PROJECT 39A, NATIONAL LAW UNIVERSITY DELHI

Bharatiya Nagarik Suraksha Sanhita Bill, 2023

AND

Bharatiya Sakshya Bill, 2023

A SUBSTANTIVE ANALYSIS

॥न्यायस्त्र प्रमाणं स्यात्॥
DELHI

PROJECT 39A
EQUAL JUSTICE
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ABBREVIATIONS

Article	Art.
Bharatiya Nagarik Suraksha Sanhita, 2023	BNSS
Bharatiya Nyaya Sanhita, 2023	BNS
Bharatiya Sakshya Bill, 2023	BSB
Clause	Cl.
Code of Criminal Procedure, 1973	CrPC
Criminal Procedure Identification Act, 2022	CPIA
Indian Evidence Act, 1872	IEA
Indian Penal Code, 1860	IPC
Foreign Exchange Management Act, 1999	FEMA
Mental Healthcare Act, 2017	MHCA
Narcotic Drugs and Psychotropic Substances Act, 1985	NDPS Act
Prevention of Money Laundering Act, 2002	PMLA
Protection of Children Against Sexual Offences Act, 2012	POCSO Act
Rights of Persons with Disabilities Act, 2016	RPwD Act
Section	s.
Unlawful Activities (Prevention) Act, 1967	UAPA

Introduction

On 31.08.2023, Project 39A released a substantive analysis of the Bharatiya Nyaya Sanhita Bill, 2023 ('BNS'), which has been proposed as a replacement for the Indian Penal Code, 1860 ('IPC'). Alongside the BNS, the Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS') and the Bharatiya Sakshya Bill, 2023 ('BSB') were also introduced in the Parliament. As with the BNS, large portions of the BNSS and BSB are identical or similar to the legislations they propose to replace, the Code of Criminal Procedure, 1973 ('CrPC'), and the Indian Evidence Act, 1870 ('IEA') respectively. However, a few significant changes to criminal law procedures and evidentiary qualifications have raised concerns. Fourteen such changes have been analysed in this brief, while the remaining have been summarised at the end for the benefit of the reader.

I. BNSS

With speedy justice as its primary goal, a significant change in the BNSS is the introduction of timelines for various steps in the investigation and trial. These timelines have been reviewed briefly towards the end of this Brief.[1] Note that previous attempts to address delays through measures like fast track courts have had limited success due to systemic constraints such as heavy caseloads and shortage of judges. It is thus unclear if these timelines would be able to ensure quick disposal, without simultaneous institutional investments. More concerning is the likely adverse consequence of rushed proceedings on the quality of investigation and fair trial rights of the accused.

Besides these timelines, several procedural changes have been introduced in the BNSS. Most of these may be categorised broadly in the following manner. The first category includes amendments that have been introduced possibly to resolve existing conflicts in law. For instance, the provision on remand now permits the police to take custody of the accused at any time within the maximum of sixty or ninety-day period of detention after arrest. This resolves a conflict in the Supreme Court jurisprudence on whether police custody can be only in the initial fifteen days after arrest, or even thereafter.

[1] Refer to section on Introduction of Timelines under BNSS, Page 107.

Another category is changes to existing provisions which incorporate or are in line with judicial developments. For instance, the clause on remission powers of State governments, which requires the 'concurrence' of the Central government, instead of 'consultation' under the CrPC, reflects the present judicial interpretation. Another amendment is the inclusion of audio-video measures in investigation, such as the mandatory need for such recording in search and seizure proceedings. Though some concerns with this proposal are discussed in the brief, inclusion of these measures is in line with the legislative and judicial trend of expanding the use of technology towards ensuring better transparency. Further, provisions have been incorporated to provide information to victims at various stages of investigation and trial. An enabling provision for State governments to introduce a witness protection scheme has also been introduced.

The final category of changes is more troubling: provisions which contradict settled law and reverse beneficial judicial developments. For instance, BNSS introduces a clause governing mercy petitions, which provides that no question '*to the arriving of the decision*' of the President can be enquired into by any court. This appears to curtail the constitutional powers of the courts to conduct judicial review on limited grounds, when fundamental rights are at stake. Further, contrary to settled jurisprudence that use of handcuffs on arrestees violate human dignity under Art.21 of the Constitution, BNSS provides statutory sanction for handcuffing of a 'habitual, repeat offender' by the police, without requiring an individualised assessment of the tendency to escape or consideration of less restrictive measures. Another significant change is that BNSS expands the category of experts who are exempted from coming to court to include not just government scientific experts as under the CrPC, but also any expert certified by the State or Central governments. Further, it provides that an expert cannot be called to court unless the genuineness as of their report is disputed by the opposing party. This disregards existing jurisprudence that emphasises the importance of meaningful examination of forensic evidence by courts, including the accuracy and reliability of the expert opinion. Making this scrutiny by the court dependent on a party challenging the genuineness of the report is unreasonable and is likely to severely affect fair trial rights of the accused and victims.

Related to this category are provisions that deviate from existing law and similarly threaten to violate fundamental rights of the accused. A shocking proposal is a clause that allows detention in police custody to be authorised beyond the

fifteen-day period provided under the CrPC, and for the entire detention period of sixty or ninety days. Police custody is a well-documented site for torture and other excesses. Expanding the duration and reach of such custody is bound to increase the potential for abuse, including fabrication of evidence by the police. Another provision permits trials of proclaimed offenders, who are absconding in serious offences to be conducted and concluded in their absence.

Thus, while there are some beneficial amendments, several provisions of BNSS have a significant potential for abuse. Some provisions subvert benefits presently conferred by law, often with serious consequences to constitutional rights of the accused. Further, some changes in the BNSS have led to absurd consequences. For instance, the term 'unsound mind' has been replaced with 'mental illness', throughout the proposed bills. This terminology completely excludes persons with intellectual disability, resulting in them being denied protections under the proposed bill. Even though such persons may lack the capacity to stand trial, the proposed law excludes them from the fitness to trial process.

II. BSB

Contrary to the numerous changes in the BNSS, BSB has only one significant change. This relates to a new scheme on the evidentiary nature and admissibility of electronic evidence. The proposed changes include expansion of the definition of primary evidence to include copies of electronic or digital files. At the same time, the special procedure under the CrPC, which requires a certificate for the admissibility of electronic files in case the original computer on which such files were prepared is not produced, has been retained. This creates confusion about the process governing admissibility of electronic evidence under the BSB. It is unclear whether the special procedure would continue to be applicable like the CrPC, or whether copies within the now expanded purview of 'primary evidence' would be proved as primary evidence, without requiring the submission of a certificate. This confusion is significant, since existing case law requires the production of this certificate, as copies of original electronic records are susceptible to alteration and errors, due to tampering or even as unintended digital artefacts. Doing away with this protection would have serious adverse consequences.

A widely stated aim of the three bills, including BSB, has been to decolonise the criminal legal framework. Given this, the choice of amendments, particularly in the

BSB, demand consideration. One of the most brutal remnants of our colonial criminal law legacy is s.27 IEA, which continues unmodified as a proviso to Cl.23 of the BSB. Confessions to police officers are barred under Indian law, but s.27 IEA allows information discovered as a result of a confession, along with a portion of the confession to be admitted in evidence. This section has been long criticised for enabling the culture of torture and violence in police custody, and severely undermining rights of the accused. The decision to retain this hallmark of colonial practice is conspicuous.

Arrest and Medical Examination of an Accused

Clauses 35, 37, 43, 48, 50, 51, 52, 53 and 54 BNSS

Cls.35 to 62 BNSS (Chapter V) deal with the procedure for the arrest of persons suspected to have committed an offence. Although much of the chapter retains arrest procedures prescribed under Chapter V of the CrPC, changes which may be of significance include additions to Cl.35 (when police may arrest without warrant), Cl.37 (designated police officer), Cl.43 (arrest how made), Cls.51 and 52 (medical examination of the arrestee at the request of a police officer) and Cl.53 (medical examination of an arrestee). The list below describes all the changes brought in by the BNSS to provisions relating to arrest and medical examination of the accused. This piece, however, delves only into those changes that may have the most significant implications.

1. Cl.35(7): Inserts an additional requirement that a police officer cannot arrest without prior permission of an officer not below the rank of Deputy Superintendent of Police where the offence is punishable with imprisonment below three years *and* where the accused is infirm or above sixty years of age.

2. Cl.36(c): Inserts additional category of persons ['*any other person*'] whom the arrestee has the right to inform regarding their arrest. Presently, the CrPC makes provision for intimation of arrest to only a relative or friend of the accused.

3. Cl.37(b): Inserts additional obligation on the State government to designate a police officer who would be responsible for maintaining information regarding all arrests and arrestees. This sub-clause also requires such information to be displayed prominently in every police station and at the district headquarters.

4. Cl.40(1): Inserts an obligation requiring private persons who arrest to turn over the arrestee to a police officer or police station, without unnecessary delay, but within six hours of arrest. Presently, the CrPC only uses the phrase '*without unnecessary delay*'.

5. Proviso to Cl.43(1): Adds a phrase (to the existing proviso on arrest of a woman) that in the arrest of a female, the details of such arrest must be given to her relatives, friends or such other persons as disclosed or mentioned by her.

6. Cl.43(3): The clause, a new addition to s.46 CrPC, empowers the police to use handcuffs for habitual, repeat offenders who have escaped from custody and who have committed a variety of bodily, social and economic offences listed therein.

7. Cl.48(1): Inserts obligation on persons making an arrest to provide information of such arrest and place of arrest to the police officer designated in the district, as provided under Cl.37(b).

8. Cl.48(3): Inserts a phrase enabling the State government to frame rules as to the manner in which entries of arrests may be recorded within the police station.

9. Cls.51 and 52: Enable *any* police officer to seek the medical examination of the arrestee for purposes of investigation and collection of bodily samples, by replacing the phrase '*police officer not below the rank of a sub-Inspector*', under the existing ss.53 and 53A CrPC, with '*any police officer*'.

10. Cl.53: Inserts a proviso, enabling a medical practitioner conducting the medical examination of an arrested person, to conduct *one more* examination if such practitioner deems it fit.

11. Cl.58: Inserts a phrase to the effect that an arrestee may be produced before a Magistrate, within the first 24 hours of arrest, even if such Magistrate does not have jurisdiction.

I. Obligation of the Police to inform about the Arrest to a Friend or Relative

S.50A(1) CrPC places an obligation upon the police to inform the arrestee's friend, relative or any other person disclosed or nominated by the arrestee on the details of such arrest. This provision, recast in the BNSS in Cl.48(1), replaces the word '*nominated by the arrested person*' with '*mentioned by the arrested person*'. By replacing the word 'nominated' with 'mentioned', Cl.48(1) possibly indicates a shift

in the autonomy granted to the arrestee. While 'nominated' in the CrPC enables an accused's choice to some extent, 'mentioned' can cover a wide range of persons, regardless of the arrestee's choice or interest in having such person informed.[2] Thus, the BNSS clause may water down whatever emphasis existed on the accused's choice of person, potentially weakening the scope of this safeguard further.

Similarly, the proviso to Cl.43(1) BNSS, which prevents a police officer from touching a woman during her arrest, unless such police officer is female, additionally specifies the requirement to inform the female arrestee's relative, friend or such other person as disclosed or '*mentioned by her*', about the arrest. This addition merely reiterates the general obligation upon the police to inform a relative, friend or any other person about the details of arrest, found both under Cl.48(1) BNSS and in s.50A(1) CrPC.

II. Use of Handcuffs during Arrest

Cl.43(3) BNSS introduces discretionary powers for the police to use handcuffs, keeping in mind the 'nature and gravity of offence' upon arrest if the following conditions are met: i) where the offender is a habitual, repeat offender; ii) the person has escaped from custody; and iii) has committed offences including organised crime, terrorist acts, drug related crime, sexual offences, murder, acid attack, human trafficking, offences against the State, illegal possession of arms and ammunition, or economic offences amongst others. Such provisions pertaining to

[2] *D.K. Basu v. State of West Bengal* (2015) 8 SCC 744: The Supreme Court decision in this regard, held that the arrestee is 'entitled to inform such other person interested in the welfare of the arrestee'. While the language of the *D.K. Basu* guidelines indicate the accused's choice in selecting such a person ('an arrested person is entitled, if he so requests'), the emphasis of the decision lies in the point that such persons must be concerned with the accused's welfare.

handcuffs, are currently existing in several state prison manuals.[3] The BNSS introduces these handcuffing powers as a *statutory* power. However, Cl.43(3) BNSS falls short of well settled constitutional thresholds, established to protect a person's right to dignity under Art.21, that must be met for the exercise of handcuffing powers.

Handcuffs and other iron fetters to bind arrestees and prisoners have been found *prima facie* unconstitutional for its arbitrariness and degrading impact on human dignity.[4] Recognising these implications, the Supreme Court (through *Sunil Batra*[5] and *Prem Shankar Shukla*[6]) sets an extremely high threshold for the use of handcuffing powers, including during arrest. The exercise of such powers must meet the following criteria: i) the prisoner has a 'credible tendency for violence',[7] ii) used on a person only for a short spell of time,[8] iii) grounds for using such fetters are to be recorded in a journal, and communicated both to victims and the arrestee[9] and iv) the use of such handcuffs are subjected to quasi judicial oversight, and any extended use of the same will need the approval of a judge.[10] Significantly, the Court in both decisions also held that the mere risk of escape alone does not warrant handcuffs. Instead, the police and the State have the obligation to use less restrictive measures to prevent such escape before turning

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[3] Prison manuals across different States prescribe various situations in which handcuffs may be used on prisoners. Requirements to be met before resorting to handcuffs vary between different States, with some States placing rules which may also be constitutionally suspect when examined in the light of the *Sunil Batra v. Delhi Administration* (1978) 4 SCC 494 and *Prem Shankar Shukla v. Delhi Administration* (1980) 3 SCC 526 decisions. Normally, State rules have provided for the contexts/situations when handcuffs may be used (transit between court and prison) and also provide for handcuffs for categories of offenders who are considered 'violent or dangerous', or with the propensity to escape from custody. For instance, the Kerala Rules enable the use of handcuffs as punishment for prison offences, outline the time period for its use and enables fettering in case of 'bad or indifferent' behaviour; the Odisha rules state that handcuffing must be used in the absence of alternative ways to prevent a prisoner's escape and enables its use for prisoners involved in 'serious or violent offences' or have 'notorious and dangerous backgrounds', are 'violent or aggressive' and 'have escaped from custody before'.

[4] *Prem Shankar Shukla* [22].

[5] *Sunil Batra v. Delhi Administration* (1978) 4 SCC 494.

[6] *Prem Shankar Shukla v. Delhi Administration* (1980) 3 SCC 526.

[7] *Sunil Batra* [197B].

[8] *Sunil Batra* [197B].

[9] *Sunil Batra* [197B].

[10] *Sunil Batra* [197B].

to handcuffs as a last resort.[11] Taking this further, the Court in *Citizens for Democracy*[12] placed onus on the police or prison officials to undertake an *individualised* assessment for the need to use handcuffs.

However, Cl.43(3) enables a police officer to use handcuffs for a wide range of offences, without incorporating the constitutional requirement of the tendency to commit violence upon escape. The few qualifiers present in Cl.43(3) are of wide import. Firstly, the clause requires a police officer to keep in mind the 'nature and gravity of the offence'. The phrase is vague; it is unclear whether this simply alludes to the kind of offence (for example, it may apply to arrestees in murder cases but not theft) or whether it also requires consideration of other crime related details such as the manner of commission (its brutality etc.). This can be a subjective determination, and does not meaningfully guide the officer's discretion. Crucial considerations including the use of alternative means (to restrict a person, prevent their escape, or reduce propensity to cause harm before resorting to handcuffs) and the parameters to undertake individualised assessments for the use of handcuffs are conspicuously absent.

In the context of constitutional requirements for handcuffing, the nexus between some offences, such as economic offences, counterfeiting of coins and currency notes, and the need to use handcuffs remains unclear. In sum, Cl.43(3) provides no qualifiers to ensure that the use of handcuffs meet the threshold to ascertain a 'credible tendency for violence'. The only other restriction on this power may be Cl.46 BNSS, which lays out that arrested persons cannot be subjected to more restraint than necessary, which is identical to s.49 CrPC.

Another significant gap is the lack of clarification regarding the meaning of the phrase 'habitual, repeat offender'. The term 'habitual offender' has a distinct connotation from the phrase 'repeat offender'. Habitual offenders may refer to the terminology used under various state legislations pertaining to 'habitual offenders'.[13] While some states have defined 'habitual offender' as any person

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[11] *Sunil Batra* [197B]; *Prem Shankar Shukla* [25].

[12] *Citizens for Democracy v. State of Assam* (1995) 3 SCC 743 [9].

[13] These legislations were intended to correct colonial era laws targeting various communities as criminal by birth, but perpetuated the same discrimination in effect; s.2(2) Habitual Offenders (Control and Reform) Act, 1956; s.2(d) Kerala Habitual Offenders Act, 1960; Dilip D'Souza, De-Notified Tribes: Still 'Criminal'?, *Economic and Political Weekly*, Volume 34, Issue 51, December 1999, Pages 3576–78.

convicted and sentenced to imprisonment at least *three* times in five years for certain bodily and economic offences, other states have fewer requirements (for instance, some states do not require prior convictions within a five year period).[14] On the other hand, there is no pre-existing legislative definition or prior conceptualisation of the term 'repeat offender'[15] and the term could possibly refer to anyone who has committed more than *one* offence.

The BNSS clause does not clarify whether 'habitual' and 'repeat' are taken to have the same meaning, or whether it alludes to two distinct concepts. Cl.43(3) also does not clarify whether handcuffs can be used only where the offence in question is one that an arrestee is habitually and repeatedly accused of. Furthermore, it is unclear whether the metric for assessing habitual or repeat offences are prior convictions, arrests or charge sheets.

III. Medical Examination of the Accused at the request of a Police Officer

Cls.51 and 52 BNSS, pertaining to the medical examination of an accused for the purposes of investigation, recast ss.53 and 53A CrPC. S.53(1) CrPC enables a police officer not below the rank of Sub-Inspector to direct a medical practitioner to conduct the arrestee's medical examination if the officer has reasonable grounds to believe that such examination will produce evidence linked to the offence. S.53A CrPC extends this power in the context of persons accused of rape, with the provision allowing both Government medical practitioners and other practitioners within 16 kms of such custody to conduct the examination. The explanation of the section makes it clear that the practitioner may collect a variety of bodily fluids and samples, including DNA profiling, blood, sweat, hair samples etc.[16] However, Cls.51 and 52 BNSS replace the phrase 'police officer not below the rank of sub-inspector' by 'any police officer'. Further, by way of an addition, sub-clause (3)

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[14] S.2(c) Uttar Pradesh Habitual Offenders Restrictions Act, 1952.

[15] The only reference to the same may be under s.376E IPC, which prescribes punishment for persons convicted more than once for rape.

[16] Explanation in s.53 is as follows: ''*examination' shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and fingernail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case*.'

of Cl.51 mandates the medical practitioner to forward the examination report without delay to such police officer.

Enabling any police officer to request such an examination removes the safeguard present in the CrPC (requiring a police officer who was qualified to be a Sub-Inspector), and widens the range of officers who can request and collect such samples. Pertinently, the power exercisable by these provisions extends to the accused's body, and involves furnishing such evidence which are of a highly sensitive and private nature. It is important to note here that samples collected under this provision will be used during forensic examinations. Widening the scope to 'any police officer' creates greater risk of improper collection of samples by junior officers who may not have the required skills, training or experience. Given the intimate nature of the samples and their use for forensic analysis, this may adversely affect an accused's right to a fair trial and right to privacy. It may be noted that this modification replicates the position under the CPIA.[17]

IV. Medical Examination of the Accused at the Time of Arrest

S.54 CrPC (which mandates the medical examination of an arrestee soon after arrest) is retained in Cl.53 BNSS with an additional proviso inserted. Unlike ss.53 and 53A, the medical examination stipulated under s.54 CrPC acts as a safeguard for the arrestee, who is required to be medically examined for any signs of custodial violence, torture or ill treatment during confinement in custody. The additional proviso introduced in Cl.53 BNSS enables the medical practitioner to conduct one more examination of the arrestee if the practitioner finds it necessary. This proviso is discretionary, as opposed to the mandatory nature of Cl.53(1). Presently, the *D.K. Basu* guidelines require the medical practitioner to conduct medical examinations once every 48 hours when the arrestee is in custody.[18] Contrary to this, Cl.53(1) does not mandate multiple examinations ('one more examination') and instead leaves this issue to the discretion of the medical practitioner.

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[17] Project 39A, Research Brief: Analysis of the Criminal Procedure (Identification) Act, 2022, September 2022, Pages 23, 44: This Act replaces the Identification of Prisoners Act, 1920, and provides that anyone above the head constable rank can collect samples. The Research Brief notes that these officials would not have the requisite skills, qualifications or training for sample collection.

[18] *D.K. Basu.*

Proclaimed Offenders and Trials *in Absentia*

Clauses 84, 86, 115 and 356

Chapter VI of the CrPC envisages a scheme of issuing summons, warrants, and notices to compel the appearance of an accused in court. If a court has reason to believe that an accused person is intentionally evading these processes, it may issue a proclamation notice and direct them to appear at a specified time and place. After issuing a proclamation notice,[19] a court may also pass an order attaching any property that belongs to the absconding accused, in order to compel their appearance in court. If they fail to appear pursuant to a proclamation notice, and they are accused of an offence specified in s.82(4) CrPC, the court may declare them as a 'proclaimed offender'.

The BNSS proposes three modifications to this scheme. One, it clarifies the nature of offences for which an accused may be declared as a proclaimed offender (Cl.84(4)). Two, it allows courts to try proclaimed offenders *in absentia,* i.e., without them being personally present (Cl.356). Three, it allows courts to request for assistance in attaching properties belonging to proclaimed persons in countries or places outside India (Cl.86).

I. Proclaimed Offender under Cl.84(4)

The list of offences for which a person may be declared as a proclaimed offender under s.82(4) CrPC is restricted to certain offences under the IPC.[20] Most of these offences carry punishments of imprisonment for seven years, ten years, or with life, and as such, are grave offences.[21] However, s.82(4) does not include many

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[19] In some cases, an order of attachment can be issued simultaneously along with a proclamation notice; See proviso to s.83(1) CrPC.

[20] S.82(4) CrPC specifies the following offences: ss.302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459, 460 IPC.

[21] This list was retained from s.45 CrPC 1898; but the basis for selecting these offences has since been unclear. It has been argued that the list of offences was chosen arbitrarily; Abhinav Sekhri, 'Section 82 CrPC and Proclaimed Offenders' (*The Proof of Guilt,* 1 June 2015) <https://theproofofguilt.blogspot.com/2015/06/section-82-crpc-and-proclaimed-offenders.html>, last accessed on 18.10.2023.

other offences that carry equal or higher punishments.[22] Cl.84(4) BNSS proposes to replace the list of specified offences under s.82(4) CrPC with a sentence-based qualifier, i.e., *any* offence that is punishable with ten years' imprisonment or more, with life imprisonment, or with death. The BNSS also extends the concept of proclaimed offenders to persons accused of offences punishable under *any other* law, in addition to the BNS.

The BNSS does not propose any other changes to the provisions related to issuing a proclamation notice or declaring an accused as a proclaimed offender. Accordingly, it retains the distinction between a 'proclaimed person', as someone to whom a proclamation is issued under Cl.84(1);[23] and a 'proclaimed offender', as someone accused of an offence specified in Cl.84(4)[24] and who fails to appear pursuant to a proclamation notice.[25]

II. Proclaimed Offenders and Trials *in Absentia*

In 2017, the Supreme Court suggested that procedure be adopted to conduct trials of absconding offenders *in absentia*, in order to remedy delays caused by their

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[22] For example, ss.121-128, s.130, s.201, ss.305–307, ss.313–316, s.326, s.326A, ss.327–329, s.366, s.376, s.377, ss.386-389, s.412, s.413 IPC are punishable with imprisonment for ten years or more, or death, but are not included within the scope of s.82(4) CrPC.

[23] S.82(1) CrPC.

[24] S.82(4) CrPC.

[25] High Courts have taken contradictory positions in this regard. *Sanjay Bhandari v. State (NCT of Delhi)* 2018 SCC Online Del 10203 (SJ): the Delhi High Court held that a person who is not accused of any of the offences in s.82(4) CrPC cannot be declared as a proclaimed offender. However, in *Rajiv v. State of Haryana* Crl. Misc. No. M-30146 of 2011, Punjab and Haryana High Court, judgment dated 12.10.2011, and *Deeksha Puri v. State of Haryana,* 2012 SCC OnLine P&H 20122: the Punjab & Haryana High Court held that a person to whom a proclamation is issued under s.82(1) will suffer the same liabilities and consequences attached to a person declared as a proclaimed offender under s.82(4), and the distinction between the two is only relevant insofar as the punishment under s.174A IPC is concerned. The position taken by the Punjab & Haryana High Court is an outlier. High Courts have largely agreed with the Delhi High Court's interpretation.

absence during trial.[26] *Inter alia,* High Courts of Gujarat,[27] Delhi,[28] Jharkhand,[29] and West Bengal[30] have taken different approaches to address this concern. Any attempts at codifying *in absentia* trials must keep in mind fair trial rights of an accused. Currently, the CrPC allows evidence to be recorded in the absence of the accused,[31] but does not provide for trials to be *completed* or for judgments be pronounced against absconding persons. To that extent, the CrPC strikes a balance by allowing trials to continue against apprehended accused and utilising the evidence recorded against the absconding accused during trial, while at the same safeguarding an accused's right to defend themselves. The new procedure for conducting certain trials *in absentia* drastically changes this scheme.

Under the provisions of the BNSS, three conditions must be met before a court can proceed to hold a trial in the absence of the accused. *One*, the accused is declared a proclaimed offender under Cl.84(4). *Two*, they have absconded to evade trial. *Three*, there is no immediate prospect of their arrest. Once these conditions are met, Cl.356 deems the proclaimed offender to have waived their

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[26] *Hussain v. Union of India* (2017) 5 SCC 702 [23]: Supreme Court flagged s.339B ('*Trial in absentia*') of the Bangladesh Code of Criminal Procedure, 1898 and requested relevant authorities to take note of the same to address delay in finishing trials.

[27] Saeed Khan, 'Continue trial even if accused is absent: Gujarat HC to lower courts' *Times of India* (11 June 2016): In 2016, the Gujarat High Court issued a circular and directed subordinate courts to proceed with trial and pronounce judgments even if undertrials were absconding; *State of Gujarat v. Narubhai Amrabhai Chunara Vaghri* 1996 SCC OnLine Guj 43 [9]: the Gujarat High Court decided to proceed with an appeal against acquittal in their absence. The High Court also issued general directions to appoint advocates to defend respondent-accused in all similar cases where they are declared absconding.

[28] *Sunil Tyagi v. Govt of NCT (Delhi)* 2021 SCC OnLine Del 3597: The High Court of Delhi has issued detailed directions after a comprehensive consultative process with senior lawyers and judicial officers, but did not recommend that absconding persons be tried *in absentia*. The Delhi High Court issued guidelines for issuing warrants at the stage of trial and investigation, for issuance of proclamation, for enhancing the efficiency in execution of proclamations, and for early apprehension of proclaimed offenders and proclaimed persons.

[29] *Hari Singh v. State of Jharkhand* 2018 SCC Online Jhar 2534: In Jharkhand, the High Court requested that s.299 CrPC be amended to expedite criminal trials.

[30] *Kader Khan v. State of West Bengal* 2022 SCC Online Cal 1038 [36]: The High Court of Calcutta has suggested that amendments be made to the CrPC to incorporate a provision for trial *in absentia*, for better administration of justice and to mitigate the impact of abscondence on speedy justice and victims' rights.

[31] S.299 CrPC.

right to be present for their trial. After recording reasons in writing, a court may proceed with the trial as if they were present in court.

Only a proclaimed offender can be tried *in absentia*. Under Cl.84(4), proclaimed offenders must be accused of a *grave offence*, i.e., an offence punishable with imprisonment for ten years or more, life, or death. It follows that the scope of trials under Cl.356 is limited to persons accused of grave offences, at least until State governments decide to issue a notification and extend this procedure to absconders mentioned in Cl.84(1).[32] Unrestricted power to notify offences for *in absentia* trials is prone to misuse and may result in arbitrary State action.

The trial under Cl.356 cannot begin until ninety days after the framing of charge.[33] Offences punishable with imprisonment for ten years or more are exclusively triable by a court of sessions, and in such cases, charges cannot be framed in the absence of the accused.[34] The Bill retains this position.[35] If framing of charge is a prerequisite for trials *in absentia*, the scope of Cl.356 is limited to those who abscond during trial, and it excludes an accused person who has absconded during the investigation. This is consistent with the second precondition for proceeding with a trial *in absentia*, that the accused should have absconded to evade trial.

A proclamation can be issued if the court has reason to believe that the accused is intentionally avoiding warrants of arrest and absconding.[36] A proclamation notice must be published and affixed at a conspicuous place where the accused last resided, and the notice may also be published in a newspaper.[37] Under Cl.356(2), courts must ensure that attempts are made to inform the accused about the

[32] Cl.356(8) BNSS.

[33] Proviso to Cl.356(1) BNSS.

[34] Cls.249, 251(1)(b) BNSS and ss.226, 228(1)(b) CrPC.

[35] Cl.251(1)(b) BNSS: this provision requires that the accused be physically present or be produced through electronic means so that before framing any charge, the judge reads and explains the same to them.

[36] Cl.84(1) BNSS and s.82(1) CrPC.

[37] Cl.84(2) BNSS and s.82(2) CrPC.

proposed commencement of trial.[38] It is unclear whether these procedural requirements will be understood as part of the process before issuing a proclamation notice, or as separate, additional measures to ensure that attempts are made to inform the accused of the commencement of trial. The standard format prescribed for a proclamation notice (Form No. 4) does not extend to notification of the accused about commencement of trial. A significant challenge under the CrPC is ensuring that summons, warrants, and notices are in fact issued to the accused and it is guaranteed that the accused is *intentionally* absenting themselves from court. The Bill does not propose any changes to address this problem.

Similar to Cl.356 BNSS, s.299(1) CrPC (retained verbatim in the BNSS as Cl.335), also requires that the accused person is absconding *and* there is no immediate prospect of their arrest, before evidence may be recorded in their absence. These requirements are conjunctive.[39] These requirements must be 'proved' to trigger Cl.335, but there is no such requirement of proof under Cl.356. It is unclear whether this is an inadvertent error, or the drafters envisaged weaker safeguards before completing a trial in the accused's absence than for recording evidence as part of the trial. Nevertheless, both Cls.335 and 356 are a departure from the general principle that trials should be conducted in the presence of the accused, and accordingly, these provisions must be construed strictly.

The possibility of securing an easy conviction by conducting trials *in absentia* under Cl.356 may serve as an incentive for prosecutors and police officers to manipulate warrants and summons, or proceeding without making adequate efforts to locate the accused. Although under Cl.356(3), the accused has a right to legal counsel where they are not already represented by an advocate, no additional safeguards are provided for those aspects of the trial where the presence of the accused is indispensable. This *inter alia* includes the hearing under s.313 CrPC, cross examination of witnesses in the presence of the accused, and a separate hearing on sentence.

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[38] Cl.356(2)(ii–iv) BNSS: (ii) publication in a national or local daily newspaper circulating in the accused's last known address, requiring the proclaimed offender to appear for trial and informing them that the trial will commence in his absence if he fails to appear within 30 days; (iii) informing a relative or friend about the commencement of trial; and (iv) affix information about the commencement of trial at a conspicuous part of the home where the proclaimed offender ordinarily resides.

[39] *Jayendra Vishnu Thakur v. State of Maharashtra* (2009) 7 SCC 104 [29].

Cl.356(7) prevents filing of appeals against trials in absentia unless the proclaimed offender appears in court, and in any case, prescribes a blanket limitation of three years for all appeals against conviction in such trials. Proclamations under s.82 CrPC are understood to stand cancelled after the accused enters appearance. Should an appeal against conviction be filed, the question remains: how will appellate courts appreciate evidence collected without the presence of the accused? Appellate courts frequently remand matters where these safeguards are denied to the accused. If appellate courts regularly start remanding matters to cure irregularities in the trial and consideration of evidence against proclaimed offenders, *in absentia* trials may risk prolonging trials indefinitely.

Cl.356 attempts to strike a balance between two considerations: the constitutional right to a fair trial where the accused has a meaningful opportunity to defend themselves, and the overarching public interest of delivering timely justice. But in doing so, the BNSS does not propose changes to the mode of delivering summons, warrants, and proclamations. As a result, people can not only be declared as proclaimed offenders, but may now also be tried and punished, all without their knowledge.

III. Proclamation and Attachment of Property abroad

The BNSS retains the procedure under Chapter VI(C) of the CrPC for attachment, release, sale, and restoration of property belonging to proclaimed persons;[40] and introduces an important new provision, Cl.86. This provision allows a court to request a *contracting state* to assist with the identification, attachment, and forfeiture of a property belonging to a proclaimed person.[41] Presumably, the intention with Cl.86 is to target a proclaimed person's property that is located in a country or place *outside* India. While Cl.86 stipulates that the procedure under Chapter VIII of the BNSS will apply to such requests, the procedure, scope, and purpose of attachment under Chapter VI(C) is different from attachment under Chapter VIII of the BNSS.[42]

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[40] Ss.83–86 CrPC, and Cls.85, 87, 88, 89 BNSS.

[41] Chapter VIII of the BNSS retains the definition of 'contracting state' under Chapter VII(A) of the CrPC. See Cl.111(a) BNSS and s.105A(a) CrPC: 'contracting State' means any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country through a treaty or otherwise.

[42] Barring the proposed insertion of Cl.86 in Chapter VIII of the BNSS, relevant provisions of Chapter VI(C) and Chapter VIII of the BNSS are identical to the corresponding provisions in

Attachment and forfeiture under Chapter VIII relates to a property derived or obtained, directly or indirectly, from the commission of an offence.[43] Under Cl.115(2), a court must have *reasonable grounds to believe* that property is derived from an offence before issuing an order of attachment or forfeiture, or making a request for assistance from a contracting state in this regard.[44] Once an order for attachment or forfeiture is passed by an Indian court, enforcement of this order will depend on the relevant treaty between India and the concerned contracting state.[45] Chapter VIII of the BNSS is identical to Chapter VII(A) of the CrPC, insofar as attachment and forfeiture proceedings are concerned.[46] After considering the historical context to Chapter VII(A) of the CrPC,[47] the Supreme Court has identified two restrictions to its applicability: the property must relate to the commission of an offence, and this offence must have international ramifications.[48]

Prima facie, these restrictions do not apply to attachment proceedings under Chapter VI(C) of the CrPC. Attachment of property under this chapter is intended

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Chapter VI(C) and Chapter VII(A) of the CrPC, respectively; see Cls. 84, 85, 87, 88, 89 BNSS and ss.82, 83, 84, 85, 86 CrPC.

[43] Cl.115(1) and s.105C CrPC; Chapter VII(A) CrPC.

[44] Cl.115(1)-(2) BNSS and s.105C(1)-(2) CrPC.

[45] See https://cbi.gov.in/MLATs-list for a list of Mutual Legal Assistance Treaties between India and other countries. Broadly, these treaties relate to requests for legal assistance in attaching or forfeiting property related to the commission of an offence.

[46] The only difference between the two chapters is the insertion of Cl.112 and Cl.113 in Chapter VIII (BNSS), which are not in Chapter VII(A) of the CrPC. These clauses are identical to s.166A and s.166B in Chapter XII of the CrPC.

[47] Chapter VII(A) was inserted in the CrPC by an amendment (Act No. 40 of 1993). While interpreting the scope of this chapter, the SC considered the Chapter heading of and the Statement of Objects and Reasons of the amending act. The Statement identified three objectives of the Amendment: '*(a) transfer of persons between contracting states including persons in custody for the purpose of assisting in investigation or giving evidence in proceedings; (b) attachment and forfeiture of properties obtained or derived from the commission of an offence that may have been or has been committed in the other country; (c) enforcement of attachment and forfeiture orders issued by a court in the other country*'.

[48] *State of Madhya Pradesh v. Balram Mihani and Ors*. (2010) 2 SCC 602 [13]-[18]; Ratio relied on in *Shine Vijayan v. State of Kerala* 2016 SCC OnLine Ker 28314; *Ugma Ram v. State of Rajasthan* 2022 SCC OnLine Raj 3287; *Mohd. Hasheer Poolakkal v. United Arab Bank* 2022 SCC Online Ker 2040; *Abhay Shenikbhai Gandhi v. State of Gujarat* 2015 SCC Online Guj 5964.

to compel accused persons to appear in court.[49] *Any* property belonging to the proclaimed person may be attached, so long as a proclamation notice has been issued validly.[50] The law does not require that the property sought to be attached be derived, obtained, or be in any other way related to the commission of any offence – and accordingly there is no requirement that a court record *reasonable grounds* to believe that there is a connection between the property and an offence. Chapter VIII of the BNSS additionally provides for *forfeiture* of property to the Central government, which is not permitted under Chapter VI of the CrPC. It is unclear why Cl.86 has been introduced in Chapter VI(C), instead of Chapter VIII.[51]

The text of the proposed addition to Chapter VI (Cl.86), does not consider the inconsistency between the purpose and procedure for attachment under Chapter VI and Chapter VIII. This raises some questions: Can a request be made to attach foreign property belonging to a proclaimed offender that is *not* obtained or derived from the commission of an offence, in order to compel their presence in court? Can such a request be made in relation to a proclaimed offender accused of a *local* offence, i.e., an offence without international ramifications? If the intention is *only* to attach or forfeit property obtained related to the commission of crime, on the basis of what material can a court form *reasonable grounds*, when the accused is absconding? Is a mere request made by a police officer (admittedly not below the rank of a Superintendent or Commissioner) sufficient? How will such requests for assistance be executed in a contracting state? Will suitable amendments be made to India's Mutual Legal Assistance Treaties (MLATs) in this regard, or will this provision only apply to treaties ratified after the new law comes into force?

In conclusion, the changes to proclaimed offenders, the addition of new procedure for trials *in absentia*, and the new provision permitting requests for assistance to

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[49] *Vimlaben Ajitbhai Patel v. Vatslaben Ashokbhai Patel and Ors.* (2008) 4 SCC 649 [32]; *Devendra Singh Negi v. State of UP* 1993 SCC Online All 90; *Daya Nand v. State of Haryana* 1975 SCC OnLine P&H 200.

[50] S.83 CrPC and Cl.85 BNSS.

[51] It may be noted that certain other provisions dealing with requests for assistance from foreign courts or authorities, such as ss.166A and 166B CrPC, are proposed to be removed from Chapter XII of the CrPC [Investigation by the Police and their Powers to Investigate] and added to Chapter VIII of the BNSS as Cls.112 and 113. It is not clear whether the Supreme Court's dicta in *Balram Mihani* as to the scope of Chapter VII(A) will apply to these provisions.

attach property abroad raise more questions than they answer, and pose serious threat to the fair trial rights of an accused.

Audio-Video Recordings during Investigation

Clauses 54, 105, 176, 183 and 185

In the BNSS there has been an overall emphasis on the use of technology at every stage of the criminal legal process. This piece will specifically consider the key changes proposed regarding the use of audio-video recording during investigation.

Table 1: New additions to Audio-Video Recording during Investigation

SN	BNSS			CrPC
	Provision	Scope	Requirement for Audio-Video[52]	
1	Clause 105 'Recording of search and seizure through audio-video electronic means'	Applicable to search and seizure under Chapter VII 'Processes to Compel the Production of Things' and Clause 185 'Search by police officer'	Search and seizure, including the process of seizure memo, '*shall* be recorded through *any audio-video electronic means preferably cell phone*'	None
2	Clause 185 'Search by police officer'	'Search by police officer'	Search conducted '*shall* be recorded through *audio-video electronic means preferably by mobile phone*'	This proviso is absent in corresponding Section 165 'Search by police officer'

[52] Emphasis added.

3	Clause 176 'Procedure for investigation'	Sub-clause (1): Any statement (made before the police) under this 'sub-section'	*Option* for statement to also be recorded through '*any audio-video electronic means preferably cell phone*'	This proviso is absent in corresponding Section 157 'Procedure for investigation' However, Section 161 'Examination of witnesses by police' provides the option of recording any statement made to the police 'by audio-video electronic means'. This has also been retained in the corresponding Clause 180 BNSS Section 154 'Information in cognizable offences' provides that the statement of certain victim-informants with physical or mental disabilities 'shall be videographed'. This has also been retained in the corresponding Clause 173 BNSS
		Sub-clause (3): Process of collection of forensic evidence from the scene of crime by forensic experts, for offences punishable with 7 years or more. The mandatory nature of this provision is	*Mandatory* requirement for *videography* of the process of collection of forensic evidence *on mobile phone or any other electronic device*	This sub-section is absent in the corresponding Section 157 'Procedure for investigation'

		subject to State government notification, within 5 years	.	
4	Clause 183 'Recording of confessions and statements'	Sub-clause (6): Process of recording of statement before the magistrate of temporarily or permanently, physically or mentally disabled victims of certain offices including crimes against women	In this particular context, the statement before the magistrate '*shall* be recorded through *audio-video electronic means preferably cell phone*'	Replaces 'shall be videographed' in otherwise similar provision Section 164(5A)
5	Clause 54	Test identification parade involving identifying witnesses with temporary or permanent physical or mental disabilities	In this particular context, the identification process *'shall* be recorded by *any audio-video electronic means*'	Replaces 'shall be videographed' in otherwise similar provision Section 54A

Exclusions

CrPC	BNSS
Section 164 'Recording of confessions and statements' 'Provided that any confession or statement made under this sub-section may *also be recorded by audio-video electronic means* in the presence of the advocate of the person accused of an offence'	Clause 183 'Recording of confessions and statements' 'Provided that any confession or statement made under this sub-section may also be recorded in the presence of the advocate of the person accused of an offence'

I. Background

The inclusion of audio-video in investigation is a positive move geared towards ensuring greater transparency and accountability in police investigation, protecting the rights of both accused and victims, and improving the quality of evidence.

The inclusions made by the BNSS are in line with the general trend of expanding the use of technology in investigation, as evident from legislative developments and judicial discourse.

The CrPC currently includes the option of audio-video recording of witness statements before the police (s.161) and confessions and other statements before the Magistrate (s.164(1)).[53] There are also mandatory provisions requiring videography of procedures involving persons with physical or mental disability, including the recording of police statements of such victim-informants in cases of sexual violence (s.154), statements before the Magistrate (s.164(5A)), and test identification proceedings (s.54A).[54] Additionally, the POCSO Act, also provides the option of use of audio-electronic means for recording the statement of a child victim. Courts have time and again emphasised the need for the utilisation of audio-video recording, for inspection of crime scene/spot;[55] dying declarations; statements of victims of sexual assault; post mortems in custodial death cases,[56] to name a few.

While audio-video has the potential to strengthen the quality of evidence, it is also more susceptible to alteration, modification and transposition, through direct intervention or unintended corruption of a digital record. Recognising this, the Supreme Court in *Arjun Panditrao Khotkar,*[57] settled conflict in jurisprudence, and held that the procedure under Section 65B IEA must be mandatorily provided for the admissibility of an electronic record. This procedure is essential in order to ensure the authenticity and accuracy of electronic evidence.

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[53] Introduced vide Code of Criminal Procedure (Amendment) Act, 2008.

[54] Introduced vide Criminal Law (Amendment) Act, 2013.

[55] *Shafhi Mohammad v. State of Himachal Pradesh* (2018) 2 SCC 801.

[56] *Criminal Trials Guidelines Regarding Inadequacies and Deficiencies, In re*, (2021) 10 SCC 598; *Santosh v. The Director Collector, Madurai District and Ors.* W.P. (MD) No. 12608 of 2020, Madras High Court, order dated 02.12.2020, <https://www.mhc.tn.gov.in/judis/index.php/casestatus/viewpdf/869346>, last accessed on 20.10.2023.

[57] *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors.* (2020) 7 SCC 1.

The Supreme Court in *Shafhi Mohammad* not only emphasised the significance of audio-video technology to aid the police in crime scene investigation, but also drew attention to the importance of building institutional and infrastructural capacity for its effective and mandatory implementation. During the proceedings in this case, infrastructural and institutional limitations, across states, in the effective use of audio-video technology in investigation were highlighted including lack of funding; equipment; systems for collection, and secure storage and transfer of electronic record; training; and forensic facilities.[58] These were identified as barriers to mandatory requirement for the use of audio-video technology during investigation.

II. Implications of changes proposed under the BNSS

a. Search and Seizure

Considering the risk of manipulation of evidence and possibility of misuse of police power, the mandatory inclusion of audio-video recording in search and seizure proceedings is a laudable addition proposed. This requirement under Cl.105 extends to all search and seizure procedures, under Chapter VII and Cl.185. However, the scope of Cl.105 is restricted to the search of a place, and appears to exclude the search of a person and seizure of articles from their person. A clear limitation of Cl.105 is that provisions related to search of place of arrest (Cl.44) and search of a person arrested (Cl.49) are clearly excluded from the mandatory requirement of audio-video recording under Cl.105. Since Cl.105 pertains to the process of 'search of a place or taking possession of any property, article or thing' under the provisions specified, it should include the search of a person suspected of concealing relevant articles, under Cl.103(3) (under Chapter VII).

Nevertheless, Cl.105 significantly extends the scope of audio-video recording during search and seizure, to include the process of preparing a list of seized items and the signature of witnesses. Transparency in search and seizure proceedings, in this manner, has the potential to deter against fabrication of evidence and subversion of the safeguard requiring the presence of independent witnesses to these proceedings.

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[58] *Shafhi Mohammad v. State of Himachal Pradesh* SLP (Crl.) Nos. 2302 of 2017, 9431/2011 and 9631-9634/2012, Supreme Court, order dated 30.02.2018 <https://main.sci.gov.in/supremecourt/2017/6212/6212_2017_Order_30-Jan-2018.pdf>, last accessed on 20.10.2023; *Shafhi Mohammad v. State of Himachal Pradesh* Petition(s) for Special Leave to Appeal (Crl.) No(s).2302/2017, Supreme Court, order dated 18.11.2021, <https://main.sci.gov.in/supremecourt/2017/6212/6212_2017_32_30_31408_Order_18-Nov-2021.pdf>, last accessed on 20.10.2023.

Cl.105 also requires that this audio-video recording be submitted before the District Magistrate, Sub-divisional Magistrate or Judicial Magistrate of first class 'without delay'. Under Cl.103, which provides the procedure for conducting search and seizure, (6) and (7) clearly provides that the occupant of place searched/person searched be provided a copy of the seizure memo.

However, an important aspect to be noted is that there is no clear provision in the BNSS that entitles the concerned persons, including the accused, access to the audio-video recordings.

b. Other Investigation

Cl.176(3)'s requirement for videography of the process of collection of forensic evidence is another move towards greater transparency and accountability in evidence gathering, and a safeguard against irregularities and manipulation.[59]

Cl.176(1) also provides an option of audio-video recording of any statement made during police investigation. The scope of this proviso is wide enough to include disclosure statements of accused before the police, besides the statements of other witnesses (audio-video recording for which is already permitted under s.161 CrPC, retained in Cl.180 BNSS). This is an important safeguard to deter against torture and coercion of the accused during custodial interrogations. However, a crucial limitation is that this is not a mandatory requirement. Further, it is unclear whether the scope of Cl.105 is broad enough to include audio-video recording of the subsequent process of recovery evidence, which is most susceptible to irregularities and fabrication. Considering the fact that investigating agencies rely heavily on recovery evidence, mandatory audio-video recording of the process of collection of this evidence would be an important inclusion in the bill.

The BNSS, however, misses the opportunity to introduce the requirement for audio-video recording of other crucial processes during investigation like spot inspection (with the exception of Cl.176(3)), inquest proceedings or post mortem of the deceased.

The BNSS does not strengthen existing provisions for audio-video recording under the CrPC. For instance, audio-video recording of statements by witnesses to police continues to be optional under Cl.180. Only test identification proceedings involving witnesses with physical or mental disabilities are required to be recorded

[59] Refer to section on Forensic Expert Evidence, Page 57 for complete analysis of this provision and its implications. This note is limited to the videography requirement.

through audio-video means, under Cl.54, and other identification proceedings remain excluded from this requirement.

Consistent with the CrPC, the BNSS retains the mandatory requirement for videography of police statements, and audio-video recording of statements before the magistrate for certain vulnerable victims with physical or mental disabilities, under Cls.173(1) and 183(6) respectively.

c. Confessions and Statements before the Magistrate

The BNSS completely omits the existing safeguard for audio-video recording of statements and confessions before the magistrate.[60]

Audio-video recording of statements before the magistrate was an important safeguard to protect the rights of witnesses, particularly victims of sexual assault. It prevents the loss of evidence due to threat or coercion, which may lead to witnesses withdrawing their statements or turning hostile. With this omission in the BNSS, the protection of audio-video recording of statements before the magistrate is only available to certain victims under Cl.183(6), but not provided to other witnesses.

The audio-video recording of the confession along with the presence of a lawyer, is an important safeguard against false confessions. Before recording any confession, a magistrate is required to ascertain its voluntariness and ensure that the accused is free from police duress, as per prescribed procedures. The provision for audio-video recording of confessions is an additional means through which the voluntariness of the confession can be confirmed, through an assessment of the physical condition, body language and manner of speaking of the accused. The BNSS misses the opportunity to strengthen the existing protection under s.164 CrPC, by making it mandatory, and expanding its scope to include audio-video recording of all the procedural safeguards essential to confirm the voluntariness of the accused's confession. Instead, this omission completely deprives the accused of an important safeguard existing in the law.

d. Access to Audio-Video Recording during Investigation

The significance of audio-video recording as a safeguard during investigation is only possible if access to these recordings are provided to the witnesses/victim-informants, but also to the accused. This would enable them to

[60] Cl.183 BNSS.

substantiate their claims regarding the non-compliance of any procedural safeguards by the police during the investigation.

The language of Cl.230 under the BNSS may be broad enough to include audio-video recording. Cl.230 requires the accused and victim (if represented by a lawyer) to be supplied with the police report and all necessary documents, including statements and confessions.[61] The provision does not explicitly mention supply of audio-video recordings.

However, the term 'document' is wide enough to include digital and electronic records.[62] Further, Cl.230, expands the existing s.207 CrPC, to also explicitly include supply of documents in electronic form, and permits the Magistrate to furnish copies of any documents considered to be 'voluminous' through electronic means, in addition to the provision for allowing them to inspect this record from the court either personally or through an advocate. Nevertheless, in the absence of explicit mandate for supply of audio-video recording, access to these documents by the accused and victim may be largely dependent on the discretion of the Magistrate or the police.

III. Scope of Audio-Video Recordings

Cl.2(a) BNSS defines 'audio-video electronic' as 'any communication device' that can be used for the purposes of recording investigation as prescribed.[63] The BNSS uses both terms 'audio-video' recording and 'videography', and there is a lack of clarity about the respective scope of these terms. It is unclear whether 'audio-video' recording includes a requirement for both audio and video, or provides an option of recording either audio or video of the proceedings. Since the BNSS also uses the term 'videography', there is a possibility that the scope of this recording would be limited to visual recording, without the corresponding audio.

In the BNSS, the term 'videography' has been used in the context of recording the process of collection of forensic evidence and recording information by the police from a vulnerable victim-informant. All other provisions in the BNSS use the term audio-video. While recording of victim statements under Cl.173(1) cannot happen without audio recording, audio is also a useful safeguard for transparency in

[61] Corresponding to s.207 CrPC.
[62] Cl.2(c) BSB.
[63] A new addition in the BNSS.

collection of forensic evidence under Cl.176(3). While most provisions[64] specify cell phone[65] as the preferred method of audio-video recording, Cl.176(3) particularly provides for 'videography' to be carried out through 'mobile phone'.

IV. Use of Mobile Phones for recording Audio-Video Evidence

While there is some inconsistency and lack of clarity in the terminology used, there is little guidance on the nature of recording device to be used. Without such clarity, there is an apprehension of variance in the audio and video recordings, which might lead to poor quality of the electronic record.

There are benefits of using mobile phones, because they are easily accessible by police officers at any point during investigation. However, the BNSS does not specify that designated equipment be used for investigation. Therefore, without legislative clarity, cell/mobile phones referred to may include personal phone devices of investigating officers.

There are several concerns with the susceptibility of electronic record to alteration, modification and transposition, either through manual intervention or unintended corruption of a digital document. These fears are heightened when a personal communication device is being used for audio-video recording during investigation. Further, it would be more difficult to prove the integrity and proper chain of custody for an electronic record originating from a personal communication device, which is in the constant possession of the police officer. It would also have adverse consequences on the privacy of investigating officers. Further, there are additional risks of contamination or corruption of the electronic record due to malfunctioning of a personal communication device. The confusion over the applicability of the special procedure under Cl.63 BSB (corresponding to s.65B IEA) to prove authenticity and accuracy of electronic record as an admissibility requirement raises more apprehensions regarding the use of personal communication devices by police offices.[66]

Concerns of misuse and illegal circulation of sensitive evidence, including statements recorded under Cls.176(1) and 183(6), are aggravated when the evidence is originally recorded on personal communication devices.

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[64] Cls.176(1), 105, 185, 183(6).

[65] 'mobile phone' in Cl.185.

[66] Refer to section on Admissibility of Electronic Records, Page 95.

V. Infrastructure and Institutional Capacity

The most significant hurdles to the adoption of audio-video technology in investigation is the absence of equipment and the lack of trained personnel to employ these technologies effectively.

There is a serious need for guidelines to set a standard for the quality of the equipment, as well as to establish systems and infrastructure regarding the safe and secure storage and transfer of electronic evidence, ensuring that it is protected from being leaked, deleted or corrupted.

Victims' Rights

Clauses 173, 193, 230 and 360

Victim-centric reforms in the Indian criminal justice system have generally been in the form of three rights, participatory rights, right to information, and right to compensation for the harm suffered. The 154th Law Commission Report (1996)[67] and the Justice Malimath Committee Report (2003)[68] identified 'justice to victims' and victimology as crucial areas of reform and made recommendations, focussing on increasing victims' participatory role and for better compensatory justice. These recommendations were incorporated by amendments such as the Code of Criminal Procedure (Amendment) Act, 2008 ('Amending Act'), to strengthen the existing framework of victims' rights. Thus, the extant structure of criminal law has been largely geared towards participatory and compensatory rights.

Reforms proposed in the BNSS build on this structure by primarily incorporating rights to information for the victim at various stages of the criminal procedure (see Cls.173, 193 and 230); and adding another participatory right through Cl.360. In addition to this, the practice of recording Zero FIRs has been institutionalised under Cl.173 BNSS whereby complainants may file an FIR, irrespective of the area where the offence was committed.

I. Participatory Rights

Participatory rights, or rights which provide the victim a say in the criminal process through the opportunity of hearing before a court, were incorporated into the criminal legal system principally through the Amending Act.

The Amending Act introduced s.2(wa) CrPC which, for the first time, defined 'victim'. The definition was expansive and included any person suffering injury or loss due to the act or omission with which the accused was charged, including their guardian and legal heir. S.321 CrPC was also amended to grant the victim the

[67] Law Commission of India, 'One Hundred and Fifty Fourth Report on the Code of Criminal Procedure, 1973', (Law Commission of India Report No. 154, 1996).

[68] Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System Report, Volume 1 (2003).

right to appeal against an order of acquittal, conviction for a lesser offence or inadequate compensation. This participatory right is made meaningful by amending s.24(8) CrPC, which provides that courts may permit victims to engage an advocate to assist the prosecution. Further, for sexual offences the Amending Act introduced the right of the victim to have her statement recorded at her residence or in a place of her choice, by a woman police officer, in the presence of her parents, guardian, relatives or social worker. While the CrPC already provided for an *in camera* trial for such offences, the Amending Act introduced a proviso to this section providing that such a trial, as far as practicable, must be conducted by a woman judge or Magistrate. The privacy of the victim is also protected by prohibiting the publication of trial proceedings without the permission of the court and subject to maintaining the confidentiality of the name and address of parties. On the front of compensatory justice, s.357 CrPC empowers the court to order compensation to be paid to the victim by the accused, upon conviction. The Amending Act introduces s.357A CrPC which directs State Governments to set up victim compensation schemes. The District or State Legal Services Authority is vested with the power to decide the quantum of compensation and to order free first aid facility, medical benefits or any other interim relief.

This framework of rights has also been expanded by the judiciary on multiple occasions. For instance, s.439(2) CrPC which mandates the presence of the *informant* or any person authorised by him, at the time of hearing of the bail application, was extended to include victims who come forward to participate in a criminal proceeding.[69] The Court observed that the victim's rights are independent, incomparable and not auxiliary to those of the State; she has a legally vested right to be heard at *every step* post the occurrence of an offence. Her participatory rights are described as unbridled from the stage of investigation till the culmination of the proceedings. Further, in *Saleem,*[70] the Delhi High Court sought to balance the participatory rights of the victim with the mandate to keep her identity confidential in cases of sexual offences, and held that the right to be heard does not entail a requirement to implead the victim (since such impleading could result in revealing the identity of the victim). S.439(1A) was also expansively interpreted to include the victim's right to be effectively heard in anticipatory bail petitions as well as accused's petitions seeking suspension of sentence, parole,

[69] *Jagjeet Singh v. Ashish Mishra* (2022) 9 SCC 321.
[70] *Saleem v. State (NCT of Delhi)* (2023) 2023 SCC OnLine Del 2190.

furlough or other such interim relief. Further, the court noted that it may appoint legal-aid counsel when necessary; mere ornamental presence of the victim without being *effectively* heard, would not suffice.

A lacuna, in this regard, remains s.321 CrPC. It allows the prosecutor to withdraw the prosecution of a case, at any time before the judgment is pronounced, with the consent of the court. Neither CrPC allows the victim to be heard at the stage, nor have the judicially enunciated principles translated into reality for the victim.[71] Through Cl.360, however, BNSS plugs this lacuna. Cl.360 largely mirrors s.321 CrPC, with the addition of one important proviso that the victim must be heard before such withdrawal is allowed. This is a significant recognition of the victim as a stakeholder in the criminal trial.

II. Right to Information

The victim's right to information has been expanded in the BNSS in three ways. Firstly, the victim has been granted the right to receive a copy of the FIR free of cost.[72] This is a crucial information right, since the FIR is an important piece of evidence that forms the basis for the trial. Secondly, Cl.193(3) BNSS requires the police to inform the victim of the progress in the investigation within ninety days and therefore allows the victim to be aware of possible lapses and delays in the investigation. At the same time, there exists no statutory mechanism for victims to hold the police accountable or seek redressal for such lapses or inordinate delays in investigations, which ultimately limits the utility of the right. Thirdly, Cl.230 BNSS provides victims with a crucial right to information about the details of their case through the mandatory provision of the police report, FIR, witness statements, etc., which is meant to enable effective and meaningful participation of the victim in the criminal process.

However, the rights under Cls.193(3) and 230 are available to victims *only if they are represented by an advocate*. While s.24(8) CrPC allows for victims to engage an advocate of their choice, the actualisation of this right becomes difficult for victims who are socio-economically disadvantaged and cannot afford to engage an advocate of their own. Thus, in the absence of a vested right to free legal aid and assistance for victims, a large portion of victims will not have recourse to these rights.

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[71] *State of Kerala v. K. Ajith* 2021 SCC OnLine SC 510.

[72] Cl.193(3) BNSS.

In *Delhi Domestic Working Women's Forum,*[73] the Supreme Court emphasised the importance of legal representation for victims of rape at every stage of the process - to support her while she is being questioned, explain the nature of the proceedings, prepare her for the case, assist her in the police station and help her seek relief from various agencies. Yet, no centralised mechanism has been created to implement this. While the BNSS has enshrined important rights to information, the intended purpose of these information rights, which is to ultimately enable active and meaningful participation in the criminal process, may not be achieved in the absence of a corresponding system of free legal aid.

Further, s.157(2) CrPC requires the police to notify the informant about the fact that he will not be investigating the case, if he does not find sufficient grounds to investigate the case. No amendment has been proposed in the BNSS to expand this right to the victim. However, it is likely that judgments which have judicially extended informants' rights to the victim in other instances will guide the interpretation of this clause as well.[74]

III. Other Rights

The BNSS has institutionally recognised the right to register Zero FIRs under Cl.173.[75] Therefore, the Bill prohibits the police from using a lack of territorial jurisdiction as a reason to avoid their duty to record first information and helps to eliminate one of the hurdles faced by victims in registering an FIR. While being an important safeguard, this is not an innovation of the BNSS and has been previously mandated by the Central Government[76] and substantially enforced by the judiciary in various instances.[77] In *Lalita Kumari*, the Supreme Court held that the police have a mandatory duty to register an FIR when the information given discloses a cognizable offence.[78] Despite multiple judicial pronouncements of this nature, non-registration of FIRs remains a pervasive issue that needs to be addressed by

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[73] *Delhi Domestic Working Women's Forum v. Union of India* (1995) 1 SCC 14 [15].

[74] *Jagjeet Singh*; *Saleem*.

[75] Cl.173 BNSS.

[76] Ministry of Home Affairs, 'Advisory on comprehensive approach towards crimes against women', No. 5011/22/2015 - SC/ST - W, 12 May 2015.

[77] *State of Andhra Pradesh v. Punati Ramulu* 1994 Supp (1) SCC 590; *Kirti Vashisht v. State* 2019 SCC OnLine Del 11713.

[78] *Lalita Kumari v. Government of Uttar Pradesh* (2014) 2 SCC 1.

the State.[79] Therefore, if it becomes the law, it remains to be seen if the BNSS will actually address this concern.

Further, despite the judicial recognition of the right to compensation,[80] victims have been inadequately and inconsistently compensated by the courts[81] and through state victim compensation schemes.[82] At the same time, beyond monetary compensation, the need for rehabilitation of victims has also been judicially recognised. For instance, in *Mallikarjun Kodagali,*[83] the Court has highlighted the importance of facilities like psychosocial support and counselling to victims, depending on the nature of the offence. These suggestions do not find a place in the scheme of CrPC or BNSS.

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[79] *Ramesh Kumari v. State (NCT of Delhi*) (2006) 2 SCC 677; *Aleque Padamsee v. Union of India* (2007) 6 SCC 171; *Lallan Chaudhary v. State of Bihar* (2006) 12 SCC 229.

[80] *Dr. Jacob George v. State of Kerala* (1994) 3 SCC 430; *Maru Ram v. Union of India* (1981) 1 SCC 107.

[81] *Hari Singh v. Sukhbir Singh* (1988) 4 SCC 551; Utkarsh Anand, 'No Compensation for 99% Minor Rape Victims: SC Fumes Over National Survey' (*CNN-News18*, 15 November 2019*),* last accessed on 11.09.23.

[82] *Tekan Alias Tekram v. State of Madhya Pradesh* (2016) SCC OnLine 131; *Gang-Rape Ordered by Village Kangaroo Court in West Bengal, In re*, (2014) 4 SCC 786.

[83] *Mallikarjun Kodagali v. State of Karnataka* (2019) 2 SCC 752.

Conditions Requisite for Initiation of Proceedings – Cognizance

Clauses 210, 218, 223

Judicial response to a crime, or 'initiation of proceedings', begins with the act of taking 'cognizance' of the alleged crime by a Magistrate. It is a morally and procedurally significant stage in the criminal trial, where a judicial officer, and thus the court, officially becomes aware of the commission of an offence. Cognizance is the precursor to 'initiation of proceedings', whereby a summons or warrant is issued against the accused and charges are framed, while also marking the end of the investigation.

The BNSS proposes three significant changes to the operation of cognizance proceedings. Firstly, it relaxes the precondition of government sanction for taking cognizance in cases involving public servants such as judges (Cl.218). This is a laudable development that brings the legislative provision in consonance with case law. Secondly, it creates an opportunity for the accused to be heard at the stage of cognizance in private complaint cases (Cl.223), and thirdly, it specifically provides for cognizance based on complaints filed under special laws (Cl.210). These two changes, however, raise concerns about their possible implications.

I. Background: Procedure for Cognizance

S.190 CrPC enumerates the situations in which the Magistrate may (and 'must')[84] take cognizance of an offence. The *first* scenario relates to cases involving commission of cognizable offences, where the police can begin investigation and arrest the accused without permission from the court, and are generally considered to be more 'serious'.[85] The police investigates the commission of the alleged offence after registration of an FIR, with or without arresting the accused, and at the end of the investigation, submits a report to the Magistrate. This report

[84] *Umer Ali v. Safer Ali* Calcutta High Court, judgment dated 19.08.1886: The Magistrate has no discretion in whether to take cognizance; if the materials *prima facie* disclose the commission of a criminal offence, the Magistrate *must* take cognizance.

[85] S.2(c) CrPC states that an offence that is punishable with death, imprisonment for life, or imprisonment for more than three years shall be cognizable.

is generally called a chargesheet, if the police concludes that a criminal offence was committed; or a final report, if the police concludes that no criminal offence was committed. The report of the police, consisting of all evidence collected by them, forms the material on the basis of which a Magistrate takes cognizance of the commission of an offence.[86]

Second, in non-cognizable offences or where the police has refused to register an FIR,[87] a complaint regarding the commission of a crime can be submitted directly to the Magistrate, without involving the police or registration of FIR. In such cases, the Magistrate conducts their own inquiry, as opposed to a police investigation, by examining the complainant and any witnesses mentioned by the complainant. These statements, in turn, form the basis for taking cognizance in non-cognizable cases. Thus, there is a largely impermeable distinction between the investigative and judicial stages of criminal prosecution.

Lastly, cognizance is also taken based upon the Magistrate's own knowledge or information received from any person 'other than a police officer'. This last provision, s.190(1)(c), is generally utilised in situations where the police has filed a closure report in cognizable cases, but the Magistrate disagrees with the closure and takes cognizance of the offence.[88]

The above structure has been retained in the newly proposed bill, in Chapter XV, with the addition of changes discussed below.

II. Sanction for Prosecution of Public Servants/Judges

Cl.218 BNSS mandates that government sanction must be obtained before a Magistrate can take cognizance of an offence alleged to be committed in the course of duty by a judge, magistrate, or public servant. This corresponds to s.197 CrPC pertaining to the 'Prosecution of Judges and public servants'. A new proviso to Cl.218 adds to this by providing a timeline of one-twenty days within which sanction must be given; and further, prescribes that where the government fails to give sanction within one-twenty days, sanction would be 'deemed to have been accorded' by the government.

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[86] S.190(1)(b) CrPC: '*upon a police report of such facts*'.

[87] S.190(1)(a) CrPC: '*upon receiving a complaint of facts which constitutes such offence*'.

[88] *R.N. Chatterji v. Havildar Kuer Singh* (1970) 1 SCC 496; *Abhinandan Jha v. Dinesh Mishra* (1967) 3 SCR 668.

Under the extant regime, this provisional protection for public servants, essentially turned to immunity for these officers. Instead of forestalling vexatious cases, governments often did not act on the requests for sanction even for non-frivolous complaints. Thus, the requirement for sanction has often acted as a barrier to prosecution of even *prima facie* legitimate cases of corruption or custodial violence.[89] Consequently, the Supreme Court took note of the inaction of governments in granting sanction, and prescribed a time limit of three months (or one hundred and twenty days) for grant of sanction.[90] Similarly, the Central Vigilance Commission has also prescribed a one hundred and twenty days time period for grant of sanction by the government under s.197 CrPC.[91] Cl.218 proviso follows on the heels of this development in jurisprudence.

The implementation of a time period did not curb the culture of impunity that developed due to delays in prosecution of public servants, due to failure of the government to grant or reject sanction.[92] The accused public servant would seek to take benefit of the delay in grant of sanction, by moving to quash the proceedings entirely. This forced the Supreme Court, in 2022, to unequivocally hold that delay in sanction would not result in quashing of the criminal proceedings, but instead subject the competent authority to administrative action and judicial review.[93] Thus, the provision of a 'deemed sanction' is a laudable addition to these developments initiated by the Supreme Court, in preventing the misuse of the power to grant sanction. It also mirrors case law development in the context of a parallel provision in the Prevention of Corruption Act,[94] where the Supreme Court had similarly held that if a sanction is neither granted nor refused within the prescribed period, the sanction would be deemed to be granted.

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[89] Polis Project, Chasing accountability: The case of custodial deaths in India, Part IV, 'Impunity and Complicity: The Role of the State and non-State Institutions in cases of custodial deaths in India - 4, last accessed on 26.09.2023.

[90] *Vineet Narain & Ors. v. Union of India & Anr.* (1998) 1 SCC 226.

[91] Ministry of Finance, Department of Financial Services (Vigilance Department), Guidelines for checking delay in grant of sanction for prosecution, F No. 5/5/2012-Vig; Central Vigilance Commission, Guidelines for checking delay in grant of sanction for prosecution, No. 005/VGL/011.

[92] *Vijay Rajmohan v. Central Bureau of Investigation* (2023) 1 SCC 329.

[93] *Vijay Rajmohan.*

[94] S.9 Prevention of Corruption Act, 1988.

III. Opportunity for Hearing the Accused

Complications arise in the context of complaint cases, through the addition of a proviso to Cl.223 on 'Examination of complainant'. The extant provision, s.200 CrPC, provides that the magistrate must examine the complainant and any witnesses while taking cognizance of a non-cognizable offence on the basis of a private complaint. A new caveat has been added to this provision, which prohibits taking of cognizance in complaint cases without affording the accused an 'opportunity of being heard'.

The right to be heard, while unquestionably beneficial for an accused at any stage of criminal adjudication, has until now not been provided at the stage of cognizance. This is for multiple reasons, all relating to the nature of cognizance as a judicial function. At the outset, it may be noted that cognizance does not involve any formal action. It is the mere application of judicial mind to *the suspected commission of an offence*.[95] When a Magistrate reads the complaint or chargesheet, and applies their mind to determine whether the averments in the complaint or chargesheet disclose the commission of an offence for the purposes of proceeding further, they are said to take cognizance.[96] Courts have highlighted that at this stage, the Magistrate need not examine the evidence with a view to determine if it would support conviction of the accused, nor assess the reliability or validity of the evidence.[97] As such, the Magistrate is also not bound to give a reasoned order, nor is a superior court ordinarily allowed to substitute its opinion for the Magistrate's. Immediately after cognizance is taken of an offence, the accused is directed to be produced, their plea of guilt or innocence is recorded, and charges are framed. The framing of charges is the first stage where the accused is permitted to be heard and make submissions relating to the commission of the crime.[98] A caveat is that in rare circumstances, where there is irrefutable evidence (sterling quality) to suggest that the prosecution version is

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[95] *Sourindra Mohan Chuckerbutty v. Emperor* 1910 SCC OnLine Cal 41; *R.R. Chari v. State of Uttar Pradesh* 1951 SCC 250.

[96] *Bhushan Kumar v. State* (2012) 5 SCC 424.

[97] *Subramanian Swami v. Manmohan Singh* (2012) 3 SCC 64.

[98] S.228 CrPC; This is not to assert that prior to the hearing on charge, no other hearings happen. In instances where, even on a private complaint, the accused has been arrested, there would be hearings prior to the hearing on charge on limited aspects of custody, bail, etc.

'totally absurd or preposterous', it may be brought to the notice of court at the stage of taking cognizance as well.[99]

In essence, cognizance is a stage where the law officially recognises the commission of an offence. *After* this, the Magistrate issues process against an accused person and affords them a right of hearing, i.e. at the framing of charges. Naturally, then, the CrPC does not envisage a right of hearing to the accused, or anyone, at the stage of taking cognizance.

This creates a host of issues, not the least of them being that the purpose of taking cognizance in complaint cases would be frustrated. Complaint cases are lodged either in cases where the offence is non-cognizable, or where, despite the offence being cognizable, the police refuses to register an FIR or the complainant is *unable* to register an FIR.[100] The object of allowing this is to '*ensure the freedom and safety of the subject in that it gives him the right to come to the court if he considers a wrong has been done to him or the Republic and be a check on police vagaries*.'[101] This provision is often utilised by vulnerable complainants where the perpetrator holds relatively more power. This includes instances of violence against members of the SC/ST community by persons from dominant caste; sexual violence against women by men in positions of power including those from dominant caste, class or religious community; and domestic violence against women. In these situations, the victims find it difficult, if not dangerous, to register an FIR and choose to file a private complaint instead. In the context of these power dynamics, the refusal of the police to take these allegations seriously or to register FIRs in these situations, further contributes to the victims' difficulties. By allowing the accused an unrestricted right of hearing at this stage, under Cl.223 before even taking notice of the commission of an offence, gives scope for witness manipulation and suppression. The importance of complaint cases in ensuring '*freedom and safety*' of victims is jeopardised.

This might also exacerbate the concerns of an already overburdened system. As per the provision in the BNSS, to even take note of a crime, the Magistrate will be required to *hear* every accused in a complaint case. The contours of this hearing are also not specified. Courts have been clear that accused persons have no right

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[99] *Rukmini Narvekar v. Vijay Sataredkar* (2008) 14 SCC 1.

[100] *Seeni Ammal, In re,* 1960 SCC OnLine Mad 115.

[101] SC Sarkar et al, The Code of Criminal Procedure, (Volume I, 12th edn, LexisNexis 2018); *Chinnaswami Reddiar v. K. Kuppuswamy* 1954 SCC OnLine Mad 378.

to produce any material, as cognizance is taken based on chargesheet /complaint,[102] apart from the aforesaid evidence of sterling quality. Judicial clarity would be needed to determine if the hearing would be limited to this point. To allow a hearing beyond that, or on the evidence, would also frustrate the purpose of taking cognizance, and be a duplication of the stage that follows immediately after, i.e. hearing on charge.

Crucially, this right has been created only in the context of complaint cases. This creates an anomalous situation, where an additional right has been created for complaint cases, whereas no such right exists where the offence has been investigated by the police. A potential explanation would be that an accused in a cognizable offence would be aware when cognizance is taken, as accused persons must (at the very least) be produced when chargesheet is filed. On the other hand, no provision mandates that the accused in a complaint case must be made aware of the lodging of a complaint or at the stage of taking cognizance. However, as discussed above, for the provision to be workable, the contours of the hearing must be clarified.

Similar concerns also arise in the context of Cl.210(3), which restrains the Magistrate from taking cognizance of allegations raised against a public servant arising in the course of discharge of official duties, until (a) receipt of a report from an officer superior to the public servant; and (b) consideration of '*assertions made by the public servant*' regarding the incident. This may have been introduced with a view to prevent vexatious or frivolous complaints against public servants discharging their duties. However, it simultaneously raises concerns about power dynamics highlighted above, and potentially contributes to the culture of impunity generally surrounding actions of public servants.

Cl.210(3) has been duplicated in Cl.175(4). Cl.175 falls within Chapter XIII of the BNSS, which deals only with investigative powers of the police, a stage of the criminal legal process that precedes the stage of cognizance. Issues of cognizance and Magistrate's role after investigation begin with Chapter XV. Thus, the addition of the new sub-clause (4), which is identical to Cl.210(3), does not fit in the scheme contemplated within the BNSS (or the CrPC). This is likely a clerical error.

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[102] *State of Orissa v. Debendra Nath Padhi* (2005) 1 SCC 568.

IV. Circumstances for taking Cognizance

The first clause of s.190(1) has been modified in Cl.210(1)(a) BNSS, which now provides that cognizance may be taken of any offence '*upon receiving a complaint of facts, including any complaint filed by a person authorised under any special law, which constitutes such offence*'. The underlined text is the addition made to s.190(1)(a). Thus, cognizance of reports of specialised agencies (who are authorised under special laws to investigate specific offences) is not only explicitly included under the Cl.210(1)(a), but these 'complaints' are curiously treated on par with private complaints, rather than a police report.

On the face of it, this equalisation sits odd. The concerning theme with complaints filed under special laws, is that they often pertain to offences which are otherwise 'serious' (as they carry a punishment of more than three years' imprisonment) and require specialised agencies for their investigation. Such specialised agencies are also authorised to undertake investigative procedures of arrest, interrogation and/or seizure. Yet, despite the gravity of offence and detailed investigation, the report submitted by the authorised person[103] is treated as a 'complaint', rather than a 'chargesheet'. More than a mere issue of terminology, the filing of a chargesheet (as opposed to a complaint) at the end of the investigation is a crucial (but not decisive) barometer for whether an investigative agency acts in the role of 'police'.[104] This, in turn, determines whether safeguards which guide the exercise of police powers,[105] would also apply to the investigative acts of such agencies. Thus, this proviso may indicate legislative intent to not treat the entities filing the complaint under special law as exercising 'police powers'.

This addition, however, is not an unexpected development. In the context of the PMLA, the Supreme Court has held that Enforcement Directorate, the specialised agency which investigates offences therein, does not exercise 'police powers', and thus, the report filed by the agency is not comparable to a chargesheet.[106] Other

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[103] An officer of the specialised agency, such as the Enforcement Directorate, SFIO, NIA, etc. in this context.

[104] *Abdul Razzak v. Sudip Kr. Dutta Gupta* 1989 SCC OnLine Cal 167; *Badaku Joti v. State of Mysore* (1966) 3 SCR 698.

[105] Such as statements of guilt made by the accused person to the police officer cannot be used in evidence.

[106] *Vijay Madanlal Choudhary v. Union of India* 2022 SCC OnLine SC 929; Cognizance is taken by the special court under the PMLA on the basis of this complaint filed by designated officers, with the prior sanction of the government.

special statutes also reflect a similar trend in the terminology adopted. The NDPS Act, 1985, allows cognizance of listed offences to be taken on the basis of a *complaint* filed by an officer of the Central or State government.[107] Other instances of complaints filed by authorised officers under a special law, may be found in s.439 r/w s.212 of Companies Act, 2013, and s.13(1D) FEMA, 1999. In the absence of specific provisions for taking cognizance under these special legislations, the procedure under s.190 CrPC for *inter alia* taking of cognizance is applicable.

[107] S.36A NDPS Act.

Custody of Arrested Persons During Investigation

Clause 187

Cl.58 of the BNSS, like s.57 CrPC, provides that arrested persons cannot be detained in police custody[108] beyond 24 hours. Cl.187 BNSS provides for the procedure when investigation cannot be completed within such 24 hours, and the accused is produced before a magistrate to determine custody. This clause seeks to replace s.167 CrPC, with some crucial modifications.

Cl.187 BNSS retains the timelines of sixty or ninety days and the concept of default bail, as in the CrPC. However, unlike s.167 CrPC, Cl.187(2) additionally provides that the detention in custody of fifteen days (in whole or in part) can be at any time during the initial forty or sixty days out of the sixty or ninety days period, as the case may be. Consistent with the position under the CrPC, Cl.187(2) empowers any magistrate to authorise detention, irrespective of whether they have jurisdiction to try the case; whereas Cl.187(3) requires a jurisdictional Magistrate. Further, Cl.187(3) provides that detention in custody can be authorised beyond the period of fifteen days, but omits the phrase '*otherwise than in police custody*'; implying that police custody can also be provided in such further period. It also specifies that the Magistrate should consider the status of the accused regarding bail, while giving custody. Additionally, through a new proviso added in Cl.187(5), it defines the kind of custody permissible under the provision. This piece discusses the significant modifications proposed in Cl.187, especially concerning police custody, along with possible implications.

I. Background

S.167 of the erstwhile CrPC, 1898 simply provided that the Magistrate could authorise detention not exceeding fifteen days. However, this provision was observed more in its breach than its compliance, with the police filing preliminary

[108] In police custody, the accused is in the custody of the police for interrogation and investigation purposes, and is held in a lock-up at the police station. In judicial custody, the accused is in the custody of the magistrate and is held in a jail or prison.

reports to extend the detention period till the investigation was completed.[109] Ultimately in the new CrPC of 1973,[110] a proviso was introduced in s.167(2) to empower the Magistrate to authorise detention in custody beyond the period of fifteen days, but up to a maximum of sixty or ninety days (depending on the extent of punishment prescribed); provided that such further custody beyond the period of fifteen days, could not be in police custody. Cl.167 also introduced default bail for the accused, if investigation was not completed within such sixty or ninety days.

It is clear from the scheme of ss.57 and 167 CrPC that the intention is to limit police custody and protect the accused from unscrupulous police officers.[111] Sub-clauses (2)(b), (2)(c), and (3) of s.167 CrPC[112] make it evident that the law understands the necessity of safeguards before such custody is granted. Custodial torture and deaths in police custody are a well documented reality,[113] and has been consistently acknowledged by the judiciary for its pervasiveness and as a matter of grave concern.[114] Constitutional protections against police excesses include Art.22(2) which provides for the right of every arrested and detained person to be produced before the nearest magistrate within twenty-four hours; Art.21 has been judicially interpreted to include the right against torture and assault by the state and its functionaries.[115] Further, the judiciary has brought in specific safeguards to prevent police excesses during custody, such as by laying down guidelines for

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[109] Law Commission of India, Forty-first Report (The Code of Criminal Procedure, 1898), Vol I, Pages 76-77 (Law Commission of India Report no. 41, 1969); *Central Bureau of Investigation v. Anupam Kulkarni* (1992) 3 SCC 141, Page 147.

[110] The statement of objects and reasons of CrPC 1973 referred to fair trial, timely investigations and procedures that ensured a fair deal to the poorer sections of the community.

[111] *Central Bureau of Investigation v. Anupam Kulkarni* (1992) 3 SCC 141 [10].

[112] These provisions are retained in the BNSS. Cl.187(4) BNSS (similar to s.167(2)(b) CrPC) requires physical production of the accused before police custody can be granted. Cl.187(5) BNSS (similar to s.167(2)(c) CrPC) bars second class magistrates, unless specially empowered by the High Court, from authorising police custody. Cl.187(7) BNSS (similar to s.167(3) CrPC) imposes an additional requirement of recording written reasons on the magistrate while granting police custody.

[113] Project 39A, Death Penalty India Report, Volume II, 2016, Page 20 onwards; National Campaign Against Torture, India: Annual Report on Torture-2020, 2021.

[114] *D.K. Basu v. State of West Bengal* (1997) 1 SCC 416; *Nilabati Behera v. State of Orissa* (1993) 2 SCC 746; *State of Madhya Pradesh v. Shyamsunder Trivedi* (1995) 4 SCC 262; *Prakash Kapadia v. Commissioner of Police (Ahmedabad City)* 2014 SCC Online Guj 11365.

[115] *D.K. Basu* [17], [22].

arrest and detention in *D.K. Basu v. State of West Bengal*,[116] and measures like installation of CCTV cameras in police stations.[117]

II. Modifications in Duration and Manner of granting Police Custody

a. Extended duration of Police Custody

The total period of detention of an accused is the same under both s.167 and Cl.187, i.e. sixty or ninety days depending on the offence to which the investigation relates. Under the CrPC, police custody cannot exceed fifteen days. However, under Cl.187(3) BNSS, the Magistrate can authorise police custody detention for a period exceeding fifteen days. In fact, such police custody may be authorised for the entire period of detention, i.e. a maximum of sixty or ninety days, as the case may be. Given this, the only difference between Cl.187(2) and (3) is that detention under Cl.187(3) needs to be authorised by a magistrate with jurisdiction to try the case, unlike Cl.187(2). Otherwise unlike the CrPC, police custody detention can be authorised under both sub-clauses.

The proposed change is excessive and in stark contrast to even special legislations such as the UAPA where the duration of police custody permissible is only thirty days; and the investigating officer is required to file an affidavit providing reasons for seeking police custody if the accused is in judicial custody.[118] Even this safeguard is absent in the BNSS.

Extended police custody magnifies the likelihood of custodial violence; practically nullifying the constitutional and other safeguards against police excesses which recognise the pervasiveness of custodial violence, as noted above. This proposed change is bound to seriously undermine the accused's fundamental rights under Art.21, including the rights to life, dignity, and physical and mental well being.[119]

This is also likely to adversely affect the accused's fair trial rights; especially if they are from a marginalised background and do not have access to a lawyer at this

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[116] *D.K. Basu* [35].

[117] *D.K. Basu*; *Prakash Kapadia v. Commissioner of Police (Ahmedabad City)* 2014 SCC Online Guj 11365.

[118] S.43D UAPA deals with some unlawful and terrorist acts. This also requires the investigating officer to explain the delay if any in requesting for police custody.

[119] *Shabnam v. Union of India* (2015) 6 SCC 702 [14].

stage, which is often the case.[120] Extended police custody increases the accused's vulnerability to forced confessions and other fabrication of evidence. For instance, the accused are tortured into signing blank papers, which are used by the police to fabricate 'disclosure statements'. These statements usually involve the accused revealing the location of the dead body or other objects related to the crime. It is then shown as if the body/objects were 'discovered' by the police due to the accused's statement.[121] Such 'discovery' can then be treated as strong evidence against the accused under s.27 IEA. Courts have widely recognised the adverse effect of extended police custody on the reliability of evidence, and have routinely disregarded such disclosures as being involuntary and coerced, if obtained after prolonged police custody or multiple interrogations.[122] Courts have also doubted the voluntariness of confessions made to judicial magistrates, if the accused was produced from judicial custody but had been in extended police custody before that.[123]

b. Initial Police Custody in tranches, beyond the first fifteen days

Courts have differing interpretations of s.167(2) CrPC on the issue of whether police custody can be granted only in the first fifteen days after production before the magistrate or even thereafter. In *Central Bureau of Investigation v. Anupam Kulkarni,* a division bench of the Supreme Court held that police custody can be authorised only in the first fifteen days.[124] This is even if the accused was unavailable for interrogation for some days in this period, or if his involvement in other offences (in the same case) was discovered later during investigation.[125] In

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[120] Project 39A, Death Penalty India Report, 2016: 76% (of 373 prisoners) of those on death row belonged to the most socio-economically marginalised sections. 97% (of 191 prisoners) did not have a lawyer during police interrogations. Of these, 155 prisoners spoke about their experience of custodial violence, with 82.6% (i.e. 128 prisoners) claiming they were tortured in police custody.

[121] Project 39A, Death Penalty India Report, 2016.

[122] *Ashish Jain v. Makrand Singh* (2019) 3 SCC 770 [32]: disclosures by the accused were held to be non-voluntary and disbelieved since the investigating officer deposed that they were extracted after multiple grillings and interrogations; *Nathu v. State of Uttar Pradesh* AIR 1956 SC 56 [6]: prolonged custody immediately preceding the confession is sufficient to make it involuntary, unless properly explained.

[123] *Babubhai v. State of Gujarat* (2006) 12 SCC 268 [16]: the accused had been in police custody for 16 days previously.

[124] *Central Bureau of Investigation v. Anupam Kulkarni* (1992) 3 SCC 141.

[125] *Anupam Kulkarni* (1992) 3 SCC 141 [8], [13]: In this case, the Central Bureau of Investigation argued for custody of the accused beyond the first 15 days, since he had

holding so, the court recognised the legislature's intention in placing limitations on police custody, to protect the accused from methods adopted by unscrupulous officers.[126] This decision in *Anupam Kulkarni* was followed with approval by a larger three judge bench of the court.[127] However, other division benches of the Supreme Court sought reconsideration of *Anupam Kulkarni*. In *Central Bureau of Investigation v. Vikas Mishra,* the Supreme Court granted police custody after the first fifteen days because the accused had '*frustrated the process*' by getting hospitalised and being unavailable for interrogation.[128] Recently, in *V. Senthil Balaji v. State,* the Supreme Court again held that s.167(2) does not mention that police custody can only be in the first fifteen days, and could be at any time during the investigation period, for any other interpretation of this subsection would cause serious prejudice to the investigation.[129]

In this background, Cl.187(2) BNSS resolves this issue by adopting the rationale in the latter line of cases. It explicitly allows detention in police custody for fifteen days, at any time in the first forty or sixty days out of the investigation period of sixty or ninety days respectively. It thus expands the reach of police custody to the later stages of investigation. When the investigation is at an advanced stage, the police are likely to have their version of how the offence unfolded. At such time, granting them unrestricted access to the accused may incentivise and facilitate fabrication of evidence towards ensuring that the police's version is tenable in court.

Even presently, courts routinely disbelieve evidence that is obtained belatedly after arrest, for being involuntary. For instance, police often obtain 'disclosure statements' (discussed above), belatedly i.e. several days after the accused's arrest. There is also a practice of obtaining disclosures in a piecemeal manner. Courts have disbelieved such belated and piecemeal disclosures[130] due to the likelihood of them being obtained pursuant to police pressure.

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been admitted in hospital for some days in that period and had not been available for interrogation. This plea was rejected.

[126] *Anupam Kulkarni* (1992) 3 SCC 141 [10], [11].

[127] *Budh Singh v. State of Punjab* (2000) 9 SCC 266 [5].

[128] *Central Bureau of Investigation v. Vikas Mishra* (2023) 6 SCC 49 [15]-[17], [19].

[129] *V. Senthil Balaji v. State* 2023 SCC Online SC 934 [68]-[69], [82]-[83], [95], [98].

[130] *Ashish Jain v. Makrand Singh* (2019) 3 SCC 770; *Sattatiya v. State of Maharashtra* (2008) 3 SCC 210 [26].

Another concern is with respect to collection of forensic evidence. Courts have recognised the possibility of police tampering with crime scene samples and falsely planting the accused's biological material. In such situations, courts have disregarded forensic evidence if there is unexplained delay in dispatching samples to forensic labs or issues with sealing after collection.[131] Under the BNSS, such tampering would be made easier if unrestricted access to the accused is permitted via police custody during the later stages. Cl.187(2) is thus likely to incentivise such malpractices and exacerbate these existing issues.[132]

Further, note that the possibility of securing police custody beyond the first fifteen days may reduce the incentive for timely investigations, contrary to the constitutional and legislative prerogatives to limit detention, and to the BNSS' own objective of reducing investigative delays.[133]

c. Consideration of the status of Bail

Cl.187(2) BNSS further requires the magistrate to consider whether the accused '*is not released on bail or his bail has not been cancelled*' while authorising detention. The reason to introduce such language is unclear; it is unclear how the magistrate's decision on remand is sought to be guided, based on the bail status of the accused.

III. Kinds of Custody Permissible

S.167 CrPC uses the terms 'custody' and 'other than in custody of the police'; the provision is thus generally interpreted to permit police custody or judicial custody.[134] Cl.187 BNSS however introduces a new proviso after sub-clause (5). This provides that detention shall only be in a police station in police custody or in a prison in judicial custody or in a place declared a prison by the central or state government.

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[131] *State of Rajasthan v. Tara Singh* (2011) 11 SCC 559; *Sahib Singh v. State of Punjab* (1996) 11 SCC 685.

[132] This is especially given the recently enacted Criminal Procedure (Identification) Act, 2022 which permits the police to compel arrested individuals to give 'measurements' including their biological samples, which are then to be preserved.

[133] Statement of objects and reasons of BNSS mentions that delays in delivery of justice, including delays in the investigation system are big hurdles in speedy delivery of justice which impacts the poor man adversely; citizen centric criminal procedures are the need of the hour.

[134] *Gautam Navlakha v. National Investigation Agency* 2021 SCC Online SC 382 [103]-[104].

Restricting the places of detention to police stations and jails through such a definition may at first blush be seen as safeguarding the rights of the accused. The detention would be in designated places governed by a set of rules including some procedural safeguards; these would also be known places, making it easier for families and lawyers to access the accused. However, the proviso precludes other forms of custody and restricts broader interpretations of 'custody' under this provision. For instance, courts have interpreted custody under s.167 CrPC to include custody of investigating agencies such as the Enforcement Directorate and Central Bureau of Investigation,[135] transit remands required for transporting accused from one state to another,[136] and house arrest.[137]

The need for many of these forms of custody would continue to exist in reality. Their exclusion from permissible custody under Cl.187 might then be harmful in practice. It may result in situations where the accused's liberty would be curtailed, but the period would not count towards default bail as it would not be 'custody' under Cl.187 BNSS.

[135] *V. Senthil Balaji v. State* 2023 SCC Online SC 934 [95].

[136] *Gautam Navlakha* [84]: A transit remand is considered as police custody, and might be necessary for instance if the accused is arrested in one state but FIR is lodged in a different state

[137] *Gautam Navlakha*: While expanding the meaning of custody to include house arrest, the court discussed concerns of overcrowding in prisons and of cost-saving.

Framing of Charge and Discharge

Clauses 250, 251, 262, 263, 272 and 274

The BNSS has introduced maximum timelines for filing of discharge applications and framing of charges. Cl.250(1) introduces a sixty-day time limit for the accused to file a discharge application from the date of committal in a sessions triable case. For warrant cases instituted on a police report, Cl.262(1) stipulates that a discharge application can be filed within sixty days from the date of framing of charge.

Additionally, Cl.272 provides discretionary powers to Magistrates to issue thirty days' notice to the complainant prior to discharging an accused in a 'complaints case'. The current framework under s.249 CrPC does not envisage giving such notice to a complainant. Also, Cl.274 confers express powers to Magistrates to discharge an accused in summons cases; a provision absent in corresponding s.251 CrPC.

Similarly, in the context of framing of charges, Cls.251(1)(b) and 263(1) mandate that charges against an accused should be framed within sixty days from the date of first hearing on charge, in sessions and warrant triable cases. Further, Cl.251(2) permits framing of charges in virtual presence of the accused. These changes are focussed on reducing delays in the trial process by prescribing timelines.

I. Changes related to Discharge

a. Issues regarding timeline for Filing for Discharge in cases triable by Sessions Court

Unlike s.227 CrPC, Cl.250(1) BNSS expressly recognises the right of the accused to file an application for discharge and prescribes a sixty-day time limit to file it from the date of committal to the Sessions Court.

The introduction of a timeline may *prima facie* appear to be a positive move towards reducing delay in the trial process. However, it ignores systemic realities regarding pre-trial processes in our country that may defeat the exercise of this right. Firstly, accused persons often do not receive timely access to their case

papers[138] and may not have legal representation at this stage in the criminal proceedings. Further, there is often a considerable time lag between the committal of the matter to the Sessions Court by the Magistrate and assignment of the matter to a Sessions Judge, for the production of the accused and the receipt of the records.[139]

While considering between discharge and framing of charges, courts have to consider whether there exists a "strong suspicion", based on some material, to support a *prima facie* conclusion that the accused committed the offence.[140] Considering this standard and the burden on the accused to successfully argue their discharge application, this opportunity to file for discharge would be meaningless without addressing the issues regarding timely provision of case papers and ensuring early access to a lawyer for all accused.

b. Confusions regarding the procedure for Discharge after the Framing of Charges in Warrant cases instituted on Police Report

Corresponding to s.239 CrPC, Cl.262 discusses discharge of accused in warrant cases instituted on police report. However, it introduces a timeline for filing of an application for discharge by the accused, within sixty days after the date of framing of charges. By prescribing the procedure for discharge *after* the framing of charges, it swaps the order of these two distinct stages and defeats the purpose of filing for discharge.

The purpose of hearing on discharge prior to the framing of charges is to protect the accused from frivolous criminal process and to conserve judicial time. It is a settled position of law that once charges are framed, either on police report or through a complaint, the Magistrate has no power to discharge the accused.[141] Further, the implication of Cl.262(1) would be that the Magistrate must wait until the expiry of sixty days after the framing of charges, in order to give an opportunity to the accused to file an application for discharge. Therefore, this would prevent the Magistrate from proceeding with the trial after framing of charges.

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[138] *P. Gopalkrishnan v. State of Kerala* (2020) 9 SCC 161 [17], [18], [21].

[139] The National Judicial Data Grid shows that currently there are 28,112 cases pending at committal stage. See: https://njdg.ecourts.gov.in/njdgnew/?p=main/index.

[140] *Dipakbhai Jagdishchndra Patel v. State of Gujarat* (2019) 16 SCC 547 [15], [23].

[141] *Chandi Puliya v. State of West Bengal* 2022 SCC OnLine SC 1710 [7].

c. Notice to Complainant for Discharge of Accused in 'Complaint Cases'

Cl.272 BNSS provides the Magistrate with discretionary powers to serve thirty days' notice to the complainant, before making an order of discharge in compoundable/non-cognizable cases, where the complainant is absent on the day fixed for hearing of the case. The corresponding provision under CrPC i.e. s.249 does not stipulate any requirement of notice to the complainant. Cl.272 ensures an additional opportunity to the complainant to make submissions opposing discharge, since an order of discharge and dismissal of matter by the Magistrate is not open for recall and reconsideration.[142]

d. Discharge in Summons Cases

Corresponding to s.251 CrPC, Cl.274 prescribes the procedure for the Magistrate to state the particulars of the offence to the accused and record their plea of guilt or hear their defence. The requirement to formally frame charges is absent in summons cases. Cl.274 introduces a new proviso which provides for discharge in case the Magistrate considers the accusation to be groundless.

Presently, courts have held that under Chapter XX of the CrPC, dealing with trial of summons cases, the Magistrate does not have the power to consider discharge or recall summons.[143] The only recourse available to the accused is under the extraordinary jurisdiction of the High Court under s.482 CrPC. However, through the addition of this proviso under Cl.274, powers of discharge similar to warrant cases have been introduced, which may allow for speedier resolution of summons cases, in case they are found to be baseless by the Magistrate.

II. Changes related to Framing of Charges

a. Issues regarding stipulation of timelines for Framing of Charge

Corresponding to ss.228 and 240 CrPC, Cls.251 and 263 BNSS prescribe a sixty-day timeline for framing of charges from the first hearing on charge, in trials before Sessions courts and warrant cases instituted on a police report, respectively. As mentioned above in reference to the timelines for discharge, without addressing the systemic issues and the gaps in institutional capacity, compliance with such timelines would be ineffective and unjust.

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[142] *A.S. Gauraya v. S.N. Thakur (*1986) 2 SCC 709 [9] - [10].

[143] *Subramanium Sethuraman v. State of Maharashtra & Anr.* (2004) 13 SCC 324 [16] - [17].

Amongst these, an important issue regarding the lack of timely access to legal representation at the stage of framing of charges, has received significant judicial attention. Recently, the Supreme Court has noted the lack of adequate legal representation at the stage of framing of charges in a few death penalty cases, and ordered a *de novo* trial.[144] It is important to note that in these cases, the Supreme Court has emphasised that expeditious disposal of criminal matters cannot be at 'the cost of basic elements of fairness and opportunity to the accused'[145] and a hasty trial would be vitiated as 'being meaningless & stage-managed'.[146] In cases that may result in life imprisonment and death penalty, the Supreme Court also laid down guidelines that adequate time should be provided to the lawyer for preparation on hearing on charge.[147] Another significant reason for the current delays in criminal proceedings is the high levels of vacancies in the subordinate-level judiciary,[148] which needs to be addressed in order to ensure just and fair compliance with such timelines.

Another implication of this provision would be on the practice of the police filing supplementary police reports (chargesheet). Corresponding to s.173(8) CrPC, Cl.193(9) permits the police to file supplementary police reports. As per settled law, courts must conjointly examine the preliminary and the supplementary police reports before the framing of charges, unless there exists an order passed by higher courts in exercise of their extraordinary jurisdiction to exclude certain

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[144] *Anokhilal v. State of Madhya Pradesh* (2019) 20 SCC 196 [21], [22], [31]: In this case, a legal aid counsel was appointed, the day before the hearing on charge. However, as this legal aid counsel was absent during the hearing on charge, a new counsel was appointed and arguments on framing of charges were heard immediately. Considering this, the Supreme Court held that the right under the ss.227 and 228 CrPC on discharge and framing of charges was denied to the Appellant and it ultimately ordered a *de novo* trial; *Naveen @ Ajay v. State of Madhya Pradesh* Criminal Appeals No. 489-490 of 2019, Supreme Court, judgment dated 19.10.2023, [18]-[21], <https://scourtapp.nic.in/supremecourt/2019/2764/2764_2019_4_1501_47778_Judgement_19-Oct-2023.pdf>, last accessed on 20.10.2023: This was another death sentence matter wherein following the reasoning in *Anokhilal*, the Supreme Court remanded the matter for de novo trial; *Shambhu Nath Singh v. State of Bihar* 2022 SCC OnLine Pat 173.

[145] *Anokhilal* [26].

[146] *Naveen @ Ajay* [16].

[147] *Anokhilal* [31].

[148] 'India Justice Report: Ranking States on Police, Judiciary, Prisons and Legal Aid', 2022, Pages 90 and 91: The lower judiciary had a significant vacancy with 19,288 judges serving against a sanctioned strength of 24,631, this indicates a vacancy of about 22% among the sanctioned posts.

documents or parts of the police report from consideration.[149] Since Cl.193(9) prescribes a ninety-day time limit for further investigation, it is unclear how this would affect the timeline for the framing of charges.

b. Issues regarding Presence of Accused using Electronic Means during Framing of Charges

In addition to the timeline for framing of charges, Cl.251(2) also introduces the option to produce the accused, either physically or through electronic means, so that the judge can explain the charges framed and record their plea.

Considering the importance of this stage in the trial process, courts have held that it is the duty of the judge to ensure the accused understands the charges framed against them before entering their plea.[150] Production of the accused through electronic means may assist with avoiding delays due to implementational issues such as lack of adequate police escorts for court visits. Also, in cases where there may be a security risk for the accused due to their physical production in court, production through electronic means may be seen as a useful alternative.

However, production through electronic means also raises several concerns that may adversely impact the right to fair trial of the accused. Firstly, considering the limitations of a video conference, the judge may be restricted in ensuring that the accused has understood the charges framed against them and is under no form of duress or threat[151] while entering their plea. Secondly, it is unclear whether the production through electronic means would be dependent on the accused's preference or would be based on the judge's discretion. As a corollary, it is unclear if the accused would have a right to insist on physical production, in case the court orders otherwise. Lastly, the effective implementation of production through electronic means would be dependent on ensuring adequate infrastructure and building the capacity of prison officials within central and district

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[149] *Vinay Tyagi v. Irshad Ali* (2013) 5 SCC 762 [41], [42], [53].

[150] *V.C. Shukla v. State through CBI* 1980 SCC (Cri) 695 [110].

[151] Sahana Manjesh, Disconnected: Videoconferencing and Fair Trial, (*Commonwealth Human Rights Initiative*, 2020), Pages 16 and 17: Concern regarding the limitation of the judicial officers in ensuring that the accused is not under duress, or pressure in testifying against themselves was raised in the qualitative study which interviewed lawyers and judicial officers across the country to understand their experiences on the use of videoconference in criminal trials.

prisons across India (in case the accused is in judicial custody).[152] This would include provision and maintenance of sufficient number of computer devices, uninterrupted access to the internet, separate space within prisons for attending judicial proceedings, and adequate training of prison officials. Without addressing these systemic gaps, production of the accused through electronic means may severely affect the realisation of their fair trial rights.

[152] Sahana Manjesh, Disconnected: Videoconferencing and Fair Trial, (*Commonwealth Human Rights Initiative*, 2020), Page 18: Concerns were raised regarding the connectivity and poor quality of audio and video by both lawyers and judicial officers when accused were produced from prison.

Forensic Expert Evidence

Clauses 176(3), 329, 330 and 349.

The use of technology and forensic sciences in the criminal justice system is a stated aim of the BNSS.[153] This part discusses the main provisions that deal with the use of forensic evidence i.e. Cls.176(3), 349, 329 and 330.

Cl.176(3) introduces a new requirement to the procedure for investigation prescribed under s.157 CrPC i.e. collection of forensic evidence from crime scenes by a forensic expert. Cl.349 expands the types of forensic samples that may be collected from any person upon a Magisterial order under s.311A CrPC. Corresponding to s.293 CrPC, Cl.329 BNSS retains the exemption for certain government scientific experts from appearing as witnesses before the court. Cl.330(1) adds a new proviso to s.294 CrPC regarding when formal proof of documents is not required. This proviso disallows calling any experts to appear before the court, unless the genuineness of their report is disputed by the parties. It is evident from these changes that the BNSS seeks to expand and enhance the State's power to collect forensic evidence, both from crime scenes and individuals, while simultaneously reducing the scope of examination of forensic experts.

I. Enhanced Evidence Collection from Crime Scenes

Cl.176(3) introduces a mandate for the collection of forensic evidence at the crime scene by a 'forensics expert' in all offences punishable by imprisonment of seven years or more. The clause prescribes a five-year period regarding the implementation of the provision. However it is unclear whether the time limit has been prescribed for states to notify the date of implementation (which may be beyond the five-year period), or for the *implementation* of the provision itself.

Considering the lack of statutory requirements on crime scene management, the introduction of this clause is a significant step towards ensuring proper collection of forensic evidence from crime scenes in serious cases. Currently, the practices for evidence collection vary across states. In many states, scientific staff from

[153] Statement of Objects and Reasons, BNSS.

forensic science laboratories (FSLs)[154] or District/Mobile Forensic Science Units (DFSU/MFSU)[155] may also be called for crime scene visits by police officials depending on the nature of the case.[156] Additionally, in states such as Karnataka, the state police have created posts to hire civilian forensic experts as Scene of Crime Officers (SoCOs) to assist with crime scene management.[157] Thus, while mandating evidence collection by an expert is a positive change, implementation of the measure may prove challenging in the current forensic science system.

a. Broad Scope of 'Forensics Experts' could include Private Experts

Under Cl.176(3), the term 'forensics expert' could include both government (FSL officers or SoCOs working with the police), as well as private forensic experts. Currently, the CrPC permits reliance on registered medical practitioners who are privately employed, to conduct medical examinations.[158] Medical professionals are regulated by the National Medical Commission through a system of registration and licensing, along with standards monitoring their professional conduct. On the other hand, there are presently no oversight mechanisms or standards to regulate the system of forensic science education or profession in India.[159] In this context, allowing private forensic experts to assist with crime scene examination, without any regulatory body to ensure their proficiency or compliance with professional and ethical standards, would be problematic and should be reconsidered.

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[154] Directorate of Forensic Science Services, Ministry of Home Affairs, 'DFSS Report 2018-2022', Page 16: There are 145 FSLs in India, comprising 7 Central, 32 State and 106 regional laboratories.

[155] Directorate of Forensic Science Services, Ministry of Home Affairs, 'DFSS Report 2018-2022': there are 552 mobile forensic science units in India.

[156] Project 39A, 'Forensic Science India Report: A Study of Forensic Science Laboratories (2013-2017)', Chapter 3: Case Management, Pages 152-153.

[157] The Hindu, 'In a first, Karnataka to have 'scene of crime officers'', (*The Hindu,* 13 July 2021).

[158] Ss.53, 53A, 54 and 164A CrPC: references to registered medical practitioners. While s.53 may include any registered medical practitioner (whether employed within a state hospital or institution or not), ss.53A, 54 and 164A CrPC state a preference for government medical practitioners, and in case they are unavailable, then any other registered medical practitioner.

[159] Project 39A, 'Forensic Science India Report: A Study of Forensic Science Laboratories (2013-2017)', Chapter 2: Recruitment, Education & Training, Page 112.

b. Potential issues with involving FSL Experts for Crime Scene Visits

Forensic scientists currently working in FSLs would be covered within the term 'forensic experts' under this provision for crime scene examination. The same experts may proceed to examine the evidence collected from the crime scene within the FSL as well. This poses a serious risk for issues of cognitive and contextual bias, as the forensic examiner would be exposed to a wide range of task-irrelevant information during the crime scene inspection.[160] In case accused persons or witnesses are present during the crime scene examination, the forensic expert may be exposed to confession by the accused, witness statements, or other information which may be irrelevant for their forensic examination, such as the gruesome nature of the crime scene. Further, visiting crime scenes in addition to grappling with a heavy caseload, with vacancies in their divisions, is often demanding for forensic examiners.[161] The necessary infrastructure for crime scene visits and evidence collection, in the form of mobile vans equipped with the requisite instruments and material, would also require significant investment across sta

II. Wider Evidence Collection from Individuals

The power of Magistrates to order collection of forensic samples from individuals under s.311A CrPC has been expanded by Cl.349 in two significant ways. Firstly, the types of samples that may be collected have been expanded from signatures and handwriting to include fingerprints and voice samples[162] as well. Secondly, in

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[160] Itiel Dror, Cognitive and Human Factors in Expert Decision Making: Six Fallacies and the Eight Sources of Bias, *Analytical Chemistry,* Volume 92, Issue 12, June 2020, Pages 7998-8004: describes eight sources of bias in scientific experts including contextual bias, discussing how contextual information about the case creates expectations that influence calls made during scientific analysis and interpretation of results; Itiel Dror, Justice Bridget M McCormack & Jules Epstein, Cognitive Bias and Its Impact on Expert Witnesses and the Court, *The Judges Journal,* Volume 54, Issue 4, (2015), Page 8.

[161] Project 39A, 'Forensic Science India Report: A Study of Forensic Science Laboratories (2013-2017)', Chapter 3: Case Management, 'Challenges in crime scene & court visits', Page 152: Between 2013-2018, 40.3% of the total sanctioned posts were vacant, out of which 69.6% of the posts were for scientific staff; Project 39A, 'Forensic Science India Report: A Study of Forensic Science Laboratories (2013-2017)', Chapter 2: Recruitment, Education & Training, Pages 95-104.

[162] *Ritesh Sinha v. State of Uttar Pradesh* (2019) 8 SCC 1: The Supreme Court held that collection of voice samples from an accused vide Magisterial order under s.91 CrPC does not amount to a violation of their right against self-incrimination under Art.21.

addition to ordering collection of samples from persons who may have been previously arrested in connection with the investigation as provided in s.311A, under Cl.349 the Magistrate can order collection of samples from any person while providing the reasons for such collection in writing.[163]

a. Expanding the scope of collection of Personal Data

Concerns regarding the expansive powers of collection of personal data under the CPIA hold true for Cl.349 as well.[164] Under Cl.349, fingerprint and voice analysis samples can be collected from any person with reasons to be recorded in writing. There is no requirement for establishing either the person's connection with the offence or the relevance of their samples to the criminal investigation. Given that the samples sought to be collected constitute an individual's personal data, this raises serious concerns regarding the disproportionate impact on the right to privacy. This gains particular significance in light of questions regarding the validity and reliability of these forensic techniques and the existing practices in forensic science laboratories in India.

1. Fingerprint Examination

Studies on the accuracy of fingerprint analysis have found different false positive rates (1 in 306 in a 2011 study and 1 in 18 in a 2014 study).[165] In case of two fingerprints from different sources that have many common features and few dissimilarities (close non-matches), the error rate is as high as 28.1%.[166] This raises critical questions regarding the perceived accuracy and infallibility of fingerprint comparison that currently exists within the criminal justice system. Besides the high

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[163] There is an overlap between Cl.349 BNSS and the provisions under the CPIA, which replaced the Identification of Prisoners Act, 1920. CPIA permits the collection of a wide range of personal data or 'measurements' from convicted persons, arrestees, and persons under preventative detention. The Magistrate may also direct any person to give their measurements, if it is considered 'expedient' for the investigation.

[164] Project 39A, Research Brief: Analysis of the Criminal Procedure (Identification) Act, 2022, September 2022, Pages 38-41: Issues of scientific validity forensic disciplines.

[165] United States President's Council of Advisors on Science and Technology (PCAST), 'Report to the President - Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods', September 2016: cites, amongst others, these studies:- Pacheco et al., 'Miami-Dade Research Study for the Reliability of the ACE-V Process: Accuracy & Precision in Latent Fingerprint Examinations', 2014; Ulery et al., Accuracy and Reliability of Forensic Latent Fingerprint Decisions, *Proceedings of the National Academy of Sciences,* Volume 108, Issue 19, 2011, Pages 7733-7738.

[166] Jonathan Koehler & Shiquan Liu, Fingerprint Error Rate on Close Non-Matches, *SSRN,* August 2020.

rates of error in fingerprint examination which impact its reliability, there is also a lack of empirical evidence of the 'uniqueness' of fingerprints.[167] Further, many studies have found that fingerprint examiners are susceptible to issues of confirmation (where examiners are prone alter the features they mark in an unknown fingerprint based on the features seen in the known fingerprint) and contextual bias (where the examiners' decision-making is influenced by task-irrelevant information), which raises concern about the reliability of fingerprint examination.[168]

2. Voice Analysis

Characteristics which impact voice comparison, such as the relevant linguistic population, conditions in which the voice recording was made, and storage and transmission conditions of the voice clip, vary greatly.[169] The characteristics of a single individual's voice in saying the same thing also varies from one instance to another, depending on the language, accent, dialect, speaking style, and their emotional and physical condition.[170] Voice analysis can be done through various kinds of methods, and while jurisdictions move from highly subjective methods to more objective ones based on automated software,[171] empirical research to validate and measure the accuracy of different forensic voice comparison systems is

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[167] William Thompson, John Black, Anil Jain and Joseph Kadane, 'Latent Fingerprint Examination, Forensic Science Assessment: A Quality and Gap Analysis, American Association for the Advancement of Science (AAAS), 2017, Report 2, Pages 13-16; SWGFAST Individualisation/Identification position statement, Document #103.

[168] United States President's Council of Advisors on Science and Technology (PCAST), 'Report to the President - Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods', September 2016, Pages 98-102.

[169] Geoffrey Stewart Morrison, Ewald Enzinger, Multi-laboratory evaluation of forensic voice comparison systems under conditions reflecting those of a real forensic case, *Speech Communication,* Volume 110, 2019.

[170] Geoffrey S Morrison & William C Thompson, Assessing the Admissibility of a New Generation of Forensic Voice Comparison Testimony, *Colum. Sci. & Tech. L. Rev.*, Volume 18, 2017, Page 337.

[171] Andrzej Drugajlo et al., Methodological Guidelines for Best Practice in Forensic Semiautomatic and Automatic Speaker Recognition, *European Network of Forensic Science Institutes*, 2015.

ongoing.[172] Until the scientific foundations of voice analysis have been tested, legal reliance on such evidence has been cautioned against.[173]

3. Lack of Validation of Procedures in Indian FSLs

Besides issues with the validity and reliability of fingerprint and voice analysis methods, there is also an issue of quality management within Indian forensic practice, to ensure that the forensic methods have been correctly applied in an individual case. Besides the absence of best practices or guidelines for laboratories to undertake such examinations,[174] FSLs widely lack their own working procedure manuals (WPMs). WPMs provide stepwise instructions on all aspects of the forensic examination. Such manuals should be prepared after internal validation studies to ensure that these procedures perform as expected within the laboratory's set-up and provide accurate results.[175] Thus, the move to collect more personal data from a wider group of people, without proper procedures within FSLs to ensure reliable analysis, needs further consideration.

III. Exemption to Forensic Experts from Judicial Scrutiny

Corresponding to s.293 CrPC, Cl.329 allows the submission of a report by a government scientific experts as evidence, without requiring their oral testimony in court as a witness. Cl.329 expands the categories of experts exempted from court deposition: any scientific expert certified by the central or state governments (which can include private experts) may be notified under the clause.

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[172] The Speaker Recognition Subcommittee of the US National Institute of Standards and Technology (NIST) is developing various studies on forensic speaker recognition to understand the effect of different conditions on speaker recognition and validating its use which may assist with the assessment of its admissibility.

[173] Catanzaro et al., 'Voice Analysis Should be Used with Caution in Court', (*Scientific American*, January 5 2017), last accessed on 19.10.2023; Geoffrey S Morrison & William C Thompson, Assessing the Admissibility of a New Generation of Forensic Voice Comparison Testimony, *Colum. Sci. & Tech. L. Rev.*, Volume 18, 2017, Pages 326-434.

[174] While the Directorate of Forensic Science Services publishes best practices and guidelines for different forensic disciplines, it has not yet published them for fingerprint examination or forensic voice comparison.

[175] Project 39A, 'Forensic Science India Report: A Study of Forensic Science Laboratories (2013-2017)', Chapter 5: Quality Management, Pages 207-209, 212-213: 'Trends' and 'Lack of Internal validation & WPMs'.

a. Background

S.293 CrPC draws from s.510 under the 1882 and 1898 CrPC, which stipulated that reports of Chemical Examiners could be used as evidence in court. While under the current CrPC 1973, s.293 grants courts the discretion to summon the exempted experts as witnesses, it allows the experts to depute a fellow expert to depose to the contents of the report on their behalf.

Cl.329 widens the exemption from oral examination for forensic experts.[176] This exemption to experts from fulfilling their duty to the court is in stark contrast to the law in other jurisdictions,[177] including the United Kingdom, where courts must provide reasons for *not* examining an expert whose report has been admitted as evidence.[178]

b. Conflict with s.45 of the Indian Evidence Act, 1872 and issues of Fair Trial

S.45 IEA permits reliance on opinions of experts on a diverse range of areas, including on matters of science. Courts have held that despite the specialised nature of expert evidence, the accuracy and reliability of the expert's findings should be independently reviewed, based on the data and materials underlying the examination.[179] In *Rahul v. State (NCT of Delhi)*,[180] the Supreme Court disregarded the DNA evidence on the basis that the lower courts had failed to examine the underlying basis of the DNA report and whether the expert had reliably conducted the examination.

However, Cl.329 impedes any meaningful judicial scrutiny of forensic evidence. Although sub-clause (2) formally allows judicial discretion to summon and examine experts, in practice this depends upon an application by the defence explaining

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[176] Project 39A, 'Forensic Science India Report: A Study of Forensic Science Laboratories (2013-2017)', Chapter 7: Law on Expert Evidence, 'Procedural law on the examination of experts', Pages 253-254: Concerns regarding s.293 generally.

[177] *Melendez-Diaz v. Massachusetts* 557 US 305 (2009).

[178] S.30 of UK Criminal Justice Act, 1988: the permission of the court must be sought in case the expert does not depose. The court shall consider the reasons for seeking exemption and the unfairness that it may cause the accused.

[179] *State of Himachal Pradesh v. Jai Lal* (1999) 7 SCC 280 [18]; *Ramesh Chandra Aggarwal v. Regency Hospital* (2009) 9 SCC 709 [16]; *Dayal Singh* v. *State of Uttaranchal* (2012) 8 SCC 263; *Pattu Rajan v. State of Tamil Nadu* (2019) 4 SCC 771 [51]; *Rahul v. State (NCT of Delhi)* (2023) 1 SCC 83 [38].

[180] *Rahul* [38].

why the particular expert ought to be summoned.[181] This inhibits meaningful examination of forensic evidence and makes it dependent on the quality of legal representation. Without oral examination of experts, courts cannot properly examine issues regarding the admissibility and weight of the forensic evidence. This includes the foundational validity of the techniques used, qualifications and necessary experience of the expert in that type of examination, and whether they reliably performed it in that particular case. Given the crucial role that forensic evidence plays in criminal justice administration, lack of adequate scrutiny of forensic reports would adversely affect the right to fair trial of both victims and accused, alike.[182]

c. Issues of arbitrariness while exempting specific Government Scientific Experts from Oral Deposition

Like s.293 CrPC, the exemption from deposing before courts is applicable to specific government scientific experts mentioned in Cl.329(4). This creates an artificial distinction between forensic examiners practising the same forensic discipline, with those holding specific designations being exempted from testifying before the court. Such an exemption lacks a determining principle and appears to be manifestly arbitrary.[183] Further, the exempted category of government scientific experts as notified by the state governments, may vary across states. Cl.329(2) also does not provide any parameters to guide the court's discretion on when they may summon experts as witnesses which can lead to arbitrariness.

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[181] *Rajkishorsingh Ranvirsing Tomar v. State of Maharashtra* 2021 SCC Online Bom 326 [2]-[4], [10]: the Bombay High Court held that it is incumbent on the prosecution to examine the expert when the court is moved by the accused for issuing summon to expert or when the court itself deems it just and proper to summon the expert; *Nana Ram & Anr. v. State* 1996 SCC Online Raj 692 [2]-[4]; discussion on Cl.330 below.

[182] *Anokhilal v. State of Madhya Pradesh,* Criminal Reference No. 6 of 2022, Madhya Pradesh High Court, Order dated 11.09.2023 [13]-[14], <https://mphc.gov.in/upload/jabalpur/MPHCJB/2022/CRRFC/6/CRRFC_6_2022_FinalOrder_11-Sep-2023.pdf>, last accessed on 19.10.2023; *Naveen @ Ajay v. State of Madhya Pradesh,* Criminal Appeals No. 489-490 of 2019, Supreme Court, judgment dated 19.10.2023 [18]-[21], <https://scourtapp.nic.in/supremecourt/2019/2764/2764_2019_4_1501_47778_Judgement_19-Oct-2023.pdf>, last accessed on 20.10.2023.

[183] *Shayara Bano v. Union of India* (2017) 9 SCC 1 [101].

IV. Curtailing Judicial Scrutiny of Forensic Evidence

The impediment to challenging forensic reports in Cl.329 is further strengthened by Cl.330. It corresponds to s.294 CrPC, which omits the requirement of formal proof for documents whose genuineness are not challenged by the opposing party.[184] Cl.330(1) requires parties to admit or deny the genuineness of documents within thirty days of their being supplied, a time limit that can be relaxed by the Magistrate upon giving reasons. Importantly, a new proviso to Cl.330(1) stipulates that an expert *cannot* be called to appear before the court *unless* their report is disputed by a party. Unlike Cl.329, this proviso is applicable to *all* experts.

a. Background

Like s.294 CrPC, Cl.330 applies to the pre-trial stage of criminal proceedings where parties are given the opportunity to challenge the genuineness of documents to be relied on by the other party i.e. whether the documents are true, devoid of any forgery or fabrication. While discussing s.294 CrPC, courts have differed on the issue of whether expert reports, like medical or post mortem reports can be admitted as evidence without the testimony of the experts who prepared such reports, in case the genuineness of such reports has not been challenged.

Some courts have held that this provision would only apply to certain documents, like letters, which speak for themselves once they are formally proved.[185] However a medical or post mortem report can only be used to corroborate or contradict the doctor and cannot be a substitute for their oral testimony.[186] A similar view has been that even if the genuineness of a post mortem report is not disputed under s.294 CrPC, the requirements under s.45 IEA regarding expert evidence would continue to apply, which necessitates the examination of the expert. Without the expert's testimony, their report would be a mere certificate, which cannot be considered as evidence.[187] On the other hand, courts have also held that a medical or post mortem report may be considered as a document s.294 CrPC. Therefore, if the accused or his counsel has admitted the genuineness of such reports, they would be admissible as evidence without requiring the oral testimony of the

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[184] *Shamsher Singh Verma v. State of Haryana* (2016) 15 SCC 485 [11].

[185] *Dhirai v. State of Tripura* 1998 SCC OnLine Gau 233 [7].

[186] *Ram Deo Yadav v. State of Bihar* 1987 SCC OnLine Pat 257 [5]; *Nagina Sharma v. State of Bihar* 1990 SCC OnLine Pat 173 [82].

[187] *Nahadariya v. State of Madhya Pradesh* 1980 JLJ 501.

experts as witness.[188] The proviso to Cl.330(1) seeks to clarify this divergence in judicial opinions by adopting the latter interpretation.

b. Examination of Experts arbitrarily restricted to ussues regarding Genuineness

The proviso to Cl.330(1) restricts the examination of experts during trial only if the genuineness of their reports have been challenged during this pre-trial stage. This restriction is unreasonable and arbitrary as it presumes that the deposition of experts as witnesses would be necessary only for the purposes of establishing the genuineness of their report. Therefore, it precludes the examination of experts on crucial aspects which determine the accuracy and reliability of their opinions, such as the scientific validity of the testing methods, their qualifications and experience in performing such forensic examinations, and whether they reliably followed the techniques.[189]

c. Limiting Inquiry into reliability of Expert Reports and issues regarding Fair Trial

The proviso to Cl.330(1) limits the parties to the trial (both accused and victims) from examining experts only to matters regarding the genuineness of the report. It is also important to note that FSL reports are often submitted by the prosecution during the course of the trial or after the recording of the prosecution evidence or the statement of the accused under s.313 CrPC.[190] In such a scenario, the accused does not receive an opportunity to object to the genuineness of the report under s.294 CrPC.

Further, under this proviso, as experts would be called as witnesses during trial only if opposing parties dispute the authenticity of their report, it may prevent courts from conducting an independent review of the accuracy and reliability of the expert's opinion. Therefore, such a restriction would adversely impact the right to fair trial for the accused and the victims.

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[188] *Saddiq v. State* 1980 SCC OnLine All 614 [11]; *K. Pratap Reddy v. State of Andhra Pradesh* 1984 SCC OnLine AP 211 [6]; *Shaikh Farid Hussinsab v. State of Maharashtra* 1981 SCC OnLine Bom 26 [16].

[189] As mentioned in reference to Cl.329 BNSS, courts have emphasised on the importance of examination of experts, including those that may be covered under the exemption under s.293 CrPC; Project 39A, 'Forensic Science India Report: A Study of Forensic Science Laboratories (2013-2017)', Chapter 7: Law on Expert Evidence, 'Procedural law on the examination of experts', Page 253.

[190] *Anokhilal; Naveen @ Ajay*.

Fitness to stand trial

Clause 368

Chapter XXV of the CrPC, pertaining to procedure in case of accused persons with 'unsound mind', has been recast as Chapter XXVIII in the BNSS ('Chapter'), wherein the scope of its application has been restricted to persons with 'mental illness'. Cl.368 in the proposed BNSS seeks to replace s.329 CrPC, and deals with the procedure for fitness to stand trial.

A separate framework had been devised under criminal law to safeguard the fair trial rights of persons who are incapable of mounting a defence to their best advantage due to their mental condition and consequent incapacity.[191] Under the fitness to stand trial scheme of ss.329 and 330 CrPC, persons who are 'lunatic' or of 'unsound mind' shall have their trial postponed or be discharged without a trial[192] if they are found to be incapable of making their defence,[193] and persons with 'mental retardation' shall in all cases be discharged without a trial. However, the BNSS does not recognise the distinction between 'unsound mind', 'lunatics' and 'mental retardation', and instead uniformly replaces these terms with 'mental illness'. This excludes persons with 'mental retardation' from the fitness to stand trial framework, which is in complete contradiction to the object of the Chapter. This further causes uncertainty over the treatment of persons with 'mental retardation' under the law. The phrasing of Cl.368 also gives rise to procedural anomalies leading to absurd consequences.

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[191] Law Commission of India, 'One Hundred and Fifty Fourth Report on the Code of Criminal Procedure, 1973', Chapter XVI, Enquiry and trial of persons of unsound mind (Law Commission of India Report No. 154, 1996).

[192] Caveat: This is dependant on the treatability of the mental condition.

[193] Incapable of making their defence is understood as they are unable to understand the charges, nature of evidence, any aspect of court proceedings; provide information relevant to the circumstances of the act; or instruct counsel; *Vijay Pradap Singh v. State* 2016 SCC OnLine Mad 13831; *State of Gujarat v. Manjuben* 2019 SCC OnLine Guj 6937; *Vivian Rodrick v. State of West Bengal* (1969) 3 SCC 176; *Gurjit Singh v. State of Punjab* 1986 SCC OnLine P&H 195.

I. Implications of Change in Terminology

The term 'mental illness' has been introduced in the BNSS without providing any definition. However, the BNS clarifies that 'mental illness' shall have the same meaning as provided under s.2(a) MHCA.[194] The MHCA defines 'mental illness' as '*a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence.*'.[195] Thus, the definition of 'mental illness' unambiguously excludes 'mental retardation' from its scope.

There is a clear distinction between 'mental illness' and 'mental retardation', and the law has consciously sought to treat both differently. While mental illness can be treated,[196] mental retardation is an 'organic disablement of the mind' which one may be taught to cope with, but cannot be 'cured'.[197] The term 'mental retardation' has now been widely replaced by 'intellectual disability',[198] which is defined under the RPwD.[199] Persons with intellectual disability (mental retardation) have high support needs which need to be accommodated under the law. Acknowledging the need for protection of persons with mental illness or 'mental retardation', the Law Commission also recognised the need for a different procedure under the

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[194] Cl.2(19) BNS.

[195] S.2(r) MHCA.

[196] Lok Sabha, 'Joint Committee on Mental Health Bill, 1978: Evidence', CB(II) No. 318, 1978.

[197] Amita Dhanda, Rights of the Mentally Ill – A forgotten domain, *India International Centre Quarterly*, Volume 13, Issue 3/4, December 1986, Pages 147-160.

[198] L Salvador-Carulla L, GM Reed, LM Vaez-Azizi, SA Cooper, R Martinez-Leal, M Bertelli, et al., Intellectual developmental disorders: Towards a new name, definition and framework for 'mental retardation/intellectual disability', *World Psychiatry*, Volume 10, Issue 3, October 2011; Bhargavi Davar, Legal Frameworks for and against People with Psychosocial Disabilities, *Economic and Political Weekly*, Volume 47, Issue 52, December 2012, Pages 123 -131; Department-Related Parliamentary Standing Committee on Health and Family Welfare, Seventy-Fourth Report on Mental Healthcare Bill, 2013 (Parliamentary Standing Committee on Health and Family Welfare Report no. 74, 2013).

[199] It is defined as '*a condition characterised by significant limitation both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behaviour which covers a range of everyday, social and practical skills*', including special learning disability and autism spectrum disorder.

CrPC for the latter category of persons.[200] Even though conceptually different, both mental illness and intellectual disability (mental retardation) have been classified as 'specified disabilities' under the RPwD Act,[201] and have been beneficiaries of protections under the fitness to stand trial framework.

The CrPC currently uses 'unsound mind', 'lunatics' and 'mental retardation' in the fitness to stand trial framework. The term 'unsound' has suffered from a lack of definitional clarity, leading to inconsistent application of protections under the law.[202] However, this term is broad enough to include varying degrees of mental illness[203] as well as mental retardation[204] within its scope. By using consistent terminology of 'mental illness', the BNSS proposes some clarity about who is eligible for protection under the law. However, troublingly, it also unambiguously excludes an important category of persons (persons with intellectual disability) thereby denying them their fair trial rights and protection under the BNSS.

II. Procedural Anomalies

Ss.329 and 330 CrPC, provides two distinct procedures to deal with persons with mental illness and persons with intellectual disability (mental retardation), who are incapable of making their defence. By excluding persons with intellectual disability, the BNSS fails to recognise the separate framework that was designed under the CrPC for this category of persons. Consequently, the BNSS suffers from procedural

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[200] Law Commission of India, 'One Hundred and Fifty Fourth Report on the Code of Criminal Procedure, 1973', Chapter XVI, Enquiry and trial of persons of unsound mind (Law Commission of India Report No. 154, 1996).

[201] Schedule, RPwD Act.

[202] Soumya AK, Maitreyi Misra & Anup Surendranath, Shape Shifting And Erroneous: The Many Inconsistencies in the Insanity Defence in India, *NUJS L. Rev.*, Volume 14, Issue 195, 2021.

[203] *Bapu v. State of Rajasthan* (2007) 8 SCC 66; R. Deb, Reform of the Indian Lunacy Act, *Journal of the Indian Law Institute*, Volume 17, Issue 3, 1975, Pages 398-409; Ketki Ranade, Arjun Kapoor, Tanya N. Fernandes, Mental Health Law, Policy & Program in India – A Fragmented Narrative of Change, Contradictions and Possibilities, *SSM - Mental Health*, Volume 2, December 2022.

[204] Amita Dhanda, Rights of the Mentally Ill – A forgotten domain, *India International Centre Quarterly*, Volume 13, Issue 3/4, December 1986, Pages 147-160.; *Bapu v. State of Rajasthan* (2007) 8 SCC 66; K.M. Sharma, Defence of insanity in Indian criminal law, *Journal of Indian Law Institute*, Volume 7, Issue 4, 1965, Pages 325-383; *Kaliyappan v. State* 2020 SCC OnLine Mad 2030.

anomalies that adversely impact the treatment of both persons with intellectual disability and persons with mental illness.

S.329(3) CrPC provides a distinct procedure for treatment of persons with intellectual disability (mental retardation). Since intellectual disability is a permanent condition, these persons are eligible to be discharged without trial under s.330(3). By proposing to replace 'mental retardation' with 'mental illness', the BNSS revokes the protection to this category of persons and unfairly excludes them from any protection under the fitness to stand trial framework. Considering the nature of their mental condition, it is absurd that persons with intellectual disability may be compelled to stand trial, exposing them to prolonged detention and violation of liberty even though they do not have the requisite 'capacity'.[205]

Persons with intellectual disability (mental retardation) are further excluded from other protections under BNSS. Unlike the CrPC, there is no provision in the BNSS allowing persons with 'mental retardation' to either be delivered to family or friends;[206] sent to safe custody;[207] undergo periodic review or assessment;[208] or be discharged[209] or acquitted due to mental incapacity at the time of commission of the offence.[210] This exclusion of persons with intellectual disability from safeguards under the BNSS puts them in a precarious position and adversely impacts their fair trial rights and personal liberty.

The BNSS is not only inconsistent with the rights of persons with intellectual disability (mental retardation) but also creates procedural anomalies in the treatment of persons with mental illness under the fitness to stand trial framework. Both Cl.368(4) and proviso to Cl.368(3) is applicable to persons with mental illness against whom a *prima facie* case is made out. The anomaly lies in the fact that both clauses provide different outcomes for the treatment of the same class of persons without any conditions on application. While one provides for postponement of trial, the other provides for discharge under Cl.369, and neither makes any distinctions between the circumstances under which either of the

[205] Law Commission of India, 'One Hundred and Fifty Fourth Report on the Code of Criminal Procedure, 1973', Chapter XVI, Enquiry and trial of persons of unsound mind (Law Commission of India Report No. 154, 1996); Cl.357 BNSS.
[206] Cl.378 BNSS.
[207] Cls.370 and 374 BNSS.
[208] Cl.376 BNSS.
[209] Cl.370 BNSS.
[210] Cls.372 and 374 BNSS.

outcomes would apply. As discussed earlier, the CrPC provides separate procedures for persons with mental illness and intellectual disability. Further, s.329 CrPC has been interpreted to provide distinct procedures for persons with treatable and untreatable mental illness.[211] While persons with mental illness are eligible for postponement of their trial, persons with untreatable mental illness and intellectual disability could be discharged under s.330 CrPC. The BNSS does not recognise any of these distinct categories but allows for separate outcomes without any guidance, leading to potential anomalies.

III. No Real Solution

While the CrPC is largely incongruent with the values and principles under the RPwD Act and the MHCA, these infirmities are carried forward in the proposed BNSS. The MHCA and RPwD Act are rights-based legislations which prioritise the liberty and dignity of persons with mental disability. Through the provision of accommodation and support, informed consent and periodic mental health assessment and reporting, these legislations allow for the realisation of the rights of all persons with mental disabilities. These priorities are not reflected in the present criminal law framework. The proposed bill makes no changes to the current framework of the CrPC. Instead it introduces a widespread change in terminology, leading to further confusion and discrimination.

[211] Law Commission of India, 'One Hundred and Fifty Fourth Report on the Code of Criminal Procedure, 1973', Chapter XVI, Enquiry and trial of persons of unsound mind (Law Commission of India Report No. 154, 1996); *Kaliyappan v. State* 2020 SCC OnLine Mad 2030.

Witness Protection Scheme

Clause 398

Cl.398 BNSS provides: '*Every State Government shall prepare and notify a Witness Protection Scheme for the State with a view to ensure protection of the witnesses*.' While this clause is an entirely new addition proposed in the criminal procedural framework, it is only an enabling provision for state governments to prepare and notify schemes for witness protection. However, when considered in light of legal developments and discourse on witness protection, the purpose and significance behind the inclusion of this provision is not discernible. In other words, the legislative aim behind the insertion of this clause is unclear.

I. Witness Protection Law in India

The most recent legal development concerning witness protection was the Witness Protection Scheme 2018. The Supreme Court in *Mahender Chawla*[212] declared this scheme to be law until the Parliament or various state governments prepared and notified their own Witness Protection Schemes. Although various provisions in the IPC, IEA and CrPC recognise the vulnerabilities faced by witnesses and provide some support,[213] the 2018 scheme was the first to develop a comprehensive approach towards ensuring the protection of witnesses in criminal proceedings. This scheme was based on a draft witness protection scheme supplied by the Central government, after deliberation and consultation with state governments.

The decision in *Mahender Chawla*, comes on the heels of a long line of judicial decisions and committee reports acknowledging the vulnerability of witnesses in the criminal justice system, and the need for an institutional response for their protection. The judgment recognises the extent of problems faced by witnesses

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[212] *Mahender Chawla v. Union of India* (2019) 14 SCC 615.

[213] S.195A IPC criminalises threatening of witnesses. S.151 and 152 IEA prohibit parties from asking scandalous or insulting questions to the witnesses. S.327 CrPC empowers the magistrate to shield the proceedings of the court from the public view. S.327(2) CrPC requires that trial for rape be conducted *in camera*. It also empowers the judge to control the publication of proceedings. S.22 UAPA, criminalising the threatening of witnesses using violence and other means; s.74 Juvenile Justice (Care and Protection of Children) Act, 2015, prohibiting disclosure of the identity of child witnesses.

ranging from difficulty in accessing courts due to expenses, travel, time and expense costs due to frequent adjournments,[214] callous treatment by court officials, as well as threats, intimidation and harassment. Through precedents, the Supreme Court also discusses the varying kinds of protection required depending on factors including the context of the crime, social status of the witness, and the power dynamics concerning the accused. For instance, child witnesses in sexual offence cases come with a unique set of protection needs to prevent intimidation and to protect them from the trauma of such proceedings.[215] Similarly, witnesses in offences committed by organised crime syndicates, such as terror outfits, may find their safety far more likely to be jeopardised.[216]

The 2018 scheme took an expansive approach to establish a holistic legal and institutional framework for the protection of witnesses. This included categorising risk/vulnerability levels of witnesses; procedures for witness protection; introduction of threat analysis reports by the police to gauge the level of protection required by witnesses; and constituting a body comprising police officials and Sessions/District Court judges to implement and oversee its functioning. While, there may be limits to the framework proposed by the 2018 Scheme - including its overreliance on the police for threat assessment or limiting the scope of witness protection to three months; this scheme was a first step towards a comprehensive legal framework for witness protection.

II. Implications of Cl.398

The change, or the purpose behind Cl.398, remains unclear in the face of the aforementioned developments. Cl.398 merely reiterates the direction under *Mahender Chawla*, enabling states to frame their own witness protection schemes. Thus, in the absence of any further guidance, it appears then that the 2018 scheme will remain operational, in the absence of specific state legislation.

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[214] Law Commission of India, Fourteenth Report (Reform of Judicial Administration), Volume II, (Law Commission of India Report No. 14, 1958).

[215] *Sakshi v. Union of India* (1999) 6 SCC 591; *Delhi Domestic Workers Union v. Union of India* (1995) 1 SCC 14.

[216] *People's Union for Civil Liberties v. Union of India* (2007) 1 SCC 719.

Mercy Petitions

Clause 473

Cl.473 BNSS is a new provision titled 'Mercy Petition in death sentence cases' which lays down the procedure for submitting mercy petitions to the President and Governor under Art.72 and Art.161 of the Constitution, respectively. A statutory written procedure with respect to mercy petitions does not exist presently; limited guidance is available in jurisprudence, guidelines released by the Ministry of Home Affairs, and jail manuals of different states where the procedure varies from state to state.[217]

This piece discusses the changes brought in Cl.473 BNSS along with its possible implications. While there may be benefit in attempting to streamline the procedure applicable to mercy petitions, Cl.473 BNSS runs contrary to the mercy jurisprudence judicially developed over the years. As a result, it appears to adversely affect a convict's constitutional right to file mercy petitions.

I. Background

Art.72 and Art.161 of the Constitution provides the President and Governor respectively with wide powers to grant pardons, reprieves, respites or remissions of punishment or to suspend, remit or commute the sentence of any person convicted of any offence. These powers, granted to the highest dignitaries of the State, operate on a different plane than judicial powers. Their exercise does not modify the judicial record.[218] Further, these powers are very expansive - the President and Governor can look beyond the case files, and into any circumstance pertaining to the convict and their life. These powers also cannot be restricted by statute.[219] They are significant since this gives convicts a *constitutional right* to file a mercy petition,[220] often a last hope for those sentenced to death.[221]

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[217] Ministry of Home Affairs, Government of India, 'Guidelines for Safeguarding the interest of the Death Row Convicts', 4 February 2014, No. VII-17013/1/2014-PR.

[218] *Kehar Singh v. Union of India* (1989) 1 SCC 204.

[219] *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1; *Maru Ram v. Union of India* (1981) 1 SCC 107.

[220] *Shatrughan Chauhan*.

[221] *Jagdish v. State of Madhya Pradesh* (2020) 14 SCC 156.

II. Restriction on who can file Mercy Petitions

Cl.473(1), through the phrase '*convict under the sentence of death or his legal heir or any other relative*' appears to limit the right to file a mercy petition to the convict or persons related to them. Presently, there is no such restriction. Although Art.72 and Art.161 are rights available to convicts, mercy petitions are often filed by third parties on their behalf, such as organisations or unrelated individuals.[222]

It is not uncommon for death row convicts to lose contact with their families.[223] In such situations, under the BNSS, only one option would remain – for the death row convicts to themselves file the petition. Most death row convicts are extremely poor;[224] lack of education and other vulnerabilities results in their inability to understand and meaningfully exercise their legal rights.[225] This inability is possibly exacerbated by the emotional distress that accompanies the knowledge of an imminent execution. Importantly, an overwhelming majority of death row convicts suffer from mental illnesses, and many have intellectual disability,[226] which might render them incapable of filing a mercy petition, or giving instructions to lawyers to file on their behalf. Thus, by barring third parties from filing mercy petitions, the BNSS fails to recognise these realities and is likely to have a severe adverse impact on a meaningful exercise of this right.

III. Restriction on the number of Mercy Petitions

Cl.473(1) BNSS uses the phrase '*if he has not already submitted a petition for mercy*'. This may imply a restriction on the number of mercy petitions that can be submitted on behalf of the convict to only one; that is, one before the Governor and one before the President. Presently, the Court has recognised the right to file multiple mercy petitions before the same authority, in case of change of

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[222] *Narayan Chetanram Chaudhary v. State of Maharashtra* 2023 SCC OnLine SC 340: petition filed by public spirited individuals; *Balwant Singh v. Union of India* 2023 SCC OnLine SC 555: petition filed by Shiromani Gurdwara Parbandhak Committee.

[223] Project 39A, Deathworthy: A Mental Health Perspective of the Death Penalty, 2021, Page 226.

[224] Project 39A, Death Penalty India Report, 2016; *Shatrughan Chauhan* [241.11].

[225] Project 39A, Deathworthy: A Mental Health Perspective of the Death Penalty, 2021, Page 219.

[226] Project 39A, Deathworthy: A Mental Health Perspective of the Death Penalty, 2021, Page 269.

circumstances.[227] For instance, if a convict develops mental illness subsequent to filing of the first mercy petition, they can file another petition on the basis of this new ground. Restricting the number of permissible petitions to only one would deprive a convict of any opportunity to submit such subsequent developments for consideration. Such a right would be especially required under the BNSS, which permits only convicts or their families to file the petition, and that too within a short and rigid time limit as discussed below. This increases the likelihood of the filed petitions being hurried and not comprehensive.

IV. Introduction of timelines

Cl.473 provides for several time limits. *First,* where a mercy has not already been submitted, Cl.473(1) imposes the time limit of thirty days for submitting mercy petitions to the Governor or the President, from the date on which the Superintendent of Jail informs the prisoner: (a) about the rejection of their special leave petition by the Supreme Court, or (b) about the date of confirmation of the death sentence by the High Court and the time for filing an appeal or a special leave petition in the Supreme Court has expired. *Second,* Cl.473(2) states that the petition may be first made to the Governor and upon rejection, the convict will have sixty days from the date of rejection, to make a petition to the President. Since the President is required to act in accordance with the advice of the Council of Ministers, sub-clause (4) requires the Central Government to seek comments of the State Government. Upon receipt of these, the Central Government is required to make recommendations to the President within sixty days. *Third,* Cl.473(6) requires communication of the President's decision on the mercy petition by the Central Government within forty-eight hours, to the Home Department of the State government and the Superintendent of the Jail or officer in charge of the Jail.

Note that while an unreasonable executive delay is a valid supervening circumstance for reduction of a death sentence, the Supreme Court has been wary of creating fixed timelines for consideration of mercy petitions by the President

[227] *Yakub Abdul Razak Memon v. State of Maharashtra* (2015) 9 SCC 552.

and Governor.[228] In line with this jurisprudence, Cl. 473 does not create such time limits for the President or the Governor.

a. Issues with thirty-day timeline for submission of Petitions under Cl.473(1)

The procedure under the BNSS may be aimed at achieving efficiency, however, the creation of rigid time limits is extremely problematic; practically nullifying the prisoner's ability to file a comprehensive petition. Presently, the Supreme Court has held that 'reasonable' time must be afforded to convicts to file a mercy petition.[229] BNSS introduces a thirty-day deadline for submission of mercy petitions under Cl.473(1), which may not be sufficient time for the convicts/their families to go through all the necessary documents and prepare the petition. For instance, other than case records, factors like post conviction mental illness and solitary confinement are also relevant in mercy petitions. Procuring records documenting these, especially from the prison administration after filing various applications, may take time. Further, given that mercy petitions are filed as a last resort against executions, it is important to seek legal advice. Locating and engaging an affordable lawyer is a time-consuming process, especially given the likely poor socio-economic profile of the convict. Communicating with and instructing lawyers is also generally a time consuming exercise since most jails permit visits only for a few minutes, across a metal barrier.

b. Issues with timeline for submission of Mercy Petition to President under Cl.473(2)

It is unclear why the BNSS has a thirty-day deadline for filing an application before the Governor but a sixty-day deadline for filing it before the President. In any event, while Cl.473(1) provides that the time period of thirty days will commence after *the prisoner is informed* about the relevant event as provided, Cl.473(2)

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[228] *Triveniben v. State of Gujarat* (1989) 1 SCC 678: In dealing with the question of executive delay, the Supreme Court held that fixing a time limit for the exercise of Art.72 and Art.161 powers meant creating a restriction on a constitutional scheme; *T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2 SCC 68: it was held that delay of two years in executing a sentence of death (from the time it is first passed by the Trial Court) would be sufficient to entitle the prisoner to have his sentence quashed and commuted to life imprisonment. However, this decision was overturned in *Sher Singh v. State of Punjab* (1983) 2 SCC 344 where it was observed that no hard and fast rule can be laid down for fixing a time limit. The Court was cognizant of the fact that the cause of delay in each case has to be assessed according to the facts of that case.

[229] *Shabnam v. State of Uttar Pradesh* (2015) 6 SCC 702.

states that the sixty-day period for filing a petition before the President would commence from the *date of rejection/disposal* of the mercy petition by the Governor. Thus, the latter deadline for filing a mercy petition before the President, does not commence from the date of the prisoner being informed. Further, there is no sub-clause mandating forthwith communication of rejections by the Governor to the concerned convict, or even to the Superintendent of Jail.[230] Cl.473(6) provides a forty-eight hour timeline for communication of rejections including to the Superintendent but pertains only to rejections by the President. This lapse is significant, since it can result in a situation where the convict's petition is rejected by the Governor, however they are informed of the rejection only after sixty days, leaving no time to submit a petition to the President.

c. Effect on ability to avail other available Judicial Remedies

As per the timelines stipulated under Cl.473, it seems that convicts could be forced into filing a mercy petition without even exhausting all available judicial remedies. Presently, after imposition of a death sentence by the Sessions Court, the case goes to the High Court for confirmation under s.366 CrPC. If the High Court confirms the sentence, an appeal can be filed before the Supreme Court. The Supreme Court routinely hears such appeals on merits in all death penalty cases.[231] Even if a special leave petition is dismissed, convicts have the right to file a review petition.[232] To further reduce any scope of error, the Supreme Court has carved out an exceptional remedy of curative petitions; these can be filed on limited grounds to prevent miscarriage of justice or abuse of power.[233] In the context of mercy petitions, the Supreme Court has repeatedly emphasised the importance of review petitions,[234] and directed that convicts should have the right to file review petitions before they are required to file a mercy petition.[235]

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[230] In *Shatrughan Chauhan*, the Supreme Court laid down guidelines, requiring that the prisoner be informed forthwith and in writing about rejection of their mercy petitions.

[231] *Babasaheb Maruti Kamble v. State of Maharashtra* (2019) 13 SCC 631.

[232] *Mohd. Arif v. Supreme Court of India* (2014) 9 SCC 737: the right of an open hearing in review petitions in death penalty cases, was held as essential to uphold Art.21 rights of the convicts.

[233] *Rupa Ashok Hurra v. Ashok Hurra* (2002) 4 SCC 388 [51]: The grounds identified were violation of principles of natural justice and apprehension of bias.

[234] *Shabnam*.

[235] *B.A. Umesh v. Union of India* 2022 SCC OnLine SC 1528; *Shabnam*.

Cl.473 is then contrary to present jurisprudence, and in effect forces convicts to file mercy petitions when the options to file a review petition and curative petition exist. For instance, after dismissal of their appeal in the Supreme Court, convicts will only have thirty days to file both a mercy petition under Cl.473(1), as well as a review petition, which also has a time limit of thirty days.[236] While courts can condone delays in filing of review and curative petitions, these simultaneous time limits may still adversely affect the ability of convicts to pursue either remedy effectively. Further, not filing the mercy petition within the set time limit may amount to forfeiture of this right.

V. Impact on cases involving Multiple Accused

Cl.473(3) requires that in cases having multiple convicts, if one convict prefers a mercy petition, then all other co-accused must also make their mercy petitions within sixty days. If other co-accused do not make such petition, the Superintendent of the Jail is required to send their names, addresses, copy of the record of the case and 'all other details of the case' to the Central Government or State Government for consideration along with the mercy petition of the convict who has filed a petition. Sub-clause (5) provides that all mercy petitions for cases having multiple convicts shall be decided together by the President. A similar provision is absent for the Governor.

Filing a mercy petition allows convicts to present their individual grounds; it is highly unlikely that two persons convicted in the same case will have the same plea. For a meaningful consideration, in addition to the case record, the President and the Governor can also consider a convict's socio-economic background, medical records/illnesses if any, jail conduct records etc. Each of these personalised documents will be different for different convicts. However, Cl.473(3) undermines this by enabling the Superintendent to simply share the name and address along with case records for the co-accused. This would leave out pertinent information about their life circumstances, preventing a meaningful realisation of the right to seek mercy. Significantly, despite this major lapse, the convict may not be permitted to file another mercy petition before the same authority, if the sending of details by the Superintendent is construed as submission of a mercy petition.

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[236] Order XLVII Supreme Court Rules, 2013.

VI. Restriction of Judicial Review

Cl.473(7) states that the President's order made according to Art.72 of the Constitution will be final and cannot be appealed against. It further mentions that '*any question as to the arriving of the decision by the President*' shall not be enquired into in any court.

At the outset, it is unclear why this clause only deals with the President's decision and not the Governor's. In any case, the first part of this sub-clause appears to reiterate the existing position. Given the extraordinary nature of mercy powers, it is settled law that appeals against the decision of the President or the Governor cannot be made before any court, and reasons for their decision also need not be given.[237] Judicial review of the decision of the President or the Governor is restricted, and courts can only intervene to remedy a fundamental rights violation.[238]

The second part of Cl.473(7) appears to contradict judicial developments, and might conflict with fundamental rights of a convict. The phrase '*any question as to arriving of the decision*' is very broad. It can cover within its ambit questions regarding procedural aspects of decision making, such as the time taken to decide, and whether relevant materials were kept out of consideration while deciding. Presently, Writ Petitions under Art.226 or Art.32 of the Constitution can be filed, and judicial review of the order passed by the President or the Governor is permissible mainly on limited procedural aspects of the decision making and on grounds of breach of fundamental rights.[239] The Supreme Court has held that judicial review could be allowed: (i) if the order is passed without application of mind, (ii) is malafide, (iii) is passed on extraneous or wholly irrelevant considerations, (iv) relevant materials had been kept out of consideration, or (v) the order is arbitrary.[240] Courts have widened the scope of enquiry to include 'supervening circumstances', the presence of which violate fundamental rights of the convict, necessitating a reduction of the death sentence. Such supervening

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[237] *State v. Jasbir Singh* 1979 SCC OnLine Del 220.

[238] *Maru Ram* [57]-[70]; *Kehar Singh*; *SR Bommai v. Union of India* (1994) 3 SCC 1.

[239] *Kehar Singh*.

[240] *Epuru Sudhakar v. Govt. of Andhra Pradesh* (2006) 8 SCC 161.

circumstances can include inordinate and unexplained delay in deciding the mercy petition, insanity, solitary confinement etc.[241]

It is important to note that Cl.473(7) BNSS cannot take away this limited power of judicial review of the courts, even if it seeks to. The exercise of these powers by the judiciary in respect of the President's mercy decision is rooted in Art.32 of the Constitution, which cannot be restricted by a statutory provision.

[241] Supervening circumstances can be delay in execution, insanity, mental illness or schizophrenia, solitary confinement, reliance on judgments declared *per incuriam*, and procedural lapses in the disposal of the request; *Epuru Sudhakar*; *TV Vatheeswaran*; *Triveniben; Sher Singh v. State of Punjab* (1983) 2 SCC 344; *Shatrughan Chauhan*; *Accused X v. State of Maharashtra* (2019) 7 SCC 1.

Powers of Commutation

Clause 475

In addition to the President or Governor's constitutional power to commute a sentence, under Art.72 and Art.161 respectively, the Central and the State governments can also statutorily commute a sentence. In the BNSS, Cl.475 titled 'Power to commute sentence' lays down the extent of this statutory power. Cl.475 corresponds to s.433 CrPC. However, new changes proposed in the BNSS lead to ambiguity in the manner in which different sentences are to be treated for commutation, while also reflecting a tendency towards enhanced punishments.

At the outset, a comparative table of changes in Cl.475 BNSS against s.433 CrPC is useful:

Table 2: Changes in Cl.475 of the BNSS against s.433 of the CrPC

Initial Sentence	Commuted Sentence/Range	
	Clause 475 BNSS	Section 433 CrPC**
Sentence of Death	Clause 475(a) Imprisonment for life	Section 433(a) Any other punishment provided by the IPC
Sentence of Life Imprisonment	Clause 475(b) Imprisonment for a term not less than seven years	Section 433(b) Imprisonment for term not exceeding fourteen years OR fine
Sentence of Imprisonment for 7 years or 10 years*	Clause 475(c) Imprisonment for a term not less than three years	–

Rigorous Imprisonment	Clause 475(d) Simple imprisonment for any term to which that person might have been sentenced	Section 433(c) Simple imprisonment for any term to which that person might have been sentenced OR fine
Imprisonment up to 3 years*	Clause 475(e) Fine	–

* New category created under the BNSS

** Section 433(d) CrPC allows for the commutation of '*a sentence of simple imprisonment, or (sic) for fine*', which has been deleted in the proposed bill.

I. Limit on Executive Discretion and Enhanced Punishments

The first major change brought about by the BNSS is with respect to the limit imposed on the commutation of a death sentence. Under s.433(a) CrPC, a sentence of death could be commuted to 'any other punishment' stipulated in the IPC. However, the BNSS restricts the discretionary power of the government by limiting the scope of commutation of a death sentence to a sentence of life imprisonment alone. However, a prisoner whose death sentence has been commuted to life imprisonment continues to be eligible for consideration for remission after completion of fourteen years of imprisonment, under Cl.476. Nevertheless, the change in Cl.475(a) limits the power of the government to directly commute a death sentence to any term sentence.

In Cl.475(b) BNSS, for the commutation of a sentence of imprisonment of life, the words imprisonment for a term 'not exceeding fourteen years or of fine' of the CrPC have been replaced with 'not less than seven years'. Thus, the BNSS removes the upper limit of fourteen years created by the CrPC. Instead, the BNSS creates a lower limit of seven years, thereby removing any restrictions on the maximum period of sentence that the government can impose while commuting a sentence of life imprisonment.

Thus, changes proposed through Cls.475(a) and (b) limit the discretionary power of commutation by governments, while also tending towards enhanced punishments.

II. Overlaps and confusion in categorisation of punishments under Cl.475

Cl.475(c) has been newly added in the BNSS which states that a sentence of imprisonment for seven years *or* ten years can be commuted to imprisonment for a term not less than three years. Curiously, this sub-clause does not mention a range between seven to ten years but only applies to two specific terms of imprisonment, that is either seven years *or* ten years. It also does not mention the description of imprisonment where sub-clause (c) will be applicable - simple imprisonment or rigorous imprisonment - thus, leaving the possibility of overlap with sub-clause (d) which applies to all sentences of rigorous imprisonment.

This overlap can be understood with the help of an hypothetical example. A and B get convicted separately, under Cl.69 of the BNS, punishable with imprisonment of either description for a term which may extend to ten years and a fine. A gets a sentence of rigorous imprisonment for seven years while B gets a sentence of rigorous imprisonment for eight years. Under Cl.475 of the BNSS, the only sub-clause applicable to B is sub-clause (d) that allows for commutation of a sentence from rigorous imprisonment to simple imprisonment. Thus, B's sentence can only be commuted to simple imprisonment of eight years. However, for A, both sub-clause (c) and sub-clause (d) could be applicable due to the overlap enabled by the BNSS. If Cl.475(c) is applied, then A's sentence of seven years can be commuted to that of three years (and not below that). Whereas, if Cl.475(d) is applied, their sentence can only be commuted from rigorous imprisonment to simple imprisonment for the term of their original sentence. Depending upon the provision applied, the commuted sentence will vary.

A situation of such overlap is missing from the CrPC because rather than classifying sentences on the basis of fixed terms, s.433 CrPC provides rules for commutation of specific categories of punishment provided under s.53 IPC. Therefore, each sub-section in s.433 pertains to distinct types of punishment: sentence of death, life imprisonment, rigorous imprisonment or simple imprisonment. While s.53 IPC has been retained in the BNS as Cl.4, the same logic of categorisation for commutations does not extend to Cl.475 BNSS.

Another implication of straying away from this logical categorisation can be seen in Cl.475(e). From s.433(d) CrPC, sub-clause (e) removes 'simple imprisonment' and replaces it with 'imprisonment up to three years'. The most absurd impact of the

removal of 'simple imprisonment' in the BNSS is that a sentence of simple imprisonment, which is not either of a term of seven years, ten years or up to three years, appears to be ineligible for commutation under Cl.475. The only provisions where simple imprisonment can be accommodated are sub-clauses (c) and (e) but they only apply to terms of imprisonment for ten years, seven years or up to three years. For example, in the previous illustration, if B gets a sentence of simple imprisonment of 8 years, then they would entirely be out of consideration for commutation due to the anomaly created by Cl.475 BNSS.

Further, since sub-clause (d) is applicable to all cases of rigorous imprisonment, there is a possibility of overlap of this provision with sub-clause (e) which pertains to imprisonment of either description up to three years. Therefore, rigorous imprisonment up to three years can either be commuted to simple imprisonment (as per (d)) OR be commuted to fine (as per (e)).

III. Removal of Fines

BNSS removes the scope of commutation of any sentence above three years into a fine. Sub-clauses (a), (b) and (d), that have been taken from the corresponding provision in the CrPC allowed for the possibility of commutation of term sentences to fines. In the proposed bill, only imprisonment (of either description) up to three years, can be commuted to fine. This is a significant limitation from the provision for commutation under s.433 CrPC.

Provisions Pertaining to Bail and Bonds

Clauses 479, 481, 482, 483, 484 and 485

Chapter XXXV of the BNSS (Cls.479 to 498) deals with the provisions relating to bail and bail bonds. While the contents of most of these clauses are identical to their corresponding sections in the CrPC (ss.436 to 450), some substantive changes have been proposed. For instance, new insertions in the BNSS include definitions of bail, bail bond, and bond. Further, significant changes have been proposed in two provisions – the provision regarding the maximum period of detention of an undertrial, and the provision on anticipatory bail.

A vital amendment proposed is in Cl.482 BNSS which replaces s.437 CrPC (bail in non-bailable offences). Under this provision, two categories of persons who are not to be released on bail are provided,[242] and the exception to this ineligibility is mentioned in the first proviso: women, persons who are sick or infirm, and persons under the age of 16. Under the corresponding Cl.482 BNSS, the age is increased from sixteen to eighteen. This amendment makes the provision consistent with the Juvenile Justice (Care and Protection of Children) Act, 2015.[243]

I. Introduction of definitions

The terms 'bail', 'bond' and 'bail bond' while used throughout the CrPC, have not been defined therein. The BNSS introduces definitions for these terms for the first time in Cl.479. Bail is defined under sub-clause (a) as *'release of a person accused of an offence from the custody of law upon certain conditions imposed by an*

[242] These two categories are: (i) persons against whom there are reasonable grounds for believing that they committed an offence punishable with death or imprisonment for life; and (ii) persons who have been convicted of an offence punishable with death, imprisonment for life, or imprisonment for seven years or more; or have been convicted two or more times for committing cognizable offences punishable with three years or more.
[243] Under s.12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 all children in conflict with the law under eighteen years of age are entitled to be released on bail and thus the provision does not expand the scope of bail law.

officer or court including execution by such person of a bond or a bail bond.'[244] Bond is defined under sub-clause (b) as a '*personal bond or an undertaking for release without payment of any surety*' and; bail bond under clause (c) as '*an undertaking for release with payment of surety.*' A combined reading of these definitions makes apparent the two ways by which a person may be released on bail i.e. execution of a bond (without surety) or a bail bond (with payment of surety).

Although, bail has been understood to include release with or without surety, in jurisprudence, there is currently some confusion regarding the textual usage of the terms bail and bond. This confusion arises as some provisions in CrPC use the term bail to include release either with or without surety, however, there are a few provisions that make a distinction between release on bail with surety, and on a personal bond without surety. For instance, the proviso to s.436 CrPC assumes that bail requires surety, and where a person is unable to pay such surety, *instead of bail,* can be released on a personal bond. S.441 CrPC is another such provision which uses the language 'released on bail or released on his own bond.' Interestingly, s.441 (2) and (3) CrPC use the term bail generically to include release with or without surety.[245]

The BNSS attempted to bring in the much needed clarity on distinction between bail with and without surety. Some changes have further been made to the remaining provisions in the chapter as well, in accordance with these new definitions.[246] However, despite the definition, the confusion on the usage of the terms and bail and surety continue since the Bill seems to have retained the

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[244] Previously, the 268th Report of the Law Commission of India attempted to define 'bail.' The Commission noted that "(T)he literal meaning of the word 'bail' is surety. Bail, therefore, refers to release from custody, either on personal bond or with sureties. Bail relies on release subject to monetary assurance—either one's own assurance (also called personal bond/recognizance) or through third party sureties".

[245] *Moti Ram v. State of Madhya Pradesh* (1978) 4 SCC 47: The Supreme Court discussed this ambiguity and held *inter alia* that bail ought to include both release with and without surety, and persons who are indigent or unable to pay surety ought to be released on their own recognisance.

[246] For instance, in Cls.480 and 481 BNSS the word bond has been inserted after bail wherever in the corresponding CrPC provisions bail was used to denote a bail with surety.

language of the present CrPC in some provisions. For instance, Cl.482(2) distinguishes between 'release on bail' and 'release on bond without surety'.[247]

II. Maximum Period of Detention for Undertrials

S.436A CrPC was inserted *vide* the Criminal Law (Amendment) Act, 2005 ('2005 Amendment').[248] This provision states that where a person has undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for the offence he is under investigation, inquiry or trial for, he shall be released by the Court on bail (with or without surety).

This provision envisages the right of an accused to a speedy trial by prescribing the maximum period for which such accused may be detained. Interestingly, despite vast jurisprudence which has developed over the years on bail being the rule and jail the exception,[249] the BNSS instead of increasing the scope of bail as a right this provision, has in many ways restricted it.

a. Exclusion of Offences punishable by Life Imprisonment

A significant exclusion from this provision is that of a person accused of offences punishable by life imprisonment. So far, the provision under s.436A has excluded persons who are accused of an offence punishable with death. However, the proposed Cl.481 expands this category by also excluding those accused of an offence punishable with imprisonment for life. Thus, the application of this provision has been made narrower, and also excludes persons arrested for a number of offences where the maximum sentence prescribed is either imprisonment for life or imprisonment for life for the remainder of one's natural life.

Notably, Cl.482 BNSS (which is in *pari materia* to s.437 CrPC relating to bail) also excludes the category of persons who are accused of offences punishable by

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[247] Notably, there are other provisions in the BNSS which speak of *executing a bond with or without surety*; and thus are inconsistent with the definitions prescribed in Cl.479. Although, Cl.479 does state that the definitions therein shall prevail u*nless the context provides otherwise*, and thus an explicit prescription in a provision that a bond could be with or without surety would mean that the definition of 'bond' provided under Cl.479 (which provides that a bond is without payment of any surety) shall not be applicable to such provisions.

[248] S.36 Code of Criminal Procedure (Amendment) Act, 2005.

[249] Recent directions of the Supreme Court in *Satendra Kumar Antil v. Central Bureau of Investigation & Anr.* (2021) 10 SCC 773.

death or imprisonment for life. Cl.483 however has exceptions to this ineligibility,[250] which does not apply in case of Cl.481. Further, the language of Cl.482 provides that such persons would be ineligible for bail *if* there is a reasonable apprehension that they have committed the offence punishable with death or imprisonment for life. This allows a court to consider the *prima facie* case against the accused while deciding the bail application, which is not the case in Cl.481. This defeats the objective of a provision introduced to release undertrials who have spent long durations in jail without trial, to prevent further violation of their Art.21 rights and right to speedy trial.[251]

b. Reduction in maximum period of Detention for a First Time Offender

Cl.481 BNSS proposes insertion of a proviso which states that a person who is a first time offender (never convicted of any offence in the past), shall be released on bail if he has undergone a third of the maximum sentence prescribed. This benefit is not made subject to any other consideration, such as the seriousness of the offence of previous conviction or judicial discretion, and remains a matter of right for an undertrial who hasn't been convicted previously.[252]

Under the CrPC, courts have held 'prior conviction' as a relevant consideration for grant of bail[253] under ss.437 or 438.[254] Such categorisation was, however, not envisaged under s.436A.

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[250] As mentioned in the *proviso* to Cl.482, these exceptions are - women, persons under the age of 18, or persons who are sick or infirm.

[251] *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India* (1994) 6 SCC 731.

[252] In 2017, the 268th Report of the Law Commission of India recommended a similar categorisation within this provision – undertrials accused of offences punishable with less than seven years of imprisonment to be released on bail if they had served a third of the maximum sentence prescribed.

[253] *Harjit Singh v. Inderpreet Singh* 2021 SCC OnLine SC 633.

[254] S.437(1)(i) CrPC provides that bail in non-bailable offences shall not be granted to persons who have been previously convicted of offences punishable with imprisonment for seven years, life imprisonment or death; or have been convicted two or more times of cognizable offences punishable with three years or more. S.438 CrPC presently also prescribes antecedents as one of the factors to be considered for grant of anticipatory bail.

c. Exclusion of a person against whom Inquiry/Trial is Pending

Sub-clause (2) to Cl.481 BNSS, which is an addition to the existing provisions under s.436A CrPC, provides that where an investigation, inquiry or trial in more than one offence, or in multiple cases are pending against a person, he shall *not be released on bail* by the court.[255] This sub-clause excludes a category of persons from the benefit of this provision. Not only is this sub-clause palpably contrary to the tenet of presumption of innocence – as it precludes one from the benefit of this section based on the existence of a pending investigation, inquiry or trial – but also raises several other concerns.

First and foremost, the textual language of the provision is extremely wide. Investigation, inquiry or trial in 'more than one offence' could also include a situation where a person is accused under several sections for a series of acts forming a part of the same transaction given that it is differentiated from 'multiple cases'. As such, this sub-clause excludes a substantial number of persons from the benefit of this provision. Secondly, this sub-clause does not consider the nature of these other cases and thus, fails to account for the possibility of the other offence the person is accused of being bailable or non-cognizable. There may also be a situation where the person is not required to be in custody for investigation, inquiry or trial of such other offence. Thirdly, the sub-clause makes the operation of this provision inapplicable even where a person accused of multiple offences has served half of the maximum prescribed punishment in all of those offences.

Through the inclusion of these broad exclusions, the sub-clause defeats the purpose of this provision, as it substantially narrows the scope, and denies the right conferred by the provision to a wide category of persons who are entitled to this relief under the present law. Further, the exclusion under this sub-clause allows for misuse by filing frivolous complaints against a person already in custody, for the purpose of precluding them from release under this provision.

d. Obligation of the Prison Superintendent

A notable insertion proposed under the BNSS is Cl.481(3) which places the responsibility of applying for bail under this provision upon the superintendent of

[255] A literal reading of the provision implies that such a person is not to be released by court on bail *at all.* This literal interpretation, however, is in all likelihood a result of an oversight in drafting of the provision.

the prison where the accused is lodged. This is especially relevant as often due to lack of effective (or any) legal aid, prisoners are denied release despite meeting the requisite criteria.

For the first time a statutory obligation is sought to be imposed on the Superintendent of the Jail to ensure that this provision is made use of, and the prisoners eligible for bail under this provision are given the benefit of this right. While it is a welcome step to cast statutory responsibility on the superintendents to file a bail application, this provision misses the point of assigning responsibility for determining eligibility under the provisions. Assessing the eligibility of inmates for bail under this section might involve an in-depth technical understanding of penal laws and their application, which superintendents may not be equipped with.

By means of several notifications by the Ministry of Home Affairs and judicial decisions, processes to ensure operation of this section were laid down. Steps taken by the government to ensure compliance with s.436A CrPC were discussed by the Supreme Court in *In Re: Inhuman Conditions In 1382 Prisons.*[256] These steps included issuance of an advisory for creation of an undertrial review committee in every district, which would meet every three months to review undertrial cases. Interestingly, the standard operating procedure of the Undertrial Review Committee had also refrained from giving this responsibility of identification of eligibility for release to prison authorities and left it to the legal services authorities.[257] In *Bhim Singh,*[258] the Supreme Court cast the duty of looking at eligibility under s.436A on the Magistrates and Sessions Judges.[259]

III. Anticipatory Bail

Anticipatory bail or grant of a bail to a person apprehending arrest is presently enshrined under s.438 CrPC. The provision allows a person who has reason to believe that he may be arrested for committing a non-bailable offence, to apply

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[256] *Inhuman Conditions in 1382 Prisons, In re,* (2016) 3 SCC 700 (Supreme Court order dated 05.02.2016).

[257] National Legal Services Authority, Standard Operating Procedure (SOP) for Undertrial Review Committees (UTRCs), WP(C) 406/2013 - *In Re: Inhuman Conditions in 1382 Prisons*.

[258] *Bhim Singh v. Union of India* (2015) 13 SCC 605.

[259] Supreme Court directed that jurisdictional Magistrates/Sessions Judges hold a sitting each week in every jail/prison for two months commencing from 1st October, 2014 for the purposes of effective implementation of s.436A CrPC by identifying and passing release orders for prisoners who are eligible for release under the provision.

before the High Court or the Sessions Court seeking a direction that in event of such arrest he be released on bail. Cl.484 BNSS seeks to replace s.438 CrPC.

a. Reverting to pre-2005 provision

The changes proposed to the provision on Anticipatory Bail include replacement of the sub-section (1), and deletion of the proviso to sub-section (1), and sub-sections (1A) and (1B). In doing so, Cl.484 seeks to revert to the provision on anticipatory bail as it existed before 2005. *Vide* the 2005 Amendment the following changes were made to the provision on anticipatory bail:

a. S.438(1) CrPC was amended to insert language, which provided guidance to courts regarding factors to be considered while deciding grant of anticipatory bail. A non-exhaustive list of these factors was enumerated in 1(i) to (iv).[260]
b. The amended sub-section (1) also stated that an application can either be rejected, or an *interim order* granting anticipatory bail may be made.
c. A proviso was inserted which said that where no interim order has been passed or where the application seeking anticipatory bail has been rejected, it shall be open to an officer incharge to make arrest without warrant, if there are reasonable grounds for such arrest.
d. Sub-section (1A) was inserted which states that notice with a copy of an interim order under s.438(1) shall be sent to the public prosecutor with a notice of at least seven days, to give a reasonable opportunity of being heard when the application is finally heard.
e. Sub-section (IB) was inserted which provides that if the public prosecutor makes an application or if the court considers it necessary, the presence of the application seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of the final order.

The changes made to the provision on anticipatory bail in 2005 came under widespread scrutiny from lawyers and jurists. The amendment to s.438 was believed to interfere with the independence of the judiciary and rights of the accused. Firstly, the proviso to s.438 was criticised as it permitted an officer

[260] The factors enumerated in the subsections are– (i) the nature and gravity of offence, (ii) antecedents of the applicant, (iii) possibility of the applicant to flee from justice, and (iv) whether the accusation has been made with the object of injuring or humiliating the applicant by having him arrested.

in-charge to arrest the applicant without warrant in the pendency of the anticipatory bail application. Secondly, sub-section (1B), gave an opportunity for the accused to be arrested in court, should the application be rejected. Thus, it was argued that the amendments to the section defeat the purpose behind s.438 CrPC.

As a response to this criticism, the Law Commission discussed the amended provision,[261] and recommended *inter alia* that the *proviso*, as well as sub-section (1B) be omitted.[262] The BNSS does away with these sub-sections which have been problematised. At the same time, it also removes the grounds to be considered while deciding grant of anticipatory bail. However, given that these grounds were instructive in the first place, their removal may not change the manner in which courts decide applications seeking anticipatory bail, especially in light of the vast jurisprudence on the subject.[263]

The BNSS also does away with the language of s.438(1) CrPC which implies that the initial order made in an application for anticipatory bail is only an interim order. Read together with the s.438(1A), the provision required for the interim order to then be sent to the public prosecutor and to allow them an opportunity to argue against grant of anticipatory bail. However, in practice courts tend to grant an *ad interim* order on anticipatory bail before hearing the final application, even before the 2005 Amendment, this may not substantially affect the manner in which anticipatory bail applications are decided.

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[261] Law Commission of India, 'Two Hundred and Third Report on Section 438 of the Code of Criminal Procedure, 1973 as amended by the Code of Criminal Procedure (Amendment) Act, 2005 (Anticipatory Bail)' (Law Commission Report No. 203, 2007).

[262] The Law Commission of India had also recommended that an explanation be inserted clarifying that a final order on an application seeking anticipatory bail shall not be construed as an interlocutory order; and that new subsection be inserted stating that conditions may be imposed upon an applicant while grant of anticipatory bail – including condition that the person make themselves available for interrogation when required, condition that a person does not make inducement, threat, promise etc to any person acquainted with facts of the case, condition that the applicant shall not leave India without permission of the court, and any such other condition which may be imposed under s.437(3). These recommendations had not been incorporated in the CrPC.

[263] *Siddharam Satlingappa Mhetre v. State of Maharashtra and Others* (2011) 1 SCC 694: the Supreme Court laid down factors to be considered while deciding an application seeking anticipatory bail, which go beyond the factors mentioned in s.438 CrPC. These included the possibility of the accused fleeing from justice, the alleged role of the accused in the offence, material available against the accused, impact of grant of anticipatory bail etc.

b. Offences for which Anticipatory Bail cannot be granted

An inexplicable amendment proposed in the BNSS is in the scheme of offences prescribed under s.438(4) CrPC.[264] This sub-section provides that the provisions of the section will not apply to any case involving arrest of a person accused of committing an offence under ss.376(3), 376AB, 376DA, and 376DB IPC. These sections pertain to offences involving rape of minor women. The corresponding provision, Cl.484(4), however, precludes those persons who are accused of aggravated forms of rape under Cls.64(2), 66, and 70 BNS from being granted anticipatory bail irrespective of the age of the victim.

A similar amendment has been proposed to the scheme of offences mentioned in s.439(1A) as well, which states that the presence of the informant or a person authorised by the informant is obligatory while considering an application of bail of a person accused of offences under ss.376(3), 376AB, 376DA, and 376DB IPC. Like Cl.484(4) above, the corresponding provision to s.439(1A) CrPC in BNSS, i.e. Cl.485 (IA) also applies to bail application of a person accused of aggravated forms of rape under Cls.64(2), 66, and 70 BNS.

[264] This subsection was inserted in the CrPC by s.22 Criminal Law (Amendment) Act, 2018.

Admissibility of Electronic Records

Clauses 57 and 63 BSB

Similar to s.65B IEA, Cl.63 BSB provides a specific procedure for the admissibility of electronic records. However, it introduces the following changes to the other provisions relating to primary and secondary evidence, that would impact the evidentiary nature and admissibility of electronic records:

1. Cl.2(c) BSB which replaces s.3 IEA, defines documents to also include '*electronic or digital records*'. Accordingly, separate references to electronic records have been deleted in certain provisions.[265]

2. Cl.57 BSB, which replaces s.62 IEA, introduces explanations 4 to 7, which expand the meaning of primary evidence to include electronic or digital records. These explanations introduce the following changes:

    a. Any electronic file which is created, or stored simultaneously or sequentially in multiple files (which would include copies) would be primary evidence.

    b. If the proper chain of custody of electronic or digital records is produced, then it would be primary evidence.

    c. Any video recording which is transmitted, broadcasted or stored in another device would be primary evidence.

    d. If an electronic record is stored in multiple storage spaces in a computer, then each automated storage, including the temporary files, would be primary evidence.

II. Cl.62 BSB, which replaces s.65A IEA, states that electronic records must be proved as primary evidence, unless mentioned.

III. Newly introduced Cl.61 BSB, prescribes that the admissibility of electronic records cannot be denied on the basis of their nature as electronic records and their legal effect, validity and enforceability shall be at par with paper records.

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[265] References to electronic records in Cls.20 and 54 BSB, which replace ss.22 and 22A, and s.59 IEA respectively, have been removed.

Notably, Cl.63(4) BSB introduces the stage at which the certificate regarding the electronic record must be submitted. Further, it proposes changes to the authorship of such certificates, which may include the person in charge of the computer or communication device and an expert that retrieves the electronic record. Lastly, it also introduces a format for a two-part certificate to be submitted. Part A of the certificate should be filled by the party, who owns, manages or maintains the computer device from which the electronic record is retrieved. Part B of the certificate should be filled by the expert who retrieves the electronic record from the device. Currently, due to a lack of format for a certificate under s.65B IEA, there is no uniformity in the information that may be present in such certificates.[266]

I. Background

Information Technology Act, 2000 amended IEA *inter alia*, to recognise electronic records as documentary evidence under s.3 IEA and provide a special procedure to govern their admissibility under ss.65A and 65B IEA.

There were contrary judicial opinions about the applicable procedure for the admissibility of electronic records. On the one hand, courts held that ss.65A and 65B IEA are merely clarificatory, and do not bar the applicability of general provisions for adducing documentary evidence, i.e. ss.63 and 65 IEA, to electronic records.[267] On the other hand, special provisions under ss.65A and 65B IEA were considered to be a complete code applicable to electronic records, and therefore, adherence with the requirements under s.65B IEA was necessary for the

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[266] Courts have attempted to close this gap by laying down guidelines for investigating authorities for information to be included in a certificate under s.65B IEA. These guidelines emphasise that the details of the computer devices, storage devices or software for making copies of electronic record (including make and model, serial number) and hash value of the electronic record must be mentioned; *Saibunisha (died) & Syed Jameel v. The State represented by the Inspector of Police CBCID Madurai Town and Ors.* (2023) Madras High Court Crl. A. (MD). No. 423 of 2019 and 181 of 2021 [39], <https://www.mhc.tn.gov.in/judis/index.php/casestatus/viewpdf/899140>, last accessed on 20.10.2023; *Yuvaraj v. The State, represented by the Additional Superintendent of Police CBCID Namakkal District & Ors.* (2023), Madras High Court, Crl.A.(MD).Nos.228, 230, 232, 233, 515, 536 & 747 of 2022 [206]-[208], <https://www.mhc.tn.gov.in/judis/index.php/casestatus/viewpdf/883500>, last accessed on 20.10.2023.

[267] *State (NCT of Delhi) v. Navjot Sandhu* (2005) 11 SCC 600; *Tomaso Bruno v. State of Uttar Pradesh* (2015) 7 SCC 178; *Shafhi Mohammad v. State of Himachal Pradesh* (2018) 2 SCC 801.

admissibility of electronic records.[268] In *Arjun Panditrao Khotkar,*[269] the Supreme Court resolved this conflict in judicial opinion in favour of the latter interpretation.

The Court clarified the following aspects regarding the admissibility of electronic records:

1. The non obstante clause ('*notwithstanding anything contained in this Act*') in s.65B(1) IEA makes it clear that the admissibility and proof of electronic records must necessarily follow the special procedure therein.
2. The general provisions regarding documentary evidence under ss. 62 to 65 IEA have no relevance for the admissibility and proof of electronic records.
3. S.65B(1) IEA differentiates between the 'original' document – which would be the original electronic record contained in the computer, in which the original information is first stored – and the copies made therefrom.
4. S.65B(1) IEA creates a deeming fiction that copies of electronic records shall be deemed to be a document if the conditions specified in s.65B(4) are satisfied. The deemed document would be admissible in evidence without production of the original document.
5. The original document being primary evidence would be admissible on producing the same without any requirements under s.65B; whereas copies of the original document being secondary evidence would be admissible only on satisfaction of conditions specified in s.65B IEA.

II. Removal of distinction between Originals and Copies of Electronic Records

Electronic or digital records are susceptible to alteration, transposition and modifications. These changes may occur either through manual intervention or even as unintended digital artefacts. Recognising this, s.65B IEA was introduced as a safeguard to ensure the authenticity of the copies of electronic records. It prescribes conditions for ensuring the lawful custody and operability of the computer from which it was originally produced and the chain of custody of such records. Therefore, the distinction between original and copies of electronic records is essential, as the latter should be admissible only if the requirements under s.65B IEA are met. However, explanations 4 to 7 in Cl.57 BSB remove the

[268] *Anvar P.V. v. P.K. Basheer* (2014) 10 SCC 473.
[269] *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors.* (2020) 7 SCC 1.

distinction between the original and copies of electronic records, by treating both as primary evidence. This may permit the admissibility of copies of electronic records, without the application of safeguards under Cl.63 BSB (equivalent of s.65B IEA).

As per explanation 4, any copies of electronic records, which may be sequentially stored in multiple files, would also be considered as primary evidence. For instance, this means that any electronic file such as CCTV footage, which is stored in a digital video recorder (DVR) and thereafter transferred to a USB drive, the footage in USB drive would also be primary evidence. This is despite the fact that the footage in the USB drive is a copy of the original DVR footage. Similarly, as per explanation 6, television broadcasts which are recorded by the users would also be primary evidence.

Further, it is unclear whether the explanations 4 to 7 are to be read together or separately. For instance, there may be electronic records which are covered within explanations 4, 6, or 7, but may not meet the requirement under explanation 5, due to lack of proper chain of custody. In this case, it is unclear whether such electronic records that lack proper custody would be considered as primary evidence.

III. Uncertainty regarding the procedure for Admissibility of Electronic Evidence

As discussed above, the explanations 4 to 7 to Cl.57 BSB, consider both originals and copies of electronic records as primary evidence. Therefore, it is uncertain whether copies of electronic records would be governed by the special conditions specified in Cl.63 BSB or would be directly admissible as primary evidence under Cl.57 BSB.

a. Option 1: special procedure may continue to govern Admissibility

In view of the non-obstante clause ('*notwithstanding anything contained in this Adhiniyam*') in Cl.63(1) BSB, the ratio of *Arjun Panditrao Khotkar* may continue to be good law. Therefore, the procedure prescribed in Cl.63(1) BSB would continue to govern the admissibility of copies, irrespective of whether they come within the purview of primary evidence as per explanations 4 - 7 to Cl.57 BSB.

b. Option 2: general provisions regarding Admissibility of Documentary Evidence may be applicable to Electronic Records

Unlike s.65A IEA which specified that contents of electronic records would be proved in accordance with special provisions under s.65B; Cl.62 BSB marks a significant shift as it prescribes that electronic records may be proved in a similar manner to other documentary evidence under Cl.59 BSB. Further, Cl.61 BSB, which also begins with a non-obstante clause, mandates that the admissibility of electronic records shall be at par with paper records.

These changes may be interpreted to mean that copies of electronic records within the purview of explanations 4 to 7 to Cl.57 BSB, may be proved as primary evidence, without following the special procedure in Cl.63 BSB. This may resurrect the view taken by the Supreme Court in *Navjot Sandhu* and *Shafhi Mohammad*, that the general provisions governing the admissibility of documents may also apply to electronic records. In these judgments, the Supreme Court held that the special procedure in s.65B IEA is not mandatory, and can be relaxed, for instance if the electronic record is produced by a party not in possession of the device.

IV. Changes to the conditions specified in Cl.63 BSB

Cl.63 BSB makes three broad changes to the conditions specified in s.65B IEA for the admissibility of electronic records.

Firstly, the definition of computer output in Cl.63(1) BSB has been expanded to include output from any communication device. It also adds that information in an electronic record may be '*stored, recorded or copied in any electronic form*' to be covered within this provision. Similarly, Cl.63(3) BSB provides that computer output may be produced by computers or communication devices working standalone or in any system or network, including those managed by an intermediary such as telecom service providers, social media services etc.

Secondly, unlike s.65B(4) IEA, which does not clarify the stage at which the certificate must be submitted,[270] Cl.63(4) BSB mandates that such a certificate shall be submitted along with the electronic record for admission. This is a positive

[270] *Arjun Panditrao Khotkar* [52]-[59]: The Supreme Court held that considering the absence of stage for production of certificate under s.65B IEA, the trial court may allow its submission at any stage before the conclusion of the trial.

change as it may ensure more meaningful compliance with the admissibility requirements under Cl.63 BSB.

Thirdly, Cl.63(4)(c) provides that the certificate shall be signed by '*a person in charge of the computer or communication device and an expert (whichever is appropriate)*' as per the format specified in the schedule. This marks a change from the position under s.65B(4) IEA which specified that the certificate may be signed by a person in an official position in relation to the operation of the device or in the management of relevant activities. The proposed changes under Cl.63(4)(c) may help ensure only those persons directly in control of the device, irrespective of their official position or designation, who may be better suited to certify the operability of the computer and the authenticity of the electronic record are permitted.

However, the use of the terms 'whichever is appropriate' creates uncertainty regarding whether the certificate should be issued by both the person in charge of the device and an expert or whether it merely indicates the type of expert that may issue the certificate. This interpretation would be significant since Part A of the prescribed format of the certificate, which must be filled by the person in charge of the device, varies from Part B which has to be filled by the expert. Only Part B of the certificate carries the requirement to state that the computer device was operating properly and to specify the hash value of the file, which is essential for authenticating the electronic record.[271] Therefore, in case submission of Part A of the certificate filled by the person in charge of the computer or communication device is sufficient, then the proper operation of the device and the hash value of the file may not be specified.

[271] *Yuvaraj* [206]-[208].

Other Changes in the BNSS

I. Explanation to definition of 'Investigation'

An explanation has been added to the definition of investigation in Cl.2(j), which defines investigation. It reiterates the rule of *lex specialis*, that the provisions of a special law shall prevail over a general law, in the event of an inconsistency between the two.

II. Deletion of references to Metropolitan Magistrate and Assistant Sessions Judge

All references to the post and powers of Metropolitan Magistrates and Assistant Sessions Judge have been removed from the BNSS.

III. Special Executive Magistrate

An amendment to Cl.15 allows the Superintendent of Police, or an equivalent police officer, to be designated as a Special Executive Magistrate.

IV. Public Prosecutors

The CrPC vests the power to appoint a public prosecutor with the state government, with the caveat of a consultation with the High Court. A proviso has been introduced to Cl.18(1), which empowers the Central Government, in consultation with the High Court of Delhi, to appoint the public prosecutor for the NCT of Delhi.

V. Directorate of Prosecution

The BNSS provides for the creation of a District Directorate of Prosecution, in accordance with the discretion of the state government in Cl.20. Further, the criteria for appointment of Director and Assistant Director of Prosecution have been modified, with the former being a Magistrate of first class or a practising advocate for ten years and the latter also being a Magistrate of first class or a practising advocate for seven years.

In a first, it also introduces the powers and duties of the Directorate. These include the duty to monitor three categories of cases, with a view to expedite the proceedings, viz. cases punishable with imprisonment of ten years to life or death to be monitored by the Director; cases punishable with for seven to ten years to be monitored by the Deputy Director; and cases punishable with imprisonment of

less than seven years by an Assistant Director.

VI. Sentence in cases of conviction of several offences at one trial

Cl.25 BNSS amends s.31 CrPC, to provide that punishment of multiple sentences in one case may run either concurrently *or* consecutively. The CrPC previously provided that sentences would run consecutively, unless directed otherwise by the judge. This change reflects jurisprudence which has found that consecutively run sentences are detrimental to the interests of the accused, and thus, sentences ought to run consecutively only if specifically provided by the court.[272] Notably, Cl.25 provides that the discretion of the judge in deciding between the two should be exercised after considering the gravity of offences.

VII. Designated Police Officer

The BNSS through Cl.37 proposes that a police officer in every police station shall be designated to maintain information about names and addresses of arrested persons, along with the nature of offence. This information would be displayed prominently in the station. However, the CrPC requirement of maintaining a public register of the arrests, along with details of the arresting officer, has not been incorporated in the BNSS.

VIII. Summons to produce document or thing

Cl.94 BNSS, mirroring s.91 CrPC, allows the court or a police officer to issue summons for the production of any document which is necessary or 'desirable' for the purposes of an inquiry or investigation. A small amendment, with potentially large ramifications, brought in by Cl.94 is its expansion of 'document' to include electronic communication and communication devices. The application of this provision is not restricted to accused persons. Thus, it raises concerns about privacy of persons, as extensive information about a person is stored on their communication devices.

IX. Protection against Prosecution for acts done under ss.148, 149 and 150

Unlawful assembly is dispersed or suppressed, under the CrPC, by the police or army personnel under directions of an Executive Magistrate or officer in charge of a police station. For any dereliction in carrying out of these duties, both army and police officers cannot be prosecuted without sanction of the government. This essentially provides a layer of immunity to the officers.

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[272] *Nagaraja Rao v. Central Bureau of Investigation* (2015) 4 SCC 302.

Cl.151 BNSS builds upon this regime, by introducing two provisos which further enhance the protection extended to the officers. First, it provides that no officer may be arrested without the sanction of the government; and second, it prevents information regarding the commission of a crime from being forwarded to a Magistrate until a preliminary enquiry is undertaken by the police officers.

X. Persons bound to conform to lawful directions of Police

This is a new insertion as Cl.172 in Chapter XII on 'Preventive Action of the Police'. It provides that persons must conform to directions of the police, which are issued in the course of preventing the commission of a cognizable offence. If a person fails to conform to the directions of the officer, they may be detained or 'removed'. No safeguards have been incorporated to regulate the time period within which such a person must be released or produced before a Magistrate by the police.

XI. Commitment of case to Court of Sessions when offence triable exclusively by it

Apart from adding a timeline of ninety days within which the case must be committed to a Court of Sessions,[273] Cl.232 also provides that all applications filed during the pre-trial proceedings must also be forwarded to the Court of Sessions by the Magistrate, with the committal of the case.

XII. Offences of same kind within a year may be charged together

S.219 CrPC allows three offences of the same kind (i.e. punishable with the same sentence), to be tried together against an accused, if they occur within the same year. Cl.242 proposes to expand the scope of this provision by allowing five such offences to be tried together.

XIII. Summary Trials

Vide Cl.283(2) BNSS, the Magistrate is now empowered to summarily try all offences punishable with imprisonment of less than three years. The extant law allows the summary trial of offences which are punishable with imprisonment of less than three years.

XIV. Plea Bargaining

The CrPC provides a system of plea bargaining, whereby a person accused of an offence is allowed to enter a guilty plea prior to the trial and awarded a lesser sentence. In this process, the need for a trial is obviated. To be able to take the

[273] Refer to section on Introduction of Timelines under BNSS, Page 107.

benefit of this system, the accused must provide an affidavit attesting that they have not been previously convicted of the same offence, for which they are entering a guilty plea. However, in Cl.290, the BNSS proposes to modify this scheme and replace the phrase 'same offence', with 'similar case'. 'Similar case' is a more ambiguous phrasing, and may lead to denial of the plea bargaining system to a wider category of persons, such as those who may have been previously convicted of another offence.

XV. Disposal of Cases

This provision provides, *inter alia*, the punishments which may be imposed for accused persons entering a plea bargain. S.265E CrPC merely provided three kinds of punishments: (a) release of the accused on probation; (b) half of the minimum punishment prescribed for the offence; or (c) where no minimum punishment has been provided, one-fourth of the sentence prescribed for the punishment. Cl.293 BNSS adds further gradations to (b) and (c), to provide further relief to first time offenders. Thus, if there is a minimum punishment prescribed for the offence and the offender has not previously been convicted of any offence, they may be sentenced to one-fourth of the minimum punishment; and where there is no minimum punishment prescribed, such an offender may be sentenced to one-sixth of the prescribed punishment.

XVI. Evidence of Public Servants, Experts, Police Officers in certain Cases

This is a new introduction to criminal procedure in BNSS through Cl.336. It allows for the evidence of certain categories of public servants, experts or police officers to be substituted by their successor, i.e. the person holding the same post. These categories of officers include those who have retired, been transferred, or died; those who cannot be found or are incapable of giving depositions; and such officers, securing whose presence would delay the proceedings.

This provision is naturally geared towards avoiding delays in proceedings, which are occasioned by the unavailability of public servants and officers. Thus, the underlying intention is laudable. However, there are no concomitant guidelines for evaluating the evidence of these successor officers, who would be deposing to events in which they may have had no role. Thus, invocation of this provision must come with the understanding that the evidence will be of significantly lower value.

XVII. Legal Aid

A fundamental right of every accused person in this country is the right to access legal aid. In accordance with judicial case law, this right extends to various stages of the criminal process, above and beyond the trial. The BNSS through Cl.341(1)

proposes the addition of the phrase '*or appeal before a Court*' to the current CrPC provision on legal aid, which presently extends only to the trial stage under the statutory scheme.

XVIII. Power to Postpone or Adjourn Proceedings

A common cause of delay in trial proceedings is the practice of seeking adjournments by the parties to the trial. The CrPC seeks to regulate this practice by prohibiting the grant of adjournment for any reason except those which are beyond the control of the party seeking adjournment. To further curb this problem, a new proviso has been proposed, in Cl.346 BNSS, which states that even adjournments on account of reasons beyond control of the parties, cannot be granted more than twice. This proviso appears *prima facie* unreasonable and unworkable. There is no way that a party can control events which are, by definition, beyond their control. Thus, the arbitrary limit of two adjournments would act punitively against parties who may have to seek multiple adjournments due to sickness, conflicting hearing in different courts, etc.

XIX. Remission

Remission is the power of the state government to reduce the sentence of persons. Cl.478 BNSS relates to the State Government's power to remit or commute sentences of persons convicted for the offences linked to the Central Government. The parallel text in s.435 CrPC, provided that the State government could remit the sentence only after '*consultation with Central Government in certain cases*'. However, the BNSS sees the replacement of 'consultation' with that of 'concurrence'. The change reflects existing case law, which had interpreted 'consultation with the Central Government' in s.432 to require agreement, or concurrence, of the Central Government.[274]

XX. Order for custody and disposal of property pending trial in certain cases

The courts in India are authorised to take custody of any property that is produced before it, during the investigation, inquiry, or trial. Cl.499 has introduced a few provisions to regulate the conditions of custody and subsequent disposal of the seized property. *First*, the court must prepare a statement containing description of the property produced before it within fourteen days of the production. *Second*, photographs and, if needed, videography of the property must also be taken. These photos and videos may be used as evidence in the course of the investigation, inquiry, or trial. *Third*, within thirty days of the preparation of such a statement, the court must order the disposal or destruction

[274] *Union of India v. V. Sriharan* (2016) 7 SCC 191.

of property.

XXI. Bar to taking cognizance after lapse of period of limitation

The law does not allow the court to take judicial notice, i.e. cognizance, of crimes, for which the criminal law is set in motion after the specified period of time. Existing provisions in the CrPC specify time periods beyond which cognizance cannot be taken of offences. A further explanation has been proposed to these provisions in the BNSS through Cl.516, to help in the calculation of the limitation period. It provides that for calculating the limitation period, the relevant date would be the filing of a private complaint with the Magistrate or the date of recording of the FIR, as applicable.

XXII. Trials and proceedings to be held in electronic mode

Cl.532 provides that all trials, inquiries and proceedings under the BNSS may be held in electronic mode. No guidelines have been laid down to specify situations in which electronic proceedings should be avoided or preferred.

Introduction of Timelines under BNSS

One of the major changes in the BNSS is the introduction of time limits for various processes within the criminal process.

The statement of object and reasons of the BNSS specifies 'speedy justice' as a primary goal of the proposed bill, and identifies the introduction of new timelines for various stages of criminal procedure as the means adopted to realise the same.[275] The BNSS introduces a number of time limits under various stages of procedure; applicable to the police, the accused, the witnesses, the government and the courts. However, it is important to note that the meaningful implementation of criminal processes in a time bound manner is dependent upon institutional capacity, and not on legislative mandate alone.

The table below provides a comparison of the time period stipulated under both the CrPC and the BNSS for the completion of specific processes under various stages of criminal procedure. The table indicates two changes: i) changes to an existing time period provided under the CrPC and ii) new time periods or limits introduced under the BNSS (this also applies to new provisions introduced altogether through the BNSS).

Changes to an existing time period provided under the CrPC are indicated in *red*. Introductions of new time periods for procedures by the BNSS are indicated in *green*.

[275] See Page 243 of the BNSS.

Table 3: Comparison of the time period stipulated under both the CrPC and the BNSS for the completion of specific processes under various stages of Criminal Procedure

Stage	Relevant provision	CrPC Timeframe	BNSS Timeframe
Initiation of criminal proceeding	Procedure for recording an FIR if information relating to the commission of a cognizable offence is received by the police through electronic communication [Section 154 CrPC/Clause 173(1)(ii) BNSS]	No corresponding provision	FIR to be taken on record if informant signs it within **3 days**
	Preliminary enquiry to ascertain *prima facie* case of commission of cognizable offence punishable between a minimum of 3 years and a maximum of 7 years [Section 154 CrPC/Clause 173(3) BNSS]	No corresponding provision	Preliminary enquiry to be conducted within **14 days**
	Police to forward daily diary reports in non-cognizable cases to the Magistrate [Section 155 CrPC/Clause 174(1)(ii) BNSS]	No corresponding provision	**Once in 14 days**
Arrest	Arrested person to be entrusted to the police or nearest police station, where arrest has	Without unnecessary delay	Within **6 hours** of arrest

	been conducted by a private person [Section 43 CrPC/Clause 40 BNSS]		
Investigation	Forward of inquest report the District Magistrate or Sub-divisional Magistrate [Section 174 CrPC/Clause 194(2) BNSS]	Shall be forthwith forwarded	Shall be forwarded within 24 hours
	Medical practitioner to forward the medical examination report (conducted at the behest of the police for investigation) to the police [Section 53 CrPC/Clause 51(3) BNSS]	No time prescribed	Without any delay
	Forward of medical examination report (of a victim of rape) by a medical practitioner to the investigating officer [Section 164A(6) CrPC/Clause 184(6) BNSS]	Without delay	Within 7 days
	Copy of search records to be forwarded to the nearest Magistrate empowered to take cognizance of the offence	Shall forthwith be sent	Shall forthwith be sent, **but not later than 48 hours**

	[Section 165(5) CrPC/Clause 185(5) BNSS]		
	Audio video recording of search and seizure procedure to be forwarded by the police officer to the the District Magistrate, Sub-divisional Magistrate or Judicial Magistrate of first class [Clause 105 BNSS]	No time prescribed	Without delay
	Show cause notice period for person to appear before any court/Magistrate before the attachment of property alleged to be proceeds of crime [Clause 107(2) BNSS]	No time prescribed	**14 days**
	Distribution of proceeds of crime, from attached or seized property, by the District Magistrate [Clause 107(7) BNSS]	No time prescribed	**60 days**
	Information on status of investigation to victims/informant [Section 173/Clause 193(3)(ii)]	No corresponding provision	Within **90 days**
Chargesheet	Further investigation during trial (post filing of chargesheet), on	No time prescribed	Further investigation to be completed

	grant of permission from the trial court [Section 173(8) CrPC/Clause 193(9) BNSS		within **90 days**, but may be extended with the permission of the Court
Commencement of proceedings before Magistrate	Magistrate to supply copies of police report, FIR, and other case documents to the accused and victim (if represented by a lawyer) [Section 207 CrPC/Clause 230 BNSS]	No time prescribed	**14 days** within date of production or appearance of accused
Cognizance	Bar to taking cognizance after lapse of limitation period, for certain offences[276] [Section 468(2) CrPC/Clause 516(2) BNSS]	**6 months** for offences punishable with fine **1 year** for offences punishable with 1 year of imprisonment	**6 months** *from the date of filing complaint before Magistrate or FIR* for offences punishable with fine **1 year** *from the date of filing complaint before Magistrate or FIR* for offences punishable with 1 year of imprisonment

[276] See *Sarah Mathew v. Institute of Cardio Vascular Diseases & Ors.* (2014) 2 SCC 102 [34], [35], [45], [51] [where a Constitution Bench held that the relevant date for computing limitation under section 468 CrPC is the **date on which the complaint was filed since the date of the offence/**the date of initiation of prosecution, and **not the date on which the Magistrate takes cognizance]**.

		3 years for offences punishable with more than 1 and a maximum of 3 years of imprisonment	**3 years** from the date of *from the date of filing complaint before Magistrate or FIR* for offences punishable with more than 1 and a maximum of 3 years of imprisonment
	Grant of sanction by the Government before prosecution of Judges, public servants etc. [Section 197(1) CrPC/Clause 218(1) BNSS]	No time prescribed	If no decision taken within **120 days**, sanction will be deemed to have been granted
	Proceedings undertaken by the Magistrate to commit cases to the Sessions Court, where the offences are exclusively triable by the Sessions Court [Section 209 CrPC/Clause 232 BNSS]	No time prescribed	Committal proceedings to be completed within **90 days, extendable up to 180 days** for reasons in writing
Charge	Framing of charges by the Magistrate (for offences the Magistrate is competent to try and punish) [Section 240(1) CrPC/Clause 262(1) BNSS]	No time prescribed	Within **60 days** from first hearing on charge

	Procedure for an accused to file application for discharge (in cases triable by a Sessions Court) [Section 227 CrPC/Clause 250(1) BNSS]	No time prescribed	**Within 60 days** from committal
	Procedure for discharge by Magistrate in case of absence of complainant on date fixed for hearing in a complaint case, for offences that are non-cognizable and compoundable [Section 249 CrPC/Clause 272 BNSS]	No time prescribed	Granting **30 days** opportunity to complainant to appear in court
Plea Bargaining	Procedure for application for plea bargaining by the accused, in court where trial for said offence is pending [Section 265B(1) CrPC/Clause 290(1) BNSS]	No time prescribed	Within **30 days** from the date of framing of charge
Appointment of Assistant Public Prosecutor	Procedure for appointment of Assistant Public Prosecutor by the District Magistrate in case of non-availability of Assistant Public Prosecutor, for a particular case. The	No time prescribed	Notice period of **14 days** to the State government before appointment of Assistant Public Prosecutor

	District Magistrate is bound to give notice to the State government prior to such appointment [Section 25(3) CrPC/Clause 19(3) BNSS]		
Trial	Procedure for admission and denial of genuineness of documents by the defence and prosecution [Section 294(1) CrPC/Clause 330(1) BNSS]	No time prescribed	Soon after supply of documents, and no later than **30 days,** unless the Court relaxes the time limit with written reasons
	Procedure for examination of the accused in custody, through electronic means, by Magistrate or Sessions Court [Section 281 CrPC/Clause 316 BNSS]	No time prescribed	Signature of the accused to be taken within **72 hours** of such examination
	Commencement of in absentia trial against proclaimed offenders by a court [Clause 356(1) BNSS]	No corresponding provision	**90 days** from the framing of charge
	Issuance of two consecutive arrest warrants by a court against proclaimed offenders, before	No corresponding provision	Execution of **2 consecutive arrest warrants** within the interval of **30**

	commencing in absentia trials [Clause 356(2)(i) BNSS]		**days**
	Publication of notice to proclaimed offender to appear before court, in a newspaper [Clause 356(2)(ii) BNSS]	No corresponding provision	Notice period of **30 days**
	Procedure for custody or disposal of property produced before a Court/Magistrate during investigation, inquiry or trial. The Court is bound to prepare a statement of property produced before it [Section 451 CrPC/Clause 499(2) BNSS]	No time prescribed	Within **14 days** of production of property before the court
Bail	Maximum period in which an accused can be placed in undertrial detention before the applicability of default bail (exclusive of cases punishable with death	½ of the sentence period	⅓ of the sentence period for first time offenders and ½ of the sentence period in all other cases

	and life imprisonment)[277] [Section 436A CrPC/Clause 481(1) BNSS]		
Judgment and sentence	Pronouncement of judgment after termination of trial in any criminal court.[278] [Section 353 (1) CrPC/Clause 392 (1) BNSS]	Immediately after the termination of trial or at some subsequent time	Not later than **45 days**
	Judgment of acquittal or conviction by Court of Sessions [Section 235(1) CrPC/Clause 258(1) BNSS]	No time prescribed	**30 days** from the completion of arguments. Extendable up to 60 days for reasons in writing
	Court to upload a digital copy of the judgment [Section 353(4)	No corresponding provision	**7 days** from pronouncement, as far as practicable

[277] The CrPC excludes default bail for persons accused of offences punishable with death, whereas the BNSS extends this exclusion for persons accused of offences punishable with a maximum sentence of life imprisonment, hence limiting the scope of default bail. The Bharatiya Nyaya Sanhita contains eighteen offences punishable with death [which include rape and gang rape of minors, murders (including mob lynching resulting in murder), kidnapping, terrorist acts resulting in death, organised crime resulting in death, dacoity, abetment of offences punishable with death and false evidence leading to an innocent person's conviction/execution] and 64 offences punishable with life imprisonment [which include dowry deaths, rape and gang rape, culpable homicide, grievous hurt caused by dangerous weapons and grievous hurt leading to persistent vegetative state, trafficking, association with dacoity, conspiracy to wage war with the Government of India and offences in association with terrorist acts amongst others].

[278] Cl.392 CrPC lays out the procedure for the pronouncement of judgment by any criminal court, whereas Cl.258(1) lays out the duty of the Sessions Court to give a judgment of conviction or acquittals. However, both clauses introduce different time limits for the pronouncement/giving of the judgment - it is unclear what timeframe the Sessions Court may be bound by under the BNSS.

	CrPC/Clause 392(4) BNSS]		
Mercy petitions	Filing of mercy petition before Governor or President by person under a sentence of death [Clause 473(1) BNSS]	No corresponding provision	**30 days** from intimation by the Superintendent of Jail about (1) dismissal of appeal by Supreme Court; or (2) High Court confirmation and expiry of limitation for appeal of death sentence
	Filing of mercy petition to the President by a person under sentence of death post the rejection of their petition by the Governor [Clause 473(2) BNSS]	No corresponding provision	**60 days** from the date of rejection by Governor
	Central Government to make recommendations on the mercy petition to the President [Clause 473(4) BNSS]	No corresponding provision	Within **60 days** from date of receipt of comments from the State government and records from the Jail Superintendent
	Central Government to communicate the President's order on the mercy petition to Home Department of the State	No corresponding provision	Within **48 hours** of receipt of order of the President

	and Superintendent of the Jail [Clause 473(6) BNSS]		

Table 4: Other powers and proceedings under the CrPC

Stage	CrPC	BNSS
Proceedings for show-cause against order passed by District Magistrate, Sub-divisional Magistrate or any other Executive Magistrate for the removal of nuisance etc. [Section 138 CrPC/Clause 157(3) BNSS]	No time prescribed	Proceedings to be completed as soon as possible, within 90 days, extendable up to 120 days for reasons in writing

Annexure

THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023

Clause 35 - When police may arrest without warrant

(1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person—

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:—

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary—

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner; or

(d) to prevent such person from making 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 the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section, record the reasons in writing for not making the arrest;

(c) against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years whether with or without fine or with death sentence and the police officer has reason to believe on the basis of that information that such person has committed the said offence;

(d) who has been proclaimed as an offender either under this Sanhita or by order of the State Government; or

(e) in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; or

(f) who obstructs a police officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody; or

(g) who is reasonably suspected of being a deserter from any of the Armed Forces of the Union; or

(h) who has been concerned in, or against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists, of his having been concerned in, any act committed at any place out of India which, if committed in India, would have been punishable as an offence, and for which he is, under any law relating to extradition, or otherwise, liable to be apprehended or detained in custody in India; or

(i) who, being a released convict, commits a breach of any rule made under sub-section (5) of section 394; or

(j) for whose arrest any requisition, whether written or oral, has been received from another police officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) Subject to the provisions of section 39, no person concerned in a non-cognizable offence or against whom a complaint has been made or credible information has been received or reasonable suspicion exists of his having so concerned, shall be arrested except under a warrant or order of a Magistrate.

(3) The police officer shall, in all cases where the arrest of a person is not required under sub-section (1) issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(4) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(5) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(6) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice.

(7) No arrest shall be made without prior permission of the officer not below the rank of Deputy Superintendent of Police in case of an offence which is punishable for less than three years and such person is infirm or is above sixty years of age.

Clause 37 - Designated Police Officer

The State Government shall—

(a) establish a Police control room in every district and at State level;

(b) designate a police officer in every district and in every police station, not below the rank of Assistant Sub-Inspector of Police who shall be responsible for maintaining the information about the names and addresses of the persons arrested, nature of the offence with which charged, which shall be prominently displayed in any manner including in digital mode in every police station and at the district headquarters.

Clause 43 - Arrest how made

(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action:

Provided that where a woman is to be arrested, unless the circumstances indicate to the contrary, her submission to custody on an oral intimation of arrest shall be presumed and, unless the circumstances otherwise require or unless the

police officer is a female, the police officer shall not touch the person of the woman for making her arrest, and give the information regarding such arrest and place where she is being held to any of her relatives, friends or such other persons as may be disclosed or mentioned by her for the purpose of giving such information.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest.

(3) The police officer may, keeping in view the nature and gravity of the offence, use handcuff while effecting the arrest of a person who is a habitual, repeat offender who escaped from custody, who has committed offence of organised crime, offence of terrorist act, drug related crime, or offence of illegal possession of arms and ammunition, murder, rape, acid attack, counterfeiting of coins and currency notes, human trafficking, sexual offences against children, offences against the State, including acts endangering sovereignty, unity and integrity of India or economic offences.

(4) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with imprisonment for life.

(5) Save in exceptional circumstances, no woman shall be arrested after sunset and before sunrise, and where such exceptional circumstances exist, the woman police officer shall, by making a written report, obtain the prior permission of the Judicial Magistrate of the first class within whose local jurisdiction the offence is committed or the arrest is to be made

Clause 48 - Obligation of person making arrest to inform about the arrest, etc., to relative or friend

(1) Every police officer or other person making any arrest under this Sanhita shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his relatives, friends or such other persons as may be disclosed or mentioned by the arrested person for the purpose of giving such information and also to the designated police officer in the district.

(2) The police officer shall inform the arrested person of his rights under sub-section (1) as soon as he is brought to the police station.

(3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station in such form as the State Government may, by rules, provide.

(4) It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person.

Clause 50 - Power to seize offensive weapons

The police officer or other person making any arrest under this Sanhita may, immediately after the arrest is made, take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Sanhita to produce the person arrested.

Clause 51 - Examination of accused by medical practitioner at the request of police officer

(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of any police officer, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.

(3) The registered medical practitioner shall, without any delay, forward the examination report to the investigating officer.

Explanation.—In this section and in sections 52 and 53,—

(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possesses any medical qualification recognised under the National Medical Commission Act, 2019 and whose name has been entered in the National Medical Register or a State Medical Register under that Act.

Clause 52 - Examination of person accused of rape by medical practitioner

(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of any police officer, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:—

(i) the name and address of the accused and of the person by whom he was brought;

(ii) the age of the accused;

(iii) marks of injury, if any, on the person of the accused;

(iv) the description of material taken from the person of the accused for DNA profiling; and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in section 193 as part of the documents referred to in clause (a) of sub-section (6) of that section

Clause 53 - Examination of arrested person by medical officer

(1) When any person is arrested, he shall be examined by a medical officer in the service of the Central Government or a State Government, and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made:

Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner:

Provided further that if the registered medical practitioner is of the opinion that one more examination of such person is necessary, she may do so.

(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person.

Clause 54 - Identification of person arrested

Where a person is arrested on a charge of committing an offence and his identification by any other person or persons is considered necessary for the purpose of investigation of such offence, the Court, having jurisdiction may, on the request of the officer in charge of a police station, direct the person so arrested to subject himself to identification by any person or persons in such manner as the Court may deem fit:

Provided that, if the person identifying the person arrested is mentally or physically disabled, such process of identification shall take place under the supervision of a Judicial Magistrate who shall take appropriate steps to ensure that such person identifies the person arrested using methods that person is comfortable with and the identification process shall be recorded by any audio-video electronic means.

Clause 84 - Proclamation for person absconding

(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows:—

(i) (a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village;

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house;

(ii) the Court may also, if it thinks fit, direct a copy of the proclamation to be published in a daily newspaper circulating in the place in which such person ordinarily resides.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day, in the manner specified in clause *(i)* of sub-section *(2)*, shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

(4) Where a proclamation published under sub-section *(1)* is in respect of a person accused of an offence which is made punishable with imprisonment of ten years or more, or imprisonment for life or with death under the Bharatiya Nyaya Sanhita, 2023 or under any other law for the time being in force, and such person fails to appear at the specified place and time required by the proclamation, the Court may, after making such inquiry as it thinks fit, pronounce him a proclaimed offender and make a declaration to that effect.

(5) The provisions of sub-sections *(2)* and *(3)* shall apply to a declaration made by the Court under sub-section *(4)* as they apply to the proclamation published under sub-section *(1)*.

Clause 86 - Identification and attachment of property of proclaimed person

The Court may, on the written request from a police officer not below the rank of the Superintendent of Police or Commissioner of Police, initiate the process of requesting assistance from a Court or an authority in the contracting State for identification, attachment and forfeiture of property belonging to a proclaimed person in accordance with the procedure provided in Chapter VIII.

Clause 105 - Recording of search and seizure through audio-video electronic means

The process of conducting search of a place or taking possession of any property, article or thing under this Chapter or under section 185, including preparation of the list of all things seized in the course of such search and seizure and signing of such list by witnesses, shall be recorded through any audio-video electronic means preferably cell phone and the police officer shall without delay forward such recording to the District Magistrate, Sub-divisional Magistrate or Judicial Magistrate of the first class

Clause 115 - Assistance in relation to orders of attachment or forfeiture of property

(1) Where a Court in India has reasonable grounds to believe that any property obtained by any person is derived or obtained, directly or indirectly, by such person from the commission of an offence, it may make an order of attachment or forfeiture of such property, as it may deem fit under the provisions of sections 116 to 122 (both inclusive).

(2) Where the Court has made an order for attachment or forfeiture of any property under sub-section *(1)*, and such property is suspected to be in a contracting State, the Court may issue a letter of request to a Court or an authority in the contracting State for execution of such order.

(3) Where a letter of request is received by the Central Government from a Court or an authority in a contracting State requesting attachment or forfeiture of the property in India, derived or obtained, directly or indirectly, by any person from the commission of an offence committed in that contracting State, the Central Government may forward such letter of request to the Court, as it thinks fit, for execution in accordance with the provisions of sections 116 to 122 (both inclusive) or, as the case may be, any other law for the time being in force.

Clause 173 - Information in cognizable cases

(1) Every information relating to the commission of a cognizable offence, irrespective of the area where the offence is committed may be given orally or by electronic communication and if given to an officer in charge of a police station,—

> (i) orally, it shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it;

(ii) by electronic communication, it shall be taken on record by him on being signed within three days by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf:

Provided that if the information is given by the woman against whom an offence under section 64, section 66, section 67, section 68, section 70, section 73, section 74, section 75, section 76, section 77, section 78 or section 122 of the Bharatiya Nyaya Sanhita, 2023 is alleged to have been committed or attempted, then such information shall be recorded, by a woman police officer or any woman officer:

Provided further that—

(a) in the event that the person against whom an offence under section 354, section 67, section 68, sub-section *(2)* of section 69, sub-section *(1)* of section 70, section 71, section 74, section 75, section 76, section 77 or section 79 of the Bharatiya Nyaya Sanhita, 2023 is alleged to have been committed or attempted, is temporarily or permanently mentally or physically disabled, then such information shall be recorded by a police officer, at the residence of the person seeking to report such offence or at a convenient place of such person's choice, in the presence of an interpreter or a special educator, as the case may be;

(b) the recording of such information shall be videographed;

(c) the police officer shall get the statement of the person recorded by a Judicial Magistrate under clause *(a)* of sub-section *(6)* of section 183 as soon as possible.

(2) A copy of the information as recorded under sub-section *(1)* shall be given forthwith, free of cost, to the informant or the victim.

(3) Without prejudice to the provisions contained in section 175, on receipt of information relating to the commission of any cognizable offence, which is made punishable for three years or more but less than seven years, the officer in-charge of the police station may with the prior permission from an officer not below the rank of Deputy Superintendent of Police, considering the nature and gravity of the offence,—

(i) proceed to conduct preliminary enquiry to ascertain whether there exists a *prima facie* case for proceeding in the matter within a period of fourteen days; or

(ii) proceed with investigation when there exists a *prima facie* case.

(4) Any person aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1), may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Sanhita, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence failing which he may make an application under sub-section (3) of section 175 to the Magistrate.

Clause 176 - Procedure for Investigation

(1) If, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which he is empowered under section 175 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender:

Provided that—

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

(b) if it appears to the officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case:

Provided further that in relation to an offence of rape, the recording of statement of the victim shall be conducted at the residence of the victim or in the place of her choice and as far as practicable by a woman police officer in the presence of her parents or guardian or near relatives or social worker of the locality:

Provided also that statement made under this sub-section may also be recorded through any audio-video electronic means preferably cell phone.

(2) In each of the cases mentioned in clauses (a) and (b) of the first proviso to sub-section (1), the officer in charge of the police station shall state in his report the reasons for not fully complying with the requirements of that sub-section by him, and, forward the daily diary report fortnightly to the Magistrate and in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed.

(3) On receipt of every information relating to the commission of an offence which is made punishable for seven years or more, the officer in charge of a police station shall, from such date, as may be notified within a period of five years by the State Government in this regard, cause the forensics expert to visit the crimes scene to collect forensic evidence in the offence and also cause videography of the process on mobile phone or any other electronic device:

Provided that where forensics facility is not available in respect of any such offence, the State Government shall, until the facility in respect of that matter is developed or made in the State, notify the utilisation of such facility of any other State.

Clause 183 - Recording of confessions and statements

(1) Any Judicial Magistrate of the District in which the information about commission of any offence has been registered, may, whether or not he has jurisdiction in the case, record any confession or statement made to him in the course of an investigation under this Chapter or under any other law for the time being in force, or at any time afterwards but before the commencement of the inquiry or trial:

Provided that any confession or statement made under this sub-section may also be recorded in the presence of the advocate of the person accused of an offence:

Provided further that no confession shall be recorded by a police officer on whom any power of a Magistrate has been conferred under any law for the time being in force.

(2) The Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him; and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has reason to believe that it is being made voluntarily.

(3) If at any time before the confession is recorded, the person appearing before the Magistrate states that he is not willing to make the confession, the Magistrate shall not authorise the detention of such person in police custody.

(4) Any such confession shall be recorded in the manner provided in section 316 for recording the examination of an accused person and shall be signed by the person making the confession; and the Magistrate shall make a memorandum at the foot of such record to the following effect:—

> "I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.
>
> (Signed) A. B.
>
> Magistrate."

(5) Any statement (other than a confession) made under sub-section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Judicial Magistrate, best fitted to the circumstances of the case; and the Judicial Magistrate shall have power to administer oath to the person whose statement is so recorded.

(6) (a) In cases punishable under section 66, section 67, section 68, section 70, section 71, section 73, section 74, section 75, section 76, section 77, sub-section (1) or sub-section (2) of section 74, or section 78 of the Bhartiya Nyaya Sanhita, 2023, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed in the manner specified in sub-section (5), as soon as the commission of the offence is brought to the notice of the police:

Provided that such statement shall, as far as practicable, be recorded by a woman Judicial Magistrate and in her absence by a male Judicial Magistrate in the presence of a woman:

Provided further that in cases relating to the offences punishable with imprisonment for ten years or more or imprisonment for life or with death, the Judicial Magistrate shall record the statement of the witness brought before him by the police officer:

Provided also that if the person making the statement is temporarily or permanently mentally or physically disabled, the Magistrate shall take the assistance of an interpreter or a special educator in recording the statement:

Provided also that if the person making the statement is temporarily or permanently mentally or physically disabled, the statement made by the person, with the assistance of an interpreter or a special educator, shall be recorded through audio-video electronic means preferably cell phone.

(b) A statement recorded under clause (a) of a person, who is temporarily or permanently mentally or physically disabled, shall be considered a statement in lieu of examination-in-chief, as specified in section 142 of the Bhartiya Sakshya Adhiniyam, 2023 such that the maker of the statement can be cross-examined on such statement, without the need for recording the same at the time of trial.

(7) The Magistrate recording a confession or statement under this section shall forward it to the Magistrate by whom the case is to be inquired into or tried.

Clause 185 - Search by police officer

(1) Whenever an officer in charge of a police station or a police officer making an investigation has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief in the case-diary and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing in any place within the limits of such station.

(2) A police officer proceeding under sub-section (1), shall, if practicable, conduct the search in person.

Provided that the search conducted under this section shall be recorded through audio-video electronic means preferably by mobile phone.

(3) If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing, require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing, specifying the place to be searched, and so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.

(4) The provisions of this Sanhita as to search-warrants and the general provisions as to searches contained in section 103 shall, so far as may be, apply to a search made under this section.

(5) Copies of any record made under sub-section (1) or sub-section (3) shall forthwith, but not later than forty-eight hours, be sent to the nearest Magistrate empowered to take cognizance of the offence, and the owner or occupier of the place searched shall, on application, be furnished, free of cost, with a copy of the same by the Magistrate.

Clause 187 - Procedure when investigation cannot be completed in twenty-four hours

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 58, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter specified relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Judicial Magistrate to whom an accused person is forwarded under this section may, irrespective of whether he has or has no jurisdiction to try the case, after taking into consideration the status of the accused person as to whether he is not released on bail or his bail has not been cancelled, authorise, from time to time, the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole, or in parts, at any time during the initial forty days or sixty days out of detention period of sixty days or ninety days, as the case may be, as provided in sub-section (3), and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Judicial Magistrate having such jurisdiction.

(3) The Magistrate may authorise the detention of the accused person, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this sub-section for a total period exceeding—

> (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
>
> (ii) sixty days, where the investigation relates to any other offence,

and, on the expiry of the said period of ninety days, or sixty days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall

be deemed to be so released under the provisions of Chapter XXXIV for the purposes of that Chapter.

(4) No Magistrate shall authorise detention of the accused in custody of the police under this section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage.

(5) No Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

Explanation I.—For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in sub-section (3), the accused shall be detained in custody so long as he does not furnish bail.

Explanation II.—If any question arises whether an accused person was produced before the Magistrate as required under sub-section (4), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused person through the medium of electronic video linkage, as the case may be:

Provided that in case of a woman under eighteen years of age, the detention shall be authorised to be in the custody of a remand home or recognised social institution:

Provided further that no person shall be detained otherwise than in police station under policy custody or in prison under Judicial custody or place declared as prison by the Central Government or the State Government.

(6) Notwithstanding anything contained in sub-section (1) to sub-section (5), the officer in charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate have been conferred, a copy of the entry in the diary hereinafter specified relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to

make such order; and, where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in sub-section (3):

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer in charge of the police station or the police officer making the investigation, as the case may be.

(7) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(8) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(9) If in any case triable by a Magistrate as a summons-case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary.

(10) Where any order stopping further investigation into an offence has been made under sub-section (9), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be made, vacate the order made under sub-section (9) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

Clause 193 - Report of Police Officer on completion of investigation

(1) Every investigation under this Chapter shall be completed without unnecessary delay.

(2) The investigation in relation to an offence under sections 64, 66, 67, 68, 70, 71 of the Bharatiya Nyaya Sanhita, 2023 or under sections 4, 6, 8 or section 10 of the Protection of Children from Sexual Offences Act, 2012 shall be completed within two months from the date on which the information was recorded by the officer in charge of the police station.

(3) (i) As soon as the investigation is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence

on a police report, a report in the form as the State Government may, by rules provide, stating—

(a) the names of the parties;

(b) the nature of the information;

(c) the names of the persons who appear to be acquainted with the circumstances of the case;

(d) whether any offence appears to have been committed and, if so, by whom;

(e) whether the accused has been arrested;

(f) whether the accused has been released on his bond and, if so, whether with or without sureties;

(g) whether the accused has been forwarded in custody under section 190;

(h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under sections 64, 66, 67, 68 or section 70 of the Bharatiya Nyaya Sanhita, 2023.

(ii) The police officer shall, within a period of ninety days, inform the progress of the investigation by any means including electronic communication to the informant or the victim.

(iii) The officer shall also communicate, in such manner as the State Government may, by rules, provide, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(4) Where a superior officer of police has been appointed under section 177, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(5) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(6) When such report is in respect of a case to which section 190 applies, the police officer shall forward to the Magistrate along with the report—

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 180 of all the persons whom the prosecution proposes to examine as its witnesses.

(7) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that part from the copies to be granted to the accused and stating his reasons for making such request.

(8) Subject to the provisions contained in sub-section (7), the police officer investigating the case shall also submit such number of copies of the police report along with other documents duly indexed to the Judicial Magistrate for supply to the accused as required under section 230:

Provided that supply of report and other documents by electronic communication shall be considered as duly served.

(9) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section *(3)* has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form as the State Government may, by rules, provide; and the provisions of sub-sections *(3)* to *(7)* shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section *(3)*:

Provided that further investigation during the trial may be permitted with the permission of the Court trying the case and the same shall be completed within a period of ninety days which may extend with the permission of the Court.

Clause 210 - Cognizance of Offences by Magistrates

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Judicial Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—

(a) upon receiving a complaint of facts, including any complaint filed by a person authorised under any special law, which constitutes such offence;

(b) upon a police report (recorded in any mode including digital mode) of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try

(3) Any Magistrate empowered under this section, shall upon receiving a complaint against a public servant arising in course of the discharge of his official duties, take cognizance, subject to—

(a) receiving a report containing facts and circumstances of the incident from the officer superior to such public servant; and

(b) after consideration of the assertions made by the public servant as to the situation that led to the incident so alleged.

Clause 218 - Prosecution of Judges and public servants.

(1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction save as otherwise provided in the Lokpal and Lokayuktas Act, 2013—

(a) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government:

Provided that where the alleged offence was committed by a person referred to in clause (b) during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force in a State, clause (b) will apply as if for the expression "State Government" occurring therein, the expression "Central Government" were substituted:

Provided further that such Government shall take a decision within a period of one hundred and twenty days from the date of the receipt of the request for

sanction and in case it fails to do so, the sanction shall be deemed to have been accorded by such Government:

Provided also no sanction shall be required in case of a public servant accused of any offence alleged to have been committed under section 197, section 198, section 63, section 66, section 68, section 70, section 73, section 74, section 75, section 76, section 77, section 141, or section 351 of the Bharatiya Nyaya Sanhita, 2023.

(2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government.

(3) The State Government may, by notification, direct that the provisions of sub-section (2) shall apply to such class or category of the members of the Forces charged with the maintenance of public order as may be specified therein, wherever they may be serving, and thereupon the provisions of that sub-section will apply as if for the expression "Central Government" occurring therein, the expression "State Government" were substituted.

(4) Notwithstanding anything contained in sub-section (3), no Court shall take cognizance of any offence, alleged to have been committed by any member of the Forces charged with the maintenance of public order in a State while acting or purporting to act in the discharge of his official duty during the period while a Proclamation issued under clause (1) of article 356 of the Constitution was in force therein, except with the previous sanction of the Central Government.

(5) The Central Government or the State Government, may determine the person by whom, the manner in which, and the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

Clause 223 - Examination of Complaint

A Magistrate having jurisdiction while taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that no cognizance of an offence under this section shall be taken by the Magistrate without giving the accused an opportunity of being heard:

Provided further that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses—

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 212:

Provided further that if the Magistrate makes over the case to another Magistrate under section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them:

Provided further that in case of a complaint against a public servant, the Magistrate shall comply with the procedure provided in section 217.

Clause 230 - Supply to accused of copy of police report and other documents

In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay, and in no case beyond fourteen days from the date of production or appearance of the accused, furnish to the accused and the victim (if represented by an advocate) free of cost, a copy of each of the following:—

(i) the police report;

(ii) the first information report recorded under section 193;

(iii) the statements recorded under sub-section (3) of section 180 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub-section (6) of section 193;

(iv) the confessions and statements, if any, recorded under section 183;

(v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub-section (5) of section 193:

Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

Provided further that if the Magistrate is satisfied that any such document is voluminous, he shall, instead of furnishing the accused and the victim (if represented by an advocate) with a copy thereof, may furnish the copies through

electronic means or direct that he will only be allowed to inspect it either personally or through advocate in Court:

Provided also that supply of documents in electronic form shall be considered as duly furnished.

Clause 250 - Discharge

(1) The accused may prefer an application for discharge within a period of sixty days from the date of committal under section 232.

(2) If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

Clause 251 - Framing of charge

(1) If, after such consideration and hearing as aforesaid, the Judge is of opinion that there is ground for presuming that the accused has committed an offence which—

(a) is not exclusively triable by the Court of Session, he may, frame a charge against the accused and, by order, transfer the case for trial to the Chief Judicial Magistrate, or any other Judicial Magistrate of the first class and direct the accused to appear before the Chief Judicial Magistrate, or the Judicial Magistrate of the first class, on such date as he deems fit, and thereupon such Magistrate shall try the offence in accordance with the procedure for the trial of warrant-cases instituted on a police report;

(b) is exclusively triable by the Court, he shall frame in writing a charge against the accused within a period of sixty days from the date of first hearing on charge.

(2) Where the Judge frames any charge under clause (b) of sub-section (1), the charge shall be read and explained to the accused present either physically or through electronic means and the accused shall be asked whether he pleads guilty of the offence charged or claims to be tried.

Clause 262 - When accused shall be discharged

(1) The accused may prefer an application for discharge within a period of sixty days from the date of framing of charges.

(2) If, upon considering the police report and the documents sent with it under section 293 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

Clause 263 - Framing of charge

(1) If, upon such consideration, examination, if any, and hearing, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused within a period of sixty days from the date of first hearing on charge.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty of the offence charged or claims to be tried.

Clause 272 - Absence of complainant

When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may after giving thirty days' time to the complainant to be present, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

Clause 274 - Substance of accusation to be stated

When in a summons-case the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked whether he pleads guilty or has any defence to make, but it shall not be necessary to frame a formal charge:

Provided that if the Magistrate considers the accusation as groundless, he shall, after recording reasons in writing, release the accused and such release shall have the effect of discharge.

Clause 329 - Reports of certain Government scientific experts

(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Sanhita, may be used as evidence in any inquiry, trial or other proceeding under this Sanhita.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject-matter of his report.

(3) Where any such expert is summoned by a Court, and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:—

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Controller of Explosives;

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government;

(g) any other scientific expert specified or certified, by notification, by the State Government or the Central Government for this purpose.

Clause 330 - No formal proof of certain documents

(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused or the advocate for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document soon after supply of such documents and in no case later than thirty days after such supply:

Provided that the Court may, in its discretion, relax the time limit with reasons to be recorded in writing: Provided further that no expert shall be called to appear before the Court unless the report of such expert is disputed by any of the parties to the trial.

(2) The list of documents shall be in such form as the State Government may, be rules, provide.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in inquiry, trial or other proceeding under this Sanhita without proof of the signature of the person by whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to by proved.

Clause 349 - Power of Magistrate to order a person to give specimen signatures or handwriting

If a Magistrate of the first class is satisfied that, for the purposes of any investigation or proceeding under this Sanhita, it is expedient to direct any person, including an accused person, to give specimen signatures or finger impressions or handwriting or voice sample, he may make an order to that effect and in that case the person to whom the order relates shall be produced or shall attend at the time and place specified in such order and shall give his specimen signatures or finger impressions or handwriting or voice sample:

Provided that no order shall be made under this section unless the person has at some time been arrested in connection with such investigation or proceeding:

Provided further that the Magistrate may, for the reasons to be recorded in writing, order any person to give such specimen or sample without him being arrested.

Clause 356 - Inquiry trial or judgment in absentia of proclaimed offender

(1) Notwithstanding anything contained in this Sanhita or in any other law for the time being in force, when a person declared as a proclaimed offender, whether or not charged jointly, has absconded to evade trial and there is no immediate prospect of arresting him, it shall be deemed to operate as a waiver of the right of such person to be present and tried in person, and the Court shall, after recording reasons in writing, in the interest of justice, proceed with the trial in the like manner and with like effect as if he was present, under this Sanhita and pronounce the judgment:

Provided that the Court shall not commence the trial unless a period of ninety days has lapsed from the date of framing of the charge.

(2) The Court shall ensure that the following procedure has been complied with before proceeding under sub-section (1) namely:—

(i) issuance of execution of two consecutive warrants of arrest within the interval of atleast thirty days;

(ii) publish in a national or local daily newspaper circulating in the place of his last known address of residence, requiring the proclaimed offender to

appear before the Court for trial and informing him that in case he fails to appear within thirty days from the date of such publication, the trial shall commence in his absence;

(iii) inform his relative or friend, if any, about the commencement of the trial; and

(iv) affix information about the commencement of the trial on some conspicuous part of the house or homestead in which such person ordinarily resides and display in the police station of the district of his last known address of residence.

(3) Where the proclaimed offender is not represented by any advocate, he shall be provided with an advocate for his defence at the expense of the State.

(4) Where the Court, competent to try the case or commit for trial, has examined any witnesses for prosecution and recorded their depositions, such depositions shall be given in evidence against such proclaimed offender on the inquiry into, or in trial for, the offence with which he is charged:

Provided that if the proclaimed offender is arrested and produced or appears before the Court during such trial, the Court may, in the interest of justice, allow him to examine any evidence which may have been taken in his absence.

(5) Where a trial is related to a person under this section, the deposition and examination of the witness, may, as far as practicable, be recorded by audio-video electronic means preferably mobile phone and such recording shall be kept in such manner as the Court may direct.

(6) In prosecution for offences under this Sanhita, voluntary absence of accused after the trial has commenced under sub-section (1) shall not prevent continuing the trial including the pronouncement of the judgment even if he is arrested and produced or appears at the conclusion of such trial.

(7) No appeal shall lie against the judgment under this section unless the proclaimed offender presents himself before the Court of appeal:

Provided that no appeal against conviction shall lie after the expiry of three years from the date of the judgment.

(8) The State may, by notification, extend the provisions of this section to any absconder mentioned in sub-section (1) of section 84 of this Sanhita.

Clause 360 - Withdrawal from Prosecution

The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court, at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal,—

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Sanhita no charge is required, he shall be acquitted in respect of such offence or offences: Provided that where such offence—

(i) was against any law relating to a matter to which the executive power of the Union extends, or

(ii) was investigated under any Central Act, or

(iii) involved the misappropriation or destruction of, or damage to, any property belonging to the Central Government, or

(iv) was committed by a person in the service of the Central Government while acting or purporting to act in the discharge of his official duty,

and the Prosecutor in charge of the case has not been appointed by the Central Government, he shall not, unless he has been permitted by the Central Government to do so, move the Court for its consent to withdraw from the prosecution and the Court shall, before according consent, direct the Prosecutor to produce before it the permission granted by the Central Government to withdraw from the prosecution:

Provided further that no Court shall allow such withdrawal without giving an opportunity of being heard to the victim in the case.

Clause 368 - Procedure in case of person with mental illness tried before Court

(1) If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is suffering from mental illness and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such mental illness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be

produced before him or it, is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceedings in the case.

(2) If during trial, the Magistrate or Court of Sessions finds the accused to be a person with mental illness, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be, shall report to the Magistrate or Court whether the accused is suffering from mental illness:

Provided that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of—

(a) head of psychiatry unit in the nearest Government hospital; and

(b) a faculty member in psychiatry in the nearest medical college.

(3) If the Magistrate or Court is informed that the person referred to in sub-section (2) is a person with mental illness, the Magistrate or Court shall further determine whether the mental illness renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal with him in the manner provided under section 369:

Provided that if the Magistrate or Court finds that a prima facie case is made out against the accused in respect of whom a finding of mental illness is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused.

(4) If the Magistrate or Court finds that a prima facie case is made out against the accused and he is incapable of entering defence by reason of mental illness, he or it shall not hold the trial and order the accused to be dealt with in accordance with section 369.

Clause 398 - Witness protection scheme

Every State Government shall prepare and notify a Witness Protection Scheme for the State with a view to ensure protection of the witnesses.

Clause 473 - Mercy Petition in death sentence cases

(1) A convict under the sentence of death or his legal heir or any other relative may, if he has not already submitted a petition for mercy, file a mercy petition before the President of India under article 72 or the Governor of the State under article 161 of the Constitution within a period of thirty days after the date on which the Superintendent of the Jail,—

(i) informs him about the dismissal of the appeal or special leave to appeal by the Supreme Court; or

(ii) informs him about the date of confirmation of the sentence of death by the High Court and the time allowed to file an appeal or special leave in the Supreme Court has expired,

and that may present the mercy petition to the Home Department of the State Government or the Central Government, as the case may be.

(2) The petition under sub-section (1) may, initially be made to the Governor and on its rejection or disposal by the Governor, the petition shall be made to the President within a period of sixty days from the date of rejection or disposal of his petition.

(3) The Superintendent of the Jail or officer in charge of the Jail shall ensure, that every convict, in case there are more than one convict in a case, also makes the mercy petition within a period of sixty days and on non-receipt of such petition from the other convicts, Superintendent of the Jail shall send the names, addresses, copy of the record of the case and all other details of the case to the Central Government or State Government for consideration along with the said mercy petition.

(4) The Central Government shall, on receipt of the mercy petition seek the comments of the State Government and consider the petition along with the records of the case and make recommendations to the President in this behalf, as expeditiously as possible, within a period of sixty days from the date of receipt of comments of the State Government and records from Superintendent of the Jail.

(5) The President may, consider, decide and dispose of the mercy petition and, in case there are more than one convict in a case, the petitions shall be decided by the President together in the interests of justice.

(6) Upon receipt of the order of the President on the mercy petition, the Central Government shall within forty-eight hours, communicate the same to the Home Department of the State Governnment and the Superintendent of the Jail or officer in charge of the Jail.

(7) No appeal shall lie in any Court against the order of the President made under article 72 of the Constitution and it shall be final, and any question as to the arriving of the decision by the President shall not be enquired into in any Court.

Clause 475 - Power to commute sentence

The appropriate Government may, without the consent of the person sentenced, commute—

(a) a sentence of death, for imprisonment for life;

(b) a sentence of imprisonment for life, for imprisonment for a term not less than seven years;

(c) a sentence of imprisonment for seven years or ten years, for imprisonment for a term not less than three years;

(d) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced;

(e) a sentence of imprisonment up to three years, for fine.

Clause 479 - Bail & Bond

In this Sanhita, unless the context otherwise requires,—

(a) "bail" means release of a person accused of an offence from the custody of law upon certain conditions imposed by an officer or court including execution by such person of a bond or a bail bond.

(b) "bond" means a personal bond or an undertaking for release without payment of any surety;

(c) "bail bond" means an undertaking for release with payment of surety.

Clause 481 - Maximum period for which undertrial prisoner can be detained

(1) Where a person has, during the period of investigation, inquiry or trial under this Sanhita of an offence under any law (not being an offence for which the punishment of death or life imprisonment has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on bail:

Provided that where such person is a first-time offender (who has never been convicted of any offence in the past) he shall be released on bail by the

Court, if he has undergone detention for the period extending up to one-third of the maximum period of imprisonment specified for such offence under that law:

Provided further that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail bond instead of the personal bond:

Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation.—In computing the period of detention under this section for granting bail, the period of detention passed due to delay in proceeding caused by the accused shall be excluded.

(2) Notwithstanding anything contained in sub-section (1), where an investigation, inquiry or trial in more than one offence or in multiple cases are pending against a person, he shall not be released on bail by the Court.

(3) The Superintendent of jail, where the accused person is detained, on completion of one-half or one-third of the period mentioned in sub-section (1), as the case may be, shall forthwith make an application in writing to the Court to proceed under sub-section (1) for the release of such person on bail.

Clause 482 - When bail may be taken in case of non-bailable offence

(1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of session, he may be released on bail, but—

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but less than seven years:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of eighteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, the accused shall, subject to the provisions of section 494 and pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI or Chapter XVII of the Bharatiya Nagarik Suraksha Sanhita, 2023 or abatement of, or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1), the Court shall impose the conditions,—

(a) that such person shall attend in accordance with the conditions of the bond executed under this Chapter;

(b) that such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected; and

(c) that such person 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 or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary.

(4) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2), shall record in writing his or its reasons or special reasons for doing so.

(5) Any Court which has released a person on bail under sub-section (1) or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time, after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

Clause 483 - Bail to require accused to appear before next Appellate Court

(1) Before conclusion of the trial and before disposal of the appeal, the Court trying the offence or the Appellate Court, as the case may be, shall require the accused to execute bond or bail bond, to appear before the higher Court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bond shall be in force for six months.

(2) If such accused fails to appear, the bond stands forfeited and the procedure under section 493 shall apply.

Clause 484 - Direction for grant of bail to person apprehending arrest

(1) When 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 this section; and that Court

may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person 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;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 482, as if the bail were granted under that section.

(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should be issued in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).

(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (2) of section 64 or section 66 or section 70 of the Bharatiya Nyaya Sanhita, 2023.

Clause 485 - Special powers of High Court or Court of Session regarding bail

(1) A High Court or Court of Session may direct,—

(a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of section 482, may impose any condition which it considers necessary for the purposes mentioned in that sub-section;

(b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified:

Provided that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the Public Prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice:

Provided further that the High Court or the Court of Session shall, before granting bail to a person who is accused of an offence triable under section 64 or section 70 of the Bharatiya Nyaya Sanhita, 2023, give notice of the application for bail to the Public Prosecutor within a period of fifteen days from the date of receipt of the notice of such application.

(1A) The presence of the informant or any person authorised by him shall be obligatory at the time of hearing of the application for bail to the person under section 64 or section 66 or section 70 of the Bhartiya Nyaya Sanhita, 2023.

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody

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Clause 57 - Primary Evidence

Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document.

Explanation 2.—Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 3.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

Explanation 4.—Where an electronic or digital record is created or stored, and such storage occurs simultaneously or sequentially in multiple files, each such file is primary evidence.

Explanation 5.—Where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed.

Explanation 6.—Where a video recording is simultaneously stored in electronic form and transmitted or broadcast or transferred to another, each of the stored recordings is primary evidence.

Explanation 7.—Where an electronic or digital record is stored in multiple storage spaces in a computer resource, each such automated storage, including temporary files, is primary evidence.

Clause 63 - Admissibility of electronic records

(1) Notwithstanding anything contained in this Adhiniyam, any information contained in an electronic record which is printed on paper, stored, recorded or copied in optical or magnetic media or semiconductor memory which is produced by a computer or any communication device or otherwise stored, recorded or copied in any electronic form (hereinafter referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original,

as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely:—

(a) the computer output containing the information was produced by the computer or communication device during the period over which the computer was used regularly to create, store or process information for the purposes of any activity regularly carried on over that period by the person having lawful control over the use of the computer or communication device;

(b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;

(c) throughout the material part of the said period, the computer or communication device was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and

(d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(3) Where over any period, the function of creating, storing or processing information for the purposes of any activity regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by means of one or more computers or communication device, whether—

(a) in standalone mode; or

(b) on a computer system; or

(c) on a computer network; or

(d) on a computer resource enabling information-creation or providing information—processing and storage; or

(e) through an intermediary.

Explanation.—All the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceeding where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things shall be submitted along with the electronic record at each instance where it is being submitted for admission, namely:—

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer or a communication device referred to in clauses (a) to (e) of sub-section (3);

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person in charge of the computer or communication device and an expert (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it in the form specified in the Schedule.

(5) For the purposes of this section,—

(a) information shall be taken to be supplied to a computer or communication device if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) a computer output shall be taken to have been produced by a computer or communication device whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment or by other electronic means as referred to in clauses (a) to (e) of sub-section (3).

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