PROJECT 39A, NATIONAL LAW UNIVERSITY DELHI

Bharatiya Nyaya (Second) Sanhita Bill, 2023

Bharatiya Nagarik Suraksha (Second) Sanhita Bill, 2023

AND

Bharatiya Sakshya (Second) Bill, 2023

ANALYSIS OF KEY CHANGES

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Introduction

On 11 August 2023, the Central Government introduced three new Bills in the Lok Sabha, viz. the Bharatiya Nyaya Sanhita Bill 2023 ('BNS'), the Bharatiya Nagarik Suraksha Sanhita Bill, 2023 ('BNSS'), and the Bharatiya Sakshya Bill, 2023 ('BSB') to replace the existing Indian Penal Code, 1860 ('IPC'), Code of Criminal Procedure, 1973 ('CrPC'), and the Indian Evidence Act, 1872 ('IEA'), respectively. The Bills were subsequently referred to a Standing Committee of the Parliament ('PSC') for review. Subsequently, the PSC released its reports on the Bills recommending changes, along with dissent notes by various members of the panel. Pursuant to these recommendations, the Bills were withdrawn from the Parliament and revised versions were introduced soon after: the Bharatiya Nyaya (Second) Sanhita Bill, 2023 ('BNS II'), the Bharatiya Nagarik Suraksha (Second) Sanhita Bill, 2023 ('BNSS II'), and the Bharatiya Sakshya (Second) Bill, 2023 ('BSB II').

The redrafted Bills rectify several mistakes from the earlier version - ranging from minor spelling and grammatical errors to incomplete sentences, and ambiguous phrasing. Significantly, the vague and broad offence of 'Terrorist act' in the BNS has been comparatively narrowed and brought in line with the definition in the Unlawful Activities (Prevention) Act, 1967 ('UAPA') in the BNS II. The Bills, especially the BSB, was riddled with errors in cross-referencing sections, as also noted by the PSC. These errors have been corrected in the revised versions. Further, all references to adultery in the BNSS have been deleted; as the offence itself had been excluded from the BNS. Similarly, references to sedition have been removed, due to its absence from the BNS. The offence of 'Acts endangering sovereignty, unity and integrity of India', had an incomplete explanation regarding expression of disapprobation in a lawful manner. In the rectified provision, the explanation now clarifies that such comments do not constitute an offence thereunder. Another example of rectification of ambiguities is Cl.93 of the BNS, which prescribed that any person who engages in hiring, employing or engaging a child to commit an offence shall be punished as if the offence had been committed by such person. This vaguely worded provision was unclear about the consequences when no offence was committed after hiring a child. The BNS II clarifies that hiring a child per se is a punishable offence. Further, the BNS II reorganises provisions already contained in the BNS to create new clauses without any substantive additions;

such as Cl.86 'Cruelty defined' and Cl.73 'Printing or publishing of any matter relating to Court proceedings without permission'.

Even after revisions, many concerns remain with the changes introduced through the criminal law bills. The expansion of the maximum limit of the period of detention in police custody, from 15 days in the CrPC to 60 days or 90 days, continues in BNSS II. Trials *in absentia* are permitted for proclaimed offenders, in spite of fair trial implications. Despite concerns being raised by the PSC and stakeholders, no provision to the effect of the present s.377 IPC has been added to penalise non-consensual sexual assault against men and transgenders. Many vague and broadly worded offences remain including '*false and misleading information*' and '*acts endangering the sovereignty, unity and integrity of India*'.

For further analysis on some of the issues that remain refer to our substantive research briefs on the BNS, BNSS and BSB.

I. Bharatiya Nyaya (Second) Sanhita Bill, 2023

Life Imprisonment

A rather odd change proposed by the BNS was in the section enumerating the punishments prescribed under the Bill. Cl.4(b), which qualified 'imprisonment for life' with the phrase 'that is to say, imprisonment for the remainder of a person's natural life'. This clause is odd because it creates an ambiguity regarding the legislative intent. The insertion could be interpreted in one of two ways. Firstly, that it merely clarifies the position in law, that life imprisonment is by default for the remainder of one's natural life, albeit subject to remission. Secondly, any reference to life imprisonment under the BNS always means life imprisonment till the end of natural life and thus, excludes remission and early release.[1]

Further, post the Criminal Law (Amendment) Acts of 2013 and 2018, the punishment of 'imprisonment for the remainder of a person's natural life' has been prescribed for certain offences relating to women and children. This distinct category of punishment has been retained in the BNS. The proposed clause was thus criticised for being ambiguous; and appropriately, the PSC recommended that the phrasing in Cl.4(b) be changed to 'Imprisonment for life, which wherever hereinafter expressly specified, shall mean imprisonment for remainder of a person's natural life'. While not accepting the suggestion as is, the drafters of the BNS II have removed the qualification. Thus, Cl.4(b) as it is in BNS II is the same as s.53 IPC.

Government's power to Commute any Sentence

Cl.5 BNS prescribed the procedure for commutation of sentence of death and imprisonment of life by the appropriate Government. In the BNS II, this provision has been modified to provide for commutation of any sentence in accordance with Cl.474 of the BNSS II. The PSC recommended changing Cl.5 (a) and (b) BNS to resolve the discrepancy between the said clauses and Cl.475 (a) and (b) (*sic*) BNSS.

The discrepancy that the PSC referred to was that Cl.474(a) and (b) BNSS provided that a sentence of death can be commuted to imprisonment for life and a sentence of imprisonment for life can be commuted to imprisonment of seven years; while Cl.5 prescribed that a sentence of death could be commuted to any

[1] *Union of India v. V Sriharan* (2016) 7 SCC 1.

sentence provided by the Sanhita and the sentence of imprisonment for life could be commuted to imprisonment for 14 years. The drafters of the Bills have resolved this discrepancy by making Cl.5 subject to Cl.474 BNSS II.

Criminal Conspiracy

A new insertion made by the BNS II is the insertion of the phrase 'with the common object' in the definition of Criminal Conspiracy in Cl.61(1). This was neither recommended by the PSC nor is it consistent with the present position in law. Hitherto, conspiracy and 'common object' have been understood as distinct concepts in criminal law. 'Common object' has been used in the IPC in relation to unlawful assembly, and unlike conspiracy, does not require a prior meeting of minds - thus, 'common object' is conceptually at odds with conspiracy. The intent of inserting 'common object' as an additional ingredient for proving criminal conspiracy is unclear.

Mob lynching - minimum punishment

The BNS, by way of Cl.101(2), introduced punishment for a subcategory of murder, where murder is committed by five or more persons acting in concert with one another, on grounds of race, caste or community, sex, place of birth, language, personal belief or any other ground. Curiously, this category prescribed a lesser minimum sentence of imprisonment of 7 years as opposed to the offence of murder where the minimum sentence is imprisonment for life. This provision was criticised for creating an anomalous situation where a sentence of seven years was permissible in cases of murder caused by mob lynching. The PSC had also recommended deletion of this minimum punishment of 7 years. The BNS II, taking the critique into consideration, has removed the minimum punishment of seven years and now penalises mob lynching at par with murder (Cl.103(2)).

Death by Negligence

The BNS (Cl.104) had introduced a punishment of 7 years for death caused by negligence and had created an aggravated category (punishable by up to 10 years of imprisonment) of offence where the perpetrator (a) fails to report the offence (b) escapes the scene of crime. However, from a textual reading of the clause, it is unclear whether both requirements need to be fulfilled for the offence to qualify as an aggravated form of causing death by negligence. The PSC had

recommended rephrasing the provision to protect a perpetrator who fulfils either of the duties prescribed from the aggravated punishment.

Accepting this recommendation, Cl.106(2) BNS II rectifies this confusion, and the provision now states that if the perpetrator 'escapes without reporting it to a police officer or a Magistrate soon after the incident' they shall be punished for a term up to 10 years of imprisonment.

Further, the PSC had recommended reduction in the punishment from 7 years to 5 years in Cl.104(1) to be in line with the present s.304A, IPC. This has been accepted by the drafters of the Bill and the new provision under Cl.106(1) BNS II provides a sentence of 5 years.

The PSC had recommended that this provision be restricted only to motor vehicle accidents. Accordingly, the drafters have added the phrase rash and negligent driving of a vehicle, in the aggravated offence under Cl.106(2) BNS II.

Organised Crime

The BNS introduced penalisation of organised crime and petty organised crime. While there were several state legislations dealing with organised crime modelled after the Maharashtra Control of Organised Crime Act, 1999 (MCOCA) and Gujarat Control of Organised Crime Act, 2003 (GujCOCA), this is the first attempt of a central penal statute dealing with organised crime. The revision of Cl.109 BNS as Cl.111 in the BNS II has attempted to provide some definitional clarity to the ambiguous scope of the provision. The definitions of economic offences and 'organised crime syndicate' have been modified, with the latter being identical to MCOCA and GujCOCA; while the definition of 'benefit' has been deleted.

Some of the more substantive critique of the provision, especially with regard to the attempt/abatement of the offence being punished at par with the commission of the offence, has not been addressed.

Alongside organised crime, the offence of petty organised crime was also introduced in the BNS. It had been criticised for vagueness, as it penalised any crime that caused 'general feelings of insecurity among citizens.' The PSC recommended redrafting the provision for definitional clarity. The BNS II has now revised the provision to remove the aforesaid vague phrasing and redefined it. Further, in the revision of the provision, the drafters have also made the scope of

offences which qualify as petty organised crime narrower compared to the provision in the BNS which was overbroad and covered various offences that may also qualify as 'organised crime.' The revised provision restricts petty offences to include offences such as theft. The explanation to the clause lists certain kinds of theft ('trick theft, theft from vehicle, dwelling house or business premises, cargo theft, pickpocketing, theft through card skimming, shoplifting, and theft of Automated Teller Machine'). However, given that theft is already defined in the bill, the reason and implication of this explanation is unclear.

Terrorist Act

The offence of terrorist act was introduced in the BNS and criticised for its vagueness. This concern was also expressed by the PSC, which had recommended removing ambiguity from the provision. Accordingly, the provision has been comparatively narrowed in the BNS II, in terms of both mens rea and actus reus; the definition is now similar to 'terrorist act' as defined s.15 UAPA. Similarly, other offences relating to a terrorist act mirror the provisions of UAPA.

In doing so, the scope of the 'terrorist act' in the BNS II now includes 'damage to the monetary stability of India by way of production or smuggling or circulation' of counterfeit currency. A small caveat may be given - s.15 UAPA qualifies such smuggling as a terrorist act if it involves 'high-quality counterfeit currency'; whereas the BNSS II merely refers to 'counterfeit currency'. Further, the vaguely-worded sub-clause defining 'acts which destabilise or destroy the political, economic, or social structures of the country, or create a public emergency or undermine public safety' as terrorist acts has been removed in the BNS II. Moreover, as in the UAPA, the mens rea required to qualify an act as a 'terrorist act' includes threatening the unity, security, sovereignty or economic security of the country or striking terror in the people. While still broad, the excessive thresholds in the BNS of intimidating the public or disturbing public order have also been removed.

Other noteworthy changes include: the possession of property derived from or through a terrorist act is punishable only if it is held knowingly. Similarly, harbouring a terrorist is punishable if it is done both voluntarily and knowingly. Finally, the offence of recruiting and training persons to engage in terrorist acts has been introduced, mirroring ss.18A and 18B of the UAPA.

The provision in the BNS also contained explanations defining 'terrorist' and 'terrorist organisation'. Both explanations had been critiqued for their redundancy and potential for misuse. These have now been removed. The BNS also punished the commission of a terrorist act resulting in death with life imprisonment without parole. This had also been critiqued for denying benefits provided under law to all prisoners as a means to maintain human connection. This provision has now been removed in the BNS II.

A final change introduced is by way of an Explanation to the clause, which allows an officer not below the rank of Superintendent of Police to decide if the prosecution of a terrorist act should continue under the UAPA or Cl.113 BNS. Without any clarity on the basis for this decision, the inclusion of 'terrorist act' in both general law and a special law is bound to cause confusion.

II. Bharatiya Nagarik Suraksha (Second) Sanhita Bill, 2023

Community Service

One of the newer concepts introduced by the BNSS is the punishment of 'community service'. In the BNSS II, this punishment has now been given a definition (see Cl.23), as recommended by the PSC. Community service is 'the work which the Court may order a convict to perform as a form of punishment that benefits the community, for which he shall not be entitled to any remuneration'. Moreover, in consonance with the recommendation of the PSC, a Magistrate of the First or Second Class has been specifically empowered to impose this punishment, in order to encourage a more reparative approach to minor crimes.

Handcuffing

Cl.43 BNSS permits a police officer to use handcuffs in the process of arresting accused persons who may be habitual offenders who have escaped from custody and have committed offences such as terrorist act, organised crime, etc. The provision has been revised in the BNSS II to clarify that these are alternative conditions. Thus, police officers are empowered to use handcuffs in the arrest of a habitual offender or an offender who has previously escaped from custody or who has committed specified offences, including offences against the State. This provision had also been approved by the PSC with the recommendation that handcuffs may not be used in cases where the accused person has been charged with an economic offence. Consequently, the category of 'economic offences' has been deleted from the BNSS II. However, the power of police to use handcuffs has been expanded beyond the time of arrest, to include stage of production before court as well.

The use of handcuffs and shackles has been held to offend human dignity in Prem Shankar Shukla v. Delhi Administration,[2] where the court further directed that handcuffs ought to be used only in limited circumstances. Opposition along these lines had also been expressed in the dissent notes to the recommendations of the PSC, with the suggestion that handcuffing should be restricted to situations where the offender is known to be violent.

[2] *Prem Shankar Shukla v. Delhi Administration* (1980) 3 SCC 586.

Immunity for Police officers and Military personnel

Under extant law, police officers and military personnel cannot be prosecuted without sanction from the government for their acts in dispersing an unlawful assembly. Thus, for instance, in situations of riots, such personnel are immune from accountability for excessive use of force or executive violence. Cl.151 BNSS had further strengthened this immunity by requiring a preliminary inquiry to be conducted before registration of offence, and a second sanction to be obtained before arresting the accused officer. However, in the BNSS II, these twin conditions have been removed and the provision has been restored to how it presently is in the CrPC.

Detention by Police for non-compliance with directions

Another expansion of police power was introduced by the BNSS in Cl.172. It allows the police to detain persons who do not conform to any directions issued by the police while trying to prevent the commission of a cognizable offence. An ambiguity in the provision permitted the detention to continue until the person is produced before a Magistrate or 'the occasion is past'. The PSC had recommended that a timeline be specified to prevent the abuse of this power. Consequently, now the detained person must be produced before the Magistrate or released in petty cases within 24 hours.

Contents of Police report

At the end of an investigation into a cognizable offence, the police submit a report, generally understood as a chargesheet (where it is concluded that an offence has been committed) or final report (where the police determines that no offence has been committed). The contents of the chargesheet, as provided in s.173 CrPC, include details on identity of the accused and their custody. A minor amendment to the corresponding clause in the BNSS now also requires that information relating to 'the sequence of custody in case of electronic device' (Cl.193) must also be produced.

Electronic evidence, as with traditional evidence, must be sealed after seizure by the police and, thereafter, submitted in the *malkhana* of the police station until it is required to be examined in a forensic laboratory or the court. Maintaining the sequence of custody of such evidence, including when it was stored in *malkhana* or taken out, is important to prevent tampering; especially in light of wide

inclusion of audio-video recording during investigation. However, it is unclear why the sequence of custody of traditional evidence (such as weapons from the scene of crime) has also not been explicitly brought within the scope of the sub-clause.

Proceedings via Audio-Visual means

A significant thrust of the changes in the BNSS related to allowing the conduct of various proceedings through audio-visual means. Cl.530 BNSS II, provides for various proceedings to be conducted in audio-visual means. However, certain proceedings mentioned in the earlier draft have been deleted, including inquiries, trials before court of sessions, trials in summary cases, plea bargaining, and trials before High Courts. The reason for deletion of these items from the list of proceedings is unclear.

On the other hand, specific sub-clauses to allow the reading out of charge to the accused, hearing on discharge, examination of witnesses, and recording of evidence in audio-visual means have been introduced in the BNSS II in Cls.251, 262, 266, and 308 respectively. The recording of evidence via audio-visual means had also been recommended by the PSC.

Judgment

Cl.258 BNSS prescribed that the judgement must be pronounced in a period of thirty days from the conclusion of hearing in a case; and if required, the period may be extended to sixty days. In the redrafted Bill, Cl.258 has been revised to limit the extended time period to forty-five days. Moreover, the additional time can be availed only if reasons are provided in writing by the judge.

With the goal of achieving speedy justice, timelines have been introduced across various other stages of the pre-trial and trial proceedings. However, there remain serious concerns regarding the practicality of such timelines.

Power to try Summarily

Summary trials are conducted for petty offences. With a view towards expeditiously finishing cases where the person has been charged with petty offences, procedures relating to framing of charge and recording of evidence are simplified in summary trials. The maximum punishment which can be imposed is three months of imprisonment. In the BNSS, summary trials are proposed to be mandatory for all petty cases. The BNSS II has now added another distinguishing

factor for summary trials - there is no appeal against the decision of a magistrate to try a case in a summary manner.

Evidence of Public Servants

Another innovation of the BNSS is that the evidence of certain categories of persons such as public servants, forensic experts, investigating officer ('IO'), and medical officers in a trial for a case where they may have investigated the offence or provided any opinion, may be dispensed with if they have been retired or transferred or securing their presence would cause delay in the trial. Instead, the successor to their office may give evidence instead, even if the successor was not involved in the investigation. The new draft further permits such successor to depose through audio-video electronic means. This is contradictory to the primary rule of evidence law, that the person who authored a document or witnessed a thing must depose to it themself, and another cannot speak for them. Thus, critique (including in P. Chidambaram's dissent note to the recommendations of the PSC) was levelled that this dispensation must not be allowed unless the officer is dead. This has been ignored.

However, in consonance with the PSC's recommendation, Cl.336 BNSS II no longer exempts the IO from giving evidence personally, even if they have retired or been transferred. This change was likely made in recognition of the centrality of the IO's evidence in a trial.

Unsoundness of Mind

In an attempt to do away with regressive terminology, the criminal law Bills had widely replaced terms including lunacy, mental retardation and unsoundness of mind with 'mental illness.' In doing so, the drafters of the Bills had failed to account for definitional distinctions and varying degrees of support needs. The PSC had also suggested that the term mental illness was too wide.

The revised Bills have replaced the term 'mental illness' with 'unsoundness of mind' in a majority of provisions, and have also added the term 'intellectual disability' along with unsoundness of mind in Cl.367 BNSS II while dealing with competence to stand trial.

Though it seems like the drafters have taken the suggestion of the PSC into consideration, the revised BNSS II, much like its predecessor and the present CrPC,

fails to be congruent with the Mental Healthcare Act, 2017 or the Rights of Persons with Disabilities Act, 2016.

Commutation of Sentences

The government has power to commute or reduce the severity of the punishment imposed by the judiciary. Provisions guiding the exercise of this power (which punishment may be commuted to what) exist under extant law. Slight modification has been introduced in Cl.474 BNSS II to allow punishment of up to seven years of imprisonment to be commuted to fines. Under s.433 CrPC, any sentence of simple imprisonment (without restriction on number of years) may be commuted to fine; the BNSS proposed to drastically restrict this power by allowing only up to three years' imprisonment to be commuted to fine.

Grant of Bail for Non-Bailable Offences

A person may be released on bail in the case of non-bailable offences on the order of the court. Cl.480 BNSS II, in pari materia with s.437 CrPC, guides the operation of this power. A small amendment to the third proviso to sub-clause (4) proposes that merely because the police may want to seek custody of the person after the first fifteen days of investigation, it may not be correct to deny bail to an accused.

This amendment has been introduced pursuant to the recommendations of the PSC. The PSC had expressed concern that Cl.187, which empowers the police to seek custody of an accused at any time in the forty or sixty days of the detention period, may be misused by the authorities. As a check on this misuse, it was recommended that the mere application of police for custody after the first fifteen days should not interfere with the grant of bail, if otherwise warranted.

III. Bharatiya Sakshya (Second) Bill, 2023

Admissibility of Electronic Evidence

The only significant change proposed by the BSB to the present Indian Evidence Act, 1872 was regarding admissibility of electronic evidence. Cl.61 in BSB, provided that an electronic record shall have the same legal effect as a paper record, and its admissibility shall not be denied on grounds that it is an electronic record. This provision made electronic evidence admissible per se, without the requirement of a certificate under Cl.63 (certificate under s.65B in the present IEA, 1872). This is a significant rectification made by the BSB II, and the provision has been revised to state that the admissibility of an electronic record is subject to Cl.63.

Another change is in the phrasing in Cl.63(4) which provided that the certificate under the section is to be signed by 'a person in charge of the computer or communication device and an expert (whichever is appropriate)...'. The same has now been modified to 'a person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) and an expert shall be evidence of any matter stated in the certificate'. This has also broadened the scope of persons who can sign the certificate by including the manager of such devices, in accordance with common practice. Additionally, changes have been made to the form of the certificate under Cl.63.

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