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ABOUT US

WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal provided dedicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

RIGHTS OF ACCUSED PERSON UNDER NEW CRIMINAL LAWS

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Abstract

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) seeks to replace the Criminal Procedure Code, 1973 (Cr.P.C). The Cr.P.C. provides for the procedure for arrest, prosecution, and bail. BNSS mandates forensic investigation for offences punishable with seven years of imprisonment or more. Forensic experts will visit crime scenes to collect forensic evidence and record the process. All trials, inquiries, and proceedings may be held in electronic mode. Production of electronic communication devices, likely to contain digital evidence, will be allowed for investigation, inquiry, or trial. If a proclaimed offender has absconded to evade trial and there is no immediate prospect of arresting him, the trial can be conducted and judgement pronounced in his absence. Along with specimen signatures or handwriting, finger impressions and voice samples may be collected for investigation or proceedings. Samples may be taken from a person who has not been arrested.

Key Words: Rights, Accused, Arrest, Trial and New Criminal Law.

INTRODUCTION

The Code of Criminal Procedure, 1973 (CrPC) is a procedural law established for the administration of the Indian Penal Code, 1860 (IPC). It governs the procedure for investigation, arrest, prosecution, and bail for offences. The Cr.P.C. was first passed in 1861 to address the problem of multiplicity of legal systems in India. Since then it has been revised on multiple occasions. In 1973, the erstwhile Act was repealed and replaced by the existing Cr.P.C. and changes like anticipatory bail were introduced. It was amended in 2005 to add changes such as provisions for plea bargaining and rights of arrested persons. Over the years, the Supreme Court has interpreted the Cr.P.C. in varied ways and revised its application. These include: (i) mandating the registration of an FIR if the complaint relates to a cognizable offence,

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(ii) making arrests an exception when the punishment is less than seven years of imprisonment, (iii) ensuring bail for bail able offence is an absolute and in-defeasible right and no discretion is exercised in such matters. The Court has also ruled on procedural aspects such as establishing guidelines for custodial interrogations and emphasizing the importance of speedy trials. However, the criminal justice system continues to face challenges like case backlogs, trial delays, and concerns about treatment of underprivileged groups. The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) was introduced on August 11, 2023 to replace the Cr.P.C. It amends provisions on bail, expands the scope of property seizure, and alters powers of police and Magistrates. The Cr.P.C. now BNSS governs the procedural aspects of criminal justice in India³.

THE BNSS RETAINS MOST OF THE PROVISIONS OF THE CRPC

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), which aims to replace the Code of Criminal Procedure (CrPC), retains most of the provisions of the CrPC. However, it also introduces significant changes, particularly regarding detention of under trials, medical examinations, and police powers⁴. Justice Krishna Iyer said, “procedure is the handmaid of justice” meaning that the procedural rules are meant to serve justice and not to hinder it. The Indian criminal procedure was introduced by the British Raj, that included the Code of Criminal Procedure, 1898 on which the Code of Criminal Procedure, 1973 (“CrPC”) was largely based. The Bharatiya Nagarik Suraksha Sanhita, 2023 (“BNSS”) replaces the existing Cr.P.C. The BNSS has been enforced on 01-07-2024. The BNSS also aims to establish a justice system that has a greater efficiency that can tackle the ongoing challenges of complex procedures, case pendency, low conviction rates, lack of technology adoption, and delayed justice delivery. Above all, the greatest objective of the BNSS is the suraksha of citizens from the unfair exploitation of the procedure possible through the existing loopholes in the current criminal procedure regime⁵.

³ <https://prsindia.org/billtrack/the-bharatiya-nagarik-suraksha-sanhita-2023>

⁴ https://www.google.com/search?q=THE+BNSS+RETAINS+MOST+OF+THE+PROVISIONS+OF+THE+CRPC&rlz=1C1GCEU_enIN1161&oq=THE+BNSS+RETAINS+MOST+OF+THE+PROVISIONS+OF+THE+CRPC+++&gs_lcrp=EgZjaHJvbWUyCQgAEEUYORifBTIHCAEQIRiPAtJBCTIyNDIqMGoxNagCCbACAFEFII N64Hxu1eQ&sourceid=chrome&ie=UTF-8

⁵ Primacy To Suraksha: Understanding The Bharatiya Nagarik Suraksha Sanhita, 2023, <https://www.scconline.com/blog/post/2024/05/05/bnss-that-is-to-replace-crpc-explained-with-key-highlights/>

SEPARATION OF OFFENCES

The CrPC classifies offences into two categories which is cognizable and non-cognizable. Cognizable offences are those in which the police can arrest and initiate an investigation without a warrant. Non-cognizable offences require a warrant, and in some cases, a complaint by the victim or a third party.

NATURE OF OFFENCES

The CrPC deals with various types of criminal offences, ranging from traffic violations to murder. It distinguishes between bail able and non-bail able offences, specifying the offences for which an accused has the right to bail from police custody.

DETENTION OF UNDERTRIALS

As per the CrPC, if an accused has spent half of the maximum period of imprisonment in detention, he must be released on personal bond. This does not apply to offences punishable by death. The Bill adds that this provision will also not apply to: (i) offences punishable by life imprisonment, and (ii) persons against whom proceedings are pending in more than one offence.

MEDICAL EXAMINATION

The Cr.P.C. allows medical examination of the accused in certain cases, including rape cases. Such examination is done by a registered medical practitioner on the request of at least a sub-inspector level police officer. The Bill provides that any police officer can request such an examination.

FORENSIC INVESTIGATION

The Bill mandates forensic investigation for offences punishable with at least seven years of imprisonment. In such cases, forensic experts will visit crime scenes to collect forensic evidence and record the process on mobile phone or any other electronic device. If a state does not have forensics facility, it shall utilize such facility in another state.

SIGNATURES AND FINGER IMPRESSIONS

The CrPC empowers a Magistrate to order any person to provide specimen signatures or handwriting. The Bill expands this to include finger impressions and voice samples. It allows

these samples to be collected from a person who has not been arrested.

TIMELINES FOR PROCEDURES

The Bill prescribes timelines for various procedures. For instance, it requires medical practitioners who examine rape victims to submit their reports to the investigating officer within seven days. Other specified timelines include: (i) giving judgement within 30 days of completion of arguments (extendable up to 60 days), (ii) informing the victim of progress of investigation within 90 days, and (iii) framing of charges by a sessions court within 60 days from the first hearing on such charges.

HIERARCHY OF COURTS

The CrPC establishes a hierarchy of courts for the adjudication of criminal matters in India. These courts include: (i) Magistrate's Courts: subordinate courts responsible for the trial of most criminal cases, (ii) Sessions Courts: presided over by a Sessions Judge and hear appeals from Magistrate's Courts, (iii) High Courts: have inherent jurisdiction to hear and decide criminal cases and appeals, and (iv) Supreme Court: hear appeals from High Courts and also exercise its original jurisdiction in certain matters. The CrPC empowers the state governments to notify any city or town with a population of more than one million as a metropolitan area. Such areas have Metropolitan Magistrates. The Bill omits this provision.

The BNSS allows up to 15 days of police custody, which can be authorized in parts during the initial 40 or 60 days of the 60 or 90 days period of judicial custody. This may lead to denial of bail for the entire period if the police have not exhausted the 15 days custody. The powers to attach property from proceeds of crime do not have safeguards provided in the Prevention of Money Laundering Act. The CrPC provides for bail for an accused who has been detained for half the maximum imprisonment for the offence. The BNSS denies this facility for anyone facing multiple charges. As many cases involve charges under multiple sections, this may limit such bail. The use of handcuffs is permitted in a range of cases including economic offences, contradicting Supreme Court directions. The BNSS allows evidence collected by retired or transferred investigating officers to be presented by their successors. This violates normal rules of evidence when the author of the document can be cross examined. Recommendations of high level committees on changes to the CrPC such as reforms in sentencing guidelines and codifying rights of the accused have not been incorporated in the BNSS. The CrPC governs the

powers of the police to maintain public order, prevent crimes, and undertake criminal investigations. These powers include arrests, detention, search, seizure, and use of force. These powers are subject to restrictions to safeguard individuals from misuse of police powers leading to excessive use of force, illegal detentions, custodial torture, and abuse of authority. The Supreme Court has also issued various guidelines to prevent such arbitrary exercise of police powers. The Bill amends the provisions related to detention, police custody and use of handcuffs, which may present some issues.

PROCEDURE OF POLICE CUSTODY ALTERED

The Constitution and CrPC prohibit detention in police custody beyond 24 hours. The Magistrate is empowered to extend it up to 15 days in case investigation cannot be completed within 24 hours. He may further extend judicial custody beyond 15 days if he is satisfied that adequate grounds exist to do so. However, overall detention cannot exceed 60 or 90 days (depending on the offence). The BNSS modifies this procedure. It adds that the police custody of 15 days can be authorized in whole or in parts at any time during the initial 40 or 60 days out of the 60 or 90 days period. This could lead to bail being denied during this period if the police argue that they need to take the person back in police custody. This differs from laws like the Unlawful Activities (Prevention) Act, 1976, where police custody is limited to the first 30 days. The Supreme Court has held that as a general rule, police custody should be taken in the first 15 days of remand. The extension of 40 or 60 days should be utilized as an exception. The BNSS does not require the investigating officer to provide reasons when seeking police custody for someone in judicial custody. The Standing Committee (2023) recommended that the interpretation of this clause be clarified.

POWERS OF DETENTION AMENDED

Article 22 of the Constitution requires a person in police custody to be produced before a judicial Magistrate within 24 hours. The Cr.P.C. also provides this. The BNSS retains this provision. It adds that police may detain or remove any person who resists, refuses or ignores directions given by an officer to prevent cognizable offences. Post detention, the detained person may either: (i) be produced in front of a Magistrate, or (ii) in the case of petty cases, be released when the occasion is past. The phrase 'occasion is past' is not defined. The Standing Committee (2023) recommended establishing a clear timeframe for detention in such circumstances.

THE POWER TO USE HANDCUFFS MAY INFRINGE ON THE ACCUSED'S PERSONAL LIBERTY

The BNSS provides for the use of handcuffs during arrest. Handcuffs may only be used to arrest: (i) a habitual or repeat offender who has escaped custody, or (ii) a person accused of offences such as rape, acid attack, organized crime, economic offences, and acts endangering sovereignty, unity and integrity of India. The provision contravenes judgements of the Supreme Court and guidelines of the National Human Rights Commission. The Supreme Court has held that the use of handcuffs is inhumane, unreasonable, arbitrary, and repugnant to Article 21. In extreme cases, when handcuffs have to be used, the escorting authority must record reasons to do so. Further, it has ruled that no prisoners undergoing trial can be handcuffed without obtaining judicial consent. The Court has therefore left the discretion to decide use of handcuffs on the trial court. The Standing Committee (2023) recommended excluding economic offences from the offences where handcuffs may be used. A dissent note in the Committee report states that handcuffs should be used only if there is a risk of violence or the suspect is likely to escape custody.

RIGHTS OF THE ACCUSED SCOPE OF MANDATORY BAIL LIMITED IN CASE OF MULTIPLE CHARGES

As per the CrPC, if an under trial has served half the maximum imprisonment for an offence, he must be released on a personal bond. This provision does not apply to offences punishable by death. The BNSS retains this provision and adds that first-time offenders get bail after serving one-third of the maximum sentence. However, it adds that this provision will not apply to: (i) offences punishable by life imprisonment, and (ii) where an investigation, inquiry or trial in more than one offence or in multiple cases is pending. Since charge sheets often list multiple offences, this may make many under trial prisoners ineligible for mandatory bail. For example, in 2014, the Supreme Court held that illegal mining constitutes an offence under the Mines and Minerals (Development and Regulations) Act, 1957, and also qualifies as theft under the IPC. Similarly, rash and dangerous driving is a punishable offence under the Motor Vehicles Act, 1988 as well as the IPC. Persons accused in such cases will not be eligible to obtain mandatory bail. Bail allows accused to be released from custody while awaiting trial, provided they meet certain conditions. Detention before conviction is done to ensure easy availability of an accused for trial and there is no tampering with evidence. If these are ensured, detention is not needed. The Supreme Court has held that bail is the rule and incarceration is

the exception. Further, it has observed that under trial prisoners should be released at the earliest and those who cannot furnish bail bonds due to poverty are not incarcerated only for that reason.

SCOPE FOR PLEA BARGAINING MAY BE LIMITED

Plea bargaining is an agreement between the defence and prosecution where the accused pleads guilty for a lesser offence or a reduced sentence. Plea bargaining was added to the CrPC in 2005. It is not allowed for offences punishable with a death penalty, life imprisonment, or imprisonment term exceeding seven years. The CrPC does not permit a bargain to be struck for a lesser offence or for compounding the offence-the accused will be considered to have confessed and been convicted of the offence. The BNSS retains this provision. This limits plea bargaining in India to sentence bargaining, that is getting a lighter sentence in exchange for the accused's guilty plea. Further, the BNSS adds a stipulation that the accused must file an application for plea bargaining within 30 days from the date of framing of charge. This time limit can impact the effectiveness of plea bargaining by limiting the opportunity for seeking a reduced sentence.

CONGESTION IN THE PRISON SYSTEM

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

SUCCESSORS DEPOSING FOR TRANSFERRED OR RETIRED OFFICERS

The BNSS states that if an officer who prepared a document or report for an inquiry or trial is unavailable, the Court will ensure that their successor officer deposes on the document. Officers covered by this provision include public servants, medical officers, and Investigating Officers (IOs). Reasons for unavailability include: (i) death, (ii) transfer, (iii) retirement, and (iv) likeliness to cause delay. While allowing successor officers to depose before the Court may help expedite cases, it may contradict the normal rules of evidence.

It may be argued that statements recorded by an IO must be provided by the same officer, as the successor may not be able to attest for the investigation undertaken by the IO. The Standing Committee on Home Affairs (2023) noted that IOs possess crucial knowledge of the case under investigation. Their cross-examination is significantly valuable, especially when documents prepared by them are used as evidence. The Committee recommended removing IOs from this provision. A dissenting member stated that all officers should be available for cross-examination, with the exception only in case of the officer's death.

SAFEGUARDS ON ATTACHMENT OF PROPERTY

Property that is derived or obtained, directly or indirectly, as a result of criminal activity is referred to as proceeds of crime. The CrPC provides police the power to seize property when it is: (i) alleged or suspected to have been stolen, or (ii) found under circumstances creating suspicion of commission of any offence. This is applicable only to movable properties. The BNSS extends this to immovable properties as well. Provisions on the treatment of seized property in BNSS differ from the provisions in the Prevention of Money Laundering Act, 2002 (PMLA). The PMLA provides for confiscation of property derived from money laundering in relation to specified offences. Certain safeguards provided under PMLA are not available under the BNSS. Under PMLA, attachment is provisional in nature for up to 180 days. A notice period of at least 30 days needs to be given to show cause why an attachment order must not be made. During the attachment, enjoying of immovable property cannot be denied. The BNSS does not provide a time limit up to which property can be attached. It provides a show cause notice of 14 days to be given to the accused.

DATA COLLECTION FOR CRIMINAL IDENTIFICATION

In 2005, the CrPC was amended to empower a Magistrate to obtain handwriting or signature specimens from arrested persons. The Bill expands this provision by empowering the Magistrate to also collect finger impressions and voice samples. It also allows collection of this data from persons who have not been arrested under any investigation. The Criminal Procedure (Identification) Act, 2022 allows a broader range of data to be collected including fingerprints, handwriting, and biological samples. Such data may be collected from convicts, those who have been arrested for an offence, or non-accused persons as well, and can be stored up to 75 years. With a broader law recently being passed to allow for data collection of criminals and accused, the need for retaining data collection provisions and expanding on them

in the BNSS is unclear. The constitutional validity of the 2022 Act is under consideration before the Delhi High Court.

MAINTENANCE OF SENIOR CITIZENS

Under CrPC, a Magistrate may order a person having sufficient means to make a monthly allowance for the maintenance of their father or mother (who are unable to maintain themselves). If the order is not followed, the Magistrate may issue a warrant for levying the amount due and sentence the person to imprisonment of up to a month or till the payment is made. The BNSS retains this provision which duplicates the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. That Act requires state governments to constitute Maintenance Tribunals to decide on the maintenance payable to senior citizens and parents. The Tribunal may issue a warrant for levying the amount due, and sentence the person to imprisonment of up to a month or till the payment is made. That Act specifically overrides all other laws.

PUBLIC ORDER FUNCTIONS RETAINED IN BNSS

The CrPC provides for the procedure for investigation and trial for offences. It also contains provisions for security to maintain peace, and maintenance of public order and tranquility. It contains provisions that allow a District Magistrate to issue orders needed to preserve public order. The BNSS has retained these provisions (in separate chapters). Since trial procedure and maintenance of public order are distinct functions, the question is whether they should be included under the same law or if they should be dealt with separately. As per the Seventh Schedule of the Constitution, public order is a state subject. However, matters under the CrPC (prior to the commencement of the Constitution fall) under the Concurrent List.

CONCLUSION

It is concluded that this legislative stride positions India towards a more equitable, accessible and efficient legal framework. The journey of legal reforms has begun, and these pioneering laws promise a future where justice is not only served but is genuinely inclusive and reflective of the dynamic fabric of our nation. The BNSS is not an arrow shot in the dark, but an empirically derived legislation with a clear goal in mind, to protect the nagarik (citizen) in criminal proceedings and not hinder the rights of the victim or of the accused person. The initiatives taken under the BNSS also ensure its effectiveness, be it the introduction of sentence

guidelines to prevent discretionary sentencing or balancing the rights of all stakeholders involved in a proceeding. The Sanhita also accords the much-needed technological advancement in the justice delivery system of the country and bringing justice to the citizens rather than the citizens having to seek justice in a prolonged, frustrating and exhausting manner.

