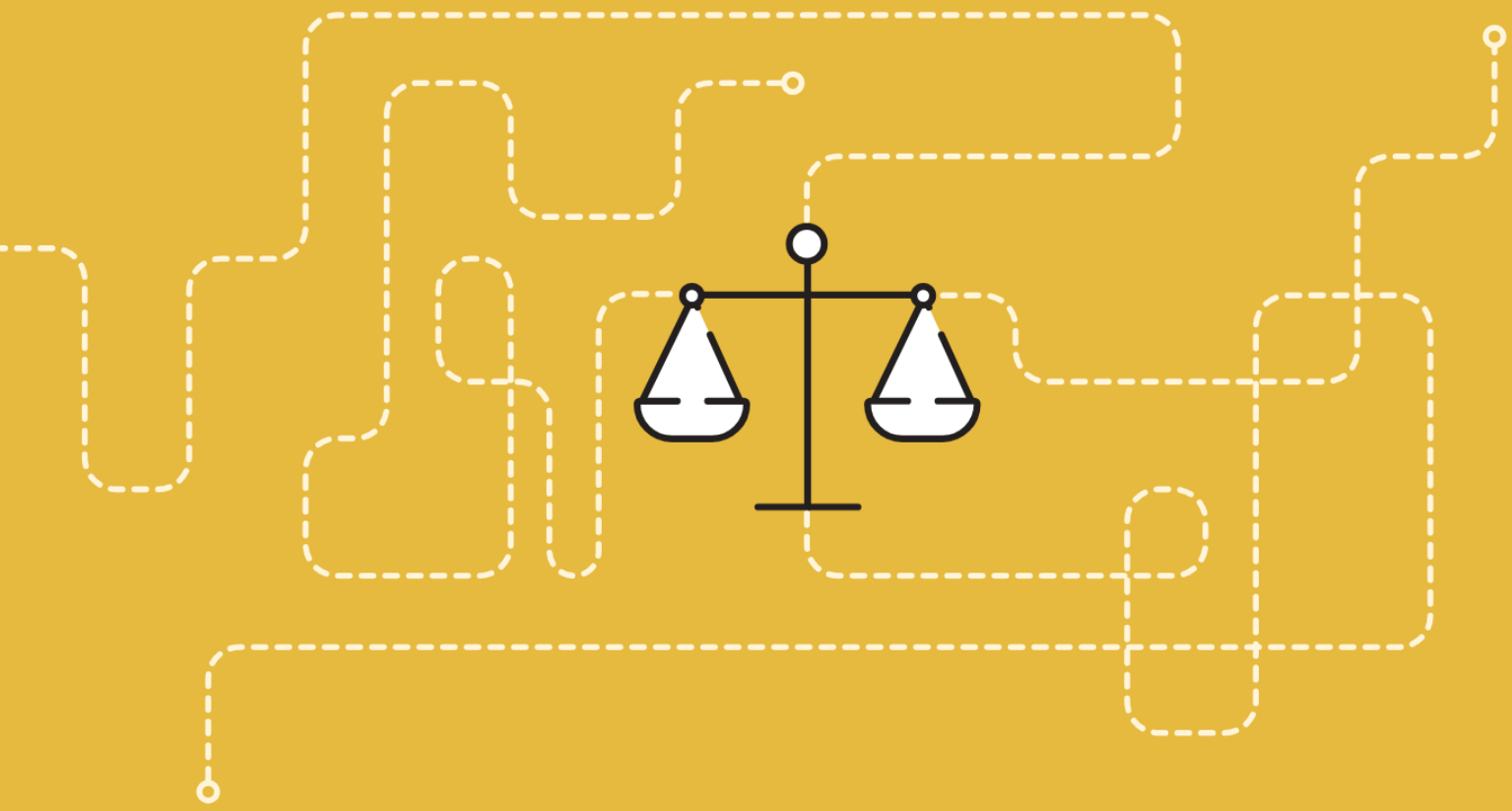
India's New Criminal Laws: A Substantive Analysis

Bharatiya Nyaya Sanhita 2023
Bharatiya Nagarik Suraksha Sanhita 2023
Bharatiya Sakshya Adhiniyam 2023



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ABBREVIATIONS

Art.	Article
BNS	Bharatiya Nyaya Sanhita
BNSS	Bharatiya Nagarik Suraksha Sanhita
BSA	Bharatiya Sakshya Adhiniyam
BSB	Bharatiya Sakshya Bill
CPIA	Criminal Procedure (Identification) Act
Cl.	Clause
CrPC	Criminal Procedure Code
DFSU	District Forensic Science Units
DVR	Digital Video Recorder
ED	Enforcement Directorate
FEMA	Foreign Exchange Management Act
FIR	First Information Report
FSL	Forensic Science Laboratory
GujCOCA	Gujarat Control of Organised Crime Act
HC	High Court
IEA	Indian Evidence Act
IPC	Indian Penal Code
IT Act	Information Technology Act
MCOCA	Maharashtra Control of Organised Crime Act
MFSU	Mobile Forensic Science Units
MHA	Ministry of Home Affairs

MHCA	Mental Healthcare Act
NDPS	Narcotic Drugs and Psychotropic Substances Act
PMLA	Prevention of Money Laundering Act
POCSO	Protection of Children from Sexual Offences Act
POTA	Prevention of Terrorism Act
PSC	Parliamentary Standing Committee
RPwD Act	Rights of Persons with Disabilities Act
S.	Section
Ss.	Sections
SC	Supreme Court
SLP	Special Leave Petition
SP	Superintendent of Police
SoCO	Scene of Crime Officer
TADA	Terrorist and Disruptive Activities (Prevention) Act
UAPA	Unlawful Activities (Prevention) Act
WP	Writ Petition
WPM	Working Procedure Manual

INTRODUCTORY NOTE

On August 31, 2023 and October 25, 2023, Project 39A released two substantive research briefs of the Bharatiya Nyaya Sanhita (BNS) Bill, 2023, the Bharatiya Nagarik Suraksha Sanhita (BNSS) Bill 2023 and the Bharatiya Sakshya Bill (BSB) 2023, which had been proposed as replacement for the Indian Penal Code, 1860 (IPC), the Criminal Procedure Code 1973 (CrPC) and the Indian Evidence Act 1872 (IEA) respectively. The Bills, which had been sent to a Parliamentary Standing Committee (PSC), were withdrawn and reintroduced in Parliament to incorporate some of the PSC's suggestions. On December 21, 2023, the reintroduced bills were passed in Parliament, received Presidential assent on December 25, 2023 and came into force on July 1, 2024 as BNS, BNSS and the Bharatiya Sakshya Adhiniyam (BSA). Project 39A had released a brief on December 14, 2023, analysing the changes that had taken place between the Bills introduced in August 2023 and their final enacted versions. This research brief provides a compiled analysis of the final enacted versions of all three pieces of legislation.

Introduction

Large portions of the BNS, BNSS and BSA are identical or similar to the legislation they propose to replace. However, a few provisions create significant additions to substantive offences, or entail key changes for criminal procedure and evidentiary requirements. These changes have been analysed in this brief, while the remaining have been summarised at the end for the benefit of the reader. The brief also tracks changes between the Bills as introduced in August 2023 with the final enacted legislation.

The proportion of text retained from the IPC, CrPC and the IEA in the new legislation alongside the changes made raises an obvious question. Why is the repeal of these codes and re-enactment of a new substantive and procedural law required when amendments would surely suffice? It is evident there is significant reordering and changes in placement of the provisions but the content of the provisions are to a very large extent a verbatim reproduction of provisions from the IPC, CrPC and IEA. This extensive verbatim retention of provisions does not justify an exercise of repeal and re-enactment. Repeal and re-enactment will unleash widespread administrative and legal confusion in the police and other investigation agencies, the bar, different levels of judiciary and also prisons. It is doubtful whether such widespread consequences can be justified for an exercise that is for the most part only about moving around existing provisions in the IPC, CrPC and IEA.

A widely stated aim of the three pieces of legislation has been to decolonise the criminal legal framework. Given this aim, the choice of amendments across them demand consideration in light of their expansion of police powers, retention of provisions that serve as remnants of our colonial criminal law legacy, and the wider scope of criminalisation in the definitions of substantive offences. Police custody is a well-documented site for torture and other excesses; yet, section (s) 27 of the IEA, which has been long criticised for enabling the culture of

torture and violence in police custody, continues unmodified into the BSA. A shocking proposal is a clause that allows detention in police custody to be authorised beyond the 15-day period provided under the CrPC, and for the entire detention period of 60 or 90 days. For the first time, handcuffing by the police also finds statutory sanction under the BNSS during arrest and production before the Magistrate, despite the Supreme Court having long acknowledged the dehumanisation inherent in it. Other examples of expanded police powers include enabling police officers to detain persons who resist or disregard their instructions while preventing the commission of a cognizable offence.

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. 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.

This brief will provide a deeper legal analysis into key provisions of the three pieces of legislation, where the aforementioned features of these changes recur.

SUMMARY OF CHANGES

I. BNS

The BNS raises serious concerns of expansive criminalisation through vague and unclear language. The use of vague and unclear language has plagued the IPC since its inception and it is instructive that such drafting language continues to be used. The vagueness, effectively, widens the scope of police powers and exacerbates concerns about the arbitrary exercise of such powers. The provisions on 'false and misleading information' and 'acts endangering sovereignty, unity, and integrity of India' are prime examples of this. Curiously, in provisions of the BNS that bring in offences from other existing legislation on terrorism and organised crime, the scope of activities that have been criminalised is wider. Also, the protections envisaged under those legislations (even though those protections were themselves inadequate) have not been incorporated in the BNS or in the BNSS. In provisions like sexual intercourse by deceitful means/promise to marry without intention of fulfilling it, the BNS seems to have worsened the legal position in its attempt to convert the judicial position into a legislative provision. However, there is a provision to make the marital rape exception as applicable to minor wives consistent with the Supreme Court's decisions. While retaining the marital rape exception, the provision makes the exception applicable only for wives who are above 18 years. The inclusion of 'community service' as a punishment is a step towards expanding the range of sentences outside imprisonment. However, its potential as a progressive development remains unclear in the absence of meaningful guidance over the activities that it could cover, and the interests that it is meant to serve.

II. BNSS

Key procedural changes have been introduced in the BNSS. Most of these may be categorised broadly in the following manner. First, amendments that have been introduced possibly to resolve existing conflicts in law. In a worrying development, the provision on remand permits the police to take custody of the accused at any time within the maximum 60- or 90-day period of detention after arrest, addressing the inconsistency in Supreme Court jurisprudence on whether police custody can be only in the initial 15 days after arrest, or even thereafter. Another category is changes to existing provisions which incorporate judicial developments. For instance, under the BNSS, the remission powers of State governments, require the 'concurrence' of the Central government instead of 'consultation' as under the CrPC, which is in line with the present judicial interpretation. Another amendment is the inclusion of audio-video measures 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. The BNSS changes the law to potentially enable custody of an accused person with the *police* for the entirety of the 60- to 90-day period of remand to custody. It also creates provisions for conducting trials in *absentia* in cases involving a proclaimed offender, with diluted safeguards. The 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 violates human dignity under Article 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 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.

III. BSA

Contrary to the numerous changes in the BNSS, the BSA has only two significant changes. 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, subject to the electronic record meeting the requirements of Section 63 BSA (which corresponds to Section 65B IEA). These changes aim to meet the legislation's stated goal of improved reliance on technology while remaining congruent with case-law position on the admissibility of electronic evidence. Admissibility of electronic evidence under the BSA now provides a broader scope of persons who can sign the certificate required for admissibility of such a record.

CHANGES BETWEEN CRIMINAL LAW BILLS AND FINAL ENACTMENTS

On August 11, 2023, the Lok Sabha introduced three new bills (the Bharatiya Nyaya Sanhita Bill 2023, the Bharatiya Nagarik Suraksha Sanhita Bill 2023 and the Bharatiya Sakshya Bill 2023). These bills were introduced to repeal and replace the Indian Penal Code 1860, the Criminal Procedure Code 1973 and the Indian Evidence Act 1872 respectively. On the same day, the Lok Sabha referred the Bills to a Parliamentary Standing Committee for its recommendations, and a report of the Committee was released on November 10, 2023. Thereafter, the bills introduced in August 2023 were withdrawn. In their place, a new set of Bills – the Bharatiya Nyaya (Second) Sanhita 2023, the Bharatiya Nagarik Suraksha (Second) Sanhita 2023 and the Bharatiya Sakshya (Second) Bill 2023 was introduced on December 12, 2023, passed by Lok Sabha and Rajya Sabha on December 20 and 21 respectively, and assented to by the President on December 25, 2023.

The final enacted version of the three laws incorporate some of the changes recommended by the Parliamentary Standing Committee. These changes by the PSC are broadly geared towards clarifying unclear wording/phrases, narrowing vague and imprecise provisions, and resolving inconsistencies between the three laws.

Bharatiya Nyaya Sanhita Bill 2023 and Bharatiya Nyaya Sanhita 2023

SN	Subject	Provision in the IPC	Provision in Bills introduced in August 2023	Final enacted version	Reason for change
1	Definition of imprisonment for life	Section 53 lists 'imprisonment for life' as a sentence that can be imposed	Clause 4(b) of the Bill modified the term to "imprisonment for life, that is to say, imprisonment for remainder of a person's natural life"	Deletes the addition of "that is to say, imprisonment for remainder of a person's natural life"	Given the ambiguity over the potential impact of the addition, the Parliamentary Standing Committee had recommended adding a clarification to Clause 4(b) as follows- "imprisonment for life, which,

					wherever hereinafter specified shall mean imprisonment for remainder of a person's natural life". The Parliament did not accept this suggestion as it was, and instead reverted it to the same language as under Section 53 IPC.
2	Commutation of death sentences and life imprisonment sentences	Sections 54, 55 and 55A of the IPC enable the appropriate government to commute a sentence of death penalty or life imprisonment	Clause 5 of the Bill laid out a process for the commutation of sentences in cases where the death penalty or life imprisonment has been imposed and enabled the appropriate government to commute the punishment to any sentence.	Section 5 enables the appropriate government to commute a sentence of death penalty or life imprisonment into any sentence *in accordance with Section 474 of the BNSS.*	*Clauses 474(a) and (b) of the BNSS Bill set a limit of commuting period to at least seven years of imprisonment for commutations in death penalty and life imprisonment cases by the government,* whereas Clause 5 of the BNS Bill mentions commutation to 'any sentence'. The Committee pointed this discrepancy out and the Sanhita was subsequently modified to rectify the same.
3	Mob lynching	[no corresponding provision]	Clause 101(2) of the Bill created mob lynching as a subcategory for murder. Unlike the sentence	Section 103 (2) of the Sanhita provides the same sentence range for both murder and mob	The PSC had recommended the deletion of the minimum sentence for mob lynching

			range for murder under Clause 101(1), which is either life imprisonment (as the minimum) or death penalty, the sentence range for mob lynching was widened from a minimum of seven years of imprisonment to the death penalty.	lynching, which is life imprisonment (as the minimum) or the death penalty.	(seven years of imprisonment) and to instead make the sentence range congruent with murder. Section 103(2) of the Sanhita's modification from the first version of the Bill reflects this change.
4	Deaths caused by rash or negligent acts	Section 304A punishes deaths caused by rash or negligent acts with an imprisonment period of two years	Clause 104 of the Bill punished deaths caused by rash or negligent acts with seven years of imprisonment, and created an aggravated subcategory of this offence where the accused i) fails to report the offence; ii) escapes the scene of crime, for which the term of sentence is ten years of imprisonment.	Section 106(1) provides a sentence period of five years of imprisonment. Further, Section 106(2) of the Sanhita modifies the provision to state 'escapes without reporting it to a police officer or a Magistrate soon after the incident'.	The wording of Clause 104 of the Bill was unclear whether both requirements (of failing to report, and of escaping the scene of crime) had to be fulfilled to fall under the scope of this offence, or whether one requirement sufficed. The PSC recommended modifications to ensure that an accused who fulfilled only one such condition would not be subjected to this provision. Accordingly, the Sanhita now incorporates both requirements to fulfil the offence.

5	Organised crime and petty organised crime	[no corresponding provision]	Clauses 109 and 110 of the Bill sought to penalise organised crime and petty organised crime. The clauses defined terms such as organised crime syndicate and organised crime. The definition of an organised crime syndicate included those activities conducted by a 'criminal organisation'. Clause 109 also included within its list of offences 'cyber crimes with severe consequences' amongst other offences. Clause 110 (which defines petty organised crime) included within its definition crime that could cause 'general feelings of insecurity among citizens'.	Sections 110 and 112 of the Sanhita penalise organised crime and petty organised crime. Section 110 no longer retains the undefined term 'criminal organisation'. Section 110 modifies the term 'cyber crimes with severe consequences' to 'cyber crime' in the offences listed. Section 112 (petty organised crime) deletes from its purview the phrase 'general feelings of insecurity among citizens'.	The PSC recognised the effort to criminalise organised crime at the level of a central legislation, but recommended deletion of vague language such as 'general feelings of insecurity among citizens'and 'criminal organisation'. The changes incorporated are in line with these recommendations.
6	Terrorist act	[no corresponding provision]	Clause 111 of the Bill sought to penalise terrorist acts and included the use of bombs, dynamites and other explosive substances to cause extensive interference with or destruction to	Section 113 of the BNS (penalising terrorist act) mirrors the definition under the UAPA and includes damage to the monetary stability of India by way of production	The PSC recommended the removal of phrases that caused ambiguity and vagueness in Clause 111 of the Bill in August. Accordingly, some

			critical infrastructure with intention to threaten the unity, integrity and security of India or to intimidate the general public or a section thereof, or to disturb public order. The clause also included within its ambit acts that 'destabilise or destroy the political, economic, or social structures of the country, or create a public emergency or undermine public safety'. Clause 111 also made such terrorist acts leading to death punishable with life imprisonment excluding parole.	or smuggling or circulation of counterfeit currency. Phrases pertaining to the intimidation of the public and disturbing public order have been removed. Life imprisonment excluding parole has been removed as a sentence available for this offence.	of the changes made in the enacted version reflect this by narrowing the scope of the provision from its preceding form in Clause 111 of the Bill in August 2023.

SN	Subject	Provision in the CrPC	Provision in Bills introduced in August 2023	Final enacted version	Reason for change
1	Community service	[no corresponding provision]	The Bharatiya Nyaya Sanhita 2023 introduced 'community service' as a sentence which could be imposed. The Bharatiya Nagarik Suraksha Sanhita Bill 2023 did not provide any provision on how such a sentence could be imposed.	The explanation to Section 23 of the BNSS defines community service as the work that a court may order a convict to perform as a form of punishment that benefits the entire community, for which he shall not be entitled to any remuneration. Magistrates of the First and Second Class are empowered to impose this sentence.	The PSC had recommended enabling Judicial Magistrates of the First and Second Class to impose a sentence of community service as part of societal restitution. Section 23 of the BNSS incorporates this change and makes the addition through an explanation.
2	Use of handcuffs during arrest	[no corresponding provision]	Clause 43 of the Bill enabled a police officer to use handcuffs on an accused person during arrest if such accused person is a 'habitual, repeat' offender who has escaped from custody and who may be accused of offences such as terrorist act, organised crime,	Section 43 of the BNSS enables a police officer to use handcuffs on an accused, both during arrest and while producing the person before the court, if the accused is either a 'habitual, repeat offender' *or* has escaped from custody *or* has committed the offence of organised	The PSC recommended the deletion of economic offences as one that could warrant the use of handcuffs during arrest, and to circumscribe handcuffing powers to select heinous crimes alone.

			economic offences etc.	crime, terrorist act etc.	
3	Immunity for police officer, military personnel in dispersing unlawful assembly	Section 132 requires the sanction of the government to prosecute a police officer or military personnel in relation to acts pertaining to the dispersion of an unlawful assembly	Clause 151 of the Bill retained the requirement of the sanction under the CrPC and additionally required a preliminary investigation before a case could be registered against such officer/military personnel. The clause also required another sanction from the government before the officer/military personnel could be arrested.	Section 151 BNSS removes the requirement for the preliminary investigation and the sanction for arrest, and is hence the same as Section 132 CrPC.	No recommendations were made on Clause 151 of the Bill. Reason for the change is unclear.
4	Detention by police for non-compliance with directions	[no corresponding provision]	Clause 172 of the Bill enabled a police officer to detain any person who does not conform to the officer's directions in preventing any cognizable offence and to release such person, in petty offences, when the 'occasion is past'.	Section 172 of the BNSS retains the power introduced in the Bill but requires the officer to release the detainee within 24 hours in petty offence cases.	The PSC had recommended substituting the phrase 'occasion is past' in the Bill to a specific timeframe with the reason that the specified phrase is open to interpretation and enables a misuse of power.
5	Contents of police report	Section 173 requires a police officer to file a report	Clause 193 retained the details that must form part of the chargesheet.	Section 193 places an additional requirement to specify the sequence	No recommendations were made on Clause 193 of the

		('chargesheet') upon the completion of an investigation to the Magistrate. The chargesheet must include details such as name of the accused, nature of the information available etc.		of custody in case of electronic devices.	Bill. Reason for the change is unclear.
6	Proceedings via audio-visual means	Section 243 lays down the procedure for the defence to adduce evidence in trial, and to call upon witnesses for the defence's case.	Clause 266 of the Bill retained the same process laid down under Section 243 of the CrPC.	Section 266 of the BNSS additionally enables the examination of witnesses under this section to be conducted by audio-video electronic means at a designated place notified by the State Government.	The PSC had recommended enabling the examination of witnesses under this provision through audio-video electronic means in line with the BNSS' larger objective of relying further on audio-video electronic means. The PSC further recommended such examination to take place in spots designated by the State Government to prevent tampering of evidence and tutoring of witnesses.
		[no corresponding provision]	Clause 532 of the Bill enabled conducting various	Section 530 of the BNSS limits the proceedings which	No recommendations were made on

			proceedings through electronic mode, including summons, warrant, issuance, service, holding of inquiry, examination of complainant and witnesses, trials, recording of evidence, and all appellate court proceedings.	can be conducted via electronic mode to summons, warrant, issuance, service, examination of complainant and witnesses, recording of evidence in inquiries and trials and all appellate court proceedings.	Clause 532 of the Bill. Reason for the change is unclear.
7	Judgment	Section 234 required a Judge to give judgment post completion of arguments and points of law.	Clause 258 of the Bill set a time limit for delivering judgment to 30 days, and an extension for 60 days.	Section 258 of the BNSS limits the extension from 60 days to 45 days and only if the judge provides reasons for the same.	No recommendations were made on Clause 258 of the Bill. Reason for the change is unclear.
8	Power to try summarily	Section 260 lays out the cases that can be tried summarily, and the process for such trials. Such trials may be conducted for offences which are punishable with imprisonment of less than two years.	Clause 283 of the Bill corresponded to Section 260 of the CrPC but expanded its ambit to offences punishable with imprisonment of less than three years.	Section 283 BNSS retains the provisions of Clause 283 of the Bill and additionally prohibits against the decision of a Magistrate to try a case in a summary way.	No recommendations were made on Clause 283 of the Bill. Reason for the change is unclear.
9	Evidence of public servants	[no corresponding provision]	Clause 336 of the Bill exempted certain categories of persons (public servants, forensic experts,	Section 336 BNSS removes investigating officers from the purview of this provision and requires them to	The PSC had recommended the removal of 'investigating officer' from the purview of this

			investigating officer, medical officers) from providing evidence in court if such person has retired, transferred or if securing their presence is likely to cause delay.	provide evidence in a trial unless the original officer who conducted such investigation has died.	provision given their centrality to a trial.
10	Competence to stand trial	Section 329 of the CrPC lays down the procedure for Court where the accused is a person of unsound mind	Section 367 of the Bill corresponded to Section 329 CrPC and replaced the term 'unsound mind' with 'mental illness'.	Section 367 BNSS removes the term 'mental illness' and retains the phrase 'person of unsound mind'. Additionally, it also brings in the phrase 'intellectual disability'.	The PSC had suggested that the word 'mental illness' was of too wide an import. The revised Bills had replaced the term 'mental illness' to its preceding term 'unsoundness of mind'.
11	Commutation of sentences	Section 433 CrPC enables the appropriate government to commute sentences without the consent of the person. A death sentence can be commuted to any other sentence; life imprisonment can be converted to a term of imprisonment not exceeding 14 years or for fine; a sentence of	Clause 475 of the Bill corresponded to this provision but circumscribed the scope of commuting sentences. A death sentence could be commuted to life imprisonment; a life imprisonment sentence could be commuted to seven years of imprisonment; imprisonment for seven to ten years could be commuted to three years; and a sentence of imprisonment for	Section 474 BNSS modifies the Bill and enables commuting imprisonment for seven or more years to imprisonment for not less than three years; and a sentence of imprisonment for less than seven years to fine.	The PSC's changes on Clause 475 have not been reflected in the final enacted version. Reason for the change is unclear.

		rigorous imprisonment to simple imprisonment or for fine; and a sentence of simple imprisonment to fine alone.	upto three years to fine.		
12	Grant of bail for non-bailable offences	Section 437 CrPC lays down the procedure for bail in non-bailable offences. The provision relaxes the conditions for bail for persons i) accused of offences punishable with death penalty or life imprisonment, or ii) persons with prior convictions (for offences punishable upto seven years) accused of offences, if such person is below 16 years of age or is infirm.	Clause 482 of the Bill corresponded to Section 437 CrPC. Clause 482 relaxed the conditions for bail for the same category of persons as provided for in Section 437 (1)(i) and (ii) but increased the age from 16 years to 18 years.	Section 480 BNSS changes the language from 18 years to 'a child'. Additionally, the proviso to the section clarifies that the accused cannot be denied bail merely because the police sought to extend custody beyond the first 15 days.	The PSC had expressed concern over police misuse of powers if custody of the accused was granted at any point in the first 40/60 days of detention. The PSC had hence recommended that seeking of custody in this time period should not factor into the denial of bail.

SN	Subject	Provision in the IEA	Provision in Bills introduced in August 2023	Final enacted version	Reason for change
1	Admissibility of electronic records	[no corresponding provision]	Clause 61 of the Bill made electronic records admissible per se, while the requirement to check for the authenticity of such records (otherwise provided for under Section 65B IEA/Clause 63 of the Bill) remained ambiguous.	Section 61 of the BSA subjects the admissibility of all electronic records to the requirements of Section 62 BSA (which corresponds to Section 65B IEA).	Reason for the change is unclear.

PART I – BHARATIYA NYAYA SANHITA 2023

Sexual Offences

Section 63, 64, 70, 74, 75, 76, 77, 78, 79

While the substance of the provisions dealing with sexual offences under the BNS are largely similar to the IPC, a few changes have been brought about[1]. BNS introduces a new chapter titled 'Offences Against Woman and Child' to deal with sexual offences. Similar offences under the IPC are part of the chapter on 'Offences Affecting the Human Body'.[2] The implication of such restructuring is that the BNS does not recognise sexual offences unless they are committed against a woman.[3] The BNS does not provide for a separate offence to cover rape of men and transgender persons. Additionally, the Sanhita has introduced minor changes to provisions relating to rape of women under the age of 18. It renumbers existing rape provisions and attempts to harmonise the treatment of gang rape of minor women with the POCSO.

I. Gendered provisions

'Rape', even in the IPC, is a gendered provision, where the offender can only be a man and the victim, a woman.[4] The only provision across statutes[5] which penalises rape of an adult man is s. 377 of the IPC,[6] which does not find a place in the BNS.[7] It follows that BNS fails to penalise sexual violence against men.

The BNS categorises gender into three classes – man, woman, and transgender.[8] Transgender here includes a transwoman irrespective of whether they have gone through sex reassignment surgery etc, and any person who self identifies as a woman but the gender assigned at their birth is not female. This category of persons is excluded from the purview of 'woman' and

[1] Annotated Comparison of the IPC with the BNS.
[2] Sexual offences, offences causing miscarriage etc, assault and criminal force against women, some offences under kidnapping and abduction which are all presently under Chapter XVI, IPC (Offences Affecting the Human Body), and offences relating to marriage presently under Chapter XX, IPC, have been included in this chapter in BNS. Offences of disclosing identity of victim in certain cases (s. 228A, Chapter XI IPC) and words, gestures, intended to insult the modesty of women (s. 509, Chapter XXII IPC).
[3] Woman includes both an adult i.e. woman over the age of 18, as well as a female child below the age of 18.
[4] Justice JS Verma, 'The Report of the Committee on Amendments to Criminal Law', (January 23, 2013), last accessed on August 30, 2023, recommended that definition of rape be expanded to be neutral to the gender of the victim.
[5] Sexual assault of male children is penalised under the POCSO.
[6] *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1: the Supreme Court read down s. 377, IPC as violative of Arts. 14, 15, 19, and 21 of the Constitution to the extent that it penalised consensual sexual acts of adults. Post this decision, s. 377, IPC is read to penalise only acts which are non-consensual.
[7] Note that even though this provision itself doesn't find a place in the BNS, the term 'unnatural lust' is mentioned under s. 38(d), BNS: 'When right to private defence extends to causing death', and s. 140(4): 'Kidnapping child for ransom, murder etc'.
[8] S. 2(10) BNS, 'Gender'; in the explanation, s. 2(k) of the Transgender Persons Act, 2019 defines 'transgender person' as '*a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone sex reassignment surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta*'.

hence sexual assault against them is not recognised as rape.[9] Interestingly, while in the definition clause "transgender" has been defined, the Sanhita does not use the term transgender in any other provision, thus the purpose of inserting the definition is unclear. It appears that the definition was added to the BNS only for the purpose of being consistent with the Trangender Persons Act of 2019 in terms of recognising a third gender. This inclusion comes without any changes in any gender based offences in order to extend the benefit of these sections to transgender persons.

As there is no provision similar to s. 377 IPC in the BNS, the Sanhita also does not penalise sexual assault committed on a transgender person.[10] Similar to the IPC, sexual assault committed by anyone other than a man, including transgender persons, is not an offence under the BNS.[11]

Notably, the statement of objects and reasons of the BNS mentions that 'various offences have been made gender neutral'. However, this does not apply to the offence of rape. In fact, only two provisions under the category of 'criminal force and assault against woman' have been made gender neutral qua the offender.[12] The victim in all these offences (as evident from the categorisation) remains a woman, but the offences of assault or use of criminal force with the intent to disrobe (s. 76 BNS) and voyeurism (s. 77 BNS) are to be penalised irrespective of whether committed by a man or a woman.[13] Sexual harassment (s. 75 BNS) and stalking (s. 78 BNS) continue to be an offence only when committed by a man. The Justice JS Verma Committee constituted to propose amendments to the rape law in the aftermath of the gang rape and murder of a young woman in New Delhi in December 2012 recommended making these offences (disrobing, voyeurism, and stalking) gender neutral qua both victim and offender.[14] The 2013 amendments to the IPC however, defined these offences only when committed by a man and the provisions of the BNS retain that approach.

II. Gang rape of women under the age of 18

S. 70(2) introduces a new offence of gang rape of a woman under 18 years of age, introducing two changes worth noting. *First*, s. 70(2) merges s. 376DA and s. 376DB IPC and removes age-based qualifiers[15] to consider gang rape of a minor woman as an aggravated offence. Under the Sanhita, gang rape of *any* minor woman is an aggravated offence, which is also the position under POCSO.[16] *Second*, this new offence proposes that gang rape of all minor women be punishable with death or with whole life sentence. The IPC provides this

[9] Jigyasa Mishra, 'Raped, Mocked By Police For Seeking Justice: India's Rape Laws Do Not Cover Transwomen', (*Article-14*, 7 July 2022), last accessed on August 24, 2023.
[10] Note that offences against transgendered persons including 'sexual abuse' are penalised under s. 18 of the Transgender Persons Act, 2019, and are punishable with a term of imprisonment of at least 6 months but which may extend to 2 years.
[11] Note that such sexual assault may be penalised as hurt/grievous hurt.
[12] These sections seek to replace s. 354, s. 354A to 354D, and s. 509, IPC.
[13] BNS seeks to replace the words 'A man' with 'whoever' for both these offences.
[14] Justice JS Verma, 'The Report of the Committee on Amendments to Criminal Law', (23 January 2013), pg. 130, last accessed on August 30, 2023.
[15] Under the IPC, s. 376DA penalises gang rape of a woman under the age of 16 while s. 376DB penalises the gang rape of a woman under the age of 12.
[16] S. 5(6), POCSO.

sentencing option only for the gang rape of a woman under 12 years under s. 376DB. The BNS does not prescribe the death penalty for gang rape of adult women.

The minimum sentence for gang rape under the Sanhita, i.e, whole life sentence, is also greater than the minimum sentence under POCSO, i.e, rigorous imprisonment for 20 years. It must be noted that whole life sentence is a possible punishment for gang rape of minors under all three texts.

Writ petitions challenging the constitutionality of ss. 376DA and 376DB are currently pending before the Supreme Court.[17] These provisions provide for a whole life sentence as the mandatory and mandatory minimum sentence respectively. The constitutionality challenge is based on the lack of judicial discretion to impose a lesser punishment. Such discretion would have enabled the court to take into account a convict's personal circumstances and their probability to reform and rehabilitate.

While the fate of these constitutional challenges is uncertain, s. 70(2) of the BNS suffers the same issue as s. 376 DB, wherein both the prescribed sentences preclude the possibility of the convict ever being released from prison. This negates the need to consider the probability of reform and denies them the opportunity for rehabilitation. If 'life imprisonment that shall mean imprisonment until the remainder of one's natural life' under the Sanhita is understood to exclude powers of remission or early release under ss. 475, 476 of BNSS, the constitutional concerns around ss. 376DA and 376DB IPC will extend to s. 70(2) of BNS as well.

III. Age of consent for married women

Another significant change is that the age of consent for a married woman under the definition of rape (s. 63 BNS/ s. 375 IPC) has been increased from 15 to 18 years. Exception 2 to s. 375 IPC provides that sexual intercourse between a man and his own wife, wife not being under the age of 15, is not rape. The change in age of consent seeks to give legislative effect to the Supreme Court's judgment in *Independent Thought v. Union of India*,[18] where the marital rape exception was read down to the extent that it allowed sexual intercourse between a man and his minor wife over the age of 15 years. S. 63 of the BNS retains the marital rape exception, provided that the wife is over the age of 18.

IV. Colonial and archaic language/provisions

The offence of 'word, gesture, or act intended to insult the modesty of a woman' (s. 509 IPC) has been brought under the category of Assault and Criminal Force against Women as s. 79 in the BNS. The provision states that '*whoever, intending to insult the modesty of any woman, utters any words, makes any sound or gesture, or exhibits any object <u>in any form</u>, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such*

[17] *Nikhil Shivaji Golait v. State of Maharashtra* WP Crl 184 of 2022; *Mahendra Vishwanath Kawchale v. Union of India* WP Crl 314 of 2022.
[18] *Independent Thought v. Union of India* (2017) 10 SCC 800.

woman, or intrudes upon the privacy of such woman'. The underlined text has been introduced presumably to include any display in electronic form.

Although the purpose of these new Acts was, *inter alia,* to remove colonial and archaic terms, the language of 'modesty of women' has been retained in s. 79 as well as in s. 74 which punishes 'assault or use of criminal force to woman with intent to outrage her modesty'. It is pertinent to note that the Justice JS Verma Committee Report recommended that non-penetrative sexual assault be penalised under s. 354 IPC without reference to 'modesty of women' as the phrase was deemed inappropriate.

Sexual Intercourse by Employing Deceitful Means

Section 69

In s. 69, the BNS criminalises sexual intercourse that does not constitute rape. This includes sexual intercourse based on deceitful means or on a promise to marry a woman without having any intention to fulfil the same. In the explanation to the provision, 'deceitful means' is said to include '*the false promise of employment or promotion, inducement or marrying after suppressing identity'*. Notably, this provision does not prescribe what constitutes sexual intercourse. The definition of "rape" under s. 63 encompasses a wide range of penetrative sexual acts; however, the lack of definition of "sexual intercourse" is vague and leaves room for the judiciary to decide whether sexual acts other than peno-vaginal penetration are included under the ambit of sexual intercourse.

Sexual intercourse based on false promise to marry (where the promiser had no intention of going through with such a promise at the outset) has for long been criminalised as rape in India through judicial pronouncements. Such cases have been treated by the judicary as 'rape' under s. 375, IPC. This interpretation relies on the definition of 'consent' under s. 90, IPC, as per which consent given under misconception of fact, such as a false promise to marry, is not consent. Not delivering on the promise vitiates consent, leading the sexual intercourse to be interpreted as rape. S. 90 has two elements. *First*, consent of the woman should be based on a misconception of a fact. *Second*, the offender should know or have reason to believe that the consent was given under a misconception. S. 69, BNS impacts both these aspects. Knowledge on part of the offender that the sexual intercourse was in fact based on a promise, which was a relevant consideration in the erstwhile jurisprudence, seems to be irrelevant here. In addition, s. 69 of the BNS discards the consent of women. This means that irrespective of whether the promise of employment, promotion or marriage had a bearing on the consent of the woman to sexual intercourse, if such promise is established to be false, the sexual intercourse can be punished under s. 69.[19]

I. Judicial interpretation of false promise to marry as rape and continuing concerns

After various conflicting High Court judgments on the applicability of s. 90, IPC to rape under false promise to marry,[20] the position was clarified by the Supreme Court in *Uday v. State of Karnataka* (2003).[21] The Court held that whether false promise to marry amounts to rape must be decided on a case-by-case basis, depending on whether (a) consent was taken

[19] Neetika Vishwanath, 'Controlling women's sexual autonomy' *(The Hindu,* 31 August 2023*)*, last accessed on August 31, 2023.

[20] In some decisions such as *Jayanti Rani Panda v. West Bengal* 1983 SCC OnLine Cal 98 and *Hari Majhi v. West Bengal* 1989 SCC OnLine Cal 255 it was observed that a joint reading of ss. 90 and 375, IPC provides that sexual intercourse under false promise to marry can be deemed rape (conviction was not upheld in either of these cases). In others, this interpretation has been rejected, such as *Mir Wali Mohammad v. Bihar* 1990 SCC OnLine Pat 16 and *Sarimoni Mahto v. Amulya Mahto* 2002 SCC OnLine Jhar 373.

[21] *Uday v. State of Karnataka* (2003) 4 SCC 46.

under a false promise of marriage with no intention of being fulfilled, and (b) the alleged offender believed that consent was given on the basis of the false promise. Since then, the Supreme Court, in cases such as *Deelip Singh v. State of Bihar* (2005)[22], *Deepak Gulati v. State of Haryana* (2013)[23], and *Naim Ahamed v. State (NCT of Delhi)* (2023)[24] has added another dimension to this analysis: whether consent was under a false promise from the very beginning, or whether a promise, genuinely made, *later* became false for any reason. Simply put, the Supreme Court has held that sexual intercourse pursuant to a false promise to marry is rape but failing to fulfil a *genuine* promise to marry is not.[25]

Determining whether a promise is genuine or whether there was 'intent to marry' has proven challenging, and a critique of this jurisprudence has been that the courts have enforced social hierarchies, including caste.[26] In cases where the marriage was deemed socially unacceptable on account of differences of religion, caste, or class, courts have acquitted the accused, assuming that the women knew such a promise was not likely to be fulfilled. S. 69 retains the language of *intent* without providing clarification on how this is to be understood, and as such, the above critique of this legal position may still be valid.

II. Undermining the sexual autonomy of women

In addition to enforcing societal norms of what an acceptable relationship is, this provision also poses the risk of being used to discourage inter-caste/faith and other socially stigmatised relationships.

The provision criminalises sexual intercourse by 'deceitful means' which includes 'marrying after suppressing identity.' This could mean the concealment of any part of a person's identity, including gender, faith, caste and religion. Inter-faith and inter-caste relationships are often accompanied by false complaints of kidnapping or rape filed by the families of a couple. Given this context, this provision further enables families and the police to charge men.[27] Further, the approach embedded in s. 69 infantalises women, and sees women inevitably as victims who can be manipulated into having sexual intercourse and need the protection of criminal law. The approach also stems from an assumption that women consent to sexual relations only on the promise of marriage, or in return for material benefits, implying that women cannot enter into a sexual relationship of their free will.

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[22] *Deelip Singh v. State of Bihar* (2005) 1 SCC 88.
[23] *Deepak Gulati v. State of Haryana* (2013) 7 SCC 675.
[24] *Naim Ahamed v. State (NCT of Delhi)* (2023) SCC Online SC 89.
[25] *Pramod Suryabhan Pawar v. State of Maharashtra* (2019) 9 SCC 608.
[26] Arushi Garg, Consent, Conjugality and Crime: Hegemonic Constructions of Rape Law in India, *Social & Legal Studies,* Volume 28, Issue 6, 2019, pg. 737. See also Nikita Sonawane, Rewriting Uday v. State of Karnataka: An Anti-Caste Reckoning of Consent in 'Promise to Marry' Cases (2023).
[27] Does India have a problem with false rape claims? *BBC News* (8 February 2017) accessed 31st October 2024.

III. Gender neutrality of offender

S. 69 is gender neutral so far as the accused is considered, as it uses the neutral term 'whoever' to describe an offender. Thus, a woman having sexual intercourse with another woman by making a false promise of employment or promotion could be punished under this provision.

IV. Overlap between s. 68 and s. 69

Cases of sexual intercourse by deceitful means under s. 69 may be similar to cases under s. 68 of the BNS, which criminalises the abuse of a fiduciary relationship or position to seduce a woman under one's charge or custody, into having sexual intercourse.[28] Neither s. 68 nor s. 69 amount to rape. The difference between the two is that the latter makes sexual intercourse an offence when 'deceitful means' are employed, while s. 68 does so when a fiduciary relationship is exploited to seduce a woman. In practice, there is likely to be significant overlap between these provisions. Notably, the punishment under these sections is different, as offences under s. 68 BNS / s. 376C IPC are punishable with imprisonment of 5 years[29] to 10 years; while convicts under s. 69 can be punished for up to 10 years of imprisonment.

[28] S. 376C, IPC.
[29] S. 68, BNS and s. 376C, IPC both prescribe a punishment of 'rigorous imprisonment of either description'.

Mob Lynching

S. 103(2) and s. 117(4) of the BNS introduce new provisions to penalise the 'heinous'[30] crime of mob lynching. Without specifically using the term 'mob lynching', special categories have been created within the offence of murder and grievous hurt, to address the said offence being committed by a group of five or more persons motivated by the social profile of the victim, specifically their '*race, caste or community, sex, place of birth, language, personal belief and any other ground'*. The punishment prescribed for this special category created within the offences of murder and grievous hurt is the same as that for murder and grievous Hurt simpliciter, respectively.

I. Background

The inclusion of special provisions for mob lynching appears to be a step in the direction recommended by the Supreme Court in *Tehseen S. Poonawalla v. Union of India*.[31] Recognising the growing problem of mob vigilantism and its implications on the rule of law, the Supreme Court urged Parliament to create a special law against mob lynching and provide adequate punishment for the same. The Court also introduced certain preventive, remedial and punitive measures, including guidelines for effective investigation and trial, as well as special provisions regarding monetary compensation to victims of mob lynching. These other guidelines, however, have not been included in the BNS.

In the BNS Bill (August), Clause 101(2), which penalised murder caused by five or more persons acting in concert, prescribed a minimum punishment of imprisonment for 7 years. This resulted in severe criticism of the proposed provision which, rather than presenting mob lynching as an aggravated form of murder, enabled courts to impose a much less severe sentence than that in murder (where minimum punishment is life imprisonment). In case of grievous hurt caused by five or more persons, the phrase 'acting in concert' was inexplicably omitted, creating confusion about legislative intent. Both these issues were rectified in the enacted BNS.

II. Observation on identified grounds

Ss. 103(2) and 117(4) of the BNS do not include religion as one of the social indicators/markers. In *Tehseen S. Poonawalla (supra)*, the Supreme Court recognised religion as a prominent factor in instances of mob lynching. Further, anti-mob lynching laws sought to be introduced by a few states,[32] also recognised religion as a motivating factor for the offence of lynching.

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[30] PIB Delhi, 'Union Home Minister and Minister of Cooperation, Shri Amit Shah introduces the Bhartiya Nyaya Sanhita Bill 2023, the Bharatiya Nagarik Suraksha Sanhita Bill, 2023 and the Bharatiya Sakshya Bill, 2023 in the Lok Sabha, today' (Press India Bureau, 11 August 2023), last accessed on August 30, 2023.

[31] *Tehseen S. Poonawalla v. Union of India* AIR (2018) SC 3354.

[32] Manipur Protection from Mob Violence Ordinance, 2018; West Bengal (Prevention of Lynching) Bill, 2019; Jharkhand (Mob Violence and Mob Lynching Prevention) Bill, 2021; Rajasthan Protection from Lynching Bill, 2019.

Instead, these provisions in the BNS employ the phrase 'personal belief or any similar other ground', without any definitional clarity. While it is possible to interpret the scope of this phrase broadly to include religion within its ambit,[33] the absence of an explicit mention of religion in the provisions sits rather oddly. This is particularly so considering religion continues to be mentioned in other provisions of the BNS, such as s. 196 which criminalises enmity between groups on the grounds of 'religion, race, place of birth, residence, language, caste or community or any other ground', and Chapter XVI which deals with offences relating to religion. Further, the phrase 'any other similar ground' has also not been qualified and creates an ambiguity on whether it relates to the social profile of the victim or could extend to other reasons as well.

III. Unclear legislative intent

Interestingly, though both these provisions use the term 'acting in concert' to determine the involvement of persons in the offence, the implication of this phrase and whether it creates a common intention for murder is unclear. This is because these are not deeming provisions, unlike the provision for gang rape (s. 70) where the persons involved have been deemed to have committed the offence of rape. Instead, it appears that for s. 103(2) or s. 117(4) as the case may be, 'five or more persons acting in concert' should first be found guilty of murder or voluntarily causing grievous hurt.

Therefore, it appears that the BNS only provides punishment for murder or grievous hurt involving a special fact situation or a special category of murder and does not create a separate offence. Additionally, there is no difference in the punishment provided for this special category of offence and the offence of grievous hurt or murder simpliciter. Therefore, there appears to be no difference in the treatment of grievous hurt/murder and grievous hurt/ murder as a result of mob lynching. Thus, there are questions about the legislative intent and the utility of introducing this separate category of offence.

[33] *S.R. Bommai v. Union of India* (1994) 3 SCC 1.

Punishment for Murder and Attempt to Murder by Life-Convicts

Section 104 and Section 109(2)

S. 104 and s. 109(2) of the BNS provide the punishment for the offence of murder and attempt to murder (if hurt is caused), respectively, committed by prisoners undergoing the sentence of life imprisonment (life-convict). Both sections prescribe death penalty or a whole life sentence as possible punishments. This part discusses issues with the mandatory minimum of a whole life sentence.

I. Background

S. 104 seeks to replace s. 303, IPC on punishment for murder by life-convict, which was declared unconstitutional by the Supreme Court in *Mithu v. State of Punjab.*[34] S. 303 prescribed mandatory death penalty for murder committed by a life-convict. The Court held that mandatory imposition of a death sentence restricts judicial consideration of factors relating to the crime and the criminal in individual cases. Further, it creates an unreasonable classification between convicts serving sentences other than life imprisonment and life-convicts. The section was held to be arbitrary and unreasonable as it disregarded the nature of the previous offence for which the sentence of life imprisonment was imposed while imposing the death penalty for a subsequent offence of murder.

S. 109 replaces s. 307 (2) IPC, which currently prescribes a mandatory death sentence for attempt to murder by a life-convict. It is important to note that despite the ruling in *Mithu* on s. 303 IPC, this section is still in force.

II. Mandatory minimum of whole life sentence restricts judicial discretion and dismisses reform

Ss. 104 and 109(2) seek to address the issues raised in *Mithu* by introducing whole life sentence as an alternative to the death penalty. The introduction of a mandatory minimum of a whole life sentence restricts judicial discretion to impose a sentence of life imprisonment (with the possibility of remission), depending on individual factors such as the culpability of the convict or their probability of reform.[35] A whole life sentence extinguishes a convict's hope of being released from prison and their reintegration into society. Similar to the death penalty, a statutorily mandated whole life sentence renders meaningless the penological goals of reform and rehabilitation.[36] It is pertinent to note that whole life sentences as

[34] *Mithu v. State of Punjab* (1983) 2 SCC 277.

[35] In *Union of India v. V. Sriharan* (2016) 7 SCC 191, by a 3:2 majority, the Constitution Bench of the Supreme Court held that in offences punishable by death, constitutional courts (i.e. the Supreme Court and High Courts) can restrict the State's powers of premature release or remission of sentence under the CrPC. Such powers may be exercised to restrict the consideration of premature release either for a fixed term or for the whole life of the convict. Such power to restrict remission has not been extended to trial courts.

[36] A similar provision of mandatory minimum of whole life sentence has been introduced for repeat sex offenders under s. 71 BNS, and for trafficking of a child below the age of 18 years on more than one occasion under s. 143(6) BNS and trafficking of any person by a public servant or police officer under s. 143(7) BNS.

prescribed under ss. 376DA and 376DB of the IPC are currently under challenge before the Supreme Court.[37]

III. No valid basis for prescribing aggravated punishments for life-convicts

Ss. 104 and 109(2) of the BNS do not resolve the issues regarding the arbitrary and unreasonable classification of persons serving life imprisonment as highlighted in *Mithu*, which are as follows:

1. No reasonable basis for drawing a distinction between persons who commit murder while serving life imprisonment from those serving fixed term sentences or those who have already undergone such sentences.
2. As with the IPC, the BNS contains life imprisonment as a punishment for a wide range of non-homicidal offences. Therefore, the motive and circumstances of the previous offence for which life imprisonment was prescribed as the punishment, may have no relation to the subsequent offence of murder, for which a mandatory minimum of a whole life sentence can be imposed.
3. There was no data to indicate the frequency of murders by life convicts in order to justify the imposition of a mandatory minimum of whole life sentence.

Without resolving these issues as explained in *Mithu*, the constitutional validity of these sections would be suspect.

IV. Section 109(2) collapses the distinction between the offence of attempt to murder and murder

S. 109(2) prescribes the punishment of death or whole life sentence in case of attempt to murder by a life convict, where hurt is caused. This raises serious concerns of arbitrariness as it erases the distinction between the offence of *attempt to murder* (if hurt is caused) and *murder* committed by a life-convict, by prescribing the same punishment. Further, the death penalty as a possible punishment for attempt to murder where hurt is caused by life-convicts has no reasonable basis and appears disproportionate. This may lead to a situation where a convict serving life imprisonment for a non-homicidal offence such as forgery, if subsequently convicted for attempt to murder resulting in simple hurt, may be sentenced to death.

[37] *Mahendra Vishwanath Kawchale v. Union of India*, WP (Crl.) 314 of 2022; *Nikhil Shivaji Golait v. State of Maharashtra*, WP (Crl.) 184 of 2022.

Death by Negligence

S. 106(1), BNS replaces s. 304A, IPC, which deals with causing death through a rash or negligent act, not amounting to culpable homicide. However, s. 106(1) enhances the maximum punishment for this offence, from two years as under s.304A to five years, and additionally mandates imposition of a fine. The reason for these changes is not clear from the Statement of Object and Reasons of the Sanhita, however, one reason for the enhancement could be repeated observations made by the Supreme Court regarding the inadequacy of punishment under s. 304A, in the context of increased vehicular accidents.[38] Further, s. 106 (2) introduces an aggravated form of death by negligence with a maximum punishment of 10 years for persons who escape without reporting the incident to a police officer or magistrate. This aggravated form of the offence may have been introduced to address hit-and-run accident cases, to ensure that the accident is immediately reported and the victims receive timely medical support.[39] The punishment for this aggravating offence is imprisonment up to 10 years and a fine.

In the BNS Bill (August), the provision read 'escape from the scene of the incident or fail to report the incident to a Police officer or Magistrate soon after the incident'. This was subjected to criticism as it was unclear whether both requirements, i.e. 'escaping from the scene of the offence' and 'failure to report to the police officer or magistrate', needed to be fulfilled. There may be situations where a person can fulfil one of the requirements only by violating the other. For example, in the case of a vehicular accident where the person does not have a mobile phone, reporting to the police or magistrate may not be possible without leaving the scene of the incident. Similarly, in accident cases, a person might be compelled to leave the scene of offence due to apprehension of assault by bystanders. Such instances would have fallen within the purview of this clause, despite there being no intention to disregard the law.

The issues with this aggravated offence however, are not entirely cured by this change in language. It should be kept in mind that the provision is not limited to instances of motor vehicle accidents, but to all cases of death by negligence and the requirement to report the incident to the police or the magistrate may be unmet as the person may be unaware of their role in the death of the victim or whether their act was rash or negligent. There is little guidance on what 'escape' in the context of this provision may mean, and therefore, it may be interpreted broadly and include all instances where the person who committed the act (irrespective of reasons for absence) is unavailable at the place where the incident occurred.

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[38] *See, State of Punjab v. Dil Bahadur* (2023) SCC OnLine SC 348; *Abdul Sharif v. State of Haryana* (2016) 15 SCC 204; *State of Punjab v. Saurabh Bakshi* (2015) 5 SCC 182.

[39] S. 2(12A) of Motor Vehicles Act, 1988, introduced in 2019, defines the term 'golden hour' as the hour-long period following the traumatic injury during which prompt medical care may avert the possibility of death. As per s. 162 in Chapter XI (w.e.f April 1, 2022), insurance companies shall provide schemes for treatment of road accident victims during the golden hour.

Finally, the requirement to mandate reporting of the incident to the police or the magistrate may compel a person to be a witness against themselves and violate their right against self-incrimination under Art. 20(3) of the Constitution. In the first version of the BNS, which had been introduced in Lok Sabha in August 2023, the corresponding provision had limited the mandate to report the incident to the police/magistrate for cases of vehicular accidents alone. Section 106(1) BNS ostensibly seeks to cure a defect (of placing such a requirement on vehicular accidents alone) but does so not by removing such a requirement altogether, but instead, by expanding its scope to *all* death-by-negligence cases. Through this expansion, the provision has now widened the scope to compel a person to be a witness against themselves.

Previously, s. 304A IPC had covered deaths involving medical negligence. S. 106(1) BNS addresses the same, and adds that such acts by a registered medical practitioner while performing a medical procedure shall be punishable with imprisonment for upto two years and fine. In this context, it is important to note that the Supreme Court has also taken note of 'indiscriminate prosecution' of medical professionals. To resolve this issue, the Court laid out guidelines which had to be followed to initiate criminal proceedings for death by negligent acts by a medical professional. These include i) requirement of prima facie evidence by complainant through a credible opinion from another competent doctor as to the negligence of the act, ii) onus on the investigating officer to obtain an independent and competent opinion from a medical officer in government service, qualified in the same branch of medicine, and iii) arrest of the doctor only where such arrest is necessary for further investigation.[40]

40 *Jacob Mathew v. State of Punjab* (2005) 6 SCC 1.

Organised crime and petty organised crime

Ss. 111 and 112 BNS have, for the first time, introduced 'organised crime' as an offence under a central law, which would be applicable throughout the country. Prior to this, 'organised crime' was penalised in some states through state legislations.[41] Organised crime under s. 111 refers to a continuing unlawful activity carried out by (a) any person or groups of persons acting in concert, either singly or jointly, or as a member of or on behalf of an organised crime syndicate, (b) by the use of violence, threat of violence, intimidation, coercion, or other unlawful means (c) to gain direct or indirect material benefit (including financial benefit). S. 111 provides an illustrative list of unlawful activities that it covers, which include (i) kidnapping (ii) robbery (iii) vehicle theft (iv) extortion (v) land grabbing (vi) contract killing (vii) economic offences (viii) cyber-crimes (ix) trafficking in people, drugs, illicit good or services and weapons and (x) human trafficking for prostitution or ransom.

S. 112 penalises common forms of organised crime by criminal groups or gangs that cause general feelings of insecurity among citizens, as 'petty organised crime'. It also provides an illustrative list of 15 unlawful activities, including various forms of theft, procuring money in an unlawful manner in a public transport system, illegal selling of tickets, and selling of public examination question papers. This section compares s. 111 and s. 112 of the BNS with provisions of the existing state legislations on organised crime and highlights the issues of arbitrariness and the vague scope of these provisions.

I. Background

As per the statement of objects and reasons of the BNS Bill (as introduced in August 2023), ss. 111 and 112 aim to effectively deal with the issue of organised crime in the country and to deter the commission of such activities. While s. 111 borrows heavily from the existing state legislations on organised crime as described below, s. 112 creates a separate category of 'petty organised crime', distinct from 'organised crime', for the first time.

II. Comparison with existing organised crime legislations in India

S. 111 of the BNS in relation to 'organised crime' borrows heavily from the Maharashtra Control of Organised Crime Act (MCOCA), which has been extended to New Delhi, and the Gujarat Control of Organised Crime Act (GujCOCA). Andhra Pradesh, Arunachal Pradesh, Karnataka, Telangana, and Uttar Pradesh have acts which are identical to MCOCA and GujCOCA. Further, Haryana and Rajasthan have introduced similar bills on organised crimes. It is important to note that the Supreme Court and the Bombay High Court have upheld the constitutional validity of several provisions in these statutes.[42]

[41] For example, Andhra Pradesh Control of Organised Crime Act, 2001; Arunachal Pradesh Control of Organised Crime Act, 2002; Telangana Control of Organised Crime Act, 2001; Gujarat Control of Organised Crime Act, 2015; Karnataka Control of Organised Crime Act, 2000; Maharashtra Control of Organised Crime Act, 1999; Uttar Pradesh Control of Organised Crime Act, 2017.

[42] *See, State of Maharashtra v. Bharat Shanti Lal Shah & Ors (*2008) 13 SCC 5.

Table 4 compares various definitions under the BNS, MCOCA and GujCOCA. Since legislations in other states are identical to MCOCA or GujCOCA, the analysis has been restricted to these two legislations.

Particulars	**BNS**	**MCOCA**	**GujCOCA**
Organised crime	Activity: Continuing unlawful activity by any person or a groups of persons or acting in concert, singly or jointly	Activity: Continuing unlawful activity by an individual, singly or jointly	Activity: Continuing unlawful activity and terrorist act, by an individual, singly or jointly
	Membership: As a member of an organised crime syndicate or on behalf of such syndicate	Membership: As a member of an organised crime syndicate or on behalf of the syndicate	Membership: As a member of an organised crime syndicate or on behalf of the syndicate
	Mode: by use of violence, threat of violence, intimidation, coercion, or by any other unlawful means	Mode: By use of violence, threat of violence, intimidation, coercion or other unlawful means	Mode: By use of violence or threat of violence or intimidation, coercion or other unlawful means
	Object: To obtain direct or indirect material benefit, including a financial benefit	Object: To (i) gain pecuniary benefit or (ii) gain undue economic or other advantage (for himself or any other person) (iii) promote insurgency	Object: In case of economic offences, with the aim to obtain monetary benefits or large scale organised betting in any form
Continuing unlawful activity	Activity prohibited by law for the time being in force	Activity prohibited by law for the time being in force	Activity prohibited by law for the time being in force including an illustrative list of eight unlawful activities
	Classification: Such unlawful activity must be a cognizable offence, punishable with three years or more	Classification: Such unlawful activity must be a cognizable offence, punishable with three years or more	Classification: Such unlawful activity must be a cognizable offence, punishable with three years or more

	Mode: Singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate	Mode: Singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate	Mode: singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate
	Continuing nature: More than one chargesheet has been filed before a competent court within the preceding period of 10 years and that the court has taken cognizance of such offence, and includes an economic offence	Continuing nature: More than one chargesheet has been filed before a competent court within the preceding period of 10 years and court has taken cognizance of such offence	Continuing nature: More than one chargesheet has been filed before a competent court within the preceding period of 10 years and court has taken cognizance of such offence
Organised crime syndicate	Members: Group of two or more persons	Members: Group of two or more persons	Members: Group of two or more persons
	Mode: Acting either singly or jointly, as a syndicate or gang indulging in any continuing unlawful activity	Mode: Acting singly or collectively as a syndicate or gang indulging in activities of organised crime	Mode: Acting singly or collectively as a syndicate or gang indulging in activities of organised crime

III. Scope of 'organised crime'

The scope of organised crime under the final enacted version of the BNS mirrors the framework under the MCOCA and GujCOCA, with minor differences that may enable criminalising a broader scope of activities under the BNS definition. The BNS Bill, when first introduced in August 2023, had provided for a significantly broader scope for organised crime as opposed to the aforementioned State legislation, through i) an increased scope of offences covered under 'continuing unlawful activity', ii) the use of vague, undefined terms such as 'criminal organisation', 'racketeering' in defining the members of an organised crime syndicate and their activities, and iii) broadened scope for the purpose/object of such organised crime.

Although the final enacted version limits the same to cognizable offences punishable by three years' imprisonment or more, the provision continues to be broader in scope from their State counterparts. The BNS defines organised crime as any continuing unlawful activity conducted to obtain direct or indirect material benefit, including financial benefit. No definition for the term 'material benefit' has been provided under s. 111. Further, the provision continues to include economic offences under its ambit, which has been defined to

include vague terms such as *hawala* transactions, mass marketing, fraud etc, none of which are defined under the BNS. Though such transactions are prohibited under various statutes such as Foreign Exchange Management Act, 1999, they have now also been criminalised under s. 111. Besides, a broad and vague understanding of organised crime stipulated in s. 111, which includes various undefined terms, provides unfettered discretion to investigating authorities to interpret the meaning of organised crime, and further enables a significant expansion of the scope of organised crime under this legislation.

IV. Collapsing the distinction between commission of a crime and attempt/abetment

S. 111(2) to (7) define various offences related to organised crime and their respective punishments. Ss. 111(2) and (3) erase the distinction between the attempt, abetment or conspiracy to commit an organised crime, and the actual commission of organised crime, by prescribing the same punishment in organised crime offences that do not result in death. This is in contrast to s. 511 of the IPC which creates a distinction in sentence between the actual commission of an offence and an attempt to commit such offence, by making attempts punishable with a maximum of half the term of imprisonment, or fine, or both, prescribed for the offence which was attempted.

S. 111(2) lays out the death penalty or life imprisonment as the sentence range for organised crime offences which result in the death of any person, and imprisonment for a term of five years to life for all other organised crime offences. S. 111(3) lays out the same range, i.e imprisonment for a term of five years to life for abetting, attempting, conspiring to or knowingly facilitating the commission of any organised offence. Additionally, it also imposes a minimum fine of Rs 10 lakh on organised crime offences resulting in death, and a minimum of Rs 5 lakh for such offences that do not result in death. While the period of imprisonment is similar to the MCOCA and GujCOCA, the minimum fine limit under the latter is set at Rs 1 lakh. By setting the same sentence range for the actual commission of the offence (not resulting in deaths) with the attempt to do the same, the BNS collapses the distinction between attempt and commission of offences. Further, like MCOCA and GujCOCA, there is no requirement for a separate *mens rea* for causing death of a person under s. 111(2) BNS. Therefore, under this section, irrespective of the person's knowledge that death is likely or their intention to cause death, they may be sentenced to death, in case the commission of an organised crime or its attempt leads to the death of any individual.

However, the requirement of intentionality has been expressly included in s. 111 (5) in relation to the offence of harbouring or concealing any person who has committed the offence of an organised crime, which is in variance from s. 3(3) of the MCOCA. Further, the proviso to s.111(5) specifies that this subsection would not apply where the harbouring or concealment is done by the spouse of the offender, which has not been provided for under MCOCA and GujCOCA. There appears to be no reasonable basis for creating this exemption and there is no clear basis for why such an exemption has been limited to the offence of harbouring or concealing any person involved in an organised crime.

V. Other activities criminalised in relation to organised crime

Besides laying out the provision for organised crime, the section also criminalises the following activities in connection to organised crime: i) abets, attempts, conspires or knowingly facilitates commission of or engages in any act preparatory to an organised crime; ii) membership to an organised crime syndicate; iii) intentionally harbouring or concealing any person who has committed organised crime; iv) possession of property derived or obtained from organised crime, or proceeds of such crime; v) possession of movable or immovable property by a person on behalf of an organised crime syndicate's member, which such person cannot satisfactorily account for.

Cl. 6 of s. 111 criminalises the possession of i) property derived/obtained from the commission of organised crime or ii) the proceeds of organised crime or iii) property acquired through organised crime, and punishes the same with a sentence range of three years of imprisonment to life imprisonment *and* a minimum fine of Rs 2 lakh. The clause differs from its MCOCA counterpart[43] through the addition of the phrase 'proceeds of any organised crime'. It is notable that under the MCOCA, courts have enquired whether the accused has produced documents to prove that the property was derived from legal sources, which shifts the onus on the accused without the investigating authorities providing a sufficient link between the commission of the organised crime and the property alleged to have been derived from it.[44]

The term 'proceeds of crime' has been used under Section 3 of the Prevention of Money Laundering Act (for the offence of money-laundering), and may hence overlap with this legislation. Section 3 of the PMLA criminalises the possession, concealment, acquisition, use, projecting or claiming of tainted property as untainted. Unlike the PMLA (which spells out some requirement of intentionality through the word 'knowingly'), s. 111(6) lacks any such requirement and seemingly criminalises mere possession or acquisition of such proceeds from organised crime.

VI. Petty organised crime

S. 112 creates the category of 'petty organised crime' as distinct from 'organised crime' for the first time and is a category not created in any other similar legislation. The provision penalises any act of theft, snatching, cheating, unauthorised selling of tickets, unauthorised betting or gambling, selling of public examination question papers or any other 'similar criminal act' when conducted by a person being a member of a group or a gang.

Unlike s. 111, s. 112 does not provide for the manner in which such crimes may be committed, such as using violence, threat or intimidation. Further, there is no requirement for directly or indirectly obtaining material benefit through the commission of organised crime under s. 112. Some issues with s. 112 are as follows:

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[43] S. 3(5), MCOCA.
[44] *Zohra Sheikh v. State (NCT of Delhi)* Bail Application No. 1481/2016, Delhi High Court.

a. The phrase ‘any other similar criminal act’ under s. 112(1) makes the scope of activities prohibited/covered under petty organised crime unclear.

b. Under s. 112, petty organised crime can be committed by any group or gang. However, the terms group or gang have not been defined and there is no threshold specified for one to qualify as a member of such a gang. Further, unlike s. 111, there is no requirement for the crime to be committed by an organised crime syndicate with more than one chargesheet filed before a competent court within the preceding ten years.

c. The absence of a standard to be considered a member of a gang has tremendous potential of misuse by investigating authorities who may group several people as members of a gang and register an offence under this provision whereby an enhanced punishment of imprisonment upto a term which may extend to 7 years, as opposed to three years or five years that would otherwise be applicable for the offence of theft or cheating.

Terrorist act

Through s. 113, the offence of 'terrorist act' has been introduced in the BNS. The provision substantially mirrors ss. 15-21 of the Unlawful Activities (Prevention) Act, 1967 and penalises terrorist acts, the attempt/abatement/conspiracy/incitement to commit or prepare for such acts, organising of training camps for training in terrorist acts, membership to organisations involved in terrorist acts, and harbouring and concealing persons who have committed terrorist acts. Where the act results in the death of any person, it is punishable with death penalty or life imprisonment; otherwise, it is punishable with imprisonment which may range from five years to life. Prior to the BNS, offences relating to terrorism were dealt with under the UAPA. Terrorism was introduced into the UAPA through an amendment in 2004, right after the repeal of the Prevention of Terrorism Act. The UAPA (and the erstwhile POTA and the Terrorist and Disruptive Activities Prevention Act, or TADA) is a special legislation. Special legislations are purportedly created to address special situations by enacting a new legal structure. In criminal law, a special legislation creates new offences and further provides special investigative and adjudicatory procedures to be followed in the prosecution of offences defined thereunder. The provisions of the CrPC, to the extent that they are inconsistent with the special provisions of the UAPA, are inapplicable to prosecutions under the statute.

Procedural safeguards provided in the UAPA have not been reflected in the BNSS for a terrorist act. These include: (a) only senior police officers being allowed to investigate a terrorist act;[45] (b) mandatory sanction to be obtained from the Central or State Government, based on a review of the evidence, before cognizance can be taken of a terrorist offence;[46] (c) requirement of a public prosecutor's report to be considered by the Court to decide on further extension of custody. These safeguards were intended to check the abuse of exceptional power testified to by their long history in the TADA and the POTA as well. In 2018, the sanctioning process was turned into a two-step process precisely to filter out cases where evidence did not warrant prosecution, particularly in view of the ambiguity in the definition of the offence. These safeguards may be necessitated due to the deviation of the UAPA from the CrPC given that the UAPA severely restricts rights of the accused, and enlarges State powers with respect to bail, police custody, and attachment of property. Accused persons under s. 113 may continue to benefit from the provisions on bail and attachment in the BNSS, as it does not provide for terror-specific exceptions.

The punishment range provided under s. 113 is similar to that of organised crime under s. 111, and hence mirrors its concerns. S. 113(2) punishes terrorist acts with the death penalty or life imprisonment where the offence has resulted in death, and punishes all other terrorist acts that do not result in death between five years of imprisonment to life imprisonment. S. 113(3) lays out the same sentence range – five years to life imprisonment – for conspiring, attempting to commit, advocating, abetting, advising, inciting or directly/knowingly

[45] S. 43, UAPA.
[46] S. 45, UAPA.

facilitating the commission of a terrorist act. By providing the same punishment range for the commission of an offence and its attempt/abetment/advocacy/advice/incitement, the BNS collapses the distinction between complete and inchoate offences, and may hence render its application arbitrary. Concerns of arbitrariness in providing the same sentence range is also exacerbated by the fact that s. 113(3) uses vague terms to criminalise a wide range of conduct, including 'advocating' and 'advising' the commission of a terrorist act.

In view of the above, it has become evident that by including provisions of organised crime and and terror in the BNS, special legislations that were enacted to address specific "extraordinary circumstances" – namely MCOCA and UAPA, which apparently warrant exceptional executive and police power – have now intertwined with laws that pertain to ordinary crimes, thereby ideologically and procedurally "normalising the exceptional".[47]

Applicability of special legislation v. BNS

As stated above, while the BNS imports provisions of MCOCA/GujCOCA and of UAPA under ss. 111 and 113, the question of which statute would be applicable to an offence is unclear. In relation to the offence of terrorist act under s. 113, the BNS attempts to regulate its applicability as opposed to the UAPA through s. 113(7). According to the explanation to s. 113(7), a police officer not below the rank of a Superintendent of Police to decide whether a case will be proceeded with under the UAPA or under this section. This may be in recognition of the substantial similarity between the UAPA and this provision, which leaves room for confusion over the applicable law and procedure in the presence of a special legislation governing the field. However, s. 113 provides no guidance on how this decision can be made, and vests unfettered discretion with the Superintendent to make this decision, thereby raising concerns of arbitrariness.

As opposed to the above, s. 111 governing organised crime makes no such attempt to provide guidance as to the applicability of BNS vis-a-vis state legislations. It therefore remains unclear whether an offence would be registered under the relevant state legislations or under BNS. The question of which legislation would apply becomes more pertinent in view of the difference in procedural safeguards under MCOCA and UAPA as stated above, and specifically in view of the more stringent provisions that govern bail under UAPA and MCOCA/GujCOCA.

[47]Ujjwal Kumar Singh, Mapping Anti-terror Legal Regimes in India, Global Anti-Terrorism Law and Policy, Chapter 17, 2nd Edition, 2012, pg. 444.

Acts Endangering Sovereignty, Unity and Integrity of India

Section 152

S. 152 of the BNS criminalises 'Acts endangering sovereignty, unity and integrity of India' and punishes them with imprisonment for life or with imprisonment which may extend to seven years and fine. The minimum punishment for the offence has been increased from three years to seven years. The section, it needs to be said, is in the same vein as s. 124A of the IPC. The provision may not be labelled 'sedition', but the spirit of that provision has been retained, and potentially covers a wider range of acts that themselves suffer from ambiguity and vagueness in their current form, creating implications for its constitutionality. A look at the journey and jurisprudence on sedition is a good place to reflect upon the implications for this section.

In the recent past, three noteworthy developments regarding the crime of sedition have taken place. First, the Supreme Court has placed s. 124A of the IPC in abeyance.[48] Second, the Law Commission of India in its 279th report recommended retaining the crime of sedition on the statute books.[49] Third, while introducing the new criminal law bills, the Home Minister proclaimed in the Lok Sabha that the crime of sedition has been done away with.[50]

Table 5 below compares the text of s. 124A IPC and s. 152 of BNS, and highlights the changes introduced in the BNS.

[48] *S.G. Vombatkere v Union of India,* WP(C) 682/2021 order on May 11, 2022 (Supreme Court): "We hope and expect that the State and Central Governments will restrain from registering any FIR, continuing any investigation or taking any coercive measures by invoking s. 124A of IPC while the aforesaid provision of law is under consideration'. From the order dated October 31, 2022, it emerges that the Attorney General also assured the Supreme Court that the Central Government is reconsidering the law regarding sedition and will abide by the May 11, 2022 order of the Supreme Court, last accessed August 30, 2023.

[49] Law Commission of India, 'Usage of the Law of Sedition' (Law Commission of India Report No. 279, 2023).

[50] PIB Delhi, 'Union Home Minister and Minister of Cooperation, Shri Amit Shah introduces the Bhartiya Nyaya Sanhita Bill 2023, the Bharatiya Nagarik Suraksha Sanhita Bill, 2023 and the Bharatiya Sakshya Bill, 2023 in the Lok Sabha, today' (Press Information Bureau, August 11, 2023), <https://pib.gov.in/PressReleseDetail.aspx?PRID=1947941>, last accessed August 28, 2023.

Table 5: Comparison between s. 124A, IPC and s. 152, BNS

S. 124A, IPC - Sedition	**S. 152, BNS - Acts endangering sovereignty, unity and integrity of India**
Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine. Explanation 1. – The expression "disaffection" includes disloyalty and all feelings of enmity. Explanation 2. – Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. Explanation 3. – Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.	Whoever, *purposely or knowingly*, by words, either spoken or written, or by signs, or by visible representation, *or by electronic communication or by use of financial means*, or otherwise, excites or attempts to excite, *secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India; or indulges in or commits any such act* shall be punished with imprisonment for life or with imprisonment which may extend to *seven years* and shall also be liable to fine. Explanation — Comments expressing disapprobation of the measures, or administrative or other action of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite the activities referred to in this section.

While s. 152 has retained the modes of committing sedition, namely 'by words…visible representation', the prohibited actions have been replaced. In the IPC, s. 124A criminalises exciting or attempting to excite '*hatred, contempt or disaffection towards the Government'* established by law. The BNS criminalises exciting or attempting to excite '*secession, armed rebellion or subversive activities, or encouraging feelings of separatist activities that endanger the sovereignty or unity and integrity of India'*. In addition to a change in the entity ('government of India' in s. 124A as opposed to 'India' in s. 152) which is the object of the provision, and the expansion in the range of activities that could be considered as threatening the 'unity and integrity' of the country, the section has also added new means of committing the offence by including 'electronic communication' and 'financial means', and the *mens rea* requirement of 'purposely or knowingly' committing such an act.

I. The vice of vagueness

Unlike the IPC, there are no explanations provided in s. 152 to indicate the meaning and scope of these terms. For instance, 'subversive activities', in the absence of a legal definition, indicates neither the nature of activity that may be termed 'subversive' nor the degree of harm that must occur, nor the object of such harm, to qualify as a subversive activity. For e.g., the Cambridge Dictionary defines 'subversive' as 'trying to destroy or damage something, especially an established political system'. Oxford Languages defines 'subversive' as 'seeking or intending to subvert an established system or institution' and 'subvert' as '[to] undermine the power and authority of (an established system or institution)'. The standard is broad enough to include within its ambit legitimate protests and dissents against the government, as they are often directed at challenging the legitimacy and authority of decisions and actions taken by the government.

The lack of accompanying legal definitions in the BNS or other legislations, therefore, creates a risk of overbroad application, rendering the provision vague and arbitrary – grounds on which legal provisions have previously been struck down.[51] In *Shreya Singhal v. Union of India,*[52] the Supreme Court held s. 66A of the IT Act to be unconstitutional and one of the main grounds was that terms like 'grossly offensive or of menacing character', 'annoyance', 'inconvenience', 'danger', 'enmity', 'hatred' and 'ill will', which were used to constitute the offence, were vague and ambiguous, making the provision amenable to abuse by officials. Similarly, there is no clarity provided on what amount of financial support or what nature (whether direct or indirect) of financial contributions would amount to using 'financial means' to commit the offence.

The Explanation to the section is incomplete, making it even more unclear. While it mentions certain acts and their purpose – comments expressing disapprobation of measures and actions of the Government[53] to alter them through lawful means -- it does not indicate whether such acts are to be considered as offensive or if they lie outside the scope of this section and are not to be considered an offence. Thus, it does not capture the meaning of Explanation 3 to s. 124A, IPC that it is seemingly modelled on.

II. Vagueness in the object of harm

A significant departure in s. 152 is the lack of a discernible object of protection as identified in the IPC. The IPC requires exciting disaffection, hatred or contempt towards '*the Government established by law in India*', whereas s. 152 mentions endangering the *'sovereignty, or unity and integrity of India*'. The former lends itself to conceptualising the government as an identified and separate entity whereas the latter expands the scope of offence because the nation is a necessarily abstract concept and does not lend itself to

[51] *Maneka Gandhi v. Union of India* (1978) 1 SCC 248; *Shreya Singhal v. Union of India* (2015) 5 SCC 1; *State Of Bombay & Anr. v. F.N. Balsara* (1951) SCC 860; *Chintaman Rao v. State of Madhya Pradesh* AIR (1951) SC 118.

[52] *Shreya Singhal v. Union of India* (2015) 5 SCC 1.

[53] The reference to the 'Government' in the explanation is also significant considering the fact that s. 152, BNS has otherwise omitted reference to the 'Government established by law' as the object of protection, as was done in s. 124A, IPC. Instead s. 152 refers to 'India' as the object of protection.

specificity. The term could refer to the government, public figures or even society and communities generally. Such ambiguous (and overbroad) delimitation of the object of harm impacts the threshold of harm required for an act to constitute sedition. The effect of such a departure from the IPC may be understood or even constrained by examining the judicially evolved standards in determining who may be said to constitute the 'Government' under s. 124A, IPC, which has in turn acted as a safeguard against an overbroad application of the provision.

In *Kedar Nath Singh v. State of Bihar*[54] the Supreme Court describes 'Government established by law' as the visible symbol of the State necessary for its continuity and stability and as different from individuals engaged in carrying on the tasks of the administration at the time. The existence of an exceptional provision like sedition was thus justified on two grounds: it delimited a specific object that needed protection and it indicated the level of harm that has to be inflicted to constitute sedition – that is, for an act to constitute sedition, it must threaten the continued existence of the State or its stability.

The impact of such clarity is seen in the judgment of *State through Superintendent of Police, CBI/SIT v. Nalini and Ors*[55] where the Supreme Court was interpreting s. 3 of the now repealed TADA[56] which was a more stringent law and contained a similar object of harm: 'Government as by law established'. The Court here held that the assassination of Rajiv Gandhi, former Prime Minister of India, did not amount to a terrorist act because he was not the sitting Prime Minister of the country and targeting him did not constitute an attempt to strike fear in the Government of the Centre or State.

In identifying 'India' as the object of harm and in failing to precisely define specific actions that constitute the offence, s. 152 creates a tenuous link between the act and its impact.

III. Criminalising dissent

The Supreme Court in *Kedar Nath* highlighted the important difference between disloyalty to the Government and strong criticism of its measures. The Court categorically held that the freedom of speech and expression under the Constitution [Art. 19(1)(a)] includes criticism or comment against the Government and its measures in the strongest words possible. The freedom exists as long as the act does not incite people to violence against the Government or intend to create public disorder. Freedom of speech was to be the norm and sedition the exception. The decision therefore clarified the scope of sedition with the aim to protect dissent from becoming a criminal offence. In *Balwant Singh v. State of Punjab,*[57] the accused raised slogans like 'Khalistan Zindabad' which is connected to a movement that seeks a separate State for Sikhs in India. The Supreme Court held that casual slogans raised without creating disturbance or inciting people to create disorder cannot by itself amount to sedition. While the Court has demonstrated a strong tendency towards protecting freedom of speech,

[54] *Kedar Nath Singh v. State of Bihar* (1962) SCC OnLine SC 6.
[55] *State through Superintendent of Police, CBI/SIT v. Nalini and Ors* (1999) 5 SCC 253.
[56] S. 3, TADA.
[57] *Balwant Singh v. State of Punjab* (1995) 3 SCC 214.

whether this spirit and tendency has translated into practice is questionable.[58] S. 152 has the potential to further erode this protection. For instance, it is likely that the mere raising of slogans like the aforementioned one, without any incitement to violence or disorder, may be understood as a secessionist act or arousing feelings of separatist activities or subversive activity. Thus, the expansion of the spirit of sedition in s. 152 generalises a provision which is meant to operate in exceptional circumstances, and expands its scope beyond that of s. 124A as established by judicial precedents. This raises concerns about the ability of the law to fulfil its intended purpose and distinguish between sedition and mere dissent.

IV. Lowered threshold of harm

Another concerning question raised by s. 152 is the status of safeguards which were judicially read into the definition of sedition. The need for the safeguards was the vague language of s. 124A, specifically the use of the words 'hatred', 'contempt', and 'disaffection'. While on first glance, s. 152 might seem like a step towards certainty, it is necessary to understand the judicial evolution of safeguards regarding the offence of sedition before commenting so.

The words used in s. 124A, IPC lend themselves to multiple possible interpretations, and therefore to ambiguity and vagueness. This is evident from the conflicting interpretations of the section by the Federal Court in *Niharendu Dutt Majumdar v. King Emperor;*[59] which interpreted the terms 'hatred', 'contempt', and 'disaffection' narrowly to only include situations affecting public order, and several decisions of the Privy Council such as *King-Emperor v. Sadashiv Narayan Bhalero,*[60] which interpreted the same words broadly to include mere arousal of feelings even if they did not affect or tend to affect public order.

In *Niharendu,* the Court explained that sedition was criminalised to avoid anarchy, which the Court described as a situation where no respect is felt for the government and its laws, and they cease to be obeyed. The test laid down in *Niharendu* was 'the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency.' This judgment of the Federal Court was overruled by the Privy Council in *Sadashiv,* in favour of a literal reading of s. 124A that did not restrict the interpretation of the phrase 'excite disaffection' to exciting disorder but included within it hatred, enmity, dislike, hostility, contempt and every form of ill-will to the government. The standard in *Sadashiv* was lowered to 'exciting' certain bad feelings towards the government as opposed to *Niharendu* which required that the seditious act lead to, or tend or intend to lead to, public disorder or violence. It was further observed in *Sadashiv* that there was no intensity threshold for the feelings aroused either.

The question was finally decided by the Supreme Court in *Kedar Nath* where it preferred the test laid down in *Niharendu,* and therefore restricted the application of s. 124A. Therefore, any claim that s. 152 introduces certainty by using concrete expressions is misleading as the judiciary has interpreted s. 124A narrowly. It remains unclear whether the standard of affecting public order will be imported to the new offence or whether the standards

[58] Article-14, 'A Decade of Darkness: The Story of Sedition in India', accessed August 28, 2023.
[59] *Niharendu Dutt Majumdar v. King Emperor* (1942) SCC OnLine FC 5.
[60] *King-Emperor v. Sadashiv Narayan Bhalero* (1947) SCC OnLine PC 9.

mentioned in the section will apply literally. The existing language in the IPC, which was restrictively interpreted in *Kedar Nath,* has been completely replaced. The words 'hatred', 'contempt', and 'disaffection' are nowhere to be found in s. 152 of the BNS.

Notably, one of the main arguments raised by the petitioners in the ongoing challenge in the Supreme Court[61] is the vagueness and subjectiveness of the standard of 'tendency or intention to create public disorder', which was held to be the gist of the offence in *Kedar Nath*. S. 152 arguably introduces even more vague thresholds such as 'excites or attempts to excite *subversive activities*' and '*encouraging feelings* of separatist activities'. Neither does the section define the terms nor is there any judicial guidance on their interpretation. The vagueness as well as the lowered threshold brought in by these terms makes the section constitutionally suspect.

Further, s. 152 specifically criminalises acts which *encourage feelings* of separatist activities. *Kedar Nath* specifically held that criminalising mere raising of feelings of hatred, enmity, dislike, hostility, contempt and other forms of ill-will towards the government would be an unreasonable restriction on the freedom of speech. While the exact feelings, the arousal of which is criminalised, are different, it remains to be seen whether the spirit in which *Kedar Nath* approaches sedition will continue to govern the application of s. 152.

The judicial guidance that had evolved with reference to the crime of sedition developed with a view to safeguard the freedom of speech and expression and to balance it against public order in a manner that was acceptable for a democratic State. This guidance is nowhere to be found in s. 152 of the BNS. It is as vague as s. 124A originally was, if not more. The lack of legislative definitions in the BNS indicates a need for fresh judicial intervention which would necessarily involve reinventing the wheel. In the meantime, before clarity is read into the provision, it will be open to abuse. In fact, commentators have indicated that s. 152 of the BNS is even more subjective and prone to abuse than s. 124A.[62] The section has the potential to criminalise dissent and is therefore antithetical to the democratic ideals of the constitution.

Sedition, as it exists in s. 124A, has seen an increase in use in the recent years (before the Supreme Court's abeyance order) through targeting of social media posts, and has been used as a tool to quell protests. S. 152 of the BNS seems to be poised to continue this legacy instead of offering a break from its colonial past.

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[61] Tanima Kishore, Petitioner's Submissions in *Kishorechandra Wangkhemcha v. Union of India,* last accessed on August 28, 2023; Aparna Bhat, Petitioner's Submission in *People's Union for Civil Liberties v. Union of India*, last accessed on August 28, 2023.

[62] Lubhayathi Rangarajan, 'Home Minister Amit Shah Says Sedition Is Dead. But Its Replacement Is More Fearsome Than The Colonial Law Ever Was' *Article-14 (*August 14, 2023) accessed 28th August 2024; Chitranshul Sinha, 'Sedition law is not gone, it's set to be more draconian' *Indian Express* (August 12, 2023) last accessed on September 1, 2024.

V. Mens rea

It is to be considered whether the *mens rea* requirement through the use of the words 'purposely or knowingly' in s. 152 can be seen as an improvement compared to s. 124A IPC. It would be erroneous to argue that s. 124A did not contain a *mens rea* requirement. Even though the provision does not use intention or knowledge (or any variations of it), s. 124A cannot be said to be a strict liability offence. The Supreme Court's case law has been clear that "in the absence of any ostensible public purpose or necessary implication from the statute, it is a sound rule of construction adopted in England – and accepted in India – to construe a provision creating an offence in conformity with common law. Mens rea by implication must be excluded only where it is absolutely clear that implementation of the object of the statute would otherwise be defeated".[63] Even going as far back as *Ravule Hariprasad Rao v. State*[64] and *State of Maharashtra v. MH George,*[65] it has been held that where an offence is created by a statute, however comprehensive and unqualified the language of the statute, it is usually understood as silently requiring that the element of mens rea should be imported into the definition of the crime, unless a contrary intention is expressed or implied. From this position of law it is evident that merely introducing the words 'purposely or knowingly' cannot be seen as an improvement on s. 124A. *Mens rea* was always a requirement under s.124A and this is made evident in *Kedar Nath*.

VI. Broadened scope of actions

S. 152 BNS identifies the following range of actions as the means which endanger the sovereignty, security, unity and integrity of India: words either spoken or written, or signs, or visible representation, or electronic means or financial means. This is a significant expansion from the range of actions identified under s. 124A of the IPC, which is limited to words either spoken or written, or signs, or visible representation. The intent of s. 152 may be to cast an even wider net than s. 124A IPC. It must be noted here that s. 124A already has a history of covering actions through electronic means as well.[66] Given that s. 152 is worded in an even wider sense than s. 124A IPC, its real time impact not only maintains status quo but can potentially lead to more disturbing patterns, such as using this provision to stifle constitutionally protected freedoms.

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[63] *Union of India v. Ganpati Dealcom Private Ltd* (2023) 3 SCC 315.
[64] *Ravule Hariprasad Rao v. State* (1951) SCC 241.
[65] *State of Maharashtra v. MH George* (1965) 1 SCR 123.
[66] Lubhyathi Rangarajan, A Decade of Darkness: Our New Database Reveals How A Law Discarded by Most Democracies Is Misused in India, *Article-14* (February 4, 2022) accessed October 14, 2024. The database reveals that digital spaces have been a primary source of target for the sedition laws, with 105 cases being filed for social media posts since 2014.

False and Misleading Information Jeopardising the Sovereignty, Unity and Integrity of India

Section 197(1)(d)

S. 153B of the IPC[67] has been recast as s. 197 of the BNS with an addition where s. 197(1)(d) criminalises the making or publication of *false and misleading information jeopardising the sovereignty, unity and integrity or security of India*. This offence is punishable with three years of imprisonment, or fine, or both. An action becomes prohibited by s. 197(1)(d) when the following elements are met: i) there must be some information which is made or published, ii) such information must be 'false or misleading' and iii) such 'false or misleading information' must have the impact of 'jeopardising' the 'unity, sovereignty and integrity or security of India'. However, in light of the Supreme Court's decision in *Shreya Singhal v. Union of India,*[68] s. 197(1)(d) may potentially bring up concerns over the reasonableness of this restriction on the freedom of expression as per the requirements of Art. 19(2) of the Constitution. Further, a fundamental rights challenge to the Information Technology Amendment Rules 2023[69] – which enable the Central Government to issue directions to intermediaries to block 'fake', 'false' and 'misleading' information – at the Bombay High Court has (post the enactment of the BNS) been held to be unconstitutional[70] (after the case was referred to another judge owing to a split verdict between a Division Bench.[71] It is pertinent to note here that s. 197(1)(d) extends the use of unconstitutional phrasing beyond the digital medium, and even expands the degree of State intervention for the same by criminalising such information (as opposed to merely blocking it).[72] Admittedly, the phrasing had not been held to be unconstitutional at the time of enactment; however, the challenge had been admitted, making it constitutionally suspect even at the time of enactment.

I. Overbroad and vague provision

In *Shreya Singhal*, the Court struck down s. 66A of the IT Act[73] which penalised anyone who sent electronic information that could be 'grossly offensive or had menacing character', or messages sent for the purpose of 'causing annoyance or inconvenience', for violating the requirement of reasonable restrictions to the freedom of expression under Art. 19(2). While doing so, the Court held that any law restricting the freedom of expression could not be phrased vaguely,[74] but had to be precisely and narrowly worded, in a manner that enabled the

[67] S. 153B, IPC criminalises specific actions which involve imputations or assertions prejudicial to national integration.
[68] *Shreya Singhal v. Union of India* (2015) 5 SCC 1.
[69] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023.
[70] *Kunal Kamra v. Union of India*, WP(L)/9792/2023, order dt. September 20, 2024.
[71] *Kunal Kamra v. Union of India*, WP(L)/9792/2023.
[72] *Kunal Kamra v. Union of India*, WP(L)/9792/2023.
[73] S. 66A, IT Act, 2000.
[74] *Chintaman Rao v. State of Madhya Pradesh* (1951) AIR 118: "The law even to the extent that it could be said to authorise the imposition of restrictions in regard to agricultural labour cannot be held valid because the

public to reasonably understand and foresee the activities being prohibited. Further, it held that Art. 19(2) can prohibit only expression which incites harm, disorder or violence, and which has a direct relation to the violence caused.[75] In doing so, the Court distinguished between three categories of speech, including i) the discussion of ideas, ii) the advocacy of ideas (however offensive or shocking) and iii) speech inciting another to act upon an idea which could directly cause disorder or violence. A reasonable restriction under Art. 19(2) can then only extend to the third category of speech – that which *incites*, as opposed to *jeopardises*.

This judgment by the Bombay High Court was a consequence of a referral order by a Division Bench of the High Court, which had delivered a split verdict on the constitutionality of these rules. Relying on *Shreya Singhal*, the Bombay High Court's opinion, which upheld the constitutionality challenge to the IT rules in *Kunal Kamra v. Union of India*, also found that the phrases suffered from overbreadth and vagueness.[76] This opinion was later upheld in the referral by the High Court and struck down the same.[77]

The phrasing of s. 197(1)(d) raises three potential causes for concern. First, the lack of definition for the phrases 'false and misleading' and 'jeopardising' renders the section vague and in need of clarity on the nature and scope of the information whose publication is being prohibited. The unqualified nature of 'false and misleading' under s. 197(1)(d) leaves it open to multiple interpretations, and is hence entirely left in the hands of discretionary decision makers. Similarly, the word 'jeopardises' can cover a wide, unforeseeable range of consequences. The consequences of such publication, which can be seen as 'jeopardising the unity, sovereignty and integrity or security of India',[78] remain unclear, leaving the public with little means to foresee how the consequences of such information may be construed as jeopardisation. Second, the provision nowhere indicates that such publication should be with the *intention* of causing 'jeopardy'/harm, as is required under Art. 19(2). Further, s. 197(1)(d) extends its ambit to even the 'making' of such information, denoting that the mere creation of such material without publication can attract punishment. In effect, criminalising the mere making of such information can potentially subvert the constitutional requirement to directly incite *others* to cause violence.[79]

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language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right".

[75] *Superintendent, Central v. Ram Manohar Lohia* (1960) SCR (2) 821: "there must be proximate and reasonable nexus between the speech and the public order".

[76] *Kunal Kamra v. Union of India*, WP(L) No. 9792/2023 [110].

[77] *Kunal Kamra v. Union of India*, WP(L) No. 9792/2023.

[78] Generally, the words 'sovereignty, integrity and unity' of India have been interpreted by the courts in various contexts, including constitutional interpretation, defining the scope of anti-terror legislations [such as POTA] and other laws relating to national symbols and imagery [Prevention of Insults to National Honour Act, 1971]. The provisions pertaining to the prohibition of acts prejudicial to the unity, sovereignty or integrity of India in these legislations have typically criminalised specific acts as being prejudicial per se. For example, s. 15 of the UAPA. However, the word 'sovereignty' has been difficult to interpret, given the conceptual variations inherent to it.

[79] Possession of offensive and incendiary literature has been dealt with by the Supreme Court in other contexts such as deciding whether such possession amounts to a terrorist act under s. 15 of the UAPA, or constitutes membership in a banned organisation under s. 10 of the UAPA. In July 2023, the Court in *Vernon Gonsalves v. State of Maharashtra,* Criminal Appeal No. 639 of 2023, held that mere possession of such literature alone could not be construed as a terrorist act. However, whether such possession can attract a penalty is unclear.

II. Impermissible executive and judicial subjectivity

This provision is the latest in a series of interventions seeking to regulate information disorder in India. Prior regulatory efforts have included orders issued under s. 69A, IT Act,[80] and the aforementioned impugned Rules. Despite the need to regulate widespread information disorder and to mitigate its subsequent harms, providing a definition or clear-cut identifiers for disinformation has remained a highly difficult task,[81] given the subjectivity of assessing truth or falsity. This is not to say that criminal law does not address the issue of assessing what qualifies as false information. It does so in other contexts, including false statements on oath, giving of false evidence, etc.[82] However, unlike s. 197(1)(d), provisions requiring the assessment of false information clarify requirements including an accused's belief or knowledge and the use of such falsehood to cause the harm stipulated.

The lack of important qualifiers in s. 197(1)(d) complicates matters given the peculiarities of information disorder in a social ecosystem. Additionally, there are varying categories of speech that can be covered under 'false and misleading' which involve varying degrees of liability. False information in the context of information disorders may be classified as either disinformation or misinformation. While disinformation is the publication of false information with full knowledge/belief in its falsity and with the aim of causing some harm,[83] misinformation refers to the mere reproduction or dissemination of such information, and does not necessarily require the level of intent in disinformation.[84] However, the lack of distinction between misinformation and disinformation under s. 197(1)(d) raises questions on the degree of liability necessary to attract sanction[85] and it is unclear whether the provision is also directed at persons who may only be strictly liable for misinformation, i.e., without intention or knowledge of the wrongfulness of the act.

These lack of qualifiers enable wide subjectivity in the exercise of discretion by various officials of the criminal justice system. In *Kunal Kamra*, the High Court found that in the

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[80] *X Corp v. Union of India*, Writ Petition No. 13710 of 2022 (Karnataka High Court): where the petitioner, an intermediary platform, had challenged the directions issued under s. 69A of the IT Act to block specific content and accounts for sharing 'false' and 'misleading' information.

[81] Noted by the Canadian Supreme Court in *R v. Zundel* [1992] 2 SCR 731 at para 136; UN Special Rapporteur on Freedom of Expression, Submission on Annual Thematic Report on Disinformation, March 2021, Centre for Law and Democracy (2001), pg. 3.

[82] For example, ss. 171G, 177 (furnishing false information), 181 (false statement on oath or affirmation to public servant authorised to administer an oath or administration), 191 (giving false evidence), IPC. The provisions come with further qualifiers including the requirement to prove the accused's knowledge or belief in the falsity, and the intention to use such falsity to cause the harm that the provisions seek to prevent. The offence in this case requires a mens rea element, as opposed to s. 197(1)(d), BNS.

[83] UN Special Rapporteur on Freedom of Expression, Submission on Annual Thematic Report on Disinformation, March 2021, Centre for Law and Democracy (2001), pg. 3.

[84] UN Special Rapporteur on Freedom of Expression, Submission on Annual Thematic Report on Disinformation, March 2021, Centre for Law and Democracy (2001), pg. 3.

[85] Criminal sanctions may be attracted for varying levels of liability. While the general rule requires both mens rea (purpose, intention and knowledge from the part of the offender on the wrongfulness of the offence) and actus reus for criminal liability, the degree of liability may be lowered in specific offences. For example, specific offences relating to environmental degradation may fall under strict liability, which only requires the commission or omission of an act, and not intention.

absence of standards to determine what 'false and misleading' could be, the Rules gave the Government an 'unacceptable level of subjectivity'.[86]

III. Ineffective approach

In light of these requirements, and the context which s. 197(1)(d) seeks to address, the criminalisation of 'false and misleading' information highlights three concerns. There is first the onerous task of balancing the constitutional requirement to frame precisely-worded penal provisions against the contextual challenge in defining disinformation (and perhaps misinformation). Even in the instance that an ideal provision (which achieves such balance) is framed, such provisions can only cover a narrow range of actions within the larger ecosystem of information disorder. Commentators have suggested that in such a scenario, a penal provision may remain largely inadequate in regulating the problem of information disorder in society.[87] The challenges and the weaker potential of criminal law in ultimately addressing the issue effectively casts doubt on the regulatory mechanism (criminalisation) adopted, and prompts questions on the need for alternative regulatory approaches that are more effective and less restrictive on questions of life, liberty and expression.

[86] *Kunal Kamra v. Union of India*, WP(L) No. 9792/2023 [109].

[87] Rebecca K Helm & Hitoshi Nasu, Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation, *Human Rights Law Review*, Volume 21, Issue 2, June 2021, pgs. 302–328.

Enhancement of Punishments

The BNS has enhanced the prescribed punishments in several offences. These include causing death by rash or negligent act which was punished under the IPC with two years of imprisonment but under the BNS is punishable by five years, and the aggravated offence is punishable by 10 years. Attempt to murder by a life convict which was punishable by life imprisonment or death penalty under the IPC is punishable with life imprisonment, for the remainder of one's natural life or death under the BNS. See table below for a list of these provisions where punishments have been enhanced.

Table 6: Comparative table of punishments[88]

New Section and Punishment (BNS)	Old Section and Punishment (IPC)
S. 8. Amount of fine, liability in default of payment of fine, etc, Sub-s. (5), Cl. (c) – 1 year of imprisonment	S.67. Imprisonment for non-payment of fine, when offence punishable with fine only – 6 months
S. 57. Abetting commission of offence by public or by more than ten persons – 7 years with fine	S. 117. Abetting commission of offence by the public or by more than ten persons – 3 years, or with fine, or both
S.99. Buying child for purposes of prostitution, etc – shall not be less than 7 years but may extend to 14 years	373. Buying minor for purpose of prostitution, etc – may extend to 10 years
S. 104. Punishment for murder by life-convict – death or imprisonment for life, which shall mean the remainder of that person's natural life	S. 303. Punishment for murder by life-convict – death
S. 106. Causing death by negligence, Sub-s. (1) – may extend to 5 years, and shall also be liable to fine	S. 304-A. Causing death by negligence – may extend to 2 years, or with fine, or both
S. 109. Attempt to murder, Sub-s. (2). Attempt to murder by life convict – death or	S.307. Attempt to murder by life convict – life imprisonment or death

[88] Please note that the table does not include provisions where there has been an enhancement of fines. Fines have been enhanced across the BNS in about 81 provisions.

imprisonment for life, which shall mean the remainder of that person's natural life	
S. 121. Voluntarily causing hurt or grievous harm to deter public servant from his duty, Sub-s. (1) – may extend to 5 years	S. 332. Voluntarily causing hurt to deter public servant from his duty – may extend to 3 years
S. 122. Voluntarily causing hurt or grievous hurt on provocation, Sub-s. (2) – may extend to 5 years	S. 335. Voluntarily causing grievous hurt on provocation – may extend to 4 years
S. 125. Act endangering life or personal safety of others, Cl. (b) – may extend to 3 years	S. 338. Causing grievous hurt by act endangering life or personal safety of others – may extend to 2 years
S.127. wrongful confinement, Sub-s. (3) – may extend to 3 years	S. 343. Wrongful confinement for three or more days – may extend to 2 years
S. 127. Wrongful confinement, Sub-s. (4) – may extend to 5 years	S. 344. Wrongful confinement for ten or more days – may extend to 3 years
S. 127. Wrongful confinement, Sub-s. (6) – may extend to 3 years	S. 346. Wrongful confinement in secret – may extend to 2 years
S. 144. Exploitation of a trafficked person, Sub-s. (1) – 10 years	S. 370-A. Trafficking of person, Sub-s. (1) – 7 years
S. 144. Exploitation of a trafficked person, Sub-s. (2) – 7 years	S. 370-A. Trafficking of person, Sub-s. (2) – 5 years
S. 166. Abetment of act of insubordination by soldier, sailor or airman – 2 years	S. 138. Abetment of act of insubordination by soldier, sailor or airman – 6 months
S. 191. Rioting, Sub-s. (3) – 5 years	S. 148. Rioting armed with deadly weapon – 3 years
S. 217. False information, with intent to cause public servant to use his lawful power to injure another person –1 year	S. 182. False information, with intent to cause public servant to use his lawful power to injury of another person – 6 months

S. 241. Destruction of documents or electronic record to prevent its production as evidence – 3 years	S. 204. Destruction of documents or electronic record to prevent its production as evidence – 2 years
S. 243. Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution – 3 years	S. 206. Fraudulent removal or concealment of property to prevent its seizure as forfeited or in execution – 2 years
S. 248. False charge or offence made with intent to injure, Cl (a) – 5 years	S. 211. False charge of offence made with intent to injure, Para. 1 – 2 years
S. 248. False charge of offence made with intent to injure, Cl. (b) – 10 years	S. 211. False charge or offence made with intent to injure, Para. 2 – 7 years
S. 276. Adulteration of drugs – 1 year	S. 274. Adulteration of drugs – 6 months
S. 279. Fouling water of public spring or reservoir – 6 months	S. 277. Fouling water of public spring or reservoir – 3 months
S. 316. Criminal breach of trust, Sub-s. (2) – 5 years	S. 406. Punishment for criminal breach of trust – 3 years
S. 318. Cheating, Sub-s. (2) – 3 years	S. 417. Punishment for cheating – 1 year
S. 318. Cheating, Sub-s. (3) – 5 years	S. 418. Cheating with knowledge that wrongful loss may ensure to person whose interest offender is bound to protect – 3 years
S. 322. Dishonest or fraudulent execution of deed of transfer containing false statement of consideration – 3 years	S. 423. Dishonest or fraudulent execution of deed of transfer containing false statement of consideration – 2 years
S. 323. Dishonest or fraudulent removal or concealment of property – 3 years	S. 424. Dishonest or fraudulent removal or concealment of property – 2 years
S. 324. Mischief, Sub-s. (2) – 6 months	S. 426. Punishment for mischief – 3 months
S. 325. Mischief by killing or maiming animal – 5 years	S. 428. Mischief by killing or maiming animal of the value of ten rupees – 2 years

In addition to enhancing punishments, mandatory minimum punishments have been introduced for various offences, including Culpable Homicide not amounting to murder, which under the BNS carries a minimum sentence of 5 years. Some new offences introduced by the BNS, such as organised crime or terrorist act, also include mandatory minimum punishments. See table below for a list of the provisions where such mandatory minimum punishment is introduced.

Table 7: Mandatory minimum sentences in the BNS

Offence	**Minimum punishment prescribed by the BNS**
S. 99 - Buying a child for purposes of prostitution, etc.	Shall not be less than 7 years but may extend to 14 years
S. 105 - Punishment for culpable homicide not amounting to murder.	A term but which may extend to 10 years with fine
S. 111(2)(a) - Organised Crime.	Punished with death or imprisonment for life, and shall also be liable to fine which shall not be less than 10 lakh rupees
S. 111(3) - Abetting, attempting etc., of an Organised Crime	Term which shall not be less than 5 years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than 5 lakh rupees.
S. 111(4) - Being a member of an Organised Crime syndicate	Term which shall be be less than 5 years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than 5 lakh rupees.
S. 111(5) - Harbouring a person who has committed an organised crime offence or who is a member of Organised Crime syndicate	Term which shall not be less than 3 years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than 5 lakh rupees.
S. 111(6) - Possessing property derived from Organised Crime	Term which shall not be less than 3 years but which may extend to imprisonment for

	life and shall also be liable to fine which shall not be less than 2 lakh rupees.
S. 111(7) - Possession of property on behalf of a member of Organised Crime Syndicate	Term which shall not be less than 3 years but which may extend to imprisonment for 10 years and shall also be liable to fine which shall not be less than 1 lakh rupees.
S. 112 (2) - Petty Organised Crime	Term which shall not be less than 1 year but which may extend to 7 years, also be liable to fine.
S. 113(2)(b) - Terrorist Act	Term which shall not be less than 5 years but which may extend to imprisonment for life, and shall also be liable to fine.
S. 113(3) - Conspiring, abetting, attempting, etc of Terrorist Act	Term which shall not be less than 5 years but which may extend to imprisonment for life, and shall also be liable to fine.
S. 113(4) - Organising a camp for Terrorist Act	Term which shall not be less than 5 years but which may extend to imprisonment for life, and shall also be liable to fine.
S. 113(6) - Harbouring any person who has committed any Terrorist Act	Term which shall not be less than 3 years but which may extend to imprisonment for life, and shall also be liable to fine.
S. 117(3) - Voluntarily causing grievous hurt resulting in permanent vegetative state	Term which shall not be less than 10 years but which may extend to imprisonment for life, which means imprisonment for the remainder of that person's natural life.
S. 118(2) - Voluntarily causing hurt or grievous hurt by dangerous weapon or means	Term which shall not be less than 1 year but which may extend to ten years, and shall also be liable to fine.
S. 121(2) - Voluntarily causing hurt or grievous hurt to deter public servant from his duty	Term which shall not be less than 1 year but which may extend to 10 years, and shall also be liable to fine.

S. 139(1) - Kidnapping a child for the purposes of begging	Term which shall not be less than 10 years but which may extend to imprisonment for life, and shall also be liable to fine.
S. 139(2) - Maiming a child for purposes of begging	Term which shall not be less than 20 years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, with fine
S. 204 - Personating a public servant	Term which shall not be less than 6 months but which may extend to 3 years with fine
S. 303(2) - Theft	Term which shall not be less than 1 year but which extend to 5 years with fine
310(3) - Murder in dacoity	Term which shall not be less than 10 years and shall also be liable to fine
314- Dishonest misappropriation of movable property	Term which shall not be less than 6 months but which may extend to 2 years with fine
302- Dishonest or fraudulent removal or concealment of property, etc, to prevent distribution among creditors.	Term which shall not be less than 6 months but which may extend 2 years, or with fine, or both.
105 - Punishment for culpable homicide not amounting murder	Term not less than 5 years but which may extend to 10 years with fine

Other Changes

I. Abetment outside India for offence in India

S. 48 expands the meaning of abetment to include abetment by persons outside of India without and beyond India of offences committed in India.

II. Snatching as theft

S. 304 of the BNS introduces snatching as a separate offence and as a special category within the offence of theft. The section states, *theft is "snatching" if, in order to commit theft, the offender suddenly or quickly or forcibly seizes or secures or grabs or takes away from any person or from his possession any moveable property.* However, the need for the provision is unclear since snatching can be covered within the offence of theft. Further, the sentence for snatching is the same as the first offence of theft with three years as the maximum punishment with no mandatory minimum sentence. The section, thus, creates no difference between the penal consequences of theft as first offence and snatching.

It is relevant to note that while there is no clear distinction between snatching and theft, snatching has existed in the state penal statutes with much more onerous punishments being prescribed for the same offence. The IPC Punjab Amendment Act of 2010 prescribed a similar offence of snatching with a punishment of a minimum term of five years and maximum of ten years of imprisonment. Vide Gujarat Act of no. 6 of 2019, snatching was added as a part of the IPC as s. 379A which prescribed punishment of a minimum of seven and maximum ten years of rigorous imprisonment for snatching. Attempt to commit snatching was made punishable by a minimum of five and maximum of ten years. Causing wrongful restraint or hurt while committing snatching could add an imprisonment of up to three years to the sentence imposed for snatching. S. 376B was also inserted which prescribed a rigorous imprisonment for minimum of seven and maximum of ten years if snatching was committed while making preparation to cause death. There have also been attempts to include snatching in the IPC vide amendment bills in 2019 and 2022, which were introduced in the Parliament. These also prescribed onerous punishments for the offence of snatching. The BNS has therefore introduced a far less grave sentence.

III. Offences against children

Some changes introduced in the BNS relate to offences against children, which include creation of new offences or changes to the ones in the IPC. The newly added s. 95 of the BNS punishes a person who hires, employs or engages any person below the age of 18 years to commit an offence. The punishment will be the same as that provided for the offence committed by the child as if the offence has been committed by such person himself. The explanation to s. 95 states that using a child for sexual exploitation or pornography is included within its meaning. This raises questions about overlaps with the Juvenile Justice (Care and Protection of Children) Act, 2015 and POCSO.

Additionally, s. 137 of the BNS has made changes to s. 361 of the IPC. While s. 361 criminalises kidnapping of girls below the age of 18 years along with kidnapping of boys under 16 years, s. 137 makes kidnapping of all children below 18 years of age an offence.

IV. Grievous hurt resulting in permanent disability or permanent vegetative state

S. 117 has replaced s. 322, IPC and introduces permanent disability or permanent vegetative state within the definition of grievous hurt. Additionally, the section carries an enhanced sentence if the grievous hurt results in permanent disability or permanent vegetative state, and prescribes a minimum punishment of 10 years which may extend to imprisonment for life. Similarly, s. 326A, IPC that deals with 'voluntarily causing grievous hurt by use of acid, etc' is replaced by s. 124(1) which also incorporates 'permanent vegetative state' as an impact of the offence.

V. Community service

In a first, s. 4(f) of BNS introduces 'community service' as a punishment for six offences. Community service has been provided for multiple 'petty' offences across BNS. S. 23 of the BNSS aims to explain community service as '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'. While the concept of community service is present within the Juvenile Justice (Care and protection of Children) Act, 2015, the modalities through which community service may be effected within the BNS – and the institutions in charge of executing this sentence – remains unclear.

VI. Criminal Conspiracy

S. 61(1) of the BNS has inserted the phrase '*with the common object*' in its definition of Criminal Conspiracy, which was absent in its IPC counterpart (s. 120B). Hitherto, conspiracy and 'common object' had been understood as distinct concepts in criminal law. 'Common object' had been used in the IPC in relation to 'unlawful assembly', and unlike conspiracy, *did not* require a prior meeting of minds. Thus, the concept of '*common objec*t' has conceptually been at odds with that of conspiracy. The reasons for such an insertion are unclear.

PART II – BHARATIYA NAGARIK SURAKSH SANHITA 2023
&
PART III – BHARATIYA SAKSHYA ADHINIYAM 2023

Intellectual Disability and Unsoundness of Mind

The BNSS has replaced *'mental retardation'* with *'intellectual disability'*[89] which is defined under the Rights of Persons with Disabilities Act, 2016 (RPwD).[90] Further, terms like '*insanity,*' '*lunatic*' and '*idiot'* have been omitted and replaced with *'person of unsound mind*' across the new legislations.

The BNSS Bill introduced in August did not recognise this distinction between '*lunacy'*, '*unsound mind'*, and '*mental retardation*', and instead uniformly replaced these terms with '*mental illness*'. '*Mental illness*', as defined in s. 2(r) of the Mental Healthcare Act, 2017 (MHCA), is 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.*' Thus, mental illness covers a wide range of illnesses (including depression, anxiety disorder, bipolar disorder, obsessive-compulsive disorder, etc) that may not be '*unsoundness of mind*'. While '*unsoundness of mind*' is not clearly defined by courts, and is open to judicial interpretation, it is reasonably clear that '*mental illness'* by itself is not unsoundness of mind and similarly, unsoundness of mind needn't necessarily be a result of a mental illness.[91] The enacted BNSS has rectified this by retaining the term '*unsoundness of mind*' while still doing away with archaic terms like *'lunacy*'.

Further, there is a clear distinction between '*mental illness*' and '*mental retardation.*' The law has consciously sought to treat both differently. While mental illness can be treated,[92] mental retardation is an '*organic disablement of the mind*' which one may be taught to cope with, but cannot be *'cured'*.[93] Thus, by proposing to replace '*mental retardation*' with '*mental illness*', the BNSS Bill (August) revoked the protection to persons with '*mental retardation*' and unfairly excluded them. For instance, in case of fitness to stand trial, s. 329 and s. 330 CrPC prescribes separate procedures for persons with unsoundness of mind and intellectual

[89] L Salvador-Carulla , 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).

[90] 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.

[91] The MHCA in s. 3(5) recognises that the determination of a person's mental illness shall alone not imply or be taken to mean that the person is of unsound mind; *Also see*, 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.

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

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

disability (mental retardation). Upon being found incapable of making their defence, those of 'unsound mind' would have their trial postponed or be discharged without a trial (if there is no *prima facie* case against them). However, since mental retardation / intellectual disability is a permanent condition, persons with 'mental retardation' would be discharged without a trial without an option of postponing, irrespective of there being a *prima facie* case. The enacted BNSS has rectified this by replacing '*mental retardation*' with '*intellectual disability*'.

Despite this rectification, BNSS, like the CrPC, remains largely incongruent with the values and principles under the RPwD Act and the MHCA. 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. The BNSS has not attempted to reflect these priorities in the criminal law framework, besides a change in terminology.

Arrest and medical examination of accused

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

Ss. 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 s. 35 (when police may arrest without warrant), s. 37 (designated police officer), s. 43 (arrest how made), ss. 51 and 52 (examination of accused by medical practitioner) and s. 53 (examination of arrested person by a medical officer). The list below describes all the changes brought in by the BNSS to provisions relating to arrest and medical examination of the accused, and points out key implications wherever present. The following, however, delves only into those changes that may have the most significant implications.

1. Section 35(7): Inserts an additional requirement for a police officer to take prior permission of an officer not below the rank of Deputy Superintendent of Police before arrest, where the offence is punishable with imprisonment below three years and where the accused is infirm or above 60 years of age. However there is no definition provided for infirm under this provision.

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

3. Section 37(b): Inserts an 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-section also requires such information to be displayed prominently in every police station and at the district headquarters through any means, including digital means. Under the CrPC, details about the arrestee and the offence had to be collected by the control room at district headquarters, and information was required to be displayed on a notice board.

4. Section 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'. The reason for the insertion of this specific time period – six hours – is not immediately clear. Further, as a study on first productions before Magistrates post arrest reveals,[94] the time of arrest recorded on arrest memos by the police is often incorrect, thereby obfuscating the actual time of custody undergone. It is hence unclear whether the introduction of this timeline (six hours) may have any real impact on arrest practices.

[94] Jinee Lokaneeta and Zeba Sikora, Magistrates and Constitutional Protections: An ethnographic study of first production and remand in Delhi courts (Project 39A, National Law University Delhi 2024).

5. Proviso to Section 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. Section 43(3): This new addition to s. 46 CrPC empowers the police to use handcuffs for persons who are habitual, repeat offenders, or who have escaped from custody, or who have committed a variety of offences listed therein.

7. Section 48(1): Inserts an 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 s. 37(b). This addition ensures that an additional person within the police force is informed of the arrest and maintains a record independent of the officer making such arrest.

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

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

11. Section 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. Use of handcuffs during arrest

S. 43(3) BNSS introduces discretionary powers for the police to use handcuffs during arrest and production before the Magistrate, keeping in mind 'nature and gravity of offence' upon arrest if the following conditions are met: i) where the offender is a habitual, repeat offender *or* ii) the person has escaped from custody *or* 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 amongst others. Such provisions pertaining to handcuffs, are currently existing in several state prison manuals. The BNSS introduces these handcuffing powers as a statutory power. However, s. 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. It is trite to state that the CrPC had been amended following the dictum of the Supreme Court in *DK Basu v State of West Bengal*[95] to enhance the statutory protections for

[95] *DK Basu v State of West Bengal,* (1997) (1) SCC 416.

an arrested person. The BNSS, in contradiction to the existing progressive jurisprudence, takes a step back by allowing restrictive measures like handcuffing by statute.

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. Recognising these implications, the Supreme Court (through *Sunil Batra v. Delhi Administration*[96] and *Prem Shankar Shukla v. Delhi Administration*[97]) 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', ii) used on a person only for a short spell of time, iii) grounds for using such fetters are to be recorded in a journal, and communicated both to victims and the arrestee, 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. 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 to handcuffs as a last resort. Taking this further, the Court, in *Citizens for Democracy v. State of Assam,*[98] placed the onus on the police or prison officials to undertake an individualised assessment for the need to use handcuffs. However, s. 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 s. 43(3) are of wide import. *First*, these qualifiers require 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 (such as its brutality). This can be a subjective determination, and does not meaningfully guide the officer's discretion. Crucial considerations, including the use of alternative means (in order 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. S. 43(3) provides no qualifiers to ensure that the use of handcuffs meets the threshold to ascertain a 'credible tendency for violence'. The only other restriction on this power may be s. 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 legislation pertaining to 'habitual offenders'. While Andhra Pradesh, Maharashtra and Kerala[99] have defined 'habitual offender' as any person convicted and sentenced to

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[96] *Sunil Batra v. Delhi Administration* (1978) 4 SCC 494.
[97] *Prem Shankar Shukla v. Delhi Administration* (1980) 3 SCC 526.
[98] *Citizens for Democracy v. State of Assam* (1995) 3 SCC 743 [9].
[99] See Andhra Pradesh Habitual Offenders Act 1962, Bombay Habitual Offenders Act 1969, Kerala Habitual Offenders Act 1960.

imprisonment at least three times in a continuous period of five years for certain bodily and economic offences, other states such as Uttar Pradesh have fewer requirements. For instance, Uttar Pradesh does not stipulate a five-year period.[100] On the other hand, there is no pre-existing legislative definition or prior conceptualisation of the term 'repeat offender' and the term could possibly refer to anyone who has committed more than one offence. In the past, similar powers for the police have led to wide arbitrariness and discrimination. For instance, the police can categorise persons as history sheeters based on a number of factors, including prior arrests, involvement in suspicious activity, and anyone whom they deem to be dangerous persons based on their activities.[101] The lack of a clear requirement for prior convictions means that the police have wide powers here, which have been observed to have resulted in arbitrary, discriminatory and casteist practices.[102] Similarly, the lack of clear-cut identifiers for what 'repeat offenders' means can entrench vague and concerning powers of categorisation for the police.[103]

The BNSS section does not clarify whether 'habitual' and 'repeat' are taken to have the same meaning, or whether it alludes to two distinct concepts. Furthermore, it is unclear whether the metric for assessing habitual or repeat offences are prior convictions, arrests or charge sheets.[104] Relying on s. 43 BNSS, a ready reckoner published by the Bureau of Police Research and Development lists out the offences where the police may use handcuffs. These include s. 71 BNS (repeat offenders for rape), s. 145 (habitual dealing in slaves), s. 253 (harbouring offender who has escaped from custody) and for offences including terrorist acts, organised crime, sexual offences, murder, acid attack, offences against the State, illegal possession of arms, and economic offences.

II. Medical examination of the accused at the request of a police officer

Ss. 51 and 52 BNSS, pertaining to the medical examination of an accused for the purposes of investigation, recast s. 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 km 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. However, ss. 51

[100] S.2(c), Uttar Pradesh Habitual Offenders Restrictions Act, 1952.
[101] Satish, Mrinal. "'Bad Characters, History Sheeters, Budding Goondas and Rowdies': Police Surveillance Files and Intelligence Databases in India." *National Law School of India Review* 23, no. 1 (2011): 133–60. http://www.jstor.org/stable/44283744.
[102] Satish, Mrinal. "'Bad Characters, History Sheeters, Budding Goondas and Rowdies': Police Surveillance Files and Intelligence Databases in India." *National Law School of India Review* 23, no. 1 (2011): 133–60. http://www.jstor.org/stable/44283744, p. 2011.
[103] Satish, Mrinal. "'Bad Characters, History Sheeters, Budding Goondas and Rowdies': Police Surveillance Files and Intelligence Databases in India." *National Law School of India Review* 23, no. 1 (2011): 133–60. http://www.jstor.org/stable/44283744, p. 2011.
[104] Section 71 of the Bharatiya Nyaya Sanhita 2023 uses the term 'Punishment for repeat offenders' to provide the sentence range for persons who have prior convictions for rape.

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-section (3) of s. 51 mandates the medical practitioner to forward the examination report without delay to such a 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. Some other processes under the CrPC, which had required an officer not below the rank of a Sub-Inspector, include tracing unlawfully acquired property,[105] search of premises where publications that contravene certain provisions of the BNS are placed,[106] and commanding the dispersal of an unlawful assembly.[107] It must be noted that the BNSS retains the requirement for an officer who is not below the rank of Sub-Inspector, to initiate these processes. It is unclear, then, why this requirement has been removed in this provision (directing the medical examination of an accused for investigation purposes alone). 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 Criminal Procedure (Identification) Act.

III. 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 s. 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 s. 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 s. 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. By doing so, the guidelines attempted to ensure the physical integrity and safety of arrestees from custodial violence in the *entire* duration of their custody. Contrary to this, s. 53(1) does not mandate multiple examinations ('one more examination') and instead leaves this issue to the discretion of the medical practitioner.

[105] S. 105D CrPC, S. 116 BNSS.
[106] S. 95 CrPC, S. 98 BNSS.
[107] S. 129 CrPC, S. 148 BNSS.

Proclaimed Offenders and Trials *in Absentia*

Section 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,[108] 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.[109] Most of these offences carry punishments of imprisonment for seven years, ten years, or with life, and as such, are grave offences.[110] However, s. 82(4) does not include many other offences that carry equal or higher punishments.[111] S. 84(4) BNSS replaces 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 has not introduced any other change 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' – someone to whom a proclamation is issued

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

[109] 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.

[110] 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), last accessed on October 18, 2023.

[111] 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.

under s. 84(1)[112] – and a 'proclaimed offender' – someone accused of an offence specified in s. 84(4)[113] and who fails to appear pursuant to a proclamation notice.[114]

II. Proclaimed offenders and trials in absentia

In 2017, the Supreme Court suggested the procedure be adopted to conduct trials of absconding offenders *in absentia*, in order to remedy delays caused by their absence during trial.[115] *Inter alia,* High Courts of Gujarat,[116] Delhi,[117] Jharkhand,[118] and West Bengal[119] 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,[120] 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 time 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 s. 84(4). *Two*, they have absconded to evade trial. *Three*, there is no immediate prospect of their arrest. Once these conditions are met, s. 356 deems the proclaimed offender

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[112] S. 82(1) CrPC.
[113] S. 82(4) CrPC.
[114] 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, judgement dated October 12, 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.
[115] *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.
[116] 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.
[117] *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.
[118] *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.
[119] *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.
[120] S. 299 CrPC.

to have waived their 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 s. 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. Notably, the BNS has also enhanced punishments for different offences[121] thus widening the application of who can become a proclaimed offender. It follows that the scope of trials under s. 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 s. 84(1).[122] Unrestricted power to notify offences for *in absentia* trials is prone to misuse and may result in arbitrary State action.

The trial under s. 356 cannot begin until ninety days after the framing of charge.[123] 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.[124] The Act retains this position.[125] If framing of charge is a prerequisite for trials *in absentia*, the scope of s. 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.[126] 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.[127] Under s. 356(2), courts must ensure that attempts are made to inform the accused about the proposed commencement of trial.[128] 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 Act does not propose any changes to address this problem.

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[121] See Chapter X (Enhancement of Punishments) of this substantive analysis.
[122] S. 356(8) BNSS.
[123] Proviso to s. 356(1) BNSS.
[124] Ss. 249, 251(2) BNSS and ss. 226, 228(1)(b) CrPC.
[125] S. 251(2) 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.
[126] S. 84(1) BNSS and s.82(1) CrPC.
[127] S. 84(2) BNSS and s.82(2) CrPC.
[128] S. 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.

Similar to s. 356 BNSS, s. 299(1) CrPC (retained verbatim in the BNSS as s. 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.[129] These requirements must be 'proved' to trigger s. 335, but there is no such requirement of proof under s. 356. The absence of this requirement dilutes the safeguards available for a trial in absentia. Both ss. 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 s. 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. In effect, this incentive can trigger the violation of key fundamental rights to a fair trial, fair notice and hearing. Although under s. 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. Further, providing the option for a legal counsel in cases where the trial is conducted without the accused can potentially make this option redundant. 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.

S. 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.

S. 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.[130] It also introduces an important new provision, i.e., s. 86, that allows a court to request a *contracting state* to assist with the identification, attachment, and forfeiture of a property belonging to a proclaimed

[129] *Jayendra Vishnu Thakur v. State of Maharashtra* (2009) 7 SCC 104 [29].
[130] Ss. 83–86 CrPC, and ss. 85, 87, 88, 89 BNSS.

person.[131] Presumably, the intention with s. 86 is to target a proclaimed person's property that is located in a country or place *outside* India. While s. 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.[132]

Attachment and forfeiture under Chapter VIII relates to a property derived or obtained, directly or indirectly, from the commission of an offence.[133] Under s. 115(1), 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.[134] 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.[135] Chapter VIII of the BNSS is identical to Chapter VII(A) of the CrPC, insofar as attachment and forfeiture proceedings are concerned.[136] After considering the historical context to Chapter VII(A) of the CrPC,[137] 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.[138]

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 to compel accused persons to appear in court.[139] *Any* property belonging to the proclaimed person may be attached, so long as a proclamation notice has been issued validly.[140] 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

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[131] Chapter VIII of the BNSS retains the definition of 'contracting state' under Chapter VII(A) of the CrPC. See s. 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.

[132] Barring the proposed insertion of s. 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 Chapter VI(C) and Chapter VII(A) of the CrPC, respectively; see ss. 84, 85, 87, 88, 89 BNSS and ss. 82, 83, 84, 85, 86 CrPC.

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

[134] S. 115(1)-(2) BNSS and s.105C(1)-(2) CrPC.

[135] 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.

[136] The only difference between the two chapters is the insertion of ss.112 and 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.

[137] 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*'.

[138] *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.

[139] *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.

[140] S.83 CrPC and s. 85 BNSS.

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 s. 86 has been introduced in Chapter VI(C), instead of Chapter VIII.[141]

The text of the proposed addition to Chapter VI (s. 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 which was obtained in relation 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? The lack of explanation that could answer these questions have concerning implications. First, these absences can enable requests and the attachment of an offender's property, even those lawfully held. It is important to note here that the forfeiture of lawful property is otherwise a punishment under the BNS, imposed after a trial where an accused has been heard and sentencing has been conducted. Second, such forfeiture can happen in the absence of any material, given that the term 'reasonable grounds' in this provision has been provided with no further clarity.

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

[141] 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 ss. 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.

Victims' Rights

Section 173, 193, 230 and 360

Victim-centric reforms in the Indian criminal justice system have generally been in the form of three rights, namely, participatory rights, right to information, and right to compensation for the harm suffered. The 154th Law Commission Report (1996)[142] and the Justice Malimath Committee Report (2003)[143] 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 introduced in the BNSS build on this structure by primarily incorporating rights to information for the victim at various stages of the criminal procedure (see s.173, 193 and 230), and adding another participatory rights through s. 360. In addition to this, the practice of recording Zero FIRs has been institutionalised under s.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) in the 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 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

[142] 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).
[143] Government of India, Ministry of Home Affairs, Committee on Reforms of Criminal Justice System Report, Volume 1 (2003).

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 by the Supreme Court in *Jagjeet Singh v. Ashish Mishra* to include victims who come forward to participate in a criminal proceeding.[144] 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,*[145] 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, 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 does CrPC allow the victim to be heard at that stage, nor does it have judicially enunciated principles translated into reality for the victim.[146] Through s. 360, however, the BNSS plugs this lacuna. S. 360 largely mirrors s. 321 CrPC, with the addition of one important proviso that the victim must be heard before such withdrawal is allowed. While this provision recognises the victim as a stakeholder in the criminal trial, it does not explain the mechanism through which the trial may then proceed. Thus, in a scenario where the State wishes to withdraw prosecution but the victim does not, the quality of such a prosecution remains suspect, and is a consequence that s. 360 does not account for.

II. Right to information

The victim's right to information has been expanded in the BNSS in three ways. Ss. 193(3) and 230 grant victims the right to receive the FIR copy free of cost, require the police to inform the victim regarding the status of investigation, and grant other informational rights such as providing them with police report, witness statements, etc. However, these rights are available only if the victims are represented by an advocate.

[144] *Jagjeet Singh v. Ashish Mishra* (2022) 9 SCC 321.
[145] *Saleem v. State (NCT of Delhi)* (2023) 2023 SCC OnLine Del 2190.
[146] *State of Kerala v. K. Ajith* (2021) SCC OnLine SC 510.

The victim has been granted the right to receive a copy of the FIR free of cost.[147] This is a crucial information right, since the FIR is an important piece of evidence that forms the basis for the trial. Previously, the CrPC granted the informant the right to access a copy of the FIR. Thus, the change in the BNSS affects only those cases where the victim and the informant are different people. Second, s. 193(3) BNSS requires the police to inform the victim of the progress in the investigation within 90 days, therefore allowing 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. Third, s. 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.

But rights under s. 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.

In *Delhi Domestic Working Women's Forum,*[148] 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 introduced 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 section as well.[149]

III. Other Rights

The BNSS has institutionally recognised the right to register Zero FIRs under s. 173.[150] Therefore, the Act 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

[147] S.193(3) BNSS.
[148] *Delhi Domestic Working Women's Forum v. Union of India* (1995) 1 SCC 14 [15].
[149] *Jagjeet Singh*; *Saleem*.
[150] S. 173 BNSS.

innovation of the BNSS and has been previously mandated by the Central Government[151] and substantially enforced by the judiciary in various instances.[152] 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.[153] Despite multiple judicial pronouncements of this nature, non-registration of FIRs remains a pervasive issue that needs to be addressed by the State.[154] Hence, it is unclear how the BNSS can actually address this concern.

The BNSS also explicitly allows a complaint to be lodged electronically, which has to be signed by the complainant within three days. It is not explained in the BNSS by which modes the complaint can be filed. Electronic mode could potentially include email, Whatsapp, etc. These means of sending the complaint, however, do not guarantee any action on behalf of the police or registration of FIR. Additionally, the requirement of signing the complaint within three days does not clarify whether it can be e-signed or whether physical signatures are required. The provision also does not make it clear whether the investigation would begin before the complaint is signed, allowing police to refuse to take any action in the absence of signatures by the complainant or even refusing to take signatures (if the complainant comes physically to sign at the police station).

Further, despite the judicial recognition of the right to compensation,[155] victims have been inadequately and inconsistently compensated by the courts[156] and through state victim compensation schemes.[157] At the same time, beyond monetary compensation, the need for rehabilitation of victims has also been judicially recognised. For instance, in *Mallikarjun Kodagali,*[158] 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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[151] Ministry of Home Affairs, 'Advisory on comprehensive approach towards crimes against women', No. 5011/22/2015 - SC/ST - W, 12 May 2015.
[152] *State of Andhra Pradesh v. Punati Ramulu* 1994 Supp (1) SCC 590; *Kirti Vashisht v. State* 2019 SCC OnLine Del 11713.
[153] *Lalita Kumari v. Government of Uttar Pradesh* (2014) 2 SCC 1.
[154] *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.
[155] *Dr. Jacob George v. State of Kerala* (1994) 3 SCC 430; *Maru Ram v. Union of India* (1981) 1 SCC 107.
[156] *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.
[157] *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.
[158] *Mallikarjun Kodagali v. State of Karnataka* (2019) 2 SCC 752.

Conditions Requisite for Initiation of Proceedings – Cognizance

Sections 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 has brought in three significant changes to the operation of cognizance proceedings. *First*, it relaxes the precondition of government sanction for taking cognizance in cases involving public servants such as judges (s. 218). This is a laudable development that brings the legislative provision in consonance with case law. *Second*, it creates an opportunity for the accused to be heard at the stage of cognizance in private complaint cases (s. 223). *Third*, it specifically provides for cognizance based on complaints filed under special laws (s. 210). The last two changes raise concerns about their possible implications.

I. Background: Procedure for cognizance

S.190 CrPC enumerates the situations in which the Magistrate may (and 'must')[159] take cognizance of an offence. The *first* scenario relates to cases involving commission of cognizable offences, in which the police can begin investigation and arrest the accused without permission from the court, and which are generally considered to be more 'serious'.[160] 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 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.[161]

Second, in non-cognizable offences or where the police has refused to register an FIR,[162] 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

[159] *Umer Ali v. Safer Ali* Calcutta High Court, judgment dated August 19, 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.
[160] 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.
[161] S.190(1)(b) CrPC: '*upon a police report of such facts*'.
[162] S.190(1)(a) CrPC: '*upon receiving a complaint of facts which constitutes such offence*'.

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.[163] The above structure has been retained in the Act, in Chapter XV, with the addition of changes discussed below.

II. Sanction for Prosecution of Public Servants/Judges

S. 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 s. 218 adds to this by providing a timeline of one hundred and twenty days within which the government must take a decision in relation to the sanction, and further prescribes that where the government fails to decide in relation to the request for sanction within 120 days, sanction would be 'deemed to have been accorded' by the Government.

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.[164] Consequently, the Supreme Court took note of the inaction of governments in granting sanction, and prescribed a time limit of three months (or 120 days) for grant of sanction.[165] Similarly, the Central Vigilance Commission has also prescribed a 120-day time period for grant of sanction by the government under s. 197 CrPC.[166] S. 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, because of the government's failure to grant or reject sanction.[167] 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

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[163] *R.N. Chatterji v. Havildar Kuer Singh* (1970) 1 SCC 496; *Abhinandan Jha v. Dinesh Mishra* (1967) 3 SCR 668.
[164] 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 September 26, 2023.
[165] *Vineet Narain & Ors. v. Union of India & Anr.* (1998) 1 SCC 226.
[166] 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.
[167] *Vijay Rajmohan v. Central Bureau of Investigation* (2023) 1 SCC 329.

judicial review.[168] 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,[169] 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.

III. Opportunity for Hearing the Accused

Complications arise in the context of complaint cases, through the addition of a proviso to s. 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.*[170] 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.[171] 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.[172] 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 of an offence is taken , 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.[173] A caveat is that in rare circumstances, where there is irrefutable evidence (sterling quality) to suggest that the prosecution version is 'totally absurd or preposterous', it may be brought to the notice of court at the stage of taking cognizance as well.[174]

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

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[168] *Vijay Rajmohan.*
[169] S.9 Prevention of Corruption Act, 1988.
[170] *Sourindra Mohan Chuckerbutty v. Emperor* (1910) SCC OnLine Cal 41; *R.R. Chari v. State of Uttar Pradesh* (1951) SCC 250.
[171] *Bhushan Kumar v. State* (2012) 5 SCC 424.
[172] *Subramanian Swamy v. Manmohan Singh* (2012) 3 SCC 64.
[173] 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.
[174] *Rukmini Narvekar v. Vijay Sataredkar* (2008) 14 SCC 1.

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.[175] 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*'.[176] This provision is often utilised by vulnerable complainants where the perpetrator holds relatively more power. This includes instances of violence against members of the Scheduled Caste or Scheduled Tribe communities by persons from dominant castes; sexual violence against women by men in positions of power, including those from a 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 further contributes to the victims' difficulties. By allowing the accused an unrestricted right of hearing at this stage, under s. 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 to produce any material, as cognizance is taken based on the chargesheet/complaint,[177] apart from the aforesaid evidence of sterling quality. Judicial clarity would be needed to determine if the hearing would be limited to this point or whether the accused would be allowed to produce documents in relation to the allegations in the complaint. 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, while no such right exists in cases 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 the 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.

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[175] *Seeni Ammal, In re,* (1960) SCC OnLine Mad 115.
[176] 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.
[177] *State of Orissa v. Debendra Nath Padhi* (2005) 1 SCC 568.

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 s. 223(2), 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) the 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.

S. 223(2) has been duplicated in s. 175(4). S.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 s. 223, does not fit in the scheme contemplated within the BNSS (or the CrPC). This is likely a clerical error.

IV. Circumstances for taking Cognizance

The first clause of s.190(1) has been modified in s. 210(1)(a) BNSS, which now provides that cognizance may be taken of any offence '*upon receiving a complaint of facts, <u>including any complaint filed by a person authorised under</u> <u>any special law,</u> 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 s. 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 is 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[178] 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'.[179] In the absence of corresponding amendments to the special laws, the treatment of final investigation reports by specialised agencies as a 'complaint' potentially removes such agencies from the ambit of the term 'police' and thereby sidesteps the safeguards that come with the exercise of

[178] An officer of the specialised agency, such as the Enforcement Directorate, SFIO, NIA, etc. in this context.
[179] *Abdul Razzak v. Sudip Kr. Dutta Gupta* (1989) SCC OnLine Cal 167; *Badaku Joti v. State of Mysore* (1966) 3 SCR 698.

police power.[180] 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 the 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.[181] Other 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.[182] Other instances of complaints filed by authorised officers under a special law may be found in s. 439 read with 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 cognizance is applicable.

[180] Such as statements of guilt made by the accused person to the police officer cannot be used in evidence.
[181] *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.
[182] S.36A NDPS Act.

Custody of Arrested Persons During Investigation

Section 187

S. 58 of the BNSS, like s. 57 CrPC, provides that arrested persons cannot be detained in police custody[183] beyond 24 hours. S. 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.

S. 187 BNSS retains the timelines of 60 or 90 days and the concept of default bail, as in the CrPC. However, unlike s. 167 CrPC, s. 187(2) additionally provides that the detention in custody of 15 days (in whole or in part) can be at any time during the initial 40 or 60 days out of the 60- or 90-day period, as the case may be. Consistent with the position under the CrPC, s. 187(2) empowers any magistrate to authorise detention, irrespective of whether they have jurisdiction to try the case; whereas s. 187(3) requires a jurisdictional Magistrate. Further, s. 187(3) provides that detention in custody can be authorised beyond the period of 15 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 s. 187(5), it defines the kind of custody permissible under the provision. This piece discusses the significant modifications introduced in s.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 15 days. However, this provision was observed more in its breach than its compliance, with the police filing preliminary reports to extend the detention period till the investigation was completed.[184] Ultimately in the new CrPC of 1973,[185] a proviso was introduced in s. 167(2) to empower the Magistrate to authorise detention in custody beyond the period of 15 days, but up to a maximum of 60 or 90 days (depending on the extent of punishment prescribed); provided that such further custody beyond the period of 15 days could not be in police custody. S. 167 also introduced default bail for the accused, if investigation was not completed within such 60 or 90 days.

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[183] 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.

[184] 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.

[185] 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.

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.[186] Sub-clauses (2)(b), (2)(c), and (3) of s. 167 CrPC[187] 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,[188] and have been consistently acknowledged by the judiciary for its pervasiveness and as a matter of grave concern.[189] 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 24 hours; Art. 21 has been judicially interpreted to include the right against torture and assault by the state and its functionaries.[190] Further, the judiciary has brought in specific safeguards to prevent police excesses during custody, such as by laying down guidelines for arrest and detention in *D.K. Basu v. State of West Bengal*,[191] and measures like installation of CCTV cameras in police stations.[192]

II. Modifications in duration and manner of granting police custody

Extended duration of police custody

The total period of detention of an accused is the same under both s. 167 and s. 187, i.e. 60 or 90 days, depending on the offence to which the investigation relates. Under the CrPC, police custody cannot exceed 15 days. However, under s. 187(3) BNSS, the Magistrate can authorise police custody detention for a period exceeding 15 days. In fact, such police custody may be authorised for the entire period of detention, i.e. a maximum of 60 or 90 days, as the case may be. Given this, the only difference between s. 187(2) and (3) is that detention under s. 187(3) needs to be authorised by a magistrate with jurisdiction to try the case, unlike s. 187(2). Otherwise unlike the CrPC, police custody detention can be authorised under both sub-clauses.

This change is excessive and in stark contrast to even draconian special legislations such as the UAPA where the duration of police custody permissible is only 30 days; and the investigating officer is required to file an affidavit providing reasons for seeking police custody if the accused is in judicial custody.[193] Even this safeguard is absent in the BNSS.

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[186] *Central Bureau of Investigation v. Anupam Kulkarni* (1992) 3 SCC 141 [10].
[187] These provisions are retained in the BNSS. S.187(4) BNSS (similar to s.167(2)(b) CrPC) requires physical production of the accused before police custody can be granted. S.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. S. 187(7) BNSS (similar to s.167(3) CrPC) imposes an additional requirement of recording written reasons on the magistrate while granting police custody.
[188] Project 39A, Death Penalty India Report, Volume II, 2016, Page 20 onwards; National Campaign Against Torture, India: Annual Report on Torture-2020, 2021.
[189] *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.
[190] *D.K. Basu* [17], [22].
[191] *D.K. Basu* [35].
[192] *D.K. Basu*; *Prakash Kapadia v. Commissioner of Police (Ahmedabad City)* (2014) SCC Online Guj 11365.
[193] 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.

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 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.[194] This is also likely to adversely affect the accused's fair trial rights during the pre-trial period; especially if they are from a marginalised background and do not have access to a lawyer at this stage, which is often the case.[195] 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.[196] 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.[197] 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.[198]

Initial police custody in tranches, beyond the first 15 days

Courts have differing interpretations of s.167(2) CrPC, which is regarding the power of the Magistrate to order that a person be held in the custody of the police for a period of 15 days. Courts have differed particularly on the issue of whether police custody can be granted only in the first 15 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.[199] 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.[200] In holding so, the court recognised the legislature's intention in placing limitations on police custody, to protect

[194] *Shabnam v. Union of India* (2015) 6 SCC 702 [14].
[195] 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.
[196] Project 39A, Death Penalty India Report, 2016.
[197] *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.
[198] *Babubhai v. State of Gujarat* (2006) 12 SCC 268 [16]: the accused had been in police custody for 16 days previously.
[199] *Central Bureau of Investigation v. Anupam Kulkarni* (1992) 3 SCC 141.
[200] *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 been admitted in hospital for some days in that period and had not been available for interrogation. This plea was rejected.

the accused from methods adopted by unscrupulous officers.[201] This decision in *Anupam Kulkarni* was followed with approval by a larger three-judge bench of the court.[202] 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 15 days because the accused had '*frustrated the process*' by getting hospitalised and being unavailable for interrogation.[203] 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 15 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.[204]

In this background, s. 187(2) BNSS resolves this issue by adopting the rationale in the latter line of cases. It explicitly allows detention in police custody for 15 days, at any time in the first 40 or 60 days out of the investigation period of 60 or 90 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[205] due to the likelihood of them being obtained pursuant to police pressure.

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.[206] Under the BNSS, such tampering would be made easier if unrestricted access to the accused is permitted via police custody during the later stages. S. 187(2) is thus likely to incentivise such malpractices and exacerbate these existing issues.[207]

Further, note that the possibility of securing police custody beyond the first 15 days may reduce the incentive for timely investigations, contrary to the constitutional and legislative

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[201] *Anupam Kulkarni* (1992) 3 SCC 141 [10], [11].
[202] *Budh Singh v. State of Punjab* (2000) 9 SCC 266 [5].
[203] *Central Bureau of Investigation v. Vikas Mishra* (2023) 6 SCC 49 [15]-[17], [19].
[204] *V. Senthil Balaji v. State* (2023) SCC Online SC 934 [68]-[69], [82]-[83], [95], [98].
[205] *Ashish Jain v. Makrand Singh* (2019) 3 SCC 770; *Sattatiya v. State of Maharashtra* (2008) 3 SCC 210 [26].
[206] *State of Rajasthan v. Tara Singh* (2011) 11 SCC 559; *Sahib Singh v. State of Punjab* (1996) 11 SCC 685.
[207] 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.

prerogatives to limit detention, and to the BNSS' own objective of reducing investigative delays.[208]

Consideration of the status of bail

S. 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.[209] S. 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.

Restricting the places of detention to police stations and jails through such a definition may at first 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,[210] transit remands required for transporting the accused from one state to another,[211] and house arrest.[212]

The need for many of these forms of custody would continue to exist in reality. Their exclusion from permissible custody under s. 187 might then be harmful in practice since custody in the form of house arrest or transit remand still effectively entail the accused's liberty being curtailed. However, since they do not fall under the ambit of "custody" as defined under s. 187, such period may not be considered towards default bail, which would further limit the liberal meaning of custody as interpreted by courts for this purpose.

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[208] 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.
[209] *Gautam Navlakha v. National Investigation Agency* (2021) SCC Online SC 382 [103]-[104].
[210] *V. Senthil Balaji v. State* (2023) SCC Online SC 934 [95].
[211] *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.
[212] *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

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

The BNSS has introduced maximum timelines for filing of discharge applications and framing of charges. S. 250(1) introduces a 60-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, s. 262(1) stipulates that a discharge application can be filed within 60 days from the date of framing of charge.

Additionally, s. 272 provides discretionary powers to Magistrates to issue 30 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, s. 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, s. 251(1)(b) and 263(1) mandate that charges against an accused should be framed within 60 days from the date of first hearing on charge, in sessions and warrant triable cases. Further, s. 251(2) permits framing of charges in the virtual presence of the accused. These changes are focussed on reducing delays in the trial process by prescribing timelines.

I. Changes related to discharge

Issues regarding timeline for filing for discharge in cases triable by Sessions Court

Unlike s. 227 CrPC, s. 250(1) BNSS expressly recognises the right of the accused to file an application for discharge and prescribes a 60-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. *First*, accused persons often do not receive timely access to their case papers[213] and may not have legal representation at this stage in the criminal proceedings. *Second*, 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.[214]

While considering the choice between discharge and framing of charges, courts have to take into account whether there exists a "strong suspicion", based on some material, to support a

[213] *P. Gopalkrishnan v. State of Kerala* (2020) 9 SCC 161 [17], [18], [21].
[214] 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.

prima facie conclusion that the accused committed the offence.[215] 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.

Notice to complainant for discharge of accused in 'complaint cases'

S. 272 BNSS provides the Magistrate with discretionary powers to serve 30 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. S. 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.[216]

Discharge in summons cases

Corresponding to s. 251 CrPC, s. 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. S. 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.[217] The only recourse available to the accused is under the extraordinary jurisdiction of the High Court under s. 482 CrPC. However, through the proviso under s. 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

Issues regarding stipulation of timelines for framing of charge

Corresponding to ss. 228 and 240 CrPC, ss. 251 and 263 BNSS prescribe a 60-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.

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

[215] *Dipakbhai Jagdishchndra Patel v. State of Gujarat* (2019) 16 SCC 547 [15], [23].
[216] *A.S. Gauraya v. S.N. Thakur* (1986) 2 SCC 709 [9] - [10].
[217] *Subramanium Sethuraman v. State of Maharashtra & Anr.* (2004) 13 SCC 324 [16] - [17].

charges in a few death penalty cases, and ordered a *de novo* trial.[218] 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'[219] and a hasty trial would be vitiated as 'being meaningless & stage-managed'.[220] 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.[221] Another significant reason for the current delays in criminal proceedings is the high levels of vacancies in the subordinate-level judiciary,[222] 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, s. 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 documents or parts of the police report from consideration.[223] Since s. 193(9) prescribes a 90-day time limit for further investigation, it is unclear how this would affect the timeline for the framing of charges.

Issues regarding presence of accused using electronic means during framing of charges

In addition to the timeline for framing of charges, s. 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.[224] 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

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[218] *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 October 19, 2023, [18]-[21], <https://scourtapp.nic.in/supremecourt/2019/2764/2764_2019_4_1501_47778_Judgement_19-Oct-2023.pdf>, last accessed on October 20, 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.

[219] *Anokhilal* [26].

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

[221] *Anokhilal* [31].

[222] '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.

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

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

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. *First*, 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[225] while entering their plea. *Second*, 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. *Third*, 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 prisons across India (in case the accused is in judicial custody).[226] Pre-existing concerns that persist include the 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.

[225] 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.

[226] 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

Sections 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.[227] This part discusses the main provisions that deal with the use of forensic evidence i.e. ss. 176(3), 349, 329 and 330.

S. 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. S. 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, s. 329 BNSS retains the exemption for certain government scientific experts from appearing as witnesses before the court. S. 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

S. 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. There is no further guidance given in relation to the category of offences wherein forensic evidence would have to be collected. Accordingly, a variety of offences including offences such as petty organised crime, which would ordinarily not require a forensic expert, may attract this provision. The section 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. In view of the above, it remains to be seen whether there is sufficient infrastructure to support the expansion of forensic sciences as envisaged in this provision.

Considering the lack of statutory requirements on crime scene management, the introduction of this section 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 forensic science laboratories (FSLs)[228] or District/Mobile Forensic Science Units (DFSU/MFSU)[229] may also be called for crime scene

[227] Statement of Objects and Reasons, BNSS.
[228] 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.
[229] Directorate of Forensic Science Services, Ministry of Home Affairs, 'DFSS Report 2018-2022': there are 552 mobile forensic science units in India.

visits by police officials depending on the nature of the case.[230] 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.[231] 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.

Broad scope of 'forensics experts' could include private experts

Under s. 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.[232] 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.[233] 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.

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.[234] 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.[235] The

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

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

[232] 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.

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

[234] 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.

[235] 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,

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 s. 349 in two significant ways. *First*, the types of samples that may be collected have been expanded from signatures and handwriting to include fingerprints and voice samples[236] as well. *Second*, in 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 s. 349 the Magistrate can order collection of samples from any person while providing the reasons for such collection in writing.[237]

Concerns regarding the expansive powers of collection of personal data under the CPIA hold true for s. 349 as well.[238] Under s. 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.

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).[239] 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%.[240] This raises critical questions regarding the perceived accuracy and infallibility of fingerprint comparison that currently exists within the criminal justice system. Besides the high rates of error in fingerprint examination which impact its

'Forensic Science India Report: A Study of Forensic Science Laboratories (2013-2017)', Chapter 2: Recruitment, Education & Training, Pages 95-104.

[236] *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.

[237] There is an overlap between s. 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.

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

[239] 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.

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

reliability, there is also a lack of empirical evidence of the 'uniqueness' of fingerprints.[241] Further, many studies have found that fingerprint examiners are susceptible to issues of confirmation bias (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.[242]

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.[243] 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.[244] 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,[245] empirical research to validate and measure the accuracy of different forensic voice comparison systems is ongoing.[246] Until the scientific foundations of voice analysis have been tested, legal reliance on such evidence has been cautioned against.[247]

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,[248] 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

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[241] 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.

[242] 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.

[243] 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.

[244] 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.

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

[246] 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.

[247] Catanzaro et al., 'Voice Analysis Should be Used with Caution in Court', (*Scientific American*, January 5 2017), last accessed on October 19, 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.

[248] 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.

validation studies to ensure that these procedures perform as expected within the laboratory's set-up and provide accurate results.[249] 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, s. 329 allows the submission of a report by a government scientific expert as evidence, without requiring their oral testimony in court as a witness. S. 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.

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 CrPC of 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.

S. 329 widens the exemption from oral examination for forensic experts.[250] This exemption to experts from fulfilling their duty to the court is in stark contrast to the law in other jurisdictions,[251] including the United Kingdom, where courts must provide reasons for *not* examining an expert whose report has been admitted as evidence.[252]

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.[253] In *Rahul v. State (NCT of Delhi)*,[254] the Supreme Court disregarded the DNA evidence on the grounds that the lower courts had failed to examine the underlying basis of the DNA report and whether the expert had reliably conducted the examination.

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[249] 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'.
[250] 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.
[251] *Melendez-Diaz v. Massachusetts* 557 US 305 (2009).
[252] 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.
[253] *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].
[254] *Rahul* [38].

However, s. 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 why the particular expert ought to be summoned.[255] 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.[256]

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 s. 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.[257] Further, the exempted category of government scientific experts as notified by the state governments, may vary across states. S. 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.

IV. Curtailing judicial scrutiny of forensic evidence

The impediment to challenging forensic reports in s. 329 is further strengthened by s. 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.[258] S. 330(1) requires parties to admit or deny the genuineness of documents within 30 days of their being supplied, a time limit that can be relaxed by the Magistrate upon giving reasons. Importantly, a new proviso to s. 330(1) stipulates that an expert *cannot* be called to appear before the court *unless* their report is disputed by a party. Unlike s. 329, this proviso is applicable to *all* experts.

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[255] *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 s. 330 below.

[256] *Anokhilal v. State of Madhya Pradesh,* Criminal Reference No. 6 of 2022, Madhya Pradesh High Court, Order dated September 11, 2023 [13]-[14], <https://mphc.gov.in/upload/jabalpur/MPHCJB/2022/CRRFC/6/CRRFC_6_2022_FinalOrder_11-Sep-2023.pdf>, last accessed on October 19, 2023; *Naveen @ Ajay v. State of Madhya Pradesh,* Criminal Appeals No. 489-490 of 2019, Supreme Court, judgment dated October 19, 2023 [18]-[21], <https://scourtapp.nic.in/supremecourt/2019/2764/2764_2019_4_1501_47778_Judgement_19-Oct-2023.pdf>, last accessed on October 20, 2023.

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

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

Background

Like s. 294 CrPC, s. 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.[259] 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.[260] 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.[261] On the other hand, courts have also held that a medical or post mortem report may be considered as a document under 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 experts as witness.[262] The proviso to s. 330(1) seeks to clarify this divergence in judicial opinions by adopting the latter interpretation.

Examination of experts arbitrarily restricted to issues regarding genuineness

The proviso to s. 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.[263]

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[259] *Dhirai v. State of Tripura* (1998) SCC OnLine Gau 233 [7].
[260] *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].
[261] *Nahadariya v. State of Madhya Pradesh* (1980) JLJ 501.
[262] *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].
[263] As mentioned in reference to s. 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.

Limiting inquiry into reliability of expert reports and issues regarding fair trial

The proviso to s. 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.[264] 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.

[264] *Anokhilal; Naveen @ Ajay*.

Witness Protection Scheme

Section 398

S. 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 section is an entirely new addition to 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*[265] 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,[266] 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 ranging from difficulty in accessing courts due to expenses, travel-time and frequent adjournments,[267] 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

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

[266] S. 195A IPC criminalises threatening of witnesses. Ss. 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.

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

proceedings.[268] Similarly, witnesses in offences committed by organised crime syndicates, such as terror outfits, may find their safety far more likely to be jeopardised.[269]

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 Section 398

The change, or the purpose behind s. 398, remains unclear in the face of the aforementioned developments. S. 398 merely reiterates the direction under *Mahender Chawla*, enabling states to frame their own witness protection schemes. Through the BNSS, the lawmakers had an opportunity to either formally introduce the framework set in place by *Mahender Chawla* into the statute (and thereby continue its problems) or to improve this framework. However, the BNSS does neither, and merely reiterates the barebones direction of the Supreme Court in *Mahender Chawla*. Thus, in the absence of any further guidance, it appears that the 2018 scheme will continue to operate, unless specific state legislation is enacted to address the same.

[268] *Sakshi v. Union of India* (1999) 6 SCC 591; *Delhi Domestic Workers Union v. Union of India* (1995) 1 SCC 14.
[269] *People's Union for Civil Liberties v. Union of India* (2007) 1 SCC 719.

Mercy Petitions

Section 472

S. 472 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.[270]

This piece discusses the changes brought in s. 472 BNSS along with its possible implications. While there may be benefit in attempting to streamline the procedure applicable to mercy petitions, s. 472 BNSS runs contrary to the mercy jurisprudence 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 provide 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.[271] 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.[272] They are significant since this gives convicts a *constitutional right* to file a mercy petition,[273] often a last hope for those sentenced to death.[274]

II. Restriction on who can file mercy petitions

S. 472(1), through the phrase '*convict under the sentence of death or his legal heir or any other relative*' may potentially limit the scope of persons who could file a mercy petition for the convict or persons related to them. Presently, there is no such restriction. It is pertinent to note that Rule I of the MHA guidelines state that the convict shall be allowed to file a mercy petition (and thereby outlines only the convict as the relevant party). However, this has not acted as a bar for mercy petitions to be filed by third parties on their behalf,[275] such as

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[270] 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; See, for instance, Model Prison Manual 2016.
[271] *Kehar Singh v. Union of India* (1989) 1 SCC 204.
[272] *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1; *Maru Ram v. Union of India* (1981) 1 SCC 107.
[273] *Shatrughan Chauhan*; Shabnam v. Union of India (2015).
[274] *Jagdish v. State of Madhya Pradesh* (2020) 14 SCC 156.
[275] *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.

organisations or unrelated individuals,[276] even though Art. 72 and Art. 161 are rights available to convicts. It is unclear whether the statutory stipulation of persons who may file mercy petitions can act as a bar to the filing of petitions by third parties.[277]

The language of s. 472(1) raises questions as well. The basis behind introducing the three categories – convict, legal heir or any other relative – is unclear. It is pertinent to note here that the law recognises different kinds of relationships, including friends[278]and conjugal partners in a relationship like marriage.[279] Further, the scope of the term 'any other relative' is ambiguous and does not provide immediate clarity on the persons this term could entail.

By precluding persons outside the convict, legal heir or any other relative, the BNSS fails to recognise the institutional reality faced by convicts in filing mercy petitions before the Governor and the President. It is not uncommon for death row convicts to lose contact with their families.[280] 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;[281] lack of education and other vulnerabilities results in their inability to understand and meaningfully exercise their legal rights.[282] 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,[283] 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

S. 472(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. It should be noted that the MHA guidelines adopt a similar language/phrase. However, Rule VII of the MHA guidelines further provides for a situation where a convict may file a subsequent mercy petition – the State government may be empowered to withhold the petition if the grounds enumerated in it are similar to the grounds enumerated in the previous mercy petition. This clearly lays out the requirement that a subsequent mercy petition must have fresh grounds.

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[276] *PUDR v. Union of India* PIL No. 57810 of 2014 (Allahabad High Court) order dt. October 31, 2014; *Shatrughan Chauhan v. Union of India* [mercy petitions filed by Bikramjeet Batra and other third parties]; *Balwant Singh Rajoana v. Union of India (*Writ Petition (Criminal) No. 261 of 2020).

[277] In this context, see also Rule 11.35 of the Model Prison Manual 2016, which seems to assume the legality of unrelated third parties filing mercy petitions on behalf of a death row convict by using the phrase "mercy has been submitted by or on behalf of the convict".

[278] See Mental Healthcare Act, 2017.

[279] S. 2(f), Protection of Women from Domestic Violence Act, 2005.

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

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

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

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

Presently, the Court has recognised the right to file multiple mercy petitions before the same authority, in case of change of circumstances.[284] For instance, if a convict develops mental illness subsequent to filing the first mercy petition, they can file another petition on the basis of this new ground. Further, the Supreme Court in *G Krishta Gout v. Government of Andhra Pradesh*[285] and *Krishnan v. State of Haryana*[286] has held that there is nothing that can debar the President or Governor from exercising their power even after the rejection of one clemency petition.

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

S. 472 provides for several time limits. *First,* where a mercy has not already been submitted, s. 472(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 about (a) the rejection of their special leave petition by the Supreme Court, or (b) 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,* s. 472(2) states that the petition may be first made to the Governor and upon rejection, the petition shall be made to the President in 60 days. 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 60 days. *Third,* s. 472(6) requires communication of the President's decision on the mercy petition by the Central Government within 48 hours, to the Home Department of the State government and the Superintendent of the Jail or officer in charge of the Jail.

S. 472 does not clarify the consequence of failure to adhere to its timelines, either for the convict or for the Central government in providing recommendations to the President. 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

[284] *Yakub Abdul Razak Memon v. State of Maharashtra* (2015) 9 SCC 552.
[285] *G Krishta Gout v. Government of Andhra Pradesh* AIR (1975) SC 2.
[286] *Krishnan v. State of Haryana* (2013) (14) SCC 24.

consideration of mercy petitions by the President and Governor.[287] In line with this jurisprudence, s. 472 does not create such time limits for the President or the Governor.

Ambiguities which have been left unclear under Section 472

Section 472 (3) BNSS (on mercy petitions where co-accused are present) contains various ambiguities regarding the processing of mercy petitions. It is unclear why an accused must file a petition within 30 days whereas the timeline for the Superintendent to forward case details of co-accused (who have not filed mercies) is kept at 60 days. Further, the Prison Superintendent is required to file a petition for co-accused prisoners within 60 days, but the day from which this timeline operates (that is, the date of an order/determination) has not been provided for. It is hence unclear when the time period gets set into motion under this clause. The logic behind the insertion of a timeline of 60 days for multiple accused is also not clear.

The ambiguities in timelines over processing multiple mercy petitions, coupled with the requirement that the President must consider petitions of co-accused in a single case together creates some confusion. For instance, if:

A, B and C are sentenced to death and their review petition has been dismissed on July 2. A files a mercy petition on July 31 (within 30 days), and his mercy has been forwarded by the Central Government with recommendations to the President on October 1 (within 60 days). B and C do not file mercy petitions. Subsequently, the Prison Superintendent files the mercy for B and C on August 30 (within 60 days) and the Central government sends its recommendations for B and C only on October 30. Does this mean that the President must wait until October 30 to decide the mercy petitions of A, B and C together? What requirement does this place on the President? What is the legal effect of this? Would this preclude convicts in multiple convict cases from filing at all?

The provision does not provide for the manner or timeline for the State Government and the Governor to process and dispose of mercy petitions, unlike the MHA guidelines which provide for the same, with the exception of Clause 2 of s. 472, mandating that the petition must first be made to the Governor. The provision provides a time limit for the Central Government to provide recommendations to the President (60 days) but does not place any timeline on the State government to provide its comments on the file and the grounds in the petition to the MHA. The reason for this difference in the law is unclear. Potential consequences of the Central Government failing to provide comments to the President within

[287] *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.

60 days is ambiguous – does this failure act as the minimum delay threshold, thereby opening the grounds for commutation?

The petition may be made to the Governor of the State and upon the Governor's rejection, it 'shall' be made to the President within 60 days. While the MHA guidelines make it clear that the State Government is required to forward the mercy petition to the President upon rejection by the Governor, S. 472 BNSS is unclear as to who will forward/file the mercy to the President – whether it has to be the convict/legal heir/any other relative (who has to undertake the process to file it before the President), or whether this has to happen at the State Government's end.

Issues with a 30-day timeline for submission of petitions under s. 472(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.[288] BNSS introduces a 30-day deadline for submission of mercy petitions under s. 472(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.

Issues with timeline for submission of mercy petition to President under s. 472(2)

It is unclear why the BNSS has a 30-day deadline for filing an application before the Governor but a 60-day deadline for filing it before the President. In any event, while s. 472(1) provides that the time period of 30 days will commence after *the prisoner is informed* about the relevant event as provided, s. 472(2) states that the 60-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.[289] S. 472(6) provides a 48 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 60 days, leaving no time to submit a petition to the President.

[288] *Shabnam v. State of Uttar Pradesh* (2015) 6 SCC 702.
[289] 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.

Effect on ability to avail other available judicial remedies

As per the timelines stipulated under s. 472, 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.[290] Even if a special leave petition is dismissed, convicts have the right to file a review petition.[291] 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.[292] In the context of mercy petitions, the Supreme Court has repeatedly emphasised the importance of review petitions,[293] and directed that convicts should have the right to file review petitions before they are required to file a mercy petition.[294]

S. 472 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 exists. For instance, after dismissal of their appeal or review petition in the Supreme Court, convicts will only have 30 days to file both a mercy petition under s. 472(1), as well as a review petition, which also has a time limit of 30 days.[295] 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 persons

S. 472(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 60 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-section (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

[290] *Babasaheb Maruti Kamble v. State of Maharashtra* (2019) 13 SCC 631.
[291] *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.
[292] *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.
[293] *Shabnam*.
[294] *B.A. Umesh v. Union of India* (2022) SCC OnLine SC 1528; *Shabnam*.
[295] Order XLVII Supreme Court Rules, 2013.

conduct records etc. Each of these personalised documents will be different for different convicts. However, s. 472(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.

VI. Disposal of petitions by President for multiple accused persons

Section 472 BNSS requires the President to hear and dispose of mercy petitions of multiple co-accused in a case together, 'in the interests of justice'. This may be an attempt to correct past mishaps/issues that the Courts have been confronted with for mercies involving multiple accused.

In *Union of India v. Vinay Sharma*,[296] the Delhi High Court held that the trial court's stay on its death warrant could be effected given that the mercy petition of one of the accused in the case was yet to be disposed of by the President (while the co-accused's mercies had been rejected). The decision found that rather than the prison rules, it was the accused's right to life which could provide grounding for staying the death warrant until all mercies had been disposed of. The Court held that a commutation of one of the co-accused's sentences could lead to fresh grounds to apply for mercy. In doing so, the Delhi High Court relied on the Supreme Court's observations in *Harbans Singh v. State of Uttar Pradesh*[297] and held that the prisoner's right to life would entail that their death warrants be stayed until the mercy petition of the co-accused was disposed of.

In *Harbans Singh*, multiple co-accused sentenced to death in the case had different outcomes (one accused had been executed and the other had their sentence commuted despite lack of significant difference in their role in the offence). The Court had then requested the President to commute the sentences of the two accused who had filed writs before the Court, but ultimately left it to the President's discretion. However, it is also pertinent to lay out the Supreme Court's order in *Balwant Singh Rajoana v. Union of India*[298] (2020) in which the Court held that the fact that the co-accused's pending appeal/case before the Supreme Court should not be a reason cited for the delay in disposing of the petitioner's mercy petition.

Section 472 (5) BNSS by mandating the President to hear petitions of multiple co convicts together, may potentially curtail the President's powers under Art. 72. Under A/72, the President has wide discretion but such discretion must be channelled towards a *fair* exercise of such power. As case law above indicates, there are issues of fairness and justice that come up in attempting to dispose of mercy petitions individually, or as a batch, in cases with multiple convicts.

[296] *Union of India v. Vinay Sharma* (2020) 267 DLT 98.
[297] *Harbans Singh v. State of Uttar Pradesh* AIR (1982) SC 849.
[298] Writ Petition (CrL) No. 261 of 2020.

VII. Relationship between mercy petition to a Governor and one to the President

Clause 2 of Section 472 stipulates that the mercy petition, once rejected by the Governor, shall be 'made' to the President within 60 days. It is unclear whether the petition being made to the President will be the same petition made to the Governor that will merely be forwarded to the President by the State Government.

One interpretation could mean that the same petition that has been rejected by the Governor is forwarded to the President within 60 days. This may potentially preclude the convict from filing any fresh petition to the President.

A second interpretation could mean that once the Governor has rejected the petition, a convict can (if they choose to do so) file a fresh petition to the President provided they do it within 60 days. However, the provision doesn't explicitly state that the convict must be informed of the rejection of their mercy petition by the Governor. This may then create a situation where the convict has no knowledge of the rejection of their mercy petition by the Governor and therefore, in effect, is denied the chance to file a fresh mercy petition to the President. However, it is pertinent to note that the Supreme Court in *Shatrughan Chauhan* has held that the convict must be informed about the rejection of their mercy petition, given that the filing of a mercy petition u/A 72 and 161 is a constitutional right.

VIII. Right to file a mercy petition and the right to be informed of the decision

Guidelines under *Shatrughan Chauhan v. Union of India* find that the accused's right to file mercy petitions under Articles 161 and 72 are constitutional rights[299] and the consequence of this right is that the decisions made by the Governor/President under these provisions must be communicated to the accused.[300] Further, the Supreme Court has also described the filing of a mercy petition as a 'remedy' and as a 'last hope'.[301] The BNSS seems to undercut this right by requiring a mercy to be filed before the President within 60 days of rejection by the Governor, as opposed to having a time limit starting from the date on which the accused has been informed of the Governor's decision to reject. Further, the MHA guidelines and the Supreme Court in *Shatrughan Chauhan* require the decision of the President to be provided in writing to the convict, along with a copy of the rejection of their petition. This is also fundamental for a convict to file a writ petition challenging the order of the President and Governor, as opposed to merely being informed of the decision orally.

IX. Restriction of judicial review

S. 472(7) states that the President's or the Governor's order made under Art. 72 or Art. 161, respectively, 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 or the Governor*' shall not be enquired into in any court.

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[299] See also *Shabnam v. Union of India.*
[300] *Shatrughan Chauhan v. Union of India* (2014) 3 SCC 1.
[301] *V Sriharan @ Murugan and Ors. v Union of India* (2014) 4 SCC 242.

The first part of this sub-section 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.[302] Judicial review of the decision of the President or the Governor is restricted, and courts can only intervene to remedy a fundamental rights violation.[303]

The second part of s. 472(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.[304] 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.[305] 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 circumstances can include inordinate and unexplained delay in deciding the mercy petition, insanity, solitary confinement etc.[306]

It is important to note that s. 472(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.

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[302] *State v. Jasbir Singh* (1979) SCC OnLine Del 220.
[303] *Maru Ram* [57]-[70]; *Kehar Singh*; *SR Bommai v. Union of India* (1994) 3 SCC 1.
[304] *Kehar Singh.*
[305] *Epuru Sudhakar v. Govt. of Andhra Pradesh* (2006) 8 SCC 161.
[306] 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.

X. Comparison between the MHA guidelines, Model Prison Manual and Section 472 BNSS

Subject	MHA Guidelines	Model Prison Manual	Section 472 BNSS
Timeline to file a mercy petition by a convict	Rule I: Seven days after the Prison SP has informed the convict about the dismissal of appeal/SLP (exclusive of the day on which the SP informs the convict). If no appeal is filed to the Supreme Court, then the timeline is seven days after the expiry of time to file appeal to the Sup Ct.	Rule 11:36: Seven days immediately after i) the prison has received receipt of the judicial order (HC confirmation/SC dismissal of appeal or SLP) *and* ii) after the Prison Superintendent personally informs the accused.	30 days after the Prison SP has informed the convict about the dismissal of their appeal, review or SLP/HC confirmation and after the period to file SLP/appeal to the Supreme Court has expired.
	Consequence of not filing within 7 days: Rule IV – discretion lies with the Chief commissioner or the State Government to consider the petition, and to withhold/not withhold such petition before the President of India. However, the discretion to withhold petitions filed after 7 days from being forwarded to the President does not apply to cases where i) death sentence was an enhancement at appellate levels, ii) cases that the State Government deems to be special either due to political interests or due to special public interest over the case.	Consequence of not filing within 30 days: No rule under the Manual speaks to this scenario and this is hence unclear.	Consequence of not filing within 30 days: No provision under the BNSS speaks to this scenario and this is hence unclear.
Persons who may file a mercy petition	The convict shall be allowed to file a mercy petition if he has not already submitted a petition for mercy.	Rule 11:35 indicates that a third party may file a mercy petition. The rule states that on receipt of an intimation from the State Government that the appeal, or application to the Supreme Court, has not been lodged within the	The convict, their legal heir or any other relative may file a mercy petition, if they have not already submitted a petition for mercy. It is unclear whether the introduction of mercy

		period prescribed by the Supreme Court Rules, the execution of the sentence shall not thereafter be postponed, unless a petition for mercy has been *submitted by or on behalf of the convict*.	petition processes into a statute *bars* third parties from filing mercy petitions.
Consequence of filing a mercy petition after the convict has already filed a prior one	Rule VII: A petition containing a similar prayer may be withheld if this prayer has already been submitted to the President in a prior petition, and the convict shall be informed of the petition being withheld along with reasons.	No rule speaks to this scenario. However, see below: Rule 11.38 states that if at any time before the execution of the sentence it comes to the knowledge of the Superintendent that exceptional circumstances have arisen which plainly demand a reconsideration of the sentence, he should report the circumstances by wireless to the State Government and ask for its orders. In such a case the Superintendent shall defer execution of the prisoner till Government orders are received.	The BNSS provides no clarity on this scenario and may lead to a situation where the convict may not be permitted to file more than one petition.
Processing of the petition from the Governor to the President	1. Petition must be addressed to the Governor of the State (except for Union Territories) and the President of India. 2. If the Governor rejects the same, the petition shall be forwarded by the State Government to the MHA along with a statement of reasons for rejection, and with observations on any of the grounds in that petition.	1. Rule 11.37 states that if the prisoner submits a petition within the period of seven days, it should be addressed to the Governor of the State and to the President of India. 2. If no reply is received within 15 days from the date of dispatch of the petition, the superintendent shall send an express letter to the Secretary to the State Government drawing attention to the fact. He shall in no case carry out the execution before receipt of a reply from the State Government.	1. The petition may be made to the Governor of the State and upon Governor's rejection, it 'shall' be made to the President within 60 days.

Mode of communication	Orders of the President on the rejection of mercy petition shall be communicated by express letter, and acknowledgment of receipt thereof shall be communicated through an express letter. Orders of the President commuting the death sentence shall be communicated by telegram (except for Delhi, where the mode is an express letter) and acknowledgment of receipt shall be communicated through a telegram or express letter.	Rule 11.37 states that if the prisoner submits a petition within the period of seven days, it should be addressed to the Governor or the State and to the President of India and dispatched by registered post with acknowledgement due, to the Secretary to Government, Home Department, together with a covering letter bearing in red ink, the words 'Death Sentence', 'Petition for Mercy' and 'Urgent' reporting the date fixed for the execution and certifying that the execution has been stayed pending receipt of the orders of the Government on the petition.	No mode of communication specified.

Power to commute sentences

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 BNSS, s. 474, i.e. 'Power to commute sentence', lays down the extent of this statutory power. This corresponds to s. 433 CrPC. A comparative table of changes in s. 474 BNSS against s. 433 CrPC is useful:

Changes in s. 474 BNSS against s. 433 of the CrPC

Initial Sentence	**Commuted Sentence/Range**	
	S. 474 BNSS	**S. 433 CrPC**
Sentence of Death	Imprisonment for life	Any other punishment provided by the IPC
Sentence of Life Imprisonment	Imprisonment for a term not less than seven years	Imprisonment for term not exceeding 14 years or fine
Sentence of Imprisonment for 7 years or more*	Imprisonment for a term not less than three years	—
Imprisonment for less than 7 years	Fine	Fine
Rigorous Imprisonment	Simple imprisonment for any term to which that person might have been sentenced	Simple imprisonment for any term to which that person might have been sentenced to fine

* New category created under the BNSS

The first major change brought about by the BNSS is 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 14 years of imprisonment. Nevertheless, the change in s. 474 (a) limits the power of the government to directly commute a death sentence to any term sentence.

In s. 474 (b) BNSS, for the commutation of a sentence of imprisonment of life, the words imprisonment for a term 'not exceeding 14 years or of fine' of the CrPC have been replaced with 'not less than seven years'. Thus, the BNSS removes the upper limit of 14 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 were made to the scheme of commutation of sentences. limit the discretionary power of governments, while also tending towards enhanced punishments.

A corresponding change made in the penal statute BNS is the insertion of s. 5 which states that the appropriate Government can commute any punishment under s. 474 of the BNSS, without the offender's consent. This resolves a contradiction between the provisions as the BNS Bill (August) contained provisions contrary to that under BNSS. In the BNSS Bill (August) in Clause 475 (a) and (b) provided that a sentence of death could be commuted to imprisonment for life and a sentence of imprisonment for life can be commuted to imprisonment of seven years, while s. 5 BNS prescribed that a sentence of death could be commuted to any sentence provided by the Sanhita and the sentence of imprisonment for life could be commuted to imprisonment for 14 years.

Provisions Pertaining to Bail and Bonds

Sections 479, 480, 481, 482, and 483

Chapter XXXV of the BNSS (ss. 478 to 496) 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 introduced. For instance, new insertions in the BNSS include definitions of bail, bail bond, and bond. Further, significant changes have been brought in two provisions – the provision regarding the maximum period of detention of an undertrial, and the provision on anticipatory bail.

A vital amendment introduced is in s. 480 BNSS which replaces s. 437 CrPC (bail in non-bailable offences). Under this provision, two categories[307] of persons who are not to be released on bail are provided, 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 s. 480 BNSS, the age is increased from 16 to 18. This amendment makes the provision consistent with the Juvenile Justice (Care and Protection of Children) Act, 2015.[308]

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 the definitions clause. Bail is defined under section 2(1)(b) as *'release of a person accused of or suspected of commission of an offence from the custody of law upon certain conditions imposed by an officer or Court on execution by such person of a bond or a bail bond.'*[309] Bond is defined under sub-clause (e) as a '*personal bond or an undertaking for release without surety'* and; bail bond under clause (d) as '*an undertaking for release with surety.*' A combined reading of these definitions makes apparent the two ways by which a person may be released on bail: 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, 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

[307] 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.

[308] Under s.12 of the Juvenile Justice (Care and Protection of Children) Act, 2015 all children in conflict with the law under 18 years of age are entitled to be released on bail and thus the provision does not expand the scope of bail law.

[309] 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".

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, ss. 441 (2) and (3) CrPC use the term bail generically to include release with or without surety.[310]

The BNSS attempts 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.[311] However, despite the definition, the confusion on the usage of the terms and bail and surety continue since the Sanhita seems to have retained the language of the present CrPC in some provisions, such as s. 142 and s.491.

II. Maximum period of detention for undertrials

S. 436A CrPC was inserted *vide* the Criminal Law (Amendment) Act, 2005 ('2005 Amendment').[312] 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,[313] the BNSS, instead of increasing the scope of bail as a right, has in many ways restricted it, as will be demonstrated in the following sections.

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 of the CrPC has excluded persons who are accused of an offence punishable with death. However, s. 479(1) 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. With a significant number of offences in the BNS carrying a punishment of life imprisonment, s. 479 considerably waters down the benefit of this provision.

Notably, s. 480 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 death or imprisonment for

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[310] *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.

[311] For instance, in ss. 478 and 479 BNSS the word bond has been inserted after bail wherever in the corresponding CrPC provisions bail was used to denote a bail with surety.

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

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

life. S. 480, however, has exceptions to this ineligibility,[314] which does not apply in case of s. 480. Further, the language of s. 480 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 s. 479. 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.[315]

Reduction in maximum period of detention for a first-time offender

S. 479 BNSS contains 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.[316]

Under the CrPC, courts have held 'prior conviction' as a relevant consideration for grant of bail[317] under ss. 437 or 438.[318] Such categorisation was, however, not envisaged under s. 436A. This exception also undercuts the reason behind introducing s. 436A CrPC: to prevent lengthy, extended periods of incarceration as an undertrial. Given that persons with prior convictions are also subjected to higher profiling than those without the same, persons with prior convictions are also at a higher risk of arrest, and thereby, a higher risk of prolonged incarceration.

Exclusion of a person against whom inquiry/trial is pending

Sub-section (2) to s. 479 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 subject to the third proviso, which states that no person shall be detained pending investigation, inquiry or trial for more than the maximum period of imprisonment provided for that offence.[319] 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

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[314] As mentioned in the *proviso* to s. 480, these exceptions are women, a child, or persons who are sick or infirm.
[315] *Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India* (1994) 6 SCC 731.
[316] 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.
[317] *Harjit Singh v. Inderpreet Singh* (2021) SCC OnLine SC 633.
[318] 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.
[319] 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.

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, 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. *Second*, 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. *Third*, 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, and can impact certain categories such as persons with prior convictions to a much greater extent.

Obligation of the Prison Superintendent

A notable insertion under the BNSS is s. 479(3), which places the responsibility of applying for bail under this provision upon the Superintendent of 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.

Through 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. 36A CrPC were discussed by the Supreme Court in *In Re: Inhuman Conditions In 1382 Prisons.*[320] These steps included issuance of an advisory for creation of an undertrial review committee in every district, which would meet every three

[320] *Inhuman Conditions in 1382 Prisons, In re,* (2016) 3 SCC 700 (Supreme Court order dated February 5, 2016).

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.[321] In *Bhim Singh,*[322] the Supreme Court cast the duty of looking at eligibility under s. 436A on the Magistrates and Sessions Judges.[323]

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 before the High Court or the Sessions Court seeking a direction that in event of such arrest he be released on bail. S. 482 BNSS has replaced s. 438 CrPC.

The changes 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, s. 482 reverts 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 that 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 subsection 1(i) to (iv).[324]

b. The amended subsection (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

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[321] National Legal Services Authority, Standard Operating Procedure (SOP) for Undertrial Review Committees (UTRCs), WP(C) 406/2013 - *In Re: Inhuman Conditions in 1382 Prisons*.
[322] *Bhim Singh v. Union of India* (2015) 13 SCC 605.
[323] The Supreme Court directed that jurisdictional Magistrates/Sessions Judges hold a sitting each week in every jail/prison for two months commencing from October 1, 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.
[324] 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.

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. *First*, the proviso to s. 438 was criticised as it permitted an officer in-charge to arrest the applicant without warrant in the pendency of the anticipatory bail application. *Second*, 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,[325] and recommended *inter alia* that the *proviso*, as well as sub-section (1B) be omitted.[326] 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.[327]

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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[325] 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).

[326] 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.

[327] *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.

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 section in the BNSS now also requires that information relating to 'the sequence of custody in case of electronic device' (s. 193 BNSS) 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. Courts have often recognised the importance of maintaining proper records and the chain of custody in maintaining the sanctity of the evidence, and failure to do so could prove fatal to the investigation.[328] Therefore, it is unclear why the sequence of custody of traditional evidence (such as weapons from the scene of crime, clothes of the deceased/accused, samples of the deceased/accused, etc) has also not been explicitly brought within the scope of the sub-section.

[328] *See, Prakash Nishad alias Kewat v. State of Maharashtra* (2023) SCC OnLine SC 666.

Evidence of Public Servants by Successors

There is a new introduction to criminal procedure by BNSS through s. 336. This provision allows for the evidence of certain categories of public servants and experts 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, died, cannot be found, are incapable of giving depositions and other such persons, 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. 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. 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 themselves, and another cannot speak for them.

Few changes have been made to this provision between the BNSS Bill (August) and the enacted BNSS. The BNSS permits such successors to depose through audio-video electronic means. However, unlike the BNSS Bill (August), the enacted BNSS does not include the investigating officers in the category of witnesses whose successors may depose instead of them. This change was likely made in recognition of the centrality of the IO's evidence in a trial.

Other Changes in the BNSS

I. Explanation added to definition of 'investigation'

An explanation has been added to the definition of investigation in s. 2(l), 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 s. 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 s. 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 s. 20. Further, the criteria for appointment of Director and Assistant Director of Prosecution have been modified, with the former being a sessions judge or a practising advocate for 15 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

S. 25 BNSS replaces 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.[329] Notably, s. 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 s. 37 states 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

S. 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 s. 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. Attachment, forfeiture or restoration of property

S. 107 BNSS comes under the Miscellaneous part of Chapter VII, which deals with processes to compel production of things. However, the scope of s. 107 is beyond the scope of compelling the production of things. Unlike the present law in other offences, forfeiture of the property is independent of the conviction of the accused [Clauses (6) and (7)]. Before this, forfeiture of property has only been after conviction of the person whose property had been attached. No relation has been specified between the amount/property that can be forfeited and the value of the proceeds of crime under question in the relevant case. The application for attachment can be made at any point of time. There is no direct connection required between the accused or the offence to the property. Further, the evidentiary standards required for showing that a property is the proceeds of a crime has not been specified in the section. A strict timeline of 14 days to reply to the show cause notice must be followed, otherwise an *ex parte* order can be passed. An *ex parte* order can be passed under clause (5) of the section where the Court is of the opinion that issuing a show cause notice will defeat the object of attachment or seizure and this order will subsist until an order under clause (6) is passed. However, no time limit has been specified till when an interim order will subsist without being confirmed by the Court. Clauses (7) and (8) allow for surplus as well as the whole forfeited value, in cases where the victims cannot be identified, to vest with the Government.

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

X. Persons bound to conform to lawful directions of the police

This is a new insertion as s. 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'. In petty cases, the person must be released as soon as possible within a period of 24 hours. However, in other cases, 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. Further, the scope of the term 'petty cases' has been left open, thereby subjecting the determination of the same to the officer who detains a person.

While the Supreme Court has laid out safeguards for police powers during arrest and police custody in *D K Basu v. State of West Bengal*[330], it is unclear whether those safeguards can apply to this provision, given that the guidelines under *D K Basu* envisage the initiation of a criminal process against a person accused of an offence. In this event, the powers provided to the police under this new provision are extremely wide and unfettered, with no requirement for creating and providing any records of such detention, or without requirement for production to a Magistrate in cases which are not 'petty'.

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

Apart from adding a timeline of 90 days within which the case must be committed to a Court of Sessions,[331] s. 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. S. 242 has expanded the scope of this provision by allowing five such offences to be tried together.

XIII. Summary trials

Vide s. 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. 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

[330] *D K Basu v. State of West Bengal* (1997) 1 SCC 416.
[331] Refer to section on Introduction of Timelines under BNSS, Page 136.

sentence prescribed for the punishment. S. 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.

XV. Evidence of public servants, experts, police officers in certain cases

This is a new introduction to criminal procedure in BNSS through s. 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, died, cannot be found, are incapable of giving depositions, and other 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.

XVI. 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 s. 341(1), introduces 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.

XVII. 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 introduced, in s. 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.

XVIII. Remission

Remission is the power of the state government to reduce the sentence of persons. S. 477 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 the 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.[332]

XIX. 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. S. 497 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 14 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 30 days of the preparation of such a statement, the court must order the disposal or destruction of property.

XX. 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 added to these provisions in the BNSS through s. 514, 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.

XXI. Trials and proceedings to be held in electronic mode

S. 530 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.

XXII. Preliminary enquiry by the police

Section 173(3) BNSS enables a police officer to conduct a preliminary enquiry to ascertain a *prima facie* case for proceeding with investigation in cognizable offences punishable between three to seven years, considering the 'nature and gravity of the offence'. A police officer may exercise this discretion only with the permission of an officer not below the rank of Deputy Superintendent of Police. The BNSS also places a timeline of 14 days to conduct the same. The BNSS does not clarify whether a preliminary enquiry under Section 173(3) is a part of

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

investigation, or is a preliminary step distinct from investigation. The interpretation of Section 173(3) may have important implications for s. 180 BNSS/s. 161 CrPC, which enables the police to collect statements from witnesses (which can be used in court during cross examination against such witnesses). The admissibility and use of statements collected from witnesses during the preliminary enquiry under s. 173(3) is dependent on the question of whether such enquiry forms part of investigation – a question that is left open by the provision.

The Supreme Court has addressed the scope of preliminary enquiry prior to the registration of an FIR as a process distinct from investigation. The Court's Constitution Bench decision in *Lalita Kumari v. Government of Uttar Pradesh*[333] has previously addressed the issue of whether the police has the power to conduct a preliminary enquiry to assess the veracity of information pertaining to a cognizable offence before filing a First Information Report. In doing so, the Court held that the registration of an FIR would enable accountability from the police in ensuring that it discharges its duty of investigation, and provides documentation necessary for judicial oversight. The Court further laid out an exceptional category of cases where such enquiry could be conducted – this was where the commission of a cognizable offence cannot be made out in the information provided. Therefore, s. 173(3) BNSS' requirement to turn to the 'nature and gravity of the offence', as opposed to availability of information pertaining to the commission of such an offence, not only fails to provide immediate clarity but may be incongruent with case law.

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

Timelines under the 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. 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 columns filled in the colour *red*. Introductions of new time periods for procedures by the BNSS are indicated using the colour *green*.

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 been conducted by a private person [Section 43 CrPC / Section 40 BNSS]	Without unnecessary delay	Within 6 hours of arrest
Investigation	Forwarding of inquest report to the District Magistrate or Sub-divisional Magistrate [Section 174 CrPC / Section 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 / Section 51(3) BNSS]	No time prescribed	Without any delay
	Forwarding of medical examination report (of a victim of rape) by a medical practitioner to the investigating officer [Section 164A(6) CrPC / Section 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 [Section 165(5) CrPC / Section 185(5) BNSS]	Shall forthwith be sent	Shall forthwith be sent, but not later than 48 hours

	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 [Section 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 [Section 107(2) BNSS]	No time prescribed	14 days
	Distribution of proceeds of crime, from attached or seized property, by the District Magistrate [Section 107 (7) BNSS]	No time prescribed	60 days
	Information on status of investigation to victims/informant [Section 173 CrPC / Section 193(3)(ii) BNSS]	No corresponding provision	Within 90 days
Chargesheet	Further investigation during trial (post filing of chargesheet), on grant of permission from the trial court [Section 173(8) CrPC / Section 193(9) BNSS	No time prescribed	Further investigation to be completed within 90 days, but may be extended with the permission of the Court.[334]
Commencem	Magistrate to supply copies of police report,	No time prescribed	14 days within date of

[334] The purpose behind the introduction of the 90-day period for such further investigation is unclear if the trial court has discretion to extend the same beyond 90 days as well.

ent of proceedings before Magistrate	FIR, and other case documents to the accused and victim (if represented by a lawyer) [Section 207 CrPC / Section 230 BNSS]		production or appearance of accused
Cognizance	Bar to taking cognizance after lapse of limitation period, for certain offences[335] [Section 468(2) CrPC / Section 516(2) BNSS]	**6 months** for offences punishable with fine **1 year** for offences punishable with 1 year of imprisonment **3 years** for offences punishable with more than 1 and a maximum of 3 years 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 3 years *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 / Section 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	No time prescribed	Committal proceedings to be completed within 90 days, extendable up to 180 days for reasons in writing

[335] See *Sarah Mathew v. Institute of Cardio Vascular Diseases & Ors,* (2014) 2 SCC 102 [paras 34, 35, 45, 51] where a Constitution Bench held that the relevant date for computing limitation under s. 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.**

	[Section 209 CrPC / Section 232 BNSS]		
Charge	Framing of charges by the Magistrate (for offences the Magistrate is competent to try and punish) [Section 240(1) CrPC / Section 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 / Section 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 / Section 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 / Section 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 District Magistrate is bound to give notice to the State government prior to such appointment.	No time prescribed	Notice period of 14 days to the State Government before appointment of Assistant Public Prosecutor

	[Section 25(3) CrPC / Section 19(3) BNSS]		
Trial	Procedure for admission and denial of genuineness of documents by the defence and prosecution [Section 294(1) CrPC / Section 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 / Section 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 [Section 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 commencing *in absentia* trials [Section 356(2)(i) BNSS]	No corresponding provision	Execution of 2 consecutive arrest warrants within the interval of 30 days
	Publication of notice to proclaimed offender to appear before court, in a newspaper [Section 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	No time prescribed	Within 14 days of production of property before the court

	prepare a statement of property produced before it. [Section 451 CrPC / Section 499(2) BNSS]		
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 and life imprisonment).[336] [Section 436A CrPC / Section 481(1) BNSS]	Half of the sentence period	One-third of the sentence period for first-time offenders and half of the sentence period in all other cases
Judgment and sentence	Pronouncement of judgment after termination of trial in any criminal court.[337] [Section 353 (1) CrPC / Section 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 / Section 258(1) BNSS]	No time prescribed	30 days from the completion of arguments. Extendable upto 45 days for reasons in writing
	Court to upload a digital copy of the judgment	No corresponding provision	7 days from pronouncement, as far as

[336] 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 18 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].

[337] S. 392 of the CrPC lays out the procedure for the pronouncement of judgment by any criminal court, whereas s. 258(1) lays out the duty of the Sessions Court to give a judgment of conviction or acquittals. However, both sections 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.

	[Section 353(4) CrPC / Section 392 (4) BNSS]		practicable
Mercy petitions	Filing of mercy petition before Governor or President by person under a sentence of death [Section 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 [Section 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 [Section 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 and Superintendent of the Jail [Section 473(6) BNSS]	No corresponding provision	Within 48 hours of receipt of order of the President

Table 11: 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/Section 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

Admissibility of Electronic Evidence

Like s. 65B IEA, s. 63 BSA 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. S. 2(d) BSA, which replaces s. 3(e) IEA, defines documents to also include '*electronic or digital records*'. Accordingly, separate references to electronic records have been deleted in certain provisions.[338]

2. S. 57 BSA, 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.

3. Newly introduced s. 61 BSA prescribes that the admissibility of electronic records cannot be denied based on their nature as electronic records and their legal effect, validity and enforceability shall be at par with paper records. However, these electronic records are subject to provisions of s. 63 of the BSA.

Notably, s. 63(4) BSA 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 is in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) 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.

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

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.[339]

I. Background

The IT Act 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 of the Supreme Court 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.[340] 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 to the requirements under s. 65B IEA was necessary for the admissibility of electronic records.[341] In *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal & Ors*,[342] 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 the production of the original document.

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[339] 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.

[340] *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*.

[341] *Anvar P.V. v. P.K. Basheer* (2014) 10 SCC 473.

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

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. Electronic record copies as primary evidence

Explanations 4 to 7 in s. 57 BSA removes the distinction between the original and copies of electronic records, by treating both as primary evidence. 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 in the case of 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. The inclusion of electronic records as primary evidence falls flat against the logic of primary and secondary evidence as laid out by the case of *Arjun Panditrao* in relation to electronic records. In view of which, all electronic records would be given the status of primary evidence despite the original record not being produced. This fails to adequately consider the manner in which electronic records may be tampered with or made copies of.

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.

In the BSA Bill (August), Clause 61 provided admissibility of electronic records per se. This was widely criticised as 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. This was the reason for s. 65B IEA being introduced as a safeguard to ensure the authenticity of the copies of electronic records.

However, in the enacted BSA, the admissibility of all electronic records has been made subject to s. 63. Considering that s. 57 of the BSA has removed the distinction between original and copies of electronic records, the deeming fiction created for electronic record, which warranted the requirement of a certificate under s. 65B IEA or under s. 63 of the BSA, is rendered irrelevant.

III. Changes to the conditions specified in s. 63 BSA

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

First, the definition of computer output in s. 63(1) BSA 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, s. 63(3) BSA 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.

Second, unlike s. 65B(4) IEA, which does not clarify the stage at which the certificate must be submitted,[343] s. 63(4) BSA mandates that such a certificate shall be submitted along with the electronic record for admission. This is a positive change as it may ensure more meaningful compliance with the admissibility requirements under s. 63 BSA.

Third, s. 63(4)(c) provides that the certificate shall be signed by a person in charge of the computer or communication device or the management of the relevant activities (whichever is appropriate) and an expert 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 changes under s. 63(4)(c) may help ensure that 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.

IV. Expansion of secondary evidence

S. 58 of the BSA further goes on to expand the scope of secondary evidence to include oral admissions and written admissions. It is pertinent to note that secondary evidence may be led subject to fulfilling certain preconditions as laid out in s. 60 of the BSA, particularly when the primary evidence in relation to the document could not be produced. However, the inclusion of oral and written admissions overlooks the foundational logic behind secondary evidence being documentary evidence and oral evidence being direct evidence. Further, the relevance of the introduction of the concept of admissions within secondary evidence remains unclear and an anomaly in view of the pre-conditions laid out in s. 60 of the BSA.

[343] *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.

Repeal and Savings

The New Legislations (BNS, BNSS, and BSA) repeal the erstwhile criminal law statutes or the Old Legislations, i.e. IPC, CrPC and IEA. The New Legislations in their respective 'Repeal and Savings' clauses, however, provide for a limited application of the Old Legislations: in proceedings which are pending immediately before these New Legislations come into force, i.e. July 1, 2024. This is also in line with s. 6 (e) of the General Clauses Act, 1897 which deals with the effect of repeal.

I. Repeal and Savings for substantive law

The Repeal and Savings clause under the BNS is s. 358 states that the IPC will continue to apply in case of any proceedings, investigation, or remedy in respect of any penalty or punishment concerning any offences committed under the IPC. The language of the provision does not seem to suggest that the date on which the offence was committed will be a factor in determining which law will apply. It indicates that only where some proceedings, investigation, or remedy concerning an IPC offence is pending, IPC will continue to apply.

A recent notification issued by theDirector General of Police, Telangana,[344] tries to clarify this question. It is yet to be seen whether other States will apply the same guidelines. The notification lays out the following:

Date of Occurrence of Crime	Date of Registration	Provisions of laws to be applied	Procedural Law to be Followed
Prior to July 1, 2024	*Prior* to July 1, 2024	IPC	CrPC
Prior to July 1, 2024	*After* July 1, 2024	IPC	BNSS
On or After July 1, 2024	*On or After* July 1, 2024	BNS	BNSS

[344] Notification bearing no. C No. 35/NCL/2024 dated June 25, 2024.

It must be noted that irrespective of the clarification, the retrospective application of criminal statutes is barred by Article 20(1) of the Constitution of India which states that "*No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence*." Thus, despite the Repeal and Savings clause and the clarification by DGP, Telangana, it is reasonably clear that no person shall be subjected to an enhanced penalty under the BNS or for an offence newly introduced by the BNS.

Further, if a change in criminal law is beneficial to the accused, the accused may claim such benefit retrospectively.[345] So, an accused should be able to seek the benefit of changed provisions in the New Legislation, such as community service being prescribed as an alternative remedy instead of imprisonment in certain offences. This was also held in the majority opinion in *Rattan Lal v State of Punjab*,[346] where the Supreme Court ruled that an accused can seek the benefit of the Probation of Offenders Act on appeal, even if the act came into force after his conviction by the trial court.

II. Repeal and Savings for procedural laws

S. 531, BNSS and s. 170, BSA state that if, before the enforcement of the new legislation, there is any appeal, application, trial, inquiry or investigation pending, then such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, by the provisions of the CrPC or IEA, as the case may be. It is settled law that procedural changes such as a change in the forum by subsequent law have a retrospective effect.[347] However, where the proceedings have concluded, change in procedural law cannot be used as a means to reopen the proceedings.[348] Regardless, the application of old legislation in a situation where proceedings are pending is clear; issues arise when considering further proceedings in the same case. For instance, if an investigation has concluded before July 1, 2024 but the trial is yet to begin, will the trial be governed by the CrPC or the BNSS? By which law will the appeal or revision be governed if the impugned order was under the CrPC but passed post July 1, or the appeal / revision petition is filed post July 1? Questions also emerge in cases which may be remanded for a retrial or *de novo* consideration: if the original trial was under CrPC, will the retrial be under CrPC too?

Similar issues arose when the Code of Criminal Procedure, 1973 was enacted,[349] repealing the prior 1898 code. Yet the law on this still needs to be settled due to contrary opinions by

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[345] *T. Barai vs Henry Ah Hoe And Anr.* (1983) (1) SCC 177.
[346] *Rattan Lal v State of Punjab* (1965) AIR 444.
[347] *Ramesh Kumar Soni v. State Of Madhya Pradesh* (2013) (14) SCC 696; *Hitendra Vishnu Thakur v. State of Maharashtra* (1994) 4 SCC 602.
[348] *Nani Gopal Mitra v. The State Of Bihar* (1969) SCR (2) 411.
[349] While the repeal and savings clause in the CrPC was similar to the one in BNSS, the CrPC clause (S. 484) comprised a proviso which stated that "*every inquiry under Chapter XVIII of the Old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code"* In *Sakatt Narayan v. Bhasani Lachu* (1975 Cri LI 995), the Orissa High Court held this to imply that the committal of a case to sessions court will in accordance to the New Code if the New Code has prescribed the offence to be triable exclusively by a Court of Sessions. A proviso to this effect is absent in the BNSS.

different High Courts. In *Dhanraj Jain v. BK Biswas*,[350] a revision petition, filed after the coming into force of the new Code against a trial held before, was held to not be a continuation of the old proceedings and was therefore held to be governed by the new code. It was also observed that revision, unlike appeal, is not a continuation of the old proceedings and since "revision" was not explicitly mentioned in the Repeal and Savings clause of the CrPC, it would be governed by the new code. In *K Keshavamurthy v State of Karnataka*,[351] the Magistrate had ordered the police to make an inquiry under s. 156(3) of the old code in a private complaint. The final report of the police came after the coming into force of the new Code; it was held that the new Code would apply to the subsequent proceedings. In *Hiralal Nansa Bhavsar v. State of Gujarat*,[352] the High Court of Gujarat held that the right of appeal is substantive, one that vests from the day of commencement of proceedings. As appeals are a continuation of proceedings, the High Court held that appeals pending as of the date of commencement of the new Code will be governed by the old Code.

The recent ruling of the Kerala High Court with respect to the BNSS in *Abdul Khader v. State of Kerala*,[353] *vide* order dated July 15, 2024, took a view similar to *Dhanraj Jain,* and held that irrespective of when the impugned order was passed, and appeal filed after July 1 will be governed by the BNSS. More recently, the High Court of Punjab and Haryana in *XXXX v State of UT Chandigarh and Another*,[354] held that any appeal/ revision/ application / petition filed under the CrPC after July 1, 2024 shall not be maintainable. The trite implication of this is that even for offences under the IPC which were investigated and tried under the CrPC, the appeal shall be governed by the BNSS if filed after July 1. The Punjab and Haryana High Court took a slightly similar view, when faced with the question of whether the BNSS would apply, since the delay was condoned *after* BNSS came into force. Despite the fact that the petition was time-barred, technically the revision proceedings hadn't begun. The Court held that in such a case, CrPC would be the applicable law, not BNSS, since the effect of condonation of delay is treating the petition as having been filed within the limitation period.[355]

The Supreme Court, in its order in *In Re Inhuman Conditions in 1382 Prisons*[356] took the view that s. 479 of the BNSS, which (amongst other things) reduced the period for default bail from half of the sentence period to one-third of the sentence period for first-time offenders, was to be implemented retrospectively, given that it was a beneficial provision. It is well established in law that retrospective application of procedure may take place only where the new provision confers some benefit. In this context, the Court failed to take into account the non-beneficial aspects of s. 479 BNSS[357], and instead applied the entirety of the

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[350] *Dhanraj Jain v. BK Biswas* (1976) Cr LJ 1297.
[351] *K Keshavamurthy v State of Karnataka* (1976) Cr LJ 761.
[352] *Hiralal Nansa Bhavsar v. State of Gujarat* (1974) 15 Guj LR 725.
[353] *Abdul Khader v. State of Kerala* (2024) Crl A 1186.
[354] *XXXX v State of UT Chandigarh and Another* (2024) CRM-M-31808.
[355] *Mandeep Singh v Kulwinder Singh,* (2023) CRR No. 2914 (O&M) [High Court of Punjab and Haryana] In this Judgement the Court followed the precedent in *National Planners v. Contributories, AIR* (1958) Punjab 230.
[356] Writ Petition (Civil) No. 406 of 2013 (Supreme Court) order dt. August 13, 2024.
[357] See Chapter XXIII (Provisions Pertaining to Bail and Bonds).

provision to all under-trials, thus violating the well-established principle that prohibits retrospective application unless beneficial.

There is bound to be litigation on these aspects of which law is applicable in what case. Further, the confusion in the everyday functioning of police stations and courts alike is imminent until these questions are conclusively settled. There have been attempts by the judiciary to clarify the position by courts. As of now it is too soon to comment on whether these attempts will lay the law of the land or be subsequently contradicted by later rulings.

Additionally, it is yet to be determined in which situations courts will allow the accused or prosecution to reap the benefits of the changes in the procedural aspects of law, and the rules of evidence. Would a faulty certificate under s. 65B IEA, prepared before BSA came into force, which is now governed by s. 63 BSA, lead to electronic evidence being discarded if the trial begins after BNSS and BSA have come into force, therefore allowing the accused the benefit of such evidence being discarded?

III. Application of judicial pronouncements

Another question that may arise concerning the Repeal and Savings is the effect of judicial pronouncements interpreting the provisions of the Old Legislation. Would those decisions also control the reading and interpretation of the provisions in the New Legislation that are a verbatim reproduction of the Old Legislation's provisions?

Justice TL Venkatarama Ayyar's opinion in a Constitution Bench decision of the Supreme Court in *Bengal Immunity Company Limited v. State of. Bihar*[358] held that when a statute is repealed and the same words are retained in provisions of a new enactment, "*they should be interpreted in the sense which had been judicially put on them under the repealed Act*". He reasoned that the legislature must be deemed to be aware of the previous interpretation and the verbatim re-enactment of the provision must be taken to mean that it accepts that interpretation. Justice Ayyar's reasoning has been subsequently adopted by the Supreme Court in *Sakal Deep Sahai Srivastava v. Union of India and Anr.* (1974) (1) SCC 338[359] (on provisions concerning the Limitation Act, 1908 and the Limitation Act, 1963) and *Pradip J Mehta v. Commissioner of Income Tax, Ahmedabad* (2008) 14 SCC 283[360] (on provisions concerning the Income Tax Act, 1922 and the Income Tax Act, 1961). In light of these averments, the provisions in the BNS that have been retained from the IPC will continue to be governed by the judicial interpretation given to those provisions under the IPC. Similarly, provisions borrowed from special legislation such as the MCOCA and UAPA may require application of their jurisprudence as well.

[358] *Bengal Immunity Company Limited v. State of. Bihar* (1955) (2) SCR 603.
[359] *Sakal Deep Sahai Srivastava v. Union of India and Anr.* (1974) (1) SCC 338.
[360] *Pradip J Mehta v. Commissioner of Income Tax, Ahmedabad* (2008) 14 SCC 283.

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