

# Default Bail and Remand under the Bharatiya Nagarik Suraksha Sanhita, 2023: Emerging Legal Challenges

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## ABSTRACT

The Bharatiya Nagarik Suraksha Sanhita, 2023, introduces significant changes to the Criminal Procedure Code, 1973, particularly in the realm of police custody. This research paper delves into a critical analysis of Section 187 of the BNSS Act, focusing on its impact on the rights of the accused, especially in relation to Articles 20, 21, and 22 of the Indian Constitution. The statute introduces time-bound investigation and trial, mandatory forensic standards, digital proceedings, enhanced victim participation and codified arrest safeguards, fundamentally reshaping India's criminal justice process. This guide provides a structured, authoritative and updated legal analysis of the Bharatiya Nagarik Suraksha Sanhita 2023, covering its constitutional basis, structure, key provisions, timelines, rights of accused and victims, compliance requirements, judicial interpretations and practical impact. By providing a comprehensive comparison of these crucial elements, the research aims to illuminate the evolving framework of default bail and remand in India's criminal justice system. This analysis will be valuable to legal professionals, policymakers and anyone seeking a deeper understanding of the right to liberty and its safeguards in the context of pre-trial detention.

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## INTRODUCTION

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) replaces the Code of Criminal Procedure, 1973 and governs arrest, remand and bail procedures in India. Among its most critical safeguards are remand provisions (Section 187) and the concept of default bail, which ensures that an accused is not subjected to indefinite detention without completion of investigation. These provisions embody the constitutional mandate of personal liberty under Article 21. Bail is among the most vital safeguards of personal liberty in criminal jurisprudence, ensuring that pre-conviction detention remains exceptional. Indian jurisprudence has consistently emphasized that the presumption of innocence must translate into practical liberty until conviction. Historically, the Code of Criminal Procedure, 1973, despite multiple amendments, reflected procedural assumptions that prioritized state convenience over individual rights. The BNSS, 2023, seeks to modernize this framework by codifying default bail, introducing sentence-based eligibility for under trials, and expanding judicial discretion. Its aims to modernize criminal procedure while balancing the state power of investigation and individual liberty (Article 21 jurisprudence). And default bail and remand are central to custodial justice framework. This paper undertakes a critical examination of whether the BNSS genuinely advances liberty or risks normalizing prolonged detention<sup>1</sup>.

## CONCEPTUAL FRAMEWORK

### Remand under BNSS

Remand refers to the detention of an accused person in police or judicial custody upon authorization by a Magistrate. Under Section 187 BNSS, the accused must be produced within 24 hours of arrest, police custody is limited to 15 days in total. Further detention can be authorized as judicial custody and maximum detention during investigation should be 90 days for serious offences and 60 days for other offences. The purpose of remand is to balance effective investigation and protection against arbitrary detention. However, concerns persist regarding mechanical remand orders and lack of judicial scrutiny.

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<sup>1</sup> State of Rajasthan v. Balchand, 4 SCC 308, 1977

Key features of this section magistrate can authorize 15 days of police custody. Major change of this provision these 15 days can now be split and used anytime within the first 40 or 60 days (depending on offence severity) and total detention still capped at 60/90 days.

### Types of Remand

The following are the main types of remand:

#### a. Police Custody Remand

Police custody remand refers to the detention of the accused in the custody of the police for the purpose of investigation. This type of remand is granted when the investigating agency requires the accused for interrogation, recovery of evidence, or identification of other persons involved in the offence. However, such custody is limited to a maximum period of 15 days and is subject to judicial scrutiny to prevent misuse. Transit remand is granted when an accused person is arrested in a place different from where the offence was committed. In such cases, the nearest Magistrate authorizes temporary custody to enable the police to transfer the accused to the appropriate jurisdiction. This ensures that the arrest and transfer are conducted lawfully.

#### b. Judicial Custody Remand

Judicial custody remand means that the accused is sent to jail and remains under the supervision of the court rather than the police. This form of remand is generally ordered when further police interrogation is not necessary. The accused remains in custody for a longer duration, subject to statutory limits, and is entitled to safeguards such as protection from coercion. Initial remand is the first order of detention passed by a Magistrate when the accused is produced before the court within 24 hours of arrest. At this stage, the Magistrate decides whether the accused should be kept in police custody or judicial custody, depending on the requirements of the investigation. Successive remand refers to the extension of custody after the initial remand period. The Magistrate may extend the remand from time to time, but only within the limits prescribed by law and after applying judicial mind. Mechanical or routine extensions are discouraged by courts.

### Constitutional Safeguards of Remand

Remand, though a necessary tool in criminal procedure, directly affects the personal liberty of an individual. Therefore, the Constitution provides important safeguards to prevent arbitrary detention and misuse of remand powers. These safeguards ensure that the process remains fair, just, and reasonable. The constitutional safeguards surrounding remand reflect a careful balance between the needs of investigation and the protection of individual liberty. Through Article 21 of the Indian Constitution and Article 22 of the Indian Constitution, the Constitution ensures that remand is not misused as a tool of oppression.

**Right to Life and Personal Liberty:** The most fundamental safeguard is under Article 21 of the Indian Constitution, which guarantees that remand must follow a fair, just and reasonable procedure. Arbitrary or mechanical detention violates Article 21 and courts have expanded this right to include Right to dignity, Protection from custodial abuse and Right to speedy trial. The Supreme Court in *Maneka Gandhi v. Union of India* expanded the scope of Article 21 by holding that any procedure depriving liberty must be non-arbitrary and reasonable.<sup>2</sup> Thus, remand orders must satisfy the test of fairness and cannot be mechanical.

**Protection Against Arbitrary Arrest and Detention:** Article 22 of the Indian Constitution provides specific safeguards the accused must be informed of grounds of arrest, and allowed to consult a lawyer. And must be produced before a Magistrate within 24 hours and cannot be detained beyond 24 hours without judicial authority. This ensures that remand is not purely a police decision, but subject to judicial control.

**Right to be Produced Before a Magistrate:** Under Article 22(2) mandatory production within 24 hours. Magistrate must apply judicial mind and decide necessity of remand. And failure to comply makes detention illegal. In *Madhu Limaye v. Sub-Divisional Magistrate*, the Court emphasized that detention without proper judicial scrutiny is unconstitutional.<sup>3</sup>

**Right to Legal Representation:** Guaranteed under Article 22(1) and expanded under Article 21. The accused has the right to consult and be defended by a lawyer and essential during remand hearings to oppose unnecessary custody and Protect against coercion. In *Hussainara Khatoun v. State of Bihar*, the Supreme Court recognized free legal aid and speedy trial as

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<sup>2</sup> *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

<sup>3</sup> *Madhu Limaye v. Sub-Divisional Magistrate*, AIR 1971 SC 2486.

essential components of fair procedure.<sup>4</sup> Legal representation is crucial during remand hearings to challenge unlawful custody.

**Protection Against Custodial Violence:** Derived from Article 21. It ensures humane treatment in custody and protection from torture and ill-treatment. Courts have laid down guidelines to prevent abuse during police custody remand. The Supreme Court in *D.K. Basu v. State of West Bengal* laid down detailed guidelines to prevent custodial torture and deaths.<sup>5</sup>

**Right Against Indefinite Detention (Default Bail):** Though statutory, default bail is linked to Article 21. It ensures that investigation is completed within 60/90 days and otherwise, the accused gains a right to bail. This acts as a check on prolonged remand. In *Uday Mohanlal Acharya v. State of Maharashtra*, the Court held that the right to default bail is an indefeasible right once the statutory period expires.<sup>6</sup> This ensures that remand does not become a tool for indefinite detention.

**Judicial Oversight and Reasoned Orders:** Magistrates must record reasons for granting remand and avoid mechanical extensions. Judicial scrutiny ensures accountability of police and protection of liberty. In *Arnesh Kumar v. State of Bihar*, the Supreme Court cautioned against routine arrests and emphasized judicial responsibility in authorizing detention.<sup>7</sup>

### Default Bail

Default bail, also known as statutory bail, is a crucial safeguard in criminal procedure that ensures that an accused person is not subjected to indefinite detention during investigation. It arises when the investigating agency fails to complete the investigation within the prescribed time limit. Under the *Bharatiya Nagarik Suraksha Sanhita, 2023*, this right continues to play a significant role in protecting personal liberty.

Default bail is not based on the merits of the case but on the failure of the prosecution to file a charge sheet within the statutory period. It is therefore considered an indefeasible right of the accused. The Supreme Court in *Uday Mohanlal Acharya v. State of Maharashtra* held that the right to default bail becomes enforceable once the statutory period expires and the accused is prepared to furnish bail.

**i. Statutory Provision under BNSS:** The provision relating to default bail is contained in Section 187(3) of the BNSS. Time limits of 90 days for offences punishable with death, life imprisonment and imprisonment of 10 years or more and 60 days for all other offences. If the charge sheet is not filed within these periods, the accused is entitled to be released on bail, subject to furnishing sureties.

**ii. Constitutional Foundation:** Though default bail is a statutory right, it is deeply connected with Article 21 of the Indian Constitution, which guarantees protection of personal liberty. In *Rakesh Kumar Paul v. State of Assam*, the Court emphasized that provisions relating to default bail must be interpreted in favor of liberty.<sup>8</sup>

**iii. Essential Conditions for Grant of Default Bail:** To avail default bail, the following conditions must be satisfied with expiry of the statutory period (60/90 days) and filing of an application by the accused and willingness to furnish bail. Once these conditions are fulfilled, the Magistrate has no discretion to deny bail.

### iv. Nature of the Right: Indefeasible but Conditional

The right to default bail is indefeasible cannot be denied once accrued and conditional must be exercised before filing of charge sheet. In *Sanjay Dutt v. State*, the Court clarified that if the charge sheet is filed before the accused applies for bail, the right is extinguished.<sup>9</sup>

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<sup>4</sup> *Hussainara Khatoon v. State of Bihar*, AIR 1979 SC 1369.

<sup>5</sup> *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610.

<sup>6</sup> *Uday Mohanlal Acharya v. State of Maharashtra*, (2001) 5 SCC 453.

<sup>7</sup> *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

<sup>8</sup> *Rakesh Kumar Paul v. State of Assam*, (2017) 15 SCC 67.

<sup>9</sup> *Sanjay Dutt v. State*, (1994) 5 SCC 410.

### v. Relationship with Remand

Default bail acts as a check on prolonged judicial custody. While remand allows detention during investigation, default bail ensures investigation is time-bound and liberty is not indefinitely curtailed. Thus, it balances state power and individual rights.

### Research Hypothesis

Default bail operates as a statutory mechanism that limits prolonged remand and strengthens the protection of personal liberty under constitutional guarantees.

### Research Question

- i. How far do the provisions relating to remand and default bail under the Bharatiya Nagarik Suraksha Sanhita, 2023 ensure a balance between individual liberty and effective criminal investigation?
- ii. Whether the concept of default bail under BNSS effectively safeguards the fundamental right to personal liberty under Article 21?
- iii. Is there a need for legislative clarification or reform in BNSS provisions relating to remand and default bail?

### Research Objectives

- i. To examine how the provisions relating to remand and default bail under the Bharatiya Nagarik Suraksha Sanhita, 2023 balance effective criminal investigation with the protection of personal liberty under Article 21 of the Indian Constitution.
- ii. To analyze whether default bail effectively safeguards the fundamental right to personal liberty and limits excessive or prolonged remand.
- iii. To identify procedural ambiguities and assess the need for judicial clarification or legislative reform in the application of remand and default bail provisions.

### Key Changes and Their Impact

The shift from the Code of Criminal Procedure, 1973 to the Bharatiya Nagarik Suraksha Sanhita, 2023 introduces both structural continuity and critical procedural changes. While many provisions appear similar on paper, their practical impact especially on default bail and remand has been significant.

- i. Police custody (15 days) can now be spread over 40/60 days instead of only the initial period. Impact of this change is to increase investigative flexibility but raises risk of prolonged custodial pressure.
- ii. The 60/90-day rule for default bail remains unchanged. Impact of this change safeguard exists, but may be weakened in practice due to flexible custody.
- iii. Greater scope for interrogation and evidence collection. Impact of this improves investigation but increases chances of misuse.
- iv. Magistrates can grant custody more flexibly. Impact of this change is to allow case-specific decisions but risks inconsistent or mechanical remand orders.
- v. Terms like adequate grounds are not clearly defined. Impact of this change is to lead to uncertainty and varied interpretations. BNSS strengthens investigation but creates concerns about possible dilution of personal liberty and default bail protections.

### Interrelationship between Remand and Default Bail

Remand allows temporary detention, whereas default bail limits its duration. Thus Remand is power of the state and default bail is check on that power. This ensures that the criminal justice system does not convert pre-trial detention into punishment.

**i. Remand as a Tool of Investigation:** Remand enables the Magistrate to authorize the custody of the accused either in police custody or judicial custody. It is primarily governed by statutory provisions (Section 187 BNSS), which allow detention for a limited period to facilitate investigation. The purpose of remand is to ensure proper investigation, prevent tampering with evidence and secure the presence of the accused. However, remand directly impacts personal liberty and must therefore comply with constitutional safeguards under Article 21 of the Indian Constitution.

**ii. Default Bail as a Limitation on Remand:** Default bail arises when the investigating agency fails to complete the investigation within the prescribed time limits (60 or 90 days). It is provided under Section 187(3) of the BNSS. Default bail serves as a statutory check on the power of remand, ensuring that detention is not indefinite, investigation is conducted

diligently and the accused is not kept in custody unnecessarily. In *Uday Mohanlal Acharya v. State of Maharashtra*, the Supreme Court recognized default bail as an indefeasible right once the statutory period expires.<sup>10</sup>

### Emerging Legal Challenges

- i. Procedural ambiguities in timelines and filing of charge sheets under the *Bharatiya Nagarik Suraksha Sanhita, 2023* affect uniform enforcement of default bail.
- ii. Misuse of remand and delayed investigations often undermine the safeguard of personal liberty under Article 21 of the Indian Constitution.
- iii. Inconsistent judicial interpretation creates uncertainty, highlighting the need for clearer legal and procedural guidelines.

### Judicial Responses

With the introduction of the *Bharatiya Nagarik Suraksha Sanhita, 2023*, courts especially the Supreme Court and High Courts have begun shaping its interpretation, focusing on protecting personal liberty while accommodating procedural changes.

In *Uday Mohanlal Acharya v. State of Maharashtra*, the Supreme Court held that once the statutory period expires, bail must be granted. The courts continue to uphold that default bail is an indefeasible right under Article 21. Even under BNS, courts are likely to strictly enforce this right.

In *Arnab Manoranjan Goswami v. State of Maharashtra*, the Court stressed protection of liberty against arbitrary arrest. The courts are increasing oversight over police custody requests. Judiciary has emphasized that remand cannot be granted mechanically and magistrates must record reasons for detention.

Earlier ruling *CBI v. Anupam J. Kulkarni* restricted police custody to the first 15 days. Under BNS, courts may need to reinterpret this principle due to staggered custody provisions.

Courts are attempting to strike a balance allow effective investigation, Prevent misuse of expanded powers. In *Rakesh Kumar Paul v. State of Assam*, the Court favored a liberal interpretation of bail provisions. Judiciary under BNS is playing a crucial balancing role, ensuring that expanded police powers do not override constitutional protections of personal liberty. The long pending demand for reconsidering the law laid down by the Supreme Court in *CBI v. Anupam J. Kulkarni*<sup>11</sup> has also been settled in the *Sanhita*. Under the modified provision on remand, the police custody is allowed up to forty or sixty days out of the total period of custody of sixty or ninety days respectively.<sup>12</sup>

The remand Magistrate is required to ascertain the status of the accused vis-à-vis bail before considering to remand him to custody. Further, it seems the *Sanhita* went against the idea of 'house arrest' as propounded by the Supreme Court in *Gautam Navlakha v. NIA*<sup>13</sup> by categorically referring custody to mean either in police station or in prison which includes any other place so declared as prison by the Government.<sup>14</sup> The *Sanhita* brings clarity in the concept of 'nearest Magistrate' for the purpose of producing the accused person post arrest by introducing both 'jurisdictional and non-jurisdictional Magistrates' in the relevant provision. This will guide the police officer effecting the arrest in inter-state matters to take the arrested person before the nearest Magistrate from the place of arrest rather taking such person before the jurisdictional Magistrate.

The law laid down by the Supreme Court in *Siddharth v. State of U.P.*<sup>15</sup> also finds place in the *Sanhita* wherein the police officer is directed not to arrest the accused person only for the purpose of filing the police report before the Magistrate. The Magistrate is also directed not to refuse to accept the report on the ground that the accused is not produced before him with the report.<sup>16</sup> Similarly, the compulsory requirement of arrest for taking specimen signature or handwriting has been relaxed under the *Sanhita*.

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<sup>10</sup> *Uday Mohanlal Acharya v. State of Maharashtra*, (2001) 5 SCC 453.

<sup>11</sup> (1992) 3 SCC 141. Recently in more than one case the Supreme Court opined relook at *Anupam J. Kulkarni* ruling - *CBI v. Vikas Mishra @ Vikash Mishra* (Cri. A. 957/2023 decided on April 10, 2023); *V. Senthil Balaji v. State represented by Deputy Director* (Cri. A. 2284/2023 decided on August 7, 2023).

<sup>12</sup> *Bharatiya Nagarik Suraksha Sanhita, 2023*, s. 187.

<sup>13</sup> 2021 SCC OnLine SC 382.

<sup>14</sup> *Bharatiya Nagarik Suraksha Sanhita, 2023*, s. 187.

<sup>15</sup> (2022) 1 SCC 676.

<sup>16</sup> *Bharatiya Nagarik Suraksha Sanhita, 2023*, s. 190(1) proviso.

### Recommendations

- i. The provisions relating to remand under the Bharatiya Nagarik Suraksha Sanhita, 2023 should be strictly monitored to prevent mechanical or unnecessary custody orders and ensure judicial application of mind.
- ii. Clear procedural guidelines should be issued for computation of limitation periods and filing of charge sheets to strengthen the effectiveness of default bail and reduce ambiguity.
- iii. Greater judicial uniformity and training should be ensured so that safeguards under Article 21 of the Indian Constitution are consistently protected in remand and bail decisions.

### CONCLUSION

Default bail and remand under the Bharatiya Nagarik Suraksha Sanhita, 2023 reflect a delicate balance between state power and personal liberty. However, emerging challenges especially misuse of procedural provisions and inconsistent application highlight the need for strong judicial oversight, clear interpretative guidelines and rights-oriented enforcement. Ultimately, the success of BNSS depends not just on statutory text, but on how faithfully constitutional values are implemented in practice.

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