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# The Interplay between Anticipatory Bail and Arrest Powers under the Bharatiya Nagarik Suraksha Sanhita, 2023: Constitutional Protection of Personal Liberty

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**Abstract**

The Bharatiya Nagarik Suraksha Sanhita, 2023,[1] which took effect on 1 July 2024, supersedes the Code of Criminal Procedure, 1973, and alters the scale of the State's powers of arrest and the rights of the individual in relation to personal liberty. This paper analyses the relationship between the power of arrest under section 35 of the BNSS[2] and anticipatory bail under section 482 of the BNSS,[3] and places that relationship within the guarantee of personal liberty under article 21 of the Constitution of India.[4] It examines the statutory provisions, the principal departures from the repealed Code, and the continued applicability of the Constitution Bench decisions in Gurbaksh Singh Sibbia v. State of Punjab[5] and Sushila Aggarwal v. State (NCT of Delhi).[6] The statutory requirements of necessity, recorded reasons and notice of appearance give concrete form to the constitutional obligation not to deprive a person of liberty arbitrarily. Anticipatory bail remains the pre-arrest judicial protection which balances those structured arrest provisions. Drawing on the statute, precedent and the institutional literature, the paper identifies remaining concerns of discretion, exclusion of certain offences, and consistency of application, and closes with the likely lines of future interpretation under India's new criminal procedure.

**Keywords:** Anticipatory bail; arrest; Bharatiya Nagarik Suraksha Sanhita, 2023; section 482; section 35; article 21; personal liberty; criminal procedure.

[1] The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023) [hereinafter "the BNSS"]. The BNSS came into force on 1 July 2024 and repealed the Code of Criminal Procedure, 1973 (Act 2 of 1974) [hereinafter "the Code"].
[2] *Id.*, s. 35.
[3] *Id.*, s. 482.
[4] The Constitution of India, art. 21.
[5] (1980) 2 SCC 565.
[6] (2020) 5 SCC 1.

## 1. Introduction

One of the most constitutionally sensitive interfaces between State power and personal freedom is the power to arrest, set against the right of a person to seek protection before the arrest takes place. In a system governed by the rule of law, a power to take away freedom must be limited, and there must be an effective judicial procedure to prevent its arbitrary or mechanical exercise. For nearly five decades that interface was governed by the Code of Criminal Procedure, 1973.[7] The constitutional principles remain. The statutory structure has been revised by the Bharatiya Nagarik Suraksha Sanhita, 2023, which replaced the Code with effect from 1 July 2024.[8]

Life and personal liberty may not be taken away except according to procedure established by law.[9] Since *Maneka Gandhi v. Union of India*,[10] the Supreme Court has held that the procedure contemplated by article 21 must be fair, just and reasonable. Arrest is an immediate restriction of personal liberty. It is justified only where it serves a legitimate purpose and is proportionate to that purpose. Anticipatory bail was introduced into section 438 of the Code on the recommendation of the Law Commission,[11] and has been carried into section 482 of the BNSS.[12] It is a judicial proceeding designed to protect liberty before arrest actually takes place.

This paper examines the relationship between the arrest powers in section 35 of the BNSS[13] and anticipatory bail in section 482.[14] It considers how far the new text structures police discretion, and how far pre-arrest bail before the High Court and the Court of Session remains a judicial control upon that discretion. The central argument is that the two provisions are complementary. Read with article 21,[15] they form a dual protection. Section 35 constrains the power of arrest at the point at which it is exercised. Section 482 supplies a remedy before the deprivation of liberty which that power contemplates has occurred.

The inquiry belongs to the larger restatement of criminal law, which also includes the Bharatiya Nyaya Sanhita, 2023 and the Bharatiya Sakshya Adhiniyam, 2023.[16] Substantive offences and the rules of evidence have been re-codified. The procedural statute remains the principal channel through which the State's coercive power is exercised and controlled. Any assessment of the new arrest and bail regime must therefore stay close to the text of the BNSS, and to the constitutional limits on every form of State power.

The paper is arranged as follows. Section II reviews the constitutional foundations of personal liberty in relation to arrest and anticipatory bail. Section III discusses arrest under the BNSS, including what has been consolidated and what is new. Section IV deals with anticipatory bail under section 482 of

[7] The Code of Criminal Procedure, 1973 (Act 2 of 1974).
[8] *Supra* note 1.
[9] *Supra* note 4.
[10] (1978) 1 SCC 248.
[11] Law Commission of India, "41st Report on the Code of Criminal Procedure, 1898" para. 39.9 (September, 1969).
[12] *Supra* note 1, s. 482; *supra* note 7, s. 438.
[13] *Supra* note 1, s. 35.
[14] *Id.*, s. 482.
[15] *Supra* note 4.
[16] The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023); the Bharatiya Sakshya Adhiniyam, 2023 (Act 47 of 2023).

the BNSS,[17] and with continuity and change from section 438 of the Code.[18] Section V examines the constitutional relationship between the two regimes. Section VI identifies the remaining difficulties. Section VII sets out the conclusion and the lines of further inquiry.

## 2. Literature Review and Constitutional Foundations

### A. Constitutional foundations under article 21

The right to personal liberty under article 21 is not a residual liberty. It is a fundamental right of the highest order.[19] An early and narrow reading of "personal liberty" was given in *A.K. Gopalan v. State of Madras*.[20] In *Maneka Gandhi v. Union of India*[21] the Court required procedure established by law to be fair, just and reasonable, and held that articles 14, 19 and 21 are not watertight compartments.[22] Later authority has drawn dignity, privacy and the presumption of innocence into the content of personal liberty.[23]

On arrest and detention, the Court has repeatedly held that the existence of a power to arrest is not a licence to arrest. In *Joginder Kumar v. State of U.P.*[24] it was held that arrest is not to be made in a routine manner, on a mere allegation of complicity. There must be a reasonable satisfaction, after some investigation, of the genuineness of the complaint and of the person's complicity, and of the need to arrest. Deprivation of liberty is a serious matter. The power need not be exercised in every case. The Court required that the arrested person be informed that a friend, relative or other person may be told of the arrest and of the place of detention, and that the Magistrate before whom he is produced be satisfied that these requirements have been met.[25]

Later authority carried these limits further. *Arnesh Kumar v. State of Bihar*[26] held that the police must not arrest as a matter of course, and must record reasons, in cases where the offence is punishable with imprisonment for a term which may extend to seven years. The Court attached departmental consequences, and contempt, to non-compliance. The effect of this line of cases is that an arrest, if it is to satisfy the Constitution, must be necessary, reasoned and proportionate.[27]

[17] *Supra* note 1, s. 482.
[18] *Supra* note 7, s. 438.
[19] *Supra* note 4. See also M.P. Jain, *Indian Constitutional Law* (LexisNexis, Gurgaon, 8th edn., 2018).
[20] AIR 1950 SC 27.
[21] *Supra* note 10.
[22] The Constitution of India, arts. 14, 19, 21.
[23] *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1; *Data Ram Singh v. State of U.P.*, (2018) 3 SCC 22.
[24] (1994) 4 SCC 260.
[25] *Id.* The practical duties stated in the judgment were later given statutory form by the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009), which inserted sections 41A to 41D into the Code. The corresponding provisions are now the BNSS, ss. 35(3) to 35(6), 36 and 48. *Supra* note 1.
[26] (2014) 8 SCC 273.
[27] *Id.* See also *supra* note 24.

## B. The foundational jurisprudence on anticipatory bail

*Gurbaksh Singh Sibbia v. State of Punjab*[28] remains the governing precedent on anticipatory bail. The Court held that the power under section 438 of the Code, now section 482 of the BNSS,[29] is wide and discretionary, and must be exercised judicially. The applicant must show "reason to believe" that he may be arrested on an accusation of having committed a non-bailable offence. A bare fear, or a vague suspicion, is not enough.[30] Filing of a first information report is not a condition precedent. The Court refused to allow High Courts to lay down rigid restrictions which the statute does not contain, and insisted that article 21 be read liberally in this setting.[31] It disapproved of a blanket order covering unknown future offences. It also made clear that the power is not confined to exceptional cases, and that the High Court and the Court of Session may impose conditions appropriate to the facts.[32]

Four decades later, a Constitution Bench in *Sushila Aggarwal v. State (NCT of Delhi)*[33] settled the duration of anticipatory bail. Protection under the provision need not be tied to a fixed period. Ordinarily it should continue until the end of the trial.[34] Decisions which had required a mandatory time-limit, and surrender on its expiry, were overruled. The Court held at the same time that conditions of the kind provided in section 437(3), read with section 438(2) of the Code, now section 480(3) and section 482(2) of the BNSS, may be imposed, and that in an appropriate case the court may still limit the duration of the order.[35] The judgment reaffirmed the liberal approach of *Sibbia*, while preserving a case-specific discretion.[36]

These principles have been applied in a variety of factual settings. Courts have had to consider whether a person already in custody in one case may seek anticipatory bail in another; whether an allegation of political motivation is relevant to the need for pre-arrest protection; and whether the mere registration of a first information report is a ground for refusal.[37] The common thread is that anticipatory bail is a safeguard of liberty, and must be applied with care so that the values of article 21 are not defeated.[38]

[28] *Supra* note 5.

[29] *Supra* note 7, s. 438; *supra* note 1, s. 482.

[30] *Supra* note 5.

[31] *Supra* note 4; *supra* note 5.

[32] *Supra* note 5.

[33] *Supra* note 6.

[34] *Ibid.*

[35] *Ibid.* The conditions referred to are those in the Code of Criminal Procedure, 1973 (Act 2 of 1974), ss. 437(3) and 438(2), now the BNSS, ss. 480(3) and 482(2). *Supra* note 1.

[36] *Supra* note 5; *supra* note 6.

[37] The rule that registration of a first information report is not a condition precedent, and that mere registration of a case does not conclude the question of pre-arrest protection, was laid down in *supra* note 5. The relevance of an accusation made in order to injure or humiliate the applicant was introduced into section 438(1) of the Code by the Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005). A claim for anticipatory bail in a distinct accusation, including where the applicant is already in custody in another case, remains a fact-specific application of section 438 of the Code and, after 1 July 2024, of section 482 of the BNSS, read with the requirement of "reason to believe". *Supra* note 1, s. 482.

[38] *Supra* note 4.

### C. Commentary and official reports on the reform

The institutional writing on the reform records that the new statute largely retains the architecture of the earlier safeguards, draws scattered provisions into one place, and adds a protection for elderly and infirm persons in section 35(7).[39] The omission from section 482 of the factors which the amended section 438(1) of the Code had enumerated leaves the court a wider field of appreciation on the face of the text.[40] Section 482(4), at the same time, shows a deliberate legislative choice that, in specified serious sexual offences, protection of the victim and the needs of investigation prevail over the statutory remedy of anticipatory bail.[41]

The constitutional frame has not changed. The BNSS is a procedural statute. It cannot operate as a restriction upon the fundamental rights in Part III.[42] Every provision on arrest and bail has therefore to be read so as to satisfy the standard of fairness and reasonableness in article 21.[43] Section 482 is the successor of section 438, and the established precedent continues to govern, subject to the changes in the text.[44]

## 3. Arrest Powers under the BNSS, 2023

### A. Section 35: structure and content

Chapter V of the Bharatiya Nagarik Suraksha Sanhita deals with arrest of persons.[45] Section 35 is the principal provision on arrest without warrant. It consolidates and renumbers sections 41 and 41A of the Code.[46] The consolidation is not merely formal. Placing the notice of appearance in the same section as the power of arrest expresses, in the text itself, a preference for non-custodial measures where arrest is not required.

A police officer may arrest without a warrant where a cognizable offence is committed in his presence, and, in the circumstances stated in the section, where a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists.[47] The duty to record reasons

[39] *Supra* note 1, s. 35(7). See Law Commission of India, "177th Report on Law Relating to Arrest" (2001); Law Commission of India, "268th Report on Amendments to Criminal Procedure Code, 1973 – Provisions Relating to Bail" (May, 2017); Government of India, "Report of the Committee on Reforms of Criminal Justice System" (Ministry of Home Affairs, 2003).

[40] The factors were the nature and gravity of the accusation, the antecedents of the applicant, the possibility of his fleeing from justice, and whether the accusation had been made with the object of injuring or humiliating the applicant. They stood in the Code of Criminal Procedure, 1973, s. 438(1), as amended by the Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005). They are not reproduced in the BNSS, s. 482(1). *Supra* note 1.

[41] *Supra* note 1, s. 482(4); the Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), s. 65 and s. 70(2). The bar continues, in substance, the exclusion introduced into section 438 of the Code by the Criminal Law (Amendment) Act, 2018 (Act 22 of 2018).

[42] The Constitution of India, art. 13(2).

[43] *Supra* note 4.

[44] *Supra* note 1, s. 482; *supra* note 7, s. 438; *supra* note 5; *supra* note 6.

[45] *Supra* note 1, ss. 35 to 62.

[46] *Supra* note 7, ss. 41, 41A; *supra* note 1, s. 35. The necessity standard and the duty to record reasons were introduced into section 41 of the Code by the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009).

[47] *Supra* note 1, s. 35(1). Clause (a) covers a cognizable offence committed in the presence of a police officer. Clause (b) covers a reasonable complaint, credible information or reasonable suspicion that a cognizable offence punishable with imprisonment for less than seven years, or extending to seven years, has been committed, and permits arrest only where the

is the means by which that discretion is later examined, including when the arrested person is produced before a Magistrate. For an offence punishable with imprisonment for more than seven years, or with death, the section is framed on credible information together with recorded reasons. It should not be assumed that the necessity conditions applicable up to seven years apply, without change of language, to the graver class.[48] The record of reasons is what makes the exercise of discretion reviewable.[49]

### B. Notice of appearance and the preference for non-custodial measures

Where arrest is not required under section 35(1), sub-sections (3) to (6) require a notice of appearance.[50] The person against whom a reasonable complaint, credible information or reasonable suspicion exists is directed to appear before the officer, or at such other place as the notice specifies. Where that person complies, and continues to comply, he is not to be arrested in respect of the offence in the notice unless the officer, for reasons recorded in writing, is of the opinion that he ought to be arrested.[51] The scheme continues section 41A of the Code, and the legislative preference against immediate custody in the investigation of a cognizable offence for which arrest is not necessary.[52]

The notice is not a formality. It requires the police to decide whether custody, or physical restraint, is actually necessary. Where the person appears and cooperates, investigation can proceed without the personal and social cost of detention. The further duty to record reasons, if arrest is made after compliance, is an accountability for departing from that course.[53]

### C. Safeguard for elderly and infirm persons

Section 35(7) has no identical predecessor in the Code.[54] It provides that no arrest shall be made, without the prior permission of an officer not below the rank of Deputy Superintendent of Police, where the offence is punishable with imprisonment for less than three years and the person concerned is infirm or is above sixty years of age.[55] The provision places a further supervisory control before liberty is restrained in the case of persons whose vulnerability calls for it. It is a statutory expression of proportionality in the use of coercion.[56]

### D. Related procedural safeguards

The BNSS also restates the duties which attend the making of an arrest. Under section 36 the officer making the arrest must bear a clear identification of his name, and must prepare a memorandum

officer has reason to believe that the person has committed the offence and the arrest is necessary for a purpose stated in the clause. Reasons for making the arrest, and reasons for not making it, are required to be recorded in writing.

[48] *Supra* note 1, s. 35(1). Where the offence is punishable with imprisonment for more than seven years, or with death, arrest may follow on credible information that a cognizable offence has been committed, with reasons recorded. The fuller necessity conditions are those in section 35(1)(b), which applies where the imprisonment may extend to seven years. See also *supra* note 26.

[49] *Supra* note 24; *supra* note 26.

[50] *Supra* note 1, ss. 35(3) to 35(6).

[51] *Id.*, s. 35(5).

[52] *Supra* note 7, s. 41A, inserted by the Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009).

[53] *Supra* note 1, s. 35(5); *supra* note 26.

[54] *Supra* note 1, s. 35(7). Section 41 of the Code contained no identical requirement of prior permission.

[55] *Id.*, s. 35(7).

[56] *Supra* note 4; *supra* note 10.

of arrest attested by at least one witness and countersigned by the person arrested.[57] Section 37 requires a designated police officer, in every district and at every police station, to maintain and display the particulars of persons arrested, including in digital form.[58] Under section 38 an arrested person is entitled to meet an advocate of his choice during interrogation, though not throughout the interrogation.[59] The duty to give notice of the arrest to a relative, friend or other nominated person is separately continued.[60] Read with articles 21 and 22,[61] these provisions are a set of controls on the manner of arrest, additional to the controls on whether an arrest may be made at all under section 35.[62]

Chapter V is, in these respects, more explicit than the chapter it replaces. Necessity, recorded reasons, notice, and a specific protection for the elderly and the infirm bring the text closer to the constitutional limits developed by the Supreme Court over the last three decades.[63]

## 4. Anticipatory Bail under Section 482

### A. Statutory text and core elements

Section 482 of the BNSS succeeds section 438 of the Code.[64] Where any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under the section. That Court may, if it thinks fit, direct that in the event of such arrest he shall be released on bail.[65]

When such a direction is made, sub-section (2) authorises the Court to impose conditions in the light of the facts of the particular case. The conditions expressly contemplated are: that the person shall make himself available for interrogation by a police officer as and when required; that he shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer; that he shall not leave India without the previous permission of the Court; and such other condition as may be imposed under sub-section (3) of section 480, as if the bail were granted under that section.[66]

If the person is thereafter arrested without a warrant by an officer in charge of a police station on that accusation, and is prepared, at the time of arrest or while in the custody of that officer, to give bail, he shall be released on bail. If a Magistrate taking cognizance decides that a warrant should issue in the first instance, he shall issue a bailable warrant in conformity with the direction.[67] The pre-arrest order is thus made effective at the moment of arrest, and a later warrant must conform to the protection already granted.

[57] *Supra* note 1, s. 36.
[58] *Id.*, s. 37.
[59] *Id.*, s. 38.
[60] *Id.*, s. 48, corresponding to the Code, s. 50A. See also *D.K. Basu v. State of West Bengal*, (1997) 1 SCC 416.
[61] The Constitution of India, arts. 21, 22.
[62] *Supra* note 1, s. 35.
[63] *Supra* note 24; *supra* note 26; *supra* note 1, s. 35.
[64] *Supra* note 1, s. 482; *supra* note 7, s. 438.
[65] *Supra* note 1, s. 482(1).
[66] *Supra* note 1, s. 482(2). The cross-reference in clause (iv) is to s. 480(3), corresponding to the Code, s. 437(3).
[67] *Supra* note 1, s. 482(3).

### B. Principal changes from section 438 of the Code

The differences of text between section 482 of the BNSS and section 438 of the Code are real, and they should be noticed rather than assumed away.[68] First, section 482 does not repeat the factors which the amended section 438(1) had listed: the nature and gravity of the accusation, the antecedents of the applicant, the possibility of flight, and whether the accusation was made with the object of injuring or humiliating the applicant.[69] The omission widens the text on which the court acts. It does not authorise an unreasoned order. Secondly, the express machinery of notice to the Public Prosecutor, and of the applicant's presence at the final hearing, is not carried forward in the same words.[70] Courts may still grant interim protection and still hear the prosecutor. The power to do so is no longer written out as a separate statutory timetable. Thirdly, sub-section (4) excludes the section where the accusation is of an offence under section 65, or under sub-section (2) of section 70, of the Bharatiya Nyaya Sanhita, 2023.[71]

These changes have to be read with the principles already settled. Omission of the enumerated factors does not leave the discretion at large. The considerations developed in *Sibbia* and in *Sushila Aggarwal* continue to structure the decision.[72] Absence of an express sub-section on interim orders does not, of itself, deny interim protection where the facts justify it.[73] Where sub-section (4) applies, the statutory remedy is not available. A court cannot grant anticipatory bail by ignoring that exclusion.[74]

### C. Continuing relevance of precedent

Subject to the new text, the principles stated by the Constitution Benches in *Sibbia* and *Sushila Aggarwal* govern the discretion under section 482.[75] An application must rest on specific facts connected with a definite accusation, not on a general apprehension. The court looks at the nature and gravity of the accusation, the role attributed to the applicant, the likelihood of interference with the investigation or of tampering with evidence, and the likelihood of flight. Protection, once granted, is not to be cut down to a fixed period as a matter of routine.[76]

Continuity of precedent matters for the transition. It reduces the risk that the repeal of the Code will be treated as wiping out the standards on which anticipatory bail has been decided, or as creating a

[68] *Supra* note 1, s. 482; *supra* note 7, s. 438.

[69] *Supra* note 40.

[70] The requirement of notice to the Public Prosecutor was part of the amendments made to section 438 of the Code by the Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005). It is not reproduced as an express sub-section of the BNSS, s. 482. *Supra* note 1.

[71] *Supra* note 1, s. 482(4); the Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), ss. 65, 70(2). Section 65 provides the punishment for rape of a woman under sixteen years of age and for rape of a woman under twelve years of age. Section 70(2) provides the punishment for gang rape of a woman under eighteen years of age.

[72] *Supra* note 5; *supra* note 6.

[73] *Supra* note 6. The Constitution Bench recognised that interim protection may be granted while the application is pending final disposal.

[74] *Supra* note 1, s. 482(4).

[75] *Supra* note 5; *supra* note 6; *supra* note 1, s. 482.

[76] *Supra* note 5; *supra* note 6.

gap in which no principle applies.[77] At the same time, the new wording has to be applied as it stands. That is especially so where sub-section (4) is invoked.[78]

## 5. The Constitutional Interplay

### A. Complementary, rather than conflicting, regimes

Section 35 and section 482 do not conflict. They regulate personal liberty at two different points.[79] Section 35 limits the police power of arrest. It requires recorded reasons and, where arrest is not required, a notice of appearance rather than custody.[80] Section 482 provides a judicial procedure, invoked before arrest, which may prevent the very deprivation of liberty that the power of arrest would otherwise bring about.[81] Together they give practical content to the proposition that arrest is neither automatic nor routine.[82]

On an application under section 482 the court undertakes an inquiry which is parallel to, but not the same as, the assessment required of the police under section 35.[83] The police inquiry is an administrative judgment of investigative necessity. The judicial inquiry is a balance between the individual's right and the interests of investigation and public order, conducted on the principles in *Sibbia* and *Sushila Aggarwal*.[84]

### B. Article 21 as the unifying principle

Both provisions are to be read in the light of article 21.[85] Anticipatory bail has been treated by the Supreme Court as a means of giving effect to the constitutional protection of personal liberty.[86] A person who reasonably apprehends an invasion of that liberty may approach the court before the invasion occurs. The remedy does not extinguish the power of investigation. It requires that the power not be used to restrict liberty where restriction is not necessary. In the same way, section 35 is part of the procedure by which any such restriction must be shown to be fair, just and reasonable.[87]

The presumption of innocence bears directly on pre-trial custody.[88] A person who has not been convicted is entitled to that presumption. Anticipatory bail gives it a practical consequence. On conditions, the applicant remains at liberty while investigation and trial proceed.[89]

[77] *Supra* note 5; *supra* note 6.
[78] *Supra* note 1, s. 482(4).
[79] *Supra* note 1, ss. 35, 482; *supra* note 4.
[80] *Supra* note 1, s. 35.
[81] *Id.*, s. 482.
[82] *Supra* note 24; *supra* note 26.
[83] *Supra* note 1, ss. 35, 482.
[84] *Supra* note 5; *supra* note 6.
[85] *Supra* note 4.
[86] *Supra* note 5; *supra* note 6; *supra* note 10.
[87] *Supra* note 1, s. 35; *supra* note 10.
[88] *Supra* note 4; *Data Ram Singh v. State of U.P.*, (2018) 3 SCC 22.
[89] *Supra* note 6.

### C. The exclusion in section 482(4), and its constitutional limit

Section 482(4) of the BNSS is an absolute statutory bar for the offences it specifies. The legislature has, for those accusations, preferred uninterrupted investigation and protection of the victim over the statutory remedy of pre-arrest bail.[90] The safeguards of section 35 are not thereby repealed.[91] Nor is the High Court stripped of its jurisdiction under article 226, or of the inherent powers saved by the Sanhita.[92] What is withdrawn is one statutory remedy. Article 21 is not withdrawn with it.[93]

Whether that complete bar is proportionate in every set of facts is a question article 21 may yet require a court to answer.[94] The present text is clear, and a court applying section 482 is bound by the exclusion. Where anticipatory bail is unavailable, the legality of arrest and detention may still be tested under the other provisions of the Sanhita and under the Constitution.[95]

### D. The interplay in practice

The working sequence is familiar. On registration of a first information report, or on otherwise learning of an accusation, the person may apply to the Court of Session or the High Court under section 482.[96] Interim protection may be granted until final hearing.[97] Independently, the investigating agency must apply section 35, decide whether arrest is necessary, and record its reasons.[98] If anticipatory bail is granted, the direction operates on arrest: the person is to be released on bail, and is not to be kept in custody on that accusation.[99] If anticipatory bail is refused, section 35 continues to bind the police.[100] The power to investigate is untouched in either case. What differs is the lawful means of securing attendance and cooperation.

The structure serves both the individual and the administration of criminal justice. The individual is not left to an arbitrary arrest.[101] The investigating agency may still insist on cooperation, through the conditions of an anticipatory bail order or, where the statute permits, through arrest.[102] The court remains the authority which settles the balance.[103]

[90] *Supra* note 1, s. 482(4); the Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), s. 65 and s. 70(2).

[91] *Supra* note 1, s. 35.

[92] The Constitution of India, art. 226; *supra* note 1, s. 528. Section 528 of the BNSS saves the inherent powers of the High Court and corresponds to section 482 of the Code. It is distinct from section 482 of the BNSS, which provides for anticipatory bail.

[93] *Supra* note 4.

[94] *Supra* note 4; *supra* note 1, s. 482(4).

[95] The Constitution of India, arts. 21, 22 and 226; *supra* note 1, ss. 35, 47, 48, 58 and 528.

[96] *Supra* note 1, s. 482(1).

[97] *Supra* note 6.

[98] *Supra* note 1, s. 35.

[99] *Id.*, s. 482(3).

[100] *Id.*, s. 35.

[101] *Supra* note 4; *supra* note 24.

[102] *Supra* note 1, ss. 35 and 482(2).

[103] *Supra* note 5; *supra* note 6.

## 6. Challenges and Residual Risks

The rearrangement of the statute has not removed every difficulty. The first is the width of the discretion under section 482. Outcomes may differ between courts, and even within the same High Court.[104] Flexibility was a considered choice in *Sibbia*. It places a corresponding duty on the judge to give reasons which can be tested against the constitutional standard, and on appellate courts to correct orders which depart from that standard.[105]

The second difficulty is institutional. Notice of appearance, and the recording of reasons under section 35, will be as effective as police training, supervisory control, and the willingness of the Magistrate to look at the record when the arrested person is produced.[106] Without that support, the statutory duty can remain a formality. Training, standing instructions, and a periodic audit of arrest records are the practical conditions of the legislative design.[107]

The third difficulty is transitional. The BNSS has been in force only from 1 July 2024. Questions will continue to arise on the use of pre-2024 precedent, on applications which were pending under the Code, and on the effect of procedural provisions which were not re-enacted.[108] Courts have rightly treated section 482 as the successor provision. Some uncertainty at the edges is still likely. Guidance from the superior courts on the transition would narrow it.[109]

The fourth difficulty is the bar in section 482(4). The exclusion is textually clear. It is still open, in a properly framed case, to ask whether a blanket denial of anticipatory bail meets the standard of proportionality which article 21 imposes on the facts.[110] The Supreme Court has in the past refused to allow restrictions on anticipatory bail to be wider than the statute, or narrower than the Constitution, would permit. Any such scrutiny would test the boundary of the exclusion. Until that is done, the text governs.[111]

The fifth difficulty is one of volume and time. Anticipatory bail applications have to be decided while the apprehension of arrest is real. The directions on prompt consideration of bail in *Satender Kumar Antil v. Central Bureau of Investigation* continue to apply and should be followed.[112] Delay in disposing of the application can itself become the injustice, particularly where interim protection is refused, or is granted for a period too short to be of use.[113]

[104] *Supra* note 1, s. 482; *supra* note 5.
[105] *Supra* note 5; *supra* note 4.
[106] *Supra* note 1, ss. 35(1) and 35(3) to 35(6); *supra* note 26.
[107] *Supra* note 39; *supra* note 26.
[108] *Supra* note 1; *supra* note 7, s. 438.
[109] *Supra* note 5; *supra* note 6.
[110] *Supra* note 1, s. 482(4); *supra* note 4.
[111] *Supra* note 5. In *Sibbia* the Constitution Bench disapproved of judicially created bars which the statute did not contain. Section 482(4) of the BNSS is, by contrast, an express legislative exclusion, and stands until a competent court holds otherwise.
[112] (2022) 10 SCC 51.
[113] *Id.*; *supra* note 6.

## 7. Conclusion and Future Scope

The Bharatiya Nagarik Suraksha Sanhita, 2023 does not repeal the constitutional protection of personal liberty. It reorganises the statutory instruments through which that protection operates.[114] Section 35 structures the power of arrest. Where the necessity standard applies, arrest must be necessary. Reasons must be recorded. Where arrest is not required, notice must be given. In less serious offences an additional permission is required before an elderly or infirm person is arrested.[115] Section 482 preserves anticipatory bail as a judicial remedy before arrest. Particular provisions of the earlier section have been altered. The core of the law stated in *Sibbia* and *Sushila Aggarwal* has not.[116]

The two sections work as one scheme. Arrest is not a free-standing police power. It is conditioned by necessity, where the text so provides, and by a duty to record reasons.[117] The person who apprehends arrest has access to a court which can prevent the loss of liberty.[118] That is the shape which the expanded reading of article 21 has given to criminal procedure over more than four decades.[119]

Further work could usefully examine, across High Courts, the rate at which anticipatory bail is granted and refused; the practical operation of section 35, including the form of notices and of recorded reasons placed before Magistrates; and the interpretation of the bar in section 482(4).[120] A comparative study of pre-arrest protection elsewhere, and a longitudinal study of arrest rates, the length of pre-trial custody, and the outcome of anticipatory bail cases, would give a firmer base for any later amendment.[121]

Judicial supervision, legislative correction where the working of the text shows that correction is needed, and ordinary institutional capacity will decide whether article 21 remains a real protection for the person who may be arrested under the new procedure.[122] The relationship between anticipatory bail and the power of arrest is not only a problem of construction. It is a continuing constitutional argument about the limits of State power, and about the place of personal liberty, in a democracy which claims to be governed by law.[123]

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[114] *Supra* note 1; *supra* note 4.
[115] *Supra* note 1, s. 35.
[116] *Supra* note 1, s. 482; *supra* note 5; *supra* note 6.
[117] *Supra* note 1, s. 35; *supra* note 26.
[118] *Supra* note 1, s. 482; *supra* note 5.
[119] *Supra* note 10; *supra* note 4.
[120] *Supra* note 1, ss. 35 and 482(4).
[121] *Supra* note 39.
[122] *Supra* note 4; *supra* note 1, ss. 35 and 482.
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