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JUDICIAL REGULATION OF ARREST AND **BAIL IN INDIA**

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I further declare that this dissertation has not been submitted, wholly or in part, for the award of any other degree or diploma at this University or any other institution. All sources of information used in the preparation of this dissertation have been duly acknowledged.

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ABSTRACT

The power of arrest and the right to bail represent two of the most consequential intersections between State authority and individual liberty in the Indian criminal justice system. This dissertation examines the role of the judiciary in regulating both powers, tracing the evolution of judicial safeguards from early constitutional interpretation to contemporary Supreme Court pronouncements.

The study analyses the constitutional framework under Articles 21 and 22, the statutory scheme under the Code of Criminal Procedure, 1973, and the Bharatiya Nagarik Suraksha Sanhita, 2023, which has now replaced the CrPC. Landmark judgments including *D.K. Basu v. State of West Bengal*, *Arnesh Kumar v. State of Bihar*, *Maneka Gandhi v. Union of India*, *Satender Kumar Antil v. CBI*, and *Gurbaksh Singh Sibbia v. State of Punjab* are critically examined to assess the development of judicial doctrine in this field.

The dissertation further identifies and analyses the systemic challenges that continue to impair the effective operation of the legal framework: the persistence of arbitrary arrests despite established judicial guidelines, the crisis of undertrial detention and prison overcrowding, the inconsistent exercise of bail discretion, and the inadequacy of current mechanisms for institutional accountability. These challenges are examined both as legal problems and as expressions of deeper structural deficiencies in the criminal justice system.

A comparative perspective incorporating the approaches of England and Wales, the United States of America, and South Africa is employed to evaluate India's framework against international standards and identify potential reform pathways. On the basis of this analysis, the dissertation advances a comprehensive set of legislative, institutional, and judicial reforms aimed at establishing a rights-centred system of arrest and bail in India.

The central argument of this dissertation is that while the Indian judiciary has made significant contributions to the protection of personal liberty, the gap between legal principle and institutional practice remains substantial. Bridging this gap requires not merely the articulation of further judicial guidelines but a structural transformation of the frameworks governing police accountability, remand scrutiny, bail adjudication, and access to legal representation.

Keywords: Arrest, Bail, Personal Liberty, Article 21, Judicial Regulation, Anticipatory Bail, Undertrial Detention, BNSS 2023, D.K. Basu, Arnesh Kumar.

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LIST OF ABBREVIATIONS

Abbreviation	Full Form
AIR	All India Reporter
Art.	Article
BNSS	Bharatiya Nagarik Suraksha Sanhita, 2023
CBI	Central Bureau of Investigation
CCTNS	Crime and Criminal Tracking Network and Systems
CrPC	Code of Criminal Procedure, 1973
ECHR	European Court of Human Rights
ED	Enforcement Directorate
FIR	First Information Report
GST	Goods and Services Tax
HC	High Court
IPC	Indian Penal Code, 1860
NALSA	National Legal Services Authority
NCRB	National Crime Records Bureau
NDPS	Narcotic Drugs and Psychotropic Substances Act, 1985
PMLA	Prevention of Money Laundering Act, 2002
SC	Supreme Court
SCC	Supreme Court Cases
SLP	Special Leave Petition
UAPA	Unlawful Activities (Prevention) Act, 1967
UP	Uttar Pradesh
UT	Union Territory

CHAPTER I

INTRODUCTION

1.1 Background

The criminal justice system in India is premised on the delicate balance between safeguarding personal liberty and ensuring justice. Of all the powers exercised by the State, the power to arrest and the power to grant or refuse bail are of fundamental significance, because the right to personal liberty of a person lies at the core of the entire scheme of justice in the country.

The fundamental right to life and personal liberty is guaranteed by the Constitution of India. This Article 21, guarantees life and liberty. It is the right to life that encompasses the right to live with human dignity and it is the right to life under Article 21 which guarantees the right to fair, just and reasonable procedure. Similarly, Article 22 of the Constitution guarantees the protection against arrest and detention in certain cases. Even then, the arbitrary exercise of the power of arrest and the approach of the judiciary towards bail have been challenged for arbitrariness.

Arrest is a state action depriving a citizen of his personal liberty. It is required for the preservation of public order and also for ascertaining the presence of the accused at the time of trial or investigation. The right to personal liberty of a citizen is not to be taken lightly and therefore the power of arrest and its misuse have given rise to problems and challenges in India. On the other hand, bail is a way of granting a chance to a person under criminal investigation or accused of a criminal offence and it is the process to ensure that an accused person appears before the court. It is one of the instances of protection of personal liberty. In the Indian scenario, the principle that “bail is the rule and jail is the exception” has been repeatedly emphasized by the courts, because the law of bail is based on the assumption that an accused person is innocent unless proved guilty beyond a reasonable doubt. The judiciary has been regulating the arrest powers through judicial regulation of constitutional provisions as well as criminal law. Courts have held that the procedure established by law must be a procedure that is just, fair and reasonable.

1.2 Importance

This research study deals with the question of regulation of arrest and bail by judicial regulation. The purpose of this research work is to see that the judicial regulation has been effective or not for regulating these powers effectively. While the police authorities and judiciary have the discretionary power of arrest and bail, these powers are required to be exercised in accordance with clear guidelines. The study highlights the need for judicial regulation of these powers, because they have the tendency to infringe personal liberty in the hands of arbitrary state authority. Judicial regulation of arrest powers has become the need of the hour because of the number of arbitrary arrest, violence and detention by police. The principle that “bail is the rule and jail is the exception” has been reiterated by several decisions of courts but the practical implementation of the same is not always in consonance with the rule. The research study aims at examining the importance of judicial regulation in protecting the fundamental right of the person arrested, and to see whether the existing regulatory mechanism has been adequate.

1.3 Statement of the Problem

The research paper deals with the issue of judicial regulation of the criminal procedure related to arrest and bail and its significance in protecting personal liberty of the person. This is so because the criminal procedure related to arrest and bail is not implemented as it should be done and there are several instances in which the police has misused its power of arrest, leading to the violation of the personal liberty of the person. Likewise, the decision of granting or refusing bail is not uniform and depends upon the discretion of the courts. There is a need to bring uniformity in the bail laws of the country in the light of the judicial precedents on the subject. This paper will study the extent of judicial intervention in the law of arrest and bail in India to bring about justice and personal liberty for the people of this country.

1.4 Research Objectives

- The objectives of the paper are as follows:
- To study the constitutional provisions related to arrest and bail.
- To study the statutory provisions related to arrest and bail.
- To study the role of judiciary in judicial regulation of arrest.
- To study the role of judiciary in the principles of grant of bail.

- To study the current state of affairs.
- To make suggestions for improvement.

1.5 Research Questions

- The following research questions have been proposed for the study:
- Whether the arrest of a person should be based on judicial regulations?
- Whether judicial guidelines are useful in regulating the power of arrest?
- Whether bail has to be based on judicial regulation?
- Does bail depend upon the discretion of the judges?
- What reforms can be done to improve the bail and arrest laws in the country?

1.6 Hypothesis

Based on the above, I have hypothesized that while the courts have laid down significant safeguards for arrest and bail in India, these safeguards are often not effective in ensuring protection of personal liberty due to lack of consistency and absence of uniform guidelines.

1.7 Methodology

The research methodology of the study is primarily based on doctrinal approach. In this approach we shall study the provisions of the Constitution, Code of Criminal Procedure, 1973 and the case law on the subject. The primary sources of the data will be the Constitution of India, Code of Criminal Procedure and Case Laws, which will be discussed in detail. Secondary sources will comprise of books, articles and journals. The paper has been written in analytical and critical method. It shall focus on the legal position of arrest and bail as per the case laws.

1.8 Scope and Limitations

This research is restricted to the Indian legal system's treatment of arrest and bail, examining constitutional mandates, statutory enactments, and relevant case law. The research is restricted to doctrinal analysis and does not involve empirical

research like surveys or interviews; it also does not include detailed cross-jurisdictional analysis.

1.9 Structure of the dissertation

This thesis has eight chapters. In Chapter I, a brief introduction to the topic as well as research methodology are discussed. The concept of arrest and bail are discussed in Chapter II. The legal framework of arrest and bail in India is covered in Chapter III, and the judicial control over arrest is discussed in Chapter IV. The judicial approach to bail is discussed in Chapter V. Challenges and issues faced in the system of arrest and bail are discussed in Chapter VI, and suggestions and reforms in Chapter VII. Chapter VIII concludes the research.

1.10 Conclusion

Judicial regulation plays a crucial role in upholding personal freedom and preserving justice and fairness within the Indian criminal justice system. Though the judicial system has developed guidelines on how arrest should be carried out and has attempted to stop the arbitrary arrest and detention of a person, some challenges exist regarding its implementation. This research has made an attempt to study the judicial regulation on arrest and bail in the criminal justice system and critically analyse it with a view to suggest changes in the existing judicial regulations to ensure that they are more uniform and consistent.

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CHAPTER II CONCEPTUAL FRAMEWORK OF ARREST AND BAIL

2.1 Introduction

Arrest and bail, the two cornerstones of the criminal justice system in India, represent opposing yet complementary aspects of the legal framework. The former empowers the state to curtail an individual's freedom to ensure compliance with the law, whereas the latter allows for the restoration of liberty, potentially with certain preconditions, once an individual has been apprehended. The interplay of individual liberty and state authority at this interface forms the core of this study. The analysis of these concepts is vital in determining how well the state upholds the constitutional mandate to uphold the rule of law in carrying out arrest and in granting bail.

2.2 Meaning and Nature of Arrest

Arrest involves the seizure of a person under a legitimate authority and involves an interference of an individual's personal freedom. There is no formal definition provided in either the Code of Criminal Procedure, 1973 (CrPC) or the more recent Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), for the term "arrest." However, it has been understood by courts to mean taking a person into the custody of the police in order that such person may be held to answer for some offence or crime, or in order to prevent the occurrence of an offence.

For the arrest to be legally valid and enforceable it must fulfill three basic conditions; there must be some actual custody or physical restraint of the person in question by another person who must also exercise a legal right to seize the person with intent to detain the person for the purpose of an investigation or taking him or her before a court. An arrest will not require the person to be touched or physically detained provided the arresting party clearly communicates that they are arresting the person and that the person in question complies with the arrest. An arrest is either made with the permission of a competent Magistrate in the form of a warrant, or without a warrant where law permits any police officer or other authority to arrest.

Arrest is indeed an invaluable tool of investigation and law enforcement.

However, at the same time it is one of the most drastic infringements of personal

freedom and one of the harshest measures to be taken by the State short of a conviction for a crime. The principles of necessity and proportionality accordingly play a central role in assessing the validity of any arrest. The Supreme Court, in

D.K. Basu v. State of West Bengal, pointed out that there are procedural safeguards that have to be built in to arrest procedures so that they don't end up as instruments for abuse of power, inhuman and cruel treatment, and loss of human dignity of the accused.¹

Arrest is essentially an act of employing coercive State power against the liberty of an individual. The consequences of a deprivation of liberty are often irreversible whether the accused is convicted or not. Loss of job, impact on mental health, impact on the family and social ties are some of the effects which could prove fatal for a person. Thus, the power to arrest is not unfettered, even if it is for legitimate reasons.

2.3 Types of Arrest

In India arrests are primarily of 3 types:

Arrest with Warrant This occurs when a person is arrested with the permission of a competent Magistrate. Here, the warrant requirement plays an important role in that it introduces a judicial check on executive detention. The Magistrate has to be satisfied on specific grounds before the liberty of the accused is taken away. Thus, the decision to arrest is filtered through the Magistrate, and there is a judicial intervention between the executive's desire to arrest and the executive deprivation of individual liberty. The police officer cannot arrest simply by virtue of his own decision. Wherever there is no immediate cause for arrest and there is no reason to believe that arrest without warrant is necessary, an accused is arrested on the issuance of a warrant of arrest by a competent Magistrate. Thus, an arrest with a warrant is the normal situation.

Arrest without Warrant A police officer has the power to arrest an accused without a warrant in cognizable offences under certain specified conditions in Section 41 of the CrPC (Section 35 of the BNSS). This power has to however be exercised cautiously and should be used only where strictly necessary. In the landmark case of *Arnesh Kumar v. State of Bihar*, a checklist of 4 parameters was developed for use in the arrest of an accused in offences punishable with imprisonment of up to 7 years. Here, a written record of reasons has to be²

¹ *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416.

² *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

maintained by the police officer, detailing why he feels the arrest is necessary. While granting remand to the police, the Magistrate too has the obligation to examine the reasons for the arrest and see whether they are justified or not. This decision thus significantly curtailed the police practice of arbitrary warrantless arrest and represented a paradigm shift in the judicial supervision of police power.

Preventive Arrest A preventive arrest is made to ensure a person does not commit an offence rather than in response to a particular act. It is based on suspicion of future conduct, and on that account, preventive arrests have a different and more speculative basis than arrests made for the purpose of investigation. The Constitution itself lays down Articles 22(3) to 22(7) as the applicable regime for cases of preventive detention. It has thus been understood by the Constituent Assembly that preventive arrests are speculative in nature and require more stringent conditions for a lawful arrest.

2.4 Legal Guarantees Against Arbitrary Arrest

The Constitution and statutory law provide a number of legal safeguards to prevent abuse of the power to arrest:

An arrested person must be told the reasons for his/her arrest;

An arrested person has the right to meet an advocate of his/her choice and be defended by a legal practitioner;

An arrested person must be produced before the nearest Magistrate within a period of 24 hours of the arrest;

An arrested person is guaranteed freedom against unlawful arrest and detention.

These are not empty formality rights which have no practical utility, but real, meaningful rights which help operationalize the constitutional right to life and personal liberty. The right to be informed of the grounds of arrest ensures that the arrested person knows the reason why his/her liberty has been taken away and can take effective steps to challenge such action in a Court. The right to consult and be defended by a legal practitioner ensures that the arrested person gets benefit of his/her right to legal advice at the very earliest stage when he/she faces the machinery of the criminal justice system. The requirement of taking the arrested person to a Magistrate within twenty-four hours is a crucial control against

detention in police custody. A person cannot be detained for more than 24 hours without being produced before a judge.

The Supreme Court has expanded the content of these safeguards through judicial interpretation and expansion of these. In the landmark judgment in *Maneka Gandhi v. Union of India*, 1978 the Supreme Court held that procedure established by law which causes the deprivation of life or liberty of the person shall be right, fair and just. This was interpreted as a qualitative requirement for all procedures which result in arrest. In the judgment of *Mihir Rajesh Shah v. State of Maharashtra* 2025, the Supreme Court ruled that the right to be informed of the grounds of arrest means that an arrested person must be informed of grounds not only by mere production of the arrest warrant, but also by explaining it in a language which the arrested person understands. This is very practical for an arrested person who cannot understand an arrest warrant written in any one of the official languages used in the State.³⁴

2.5 Concept of Bail

Bail is the process of getting a provisional release of a person accused of a crime or in custody on a promise to pay a surety in case the person fails to appear in court as required. It means that a person accused of committing a crime is not jailed or otherwise detained but released from custody on giving bail. A bail bond is an obligation undertaken by a person accused of an offense in such manner as the police or court may prescribe and is a document by which an accused is required to appear in court at the time and place mentioned.

The purpose of bail is not to punish a person who has not yet been convicted, nor is its purpose to prevent or hinder trial by keeping the accused in detention pending trial. Bail is an instrument to ensure the continued liberty of the person who is entitled to be released on a personal bond that he/she will appear before the trial or other competent court for the purpose of the proceedings. In the case of persons whose release on bail is sought for the purpose of investigation, the purpose of bail is to ensure the attendance of the accused for investigation as a witness in court and to ensure that his/her right to personal liberty under Article 21 is not interfered with unless there is some compelling reason to do so.

Bail rests on the fundamental legal presumption of innocence of the accused: "Until proved guilty, every person is presumed to be innocent." Consequently,

³ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

⁴ *Mihir Rajesh Shah v. State of Maharashtra*, (2025) [Recent Judgment].

depriving someone of their freedom before a verdict is reached infringes upon the rights of an individual who has not yet been proven guilty. Such an intrusion on personal freedom can only be warranted if it serves specific objectives, such as stopping the suspect from escaping, obstructing the destruction or manipulation of evidence, or halting additional crimes, and no less intrusive methods are sufficient to meet these needs. This perspective of bail as a final option, not the inevitable result of arrest, has been firmly established by the Supreme Court on multiple occasions. For instance, in the case of *Gudikanti Narasimhulu v. Public Prosecutor*, the Court stressed that the choice between permitting bail and imposing custody calls for a nuanced consideration of liberty and societal considerations, based on the particular facts and circumstances of the individual case. In the case of *Sanjay Chandra v. CBI*, the Court clarified that custody before trial cannot be utilized as a penalty or as a vehicle for passing moral judgment on the conduct allegedly committed by the accused.⁵⁶

2.6 Types of bail

In India, bail falls into three distinct categories:

Regular bail. Bail given to an already arrested individual who is in remand.

Anticipatory bail. Bail extended to an individual who is on the verge of being arrested, providing protection from being unfairly arrested.

Interim bail. The bail extended during the pendency of the application, for a fixed period of time, until an ultimate decision on the grant of bail is rendered.

2.7 Bailable and non-bailable offences

In determining if bail is given or denied, the distinction between bailable and non-bailable offences is of immense significance:

Bailable offences. Bail is a right and release from custody is mandatory for those who have been arrested, provided they satisfy the relevant conditions.

Non-bailable offences. The question of bail is at the discretion of the judge, keeping in view the seriousness of the crime and the chances of the offender escaping custody. This approach aims to strike a balance between individual rights and public interest.

⁵ Gudikanti Narasimhulu v. Public Prosecutor, (1978) 1 SCC 240.

⁶ Sanjay Chandra v. CBI, (2012) 1 SCC 40.



2.8 Principles governing bail

The courts have formulated certain guidelines in the context of bail: Bail is the rule and jail is the exception.

Circumstances and gravity of the offence to be considered. Probability of the accused to run away from the judicial process.

Possibility of the accused tampering with the evidence and influencing witnesses.

In the judgment of Sanjay Chandra v. CBI, the apex court held that the custody before trial should not be utilised as a penalty.⁷

2.9 Linkage between arrest and bail

Arrest and bail are inherently and functionally related dimensions of the pre-trial stage of the criminal justice process. Arrest is the gateway to state custody and bail provides the means to restore liberty on conditions meant to ensure continued participation in the judicial system. They stand as reflections of the same underlying paradox between the state's need to ensure the presence of the accused for investigation and trial, and the accused's right to liberty, and his right to enjoy a presumption of innocence. The justification for one depends upon the functioning of the other. A wrongful arrest or an arrest that isn't really necessary, one that isn't done with the legal protections that are necessary, is harmful for the legitimacy of the criminal process and could be a reason in itself for bail or release. If the conditions that the bail court decides are too heavy for the defendant to meet, then this makes the effects of the arrest longer than what the court has formally intended, and the connection between arrest and bail shows why we must have courts overseeing both; without judicial control over them, the state can use its ability to use force in a way that is technically legal but that undermines the constitutional guarantee of liberty.

The connection between arrest and bail also reveals a larger flaw in the Indian criminal justice system: when arresting people, courts do not pay close enough attention to whether the investigation can be conducted without arresting someone, and when bail hearings happen, courts do not pay close enough attention to whether the goals that detention might serve could be met by milder restrictions.

⁷ Sanjay Chandra v. CBI, (2012) 1 SCC 40.



Both arrest and bail will have to be changed at the same time and with attention to each other, not one at a time.

2.10 Conclusion

The understanding of arrest and bail that was provided in this chapter shows us the delicate balance between state power and individual liberty. While arrest needs to happen for law enforcement to do its job, the police need to observe limits that are both legal and constitutional. Bail needs to be there for freedom from random arrest to happen. Understanding these two ideas is what makes it possible to understand the role that judges have when overseeing arrest and bail, and these two ideas will come up repeatedly in the upcoming chapters.



CHAPTER III LEGAL FRAMEWORK GOVERNING ARREST AND BAIL IN INDIA

3.1 Introduction

Arrest and bail are controlled in India by a big legal system that includes the Constitution, laws passed by the state, and court decisions that interpret the laws. This legal system tries to find a balance between the power of the state and the freedom of individuals. The Constitution establishes basic protections for individual rights and guarantees, but the Code of Criminal Procedure 1973 (CrPC) describes the specific steps for arrest and bail, and it is the courts that must make sure that laws and procedures are applied to individuals fairly, rationally and with respect for their rights to due process.

3.2 Constitutional Framework

The Constitution of India is the beginning point for all legal protections related to arrest and bail.

Article 21 – Protection of Life and Personal Liberty

Article 21 says that a person cannot be taken away his or her freedom unless the law that says so was followed. The Supreme Court ruled that the procedures that a law establishes must be fair and reasonable. In the case of *Maneka Gandhi v. Union of India*, the Court ruled that any law that deprives an individual of their freedom of movement must be fair and reasonable, giving more protections to people against being arrested or held against their will without a good reason.⁸

Article 22 – Protection against Arbitrary Arrest and Detention

Under Article 22, a person who has been detained or arrested is entitled to: Right to know the reasons for arrest

Right to legal counsel for defence

Production before a Magistrate within 24 hours

Prevention of detention after 24 hours without judicial authorization.

These provisions constitute constitutional constraints on the deployment of police authority.

⁸ Maneka Gandhi v. Union of India, (1978) 1 SCC 248.



3.3 Statutory Framework

For over fifty years, the Code of Criminal Procedure, 1973 (CrPC) has formed the bedrock of arrest and bail rules in India. It enumerates exhaustively what offences allow for an arrest; how and when arrest is conducted; the rights of a person undergoing the arrest; and the rules regarding release on bail. The CrPC has now been replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) that came into effect as of 1st July 2024. The BNSS, however, broadly continues in the footsteps of the CrPC with some modifications in the provisions relating to arrest and bail as well. For example, a new provision for release of undertrial prisoners who have spent a term amounting to half of their maximum possible sentence (see Section 479 BNSS); and a provision dealing with the use of technology for the process of arrest (see Section 77 BNSS) are new additions. For the sake of convenience, we will mostly be quoting the CrPC provisions in the ensuing chapters, especially in the cases on arrest and bail because it is the statutory framework under which the vast majority of case law has developed thus far.

3.4 Provisions Relating to Arrest

Section 41 CrPC – Arrest without Warrant

This provision confers power to the police to arrest without a warrant in a cognizable offence. But such arrest is only in the case of existence of reasonable suspicion or credible information to proceed. The provision was subsequently amended in order to check arbitrary arrests in order to ensure that the arrest is accompanied by the requirement of reason and recording of such reasons. This was in view of a Supreme Court judgment *Arnesh Kumar v. State of Bihar* that held that arrest was not to be carried out in a routine manner; it must be justified by the existence of a cause.⁹

Section 41A CrPC – Notice of Appearance

This is a provision introduced into the CrPC with the purpose of reducing the incidence of unnecessary arrests, and as such, the police officer is required to serve the accused a notice to appear if the police officer has determined in his/her opinion that arrest is not required in the particular case. This provision reflects a rights-based approach to criminal procedure.

Section 46 CrPC – Mode of Arrest

⁹ Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273.



It prescribes the manner in which the arrest has to be conducted including force where necessary; but also provides for the limitations on the use of force and special protection for arrest of women, among others.

Section 50 CrPC – Grounds of Arrest and Right to Bail

The person arrested is required to be informed about the reason for the arrest and in cases where the offence is bailable, then also, about the right to bail.

Section 57 CrPC – Production before Magistrate

This provision ensures that a person cannot be detained for more than 24 hours without being produced before a Magistrate, thereby preventing illegal detention.

The BNSS only renumbers all the above-mentioned sections while their contents have been largely unchanged. Section 41 CrPC maps onto Section 35 of BNSS; Section 41A CrPC corresponds to Section 35(7) of BNSS; Section 46 CrPC corresponds to Section 43 of BNSS; Section 50 CrPC maps onto Section 47 of BNSS; and Section 57 CrPC maps onto Section 58 BNSS. Consequently, all the judicial precedents on arrest in India will hold good and will continue to apply to proceedings under the BNSS provisions, unless there is any specific textual difference.

3.5 Provisions Relating to Bail

The CrPC has provided various clauses in regards to bail and its granting under different sections.

Section 436 CrPC - Bail in Bailable Offences Section 436 CrPC says that a bail can be provided as of right in bailable offences, and the accused shall be released in compliance of the prescribed terms and conditions.

Section 437 CrPC - Bail in Non-Bailable Offences Under section 437 CrPC it can be noted that in case of non-bailable offences, the power to grant bail shall rest on the discretion of the court.

The courts would consider the following matters:

nature and gravity of the offence, chances of the accused to abscond chances of tampering with evidence.

Section 438 CrPC - Anticipatory Bail Section 438 CrPC states that a bail can be given even before the arrest if there is a likelihood of it happening. It acts as a protection against arbitrary arrest of an individual. In *Gurbaksh Singh Sibbia v.*

State of Punjab, the Supreme Court held that anticipatory bail should be granted based on judicial discretion and not subject to rigid conditions.

Section 439 CrPC - Special Powers to the High Courts and Sessions Courts Under section 439 CrPC, high courts and sessions courts can use its wide discretionary powers to grant bail and impose suitable conditions to maintain the cause of justice.

3.6 The role of the police in arrest Police are in the first instance the mechanism whereby the state's power of arrest is first brought to bear on the individual. Their role is not simply executive, in the sense that it involves a mere carrying out of a decision already taken at a higher level; it is much more than that, it is largely a discretionary and almost quasi-judicial one. It is for the police officers to consider the adequacy of the information available, whether there are grounds that would justify arrest under section 41, whether it is necessary to make an arrest or can any of the available alternatives be deployed, and whether the person will respond satisfactorily to a notice to appear under section 41A of the CrPC. In the first instance at least, the decision whether his liberty can or cannot be restricted legitimately or arbitrarily is taken by the police officer in this assessment process.

However, in our context of the police organization, the features that drive individual police officer's discretion in this regard, the performance parameters, the evaluation norms, the promotion policies, the nature of the supervision, do not consistently militate in favor of the conscientious and constitutional exercise of discretion that is required. Arrest is an observable and quantifiable parameter for the police. It is much more visible, and easier to explain to superiors than not to arrest. In addition, there is practically little effective checks over arrest decisions in the remand proceedings. This leads to the over-entrenchment of an over-arrest policy, which no number of judicial directions have been able to dispel. The process of reforming police accountability, involving measures such as the creation of an independent police oversight body, professionalising the requirement that the police must demonstrate the necessity for arresting someone, is a vital element in the overhaul of any bail-arrest system.

3.7. Role of Judiciary in Grant of Bail The grant of bail is the judiciary's tool for guarding against arbitrary detentions; courts have to weigh the individual freedom of the arrestee against the interest of society. Judicial discretion is very important here, and this discretion is more relevant in cases of non-bailable

offences, but at the same time, it needs to be used in consonance with established legal principles in order not to create judicial confusion.

3.8. Interplay between Constitutional and Statutory Provisions An important aspect of bail and arrest is the relation between constitutional principles and statutory provisions. Even though the constitutional protections against arbitrary detentions set up the broad framework for regulation of bail and arrests, the CrPC spells out all these details. It is, then, incumbent upon the judiciary to interpret these statutory provisions with the aid of constitutional principles, and in this manner ensure the rule of law.

The interaction between the Constitution and statutory provisions has also been a fertile ground of development of legal doctrines. Perhaps the single most important one is the progressive development of the ambit of Article 21 of the Constitution, from Maneka Gandhi onwards, such that what is protected by Article 21 is no longer mere freedom from bodily restraint but also a right to live with dignity, and a right to remain subject to only those restrictions that adhere to substantive standards of fairness. This redefined understanding of the contours of Article 21, means, for instance, that while even a 'statutorily valid' provision for arrest will need to be applied with due regard for the human dignity of the arrestee, so also a statutory provision might be vulnerable to constitutional challenge if in its application it is found to have not been consistently applied in the manner which is constitutionally mandated, even without any express textual violation.

The relationship between the constitutional provisions and these special statutory schemes, like the PMLA, NDPS Act, and UAPA, has been one of a much more contested terrain, because the powers to arrest and restrictions on grant of bail that these special statutes provide for is not easily compatible with the principles that the ordinary criminal jurisprudence had developed. The challenge which courts have faced in reconciling the frameworks laid down by these special statutes with constitutional requirements has resulted in a set of precedents that is by no means internally consistent and shows the inherent difficulty in trying to do principled constitutional interpretation while legislatures assert their priority on national security, preservation of economic stability, or public order.

3.9. Need for Judicial Oversight In view of the broad powers that are conferred upon executive officials, it becomes vital for the judiciary to exercise oversight in order to prevent the misuse of the power of arrest. Judicial review helps

in ensuring that the provisions related to arrest and detention are being adhered to and that the release of persons arrested on bail is not arbitrary in nature and is guided by the well-defined principles in this area. Judicial review ensures accountability and safeguards civil rights.

3.10 Conclusion India's arrest and bail laws constitute a systematized attempt to balance the State's right to rule with the citizen's right to freedom. While the Constitution forms the basis of this right, the procedural mechanisms through which these rights can be claimed are given under statutory law, and the manner in which these statutory laws are construed and applied is under judicial law.

Nevertheless, the efficacy of the law in this area is dependent not only on a correct reading of these legal provisions, but also on a consistent approach to such interpretation. This chapter looks at the judicial role in the regulation of arrest through a few leading cases, which will be elaborated in the next chapter.



CHAPTER IV

JUDICIAL REGULATION OF ARREST IN INDIA

4.1 Introduction

Arrest is one of the most coercive powers vested with the State. The arrest power is an instrument for the effective administration of criminal justice and the maintenance of order in society; at the same time, it affects the personal liberty of the person arrested, protected by Article 21 of the Constitution of India.

Judicial regulation of the arrest power is a necessary tool for the judiciary to keep the coercive power of the State within constitutional bounds. The Courts, specifically the Supreme Court, have taken an important role in shaping safeguards to prevent unnecessary arrest and abuse of police powers.

This chapter looks at the judicial regulation of the arrest power, focusing on how this jurisprudence has developed over the years, its application in recent cases and the challenges posed to its effective implementation.

4.2 Evolution of Judicial Safeguards

Over time, the Courts, through its pronouncements, have evolved a judicially created mechanism for the regulation of arrest in India, progressively establishing guidelines to ensure proper arrest procedure and safeguard rights.

In *Joginder Kumar v. Union of India*, it was held that there cannot be an automatic arrest, and every arrest must have valid reasons. The Supreme Court held, "there can be no power to arrest merely because it is lawful to do so, for there must be reasonable cause, that is, the power is to

be exercised on valid and just grounds." The principles laid down in *Joginder Kumar* were restated in *D.K. Basu v.*¹⁰

State of West Bengal in the form of 11 guidelines. These include the preparation of an arrest memo, the notification of relatives and friends, medical examination, and ensuring that an arrest is not made routinely. This was to provide transparency and to prevent custodial violence.

Subsequently, *Arnesh Kumar v. State of Bihar* was a step forward, addressing the problem of arrest in cases under section 498A of the Indian Penal Code. It was held that arrest should not be automatic but should be an exception.¹¹

¹⁰ Joginder Kumar v. Union of India, (1994) 4 SCC 260.

¹¹ Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273.



The arrest must be justified by necessity and the arrest officer must have reasonable reasons to believe that the suspect is guilty.

It is worthwhile to elaborate the 11 directions laid down in D.K. Basu case. In that particular case, the Supreme Court outlined eleven conditions to be observed in every arrest and detention as under:

- (1) the arresting officer must wear accurate and visible badge of identification;
- (2) an arrest memo must be prepared at the time of arrest, which shall be counter-signed by a member of the arrestee's family or a reputable member of the locality;
- (3) the arrestee shall be informed of the same by a friend, relative or such other person who is likely to transmit such information or message about his detention to the police;
- (4) a police diary shall be entered at the place of detention regarding the arrest;
- (5) the arrested person must be subjected to a medical examination at the time of arrest and at regular intervals during detention;
- (6) copies of all documents including the memo of arrest shall be given to the Magistrate; and

(7) the arrestee shall be allowed to meet his counsel during an investigation. These safeguards have also been incorporated by the Code of Criminal Procedure (Amendment) Act, 2008. These safeguards have now been reflected through the corresponding provisions of BNSS, 2023. The significance of this lies not merely in the particular content of these safeguards but in the broader underlying principle of arrest. Arrest being an act involving deprivation of fundamental rights must, as a corollary, be accompanied with safeguards that are sufficiently transparent as to allow for accountability and to deter misuse.

4.3 Recent Judicial Developments

Recent judgments have further cemented the regulation of arrest, through the emphasis on adherence to these safeguards.

In the recent judgment of *Mihir Rajesh Shah v. State of Maharashtra, 2025*, the Court held that the grounds for arrest must be communicated to the accused, preferably in writing, in a language which he understands. The Supreme Court also¹²

12 Mihir Rajesh Shah v. State of Maharashtra, (2025) [Recent Judgment].



clarified that the grounds for arrest must be communicated at a reasonable time after the arrest of the accused. At the very least, they should be communicated at the time of the arrestee being produced before a judicial Magistrate for the purposes of remand to remand custody. The Court further held that, failure to give reasons, grounds for arrest shall make the arrest illegal.

In *Radhika Agarwal v. Union of India* (2025), the Supreme Court expanded the safeguards for arrest to include arrest-like action under special statutes like GST laws and held that non-police authorities must also ensure to ensure the procedural safeguard for arrest while conducting arrest-like action under criminal law.¹³

This indicates a shift towards strengthening the procedural accountability of arrest, and ensuring a uniformity across all legal safeguards.

4.4 Comparative Analysis of Judicial Guidelines

The following table outlines a summary of the various principles that have been laid down by the judiciary on arrest.

Joginder Kumar (1994): Arrest only when deemed necessary; communication of grounds for arrest (Establishment of necessity principle)

D.K. Basu (1997): Arrest memo, witness presence; notification of arrest to family; regular medical examination (Introduction of procedural safeguards)

Arnesh Kumar (2014): Must record reasons for arrest prior to arrest; Avoid routine arrests as a matter of course (Prevention of abuse of arrest powers)

Mihir Rajesh Shah (2025): Written grounds for arrest mandatory (Enhancement of transparency)

Radhika Agarwal (2025): Safeguards of arrest apply to all authorities (Expansion of scope of protection)

4.5 Implementation Challenges

Although judicial safeguards have evolved over the years to become more precise and onerous, their ground level implementation is still a far cry from uniform. There are a number of reasons for this gap between policy and practice.

To begin with, the officers at the police stations are the first to execute an arrest. It is often observed that they are poorly trained or inadequately informed regarding the judicial guidelines that must be followed by them. Furthermore, considering the volume and tempo of police work, it would be unreasonable to

13 Radhika Agarwal v. Union of India, (2025) [Recent Judgment].



require the officers to go through a rigorous process of deliberation and preparation of documentary requirements for arrest. As a result, the officers may be more likely to resort to an arrest based on institutional habit rather than considering the requirement of arrest in light of the guidelines.

Moreover, officers who conduct illegal arrests rarely face disciplinary action. Where departmental proceedings against the offending officers are conducted, they usually take years to be concluded. In any case, the penalties for individual officers for non-compliance with arrest-related guidelines are usually low. Thus, there is a dearth of direct personal liability for any officer who fails to comply with the guidelines for arrest, thus making it easier to violate the requirements of the law and not incur any consequences for non-compliance.

Next, the courts that deal with remand applications are similarly overburdened with cases, which leads to a scarcity of time for the judge to assess whether the guidelines have been followed. As a result, the judicial assessment of the requirement of an arrest that is expected under Arnesh Kumar is rarely done and orders for remand are made quickly without the requisite consideration. In these situations, remand effectively endorses the decision to arrest without the judicial scrutiny that the constitutional scheme seeks to impose as a check on executive power.

Last but not the least, the persons arrested are usually unaware of their rights. Often, they do not know they were arrested unreasonably, are not aware that they have certain legal rights that are enforceable and have no access to legal advice which could help them exercise those rights in pursuit of remedies. Such violations, therefore, remain unchallenged and perpetuate a cycle of non-compliance.

4.6 Impact on Personal Liberty

In addition to the duration of custody that an arrest results in, an arrest, even a short-term arrest, causes serious harm to the person: loss of employment, damage to reputation, distress, etc. Such losses do not go away with the person's acquittal and do not get compensated by the judicial declaration that the person was wrongly accused.

The data released by the NCRB demonstrates that persons arrested are not found guilty of the offences in many cases. Such cases do not necessarily reflect that no offences were committed, but rather that the investigations in such cases

were not conducted properly or evidence for the allegations was not collected during a cursory arrest process and charges could not be proved. Unjust arrests, therefore, have significant implications beyond individual rights violations. They represent a waste of state resources and indicate that the rule of law does not apply equally to all citizens. The collective impact of many such unnecessary arrests every year is that it severely undermines trust in the criminal justice system as a fair institution.

4.7 Critical Assessment

- Indian arrest regulation by the courts reveals a progressive attempt at protecting individual rights but also has some shortcomings:
- Too much emphasis on court rules compared to legislative rules
- No consistent enforcement in different areas
- Not enough consequences when authorities ignore the rules
- Even though courts have clearly laid out the principles governing arrest, their actual impact is dependent on whether those principles are actually enforced and upheld.

4.8 Recommendations for Improvements

- To better regulate arrests, the following changes are recommended:
- Making the court rules for arrests part of formal law
- Required education for police officers on the rules of arrest
- More rigorous court supervision of court-ordered detention
- Electronic records of all arrests
- Greater awareness and understanding of the laws among the general population
- These proposed improvements would increase responsibility and improve the protection of an individual's freedom.

4.9 Summary

Indian court regulation of arrests is an important advancement in securing basic human rights. Through its important cases and new legal developments, India's judiciary has built a system designed to stop arrests at random and to honor the dignity of each individual.

However, how well it works depends on actually putting those ideas into action. Building stronger legal structures and making sure courts' instructions are followed are both necessary steps toward the goals of fair and just law.



CHAPTER V INDIAN COURTS' METHODS OF BAIL

5.1 Introductory Remarks

Bail is an essential component of the Indian criminal justice system, and is used as a mechanism to prevent unjustified incarceration of the suspect or accused, as well as to safeguard individual freedoms. Arrest represents the use of the power of the state, whereas bail is a means of restoration of the liberty of the accused. The judiciary oversees the grant or refusal of bail, especially for non-bailable cases. Over the years, it has developed a set of doctrines for dealing with bail. While considering the rights of the accused and the need to safeguard public interest, Indian courts have developed a clear body of law that governs bail.

5.2 Bail from a Constitutional Standpoint

Bail is constitutionally rooted within the rights guaranteed under Article 21 of the Constitution of India that guarantees life and personal liberty as fundamental rights that can be claimed from the state. In *Maneka Gandhi v. Union of India*, the Supreme Court has interpreted Article 21 to include not only the physical existence but also to live with dignity, right to earn a livelihood, maintaining family relations, and enjoying all other attributes necessary for a full life that a human being requires. A pre-trial incarceration restricts all these elements of one's personal liberty at once.¹⁴ Pretrial custody is a severe measure, not to be resorted to lightly, for legitimate purposes only, and should not be used to inflict punishment, or as a form of public censure on the accused. Although not explicitly mentioned in the Constitution, this concept has been found by the Courts to be implicit under Article 21 and to constitute an essential part of the right to a fair trial. Every person who has not been convicted of an offence is presumed in law to be innocent, and consequently, their detention is the detention of an innocent person, which would therefore be a deprivation of liberty unless and until such deprivation has been established as necessary to be imposed to the minimum extent possible. This constitutional foundation is the deepest reason for the settled legal principle that the rule as far as bail is concerned is release, and the exception is to be confined to custody. The position is so well-settled and has been repeatedly affirmed by the Supreme Court that no further citation is required.

14 Maneka Gandhi v. Union of India, (1978) 1 SCC 248.



5.3 Evolution of Bail Jurisprudence

The judicial evolution of the principle of bail can be traced through several key judgments that have shaped its application. In *Gudikanti Narasimhulu v. Public Prosecutor*, the Supreme Court established that the decision to grant bail involves weighing two opposing factors, the interest of the liberty of the individual accused, and the interest of the society or community at large. Later, in *Sanjay Chandra v. CBI*, the Court reasserted that “Bail is the Rule and Jail is the Exception”, stressing that bail should not be denied simply because the accused may fail to appear in the court. Most recently, the Supreme Court, in *Satender Kumar Antil v. CBI*, has provided guidelines for granting bail and emphasized reducing the number of persons languishing in jail.¹⁵¹⁶¹⁷

Another neglected aspect of bail jurisprudence was discussed by the Supreme Court in *Moti Ram v. State of M.P.* and relates to the issue of bail amount and sureties. The Court observed that bail bonds are to be in reasonable amounts relative to the financial status of the accused and that in no case should such bail conditions become a ground for denial of bail to a person who is otherwise entitled to be released on bail. It was further emphasised that a liberal bail policy can be turned into an instrument of injustice and effectively deny the right of bail to the accused, if the accused was in no position to provide bail bonds to the Court or furnish adequate sureties. The Court held that the question whether bail bond would become unenforceable and would result in detention is a matter which the Court should consider in every case, and in particular cases where the amount of surety may be disproportionate and where the bail bonds is so high in monetary terms that the accused could not obtain a release merely because he could not find persons to furnish security of the magnitude of the bail bond. The Court’s directive in this regard is still as valid today as it was at the time it was issued, and has been reiterated in *Ram Govind Upadhyay v. Sudarshan Singh* and other subsequent decisions. Even if this has not received much practical application to date, the fact that this is still law makes for the necessity of examining the bail policy in this light.¹⁸¹⁹ The evolution of bail jurisprudence must therefore also be seen in the context of the interaction between bail jurisprudence and special enactments. In *Nikesh Tarachand Shah v. Union of India*, the Supreme Court struck down the twin

¹⁵ *Satender Kumar Antil v. CBI*, (2022) 10 SCC 51.

¹⁶ *Gudikanti Narasimhulu v. Public Prosecutor*, (1978) 1 SCC 240.

17 Sanjay Chandra v. CBI, (2012) 1 SCC 40.

18 Moti Ram v. State of M.P., (1978) 4 SCC 47.

19 Ram Govind Upadhyay v. Sudarshan Singh, (2002) 3 SCC 598.



conditions of grant of bail under Section 45 of the Prevention of Money Laundering²⁰





²⁰ Nimesh Tarachand Shah v. Union of India, (2018) 11 SCC 1.

Act, 2002 as it then stood, on the ground that conditions for grant of bail that effectively invert the presumption of innocence and place the burden on the accused to show that he was not guilty as a precondition for release would be violative of Articles 14 and 21 of the Constitution. That legislative provision was later reproduced, and it has been judicially upheld since.

5.4 Principles Governing Grant of Bail

Over time, the judiciary has established specific guiding principles for the grant or refusal of bail in non-bailable cases. While the list is not exhaustive, these are the broad principles that guide the exercise of discretion in this domain. It has been established that bail is the rule and jail is the exception. This is because the object of criminal law is not to punish the accused until he is convicted, and so there should be a general principle that unless the accused fails to show good reasons for their release, bail should be granted.

The Court should not merely express general disapproval about the nature of the charge or seriousness of the offence for denying bail; it needs to identify one or more specific applicable grounds. The nature and gravity of the charge are relevant factors that may go towards assessing the risk of the accused absconding or tampering with the evidence. The Court must assess these factors on their own merits and cannot rely solely on the fact that the accused is suspected of committing a heinous crime.

The concern for bail being granted and the accused absconding (fleeing justice) is real and has often been a sufficient ground for refusing bail. The question for the Court is whether there is a basis on which such fear can be entertained. This needs to be assessed on a number of relevant factors such as the nature and gravity of the charges, the character, behaviour, and means of the accused, the possibility of his fleeing from justice, his prior criminal record if any, and whether he is in possession of a passport.

The apprehension that the accused may tamper with the evidence and the witnesses to the crime is also a real concern. Again, the apprehension needs to be based on some material to hold a reasonable belief; mere bare apprehension would not be enough. The period already spent in pre-trial detention is a highly significant factor. As the Supreme Court emphasized in *Satender Kumar Antil v. CBI*, the prolongation of pre-trial detention beyond a reasonable period, particularly where²¹

²¹ *Satender Kumar Antil v. CBI*, (2022) 10 SCC 51.

trial has not made meaningful progress, constitutes an independent ground for bail that goes beyond the ordinary balancing exercise.

5.5 Bail in Bailable and Non-Bailable Offences

Since the nature of offences varies from a simple offence to a heinous offence, bailable and non-bailable offences play a significant role in granting bail. Bail in a bailable offence is a matter of right, but bail in a non-bailable offence is a matter of discretion. Consequently, the granting or refusing of bail in a non-bailable offence depends upon discretion. However, there is usually a difference in the decision-making process in this regard. This shows the need for consistency in judicial decisions.

5.6 Anticipatory Bail

Anticipatory Bail is in a league of its own as it is aimed at safeguarding against the evil of arrest rather than the result or aftermath of arrest itself. In *Gurbaksh Singh Sibbia v. State of Punjab*, the Supreme Court delivered an authoritative decision on the nature and extent of anticipatory bail jurisdiction under Section 438 CrPC. The Court affirmed that the said power is to be exercised liberally and cannot be fettered by rigid or pre-ordained conditions; instead, it must be decided by taking into consideration the relevant circumstances and facts of each case. While the applicant must show reasonable and genuine fear of being arrested, the Court must, thereafter, determine whether the apprehension is reasonable and whether the liberty of a person so apprehends requires anticipatory bail.

A considerable amount of jurisprudence has developed in the post-Gurbaksh Singh Sibbia era regarding anticipatory bail jurisprudence and the terms of bail. There have been debates on whether anticipatory bail orders should be time bound or last till the end of the trial, the question was finally decided by the Supreme Court in that there is no one rule and it will depend on the facts of a given case. The nature of conditions that can be imposed has also been discussed: can conditions of travel restrictions, conditions of co-operation with the police, and conditions of not tampering with witnesses be imposed? And whether the Supreme Court rule that conditions should not be so onerous as to make anticipatory bail illusory is correct. The provisions for anticipatory bail in the BNSS are found in Section 482, which

essentially incorporates the CrPC provisions in view of the case law that has developed in the intervening period.

5.7 Recent Judicial Trends in Bail

Recent developments in bail show a Supreme Court that is fully cognizant of the failure of the bail system to deliver the constitutional promise of liberty- preservation. The decisions of the Court during the last decade, and particularly the comprehensive directions in *Satender Kumar Antil v. CBI*, show a Court that is no longer content to merely pronounce principles, but will actually follow up on implementation of its own directions and will give specific directions for remedial action.²²

The trend that the Court is more willing now to hold that delay in trial itself is a ground for bail is a significant one. If delay in trial, and particularly delay in cases in which there is not trial, is held to itself amount to a deprivation of liberty, then it will be able to reduce to significant numbers the undertrial jail population. The Supreme Court has held in *Union of India v. K.A. Najeeb* that the constitutional courts have the power to grant bail in UAPA cases in which the right to a speedy trial has been denied, and has re-affirmed that no statutory restriction on the grant of bail in UAPA can take away the power of constitutional courts to vindicate constitutional rights.²³

It also seems that the Supreme Court is now more willing to identify the systemic nature of the bail problem, the failure of the lower judiciary to apply the law of bail effectively, the failure of legal aid systems to effectively address the bail needs of undertrial prisoners, and the failure to address the systemic barriers to bail arising out of the bail conditions in monetary bail. *Satender Kumar Antil's* direction that courts must give reasoned orders on bail applications, and the Court's concern about the volume of unnecessary arrests, reflect a judicial awareness that the problem of undertrial detention requires not merely more eloquent statements of principle but structural change in institutional practice.

5.8 Challenges in Bail Jurisprudence

Bail jurisprudence notwithstanding, several critical challenges continue to impede its effectiveness. One of the primary challenges is the inconsistent application of discretion, which results in bail outcomes depending not on the nature

²² *Satender Kumar Antil v. CBI*, (2022) 10 SCC 51.

²³ Union of India v. K.A. Najeeb, (2021) 3 SCC 713.



of the offence, the criminal record, or the background of the accused person but on the choice of judge. It would often happen that the same case is dealt with in different ways in the same court as well as in different courts because there is no standardised structure to facilitate uniform application of discretion in bail cases. This amounts to a breach of equality before law and weakens trust in the system.

Bail is a matter that is not decided on the basis of the accused person's ability to comply with the bail conditions, especially the requirement of property owning sureties. The requirement of property-owning sureties, which remains common in many courts despite judicial directions to the contrary, effectively makes the grant of bail dependent on the accused's economic resources rather than on the legal merits of their application. People who do not own property are often left behind in the jails even though there was no order from the court requiring that they should be held in custody. This happens because of the economic constraints faced by them in finding property owning sureties, which the system demands.

The enactment of special laws containing strict provisions for bail conditions like the twin condition under PMLA, the threshold of prima facie evidence for bail cases under UAPA, and the special provisions of bail under NDPS Act has further complicated this issue. Now, instead of deciding the case of an accused person on a consideration of their specific risk factors, the courts decide the bail of the accused person depending on what offence they are charged with. This is a major challenge to equal protection under the law and creates a serious disparity in access to bail.

The delays in disposing of bail applications add to these challenges. Often times, bail applications that remain pending for weeks or even months before they are heard keep the accused in custody. Such a period is a period of incarceration in jail that has not been authorised by law. This delay in bail proceedings, which has emerged as a structural problem in our overburdened courts, itself amounts to deprivation of liberty. No court has found that the liberty of the accused is to be deprived for that period, but the accused suffer from this deprivation all the same.

5.9 Critical Evaluation

The judicial approach to bail in India shows progressive development in this regard. However, the following are the limitations:

- a) Over reliance on discretion;

- b) Non-existence of uniform practice;
- c) Divergent interpretation of the principles.
- d) While the judicial system has created a guiding framework, the challenge is one of implementation of the framework uniformly.

5.10 Suggestions and Reforms

- In this light, it is proposed that there must be the following reforms to improve bail jurisprudence in India.
 - Establishing standardized guidelines for grant of bail
 - Accelerating the disposal of bail cases
 - Enhancing the application of technology within the bail process
 - Strengthening the accountability of judges while exercising discretion
 - Such reforms can go a long way in achieving greater uniformity in the administration of bail.

5.11 Conclusion

Bail is indispensable to safeguarding personal liberty and ensuring justice in the administration of criminal law. The intervention of the judiciary has played a pivotal role in shaping Indian bail jurisprudence. Nevertheless, the lack of uniformity in decision making and the persistent problems of implementation signal a need for further reform. It is necessary to balance the protection of personal liberty with the interest of the society at large.

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CHAPTER VI ISSUES AND CHALLENGES IN THE REGULATION OF ARREST AND BAIL IN INDIA

6.1 Introduction

The earlier chapters have discussed the constitutional backdrop, statutory scheme and judicial oversight of arrest and bail in India. They reveal a sophisticated structure of rights: constitutional rights under Articles 21 and 22, the procedural guarantees in the Code of Criminal Procedure, 1973 (CrPC), now replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), and a large body of case law, which has progressively limited arbitrary state authority and detailed the rights of the accused. But, as this chapter shows, that structure of rights exists in a setting characterised by persistent malaise, systemic disparity, and chronic under-resourcing which makes its effective enforcement impossible.

The gap between the legal norms and the actual experience of arrest and bail is among the more disturbing aspects of Indian criminal justice. The wealthy can obtain bail without much difficulty; the poor stay behind bars, awaiting trial, for crimes with potential sentences lower than time already served. The police go unpunished for making illegal arrests. The courts have a backlog of bail matters and cannot give the close attention that such liberty affecting decisions deserve. Bail restrictions under special legislation make it unconstitutional difficult to obtain bail. The new statutory code, BNSS 2023, raises fresh questions as to whether it will effect real reform or simply a restructuring of the bureaucratic machinery.

In this chapter we discuss six major problems in the present regime of arrest and bail, namely: (i) continuing misuse and over-use of arrest; (ii) pendency of trial, detention of undertrials and prison overcrowding; (iii) inconsistency in judicial discretion in bail; (iv) effects of special law on bail; (v) access to justice and lack of adequate legal advice; and (vi) transitional implications of the BNSS 2023. Each problem will be discussed with the help of legal principles, statistical data and judicial pronouncements.

6.2 Arbitrariness and Misuse of Power to Arrest

6.2.1 The Persistence of Arrest as a Default Position

More than three decades after the Supreme Court first sought to regulate this practice in *Joginder Kumar v. Union of India*, and following the detailed guidelines laid down in *Arnesh Kumar v. State of Bihar*, the Indian criminal justice system continues to grapple with the phenomenon of arbitrary and unnecessary arrests. In *Arnesh Kumar*, the Supreme Court laid down two clear mandates: that a police officer should be satisfied that reasons exist, as mentioned in clause (b)(ii) of Section 41(1), for making an arrest, and that the police officer will record such reasons. The Supreme Court further directed that such reasons will have to be examined by a Magistrate before granting a remand. However, the National Crime Records Bureau (NCRB) statistics continue to reveal that every year, lakhs of individuals are arrested, but either are acquitted later or no further proceeding is taken against them.²⁴²⁵

This phenomenon can be attributed to the way the police system is set up. For one, arrests are a visible outcome of police activity which can also be used as a way of increasing the case closure rates. In addition, the legality of an arrest is almost never reviewed when remand applications are filed. The judge is often under a time constraint to process the case and can only rely upon the reasons submitted by the police. Consequently, while *Arnesh Kumar* directives are often referred to in judgments, they continue to be flouted on a regular basis. In *Satender Kumar Antil*

v. CBI, the Supreme Court was compelled to lament that the practice of making unnecessary arrests, after having sought to address it in *Arnesh Kumar* "has not lost any of its vigour".

6.2.2 Section 498A IPC, a case study of Mechanical Arrest

Arbitrary arrest of a person under Section 498A IPC (1860) [Section 498A of the *Bharatiya Nyaya Sanhita* (2023) is now equivalent to this provision] has been widely reported in India. Section 498A of the IPC 1860 deals with the issue of a husband or relatives of a husband treating a woman with cruelty. It is cognizable and non-bailable, thus allowing for arrest on the basis of a complaint being filed. In *Arnesh Kumar*, the Supreme Court observed, that Section 498A of the IPC 1860 is often being invoked to settle personal and business disputes or to put undue pressure

²⁴ Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273.

²⁵ Joginder Kumar v. Union of India, (1994) 4 SCC 260.



on relatives of accused to meet the demand for dowry. Thus, no arrest should be made in a complaint registered for an offence punishable under Section 498A of IPC 1860 unless the checklist contained in subsection (1)(b)(ii) of Section 41 Cr.PC is filled. Further, a Magistrate must apply his or her mind for the necessity of arrest before remand is granted. Even after this order, such incidents have come in matrimonial cases where investigation is conducted after arrest. In *Social Action Forum for Manav Adhikar v. Union of India*, the Supreme Court came back with a suggestion to set up a family welfare committee before a person could be arrested in matrimonial disputes, but this provision too is not being implemented in letter and spirit. It is the structural nature of these offences, namely, their wide net, the lack of any real judicial control before someone is locked up, and the lack of accountability for police who illegally take people into custody, that makes such practices possible.²⁶

6.2.3 Custodial Violence and the Continuing Infringement of the D.K. Basu Norms

The *D.K. Basu v. State of West Bengal* norms are the only ones that offer judicial guidance on arresting and detaining people. Requisites that the norms laid down include the completion of a memo when a person is arrested, the presence of witnesses, the communication of arrest to relatives or close friends, medical checks of the arrested person, and a record of their detention, and the CrPC (Amendment) Act, 2008 made these norms part of statutory law; provisions in a similar spirit now appear in the BNSS, 2023.²⁷

Yet India continues to report deaths in police custody, torture and abductions from it with dismaying frequency. The annual reports of the NCRB mention death in police custody. The NHRC regularly deals with complaints of abuse in police custody. In *Paramvir Singh Saini v. Baljit Singh*, the Supreme Court ordered that functional CCTV cameras be installed at all police stations, lock-ups and detention centres; the order itself reflects the Court's acknowledgement that the existing system of procedural protection is not adequate to prevent ill-treatment in the absence of adequate surveillance facilities.²⁸

The basic concern here is one of accountability: the *D.K. Basu* directions lay down procedural duties for arresting officers, and while there can be consequences for their failure, the arrest being rendered illegal, at the least, they

²⁶ *Social Action Forum for Manav Adhikar v. Union of India*, (2018) 10 SCC 443.

²⁷ *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416.

28 Paramvir Singh Saini v. Baljit Singh, (2021) 1 SCC 184.



rarely result in action against the individual officers involved. Criminal prosecutions are rare. Administrative punishment is rarely imposed. And the deterrent value of both is therefore low. In short, the actual protections for those arrested rest to a great extent on the disposition of the arresting officer, rather than on the enforcement of the law.

6.2.4 Arrests under Special Laws

Finally, a different kind of threat to arbitrary arrest arises in the context of laws that contain special provisions for arrest: the most important of these are the Prevention of Money Laundering Act, 2002 (PMLA), the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS), and the Unlawful Activities (Prevention) Act, 1967 (UAPA). These laws confer powers of arrest on authorities other than police officers (the Enforcement Directorate in the case of PMLA, narcotics authorities in the case of the NDPS, and the NIA in the case of the UAPA), and the applicable safeguards in such cases have seen sustained and often conflicting judicial scrutiny.

The Supreme Court's judgment in *Vijay Madanlal Choudhary v. Union of India* upheld the vast arrest powers of the Enforcement Directorate under the PMLA, permitting arrest on the basis of mere 'reasons to believe', without a warrant or prior judicial approval. This judgement has attracted criticism for lowering the bar for deprivation of liberty in economic offences. The Court's judgment in *Radhika Agarwal v. Union of India* (2025) took a more rights-positive position, ruling that authorities other than police officers that exercise the power of arrest must comply with the procedural safeguards established in criminal law (for example, providing the arrested person with the grounds of the arrest in an intelligible manner). The conflict between these approaches continues to cause uncertainty around the rights of persons arrested under the special law provisions of these statutes.²⁹³⁰

6.3 The Crisis of Undertrial Detention and Prison Overcrowding

6.3.1 The Scale of the Problem

Prisons in India have some of the highest numbers of undertrials anywhere in the world. According to the NCRB Prison Statistics India report, undertrial prisoners consistently make up seventy six to seventy seven percent of the total

²⁹ *Vijay Madanlal Choudhary v. Union of India*, (2022) 9 SCC 321.

30 Radhika Agarwal v. Union of India, (2025) [Recent Judgment].



prison population in India. As of the latest data, the prison occupancy stands at one hundred and thirty one percent of capacity in India. This is not just an administrative problem but is indicative of the continued violation of the constitutional rights of countless men and women who have never been convicted of a crime and may be acquitted of all charges against them. This situation was highlighted by the Supreme Court in *Hussainara Khatoon v. Home Secretary, State of Bihar* 1979, where the Court ordered release of the undertrials who were held beyond the maximum period of detention for which a convicted person in a similar case could have been held. Nearly 50 years down the line, this problem still exists in the same form albeit in a much bigger scale than what was found by the Supreme Court in the *Hussainara Khatoon* judgment. This shows the utter failure of legal reforms and judicial pronouncements since that decision.³¹

6.3.2 Causes of Undertrial Accumulation

There are many contributing factors to the accumulation of undertrial prisoners. To begin with, the law relating to the right of bail, especially the provisions denying bail in non-bailable offences as well as special law offences, deny a significant number of accused from being granted bail on a law right.

Secondly, even where bail is legally available, the accused is often unable to obtain bail due to practical difficulties. Obtaining bail often requires the presence of counsel, and most undertrials do not have access to a good and qualified lawyer. Even where government sponsored legal aid lawyers are available, the quality and efficiency of such representation in bail applications has been called into question. In such scenarios, it becomes incumbent on the courts themselves to consider bail in an application by an unrepresented accused. In practice, however, the overworked courts rarely exercise this duty proactively.

Thirdly, the financial requirements in terms of sureties required at the time of granting bail, act as a barrier to those who are economically disadvantaged. In *Moti Ram v. State of M.P.*, 1978, the Supreme Court mandated that courts should take into consideration the means of the accused at the time of granting bail and should not routinely require property based sureties. This order has not been uniformly complied with and surveys of bail practices show that property sureties are still widely required even where the undertrial cannot provide them due to financial reasons.³²

³¹ *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 81.

32 Moti Ram v. State of M.P., (1978) 4 SCC 47.



Fourthly, the backlog of cases in criminal courts often leads to delays in the hearing and disposal of bail applications. When a bail application stays undecided for weeks or months before being heard, the period of pre-trial detention is prolonged and no attempt is made to examine the grounds for release. The Supreme Court in *Imtiyaz Ahmed v. State of U.P.* laid emphasis on quick disposal of cases in which the prisoners are undertrial but the same has been not been implemented in the majority of cases.³³

6.3.3 Consequences of prolonged undertrial detention

The consequences of such long term detention are manifold in nature and scope. For the individual undertrial, long term detention leads to physical as well as psychological suffering and disruption of normal social life with all its attendant economic losses in the wake of loss of employment. For those acquitted the suffering is compounded by the fact that it was the experience of a punishment without trial, thus defeating the very foundation of presumption of innocence enshrined in our constitution and the principle of fair procedure.

For the society as a whole, the prevalence of marginalised sections of the society, namely, the poor, religious minorities and the Scheduled Caste/Scheduled Tribes among the undertrial prisoners not only reflects but also reinforces existing social inequalities. The exercise of criminal law enforcement powers of arrest and bail impacts in a disproportionate manner persons who are less capable of withstanding their consequences. In *Re Inhuman Conditions in 1382 Prisons*, the Supreme Court took suo motu cognisance of the state of Indian jails and issued directions for the implementation of a number of remedial measures including the constitution of Under Trial Review Committees. These directions have been implemented unevenly in the different States.³⁴

For the state also there is a significant cost involved in the maintenance of a very large undertrial population. The funds used up in incarcerating such undertrial prisoners would have otherwise been available for investigation, trial or rehabilitation. The economic argument for greater availability of bail, which was acknowledged in the case of *Satender Kumar Antil* implicitly, thus coincides with the argument of rights.

33 *Imtiyaz Ahmed v. State of U.P.*, (2012) 2 SCC 688.

34 *Re Inhuman Conditions in 1382 Prisons*, (2016) 3 SCC 700.



6.4 Inconsistency in the Exercise of Judicial Discretion in Bail

6.4.1 The Problem of Unguided Discretion

Power to grant and refuse bail in non-bailable offences is discretionary power in essence. The statutory provision, Sections 437 CrPC (now Section 480 BNSS) and 439 CrPC (now Section 483 BNSS), specify the relevant factors for determination but do not prescribe any hierarchy of importance, relative weightage or criterion for the same. This in essence is a discretionary power which is governed, inter alia, by the case law on the subject but can also vary to some extent on subjective basis.

Inconsistencies in bail matters have been brought on record by academicians, empirical research and most importantly by the Supreme Court in the case of *Satender Kumar Antil v. CBI*. The Court observed the variations in bail decisions by different courts and directed for formulation of guidelines for uniformity. "the system of bail in our country is not in the best shape", the Court observed in frank terms.³⁵

6.4.2 Variations among courts and judges

A bail application in respect of the same offence and accused persons with comparable social and economic background and antecedents may be decided differently in different courts or even by different judges in the same court. There are, of course, no studies conducted on the nature and quantum of judicial time that go into adjudicating these applications but it is clear that the discretion in deciding these matters has not been channelized within any well defined parameters. This variance in bail order is largely accounted for by three factors: (1) large pendency of bail applications in first courts, leaving very little judicial time to examine these matters; (2) quality of the judicial order in the bail applications varies, some courts giving well-reasoned orders discussing various parameters; others passing bail order in a couple of lines without discussing the relevant facts and circumstances; and (3) ineffective appellate review of these orders. The latter is because of delay and expense in the process of challenging a bail order.

6.4.3 The problem of conditions in bail

Bail is refused and the accused persons in some serious crimes remain in custody because they are unable to meet the onerous bail conditions such as high

³⁵ Satender Kumar Antil v. CBI, (2022) 10 SCC 51.



personal bond, or to provide security. Research studies have shown that bail conditions especially the conditions of surety have systematically operated to deny bail to the poor. The accused are required to put up the amount of bond and to offer surety from people having possession of immovable property and are unable to do so. This was recognized by the apex court in *Ram Govind Upadhyay v. Sudarshan Singh*. "While the imposition of conditions is not precluded, the condition should be reasonable... the bail conditions cannot be so onerous as to amount to a refusal of bail". While the principle is recognized, it has not been applied consistently. There is a general recognition of the "wealth-based" nature of pretrial detention in India with the accused person being denied liberty if they are financially unable to pay the bond amount.³⁶

6.4.4 Bail and Nature of offence: The presumption problem

There is another doctrinal question which has not received a satisfactory answer so far. While in *State of Rajasthan v. Balchand*, *Sanjay Chandra v. CBI*, and many other decisions, it was said that bail is the rule and jail is the exception and the consideration to be taken into account at the time of ordering bail are not the seriousness of the charge but other factors such as likelihood of flight, tampering of evidence and the danger to the society. Conversely, courts often, and in certain situations, routinely, cite the seriousness of the alleged crime itself as a ground to reject bail, resulting in punishment of the accused for an unproven charge. The issue is compounded in high profile cases involving offences against state, terrorism, or large scale financial crimes where the courts have to balance the interests of the individual and of the society. The Supreme Court judgments in cases like *P. Chidambaram v. Directorate of Enforcement* and *Nikesh Tarachand Shah v. Union of India* reflect the struggle to maintain principled bail law in cases where political or economic interests are involved and which lead to incoherence and lack of guidance for the lower courts in this domain.³⁷³⁸³⁹⁴⁰

6.5 Impact of Special Statutes on Bail Rights

6.5.1 Twin Conditions and Constitutional Challenge

The most substantial structural challenge to bail in India in recent times comes from special laws that impose rigorous, in many cases nearly total,

³⁶ *Ram Govind Upadhyay v. Sudarshan Singh*, (2002) 3 SCC 598.

³⁷ *Sanjay Chandra v. CBI*, (2012) 1 SCC 40.

38 NIKESH TARACHAND SHAH v. UNION OF INDIA, (2018) 11 SCC 1.

39 STATE OF RAJASTHAN v. BALCHAND, (1977) 4 SCC 308.

40 P. CHIDAMBARAM v. DIRECTORATE OF ENFORCEMENT, (2019) 9 SCC 24.



limitations on grant of bail. Such is the case in the Prevention of Money Laundering



Act, 2002 (Section 45), which has prescribed “twin conditions” for bail: courts need to be prima facie satisfied that the accused is not guilty of the offence and has not been likely to commit any offence while on bail. This amounts to reversing the burden of proving the accused’s innocence for him to claim his right to liberty.

In *Nikesh Tarachand Shah v. Union of India*, the Supreme Court held Section 45 PMLA as it stood, unconstitutional as the twin conditions violated Articles 14 and 21. Parliament then brought in the law with the same section, albeit with some modifications, and subsequent Supreme Court decisions culminating in *Vijay Madanlal Choudhary v. Union of India* affirmed the re-enacted law and the twin conditions bar. The outcome is an exceptional regime of bail applicable for the accused in money laundering cases in comparison to the normal bail regime in criminal law that is more restrictive and in effect presumes guilt. Similar provisions exist in NDPS Act, 1985 (Section 37), UAPA, 1967 (Section 43D(5)), and the Protection of Children from Sexual Offences Act, 2012 (Section 31) which also restrict bail in ways that do not easily comply with core principles of criminal law, the right to presumption of innocence, to liberty, and detention as an exception and not the rule.⁴¹⁴²

6.5.2 The Unlawful Activities (Prevention) Act and the issue of political prisoners

The Unlawful Activities (Prevention) Act gives cause for special concern regarding bail. Section 43D(5) says that bail cannot be granted to an accused in a UAPA case if, after looking at the case diary or the charge sheet, a court feels there are reasonable grounds for thinking that the accusation against them is prima facie true. This requires a court to form a prima facie view against an accused as a precondition to denying them bail, essentially serving as an interim decision of guilt at a point when the evidence against the accused has not been tested. The impact of Section 43D(5) has been well established: people accused of terrorism offences under the UAPA frequently end up spending years awaiting trial, detained in circumstances that are akin to life imprisonment without a conviction. In the case of *Union of India v. K.A. Najeeb*, the Supreme Court found that constitutional courts do have the power to bail UAPA accused who were kept in custody due to a violation of the right to a speedy trial. Yet, the Court has not used this power very⁴³

⁴¹ *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1.

42 Vijay Madanlal Choudhary v. Union of India, (2022) 9 SCC 321.

43 Union of India v. K.A. Najeeb, (2021) 3 SCC 713.



regularly or consistently; indeed, there have been undertrials in the UAPA for periods longer than it is possible to justify for any penal purpose.

6.5.3 Judicial responses and doctrinal tensions

The approach taken by the judiciary towards bail provisions of special laws is, on balance, uncertain. While the Supreme Court has conceded that bail provisions need constitutional justification in cases like *Nikesh Tarachand Shah, Union of India v. K.A. Najeeb*, and elsewhere, and that such provisions cannot be allowed to entirely take away the liberty to which an accused is entitled; yet, it has shown itself hesitant to strike down, in a systematic manner, bail provisions found in special laws, preferring instead to defer to legislative decisions regarding the seriousness of certain types of crimes and the requirement for deterrence. The outcome of the foregoing is a body of case law which is neither sufficiently protective of the rights of accused nor sufficiently principled in its deference to legislative restriction. In short, it creates bail law regimes that are highly variable between charges laid under a particular statute, and it is not easy to reconcile such variations with the constitutional promise of equal protection of the law.⁴⁴

6.6 Access to Justice and Legal representation

6.6.1 The right to counsel and its enforcement

Article 22(1) of the Constitution states that any person who is arrested shall be entitled to the right to be defended by a lawyer of their choice. In *Hussainara Khatoon*, the Supreme Court ruled that this article implicitly creates a constitutional duty of the state to provide legal representation to those who are indigent. Article 22's mandate has been codified in the Legal Services Authorities Act, 1987 and the NALSA structure. In theory, therefore, it can be said that every arrested person in India is entitled to be represented by a lawyer from the moment of arrest. In reality however, there exists a significant gap between theory and practice. Legal aid services are improving, but are still very underfunded. The number of legal aid lawyers per number of undertrials who require representation is grossly insufficient in several places. Legal aid representation is often of poor quality because a significant number of legal aid lawyers are neither well versed in criminal procedure nor are they experienced in making bail applications. While the Supreme Court, in *Shafiqi Mohammad v. State of Himachal Pradesh*, directed the government

44 Union of India v. K.A. Najeeb, (2021) 3 SCC 713.





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⁴⁵ Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 SCC 81.

⁴⁶ Shafhi Mohammad v. State of Himachal Pradesh, (2018) 5 SCC 311.

improve the quality of the legal aid infrastructure, including in the bail hearings, it is difficult to fix these structural challenges by court direction alone.

6.6.2 Language, Literacy and Information Barriers

The criminal justice system in India is conducted in English at the higher courts and in official languages at the level of the subordinate courts. Many accused persons (particularly those coming from rural areas, tribal areas and the urban poor) lack the literacy in the relevant official language to be able to understand the contents of documents they are expected to sign, the charges framed against them and even the language they are spoken to at the court or in the police station. The Supreme Court in *Mihir Rajesh Shah v. State of Maharashtra* (2025) specifically dealt with the need to communicate the grounds of arrest in a language that is known to, or understood by, the arrested person which suggests recognition of the severity of the communication barrier that is inherent in our legal system. The right of the arrestee to be informed of the grounds of his arrest (as guaranteed in Art. 22(1)) is generally fulfilled by handing over an arrest memo in a language that the arrestee is unable to read and signing the same at a time when they lack the literacy to contest what they are asked to sign. The formal compliance with the requirement fails in its substantive purpose which is to ensure that the arrestee is sufficiently able to understand why they have been arrested and the rights that they have under law. As a consequence, it also prevents an arrestee from being able to exercise their rights effectively: namely, they are unable to appreciate if the arrest is lawful, obtain legal advice on the lawfulness of an arrest on immediate bail or challenge an unlawful arrest knowing the basis of the claim with any certainty.⁴⁷

6.6.3 Economic Barriers to Access

The economic barriers to access are significant. Getting competent criminal legal representation to help with an application for bail takes money that many accused persons lack. Even with the availability of a legal aid lawyer, the lawyer's ability is restricted by heavy caseload, very low payment, lack of access to case materials and insufficient information about the accused. The surety requirement acts as an economic barrier for bail as well. It is likely that many times a judge will impose only a bond of a small amount and a release order but the accused will not be able to find a property owning surety with whom they have a relationship to post

47 Mihir Rajesh Shah v. State of Maharashtra, (2025) [Recent Judgment].



for them as surety. Hence, the accused will remain in jail because they are unable to obtain a bail, but only in cases where they fail to be able to produce an acceptable surety, not because the bail application has been rejected. This "economic detention" in itself is a disturbing feature of the criminal justice process where incarceration of the accused arises from poverty and not due to a judicial order for their continued detention in custody.

6.7 Challenges Arising from the Bharatiya Nagarik Suraksha Sanhita, 2023

6.7.1 Overview of the Transition

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) came into effect on 1 July 2024 replacing the existing Code of Criminal Procedure, 1973. This will be the first time that there will be major reorganisation of the Indian criminal justice system in over 50 years. This has repercussions for all parts of the criminal justice system, from the arrest of the accused and bail provisions to the substantive content of the new provisions, and the extent to which the criminal justice institutions are geared up to implement them.

The BNSS has retained the same broad framework of arrest and bail as the CrPC. The corresponding provisions to Section 41 CrPC (arrest without warrant) are now covered under Section 35 BNSS. The provision which earlier was Section 41A (notice of appearance) in the CrPC is now in Section 35(7) of the BNSS. The earlier provision on anticipatory bail, Section 438 CrPC is now in Section 482 BNSS and the special powers that higher courts enjoyed in matters of bail under Section 439 of the CrPC have been covered by Section 483 BNSS. The safeguards developed in judgments under the CrPC will continue to apply as the substantive provisions under the BNSS are largely a continuation of those under the CrPC.

6.7.2 New Provisions and their Implications

There are some provisions of the BNSS that are new or that have made a significant change to the CrPC provisions. Section 479 BNSS introduces a provision for the bail of an undertrial prisoner that has been reworked. It states that if an undertrial prisoner has undergone one-half of the maximum period of imprisonment for the offence alleged against him, he shall be released on bail. The exceptions to this provision are those accused of offences punishable with death or life imprisonment. If this provision is implemented well, it could go a long way in

addressing the over-incarceration of undertrials. Its effectiveness will depend upon the manner in which the courts go about monitoring the undertrials in their courts and how they apply this provision to reduce the detention of undertrial prisoners.

There are new provisions in the BNSS dealing with electronic summons, video conferencing in proceedings and recording of arrest electronically. These provisions clearly indicate a drive to modernise criminal procedure to make it more accessible and to minimize non-compliance with the requirements of the law. It remains to be seen if these provisions will be implemented in all the courts, especially in the light of the large variation in the resources available in the courts in major urban centres and the underserved rural magistrates' courts.

6.7.3 Challenges and Implementation

The transition from the CrPC to the BNSS has introduced an element of uncertainty, itself a challenge that will need to be managed as the bail and arrest provisions are applied in criminal proceedings. There are questions about the applicability of judgments delivered in relation to the CrPC in connection with matters under the BNSS, how cases that were initiated in the CrPC but are yet to be disposed of will be handled under the BNSS, and if the police officers, prosecutors and judicial officers have received uniform training on the new provisions.

These are not purely academic challenges. A police officer who is unsure as to which is the applicable provision may follow the now repealed provisions in his/her actions, which could be grounds to challenge the validity of his/her actions. A court hearing an application for bail under the BNSS must be cognisant as to how far judgments delivered in similar contexts under the CrPC are applicable, which is not necessarily always clear, especially if the BNSS provision itself has been different from the original version in the CrPC. The Bar Associations and the judicial training institutes have an important role to play in ensuring that such transitional challenges are handled and the quality of criminal justice administration in the years after the transition will depend upon how well-prepared these institutions are for the implementation of the BNSS.

6.8 Structural Inequality and the Criminal Justice System

A consistent theme emerging from the challenges outlined in this chapter is structural inequality, marked by the disproportionate incarceration of marginalised

communities. Evidence from NCRB data, scholarly analysis, and judicial observations indicates that the criminal justice system in India, while constitutionally neutral, operates according to economic, caste, and religious lines to the detriment of the poor.

The structural causes of disproportionate incarceration and pre-trial detention are many. These include:

- a) differences in access to high-quality lawyers for the poor
- b) bail amounts that exclude the poor who do not own land
- c) uneven geographic distribution of lawyers and courts
- d) language and literacy difficulties that prevent individuals from properly availing rights under the Constitution
- e) evidence from empirical studies suggesting that arrest decisions are affected by characteristics of the person being arrested
- f) Reforms in the arrest and bail regime therefore have to take these structural issues into account, beyond merely changing the statutory regime. It is impossible to achieve an accessible rule of law if one reforms law on paper, but continues to work within existing structures that are not only indifferent to but which actually produce inequalities.

6.9 Conclusion

This chapter has explored several challenges in implementing arrest and bail law. Taken together, the challenges demonstrate that the problem of arrest and bail law reform is not merely a problem of the enactment of better laws or clearer judicial guidelines. The problems are structural, institutional, and even cultural. They are located in the divide between law on paper and practice on the ground, between the ideal of the Constitution and reality on the ground.

The persistence of arbitrary arrest despite several Supreme Court pronouncements indicates that guidelines on their own cannot be relied upon in the absence of a mechanism of accountability. The large numbers in arrestees under trial even in the face of the constitutional presumption of innocence indicate that bail law has failed to deliver on the promise of liberty. The unpredictability of bail decisions in the face of a large body of jurisprudence indicates a lack of structure in the decision-making process. The impact of special statutes that have created

exceptional regimes of bail on bail rights indicates a creeping expansion of exceptions that threaten to swallow the rule. The issues of representation, language, and resources indicate that the problem of inequalities has become embedded in the system through decades of neglect and inertia. The next chapter seeks to address each of these challenges with a carefully calibrated set of legislative, institutional, and judicial reform solutions.



CHAPTER VII SUGGESTIONS AND REFORMS: TOWARDS A RIGHTS-ORIENTED REGIME OF ARREST AND BAIL

7.1 Introductory Note

The foregoing chapters have exposed, through an analysis of the constitutional architecture, the statutory apparatus, the jurisprudential trajectory and the on-ground realities, that the Indian arrest and bail regime is marked by a disjuncture between ideals and reality. The current chapter proposes a number of legislative, institutional, procedural and cultural measures to address specific issues identified in Chapter VI, while taking inspiration from the experiences of other jurisdictions and being cognisant of the institutional context in India.

The proposed reforms are conceptualised in four inter-related spheres: legislative, addressing the deficiencies and lacunae in the statutory regime; institutional, focussing on accountability and capacity in the police, judiciary and legal aid system; procedural, seeking to alter the processes of decision-making in arrest and bail to be principled, transparent and rights-sensitive; and cultural, addressing the patterns of inequality and discrimination that shape the operation of the current regime. These spheres are inter-linked: without institutional competence, laws can only be ideals; without legislative revision, institutional efforts are bound by an inadequate statutory framework; procedural and cultural change requires a legislative anchor and an institutional investment.

7.2 Reforms in the Law

7.2.1 A Consolidation of the Guidelines on Arrest

The most important change in arrest law would be the codification of the guidelines developed over decades through Supreme Court pronouncements in judgments such as D.K. Basu, Joginder Kumar and Arnesh Kumar, which are guidelines that set out the procedural requirements for arrest, the justification to be provided and the rights of the arrestee, as substantive, statutory clauses in the Bharatiya Nagarik Suraksha Sanhita, 2023 and not as judicial guidelines whose applicability and enforceability depends on the individual judge's knowledge and will to implement them.

In particular, the following ought to become statutory requirements (with legal consequences of failure to perform):

- a. a specific written record of the reasons for arrest including an indication of the provision of Section 35 BNSS under which they are arrested, before the arrest is effected
- b. communication to the accused of the grounds of arrest in a language he or she understands and the responsibility of the arresting officer to verify such understanding
- c. notification to a relative or person nominated by the arrestee within two hours
- d. medical examination before and after custody
- e. presence of an independent witness during arrest
- f. access to a lawyer from the point of arrest including an affirmative obligation on the arresting officers to inform the arrestee about this right, and assist in the contact

The statute must explicitly outline the ramifications for breach: violating mandatory arrest protocols must be treated as grounds for invalidating the arrest, mandating the immediate release of the detainee. Arresting officers must face personal disciplinary measures and civil liability for breaches of arrest law; furthermore, there must be a reverse onus, shifting the burden of proof from the arrested person to the authorities to demonstrate their arrest has complied with law.

7.2.2 Bail Law Reform: Structured Discretion

Though an essential part of the individualised justice that bail determination demands, the existing system of judicial discretion regarding bail is not sufficiently structured. It lacks an agreed system for assessing the factors pertinent to bail that creates the arbitrariness documented by Chapter VI and decried by the Supreme Court in the Satender Kumar Antil case. Bail law must be reformed through structured discretion: legislative prescription of the factors which must be considered when deciding on bail, the relative weight of the different factors in the various types of case, and the obligation on a court in a bail order to record its reasons on the application of each of those factors.

Structured discretion must involve:

- a. a statutory presumption of grant of bail, rebuttable only on certain grounds
- b. a mandatory duty on the court to give a written reasoned judgment on an application for grant of bail, specifically considering the weight of the factors involved, such as possibility of absconding, interference with investigation and danger of repeating the commission of a similar offence in each specific case
- c. a ban on granting refusal for bail only on the account of heinousness of an offence without specific consideration of relevant factors
- d. a time-bound mandatory reconsideration of refusal of bail on the part of the court in the absence of commencing trial within a fixed duration

7.2.3 Reform of the Surety and Bond System

As it operates currently, the system of surety and bonds constitutes an economic filter, effectively depriving the poor of the benefit of the bail. Legislative reform must provide:

- a. a statutory directive that financial requirements of bail shall be commensurate with the financial resources of the accused person, specifically allowing for personal recognisance or personal bond alone for persons who show inability to provide financial securities
- b. the institution of community bail, similar to several bail systems in the United States where community members, and not necessarily money, can be used as surety
- c. the abolition of property bond system for crimes with a maximum sentence of less than three years of imprisonment

In the interest of promoting undertrial reform, the provision in Section 479 BNSS regarding the release of undertrials who have already served half of the prescribed maximum sentence period must be followed and proactively enforced. Courts should be under a legal obligation to examine the status of undertrials in the prisons from time to time and decide upon their entitlement under this provision even without any application by the accused.

7.2.4 Revisiting Bail Provisions of Special Statutes

The proliferation of special laws with ever-stringent bail conditions such as the twin conditions of the PMLA, the requirement of evidence to make a prima facie case under UAPA or the bail conditionality of NDPS Act raises grave questions of constitutionality which the Courts have been trying to address on an ad-hoc basis. The legislature must therefore consider prescribing a constitutional limit on the extent of stringency of conditions of bail in any special law and not allow it to have effect of negating the presumption of innocence or making bail unachievable in any event. It may also consider a legislation which is commonly known as Bail Rights Act which lays down the basic norms or minimum standards for bail to apply across all special laws. This can then form the base and deviation from such norms is only permissible if they can be explicitly defended and subject to periodic Parliamentary review. Such an Act can lay down the:

- (a) minimum rights of the accused in relation to bail
- (b) the maximum conditions which can be imposed under any law
- (c) an independent monitoring authority in the courts for reviewing bail in cases where the accused has remained in custody over a long period of time

7.2.5 Legal Framework for Implementation of Police Accountability and Arrest and Bail Regulations

The implementation of arrest and bail regulation requires a legal framework of accountability as a final sanction to implement the violations in these cases. The current legal regime of arrest and bail regulation lacks a suitable legal framework for the same. A legislative initiative must be taken in:

- a. creating a tort under the law for arrest in violation of procedure which can be claimed without the requirement to prove malice or bad faith on the part of police officers
- b. creating a statutory right for any State to pay any compensation to persons who have suffered detention for a long period as an undertrial in courts of law and are acquitted in the end
- c. a fully empowered Police accountability body with statutory power to inquire into and adjudicate on police cases

d. mandatory publication by Police authorities of all arrests made by them, the reasons for arresting the accused, the extent of compliance in adhering to the arrest procedures and the outcome of prosecutions

7.3 Institutional Reforms

7.3.1 Police Training and Accountability

The legal safeguards regarding arrest first rely upon the knowledge and attitude of the police officers who make the arrest. Training regarding the arrest process, the rights of the arrested, and the necessity of compliance is required not only in the induction of new recruits, but also as part of in-service training for all levels of the police force. This training must not be limited to the reading of relevant sections of the law, but rather should include simulations of the arrest process, analysis of case law on arrest, and testing of knowledge.

It must also provide for stronger accountability for officers found to be in non-compliance with the provisions of the law. Presently, when officers are found to have been in violation of arrest procedure, they may be subject to departmental proceedings, which are often slow and non-transparent, and rarely lead to any significant consequences for the officer in question. A stronger accountability mechanism is therefore needed, with powers to independently investigate complaints against police officers and to recommend or impose sanctions for violations of police procedure, to deter non-compliance. The complaints bodies in England and Wales, Canada, and South Africa, for example, could be used as a starting point for the drafting of such a law in India.

7.3.2 Judicial Training and Case Management

Effective bail adjudication depends on high quality judicial training and efficient case management. Judges and magistrates who determine whether to grant or refuse bail should be given training in the law on bail, including the constitutional and legal framework, the jurisprudence, and the frameworks for decision-making suggested by these reforms. The National Judicial Academy and State Judicial Academies should, and may need to, develop curricula on bail law and arrest law, and review them regularly to incorporate new precedents and legislative developments, such as the provisions in the BNSS.

Reform of the judicial process in terms of case management is another way of strengthening the quality of bail adjudication. A great part of the problem of inconsistency and delay in bail adjudication is caused by a large burden of pending bail applications before courts at all levels. The creation of separate bail benches in Sessions Courts and High Courts, with judges who would only deal with bail applications and receive the same training outlined above, would provide an opportunity for more focused and higher-quality bail adjudication. There may also be scope to develop electronic case management systems that could track the status of applications pending before bail benches, flag bail applications pending over a certain time limit, and generate automatic reminders of when to review undertrial detention. These mechanisms would allow the courts to deal with the problem of delay using technology.

7.3.3 Strengthening Legal Aid

A key to the enjoyment of the right to bail is legal representation. There is a need for multi-pronged investment in legal aid in the bail context: higher legal aid lawyer fees that attract and retain quality lawyers; training for legal aid lawyers in criminal procedure and bail law; a duty lawyer scheme at police stations and courts so that persons arrested receive legal advice; and, bail clinics at remand courts for providing focused bail advocacy to indigent accused persons. Meaningful, not merely token, access to legal aid, as recognised by the Hussainara Khatoon judgment, requires institutional investment. NALSA and State LSAs must develop and enforce a Legal Aid Quality Framework setting minimum standards for quality of representation, providing a mechanism to monitor quality, and setting up a complaints redressal mechanism for those seeking quality of legal aid.⁴⁸

7.3.4 Technology in Arrest and Bail Administration

Technological intervention offers great potential to overcome at least some of the challenges mentioned in chapter VI. In *Paramvir Singh Saini v. Baljit Singh* the Supreme Court's direction to install CCTV cameras in all police stations and lock-ups reflects such understanding. The implementation should be expedited with funds allocated by Centre to States for the same upon proof of compliance. Digital arrest records (providing information on time, place, grounds, compliance with procedure etc. of every arrest) will make arrests auditable and ensure accountability.⁴⁹

⁴⁸ *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 81.

⁴⁹ Paramvir Singh Saini v. Baljit Singh, (2021) 1 SCC 184.



For the bail context, creation of a national bail information system, similar to the system that operates in England and Wales and some States in Australia, will help courts access standardised information regarding accused's background, criminal antecedents, community roots, and ability to bail when a bail application is presented, and also enable better, more effective bail management. Such a system could also facilitate the monitoring of undertrial prisoners who are eligible for release under Section 479 BNSS and could enable proactive compliance. In this context, video conferencing of bail hearings (which has become commonplace during COVID) should be expanded, and made more standardized so that accused persons need not appear in-person in court when their bail cases are heard, expeditiously disposing of bail applications. e-Courts platform for filing bail applications electronically and electronic service of bail orders will improve the speed and access.

7.4 Procedural Reforms

7.4.1 Bail Decision Framework

Courts should follow a structured decision framework so that the factors are clearly brought to attention and considered. This framework must be drawn up by the Supreme Court or the various High Courts, through issuance of practice directions, that mandate bail orders address all of the following issues:

(a) the nature of the offence and circumstances of its commission; (b) the background of the accused, including his prior conviction or acquittals as well as any prior compliance with the orders of courts; (c) the relationship between the accused and the community and the possibility of his absconding; (d) the possibility of the accused tampering with evidence or intimidating witnesses; (e) the health and other personal needs of the accused; (f) the duration of pre-trial detention undergone; (g) the likely period of the trial; and (h) the means of the accused to meet the terms of the bail.

The framework should require the courts to give their findings on all these issues, and state which of their findings would support the grant of bail, and which would militate against it. This approach would not take away the discretion of the Court, but would provide a structured, principled basis to the exercise of such

discretion, and thereby curb arbitrary exercise of discretion, and ensure that a sufficient record is created that may be reviewed by appellate courts.

7.4.2 Scrutiny of Remand Orders

The first production before a Magistrate after arrest is a key opportunity to protect the rights of the arrested person; hence reforming remand proceedings to require the following:

(a) a requirement that the Magistrate must first examine the documents tendered by the arresting police officer, namely, the record of necessity for arrest, as well as the arrest memo, before ordering a remand; (b) a requirement that the Magistrate must also explicitly consider the legality of arrest before ordering a remand; (c) a requirement that the accused be physically present at the remand proceedings and afforded an opportunity to make their submissions; and (d) a requirement that remand orders must also be reasoned orders that state the facts and law that support detention.

These requirements are largely reflective of the directions that have been laid down in *Arnesh Kumar* and correspond with the provisions of the BNS; ensuring these directions are effectively implemented will go a long way in strengthening judicial oversight of arrest. Judicial officers should be trained on these requirements in conducting remand proceedings.

7.4.3 Periodic Review of Bail Decisions and Undertrial Status

At present, there is no system of periodic review of either bail decisions or the status of undertrial prisoners. In the event that an undertrial prisoner's application for bail is turned down, he remains in custody for a significant period of time, without any mechanism for the review of his situation, and reconsideration of whether it is still justifiable to continue to detain him. This problem can be addressed by creating a statutory obligation of periodic bail review. Courts should be required to review any earlier bail orders at regular intervals, every sixty days for ordinary offences, or every thirty days for more serious offences, and give written reasons if they are unwilling to grant bail.

In addition, a fast-track mechanism of review should be introduced for prisoners who have already been in custody for a significant period of time. Under Trial Review Committees, already established by the Supreme Court, should be

appropriately strengthened and made fully functional in every district, and must regularly review the status of every undertrial prisoner, and recommend bail and/or release, where appropriate.

7.5 Comparative Perspectives to Shape Reform

7.5.1 United Kingdom and Wales: A Structured Model for Police Accountability and Bail

In England and Wales, the Bail Act, 1976 outlines a statutory bail system that has informed bail reform efforts in other common law nations. By establishing a general right to bail, the Act creates a rebuttable presumption that can only be negated for specific reasons, including the risk of the accused failing to surrender, committing further offences while on bail, interfering with witnesses, or where their own safety requires it. Courts are obligated to assess each of these factors, and bail may not be denied unless there is at least one ground to justify the refusal. This approach limits discretion and provides a clear framework for appeals.

In England and Wales, the Independent Office for Police Conduct (IOPC) offers an example of police accountability for unlawful arrest and custody malfeasance. It independently investigates grievances lodged against the police, can refer matters for prosecution or discipline, and its presence has been linked to greater compliance with arrest procedures by police, in no small part because it has a duty to report and a power to investigate.

7.5.2 United States: Bail Reform and Pretrial Services

Bail reform efforts, bolstered by statistics demonstrating that racial and economic disparities are prevalent in the system, are being explored across many states and at the federal level of the US, and are potentially instructive to India's context. Instead of a system that depends on finances for pretrial release (similar to our current surety system which has the effect of detaining the poor), many states have turned to risk assessments to inform bail decisions. Pretrial services will interview the accused at the earliest stage, determining their risk of non-appearance and likelihood of re-offending, providing recommendations to the court with regards to what conditions should be placed on the accused. This shifts the focus of the bail decision from financial capacity to risk assessment. Additionally, the Bail Reform Act of 1984 (Federal) sets out a list of factors to be considered and obliges

a court to provide reasons in writing before ordering pretrial detention, leading to increased consistency and transparency in the system, which is a model for India to adopt.

7.5.3 South Africa: A Constitutional and Systemic Model for Reform

The South African Constitution of 1996 guarantees the right of anyone arrested or detained to be released if the interests of justice so permit, subject to reasonable conditions. In *S v. Dlamini*, the Constitutional Court of South Africa upheld legislation that restricts bail in certain serious offences but clarified the primacy of constitutional considerations in making a bail decision. South Africa's example shows that a principled balance can be struck between rights protection and legislative restriction on bail, when these rights are constitutionally entrenched and the Constitutional Court is able to exercise effective oversight of the bail system. Furthermore, reforms to South Africa's legal aid system, for example, the appointment of full-time, in-house public attorneys, rather than the assignment of juniors from outside of the Bar, demonstrate how legal aid quality can be enhanced by ensuring legal aid lawyers are properly remunerated and can handle a reasonable case load.⁵⁰

7.6 Confronting Systemic Inequality

The above-referenced proposals will only be effective insofar as they are backed by initiatives that directly address the systemic inequality that permeates the current bail system. The disproportionate impact of arrest, custody, and bail refusal on marginalized groups should be mitigated through:

rights-awareness campaigns in those communities

legal assistance services attuned to those communities' needs

judicial sensitization workshops that deal with unconscious bias in bail rulings

arrest and bail statistics, disaggregated by the social/economic position, caste and religion, of the person accused.

A National Policy on Pretrial Detention, which is formulated after consultations with civil society, lawyers, experts and people most affected by it, could provide the overarching strategy and approach for tackling the legal problems as well as structural problems. This could set specific, national-level goals to reduce

50 S v. Dlamini, (1999) (4) SA 623 (CC) (Constitutional Court of South Africa).



undertrial detention; specific indicators and benchmarks to measure progress; and accountability mechanisms for agencies charged with implementation.

7.7 Conclusion

The reform of arrest and bail system in India is a multifaceted project that entails work on several fronts, legislative, institutional, procedural and cultural. What is proposed in this chapter is not the definitive architecture of an ideal system, but a programme for reform that moves from a gradual to a more progressive system. In each of these propositions, we have emphasized the centrality of rights. The right to personal liberty, the right to be innocent till proven guilty, the right to legal aid and the right to equality are all rights that must be respected, not as ornamental phrases in judicial judgments, as they so often are today, but as entitlements that need to be provided in reality by effective institutions. A reform agenda which is centred on rights is one which has the potential of creating a justice system that lives up to the constitutional ideals it has been intended to uphold.



CHAPTER VIII CONCLUSION

8.1 Summary of the Study

In this work, I have attempted a critical examination of the judicial control of the powers to arrest and to release on bail. I have taken the constitutional and statutory scheme, the relevant provisions in the Constitution of India and under the Code of Criminal Procedure, 1973, which have now been replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023, have been briefly discussed and analyzed in view of the relevant case laws, to understand the way the judiciary has sought to regulate the power of arrest and the powers of the Court to grant or deny bail. This work then analyses the structural and systemic problems facing this framework and suggests a comprehensive reform agenda for an effective rights-based system.

I have divided my thesis into eight chapters. Chapter I introduces the thesis in terms of the Statement of the Problem, the objectives and scope of the study, research methodology and structure of the thesis. Chapter II deals with the concept, nature and typology of arrest and bail and the principles governing them. Chapter III analyses the constitutional and statutory framework governing arrest and bail. I have discussed the relevant constitutional and statutory provisions with a view to understanding the inter-relationship between them, and the role of the judiciary in filling the vacuum. Chapter IV studies the judicial control of arrest. I have taken up the development of judicial safeguards from the 1994 decision in *Joginder Kumar v. State of U.P.* (a landmark case which established that arrest is a "coercive" power and must therefore be exercised with great circumspection) to *Arnesh Kumar v. State of Bihar*, which gave important guidance to police as to when arrest must not be made, and to the latest judgments in this regard in 2025. Chapter V analyses the judicial approach to bail, which involves a discussion on the genesis and development of the law governing bail, from its core principles to its current state, including its most comprehensive articulation in *Satender Kumar Antil*. Chapter VI analyses the systemic problems. Chapter VII presents a comprehensive reform agenda. The thesis concludes with Chapter VIII, which summarises the findings of the work and provides the final conclusion.⁵¹

⁵¹ Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273.



8.2 The Core Result – Principle vs Practice in India

This dissertation's central finding is that the law in India relating to the two most severe infringements of liberty, arrest and bail, does not match reality. This problem, as we have seen, has not appeared out of nowhere and it has not been created by just one thing. It has taken years to build as a number of distinct and separate pieces were put together: inadequate oversight, inadequate funding of courts and legal aid, a level of inequality that renders the ability to access justice a formality and not a reality, the sheer number of bail-restrictive laws, and the policing mentality that considers arrest an appropriate response to a cognizable offence. That is not to say that the courts have not done a good job. The court decisions in *D.K. Basu*, *Arnesh Kumar*, *Hussainara Khatoon*, and *Satender Kumar Antil* represent major, genuine victories in the struggle for personal liberty and state accountability. The Supreme Court has not hesitated in its approach and has not been afraid to get its hands dirty: it has issued directions for police, set time limits for disposing of bail, and called out problems in the criminal justice system.⁵²

However, the problem has not gone away. This is because of what the judiciary is able to actually do. The Court may have the constitutional power to direct police, but it cannot put itself inside every single police station in the country to make sure its orders are carried out. It may direct that bail applications be disposed of expeditiously, but it cannot provide those courts with the resources necessary to do that. This does not in any way diminish the work that the Supreme Court has done in articulating the relevant principles. What it does mean is that the work that has been done in terms of principle in relation to arrest and bail cannot be implemented across the country as long as the systemic issues are left unresolved.

8.3 Testing the Proposition

This dissertation was predicated on the proposition that while the judiciary has created significant safeguards in the area of arrest and bail, these safeguards are not implemented consistently and lack uniformity, resulting in an inadequate protection of the right to personal liberty. The evidence presented in the previous chapters bears out that this assertion is true:

⁵² *Hussainara Khatoon v. Home Secretary, State of Bihar*, (1980) 1 SCC 81.

The systemic violation of the procedure of arrest can be observed from NCRB data, the fact that the Supreme Court itself has made such observations in a string of cases, and the continuing prevalence of custodial violence and detention on spurious grounds, which suggests that the judiciary's legal protections of personal liberty have proved to be fragile in practical implementation;

The reality of undertrial detention being applied to such a large number of persons, many of whom will eventually be acquitted, shows that liberty is not the primary presumption in practical application; The documented variations in bail outcomes among different courts and regions show that relying on judicial discretion without guidelines cannot reliably result in consistent and principled decisions.

The hypothesis cannot, however, mean that judicial involvement has not had any positive impacts. The situation prior to the CrPC was far worse, where persons who had been arrested had limited legal procedural rights and received less judicial protection. There have been various progressive enhancements in judicial protection from the right to be provided with the grounds of arrest, through to detailed directions in *Satender Kumar Antil*, and these have given us a body of law that, when consistently followed, will lead to a more rights-friendly system. The issue is therefore with practice rather than principle. Consequently, the hypothesis holds, not in its strictest form (i.e. that there has been no impact of judicial intervention) but in its more reasonable sense that the difference between principle and practice is large and is not adequately addressed in existing ways.

8.4 Reflections on the Bharatiya Nagarik Suraksha Sanhita, 2023

The enforcement of the BNSS starting 1 July 2024 provides a possibility for the statutory consolidation and modernization that the reform suggestions in Chapter VII envision. The BNSS keeps the general form of the CrPC on arrests and bail but incorporates new provisions such as the undertrial bail provision in s. 479 and provisions dealing with technology, to some degree improve.

Whether the BNSS makes a substantive difference to the practice of arrests and bail in India, or is simply a new statutory regime that does not engage the institutional and cultural problems in the system, depends on the measures taken alongside the legislative change. If the BNSS is implemented with the necessary institutional support, in police training, judicial capacity, access to legal aid and

accountability, the change is likely to be truly transformative. If the BNSS is implemented without any institutional change merely as a statutory replacement, the gap between principle and practice will still remain, but in another statute.

Initial signs as the transitional period continues are mixed. There have been reports of uncertainty in courts and police stations over what provisions apply, indicating that training and preparation were inadequate for the extent of change required. The provisions for technology, including video conferencing, electronic records and electronic summons, are encouraging but will be affected by uneven access to infrastructure in India. The undertrial bail provision in s. 479 is an improvement but will only work if implemented proactively, which will be difficult for overburdened courts.

8.5 The Comparative Perspective

This conclusion builds on the comparative analysis conducted in Chapter VII, drawing on the experience of England and Wales, the United States, and South Africa, to reaffirm the argument that proper regulation of arrest and bail is fundamentally an institutional, not merely a legal issue. The regions with the best track records for curbing the arbitrary arrest and pre-trial incarceration of the accused have been able to achieve this through sustained capacity building in police accountability, judicial education, legal aid, and data, along with the clear articulation of legal principles. The legal framework is a prerequisite but is not an end in itself. Due to the scale, heterogeneity of its criminal courts, disparate levels of state capacity, and social and economic complexity, India faces a more challenging institutional implementation task than most other countries. But scale is no excuse. There is precedent for significant institutional change within the Indian context through expansion of legal aid by NALSA, deployment of fast track courts for particular classes of cases, and technological intervention in court administration. The question is one of prioritisation and allocation of resources, not feasibility.

8.6 The Constitutional Imperative

As the dissertation has shown, there is a powerful constitutional imperative underlying this project which deserves to be restated. Article 21 of the Constitution of India grants a fundamental right to life and personal liberty. Article 21 is not only

about a law being fair. In India, Article 21 must also encompass the effective implementation of that law. That a right to liberty must be more than a theoretical right which a rich man may avail himself of, is a principle long espoused by Indian jurisprudence. It demands that everyone, whatever their economic and social status, and regardless of what they are accused of, must be able to enjoy their constitutional right to freedom.

In *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, the Supreme Court of India famously interpreted Article 21 to mean that the right to life includes the right to live with human dignity. The fact that many undertrial prisoners in India remain imprisoned in many parts of the country in conditions which are overcrowded and poorly resourced, with little or no amenities, cannot be said to accord with this constitutional imperative. The massive incarceration of undertrials, resulting from a flawed arrest and bail regime which fails its most vulnerable actors, is not only a legal problem, it is a serious human rights concern.⁵³

The reform of the law of arrest and bail must therefore be seen, in the context of fundamental rights and constitutional obligations, to be more than just a question of better law. The Constitution requires that the power of arrest be exercised by the State in a manner which accords the fundamental right to liberty the respect and procedural safeguards it must command. Equally, the right to bail must be more than a theoretical right but a practical right, to be enjoyed by those to whom it is given by law. This dissertation is submitted as a contribution towards understanding the obligations which the Constitution creates, and ways of ensuring that those obligations are fulfilled.

⁵³ *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 SCC 608.