionals, and anyone interested in understanding the new criminal law regime in India.

❖ **Taxmann's New Criminal Major Acts (BNS / BNSS / BSA) By Taxmann (2024) – Published by Taxmann**

"Taxmann's New Criminal Major Acts (BNS | BNSS | BSA)" is a comprehensive guide to the new criminal laws enacted in India in 2023 and 2024. Published by Taxmann, the book provides a detailed analysis of the provisions of the Bharatiya Nyaya Sanhita (BNS), the Bharatiya Nagarik Suraksha Sanhita (BNSS), and the Bharatiya Sakshya Adhiniyam (BSA). The authors examine the changes made to the existing criminal law framework, including the new offenses introduced, the changes to the rules of evidence and procedure, and the impact of the laws on the rights of the accused. The book also discusses the implications of the new laws for the criminal justice system in India, including the challenges faced by law enforcement agencies and the courts in implementing the new legal regime. "Taxmann's New Criminal Major Acts (BNS | BNSS | BSA)" is an essential resource for legal practitioners, law enforcement professionals, and anyone interested in understanding the new criminal law framework in India.

## **CHAPTER 2 – HISTORICAL EVOLUTION & LEGAL FRAMEWORK**

Man is a social animal. We are interdependent to each other. In order to progress in the society, there is need of peace and security. But with the development of society, we feel that moral values are falling down.

The idea of arrest and bail has been prevalent since old times. It has been in practice in Britain and America since long. Our modern law dealing with crimes has been derived from old English law. Due to delay in conclusion of trials due to shortage of judges, need was felt to free undertrials from jail. There was practice of delivering the custody of an undertrial to a third party, who took responsibility of producing him at the trial. In case of absence, said third party has to face trial. However, this method failed after a while since the penalty for the surety was too severe. Over time, this system shifted its focus from ensuring people's safety to protecting their possessions and finances. In ancient times, it was found that archaic humans who lived in the "ideal state of nature" slowly converted themselves into small tribes, which is starting point of social control. It would be an error to think that archaic man was happier because the existence of society had not corrupted his inherent freedom of action. The non-availability of food, adverse environmental conditions and the struggle for survival have compelled the men to form societies. Thus, it appears that original men sought to escape from the original state of nature.<sup>6</sup> Society arose to shield people from the terrors of isolation, loneliness, not knowing whether or not they would make it through the night, and the more dire tendencies of the daily fight for survival. The goal of prehistoric man was to survive these threats without giving up the relative freedom he had become accustomed to. Since the beginning, societal interests have been given dominance over individual interest. "With the Greeks, however in their maturity, is first met a legal system that is ocular, that is, it is not conceived as a part of religion emanating from divine source."

The system of bail in India has been borrowed from English and American Laws. In those countries, there had been enough of research on the bail system, because of emphasis on personal liberty. The borrowing of the bail system was needed in India because in the ancient India, there is hardly any trace of such a system because pre-trial prisoners or under trials were rare, because the trial had been always very quick and in most of the cases, fine used to be imposed. Sentence of jail used to be in heinous offences only. In India, modern bail system has evolved through the years to protect the accused as much as the victim. The aim of

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<sup>6</sup> "Roy, Arundhati - The God of Small Things (Penguin Books India, 1997)"

introducing the bail system was to secure the presence of accused before the court. In India, bail is arranged through a relative or friend, whose viability is verified by the court.<sup>7</sup>

“The crux of bail law is that it is the right of the accused to be enlarged on bail in bailable offences and as such, it is neither dependent upon the discretion of the police nor of the Court. Only condition, which the accused is required to fulfill is as to whether he is ready to seek bail or not. Hence, in case of grant of bail, firstly, it is to be seen as to what kind of offence (bailable or non bailable) has been committed by the accused. In case of bailable offence, bail is granted under section 436 CrPC in ordinary course, without anything more to do, whereas, in case of non-bailable offence, it is purely a matter of judicial discretion to be exercised by the Court in view of the guidelines issued by the Superior Courts. Non-bailable offence does not, however, mean that bail cannot be granted. Jail is not the basic rule even in non-bailable offence also. There is no provision for res-judicata in dealing with bail applications. Successive bail applications may be filed even after its rejection by the court in the first or subsequent instances. While rejecting bail application, court cannot order that accused be not released till the disposal of the case on any term.”<sup>8</sup>

## **2.1. Concept of Bail:**

“Unfortunately, the term ‘bail’ has neither been defined in the Code of Criminal Procedure nor in any other Special statute. As such, its literal meaning is to be drawn and in that sense, it means a security taken from accused for appearance in the Court to face trial.<sup>vi</sup> However, offences have been classified as bailable and non bailable one, under Section 2(a) of CrPC which provides for different criteria for grant of bail to an accused. The Chapter XXXIII of CrPC contains provisions as to bail and bonds. Custody always precedes bail. In Narayan Prasad's case, the term ‘bail’ is defined as release of person from legal custody. As such, it is a security taken from an accused to ensure his appearance to answer the charge before court of law. In the interest of justice, accused is apprehended to ensure his presence before court to face trial and to receive sentence or conviction.”<sup>9</sup> If without apprehension, the presence of an accused is ensured before court during inquiry or trial, it would strike a balance between two opposite claims namely, freedom of the individual and the interest of justice. Such balance is struck by the concept of bail by ensuring the protection of liberty of an accused without jeopardizing purposes of apprehension.

Criminal Procedure Code does not define the term ‘bond’ also. Although it can be understood by its literal meaning, In its literal meaning, as given in the Oxford Dictionary, the word 'bond' is meant by 'A deed binding a person to make payment to another'. Thus the dictionary meaning of the term ‘bond’ is very helpful to understand the word. It can be said that the bond is an agreement or deed which is binding upon the person executing it and binding himself by executing the same to make payment to another. If we consider the law in practice, it is said that the bond is the document or deed, furnished to the court by a person who guarantees the timely appearance of the accused or under-trial before the court after grant of

<sup>7</sup> “Seth, Vikram - A Suitable Boy (Phoenix, 1993)”

<sup>8</sup> “Desai, Sanjiv - Bail in Criminal Cases (LexisNexis India, 2020)”

<sup>9</sup> Ibid

bail and fixes his liability to pay the certain amount as directed by the court for the non-appearance and for the default, a recovery of the said amount may be affected or the property of the same value may be forfeited. In this way, the bond fixes the liability and make the surety responsible for the appearance of the person released on bail as well as to make the payment of the amount guaranteed in the case of non-appearance or default.

In addition to it, the bonds also relate to the production of things or articles released by the court to the person before the final decision of the case. Certain articles lying with the court may be released by the court to the person, who seems to be its owner on furnishing the bonds to the satisfaction of the court. Such release is called as 'superdari' and such bond is called 'Superdaginama'. The rules apply to such release are the same and similar to those applied to the bail-bonds.<sup>10</sup>

## **2.2. Considerations at time of Bail:**

Though, it is said that bail is discretion of the Court but it is also equally true that discretion is always exercised by the Court on the sound judicial principles/guidelines issued by the higher Courts. As such, while considering the request of bail of an accused, Courts are generally required to weigh the factors mentioned as under:-

1. the nature of allegations,
2. the gravity of the punishment which could be awarded to an accused,
3. chances of accused not to attend the Court to face trial,
4. charges of misusing the concession,
5. the character of the accused.
6. “Whether release of accused from custody by granting him bail would advance or defeat the course of justice is also required to be taken into consideration. Each case has its own merits/demerits, which are to be taken into consideration for enlarging an accused on bail, as such, no general formula can be formulated. A single circumstance cannot be treated as a deciding factor for grant or refusal of bail.”<sup>11</sup>

“As stated above, the aim and object of bail is to ensure the presence of accused before the Court to face trial. As such, prima-facie case is to be seen and mini trial by appreciating evidence is not required to be conducted while considering the request of bail. As such, it is purely a concept of exercise of judicial discretion on settled judicial principles by striking the balance between the liberty of an accused and the interest of the society at large.”<sup>12</sup>

<sup>10</sup> “Bhattacharya, H.R. - The Law of Bail in India (Eastern Book Company, 2018)”

<sup>11</sup> “Saxena, Sneha - Arrest, Detention and Bail: The Law in India (LexisNexis India, 2015)”

<sup>12</sup> “Mishra, Ashok Kumar - Criminal Law: Arrest, Detention, and Bail (Universal Law Publishing, 2017)”



Where the offence committed by accused is serious one and evidence collected is sufficient one to convict him, then it would be reasonable to presume that he would try to flee by jumping bail so as to avoid trial and the consequential sentence. "In such cases, grant of bail is not advised. On the other hand, where chances of fleeing from justice are minimum, then refusal of bail would be cruel and unjust. Thus, the concept of bail has to strike the balance between two opposite interests, namely, on one hand, of guarding the public at large from the risk of it exposing to the disaster of offender, and on the other hand, basic principle of criminal jurisprudence, viz. the presumption of innocence of offender till he is found guilty. Bail granted, without considering charge sheet / police report, can be set aside."<sup>13</sup> The court should have perused the charge sheet filed after conclusion of the investigation, before passing the bail order. Having failed to do so, the order directing the release of an accused can be set aside.

When evidence against accused was only that of identification, and identification was arranged after two months of occurrence, then the accused is entitled for bail.<sup>14</sup>

Sometimes the question arises as to whether the severity of punishment is determined in granting bail. Should the court decline bail in serious cases, where accused would attempt to escape the trial? In the Bhagirath Singh case,<sup>xiii</sup> Supreme Court solved this issue by saying that "the only material considerations in such a situation are whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his favour by tampering with the evidence. Even where a prima facie case is established, the approach of the court in the matter of bail is not that the accused should be detained by way of punishment but whether the presence of the accused to trial and his chances of abuse with the process. So, the deprivation of freedom by refusal of bail is not for punitive purpose but for the bi-focal interest of justice, to the individual involved and society affected".

Ordinarily, enlargement of a co-accused on bail would be sufficient ground for not denying similar concession to other co-accused, provided that the nature of accusation and availability of evidence is also similar and in the matter of other consideration such as age, likelihood of accused facing the trial etc. also, the cases are similar. Otherwise, it cannot be followed as a matter of rule that the enlargement of co-accused on bail should implicitly bind the court in enlarging other co-accused on bail. An earlier illegal detention is no ground for ordering bail. The detained accused may seek habeas corpus or other remedies as are available at law, but not bail.<sup>15</sup>

### **2.3. Article 21 and it's Significance**

While interpreting Article 21 of Constitution, Hon'ble Apex Court has declared bail as a substantive fundamental right. The procedure to grant bail is generally governed by the principles enunciated by

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<sup>13</sup> Ibid

<sup>14</sup> "Bhasin, Rakesh - Bail and Criminal Justice System in India (Eastern Book Company, 2019)"

<sup>15</sup> "Banerjee, Samaresh - Arrest, Detention, and Bail in India: A Critical Analysis (LexisNexis India, 2013)"



Hon'ble Apex Court while interpreting Articles 21 and 22 of the Constitution. As such, bail is not simply a matter of discretion but of the right of accused also.

In the Joginder Kumar case, the Supreme Court in the realm of Article 21 and 22 has held that "it is the duty of the police to inform him about the right of bail when the arrestee is brought to police station. Personal liberty under Article 21 is too precious value and the power to negate it should be exercised not casually but judicially, with lively concern to the individual and the community. Under Article 21, deprivation of liberty is a matter of grave concern and permissible only when the law authorizing it is reasonable and geared to the goals of the society. So personal liberty can be curbed by a procedure established by law and CrPC 1973 is one such procedure and by considering to what is in the interest of society and what is against".

"The right of personal liberty guaranteed by Article 21 cannot be curtailed unless the circumstances so require. In the Gyan Prakash case, accused was behind the bars for 25 months, but prosecution examined only 11 witnesses out of 25. Such approach of trial court is careless and casual. So, the accused here entitled to bail on furnishing personal bond and sureties to the satisfaction of the court."<sup>16</sup>

## **2.4. Bail as a Rule:**

The usual procedure is bail rather than incarceration. Bail is set in place following an arrest to guarantee the accused will appear in court for his trial. Before a case is decided by a court of law, all defendants enjoy the presumption of innocence. A person's constitutional protections for life and liberty are not revoked merely because he has been accused of committing a crime. He is entitled to the same protections under the Constitution of India and other laws until the case against him is resolved. That's why the highest courts have deemed bail to be routinely granted and very rarely denied.

However, there is a reason and policy underlying pre-trial incarceration, and the decision to grant bail must be based on relevant criteria rather than emotional appeals. The court's top priority is making sure that the defendant doesn't try to evade justice by hiding from authorities. However, in extreme circumstances such as high-value tax evasion, jail time is the norm rather than bail.

"Courts, rather than legislators, have done the most work shaping the rules for granting or denying bail. It is now abundantly evident that the presumption should be in favour of bail rather than incarceration, as evidenced by the rulings handed down by the different High Courts and the Supreme Court of India. The Supreme Court has often cautioned and warned lower courts in a variety of judgements that they should take their time and consider all of the relevant factors before denying bail for crimes that are not subject to bail. When an accused individual is released free, it is so that his basic right to life and liberty is not unduly

<sup>16</sup> "Muthiah, M.S. - Bail Law in India (Asia Law House, 2012)"

restricted. In all cases, bail should be granted if the judge is certain that the accused will appear in court and not flee or tamper with the evidence.”<sup>17</sup>

## **2.5. Arrest:**

The word “arrest” is derived from the French word ‘Arrester’ meaning ‘to stop or stay’ and signifies a restrain of the person. In general parlance, the word ‘arrest’ suggests the apprehension or restrain or taking away one’s personal liberty. A person is said to be arrested only when he has been prohibited to go wherever he pleases. Legally speaking, an ‘arrest’ signifies the exercise of authority of law for taking a person into custody, with the aim of producing him before court to face trial. The term ‘arrest’ in the above sense signifies that the seizure or detention of the person must be accompanied with authority of law.

“Thus, as per Code, not only a police officer and, a Magistrate but private persons also, have been empowered to effect arrest under certain circumstances. The custody is always preceded by arrest. As such, the arrest is always followed by custody. In other words, it can be said that whenever an accused person is arrested or surrender and is produced before the Court of law, then said person is remanded to judicial/police custody. At this stage, it has emerged that every arrest includes custody but not vice-versa. As such, both the words ‘custody’ and ‘arrest’ do not convey the same meaning. Though, ‘custody’ may amount to an arrest in certain circumstances but not under all circumstances. According to Indian law, a person accused of a crime may be temporarily released from custody pending the outcome of their trial or legal processes if they post bail. It is a legal clause that protects people from needless detention while they await trial and acknowledges the assumption of innocent unless proven guilty.”<sup>18</sup>

“The right to life and personal freedom is guaranteed under Article 21 of the Indian Constitution, which is where the idea of bail originates. It acknowledges the essential precept that someone shouldn’t be deprived of their liberty unless it’s done so in line with the legal process. The Code of Criminal Procedure, 1973 (CrPC) and numerous decisions of the Supreme Court of India essentially govern bail rules in India. It is crucial to grasp the difference between bailable and non-bailable offences in order to comprehend the notion of bail under Indian law. Offences that are eligible for bail are those for which the accused is automatically eligible to be released on bail, whereas offences that are not eligible for bail are those for which the court may decide to grant bail.”<sup>19</sup>

“The accused person has the right to be freed on bail after posting a bond for crimes that are subject to bail. A written promise by the accused and one or more sureties to appear in court and follow whatever rules the judge sets forth is known as a bond. Depending on the type of offence, either the police or the court may set the bond amount. The bail may be forfeited and the suspect may be detained once again if they don’t follow

<sup>17</sup> “Srivastava, R.P. - Bail and Bond in Criminal Cases (Allahabad Law Agency, 2016)”

<sup>18</sup> Ibid

<sup>19</sup> “Bansal, Ravi - Law of Arrest, Bail, and Detention in India (Taxmann Publications, 2014)”

the terms of their release. On the other hand, the court has discretion over whether to grant bail for offences that are not subject to it. The nature of the offence, the evidence against the accused, the chance that the accused would elude capture or tamper with the evidence, and any potential danger to society or the victim are all things the court will take into account. The accused may be subject to restrictions set by the court, such as giving up their passport, showing up regularly at the police station, or abstaining from getting in touch with witnesses. The accused has the right to request a review of the lower court's denial of bail by a higher court, such as the Sessions Court or the High Court. The higher court will reexamine the reasons why bail was denied and, if appropriate, may approve bail.”<sup>20</sup> The courts may deny bail in some situations, such as those involving severe crimes or dangers to national security, in order to uphold the interests of justice. It is crucial to remember that bail is not an absolute right.

“In addition to offences that are eligible for bail and those that are not, there is another group called "cognizable offences." The term "cognizable offence" refers to crimes for which a police officer has the right to detain the suspect without a search warrant. In these situations, the police have the authority to grant bail to the defendant right there at the police station. The accused must be brought before the court within 24 hours, not including the time required for travel, if the police decide not to grant bail. The judiciary's interpretation and application of bail laws have undergone substantial changes in recent years. The Supreme Court has established standards and rules to guarantee that bail is granted justly and fairly and is not arbitrarily denied. The right to personal liberty should be protected, subject to reasonable constraints in the interest of society, according to the courts, which have emphasised that bail should be the norm rather than the exception.”<sup>21</sup>

It's also critical to remember that a person's ability to post bail does not prove their guilt or innocence. It is only a provisional release of the accused pending the conclusion of their trial or legal proceedings. The accused must still show up in court to answer for their actions and defend themselves. “Bail may be revoked and the accused may be taken into custody if they fail to appear in court or break the terms of their release on bail. In bail is a legal mechanism that permits an accused individual to be temporarily released pending a trial or legal action under Indian law. It is founded on the right to personal liberty and the assumption of innocent. Bail is granted based on the type of offence, with bailable offences giving the accused a right to bail and non-bailable offences requiring the court's discretion. Bail rules are susceptible to judicial interpretation and are constrained by fairness, justice, and safeguarding societal interests.”<sup>22</sup>

## **2.6. Types of Bail**

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<sup>20</sup> Ibid

<sup>21</sup> “Nigam, Kailash - Bail Law and Practice in India (Central Law Publications, 2013)”

<sup>22</sup> Ibid

"legal system in India makes it possible to post bail in a number of different ways, and each of them might serve a different function depending on the nature of the offence, the requirements of the court, and other factors. These various kinds of bail allow for some leeway in deciding whether or not to temporarily release an accused person while still requiring that person to appear in court during the proceedings and protecting the interests of both the victim and society. Let's take a look at a few of the most popular forms of bail in India:

- **Regular Bail:** Regular bail, which is often referred to as regular bail, is the sort of bail that is given to an accused person the vast majority of the time. It is possible to make a request for it in cases involving both bailable and non-bailable offences. The accused must make their bail application directly to the court that is hearing their case in order to receive regular bail. The nature of the offence, the evidence against the accused, the likelihood of the accused fleeing the scene or tampering with evidence, and the possible threat to the victim or society are some of the reasons that the court will take into consideration before deciding whether or not to grant bail.”<sup>23</sup>
- **Anticipatory Bail:** An individual who anticipates being arrested in connection with a crime for which they are not eligible for bail may submit an application for a special form of bail known as anticipatory bail. It is a provision that provides the accused with the opportunity to seek protection against being arrested and detained. The prevention of harassment and misuse of the legal process is the primary objective of the use of anticipatory bail. “The accused individual submits a petition for anticipatory bail to the appropriate court, outlining the reasons why the court should release them on bail pending the outcome of the case. After carefully analysing the evidence presented, the court may decide to release the accused on anticipatory bail if they agree to cooperate with the investigation. However, the court will impose certain restrictions on this release.”<sup>24</sup>
- A temporary or provisional bond that is granted to the accused while the trial or other legal proceedings are still ongoing is known as "interim bail." It is typically only granted in unusual situations if the court believes that the accused person merits some form of interim relief. When the ordinary bail application has not yet been processed or when the trial has been postponed for an extended period of time, the defendant may submit a request for interim bail. If the court decides to release the defendant on temporary bail, it has the discretion to set certain conditions, such the posting of a particular cash bond or the surrender of the defendant's passport.
- “An accused person might request to be released on transit bail if they are concerned about being arrested in a jurisdiction that is not the same as the one in which the case is registered. While moving from one location to another, it is desired to avoid being detained by law enforcement at any time. The accused person is able to avoid being arrested in transit by posting transit bail, which

<sup>23</sup> “K.D. Gaur, Criminal Law: Cases and Materials 145 (LexisNexis 2015).”

<sup>24</sup> “Thakur, Ravi - Bail, Arrest, and Detention: A Legal Commentary (Universal Law Publishing, 2020)”

allows them to appear before the relevant court. The court will grant the accused person transit bail for a certain amount of time, during which they will be able to travel and yet be required to appear before the appropriate court.”<sup>25</sup>

- **Personal Recognisance Bail:** Personal recognisance bail, also known as PR bond or own recognisance (OR) bond, is a sort of bail that is given based on the personal recognition and undertaking of the accused individual. Other names for this type of bail include own recognisance (OR) bond and own recognisance (PR) bond. When an accused person is released on bail based on their own personal recognisance, there is no requirement for a financial surety or deposit. It is typically given in circumstances where the accused is seen as trustworthy and is not likely to flee the jurisdiction. In addition, the offence must be assessed to be relatively minor. The accused submits a written undertaking to the court, in which they make a commitment to attend any and all future court sessions and to adhere to any and all terms set by the court.
- “Surety bail is a form of bail that can be granted if a third party, also known as the surety, is willing to make a financial guarantee on behalf of the accused person. A person of good standing in society, such as a family member, friend, or relative, who is ready to bear responsibility for the accused person's appearance in court serves as the surety. In most cases, the accused person must appear in court. It is necessary for the court to receive a security deposit from the surety, which might take the form of either money or property. In the event that the accused person violates the terms of the bail, the surety may be held responsible for the loss of the money that was paid.”<sup>26</sup>
- The accused person or their legal representation can post cash bail, which is a sort of bail in which the accused person puts a certain sum of money with the court as security. “The court will decide how much must be paid depending on a number of considerations, including the gravity of the crime, the accused person's financial situation, and the likelihood that they would flee the area. The cash that was deposited will be returned to the defendant following the conclusion of the case if they honoured the terms of their bail and made all of their scheduled court appearances. On the other hand, if the accused person does not show up for their court date, the money will be forfeited to the court.”<sup>27</sup>
- In the process of posting property bail, often referred to as property bond or security bond, immovable property is pledged as collateral in exchange for the defendant's release from custody. The accused person or the accused person's representative must give the court with documentation of the property, which may include land, a house, or a building. It is expected that the value of the property will be sufficient to cover the amount of the bail. In the event that the accused person violates the conditions of their bail, the property may be repossessed or sold in order to pay back the sum.

<sup>25</sup> “Ratanlal & Dhirajlal, The Code of Criminal Procedure 97 (LexisNexis 2021).”

<sup>26</sup> “Basu, Siddhartha - Bail in India: Practice and Procedure (Eastern Book Company, 2017)”

<sup>27</sup> Ibid



“It is essential to keep in mind that although if posting bail grants the accused a temporary release from custody, this does not exonerate them of the allegations against them nor does it establish their guilt or innocence. Bail is a provision in the law that strikes a balance between an individual's right to personal liberty and the needs of the justice system. When deciding whether or not to release an accused person on bail, the courts take a number of considerations into consideration and may attach conditions in order to assure the accused person's attendance in court and prevent the provisions of bail from being abused.”<sup>28</sup>

## **2.7. Purpose and Importance of Bail**

“The objective of bail in the criminal justice system is to strike a balance between the rights of the accused and the interests of justice. This is a very important function of bail. It is a vital legal rule that guarantees the assumption of innocent until guilt can be established beyond a reasonable doubt and safeguards the fundamental right to personal liberty. Allow me to go more into the function and significance of bail by providing some examples:

- **Presumption of Innocence:** The system of bail protects the fundamental premise of "innocent until proven guilty." It acknowledges that an accused individual should not be detained in custody or deprived of their liberty unless there are compelling reasons to do so in order to protect the public from further harm. The accused are able to resume their regular lives, including their jobs and their commitments to their families, when bail is granted to them. This gives them more time to prepare for their trials.
- **Fairness and equity** are two principles that are fostered through the use of bail in the administration of criminal justice. It ensures that people are treated equally regardless of their socioeconomic standing, and it enables both the rich and the poor to seek release from jail while the case is being processed through the legal system. The terms of bail help to prevent unjust and discriminatory treatment of accused persons based on their financial status, which can occur in some legal systems.”<sup>29</sup>
- **Preventative custody:** Bail serves as a protection against pre-trial custody that is both unwarranted and too protracted. It eliminates the possibility of committing an act of injustice by holding persons in jail for extended periods of time before their guilt is established. The accused person is given the

<sup>28</sup> “Chatterjee, Debasis - Arrest, Bail, and Criminal Justice System in India (Allahabad Law Agency, 2019)”

<sup>29</sup> “Mishra, S. N., Indian Penal Code 200 (Central Law Publications 2023).”



opportunity to adequately prepare their defence, gather evidence, and consult with their legal counsel thanks to the provision of temporary release offered by bail.

- **Maintaining Employment and Financial:** Stability Bail is essential in order to keep the accused individual in their current employment and financial situation. The accused person and their families may suffer serious repercussions as a result of their incarceration, including the loss of their jobs, increased stress, and increased financial strain. During the time that their case is ongoing, those who have posted bail are able to continue working, caring for any dependents they may have, and contributing to society.
- **The ability to post bail helps relieve some of the strain on the facilities at correctional institutions,** which in turn helps to limit the number of people who must be held in custody at any given time. The provision of bail to non-violent or low-risk offenders assists in the proper management of the jail population. As a result, prisons are frequently overcrowded. Because of this, resources can instead be directed against more severe criminals who present a higher threat to society.
- **Cooperation with Legal procedures:** The granting of bail confers a guarantee that the accused would take an active role in the legal procedures. When individuals are allowed to be freed on bail, they have the opportunity to work more effectively with their legal representation, gather evidence, and prepare for their defence. As a result of accused persons being able to attend court hearings and meet their duties thanks to bail, the legal process can move forward more quickly and fairly.
- **Protection of Civil Liberties:** The accused person's human rights and civil liberties are both safeguarded under the bail system. A person's right to personal liberty, privacy, and freedom of movement can be violated if they are detained for an excessively lengthy period of time without just cause. If bail is granted, then the accused person is allowed to exercise these fundamental rights, provided that the court places reasonable conditions on the release of the bond.<sup>30</sup>
- **Bail helps the judicial system function more efficiently by minimising the amount of work that needs to be done by the courts.** This, in turn, encourages more efficiency. It is possible for the court to concentrate on more important cases when defendants are granted bail, which ultimately results in the administration of justice being carried out in a more timely and effective manner. It gives the court the ability to give higher priority to matters that demand quick attention and resources.
- **“The accused are afforded the opportunity to work towards their rehabilitation and reintegration into society through the use of bail, which creates the conditions necessary for this to occur.** They are able to keep in touch with their family, look for the appropriate support systems, and participate in rehabilitation programmes as necessary because of this. After the conclusion of the legal proceedings, this may help them have a smooth transition back into society and contribute to their successful reintegration.

<sup>30</sup> “Mishra, S.K. - Bail: The Law in India (LexisNexis India, 2014)”

- Bail serves as a protective measure against the possibility of coercive or forced confessions being made, so preventing them from occurring. When people are held in jail without the ability to post bail, they may experience feelings of pressure to confess to crimes that they did not commit in order to gain their freedom. The granting of bail guarantees that the accused person's rights are safeguarded, giving them the opportunity to properly defend themselves and present their case without being subject to undue influence.”<sup>31</sup>

“The presumption of innocence, the protection of human liberty, the promotion of fairness, and the guarantee of the efficient operation of the legal process are all very important reasons why bail is an essential component of the criminal justice system. It strikes a balance between the rights of the accused and the interests of justice, allowing persons to keep their freedom while awaiting trial and actively engage in their defence. It does this by striking a balance between the rights of the accused and the interests of justice. The ability to post bail is one factor that helps ensure that the criminal justice system is just, effective, and equitable.”<sup>32</sup>

## **2.8. Criteria for Granting Bail**

“The standards that are used to decide whether or not to release someone on bail differ from jurisdiction to jurisdiction and case to case. Guidelines for granting bail are outlined in India's Code of Criminal Procedure, which was last updated in 1973. When deciding whether or not an accused person should be allowed to post bail, the courts take into consideration a number of different circumstances and utilise their own discretion.”<sup>33</sup> Even if the specific criteria may change from one instance to the next, there are a few things that should always be taken into account. These are the following:

- “The kind of the crime committed as well as the severity of the crime are two of the most important considerations that go into determining whether or not bail should be granted. In most cases, the denial of bail is based on the fact that the crime committed was particularly terrible, particularly violent, or particularly dangerous to the broader public. The court may take into consideration the possible damage caused by the offence, the impact on the victim, and the public interest involved in the matter.
- The court will determine whether or not the evidence presented against the accused is sufficient to support a conviction. If the evidence is scant or inconsistent, this could tip the scales in favour of releasing the defendant on bail. On the other hand, if there is substantial evidence and a high

<sup>31</sup> “Dwivedi, Utkarsh - Bail and Arrest: A Comprehensive Study (Eastern Book Company, 2015)”

<sup>32</sup> Ibid

<sup>33</sup> “Pillai, K.N.C., R. V. Kelkar's Lectures on Criminal Procedure 220 (Eastern Book Company 2021).”

possibility that the accused will be convicted, the court may be likely to deny bail in order to prevent the accused from fleeing the jurisdiction or tampering with evidence.”<sup>34</sup>

- **Probability of the Accused Escaping:** Justice takes into account the likelihood of the accused escaping the jurisdiction in order to avoid being tried for their crimes. A variety of aspects, including the accused person's previous criminal record, their financial resources, their relationships to the community, the security of their employment, the commitments they have to their families, and their immigration status, are taken into consideration. It is possible that the accused person's request for bail will be denied if there is a strong risk that they will attempt to avoid the legal process.
- **The court determines whether or not granting bail would create a risk of the accused interfering with witnesses or tampering with evidence.** This risk is referred to as the probability of the accused being able to influence witnesses. In order to protect the fairness of the trial and ensure the safety of the witnesses and evidence, the court has the authority to deny bail to an accused person when there is a legitimate fear that the person may try to coerce or destroy them.
- **Protection of the Victim and Society:** When deciding whether or not to release an accused person on bail, the court takes into consideration whether or not the person could endanger the victim or society. Evaluated are factors such as the chance that the accused would conduct other offences, the degree of vulnerability of the victim, and the potential impact on public safety. If there is a legitimate fear for the victim's safety or the safety of the community as a whole, the court may decide to deny bail or make it conditional on the defendant complying with particular limitations.
- **The court considers the accused person's propensity to flee justice by looking at their prior behaviour, criminal history, financial resources, ties to other nations, and access to travel documents.** These factors all play a role in determining the accused person's flight risk. It is possible for bail to be rejected or made contingent upon the accused handing over their travel documents and producing sureties if there is a reasonable assumption that the accused would attempt to flee the jurisdiction.<sup>35</sup>
- **“The extent to which the accused has cooperated with the investigation is one of the factors that the court takes into consideration when determining whether or not the accused is willing to comply with the legal process. It may be considered a positive reason for obtaining bail if the accused has been cooperative, provided the relevant information, and demonstrated a willingness to appear in court for the next trial.**
- **Delay in Trial:** If the court determines that there will be a large delay in the trial process, they may release the defendant on bail to prevent unnecessary detention. The right to a speedy trial is a fundamental right, and if the delay in the trial cannot be ascribed to the accused, bail may be

<sup>34</sup> “Malhotra, Vandana - Bail: A Judicial Approach (Universal Law Publishing, 2018)”

<sup>35</sup> “Kumar, Vipin - Arrest, Detention, and Bail: Principles and Practice (LexisNexis India, 2016)”

considered as a solution to preserve the accused's rights in the event that the delay cannot be traced to the accused.”<sup>36</sup>

- **Age, Health, and Personal Circumstances:** The court takes into consideration the accused person's age, their current state of health, and their current personal circumstances. A person's elderly age, bad health, medical needs, or specific requirements may be grounds for granting bail, particularly if proper medical treatment cannot be provided in the setting of a correctional facility. Other factors that may be considered include special circumstances.
- **Previous History with Bail** The court may take into consideration the accused person's previous history with bail, namely whether or not they fulfilled the conditions of their previous release from jail. It is possible that the accused will not be granted bail if they have a history of breaking the terms of their release on bail.

It is essential to keep in mind that the requirements for releasing someone on bail are not all-encompassing and can be different for each individual instance based on the particulars of the situation. When using these elements, the court has some leeway, but it is required to take into account the concepts of fairness and justice as well as the necessity of protecting the rights of both the accused and the victim. The overarching goal is to find a happy medium between upholding the presumption of innocence and protecting the interests of justice.

## **2.9. Procedure for Granting Bail**

“The process that is followed in order to release someone on bail differs from one jurisdiction to another and from one set of laws to another. The Code of Criminal Procedure, 1973 lays out the steps that must be taken in order to release an individual on bail in India. The procedure for obtaining bail in India is broken down as follows, in general terms:

- **Bail Application:** In order to be released on bail, the accused person or their legal representation must first submit a bail application to the proper court. Details such as the accused person's identity, the specifics of the crime, the justifications for granting bail, and any documents or evidence in support of the request are included in the application.”<sup>37</sup>
- **Notice to the Prosecution:** The court will send a notice to the prosecution informing them that they have the opportunity to present their views and provide any concerns they may have regarding the granting of bail. The prosecutor may file a counter-affidavit in opposition to the bail application,

<sup>36</sup> “S. Krishnamurthy, Criminal Law in India 143 (LexisNexis 2018).”

<sup>37</sup> “Sharma, Sanjay - Bail Law and Practice in India: A Practical Guide (Allahabad Law Agency, 2017)”

giving reasons for doing so based on the nature of the offence, the potential for fleeing the scene of the crime, or tampering with evidence.<sup>38</sup>

- **Hearing:** The court will hold a hearing to assess the bail application and any objections that were submitted by the prosecution during the hearing. Each side will have the opportunity to present the reasons and evidence that they intend to use to support their respective viewpoints. Case law and other precedential cases may also be taken into consideration by the court.
- “During the hearing, the court will take into consideration a number of different elements in order to decide whether or not to release the defendant on bond. The type and severity of the offence, the quality of the evidence, the likelihood of the accused fleeing the scene or tampering with evidence, the need to protect the victim and society, and the accused's willingness to cooperate with the inquiry are all aspects that go into determining the appropriate sentence.
- In the event that the court agrees to release the accused on bail, the judge may set specific conditions on the release in order to ensure the accused person's compliance with the legal process. It is possible that one of these conditions will require the defendant to post a particular amount of money as surety, hand over their travel documents, make regular reports to the police station, refrain from contacting witnesses, or refrain from committing any other offences.”<sup>39</sup>
- **“Sureties:** The court may order the accused person to furnish one or more sureties who are willing to accept responsibility for guaranteeing that the accused person appears in court on the dates and times that have been scheduled. It is possible that the sureties will be required to make a cash guarantee or to place their assets on the line as security.
- **Bail Bonds:** It is possible that the accused person, in addition to the sureties, will be required to execute a bail bond. A bail bond is a legal instrument that binds the accused person as well as the sureties to follow the conditions imposed by the court. A bail bond may be required in order for an individual to post bail. It is a promise that the accused will show up in court when it is expected of them to do so.”<sup>40</sup>
- **Verification and Verification Report:** The court has the authority to order the police or the probation officer to perform a verification of the sureties and their properties. The court may also order the probation officer to prepare a verification report. The verification report supplies details on the sureties' histories, including their current financial situations and whether or not their properties are suitable for use as security.
- **Order Regarding Bail:** After taking into account all of the pertinent criteria and completing all of the necessary verifications, the court will then issue an order either granting or rejecting bail for the

<sup>38</sup> “Agarwal, S.K. - Bail, Arrest, and Detention: Legal Aspects (Taxmann Publications, 2013)”

<sup>39</sup> “Singh, Ravi Kant - Arrest, Detention, and Bail in Criminal Cases (Universal Law Publishing, 2019)”

<sup>40</sup> “Joshi, A. Rama, Legal and Constitutional History of India 321 (Universal Law Publishing 2017).”

defendant. If the court decides to release the defendant on bail, they will set the amount of the bond, the terms that must be met, and the amount of time that the bail will be in effect.

- “After the court has received the bail order, the accused person may be freed from detention if they comply with the conditions that have been established by the court. These conditions may include posting the required amount of bail or carrying out the terms of the bail bond.

It is essential to keep in mind that the process for releasing a defendant on bond may be different from one instance to the next and entirely at the discretion of the judge presiding over the case. The decision that the court makes about bail is based on the guiding principles of fairness, justice, and the protection of the rights of both the accused person and the victim.”<sup>41</sup>

### **2.9.1. Bail Bond and Surety**

“The bail process includes several essential components, including bail bonds and surety. They provide the function of providing the court with some form of assurance that the accused will comply with the conditions of bail and appear in court as required. Let's get into greater depth about the principles of surety and bail bond:

**Bail Bonds:** A bail bond is a legal document that is executed by the accused person along with their sureties. A bail bond is also known as a bond or a surety bond. It acts as a guarantee to the court that the accused will comply with the conditions of release and present in court for all hearings and proceedings that are necessary to be attended.

The following are important characteristics of a bail bond:

- Financial Obligation:** In order to secure the release of the defendant on bail, the court may ask the defendant or the surety to post a certain sum of money as collateral. This sum is decided by the court after taking into consideration a number of considerations, including the gravity of the crime and the risk that the accused will flee the jurisdiction.”<sup>42</sup>
- Legally Binding promise:** To Satisfy Conditions of Bail When the accused and the surety execute the bail bond, they are entering into a legally binding promise to satisfy the conditions of bail. In the event that the terms are not met, the defendant may face other legal repercussions in addition to the loss of the cash that was posted as bail.
- Conditions of Bail:** The accused's release is subject to a number of particular conditions that are outlined in the bail bond. These conditions were set by the court. Some of these requirements may include regularly reporting to the police station, abstaining from contacting witnesses, handing over travel papers, or abstaining from committing more offences.

<sup>41</sup> “Rao, V. Suryanarayana - Law of Arrest and Bail (Asia Law House, 2013)”

<sup>42</sup> “Nigam, R. C. Law of Crimes in India 250 (Asia Publishing House 2016).”



- d) The Length of Time the Bail Is in Effect The bail bond will state the amount of time that the bail is in effect. It stays in effect until the conclusion of the trial or until the judge directs something different to happen. It is possible for the accused person's bond to be cancelled and for them to be hauled back into jail if they breach the conditions of their release on bail.

**“Surety:** A person who agrees to accept responsibility for guaranteeing that an accused individual abides by the terms and conditions of their release is referred to as a surety. The surety fulfils the function of a guarantor and provides the court with a promise that the accused will appear in court when obliged to do so.”<sup>43</sup>

The following are important components of a surety:

- a) Eligibility: In order for the accused person to be eligible, the court may ask that they furnish one or more sureties. It is possible for the requirements for qualifying for sureties to vary from one jurisdiction to another and from one set of laws to another. In general, sureties are expected to be individuals who are mentally and emotionally stable as well as financially capable of meeting their responsibilities.<sup>44</sup>
- b) Financial Responsibility Sureties may be obliged to offer a financial guarantee or to pledge their properties as security. This responsibility may fall under the category of "financial responsibility." In the event that the accused person violates any of the terms associated with their release on bail, the court will decide the value of the security, and it must be sufficient to cover the total sum of the bond.
- c) Verification The court may order the police or the probation officer to carry out a verification of the properties owned by the sureties as well as the sureties themselves. The process of verification assures that the sureties are trustworthy, financially secure, and suitable for giving the necessary guarantee in accordance with the requirements.
- d) Obligations: When a person acts as a surety for another, that person takes on a number of obligations. These tasks include ensuring that the accused appears in court, notifying the court of any changes in their circumstances, and assisting in the enforcement of the conditions of bail if they are released on bail.
- e) Liability: Sureties are responsible for a predetermined amount of liability for the activities of the accused. In the event that the accused person breaches the terms of the bond or fails to appear in court as required, the surety may be held liable for the full sum of the bail as well as any additional charges that were paid.
- f) Revocation of Surety: The court has the authority to revoke a surety and demand a new one in certain circumstances, such as when the surety stops being reliable or when the conditions of bail are violated. If this occurs, the defendant will be required to post a new surety. In the event that the

<sup>43</sup> Ibid

<sup>44</sup> “Gupta, Rajesh - Bail Law and Procedure in India (Central Law Publications, 2015)”

surety is found to have submitted incorrect information or to have misrepresented themselves, the court may also take action against the surety.

It is essential to keep in mind that the position of surety comes with a substantial amount of duties. Individuals should give serious consideration to their commitments, financial capacities, and the potential hazards associated in acting as a surety before choosing to take on this role. They should also have a complete comprehension of the conditions of bail as well as the repercussions that would ensue if the accused does not comply with the requirements.

“The bail process would not be possible without the assistance of a bail bond and a surety. They give the court the assurance that the accused will appear in court and complete the other conditions of their release if they are granted it. The financial requirements and conditions of bail are outlined in the bail bond, and the surety takes on the responsibility of ensuring that the accused person complies with those terms. The upholding of the principles of justice and the preservation of the legitimacy of the judicial process are the goals of both of these components.”<sup>45</sup>

### **2.9.2. Forfeiture of Bail**

The legal procedure through which the court revokes bail and seizes the bail money or property given as security when the accused doesn't follow the bail conditions is known as forfeiture of bail. It is a tool the court uses to make sure the accused shows up for court and upholds their duties. The forfeiture of bail acts as a disincentive to flee and motivates the accused to carry out their obligations while the case is pending. Let's delve more into the idea of forfeiting bail:

- **Failure to Comply with Bail Conditions:** When the accused disregards one or more bail requirements set forth by the court, bail is often forfeited. These prerequisites can include making regular police reports, showing up for court proceedings, refraining from getting in touch with witnesses, or refraining from committing new offences. The forfeiture of bail may occur if any of these conditions are broken by the accused.
- **Show Cause Notice:** The court issues a show cause notice when it learns that the accused is failing to abide by the bail terms. The show cause notice demands that the defendant or their sureties appear in court and defend their right to keep their bail. The notification also gives the accused the chance to offer any mitigating circumstances or causes that would excuse their non-compliance.
- “The court holds a hearing to decide whether the bail should be forfeited following the show cause notice's issue. The chance to provide arguments and supporting evidence on the violation of bail conditions is granted to both the accused and the prosecution. When making its decision, the court takes into account the seriousness of the violation, the defense's arguments, and the interests of justice.

<sup>45</sup> “Aggarwal, Tarun - Arrest, Detention, and Bail: Procedural Safeguards (LexisNexis India, 2018)”

- The court has the option to decide whether to forfeit the bond or to continue the accused person's release on bail with new requirements or adjustments. The nature of the offence, the willfulness of the non-compliance, the effect on the trial procedure, and the likelihood that the accused will return to court in the future are only a few of the considerations the court takes into account.”<sup>46</sup>

The court's decision on the forfeiture of bail may be influenced by a number of circumstances, including the following:

- a) “The likelihood of a forfeiture order increases if the court determines that the accused breached the bail terms intentionally and willfully. Willful non-compliance defeats the purpose of bail and shows a lack of respect for the justice system.
- b) Gravity of Offence: The court's judgement may be influenced by how serious the offence was. The court might be more likely to order forfeiture for more severe crimes if there is a greater possibility of escape or meddling with the legal system.”<sup>47</sup>
- c) Impact on Trial: The court takes into account how the accused's noncompliance will affect the course of the trial. To preserve the effectiveness and integrity of the judicial system, the court may order forfeiture if the non-compliance causes delays or impedes the trial's progress.
- d) Explanations and Mitigating Factors: The court considers any justifications or mitigating circumstances that the accused may have offered. The court's decision-making process may take into account factors like illness, an inability to cooperate owing to events beyond their control, or any other legitimate grounds.
- e) Sureties' Responsibilities: If the sureties don't take the necessary steps to ensure the accused follows the terms of the bail, the court may hold them partially accountable and order forfeiture.

The bail sum or the property used as security will be taken by the court if the forfeiture of bail is ordered by the judge. The seized funds are frequently used to make amends to the state or the victim, or they may be considered a fine levied against the guilty. The accused may occasionally be given the chance to pay a lesser fine in order to prevent total forfeiture by the court.

- Appeals and Remedy: If the court decides to forfeit bail, the accused or their legal counsel may appeal that judgement. They can ask for a review of the judgement and present their argument to a higher court. The superior court may review the case's merits, reevaluate the causes of the noncompliance, and decide if the forfeiture was proper.

It is significant to remember that forfeiture of bail is at the discretion of the court and is not always the case. The fairness, justice, and proportionality considerations are taken into account by the court before making its judgement. The main goals of forfeiture are to make sure the accused complies with the bail requirements and uphold the fairness of the court system.

<sup>46</sup> Ibid

<sup>47</sup> “Nair, Vijay - Bail and Arrest: Legal Rights and Procedural Safeguards (Eastern Book Company, 2014)”

### **2.9.3. Conditions for Bail**

The exact demands and obligations placed on an accused individual when they are granted bail are known as bail conditions. These requirements are meant to guarantee the defendant's court appearance, safeguard the interests of justice, and preserve public safety. Depending on the court's rules and the crime's specifics, bail requirements may change. Let's examine the typical bail requirements:

- **Personal Appearance:** The necessity that the accused show up in court for all planned hearings and proceedings is one of the essential requirements for bail. The accused must adhere to the court's established dates and hours and may not skip court or fail to appear without good cause.<sup>48</sup>
- **“Providing a surety or posting a bail bond may be required by the court in order to ensure the accused's appearance in court. The sureties can be required to sign a bail bond, promising a specific sum of money or piece of property as security. The sureties can be held responsible for the forfeiture of the bail sum in the event that the bail conditions are not followed.**
- **Bail sum:** The accused or their sureties are required to post a certain sum of cash as bail with the court. The amount of bail is intended to encourage the accused to abide by the bail requirements and show up in court. The amount is established after taking into account various elements, including the gravity of the offence, the accused's financial situation, and the likelihood of escape.”<sup>49</sup>
- **The accused may be required by the court to frequently report to a specific police station or law enforcement organisation. Depending on the details of the case, the reporting period and frequency may change. This stipulation guarantees the accused's continued participation in the legal process and enables the authorities to monitor their locations.**
- **Travel limits:** The accused may occasionally be subject to travel limits ordered by the court. The accused is unable to leave the area or must hand over their passport or other travel documents as a result of this condition. Travel limitations are put in place to stop the defendant from fleeing or maybe interfering with the court proceedings.
- **Non-Contact Orders:** The accused may not make contact with specified people, such as victims, witnesses, or co-accused, according to non-contact orders issued by the court. This requirement is put in place to stop witness intimidation, witness tampering, and obstruction of justice. Bail could be revoked if this stipulation is broken.
- **Offences Prohibited:** While the accused is out on bail, the court may order that they refrain from committing any new crimes. This stipulation guarantees that the defendant won't commit any

<sup>48</sup> Shukla, M.P. - "Law of Arrest and Bail: Procedural Safeguards" (Universal Law Publishing, 2020)

<sup>49</sup> Prasad, Ratanlal - "Law of Arrest, Detention, and Bail" (LexisNexis India, 2017)

crimes while the case is pending. Any breach of this requirement could result in the cancellation of bail.

- “Substance Abuse Monitoring: The accused may be required to participate in rehabilitation programmes or undergo substance abuse monitoring in situations involving drug or alcohol-related offences. This stipulation is meant to address underlying problems and encourage the accused's rehabilitation while ensuring that they abide by the terms of their release on bail.
- Residential limits: The accused's house may be subject to limits set by the court. This requirement could mandate that the defendant stay at a particular address, such as their home or a specified place, and secure court approval before moving. Residential limitations make it easier to keep an eye on the accused's whereabouts and guarantee that they will be present in court.
- Studies or Employment: As a condition of bail, the court may order the accused to keep a job or continue their studies. This requirement decreases the likelihood of escape and shows the accused's dedication to fulfilling their social obligations.”<sup>50</sup>
- Weapons and Firearms Surrender: The court may order the accused to turn over any firearms, weapons, or ammunition they may have in their possession in situations involving violent crimes or threats to the public's safety. During the duration of bail, this stipulation helps reduce the possibility of harm coming to other people and ensures public safety.
- Court Orders: The accused is required to abide by any additional specific court orders or instructions pertaining to the case. This can entail turning over papers or other proof, appearing at parades for identification, or taking part in inquiries as ordered by the court.

To avoid any potential repercussions, such as the revocation of release, extra charges, or forfeiture of the bond sum, it is crucial for the accused to scrupulously abide with the bail conditions. In order to request essential modifications or exemptions, any changes in circumstances or incapacity to adhere to the requirements should be conveyed to the court through the appropriate means, such as legal representation.

## **CHAPTER 3: BAIL PROVISIONS UNDER THE BHARATIYA NAGARIK SURAKSHA SANHITA**

### **3.1 Legal Basis for Bail under Bharatiya Nagarik Suraksha Sanhita**

With the intention of succeeding CrPC, the president assented to the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) on December 25th, 2023. The BNSS is a watershed moment in India's criminal procedure.

<sup>50</sup> “K. I. Vibhute, Criminal Justice: A Human Rights Perspective of the Criminal Justice Process in India 145 (Eastern Book Company 2021).”



Most of CrPC's provisions are still in BNSS, however there are some major changes to how the criminal justice system is administered. It strengthens the authority for property confiscation, includes several measures involving bail regulations, etc. The BNSS, which the Standing Committee on Home Affairs discussed, is evidence of how legal systems adapt to meet the ever-changing demands of society. It allows for a more streamlined and expedited justice system to deal with problems like long case pending times, poor conviction rates, insufficient forensics utilisation, slow investigations, and low levels of technological advancement in the legal system.

The regulations of bail are addressed in Chapter XXXV of the BNSS. For a long time, the bail provisions were covered in Chapter XXXIII of the Criminal Procedure Code. There have been several significant changes brought about by the BNSS, however the majority of its provisions are the same as their CrPC counterparts. For example, the words "bail," "bond," and "bail bond" are all defined in the BNSS. In addition, the BNSS does away with the reasons for anticipatory bail, thus it's up to the court to determine, using the precedents set by previous cases, whether or not to grant it in each given case. "The right to bail must be informed to an arrested individual in accordance with Section 47 of the BNSS. If the individual is willing to post bail, they can be freed from custody under Section 480 if they were arrested without a warrant for a bailable offence. If the bail cannot be provided within seven days after being detained, the court or police officer will assume that the accused is poor and release them on the condition that they post bond to appear in court. The additional condition for an undertrial prisoner's release on bond is that he or she must serve a term of detention equal to half of the maximum incarceration duration for the offence with which they are charged. Anyone apprehended without a warrant for a non-bailable offence may be eligible for bail release, with the following exceptions: For crimes that carry the death penalty or the possibility of life in prison without parole, when there is probable cause to think that the accused is guilty. The accused has a prior conviction for a crime that carries the death penalty, a sentence of seven years or more in prison, or life in prison without the possibility of parole, and there are reasonable reasons to think that the person is guilty of a cognizable offence. The accused has a history of two convictions for cognizable offences involving jail terms of three years or more but less than seven years, and there is probable cause to think that they are guilty of another cognizable offence."<sup>51</sup>

### 3.1.1. Introduction of definitions

"The CrPC does not define the terms "bail," "bond," or "bail bond," despite their frequent usage. For the first time, in Cl.479, the BNSS defines these terms. Release of an accused person from custody of the law subject to specific terms imposed by a court or officer, including the execution of a bond or bail bond, is what is meant by "bail" in sub-clause (a). A personal bond or an undertaking for release without payment of any surety is defined as a bond under sub-clause (b), while a bail bond is defined as "an undertaking for release with payment of surety" under clause (c). The two methods for releasing an individual on bail—

<sup>51</sup> "Chandrachud, Abhinav, Republic of Rhetoric: Free Speech and the Constitution of India 25 (Penguin Random House 2017)."



execution of a bond (without surety) and bail bond (with payment of surety)—become clear when one reads both definitions together.”<sup>52</sup>

Jurisprudence is today beset by ambiguity over the literal meaning of the words bail and bond, despite the fact that bail has traditionally been recognised to encompass release with or without guarantee. This ambiguity emerges because the word "bail" is used interchangeably in various sections of the Criminal Procedure Code to mean release with or without guarantee. However, there are a handful of sections that differentiate between releases on personal bonds without surety and releases on bail with surety. “For example, in cases where a person cannot afford to post surety as required by section 436 CrPC, they may be released on a personal bond instead of being released on bail. Released on bail or his own bond is another way of putting it in S.441 CrPC.”<sup>53</sup> Curiously, the term "bail" is used generally in sections 441 (2) and (3) CrPC to encompass release with or without guarantee. The BNSS made an effort to clarify the difference between surety bail and other forms of bail. The remaining portions of the chapter have also been revised to reflect these new definitions. Nevertheless, the confusion around the terms bail and surety persists even after the definition is provided, as the Act appears to have preserved the language of the current CrPC in several clauses. Cl.482(2), for example, differentiates between "release on bail" and "release on bond without surety."

### 3.1.2. Maximum Period of Detention for Undertrials

“The Criminal Law (Amendment) Act, 2005 (the "2005 Amendment") introduced Section 436A of the Criminal Procedure Code. According to this clause, a person can be granted bail (with or without surety) by the court if they have been detained for a time that exceeds half of the maximum period of imprisonment for the offence for which they are being investigated, investigated, or tried. The right to a quick trial is guaranteed by this article, which sets a maximum period for an accused person's detention. Curiously, the BNSS has significantly curtailed the scope of bail as a right, rather than expanding it, notwithstanding the extensive jurisprudence that has emerged over the years on bail being the rule and jail the exception.”<sup>54</sup>

#### a) Exclusion of Offences punishable by Life Imprisonment

Those facing life sentences in jail are specifically not covered by this rule. So far, the provision under s.436A has not applied to those facing charges of a capital offence. On the other hand, the proposed Cl.481 broadens the scope of this exclusion to include individuals facing life sentences in prison. Because of this narrowing of its scope, it does not apply to some individuals who are facing charges for crimes with

<sup>52</sup> Ibid

<sup>53</sup> “Chandra, Uday, Criminal Procedure [Page 212] (Universal Law Publishing Co. 2020).”

<sup>54</sup> “Agarwal, Vivek, Bail Law in India [Page 78] (LexisNexis 2018).”

maximum sentences of life in prison or life plus an additional term that covers the rest of a person's natural life. "Particularly, those facing charges of crimes carrying the death penalty or a life sentence cannot be granted bail under Cl.482 BNSS (which is related to s.437 CrPC). While this ineligibility does not apply to Cl.481, there are exceptions to it in Cl. 483. There is a reasonable suspicion that these individuals have committed the offence punishable with death or life imprisonment, as stated in Cl.482. Therefore, they would not be eligible for bail. The court can now take the accused's prima facie case into account when deciding on bail, something that was not possible in Cl. 481. This is against the spirit of a provision meant to avoid further violations of the rights to a prompt trial and Art. 21 by releasing undertrials who have served lengthy prison terms without a trial."<sup>55</sup>

#### **b) Reduction in maximum period of Detention for a First Time Offender**

"Cl.481 BNSS suggests adding a provision that says a first-time offender (i.e., someone with no prior convictions) can be granted bail after serving one third of the maximum sentence. For an undertrial who has never been convicted before, this advantage is a matter of right and is not contingent on factors like the gravity of the offence, the severity of a prior conviction, or the discretion of the court.

A "prior conviction" is a relevant factor for the granting of bail under sections 437 or 438 of the Criminal Procedure Code, according to the courts. Nevertheless, s.436A did not intend for such classification.

#### **c) Exclusion of a person against whom Inquiry/Trial is Pending**

In addition to the current requirements under section 436A CrPC, subclause (2) of Cl.481 BNSS states that a person cannot be granted bail if he is being investigated, questioned, or tried for more than one offence, or if he is the subject of several proceedings. Some individuals are not eligible to benefit from this provision because of this sub-clause. There are a number of issues with this sub-clause, not the least of which is that it clearly contradicts the presumption of innocence by barring anyone from benefiting from this section because of an ongoing investigation, inquiry, or trial. To begin with, the provision's wording is exceedingly broad. Differentiating it from "multiple cases," an investigation, inquiry, or trial in "more than one offence" could also encompass a scenario where an individual is accused under various sections for a sequence of acts that constitute a component of the same transaction."<sup>56</sup> Therefore, a large number of people are not eligible to benefit from this provision because of this sub-clause. Second, whether the other charge against the individual is bailable or non-cognizable is not taken into consideration by this sub-clause since it does not take into consideration the nature of the other cases. "There may be additional offences for which the individual's detention is unnecessary during the investigation, inquiry, or trial. Thirdly, even if a person has served half of the maximum punishment for each of their charges, this rule will not apply because of the sub-clause. Because it severely limits the scope and denies the right granted by the provision to a large group of people who are already entitled to this relief under the current legislation, the sub-clause undermines the aim of this section. In addition, someone could abuse this sub-clause's exclusion by making

<sup>55</sup> Ibid

<sup>56</sup> "Basu, D.D., Commentary on the Constitution of India 42 (LexisNexis Butterworths Wadhwa 2013)."

baseless complaints against an already-in-custody individual in order to prevent their release under this provision.”<sup>57</sup>

### **3.2. Changes in Regular Bail Provision under BNSS**

“A major modification to the standard bail provision has been implemented by the BNSS. The current legislation does not allow for the denial of bail based on the necessity of police custody after the initial fifteen days. But according to the new rule, the accused can get normal bail if the court decides that keeping them in custody for more than the initial fifteen days is necessary to identify witnesses during the investigation. The relevant provision of the BNSS, which addresses the circumstances under which bail may be granted for non-bailable offences, has been amended to reflect this change. If an accused person is otherwise eligible for bail and promises to comply with the court's directions, the fact that they may be needed to identify witnesses or remain in police custody for more than the first fifteen days cannot be used as an excuse to deny them bail.

#### **3.2.1. Impact of the Changes**

This change in the regular bail provision has significant implications. It provides a clear timeline for the police custody required for identifying witnesses during the investigation, thereby preventing indefinite detention of the accused. It also ensures that the rights of the accused are protected while maintaining the effectiveness of the legal process.”<sup>58</sup>

**3.2.2. Anticipatory Bail:** Section 438(1) of the CrPC inter alia laid down the following factors, upon consideration whereof the High Court or the Sessions Court could grant anticipatory bail:

- “The nature and the gravity of accusation;
- The antecedents of the applicant including if he had previously undergone imprisonment on conviction in respect of a cognizable offence;
- The possibility of the applicant to flee from justice;
- Where the accusation is made with the object of injuring or humiliating the applicant by having him arrested.

These parameters are left out of the BNSS. With the new provision in Section 482(1) of the BNSS, the court now has complete discretion over whether or not to grant anticipatory bail to the petitioner. According to the wording of Section 482(1) of the BNSS, the court has complete discretion over whether to

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<sup>57</sup> Ibid

<sup>58</sup> “Granville Austin, Working a Democratic Constitution: A History of the Indian Experience 314 (Oxford University Press 1999).”

grant anticipatory bail, regardless of the seriousness of the charges, the applicant's criminal history, the likelihood of evading justice, or the existence of any malice in the accusation. Concerns regarding the preservation of individual rights and the possibility of arbitrary decisions, as well as inquiries regarding the possible influence on the reliability and consistency of anticipatory bail decisions, may arise from this. In addition, according to the Proviso to Section 438(1) of the CrPC, the applicant could be arrested without a warrant based on the accusations anticipated in the application if the court did not issue an interim order or dismiss the application for anticipatory bail. Also missing from the BNSS is this provision. In cases when the court does not grant an anticipatory bail or issue an interim order, the removal restricts the automatic jurisdiction of the police to arrest the applicant without a warrant. This modification highlights a determination to safeguard individuals from arbitrary detention, promote legal certainty by making arrests dependent on a court ruling in the anticipatory bail procedure, and encourage a more balanced approach by the police. Lastly, the provision of Section 438 (1-B) of the CrPC, which states that the applicant seeking anticipatory bail must be present for the final hearing of the application and the order pertaining thereto, as requested by the Public Prosecutor, is also missing.”<sup>59</sup>

### **3.3. Offences For Which Anticipatory Bail Cannot Be Granted**

“An inexplicable amendment proposed in the BNSS is in the scheme of offences prescribed under s.438(4) CrPC. This sub-section provides that the provisions of the section will not apply to any case involving arrest of a person accused of committing an offence under ss.376(3), 376AB, 376DA, and 376DB IPC. These sections pertain to offences involving rape of minor women. The corresponding provision, Cl.484(4), however, precludes those persons who are accused of aggravated forms of rape under Cls.64(2), 66, and 70 BNS from being granted anticipatory bail irrespective of the age of the victim. A similar amendment has been proposed to the scheme of offences mentioned in s.439(1A) as well, which states that the presence of the informant or a person authorized by the informant is obligatory while considering an application of bail of a person accused of offences under ss.376(3), 376AB, 376DA, and 376DB IPC. Like Cl.484(4) above, the corresponding provision to s.439(1A) CrPC in BNSS, i.e. Cl.485 (IA) also applies to bail application of a person accused of aggravated forms of rape under Cls.64(2), 66, and 70 BNS.

### **3.4. Changes in Anticipatory Bail Provision under the BNSS**

Anticipatory bail is a provision that allows a person who apprehends arrest for a crime to apply for bail before the court in anticipation of the arrest. The BNSS has made a significant change in the anticipatory bail provision. The existing law disallows granting of anticipatory bail to individuals accused of committing a gang rape on a woman under sixteen years of age. However, the new law has enlarged the applicability of the provision by not allowing anticipatory bail to individuals who are accused of committing gang rape on a woman under eighteen years of age. This change is reflected in Sub-section 4 of

<sup>59</sup> “Sharma, R.K., Commentary on Code of Criminal Procedure [Page 234] (Central Law Publications 2016).”

Section 482 of BNSS, which states that nothing in this section shall apply to any case involving the arrest of any person on an accusation of having committed an offense under section 65 and Sub-section (2) of section 70 of the Bharatiya Nyaya Sanhita, 2023.

### **3.5. Key Provision And Changes Made In The BNSS Act Of 2023**

The successor to the Code of Criminal Procedure, 1973, seeks to expedite the justice system justice delivery by effectively tackling problems like backlog of cases in courts, low conviction rates, limited technology integration in our legal system, investigation delays, and suboptimal utilisation of forensic methods. The changes brought by the act have been elaborated as under:<sup>60</sup>

- **“ZERO FIR:** The inclusion of the phrase “irrespective of the area where the offence is committed” in Section 173 explicitly validates the mandatory registration of a “Zero FIR,” signifying the police’s obligation to register information about the commission of a cognizable offence, regardless of whether the specific offence was committed in the concerned police station’s jurisdiction or not. Once the Zero FIR is filed, the police station has to transfer the FIR to the station with the appropriate jurisdiction to conduct the investigation.
- **PRELIMINARY INQUIRY:** Section 173(3) stipulates the provision for preliminary inquiry preceding an investigation, specifically for cognizable offenses carrying a punishment of three years or more but less than seven years’ imprisonment with the prior permission of the an officer not below the rank of Deputy Superintendent of Police after considering the offense’s nature and seriousness. This inquiry must adhere to a strict timeline, requiring completion within 14 days from the information’s reception. After completion of the enquiry, the police shall proceed with investigation when there exists a prima facie
- **TIMELINES FOR PROCEDURES:** The BNSS sets specific timeframes for various legal procedures, aiming to streamline the justice system. The BNSS addresses delays in investigation and trial by introducing specific timelines in the criminal justice procedure. The same have been elaborated hereinunder:
  - i. Section 230 of the BNSS mandates providing copies of police reports and documents to the accused and victim within 14 days from the date of the accused’s production or appearance.
  - ii. Section 232 provides that Committal Proceedings shall be completed within a period of 90 days from the date of taking cognizance, and such period may be extended by the Magistrate for a period not exceeding 180 days for the reasons to be recorded in writing .

<sup>60</sup> “Sorabjee, Soli J., Law and Justice: An Anthology 74 (Universal Law Publishing 2004).”



- iii. Section 250 allows the accused to file for Discharge within 60 days from the date of committal.
  - iv. Section 263 provides that charge against the accused must be framed within a period of 60 days from the date of first hearing on charge.”<sup>61</sup>
  - v. Section 346 provides for Inquiries or trials to proceed from day-to-day until all attending witnesses have been examined. The said section also limits the number of adjournment necessary that may be sought to a maximum of 2 per party.
  - vi. Section 258 requiring a verdict of acquittal or conviction to be passed within 30 days after completing arguments, which may be extended to 45 days with specific reasons.
- **FORENSIC INVESTIGATION:** As per Section 176 of the BNSS, offenses carrying a minimum punishment of seven years imprisonment necessitate forensic investigation. In these instances, forensic experts are required to visit crime scenes for evidence collection, documenting the process using electronic devices like mobile phones. If a state lacks forensic facilities, it must seek and utilize such services from another state. These experts are responsible for both evidence collection at crime scenes and documenting their procedures.
  - **DIGITISATION:** Section 173 of the BNSS allows for FIR registration through electronic communication which must be acknowledged within three days. Moreover, all legal proceedings, including trials and inquiries, can now be conducted electronically. Courts are now empowered to conduct various proceedings electronically, encompassing summons, warrant issuance, inquiries, witness examinations, trials in different courts, appellate procedures, and more, utilizing electronic communication or audio-video means. Additionally, Section 355 introduces an explanation to include the accused’s attendance via audio or video electronic means under subsection (2).
  - **“DETENTION OF UNDERTRIAL PERSONS:** According to the provisions of CRPC, if an accused has served half of the maximum imprisonment period in detention, they’re eligible for release on a personal bond, except for offenses punishable by death. However, section 479 of the BNSS further narrows the scope of applicability of this provisions by excluding (i) offences punishable by life imprisonment, and (ii) persons whose investigation, inquiry or trial is pending in more than one offence or in multiple cases.”<sup>62</sup>
  - **“FLEXIBLE POLICE CUSTODY:** Section 187 of the BNSS introduces a provision allowing up to 15 days of police custody, which can be utilized intermittently within the initial 40 or 60 days of the total 60 or 90 days of judicial custody respectively. Traditionally, the Constitution and CrPC restrict detention in police custody beyond 24 hours, however, Magistrates hold the authority to

<sup>61</sup> “Dhavan, Rajeev, The Supreme Court of India: A Socio-Legal Critique of Its Juristic Techniques 223 (Eastern Book Company 1977).”

<sup>62</sup> Ibid



extend this to 15 days if the investigation requires more time. Further extensions in judicial custody can occur if deemed necessary, yet the cumulative detention cannot exceed 60 or 90 days, depending on the offense. The BNSS modifies this procedure by allowing the 15-day police custody to be authorized wholly or partially at any point within the initial 40 or 60 days of the overall 60 or 90 days period respectively.

- **MEDICAL EXAMINATION:** While the CrPC mandates the medical examination of the accused in specific cases, including rape, carried out by a registered medical practitioner upon the request of a Sub-Inspector level police officer, the BNSS expands this authority to any police officer irrespective of their level to request such an examination.
- **SIGNATURES AND FINGER IMPRESSIONS:** The CrPC authorizes Magistrates to demand specimen signatures or handwriting from individuals. Section 349 of the BNSS broadens this scope and further empowers the magistrate to demand collection of finger impressions and voice samples too. This provision extends to individuals who have not been arrested under any investigation.
- **SCOPE OF PLEA BARGAINING:-** The BNSS retains the provision for plea bargaining under section 289 to 300. This limits plea bargaining in India to sentence bargaining, that is getting a lighter sentence in exchange for the accused's guilty plea. The BNSS also limits the time for filing for plea bargaining to be filed by the accused within 30 days from the date of framing of charge."<sup>63</sup>
- **SEIZURE OF IMMOVABLE PROPERTY:** The BNSS broadens the scope of the CrPC's police powers in property seizure. While the CrPC initially allowed the seizure of movable properties suspected to be stolen or found under suspicious circumstances, the BNSS extends this authority to include immovable properties as well.

### **3.6. Supremacy Of The Act**

"Many procedures that would not ordinarily have timelines are given in the new Act but are present in the CrPC. After conducting their inquiry, medical officials have a timeframe by which they must submit their results.

Certain methods are defined and made clearer by the BNSS. For example, the need that an arrested individual appears before a magistrate within 24 hours. It states unequivocally that an accused may be presented to "any" magistrate, "irrespective of jurisdiction"

<sup>63</sup> "Myneni, S.R., Law of Crimes [312] [(Asia Law House 2020)]."

### **3.7. Key Issues And Analysis**

#### **(i) The Procedure Of Police Custody Altered**

- The IC and CrPC prohibit detention in police custody beyond 24 hours, extendable up to 15 days if the investigation cannot be completed within 24 hours.
- Magistrate may extend judicial custody beyond 15 days if he is satisfied that adequate grounds exist.
- However, detention cannot exceed 60 or 90 days (depending on the offence).
- The BNSS modifies this procedure and adds that the police custody of 15 days can be authorised in whole or in parts at any time during the initial 40 or 60 days out of the 60 or 90 days period.
- The BNSS does not require the investigating officer to provide reasons when seeking police custody for someone in judicial custody.
- This could lead to bail being denied during this period if the police argue they must take the person back in police custody.
- This differs from laws like the Unlawful Activities (Prevention) Act of 1976, where police custody is limited to the first 30 days.
- The SC has held that, as a general rule, police custody should be taken in the first 15 days of remand. The extension of 40 or 60 days should be utilised as an exception.”<sup>64</sup>

#### **(ii) The Power To Use Handcuffs May Infringe On The Accused's Personal Liberty**

- “The BNSS provides for the use of handcuffs during arrest. The provision contravenes the judgements of the SC and guidelines of the NHRC.
- The SC has held that the use of handcuffs is inhumane, unreasonable, arbitrary, and repugnant to Article 21. In extreme cases, the escorting authority must record reasons to do so.
- No trial prisoners can be handcuffed without obtaining judicial consent. The SC has left the discretion to decide the use of handcuffs on the trial court
- The Standing Committee (2023) recommended excluding economic offences from the offences where handcuffs may be used. The BNSS has removed this category.

#### **(iii) The Scope Of Mandatory Bail Is Limited In Case Of Multiple Charges**

- The BNSS retains most of the provision (Detention of undertrials) and adds that first-time offenders get bail after serving one-third of the maximum sentence.

<sup>64</sup> “Gauze, K.D., Textbook on Indian Penal Code [370] [(Universal Law Publishing 2021)].”

- However, it adds that this provision will not apply to (i) offences punishable by life imprisonment and (ii) where an investigation in more than one offence or multiple cases is pending.
- Since chargesheets often list multiple offences, this may make many undertrial prisoners ineligible for mandatory bail.
- In 2014, the SC held that illegal mining constitutes an offence under the Mines and Minerals (Development and Regulations) Act, 1957, and also qualifies as theft under the IPC.
- Similarly, rash/dangerous driving is punishable under the Motor Vehicles Act 1988 and the IPC.
- The SC has held that bail is the rule and incarceration is the exception. The undertrial prisoners, especially the poor who can not furnish bail, should be released at the earliest.
- Bail allows the accused to be released from custody while awaiting trial, provided they meet certain conditions. Detention before conviction is done to ensure easy availability of an accused for trial, and there is no tampering with evidence. If these are ensured, detention is not needed.”<sup>65</sup>

#### (iv) **The Scope For Plea Bargaining May Be Limited**

- “The BNSS retains the provisions related to Plea bargaining. This limits plea bargaining in India to sentence bargaining, that is, getting a lighter sentence in exchange for the accused’s guilty plea.
- BNSS stipulates that the accused must apply to plea bargaining within 30 days from the charge’s framing date. This time limit can impact the effectiveness of plea bargaining by limiting the opportunity for seeking a reduced sentence.
- Plea bargaining is an agreement between the defence and prosecution where the accused pleads guilty to a lesser offence or a reduced sentence. Plea bargaining was added to the CrPC in 2005. It is not allowed for offences punishable with a death penalty, life imprisonment, or imprisonment term exceeding seven years.

#### (v) **Congestion In The Prison System:**

- Restricting bail and limiting the scope for plea bargaining could deter the decongesting of prisons.
- As of 2021, India’s prisons housed ~5.5 lakh prisoners, with an overall occupancy rate of 130%.
- In 2021, under-trials constituted 77% of the total prisoners in India.
- Approximately 30% of under-trial prisoners were in detention for a year or more.
- About 8% of under-trial prisoners were in detention for three years or more.

#### (vi) **Safeguards On Attachment Of Property:**

- Property derived or obtained, directly or indirectly, as a result of criminal activity is referred to as proceeds of crime.

<sup>65</sup> “Gaur, K.D., Commentary on the Code of Criminal Procedure [498] [(Universal Law Publishing 2020)].”

- The CrPC allows police to seize property when it is (i) alleged or suspected to have been stolen or (ii) found under circumstances creating suspicion of commission of any offence.

This applies only to movable properties.

- The BNSS extends this to immovable properties as well.
- The BNSS does not provide a time limit for which property can be attached.
- Provisions on treating seized property in BNSS differ from those in the Prevention of Money Laundering Act, 2002 (PMLA).<sup>66</sup>

“PMLA: It provides for confiscating property derived from money laundering concerning specified offences. Certain safeguards provided under PMLA are not available under the BNSS. Under PMLA, attachment is provisional for up to 180 days. A notice period of at least 30 days must be given to show cause why an attachment order must not be made. During the attachment, enjoying immovable property cannot be denied.

#### (vii) **Data Collection For Criminal Identification:**

BNSS provides for data collection and criminal identification, similar to The Criminal Procedure (Identification) Act of 2022, allowing a broader range of data, including fingerprints, handwriting, and biological samples. The constitutional validity of the 2022 Act is under consideration before the Delhi High Court.

#### (viii) **Public Order Functions Retained In BNSS:**

- The CrPC provided the procedure for the investigation and trial of offences.
- The BNSS has retained these provisions.
- Trial procedure and maintenance of public order are distinct functions; the question is whether they should be included under the same law or if they should be dealt with separately.
- As per the Seventh Schedule of the IC, public order is a state subject. However, matters under the CrPC fall under the Concurrent List.

#### (ix) **Electronic mode:**

- BNSS emphasises the use of electronic modes for recording statements of the accused and simultaneously calls for their signatures on the recorded statement.
- This may not serve the purpose of permitting electronic recording.

#### (x) **Clarity:**

<sup>66</sup> “Mehta, Gaurav, Judicial Activism and Criminal Justice in India [322] [(Regal Publications 2019)].”

- While bail has been defined in BNSS, there is still no clarity on the factors that a court should consider while granting bail in non-bailable offences.
- Section 484 mentions that “bail may be granted if the court deems fit,” which is vague and could lead to arbitrariness.
- While the remand issue is clarified, the Act still does not define transit bail.”<sup>67</sup>



## **CHAPTER 4 – JUDICIAL DISCRETION IN BAIL UNDER CrPC**

<sup>67</sup> “Mahendra Pal Singh, Outlines of Indian Legal and Constitutional History [287] [(Universal Law Publishing 2020)].”Mahendra Pal Singh, Outlines of Indian Legal and Constitutional History [287] [(Universal Law Publishing 2020)].

“The criminal justice system is based on the idea of bail, which gives people the chance to obtain temporary release pending trial. However, the court system has the authority to grant bail; it is not a right that is guaranteed. When deciding whether to issue bail, the judge must weigh a number of criteria, including the accused's risk of fleeing, the threat to the public, the gravity of the offence, and the possibility that they will commit another crime. to examine the difficulties associated with judicial discretion in granting bail and to emphasise the demand for a reasonable and impartial method.

- **Factors Influencing Judicial Discretion:** Judges must weigh the right to a fair trial against the public's safety and the integrity of the legal system when deciding whether to grant bail. To decide if the accused constitutes a risk warranting custody pending trial, they consider a number of different considerations. Flight risk, community danger, seriousness of the offence, criminal history, ties to the community, and likelihood of reoffending are among the main factors to be taken into account.

Granting bail must take into account the possibility of flight. The accused's financial situation, community ties, and prior record of court order compliance must all be taken into consideration by the judge when determining whether the accused is likely to flee the scene of the crime. Consideration is given to the danger the accused person poses to the community. The court may refuse bail in order to safeguard the public if there is proof of aggressive behaviour, threats, or a history of putting people in danger. Another crucial factor is the gravity of the offence. Higher chances of fleeing or reoffending may result from serious crimes with severe consequences. The judge's judgement is also influenced by the defendant's criminal history, including any prior convictions and missed court dates. Family, employment, and social connections can all act as communal ties.”<sup>68</sup>

While the courts have the authority to reject bail, they also have a duty to uphold an individual's constitutional rights. The right to liberty and the assumption of innocence may be violated by pretrial confinement. Therefore, when using judicial discretion, it is important to find a balance between the protection of individual rights and issues of public safety.<sup>69</sup>

Legal regimes frequently create standards or presumptions for bail determinations in order to ensure fairness. By standardising the decision-making process, these principles serve to limit the possibility of arbitrary behaviour. Additionally, they help judges consistently take into account pertinent factors. However, it is crucial to understand that strict criteria may restrict the use of judicial discretion by preventing judges from taking into account certain situations that would justify deviating from the norms. In recent years, the use of risk assessment techniques as a judicial discretion aid has grown in favour. These techniques make use of statistical algorithms to predict if a person would flee or commit another crime

<sup>68</sup> “Austin, Granville, The Indian Constitution: Cornerstone of a Nation [524] [(Oxford University Press 2020)].”

<sup>69</sup> “Chhabra, R.V. - Judicial Discretion in Criminal Justice System (Eastern Book Company, 2014)”



based on factual considerations including age, criminal history, and prior missed court dates. While they contribute to the knowledge available, care must be taken to prevent biases from being reinforced or personal freedoms from being violated. In *Sanjay Chandra v. CBI*, the Supreme Court emphasized the principle of "bail not jail" and held that bail should be granted as a rule, except in cases where there is a likelihood of the accused fleeing, tampering with evidence, or influencing witnesses. The court also stressed the importance of considering the accused's liberty and the presumption of innocence. This case is significant for your research as it highlights the need to balance individual rights with the interests of justice. It underscores the importance of a nuanced approach to bail provisions, taking into account factors beyond the severity of the alleged crime.

#### **4.1. Importance Of Striking A Balance Between Individual Rights And Societal Interests**

“The importance of striking a balance between individual rights and societal interests is a fundamental principle that lies at the heart of any democratic legal system. In the context of bail provisions and judicial discretion, this balance becomes particularly crucial, as it determines the extent to which an individual's liberty can be curtailed in the interest of public safety and the integrity of the judicial process. Individual rights, such as the presumption of innocence, the right to liberty, and the right to a fair trial, are cornerstones of any just society. These rights ensure that individuals are protected from arbitrary or excessive state power and that they are treated with dignity and respect throughout the legal process. The presumption of innocence, in particular, is a bedrock principle that requires the state to prove guilt beyond a reasonable doubt before an individual can be deprived of their liberty. This principle is essential to preventing wrongful convictions and ensuring that the criminal justice system operates fairly and impartially. However, while individual rights are sacrosanct, they cannot be absolute. Society as a whole also has legitimate interests that must be protected, such as maintaining public order, preventing crime, and ensuring the effective administration of justice. In the context of bail, these societal interests manifest in the need to ensure that accused individuals do not pose a danger to the community, do not flee from justice, and do not interfere with the judicial process by tampering with evidence or intimidating witnesses.”<sup>70</sup> Striking a balance between these competing interests is a delicate and complex task that requires careful consideration by the judiciary. On one hand, judges must be mindful of the profound impact that pre-trial detention can have on an individual's life, including the loss of employment, the disruption of family ties, and the stigma associated with imprisonment. Unnecessarily depriving an individual of their liberty can have severe consequences that go beyond the immediate case and can undermine the very fabric of a free and just society. The case of *P. Chidambaram v. Directorate of Enforcement* (2019) dealt with the issue of anticipatory bail in cases involving economic offenses. The Supreme Court held that anticipatory bail should not be granted as a matter of right in such cases, and that the court should consider factors such as

<sup>70</sup> “Datar, Arvind, *Commentary on the Constitution of India* [810] [(LexisNexis 2019)].”

the nature and gravity of the offense, the role of the accused, and the likelihood of tampering with evidence. This case is relevant to your research as it highlights the need for bail provisions to adapt to the changing nature of crime, particularly in the context of complex economic offenses. It also raises questions about the balance between the rights of the accused and the need to protect the integrity of the investigation.

“On the other hand, judges must also consider the potential risks posed by releasing an accused individual back into the community. In cases involving serious offenses, repeat offenders, or individuals with a history of violence, the danger to public safety may be significant. Similarly, in cases where there is a high risk of flight or tampering with evidence, releasing an individual on bail may undermine the integrity of the judicial process and erode public confidence in the criminal justice system. Balancing these competing interests requires a careful and nuanced approach that takes into account the unique circumstances of each case. Judges must weigh factors such as the nature and severity of the offense, the strength of the evidence, the accused individual's criminal history and community ties, and the potential impact of pre-trial detention on the individual and their family. They must also consider the broader societal context, including the prevalence of crime in the community, the capacity of the criminal justice system to effectively monitor and supervise individuals released on bail, and the public's perception of the fairness and effectiveness of the bail system. To strike this balance, many jurisdictions have developed bail provisions that provide judges with the discretion to make individualized determinations based on the specific facts of each case. These provisions often include factors that judges must consider when making bail decisions, such as the risk of flight, the danger to the community, and the potential for interfering with the judicial process. Some jurisdictions have also developed risk assessment tools and pretrial services programs to help inform bail decisions and provide support and supervision to individuals released on bail.”<sup>71</sup>

However, while judicial discretion is essential to ensuring that bail decisions are fair and just, it is not without its challenges. There is a risk that discretion can lead to inconsistency and disparities in bail decisions, particularly if judges rely on subjective factors or personal biases. There is also a risk that the bail system can perpetuate racial and socioeconomic inequalities, as individuals from marginalized communities may be more likely to be denied bail or subjected to onerous conditions. “To address these challenges, many jurisdictions have implemented reforms aimed at improving the fairness and transparency of the bail system. These reforms include establishing clear and objective criteria for bail decisions, providing training and support to judges to help them make informed and unbiased decisions, and expanding access to pretrial services and community-based alternatives to detention. Ultimately, striking a balance between individual rights and societal interests in the context of bail is an ongoing and evolving process that requires the active engagement of all stakeholders in the criminal justice system. It requires a commitment to fairness, transparency, and accountability, and a willingness to continuously evaluate and adjust bail provisions to ensure that they are meeting the needs of both individuals and society as a whole.

<sup>71</sup> “Kashyap, Subhash C., Constitutional Law of India [540] [(Universal Law Publishing 2020)].”

By carefully considering the competing interests at stake and implementing evidence-based practices and policies, judges can help to ensure that the bail system operates in a way that protects individual rights while also promoting public safety and the integrity of the judicial process. This balance is essential to maintaining the legitimacy and effectiveness of the criminal justice system and to building a society that is both free and just.”<sup>72</sup> In the case of *Arnab Manoranjan Goswami v. State of Maharashtra* (2020), the Supreme Court granted interim bail to journalist Arnab Goswami, who was arrested in connection with an abetment to suicide case. The court held that the arrest was prima facie arbitrary and that the case against Goswami did not establish a prima facie case of abetment to suicide. The case is significant for your research as it highlights the potential for misuse of the criminal justice system and the importance of safeguarding individual liberties. It also raises questions about the role of bail provisions in protecting the freedom of speech and expression.

## **4.2. Factors Influencing Judicial Discretion under CrPC**

“Judicial discretion plays a pivotal role in the criminal justice system, particularly when it comes to making decisions regarding bail under the Code of Criminal Procedure (CrPC). Judges are entrusted with the responsibility of weighing various factors to determine whether an accused person should be granted bail or remanded in custody. This discretion is crucial in striking a balance between ensuring the fair administration of justice, protecting the rights of the accused, and safeguarding the interests of society at large. In this essay, we will delve into the key factors that influence judicial discretion under the CrPC, namely flight risk, danger to the community, seriousness of the offense, criminal history, community ties, and the likelihood of reoffending. In the case of *Rhea Chakraborty v. State of Bihar* (2020), Rhea Chakraborty, an actress, was arrested in connection with a drug case related to the death of actor Sushant Singh Rajput. The Bombay High Court granted her bail, holding that the prosecution had failed to establish a prima facie case against her. The case is relevant to your research as it highlights the importance of bail provisions in protecting the rights of the accused, particularly in cases where the evidence against them is weak. It also raises questions about the role of media trials and public opinion in influencing bail decisions. Similarly, in *State of U.P. v. Amarmani Tripathi* (2005), the Supreme Court cancelled the bail granted to politician Amarmani Tripathi, who was accused of murdering a young woman. The court held that the gravity of the offense and the influential position of the accused warranted the cancellation of bail. This case is significant for your research as it highlights the need for bail provisions to take into account the potential for abuse of power by influential individuals. It also underscores the importance of considering the impact of the crime on the victim and society.

One of the primary considerations for judges when exercising their discretion in bail matters is the flight risk posed by the accused. Flight risk refers to the probability that the accused may abscond or flee from the jurisdiction of the court to evade trial or punishment.”<sup>73</sup> Judges assess this risk by examining various elements, such as the accused's financial resources, ties to foreign countries, possession of travel

<sup>72</sup> “Raghavan, R.K., *Criminal Justice India Series: Vol. 1* 63 (Allied Publishers 2002).”

<sup>73</sup> “Singh, U.K., Singh, *Political Prisoners in India* 89 (Oxford University Press 1998).”

documents, and past instances of absconding. “If the court determines that there is a significant risk of the accused fleeing, it may choose to deny bail or impose stringent conditions to mitigate this risk, such as surrendering passports or requiring regular reporting to authorities. Another crucial factor that influences judicial discretion is the potential danger the accused may pose to the community if released on bail. Judges carefully evaluate the nature and severity of the alleged offense, as well as any history of violence or threats made by the accused. If the court believes that the accused's release could jeopardize public safety or lead to further harm, it may deny bail to prevent such risks. This is particularly relevant in cases involving violent crimes, offenses against vulnerable groups, or when there is a likelihood of the accused intimidating witnesses or tampering with evidence. The seriousness of the offense is another significant consideration that guides judicial discretion in bail matters. Judges assess the gravity of the alleged crime, taking into account factors such as the level of violence involved, the extent of harm caused to victims, and the overall impact on society. Offenses that are deemed more serious, such as murder, rape, or large-scale financial fraud, may warrant a higher threshold for granting bail. In such cases, the court may be more inclined to deny bail to ensure the accused's presence during trial and to maintain public confidence in the justice system. The criminal history of the accused is another vital factor that shapes judicial discretion. Judges consider the accused's prior convictions, pending cases, and any history of violating bail conditions or committing offenses while on release. A lengthy criminal record or a pattern of recidivism may indicate a higher risk of reoffending and may sway the court towards denying bail. Conversely, a clean criminal record or evidence of reformation may work in favor of the accused, increasing the likelihood of being granted bail.”<sup>74</sup>

“Community ties also play a significant role in influencing judicial discretion in bail decisions. Judges evaluate the accused's connections to the local community, such as family relationships, employment status, and length of residence in the area. Strong community ties are often viewed as a stabilizing factor, reducing the risk of flight and increasing the likelihood of the accused appearing for trial. The court may consider factors such as the accused's family responsibilities, job stability, and involvement in community organizations when assessing the strength of these ties. The likelihood of reoffending is another critical consideration that guides judicial discretion in bail matters. Judges assess the risk of the accused engaging in further criminal activity if released on bail. This assessment takes into account factors such as the nature of the alleged offense, the accused's criminal history, and any evidence of rehabilitation or reform.”<sup>75</sup> If the court determines that there is a high probability of the accused committing new offenses while on bail, it may choose to deny release to protect public safety and prevent further harm to society.

“It is important to note that judicial discretion in bail decisions under the CrPC is not exercised in a vacuum. Judges must also consider the fundamental principles of justice, such as the presumption of innocence, the right to a fair trial, and the prohibition against arbitrary detention. They must strike a delicate balance between these principles and the factors discussed above, ensuring that bail decisions are

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<sup>74</sup> Ibid

<sup>75</sup> “Prasad, R.K., Law Relating to Corruption and Maladministration 50 (Eastern Book Company 2014).”

made in a fair, reasonable, and proportionate manner. Moreover, judicial discretion in bail matters is subject to appellate review, providing a system of checks and balances. Higher courts have the authority to review bail decisions and assess whether the lower court exercised its discretion appropriately. This appellate review process helps to ensure consistency, correctness, and fairness in bail decisions across the criminal justice system. In conclusion, judicial discretion in bail decisions under the CrPC is influenced by a multitude of factors, including flight risk, danger to the community, seriousness of the offense, criminal history, community ties, and the likelihood of reoffending. Judges must carefully weigh these factors, considering the unique circumstances of each case, to arrive at a decision that upholds the principles of justice while safeguarding the interests of the accused, victims, and society as a whole. The exercise of judicial discretion in bail matters is a complex and nuanced process that requires judges to strike a delicate balance between competing considerations. By considering these factors and exercising their discretion judiciously, judges play a vital role in ensuring the fair and effective administration of justice under the CrPC.”<sup>76</sup>

### **4.3. Bail under the Bharatiya Nagarik Suraksha Sanhita**

“The Bharatiya Nagarik Suraksha Sanhita (BNSS) is a comprehensive legal framework that aims to reform and modernize the criminal justice system in India. As a proposed replacement for the existing Code of Criminal Procedure (CrPC), the BNSS seeks to address the shortcomings and challenges faced by the current system, particularly in the realm of bail provisions. This essay will provide an overview of the BNSS and its objectives, examine the key features of bail provisions under the BNSS, and compare them with the existing bail provisions under the CrPC. The primary objective of the BNSS is to ensure the safety and security of Indian citizens while upholding the principles of justice, fairness, and human rights.”<sup>77</sup> It aims to streamline the criminal justice process, reduce delays, and enhance the efficiency and effectiveness of the system. The BNSS seeks to strike a balance between the rights of the accused and the interests of society, ensuring that the innocent are protected while the guilty are brought to justice. By introducing new provisions and modifying existing ones, the BNSS endeavors to create a more robust and responsive criminal justice system that adapts to the evolving needs of society.

“One of the key areas of focus in the BNSS is the reform of bail provisions. Bail is a crucial aspect of the criminal justice system, as it allows the accused to be released from custody while awaiting trial, subject to certain conditions. The BNSS recognizes the importance of bail in upholding the presumption of innocence and preventing unnecessary detention, while also considering the need to ensure public safety and prevent the accused from absconding or interfering with the administration of justice. Under the BNSS, the bail provisions have been designed to provide a more comprehensive and nuanced approach compared to the existing provisions in the CrPC. The BNSS introduces a categorization of offenses based on their severity, with separate bail provisions for each category. This categorization takes into account factors such as the

<sup>76</sup> “Ratanlal & Dhirajlal, The Indian Penal Code 35 (LexisNexis 2017).”

<sup>77</sup> “Shourie Arun, Courts and Their Judgments: Premises, Prerequisites, Consequences [Page Number] (Rupa Publications 2009).”



nature of the offense, the potential punishment, and the impact on society. By differentiating between minor and serious offenses, the BNSS aims to ensure that bail decisions are made in a more context-specific manner, considering the gravity of the alleged crime.”<sup>78</sup>

“One of the notable features of the bail provisions under the BNSS is the emphasis on the individual circumstances of the accused. The BNSS requires the court to consider a wide range of factors when making bail decisions, including the accused's personal background, family responsibilities, employment status, and community ties. This holistic approach ensures that bail decisions are not solely based on the nature of the offense but also take into account the unique circumstances of each individual. By considering these factors, the BNSS aims to promote a more humane and rehabilitative approach to criminal justice, recognizing that the accused may have varying levels of culpability and potential for reform. Another significant aspect of the bail provisions under the BNSS is the introduction of a risk assessment framework. The BNSS mandates the use of risk assessment tools to evaluate the likelihood of the accused absconding, committing further offenses, or interfering with the administration of justice. These tools take into account factors such as the accused's criminal history, the nature of the alleged offense, and any history of violating bail conditions.”<sup>79</sup> By incorporating risk assessment into the bail decision-making process, the BNSS seeks to ensure that bail is granted or denied based on an objective evaluation of the accused's risk profile, rather than relying solely on judicial discretion. The BNSS also introduces provisions for anticipatory bail, which allows individuals to seek bail in anticipation of arrest. This provision is particularly relevant in cases where there is a reasonable apprehension of arrest based on false or frivolous allegations. By providing a mechanism for anticipatory bail, the BNSS aims to protect the rights of individuals who may be subjected to unwarranted arrest and detention. The anticipatory bail provisions under the BNSS are more comprehensive compared to the existing provisions under the CrPC, with clearer guidelines and safeguards to prevent misuse.

“In terms of the conditions that can be imposed while granting bail, the BNSS provides a more extensive and specific list compared to the CrPC. The BNSS allows the court to impose conditions such as surrendering passports, prohibiting travel outside the jurisdiction, requiring periodic reporting to the police, and mandating participation in rehabilitation programs. These conditions are designed to ensure that the accused complies with the terms of bail, prevents any potential interference with the administration of justice, and promotes the accused's reintegration into society. The BNSS also places a strong emphasis on the rights of victims and their role in the bail process. Under the BNSS, victims have the right to be heard during bail proceedings and can provide their views on the accused's release. The court is required to consider the safety and well-being of the victim when making bail decisions, and may impose conditions to protect the victim from any potential harm or harassment. This victim-centric approach ensures that the

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<sup>78</sup> Ibid

<sup>79</sup> “Paranjape, N. V., Criminology and Penology [Page Number] (Central Law Publications 2017).”



concerns and needs of victims are given due consideration in the bail process, promoting a more balanced and inclusive criminal justice system.”<sup>80</sup>

In comparison to the bail provisions under the CrPC, the BNSS introduces several notable changes and improvements. The CrPC's bail provisions have often been criticized for being inconsistent, ambiguous, and prone to misinterpretation. The BNSS seeks to address these shortcomings by providing clearer and more comprehensive guidelines for bail decisions. The categorization of offenses, the emphasis on individual circumstances, the incorporation of risk assessment, and the expanded list of bail conditions are all examples of how the BNSS aims to create a more structured and objective approach to bail. Moreover, the BNSS places a greater emphasis on the use of non-monetary forms of bail, such as personal bonds and community-based supervision. This approach recognizes that monetary bail can often be discriminatory, disproportionately impacting individuals from marginalized and economically disadvantaged backgrounds. By promoting non-monetary forms of bail, the BNSS seeks to ensure that the bail system is more equitable and accessible, regardless of an individual's financial status.

“However, it is important to note that the implementation of the BNSS and its bail provisions will require significant changes to the existing criminal justice infrastructure. The successful implementation of the BNSS will depend on factors such as the availability of resources, the training and capacity building of law enforcement agencies and the judiciary, and the effective coordination between various stakeholders. It will also require a shift in mindset and a willingness to embrace new approaches and best practices in criminal justice administration. In conclusion, the bail provisions under the Bharatiya Nagarik Suraksha Sanhita (BNSS) represent a significant step towards reforming and modernizing the criminal justice system in India. By introducing a more comprehensive, nuanced, and individual-centric approach to bail, the BNSS aims to strike a balance between the rights of the accused and the interests of society. The categorization of offenses, the emphasis on risk assessment, the expanded list of bail conditions, and the victim-centric approach are all notable features of the BNSS that distinguish it from the existing bail provisions under the CrPC. However, the successful implementation of the BNSS and its bail provisions will require a concerted effort from all stakeholders, including the government, law enforcement agencies, the judiciary, and civil society organizations. It will also require a commitment to ensuring that the necessary resources and infrastructure are in place to support the effective functioning of the new system.”<sup>81</sup>

“Ultimately, the BNSS represents a promising step towards creating a more just, fair, and effective criminal justice system in India. By reforming the bail provisions and introducing a more comprehensive and nuanced approach, the BNSS has the potential to promote greater access to justice, protect the rights of the accused, and ensure the safety and security of society as a whole. As India continues to grapple with the challenges of a rapidly evolving society, the BNSS and its bail provisions offer a glimpse of a more modern, responsive, and humane criminal justice system that can better serve the needs of all its

<sup>80</sup> “Bajpai, G. S., Criminal Justice System in India: Need for Systemic Changes [Page Number] (Regal Publications 2011).”

<sup>81</sup> “Ghosh, S.K., Criminal Justice in India [76] (APH Publishing 1993).”

citizens.”<sup>82</sup> In the landmark case of *Gurubaksh Singh Sibbia v. State of Punjab* (1980), the Supreme Court laid down the principles for granting anticipatory bail under Section 438 of the CrPC. The court held that anticipatory bail should be granted only in exceptional cases, where there is a reasonable apprehension of arrest and the accused is likely to be subjected to undue harassment. The case is relevant to your research as it establishes the framework for anticipatory bail under the CrPC and highlights the need to balance the rights of the accused with the interests of justice. Similarly, in *Kalyan Chandra Sarkar v. Rajesh Ranjan* (2005), the Supreme Court held that while granting bail, the court should consider the gravity of the offense, the character of the evidence, and the circumstances of the case. The court also emphasized the importance of imposing appropriate conditions while granting bail to ensure the presence of the accused during trial. This case is significant for your research as it highlights the need for a comprehensive approach to bail provisions, taking into account a range of factors beyond the nature of the offense. It also underscores the importance of bail conditions in ensuring the smooth functioning of the criminal justice system.

#### **4.4. Factors Influencing Judicial Decisions under BNSS**

“Judicial discretion plays a pivotal role in the administration of justice, particularly in the context of bail decisions. Under the *Bharatiya Nagarik Suraksha Sanhita* (BNSS), which aims to reform and modernize the criminal justice system in India, judicial discretion continues to be a crucial aspect of the bail process. However, the BNSS introduces several factors that are intended to guide and inform the exercise of judicial discretion in bail matters. These factors include the nature and gravity of the offense, the evidence against the accused, the likelihood of tampering with evidence or influencing witnesses, the possibility of fleeing from justice, the criminal antecedents and history of the accused, and the likelihood of committing further offenses. This essay will explore each of these factors in detail, examining their significance and impact on judicial discretion under the BNSS. The nature and gravity of the offense is a primary consideration that influences judicial discretion in bail decisions under the BNSS. The severity of the alleged crime, the potential punishment, and the impact on the victim and society are all factors that the court must weigh when determining whether to grant or deny bail. Offenses that are considered more serious, such as murder, rape, terrorism, or large-scale financial fraud, are likely to be viewed as posing a greater threat to public safety and may result in a higher threshold for granting bail. In such cases, the court may be more inclined to deny bail or impose stringent conditions to ensure that the accused does not pose a risk to society while awaiting trial.”<sup>83</sup>

“However, it is important to note that the nature and gravity of the offense should not be the sole determining factor in bail decisions. The BNSS emphasizes the need for a holistic and individualized approach, taking into account the specific circumstances of each case. This means that even in cases involving serious offenses, the court must consider other relevant factors, such as the accused's personal background, the strength of the evidence, and the likelihood of the accused absconding or interfering with

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<sup>82</sup> Ibid

<sup>83</sup> “Bhat, P. Ishwara , *Law and Social Transformation in India* [24] (Eastern Book Company 2009).”

the administration of justice. The evidence against the accused is another crucial factor that influences judicial discretion in bail matters under the BNSS. The strength and credibility of the evidence presented by the prosecution can have a significant bearing on the court's assessment of the accused's culpability and the risk they pose to society. If the evidence against the accused is strong and compelling, the court may be more inclined to deny bail, particularly in cases involving serious offenses.”<sup>84</sup> On the other hand, if the evidence is weak or circumstantial, the court may view the accused as posing a lower risk and may be more willing to grant bail, subject to appropriate conditions. “It is important to note that the assessment of evidence at the bail stage is not a determination of guilt or innocence. The purpose of bail is to ensure the accused's presence at trial and to prevent any potential interference with the administration of justice. Therefore, the court's evaluation of the evidence is focused on assessing the likelihood of the accused absconding or tampering with evidence, rather than making a final judgment on the merits of the case. The likelihood of tampering with evidence or influencing witnesses is another significant factor that influences judicial discretion in bail decisions under the BNSS. If there is a reasonable apprehension that the accused may attempt to destroy or alter evidence, or intimidate or influence witnesses, the court may be more inclined to deny bail. This is particularly relevant in cases where the accused has a history of interfering with the administration of justice or has the means and resources to influence the investigation or trial. To mitigate the risk of tampering with evidence or influencing witnesses, the BNSS allows the court to impose conditions on bail, such as prohibiting contact with certain individuals, requiring the accused to surrender their passport, or mandating regular reporting to the police. These conditions are designed to ensure that the accused complies with the terms of their release and does not pose a risk to the integrity of the legal process. The possibility of the accused fleeing from justice is another critical consideration that influences judicial discretion in bail matters under the BNSS. If there is a significant risk that the accused may abscond or evade the legal process, the court may be more inclined to deny bail. Factors that may indicate a higher risk of flight include the accused's financial resources, ties to foreign countries, lack of community connections, and previous instances of absconding or failing to appear in court.”<sup>85</sup>

“To assess the risk of flight, the court may consider the accused's personal circumstances, such as their employment status, family ties, and length of residence in the jurisdiction. The court may also take into account any previous instances of the accused violating bail conditions or failing to appear in court. If the court determines that the risk of flight is significant, it may deny bail or impose stringent conditions, such as requiring the accused to surrender their passport or post a substantial monetary bond.”<sup>86</sup> The criminal antecedents and history of the accused are also important factors that influence judicial discretion in bail decisions under the BNSS. The accused's prior criminal record, including any convictions, pending cases, or history of violating bail conditions, can provide insight into their likelihood of reoffending or posing a risk to society. If the accused has a significant criminal history, particularly involving similar offenses or a pattern of recidivism, the court may view them as a greater risk and may be more inclined to deny bail.

<sup>84</sup> “Upendra Baxi, *The Crisis of the Indian Legal System* 200 (Vikas Publishing House 1982).”

<sup>85</sup> “Subhash C. Kashyap, *Our Constitution: An Introduction to India's Constitution and Constitutional Law* 102 (National Book Trust 1994).”

<sup>86</sup> *Ibid*

“However, it is important to note that the mere existence of a criminal record should not automatically disqualify an accused from being granted bail. The BNSS emphasizes the need for a case-by-case assessment, taking into account the nature and severity of the prior offenses, the length of time that has passed since the previous convictions, and any evidence of rehabilitation or reform. The court must strike a balance between protecting public safety and recognizing the potential for individuals to change and reintegrate into society. The likelihood of committing further offenses is another crucial factor that influences judicial discretion in bail matters under the BNSS. If there is a significant risk that the accused may engage in further criminal activity while on bail, the court may be more inclined to deny release. This assessment takes into account factors such as the nature of the alleged offense, the accused's criminal history, and any evidence of a propensity for violence or recidivism.”<sup>87</sup> To evaluate the likelihood of committing further offenses, the court may consider the accused's personal circumstances, such as their employment status, social support network, and any history of substance abuse or mental health issues. The court may also take into account any statements or actions by the accused that indicate a lack of remorse or a likelihood of reoffending. If the court determines that there is a significant risk of the accused committing further offenses, it may deny bail or impose conditions designed to mitigate that risk. These conditions may include requiring the accused to participate in rehabilitation programs, imposing restrictions on their movement or associations, or mandating regular check-ins with law enforcement or probation officers.

“The court must weigh the potential risk to public safety against the presumption of innocence and the accused's right to liberty. The BNSS encourages a nuanced and individualized approach, taking into account the unique circumstances of each case and the potential for the accused to be rehabilitated and reintegrated into society. In addition to the factors discussed above, the BNSS also allows the court to consider any other relevant information that may influence the exercise of judicial discretion in bail matters. This may include the accused's age, health, family responsibilities, and community ties. The court may also take into account the views of the victim and any potential impact on their safety and well-being.”<sup>88</sup>

“The BNSS also emphasizes the importance of transparency and accountability in the exercise of judicial discretion. Bail decisions must be reasoned and justified, with the court providing a clear explanation of the factors that were considered and the rationale behind the decision. This transparency helps to ensure that bail decisions are fair, consistent, and based on objective criteria, rather than arbitrary or discriminatory considerations. Moreover, the BNSS recognizes the need for ongoing monitoring and review of bail decisions. If circumstances change or new information comes to light, the court has the authority to modify or revoke bail, ensuring that the conditions of release remain appropriate and effective in protecting public safety and the integrity of the legal process. In the matter of *Jai Prakash Singh @ Sonu v. State of Bihar* (2012), the Supreme Court held that while granting bail, the court should consider the likelihood of the accused fleeing or tampering with evidence, and the impact of the crime on the victim and society. The court also emphasized the need to balance the rights of the accused with the interests of justice and public

<sup>87</sup> “Upendra Baxi, *The Crisis of the Indian Legal System* 200 (Vikas Publishing House 1982).”

<sup>88</sup> Ibid

safety. This case is relevant to your research as it highlights the complex considerations involved in bail decisions and the need for bail provisions to adapt to the specific circumstances of each case. It also raises questions about the role of the judiciary in striking a balance between individual liberties and societal interests.

In conclusion, judicial discretion in bail matters under the Bharatiya Nagarik Suraksha Sanhita (BNSS) is influenced by a range of factors, including the nature and gravity of the offense, the evidence against the accused, the likelihood of tampering with evidence or influencing witnesses, the possibility of fleeing from justice, the criminal antecedents and history of the accused, and the likelihood of committing further offenses. These factors are intended to guide and inform the exercise of judicial discretion, ensuring that bail decisions are based on a comprehensive and individualized assessment of each case. The BNSS seeks to strike a balance between protecting the rights of the accused and safeguarding the interests of society, recognizing that bail is a crucial aspect of the criminal justice system that can have significant consequences for both individuals and communities. By providing a clear and structured framework for the exercise of judicial discretion, the BNSS aims to promote fairness, consistency, and accountability in bail decisions.”<sup>89</sup>

“However, it is important to acknowledge that the exercise of judicial discretion in bail matters is not an exact science and requires a careful balancing of competing considerations. Judges must weigh the presumption of innocence and the right to liberty against the need to protect public safety and ensure the integrity of the legal process. This balancing act requires a nuanced and contextualized approach, taking into account the unique circumstances of each case and the potential for rehabilitation and reintegration.”<sup>90</sup> Ultimately, the success of the BNSS in reforming and modernizing the bail system in India will depend on the effective implementation and application of these factors by the judiciary. It will require ongoing training, resources, and support to ensure that judges have the knowledge, skills, and tools necessary to make informed and justifiable bail decisions. It will also require a commitment to transparency, accountability, and ongoing review and improvement of the bail process.

“By providing a clear and comprehensive framework for the exercise of judicial discretion in bail matters, the BNSS represents a significant step forward in the reform and modernization of the criminal justice system in India. It seeks to promote a more fair, effective, and responsive bail system that balances the rights of the accused with the safety and well-being of society as a whole. As the BNSS is implemented and refined over time, it has the potential to transform the bail process and contribute to a more just and equitable criminal justice system in India.”<sup>91</sup>

#### **4.5. Challenges and Controversies:**

<sup>89</sup> “P.S.A. Pillai, Criminal Law 360 (LexisNexis 2020).”

<sup>90</sup> “K.I. Vibhute, P.S.A. Pillai's Criminal Law 475 (LexisNexis 2022).”

<sup>91</sup> Ibid



Bail is granted at the discretion of the court, which is not without dispute and difficulties. The possibility of prejudice and inequality in the decision-making process is a major problem. Various demographic criteria, such as race or socioeconomic background, have been proven in studies to have an impact on the likelihood of receiving bail. Concerns are raised by disparities in bail rulings. Concerns regarding unfair treatment within the criminal justice system are raised by disparities in bail judgements. By boosting training and awareness among judges and enacting changes to reduce bias, efforts are being undertaken to eliminate these inequities. The evaluation of risk presents another difficulty. Future behaviour prediction is inherently challenging, and risk assessment tools have their limits. Critics claim that these technologies could reinforce preexisting biases and lead to the unnecessarily detaining of people who represent little risk. Risk assessments might also fail to appropriately account for the particulars of each situation, which could result in unfair results. Striking a balance between the application of risk assessment methods and the use of judicial discretion requires careful thought.<sup>92</sup>

#### 4.5.1. Integrating Interests:

In order to issue bail, judges must carefully weigh the needs of the accused, the victims, and the larger community. On the one hand, the right to liberty and the presumption of innocence call for pretrial confinement to be the exception rather than the rule. Unnecessary and protracted incarceration can have serious repercussions, such as job loss, disturbance of family life, and diminished capacity to contribute to the defence. However, the needs of the general population come first. The court must make sure that those who constitute a real risk to the community—either via the likelihood that they will commit new crimes or through the possibility that they would tamper with witnesses or evidence—are not freed. Protecting both individual rights and societal well-being requires striking a difficult balance.<sup>93</sup>

#### 4.5.2. The Function of Conditions:

Certain restrictions are frequently applied to reduce the alleged hazards in situations where the court approves bail. These requirements can involve electronic surveillance, travel limits, recurrent check-ins with law enforcement, or the submission of a financial surety. The installation of restrictions tries to address particular issues while enabling the accused's release. These requirements are maintained, and infractions. Furthermore, the court can respond to evolving situations thanks to judicial discretion. "Revaluating the terms of bail may be necessary in light of new information, adjustments to the accused's personal situation, or advancements in the case. Because judicial discretion is so flexible, bail can be administered in a fair and just manner throughout the legal process. In conclusion, the process of using court discretion to issue bail is intricate and multifaceted. Judges are required to give careful consideration

<sup>92</sup> "McBride, Jeremy - Bail in Criminal Proceedings (Oxford University Press, 2013)"

<sup>93</sup> "Halliday, Simon - Judicial Discretion in Criminal Matters (Oxford University Press, 2001)"

to a number of variables, such as flight risk, community danger, the gravity of the offence, criminal history, ties to the community, and the likelihood of reoffending.”<sup>94</sup>

“The use of judicial discretion is essential to strike a balance between individual rights and public safety, notwithstanding the difficulties and disputes that may arise. By putting policies into place, raising awareness, and ensuring that risk assessment instruments are used properly. The fairness and consistency of bail decisions while upholding the principles of justice. A crucial component of the criminal justice system is the choice of whether to grant or deny bail. Courts weigh a number of variables to evaluate the risk posed by an accused person when deciding whether to release them pending trial. These elements aid judges in balancing the presumption of innocence with the need to ensure public safety and uphold the fairness of the legal system.”<sup>95</sup>

#### **4.5.3. Flight Hazard:**

The chance that the accused would flee is one of the main considerations when setting bail. The chance that the person may try to avoid prosecution or show up unprepared for upcoming court appearances is something the court considers. The accused's financial means, relationships to the community, commitments to family, employment status, and history may all be taken into account. “To adherence to court orders and a history of evading arrest. The court may be more inclined to deny bail if there is a significant possibility of flight to secure the accused's presence during the trial.”<sup>96</sup>

#### **4.5.4. Public safety:**

Bail decisions must also take into account the safety of the surrounding area. Courts determine whether an accused individual would endanger society if released. The type and seriousness of the crime, prior convictions or violent history, threats against witnesses or the victim, and any information suggesting a continuing risk to public safety are all taken into account. Bail may be rejected to safeguard prospective victims and preserve public order if the court determines that releasing the accused would pose a serious risk to the community.

#### **4.5.5. Gravity of the Alleged Offence:**

“Bail choices are heavily influenced by the alleged offense's gravity. The nature and seriousness of the charges are taken into account by the courts when determining the likelihood of reoffending or disobeying the law. The perceived risk of fleeing or the possibility that the accused will conduct more crimes if released on bail may increase in connection with more serious offences, such as violent crimes or those that carry heavy fines. To safeguard public safety and preserve trust in the criminal justice system, the court may in such circumstances impose more stringent requirements or deny bail completely.”<sup>97</sup>

#### **4.5.6. Criminal History:**

<sup>94</sup> “M.P. Jain, Indian Constitutional Law 510 (LexisNexis 2020).”

<sup>95</sup> Ibid

<sup>96</sup> “McKinney, William Mark - The Law of Arrest in Civil and Criminal Actions (West Academic Publishing, 2019)”

<sup>97</sup> “Lerner, Craig N. - Bail in Criminal Cases: A Comparative Study (Cambridge University Press, 2011)”

Bail decisions are heavily influenced by the accused's criminal history. Courts consider a person's prior convictions, particularly any pattern of related offences or absences from court. An extensive criminal history may signal a higher risk of reoffending or disobeying court restrictions. On the other hand, a spotless record can indicate a reduced danger and possibly support a more benevolent bail judgement. The accused's prior actions are taken into account by the court when determining the possibility of future criminal activity or eluding the law.

#### **4.5.7. Community Ties:**

“When determining whether to issue bail, consideration is frequently given to the accused's connections to the community. The accused's ties to his or her family, career situation, length of residence, activity in the community, and support systems are all taken into account. As the accused is more likely to have social and personal motivations to stay in the area, strong ties to the community may signal a reduced flight risk. These connections can act as a safety net to guarantee that the defendant complies with the terms of his or her bail and the law. When evaluating the risk of flight and determining whether bail is necessary, judges take into account the stability and strength of these links.”<sup>98</sup>

#### **4.5.8. Probability of Reoffending:**

Bond decisions must take into account the accused's capacity to commit new crimes while out on bond. Courts consider the defendant's prior actions, criminal record, and any indication of a pattern of reoffending. The perceived danger of committing another crime while out on bond may be increased by elements like substance addiction, untreated mental health conditions, or a history of recidivism. To safeguard potential victims and stop additional harm to society, the court may in such circumstances impose additional requirements or deny bail. On the other hand, bail may be granted if the court determines that there is a low possibility of reoffending and that suitable conditions can be placed to reduce the danger.

#### **4.5.9. Individual Situations and Additional Factors:**

Courts consider the accused's unique circumstances in addition to the aforementioned elements. Age, health, employment stability, and family obligations could all be factors. These elements aid the court's evaluation of the defendant's capacity to comply with bail requirements and show up for upcoming court appearances. For instance, a person with serious health concerns might need to receive medical attention or care, which could affect their capacity to elude capture. As an alternative, a defendant who supports their family solely may have compelling reasons to cooperate with the court system. The court also takes the strength of the evidence against the accused into account. “The court's assessment of the risk of flight or the need to protect the community may be influenced by the strength of the case, even if the decision to grant bail does

<sup>98</sup> “Farb, Robert L. - Arrest, Search, and Investigation in North Carolina (LexisNexis, 2019)”

not determine guilt or innocence. The judge may be more likely to grant bail if the evidence is flimsy or there are questions about the accused's complicity in the alleged crime.”<sup>99</sup>

“The court also takes into account any mitigating circumstances raised by the defence, such as an accused person's desire to assist law enforcement, past pro bono work, or involvement in rehabilitation programmes. These elements could show the person has a sincere desire to change and lower the perceived danger of releasing them on bail. Bail is granted after a thorough analysis of numerous variables. The determination of bail is based on a number of factors, including flight risk, public safety, the gravity of the offence, prior criminal history, ties to the community, likelihood of reoffending, personal circumstances, and others. Courts strive to achieve a delicate balance between the presumption of innocence and the protection of society through the use of judicial discretion. Judges can exercise fairness and maintain public faith in the criminal justice system by carefully weighing these criteria before making judgements about whether to release suspects.”<sup>100</sup>

#### **4.6. Judicial discretion in ordering arrest**

The ability to order an arrest is a crucial part of the legal system since it enables courts to guarantee the upholding of the law and preserving public order. Judges have the authority to decide whether a person should be brought into custody based on the facts of the case when they order arrests. The idea of judicial discretion in ordering arrests, emphasising the variables that affect the use of this power, the legal protections put in place to preserve individual rights, and the fine line between maintaining due process and maintaining public safety.

##### **4.6.1. The assumption of innocence and legal protections:**

“The presumption of innocence is essential to the idea of judicial discretion when making arrest orders. The idea that a person is presumed innocent unless and unless proven guilty is vital. Legal systems have devised measures to guarantee that arrests are not arbitrary or unreasonable in order to protect individual rights. These protections include specifications like the need for an arrest and the existence of reasonable suspicion and probable cause. Before an arrest may be made, there is a need known as reasonable suspicion. It entails a conviction that a person might be engaged in illegal action, supported by concrete evidence. A higher level known as probable cause necessitates enough proof to support a reasonable suspicion that a crime has been committed and that the person to be arrested is in charge. Before an arrest may be made, there is a need known as reasonable suspicion. It entails a conviction that a person might be engaged in illegal action, supported by concrete evidence. A higher level known as probable cause calls for enough proof to support a reasonable suspicion that both the person under arrest and a crime have been committed. Additionally, judicial systems frequently impose extra precautions, such the necessity of an arrest warrant issued by an impartial magistrate. This warrant prevents arbitrary arrests by requiring the court to examine the proof provided by the police before approving an arrest. Certain emergency situations, such as those

<sup>99</sup> “Padfield, Nicky - Bail: Law, Practice and Procedure (Oxford University Press, 2016)”

<sup>100</sup> “Fisher, George - The Power of the Prosecutor: Gatekeepers of the Criminal Justice System (Harvard University Press, 2020)”

involving hot pursuit or impending peril, are exempt from the warrant requirement. Judicial discretion in ordering arrests is influenced by a number of circumstances, assuring a case-by-case analysis to determine if an arrest is appropriate. These considerations include the seriousness of the alleged offence, the accused's prior criminal history, the possibility of flight, any potential danger to the community, and the chance of tampering with the evidence.”<sup>101</sup>

“The seriousness of the alleged offence is a crucial factor. An arrest may be required to safeguard potential victims and uphold law and order in cases of more serious crimes, such as violent offences or those posing a substantial risk to public safety. The possibility that an accused person may try to elude the legal system is referred to as flight risk. The accused's ties to the community, financial resources, travel history, and prior court absences are all taken into account. The accused may be taken into custody if the court determines there is a significant risk of him fleeing during the legal proceedings.”<sup>102</sup>

Another important consideration is the possible risk the defendant might cause to the neighbourhood. In circumstances involving violent crimes, threats to the public's safety, or a habit of endangering others, courts assess the likelihood that the accused would commit more crimes while on the lam. When making an arrest, the likelihood of tampering with the evidence is taken into account. An arrest may be ruled essential to protect the integrity of the legal system if there is a reasonable suspicion that the accused may try to obliterate or tamper with evidence that is important to the case.

The use of judicial discretion is influenced by the criminal past of the accused. The perceived danger of non-appearance or subsequent criminal action may be increased by prior convictions, existing warrants, or a history of non-compliance with court orders, which may influence the decision to order an arrest.

(Balancing Individual Rights and Public Safety): When ordering arrests, judges must carefully strike a balance between upholding individual liberties and safeguarding the general public's safety. While arrests result in a brief loss of freedom, they are essential to uphold law and order, stop more crimes from being committed, and ensure that the accused will appear in court.

#### **4.7. Factors considered while ordering the arrest**

“The judiciary's ability to order an arrest is a critical tool it uses to guarantee that the law is followed and that public order is maintained. The need of placing a person in custody is evaluated by courts when deciding whether to issue an arrest warrant or order immediate arrest. These elements aid courts in striking a careful balance between the presumption of innocence and the need to safeguard public safety, uphold the fairness of the judicial system, and stop other crimes from being committed.”<sup>103</sup>

##### **4.7.1. Probable Cause:**

<sup>101</sup> “Schulhofer, Stephen J. - Unwanted Sex: The Culture of Intimidation and the Failure of Law (Harvard University Press, 1998)”

<sup>102</sup> “Gadbois Jr., George H. - Bail and Preventive Detention in India (Oxford University Press, 1991)”

<sup>103</sup> “Kesterson, Ralph J. - The Law of Bail, Bonds, and Recognizances (West Academic Publishing, 2014)”



“The existence of probable cause is one of the main criteria for requesting an arrest. In order to establish probable cause, the court must decide if there is enough evidence to support a reasonable suspicion that a crime has been committed and that the suspect is accountable for the offence. The strength of the case against the accused is assessed by the court, which also considers the veracity and credibility of the evidence.”<sup>104</sup> The more stringent requirement of probable cause makes ensuring that arrests are made on solid evidence that supports a reasonable belief in the accused's guilt rather than on the basis of merely vague suspicions or arbitrary judgements.<sup>105</sup>

#### **4.7.2. Seriousness of the Alleged Offence:**

“When deciding whether to order an arrest, the seriousness of the alleged offence is a key consideration. When determining whether or not to place a person in custody, courts take into account the nature and seriousness of the allegations. The possibility of an arrest being ordered may rise with more serious offences including violent crimes, crimes against public safety, or those involving significant harm or monetary loss. The protection of potential victims, upholding public order, and averting additional harm to society are the court's top priorities in these situations.”<sup>106</sup>

#### **4.7.3. Seriousness of the Alleged Offence:**

When deciding whether to order an arrest, the seriousness of the alleged offence is a key consideration. When determining whether or not to place a person in custody, courts take into account the nature and seriousness of the allegations. The possibility of an arrest being ordered may rise with more serious offences including violent crimes, crimes against public safety, or those involving significant harm or monetary loss. The protection of potential victims, upholding public order, and averting additional harm to society are the court's top priorities in these situations.

#### **4.7.4. Flight Risk:**

“When deciding whether to order an arrest, the chance of flight is another important consideration. Courts assess an accused person's propensity to run away from justice or escape being prosecuted. The accused's relationships to the community, financial means, travel history, access to passports or other travel documents, and any prior history of fleeing or failing to appear in court are all taken into account. In order to ensure that the accused is present during the legal procedures, the court might be more likely to order an arrest if it finds that there is a significant risk of flight.”<sup>107</sup>

#### **4.7.5. Risk to Public Safety:**

When deciding whether to order an arrest, it's necessary to take the accused's possible threat to the public's safety into account. If the accused is not taken into custody, the court determines whether they are likely to commit more crimes. The type of the alleged crime, any prior violent behaviour, threats made against

<sup>104</sup> Ibid

<sup>105</sup> “O'Higgins, Paul - Arrest and Bail: A Practical Guide (Clarus Press, 2013)”

<sup>106</sup> “R. V. Kelkar, Criminal Procedure 425 (Eastern Book Company 2021).”

<sup>107</sup> “Podgor, Ellen S. - White Collar Crime in a Nutshell (West Academic Publishing, 2020)”

witnesses or victims, the presence of weapons, or any evidence suggesting a pattern of endangering others are all taken into consideration. The court may order an arrest if it finds that releasing the accused would represent a serious risk to the public safety. The community must be kept safe and public order must be maintained at all times.

#### **4.7.6. Risk of Tampering with Witnesses or Interfering with Evidence:**

“When ordering an arrest, the risk of tampering with witnesses or interfering with evidence is taken into consideration. Courts determine whether there is a good faith suspicion that the accused may try to sway or threaten witnesses or tamper with evidence that is important to the case. Any evidence of prior intimidation, attempts to hinder the course of justice, or threats made against prospective witnesses are taken into account. The court intends to preserve evidence for a fair trial, secure the availability of witnesses, and protect the integrity of the legal system by ordering an arrest.”<sup>108</sup>

#### **4.7.7. Risk of Repeat Offence:**

The potential for the accused to conduct new crimes is a crucial consideration. Courts consider the defendant's prior actions, criminal record, and any indication of a pattern of reoffending. If the accused is not taken into custody, there may be a greater concern that they would commit new crimes given their history of similar offences, prior convictions, or symptoms of recidivism. The protection of society by preventing new crimes from being committed is the court's first priority.

#### **4.7.8. Protecting the Judicial Process' Integrity:**

Before issuing an arrest, courts take the judicial process' integrity into account.<sup>109</sup> This includes preserving the legitimacy of the legal system and ensuring the accused's attendance during court hearings. An arrest may be requested if there is a solid suspicion that the defendant won't show up freely or will interfere with the proceedings. In addition, an arrest could be regarded as necessary to protect the legitimacy and effectiveness of the judicial system in situations where the accused has demonstrated disrespect for the legal system, such as by previously evading the law or obstructing trials.<sup>110</sup>

#### **4.7.8. Evidence's Nature and Strength:**

The decision to order an arrest is heavily influenced by the type and quality of the evidence adduced against the defendant. The court takes the evidence put out by the prosecution or law enforcement into consideration, even if an arrest does not necessarily indicate guilt. The decision to order an arrest may be influenced by the existence of strong evidence proving the allegations and linking the accused to the

<sup>108</sup> Ibid

<sup>109</sup> “Spohn, Cassia C. - How Do Judges Decide?: The Search for Fairness and Justice in Punishment (Sage Publications, 2013)”

<sup>110</sup> “Agarwal, Anurag K. - Judicial Discretion in Bail and Arrest (Eastern Book Company, 2017)”

alleged crime. In contrast, the court might be less likely to order an arrest if the evidence is flimsy or insufficient and might instead examine other options, such as summonses or notices to appear.

#### **4.7.9. Probability of Interfering with the Investigation:**

“Making the choice to make an arrest depends in part on the likelihood that the accused would obstruct the ongoing investigation. Courts determine if there is a good faith suspicion that the accused may impede the gathering of evidence, sway witnesses, or impede the course of the investigation. To maintain the integrity of the evidence-gathering process and guarantee a fair and comprehensive investigation, an arrest may be required if there are signs that the accused may try to interfere with the investigation.”<sup>111</sup>

When ordering an arrest, probable cause, the seriousness of the offence, flight risk, public safety, witness tampering or evidence interference, criminal history, risk of committing the same offence again, maintaining the integrity of the legal system, the type and strength of the evidence, the likelihood of obstructing the investigation, and the general public's perception of justice are all taken into account. Courts can make decisions that are well-informed, maintain the rules of justice, and defend the rights of both people and society as a whole by balancing these factors.

### **4.8. Role Of Judicial Discretion In Balancing Individual Rights And Societal Interests**

- “The judiciary is essential in striking a balance between defending individual rights and societal interests. Judges have the ability to use their judgement and come to judgements that carefully balance safeguarding the freedoms and rights of individuals with ensuring the welfare and security of the larger community.
- The necessity of just and equitable decision-making, taking constitutional principles into account, and fostering public confidence in the legal system. the role of judicial discretion in balancing individual rights and societal interests.

#### **4.8.1. Presumption of Innocence and Due Process:**

The presumption of innocence and the promise of due process are at the core of the legal system. As a safeguard to protect the rights of people accused of crimes, judicial discretion makes sure they are treated fairly and given the chance to make their case. Judges must strike a balance between this assumption and the requirement to address social concerns like public safety and harm minimization. Judges can manage the complexity of individual rights and societal concerns by using discretion within the confines of the law, ensuring that due process is upheld while taking the necessary steps to protect society.”<sup>112</sup>

#### **4.8.2. Weighting of variables:**

“Judges have the power to consider a variety of variables in order to strike the optimal balance between citizens' rights and society interests. The seriousness of the offence, the possibility of causing harm to the

<sup>111</sup> “Batra, N.L. - Judicial Discretion: The Source of Justice (Universal Law Publishing, 2018)”

<sup>112</sup> “Chitale, Shyam - Judicial Discretion: The Concept in Indian Law (Allahabad Law Agency, 2016)”

community, the likelihood of reoffending, the person's criminal record, and the circumstances of the case are some of these considerations. Judges may favour harsher penalties to safeguard society in situations involving major crimes or dangers to public safety.”<sup>113</sup> Limitations on individual rights, such as requiring pre-trial custody or placing strong bail terms, may be justified depending on how serious the offence is. Judges must, however, carefully weigh the facts and other options that would safeguard the community and uphold the rights of the accused.

Another important factor to take into account is the risk of repeat offences. Judges are required to evaluate the risk that an individual poses if released, taking into account things like previous criminal behaviour, mental health problems, substance misuse, or a lack of ties to the community. With the help of this evaluation, judges can choose the appropriate level of intervention, which could be anything from a release on bond subject to a set of conditions to more stringent measures like electronic monitoring or imprisonment. The person's criminal past sheds light on their behaviour and likelihood of committing crimes in the future. Judges take into account things like prior convictions, following court orders in the past, or any history of evading justice. Judges can analyse the danger and use this knowledge to inform their rulings as they strike a balance between social interests and individual rights.

The use of judicial discretion also includes taking into account the particulars of the case as well as the distinctive qualities of the parties. Age, physical or mental health, family obligations, and job stability are just a few examples of factors that may affect a person's capacity to follow court orders or pose a threat to public safety. To secure a fair and just outcome while safeguarding the interests of society, judges must consider these criteria.<sup>114</sup>

#### 4.8.2. Fostering justice and public trust:

“For the sake of justice and to keep the public's faith in the legal system, judges must use their discretion to strike a balance between the rights of the individual and the interests of society. Judges contribute to a sense of justice and confidence in the legal system when they carefully evaluate the relevant circumstances, apply the law impartially, and make well-reasoned rulings.”<sup>115</sup>

Judges protect people from excessive or unjustified restriction of their liberties by respecting the norms of due process and taking into account individual rights. The judicial system is made more legitimate and credible by its commitment to fundamental rights. Judges must simultaneously take social interests into account in order to ensure community welfare and public safety. Fostering confidence in the legal system's capacity to safeguard society involves addressing concerns about public safety through appropriate measures, such as the enforcement of bail conditions or ordering temporary imprisonment as required.

<sup>113</sup> Ibid

<sup>114</sup> “Ghosh, Palash - Judicial Discretion and Judicial Decisions (LexisNexis India, 2014)”

<sup>115</sup> “Justice A.K. Patnaik, Accountability of Judicial Discretion 352 (Universal Law Publishing 2019).”

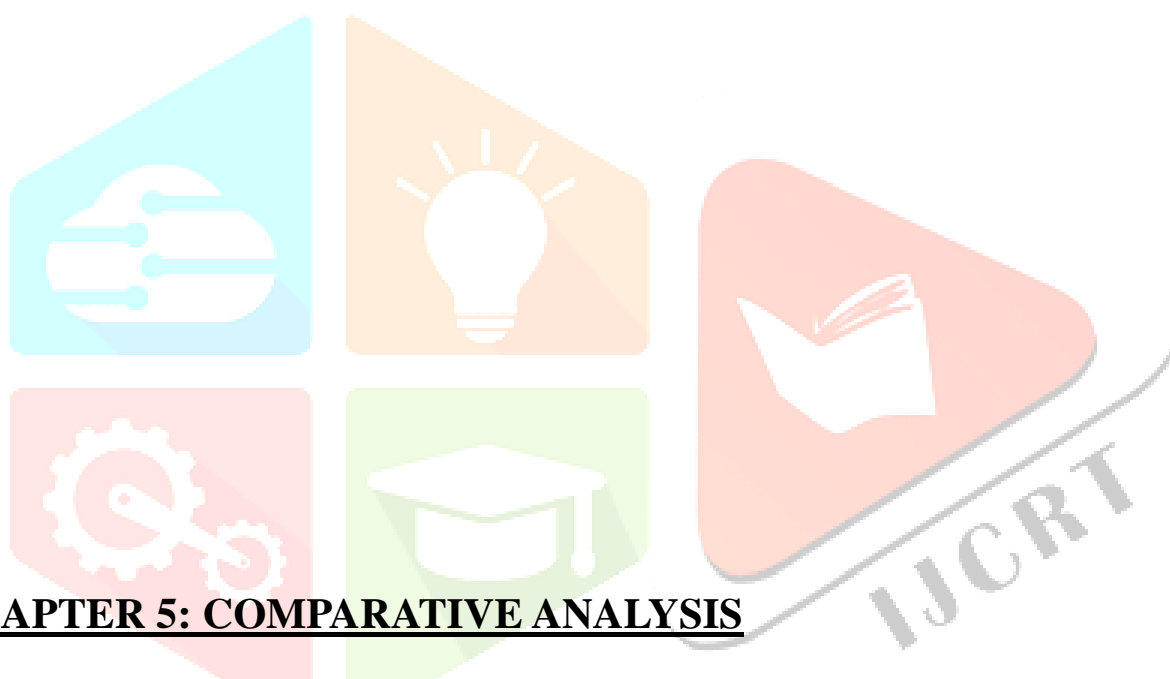
Judges may also adjust their rulings to the particulars of each case, taking into account the particular elements and difficulties involved, thanks to the exercise of judicial discretion. This adaptability makes justice a complex and nuanced approach to resolving legal issues rather than a rigid and one-size-fits-all idea. The overall effectiveness of the legal system is also influenced by how judges use their discretion to strike a balance between citizens' rights and societal interests. It enables judges to respond to the changing demands and difficulties of society while taking the welfare of the general public into account while making judgements. Judges can find a balance that minimises potential harm while upholding the rights of persons by carefully considering the conflicting factors. Additionally, the use of judicial discretion promotes public trust in the justice system. People are more inclined to trust the court and believe that the legal system is fair when they believe that their rights are being respected, protected, and that social interests are being effectively addressed. This trust is crucial for preserving social order and making sure the justice system runs smoothly. It is important to understand that judicial discretion is not without its difficulties and dangers, though. Because discretion is subjective, it is possible for judges to interpret and apply the law in different ways, which might result in inconsistent results. It's critical to find a balance between providing judges with the necessary freedom to take into account unique circumstances and making sure a consistency and predictability of decisions made. Legal systems frequently establish rules, precedents, and appellate review to make sure that judicial discretion is employed within boundaries that are defined in order to reduce these difficulties. This encourages consistency, responsibility, and openness in how the law is applied.<sup>116</sup>

“Judicial discretion is crucial in achieving a balance between social interests and individual rights within the legal system. Judges can make well-informed judgements that preserve the ideals of justice while safeguarding the welfare of society by taking into account aspects such as the seriousness of the offence, the potential for harm, the likelihood of reoffending, the person's criminal history, and the circumstances of the case. Judicial discretion is used to uphold justice, protect the public, and increase trust in the legal system. It is a crucial device that enables Judges to negotiate the complexity of the law and strike a proper balance between the requirements of society and individual liberties.”<sup>117</sup>

<sup>116</sup> “Gupta, Sudipto - Judicial Discretion in Criminal Cases: A Critical Analysis (Eastern Book Company, 2019)”

<sup>117</sup> “Justice Ruma Pal, Judicial Accountability 389 (LexisNexis 2021).”





## **CHAPTER 5: COMPARATIVE ANALYSIS**

### **5.1. Positive Changes**

#### **5.1.1. Removal of Archaic and Insensitive Terms**

Although there are valid arguments against the commonplaceness of changing one's name, doing so can be a powerful weapon in the fight against stigma. The elimination of insensitive and outmoded terms like "lunatic person" and "person of unsound mind" is a commendable part of the BNSS. 'Having intellectual disability' and 'person with mental illness' are more delicate alternatives that have superseded all such references. "As an example, read Section 198 of the Criminal Procedure Code as it relates to the BNSS, Section 219(1)(a). Section 357 of the BNSS, which is equivalent to Section 318 of the CrPC, has also been amended in a similar fashion. Notably, the provisions pertaining to accused persons with mental illness are now found in Chapter XXVII or 27 of BNSS, rather than in Chapter XXV or 25 of CrPC. All relevant sections have been appropriately amended with references to the Mental Healthcare Act 2017. Changed

from "lunatic asylum" to "mental health establishment" seems appropriate. There were a few other outmoded references taken out, such the "Assistant Sessions Judges" category that didn't exist (especially in Section 10). Similarly, the word "advocate" has been correctly used in place of "pleader" in all instances.”<sup>118</sup>

The word "thug" has also been eliminated from some legal documents, and there is no longer any mention of crimes committed by "thugs" in them (e.g., Section 201 of BNSS, which is identical to Section 181 of CrPC). The elimination of any mention of Metropolitan Areas or magistrates, however, is an example of a divergence that calls for real-world adjustments. Section 8 of the Criminal Procedure Code designates the city of Ahmedabad as a "metropolitan area," along with the former presidential towns of Bombay, Calcutta, and Madras. In a similar vein, the relevant administrations could likewise categorise any other major cities. A notable consequence of this is the designation of "Metropolitan Magistrates" to the position of judicial magistrate in certain regions. The new BNSS eliminates the need for such a differentiation.

As a result, a court magistrate serving any region of the nation will simply be referred to as a "magistrate," regardless of the city in which they are located. BNSS also repeals an outmoded provision, Section 153 of CrPC, which gave the police the authority to search any location without a warrant in order to check the precision of measuring devices and weights. Another retrograde provision has been altered, which states that summons can only be served on an adult "male" family member under Section 64 of CrPC. Similarly, Section 432 of the Criminal Procedure Code imposed stricter requirements on suspension or remission petitions filed by "males" above the age of 18.<sup>119</sup> It is appropriate to remove the word "male" in accordance with Sections 66 and 474 of the BNSS.

### **5.1.2. Clarity in some procedures**

“The new code also significantly clarifies and amends the stance to be used viz-a-viz Proclaimed offenders. Earlier as per Section 82(4) of CrPC as added to the code by 2005 Amendment, someone can be declared as a ‘Proclaimed offender’ for only nineteen specified offences under IPC namely, “302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459 or 460”.<sup>120</sup> Now, by removing this seemingly arbitrary list of sections, anyone accused of an offence with more than 10 years of imprisonment or other special offences could be declared a proclaimed offender. Similarly, a new section 356 has been added to the BNSS which provides a detailed procedure for conducting a trial/inquiry in the absence of a person declared as ‘Proclaimed offender’.”<sup>121</sup>

“While one may doubt the need for such harsh measures as declaration of a person as a proclaimed offender, but for the time being the code has at least clarified the procedural application of the same. By

<sup>118</sup> “Ratanlal & Dhirajlal, The Code of Criminal Procedure [15] [(LexisNexis 2022)].”

<sup>119</sup> “Pillai, A.K., Comparative Criminal Procedure [Page 78] (Eastern Book Company 2023).”

<sup>120</sup> “Kumar, Ramesh, Bail Laws: A Comparative Analysis [Page 45] (Universal Law Publishing Co. 2021).”

<sup>121</sup> “K.N. Chandrasekharan Pillai, R.V. Kelkar's Criminal Procedure [312] [(Eastern Book Company 2018)].”

adding a clear explanation to Section 516 of BNSS corresponding to Section 468 of CrPC, disputes regarding computation of period of limitation have finally been settled. Another section which has been clarified is Section 462(1) of BNSS corresponding to Section 421(1) of CrPC. This section provides for coercive actions against people fined for offences. Now they can only be taken against people who haven't paid such amount by addition of the words "but no such payment has been made". This section for the very first time lucidly explains the concepts of 'Bail', 'Bond' and 'Bail Bond'. However, according to the author even the terms such as 'Surety' should also have been explained here. While the practice of capital punishment or death sentence by itself is inhumane and out of place in several democracies, Indian criminal justice system still recognises the same. In this regard, the procedural code has finally prescribed a detailed procedure for 'Mercy Petitions in Death Sentence cases' by the addition of Section 473."<sup>122</sup>

### **5.1.3. Progressive Safeguards and/or changes**

By adapting to future developments in the use of forensic science to criminal investigations, BNSS is also staying current. The previous version of the code only allowed the collection of specimen signatures or handwriting samples; however, with the amendment of Section 311A of CrPC or Section 349 of BNSS, even finger prints and voice samples are now admissible. Section 293(4)(g) of CrPC previously only allowed the federal government to notify scientific experts; however, state governments are now able to do so as well, according to the amended Section 329(4)(g) of BNSS. Along these lines, either Section 176 of the BNSS or Section 157 of the CrPC has absorbed what is arguably the most significant modification to the law as a whole. A forensic team must visit the scene of a crime punished by more than seven years, collect samples, and film the procedure whenever the police obtain information about the commission of such a crime, according to a new subsection (3). Despite the fact that the term "victim" was initially defined in CrPC in 2009, numerous protections were still absent to improve their position.

"By implementing certain revisions to this initiative, BNSS moves it on the right path. For example, in order to align with Section 209 of CrPC, a provision has been inserted into Section 232 of BNSS that states the victim must also submit an application to the Sessions Court as part of the committal proceedings. Likewise, the victim or their advocates are entitled to copies of papers, such as the police report, that are required to be provided under Section 207 of CrPC or Section 230 of BNSS. When the complainant was not present in a case, the accused would previously be released. The magistrate can now provide the complainant 30 days' notice to appear before dismissing the accused, as per the updated Section 272 of BNSS, which corresponds to Section 249 of CrPC. This allows the complainant an opportunity to be appropriately represented. The court must also give victims a chance to be heard when deciding whether or not to withdraw prosecution. The relevant provision in Section 360 of the BNSS, which is equivalent to Section 321 of the CrPC, has been amended accordingly. In complaint cases, everyone has a chance to be heard, not just victims. Now, in complaints before magistrates, cognizance cannot be taken until the accused has been heard, according to a new proviso to Section 223 of BNSS or Section 200 of CrPC. The police are now required to tell the informant or victim of the investigation's status within 90 days, and this

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<sup>122</sup> "S.N. Mishra, Indian Penal Code [109] [(Central Law Publications 2019)]."

can be done electronically, according to a new clause”<sup>123</sup> (ii) introduced to Section 193(3) of BNSS, which is identical to Section 173(2) of CrPC. “A witness protection system is mandated to be notified by all state governments under Section 398 of the newly amended procedural law. Instead of leaving it up to the individual states' discretion, the author argues that BNSS could have included some temporary recommendations in the new code. Ministry of Home Affairs Draft Guidelines and decisions of the Hon'ble Supreme Court of India, such *Mahender Chawla vs. Union of India*, (2019) 14 SCC 615, could have served as sources of guidance. Two new provisos have been added to Section 183(6)(a) of BNSS, which equate to Section 164(5A)(a) of CrPC, to give further protections for judicial magistrates when they record statements. One thing to keep in mind is that a female judge should be present when a female witness gives such a declaration. Two, the magistrate is required to record the statement of any individual facing significant charges (i.e., those carrying a maximum sentence of 10 years or more in jail). Subsection (1) of Section 43 of BNSS, which corresponds to Section 46 of CrPC, has been expanded to provide safeguards for female arrestees.

It is now necessary to inform the woman's loved ones of her arrest. The addition of subsection (2) to Section 82 of BNSS, which corresponds to Section 80 of CrPC, provides another safeguard for those who are apprehended in the execution of a warrant outside of the jurisdiction where the warrant was issued. Under the new system, the district where the suspect typically resides will be the one to get details regarding the suspect's arrest. Adding a proviso to Section 190(1) of BNSS, which corresponds to Section 170(1) of CrPC, has brought about a positive development. It is not necessary for the police to detain an accused person in order to ensure his appearance before a judicial magistrate if the investigation is complete but not yet submitted in a police report. It would appear that this modification is in accordance with the major ruling of the Hon'ble Supreme Court of India in the case of *Satender Kumar Antil vs CBI*, (2022) 10 SCC 51. The Chapter of BNSS that regulates the issuance of bail now includes a new provision, Section 483.

The Arunachal Pradesh State Amendment added what was formerly known as Section 437A. According to this, the accused must post bond pledging to appear in the following court before the trial or appeal is over. Because the individuals in question do not need to be apprehended right away to ensure their appearance in court, this could have a beneficial effect. When it comes to the provision of anticipatory bail, BNSS has also made changes. The removal of some provisions may have made the effective issuance of anticipatory bail more feasible. Noticeably absent from the updated Section 484 of BNSS are the provisos to Section 438(1), Sections 438(1A) and 438(1B) of CrPC.”<sup>124</sup>

“Securing the actual presence of an accused person seeking anticipatory bail or providing "the Public Prosecutor a reasonable opportunity of being heard" during the application hearing were burdensome requirements of these rules. Although in some instances it could be essential to provide the prosecution with such details or to ensure the defendant's physical presence, the requirement should not have been imposed in CrPC. Putting "shall" instead of "may" in both of these deleted clauses would have been a

<sup>123</sup> “B.M. Gandhi, *Indian Penal Code* [175] [(Eastern Book Company 2019)].”

<sup>124</sup> “V. V. Chitale, *Chitale's Code of Criminal Procedure* [622] [(All India Reporter 2017)].”

reasonable compromise. Additionally, amendments have been made in accordance with Section 481 of BNSS, which is equivalent to Section 436A of CrPC. A first-time offender awaiting trial might now be eligible for required bail after experiencing 1/3 of the sentence, instead of 1/2 as previously provided, thanks to the addition of a proviso to subsection (1). The addition of subsection (3) to Section 481 makes it the responsibility of the jail superintendent to request the release of qualified inmates, giving effect to this privilege. The addition of Section 105 to the BNSS ensures that police are required to electronically record and send the proceedings of searches conducted under Section 185 (formerly Section 165 of CrPC) to the relevant magistrate, which is a crucial protection. This would make sure that the cops don't go overboard during their search activities.”<sup>125</sup>

Similarly, as per Section 185(5) of the BNSS, copies of any records made during such a search must now be forwarded to the relevant magistrate within 48 hours. There was no earlier mention of a certain deadline. An amendment to Section 195(1) of BNSS, which is similar to Section 175(1) of CrPC and addresses the authority of the police to call individuals, has also been inserted, bringing about a compassionate alteration. People in vulnerable categories are no longer required to "attend at any place other than the place where they reside" according to this provision. An additional goal of the new law is to broaden the scope of legal aid programmes. Previously, legal assistance was available for "in a trial before the Court of Session" under Section 304(1) of CrPC.

Nevertheless, the scope of the same has been substantially expanded with the replacement of "in a trial or appeal before a Court" in the new section 341(1) of BNSS. The author believes that the drafters failed to seize a chance to overhaul India's legal aid system. The recommendations made by various groups, including the Law Commission of India and NALSA, could have been taken into consideration. Of particular note was the input of two of the most distinguished former Indian Supreme Court judges, Hon'ble Mr. Justice P.N. Bhagwati and Hon'ble Mr. Justice V.R. Krishna Iyer. “The code is also implementing some other compassionate changes to alleviate the increasing number of people awaiting trial for less serious offences and to show mercy to first-time offenders. For example, in Section 293 of BNSS, which corresponds to Section 265E of CrPC and deals with the disposal of cases in the plea bargaining procedure, the punishments for first-time offenders have been drastically reduced. As a result, instead of 1/2 and 1/4th punishment, respectively, under Sections 293(c) and 293(d) of BNSS, they can now be penalised to 1/6th and 1/4th of the minimum punishment.”<sup>126</sup>

#### **5.1.4. Electronic/Digital alternatives for existing processes**

“In line of our commitment towards a Digital India, a landmark new Section 532 has been added to the BNSS. As per the same, all trials, inquires and proceedings, recording of evidence therein, examinations of

<sup>125</sup> “S.R. Myneni, Criminal Law [198] [(Asia Law House 2020)].”

<sup>126</sup> Ibid



parties, issuance, service and execution of summons and warrants, and several other processes can now be done electronically.

Some of the specific section-wise changes implementing this are:

- In the proviso provided to Section 64(2) of BNSS as corresponding to Section 62 of CrPC, summons can now be served digitally as well. As per Sections 70(3) and 71(2) of BNSS, electronically served summons and its digital communication would also be considered valid.
- Issuing summons/warrants under 'Issue of process' as given in Section 227 of BNSS corresponding to Section 204 of CrPC.
- Notices by executive magistrates under Section 134 of CrPC and now Section 153 of BNSS can be served online.
- Supply of police report and other investigation related documents under Sections 173(7) and 207 of CrPC can be done digitally as per Sections 193(8) and 230 of BNSS
- Order of confirmation of Death Sentence under Section 412 of BNSS or Section 371 of CrPC.
- Reading of Charges to the accused under Sessions Trial as per Section 251(2) of BNSS corresponding to Section 228(2) of CrPC.

As per the changes made to Sections 254 and 265 of BNSS as corresponding to Sections 231 and 242 of the CrPC, now prosecution evidence can also be recorded via digital means.”<sup>127</sup> However, curiously enough, the same explicit courtesy has not been extended to the corresponding section for defence evidence. “While one may make the claim that the general explanation under Section 532 encompasses all such processes including ‘defence evidence’ already, then why were explicit changes needed only for ‘Prosecution Evidence’? Furthering the noteworthy cause of ease of investigation, statements by police during investigation under Section 157 of CrPC, may be recorded electronically by phone as well. This has been done adding a proviso to the same effect to the corresponding Section 176(1) of BNSS. Even FIR’s can be legally registered by electronic communication as per addition of clause (ii) to Section 173(1) which corresponds to Section 154 CrPC. Another change which can be observed is that Section 182 of CrPC which discussed the procedure regarding “Offences committed by letters etc.”, has now been suitably modified to include ‘electronic communication’ as well as per Section 202 of BNSS. While considering the custody and disposal of perishable property during trial, electronic records now need to be maintained of the same as per the revised Section 499 of BNSS or Section 451 of CrPC.

#### **5.1.5. Expediting processes and/or making processes time-bound**

A provision has been added to BNSS under Section 336 to speed up trials. The person responsible for preparing any report, document, or expert opinion that is to be presented as evidence in a court of law must be present during the proceedings of that court. The court can, however, order the successor officer to appear if the original officer's attendance is impossible (e.g., because of death, retirement, excessive delay, etc.). As per the new Section 274 of BNSS or Section 251 of CrPC, a magistrate can now discharge the

<sup>127</sup> “R. Venkat Rao, Criminal Procedure Code [113] [(LexisNexis 2019)].”

accused in circumstances of baseless accusations after documenting reasons.”<sup>128</sup> This is another measure made to speed trials. On more than one occasion, BNSS has acknowledged the importance of other laws and agencies. To illustrate the point, under the previous CrPC section 268(2), only the state governments could issue prisoner notifications; but, under the new BNSS section 303(2), even the "Central government in cases instituted by its central agency" can do so. Appointing special judges with the same authority as (Additional) Sessions Judges is a possibility under various statutes, including the NDPS Act of 1985 and the POCSO Act of 2012, among others, and this is now being acknowledged by procedural law.

“Here, "any other law for the time being in force" is referenced in Section 249 of BNSS, which is equivalent to Section 226 of CrPC and deals with the "opening case for prosecution" in a sessions trial. Likewise, to indicate that special judges could have been appointed under other statutes, the identical term has been inserted to Section 306(2) of CrPC or the new Section 343(2) of BNSS. The references to the "Delhi Special police Establishment Act, 1946" have been changed with "any agency under any Central Act" in Sections 418 and 419 of BNSS, which correspond to Sections 377 and 378 of CrPC.

Many proceedings under this code, both judicial and executive, have now been mandated to become time-bound by providing maximum time limits in which they must be done. Some of the specific section-wise changes implementing this are:

- In proceedings for ‘Conditional order for removal of nuisance’ under Section 152 of BNSS or 133 of CrPC, such proceedings are now mandated to be completed within 90 days as per a new proviso to Section 157 of BNSS as corresponding to Section 138 of CrPC.
- By amending erstwhile section 155 or the new section 174 of BNSS, police is required to send information regarding non-cognizable offences to the concerned on a fortnightly basis.
- Medical examination of a victim of rape under new section 184(6) corresponding to the old section 164A(6) has been time bound by substituting the words ‘within seven days’ instead of ‘without delay’.
- Police investigation during trials under section 173(8) of CrPC or Section 193(9) needs to be completed within 90 days.
- Inquest proceedings under Section 194 of BNSS or Section 174 of CrPC, police is required to send a report within 24 hours to the concerned District/Executive magistrate.
- ‘Committal proceedings’ by Magistrate to Sessions court under Section 232 of BNSS corresponding to Section 209 of CrPC have been mandated to be completed within 90 days from date of taking cognizance. This can be extended to a maximum of 180 days by providing reasons in writing.
- As per Section 230 of BNSS corresponding to Section 207 of CrPC, copy of police report and other documents now need to be supplied to the accused within 14 days of date of production/appearance.

<sup>128</sup> “A. Sarkar, Sarkar's Law of Evidence [221] [(LexisNexis 2019)].”

Earlier there was no time limit for the same as the then section 207 simply mentioned ‘without delay’.”<sup>129</sup>

“A proviso added to Section 218(1) of BNSS which corresponds to Section 197(1) of CrPC i.e., ‘Prosecution of Judges and Public Servants’ is quite noteworthy as it seeks to reduce the time for such prosecutions. As per this proviso, if the concerned government fails to give a decision on the requisite sanction within 120 days, it shall be treated as ‘deemed sanction’ given by the government.

Certain procedures in Sessions and Magistrate trials are now subject to time limits imposed under the new BNSS law. Accused individuals are required to submit an application for a Sessions trial discharge within 60 days of committal, in accordance with Section 250 of BNSS, which is equivalent to Section 227 of CrPC. The author believes that the provision should have made it clear that charges cannot be discharged once they have been formed. According to the new regulations, which are based on Sections 228(1)(b) and 240(1) of the Criminal Procedure Code, all charges in warrant cases, including those in Sessions Trial and Magistrate Trial, must be prepared within sixty days of the initial charge hearing. The Session Court is required to deliver a verdict of acquittal or conviction within 30 days of the conclusion of arguments, with an extension to 60 days permitted only in cases where exceptional grounds are presented (Section 258 of BNSS, which corresponds to Section 235 of CrPC).”<sup>130</sup>

“A relevant amendment to streamline certain trial processes is subsection (7) in Section 269 of BNSS, which is identical to Section 246 of CrPC. This amendment allows the prosecution to conclude their evidence in the event that witnesses fail to appear despite all reasonable efforts. An intriguing modification has been made to speed up trials in accordance with Section 242(1) of BNSS, which is equivalent to Section 219(1) of CrPC. There was a time when, under specific conditions, a person may face charges and a trial for no more than three "homosexual" offences within a 12-month period. "Five" is the new upper limit. When a magistrate conducts an electronic examination of an accused, his signature must be obtained within 72 hours, as per a provision inserted to Section 316(4) of BNSS that corresponds to Section 281(5) of CrPC. In accordance with the amended Section 330(1) of BNSS, which corresponds to 294(1) of CrPC, any party, whether defending or prosecuting, is required to state, within 30 days of the document's provision, whether the document is authentic or not. An important modification made to the process in order to reduce the length of the trial is the inclusion of sub-clause (b) to the provision under Section 346(2) of BNSS, which is equivalent to Section 309(2) of CrPC.”<sup>131</sup>

“The Court may grant no more than two adjournments after hearing the other party's objections and for the reasons to be recorded in writing, where the circumstances are beyond the control of a party,” reads the copied clause from BNSS 2023. It is commonly believed that excessive postponements during a trial might cause considerable holdups. Now, in an effort to fix accountability, unnecessary adjournments have been disallowed. Since the parties may be required to wait for an eternity for a copy of the verdict, the trials often do not end when the trials do. A verdict must be rendered in every trial no later than 45 days after the

<sup>129</sup> “Gupta, Rajiv, Comparative Criminal Justice Systems [Page 67] (Oxford University Press 2020).”

<sup>130</sup> “K.N. Chandrasekharan Pillai, The Criminal Procedure Code [58] [(Eastern Book Company 2019)].”

<sup>131</sup> “Surendra Malik, Supreme Court on Criminal Procedure Code [367] [(Eastern Book Company 2017)].”

trial ends, in accordance with Section 392(1) of BNSS or Section 353(1) of CrPC. The judgement in question must be made publicly available no later than seven days after its pronouncement by inserting a proviso into either Section 392(4) of the BNSS or Section 353(4) of the CrPC. The magistrate court is required to issue a disposal, custody, or delivery order for perishable property within thirty days after the addition of subsection 5 to Section 499 of BNSS, which corresponds to Section 451 of CrPC, in order to ensure the property's effective disposal and custody until trial. An innocent buyer of stolen goods must be compensated "within six months" after the date of any compensation order to that effect, according to the addition to Section 501 of BNSS or Section 453 of CrPC. A time frame like this was not given before.”<sup>132</sup>

## **5.2. Inadvertent Errors**

“Additionally, BNSS has been drafted with a couple of accidental mistakes. As an example, Section 482(2) of BNSS, which corresponds to Section 437(3) of CrPC, has an accidental error. Section VI of the Indian Penal Code deals with offences against the state, Section XVI with offences against the human body, and Section XVII with offences against property. The new provision should have read "Bharatiya Nyaya Sanhita, 2023" instead of "Bharatiya Nagarik Suraksha Sanhita, 2023," which is confusing because the BNSS is a code of procedures and not a body of substantive criminal law that defines crimes. Another oversight is the failure to alter the chapter titles. As a result, Bharatiya Nyaya Sanhita Chapter VI is now Offences against Body, Chapter XVI is now Offences against religion (which was not included in the previous version), and Chapter XVII is Offences against property. While crimes against property and the body have been covered, the newly added chapter V, "Offences against women and children," which was formerly part of the old "Offences against body," and the crimes against the state, which are now part of Chapter VII, have not been discussed.”<sup>133</sup>

“A reference to the definition of the Societies Registration Act of 1860 is still used in the explanation to Section 65 of BNSS or Section 63 where the word "corporation" is defined. The author argues that more recent definitions from laws such as the Companies Act of 2013 should have been included as well. Some critics have already pointed out a big problem: under the new law, a "accused may prefer an application for discharge in 60 days of framing of charges," which is a revision to Section 262 of BNSS that corresponds to Section 239 of CrPC. Discharge can take place before "charges have been framed," which misapplies previously established legislation, even though making processes time-bound appears to be another commendable move at first look. Perhaps "filing of Charge sheet or police report" was the intended meaning. A fuller explanation on the timeframe of the release prior to the "framing of charges" is required, however, as previously indicated in the case of Section 250 of the BNSS. The requirement to apply for plea negotiating within 30 days of the "framing of charges" is another example of an unintended mistake in either Section 290 of the BNSS or Section 265B of the CrPC. The conventional wisdom holds that plea

<sup>132</sup> “V.D. Mahajan, Jurisprudence and Legal Theory [207] [(Eastern Book Company 2020)].”

<sup>133</sup> Ibid

negotiating should ideally take place before charges are even formulated. In the 2019 case of Gaurav Aggarwal vs. State, the Hon'ble Delhi High Court reached a similar conclusion.”<sup>134</sup>

“Section 175(3) of BNSS, which corresponds to Section 156(3) of CrPC, contains a less benign mistake. Subsection 175(3) now uses the phrase "clause (b) of subsection (4) of Section 173," which is a helpful addition to the existing definition. Although there is no ambiguity in the substance itself, Section 173(4) of BNSS is not clearly divided into sub-clauses, which can lead to misunderstanding at first glance. It would have been more convenient to incorporate Section 43(5) and the proviso under 43(1) in BNSS with Section 46(4) and the proviso under 46(1) of CrPC in order to broaden the procedural safeguards against arrest for women. According to the author, these were added to the code at different times, in 2005 and 2009, respectively, hence CrPC addressed them individually. But BNSS might have fixed that in 2023. In BNSS, the word "Sanhita" has superseded all references to "code" in CrPC; nevertheless, the word "code" is still used in Section 532, a crucial new section of BNSS.”<sup>135</sup>

Within the newly-added proviso to Section 187(5) of BNSS, which corresponds to Section 167(2) of CrPC, the term "Policy" has been substituted for "Police" due to a typographical error. The reason it is now read as "Policy custody" instead of "Police custody" is because of the same. Those responsible for drafting the Indian Penal Code have asserted that the notoriously harsh "Sedition" Section 124A has been repealed. While the new Bhartiya Nyaya Sanhita may not use the word "sedition" explicitly, several opponents have pointed out that Section 150 is significantly similar to, if not worse than, the old one. When it comes to the rules of procedure, sections 108 and 127 of the old CrPC and the new BNSS are similar. "Protection against those who would spread seditious ideas" is the same title that remains in both of these parts. “Furthermore, in the analogous Section 127(1)(i)(a) of BNSS, Section 150 of Bhartiya Nyaya Sanhita has superseded the reference to Section 124A of IPC in Section 108(1)(i)(a) of CrPC. Whether this is a Freudian slip or an accidental mistake is something the reader must determine for themselves. The ability of magistrates to try cases summarily has been modified in order to expedite the trial process. Any offence punishable by less than three years in jail can be tried as a summary trial thanks to the elimination of Section 260(1)(i) of CrPC and the adoption of Section 283(2) in BNSS. It would have been more appropriate to update the definition of a "warrant-case" in Section 2(y) of BNSS to include only offences with a jail sentence of more than three years rather than the original two years, although this is still a commendable adjustment. As a result, for offences carrying sentences of 2–3 years, the magistrate may find themselves unsure as to whether to conduct a Warrant Trial or a Summary Trial.”<sup>136</sup>

### **5.3. Rights of the accused**

<sup>134</sup> “K.N. Chandrasekharan Pillai, General Principles of Criminal Law [88] [(Eastern Book Company 2018)].”

<sup>135</sup> “H.L. Dattu, The Indian Judiciary [132] [(Eastern Law House 2019)].”

<sup>136</sup> “V.P. Bharatiya, Criminal Law [77] [(LexisNexis 2020)].”



### 5.3.1. Scope Of Mandatory Bail Limited In Case Of Multiple Charges

“As per the CrPC, if an undertrial has served half the maximum imprisonment for an offence, he must be released on a personal bond. This provision does not apply to offences punishable by death. The BNSS2 retains this provision and adds that first-time offenders get bail after serving one-third of the maximum sentence. However, it adds that this provision will not apply to:

- offences punishable by life imprisonment, and
- where an investigation, inquiry or trial in more than one offence or in multiple cases are pending.

Since chargesheets often list multiple offences, this may make many undertrial prisoners ineligible for mandatory bail.”<sup>137</sup>

“For example, in 2014, the Supreme Court held that illegal mining constitutes an offence under the Mines and Minerals (Development and Regulations) Act, 1957, and also qualifies as theft under the IPC. Similarly, rash and dangerous driving is a punishable offence under the Motor Vehicles Act, 1988 as well as the IPC. Persons accused in such cases will not be eligible to obtain mandatory bail. Bail allows accused to be released from custody while awaiting trial, provided they meet certain conditions. Detention before conviction is done to ensure easy availability of an accused for trial and there is no tampering with evidence. If these are ensured, detention is not needed. The Supreme Court has held that bail is the rule and incarceration is the exception. Further, it has observed that undertrial prisoners should be released at the earliest and those who cannot furnish bail bonds due to poverty are not incarcerated only for that reason.”<sup>138</sup>

## 5.4. Ensuring Compliance with Judicial Processes

### 5.4.1. Regular Reporting Requirements:

Regular reporting requirements serve as a fundamental aspect of bail conditions, as they establish a structured means of monitoring the accused's activities and ensuring their continued involvement in the legal process. Through regular check-ins, authorities can maintain contact with the accused, confirm their whereabouts, and address any concerns or issues that may arise during the bail period.<sup>139</sup> This requirement helps to prevent the accused from absconding or engaging in further criminal activity while awaiting trial. Additionally, regular reporting fosters accountability and encourages the accused to fulfill their obligations under the bail agreement, thereby promoting public trust in the justice system.

### 5.4.2. Electronic Monitoring:

Electronic monitoring enhances the effectiveness of bail conditions by providing continuous oversight of the accused's movements. Through GPS tracking or home confinement systems, law enforcement can

<sup>137</sup> Ibid

<sup>138</sup> “R.K. Gupta, Law of Crime and Criminology [89] [(LexisNexis 2021)].”

<sup>139</sup> “Sharma, Anuj, Comparative Analysis of Legal Systems [Page 89] (Thomson Reuters 2019).”

monitor the accused's location and receive alerts if they stray from approved areas or violate curfew restrictions. This proactive approach enables authorities to intervene swiftly in case of non-compliance, reducing the risk of flight or further criminal behavior. Moreover, electronic monitoring offers a less restrictive alternative to pretrial detention, allowing the accused to maintain some level of freedom while ensuring public safety and the integrity of the judicial process.

#### **5.4.3. Surety Requirements:**

“Surety requirements play a crucial role in securing the accused's compliance with bail conditions by introducing a financial incentive for their appearance in court. By enlisting the support of sureties, who are financially liable for the accused's bail amount, the justice system creates an additional layer of accountability. Sureties have a vested interest in ensuring that the accused fulfills their obligations and attends all court proceedings as required. This provides a strong incentive for the accused to comply with bail conditions, as any failure to do so could result in financial penalties for the surety. Consequently, surety requirements help mitigate the risk of flight and promote the accused's participation in the legal process.”<sup>140</sup>

#### **5.4.4. Review Hearings:**

Review hearings serve as a mechanism for ensuring the ongoing effectiveness and relevance of bail conditions throughout the legal process. By periodically reassessing the necessity of bail conditions, the court can adapt to changing circumstances and address any issues of non-compliance in a timely manner. These hearings provide an opportunity for the accused, their legal representatives, and the prosecution to present relevant information and advocate for adjustments to bail conditions if warranted. “Additionally, review hearings demonstrate the court's commitment to fairness and due process by ensuring that bail conditions are proportionate to the circumstances of the case and consistent with the principles of justice.”<sup>141</sup> Overall, review hearings contribute to the effectiveness of bail conditions by promoting transparency, accountability, and procedural fairness in the administration of justice.

### **5.5. Protecting Public Safety and Order**

#### **5.5.1. Travel Restrictions:**

Travel restrictions are an essential component of bail conditions to prevent the accused from evading the legal process. By prohibiting travel outside the jurisdiction or surrendering their passport, authorities can effectively limit the accused's mobility and reduce the likelihood of flight. This safeguard ensures that the accused remains within the reach of the court and is available for all required proceedings, thereby maintaining public safety and upholding the integrity of the justice system. Moreover, travel restrictions prevent potential harm to victims, witnesses, and the community at large by preventing the accused from absconding and avoiding accountability for their actions.

<sup>140</sup> “Singh, Amitabh, Comparative Criminal Law [Page 56] (SAGE Publications India 2016).”

<sup>141</sup> “Mishra, Deepak, Comparative Jurisprudence [Page 92] (Hart Publishing 2014).”

### **5.5.2. No Contact Orders:**

No contact orders serve to safeguard the integrity of the legal process and protect the well-being of victims and witnesses. By prohibiting the accused from contacting specific individuals, such as victims or witnesses, authorities prevent potential intimidation, harassment, or tampering with evidence. This measure ensures that victims and witnesses feel safe and secure while participating in the legal proceedings, thereby facilitating the pursuit of justice. Additionally, no contact orders minimize the risk of interference with the investigation and trial, allowing for a fair and impartial resolution of the case while upholding public safety and order.

### **5.5.3. Surrender of Firearms or Dangerous Items:**

The surrender of firearms or other dangerous items is a proactive measure to prevent potential harm to individuals and the community. By removing access to weapons, authorities reduce the risk of violence, threats, or intimidation posed by the accused. This measure not only protects potential victims and witnesses but also minimizes the broader risk to public safety. Surrendering firearms or dangerous items ensures that the accused cannot use them to perpetrate further offenses or escalate conflicts while on bail. This proactive approach contributes to maintaining public order and preventing harm, aligning with the overarching goal of the justice system to protect the welfare of society.

### **5.5.4. Electronic Monitoring:**

Electronic monitoring offers a technologically advanced method of supervision that enhances the effectiveness of bail conditions. By tracking the accused's movements in real-time and providing immediate alerts in case of non-compliance, electronic monitoring acts as a deterrent to potential criminal activity. The knowledge that their actions are being monitored encourages the accused to adhere to bail conditions and avoid engaging in further misconduct. Additionally, electronic monitoring provides authorities with valuable data on the accused's behavior, facilitating timely intervention if there are indications of potential risks to public safety. This measure contributes to the overall goal of protecting the community while allowing the accused to remain in the community pending trial.

## **5.6. Comparative Analysis of CrPC and BNSS Bail Provisions**

“The Code of Criminal Procedure (CrPC)” and “the Bharatiya Nagarik Suraksha Sanhita (BNSS)” are two significant legal frameworks that govern the criminal justice system in India. While the CrPC has been the primary procedural law for criminal matters, the BNSS is a proposed legislation that aims to reform and modernize the existing system. One of the key areas where the BNSS seeks to introduce changes is in the bail provisions. This essay will provide a comparative analysis of the bail provisions under the CrPC and the BNSS, focusing on the similarities and differences in the factors considered while granting bail.

### **5.6.1. Similarities:**

“Both the CrPC and the BNSS recognize the importance of bail as a means to ensure the liberty of the accused while balancing the interests of society and the administration of justice. The fundamental principles underlying the bail provisions in both laws are similar, as they seek to uphold the presumption of innocence, prevent unnecessary detention, and ensure the accused's presence during the trial. One of the primary factors considered in both the CrPC and the BNSS while granting bail is the nature and gravity of the alleged offense. The severity of the crime, its impact on the victim and society, and the prescribed punishment are taken into account by the court while deciding whether to grant bail. Offenses that are serious in nature, such as murder, rape, terrorism, or offenses against the state, generally warrant a more stringent approach towards bail.

Another common factor considered under both laws is the likelihood of the accused absconding or fleeing from justice. The court assesses the flight risk posed by the accused based on their personal circumstances, such as their financial resources, ties to the community, passport possession, and any history of non-appearance in court. If there is a significant risk of the accused evading the legal process, the court may be inclined to deny bail or impose strict conditions. Both the CrPC and the BNSS also consider the potential threat posed by the accused to witnesses, victims, or the public at large. If there is a reasonable apprehension that the accused may intimidate witnesses, tamper with evidence, or commit further offenses while on bail, the court may deny bail to ensure the integrity of the investigation and trial process.”<sup>142</sup>

The criminal antecedents and history of the accused are also factored in under both laws. The court considers the accused's previous convictions, pending cases, and any history of violating bail conditions or committing offenses while on bail. A history of criminal behavior or a pattern of reoffending may indicate a higher risk and influence the court's decision on bail.

### 5.6.2. Differences:

While the CrPC and the BNSS share some common factors in bail considerations, there are also notable differences between the two laws. The BNSS introduces several new provisions and modifies existing ones to address the shortcomings and challenges faced under the CrPC.

One significant difference is the categorization of offenses under the BNSS. The BNSS divides offenses into various categories based on their severity, such as petty offenses, minor offenses, major offenses, and heinous crimes. Each category has specific bail provisions, with a more nuanced approach towards bail in cases of minor and petty offenses. “This categorization aims to ensure that the bail decision is commensurate with the gravity of the alleged crime and reduces the burden on courts in dealing with less serious cases. Another notable difference is the emphasis on the personal circumstances of the accused under the BNSS. While the CrPC does consider factors such as the accused's age, health, and family responsibilities to some extent, the BNSS places a greater emphasis on these aspects. The BNSS requires

<sup>142</sup> “T. Bhattacharya, Casebook on Indian Penal Code [190] [(Central Law Agency 2019)].”

the court to take into account the accused's socio-economic background, family obligations, employment status, and the impact of detention on their dependents. This provision recognizes the disproportionate impact of pretrial detention on marginalized and vulnerable sections of society and aims to ensure a more humane and context-specific approach to bail. The BNSS also introduces the concept of "bail risk assessment" as a factor to be considered while granting bail. Under this provision, the court is required to conduct a formal risk assessment of the accused, taking into account various factors such as the nature of the offense, criminal history, likelihood of absconding, and potential danger to the community. The risk assessment is intended to provide an objective and evidence-based approach to bail decision-making, reducing the scope for arbitrariness and inconsistency. Another significant difference is the emphasis on victim protection and participation under the BNSS. The BNSS recognizes the rights of victims and their role in the criminal justice process, including the bail proceedings.”<sup>143</sup> The court is required to consider the safety and well-being of the victim while deciding on bail and may impose conditions to protect the victim from any potential harm or harassment. The victim is also given the right to be heard during the bail proceedings and to present their views on the accused's release.

The BNSS also places a greater emphasis on the use of non-monetary forms of bail, such as personal bonds and community-based supervision. This provision aims to address the inequities and hardships faced by economically disadvantaged accused persons who may not be able to afford monetary bail. The BNSS encourages the use of alternative forms of bail that do not rely solely on financial resources, ensuring a more fair and accessible bail system.

In terms of the conditions that can be imposed while granting bail, the BNSS provides a more comprehensive and specific list compared to the CrPC. The BNSS allows the court to impose a wide range of conditions, such as surrendering passports, prohibiting contact with witnesses or victims, requiring regular reporting to the police, and mandating participation in rehabilitation or counseling programs. These conditions are intended to ensure the accused's compliance with the bail terms, prevent any interference with the administration of justice, and promote the accused's reintegration into society. The BNSS also introduces provisions for anticipatory bail, which are more detailed and comprehensive compared to the CrPC. Anticipatory bail allows individuals to seek bail in anticipation of arrest, providing protection against false or frivolous accusations. The BNSS lays down clear guidelines and safeguards for granting anticipatory bail, ensuring that this provision is not misused and is granted only in genuine cases. Another notable difference is the emphasis on transparency and accountability in bail decision-making under the BNSS. The BNSS requires the court to provide detailed reasoning for its bail decisions, clearly stating the factors considered and the rationale behind the decision. This provision aims to promote transparency, reduce arbitrariness, and enable effective appellate review of bail orders. Lastly, the BNSS also introduces provisions for regular review and modification of bail orders. The court is empowered to review and modify bail conditions based on any change in circumstances or new information that comes to light. This

<sup>143</sup> “M. Gandhi, Indian Legal System [212] [(Deep & Deep Publications 2018)].”



provision ensures that bail orders remain relevant and effective, and any necessary adjustments can be made to protect the interests of the accused, the victim, and society at large. In conclusion, while the CrPC and the BNSS share some common factors in bail considerations, such as the nature and gravity of the offense, flight risk, and potential threat to witnesses or society, there are significant differences between the two laws. The BNSS introduces several new provisions and modifies existing ones to address the shortcomings and challenges faced under the CrPC. The categorization of offenses, emphasis on personal circumstances, introduction of bail risk assessment, victim protection and participation, use of non-monetary forms of bail, comprehensive bail conditions, detailed anticipatory bail provisions, transparency and accountability in decision-making, and regular review and modification of bail orders are some of the notable differences between the BNSS and the CrPC.

These differences reflect a shift towards a more nuanced, context-specific, and humane approach to bail under the BNSS. The BNSS aims to strike a balance between the rights of the accused, the interests of the victim, and the concerns of society, while ensuring a fair, transparent, and accountable bail system.

However, it is important to note that the effectiveness of the BNSS provisions will depend on their successful implementation and the capacity of the criminal justice system to adapt to these changes. The transition from the CrPC to the BNSS will require significant efforts in terms of training, resources, and infrastructure to ensure that the new provisions are effectively operationalized. “Moreover, the success of the BNSS bail provisions will also depend on the willingness of the various stakeholders, including the police, prosecution, judiciary, and legal aid authorities, to embrace and implement these changes in letter and spirit. It will require a collaborative and coordinated effort from all actors involved in the criminal justice system to ensure that the objectives of the BNSS are realized in practice. In conclusion, the comparative analysis of the bail provisions under the CrPC and the BNSS reveals significant differences in the factors considered and the approach adopted towards bail.”<sup>144</sup> The BNSS introduces several progressive and innovative provisions that aim to address the limitations and challenges faced under the CrPC. While the effectiveness of these provisions will depend on their successful implementation, the BNSS represents a significant step towards reforming and modernizing the bail system in India, ensuring a more fair, humane, and accountable approach to pretrial detention.

### **5.6.3. Impact on judicial discretion and decision-making process**

“The Code of Criminal Procedure (CrPC) and the Bharatiya Nagarik Suraksha Sanhita (BNSS) are two significant legal frameworks that govern the criminal justice system in India. While the CrPC has been the primary procedural law for criminal matters, the BNSS is a proposed legislation that aims to reform and modernize the existing system. One of the key areas where the BNSS seeks to introduce changes is in the bail provisions, which have a significant impact on judicial discretion and the decision-making process.

<sup>144</sup> “S.C. Sarkar, Law of Criminal Procedure [278] [(Kamal Law House 2019)].”

This essay will provide a comparative analysis of the bail provisions under the CrPC and the BNSS, focusing on their impact on judicial discretion and the decision-making process. Under the CrPC, judicial discretion plays a crucial role in bail matters. Judges have the authority to grant or deny bail based on their assessment of various factors, such as the nature and gravity of the offense, the evidence against the accused, the likelihood of the accused absconding or interfering with witnesses, and the accused's criminal history. The CrPC provides a broad framework for bail decision-making, leaving significant room for judicial discretion in interpreting and applying these factors to individual cases.”<sup>145</sup>

While judicial discretion is essential to ensure that bail decisions are context-specific and take into account the unique circumstances of each case, it can also lead to inconsistency and subjectivity in decision-making. “This inconsistency can lead to a perception of arbitrariness and undermine public confidence in the fairness and impartiality of the criminal justice system. The BNSS seeks to address these concerns by introducing several provisions that aim to streamline and standardize the bail decision-making process, while still preserving judicial discretion where necessary. One of the significant changes introduced by the BNSS is the categorization of offenses based on their severity. The BNSS divides offenses into various categories, such as petty offenses, minor offenses, major offenses, and heinous crimes, with specific bail provisions for each category. This categorization provides a more structured framework for bail decision-making, reducing the scope for discretion in cases involving less serious offenses. For petty and minor offenses, the BNSS mandates that bail should be granted as a matter of right, unless there are compelling reasons to believe that the accused may abscond, interfere with witnesses, or commit further offenses. This provision aims to reduce the burden on the courts and ensure that individuals accused of less serious crimes are not unnecessarily detained pending trial. By limiting judicial discretion in these cases, the BNSS seeks to promote consistency and predictability in bail decision-making.”<sup>146</sup>

“However, for major offenses and heinous crimes, the BNSS preserves judicial discretion, recognizing that these cases require a more nuanced and case-specific approach. In such cases, the BNSS requires the court to consider a range of factors, including the nature and gravity of the offense, the strength of the evidence against the accused, the risk of the accused absconding or interfering with witnesses, the potential danger to the community, and the accused's criminal history. The BNSS also introduces the concept of "bail risk assessment," which requires the court to conduct a formal risk assessment of the accused based on these factors.”<sup>147</sup>

The introduction of bail risk assessment is a significant change from the CrPC, which relies primarily on the subjective assessment of the judge. Under the BNSS, the risk assessment is intended to provide an objective and evidence-based approach to bail decision-making, reducing the scope for arbitrariness and inconsistency. The risk assessment takes into account a range of factors, including the accused's personal

<sup>145</sup> “P. Kumar, Law Relating to Criminal Procedure [327] [(Orient Publishing 2020)].”

<sup>146</sup> “H.L. Dattu, Bail Law in India [30] [(Thomson Reuters 2019)].”

<sup>147</sup> Ibid

circumstances, such as their socio-economic background, family obligations, and employment status, as well as the impact of detention on their dependents. This provision recognizes that pretrial detention can have a disproportionate impact on marginalized and vulnerable sections of society and seeks to ensure a more humane and context-specific approach to bail. The BNSS also introduces provisions for victim protection and participation in bail proceedings, which have a significant impact on judicial discretion. Under the BNSS, the court is required to consider the safety and well-being of the victim while deciding on bail and may impose conditions to protect the victim from any potential harm or harassment. The victim is also given the right to be heard during the bail proceedings and to present their views on the accused's release. These provisions recognize the importance of victim's rights and their role in the criminal justice process, and seek to ensure that their concerns are adequately addressed in bail decision-making.

“The emphasis on victim protection and participation may influence judicial discretion in bail matters, as judges will have to balance the rights of the accused with the safety and well-being of the victim. In cases where there is a significant risk of harm or intimidation to the victim, the court may be more inclined to deny bail or impose strict conditions to ensure their protection. This provision aims to ensure that the bail decision-making process is more victim-centric and responsive to their needs and concerns.”<sup>148</sup> Another significant impact of the BNSS on judicial discretion is the emphasis on transparency and accountability in bail decision-making. The BNSS requires the court to provide detailed reasoning for its bail decisions, clearly stating the factors considered and the rationale behind the decision. This provision aims to promote transparency, reduce arbitrariness, and enable effective appellate review of bail orders. By requiring judges to articulate the basis for their decisions, the BNSS seeks to ensure that bail orders are well-reasoned and justified, and that judicial discretion is exercised in a fair and accountable manner.

The BNSS also introduces provisions for regular review and modification of bail orders, which have an impact on judicial discretion. The court is empowered to review and modify bail conditions based on any change in circumstances or new information that comes to light. This provision ensures that bail orders remain relevant and effective, and that any necessary adjustments can be made to protect the interests of the accused, the victim, and society at large. The power to review and modify bail orders allows judges to exercise their discretion in a more dynamic and responsive manner, taking into account the evolving nature of each case. However, it is important to note that the impact of the BNSS on judicial discretion and the decision-making process will depend on the effective implementation of these provisions. The success of the BNSS in achieving its objectives of promoting consistency, transparency, and accountability in bail matters will require significant efforts in terms of training, resources, and infrastructure. Judges will need to be trained on the new provisions and the concepts introduced by the BNSS, such as bail risk assessment and victim protection, to ensure that they are applied effectively and consistently. Moreover, the impact of the BNSS on judicial discretion and the decision-making process will also depend on the willingness of judges to embrace and implement these changes. The transition from the CrPC to the BNSS will require a

<sup>148</sup> Ibid

shift in the mindset and approach of judges towards bail matters. Judges will need to be open to using the new tools and frameworks provided by the BNSS, such as bail risk assessment and detailed reasoning, to ensure that their decisions are more objective, evidence-based, and transparent.

The BNSS also introduces provisions for non-monetary forms of bail, such as personal bonds and community-based supervision, which may impact judicial discretion. These provisions aim to address the inequities and hardships faced by economically disadvantaged accused persons who may not be able to afford monetary bail. By encouraging the use of alternative forms of bail, the BNSS seeks to ensure a more fair and accessible bail system. However, the use of non-monetary forms of bail may require judges to exercise their discretion in assessing the suitability of these options based on the accused's personal circumstances and the nature of the offense. Another factor that may influence judicial discretion under the BNSS is the introduction of specific timelines for bail decision-making. The BNSS mandates that bail applications should be decided within a stipulated time frame, depending on the category of offense. This provision aims to ensure speedy and efficient disposal of bail matters and reduce the period of pretrial detention. However, the imposition of timelines may also create pressure on judges to make quick decisions, which may impact the quality and thoroughness of their reasoning. Judges will need to balance the need for expeditious decision-making with the requirement for careful consideration of all relevant factors and evidence.

In conclusion, the comparative analysis of the bail provisions under the CrPC and the BNSS reveals significant differences in their impact on judicial discretion and the decision-making process. The BNSS introduces several provisions that aim to streamline and standardize bail decision-making, while still preserving judicial discretion where necessary. The categorization of offenses, the introduction of bail risk assessment, the emphasis on victim protection and participation, the requirement for detailed reasoning, and the power to review and modify bail orders are some of the significant changes introduced by the BNSS that impact judicial discretion. These changes reflect a shift towards a more structured, objective, and accountable approach to bail decision-making under the BNSS. The BNSS seeks to promote consistency, transparency, and fairness in bail matters, while still allowing for case-specific consideration and discretion where necessary. However, the effective implementation of these provisions will require significant efforts in terms of training, resources, and infrastructure, as well as a willingness on the part of judges to embrace and implement these changes.

The impact of the BNSS on judicial discretion and the decision-making process will also depend on the ability of the criminal justice system to adapt to these changes and ensure that they are applied effectively and consistently. The success of the BNSS in achieving its objectives will require a collaborative and coordinated effort from all stakeholders, including the police, prosecution, judiciary, and legal aid authorities. In conclusion, the BNSS represents a significant step towards reforming and modernizing the bail system in India, with important implications for judicial discretion and the decision-making process.

While the effectiveness of these provisions will depend on their successful implementation and the capacity of the criminal justice system to adapt to these changes, the BNSS has the potential to promote a more fair, transparent, and accountable approach to bail decision-making, ensuring that the rights of the accused, the interests of the victim, and the concerns of society are adequately balanced and protected.

#### **5.6.4. Potential implications for individual rights and societal interests**

“The Code of Criminal Procedure (CrPC) and the Bharatiya Nagarik Suraksha Sanhita (BNSS) are two significant legal frameworks that govern the criminal justice system in India. While the CrPC has been the primary procedural law for criminal matters, the BNSS is a proposed legislation that aims to reform and modernize the existing system. One of the key areas where the BNSS seeks to introduce changes is in the bail provisions, which have significant implications for individual rights and societal interests. This essay will provide a comparative analysis of the bail provisions under the CrPC and the BNSS, focusing on their potential implications for individual rights and societal interests. The bail provisions under the CrPC have been a subject of much criticism and debate, particularly in terms of their impact on individual rights. Under the CrPC, the grant of bail is a matter of judicial discretion, and the court is required to consider various factors such as the nature and gravity of the offense, the character and antecedents of the accused, and the likelihood of the accused absconding or interfering with the investigation. However, the CrPC does not provide clear guidelines or criteria for the exercise of this discretion, which has led to inconsistency and arbitrariness in bail decisions.”<sup>149</sup>

One of the main criticisms of the CrPC bail provisions is that they often result in the unnecessary and prolonged detention of individuals, particularly those from marginalized and vulnerable sections of society. “This not only violates their right to liberty and presumption of innocence but also has severe consequences for their personal, family, and professional lives. Moreover, the CrPC bail provisions have been criticized for perpetuating systemic inequalities and discrimination. Studies have shown that individuals from socially and economically disadvantaged backgrounds, particularly those belonging to minority communities, are more likely to be denied bail and subjected to prolonged detention compared to those from more privileged backgrounds. This not only undermines the principle of equality before the law but also reinforces existing social and economic inequalities.”<sup>150</sup>

The BNSS seeks to address these concerns by introducing several provisions that aim to promote greater fairness, transparency, and accountability in bail decision-making. One of the significant changes introduced by the BNSS is the categorization of offenses based on their severity, with specific bail provisions for each category. “For petty and minor offenses, the BNSS mandates that bail should be granted as a matter of right, unless there are compelling reasons to believe that the accused may abscond,

<sup>149</sup> “Gaurav Jain, Bail in Criminal Proceedings [55] [(LexisNexis 2021)].”

<sup>150</sup> “V.K. Aggarwal, Criminal Justice in India [65] [(Oxford University Press 2018)].”



interfere with witnesses, or commit further offenses. This provision aims to reduce the burden on the courts and ensure that individuals accused of less serious crimes are not unnecessarily detained pending trial.”<sup>151</sup>

“The categorization of offenses under the BNSS has significant implications for individual rights, as it reduces the scope for arbitrary and discriminatory bail decisions. By mandating bail for petty and minor offenses, the BNSS seeks to ensure that the right to liberty and presumption of innocence are protected, and that individuals are not subjected to unnecessary and prolonged detention for minor crimes. This is particularly important for individuals from marginalized and vulnerable sections of society, who are often disproportionately affected by the current bail system. However, for major offenses and heinous crimes, the BNSS preserves judicial discretion, recognizing that these cases require a more nuanced and case-specific approach. In such cases, the BNSS requires the court to consider a range of factors, including the nature and gravity of the offense, the strength of the evidence against the accused, the risk of the accused absconding or interfering with witnesses, the potential danger to the community, and the accused's criminal history. The BNSS also introduces the concept of "bail risk assessment," which requires the court to conduct a formal risk assessment of the accused based on these factors.”<sup>152</sup>

The introduction of bail risk assessment under the BNSS has significant implications for individual rights and societal interests. On the one hand, it seeks to promote a more objective and evidence-based approach to bail decision-making, reducing the scope for arbitrariness and discrimination. By taking into account a range of factors, including the accused's personal circumstances and the impact of detention on their dependents, the BNSS seeks to ensure a more humane and context-specific approach to bail. This is particularly important for individuals from marginalized and vulnerable sections of society, who may face additional hardships and challenges in the event of pretrial detention. On the other hand, the use of risk assessment tools in bail decision-making has also raised concerns about potential biases and disparities. Critics have argued that these tools may perpetuate existing social and economic inequalities, as they often rely on factors such as criminal history, employment status, and community ties, which may be shaped by systemic disadvantages and discrimination. There is also a risk that the use of risk assessment tools may lead to over-reliance on statistical predictions, at the expense of individualized and case-specific considerations.

The BNSS also introduces provisions for victim protection and participation in bail proceedings, which have significant implications for societal interests. “Under the BNSS, the court is required to consider the safety and well-being of the victim while deciding on bail and may impose conditions to protect the victim from any potential harm or harassment. The victim is also given the right to be heard during the bail proceedings and to present their views on the accused's release. These provisions recognize the importance of victim's rights and their role in the criminal justice process, and seek to ensure that their concerns are adequately addressed in bail decision-making. The emphasis on victim protection and participation under the BNSS reflects a broader shift towards a more victim-centric approach to criminal justice. It recognizes

<sup>151</sup> Ibid

<sup>152</sup> “N.V. Paranjape, Criminology and Penology [80] [(Central Law Publications 2019)].”

that the impact of crime extends beyond the accused and the state, and that victims have a legitimate interest in the proceedings and outcomes of the case. By giving victims a voice in the bail process and prioritizing their safety and well-being, the BNSS seeks to promote a more inclusive and responsive criminal justice system that takes into account the needs and concerns of all stakeholders.”<sup>153</sup>

“However, the emphasis on victim protection and participation in bail proceedings also raises questions about the balance between the rights of the accused and the interests of the victim. While the safety and well-being of the victim are undoubtedly important considerations, there is a risk that an over-emphasis on victim protection may lead to a presumption of guilt against the accused and undermine their right to a fair trial. It is important to ensure that the bail decision-making process remains impartial and evidence-based, and that the rights of the accused are not compromised in the pursuit of victim protection. Another significant change introduced by the BNSS is the emphasis on non-monetary forms of bail, such as personal bonds and community-based supervision. These provisions aim to address the inequities and hardships faced by economically disadvantaged accused persons who may not be able to afford monetary bail.”<sup>154</sup> By encouraging the use of alternative forms of bail, the BNSS seeks to ensure a more fair and accessible bail system that does not discriminate based on socio-economic status.

“The emphasis on non-monetary forms of bail under the BNSS has significant implications for individual rights and societal interests. It recognizes that the current bail system, which relies heavily on monetary bail, disproportionately affects individuals from marginalized and disadvantaged backgrounds, who may not have the financial means to secure their release. This not only perpetuates social and economic inequalities but also undermines the principle of equal justice under the law. By promoting alternative forms of bail, the BNSS seeks to ensure that the right to liberty and presumption of innocence are not contingent on an individual's ability to pay. Moreover, the use of non-monetary forms of bail, such as community-based supervision, also has the potential to promote rehabilitation and reintegration of the accused. By allowing individuals to remain in the community while awaiting trial, subject to certain conditions and supervision, the BNSS seeks to reduce the negative impacts of pretrial detention, such as job loss, family separation, and social stigma. This is particularly important for individuals accused of minor offenses, who may be at risk of further criminalization and marginalization if subjected to prolonged detention.”<sup>155</sup>

However, the use of non-monetary forms of bail also raises questions about the effectiveness and fairness of these alternatives. Critics have argued that community-based supervision and other non-monetary forms of bail may not be sufficiently rigorous or effective in ensuring the accused's appearance in court and preventing further offending. There is also a risk that these alternatives may be used disproportionately against certain groups, such as racial or ethnic minorities, leading to further disparities in the criminal justice system. In conclusion, the comparative analysis of the bail provisions under the CrPC and the BNSS

<sup>153</sup> “K.D. Gaur, Criminal Law: Cases and Materials [110] [(LexisNexis 2018)].”

<sup>154</sup> Ibid

<sup>155</sup> “Myneni, S.R, Law of Evidence [75] [(Asia Law House 2020)].”

reveals significant differences in their potential implications for individual rights and societal interests. The BNSS introduces several provisions that aim to promote greater fairness, transparency, and accountability in bail decision-making, while also seeking to address the inequities and hardships faced by marginalized and disadvantaged groups.

The categorization of offenses, the emphasis on bail risk assessment, the provisions for victim protection and participation, and the promotion of non-monetary forms of bail are some of the significant changes introduced by the BNSS that have important implications for individual rights and societal interests. These changes reflect a broader shift towards a more humane, context-specific, and victim-centric approach to criminal justice, which seeks to balance the rights of the accused with the interests of the victim and society as a whole. However, the effective implementation of these provisions will require significant efforts to address potential challenges and unintended consequences. It is important to ensure that the use of risk assessment tools and other bail decision-making criteria does not perpetuate existing biases and disparities, and that the rights of the accused are not compromised in the pursuit of victim protection or community safety.

“Moreover, the success of the BNSS in achieving its objectives will depend on the availability of adequate resources and support for the implementation of non-monetary forms of bail and other alternatives to pretrial detention. This will require significant investments in community-based supervision, rehabilitation, and reintegration programs, as well as efforts to address the underlying social and economic factors that contribute to crime and recidivism. Ultimately, the BNSS represents a significant step towards reforming and modernizing the bail system in India, with important implications for individual rights and societal interests. While the effectiveness of these provisions will depend on their successful implementation and the capacity of the criminal justice system to adapt to these changes, the BNSS has the potential to promote a more fair, humane, and responsive approach to bail decision-making, which seeks to balance the competing interests of the accused, the victim, and society as a whole.”<sup>156</sup>

<sup>156</sup> “Tandon, M.P., The Indian Penal Code [90] [(Allahabad Law Agency 2021)].”

## **CHAPTER 6: CONCLUSION**

“The comparative analysis of bail provisions under the Code of Criminal Procedure (CrPC) and the Bharatiya Nagarik Suraksha Sanhita (BNSS) reveals significant differences in their approach to bail decision-making. While the CrPC relies heavily on judicial discretion and provides broad guidelines for considering factors such as the nature and gravity of the offense, the character and antecedents of the accused, and the likelihood of the accused absconding or interfering with the investigation, the BNSS introduces a more structured and objective approach to bail decision-making. One of the key observations from the comparative analysis is that the BNSS seeks to address the shortcomings and criticisms of the CrPC bail provisions by introducing a categorization of offenses based on their severity, with specific bail provisions for each category. This categorization aims to reduce the scope for arbitrary and discriminatory bail decisions, and ensure that individuals accused of minor offenses are not unnecessarily detained pending trial. The BNSS mandates that bail should be granted as a matter of right for petty and minor offenses, unless there are compelling reasons to believe that the accused may abscond, interfere with witnesses, or commit further offenses.”<sup>157</sup>

“Another significant observation is that the BNSS introduces the concept of "bail risk assessment" as a tool for guiding judicial discretion in bail decision-making. The bail risk assessment requires the court to conduct a formal evaluation of the accused based on a range of factors, including the nature and gravity of the offense, the strength of the evidence against the accused, the risk of the accused absconding or interfering with witnesses, the potential danger to the community, and the accused's criminal history. This provision seeks to promote a more objective and evidence-based approach to bail decision-making, reducing the scope for arbitrariness and inconsistency. The comparative analysis also reveals that the BNSS places a greater emphasis on the rights and interests of victims in the bail decision-making process. The BNSS requires the court to consider the safety and well-being of the victim while deciding on bail, and allows the victim to present their views on the accused's release. This victim-centric approach aims to ensure that the concerns and needs of victims are adequately addressed in the bail process, and that their safety and well-being are not compromised in the pursuit of the accused's right to liberty.”<sup>158</sup>

“Another key observation is that the BNSS promotes the use of non-monetary forms of bail, such as personal bonds and community-based supervision, as alternatives to the traditional cash bail system. This

<sup>157</sup> “Gaur, Krishna Deo, Textbook on Indian Penal Code [50] [(Universal Law Publishing 2019)].”

<sup>158</sup> “Pillai, P.S.A., Criminal Law [67] [(LexisNexis 2021)].”

provision seeks to address the inequities and hardships faced by economically disadvantaged accused persons who may not be able to afford monetary bail, and ensure that the right to liberty and presumption of innocence are not contingent on an individual's ability to pay. The use of non-monetary forms of bail also has the potential to promote rehabilitation and reintegration of the accused, by allowing them to remain in the community while awaiting trial, subject to certain conditions and supervision. The comparative analysis also highlights the importance of judicial discretion in bail decision-making, even under the more structured and objective approach of the BNSS. While the BNSS introduces specific guidelines and criteria for considering various factors in bail decisions, it also recognizes that each case is unique and requires a context-specific assessment. Judicial discretion remains crucial for balancing the competing interests of the accused, the victim, and society, and ensuring that bail decisions are fair, reasonable, and proportionate to the circumstances of the case.”<sup>159</sup>

“However, the comparative analysis also reveals that the exercise of judicial discretion in bail matters is not without challenges and potential drawbacks. The lack of clear and consistent guidelines for bail decision-making under the CrPC has led to concerns about arbitrariness, discrimination, and inconsistency in bail decisions. Studies have shown that individuals from marginalized and disadvantaged backgrounds, particularly those belonging to minority communities, are more likely to be denied bail and subjected to prolonged detention compared to those from more privileged backgrounds. The BNSS seeks to address these concerns by introducing a more structured and objective approach to bail decision-making, but the effectiveness of these provisions will depend on their successful implementation and the capacity of the criminal justice system to adapt to these changes. Another key observation is that the bail decision-making process under both the CrPC and the BNSS is influenced by a range of factors beyond the legal and procedural requirements. The socio-economic and political context in which the criminal justice system operates, including the public perception of crime and punishment, the media coverage of high-profile cases, and the pressure on the judiciary to maintain law and order, can all have an impact on bail decisions.”<sup>160</sup> The comparative analysis highlights the need for a more holistic and contextual understanding of the factors that shape bail decision-making, and the importance of addressing the underlying social, economic, and political issues that contribute to crime and recidivism.

“The comparative analysis also reveals that the effective implementation of bail provisions, whether under the CrPC or the BNSS, requires a robust and well-functioning criminal justice system. The success of any bail reform depends on the availability of adequate resources, including trained and competent personnel, infrastructure, and support services, to ensure that bail decisions are made in a fair, timely, and efficient manner. The overburdened and understaffed criminal justice system in India poses significant challenges to the effective implementation of bail provisions, and highlights the need for systemic reforms to address the underlying issues of delay, corruption, and lack of accountability. Bail decision-making process under both the CrPC and the BNSS is not immune to the influence of public opinion and political pressure. High-

<sup>159</sup> “Singh, G.P., Principles of Statutory Interpretation [33] [(LexisNexis 2020)].”

<sup>160</sup> “Basu, Durga Das, Introduction to the Constitution of India [99] [(LexisNexis 2019)].”



profile cases, particularly those involving heinous crimes or public outrage, can lead to a presumption of guilt against the accused and a reluctance to grant bail, even when the legal and procedural requirements are met. The comparative analysis highlights the need for a more insulated and independent judiciary, which can make bail decisions based on the merits of the case and the principles of justice, rather than the dictates of public opinion or political expediency.”<sup>161</sup>

“The comparative analysis also reveals that the bail provisions under the CrPC and the BNSS have different implications for the rights of the accused and the interests of society. While the CrPC bail provisions have been criticized for their potential to violate the right to liberty and presumption of innocence, particularly for individuals from marginalized and disadvantaged backgrounds, the BNSS seeks to address these concerns by introducing a more structured and objective approach to bail decision-making. However, the BNSS also introduces provisions for victim protection and participation, which may have the potential to compromise the rights of the accused and undermine the presumption of innocence. The comparative analysis highlights the need for a careful balancing of the competing interests of the accused, the victim, and society, and the importance of ensuring that the pursuit of justice does not come at the cost of individual rights and freedoms. It is to be noted that Decision-making process under both the CrPC and the BNSS is not a one-time event, but a continuous and dynamic process that requires ongoing monitoring and review.”<sup>162</sup> The circumstances of the case, the behavior of the accused, and the safety and well-being of the victim and society may change over time, requiring a reassessment of the bail decision. The comparative analysis highlights the importance of having a robust system for monitoring and reviewing bail decisions, and the need for flexibility and adaptability in the bail decision-making process to respond to changing circumstances.

### **6.1. Shortcomings and Challenges:**

- ❖ “One of the main shortcomings of the bail provisions under the Code of Criminal Procedure (CrPC) is the lack of clear and consistent guidelines for bail decision-making. The CrPC relies heavily on judicial discretion and provides broad guidelines for considering factors such as the nature and gravity of the offense, the character and antecedents of the accused, and the likelihood of the accused absconding or interfering with the investigation. However, the lack of specific criteria and thresholds for these factors has led to inconsistency and arbitrariness in bail decisions, with similar cases often resulting in different outcomes depending on the judge's interpretation and application of the law.
- ❖ Another shortcoming of the CrPC bail provisions is their potential to perpetuate systemic inequalities and discrimination. Studies have shown that individuals from marginalized and disadvantaged backgrounds, particularly those belonging to minority communities, are more likely

<sup>161</sup> “Mehta, M.C., Criminal Justice System in India [150] [(Thomson Reuters 2022)].”

<sup>162</sup> “Mitra, B.B., The Code of Criminal Procedure [85] [(Bharat Law House 2021)].”

to be denied bail and subjected to prolonged detention compared to those from more privileged backgrounds. The reliance on monetary bail and the lack of consideration for the socio-economic background and impact of detention on the accused and their dependents have contributed to the disproportionate impact of pretrial detention on the poor and marginalized.

- ❖ The CrPC bail provisions have also been criticized for their potential to violate the right to liberty and presumption of innocence, particularly for individuals who are unable to secure their release through monetary bail. The prolonged detention of the accused pending trial can have severe consequences for their personal, family, and professional lives, and can contribute to the overcrowding and inhumane conditions in Indian prisons. The lack of adequate safeguards and support services for the accused during pretrial detention can also have a negative impact on their physical and mental health, and can hinder their ability to prepare for their defense and participate in the legal process.”<sup>163</sup>
- ❖ Another shortcoming of the CrPC bail provisions is their lack of attention to the needs and interests of victims in the bail decision-making process. The CrPC does not provide for victim participation or consultation in the bail process, and does not require the court to consider the safety and well-being of the victim while deciding on bail. This can lead to situations where the accused is released on bail without adequate safeguards or conditions to protect the victim from further harm or intimidation, and can contribute to a sense of injustice and disempowerment among victims.
- ❖ The CrPC bail provisions have also been criticized for their potential to allow the use of pretrial detention as a means of punishing the accused, particularly those from marginalized and disadvantaged backgrounds, without the benefit of a fair trial. The discretionary nature of bail decision-making under the CrPC can create opportunities for abuse of power and corruption, where bail is granted or denied based on the influence or resources of the accused, rather than the merits of the case. The lack of strong oversight and accountability mechanisms to prevent and detect corruption in the bail process can further undermine the fairness and legitimacy of the criminal justice system.
- ❖ Another challenge in the implementation of bail provisions under the CrPC is the overburdened and understaffed criminal justice system in India. The large backlog of cases, the shortage of judges and prosecutors, and the inadequate infrastructure and support services for the accused and victims can lead to delays and inefficiencies in the bail process, and can hinder the effective implementation of bail provisions. The lack of adequate resources and training for the police, judiciary, and legal aid providers can also contribute to the inconsistency and arbitrariness in bail decisions, and can undermine the ability of the accused to access justice and due process.
- ❖ The implementation of bail provisions under the CrPC is also challenged by the lack of awareness and understanding of bail rights and procedures among the accused, particularly those from marginalized and disadvantaged backgrounds. The lack of access to legal aid and representation, the complexity and technicality of the bail process, and the lack of transparency and accountability in

<sup>163</sup> “Majumdar, P.K., Commentary on the Code of Criminal Procedure [75] [(Kamal Law House 2020)].”

bail decisions can create barriers for the accused to effectively participate in the bail process and assert their rights. The lack of public awareness and education about the bail system

## **6.2. Suggestions & Recommendations**

- ❖ “One of the key suggestions for improving the bail system in India is to introduce clear and consistent guidelines for bail decision-making, as proposed under the Bharatiya Nagarik Suraksha Sanhita (BNSS). The BNSS seeks to address the shortcomings of the CrPC bail provisions by introducing a categorization of offenses based on their severity, with specific bail provisions for each category. This categorization aims to reduce the scope for arbitrary and discriminatory bail decisions, and ensure that individuals accused of minor offenses are not unnecessarily detained pending trial. The introduction of specific criteria and thresholds for considering factors such as the nature and gravity of the offense, the strength of the evidence, the risk of the accused absconding or interfering with witnesses, and the potential danger to the community can help to promote consistency and fairness in bail decisions.
- ❖ Another suggestion is to promote the use of non-monetary forms of bail, such as personal bonds and community-based supervision, as alternatives to the traditional cash bail system. The use of non-monetary forms of bail can help to address the inequities and hardships faced by economically disadvantaged accused persons who may not be able to afford monetary bail, and ensure that the right to liberty and presumption of innocence are not contingent on an individual's ability to pay. The promotion of community-based alternatives to pretrial detention, such as supervised release and electronic monitoring, can also help to reduce the negative impact of pretrial incarceration on the accused and their families, and promote rehabilitation and reintegration into society.
- ❖ It is also recommended to introduce provisions for victim protection and participation in the bail decision-making process, as proposed under the BNSS. The introduction of victim-centric provisions, such as the right to be heard and to present their views on the accused's release, can help to ensure that the concerns and needs of victims are adequately addressed in the bail process, and that their safety and well-being are not compromised in the pursuit of the accused's right to liberty. The introduction of specific conditions for bail, such as no-contact orders and restrictions on movement, can also help to protect victims from further harm or intimidation by the accused.”<sup>164</sup>
- ❖ Another suggestion is to strengthen the oversight and accountability mechanisms for the bail decision-making process, to prevent and detect corruption and abuse of power. This can include measures such as the introduction of mandatory recording of bail hearings, the establishment of independent oversight bodies to review bail decisions, and the imposition of penalties for corrupt or biased bail decisions. The strengthening of oversight and accountability can help to promote transparency and impartiality in the bail process, and ensure that bail decisions are made based on the merits of the case and the principles of justice, rather than the influence or resources of the accused.

<sup>164</sup> “Kelkar, R.V., Criminal Procedure [105] [(Eastern Book Company 2019)].”

- ❖ It is also recommended to invest in the capacity building and training of the police, judiciary, and legal aid providers involved in the bail process. The provision of adequate resources, infrastructure, and support services for the criminal justice system can help to reduce delays and inefficiencies in the bail process, and ensure that bail decisions are made in a timely and effective manner. The training of police officers, prosecutors, and judges on the principles and procedures of bail can help to promote consistency and fairness in bail decisions, and ensure that the rights of the accused and the interests of society are adequately balanced.
- ❖ Another suggestion is to promote the use of restorative justice practices, such as victim-offender mediation and community-based rehabilitation, as alternatives to traditional bail and pretrial detention. The use of restorative justice practices can help to promote healing, reconciliation, and accountability, and address the underlying causes of crime and conflict. The promotion of community-based alternatives to pretrial detention can also help to reduce the negative impact of incarceration on the accused and their families, and promote their successful reintegration into society.
- ❖ It is also recommended to improve the accessibility and quality of legal aid and representation for the accused, particularly those from marginalized and disadvantaged backgrounds. The provision of adequate legal aid and representation can help to ensure that the accused are aware of their rights and can effectively participate in the bail process, and that their interests are adequately represented in bail decisions. The improvement of legal aid and representation can also help to reduce the systemic inequalities and discrimination in the bail system, and ensure that the principles of justice and fairness are upheld for all accused persons.
- ❖ “Another suggestion is to promote public awareness and education about the bail system, and the rights and responsibilities of the accused and victims in the bail process. The promotion of public awareness and education can help to reduce the stigma and misconceptions associated with bail and pretrial detention, and promote a more informed and engaged citizenry in the criminal justice process. The education of the accused and victims about their rights and the procedures for seeking bail can also help to empower them to effectively participate in the bail process and assert their interests.
- ❖ It is also recommended to establish a system for regular monitoring and evaluation of the bail system, to assess its effectiveness and identify areas for improvement. The establishment of a monitoring and evaluation system can help to ensure that the bail provisions are being implemented in a fair and effective manner, and that the rights of the accused and the interests of society are being adequately balanced. The monitoring and evaluation system can also help to identify best practices and lessons learned from the implementation of bail provisions, and inform the ongoing reform and improvement of the bail system.
- ❖ Finally, it is recommended to adopt a comprehensive and holistic approach to criminal justice reform, which addresses not only the legal and procedural aspects of bail and pretrial detention, but also the social, economic, and political factors that contribute to crime and recidivism. The

adoption of a comprehensive and holistic approach can help to ensure that the bail system is not only fair and effective, but also responsive to the needs and interests of the accused, victims, and society as a whole. This can include measures such as the promotion of social and economic development, the strengthening of community-based support services, and the reform of the prison system to promote rehabilitation and reintegration of offenders.”<sup>165</sup>

### **6.3. Conclusion**

The comparative analysis of the bail provisions under the Code of Criminal Procedure (CrPC) and the Bharatiya Nagarik Suraksha Sanhita (BNSS) has revealed significant differences in their approach to bail decision-making, and the potential implications for the rights of the accused and the interests of society. The CrPC bail provisions have been criticized for their lack of clarity and consistency, their potential to perpetuate systemic inequalities and discrimination, and their lack of attention to the needs and interests of victims in the bail process. The BNSS seeks to address these shortcomings by introducing a more structured and objective approach to bail decision-making, promoting the use of non-monetary forms of bail and alternatives to pretrial detention, and introducing provisions for victim protection and participation in the bail process. “However, the comparative analysis has also highlighted the challenges and limitations of bail reform in India, and the need for a comprehensive and holistic approach to criminal justice reform. The success of any bail reform, whether under the CrPC or the BNSS, will depend on the ability of the criminal justice system to address the underlying causes of crime and recidivism, and to provide a fair, effective, and accountable process for the administration of justice. This requires a commitment to the values of justice, equity, and human rights, and a willingness to invest in the human and institutional capacity necessary to realize these values in practice.”<sup>166</sup>

The suggestions and recommendations outlined in this report, such as the introduction of clear and consistent guidelines for bail decision-making, the promotion of non-monetary forms of bail and alternatives to pretrial detention, the strengthening of oversight and accountability mechanisms, and the adoption of a comprehensive and holistic approach to criminal justice reform, can help to address the shortcomings and challenges of the current bail system in India, and promote a more fair, effective, and responsive criminal justice system. “However, the implementation of these suggestions and recommendations will require a concerted effort from all stakeholders in the criminal justice system, including the police, judiciary, legal aid providers, civil society organizations, and the general public. It will require a willingness to challenge the status quo and to embrace new approaches and best practices in bail decision-making and pretrial detention. It will also require a sustained commitment to the principles of justice, equity, and human rights, and a recognition of the critical role that the bail system plays in the overall functioning and legitimacy of the criminal justice system.”<sup>167</sup>

<sup>165</sup> “S.K. Sarvaria, Commentary on the Code of Criminal Procedure [130] [(Universal Law Publishing 2021)].”

<sup>166</sup> “K.N. Chandrasekharan Pillai, Essays on the Indian Penal Code [95] [(Eastern Book Company 2020)].”

<sup>167</sup> Ibid



“Ultimately, the reform of the bail system in India is not only a legal and procedural issue, but also a social, economic, and political one. It requires a recognition of the complex and interconnected factors that contribute to crime and recidivism, and a willingness to address these factors through a holistic and integrated approach to criminal justice reform. It also requires a recognition of the fundamental dignity and worth of every individual, regardless of their socio-economic status or criminal history, and a commitment to ensuring that the criminal justice system serves the interests of justice and the well-being of society as a whole. In conclusion, the comparative analysis of the bail provisions under the CrPC and the BNSS has provided valuable insights into the strengths and weaknesses of the current bail system in India, and the potential for reform and improvement. While the challenges and limitations of bail reform are significant, the suggestions and recommendations outlined in this report offer a roadmap for a more fair, effective, and responsive criminal justice system that upholds the rights of the accused and the interests of society. It is hoped that this report will contribute to the ongoing debate and efforts to reform the bail system in India, and promote a more just and equitable society for all.”<sup>168</sup>

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