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Warrantless Arrest Under the BNSS, 2023: Police Discretion, Procedural Safeguards and the Right to Personal Liberty in India

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ABSTRACT

The power of the police to arrest without a warrant is among the most intrusive powers the State exercises over an individual before any judicial finding of guilt. The Bharatiya Nagarik Suraksha Sanhita, 2023 (“BNSS”), which replaced the Code of Criminal Procedure, 1973 (“CrPC”) with effect from 1 July 2024, retains this power in Section 35 while surrounding it with a network of notice, recording, information and production requirements. This paper asks a specific question: when does the exercise of the power to arrest without a warrant cease to be a lawful investigative step and become inconsistent with the right to personal liberty under Article 21 of the Constitution of India?

Using a doctrinal method, the paper traces the constitutional foundations of the right against arbitrary arrest, analyses Section 35 and its companion safeguards, and studies the Supreme Court’s arrest jurisprudence from *Joginder Kumar* and

D.K. Basu through *Arnesh Kumar* to the decision of 15 January 2026 in *Satender Kumar Antil v. Central Bureau of Investigation*, which held that for offences punishable with imprisonment up to seven years a notice under Section 35(3) is the rule and arrest the exception. The paper argues that the BNSS now embodies a necessity-based model of arrest, but that the protective value of that model depends on the quality of recorded reasons, the rigour of magisterial scrutiny and the availability of real consequences for non-compliance. It proposes a six-stage diagnostic framework for identifying when police discretion becomes constitutionally suspect and closes with reform recommendations.

Keywords: BNSS 2023, Section 35, arrest without warrant, police discretion, Article 21, necessity, notice of appearance, procedural safeguards.

I: INTRODUCTION

Arrest is the point at which the abstract power of the State meets the body of the individual. It is executed by a police officer, usually without prior judicial authorisation, and its consequences are immediate: loss of liberty, exposure to custodial interrogation, possible remand, reputational injury and, for many, prolonged pre-trial incarceration. Even where the accused is ultimately acquitted, the arrest itself cannot be undone. It is for this reason that the law of arrest sits at the centre of the relationship between police power and personal liberty.

Warrantless arrest is not a hypothetical or marginal power in India. Section 35 of the Bharatiya Nagarik Suraksha Sanhita, 2023, titled “When police may arrest without warrant”, empowers a police officer, in specified circumstances, to arrest a person without an order from a Magistrate and without a warrant.¹ The Sanhita re-enacts, with modifications, Section 41 and Section 41A of the CrPC, which had themselves been reshaped in 2010 to curb unnecessary arrests.²

The Supreme Court has long recognised that the mere existence of the power to arrest is distinct from the justification for its exercise. In *Joginder Kumar v. State of Uttar Pradesh*, the Court warned that an arrest cannot be made in a routine manner on a mere allegation of an offence, and that the officer must be able to justify the arrest apart from the legality of the power.³ That distinction between *power* and *justification* is the analytical core of this paper. The BNSS supplies the power in Section 35(1); it supplies the machinery of justification in the necessity conditions of Section 35(1)(b)(ii), the requirement to record reasons, the notice regime of Section 35(3) to (7), and the ancillary duties in Sections 36 to 38, 43, 47, 48, 57, 58 and 62.

¹ Bharatiya Nagarik Suraksha Sanhita 2023 (Act 46 of 2023), s 35. The Sanhita came into force on 1 July 2024 and repealed the Code of Criminal Procedure 1973 (see s 531).

² Code of Criminal Procedure (Amendment) Act 2008 (Act 5 of 2009), which inserted s 41A and recast s 41(1)(b) of the Code of Criminal Procedure 1973 with effect from 1 November 2010.

³ *Joginder Kumar v. State of U.P.* (1994) 4 SCC 260.

The interesting research question is therefore not whether India permits arrest without a warrant; it plainly does. The question is when that power, exercised in a given case, becomes inconsistent with the individual's right to personal liberty. Answering it requires examining a chain of relationships: the police power to investigate; the power of warrantless arrest under Section 35; the need for necessity and procedural safeguards; the guarantee of life and personal liberty under Article 21; and the judicial scrutiny that must sit at the end of the chain.

The question has acquired fresh importance because the Supreme Court has recently addressed Section 35 directly. On 15 January 2026, in *Satender Kumar Antil v. Central Bureau of Investigation*, a Bench of Justices M.M. Sundresh and N. Kotiswar Singh held that for offences punishable with imprisonment up to seven years, a notice under Section 35(3) BNSS is the rule and arrest under Section 35(6) read with Section 35(1)(b) is a clear exception.⁴ This paper situates that decision within the wider constitutional and statutory framework.

1.1 Research Problem

Section 35 BNSS confers a discretionary power on the police, and discretion of this kind invites two opposite risks: over-use, where arrest becomes a default investigative tool or a means of pressure; and formalism, where the statutory safeguards are satisfied on paper through stereotyped recitals rather than genuine consideration. Both risks bear directly on Article 21. The research problem of this paper is to identify the point at which discretion, though exercised under a valid statutory power, offends the constitutional guarantee of personal liberty. There is an evident tension between the police power to investigate and the individual's right to liberty, and the difficulty lies in locating the line between them.

1.2 Literature Review

The sources on which this paper draws fall into three groups: official reports on the law of arrest, judicial decisions, and doctrinal commentary. The principal works are the following.

1. Law Commission of India, *177th Report on Law Relating to Arrest* (December 2001).⁵ This report reviewed the law of arrest and the safeguards against its misuse, and forms part of the reform background to the 2008 amendment of the CrPC. It is used in this paper to trace the origin of the necessity requirement now found in Section 35(1)(b) BNSS.
2. National Police Commission, *Third Report* (1980).⁶ The Commission's observation that a considerable proportion of arrests were unnecessary or unjustified was quoted by the Supreme Court in *Joginder Kumar v. State of U.P.* and has shaped the judicial approach to arrest ever since.
3. The Supreme Court decisions in *Joginder Kumar*, *D.K. Basu*, *Arnesh Kumar* and the two decisions in *Satender Kumar Antil v. CBI* (2022 and 2026).⁷ These form the core of the material for this paper. Together they move the law of arrest from a question of power to a question of justification, and the 2026 decision applies that approach to the text of the BNSS.
4. K.N. Chandrasekharan Pillai (rev.), *R.V. Kelkar's Criminal Procedure* (6th edn., 2018).⁸ This standard commentary explains the arrest provisions of the CrPC. Because it pre-dates the BNSS, it is used here for historical comparison of Sections 41 and 41A CrPC with Section 35 BNSS and not as authority on the new Sanhita.
5. Yash Mittal, 'Arrest Exception, Not Rule For Offences Punishable Up To 7 Yrs; S.35(3) BNSS Notice Mandatory In Such Cases: Supreme Court' (*LiveLaw*, 5 February 2026).⁹ This is an early report of the 2026 decision. It is a secondary source and is used to identify the Court's conclusions, which should be checked against the text of the judgment.

To the author's knowledge, scholarly analysis of Section 35 BNSS as distinct from Section 41 CrPC is still at an early stage. This paper seeks to contribute a structured way of testing whether a particular warrantless arrest is consistent with Article 21, in the form of the six-stage diagnostic framework presented in Part VI.

1.3 Scope of the Study

This paper is confined to the power of a police officer in India to arrest a person without a warrant under Section 35 BNSS, and to the safeguards that accompany that power. It does not deal with arrest under a warrant, arrest by a private person or by a Magistrate, preventive detention, or the special

⁴ *Satender Kumar Antil v. Central Bureau of Investigation* 2026 INSC 115 (SC, 15 January 2026); see also Yash Mittal, 'Arrest Exception, Not Rule For Offences Punishable Up To 7 Yrs; S.35(3) BNSS Notice Mandatory In Such Cases: Supreme Court' (*LiveLaw*, 5 February 2026) <<https://www.livelaw.in/supreme-court/arrest-exception-not-rule-for-offences-punishable-up-to-7-yrs-s353-bnss-notice-mandatory-supreme-court-521972>> accessed 3 September 2026.

⁵ Law Commission of India, *177th Report on Law Relating to Arrest* (December 2001).

⁶ National Police Commission, *Third Report* (Government of India 1980).

⁷ *Joginder Kumar v. State of U.P.* (1994) 4 SCC 260; *D.K. Basu v. State of West Bengal* (1997) 1 SCC 416; *Arnesh Kumar v. State of Bihar* (2014) 8 SCC 273; *Satender Kumar Antil v. Central Bureau of Investigation* (2022) 10 SCC 51.

⁸ K.N. Chandrasekharan Pillai (rev.), *R.V. Kelkar's Criminal Procedure* (6th edn., Eastern Book Company 2018).

⁹ Yash Mittal, 'Arrest Exception, Not Rule For Offences Punishable Up To 7 Yrs; S.35(3) BNSS Notice Mandatory In Such Cases: Supreme Court' (*LiveLaw*, 5 February 2026) <<https://www.livelaw.in/supreme-court/arrest-exception-not-rule-for-offences-punishable-up-to-7-yrs-s353-bnss-notice-mandatory-supreme-court-521972>> accessed 3 September 2026.

arrest provisions of statutes such as the Prevention of Money-Laundering Act, 2002 and the Unlawful Activities (Prevention) Act, 1967, except where a decision under those statutes clarifies the requirement to communicate grounds of arrest under Article 22(1). A brief comparison with England and Wales and the United States is included for perspective only.

1.4 Objective of the Study

The objectives of this research paper are as follows:

- 1 To examine the constitutional basis of the right against arbitrary arrest under Articles 14, 21 and 22 of the Constitution.
- 2 To analyse the structure of Section 35 BNSS and its accompanying safeguards, and to compare them with the corresponding provisions of the CrPC.
- 3 To evaluate the Supreme Court's arrest jurisprudence and its treatment of police discretion.
- 4 To identify implementation gaps and to propose a diagnostic framework and reforms.

1.5 Research Question

- 1 What limits does the BNSS place on the power of the police to arrest without a warrant?
- 2 How have constitutional courts read those limits in light of Article 21?
- 3 At what point does the exercise of the power become inconsistent with personal liberty, and what remedies follow?
- 4 What reforms would make the safeguards effective in practice?

1.6 Hypothesis

The statutory text of Section 35 BNSS, read with the Supreme Court's directions, is adequate on paper to protect personal liberty; however, an arrest becomes inconsistent with Article 21 where the officer's stated reasons are formulaic, where the notice route is bypassed without fresh justification, or where ancillary safeguards and magisterial scrutiny are performed mechanically.

1.7 Research Methodology

In this research paper the doctrinal and critical analysis method is followed throughout. The study is based on primary sources (the Constitution, the BNSS, the CrPC and Supreme Court judgments) and secondary sources (Law Commission and National Police Commission reports, textbooks and legal news reports of recent decisions). It does not involve empirical fieldwork, and its observations on practice draw on judicial findings and official reports rather than original data. Because the BNSS is recent, authoritative interpretation of many of its provisions is still developing, and the paper therefore relies substantially on CrPC-era jurisprudence that the courts have carried into the new Sanhita.

II: THE CONSTITUTIONAL FRAMEWORK

2.1 Article 21 and the Requirement of Fair Procedure

Article 21 provides that no person shall be deprived of life or personal liberty except according to procedure established by law.¹⁰ Since *Maneka Gandhi v. Union of India*, that procedure must itself be just, fair and reasonable; a procedure that is arbitrary or oppressive does not satisfy the Article.¹¹ The consequence for arrest is significant. It is not enough that a statute authorises the police to arrest; the manner and occasion of the arrest must also meet the standard of fairness that Article 21 demands. The Court's equality jurisprudence reinforces the point, since arbitrariness is treated as antithetical to Article 14.¹²

The right to privacy, recognised as a fundamental right in *Justice K.S. Puttaswamy v. Union of India*, adds a further layer: any State action that interferes with a fundamental right must have a basis in law, pursue a legitimate aim, be proportionate to that aim, and be accompanied by procedural safeguards against abuse.¹³ Applied to arrest, this proportionality reasoning explains why the necessity conditions in Section 35(1)(b)(ii) are not mere technicalities: they are the statutory expression of the requirement that deprivation of liberty be a proportionate means of achieving a legitimate investigative purpose.

¹⁰ Constitution of India, art 21.

¹¹ *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.

¹² *E.P. Royappa v. State of Tamil Nadu* (1974) 4 SCC 3.

¹³ *Justice K.S. Puttaswamy (Retd) v. Union of India* (2017) 10 SCC 1.

2.2 Article 22: Specific Protections on Arrest

Article 22 lays down the minimum protections for a person who is arrested. Under Article 22(1), no person who is arrested may be detained in custody without being informed, as soon as may be, of the grounds of arrest, and the person cannot be denied the right to consult and be defended by a legal practitioner of choice. Under Article 22(2), the arrested person must be produced before the nearest Magistrate within twenty-four hours of arrest, excluding the time necessary for the journey, and cannot be detained beyond that period without the Magistrate's authority.¹⁴ Sections 47, 57 and 58 BNSS are the statutory implementations of these constitutional guarantees.

The Supreme Court has treated the requirement to communicate grounds of arrest as a mandatory constitutional safeguard, not a formality. In *Pankaj Bansal v. Union of India* and *Prabir Purkayastha v. State (NCT of Delhi)*, the Court held that grounds of arrest must be furnished to the arrestee in writing in the statutes there considered, and that arrests made without such communication were vitiated.¹⁵ In *Vihaan Kumar v. State of Haryana*, the Court emphasised that Article 22(1) applies to arrests under ordinary criminal law as well and that the information must be conveyed in a manner that enables the arrestee to understand and challenge the arrest.¹⁶

III: THE STATUTORY FRAMEWORK

3.1 From the CrPC to the BNSS

The older procedural codes gave the police a broad power to arrest on "reasonable suspicion" of involvement in a cognizable offence.¹⁷ The National Police Commission, in its Third Report of 1980, observed that a large share of arrests were unnecessary or unjustified, and the Supreme Court quoted this finding in *Joginder Kumar*.¹⁸ The Law Commission's 177th Report on the *Law Relating to Arrest* (2001) likewise urged that arrest be tied to necessity and accompanied by safeguards.¹⁹

Parliament responded through the 2008 Amendment, effective from November 2010. It introduced the "necessity" conditions in Section 41(1)(b)(ii) CrPC for offences punishable with imprisonment up to seven years, required the officer to record reasons in writing, and inserted Section 41A, which provided for a notice of appearance in cases where arrest was not required. The Supreme Court's decision in *Arnesh Kumar v. State of Bihar* then converted these provisions into a working checklist and imposed duties on Magistrates.²⁰ The BNSS carries this scheme into Section 35, and Section 35(1)(b) and Section 35(3) BNSS correspond to Section 41(1)(b) and Section 41A CrPC respectively.

3.2 The Anatomy of Section 35 BNSS

Section 35(1) lists the circumstances in which a police officer may arrest without an order from a Magistrate and without a warrant. In broad terms, these include: (a) a person who commits a cognizable offence in the presence of the police officer; (b) a person against whom a reasonable complaint has been made, credible information received or reasonable suspicion exists of involvement in a cognizable offence punishable with imprisonment up to seven years, subject to the conditions discussed below; (c) a person against whom credible information exists of a cognizable offence punishable with imprisonment exceeding seven years or with death; and further categories such as proclaimed offenders, persons in possession of stolen property, persons who obstruct a police officer or escape from custody, and arrests requisitioned by another officer.²¹

The most significant clause for present purposes is Section 35(1)(b). For offences punishable with imprisonment which may be less than seven years or may extend to seven years, the officer must satisfy two cumulative requirements. First, the officer must have reason to believe, on the basis of the complaint, information or suspicion, that the person has committed the offence (Section 35(1)(b)(i)). Second, the officer must be satisfied that arrest is necessary for at least one of five purposes (Section 35(1)(b)(ii)): to prevent the person from committing any further offence; for proper investigation of the offence; to prevent the person from causing evidence to disappear or tampering with it; to prevent the person from inducing, threatening or promising anything to a witness so as to dissuade disclosure of facts to the Court or the police; or because, unless arrested, the person's presence in Court cannot be ensured. The officer must record the reasons for arrest in writing, and must also record reasons where the officer decides not to arrest.²²

Where arrest is not required under Section 35(1), Section 35(3) obliges the officer to issue a notice directing the person to appear. Section 35(4) requires the person to comply with the notice. Section 35(5) provides that a person who complies and continues to comply cannot be arrested unless, for reasons recorded, the officer is of the opinion that arrest is necessary. Section 35(6) permits arrest, subject to orders of the competent Court, where the person

¹⁴ Constitution of India, art 22(1) and (2). Article 22(3) excludes enemy aliens and persons detained under preventive detention laws from these two clauses; that category is outside the scope of this paper.

¹⁵ *Pankaj Bansal v. Union of India* (2024) 7 SCC 576; *Prabir Purkayastha v. State (NCT of Delhi)* (2024) 8 SCC 254.

¹⁶ *Vihaan Kumar v. State of Haryana* 2025 SCC OnLine SC 269 (SC, 7 February 2025).

¹⁷ See Code of Criminal Procedure 1898, s 54, and Code of Criminal Procedure 1973, s 41 (as originally enacted). For the historical account, see K N Chandrasekharan Pillai (rev), *R V Kelkar's Criminal Procedure* (6th edn, Eastern Book Company 2018).

¹⁸ National Police Commission, *Third Report* (Government of India 1980), as discussed in *Joginder Kumar v. State of U.P.* (1994) 4 SCC 260.

¹⁹ Law Commission of India, *177th Report on Law Relating to Arrest* (December 2001).

²⁰ *Arnesh Kumar v. State of Bihar* (2014) 8 SCC 273.

²¹ BNSS 2023, s 35(1). Section 35(2) preserves the rule that no person concerned in a non-cognizable offence may be arrested except on a warrant or order of a Magistrate.

²² BNSS 2023, s 35(1)(b)(i)–(ii) and the proviso requiring recorded reasons; compare Code of Criminal Procedure 1973, s 41(1)(b)(i)–(ii).

fails to comply with the notice or is unwilling to identify himself. Section 35(7) adds a further protection: for an offence punishable with imprisonment of less than three years, a person who is infirm or above sixty years of age cannot be arrested without the prior permission of an officer not below the rank of Deputy Superintendent of Police.²³

3.3 Corresponding Provisions

Table 1: Principal arrest-related provisions, CrPC 1973 and BNSS 2023

Subject	CrPC 1973	BNSS 2023
Arrest by police without warrant	Section 41	Section 35(1)
Notice of appearance in lieu of arrest	Section 41A	Section 35(3)–(7)
Procedure of arrest; memorandum of arrest	Section 41B	Section 36
Information about arrested persons (designated officer)	Section 41C	Section 37
Right to meet an advocate during interrogation	Section 41D	Section 38
Grounds of arrest and right to bail to be informed	Section 50	Section 47
Information of arrest to a relative or friend	Section 50A	Section 48
Production before Magistrate without unnecessary delay	Section 56	Section 57
Detention not to exceed twenty-four hours	Section 57	Section 58
Arrest strictly in accordance with the Code	Section 60A	Section 62
Remand and custody beyond twenty-four hours	Section 167	Section 187
Anticipatory bail	Section 438	Section 482

IV: PROCEDURAL SAFEGUARDS ACCOMPANYING WARRANTLESS ARREST

Section 35 does not operate alone. The BNSS builds a sequence of safeguards around the arrest, each of which addresses a distinct risk. They may be grouped by function.

4.1 Safeguards at the Point of Arrest

Section 36 BNSS requires an officer making an arrest to bear an accurate, visible and clear identification of name, to prepare a memorandum of arrest attested by at least one witness who is either a member of the arrestee's family or a respectable member of the locality, and to have it countersigned by the arrested person. The arrestee must also be informed of the right to have a relative or friend named by him informed of the arrest.²⁴ Section 43 governs how the arrest is made. It preserves the rule that the person arrested is not to be subjected to more restraint than is necessary, and it newly permits handcuffing, having regard to the nature and gravity of the offence, in the case of habitual or repeat offenders, persons who have escaped custody and persons accused of specified serious offences.²⁵ Section 43 also retains the rule that a woman is ordinarily not to be arrested after sunset and before sunrise except in exceptional circumstances, on a written report and with the prior permission of the Judicial Magistrate of the first class.²⁶

4.2 Safeguards of Information and Access

Section 47(1) requires the officer to communicate forthwith the full particulars of the offence or other grounds of arrest, and Section 47(2) requires the officer to inform a person arrested without warrant for a bailable offence of the right to be released on bail.²⁷ Section 48 obliges the officer to give information of the arrest and the place of custody to a relative, friend or other person nominated by the arrested person, and to record the same.²⁸ Section

²³ BNSS 2023, s 35(3)–(7). The numbering of the notice sub-sections is also reflected in *Satender Kumar Antil v. CBI* 2026 INSC 115 (SC, 15 January 2026), which refers to Sections 35(3), 35(5) and 35(6).

²⁴ BNSS 2023, s 36; compare Code of Criminal Procedure 1973, s 41B, which enacted the requirements first laid down in *D.K. Basu v. State of West Bengal* (1997) 1 SCC 416.

²⁵ BNSS 2023, s 43. The handcuffing provision must be read with *Prem Shankar Shukla v. Delhi Administration* (1980) 3 SCC 526 and *Citizens for Democracy v. State of Assam* (1995) 3 SCC 743, which treated handcuffing as an exception requiring justification.

²⁶ BNSS 2023, s 43(5); compare Code of Criminal Procedure 1973, s 46(4).

²⁷ BNSS 2023, s 47(1)–(2); Constitution of India, art 22(1).

²⁸ BNSS 2023, s 48; compare *Joginder Kumar v. State of U.P.* (1994) 4 SCC 260, where the Court held that an arrested person is entitled to have someone informed.

37 requires the designation of a police officer to maintain information about the names and addresses of arrested persons and the nature of the offence, to be displayed at every police station and district headquarters, and Section 38 recognises the right of the arrested person to meet an advocate of choice during interrogation, though not throughout the interrogation.²⁹ The arrested person is also entitled to medical examination under the Sanhita, which serves as a protection against custodial ill-treatment.³⁰

4.3 Safeguards of Judicial Oversight

Section 57 requires that a person arrested without warrant be taken before a Magistrate, or the officer in charge of a police station, without unnecessary delay, and Section 58 prohibits detention beyond twenty-four hours, excluding travel time, in the absence of a Magistrate's special order.³¹ Where investigation cannot be completed within that period, Section 187 governs remand, and the Magistrate must apply judicial mind before authorising further custody.³² Section 62 provides a general rule that arrest must be made strictly according to the Sanhita or other applicable law, which gives statutory footing to the argument that non-compliance with the prescribed procedure is a legal defect and not a mere irregularity.³³

4.4 Safeguards at the Threshold of Investigation

Two further BNSS provisions operate before or alongside arrest. First, for cognizable offences punishable with imprisonment of three years or more but less than seven years, Section 173(3) permits the officer in charge, with the prior permission of an officer not below the rank of Deputy Superintendent of Police, to conduct a preliminary enquiry within fourteen days to ascertain whether a prima facie case exists before registering the First Information Report.³⁴ Second, the Sanhita retains anticipatory bail in Section 482, which allows a person apprehending arrest for a non-bailable offence to seek directions for release on bail in the event of arrest.³⁵

V: JUDICIAL SCRUTINY OF WARRANTLESS ARREST

5.1 Joginder Kumar and D.K. Basu: The Constitutional Foundations

In *Joginder Kumar v. State of Uttar Pradesh* (1994), the Supreme Court held that the existence of the power to arrest is one thing, and the justification for its exercise is another. It observed that no arrest should be made only because it is lawful for the police officer to do so, and that the officer must be able to justify the arrest, in addition to the power. The Court linked these principles to Articles 21 and 22 and directed that an arrested person be told of the right to have someone informed of the arrest.³⁶

In *D.K. Basu v. State of West Bengal* (1997), the Court, confronted with custodial deaths, prescribed a set of requirements to be followed in all cases of arrest and detention. These included the identification of arresting personnel, a memorandum of arrest attested by a witness and countersigned by the arrestee, the informing of a relative or friend, entries in a diary at the place of detention, medical examination of the arrestee at regular intervals, and the display of information about arrest and place of custody in a control room.³⁷ Many of these requirements now find a place in the text of Sections 36 to 38 and 48 BNSS. Their significance is that they moved a large part of the law of arrest from the domain of discretion to that of enforceable procedure.

5.2 Arnesh Kumar: Converting Power into a Checklist

In *Arnesh Kumar v. State of Bihar* (2014), the Supreme Court addressed the tendency of the police to arrest automatically in matrimonial cruelty cases under the then Section 498A of the Indian Penal Code, and the tendency of Magistrates to authorise detention as a matter of routine. The Court directed that the police officer should not arrest automatically but satisfy himself, through a checklist drawn from Section 41(1)(b)(ii) CrPC, that arrest is necessary; that the checklist and the reasons and materials for arrest be forwarded to the Magistrate, who must peruse them before authorising detention; that the decision not to arrest be communicated to the Magistrate; that a notice of appearance under Section 41A be served within a stated period; and that failure to comply would expose the police officer to departmental action and contempt, and the Magistrate to departmental action by the High Court.³⁸

²⁹ BNSS 2023, ss 37 and 38; compare *Nandini Satpathy v. P.L. Dani* (1978) 2 SCC 424 on the protection against compelled self-incrimination during interrogation.

³⁰ BNSS 2023, s 53 (examination of arrested person by medical officer); see also the medical-examination directions in *D.K. Basu v. State of West Bengal* (1997) 1 SCC 416.

³¹ BNSS 2023, ss 57 and 58; Constitution of India, art 22(2).

³² BNSS 2023, s 187; compare *Manubhai Ratilal Patel v. State of Gujarat* (2013) 1 SCC 314, where the Court held that remand is a judicial function that cannot be exercised mechanically.

³³ BNSS 2023, s 62; compare Code of Criminal Procedure 1973, s 60A.

³⁴ BNSS 2023, s 173(3). The general duty to register an FIR for a cognizable offence was affirmed in *Lalita Kumari v. Government of Uttar Pradesh* (2014) 2 SCC 1, which allowed preliminary enquiry only in limited categories of cases.

³⁵ BNSS 2023, s 482; compare *Sushila Aggarwal v. State (NCT of Delhi)* (2020) 5 SCC 1.

³⁶ *Joginder Kumar v. State of U.P.* (1994) 4 SCC 260.

³⁷ *D.K. Basu v. State of West Bengal* (1997) 1 SCC 416.

³⁸ *Arnesh Kumar v. State of Bihar* (2014) 8 SCC 273. The directions were expressed to apply to cases where the offence is punishable with imprisonment up to seven years

The importance of *Arnesh Kumar* for this paper lies in the way it distributes responsibility. It places the initial burden of justification on the arresting officer and the second layer of scrutiny on the Magistrate. Personal liberty, on this design, is protected not by a single check but by two sequential ones.

5.3 *Satender Kumar Antil* (2022): Compliance and Bail

In *Satender Kumar Antil v. Central Bureau of Investigation* (2022), the Court, concerned by the number of undertrial prisoners, reiterated that Sections 41 and 41A CrPC must be complied with, categorised offences for the purpose of bail and urged the legislature to consider a dedicated bail statute. It also stressed that courts should ensure compliance with the arrest provisions and that non-compliance would ordinarily weigh in favour of bail.³⁹ The decision therefore connected the law of arrest with the wider problem of pre-trial detention.

5.4 *Satender Kumar Antil* (2026): Notice as the Rule under the BNSS

The most recent and most directly relevant decision is the judgment of 15 January 2026 in the same matter. The Court was called upon to decide whether a notice under Section 35(3) BNSS must be mandatorily issued in all cases involving offences punishable with imprisonment up to seven years. Its answer, in substance, was affirmative in respect of that category. The Court held that arrest is a discretionary and optional step in furtherance of investigation, not a mandatory consequence of the existence of an offence; that the officer must first ask whether arrest is necessary; and that, for offences up to seven years, the requirement of Section 35(1)(b)

(i) together with at least one of the conditions in Section 35(1)(b)(ii) must exist before arrest.⁴⁰

The Court went further. It held that notice under Section 35(3) is the rule for such offences, and that arrest under Section 35(6) read with Section 35(1)(b) is an exception; that even where the Section 35(1)(b) conditions exist, arrest should not be undertaken unless it is absolutely warranted; and that the power to arrest after a notice is not a matter of routine, and the officer should be circumspect and slow in exercising it.⁴¹ As reported, the Court also held that non-compliance with a notice does not automatically justify arrest, since the investigating agency must still form an opinion that arrest is objectively necessary; that an arrest following a notice must rest on material not available when the notice was issued; and that Magistrates must not authorise detention casually and must peruse the report and checklist furnished by the police.⁴²

This decision matters for two reasons. It confirms that the *Arnesh Kumar* framework survives the change of statute and is now anchored in the text of the BNSS. And it introduces a concept that is central to this paper's analysis: the idea that a lawful ground of arrest may exist and yet arrest may still be improper if it is not absolutely warranted. That is, in effect, a proportionality standard applied to Section 35.

5.5 Remedies for Unlawful Arrest

The Supreme Court has recognised that unlawful arrest and detention give rise to public-law remedies. In *Rudul Sah v. State of Bihar* and *Bhim Singh v. State of Jammu and Kashmir*, the Court awarded compensation for illegal detention, and in *Nilabati Behera v. State of Orissa* it held that compensation may be granted in proceedings under Articles 32 and 226 for violation of fundamental rights by State agents.⁴³ In addition to compensation, the accused may seek release on bail with reliance on non-compliance with the safeguards, invoke the writ of habeas corpus, seek quashing of proceedings where appropriate, and pursue departmental and criminal action against erring officers.

VI: WHEN DOES WARRANTLESS ARREST BECOME INCONSISTENT WITH PERSONAL LIBERTY?

The preceding discussion allows the central research question to be answered with more precision. A warrantless arrest that is authorised by the text of Section 35 is not thereby insulated from Article 21. On the framework reviewed above, an arrest becomes inconsistent with personal liberty when it fails at any of the following six stages. The stages are drawn from the statutory text and the decisions discussed, and are presented here as an analytical tool, not as a test laid down by any Court.

Table 2: A six-stage diagnostic framework for testing a warrantless arrest

Stage	Question	Indicators of failure	Provision / authority
1. Power	Does a clause of Section 35(1) actually apply?	Offence non-cognizable and no warrant; no credible information or reasonable suspicion; arrest for a civil or purely contractual dispute	Section 35(1), (2)

³⁹ *Satender Kumar Antil v. Central Bureau of Investigation* (2022) 10 SCC 51.

⁴⁰ *Satender Kumar Antil v. CBI* 2026 INSC 115 (SC, 15 January 2026), per M.M. Sundresh and N. Kotiswar Singh JJ, as reported in Yash Mittal, 'Arrest Exception, Not Rule For Offences Punishable Up To 7 Yrs' (LiveLaw, 5 February 2026).

⁴¹ *Satender Kumar Antil v. CBI* 2026 INSC 115 (SC, 15 January 2026). The Court endorsed the approach of the Bombay High Court in *Chandrashekhar Bhimsen Naik v. State of Maharashtra* (2024) on the relationship between notice and arrest.

⁴² *ibid*; and see the report on the "fresh material" holding, 'BNSS | Arrest Under S. 35(6) Must Be Based On Fresh Material, Not On Grounds In S.35(3) Notice: Supreme Court' (LiveLaw, February 2026) <<https://www.livelaw.in/supreme-court/bnss-arrest-under-s-356-must-be-based-on-fresh-material-not-on-grounds-in-s353-notice-supreme-court-522156>> accessed 3 September 2026.

⁴³ *Rudul Sah v. State of Bihar* (1983) 4 SCC 141; *Bhim Singh v. State of J&K* (1985) 4 SCC 677; *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746.

Stage	Question	Indicators of failure	Provision / authority
2. Belief	Does the officer have genuine reason to believe the person committed the offence?	Belief based on bare allegation or on the fact of registration of an FIR alone	Section 35(1)(b)(i); <i>Joginder Kumar</i>
3. Necessity	Is arrest necessary for at least one listed purpose?	No link between the recorded reason and the facts; generic recital that arrest is needed for “proper investigation”	Section 35(1)(b)(ii); <i>Arnesh Kumar</i> ; <i>Antil</i> (2026)
4. Alternatives	Was notice under Section 35(3) considered and used where possible?	Notice bypassed for offences up to seven years; arrest after compliance with notice, or after non-compliance without fresh material	Section 35(3)–(6); <i>Antil</i> (2026)
5. Procedure	Were the arrest safeguards observed?	No memorandum of arrest; grounds not communicated; no information to relative; delay in production	Sections 36, 47, 48, 57, 58, 62; Art 22
6. Scrutiny	Did the Magistrate examine the reasons before remand?	Remand granted mechanically; checklist not perused; reasons absent	Section 187; <i>Arnesh Kumar</i> ; <i>Manubhai Patel</i>

6.1 Discretion at the Threshold: Belief and Necessity

The phrases “reason to believe” and “satisfied” in Section 35(1)(b) leave room for subjective judgment, and the phrase “proper investigation” is elastic. The danger is that the necessity conditions, though carefully enumerated, come to be satisfied by a stock recital. The 2026 ruling addresses this danger in two ways. First, it makes the officer’s question of necessity an obligation that precedes arrest, not an afterthought that follows it. Second, by holding that arrest should not be undertaken unless absolutely warranted even where a ground is available, it ties the exercise of discretion to proportionality. Under this approach, a recorded reason that merely repeats the words of Section 35(1)(b)(ii) without reference to facts would not be sufficient to sustain an arrest, and it would be a strong indicator of arbitrariness for the purposes of Articles 14 and 21.

6.2 Discretion and the Notice Regime

Section 35(3) transforms the arrest decision from a binary choice (arrest or do nothing) into a graduated one (notice, then arrest only if necessary). This graduated approach reflects a basic principle of proportionality: the State should use the least intrusive means capable of achieving its legitimate purpose. The requirement that any arrest after a notice be based on fresh material is important because it prevents the notice from becoming a formality that precedes an arrest already decided upon. Where the notice is issued and complied with, the person’s liberty interest is protected by Section 35(5), which prevents arrest unless the officer records reasons for considering it necessary.

6.3 The Limits of the 2026 Ruling

Three limits should be noted. First, the categorical rule that notice is the norm applies to offences punishable with imprisonment up to seven years. For more serious offences, Section 35(1)(c) empowers arrest on credible information, and the notice rule of the 2026 judgment does not directly regulate that field. In such cases Article 21 and the proportionality principle must still apply, but the statutory text gives the officer wider latitude. Second, the ruling operates through the courts: its benefit is realised chiefly when an accused is able to reach a Magistrate or a High Court. Persons with limited access to legal assistance may not be in a position to invoke it. Third, arrests under Section 35(1)(a), which concerns offences committed in the presence of the officer, and other categories under Section 35(1) are not governed by the same necessity conditions and depend more heavily on the officer’s on-the-spot judgment.

6.4 Points of Concern in the Sanhita Itself

Commentators have raised several concerns about features of the BNSS that may sit uneasily with the liberty-protective design of Section 35. These are noted here as areas for further study, not as settled conclusions. The handcuffing power in Section 43 lists a broad range of offences, which raises the question of whether it is consistent with the principle in *Prem Shankar Shukla* that handcuffing is an exception justified by the circumstances of the particular case. The treatment of police custody under Section 187, which allows the period of police custody to be availed in parts within a longer initial window, has been debated for its potential effect on the duration and repetition of custodial interrogation. And the shift from the control-room model of information in Section 41C CrPC to the designated-officer model in Section 37 BNSS requires careful implementation if arrest information is to be as accessible to families as the earlier model intended.

6.5 Structural Constraints on Implementation

Legal safeguards depend on institutions. Official prison statistics compiled by the National Crime Records Bureau have consistently shown that undertrial prisoners constitute a large majority of the prison population in India, which suggests that the problem of unnecessary or prolonged pre-trial detention is not solved by the text of the law alone.⁴⁴ The Supreme Court's directions on police reform in *Prakash Singh v. Union of India* recognised that the quality of policing depends on institutional independence, accountability and the separation of investigation from law-and-order functions.⁴⁵ Where police performance is measured by arrests or detections, or where complainants press for arrest as a form of leverage, the discretion in Section 35 is exposed to pressures that the statutory checklist alone cannot neutralise.

A further structural constraint is the absence of a clear, automatic consequence for non-compliance. The remedies described in paragraph 5.5 above are available, but they are reactive, and each requires the aggrieved person to initiate proceedings. The design of the safeguards in Sections 36, 47 and 48 assumes that the arrested person or a family member will notice and object to non-compliance; where the arrestee is poor, uninformed or intimidated, this assumption may fail.

VII: A COMPARATIVE GLANCE

A brief comparison helps to place the BNSS model in context. In England and Wales, the Police and Criminal Evidence Act 1984, as amended, allows a constable to arrest without warrant where he has reasonable grounds to suspect that the person has committed an offence, but only if he also has reasonable grounds to believe that arrest is necessary for one of the reasons listed in the statute, such as to enable the person's name or address to be ascertained, to prevent injury or damage, to protect a child or vulnerable person, to allow prompt and effective investigation, or to prevent any prosecution from being hindered.⁴⁶ The two-stage structure (suspicion, then necessity) closely resembles Section 35(1)(b)(i) and (ii) BNSS, which suggests that the Indian provision is in line with a widely accepted model for limiting police arrest powers.

In the United States, the Fourth Amendment governs arrest. The Supreme Court has held that a warrantless arrest in a public place requires probable cause, that a prompt judicial determination of probable cause must follow a warrantless arrest, and that a determination made within forty-eight hours is generally treated as prompt.⁴⁷ The Court has, however, also upheld a custodial arrest for a minor fine-only offence where probable cause exists, without a separate necessity inquiry.⁴⁸ The contrast is instructive. By adding an express necessity condition and a notice regime, Indian law, as now interpreted, imposes a more demanding standard on police discretion than the *Atwater* approach, at least in respect of offences punishable up to seven years.

VIII: FINDINGS AND RECOMMENDATIONS

8.1 Findings

1. The BNSS retains the police power of warrantless arrest but, through Section 35(1)(b) and Section 35(3)–(7), adopts a necessity-based and notice-first model for offences punishable up to seven years.
2. The Supreme Court's decision of 15 January 2026 in *Satender Kumar Antil v. CBI* makes that model authoritative under the BNSS: notice is the rule, arrest the exception, and arrest is to be undertaken only where absolutely warranted.
3. Arrest becomes inconsistent with Article 21 where any of the six stages in the diagnostic framework fails, in particular where recorded reasons are formulaic, where notice is bypassed, or where magisterial scrutiny is mechanical.
4. The principal weaknesses are not in the text of Section 35 but in implementation: the reactive nature of remedies, uneven access to legal assistance, institutional pressures on the police, and wider discretion in offences above seven years.

8.2 Recommendations

1. *Structured reasons.* Rules or standing orders should prescribe a form for recording reasons under Section 35(1)(b), requiring the officer to state the specific facts supporting each necessity ground relied on, and not to merely repeat the statutory words.
2. *Digital arrest and notice records.* Arrest memoranda, Section 35(3) notices and recorded reasons should be maintained in a tamper-proof electronic register that Magistrates can consult at the time of remand, so that the "fresh material" requirement can be checked against the record.

⁴⁴ National Crime Records Bureau, Prison Statistics India (Ministry of Home Affairs, annual publication). The proportion of undertrial prisoners has been reported at roughly three-quarters of the prison population in recent years.

⁴⁵ *Prakash Singh v. Union of India* (2006) 8 SCC 1.

⁴⁶ Police and Criminal Evidence Act 1984 (UK), s 24, as substituted by the Serious Organised Crime and Police Act 2005 and amended by the Crime and Courts Act 2013.

⁴⁷ *Gerstein v. Pugh* 420 US 103 (1975); *County of Riverside v. McLaughlin* 500 US 44 (1991); and see *Payton v. New York* 445 US 573 (1980), holding that police generally need a warrant to enter a home to make a routine arrest.

⁴⁸ *Atwater v. City of Lago Vista* 532 US 318 (2001).

3. *Consequences for non-compliance.* Magistrates should routinely record whether the Section 35 checklist and Sections 36, 47, 48 and 58 have been complied with, and non-compliance should be treated as a significant factor in bail and in the assessment of the legality of custody.
4. *Extending the necessity principle.* The reasoning of the 2026 decision, that arrest must be absolutely warranted, should be applied by courts as a proportionality standard, in appropriate cases, to arrests under Section 35(1)(c) as well.
5. *Legal assistance at the police-station stage.* Section 38 should be supported by the availability of legal aid counsel or para-legal support at police stations, so that the safeguards do not depend on the arrestee's own resources.
6. *Oversight and accountability.* State-level police complaints authorities, as envisaged in *Prakash Singh*, should be made functional and empowered to examine complaints of unlawful arrest, and departmental action should follow findings of non-compliance.
7. *Transparency.* Police departments should publish periodic data on the number of arrests, notices under Section 35(3), arrests after notice, and grounds recorded, so that patterns of over-use can be identified and studied.
8. *Review of the handcuffing power.* Section 43(3) should be applied in a manner consistent with *Prem Shankar Shukla*, requiring case-specific justification and not treating the listed categories as an automatic licence.

IX: CONCLUSION

Warrantless arrest under Section 35 BNSS is a lawful and necessary component of criminal investigation. But the law's attitude to it has changed over time from a permissive rule of suspicion to a structured regime of necessity, notice, recorded reasons and judicial scrutiny. The recent decision of the Supreme Court in *Satender Kumar Antil v. CBI* has placed that regime on firm footing under the BNSS by declaring notice to be the rule and arrest the exception for offences punishable up to seven years.

The answer to the central question of this paper is therefore this. The police power to arrest without a warrant becomes inconsistent with personal liberty when it is exercised without a genuine, fact-specific belief and necessity; when less intrusive alternatives such as notice are ignored; when the procedural safeguards of Articles 22(1) and 22(2) and Sections 36, 47, 48, 57 and 58 are disregarded; or when the Magistrate, who is the last safeguard, treats remand as a formality. In each of these cases the arrest, though nominally under a valid statute, fails the test of fair, just and reasonable procedure under Article 21.

The hypothesis of this paper is accordingly supported: the statute and the case law are adequate on paper, but the real measure of protection is the quality of their implementation. The recommendations in Part VIII aim to narrow the distance between the two. Because the BNSS is still new and judicial interpretation is developing, the questions raised here will need continuing study, particularly through empirical research on how Section 35 is applied by police stations and Magistrates.

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