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Special Edition on New Criminal Laws

Bureau of Police Research & Development
Ministry of Home Affairs
Government of India

"Promoting Good Practices and Standards"

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FOREWORD

From 1860 to June 2024, India's criminal justice system was functioning on the foundation of laws made by the British Parliament. From July 1, 2024, the three colonial era laws Indian Penal Code (IPC), Code of Criminal Procedure (CrPC) and Indian Evidence Act (IEA) have been replaced by New Criminal Laws (NCLs), which are grounded in the Indian ethos focusing on justice rather than punishment. The enactment of Bharatiya Nyaya Sanhita 2023 (BNS), Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS), and Bharatiya Sakshya Adhiniyam 2023 (BSA) represents a pivotal moment in Indian legal history, reinforcing the principle that laws must evolve to ensure contemporaneity and relevance. Now, a new era has begun which is firmly grounded in the principles of 'Citizen First-Justice First-Dignity First'.

Assessing the need of the hour, the Bureau of Police Research & Development (BPR&D) has undertaken capacity building on the NCLs in a comprehensive manner, augmenting the efforts of the Ministry of Home Affairs. The Bureau has developed customized Training of Trainers (ToT) modules for the five pillars of the criminal justice system - Police, Prosecution, Judiciary, Forensics and Prisons. This initiative which was launched in December 2023, and the subsequent handholding of States and UTs to help in the smooth implementation of the new laws has resulted in the tangible benefits. With the aim to further expand the outreach efforts for enhancing understanding of the NCLs, BPR&D has especially curated this issue of the Indian Police Journal (IPJ), the oldest police journal of the country.

I am confident that this Special Issue on NCLs which has been created with contributions by expert stakeholders of the criminal justice system, will enhance the awareness of police officers, academicians, researchers and the general public about the New Criminal Laws and ensure enhanced service delivery to the citizens.

Rajeev

(**Rajeev Kumar Sharma**)
Chief Patron

"Promoting Good Practices and Standards"

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EDITORIAL

BPR&D is the think-tank of police organizations and the motto of BPR&D is "***Let noble thoughts come to us from every side***". Since its inception, BPR&D has been the repository of knowledge and good practices. Indian Police Journal is one of such repository of knowledge where all the noble thoughts are etched into effective, scholarly articles that enrich the law enforcement agencies to perform in an efficient manner. The Criminal Justice System refers to corpus of laws and institutions that aim to control the delinquent behavior and maintain collective security in a civilized society. In order to ensure "justice for all", effective, holistic and futuristic laws are essential. In this direction, the three new criminal laws, the "Bharatiya Nyaya Sanhita, (BNS)" the "Bharatiya Nagarik Suraksha Sanhita, (BNSS)" and the "Bharatiya Sakshya Adhiniyam, (BSA)" have come into effect from 1st July, 2024 by replacing the Indian Penal Code (IPC), the Code of Criminal Procedure (CrPC), and the Indian Evidence Act (IEA) respectively.

The characteristics of an effective law are fairness, equality, easy accessibility, easy enforceability and simple procedures infused with scientific temperament. Our new criminal laws are rich in these characteristics. These principles and procedures need to be disseminated to all the stakeholders. Indian Police Journal is one of such medium to disseminate this knowledge.

This special issue of the Indian Police Journal sheds light on various aspects of the three New Criminal Laws and their applicability. I sincerely hope that the readers will find this special edition of Indian Police Journal as a reflection of the letter and spirit of new criminal laws and I encourage them to share their valuable suggestions for further refining the standards of the IPJ.

(**Ravi Joseph Lokku**, ADG)
Editor-in-Chief

"Promoting Good Practices and Standards"

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SUMMARY

Effective governance is often defined by impactful decisions that pave the path towards progress and inclusivity. The introduction of the three New Criminal Laws is a step in this direction. The overall goal behind the decision to introduce these laws was to create a conducive atmosphere to benefit the overall well-being, security, and prosperity of the nation and its citizens, by delivery of efficient policing and timely justice. These laws have been designed to address contemporary social realities and modern-day crimes. I am confident that this special issue of the Indian Police Journal (IPJ) on the New Criminal Laws will help stakeholders in the criminal justice system and the layman alike, in better understanding of these laws.

This special issue begins with a comprehensive article by Sh. Anil Kishore Yadav, IPS, Director, CAPT Bhopal, which seeks to portray the historical context of and main features in the recently passed three New Criminal Laws.

Sh. D.C. Jain, IPS (Retd)'s article on Bharatiya Nagarik Suraksha Sanhita (BNSS) provides an overview of the newly enacted law, its salient features and overall framework.

Dr. Neeraj Tiwari, Assistant Professor, NLU Delhi has written on the Bharatiya Nyaya Sanhita, 2023, examining the historical background of this law as well as the purpose and substance of the modifications introduced therein.

The article, "Contours of Witness Protection in Indian Laws" by Dr. K. P. Singh, IPS (Retd.) discusses the legal provisions for Witness Protection, which have been introduced for the very first time, thereby acknowledging the critical need to shield witnesses from threats and intimidation.

"Investigation and Trial Framework in BNSS" by Dr. Manoj Kumar Sharma, Assistant Professor, RGNUL Patiala demonstrates how a structured framework for legal processes, along with a full timeline for every stage of criminal proceedings, is provided in the BNSS,

The article by Sh. Amandeep Singh Kapoor, IPS, Director CDTI Jaipur on First-time offenders provides insight into the consequences of being a first-time offender in India with regard to socio-demographics, criminal histories, and reintegration tactics under the New Criminal Laws.

In the article, “Admissibility of Electronic or Digital Evidence: An Overview of Bharatiya Sakshya Adhiniyam, 2023”, Dr. Nisha Dhanraj Dewani, Associate Professor, Maharaja Agrasen Institute of Management Studies, GGSIPU examines the evolving nature of digital evidence laws through 2023 and the challenges faced in ensuring the integrity of electronic evidence in criminal proceedings.

The article, “Tech Trial: Adapting to the New Legal Landscape of Evidence” by Ms. Aditi Tripathi, Advocate, Supreme Court examines how the Bharatiya Sakshya Adhiniyam, 2023, provides for the use of technology to enhance the criminal justice system.

The article by Dr. Swapnil Bangali, Director, CICTL, MNLU, Mumbai on Transforming Criminal Justice-International Implications looks into the various provisions of the New Criminal Laws that function in unison with international law and coordinate with international agencies on transnational crimes.

Dr. Sharanjit, Assistant Professor, RGNUL Patiala’s article on Human Trafficking describes how the new legislation will help increase effectiveness of the criminal justice system in addressing the menace of human trafficking.

Ms. Astha Tiwari Ph.D. scholar, MNLU Mumbai’s article on Victim-centric Approach examines the evolution of victim justice, from past to present, and anticipates its trajectory into the future in the context of the NCLs

Sh. Devvrat Yadav, Advocate, Delhi High Court’s article on Community Service describes how the newly introduced provision of community service goes beyond simple punishment and serves as a means of constructive restitution.

We hope this special publication with articles by police officers, eminent personalities from the judiciary and subject matter experts will be useful to all stakeholders who aspire to bolster the functioning of the Police forces. As always, we look forward to your support and suggestions.

(Ruchika Rishi, IG/Director SPD)
Managing Editor

Contents

Overview of New Criminal Major Acts, 2023

Anil Kishore Yadav, IPS*

Abstract

This article presents an in-depth analysis of the transformative changes in India's criminal law following the enactment of the Bharatiya Nyaya Sanhita, 2023, the Bharatiya Nagarik Suraksha Sanhita, 2023 and the Bharatiya Sakshya Adhiniyam, 2023. These new statutes replace the colonial-era Indian Penal Code, Indian Evidence Act, and also the Code of Criminal Procedure, marking a significant shift in India's legal landscape. The article offers a comparative study between the old and new laws, detailing the reorganization, key additions, exclusions, and other major reforms introduced. It also explores how these updates are designed to strengthen and modernize India's legal framework.

Keywords: *Audio-Video Electronic Means, Gender Neutrality, Specific Timelines, Community Service, Use of Technology, Snatching, Organised Crime, Trial in Absentia*

Introduction

On December 25, 2023, the Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023); the Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023); and the Bharatiya Sakshya Adhiniyam, 2023 (Act 47 of 2023) were duly notified and published in the Gazette of India. For brevity, we refer to them as BNS, BNSS, and BSA, respectively. These new laws replaced the Indian Penal Code, 1860 (IPC), the Code of Criminal Procedure, 1973 (CrPC), and the Indian Evidence Act, 1872 (IEA). Section 1(2) of BNS, Section 1(3) of BNSS, and BSA empowered the Central Government to appoint the date of enforcement through notification in the official gazette. Accordingly, the Central Government enforced them on July 1, 2024.

Comparative statistics of the content along with reorganisation of chapters and sections in new criminal major Acts

The table below presents the statistical comparative analysis of both sets of criminal major Acts in terms of individual section as a unit:

S.N.	Description	IPC	BNS	CrPC	BNSS	IEA	BSA
1	Original number of sections	511	358	484	531	167	170
2	Sections inserted in old laws [within the original numbering scheme] through successive amendments	64	-	51	-	18	-
3	Number of sections repealed through successive amendments	21	-	-	-	1	-

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4	Total number of sections in old laws immediately before 1st July, 2024 [within the original numbering scheme]	554	-	535	-	184	-
5	Sections of old laws not included in new laws	19	-	11	-	4	-
6	Sections of old laws which are included in new laws	535	-	524	-	180	-
7	Sections of old laws included as individual sections in new laws	287	287	520	520	161	161
8	Contents of sections of old laws reorganised within individual sections of new laws	248	61	4	2	19	8
9	Newly added sections in new laws	-	10	-	9	-	1
10	Total number of sections in new laws	-	358	-	531	-	170

Serial number 7 of the above table enumerates one-to-one correspondence of sections of both sets of laws. Similarly, serial number 8 deals with more complicated correspondence instances, including merger and/or consolidation of many sections of old laws into a lesser number of sections of new laws and certain rare instances of split of old section into many sections in new laws etc.

Reorganisation of chapters and sections in **BNS** is the most pervasive among new criminal laws. The other two Acts are essentially similar to old laws on this account. Originally, IPC consisted of 23 chapters. Subsequently, three chapters (VA, IXA and XXA) were inserted. The contents of 25 out of the total 26 chapters have been reorganised and included in BNS. Chapter XIII, which deals with the offences relating to weights and measures, is excluded altogether as the Legal Metrology Act, 2009 comprehensively covers this subject. BNS has 20 chapters, the last of which contains only one section (s. 358), which is a newly added chapter titled 'Repeal and savings' as the IPC does not contain any such provision due to fresh enactment by the Britishers.

Definitions in the IPC are scattered from Section 8 to 52A under Chapter General Explanations. In BNS, these are organized and consolidated in sub-sections (1) to (39) arranged in alphabetical order under Section 2, titled as Definitions.

IPC Chapter I (Introduction) and Chapter II (General Explanation) are merged into Chapter I (Preliminary) of BNS. Chapter V (Of Abetment) and Chapter VA (Criminal Conspiracy) are merged into Chapter IV (Of Abetment, Criminal Conspiracy, and Attempt). Thus, all inchoate offences are consolidated in this single chapter.

The first chapter containing substantive offences, i.e., Chapter V (Of Offences against Woman and Child), is a newly carved out chapter that shows the law maker's top priority to curb offences against women and children[1]. This chapter has consolidated various relevant provisions from chapters XI, XVI, XX, XXA, and XXII of the IPC. Similarly, Chapter VI (Of Offences Affecting the Human Body) has also taken precedence over other categories of offences. This chapter contains the maximum number of important newly added offences like mob lynching (as known in common parlance),

[1] Hon'ble Union Home Minister in his Lok Sabha speech delivered on December 20,2023, described the philosophy behind the reorganisation and sequencing of chapters in the Sanhita as against colonial priorities.

organized crime, petty organised crime, terrorist act, etc.

Chapter XII of the IPC dealing with offences relating to coins and government stamps has undergone a process of unparalleled reorganisation and consolidation. Twenty-six sections and offences from Chapter XII have been consolidated into four sections (178 to 181) of the BNS, which also accommodate four offences from Chapter XVIII of the IPC, namely 489A to 489D.

BNSS contains 39 chapters, while the original number of chapters in CrPC was 37. Chapter VIIA titled 'Reciprocal arrangements for assistance in certain matters and procedure for attachment and forfeiture of property' and Chapter XXI A titled 'Plea Bargaining' were inserted by Act 40 of 1993, w.e.f. 20-7-1994, and Act 2 of 2006, w.e.f. 5-7-2006, respectively. These later-inserted chapters are enumerated in BNSS as separate chapters, making the total number of chapters 39.

BSA contains 12 chapters, while IEA contains 11 chapters. 'Repeal and Savings' chapter is the last chapter, which is newly added.

Summary of important reforms in the BNS

For convenience, these may be overviewed under following headings:

New definitions added or modified

A new definition of "child," meaning any person below the age of eighteen years, has been added under Section 2(3), aligning with this definition in Section 2(12) of the Juvenile Justice Act, 2015.

Under Section 2(8) [IPC 29], the definition of "document" now also includes electronic and digital records.

Under Section 2(10) [IPC 8], the definition of "gender" now also includes "transgender."

Under Section 2(20) [IPC 49], the British Calendar is replaced by the Gregorian calendar.

Under Section 2(21) [IPC 22], the scope of "movable property" has been greatly expanded by removing the adjective "corporeal."

Section 2(39) [IPC 29A], with regard to **electronic records**, expands the scope by providing that words and expressions used but not defined in BNS but defined in the Information Technology Act, 2000, and the BNSS shall have the meanings respectively assigned to them therein.

Section 48 defines abetment outside India for offence in India[2].

Newly added sections/offences

Section 69 - Sexual intercourse by employing deceitful means, etc.

S. 95- Hiring, employing or engaging a child to commit an offence[3]

S. 103(2)- Murder by group of five or more persons acting in concert commit murder on the ground of race, caste or community, sex, place of birth, language, personal belief or other similar ground[4]

[2]This section provides legislative effect to the Supreme Court verdict in Fatima Bibi Ahmed Patel vs State of Gujarat AIR 2008 SC 2392.

[3] This provision adds to existing laws on conspiracy and abetment to punish adults behind such children hired and employed to commit crimes.

[4] This new addition aligns with concerns raised by the Supreme Court in the Tehseen S. Poonawala vs. Union of India, AIR 2018 SC 3354 verdict. In common parlance, this is known as Mob Lynching. The punishment for mob lynching is made equivalent to that of murder after the recommendations made by the 246th Report of Department-related Parliamentary Standing Committee on Home Affairs.

Section 106(1) later clause has defined causing death by negligence by a registered medical practitioner[5] with the punishment of imprisonment for two years.

S. 106(2)- Causing death by rash and negligent driving of vehicle and escaping without reporting it to Police or Magistrate (hit and run)[6]

S. 111- Organised crime

S. 112- Petty organised crime[7]

S. 113- Terrorist act introduces definitions and penalties for terrorist acts previously covered solely under the Unlawful Activities Prevention Act, 1967 (UAPA)[8]. To resolve ambiguity, it explains that a Superintendent of Police or higher-ranking officer will determine whether to register a case under this section or under the Special Act

S. 117(3)- Voluntarily causing grievous hurt resulting in permanent disability or in persistent vegetative state

S. 117(4)- Voluntarily causing grievous hurt by five or more persons acting in concert on the ground of his race, caste or community, sex, place of birth, language, personal belief or any other similar ground

S. 152. Acts endangering sovereignty unity and integrity of India[9]

S. 197(1)(d)- Publishing false or misleading information jeopardising the sovereignty, unity and integrity or security of India

S. 226- Attempt to commit suicide to compel or restrain exercise of lawful power

S. 304- Snatching[10].

S. 305. (b) Vehicle theft

S. 305(c)- Theft of any article or goods from vehicle

S. 305(d)- Theft of idol or icon in any place of worship

S. 305(e)- Theft of any property of the Government or of a local authority

S. 341(3)- Possession of counterfeit seal, plate or other instrument knowing the same to be counterfeit

S. 341(4)- Using a counterfeit seal, plate, or instrument fraudulently or dishonestly, knowing or believing it to be fake.

Reforms pertaining to scheme of punishments: Punishment scheme related various reforms are briefly discussed as follows:

[5] Understandably, the Apex Court verdict in Jacob Matthew vs. State of Punjab AIR 2005 SC 3180 will be available to guide the practitioners in this context upto the extent it is consistent with the letter and spirit of this provision. The remaining part (simplicitor) of the sub-section corresponds to Section 304A IPC, the punishment of which has been enhanced from two years to five years.

[6] This has not been notified to be enforced yet.

[7] Notably, this offence, despite lacking any bodily harm caused, is classified under Chapter VI, which deals with the offences affecting the human body.

[8] There is a debate about whether this section should have been included in Chapter VII, which deals with offences against the State. The Hon'ble Union Home Minister's speech in the Lok Sabha (supra) provides insight into the rationale behind this reform.

[9] The Hon'ble Union Home Minister's speech in the Lok Sabha provided a detailed discussion of these provisions, particularly in the context of the colonial-era Section 124A, which has now been excluded. This provision fills the gap left by the exclusion of sedition [Section 124A IPC], shifting from the colonial offence of Rajdroh (sedition) to Deshdroh (treason). Additionally, sub-section 197(1)(d) has been added, punishing those disseminating false or misleading information jeopardizing India's sovereignty, unity, or integrity.

[10] Intriguingly, in this aggravated form of theft, the maximum prescribed punishment is not harsher than that for regular theft under section 303 of the BNS.This is the case even after the states of Gujarat, Punjab, and Haryana, by their respective amendments, have previously added snatching [379A, 379B IPC] with imprisonment up to ten years and even in cases of snatching with hurt, wrongful restraint, fear of hurt, etc., up to fourteen years.

Community service as a new form of punishment

Under Section 4(f), a new form of punishment Community Service[11] has been added.

Community service is prescribed for six offenses, with one offense (S. 209) being cognizable and the other five non-cognizable. Only one provision, Section 303(2), mandates community service as the sole punishment, while for the other five offenses, it is an alternate punishment. These six offenses are as follows:

S.202: [IPC 168] Public servant unlawfully engaging in trade.

S.209 [IPC 174A]: Non-appearance in response to a proclamation issued u/s 84(1) of BNSS.

S.226: Attempt to commit suicide to compel or restrain exercise of lawful power of public servant.

S.303(2) [IPC 379]: Theft where the value of stolen property is less than five thousand rupees and the person is first time offender and value of property is returned, or stolen property is restored.

S. 355 [IPC 510]: Misconduct in public by a drunken person.

S. 356(2) [IPC 500]: Defamation.

Enhanced punishment in terms of imprisonment

The corresponding provisions of BNS/IPC are mentioned below:

8(5)(C)/67(C), 57/117, 99/373, 106(1)/304(A), 121(1)/332, 122(2)/335, 125 (b) /338, 127(3)/343, 127 (4)/344, 127(6)/346, 139(1)/363A, 139(2)/363A, 144(1)/370A, 144(2)/370A, 166/138, 191(3)/148, 04/170, 217/182, 223(a)/188, 223(b)/188, 241/204, 243/206, 248(a)/211, 248(b)/211, 276/274, 279/277, 303(2)/379, 308(2)/384, 316(2)/406, 318(2) /417, 318(3)/418, 319(2)/419, 322/423, 323/424, 324 (2) /426, 325/428 & 429

Minimum mandatory punishment (lower limit of imprisonment)

Most of the new offences created under BNS have provision of minimum mandatory punishment, in terms of imprisonment, namely, section 95, 111(2)(b), 111(3), 111(4), 111(5), 111(6), 111(7), 112(new), 113(2)(b) , 113(3), 113(4), 113(6) and 117(3)

BNS has also introduced minimum mandatory punishment of imprisonment in following sections of IPC, namely 105/304, 118(2)/326, 121(2)/333, 139(1)/363A, 139(2)/363A, 204/170, 303(2)/379, 310(3)/396, 314/403 and 320/421.

Reforms related to punishment by fine

Fine is enhanced in following sixty seven offences in BNS:

8(5)(a)/67A, 8(5)(b)/67B, 115(2)/323, 122(1)/334, 122(2)/335, 125/336, 125A/337, 125B/338, 126(2)/341, 127(2)/342, 131/352, 135/357, 136/358, 165/137, 168/140, 176/171(h), 177/177(I), 182(1)/489(E), 182(2)/490, 194(2)/160, 205/171, 206(a)/172, 206(b)/172, 207(a)/173, 207(b)/173, 208(a)/174, 208(b)/174, 210(a)/175, 210(b)/175, 211(a)/176, 211(b)/176, 212(a)/177, 213/178, 214/179, 215/180, 217/182, 218/183, 219/184, 221/186, 222(a)/187, 222(b)/187, 223(a)/188, 223(b)/188, 267/228, 274/272, 275/273, 276/274, 277/275, 278/276, 279/277, 280/278, 282/280, 284/282, 285/283, 286/284, 287/285, 288/286, 289/287, 290/288, 291/289, 292/290, 294/292, 297(2)/295(2), 329(3)/447, 329(4)/448, 355/5(10), 357/491.

[11] Community service is not defined in the BNS but it has been explained under section 23 of BNSS. Before finding place under these new criminal major acts, community service was provided under section 18(c) of The Juvenile Justice (Care and Protection of Children) Act, 2015 and also in the Motor Vehicles Act, 1988 (59 of 1988).

Fine has been added in two offences of BNS i.e. 127(5)/345, 127(6)/346

Fine has been imposed mandatorily in addition to the imprisonment in section 105 BNS/304 IPC by replacing the phrase "or with both".

Previously undefined fine amount has been defined in following offences of BNS:

118/324, 127(3)/343, 127(4)/344, 229(1)/193, 229(2)/193, 230(1)/194, 239/202, 241/204, 243/206, 248(a)/211, 293/291, 296/294.

Minimum amount of fine is introduced in two sections of BNS i.e. 195(1)/152, 28/281

Sections 104 [IPC 303] and 109(2)[IPC 307] BNS align with the Supreme Court judgement[12] that declared mandatory death sentences unconstitutional. The legislature codifies this by allowing life imprisonment as an alternate punishment for these offences committed by a life convict.

Sub-section 303(2) [IPC 379] provides enhanced punishment in case of theft on subsequent conviction. This is in addition to section 13 BNS [IPC 75] which provides enhanced punishment on subsequent conviction in offences under Chapters X and XVII of this Sanhita punishable with imprisonment for a term of three years or upwards.

Reforms made to introduce gender neutrality and to rationalise age-related provisions

Following offences have been made gender neutral:

Assault or use of criminal force to a woman with intent to disrobe (S-76) [IPC 354B];

Voyeurism (S-77) [IPC 354C]

Procuration of child (S-96) [IPC 366A]

Kidnapping [S-137(1)(b)] [IPC 361]

Importation of girl or boy from a foreign country (S-141) [IPC 366B] and

Harboring deserter (S-164) [IPC 136]

The age of consent in cases of sexual intercourse or acts by a man with his wife is fifteen years in the IPC, which is now changed to eighteen years[13] in Exception 2 of BNS Section 63 [exception 2 of Section 375 IPC].

Sub-section 70(2) of BNS replaces IPC Section 376DB, now making gang rape of victims under eighteen (in place of twelve) years of age, punishable by up to the death penalty. Thus, it greatly expands the scope here and also under Section 482(4) BNSS [CrPC 438(4)], preventing such accused from obtaining anticipatory bail. This removes additional category of gang rape victim of below sixteen years of age (376DA IPC).

Section 295 [IPC 293], which deals with the sale of obscene objects to young persons, is rationalised by replacing the age below twenty years with child.

Some other important reforms in BNS

The words "insane person", "lunatic", etc. of IPC have been replaced by phrases like "person of unsound mind," etc. everywhere in BNS. 22, 27, 36, 46, 72, 107 and 137 etc. This aligns with the phraseology used in the Mental Healthcare Act, 2017 (10 of 2017).

Sub-section 116(h) has revised the definition of grievous hurt to reduce the suffering threshold from twenty days to fifteen days. Thus, it has enhanced the scope of the provision.

[12]Mithu vs State of Punjab AIR 1983 SC 473

[13] Thus, it becomes in consonance with the Apex Court verdict in Independent Thought vs. Union of India AIR 2017 SC 4904 and other special acts like The Protection of Children from Sexual Offences Act, 2012 and Child Marriage (Prohibition) Act, 2006, etc.

Section 299 BNS [IPC 295A]- expands the scope of the concerned offence of outraging religious feelings of any class, etc. by the addition of the words "or through electronic means".

Section 326(d) [IPC 433]- By addition of rail and aircraft, the scope is significantly broadened regarding mischief by injury, inundation, fire, or explosives.

Under section 337 BNS [IPC 466] -Identity documents issued by Government including voter identity cards or Aadhar cards have been added in the context of forgery of records of Court or the public registry.

Under section 353 BNS [IPC 505]- by addition of the phrases "false information" and "including through electronic means", scope has been immensely expanded.

Another way to compare the successive substantive laws IPC and BNS can be a comparative statistical analysis of offences stipulated in these laws. Therefore, it is presented in the table below:

Comparative Statistics of offences stipulated under two substantive laws

S.N.	Description	IPC	BNS
1.	Total number of offences	483	467
2.	Number of cognizable offences	314	297
3.	Number of non-cognizable offences	147	147
4.	Number of bailable offences	264	255
5.	Number of non-bailable offences	205	196
6.	Number of offences triable by Court of Session	105	118
7.	Number of offences triable by Magistrate of the first class	170	144
8.	Number of offences triable by Any Magistrate	172	166
9.	Number of offences compoundable by parties on their own	43	42
10.	Number of offences compoundable with permission of the Court	13	13
11.	Number of non-compoundable offences	427	412
12.	Number of cognizable offences punishable with imprisonment for a term less than seven years or which may extend to seven years	199	174
13.	Number of offences punishable with imprisonment for a term of seven years or more than seven years	102	117
14.	Number of offences punishable with imprisonment for a term of ten years or more than ten years	76	85
15.	Number of offences punishable with death penalty	13	16

NB: 23 offences are classified under the First Schedule of the procedural law as "According as offence abetted is cognizable or non-cognizable" etc. 16 offences are classified as "According as offences abetted is bailable or non-bailable" etc. 39 offences are classified as "Court by which offence abetted is triable", etc. Therefore, due to this variability, they have not been included in the concerned binaries.

Exclusions of IPC Sections in BNS

Sedition related section 124A IPC[14]

153AA IPC[15]

All four sections of Chapter XIII of IPC, i.e. section 264 to 267 are excluded as separate special Act, Legal Metrology Act, 2009 covers the subject comprehensively.

Section 309 attempt to commit suicide[16]

Section 377 Unnatural offences[17]

Section 497 Adultery[18]

Other excluded sections of IPC are 14, 18, 50, 53A, 236, 310, 311, 376DA, 444 and 446.

Summary of important reforms in the BNSS

Newly added or modified Definitions

2(1) (a)Audio – Video electronic means

2(1) (b) Bail – conditional release on execution of bail bond or bond

2(1) (d) Bail Bond - undertaking for release with surety

2(1) (e) Bond – undertaking for release without surety

2(1) (i) Electronic Communication

2(1) (l) [CrPC 2(4)] An 'Explanation' is added to 'Investigation' to clarify that in cases of inconsistency between provisions of a special Act and this Sanhita, that of the special Act shall prevail. This is in addition to the provision u/s 5 (saving) to the same effect, which is embodied in the Latin maxim "Generalia specialibus non derogant."

New classification of Criminal Courts

As per Section 6 of BNSS [CrPC 6], there are only the following four classes of Criminal Courts:

(i) Courts of Session

(ii) Judicial Magistrates of the first class

(iii) Judicial Magistrates of the second class; and

(iv) Executive Magistrates

Thus, the posts of Metropolitan Magistrate, Assistant Session Judge, and Judicial Magistrate of the third class have been **abolished**.

Newly added sections in BNSS

Section 86 provides that the Court, on a written request from the Superintendent of Police or Commissioner of Police, or above rank officer, may initiate the process of issuance of a letter of request as provided in Chapter VIII for identification, attachment, and forfeiture of **property belonging to a proclaimed person** in a country or place outside India (the contracting State).

Section 105 of the BNSS stipulates **mandatory audio-video recording of search**

[14] May refer to above note #9.

[15] Punishment for knowingly carrying arms in any procession or organising, holding or taking part in any mass drill or mass training with arms. This section along with procedural counterpart section, 144A CrPC was inserted by the Act 25 of 2005, but their enforcement date were never notified.

[16] Section 115 (1) of the Mental Healthcare Act, 2017 had significantly limited the scope of this section by stipulating that, notwithstanding anything in section 309 of the IPC, any person who attempts to commit suicide will be presumed to have severe stress, unless proven otherwise, and will not be tried or punished.

[17] The 246th Report of Department-related Parliamentary Standing Committee on Home Affairs (supra) unequivocally recommended maintaining the status as per the five judges bench verdict of the Supreme Court in Navtej Singh Johar vs Union Of India AIR 2018 SC 4321 so that non-consensual carnal intercourse committed against an adult male, transgender, and acts of bestiality could be legally punished.

[18] The Supreme Court of India, in the case of Joseph Shine vs Union of India AIR 2018 SC 4898, read down section 497 of the IPC as unconstitutional being violative of Article 14, 15 and 21 of the Constitution.

and seizure under Chapter VII or Section 185 [CrPC 165], including the process of conducting a search of a place, the process of taking possession of any property, article, or thing, the preparation of the list of all things seized, and the signing of such list by witnesses[19].

Section 107 of the BNSS provides a process of attachment, forfeiture, or restoration of **property that is derived or obtained from criminal activity**. The investigating officer may apply for its attachment in Court with the approval of the Superintendent of Police or Commissioner of Police. The Court, if satisfied, will issue a show cause notice for a reply within fourteen days. After considering the replies, evidence, and hearings, the Court may order the attachment of the property as proceeds of crime, potentially issuing an ex-parte order if there is no response. The Court can bypass the notice if it believes it would defeat the attachment's purpose and may issue an interim ex-parte order. If the property is confirmed as proceeds of crime, the Court will instruct the District Magistrate to ratably distribute the proceeds to victims within sixty days. Any surplus or unclaimed proceeds of crime will be forfeited to the government.

Section 336 BNSS: Evidence of public servant, expert and police officers – Where any document or report prepared by a public servant, scientific expert or medical officer is purported to be used as evidence in any inquiry, trial or other proceedings under this Sanhita and if such public servant, expert or officer is transferred or retired or died, or cannot be found or is incapable of giving deposition, or securing his presence would cause delay the Court shall secure presence of his successor holding that post to give deposition on such document or report: Provided none of these shall be called unless such document or report is disputed by any of the parties. Provided further that deposition of such successor may be allowed through audio-video electronic means[20].

The newly added Section 356 BNSS **Inquiry, Trial or Judgment in absentia**[21] of proclaimed offenders is a revolutionary provision in the history of our jurisprudence. When proclaimed offender has absconded to evade trial, and there is no immediate prospect of arresting him, it shall be deemed to operate as a waiver of the right of such person to be present and tried in person, and the Court shall after recording reasons in writing in the interest of justice, proceed with the trial in the like manner and with like effect as if he was present and pronounce judgment. Provided that the Court shall not commence trial unless a period of ninety days has lapsed from the date of framing of the charge.

The Court shall ensure that certain procedures are followed before such a trial in absentia, like the issuance of two consecutive warrants of arrest, publication in newspaper, inform his relatives or friend etc. If he is not represented by any advocate, he shall be provided with an advocate for his defence at the expense of the State. If he is arrested and produced, or appears before the Court during such a trial, the Court may, in the interest of justice, allow him to examine any evidence that may have been taken in his absence. No appeal against such judgment shall lie unless he presents himself

[19]With this new addition, the procedure now complies with the concerns raised by the Supreme Court's ruling in Shafhi Mohammad v. State of Himanchal Pradesh (2018) (2018) 5 SCC 311.

[20]This innovation is expected to help speed up the trial of cases which are adversely affected by non-appearance of public servant to depose before the Court.

[21] In the Indian sub-continent, the first innovation of trial in absentia was introduced by Bangladesh through insertion of section 339B and 339C into the Code of Criminal Procedure, 1898 by Ordinance, 1982 (Ordinance No. XXIV of 1982). In India, Jharkhand state introduced such concept by amending section 299 of CrPC through The Code of Criminal Procedure (Jharkhand Amendment) Act, 2020 (Jharkhand Act- 06, 2022).

before the Court of appeal. No appeal against conviction shall lie after the expiry of three years from the date of the judgment.

Section 398 BNSS (new) **Witness Protection Scheme** - Every State Government shall prepare and notify a Witness Protection Scheme for the State with a view to ensure protection of the witness[22].

Section 472 BNSS: A convict under a death sentence or his legal heir, or any other relative may file a **mercy petition** with the President of India under Article 72 or the Governor of the State under Article 161 within thirty days of being informed by the jail Superintendent about the dismissal of appeals or confirmation of the sentence. If the Governor rejects the petition, it can be submitted to the President within sixty days. The Superintendent must ensure all convicts in a case file petitions within sixty days and forward any missing petitions' details to the government. The Central Government, after consulting the State Government, will make recommendations to the President within sixty days. The President will decide on all petitions in a case together. Upon receipt of the order of the President, the same will be communicated to concerned within forty-eight hours, and no appeal against the President's or Governor's decision shall lie in any Court.

Section 530 BNSS (new): This section has unequivocally empowered the Court to hold **trial and proceedings to be held in electronic mode** - All trials, inquiries, and proceedings under the BNSS, including the issuance and execution of summons and warrants, examination of complainants and witnesses, recording of evidence, and appellate proceedings, may be conducted electronically using audio-video communication.

FIR related reforms in BNSS

Section. 173 BNSS [CrPC 154] Information about a cognizable offence, irrespective of the area where the offence is committed **(zero FIR),** may be given orally or by electronic communication **(e-FIR)** to an officer-in-charge of a police station. A copy of the FIR must be provided free of cost to the informant or victim.

Sub-section (*3*) stipulates that, on receipt of information relating to the commission of any cognizable offence, which is made punishable for three years or more but less than seven years, the officer in charge of the police station may, with the prior permission from an officer not below the rank of Deputy Superintendent of Police, considering the nature and gravity of the offence, —

(i) proceed to conduct **preliminary enquiry**[23] to ascertain whether there exists a *prima facie* case for proceeding in the matter within a period of fourteen days; or

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

Specific Time Lines stipulated in BNSS

To ensure timely justice, various timelines have been established in the BNSS, which are briefly outlined as follows:

Section19(3) [CrPC 25] – Appointment of assistant public prosecutor after giving **fourteen days** notice to state government.

Section 40 [CrPC 43]- Arrest by private person, after arrest he should hand over the offender to police officer within **Six hours**

[22]Presumably, the Witness Protection Scheme, 2018, which is taken notice of by the Apex Court in Mahender Chawla vs. Union of India, Ministry of Home Affairs AIR 2018 SC (SUPP) 2561, may be used as a reference document in the meantime and also during the drafting process of such scheme by the government of the respective state.

[23] The Constitution Bench Judgment in Lalita Kumari v. Govt. of U.P (State of U.P.) AIR 2014 SC 187 will still be applicable in cases that are not covered under the scope of this sub-section.

Section 50 [CrPC 52]- Power to seize offensive weapon- it should be seized **immediately** after the arrest

Section 157[CrPC 138]- Procedure where person against whom order is made under Section 152 [CrPC 133] appears to show cause. Provided that the proceedings under this section shall be completed, as soon as possible, within a period of **ninety days**, which may be extended for the reasons to be recorded in writing, to **one hundred and twenty days**.

Section 173(1)(ii) [CrPC 154]- If first information is given by electronic communication, it shall be taken on record by officer incharge on being signed within **three days** by the person giving it.

Section 173(3) [CrPC 154]- Preliminary enquiry to ascertain whether there exists a *prima facie* case for proceeding in the matter within a period of **fourteen days;**

Section 174(1) [CrPC 155] –Information of noncongnisable offence should be forwarded to the Magistrate **fortnightly.**

Section 176(2) [CrPC 157]- The officer in charge shall, forward the daily diary report **fortnightly** to the Magistrate

Section 184(6) [CrPC 164 A]- The registered medical practitioner shall, within a period of **seven days f**orward the report to the investigating officer

Section 185(5) [CrPC 165]- Copies of any record made under sub-section (*1*) or sub-section (*3*) shall forthwith, but not later than **forty-eight hours,** be sent to the Magistrate .

Section 187(2) [CrPC 167]- If investigation is not completed in forty eight hours the Magistrate may order the detention of the accused in such custody as such Magistrate thinks fit (including police custody), for a term not exceeding fifteen days in the whole**,** or in parts, at any time during the initial **forty days or sixty days** out of detention period of sixty days or ninety days, as the case may be,

Section 193(9) [CrPC 173(8)]- Further investigation during the trial may be conducted with the permission of the Court trying the case and the same shall be completed within a period of **ninety days** which may be extended with the permission of the Court

Section 194(2) - Enquiry report on suicide should be signed by the police officer and forward it to the District Magistrate or sub Divisional Magistrate within **twenty four hours.**

Section 218(1) [CrPC 197]- The Government shall take a decision regarding prosecution sanction within a period of **one hundred and twenty days** from the date of the receipt of the request for sanction and in case it fails to do so, the sanction shall be deemed to have been accorded by such Government.

Section 230 [CrPC 207]- Supply of copy of police report or other documents in no case beyond **fourteen days** from the date of production or appearance of the accused, be furnished to the accused and the victim (if represented by an advocate)

Section 232 [CrPC 209]- Commitment of case to Court of Session shall be completed within a period of **ninety days** from the date of taking cognizance, and such period may be extended by the Magistrate for a period not exceeding **one hundred and eighty days** for the reasons to be recorded in writing.

Section 250(1) [CrPC 227]- Discharge in a session trial: The accused may prefer an application for discharge within a period of **sixty days** from the date of commitment of the case under section 232.

Section 251(1) [CrPC 228]- Framing of charge in a session trial within a period of **sixty days** from the date of first hearing on charge.

Section 258 (1) [CrPC 235]- Judgment within a

period of **thirty days** from the date of completion of arguments, which may be extended to a period of forty-five days for reasons to be recorded in writing.

Section 262- (*1*) [CrPC 239] Discharge in a warrant trial: The accused may prefer an application for discharge within a period of **sixty days** from the date of supply of copies of documents under section 230.

Section 263 [CrPC 240]- Framing of charge in a warrant trial within a period of **sixty days** from the date of first hearing on charge.

Section 272 [CrPC 249]- Absence of complainant: the Magistrate may after giving **thirty days**' time to the complainant to be present, in his discretion, at any time before the charge has been framed, discharge the accused.

Section 279 [CrPC 256]**-** Non appearance or death of complainant in summons trial: the Magistrate shall, after giving **thirty days' time** to the complainant to be present, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Section 290(1) [CrPC 265B] – Application for plea bargaining within **thirty days** from the date of framing charge

Section 290(3) [CrPC 265B] For arriving at a mutually satisfactory disposition of the case by both sides on an application of plea bargaining – **sixty days** from the date of accepting application by the Court

Section 316 [CrPC 281]- Record of examination of accused: where the accused is in custody and is examined through electronic communication, his signature shall be taken within **seventy-two hours** of such examination.

Section 330 (1) [CrPC 294]- Admission/Denial of documents in no case later than **thirty days** after supply of the document but court may relax the time limit with reasons to be recorded in writing:

Section 356(1) - The Court shall not commence the trial in absentia unless a period of **ninety days** has lapsed from the date of framing of the charge.

Section 392(4) [CrPC 353]- The Court shall, as far as practicable, upload the copy of the judgment on its portal within a period of **seven days** from the date of judgment.

Section 497 [CrPC 451] Upon receiving property, as per Subsection 497(2), the Court must document its details within **fourteen days** using a format set by State rules. Subsection 497(5) mandates a decision within **thirty days** on disposal, destruction, confiscation, or return of the property, post documenting it and taking visual evidence.

Specific provisions regarding use of technology in BNSS

To make our justice delivery system more efficient and contemporary, Sanhita provides for the most effective use of audio-video electronic means or concerned technology. Such sections are briefly mentioned below for ready reference:

54 [CrPC 54 A]- Identification of person arrested

63(ii) [CrPC 61]- Form of summons- In an encrypted or any other form of electronic communication and shall bear the image of the seal of the court or digital signature.

64(2) [CrPC 60A]- Summons how served.

70(3) [CrPC 68]- Proof of service in such cases and when serving officer not present.

71(1), (2) [CrPC 69]- Service of summons on witness

94(1) [CrPC 91]- Summons to produce document or other thing

105 Recording of search and seizure through audio video electronic means.

154 [CrPC 135] (*b*)- Person to whom order is addressed to obey or show cause. 173[CrPC 154]- Information in cognizable cases.

176. (1) (b) (3) [CrPC 157]- Procedure for investigation.

183(6) [CrPC 164]- Recording of confessions and statements

185. (2) [CrPC 165]- Search by police officer.

187. (*4*) (b) [CrPC 167]- Procedure when investigation cannot be completed in twenty-four hours.

193. (*3*) (*i*),(h)(i),(8) [CrPC 173]- Report of police officer on completion of investigation.

202 [CrPC 182] (1)- Offences committed by means of electronic communications, letters, etc.

209 [CrPC 189]- Receipt of evidence relating to offences committed outside India.

210. (1) (a)(b) [CrPC 190]-Cognizance of offences by Magistrate.

227 [CrPC 204]- Issue of Process

230 [CrPC 207]- Supply to accused of copy of police report and other documents

231 [CrPC 208]- Supply of copies of statements and documents to accused in other cases triable by Court of Session.

251 (1), (2) [CrPC 228]- Framing of Charges

254.(*1*), (2) [CrPC 231]- Evidence for prosecution.

262. (*1*), (2) [CrPC 239]- When accused shall be discharged.

265. (3) [CrPC 242]- Evidence for prosecution.

308 [CrPC 273]- Evidence to be taken in presence of accused.

316 (4) [CrPC 281]-Record of examination of accused.

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

355 [CrPC 317]-Provision for inquiries and trial being held in absence of accused in certain cases

356(5)- Inquiry, trial or judgment in absentia of proclaimed offender.

392 (5) [CrPC 353]- judgement

412 [CrPC 371]- Procedure in cases submitted to High Court for confirmation.

497 (1) (2) (3)(4)(5) [CrPC 451]- Order for custody and Disposal of property pending trial in certain cases.

530- Trial and proceedings to be held in electronic mode.

Other essential reforms in BNSS

In Section 8 of BNSS [CrPC 9], subsections 7 and 8 are newly added. These authorise Session Judge to distribute business among Additional Session Judges and delegate authority for the disposal of any urgent application in his absence.

Section 15 of BNSS [CrPC 21] adds that State Government may appoint any police officer not below the rank of Superintendent of Police or equivalent to be known as **Special Executive Magistrates** for particular areas or for the performance of particular functions.

In Section 18 of BNSS [CrPC 24], a new proviso is added that for National Capital Territory of Delhi, the Central Government shall, after consultation with the High Court of Delhi, appoint the Public Prosecutor or Additional Public Prosecutors for the purposes of this sub-section.

Sub-sections 20(1)(b), 20(2)(b), 20(8), 20(9), 20(10), and 20(11) are added to Section 20 of BNSS [CrPC 25] to streamline the constitution and functioning of the **Directorate of**

Prosecution down to the district level for effective monitoring of the prosecution of cases.

Section 23 [CrPC 29] redefines the **powers of Magistrates** to pass sentences due to new developments like the classification of Magistrates and the new provision of punishment of community service, as well as the respective amount of the fine.

Sec. 25 BNSS [CrPC 31] Sentences in cases of conviction of several offences at one trial: This provision is reformed to the effect that the Court shall, considering the gravity of offences, order such punishments to run **concurrently or consecutively**.

25(2)(a): The longest period of imprisonment a person may have to undergo in such cases is increased from fourteen years to **twenty years**.

Sec. 35 BNSS [CrPC 41- 41A] When police may arrest without warrrant –

Sub-sections 1 to 6 of Section 35 BNSS are reproductions of two sections of CrPC, namely 41 and 41 A. A new form is added to the second schedule, namely, **Form No. 1**, captioned **Notice for appearance by the police**. But said Form No. 1 does not efficiently cover the last clause of 35(3), namely 'or at such other place as may be specified in the notice', because the said form seems to be too rigid to be used to this effect constructively. Proviso to subsection 190(1) may also be considered to improve implementation of these provisions.

Newly added Sub section 35(7) stipulates that the arrest shall not be made without prior permission of an officer not below the rank of Deputy Superintendent of Police in an offence which is punishable for imprisonment of less than three years and such person is **infirm or is above sixty years of age**.

In Section 37 of BNSS [CrPC 41C], the previous sub-sections (2) and (3) have been replaced with sub-section (b), which states that the state government shall designate a police officer in every district and every police station, not below the rank of Assistant Sub-Inspector of Police, who will be responsible for maintaining information about the names and addresses of arrested persons and the nature of the offences with which they are charged. This information must be prominently displayed, including in digital mode, at every police station and district headquarters.

Similarly, Section 82 [CrPC 80] of BNSS sub section (2) is added which mandates that the police officer shall forthwith give the information regarding such arrest and the place where the arrested person is being held to the designated police officer in the district and to such officer of another district where the arrested person normally resides.

Newly added sub-section 43 (3) BNSS [46 CrPC] stipulates that a police officer may use handcuffs during the arrest or court production of a person who is a habitual or repeat offender, has escaped custody, or has committed offences such as organized crime, terrorist acts, drug-related crimes, illegal possession of arms and ammunition, murder, rape, acid attacks, counterfeiting of coins and currency notes, human trafficking, sexual offences against children, or offences against the State, considering the nature and gravity of the offence.[24]

[24] The Case laws like Sunil Batra vs. Delhi Administration 1980 AIR 1579, Prem Shankar Shukla vs. Delhi Administration 1980 AIR 1535, Sunil Gupta vs. State of Madhya Pradesh AIRONLINE 1990 SC 268, followed by Citizens For Democracy vs. State of Assam AIR 1996 SC 2193, etc. get superseded to the extent they are inconsistent with this newly enacted provision.

Section 53. [CrPC 54] includes a new proviso stating that if the medical officer or registered medical practitioner believes that an additional examination of the person is necessary, they may conduct it.

Sections 63-65 BNSS [61-63 CrPC], which deal with the **Issuance and Service of summons,** have been reformed so that electronic communication technology can be utilised in the criminal justice delivery system in the best possible manner. Sections 70, 71 BNSS [CrPC 68, 69] relating to service of summons are also accordingly amended.

Proclaimed Offender Sec. 84(4) BNSS [82 CrPC]: The scope of the declaration of an accused as a proclaimed offender is limitlessly expanded. Earlier, the provision was for offences punishable u/s 302, 304, 364, 367, 382, 392 to 400, 402, 436, 449, 459 or 460 of the IPC, which has been expanded now to **all offences punishable with imprisonment of ten years or more**, life imprisonment, death under BNS, or under any other law for the time being in force.

Section 175 BNSS [CrPC 156] has undergone extensive modification, notably with changes to sub-section (3) and the addition of sub-section (4), to curb abuse of the legal process by unscrupulous litigants and address concerns highlighted by the Apex Court in Priyanka Srivastava vs State Of U.P., 2015 AIR SC 2075, thus protecting public servants acting in good faith. Sub-section (3) allows a Magistrate empowered under section 210 [190] to order an investigation after reviewing an application supported by an affidavit under sub-section (4) of section 173 and considering police inquiries and submissions. Sub-section (4) enables such a Magistrate to order an investigation into complaints against a public servant related to their official duties, provided that a report from the public servant's superior officer detailing the incident is received and the public servant's assertions are considered.

Section 176 BNSS [CrPC 157] dealing with procedure for investigation has following important modifications- Statement of a **victim of rape** may also be recorded through any audio- video electronic means including mobile phone. If officer incharge does not proceed to spot or depute a subordinate to proceed [176 (1) (a)] or decides not to investigate the case [176(1) (b)], he shall forward the daily diary report fortnightly to the Magistrate.

The newly added **sub-section 176(3)** states that upon receiving information about the commission of an offence punishable by seven years or more, the officer in charge of a police station must, from a date notified by the State Government within five years, ensure that a forensic expert visits the crime scene to collect evidence and that the process is recorded via videography on a mobile phone or other electronic device. If forensic facilities are not available for such offences, the State Government must notify the use of facilities from another state until their own are developed.

Section 179 BNSS [CrPC 160] **Seeking attendance of witness** - In the category of persons to be examined at the place of their residence, the age of a male person is reduced from 65 years to **60 years**, and a new category of a person with **acute illness** is added. A new proviso added to sub- section (1) provides that if such a person is willing to attend at the police station, such person may be permitted so to do. If any public servant knowingly disobeys this provision, an FIR can be lodged against him under **Section 199(a) of the BNS**.

Section 183 BNSS [CrPC 164] Two important provisos have been added to sub-section (6) regarding the recording of confessions or statements. The first proviso states that such statements should be recorded by a woman Magistrate whenever possible, or by a male Magistrate in the presence of a woman if a woman Magistrate is unavailable. The second proviso specifies that in cases involving offences

punishable by ten years or more of imprisonment, life imprisonment, or the death penalty, the Magistrate must record the statement of the witness brought before them by the police officer.

Section 187 BNSS [CrPC 167] Inter alia, an important modification in sub-section (2) provides that the Magistrate may, irrespective of whether he has or has no jurisdiction to try the case, after taking into consideration whether such person has not been released on bail or his bail has been cancelled, authorise, from time to time, the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding **fifteen days** in the whole, or in parts, at any time during the initial forty days or sixty days out of the detention period of sixty days or ninety days, as the case may be, as provided in sub-section (*3*).

A crucial proviso has been added to sub-section (1) of Section 190 BNSS [CrPC 170], which states that if the accused is not in custody, the police officer must secure a bond from the person for their appearance before the Magistrate. The Magistrate receiving the report cannot refuse to accept it solely on the grounds that the accused has not been taken into custody. It seems to be inspired by the Apex Court judgment in Siddharth vs. State of U.P., followed by Satender Kumar Antil vs. Central Bureau of Investigation.

Section 193 BNSS [CrPC 173] Police report on completion of investigation - According to (3)(i)(i), **the sequence of custody in case of electronic device** also to be included in the police report. According to (3)(ii), the police officer shall inform the progress of the investigation by any means including electronic **communication to the informant or the victim**, within a period of ninety days. The newly added sub-section (8) investigating officer shall also submit such number of copies of the police report along with other documents to the Magistrate for supply to the accused as required under Section 230 [CrPC 207]. Provided that supply of report and other documents by electronic communication shall be considered as duly served. A proviso has been added to sub-section 193(9) [CrPC 173(8)], stating that further investigation during the trial may be conducted with the Court's permission and must be completed within ninety days, with possible extensions granted by the Court.

Section. 208, 209 BNSS [CrPC 188, 189] Offences committed outside India: Now such offences may be dealt with at any place within India where the offence is registered, in addition to the place at which such person may be found. Under Section 209, the Central Government may direct that evidence be produced either in physical form or in electronic form.

Section 218 BNSS [CrPC 197] Provisions for **deemed prosecution sanction**: The newly added proviso stipulates that a decision on a request for prosecution sanction shall be taken by such Government within **one hundred and twenty days** from the date of receipt of such request, and in case it fails to do so, the sanction shall be deemed to have been accorded by such Government.

Section 223 BNSS [CrPC 200] Complaints to a Magistrate and examination of complainant.

A new proviso is added to sub-section (1) that no cognizance of an offence shall be taken by the Magistrate without giving the accused an **opportunity of being heard**.

The newly added sub-section (2) states that a Magistrate shall not take cognizance of a complaint against a public servant for an offence alleged to have occurred during the discharge of official duties unless: (a) the public servant is given an opportunity to present their version of the situation leading to the alleged incident, and (b) a report detailing the facts and circumstances of the incident is received from an officer superior to the public servant.

Section 274 BNSS [CrPC251] **Release of an accused** in a summons-trial, triable by a Magistrate, a new proviso has been added to empower the Magistrate to release the accused (on being produced before him) if accusations are considered groundless by him after recording reasons in writing, and such release shall have the effect of a discharge.

Section 283 [CrPC 260] Power to try summarily - Existing stolen property threshold has been increased from two thousand rupees to twenty thousand rupees. The newly added sub-section (2) enhances the power to try cases summarily, allowing the Magistrate to try, after giving the accused a reasonable opportunity to be heard and recording reasons in writing, any offence not punishable by death, life imprisonment, or imprisonment exceeding three years in a summary manner. The proviso specifies that no appeal shall lie against the Magistrate's decision to try a case summarily under this sub-section.

Section 293 BNSS [265E CrPC] Punishment for **first time offenders** on plea bargaining has been made less harsh by modifying sub-section (c) and (d). (c) if the accused is a first-time offender without any previous conviction, Court may sentence the accused to one-fourth of minimum punishment provided for the offence. (d) in cases not falling under clause (b) or clause (c), if the accused is a first- time offender without any previous conviction, Court may sentence the accused to one-sixth of the punishment provided or extendable, for the said offence.

Section 346 BNSS [CrPC 309] A new clause 2(b) stipulates that the Court may grant no more than two adjournments, provided the circumstances are beyond the party's control, after hearing the objections of the other party and recording reasons in writing.

Section 349 BNSS [CrPC 311A] The Magistrate's power to order the provision of specimen signatures, fingerprints, and voice samples has been expanded to include these new elements. Additionally, a new proviso allows the Magistrate to order a person to provide such specimens or samples without arresting them, provided the reasons are recorded in writing.

Section 360 BNSS [CrPC 321] **Withdrawal from Prosecution** – The scope of proviso (II) to clause (b) has been expanded by replacing Delhi Special Police establishment under the Delhi Special establishment Act 1946(25 of 1946) with under any central Act. A new proviso is also added that no Court shall allow such withdrawal without giving an **opportunity of being heard to the victim** in the case.

Section 474 The appropriate Government may **commute**, without the sentenced person's consent: a death sentence to life imprisonment; life imprisonment to a term of at least seven years; imprisonment of seven years or more to a term of at least three years; imprisonment of less than seven years to a fine; and rigorous imprisonment to simple imprisonment for any applicable term.

Section 479 BNSS [CrPC 436A] **Maximum detention period for undertrials** - Reforms regarding this section are made by adding one proviso and two sub-sections to provide that: First- time offenders without prior convictions shall be released on bond by the Court if they have undergone detention for up to one-third of the maximum imprisonment period specified for the offence. If a person has multiple pending investigations, inquiries, or trials, they shall not be released on bail. The jail superintendent must apply to the Court for the person's release on bail upon completing one-half or one-third of the detention period specified in subsection (1).

Section 497 BNSS [CrPC 451]: BNSS has added four sub-sections to streamline the process regarding order for custody and disposal of property pending trial in certain cases.

Section 514 BNSS [CrPC 468]: Explanation is

added to clarify that for the purpose of computing the period of limitation, the relevant date shall be the date of filing complaint u/s 223 [CrPC 200] or the date of recording of information u/s 173 [CrPC 154].

Section 531 BNSS [CrPC 484] Repeal and Savings - This section is, in essence reproduction of 484 CrPC.

Exclusions of CrPC sections in BNSS

Definitions of India, metropolitan area, pleader, and prescribed given under sections 2(f), 2(k), 2(q), 2(t) of CrPC have been excluded. Similarly, section 8, 10, 16, 17, 18 and 19 of CrPC relating to abolished classes and jurisdictions of criminal courts have been excluded. Section 355 and 404 CrPC have also been excluded as they relate to metropolitan magistrate the class which has been abolished.

Section 27 CrPC related to jurisdiction in the case of juveniles has been excluded as the Juvenile Justice (Care and Protection of Children) Act, 2015 which thoroughly covers this subject and jurisdiction

Section 144A of CrPC has also been excluded[25]

Section 153 CrPC providing inspection of weights and measures is excluded as separate special Act, Legal Metrology Act, 2009 covers the subject comprehensively.

Summary of important reforms in the BSA

Definition related reforms in BSA

Section 2(1)(d) [IEA 3 para 5]: definition of **'document'** is expanded to include an electronic or digital record including emails, server logs, documents on computers, laptop or smartphone, messages, websites, cloud, locational evidence and voice mail messages stored on digital devices.

Section 2(1)(e) clause (i) [IEA 3 para 6]: under definition of **'oral evidence'** is expanded to include any statement given electronically. This will permit the appearance of witnesses, accused, and experts, etc., to depose their evidence through electronic means. Clause (ii) defining **'documentary evidence'** is also expanded by addition of the words "or digital".

Sub-section 2(2) is newly added to state that words and expressions used in BSA and not defined but defined in the Information Technology Act, 2000 (21 of 2000), BNSS, and BNS shall have the same meaning as assigned to them therein.

Newly added sections in BSA

The newly added Section 61 BSA states that no provision in this Adhiniyam shall exclude the admissibility of electronic or digital records as evidence solely because they are electronic or digital. Such records, subject to Section 63, will have the same legal effect, validity, and enforceability as other documents.

Other important reforms in BSA

Section 24 [IEA 30]: A new explanation II has been added, stating that a trial involving multiple persons held in the absence of an accused who has absconded or failed to comply with a proclamation issued under Section 84 of the BNSS shall be considered a joint trial for the purposes of this section. This addition complements the newly introduced Section 356 BNSS (trial in absentia).

Section 31 [IEA 37] Colonial vestiges have been removed as the words "any Act of Parliament (of the United Kingdom) or in any Central Act, Provincial Act or a State Act or in a Government notification or notification by the Crown Representative appearing in the Official Gazette or in any printed paper purporting to be the London Gazette or the Government Gazette of any Dominion, colony, or possession of his

[25] May refer to note#15 above

Majesty is a relevant fact." are replaced by "any Central Act or State Act or in a Central Government or State Government notification appearing in the respective Official Gazette or in any printed paper or in electronic or digital form purporting to be such Gazette, is a relevant fact".

Section 39 [IEA 45 and 45A]: the scope of the phrase **'expert'** is expanded to include persons especially skilled in **'any other field'**.

Section 52 of BSA [IEA 57] deals with facts of which the court shall take **judicial notice**. Under this section, subsection (a) is expanded by the addition of the words "including laws having extra-territorial operation," and also subsections (b), (d), and (e) are added to expand the scope further. These modifications enable the courts to take judicial notice of laws having extra- territorial operations, international treaties, agreements or conventions with countries by India, or decisions made at international associations or other bodies; proceedings of State Legislatures; the seals of all Courts and Tribunals, etc.

Section 57 [IEA 62] Expansion of Primary Evidence is effected by adding four new explanations. Explanation 4 states that electronic or digital records created or stored in multiple files, whether simultaneously or sequentially, are considered primary evidence. Explanation 5 clarifies that electronic or digital records produced from proper custody are primary evidence unless disputed. Explanation 6 indicates that video recordings stored electronically and transmitted, broadcast, or transferred to another location are all considered primary evidence. Explanation 7 specifies that electronic or digital records stored in multiple locations within a computer resource, including temporary files, are all primary evidence.

Section 58 [IEA 63] Scope of Secondary Evidence is expanded with three new additions which are as follows: (vi) Oral admissions, (vii) written admissions, and (viii) evidence from a skilled person who has examined a document comprising numerous accounts or other documents that cannot be conveniently examined in court.

Now, giving the matching hash value of the original record as proof of evidence shall be admissible as secondary evidence. Importance is given to the integrity of a specific file and not to the entire storage medium.

In Section 63 of the BSA [IEA 65B] dealing with the admissibility of electronic records, the words "or semiconductor memory" "or any communication device or otherwise stored, recorded, or copied in any electronic form" are added in subsection (1). The words "communication device" are added in every clause of Sub-section (2) and other sub-sections as well. This section is modified at many other places also by use of more contemporary phraseology, etc. **A schedule** has been newly added in reference to Section 63(4)(c) of the Adhiniyam. It provides formats for the certificates required. Part A is required to be filled by the party and Part B is to be filled by the expert.

In Sections 80 and 81 [IEA 81 and 81A], explanations are added that explain the proper custody of documents.

Section 165 [IEA 162]: A proviso has been added that no Court shall require any communication between the Ministers and the President of India to be produced before it. With the effect of this newly added proviso, any communication between the Ministers and the President of India will be strictly barred from being produced before any court, which may seem like quite an interesting development to many jurists.

Exclusions of IEA sections in BSA

Section 3, para 10 definition of India; Section 22A dealing with relevancy of electronic records in oral admissions; Section 82 prescribing

presumption as to document admissible in England without proof of seal or signature; Section 88 providing presumption as to telegraphic messages; Section 113 dealing with proof of cession of territory, and Section 166 stipulating power of jury or assessors have been excluded.

References

1. BNS, BNSS, and BSA as notified and published in the Gazette of India dated December 25, 2023.
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3. The Code of Criminal Procedure, 1973, (2 of 1974).
4. The Indian Evidence Act, 1872, (1 of 1872).
5. The Legal Metrology Act, 2009, (1 of 2010).
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7. The Protection of Children from Sexual Offences Act, 2012 (32 of 2012)
8. 246th Report of Department-related Parliamentary Standing Committee on Home Affairs
9. Juvenile Justice (Care and Protection of Children) Act, 2015 (2 of 2016)
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12. Speech of Hon'ble Union Home Minister in Lok Sabha delivered on December 20, 2023.

A Generic Article on Bharatiya Nagarik Suraksha Sanhita

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Abstract

This article aims to capture the essence of changes made in the newly enacted Bharatiya Nagarik Suraksha Sanhita, 2023. Far reaching changes have been made in this major procedural law which will substantially impact the working of all the pillars of Criminal Justice System – the Police, Prosecution, Judiciary and Prisons. The broad objective of the new law is to provide a legal framework where all organs discharge their duties more diligently and efficiently to ensure peace and security in society by providing justice to all.

Keywords : *Arrest, attachment, audio-video electronic means, chargesheet, Court, electronic communication, enquiry, handcuff, investigation, inquiry, Magistrate, proceeds of crime, police, proclaimed offender, prosecution, prison, remand, search, seizure, trial and victim*.

Introduction

The Parliament of India created history last year in the month of December by replacing the age old three major criminal laws, viz. the Indian Penal Code, 1860 (replaced by the Bharatiya Nyaya Sanhita, 2023), the Criminal Procedure Code, 1973 (replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023) and the Indian Evidence Act, 1872 (replaced by the Bharatiya Sakshya Adhiniyam, 2023). As we know the earlier laws were made by the British to suit their interests and to subjugate the natives. The new major criminal laws represent the ethos and values enshrined in our Constitution.

While responding to the debate on the new laws in the Parliament, Hon'ble Home Minister, Shri Amit Shah, emphasized that the main objective of the new laws is to provide justice and not punishment. Justice is a much wider concept than punishment and it includes safeguarding the rights and interests of victim, accused and society. It is with this aim and objective that the new laws have been named as Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita and Bharatiya Sakshya Adhiniyam.

An efficient and effective administration of Criminal Justice System is a sine qua non for ensuring justice as envisaged in the new criminal laws. Criminal Justice System aims at providing peace and security to its subjects by ensuring expeditious delivery of justice. Significant changes have been made

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in the three new criminal laws, keeping in view the above broad objectives. The nomenclature of the new procedural law, viz. the Bharatiya Nagarik Suraksha Sanhita, amply demonstrates the intent of the legislature behind enacting these new laws.

Police, Prosecution, Judiciary and Prisons are the four important pillars of the Criminal Justice System. These four organs together play a key role in the delivery of justice. Out of the three major criminal laws, it is the procedural law, which impacts the working of above pillars the most. Right from the stage of handling information relating to criminal wrongs by police and courts, procedural law deals with the powers and duties of the police, prosecution and judiciary in getting these enquired, inquired, investigated, prosecuted and adjudicated. It also deals with the powers of appellate courts in handling revisions and appeals against the orders and judgments of the trial courts.

This article aims to summarize the important changes that have been made in the procedural law impacting the working of the Police, Prosecution, Judiciary and Prisons.

Out of the three New Criminal Laws, maximum changes have been made in the procedural law as depicted below.

- Total number of sections: CrPC:484, BNSS : 531
- New sections/clauses/sub-sections: 92
- Modified Total Sections/Clauses: 177
- Deleted Sections: 14
- Audio Video Electronic Means: 35
- Timelines: 35 Places

To encapsulate the effect of above changes, these may be broadly divided under the following heads.

1. Victim Centric Law
2. Efficient Prosecution
3. More Accountable and Efficient Policing
4. Use of Technology, both in collecting evidence and imparting justice
5. More Efficient Judicial System and
6. De-clogging of Prisons
7. Miscellaneous Provisions

These are being discussed briefly head wise.

1. Victim Centric Law

BNSS incorporates many provisions to ensure that rights of the victim are protected and victim get speedier justice. Some of the important provisions are as follows.

i. **Easy registration of FIR in the Police Station** : In sec. 173 BNSS relating to registration of FIR (earlier sec. 154 CrPC), 3 changes have been made in this regard—

   a. irrespective of the place where the crime is committed, victim will be able to register FIR at the nearest police station,

   b. victim need not go to police station for registering FIR but can send the complaint by electronic means and

   c. victim will be entitled to receive a copy of FIR, free of cost, if informant and victim are not the same persons.

ii. **Progress of investigation to be informed to the victim:** As per sec. 193 (3) (ii) of BNSS, the police will have to inform the victim about the progress of investigation within a period of 90 days from the registration of FIR.

iii. **Hearing the victim mandatory before withdrawing a case from prosecution:** As per sec. 360 BNSS, Court shall not allow any request for withdrawal of a case from prosecution without providing an opportunity of hearing to the victim.

iv. **Share to victim in the disposal of proceeds of crime**: As per sec. 107 BNSS, if the court finds the properties, attached or seized during investigation or trial to be proceeds of crime, it shall direct the District Magistrate to rateably distribute such proceeds of crime to the persons affected by it.

v. **Recording of statement of victim by a woman Magistrate:** In sec. 183(6) of BNSS, relating to mandatory recording of statement of victim of sexual offences by a Magistrate, *shall,* as far as practicable, be done by a woman magistrate and in her absence by a male magistrate in the presence of a woman.

vi. Sec. 183(6) of BNSS further provides that ***statements of temporarily or permanently mentally or physically disabled*** persons shall be recorded *through audio-video electronic means* preferably by mobile phone.

vii. **Time limit for forwarding medical examination report of a victim of rape:** Sec.184 (6) of BNSS provides that the medical expert shall, within a period of 7 days forward the medical examination report to the IO.

2. Efficient Prosecution

Sec. 20 of BNSS enjoins upon the State Govt. to set up a Directorate of Prosecution not only at the State Level but in every District of the State. Besides changing eligibility conditions for appointment to the posts of Director of Prosecution, Deputy Director of Prosecution and Assistant Director of Prosecution, the new Act defines their powers and functions, which shall, inter-alia, include – examining and scrutinizing police reports before filing in court, to monitor proceedings in courts for their expeditious disposal and to give opinion on filing appeals. The other powers and functions of these officers are to be notified by the State Govts.

3. More Accountable and Efficient Policing

Police is the first responder of the Criminal Justice System, which sets the criminal laws in motion by entertaining complaints or information relating to crimes. To maintain peace and security, police enjoy powers and duties relating to prevention, detection and investigation of crime. It is imperative to have enough safeguards to ensure that police do not abuse powers given to it under the laws. The new Act balances these twin objectives. Salient provisions in the new Act in this regard are discussed as under:

i. Recording of search/seizure by audio-video electronic means

If one is asked to pick up one section in the new Act, which makes police the most accountable, it is section 105 BNSS (new). Police conducts searches and seizures during investigation for the purpose of collecting evidence. To ensure accountability of police while exercising these powers, the new Act makes it *mandatory* for the police to record entire proceedings (*the process of conducting search, of taking possession of any property, article or thing, preparation of the list of all things seized and signing of such list by the witnesses*) of every search (with or without warrant as per sec. 185 BNSS) through audio-video electronic means, preferably mobile phones.

Sec. 105 further mandates forwarding such recording to the District Magistrate, Sub-divisional Magistrate or the Judicial

Magistrate of the First Class without delay. It is to be noted that DM and SDM also enjoy powers under part B of chapter VII of the BNSS to issue search warrant.

ii. Attachment, forfeiture and restoration of property

If sec. 105 BNSS makes police more accountable than before, newly added sec. 107 BNSS empowers the police to get proceeds of crime attached/seized during investigation. The practical bottlenecks faced by police in doing above using provisions in the Criminal Law (Amendment) Ordinance, 1944, have been removed in this section. For attachment of property, believed to be proceeds of crime now, an investigating officer, can move an application in the *jurisdictional court* (in 1944 law it is the District Court), with the *approval of the Superintendent of Police or Commissioner of Police* (in 1944 law it is the Govt.). If satisfied, Court shall issue a show cause notice to the concerned person including benami holder of the property, if applicable, giving 14 days' time to reply. After considering reply and submissions made by the two sides, Court if satisfied, may pass an order of attachment of the property.

If no reply is received within the period of 14 days, Court, may issue an *ex-parte order*. If satisfied that issuance of notice would defeat the object of attachment/seizure, the Court may attach/seize such property by an *interim ex-parte order*, *which shall remain in force till the court gives final verdict.*

If in its verdict, the Court finds the attached/ seized properties to be proceeds of crime, it *shall* direct the District Magistrate to rateably distribute the proceeds of crime to the persons who are affected by such crime *within sixty days* from the date of receipt of the order. If no claimants are found, proceeds shall stand forfeited to the Govt.

iii. Changes relating to police remand of an arrested person

In *Anupam Kulkarni v. CBI (1992)*, the Hon'ble Supreme Court held that as per provisions in sec. 167 CrPC, Court can grant police custody remand of total duration of 15 days of an arrested person only within the first fifteen days from the date of arrest. Further extension of custody could be only judicial. This posed many difficulties before the investigative agencies, especially when investigation was to be handed over to specialised wings/agencies such as the Crime Branch, Economic Offences Wing or CBI. By the time these agencies take over investigation, the period of first 15 days is generally over and these are not able to obtain police custody of the arrested persons. The new Act has addressed these concerns.

As per sec. 187(2) of BNSS, the Magistrate may authorize, from time to time, the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding 15 days in the whole, or in parts, at any time *during the initial 40 days or 60 days* out of detention period of 60 days or 90 days, as the case may be, as provided in sub-sec. (3).

iv. Other provisions for making police more accountable

a. As per sec. 35(7) BNSS, a police officer *shall* obtain prior permission of the officer of the rank of Deputy Superintendent of Police or above, for arresting a person, who is *infirm or above 60 years of age*, in an offence punishable for imprisonment of *less than 3 years*.

b. Changes in sections 36, 37 and 48 further strengthen accountability of police in matters relating to rights of the arrested persons. Now an arrested person may nominate *'any*

other person' as the person, besides a member of the family or a relative or a friend, for providing information about his arrest {sec. 36(c) & 48}. State Govt. shall designate an officer *not below Assistant Sub Inspector* for collecting information about arrested persons and nature of offence and cause it to be prominently displayed in every district headquarters and the police station {sec. 37(b)}.

c. As per sec. 174(1) BNSS, police will now have to forward the daily diary report of all the complaints/ information relating to non-cognizable offences fortnightly to the Magistrate.

d. As provided in sec. 185(1) of BNSS, Police shall record reasons for doing search under this section (without search warrant) in **case diary.**

e. While retaining powers of police to continue further investigation after filing charge sheet as provided in sec. 173(8) CrPC, some restrictions have been placed on these powers in BNSS. As per sec. 193(9) BNSS, *for doing further investigation during trial, permission of the Court shall be taken*, and *it shall be completed within 90 days* which may be extended by permission of the Court.

v. Other provisions for improving efficiency of Police

a. Use of handcuff by Police— Hon'ble Supreme Court in *Citizen for Democracy v. State of Assam and others (1995)* held that police would not use handcuff while effecting arrest of a person and if considered necessary, would do so after obtaining permission of the Court. This led to police facing practical difficulties in handling arrest of criminals and their production in Courts.

The new Act in sec. 43(3) BNSS, has given powers to a police officer for using handcuff *while making arrest of a person or producing such arrested person before the court,* who is a habitual offender or who has escaped from custody or who has committed serious crimes such as terrorist act, murder, rape as listed in this sub-sec.

b. Registration of PE by SHO— Directions given by the hon'ble apex Court in *Lalita Kumari v. State of UP (2013)* on this have been incorporated in the new Act with some modifications. As per sec. 173(3) BNSS, *If the offence is punishable for imprisonment up to 3 years or more but less than 7 years*, SHO, *with the permission of DSP or above*, *considering the nature and gravity of the offence,* may conduct a Preliminary Enquiry (PE) to ascertain whether there exists a prima facie case for proceeding in the matter, within a period of 14 days.

c. Mandatory recording of statement by Court on police request: As per sec. 183(6) BNSS, in offences punishable with imprisonment up to 10 years or more or Life Imprisonment or Death, the Magistrate *shall* record statements of the witness brought before him by the police officer.

d. Filing of chargesheet without accused being arrested: Provision of sec. 170 of CrPC, would be interpreted by many Courts in a way that they would refuse to accept the

police reports to be filed u/s 173 CrPC unless accused was not arrested and brought along with the police report despite amendment in sec. 41 CrPC and insertion of sec. 41A in 2009, sprit of which was to make arrest by police only if considered necessary. The compliance of these amended provisions was emphasized by the Hon'ble Apex Court in *Arnesh Kumar v. State of Bihar (2014)*. Hon'ble Apex Court reiterated its directions of above in *Satender Kumar Antil v. CBI (2022)* and pulled up the agencies for arresting persons for the purpose of filing charge sheet and then for opposing their bail.

Keeping in view above decisions of the Apex Court, sec. 190(1) BNSS makes it clear that, if the accused is not in custody, the police officer shall take security from such person for his appearance before the magistrate and *the magistrate shall not refuse to accept the police report on the ground that the accused is not taken in custody*.

e. **Taking voice sample of a person during investigation:** The Hon'ble Supreme Court in *Ritesh Sinha v. State of UP (2019)* held that a Magistrate can order an accused person to give his *voice sample* for the purpose of investigation/inquiry. This has been incorporated in sec. 349 BNSS. Court may now order any person including an accused, to give specimen signatures or *finger impressions* or handwriting or *voice sample* for the purpose of investigation or proceedings under this Sanhita, *without him being arrested.*

f. **Disposal of seized property during investigation:** Changes have been made in sec. 497 BNSS to facilitate disposal of seized properties during investigation itself. On an application, Court, if satisfied, *shall* prepare a statement containing description of the property and cause photography/videography of the property taken, within 14 days of the production of the property before it. This statement and photography/ videography is to be used as evidence in trial or other proceedings under the Sanhita. After acting as above, Court shall order disposal of the property, within a period of 30 days after such a statement is prepared and photograph/ videography taken.

4. Use of Technology

In this all-pervading technology driven era, the new Act makes provisions for tapping technology, both for modernising police, prosecution and courts and for collecting electronic/digital evidence during proceedings. Some of the salient features are as follows.

i *Issuance of summons by Courts in electronic/digital form* {sec. 63(ii)} and *its service through electronic communication* by Police {sec.64(2)} and Courts {sec. 71(1)}

ii Sec. 94 BNSS empowers a police officer and Court to direct a person to provide *electronic communication including communication devices*, in addition to any document or other thing for the purpose of *collecting electronic/digital evidence*.

iii *Statement of a victim of rape may also be recorded by audio-video electronic means* including mobile phone {sec. 176(1}.

iv For offences punishable with 7 years or more, SHO shall, *from such date as the State Govt. notifies within 5 years*, cause the *forensic expert to visit the crime scene to collect forensic evidence* {sec. 176(3}.

v Police may supply copies of police report and documents to the accused persons and victim (if represented by an advocate), as per provisions of sec. 193(8) and 230 BNSS, by means of *electronic communication* and it shall be considered as *duly served*.

vi Both at the time of making the *accused* hear the charges and judgement, *his presence may also be secured in Court through audio-video electronic means* (sec. 251 & 392)

vii Sections 254, 265 and 336 of BNSS enable *recording of evidence* of witnesses, public servants, experts and medical experts *by audio-video electronic means*. Section 530 provides an all-encompassing regime for doing whatever that can be done using audio-video electronic means and electronic communication *covering all proceedings under this Sanhita* including appeals.

5. More Efficient Judicial System

i. Timelines for various processes during the proceedings

One of the major criticisms of our justice system is the delays inherent in proceedings, both during investigation and trial. Some of the timelines introduced in the new Act for expediting investigation have already been discussed. Timelines introduced relating to proceedings in the Courts are discussed here.

a. *Supply of documents* – 14 days from the date of production or appearance of the accused in Court (sec. 230)

b. *Admission/Denial of documents* – 30 days from the date of supply *but Court may relax* (sec. 330)

c. *Committal of case to Court of Session* – 90 days from the date of taking cognizance *extendable up to 180 days* (sec. 232)

d. *Filing of discharge applications by accused persons* – 60 days from the date of committal in a session's case (sec. 250) and from the date of supply of documents in a warrants case (sec. 262)

e. *Framing of charges* – 60 days from the date of first hearing on charge (secs. 251 & 263)

f. *For filing an application of plea bargaining* —30 days from the date of framing charge (sec. 290). This time limit was not there in sec. 265B CrPC and such application could be filed at any stage during trial. In the new Act, however, an eligible accused person can file such application before the commencement of trial.

g. *For arriving at a mutually satisfactory disposition of the case by both sides in above* — 60 days from the date of accepting application by the Court (sec. 290)

h. *Pronouncement of Judgement* – 45 days from the date of conclusion of final arguments (secs. 258 & 392)

i. *Uploading copy of judgement on portal* — 7 days from the date of pronouncement of judgement, *as far as practicable* (sec. 392)

ii. Limit on number of adjournments

As per sec. 346(2) of BNSS, in every inquiry or trial, ***not more than two*** adjournments ***may be*** granted by the Court, on the request of a party, after hearing the objections of the other party.

iii. Additional Power to a Magistrate in a Summons case

In a summons case, Magistrate may release the accused, if accusations are considered groundless and such release shall have the effect of a discharge (sec. 274)

iv. Powers of Magistrate to conduct summary trial enhanced

a. In sec. 260 CrPC, there was no provision for mandatory summary trial by a Magistrate. In BNSS, Magistrate *shall* try summarily, offences specified in sec. 283(1) (b), which includes thefts and receiving stolen property of value less than Rs. 20000.

b. As provided in sec. 283(2) BNSS, Magistrate *may also* try summarily, offences punishable with less than ***3 years*** (*in CrPC it was 2 years)*. Further, *no appeal shall lie* against such decision of the Magistrate.

v. Special Provisions for Evidence of Public Servants and Experts

A new sec. 336 has been added to make special provisions for evidence of a *public servant, scientific expert or medical officer*, where a *report of document* prepared by them is to be used as evidence in the Court. *None of these shall be called unless their document or report is disputed*. Further if such an officer is *transferred or retired or died or cannot be found or is incapable of giving deposition or securing his/her presence would cause delay*, the Court *shall* secure presence of his/her *successor* holding that post to give deposition on such doc or report.

6. De-clogging of Prisons

i. Early release of certain undertrials on bail

As per sec. 479 BNSS, if an undertrial is a *first-time offender without previous conviction* and not an accused of an offence punishable with death or *life imprisonment*, he shall be released on bail by the Court, if he has undergone detention up to ***one-third of the maximum period of imprisonment*** specified for that offence *(in earlier law it is one-half for all offenders).* It shall be the *duty of the Superintendent of Jail* to make an application in the Court for release of such undertrials.

ii. Lenient punishment for plea bargaining by first-time offenders

As per provisions in sec. 293 BNSS, in a case of successful plea bargaining, if minimum punishment has been provided for the offence and if the accused is a first-time offender without previous conviction, Court may sentence the accused to *one-fourth of such minimum punishment*, other wise to *one-sixth of the punishment* provided.

7. Miscellaneous Provisions

i. Relating to Proclaimed Offenders

a. As per sec. 82(4) CrPC, only those absconders, who are wanted in one of the 19 IPC offences listed therein, could be declared as proclaimed offenders. This would not cover many serious offences of IPC including rape and that of other laws. Sec. 84(4) BNSS removes this anomaly by linking declaring absconders as proclaimed offender *to the punishment provided under the law instead of specific offences*. As per this section, absconding persons wanted in an offence *punishable for imprisonment up to 10 years or more or with Life Imprisonment or Death* under the Bharatiya Nyaya Sanhita (BNS) or *any other law* may be declared as proclaimed offenders by the Court.

b. A new sec. 86 has been added for *identification, attachment and forfeiture of property belonging to a proclaimed offender in a foreign country*. Upon written request of Superintendent of Police or Commissioner of Police and above rank officer, as provided in Chapter VIII, Court may issue Letter of Request (LR) to the Court of that country for above purpose.

c. A new principle of jurisprudence has been introduced in sec. 356 *(new)* BNSS relating to **trial in absentia of the proclaimed offenders,** who do not join the trial despite giving sufficient opportunity. The new law says that if a PO has absconded to evade trial, and there is no immediate prospect of arresting him, *it shall be deemed to operate as a waiver of the right of such person to be present and tried in person, and the Court shall, after recording reasons in writing, proceed with the trial and pronounce the judgment.*

A*ppeal* against judgment of conviction can be filed only within 3 years of the judgement and that too when *PO presents himself* before the appellate court.

ii. Additional Power to Police for effective preventive action

As per sec. 172 (new), all persons shall be bound to conform to the lawful directions of a police officer given in fulfillment of any of his duty under chapter XII regarding Preventive Action of Police and any such person disobeying such directions, may be *detained* or removed by a police officer, who may either take such person before a magistrate or *in petty cases, release him as soon as possible within a period of 24 hours*

iii. Safeguarding Public Servants from malicious complaints

In the new Act, in two important sections – 175 and 223 BNSS, relating to powers of a Magistrate to order investigation or inquiry – additional safeguards have been provided to public servants to save them from malicious complaints in matters arising in course of discharge of his/her official duties. Before ordering registering of FIR under section 175(3) BNSS or taking cognizance on such complaint under section 223 BNSS, magistrate shall receive a report about facts and circumstances of the incident from a superior officer of the public servant and after considering the assertions made by the public servant as to the situation that led to the incident so alleged. This will inculcate confidence in public servants that they can discharge their official duties fairly and fearlessly without being victimized to malicious prosecution.

iv. Preventing misuse of power to Magistrate under sec. 175 BNSS

Hon'ble Apex Court in *Priyanka Srivastava v. State of UP (2015)* had issued directions to the Magistrates for preventing misuse of powers under section 156(3) CrPC to order registration of FIR. These directions of the Apex Court have been incorporated in the new Act. Combined reading of secs. 174(4) and 175(3) BNSS reveals that a complaint can approach the Court only after reporting the matter to police station and Superintendent of Police. Sec. 175(3) BNSS provides that a Magistrate may order such investigation, subject to filing an application u/s 173(4) supported by an affidavit by the Complainant, Magistrate making necessary inquiry and considering submissions made by a police officer in this regard.

v. Summoning of witnesses by Police — Important Changes

In sec. 179 BNSS, *age of male person has been reduced from 65 years to 60 years* and a *new category of a person with acute illness* added in the list of persons to be examined at the place of their residence; other persons being a male person below 15 years or a woman or a mentally or physically disabled person.

Further proviso has been added in sub-sec. (1), t*hat if such a person is willing to attend at the police station, such person may be permitted so to do*. Keeping in view that violation of directions in sec. 179 BNSS is a cognizable offence under section 199 BNS and there is no requirement of seeking prosecution sanction under section 218 BNSS for this offence, It is advised that police officers take special caution while allowing a person making request as above and keep necessary evidence on record in this regards.

vi. Restricted scope of sec. 183 BNSS

Scope of sec. 183 BNSS has been restricted compared to sec. 164 CrPC in the sense that now a magistrate of the *district in which the FIR has been registered* will only be able to record confessions or statements. In the old law any Magistrate anywhere in the Country could do so.

vii. Widened scope of sec. 208 BNSS relating to local prosecution

In order to widen the scope of places where action can be initiated on the requests for *local prosecution* sent by a country with whom India may not have an extradition treaty or the treaty may not provide for extradition of each other's national, it has been added in sec. 208 BNSS, that such offences may be dealt with at any place within India *where the offence is registered* in addition to the place at which such person may be found.

viii. Provision for deemed Prosecution Sanction in sec. 218 BNSS

To prompt expeditious decision on requests seeking prosecution sanction, provision has been made in sec. 218(1) BNSS, that if such Govt. fails to take a decision on such requests within 120 days from the date of receipt, the sanction shall be deemed to have been accorded by such Govt.

ix. States shall notify a witness protection scheme u/s 398 BNSS

Every State Govt. shall prepare and notify a Witness Protection Scheme for the State with a view to ensure protection of the witness.

x. Applicability of old and new law as per sec. 531 BNSS

Though CrPC shall stand repealed with effect from the 1st of July 2024, all appeal, application, trial, inquiry or investigation pending before this date shall be disposed of, continued, held or made, in accordance with the provisions of CrPC, as if this Sanhita had not come into force.

It is also to be noted that on all new complaints or FIR that will be received or registered with effect from 1st of July 2024, the provisions of BNSS would apply even in a case which would be registered under the provisions of the Indian Penal Code.

Conclusion

The above discussion demonstrates that far reaching changes have been made in the new procedural law affecting all the pillars of the criminal justice system. Provisions relating to zero FIR, e-FIR, informing progress of investigation, hearing the victim before allowing withdrawal of a case from prosecution, expeditious investigations and trials, deposition in court through electronic means make it a victim centric law. Whereas steps have been taken to enable investigative

agencies in doing efficient and effective investigations, sufficient provisions have also been made to ensure an enhanced accountability of these agencies. Using technology for effective and efficient investigation, inquiry and trials and for collection of digital and scientific evidence will go a long way in overhauling the criminal justice system for ensuring delivery of timely justice to all the affected persons and society.

Decoding the Bharatiya Nyaya Sanhita, 2023: Indianization of the Colonial Penal Law

Dr. Neeraj Tiwari[1]

Abstract

Recently the Government of India has undertaken a historic step towards revisiting the Victorian criminal laws and passed three laws viz. Bharatiya Nyaya Sanhita, 2023, Bharatiya Nagarik Suraksha Sanhita, 2023 and Bharatiya Sakshya Adhiniyam, 2023 to replace the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 from 1st July 2024. The reasons which may be gathered from the Statement of Objects and Reasons of the three laws behind initiating this transformation of criminal laws that form the bedrock of the Indian criminal justice system for decades is to make the law relevant to the existing contemporary situation and to break free from the colonial past.[2] *This paper has used the analytical method to underline the intent and content of the changes introduced in the Bharatiya Nyaya Sanhita, 2023. The attempt has been made to trace the historical context of such reform. The present paper critically evaluates the impact of the changes on the functioning of the Police with the addition of new crimes like Mob-lynching, Organised crime and Terrorist act. Further, the paper highlights the prominent features like community service, age uniformity and gender neutrality introduced in the Bharatiya Nyaya Sanhita, 2023.*

Keywords: *Mob-lynching, Organised crime, Terrorist Act, Gender neutrality, Punishment, Bharatiya Nyaya Sanhita, 2023*.

Introduction

It is not for the first time that the attempt is made to reform the Indian Penal Code, 1860 (hereinafter referred as 'IPC'). The making of IPC took more than two decades to produce a near perfect penal law imbued with Benthamite philosophy. The first Law Commission, headed by Macaulay submitted the Draft Penal Code, 1837. The Draft was examined by two Review Committees- First Report 1846, Report 1851, Indian Penal Code Bill 1856 second reading Bill 1857, final passage by the Legislative Council and finally the assent by the Governor General on 6th October, 1860. Somewhat similar was the dilatory experience in respect to the post-independence penal law making in India. Though the procedural criminal law that had been in the focus of several Law Commission Reports, such as the 14th Report and

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[2] Para 3 of the Statement of Objects and Reasons, Bharatiya Nyaya Sanhita, 2023.

41st Report, had a smooth sailing leading to the enactment of the Code of Criminal Procedure 1973, the Penal Code reform ran into a tough weather. Initiative in respect to Penal Code reform had been recommended by the 42nd Report of the Law Commission that were taken up by the government almost immediately by the introduction of the Indian Penal Code (Amendment) Bill 1972. The dissensions and disagreements on the Bill necessitated the re-introduction of the Bill in 1978. However, the penal code reform was disrupted abruptly and the Bill never saw the light of the day.

After almost five decades, the successful attempt is made by bringing the Bharatiya Nyaya Sanhita, 2023 (hereinafter referred as 'BNS') which deleted nineteen sections from the IPC and introduced ten new sections with sixteen sub-sections. Additionally, a number of major and minor changes and modifications have been made which resulted in reorganization of chapters and sections. The changes in the BNS may be looked into from the perspective of culpability standards, punishment, decriminalization, overcriminalization and the adherence to judicial pronouncements.

Reorganisation of Chapters and Provisions: Continuity with Change

As stated above, the Objects and Reasons of the BNS clearly spells out the aim to create a legal structure that is more citizen centric and therefore, prioritizes the life and liberty of the citizens over the protection of the State and its property.[3] One of the main objectives behind enacting a new penal law instead of amending the IPC was to streamline the provisions relating to offences and punishments.[4] To effectuate this, the majority of the sections have been rearranged, new chapters have been added and the obsolete sections have been deleted. For the first time a chapter on 'Offences against Woman and Child' has been introduced and the provisions relating to offences against woman and child, which were scattered throughout the IPC, have been brought under one chapter. What is interesting is the placement of this chapter in the BNS which marks as the first chapter dealing with substantive offences under the BNS after the chapter on inchoate crimes.[5] It may be seen as a reflection of the Government's commitment of zero tolerance towards the crime against the women and children keeping in view their vulnerable position in the society.

Another significant attribute of such rearrangement of chapter is seen in the domain of 'inchoate crimes'. All three inchoate offences *viz.* attempt, abetment and criminal conspiracy are brought under one chapter.[6]

Further, it is noticeable that as per the modern-day legislative drafting, all the definitions have been put under one section in alphabetical order. The sections that have been repealed over the years have finally been removed from the text and important changes as suggested by the judicial decisions have been incorporated in the text of the BNS.[7]

The BNS brings down the total number of sections to 358 (which were originally 511 in IPC) by merging many provisions within the same family offences.[8] One of the concerns

[3] *Ibid.*
[4] *Id.* at para 4.
[5] Chapter V, Bharatiya Nyaya Sanhita, 2023.
[6] Chapter IV, Bharatiya Nyaya Sanhita, 2023.
[7] Parliament of India, Rajya Sabha, *Department-related Parliamentary Standing Committee on Home Affairs* (Two hundred forty sixth Report on the Bharatiya Nyaya Sanhita 2023, 2023) para 1.11.
[8] Sidharth Luthra, 'New laws, same system' *The Indian Express* (New Delhi, 23 August 2023). For example, the offences relating to rioting, house-trespass, criminal-trespass and mischief.

expressed against the rearrangement of sections is linked to the confusion and chaos it may create in the minds of the functionaries of the criminal justice and common public. However, it is an indisputable fact that the IPC has undergone a lot of changes since its inception. A total of 78 amendments had been made to the IPC. As many as 11 Indian Penal Code (Amendment) Acts had been enacted till Independence and since Independence the IPC has witnessed amendments 12 times.[9] In all these years the sections have been added or repealed but the original serial numbers have not been disturbed to avoid confusion. So while critics may say that the section numbers have been mixed up by rearranging them but keeping in view the opportunity at hand, it seems logical to streamline the diverse sections and renumber the sections inserted *via* amendments as well as those introduced freshly. There is no doubt that it may require time to get adjusted with the new section numbers, nonetheless the interpretation provided in court rulings will be applicable as before where there is no change made in the definitional part of the offences.

Act of Decolonization: Step to Dispel the Victorian Legacy!

One of the objectives behind repealing and reenacting the IPC as BNS was to get rid of the colonial imprint from our criminal justice system. Decolonisation does not necessarily mean complete overhaul of the erstwhile three laws. The focus must be on the nature of changes and the objectives that such changes seek to achieve. It has been stated by the Union Home Minister in the Lok Sabha at the time of introducing the new Bills that these laws were aimed to replace the British-era laws. The purpose will not be to punish anyone rather to ensure justice. The intent of the legislation would be to protect the rights of the citizens as enshrined in the Constitution of India.[10] It is promised to be a shift from *'danda'* to *'nyaya'* as reflected in the name of the new penal Code. The name of any legislation signifies the intention of the legislators for making that particular law. In this case, the objective appears to deliver *'nyaya'* to the victim, to the society and also to those who commit petty crimes for the first time. This may seem like a small modification but it changes the entire perspective towards the justice dispensation process.

In order to bring the above mentioned to fruition, a number of major as well as minor changes have been made which range from as minor as deletion of all references made to Her Majesty,[11] Queen,[12] British India,[13] British calendar,[14] etc. to the major steps in dropping the offences relating to sedition,[15] adultery,[16] homosexuality,[17] attempt to suicide[18] etc.

The BNS has not given any place to the offence of sedition.[19] Earlier, the Supreme

[9] Tahir Mahmood, 'The IPC in the mirror of history' *The Tribune* (New Delhi, 14 August 2023).
[10] '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, Government of India*, 11 August 2023) <https://pib.gov.in/PressReleseDetailm.aspx?PRID=1947941> accessed 11 November 2023
[11] Section 263A, Indian Penal Code 1860.
[12] Section 13, Indian Penal Code 1860.
[13] Section 15, Indian Penal Code 1860.
[14] Section 49, Indian Penal Code 1860.
[15] Section 124A, Indian Penal Code 1860.
[16] Section 497, Indian Penal Code 1860.
[17] Section 377, Indian Penal Code 1860.
[18] Section 309, Indian Penal Code 1860.
[19] Section 124A, Indian Penal Code 1860.

Court has put section 124A in abeyance in *S. G. Vombatkere* v. *Union of India*[20] citing its misuse at the hands of the law enforcement agencies. Despite its removal from the statute book, it is being argued that the 'sedition' law has been reintroduced in the form of the newly inserted section 152 in the BNS. However, section 152 makes stark distinction from section 124A, IPC. Section 152 criminalises acts endangering the sovereignty, unity and integrity of India which is not the same as to bring into hatred or contempt or exciting disaffection towards the *Government established by law*. Further, *mens rea* standard has been introduced in section 152 which remained absent in section 124A, IPC. Hence, the concerns surrounding section 152 to be invoked to curb freedom of speech or to suppress dissent appears mere speculation and lacks merit.[21]

The provision punishing consensual sexual acts among same sex adults (section 377 IPC) has also been deleted in the BNS. The respective section was already declared unconstitutional by the Supreme Court in *Navtej Singh Johar* v. *Union of India*[22] to the extent that it criminalizes the same sex consensual relations.

One of the archaic provisions in the IPC was dealing with adultery[23] which also does not find place in the BNS. The provision pertaining to adultery has been declared by the Supreme Court in *Joseph Shine v. Union of India*[24] as reflective of paternalistic approach and violative of articles 14, 15 and 21 of the Constitution which reduced the status of married woman to be a property of her husband. The BNS has gone with the views of the Supreme Court and dropped the offence of 'adultery'. Another step towards decolonization is seen in the deletion of the reference *'from that man, or from any person having the care of her on behalf of that man'* from section 498, IPC which cannot sustain on similar grounds on which adultery is declared unconstitutional.[25]

The change in BNS also presents the decriminalization of the attempt to commit suicide.[26] The passing of the Mental Healthcare Act in 2017 effectively decriminalised attempt to suicide by creating an exception to section 309, IPC.[27] Earlier, the Law Commission on several occasions has recommended that the 'attempt to commit suicide' deserves to be repealed on the ground of it being inhuman and anachronistic.[28] Though the provision making 'attempt to commit suicide' a criminal act is deleted in the BNS, using the act of 'attempt to commit suicide' to compel or restrain public servant in discharge of his duties is made punishable.[29] It is interesting to note that earlier 'attempt to commit suicide' was considered an offence affecting human body and found place in chapter XVI of the IPC. However, in the BNS the act of 'attempt to commit suicide' falls in chapter XIII which deals with 'Contempt of the lawful authority of the Public Servant'. This shows that the act of 'attempt to commit suicide' is not with

[20] (2022) 7 SCC 433.
[21] Yashovardhan Azad, 'To fight mob lynching, police reforms a must' *Hindustan Times* (New Delhi, 23 August 2023)
[22] (2018) 10 SCC 1.
[23] Section 497, Indian Penal Code 1860.
[24] (2019) 3 SCC 39.
[25] Section 84, Bharatiya Nyaya Sanhita 2023.
[26] Section 309, Indian Penal Code 1860.
[27] Section 115, Mental Health Care Act 2017.
[28] 42nd Report and 210th Report, Law Commission of India.
[29] Section 226, Bharatiya Nyaya Sanhita 2023.

an aim to harm the body of oneself but to use it as a tool to compel or restrain public servant in discharge of his duties.

Considering all the changes introduced in the BNS, it can be concluded that a fair attempt to decolonise the penal law has been done. However, one provision that has been retained which bears a strong colonial footprint is 'criminal conspiracy'.[30] Initially the IPC made conspiracy punishable only in two cases *viz.*, 'conspiracy by way of abetment' and 'conspiracy as part of certain offences'. The act of 'conspiracy' as an independent substantive offence was introduced in the IPC through an amendment in 1913. The reason to include law of conspiracy can be gathered from the statement of objects and reasons of the 1913 Amendment Act which stated that *"dangerous conspiracies are entered into in India… and that the existing law is inadequate to deal with modern conditions".* However, it is quite evident that 'criminal conspiracy' as a substantive and independent offence was inserted to discourage and punish even the thought of going against the Government of the day. Such an archaic and oppressive provision which was added only to serve the purpose of the Britishers has seen a change in the BNS wherein the expression *'with the common object'* has been added in section 61(1) dealing with the offence of 'criminal conspiracy'. This will require the prosecution to establish the existence of common object to fasten the liability on every conspirator. Earlier, the IPC has used 'common object' in section 149 which required a minimum of five individuals to fasten liability. In contrast, criminal conspiracy requires a minimum of two individuals only. This will also require judicial interpretation in times to come.

Punishment related Reforms: From Deterrence to Reformation!

One of the most awaited reforms in the BNS was in the domain of punishment. Broadly, five key changes in the domain of punishment have been identified in the BNS which are, introduction of community service as a form of punishment, increase in the number of offences with mandatory minimum punishment, increase in the quantum of punishment of imprisonment, increase of amount of fine, and death penalty for a greater number of offences.

The BNS takes a laudable step towards reformative approach in punishment by providing 'community service' as an option for the sentencing courts. The punishment of 'community service' has been prescribed in six offences. Further, it is seen that in many instances either the term of imprisonment has been enhanced or the amount of fine has been increased.[31] Additionally, inclusion of mandatory minimum punishment in many offences is also worrying as it curtails the discretion of the sentencing court as well as excludes the accused from being eligible for certain beneficial treatment.[32] The 'deterrence' and 'retributive' approach of punishment is balanced with the reformative form of punishment. The BNS has made a strong statement that death penalty is going to stay. Despite the Law Commission recommendations[33] and worldwide movement against the death penalty, the BNS reflects an increase in the number of offences

[30] Section 61, Bharatiya Nyaya Sanhita 2023.
[31] In Bharatiya Nyaya Sanhita 2023 total 41 offences have seen increase in the period of imprisonment and in 83 offences amount of fine has been rationalised.
[32] In Bharatiya Nyaya Sanhita 2023 total 23 offences have seen introduction of mandatory minimum punishment. However, many of these offences are borrowed from special laws wherein they provide such mandatory minimum punishment.
[33] 262nd Report on Death Penalty, Law Commission of India.

attracting death penalty which is now 15 in comparison to 11 in the IPC. However, such an increase is due to the incorporation of offences of 'organised crime' and 'terrorist act' which are punishable with death sentence under the respective special laws.

The nomenclature 'imprisonment for life for remainder of a person's natural life' was introduced for the first time by the Criminal Law (Amendment) Act 2013 for a limited number of crimes which were increased in 2018. In the BNS, such punishment has been prescribed for offences like grievous hurt resulting in permanent vegetative state or permanent disability.[34] It can be noted that the terminology 'imprisonment for life for remainder of a person's natural life' is used to show harsher punishment which will be beyond the scope of remission at the government level. It reflects more stringent punishment.

Introducing New Offences: Need of the day

The BNS compensates the deletion of offences with the addition of few and thereby widens the scope of criminal liability. Some of the newly introduced offences are completely new whereas some of them trace their origins in the State laws or special laws.[35] It is interesting to note that the offences which are already covered under the State laws or special laws are introduced in the BNS with some significant modifications.

First and foremost, criminal activity against women and children have been given importance and some key offences have been introduced in this domain. The rising number of cases of sexual intercourse on the pretext of false promise of marriage or concealment of identity is made punishable.[36] It may be misunderstood that it takes away the sexual autonomy of a woman, but the choice to initiate the criminal process is given to the victim and only if she feels that she is 'duped' into the act of sexual intercourse, she may initiate the criminal process.[37] Further, section 95 of the BNS makes an attempt to curb the cases where child is used for committing crimes.[38] The child in conflict with law falls under the protective umbrella of the Juvenile Justice (Care and Protection of Children) Act, 2015. Since a child cannot be subjected to adult court and prison system, it has been a common practice among gangs or groups to hire child for committing an offence. Interestingly, this offence was also recommended in the Indian Penal Code (Amendment) Bill, 1978. The making of such act as criminal is a welcome step towards protecting the child from falling a pray to the gangs and groups involved in criminal activity.

In the BNS some state centric and national security related offences have been introduced. As discussed earlier, section 152 punishes the acts endangering sovereignty, unity and integrity of India. On the lines of various State organised crime prevention laws[39], the BNS has also introduced the offence of 'organised crime'.[40] However, the ambit of 'organised crime' in BNS is wider than any of the State law dealing with the subject. It covers within its sweep larger number of activity like trafficking in drugs,

[34] Section 117(3), Bharatiya Nyaya Sanhita 2023.
[35] Anup Surendranath, 'The Bills, in perspective' *The Indian Express* (New Delhi, 12 August 2023).
[36] Section 69, Bharatiya Nyaya Sanhita 2023.
[37] Neetika Vishwanath, 'Controlling women's sexual autonomy' *The Hindu* (New Delhi, 31 August 2023).
[38] Section 95, Bharatiya Nyaya Sanhita 2023.
[39] Maharashtra Control of Organized Crime Act (MACOCA), 1999, Karnataka Control of Organised Crime Act, 2000, Andhra Pradesh Control of Organised Crime Act, 2001, Gujarat Control of Terrorism and Organised Crime Act. 2015.
[40] Section 111, Bharatiya Nyaya Sanhita 2023.

arms, illicit goods etc. The 'economic offence' is brought within the sweep of organised crime which has not been included in any of the laws dealing with the 'organised crime'. As far as applicability of this offence is concerned, some clarity may be required as to the expression 'continuing unlawful activity'. Whether all the unlawful activity should take place before 1st July, 2024 or one of them to be continued after 1st July for the invocation of section 111 of the BNS. The Supreme Court decision in *State of Gujarat* v. *Sandip Omprakash Gupta*[41] on Gujarat Control of Terrorism and Organised Crime Act, 2015 may prove useful in understanding such position.

The practice of carving out a criminal act from general law and making it an offence under a special law is very common. However, both the offences of 'organised crime' and 'terrorist act' show a reverse practice where the general penal law borrows offences from the special laws. The intention may be to convey a strong statement of Government's stand against such criminal activities which severely impact the national security, integrity and economy. Both the provisions have gone beyond their counterparts in the State and special laws. The procedural regime governing such offences also vary from the general procedural norms applicable to other penal provisions in the BNS.

Interestingly, in addition to the 'organised crime' the BNS introduces 'petty organised crime'[42] which covers the criminal activity that general public encounters on a daily basis like pick pocketing, trick theft etc.

One of the significant additions in the BNS is the offence of 'mob lynching'. Though the BNS does not use the term 'mob lynching' but the spirit and essence of section 103(2) convey the same meaning. Section 103(2) provides punishment for the crime of murder if it has been committed by a group of five or more persons. Therefore, a new category has been added in the list of group liability provisions based on the number of persons involved in the commission of the criminal act. What distinguishes it is the ground for committing murder which is solely based on the identity of the victim. Therefore, certain ingredients need to be satisfied before someone could be punished under mob lynching as opposed to a case of murder.

The earlier optional punishment of imprisonment or fine is replaced with mandatory prison term with fine for all categories of causing death by rash or negligent act.

It will not be wrong to state that 'snatching' has become a menace in every part of the country. Though some states like Haryana, Punjab and Gujarat have made amendments in the IPC making 'snatching' as a separate offence between theft and robbery, it required to be addressed at pan India level. Keeping this in view, the BNS has made the act of 'snatching' an offence which till date was dealt with under section 356 or section 379 or section 392 IPC.[43] The offence of 'snatching' is considered to be between the offence of theft and robbery, the punishment prescribed for 'snatching' in the BNS is similar to the punishment for the offence of 'theft' with the only change that for 'snatching' the punishment of fine is in addition to the punishment of imprisonment and not in alternate to the same which is the case with the offence of 'theft'. Further, the act of 'snatching' has been severely punished under the State amendments mentioned above. Now it will be interesting to see whether these

[41] 2022 LiveLaw (SC) 1031.
[42] Section 112, Bharatiya Nyaya Sanhita 2023.
[43] Section 304, Bharatiya Nyaya Sanhita 2023.

States will continue to follow the BNS for such offence or will bring amendment to introduce harsh punishment for the offence of 'snatching' like earlier.

Further, in the domain of offence against property, specific provisions have been made to tackle the motor vehicle theft. Section 305, BNS prescribes four sub-categories of theft to include motor vehicle theft[44], theft from motor vehicle[45], theft of idol or icon from the place of worship[46] and theft of property of Government or Local Authority[47]. Further, the offence of theft has seen two significant changes. First, the repeat offender of theft will attract a higher punishment extendable up to five years and second, the first time offender of petty theft where the property stolen values up to five thousand rupees will be given community service.[48]

Some other notable additions are in the form of 'abetment outside India for offence in India'[49] and 'making or publishing false or misleading information endangering the sovereignty, unity and integrity or security of India'[50]. The offence of 'abetment outside India for offence in India' seems to have been inspired by section 108B of the Singapore Penal Code, 1871.[51] The offence of 'making or publishing false or misleading information' is targeting the menace of fake news which in the present world of technology spreads faster than light. The offence caters to those false or misleading information which have the tendency to jeopardize the unity, sovereignty, integrity and security of India.

Inclusion of Judicial Decisions into the Letter of Law

A laudable feature of the BNS is that it gives a legislative effect to a number of important Supreme Court rulings passed over the years.[52] The Constitution oriented interpretation given to the rights and liberties of the people by the Supreme Court have been duly recognised in the text of the law. An honest effort has been made to make the BNS relevant to the contemporary context as indicated in the Statement of Objects and Reasons of the Sanhita.

One of the most significant developments in criminal law happened after the enactment of the Mental Healthcare Act, 2017. This Act brought a remarkable change in how section 309 of the IPC was understood and applied earlier. The constitutionality of this provision has been in debate for several years and it has been time and again reiterated by the judiciary that this provision is unconstitutional and Article 21 of the Constitution of India encapsulates within its right to live, the right to end one's own life as well.[53] With the enactment of the BNS, the provision has been deleted and the observations of the Supreme Court have finally been converted into the text of law.

The BNS gives legislative effect to the 2017 ruling of the Supreme Court in the case of *Independent Thought* v. *Union of India*.[54] The age of consent of a married woman now

[44] Section 305(b), Bharatiya Nyaya Sanhita 2023.
[45] Section 305(c), Bharatiya Nyaya Sanhita 2023.
[46] Section 305(d), Bharatiya Nyaya Sanhita 2023.
[47] Section 305(e), Bharatiya Nyaya Sanhita 2023.
[48] Section 303, Bharatiya Nyaya Sanhita 2023.
[49] Section 48, Bharatiya Nyaya Sanhita 2023.
[50] Section 197(1)(d), Bharatiya Nyaya Sanhita 2023.
[51] Penal Code 1871 *available* at: https://sso.agc.gov.sg/Act/PC1871
[52] G.S. Bajpai, 'New Bills and a principled course for criminal law reforms' *The Hindu* (New Delhi, 17 August 2023).
[53] *P. Rathinam v. Union of India*, 1994 SCC (3) 394.
[54] (2017) 10 SCC 800.

stands at 18 years[55] as opposed to 15 years. Therefore, step has been taken to bring the position of law in conformity with the Protection of Children from Sexual Offences Act, 2012.

The Supreme court in the case of *Tehseen S. Poonawalla* v. *Union of India*[56] has shown concern towards growing incidents of mob lynching. The idea of private citizens taking law in their own hands and mete out 'justice' by assuming a person to be guilty of any offence is unacceptable in a civilised society governed by the rule of law. The BNS appropriately responded to such cases of cow vigilantism, child lifting etc.

Furthermore, the much-appreciated decision of the Supreme court in the case of *Navtej Singh Johar* v. *Union of India*[57] has also been honored in the BNS where under the provision criminalising consensual sexual acts between adults has been deleted. Another pathbreaking ruling of the Supreme Court *Joseph Shine v. Union of India*[58] which decriminalised adultery has been duly incorporated in the BNS.

It can be seen that the key rulings of the Supreme Court were considered and adopted while drafting the BNS. Interestingly, in the BNS the defect cited in case of *Mithu* v. *State of Punjab*[59] for declaring section 303 IPC unconstitutional has been rectified and now the alternate punishment is prescribed alongside death penalty for the offence of murder by a life convict.[60]

Gender Neutral Provisions: Towards more inclusivity

The BNS makes a commendable effort to introduce gender neutrality in various offences which gives boost to the idea of gender equality and inclusivity.[61] Two offences have been made gender neutral from the perpetrator's perspective under the category of 'assault or use of criminal force' and 'voyeurism'. With the proposed change the offences of 'assault or use of criminal force to woman with intent to disrobe'[62] and 'voyeurism'[63] can now be committed by a male, female or a transgender person. The reference to '*any man'* has been substituted by the word *"whoever"* respectively.

Further, with respect to the gender of the victim, two offences have been made gender neutral. Section 96 of the BNS widens the scope of the provision by making the procurement of *any child* as an offence. [64] Previously in the IPC, procuration of only a minor girl was a punishable offence.[65] In addition, the gender neutrality is brought in the matter of importation of a girl or boy. Earlier the provision was limited only to a girl below the age of 21 years but with the proposed change even a boy under the age of 18 years is protected from any such act of importation which is made a punishable offence.[66]

The efforts have been made towards making the offences gender neutral. At the same time there is a greater need to provide protection

[55] Section 63, Exception 2, Bharatiya Nyaya Sanhita 2023.
[56] (2018) 9 SCC 501
[57] (2018) 10 SCC 1
[58] (2019) 3 SCC 39
[59] AIR 1983 SC 473
[60] Section 104, Bharatiya Nyaya Sanhita 2023.
[61] Kanav N. Sahgal, 'The BNS: A missed opportunity for gender inclusivity and LGBTQ+ rights', *Deccan Herald* (21 September 2023)
[62] Section 76, Bharatiya Nyaya Sanhita 2023.
[63] Section 77, Bharatiya Nyaya Sanhita 2023.
[64] Section 96, Bharatiya Nyaya Sanhita 2023.
[65] Section 366A, Indian Penal Code 1860.
[66] Section 141, Bharatiya Nyaya Sanhita 2023.

to the persons belonging to other gender. The BNS, for the first time, brought inclusivity by adding transgender persons in the definition of 'gender' in section 2(10).

With gender neutrality, the BNS also achieved to provide age uniformity in many offences, particularly in the offence of kidnapping. The earlier standard of differential age criteria for girl and boy in kidnapping[67] has been removed in the BNS. Now, the expression 'child' is used to refer any person below the age of 18 years for both the offence of Kidnapping[68] and Kidnapping or maiming a child for purposes of begging[69].

Conclusion

The Government has undertaken a major step in revisiting the major criminal laws. The work which started in September, 2019 and proceeded with the constitution of the Committee for Reforms in Criminal Laws in 2020 culminated on 25th December 2023 with the Presidential assent on the three new criminal laws. This is a historic event in independent India. The act of decolonising the penal law needs to be understood as a shift in perspective from 'colonial criminal values' to 'Constitution oriented criminal values'. It never meant to reject Macaulay's fine work in totality, rather the effort appears to make it relevant to the contemporary developments. Many offences carrying the impression of 'Victorian morality' have been deleted from the BNS. Despite the Parliamentary Standing Committee making the recommendations to recriminalise 'homosexuality' and 'adultery', Government proceeded on to give way to 'Constitutional morality' over 'Victorian morality' and removed these Victorian vestiges from the statute book. The step of including 'community service' as a punishment further demonstrates the shift from 'deterrence' to 'reformative' approach of punishment which was never an aim of the *British raj*. The BNS, taking over the IPC, became a law passed in the Indian Parliament, by the Indians and for the Indians which conforms to the democratic and Constitutional values and upholds rule of law.

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Contours of Witness Protection in Indian Laws

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Abstract

Protection of Witness is relevant to ensure free and impartial trial of offenders, the obligation to protect witnesses from all kinds of threats and intimidation, in order to enable them to depose truthfully, lies on the state. If the witnesses are incapacitated from deposing freely before the court, the trial gets vitiated. There are some cursory provisions scattered here and there in the Indian criminal laws and procedures, which aim to guarantee protection to witnesses and other stakeholders in the criminal proceedings. Comprehensive Witness Protection Scheme (WPS) was not provided in Criminal Procedural Code, although courts have emphasized for such a programme almost regularly. Lately, the Apex court in Mahender Chawla and Others case has given blue-print of a comprehensive WPS 2018, and asked the states to prepare a suitable scheme in their respective jurisdiction. Section 398 of the Bharatiya Nagarik Suraksha Sanhita, 2023 also mandates the same.

A meaningful WPS must include protection not only to witnesses but also to those persons in whom witness has interest. Additionally, protection should be available during course of entire criminal proceedings and thereafter. In addition to physical protection, WPS must include a variety of measures, like concealment of identity and relocation etc. Governments are required to establish a Witness Protection Fund (WPF) to arrange for the resources required for implementation of the scheme. Detailed procedure to apply for protection needs to be prescribed in the scheme. Modern state is expected, both morally and legally, to guarantee justice to its people by ensuring impartial trial to the offenders.

Keywords: *Witness, Hostile Witness, Perjury, Witness Protection, Witness Protection Scheme, Relocation, Protection of Identity*.

Introduction

Witness is an indispensable aid to find out truth during criminal proceedings in a civilized society. Accordingly, citizens are made legally and morally liable to give information to police about crime and criminals, as per section 39 of the Criminal Procedure Code 1973[2], re-numbered as 33 in the Bharatiya Nagarik Suraksha Sanhita 2023 (BNSS)[3]. It is a fact that independent witnesses are

[1] Former Director General of Police, Haryana.
[2] The Criminal Procedure Code, 1973, Act No 2 of 1974
[3] Act No.46 of 2023

hardly available to assist in police investigations. It is understood that non-cooperation to police by the public is not without reasons. Witnesses, especially in heinous offences are threatened and even face physical threat from the offenders.

Before the BNSS coming into operation, except the few special laws like the Unlawful Activities Prevention Act[4] (UAPA), WPS worth its name was not provided in criminal procedures. Now, section 398 of the BNSS mandates that state governments should chalk out a scheme for witness protection in their respective jurisdiction. It is in this background that the present write up has been envisaged with the objective of putting the concepts like "witness", "hostile witness" and "perjury" in correct legal perspective and discuss ingredients of a meaningful and workable WPS in Indian context.

Witness

Witness is an individual who testifies in a court, after getting administered oath and affirmation. Section 118 of the Indian Evidence Act[5] (IEA), re-numbered as 124 in the Bharatiya Sakshya Adhiniyam 2023[6] (BSA), provides eligibility criteria for a competent witness. Court may put questions to examine competency of a witness.

Statement of a witness is crucial for the court to arrive at the truth of the matter and pronounce the guilt or otherwise of the accused person. A witness is very vulnerable person who takes the pain to come to the court for depositions, he submits himself to cross-examination and cannot refuse to answer questions on the ground that the answer would incriminate him, he incurs the displeasure of the opposite party and risks his life for the cause of justice. Therefore, a witness deserves all courtesies and respect during the criminal proceedings.

Hostile Witness

Section 8 of the Oaths Act, 1969[7] provides that a witness is legally bound to state the truth on the subject. An expert deposes before the court based upon his skills and qualification in the relevant field.

A hostile witness is the one whose statement given to the police during investigation, does not match with his deposition before the court. However, it is a reality that witnesses are turning hostile in the courts with predictable regularity, especially in heinous crime cases, for various reasons.

'Hostile Witness' is not a defined concept in the law of evidence in India, but it is known in English law. Deposition by a hostile witness cannot be thrown in dust-bin, as such court may consider and decide how much of the statement is credit worthy. Evidence law empowers a party to put any question to a hostile witness with the leave of the presiding officer in order to impeach his or her credit.

In order to understand conduct of a witness turning hostile, it is imperative to know the circumstances under which witness has deposed against the party who has called him/her for deposition. Provisions in section 180(3) of the BNSS empower a police officer to take statement of witnesses during investigation. They may be used as a reference point to examine veracity of the witness. If a witness deviates from earlier statement recorded by police, he/she may be declared hostile. In a country like India,

[4] Act No. 37 of 1967
[5] Act No. 1 of 1872.
[6] Act No. 47 of 2023
[7] Act No. 44 of 1969

where police is infamous for recording statements u/s 161 of the CrPC (180 of the BNSS) untruthfully in order to prove the prosecution story, treating that statement a reference mark to establish the truthfulness of the maker is not desirable.

Many other ground realities are also to be taken into account before declaring a witness hostile. An unwilling witness, if called by a party to depose, may often turn hostile. Sometimes, witnesses are reluctant to speak in the intimidating environment of the court. In many cases, where the offenders are economically strong and socially influential, state witnesses face multiple threats including physical elimination, and they are coerced not to depose truthfully. Sometimes, long drawn trial and unwelcoming court environment compel witnesses to adopt non-cooperative attitude during the proceedings due to immense inconvenience and harassment suffered by them.[8] Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that the ultimate truth is presented before the court and justice triumphs and the trial is not reduced to mockery.[9]

WPS in Indian Laws

Citizens participate in police investigation as informer, complainant or witness and are entitled to protection in the court complex, outside the court, during the court proceedings and even after the trial is over.

(i) Protection in court complex

Witnesses attending courts suffer lack of facilities, there is hardly any place where a witness can sit honourably and nobody is there to guide them up to the court room. Toilet facilities in the court complex are inadequate, drinking water and other amenities like food and refreshment are not available and daily maintenance allowances are insufficient to meet the expenditure. These are the reasons why independent witnesses are shy of extending a helping hand to police and generally those persons only agree to come to its aid who have an axe to grind.

(ii) Protection in the court room

Witnesses in general may face harassment and indignities during the court proceedings, whereas, they deserve all protection and patronage from the presiding officer, who has called them to come forward to help in arriving at the truth of the matter pending before him. Therefore, it is incumbent upon the judge to see that witnesses are not bullied by the opposite party and they are comfortable in the court room. The witness should be treated with great respect and consideration as a guest of honour.[10]

To ensure that a witness deposes truthfully and also to protect his dignity and honour, proviso to section 137 of BSA provides that in case an answer given by a witness incriminates him, that statement cannot be used to launch criminal proceedings, other than those for giving false statement. Under the provisions of section 154 of the BSA, the presiding officer may prohibit the opposite counsel from asking any indecent or scandalous question. The court is also duty bound to disallow questions which may insult or annoy a witness, or which are offensive. Despite all these protective provisions, it is

[8] Quoted from the Forth Report of the National Police Commission, Government of India, June 1980, at 15016.
[9] Foreword written by Shanker Sen, Senior Fellow, Institute of Social Sciences, New Delhi and Former Director, National Police Academy, Hyderabad, to a monograph titled Urgent Need for Witness Protection authored by Dr. K.P. Singh, published by Institute of Social Sciences, New Delhi, Kalpna Printing House, New Delhi.
[10] Malimath Committee Report, Volume I, A committee on Reforms of Criminal Justice System, constituted by MHA, Government. of India, March 2003 at 137

true that witnesses are not comfortable in the court room environment.

(iii) Protection outside the court

In *Zahira Sheikh and Another v State of Gujarat*[11], the SC has observed that witnesses need protection from anti-social elements. The National Police Commission in its 4th Report (1980) has expressed the urgency to check manipulation of witnesses by the opposite party; the Commission in its 14th Report (1958), 154th Report (1996), 178th Report (2001) and 198th Report (2006) has discussed different dimensions of the issue of WP and made recommendations including protection of identity. In compliance of the recommendations of the Law Commission, a new section 195A was inserted in the IPC in 2006, whereby criminal intimidation of witnesses was made punishable with an imprisonment of 7 years. Provisions to protect witnesses also find mention in some Special Laws as well.

In the Juvenile Justice (Care and Protection of Children) Act 2015[12], it is prescribed that child friendly special court rooms shall be established so that children attending the court do not get intimidated in the traditional court environment; proceedings are also to be held in informal manner. Child friendly procedures are also prescribed in the POCSO Act 2012[13]

The Whistle Blowers Protection Act 2014[14], was enacted to protect informers giving information against corrupt public servants; a new chapter IVA titled "Rights of Victims and Witnesses" was added[15] in 2016 in the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989[16]. Special courts established as per the Act are required to ensure that witnesses get complete protection including relocation, travelling and maintenance allowances and a package for socio-economic rehabilitation.

Section 44 of the UAPA (supra) provides a comprehensive WPS including provisions relating to concealing identity of witnesses, relocation and other measures. Section 17 of the National Investigation Agency Act, 2008 (NIA Act)[17] also contains similar provisions. Under the provisions of both these laws, public prosecutor (PP) may request the court to order suitable measures to protect a threatened witness. The PP may also request the court to conduct trial in absentia.

WPS, 2018

As per the facts narrated in *Mahendra Chawla & Others v. UOI & Others*[18], 3 witnesses had been killed and another witness Mahendra Chawla survived murderous attack for daring to testify against Asaram Bapu, a rape convict. Mahendra Chawla along with 4 others persons filed an application in the Supreme Court for protection. During hearing of the case, the Supreme Court converted the application into a Public Interest Litigation (PIL) and asked the Central Government to present draft of an WPS. Resultantly, the Central Government prepared the WPS 2018 and got it approved from the Apex court. The scheme was declared the law by the Supreme Court on the subject under Article 141/142 of the Constitution, until a suitable legislation is enacted.

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11 (2004) 4 SCC 158.
12 Act No. 2 of 2016
13 The Protection of Children from Sexual Offence Act 2012" Act No. 32 of 2012
14 Act No. 17 of 2014.
15 [Ins. By Act1 of 2016, s. 11 (w.e.f. 26-1-2016)]
16 Act No. 13 of 1989.
17 Act No. 34 of 2008.
18 [WP (Criminal) 156 of 2016; AIR 2018 SC (SUPP) 2561]

As per the provisions of the WPS 2018, all witnesses in offences entailing punishment of more than 7 years imprisonment, death penalty and life imprisonment are entitled to seek protection under the scheme. Additionally, persons coming to depose in the court in all cases of 'Crime against Women' defined in sections 354, 354 A to D and 509 of the IPC can also avail protection under the WPS 2018. The District & Sessions Judge is the competent authority (CA) and head of prosecution agency of the district is designated as member secretary of the authority to decide upon the matters of WP. The Superintendent of Police of the district is responsible to prepare a "Threat Analysis Report" *qua* the witness and submit it to the CA. Application for protection may also be filed by the threatened witness or any other person on his behalf, including his family members, counsel, investigating officer of the case, concerned officer-in-charge of the police station and jail superintendent concerned, as the case may be, in the prescribed form. Final order for witness protection shall be passed by the CA. A 'Witness Protection Cell' (WP Cell), constituted in each state and union territory shall be responsible to implement the WPS.

In order to provide effective and meaningful protection, threatened witnesses are to be classified in three categories depending upon gravity of threat. The first category includes witnesses facing threat extending to their life or life of family members during the investigation, trial or thereafter, persons suffering threats extending to damage of reputation or safety of property are included in second category. The third category of witnesses includes those who experience moderate harassment and intimidation only.

State Witness Protection Fund (SWPF), which is to be established to arrange for financial resources for proper implementation of the scheme, shall comprise of funds received on account of budgetary allocation by the state, receipt of cost imposed by courts, donations/contributions by philanthropies/charitable institutions and contributions received on account of corporate social responsibility.

Detailed guidelines for implementing WPS 2018 have been prescribed. The programme may include measures like: concealment of identity, close proximity security, patrolling around the place of residence, relocation of residence, special court complex and day-to-day trial proceedings etc.

Concealment of identity of witnesses and that of their family members and other stakeholders becomes important in some cases to thwart attempt of any physical harm to them. CA is empowered to pass any other protection order. Conferring new identity may involve giving of new name and parentage, changing of profession and providing supportive documents so that the government agencies accept them. It is clarified that the new identity so given shall not deprive the person from existing educational, professional and property rights.

Relocation of residence is another protection measure which is prescribed under the WPS 2018. The CA is competent to pass required order considering the report of the District Superintendent of Police and request made by the individual. The whole proceedings and record relating to witness protection under the WPS 2018 is confidential and the record may be destroyed after one year of the disposal of last appeal. However, soft scanned copies are to be preserved.

In case the request for protection is found false, the home department can initiate proceedings for recovery of expenditure

incurred from the SWPF. A party aggrieved by the protection order given by the CA or the police may file a review application within 15 days of passing of such an order.

The WPS 2018 however suffers a significant drawback as nothing has been mentioned in it about protection of the witnesses after the court proceedings are over. Further, detailed guidelines for proper implementation of the scheme have not been prepared yet by majority of the states. Moreover, practical difficulties in implementing the provisions relating to concealment of identity and relocation etc. remain to be tested on ground.

Additional Measures

Protecting witness is a subject matter of experience and procedural details, rather than that of theoretical concepts and ideas. Indian socio-economic conditions and political ground realities are to be given due weightage before suggesting any solution to the problem of WP. The following additional measures along with the protection measures prescribed under the WPS 2018 may provide a complete package for witness protection:

1. Statement of threatened witnesses u/s 183 of the BNSS (section 164 of the CrPC) should be recorded as soon as possible during the investigation in important cases.
2. Security bond for a large amount may be got executed from the offender u/s 126 of the BNSS (section 107 of the CrPC).
3. Investigation should be completed and final report submitted to the court for trial as soon as possible. Threatened witnesses may be presented by police before the magistrate during investigation, in order to get their statements recorded under section 183(6) BNSS. Proviso to the section provides that magistrate shall record statements of such witnesses in cases of offences punishable with imprisonment for more than 10 years, life imprisonment or death penalty.
4. The statement of threatened witness may be recorded during trial at the earliest available opportunity.
5. Provisions of section 232 of the BNS (195A of the IPC) should be used against the offender, wherever required.
6. Application for cancellation of bail of the offenders, who engaged in threatening witnesses, should be moved without loss of any time.
7. Threatened witnesses may be trained in using fire-arms and the arms may be provided to them by the state on loan from the state armory.
8. Video-conferencing for recording statement may be used where witnesses face threat from the opposite party.
9. Day-to-day proceedings at a safe location may be ensured.
10. Accused persons may be asked by the court to furnish security and bail bond of heavy amount, before releasing them on bail.
11. Security bond of heavy amount u/s 125 of BNSS may be insisted by the trial court at the time of the final conviction order to guard the witness against the possibility of the convict indulging in any post-conviction threat and intimidation.
12. Audio-video electronic means may be used for conducting proceedings against criminals who are found involved in threatening witnesses in order to restrict their movement from the jail.

WPS under the BNSS

Under the newly enacted procedural code (BNSS), two provisions deal with the subject matter of witness protection. It is provided in section 216 of the BNSS that any person, including the witness, is competent to lodge a complaint under section 232 of the BNS if a witness encounters any threat and coercion from the opposite party. It is prescribed in section 398 of the BNSS that the states shall chalk-out a WPS in their respective jurisdictions to ensure protection to witnesses.

Conclusion

It is a harsh reality that witnesses who attend courts for the cause of justice face intimidation, harassment and threats of different kinds, even threats extending to life. The success of any trial depends on truthful deposition by the witnesses in trial proceeding. The witnesses depose in the court not for themselves but to assist the court to arrive at the truth of the matter. Ensuring justice to its people is the very basis of the existence of the modern states. It is, therefore, the most important duty of the government to guarantee protection to witnesses, not only outside and inside the court room but also after conclusion of trail and till such time as the threat persists. The WPS 2018 and additional measures suggested in this write up provide sufficient base material for the states to prepare and notify a suitable scheme for witness protection in their jurisdictions.

Investigation and Trial Framework in Bharatiya Nagarik Suraksha Sanhita

Dr. Manoj Kumar Sharma*

Abstract

Bharatiya Nagarik Suraksha Sanhita, 2023 (Act No. 46 of 2023) has introduced various amendments in the criminal procedural law, including provisions for speedy trial by stipulating time-lines for preliminary inquiry, framing of charges, discharge applications, delivery of judgment, plea bargaining, etc. Specific provisions have been inserted regarding Zero FIR, Preliminary Inquiry, E-FIR, time-bound disposal of mercy petitions, extensive use of audio video electronic means, compulsory forensic examination of the scene of crime in certain cases. Further, new and innovative provisions have been inserted for dealing with cases of proclaimed offenders, speedy disposal of property, attachment and forfeiture of property acquired from criminal activities, etc. This apart, amendments have also been made in criminal procedure regarding complaints and petitions to Magistrate and for safeguarding public servants against false FIRs. Important amendments have also been made regarding remand provisions, summary trial, bail to under-trial prisoners, etc. The amendments in the procedural law are indeed a welcome step and a much-needed step, but their efficacy is yet to be seen. This paper is an attempt to analyse the amendments made in the new criminal procedural law and to compare the same with the provisions contained in the Code of Criminal Procedure, 1973. For the purpose of this research paper, the doctrinal method of research coupled with the comparative method has been used.

Keywords: *BNSS, Investigation, Trial, FIR, Court, Code, CrPC, Preliminary Enquiry, Cognizable offence, cognizance, pre-cognizance.*

Introduction

Three new criminal laws[2] have ushered in various important reforms with far-reaching consequences in the criminal justice system of our country. These reforms have been introduced with various objectives in mind, including, but not limited to, shedding away colonial shadows from the criminal laws, aligning criminal laws with the judgments of the constitutional courts, amending laws and inserting new provisions in accordance with contemporary needs, making laws genderless to the extent possible,

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[2] Bharatiya Nagarik Suraksha Sanhita, 2023; Bharatiya Sakshya Adhiniyam, 2023; and, Bharatiya Nyaya Sanhita, 2023.

strengthening the rights and position of the victim as an important stakeholder, and expediting the procedure to effectuate the right to a speedy trial.

In this paper, an attempt has been made to analyse the important amendments relating to investigation and trial brought about by the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as BNSS)

Investigation

Fair probe is also an important facet of criminal law[3] and is part of the right to personal liberty[4]. As we understand, investigation commences after the FIR is recorded[5] and ends with the filing of a charge-sheet or challan[6], under Section 193, BNSS (Section 173 of the Code of Criminal Procedure, 1973, hereinafter referred to as the Code).[7]

Chapter XIII of the BNSS (sections 173-196) deals with investigation, i.e. information to police, commencement, procedure and completion of investigation. A comparison between the Code of Criminal Procedure (Chapter XII, sections 154-176) and Chapter XIII of the BNSS (sections 173-196) reveals that the BNSS has introduced several amendments in this chapter.

E-FIR

Section 154 of the CrPC was not designed for recording the FIR through phone or email. However, due to advancements in the means of communication, Section 154(1) was given a liberal meaning by the constitutional courts. Accordingly, courts deliberated on the recording of FIR on a phone message if such information discloses the commission of a cognizable offence.[8] It must be noted that an ambiguous and incomprehensible telephonic message is not equivalent to lodging an FIR because such a message does not disclose the commission of a cognizable offence.[9]

However, there was no provision in the CrPC which specifically permitted the recording of an FIR on receipt of information through electronic means[10] though few States[11] have allowed e-FIR in petty cases[12].

In 2023, the Law Commission of India presented its 282nd Report, in which it proposed that e-FIR registration be allowed on a gradual basis, starting with offenses where the accused is unknown and offences punishable up to three years. The intent was to minimize the probability of such a feature being abused while still enabling the pertinent stakeholders to test the effectiveness of the online FIR. It was also suggested that the

[3] Mohammed Zubair v. State of NCT of Delhi, AIR 2022 SC3649; Arnab Ranjan Goswami v. Union of India, AIR 2020 SC 2386.
[4] Amar Nath v. Union of India, AIR 2021 SC 109.
[5] Section 173, BNSS (Section 154, CrPC).
[6] Section 193, BNSS (Section 173, CrPC).
[7] T.T. Antony v. State of Kerala, (2001) 6 SCC 181; Umesh Singh v. State of Bihar, (2013) 4 SCC 360.
[8] Bhagwan Jagan Nath Markad v. State of Maharashtra, AIR 2016 SC 3531.
[9] Tapinder Singh v. State of Punjab, AIR 1970 SC 1566; Vikram v. State of Maharashtra, 2007 Cri. LJ 3193. (SC); Patai v. State of U.P., (2010) 4 SCC 629; Surajit Sarkar v. State of W.B., (2013) 2 SCC 146.
[10] Ministry of Home Affairs, Government of India requested the Law Commission of India to examine the issue in 2018. Law Commission of India collected information from various sources including the Bureau of Police Research and Development. It was found that some states had allowed E-FIR in certain cases.
[11] Delhi, Gujarat, Karnataka, Madhya Pradesh, Odisha, Rajasthan, Uttar Pradesh, Uttarakhand etc., (Law Commission of India, 282nd Report, 2023).
[12] Like vehicle or property theft, lost articles like wallet/purse, PAN Card, Passport, important documents like School or College Mark Sheets or Degree, Aadhaar Card, Driving License etc. (Law Commission of India, 282nd Report, 2023).

system may be expanded after modifications if found efficacious.[13]

However, the Indian Legislature took a bold and progressive step by allowing the e-FIR in Section 173(1) of the BNSS for all cognizable offences. The legislature was alive to the issues of probable misuse of such a facility and therefore, enacted a safeguard[14] by laying down that an e-FIR shall be taken on record on being signed within three days" by the informant. Thus, now that the FIR can be lodged by electronic means, the only condition is that such a message must be first in point of time and should disclose the commission of a cognizable offence.

The Apex Court of India[15] has held that an ambiguous and incomprehensible phone message concerning the commission of a crime is not to be equated with lodging an FIR.[16] Similarly,[17] while dealing with information received on a telephone call, the Constitutional Court ruled that a phone call that is made solely to ask the investigator to come to the site cannot be considered an FIR. Additionally, in the event that the IO responds to a telephone message and visits the crime site, the statements made therein will be deemed as statements under Section 162 of the Code.

It follows that in the event of an electronic message and the disclosure of a cognizable offence, the police do not need to wait three days. The police officer can proceed to the spot and record the statements. Such a statement can be taken as an FIR. The requirement of signatures on e-messages about cognizable offences is only to prevent frivolous FIRs.

Zero FIR

The concept of Zero FIR was not specifically provided for in the CrPC. However, the Apex Court, in *State of A.P. v. Punati Ramulu*[18], recognized the concept of Zero FIR. The court ruled that if a police officer refuses to file a FIR on the ground that it has no territorial jurisdiction, such an act will amount to dereliction of duty.[19]

Further, if we dig deep, it becomes evident that on May 10, 2023, an Advisory by MHA in this regard was issued.[20] Later, the Government of India issued another advisory dated 05-02-2014 for the recording of Zero FIR instructing that FIR shall not be refused only on the ground that the concerned police station does not have territorial jurisdiction.

Keeping in view the judicial decisions and the prevalent practices, section 173(1) has been enacted to include the provision for Zero FIR. The opening line of section 173(1) uses the phrase "irrespective of the area where the offence is committed" which makes it abundantly clear that the legislature has mandated the recording of FIR or Zero FIR even though the recording police station does not have territorial jurisdiction.

Preliminary Enquiry

A cursory reading of Section 154(1) CrPC suggests that the Station House Officer

[13] Law Commission of India, 282nd Report on Amendment in Section 154 of the Code of Criminal Procedure, 1973 for enabling Online Registration of FIR, 2023, pp. 55-57.
[14] BNSS, Section 173 (1)(ii)
[15] Netaji Achyut Shinde (Patial) v. The State of Maharashtra, (2021) 14 SCC 222.
[16] See also: T.T. Antony v. State of Kerala, (2001) 6 SCC 181; Damodar v. State of Rajasthan, (2004) 12 SCC 336.
[17] Ramsinh Bavaji Jadeja v. State of Gujarat, (1994) 2 SCC 685.
[18] AIR 1993 SC 2664.
[19] Satvinder Kaur v. State (NCT of Delhi), AIR 1999 SC 3596.
[20] Same view was echoed in Verma Committee and in Lalita Kumari v. State of U.P., AIR 2014 SC 187.

(SHO) is bound to file an FIR, if he receives the information of a cognizable offence. CrPC had no provision for the holding of an enquiry by the police officer before recording of the FIR. However, in due course of time, two sets of cases, decided by the Supreme Court, emerged which expressed conflicting opinions regarding registration of FIR. According to one view[21], the police officer shall record an FIR when he receives information about a cognizable offence. The opposing viewpoint[22] holds that a police officer need not file a formal complaint (FIR) every time he finds that the matter is cognizable and may, in some circumstances, choose to conduct some sort of enquiry. Both views came for discussion before the Constitution Bench[23], which held that if information reveals the commission of a cognizable offence, an FIR must be registered. However, a preliminary enquiry may be conducted in certain situations.[24] Thus, the Apex Court recognized that there can be a preliminary enquiry in certain cases, though the CrPC was silent on the issue.[25]

To clarify the law, Section 173(3), BNSS has introduced a provision for preliminary enquiry when the matter is punishable with imprisonment, which is not less than three years but which goes upto seven years. When information about such offences is received, the SHO may, with the prior consent of a senior police officer[26], conduct a preliminary enquiry. Bare perusal of Section 173(3) brings to light that the police is bound to record an FIR, if the cognizable offence is disclosed. Alternatively, the SHO may decide to hold a preliminary enquiry with a view to finding out whether the cognizable offence is committed.[27] In conformity with the judicial mandate[28], the section has fixed a time-line of fourteen days to complete the preliminary enquiry.

From the foregoing discussion, it is evident that the insertion of the provision in Section 176(3) has made the law clearer by laying down specifically the cases where preliminary enquiry is permissible in contradistinction to the existing law on the point. It is also obvious that if the circumstances reveal that a cognizable offence was committed, the police officer must file an FIR, and resorting to a preliminary enquiry is not permissible. The purpose of preliminary enquiry is not to check the reliability, genuineness and credibility of information but to find out whether a *prima facie* case exists.[29] If the result of preliminary enquiry discloses that *prima facie* case exists, the police officer

[21] State of Haryana v. Bhajan Lal, 1992 Supp. (1) SCC 335; *Ramesh Kumari* v. *State (NCT of Delhi*, (2006) 2 SCC 677; *Parkash Singh Badal* v. *State of Punjab,* (2007) 1 SCC 1.

[22] *State of U.P.* v. *Bhagwant Joshi,* AIR 1964 SC 221; *Selvi* v. *State of T.N,* 1981 Supp. SCC 43; *Rajinder Singh Katoch* v. *Chandigarh Administration,* (2007) 10 SCC 69; *Shashi Kant* v. *C.B.I.,* (2007) 1 SCC 630.

[23] Lalita Kumar v. State of U.P., (2012) 4 SCC I. This matter was heard by a three-judge bench in view of the decision of the two judge bench in Lalita Kumari v. State o UP, (2008) 7 SCC 164. The matter was later referred to the Constitution Bench.

[24] The Court provided an illustrative list of instances in which preliminary investigation is permissible viz., matrimonial disputes, medical negligence matters, commercial offences, corruption matters etc.

[25] Before enactment of section 173(3) in BNSS, Chapter IX of the CBI Crime Manual contained the provision of preliminary inquiry. That being said, the CBI Crime Manual was not enacted by the Legislature and it is not statutory rule applicable to investigation of crimes under the Code. It is only a set of administrative orders issued for internal guidance of officers of the CBI and was not meant to supersede the CrPC.

[26] Not below the rank of Deputy Superintendent of Police.

[27] While conducting such enquiry, the SHO is required to take into account the circumstances and seriousness of the offence, and is required to obtain the prior consent of a senior police officer, as aforesaid.

[28] Lalita Kumari v. State of U.P., AIR 2014 SC 187.

[29] Shiv Inder Singh v. State of Punjab, 2016 Cri. L.J. 465 (P & H).

is bound to register an FIR, and thereafter, regular investigation shall begin. [30]

Safeguards against Misuse of Applications to Magistrate for Recording FIR

Section 173(4) of BNSS [Section 154(3) of the Code] provides remedies to the informant in cases where the FIR is not recorded. In cases where no FIR is recorded even after a written complaint to the SP, the informant can file an application with the Magistrate.

On receipt of such a petition, the Magistrate can direct the police to investigate under Section 175(3) of the BNSS (corresponding to section 156(3) of the Code). This power of the Magistrate is subject to abuse by unscrupulous and mischievous complainants whose purpose is to harass and humiliate the adversaries by filing vexatious and malicious complaints. Therefore, the Apex Court has ruled[31] that to avoid misuse of petitions under Section 156(3), the application shall be supported by an affidavit to deter the applicant from filing frivolous applications.

Accordingly, section 175(4), BNSS provides that the petition to the Magistrate shall be supported by an affidavit. Thus, the Magistrate cannot entertain an application for investigation without the affidavit of the applicant.[32]

The Parliament has gone a step further to protect public officers against the misuse of such a provision and accordingly inserted a new provision in Section 175(4). The provision states that in cases of complaints against a public officer regarding the discharge of his official duties, the Magistrate shall obtain the report of the superior officer and also consider the assertions of such officer before ordering an FIR and consequent investigation. Fulfillment of these twin conditions is *sine qua non* for a direction by the Magistrate to record the FIR.[33]

Forensic Examination of the Scene of Crime

Crime Scene Management in a scientific manner is a crucial aspect of investigation. Various clues and evidence are available on the crime spot which are carefully needed to be picked up at the earliest without contamination. The diligent collection of such evidence by an expert, ensuring that the evidence is not contaminated, will help in the discovery of important evidence linking the crime and its offender and, thus, is significant in dispensing justice. Accordingly, the Apex Court[34] has emphasized the need for scientific crime scene management. The BNSS has echoed this judicial mandate in Section 176(3) wherein a new provision has been added that states that the officer in charge of the police station must invite the forensic expert for a crime scene inspection and collection of forensic evidence whenever he receives information about the commission of an offence that carries a seven-year or longer prison sentence. The legislative objective, as can be seen from a simple reading of the clause, is to guarantee the scientific administration of the crime scene, the gathering of forensic evidence by an expert, and video-recording of the proceedings.

The Parliament was aware of the problems to be encountered in the immediate execution of the provision in the face of infrastructural

[30] Samaj Parvartan Samudaya v. State of Karnataka, AIR 2012 SC 2326.
[31] Priyanka Srivastava v. State of U.P., (2015) 6 SCC 287.
[32] Magistrate, Babu Ventakesh.v. State of Karnataka, (2022) 5 SCC 639.
[33] BNSS, Section 175(4).
[34] Dharam Deo Yadav v. State of UP., (2014) 5 SCC 509.

inadequacies and the need for infrastructural upgradation. Therefore, Parliament empowered the State Governments, who are responsible for the maintenance of law and order, to notify the implementation of the provision when they have adequate infrastructure in place within a maximum period of five years.[35]

This provision is a laudable step and was long overdue. This provision will also enable the recruitment/notification of Scene of Crime Officers (SoCO), who are specialised in the management of the crime-spot. It is apposite to refer that BNSS has nowhere mandated that the forensic examiner shall always be from a Forensic Science Laboratory. Therefore, there is a scope for declaring such SoCO as specialists for the purpose of collecting, preserving, and handling evidence from crime spot. Furthermore, the videography of the crime spot will make the process transparent, reliable, and fair.

Duration of Police Remand and its Interchangeability

Laws generally disfavour police custody. [36] Police custody, if permitted, is not for an unlimited period and the Magistrate authorizing police remand is required to record reasons[37], whereas such reasons are not required to be recorded if the police remand is refused. The maximum period of police remand in one case can be 15 days.[38]

The maximum duration of police detention has not been changed by the BNSS. It is crucial to emphasize nonetheless that police custody in a single FIR may only be provided for the first fifteen days as per the CrPC [39] and not thereafter even when some more offences, either serious or otherwise committed by an accused in the same transaction came to light at a later stage.[40] After the elapse of 15 days, if the accused is not enlarged on bail, further detention can only be in judicial custody. Henceforth, when custody was required for questioning the accused after the elapse of fifteen days, the same could not have been granted under the Code. For example, when the case is handed over to the Central Agency after the first fifteen days and the agency undertakes an investigation, there was no provision in the Code for the police remand after the first fifteen days. Accordingly, BNSS has amended the law. The amended law[41] permits police custody even after the first fifteen days subject to a maximum of fifteen days of police custody, but within the first sixty days[42] or forty days of the detention period[43]. However, this limitation is applicable in one case.[44] When many cases pending against the accused are under investigation, the limitation of 15 days does not apply to him. Such a person can be sent to police custody

[35] BNSS, Section 176(3).
[36] Narender Mann v. State (NCT of Delhi), 2002 Cri LJ 823 (Del); From the date of arrest of the accused or from the date accused surrenders on and from such date, accused is deemed to be in custody.
[37] Section 167(3) of the Code.
[38] CBI v. Anupan, (1992) 3 SCC 141; Satyajit Ballubhai Desai v. State of Gujarat, (2013) 5 SCR 1; 2014 (4) RCR (Criminal) 548 (SC)
[39] Davender Kumar v. State of Haryana, (2010) 6 SCC 753.
[40] Budh Singh v. State of Punjab, (2000) 9 SCC 266; Satyajit Ballubhai Desai v. State of Gujarat, 2014 (4) RCR (Criminal) 548 (SC).
[41] BNSS, Section 187(2).
[42] When the offence is punishable with death sentence, imprisonment for life and imprisonment for ten years or more.
[43] When the offence is punishable with imprisonment of less than ten years.
[44] When many cases pending against the accused are under investigation, the limitation of 15 days does not apply to him. Such a person can be sent to police custody in each case (each FIR) subject to maximum 15 days of detention.

in each case (each FIR) subject to maximum 15 days of detention.

Right to Expedited Trial

The Apex Court in a number of judicial decisions[45], held that reasonably expeditious trial is an important facet of Article 21.[46] The Apex Court [47] ruled that Article 21 implicitly assures a fair, just, and reasonable process, which is an inalienable right. [48]

Though the right to a reasonably speedy and expeditious trial was declared as part of Article 21 yet there were insufficient provisions in the CrPC for ensuring it. Accordingly, to expedite the trial in criminal cases, BNSS has promulgated timelines for various steps in investigation, trial, delivery of judgment and other matters under criminal procedure some of which are elucidated hereinafter.

Table I

Time-Lines prescribed under BNSS

Sections of BNSS	Brief Particulars	Prescribed Time
193(2)	Submission of Charge Sheet in POCSO matters and sexual offences	Two months
184(6)	Submission of Medical Report of the rape victim by Medical Officer to Investigation officer	Seven days
185(5)	Submission of copy of the record to nearest Magistrate regarding grounds of search, place to be searched, things for which search is to be made	Forty-eight Hours
105	Forwarding of Audio-video recording of Search of a place or taking possession of property to DM, SDM or Judicial Magistrate	Immediately Without delay
173(3)	Completion of Preliminary Enquiry	Fourteen days
193(3)	Information to the victim regarding progress of investigation	Ninety days
193(9)	Completion of Further Investigation	Ninety days
194(2)	Forwarding of Inquest Report	Twenty-four hours
230	Supply of documents to accused by the Court of production or appearance of the	Within fourteen days from the date accused
218	Time-line to government for taking decision on sanction for prosecution of Judges and Public Servants	One Hundred and Twenty days from the date of receipt of request for sanction
232	Time-line for committal proceedings	Ninety days
251, 263	Time limit for framing of charges in cases triable by Sessions court and in Warrant Cases triable by Magistrate	Sixty Days from the date of first hearing on Charge
258	Judgment of Acquittal or conviction by the Sessions Court	Thirty days extendable to forty-five days.

[45] Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 SCC 627; Kadra Pahadiya v. State of Bihar, AIR 1981 SC 939.

[46] See Also Sheela Barse v. Union of India, AIR 1986 SC 1373; Common Cause v. Union of India, AIR 1996 SC 1619; P. Ramchandra Rao v. State of Karnataka, AIR 2008 SC 3077; Ranjan Dwivedi v. CBI, (2012) 8 SCC 495.

[47] A. R. Antulay v. R.S. Nayak, (1992) 1 SCC 225.

[48] Vakil Prasad Singh v. State of Bihar, (2009) 3 SCC 355.

Sections of BNSS	Brief Particulars	Prescribed Time
392(1)	Judgment	Forty-five days.
392(4)	Uploading of judgments on portal	Seven days
290(1)	Application for Plea Bargaining of charge	Thirty days from the date of framing
290(4)	Submission of mutually satisfactory disposition in plea bargaining	Not exceeding sixty days
330	Challenging genuineness of documents filed by the accused or prosecution	Within thirty days after the supply of such documents

Furthermore, the scope of summary trials has been expanded by making summary trials mandatory in specified cases.[49] Further, the scope of summary trials has been increased by bringing the offences punishable upto three years within the scope of summary trials, in contradistinction to the earlier provision where offences punishable upto two years could have been tried summarily.

Audio-Video Electronic Means in Investigation and Trial

The criminal procedure has undergone significant changes, one of which is the increased emphasis on the use of audio-video technology tools for both investigation and trial. The BNSS has permitted the use of electronic means for the serving of summons[50], notices, production of the accused for explaining the charges[51] and for hearing the judgment[52], recording of the crime scene[53], recording of searches conducted under Section 185 read with Section 105 BNSS, furnishing of documents to the accused[54], submission of charge-sheets, submission of evidence, examination of witnesses[55], trial of criminal matters[56], etc. To ensure transparency and reliability of electronic evidence, the IO is required to attach, with the challan, details as to sequence of custody in the case of electronic devices.[57]

The extensive use of audio-video electronic means shall bring more transparency, induce credibility, and expedite the procedure.

Victim-Centric Approach

BNSS has further strengthened the shift from an accused centric approach to a victim-centric approach. The victim has been recognized as an important stakeholder under BNSS. BNSS has amended the definition of the term victim and significantly increased the scope of the term.[58] Further, Section 173 has provided for the supply of a copy of the

[49] BNSS, Section 283(1).
[50] Sections 64, 70, 71.
[51] Section 251.
[52] Section 392(5).
[53] Section 176(3).
[54] Section 230
[55] Sections 254, 265, 266.
[56] Section 530.
[57] Section 193(3).
[58] The phrase "for which accused person has been charged" as appearing in section 2(wa) of the Code has been removed while defining the term in BNSS. The impact of the amendment is that person who has suffered injury owing to an offence shall be a victim regardless of whether the accused has been charged or not.

FIR to the victim. Similarly, provision has been enacted to inform the victim of the progress of the probe within ninety days.[59] Further, a proviso has also been inserted in Section 360 BNSS, laying down the requirement of giving a hearing to the victim before allowing withdrawal from prosecution.

Trial in Absentia

Section 356 of the BNSS has added another significant provision inserted regarding trial in absentia, which was hitherto not permissible under the Code. This section permits trial in absentia in the case of proclaimed offenders. The provision requires the issuance of two warrants of arrest within an interval of 30-days; publication of notices in local and national newspapers etc. Furthermore, the notice is required to be given to the relatives of the accused. In such cases, trial-in-absentia will commence after the passage of 90 days from the date of framing charges.

Pre-Cognizance Hearing in Complaint Cases

BNSS contains a specific provision in the form of a proviso to Section 223(1) mandating a pre-cognizance hearing in complaint cases. Similarly, in cases of complaints against public servants also, Section 223(2) mandates a pre-cognizance hearing. There was no concept of pre-cognizance hearing in the Code. In fact the heading of Section 200 of the Code points out that the section is concerned with the examination of the complainant and not of the accused. However, as per the amended provisions, the proviso requires the Magistrate to hear the accused before cognizance can be taken by him. This will surely avoid unnecessary litigation in courts, and the courts may decide not to take cognizance after hearing the accused.

Concluding Observations

BNSS introduced much-needed reforms to align the criminal procedure with technological advancements and to ensure that criminal matters are concluded in a time-bound manner. Extensive use of information technology and audio-video electronic means in various stages of criminal investigation and trial will bring in more transparency and is expected to speed up the trial. Further, the scientific management of the crime scene by forensic experts and the collection of evidence will surely lend credibility to the prosecution case and will help in imparting justice, which is a crying need of humanity. The amendments introduced will have far-reaching consequences; however, the efficacy of these amendments shall be dependent on a host of factors, viz., the adaptability of investigation machinery and courts to the new regime and the availability of adequate infrastructure, etc.

[59] BNSS, Section 193(3).

Rehabilitation Strategies for First-Time Offenders in India in New Criminal Laws: An Integrated Approach towards Restorative Justice

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Abstract

The purpose of this paper is to understand the implications of being a first-time offender in India in terms of criminal history, socio-demographics, and reintegration strategies. And then understand what changes have been brought in the New Criminal laws. Because of this development, there is a need to understand the factors that stimulate an individual to turn out to be a criminal and the extent to which the rehabilitation programs work in India to reform such criminals and unleashing of restorative justice through new laws. This helps bring out the notion of cultural relativism given the fact that crime as a concept has been defined differently by different cultures across history. Intervention in the preliminary stages is a crucial process since first-time offenders are different from those who are prone to criminal mindset and the individuals have not developed the habit of committing crimes. The research encompasses statutes and measures focused on rehabilitation and leniency including the Probation of Offenders Act and the BNSS. Different aspects such as family influence, financial situation, education, influence from friends, and the psychological effect are some of the aspects studied as possibly being a cause of first-time offending. A proper examination of the social and legal challenges that are in front of such individuals urges to focus on the concept of the wraparound processes referring first-time offenders. Thus, concerning education programs, drug treatment centres, mental health support, and the use of restorative justice and community service as reformative, the study provides information on the need to apply the concept of the rehabilitative course. The study aims to reduce the number of first offenders who re-offend and to help them reintegrate into society, fighting social exclusion and isolation.

Keywords: First-time offenders, Rehabilitation, Restorative justice, Criminal justice system

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Introduction

A major focus of the Indian criminal justice system, after introduction of New Criminal Laws, is now on first-time offenders.

First time offenders are those offenders who never have been convicted of any offence in the past. Our jails are overcrowded with prisoners, many of those being first time offenders. As of December 2021, India's prisons housed over 5.5 lakh prisoners, with an overall occupancy rate of 130%. In 2021, under-trials constituted 77% of the total prisoners in India. Approximately 30% of under-trial prisoners were in detention for a year or more. About 8% of under-trial prisoners were in detention for three years or more[1]

The provisions introduced in New criminal laws and discussed subsequently, of leniency in bail provisions and sentences, plea bargaining and community services aim to unclog the prisons and at the same time maintain a balance between restorative and punitive aspect of criminal jurisprudence.

But first, there is a need to carefully evaluate the backgrounds of these people, such as prior convictions, demographics, and modalities applied during their rehabilitation process because their numbers have increased considerably. To understand the criminal histories, demographic profiles, and strategies for successful reintegration into society among these young criminals, this paper probes into India's first-time offenders' data[2] *(Pedia, 2023).* Historically, we may define crime as a socially constructed concept that is as old as human societies. Whenever societies and civilizations were formed people started committing offences to laws, rules and regulations of the societies and cultures broadly mentioned as a crime. The definition of crime on the other hand is still a challenging and hazy task as its depiction alters across different communities. One society's crime may not be the same as other societies' crimes; this implies that there is cultural relativism in defining crimes[3] *(Allott and C, Crime Law 2024).* These people who are often novices to offences still do not live a deeply entrenched life of crime. The desire to get basic needs and support can go a long way in minimizing their involvement in subsequent crimes. It is pertinent to know what factors or circumstances stimulate some first-offenders to become criminals again after release from confinement would help in facilitating reintegration and reducing recidivism rates significantly [4] *(Kleemans and Koppen 2020).*

The art of criminology studies the crime and offender. The essential elements to commit a crime are the Actus Rea and Men Rea, but criminology goes far beyond it and studies the factors that have contributed to the commission of crime. Criminology helps to evaluate the factors and circumstances in which an individual has to take a hard step to enter into the world of crime. Criminality is not innate in any person, his surroundings instigate him to commit a crime[5] *(Schabas, 2012).*

[1] Prison data 2021, NCRB

[2] Pedia, Law. 2023. Exploring the Components of India's Criminal Justice System: A Comprehensive Look at the Punishment System. 01 04. https://timesofindia.indiatimes.com/readersblog/lawpedia/exploring-the-components-of-indias-criminal-justice-system-a-comprehensive-look-at-the-punishment-system-48833/ .

[3] Allott, Antony Nicolas, and Donald Clarke C. 2024. "Crime Law." britannica.com. 05 28. https://www.britannica.com/topic/crime-law.

[4] Kleemans, Edward, and Vere van Koppen. 2020. "Organized Crime and Criminal Careers." The University of Chicago Press Journal 385-402.

[5] Schabas, William. 2012. "Mens Rea, Actus Reus, and the Role of the State." In Unimaginable Attrocities-Justice, Politics and the Rights at the War Crime Tribunal, by William Schabas, 130-150. Oxford Academic.

Legal Framework and Definition

An offence is defined as, all those acts or the omission of acts which are unlawful according to the provisions of the criminal code under Indian statutes. The Legislature has categorized such acts as crimes since they are usually deliberate and have no legal justification. Misdemeanour offences include offences that may be outrageous or subtle and are criminal and subject to punishment by the laws of the land. There are varying theories of punishment that frame the criminal justice system [6] *(Gupta, 2024)* which rests on punishing individuals who are involved in crimes.

The **retributive theory** calls for a punishment that is proportional to the harm that the offender has caused the victim and this can be represented by the biblical adage 'an eye for an eye.' On the same note, the **deterrent theory** seeks to deter people from engaging in offences because of the punishment that they will receive. The deterrent hypothesis is aimed at halting people from committing their crimes, having established fear of such a punishment. There are some reformations in the view of punishment over the time as the major aim of punishment remained the reformation of the offender and the rightful sanction for the victim was also achievable in this approach[7] *(Mishra, 2016).* Such a form of Punishment seeks to reduce the likelihood of such recidivism in offenders by trying to reform them. Of course, the **reformative theory** of punishment later evolved with the consideration of benefiting the offender, however justice to the victim is served[8] *(Zalta and Nodelman, 2012).* This theory aims at changing the behaviour of offenders and preventing them to further committing any offence. By emphasizing the rehabilitation of first-time offenders, the legal system hopes to decrease the number of recurrent offences and make it easier for first-time convicts to reintegrate into society, which will ultimately make the community safer and more just.[9] *(Sarraf and Srivastav, 2024).* The goal of **restorative justice** is to mend the damage that crime has created by bringing the offender and the victim back together. This strategy encourages criminals to own up to their mistakes and make restitution to the people they harmed. By encouraging empathy and understanding and assisting offenders in establishing constructive relationships within their communities, restorative justice has the potential to lower recidivism rates.

As propounded in the reformative theory, the punishment system of **Bharatiya Nyaya Sanhita, 2023** introduces a new form of punishment, which is **community service.** Here, convicts are placed under the order of the court to perform community services for which they would not be paid [10]. *(Roy, 2024).* It's the discretion of a judge as to what sort of community services the convict has to perform as the code is silent on this. This

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6 Gupta, Divyanshi. 2024. "Theories of punishment." 02 16.

7 Mishra, Shikha. 2016. "Theories of Punishment – A Philosophical Aspect." Imperial Journal of Interdisciplinary Research 74-77.

8 Zalta, Edward N., and Uri Nodelman. 2012. The Stanford Encyclopedia of Philosophy. Stanford: The Metaphysics Research Lab Philosophy Department Stanford University.

9 Sarraf, Snajay, and Deepak Kumar Srivastav. 2024. "The Bharatiya Nyaya Sanhita: A Comprehensive Overview of India's New Criminal Law." *researchgate.net.* 05. https://www.researchgate.net/publication/381005159_The_Bharatiya_Nyaya_Sanhita_A_Comprehensive_Overview_of_India's_New_Criminal_Law.

10 Roy, Ankita. 2024. Community Service Sentencing And Its Significance In The Indian Criminal Justice System. 02 06. https://www.livelaw.in/articles/community-service-sentencing-and-its-significance-in-the-indian-criminal-justice-system-248589#:~:text=incorporating%20community%20service.-,The%20recent%20adoption%20of%20community%20service%20sentencing%20as%20a%20form,aw.

form of punishment can be said to serve the two important issues of reinforcing the offenders to consider the social consequences of their actions as well as play a positive part in the society.

Community service is mainly directed to those who committed minor crimes and are first-time offenders, which means that they can get a chance to change for the better through the service and hence the desire to reduce the rate of recidivism among the perpetrators[11] *(Sharma, 2023).* While interpreting criminal law, more particularly, the interpretation of penal statutes has often focused on the accused, a practice that is grounded on the principle of 'innocent until proven guilty". This is even more crucial to first-time offenders to differentiate them from recidivists and allow them rehabilitation rather than punishment. The Indian legal system understands the need to treat first-time offenders with a nuanced strategy that strikes a balance between prospects for rehabilitation and justice.

First-time offenders vis a vis Repetitive Offenders

It is pertinent to know that the legal proceedings as well as the punishment that the offenders have to face in India, mark the most important difference between first-time offenders and repeat offenders. However, first-time offenders, for instance, are punished less severely than recidivists – this follows the legal principle that matters by emphasizing reform rather than prevention[12] *(Marwah, 2020).* This antagonism, which aims at ensuring that society is protected while also transforming the individuals, is enshrined in several acts of parliament and legal proceedings. The primary laws governing dealing with criminal conduct are the Indian Penal Code (IPC) and the Code of Criminal Procedure (CrPC). The above-stated legislation including the Probation of Offenders Act, 1958; the Juvenile Justice (Care and Protection of Children) Act, 2015; and also The Constitution of India contain provisions demonstrating that the key objective during the first-time offender is rehabilitation and reintegration. Judges have substantial discretionary powers in sentencing first offenders depending on the nature of the offence or other factors for rehabilitation purposes.

On the other hand, repeat offenders become subjected to severe treatment concentrating on the goals of punishment and protection targeting other individuals emphasizing on deterrent measures under IPC legal enactment, various state-regulation Habitual Offenders Acts, and preventive detention acts including the NSA and the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act.[13] *(Goyal, et al. 2020).* The main difference is one of the approaches to sentencing where first-time offenders are provided with other options than incarceration and probation as well as the opportunity to undergo rehabilitation programmes, unlike the repetitive offenders who due to their past record, the court imposes on them stricter measures including treatment as a way of preventing them from continuing with their criminal activities. Socio-economic factors are given a more sympathetic hearing when

[11] Sharma, Nalini. 2023. In a first, community service proposed as punishment for petty offences in India. 08 12. https://www.indiatoday.in/law-today/story/community-service-punishment-petty-offences-india-ipc-bharatiya-nyaya-sanhita-amit-shah-2419928-2023-08-12.

[12] Marwah, Akanksha. 2020. "RESTORATIVE JUSTICE AND REFORMATION OF OFFENDERS." ILI Law Review 157-169.

[13] Goyal, Rashmi, Mohd. Imran Khan, Durga Sharma, and Rajesh Kumar. 2020. "Judicial Discretion." *Uttrakahnd Judicial & Legal Review* 59-69.

dealing with first-time offenders who have been unsuccessful in school, in employment, and in life to whose lives criminal demographic factors may have provided some sort of opportunity; unlike the habitual offender whose repetitive offences point to a more inherent criminal characteristic.

There are various provisions under several criminal laws statutes providing leniency towards first-time offenders:

(a) ***Sec:401 of Bharatiya Nagarik Suraksha Sanhita, 2023 & Sec: 360(1) of erstwhile Code of Criminal Procedure,1973]:*** It provides that if the offender is found guilty for an offence punishable with less than 7 years and the age of the offender is more the 21 years or the person is a woman, then the convicted person won't be sent to Jail initially, rather he would be released upon **probation** for a maximum period of 3 years in supervision of probation officer and if his conduct is good in that 3 years in that he will be set free. This approach is very useful for first-time offenders as they won't be sent to jail after being convicted and they would get an opportunity to live with their families and reform themselves[14] *(Sec:360 of Code of Criminal Procedure 1973).*

(b) ***Sec:401(3) of Bharatiya Nagarik Suraksha Sanhita, 2023 [Sec: 360(3) of erstwhile Code of Criminal Procedure,1973]:*** Apart from probation, if a person is found guilty of any offence, punishable with less than 2 years, the convicted person can be released after due **admonition** from the Judge for the offence. In admonition, there is no time limit, soon after conviction he would be sent home permanently[15] *((Sec:360(3) of Code of Criminal Procedure, 1973) n.d.).*

(c) ***Probation of Offenders Act, 1958:*** An act was passed by the Parliament, specifically for granting probation and admonition to the offenders, as in CrPC, there was some restriction on grating probation and admonition to convicted persons, all of those removed in the present statute-BNSS. Now unless the offence is punishable with Death or Life imprisonment, *the Judge must grant the Probation otherwise he has to state the reasons in the judgment for the non-granting of probation*. Moreover, as per the Probation Act, even if a person is released from probation the convicted person would not be disqualified from any occupation. Such provision will show a fresh pathway for the first-time offender to start a fresh life after being released on Probation[16] (*Probation of Offenders Act 1958).*

(d) ***Sec 289 of Bharatiya Nagarik Suraksha Sanhita, 2023 [Sec: 265-A of erstwhile Code of Criminal Procedure,1973]:*** It states that an opportunity will be given to an Accused during the

[14] Sec:360 of Code of Criminal Procedure,1973
[15] "(Sec:360(3) of Code of Criminal Procedure, 1973)."
[16] "Probation of Offenders Act,1958."

inquiry, where the Accused has the option to **bargain for his plea** from the Victim of offence, where the punishment of the offence is less than 7 years. In this plea, the accused will pay a certain amount of money in exchange for reducing the sentence for the alleged offence, a mutually satisfactory agreement would be signed between the offender and the victim and authorised by the judge with his sign and seal. Such approaches will prevent the first-time offender from being in jail for a longer period, moreover, this will help the victim to receive compensation for any injury caused to him[17] *((Sec:265-A of Code of Criminal Procedure, 1973) n.d.).*

(e) ***Sec 59(5) of Prison Act, 1984:*** It empowers the state legislature to make guidelines for a convicted person to be released upon Prole (Sec:59 of Prison Act 1984). Parole is the release of convicted persons from prison at regular intervals so that they are not cut cut-off from society. Parole is of two types, Custody parole and Regular Parole. Custody parole is granted in cases of emergency as there is any death or serious illness in the family, the genuineness of the situation is verified through the concerned police station and it is given for a maximum of 6 hours excluding the time of Journey. Regular parole is granted on any ground other than emergency. This arrangement helps the convicted person to be in touch with his family members [18] *((Sec:59-A of Prisons Act, 1984) n.d.).*

(f) ***Sec 359 of Bharatiya Nagarik Suraksha Sanhita, 2023 & [Sec:320 of erstwhile Code of Criminal Procedure, 1973]:*** The Compounding of Offences provided a two list of offences, where the parties involved in an offence are at the option to **compound the offence** with the permission of the court or without the permission of the Court. Such an arrangement provides an opportunity with the offender in case of the commission of a petty offence to settle the dispute with the victim in a situation where permission from the court is not required and prevents him from being sentenced. As this provision is not allowed upon individuals who are being previously convicted, so first-time offenders can take advantage of this section[19] *((Sec:320 of Code of Criminal Procedure, 1973) n.d.).*

Factors contributing to First-time offenders

In India, the criminality of first-time offenders is determined by a multi-factorial concept which includes Family, Socioeconomic, Educational, Peer pressure, Psychological, and socio-legal factors.

(a) Family Factors

Family factors and Home environment greatly influence the ability of a person to be a criminal. Substance use, poor parental care

[17] "(Sec:265-A of Code of Criminal Procedure, 1973)."
[18] "(Sec59-A of Prisons Act, 1984)."
[19] "(Sec:320 of Code of Criminal Procedure, 1973)."

and supervision, domestic violence, and escalated family conflicts are significant causes of criminal behaviours among first-time offenders. Leaving children in homes without parental care where they witness the use of violence allows it to become a normal practice in their lenses and may even give them the impression that violence is acceptable mostly in terms of resolving disputes[20] (Karam and Onyeneke 2022). When children fail to be supervised by their parents and fail to receive examples to emulate from them due to their getaway participation in criminal activities then the children mimic the same actions. Additionally, children who are from dysfunctional homes or those whose parents ignore them could seek attention in some other place, which most often leads them astray and into criminal activities.

(b) Socio-economic factors

The probability of a person committing a criminal offence depends on their socioeconomic status, so the prominent socio-economic factors are unemployment and poverty, most of which influence first-time offenders in India. Lack of jobs and necessary resources among families with low income often do not allow them to get a job, which in turn makes them feel frustrated and even have feelings of despair [21] (*Raj and Rahman, 2023).* This may cause many people to think that it is allowable to incur crimes, so as to be in a position to earn more income. As a result, poverty entails that a person does not have his or her basic needs met, and as the means to try and achieve this, persons in poverty may resort to criminal activities such as theft and drug trafficking.[22] *(K.B.Das, 2017).* On the same note, the high unemployment incidence especially among the youths is a cause of first-time offences as more youths are forced to resort to criminal activities to earn a living. Besides, belief systems favouring extremism coincide with India's extreme economic divide which results in feelings of social injustice, and consequently, criminality.

(c) Educational Factors

A person's propensity to commit crimes is largely determined by their educational background and quality of education. Education instils a feeling of morality and social duty in addition to providing the information and skills necessary for legal work. People with little or no education have trouble finding employment and could resort to crime in order to survive. People who receive subpar instruction, inadequate training, and inadequate infrastructure are ill-prepared for the workforce, which leaves them more vulnerable to criminal influences. High dropout rates are associated with greater crime rates because early school leavers frequently lack the skills and credentials necessary for gainful work, especially in places with low economic status [23] *(Bateman, 2020).*

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[20] Karam, Aly H., and Christopher Chimaobi Onyeneke. 2022. "An Exploratory Study of Crime: Examining Lived Experiences of Crime through Socioeconomic, Demographic, and Physical Characteristics." Urban Science 4-16.

[21] Raj, Pranav, and Md Mizanaur Rahman. 2023. "Revisiting the economic theory of crime A state-level analysis in India." *Cogent Social Sciences* 4-14.

[22] K.B.Das. 2017. "Poverty and its Social Dynamics." In *Basic Issues in Development -I*, 28-40. New Delhi: IGNOU University .

[23] Bateman, Neema Trivedi. 2020. "Why young people commit crime and how moral education could help – new research." *the conversation.com.* 05 15. https://theconversation.com/why-young-people-commit-crime-and-how-moral-education-could-help-new-research-131855.

(d) Peer pressure

The probability that a certain individual would engage in criminal behaviour can greatly be predisposed by peer pressure especially if the individual is a teenager or a young adult. This means that since members of peer groups influence one another, those in the group that are involved in illicit activities compel individuals to conform to group norms and this results to crime. Bullying may also lead to substance abuse whereby individuals engage in criminal activities to sustain their habit since addicts are known to become criminals since they have to steal to get their next fix. Also, the individual may engage in criminal behaviours as a way of conforming to their peer group, due to the pressure that they feel when they know that others do not approve of them. These elements emphasize the role of compelled compliance with peers concerning the illegality of a certain action.

(e) Psychological Factors

Psychological factors are very important in determining an individual's risk of engaging in a criminal activity for the first time; this includes the individual's personality disorder and mental problems. Criminal rates rise as mental health illnesses such as conduct disorders, depression, and anxiety are on the rise, and this is true. It could be seen that if individuals are allowed to have mental health diagnoses yet receive no therapy and treatment, they end up committing crimes as they act out their suffering, as they lose control over their impulses or cannot make good decisions anymore. Among personal variables, there are such character traits as aggressiveness, impulsiveness, and readiness to take risks. Additionally, high rates of violence may lead to deterioration in behaviour and the likelihood of committing a crime when exposed to traumatic situations in the early stages of development [24] *(Ghiasi, Azhar and Singh, 2023).*

Challenges Faced by First-time Offenders

In India, an offender faces umpteen challenges other than the immediate legal repercussions of their conduct of being involved in a crime. They experience different psychological, social, and systemic challenges that create a system of challenges they may stand to face upon their release and the likelihood of returning to society only to commit a crime again.[25] *(Sunil Batra v. Delhi Administration, 1979).* To promote understanding these difficulties need to be comprehended to build the interventions and support systems that would address these issues.

(a) Legal Challenges & Procedural Challenges

The primary hurdle is procedural challenges in the judicial system as it may be complex and intimidating. For most first-time offenders, it would be difficult to understand the allegations against them, their liberties and the lawful processes that accompany such situations due to insufficient legal experience and adequate knowledgeable help. Due to this ignorance, people may make igniter decisions for example accepting unfavourable plea bargains and not appealing against unjust convictions. However, the two aforementioned factors are still not the only deficiencies, as the last problem, acute, far-reaching and essential, is the delay that it takes to obtain any legal action. The Indian legal process is famed for its sharp backlog of cases, resulting in extremely lengthy trials

[24] Ghiasi, Noman, Yusra Azhar, and Jasbir Singh. 2023. "Psychiatric Illness and Criminality." *StatPearls.*
[25] *Sunil Batra v. Delhi Administration.* 1979. 1980 AIR 1579 (Supreme Court of India, December 20).

that take decades to complete[26] *(Younus,2024).* Besides having negative effects on the offender's psychological and emotional state, delay has negative effects on his or her interpersonal and occupational activities. Litigation may take a long time and may inevitably lead to loss of employment, instability in the offender's financial future, and erosion of his or her relationships with kith and kin; these factors make it difficult for the offender to reinvent himself or herself following the trial.

(b) Psychological & Emotional Challenges

For first-time offenders, being considered a criminal can take a heavy toll on one's psychological state of mind, especially for first-time offenders. A delinquent record implies feelings of shame and guilt and aloneness as an unproductive individual to others and society. Society's tendency to stigmatise previous convicts merely aggravates these emotions into a scenario where they are almost impossible to overcome [27] *(Moore, Folk and Tangney, 2018).* Lack of social support may also cause anxiety, depression, and in the worst case where they may consider taking their own lives. Often the apprehension or while under detention the first-time offenders have to go through extreme pressure and torture, such as congestion, brutality, poor physical facilities, and cruel stewardship in the jail environment. Some of the prisoners released from jail might have psychological effects from being exposed to violent offenders and have to face psychological repercussions or the sociological effects from being in jail that they cannot easily adjust to being back in society[28] *(Kashyap, 2022)*

(c) Social & Economic Challenges

Criminal conviction also comes with a social cost since an individual is regarded as a criminal by society. For first-time offenders, this stigma of convict persons may even affect relations with friends and members of the family. Members of the family may even decide to cut off their relationship with the one who has been apprehended due to shame or for fear of being associated with a criminal [29] *(Karam and Onyeneke, 2022).* It also affects social relationships especially family ones since it is shameful. The support of one's social circle could decrease as people in the offender's social circle disengage from supporting them. Some of the ways used include: A successful reintegration program entails support and encouragement, but social seclusion slows down this process. Indeed, some employers are very reluctant to offer jobs to people with criminal backgrounds. This limitation leads to fewer jobs being created, hence the living wage being acutely affected. They are likely to be in a position to get unstable income and that may lead to difficulty meeting their needs and ending up in poverty. Facing basic needs puts a person at a higher likelihood of returning to crime; this is because the likelihood of

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[26] Younus, Mohamed. 2024. "Challenges Faced By The Criminal Justice System In The Process Of Reformation Of Criminals." *legalserviceindia.com.* https://www.legalserviceindia.com/legal/article-15596-challenges-faced-by-the-criminal-justice-system-in-the-process-of-reformation-of-criminals.html.

[27] Moore, K.E., K.C. Folk, and J.P. Tangney. 2018. "Self-stigma among criminal offenders: Risk and protective factors." *Stigma and Health* 242-251.

[28] Kashyap, Shubham. 2022. "Major problems of prison system in India." *Timesofindia.com.* 01 01. https://timesofindia.indiatimes.com/readersblog/shubham-kashyap/major-problems-of-prison-system-in-india-40079/.

[29] Karam, Aly H., and Christopher Chimaobi Onyeneke. 2022. "An Exploratory Study of Crime: Examining Lived Experiences of Crime through Socioeconomic, Demographic, and Physical Characteristics." *Urban Science* 4-16.

getting arrested replaces the chance of getting gainful employment [30] *(J.Fox, 2013)*. Also, the amount of bail, penalties, lawyer's fees and other related costs might be crushing for the Offender. It also shows that first-time offenders suffer legal implications, as well as social and financial effects. Since the problems are multifaceted, a comprehensive strategy of treatment involving reformist, interpersonal, and policy treatment must be followed.

(d) Systematic Challenges

There are several problems in the Indian criminal justice system but one of the most often cited and prominently considered is its lack of focus on reintegration. The legal provisions that lay down probation and community service are infrequently and incompletely used. Prisoners lack proper programs that can help reintegrate them into society since compensation is not offered by Prison services to enable them to be set free with proper rehabilitation programs [31] *(Naik, 2019)*. Also, the rehabilitative services and support structures in place for the post-release prisoners are very few and far between. Services to help ex-offenders find a job or housing or treatment for their mental health issues are hard to come by. It is specifically stated that it is very challenging for many of the first-timer offenders along with other offenders to rebuild their lives and avoid going back to crime when there is a lack of such significant resources.

Rehabilitative Approach to Reduce Recidivism

Recidivism is the tendency for criminals who have been convicted to continue with other criminal activities, this is an area that can be dealt with greatly through rehabilitating and reforming the criminals. It can be potentially to lower re-offending by providing competency-based focuses on the causes of criminality and support with reintegration. For accumulation of such policies to be useful it means they have to factor in the social, economic and personal factors that define criminality. Individuals can relapse to criminal behaviour in one way or another due to the following factors; shame, drug and alcohol use, unemployment, mental disorders and illiteracy. Recidivism is often the consequence of ineffective preventive measures as many traditional punitive techniques fail to address such issues. On the other side, reformative and rehabilitation strategies do this to not continue in this cycle and instead provide the criminals with the necessary tools and support to lead lawful lives.

(a) Components of Rehabilitation

i. ***Education Training-*** Education and vocational training are important aspects of rehabilitation processes that should be implemented. While vocational training may provide prisoners with skills that are useful when it comes to acquiring employment once they are out of prison, education can help enhance literacy and numeracy levels[32] *(Mohammed and Wan Mohamed, 2015)*. Being engaged in employment provides a sense of purpose and monetary stability thus greatly helping in preventing recidivism.

[30] J.Fox, Kathryn. 2013. "Restoring the social: offender reintegration in a risky world." *International Journal of Comparative and Criminal Justice* 236-252.

[31] Naik, Kiran R. 2019. "THE PROBLEMS OF PRISONERS: AN ANALYSIS." *International Journal of Research and Analytical Reviews* 268-278.

[32] Mohammed, Hadi, and Wan Azlinda Wan Mohamed. 2015. "Reducing Recidivism Rates through Vocational Education and Training." *Procedia-Social and Behavioural Sciences* 272-276.

ii. ***Substance Abuse Treatment-*** The offenders have long-standing backgrounds of substance abuse, and substance use can prompt criminal behaviour. Criminals can be helped by focusing treatment programs on addictions which eliminate the vulnerability of the criminals to repeat the crime. These are the programs that help individuals cope with the problem of alcoholism and maintain abstinence; often they involve medical intervention, counselling, and self-help groups.

iii. ***Mental Health Counselling-*** Criminal activities have indicated that most of criminals are prone to mental illness and disorders that may contribute to criminality. By addressing these problems and ensuring that offenders are taken through psychotherapy or receive an opportunity to attend counselling sessions or treatment, then offenders can be helped to control their disorders if at all they have them and their chances of repeating the same mistakes will be minimised [33] *(Harte, 2015).* Counselling can also help the offenders in how they can influence or address the adverse stress and trauma resulting from imprisonment.

iv. ***Addressing Social Stigma***

- ***Awareness Initiatives-*** The mark of a convicted person can be lessened by educating the public about the value of rehabilitation and the possibility of criminals' psychology changing. Campaigns for public awareness can showcase success stories of people who have changed their life, proving that rehabilitation works. Due to a lack of awareness initiatives regarding the rehabilitation of convicted persons, the convict has to face a lot of backlash from society, which lowers his respect before his relatives.
- ***Community engagement-*** Including the community in rehabilitation initiatives can greatly improve the network of support available to convicted criminals. Programs that involve volunteers mentoring and helping criminals might be established to foster trust and lessen unfavourable judgments. By offering direction and support, this cooperative approach helps the community better comprehend and embrace the reintegration process, in addition to the offenders. Positive interactions such as these might lessen the societal stigma attached to criminal records, thereby fostering a community that is more accepting and compassionate. Participation by the community in these programs eventually helps to ensure both the general safety and peace of the community as well as the effective reintegration of criminals.
- ***Support Networks-*** Creating networks of support for ex-offenders can help them build the vital social ties needed for a smooth transition back into society. help groups, peer mentorship programs, and community organizations are a few examples of initiatives that can offer offenders the vital help and encouragement they need to overcome the obstacles they

[33] Harte, Joke M. 2015. "Preventing crime in cooperation with the mental health care profession." *Crime, Law and Social. Change* 264-273.

confront during reintegration *(Nixon, 2020)*[34]. In addition to providing practical and emotional assistance, these networks foster a sense of belonging and community, which is essential for reducing recidivism *(Kavanagh and Borrill, 2013)*[35]. By interacting with these support systems, offenders can get access to tools, direction, and exemplary role models—all of which facilitate a more seamless reintegration into society. In the end, these initiatives raise the likelihood of a successful reintegration, which is advantageous to the community at large as well as the offenders.

Initiatives taken in BNSS & BNS

(a) Introduction of Community Service in New Criminal Laws

The introduction of community service for minor offences marks a ground-breaking approach in India's legal system. This involves the completion of unpaid work within a given timeframe as a form of reparative sanction, which correlates the nature of the service to the offence committed[36] *(Bhat, 2024).* It fosters a sense of responsibility in the offender and lightens the load on the prison system, in line with the concepts of re-socialisation and restorative justice.

This marks a paradigm shift from traditional punitive measures for petty offences, emphasizing a more rehabilitative and community-centric approach to justice. The impact of community service as a form of punishment is not only revolutionary in its legal implications but also promises to reshape the mindset of offenders, fostering personal accountability, re-socialization, and restorative justice.[37] *(Sharma,2023)*

Community service can be awarded to benefit various groups in need, including children, the elderly, people with disabilities, and language learners. Additionally, it can be used to provide help to animals in shelters or can contribute to the improvement of public places such as local parks, historic sites, scenic areas, and more.

(b) Background on community Punishment

For the first time in India, the new BNS proposes Community Service as a mode of punishment.

But the use of non-custodial forms of punishment has been discussed by several previous judicial decisions and Committees as well as Commissions. The 42nd Law Commission Report suggested the incorporation of non-custodial forms of punishment[38] "the Indian Penal Code (Amendment) Bill, 1978 sought to introduce the concept of supervised Community Service Orders as an alternative to imprisonment[39]; and the Malimath Committee Report recommended the introduction of community

[34] Nixon, Sarah. 2020. "Giving back and getting on with my life': Peer mentoring, desistance and recovery of ex-offenders." *Probation Journal* 48-60.

[35] Kavanagh, Laura, and Jo Borrill. 2013. "Exploring theexperiences ofex-offender mentors." *Probation Journal- The Journal of Community and Criminal Justice* 401-410.

[36] Bhat, Raja Muzaffar. 2024. *Community Service: Now a Punishment Under New Criminal Code.* 06 11. Accessed 06 02, 2024. https://kashmirobserver.net/2024/06/11/community-service-now-a-punishment-under-new-criminal code/#:~:text=Community%20Service%20a%20Punishment,punishments%20for%20%E2%80%9Cpetty%E2%80%9D%20offences.

[37] Sharma, Nalini. 2023. *In a first, community service proposed as punishment for petty offences in India.* 08 12. https://www.indiatoday.in/law-today/story/community-service-punishment-petty-offences-india-ipc-bharatiya-nyaya-sanhita-amit-shah-2419928-2023-08-12.

[38] K.V.Sundaram. 1971. *42nd Law Commission Report on Indian Penal Code.* Amendments in Criminal Law, New Delhi: Ministry of Law, Governmnet of India.

[39] "Clause 27, Indian Penal Code (Amendment) Bill, 1978"

service as an alternative punishment for less grave offences pertaining to Social Welfare, Economic, and other offences (Committee on Reform of Criminal Justice System Vol:1,(15.6) 2003)[40].

Community service, alternative to custodial punishment, also finds judicial backing as early as in 1978, in Babu Singh v. State of Uttar Pradesh 1978,[41] the principles of which were reiterated in State v. Sanjeev Nanda 2012[42] in the terms that 'Convicts, in various countries, now voluntarily come forward to serve the community, especially in crimes relating to motor vehicles. Graver the crime greater the sentence. But, serving the society actually is not a punishment in the real sense where the convicts pay back to the community to which he owed. Conduct of the convicts will not only be appreciated by the community, it will also give a lot of solace to him, especially in a case where because of one's action and inaction, human lives have been lost'

The concept of Community services could involve the performance of unpaid work, during leisure - time and within a given period, for the good of the community. Thus, the original philosophy of community service fits very well with the special preventive aim of punishment (resocialization) as well as to the idea of restorative justice by emphasizing on individual accountability.

- Focus on Minor Offenses

It is necessary to segregate properly the amount of punishment between the major and minor Offences, and community services are the best example of it where community service primarily targets minor offences, recognizing the need for nuanced responses to lesser transgressions. By offering an alternative to traditional punishments, the legal system aims to foster a more balanced and rehabilitative form of justice for minor infractions.

- Examples of Offences Eligible for Community Service

Several offences have been identified under the Bharatiya Nyaya Sanhita, 2023 for which community service may be prescribed. These include, but are not limited to:

- Involvement of public servants in illegal trade (Sec:202)
- Non-appearance in response to a proclamation under Section 84 of Bharatiya Nagarik Suraksha Sanhita, 2023
- Attempt to commit suicide to force or prevent the exercise of lawful power (Sec:226)
- First conviction of theft of property for offences less than Rs. 5000 (Sec:303(2))
- Misconduct in public by a drunken person (Sec:355)
- Defamation (Sec:356)

With introduction of Community Service as a mode of punishment, the terms/contours of this has to be defined by respective Governments.

(c) Evolving Plea Bargaining in New Criminal Laws

Plea bargaining, introduced in India in 2006, allows defendants to plead guilty to lesser charges or reduced sentences in exchange for concessions from the

[40] Committee on Reform of Criminal Justice System Vol:1,(15.6). New Delhi: Ministry of Home Affairs,2003
[41] Babu Singh v. State of Uttar Pradesh. 1978. 1978 AIR 527 (Supreme Court of India, January 31).
[42] State Tr.P.S.Lodhi Colony, New Delhi v. Sanjeev Nanda . 2012. AIR 2012 SC 3104 (Supreme court of india, August 3).

prosecution. The Bharatiya Nagarik Suraksha Sanhita (BNSS) governs this process, outlining eligible offences, application procedures, and court guidelines *(Bharatiya Nagarik Suraksha Sanhita, 2023 n.d.).*[43] In new laws, under plea bargaining, granting lesser sentences to first time offenders is also a much needed change in which they would receive 1/6th of the minimum sentence; initially, they received only 1/4th of the minimum sentence.

(i) Key Points of Plea Bargaining under BNSS

- **Eligibility:** Plea bargaining applies to offences not punishable by death, life imprisonment, or a term exceeding seven years. It excludes offences affecting the socio-economic condition of the country, those against women, or those against children under 14.
- **Application:** The accused must file an application within 30 days of charge framing, accompanied by an affidavit confirming voluntariness and no prior conviction for the same offence.
- **Court Proceedings:** The court examines the accused on camera to ensure voluntariness. If satisfied, it allows a maximum of 60 days for both parties to negotiate a mutually satisfactory disposition, potentially including victim compensation.
- **Guidelines for Disposition:** The court involves the public prosecutor, investigating officer, accused, and victim in discussions. The process must be voluntary, with legal representation allowed if desired.
- **Outcome:** If a disposition is reached, the court prepares a report. Otherwise, it records observations and proceeds with the trial.
- **Sentencing:** In successful plea bargains, the court awards victim compensation and considers probation, good conduct release, or reduced sentences. Leniency is shown to first-time offenders, potentially receiving one-fourth (for minimum sentences) or one-sixth (for extendable sentences) of the prescribed punishment.
- **Finality:** The court's judgment is final, with limited avenues for appeal.

Overall, the BNSS streamlines the plea-bargaining process, focusing on efficiency, victim involvement, and leniency for first-time offenders. However, the strict time limits and exclusion of certain offences might limit its applicability which needs fine-tuning with practice.

(ii) Key Changes from the Code of Criminal Procedure (CrPC)

- **Time Limits:** BNSS introduces time limits for filing applications (30 days) and reaching a disposition (60 days), absent in the CrPC.
- **Leniency for First-Time Offenders:** BNSS encourages leniency for first-time offenders, differentiating between minimum and extendable sentences, a departure from the CrPC. **As per section 293 BNSS** the court may impose a sentence equal to **one-fourth of the minimum sentence** prescribed in law **for first time offenders** with no criminal antecedents. This latitude was not available to the court under section 265E of CrPC.

[43] 2024. "New Criminal Law." *jpassociates.co.in/.* 01 04. Accessed 06 04, 2024. https://jpassociates.co.in/bharatiya-nagarik-suraksha-sanhita-2023-bnss/.

- **Delay in Trial: Section 479 BNSS** provides **bail** may be granted for the First Time Offender who has undergone detention for **one third of maximum period** of imprisonment prescribed in law. In other cases, detention undergone should **be half of maximum period.** Moreover if the Accused is detained in the jail before the judgement, after completion of 1/3rd of the sentence, it's the duty of the Jail superintendent to write an application as per sec: 481(c) of BNSS
- **Victim Participation:** BNSS emphasizes victim participation in the disposition process, unlike the CrPC.

Conclusion

In the Indian criminal justice system, especially with advent of New Criminal Laws, the emphasis is mostly on first-time offenders because of their growing number and the possibility of effective reintegration with the right interventions. It is more difficult to define and deal with criminal behaviour in light of the historical background of crime as a socially constructed term that differs among cultures. Since they are usually less involved in the criminal world, first-time offenders offer a special chance for early intervention and rehabilitation.

Legal frameworks in India that emphasize the possibility of reform over punishment, such as the Probation of Offenders Act and particular provisions of the Code of Criminal Procedure, offer opportunities for rehabilitation and leniency. By providing alternatives to jail, these measures hope to lower the risk of reoffending among first-time offenders.

To enable effective reintegration, such relations foster a sense of togetherness and membership in a community. Therefore, prevention, rehabilitation, and reintegration can be considered as the essential goals of the Indian criminal justice system's multifaceted response to first-time offenders. To avoid the reiteration of crimes and enhance a safer society that is balanced in terms of equity, an entire spectrum should be understood concerning criminal behaviour and enhanced support systems put in place as a result.

The distinct departure from conventional punitive measures reflects a progressive approach that aligns with global trends in restorative justice and rehabilitation. The Bharatiya Nyaya Sanhita, 2023 breaks new ground by proposing community service as a method of punishment in India for the first time and improving on other rehabilitative approaches like plea bargaining.

Focusing on the rehabilitation of the offenders rather than punishing them is an effective method that brings benefit not only to individual offenders but also to the community as a whole. The first-time offenders' reintegration will be significantly helped by constant endeavours towards legislation, social support, and public awareness to cut round details rates and foster a tolerant society.

Tech Trial: Adapting to the New Legal Landscape of Evidence

Aditi Tripathi*

Abstract

The evolution of the Indian Evidence Act, 1872, culminating in the recently introduced Bharatiya Sakshya Adhiniyam, 2023, reflects a transformative journey of the Indian criminal justice system. This article traces the historical background of the Indian Evidence Act and focuses on the changes introduced in the evidence law through the implementation of the Bharatiya Sakshya Adhiniyam, 2023. The Bharatiya Sakshya Adhiniyam expands the meaning of electronic records, streamlines the certification process and bridges gaps that impeded the proper appreciation of electronic data. The article discusses landmark legal judgments that have shaped the interpretation of electronic evidence, certification requirements under the Indian Evidence Act and how those judgments stand today, in light of the new legislations. It explores the broader context of the legislative reforms introduced through the new criminal laws, emphasizing on the synergy of changes introduced through the new criminal law to create a cohesive and efficient criminal legal landscape of the country.

Historical Background and Evolution of the Indian Evidence Act

The Indian Evidence Act, 1872 was drafted under the Stephen Commission by Sir James Fitzjames Stephen who was a Law Member of the Viceroy's Legislative Council. It came into effect on 1st September 1872. Over time, the Indian Evidence Act saw relatively few amendments compared to many other legislations. The first set of amendments were introduced through the *Gazette of India* of August 17, 1872. This publication titled 'Bill for the Amendment of the Evidence Act' was published with 12 amendments. The Statement of Objects and Reasons appended to the Bill stated that "*the primary object of this Bill is to continue certain rules which it is believed were inadvertently repealed by the Indian Evidence Act*"[1] and added that "*at the same time opportunity is taken to correct some clerical and other accidental errors to which attention has been called.*"[1] The next set of amendments were introduced after 128 years of the enactment of the law. In 1995 the general population of India got access to internet for the first time and five years after that, the Information and Technology Act, 2000 was passed to provide '*legal recognition*

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[1] "The Indian Evidence Act, 1872 with an Introduction on the Principles of Judicial Evidence by James Fitzjames Stephen, Q.C" https://upati.gov.in/MediaGallery/POINT_23.pdf

for transactions carried out by means of electronic data interchange and other means of electronic communication' [2]. This marked the beginning of Indian legislations integrating with modern technology and led to amendments being introduced in the Indian Penal Code and the Indian Evidence Act to address proper adjudication of matters involving electronic data. The amendments introduced by the Indian Evidence (Amendment) Act, 2000 expanded the definition of documentary evidence and other provisions to include 'electronic records' and incorporated eight new sections, including Section 65A[3] and 65B[4] in the Indian Evidence Act. The last set of amendments were introduced through the Criminal Law Amendment Act of 2013 which made pivotal reforms for the protection of women in case of sexual offences.

Since the turn of the millennium and the introduction of the Indian Evidence (Amendment) Act, 2000 there has been a profound increase in our reliance on technology with its pervasive integration into our daily routines. Apart from the evident backlog and inefficient procedures of the justice machinery, there was a critical necessity to integrate the administration of justice with technology as technology itself was rapidly transforming the nature and modes of committing crime. There was a palpable need to leverage the use of technology and understand its facets to equip the criminal justice system to address the dynamic challenges posed by contemporary societal transformations. The recent legislative reforms - Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita, and Bhartiya Sakshya Adhiniyam, 2023 mark a pivotal moment in harnessing technology as a tool to cultivate a more responsive, credible, and accountable criminal justice system.

Tech Integration– Bridging Gaps Among Legislations

There is a notable harmony among the three new criminal laws regarding the integration of technology. The Bharatiya Nyaya Sanhita[5] addresses the role of electronic means in the commission of offenses, the Bharatiya Nagarik Suraksha Sanhita[6] incorporates technology in the investigation, inquiry and trial of offences and the Bharatiya Sakshya Adhiniyam[7] offers a more comprehensive appreciation of electronic records.

One of the major standpoints of the new criminal laws is to enhance the credibility of investigation. There is a special focus on enhancing the integrity of evidence collection and preservation in the Bharatiya Nagarik Suraksha Sanhita. The explicit inclusion of forensic experts[8] at the scene of crime for evidence collection ensures crucial evidence is handled by field experts from day one. The recording of 'sequence of custody[9]' of an electronic device in the police report ensures that all electronic devices seized by police have a recorded history of their custody. 'Sequence of custody' presumably comes from the general understanding of chain of custody which means the documentation of the ownership of a digital asset, its transfer,

[2] Information Technology Act, 2000 (No. 21 of 2000)
[3] Section 65A. Special provisions as to evidence relating to electronic record of Indian Evidence Act, 1872 (1 of 1872)
[4] Section 65B. Admissibility of electronic records of Indian Evidence Act, 1872 (1 of 1872)
[5] Bharatiya Nyaya Sanhita, 2023 (No. 45 of 2023)
[6] Bharatiya Nagarik Suraksha Sanhita, 2023 (No. 46 of 2023)
[7] Bharatiya Sakshya Adhiniyam (No. 47 of 2023)
[8] Section 176(3) of Bharatiya Nagarik Suraksha Sanhita, 2023
[9] Section 193(3)(i)*(i)* of Bharatiya Nagarik Suraksha Sanhita, 2023

the exact date, time and purpose of such transfer. This is a significant assurance put in the letter of law that ensures proper preservation of electronic evidence. These provisions are further buttressed by the tectonic reforms introduced through the Bharatiya Sakshya Adhiniyam. At the heart of this legislation lies the significant evolution of how electronic data is understood and appreciated within the legal system.

Meaning of 'Document' and 'Evidence' Expanded

The Indian Evidence Act (Act) originally categorized evidence into three types – documentary, oral, and electronic, thereby treating electronic records differently from documentary records, which remained unchanged even after the amendments brought about by the Information Technology Act, 2000. The Bharatiya Sakshya Adhiniyam (Adhiniyam) eliminates this distinction between electronic records[10] and documents and includes the former within the definition of 'document'[11]. This inclusion is clarified through a new illustration which provides examples of different forms of electronic record such as locational data, server logs, voice messages, emails which are now to be understood as documents in the legal framework. By erasing the traditional divide between paper and electronic records, a tech neutral approach is adopted by the statue ensuring that all forms of evidence are treated equally in the legal system. This inclusion is in the spirit of the Supreme Court judgment in *Shamsher Singh v. State of Haryana*[12] which held CDs to come within the meaning of 'document'.

The definition of 'evidence'[13] was expanded to include 'electronic records' as far as it pertained to documentary evidence. This was owing to the amendments introduced through the Indian Evidence (Amendment) Act, 2000. The new law expands the scope of 'oral evidence' to include 'statements given electronically.' This harmonizes Bharatiya Sakshya Adhiniyam with the changes introduced in the Bharatiya Nagarik Suraksha Sanhita which enables evidence to be deposed electronically.

Electronic Record as Primary Evidence

The Bharatiya Sakshya Adhiniyam takes the parity between electronic record and document forward by expanding the scope of primary evidence. Four new explanations have been added to the definition of 'primary evidence'[14] that vastly change the landscape of how electronic data is interpreted and appreciated by evidence law. The first new explanation added, *Explanation 4* states that when an electronic or digital record is created or stored, such storage, which occurs either sequentially or simultaneously, in multiple files, each such file stored is primary evidence. Imagine a scenario where an electronic or digital record crucial to an investigation is alleged to have been deleted by the suspect. For instance, an officer is investigating a case where a suspect is accused of deleting incriminating videos. The suspect denies the allegations, claiming the videos never existed. Upon examining the suspect's computer, the forensic team recovers a temporary file of the alleged deleted video from the system. According to the Bharatiya Sakshya Adhiniyam, this

[10] To be read as 'electronic and digital records' henceforth
[11] Section 2(1)(d) of Bharatiya Sakshya Adhiniyam, 2023
[12] AIR 2016 SC (CRIMINAL) 1
[13] Section 2(1)(e) of Bharatiya Sakshya Adhiniyam, 2023
[14] Section 57. Primary Evidence of Bharatiya Sakshya Adhiniyam, 2023

recovered temporary file would be considered sufficient primary evidence to support the existence of the deleted video.

A lot of electronic record is stored in multiple files on a computer, especially where such record is large or complex. For example, a video is saved across multiple files to manage its content. The computer, through automated process, may sequentially store parts of the record in separate files one after another or a computer using parallel processing or distributed storage systems can simultaneously store electronic records across multiple files. This explanation acknowledges the phenomena of an electronic record being stored in multiple files and determines each such file as primary evidence. The words 'storage occurs' and 'simultaneously or sequentially' denotes that this explanation limits itself to automated processes of the computer only.

Explanation 5 states that any electronic or digital record when produced from proper custody is primary evidence unless such custody is disputed. Proper custody of an electronic device is when the device is in a place looked after by a person who is responsible for the electronic device and no custody is improper if its legitimate origins are proved. Consider a case where an individual is accused of disseminating defamatory content via social media. An officer is investigating an incident where a suspect is alleged to have recorded and shared an embarrassing video of a colleague without consent. The colleague claims the video was sent to multiple contacts via a messaging app, causing significant personal and professional harm. The suspect denies the accusation, asserting his innocence. To resolve the matter, the suspect consents to a forensic examination of their smartphone. Upon inspection, the video in question is found on the device, seemingly corroborating the allegations. However, during the investigation, the suspect reveals that the phone was in the possession of a third party at the time the video was recorded and shared. As per Bharatiya Sakshya Adhiniyam, the existence of the video in the suspect's phone will not be considered primary evidence since the proper custody of the device for the time in question is disputed. Had such custody not been disputed, the electronic record of the video would amount to being primary evidence.

'Proper custody' ensures authenticity of electronic records and as per Bharatiya Sakshya Adhiniyam, the provenance and handling of digital evidence are paramount in determining its admissibility and reliability in court. If an electronic record is not in proper custody, it is at the risk of being tampered, transposed, altered, or fabricated. Proper custody ensures that the data remains unchanged or uncorrupted, maintaining its original form and content. It also establishes a chain of custody of the electronic record, denoting who had access to the data and when. Therefore, 'proper custody' becomes an important aspect to be considered to establish an electronic record as primary evidence.

Explanation 6 speaks about the nature of an electronic record in a video when it is stored and disseminated simultaneously in different forms. It includes each such storage, occurring while a video is transferred, transmitted or broadcast to another device, as primary evidence. This explanation essentially dilutes the principle of 'original electronic record' in context of a video recording. It is no more essential to produce the original device making the recording of a video to establish such electronic record as primary evidence. All electronic record pertaining to the transfer, transmission or broadcast of that video will also be primary

evidence of that video. If in the above-mentioned scenario of the defamatory video being disseminated, it is unclear whether the dissemination through WhatsApp be valid to count such electronic record as primary evidence since such dissemination is not simultaneous to the recording of the video, but it is amply clear that had the video been broadcast in real time through YouTube Live, each such storage of such electronic record caused by the broadcast will amount to that electronic record to be considered primary evidence.

Explanation 7 speaks of an electronic or digital record stored in multiple spaces through the automated process of a computer. This implies that if the above-mentioned defamatory video was recorded and broadcast through YouTube Live, the electronic record stored on the device, and the electronic record saved on the server of YouTube will be considered primary evidence individually. While *Explanation 4* speaks about storage of an electronic record in multiple files, *Explanation 7* speaks about the storage of an electronic record in multiple storage spaces. The distinction between the two lies in recognizing that storage in multiple files implies that various parts of an electronic record can be stored in different files, and different storage spaces implies that the electronic data is saved as a whole in different locations.

The amendments introduced through Explanations 4 to 7 of the Bharatiya Sakshya Adhiniyam presents the groundbreaking concept of recognizing electronic records as primary evidence through legislation. By recognizing electronic data in its various forms, the law acknowledges and accommodates the complexities of modern electronic data appreciation. It does so along with prioritizing the integrity and preservation of electronic evidence, providing safeguards against tampering and alteration. This new view of electronic evidence puts to rest the diverging positions held by the Apex court in adjudicating whether electronic record can be presented as primary evidence. The comprehension of electronic records as primary evidence in the Adhiniyam parallels the understanding of Justice Nariman in *Arjun Panditrao Khotkar v. Kailash Kishanrao Goratyal.*[15] Justice Nariman understood that an electronic record could be presented as primary evidence in Court if it was in its original form in which case the compliance with Section 65B will not be necessary. He makes this distinction by denying the admissibility of electronic records that contained the contents of the original electronic records but were deliberately copied and recorded on another electronic record and adduced as evidence without compliance with Section 65B. He notes –

> "*The situation would have been different had the appellant adduced primary evidence, by making available in evidence, the CDs used for announcement and songs. Had those CDs used for objectionable songs or announcements been duly got seized through the police or Election Commission and had the same been used as primary evidence, the High Court could have played the same in court to see whether the allegations were true. That is not the situation in this case. The speeches, songs and announcements were recorded using other instruments and by feeding them into a computer, CDs were made therefrom which were produced in court, without due certification. Those CDs cannot be admitted in evidence since the mandatory requirements of Section 65-B of the Evidence Act are not satisfied. It is clarified that notwithstanding what we have stated herein in the preceding*

[15] AIR 2020 SUPREME COURT 4908

paragraphs on the secondary evidence of electronic record with reference to Sections 59, 65-A and 65-B of the Evidence Act, if an electronic record as such is used as primary evidence under Section 62 of the Evidence Act, the same is admissible in evidence, without compliance with the conditions in Section 65-B of the Evidence Act."[16]

The framework outlined in the Adhiniyam regarding the presentation of electronic records in court as primary evidence aligns with Justice Nariman's perspective, as both acknowledge the admissibility of electronic records as primary evidence. However, the Adhiniyam goes beyond this by reducing the importance placed on the original device where electronic data originates and instead directs attention to the qualities of the electronic record that make it primary evidence. It determines an electronic record to qualify as primary evidence when it originates from proper custody and is generated through automated processes—be it simultaneous or sequential—of a computer system.

Electronic Records as Secondary Evidence and its Certificate

Understanding the articulation of provisions in the Bhartiya Sakshya Adhiniyam, a refined iteration of the Indian Evidence Act, is crucial to grasp the incorporation of Section 61 of the Adhiniyam. Chapter V of the Adhiniyam deals with documentary evidence and it extends from Section 56 to Section 93. Section 56[17] of the Adhiniyam is the reproduction of Section 61 of the Act. It states that the contents of a document may be proved by primary or secondary evidence. Section 57 of the Adhiniyam pertains to primary evidence, which has been expanded to include different types of electronic records as discussed above. Section 59[18] of the Adhiniyam corresponds to Section 64 of the Act which states that a document shall be proved by primary evidence '*except in the cases hereinafter mentioned*'', denoting that the sections following Section 59 pertain to secondary evidence. Section 61[19] is a newly added provision to the Adhiniyam which firmly establishes the admissibility of electronic record. It becomes evident that the inclusion of Section 61 in the Adhiniyam specifically addresses the admissibility of electronic evidence as secondary evidence. This strategic placement affirms that the expansion under Section 57 does not exclude the possibility of substantiating electronic records through secondary evidence. Section 61 states that nothing in the Adhiniyam shall deny the admissibility of an electronic record on the ground that it is an electronic record, and subject to section 63, that electronic record shall have the same enforceability, validity and legal effect as any other document. This ensures that electronic records retain admissibility in the absence of their primary evidence. This further lays to rest, the debate about the compliance of the certificate provided in Section 63 of the Adhiniyam, which corresponds to Section 65B of the Act. Section 61 states that electronic records admissible under it shall be subject to provisions of Section 63, thereby clarifying that when electronic record is adduced as secondary evidence, it shall be accompanied by the certificates mentioned in Section 63.

The certificate provided in Section 65B of the Act, has been scrutinized through multiple rulings of the Supreme Court. In *Anvar P.V.*

[16] Para 24, AIR 2020 SUPREME COURT 4908
[17] Section 56. Proof of contents of documents, Bharatiya Sakshya Adhiniyam, 2023
[18] Section 59. Proof of documents by primary evidence Bharatiya Sakshya Adhiniyam, 2023
[19] Section 61. Electronic or digital record of Bharatiya Sakshya Adhiniyam, 2023

v. P.K. Basheer[20] the Supreme Court held that the applicability of Section 65B prevailed over any other provision of the Indian Evidence Act as it began with the non-obstante clause - 'Notwithstanding anything contained in this Act'. It held that '*An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied.*' Later, in *Shahfi Mohammad v State of Himachal Pradesh*[21] the Supreme Court departed from this understanding and held that the requirement of the certificate under Section 65B(4) is not mandatory and that '*the applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies*.'[22] The position of law with respect to the certificate under Section 65B was finally laid to rest in *Arjun Panditrao Khotkar v. Kailash Kishanrao Goratyal* which made two key observations about the admissibility of electronic evidence – first, it established that electronic record can be adduced as primary evidence when the original device on which the record was first stored was made available in court, and second, it clarified that whenever such original electronic record, through human intervention, is copied on another device, then such electronic record can be produced only as secondary evidence and with the mandatory compliance of the certificate provided in Section 65B(4) of the Act.

Section 63 of the Adhiniyam corresponds to Section 65B of the Act. This section has modified both the nature of electronic record and the process of certification required for making such electronic record admissible in court. The scope of electronic record has been expanded to include electronic record stored on semiconductor memory[23] and communication devices[24]. The addition of the word 'create'[25] denotes that the process of creation conducted by a computer or communication device is now included within the understanding of its 'regular use'[26]. The addition of these terms is clarificatory, aimed at addressing existing ambiguities in the drafting of Section 65B of the Act. While their inclusion has not been a subject matter of litigation yet, they have been added to enhance the section's robustness in assessing the nature of electronic devices when presented as secondary evidence. Sub-section (3) of this section provides the conditions for considering multiple computers or communication devices functioning together as a single computer or device. This provision has been re-drafted and appropriate terminologies have been used to denote different operation modes of computers and communication devices. Terms like 'standalone model'[27] 'computer system'[28] computer network',[29] 'computer resource enabling information creation or providing information processing and storage'[30] and 'intermediary'[31] are recognized as valid methods for creating, storing, or processing information. This expanded scope encompasses a wider range of technological

[20] (2014) 10 SCC 473
[21] (2018) 2 SCC 801
[22] Para 12, (2018) 2 SCC 801
[23] Section 63(1), of Bharatiya Sakshya Adhiniyam, 2023
[24] Section 63(1),63(2), 63(4), 63(5) of Bharatiya Sakshya Adhiniyam, 2023
[25] Section 63(2)(a) and Section 63(3) of Bharatiya Sakshya Adhiniyam, 2023
[26] Section 63(2)(a) Bharatiya Sakshya Adhiniyam, 2023
[27] Section 63(3)(a) Bharatiya Sakshya Adhiniyam, 2023
[28] Section 63(2)(b) Bharatiya Sakshya Adhiniyam, 2023
[29] Section 63(2)(c) Bharatiya Sakshya Adhiniyam, 2023
[30] Section 63(2)(d) Bharatiya Sakshya Adhiniyam, 2023
[31] Section 63(2)(e) Bharatiya Sakshya Adhiniyam, 2023

setups and scenarios, enhancing the inclusivity and applicability of the provision. The explicit inclusion of the term 'through an intermediary' acknowledges the role entities like internet service providers or social media platforms play in facilitating and recording electronic activities and enhances the admissibility of electronic evidence in court. It enables the presentation of evidence from intermediary records and broadens the scope of what constitutes as evidence, especially in cases where electronic records cannot be proved by primary evidence owing to their inaccessibility.

The process of certification provided in Section 63 of the Adhiniyam has been streamlined. The section mandates the submission of two certificates – one to be submitted by the person in charge of the computer or communication device and the other to be submitted by an expert. A new Schedule has been added to provide two certificates which shall be filled to the best of the knowledge and belief of the person signing them. It is also mandated to produce the certificates and electronic record every time the electronic record is being submitted for admission. The inclusion of an expert certificate brings in desired safeguard to ensure the authenticity of information found in electronic form. The certificates themselves contain detailed information about the nature of the device from which the electronic record is obtained. This includes specifics such as the type of device (e.g., DVR, Mobile, Flash Drive, Server, Cloud, CD/DVD), details like model, serial number, colour, and unique identifiers (IMEI/UIN/UID/MAC/Cloud ID). Additionally, recording the HASH value of the device adds a layer of security by providing a digital fingerprint that can be used to verify the integrity of the electronic data.

Expanding the scope of electronic records by recognizing electronic record stored in semiconductor memory or a communication device and refining the process of certification provides a structured framework for handling electronic records. The streamlined certification process, its compulsory compliance, the inclusion of a certificate by an expert and recording of detailed device information in the certificate- add crucial safeguards to validate electronic records and promote trustworthiness in electronic evidence presentation.

Conclusion

The Indian Evidence Act of 1872 and the Bharatiya Sakshya Adhiniyam of 2023, were conceived in vastly different technological contexts; and the 151 years between them are highlighted by a dramatic evolution of technology. By 1876, when Alexander Graham Bell invented the telephone, the Indian Evidence Act had already been in place for four years, and the Act remained grounded in the technological realities of its time. Fast forward to the early 2000s, the first personal computers, which once represented the pinnacle of digital technology, now seem rudimentary compared to today's sophisticated smartphones. This stark contrast underscores the necessity for the legal system to evolve in tandem with technological progress to effectively address contemporary challenges.

The Bharatiya Sakshya Adhiniyam, 2023, represents a significant leap forward in this regard. By integrating modern technological advancements into its framework, the Adhiniyam acknowledges the crucial role technology plays in today's legal landscape. One of the most impactful changes introduced by the new criminal laws is the incorporation of technology into the judicial process, exemplified by Section 530[32] of the Bharatiya

[32] Section 530. Trial and proceedings to be held in electronic mode, Bharatiya Nagarik Suraksha Sanhita, 2023

Nagarik Suraksha Sanhita. This provision allows for inquiries and trial to be held using electronic means, marking a decisive shift towards what can be termed as a 'tech trial' era.

A 'tech trial' represents a transformative approach where technology is seamlessly integrated into the criminal justice system, fundamentally altering how trials are conducted. The new criminal laws leverage technology in several critical ways: facilitating the service of summons, notices, the supply of documents, and the deposition of evidence through electronic means. This transition not only streamlines the procedural aspects of trials but also enhances their efficiency. The ability to conduct trials electronically addresses logistical challenges and reduces delays, which can be particularly beneficial in managing high caseloads and ensuring timely justice.

Moreover, the integration of technology extends beyond mere procedural facilitation. It also plays a vital role in enhancing accountability within the judicial process. For instance, the Bharatiya Nagarik Suraksha Sanhita mandates the use of audio-video recording for search and seizure proceedings and forensic investigations of serious offenses. This requirement ensures that critical aspects of investigations are meticulously documented, providing a reliable record of procedural integrity. Additionally, the documentation of the chain of custody for electronic devices—detailing the ownership, transfer, and handling of such evidence—ensures that all evidence is tracked accurately, thereby bolstering its credibility and reliability in court.

A significant development in the Bharatiya Sakshya Adhiniyam is the expanded definition of 'document' to encompass all forms of electronic and digital records. This move represents a profound shift towards tech neutrality, effectively erasing the traditional distinction between paper-based and electronic records. By treating all records equally, the Adhiniyam ensures that electronic records hold the same evidentiary weight as traditional paper documents. This tech-neutral approach not only modernizes the legal framework but also aligns it with current technological realities. This neutrality is further reinforced by detailed explanations added to primary evidence which outline various forms of digital and electronic records. Such comprehensive definitions are crucial for accurately understanding and interpreting the complexities of electronic evidence.

As technology continues to evolve rapidly, its role in delivering justice in a time-bound and transparent manner becomes increasingly significant. The ability to adapt to emerging technologies is essential for maintaining an effective and equitable legal system. To this end, robust legislation and technologically adept stakeholders like law enforcement personnels, prosecutors, advocates and judges are imperative. Legislators must draft laws that not only accommodate current technological advancements but also anticipate future developments. Meanwhile, the stakeholders of the criminal justice system must also possess the requisite technological proficiency to effectively manage and interpret digital evidence.

In conclusion, by embracing technological advancements and integrating them into the judicial framework through the three new criminal laws, the Indian criminal justice system is better positioned to address the challenges of the digital age. The harmonization of technology within the legal process ensures greater procedural efficiency, evidentiary accuracy, and overall transparency of the criminal justice system. This approach not only modernizes the legal system but also upholds its fundamental commitment to fairness, equity, and justice to all.

Admissibility of Electronic Evidence: An Overview of Bharatiya Sakshya Adhiniyam, 2023

Dr Nisha Dhanraj Dewani[1]

Abstract

The enactment of the Bharatiya Sakshya Adhiniyam (BSA) 2023 marks a significant shift in the landscape of digital evidence laws in India, particularly in the realm of criminal trials. This legislation replaces the antiquated Indian Evidence Act of 1872 and presents a complete outline for the admission and assessment of electronic evidence in legal proceedings. In the area of cybercrimes, where digital evidence plays a significant role, the Bharatiya Sakshya Adhiniyam provides clear and cogent provisions for the admission of electronic evidence and defines its authenticity criteria. It outlines the conditions under which electronic record can be classified as primary and secondary evidence. In addition, the admissibility is the cornerstone to lead the discussion over various Sections like 57, 61, 62 and 63 of BSA with examples. This research paper sheds light on the evolving nature of digital evidence laws through 2023 and the challenges faced in ensuring the integrity of electronic evidence in criminal proceedings.

Keywords: *Bharatiya Sakshya Adhiniyam, Electronic Evidence, Admissibility, Presumptions in electronics*

Introduction

The Bharatiya Sakshya Adhiniyam, 2023 (BSA), heralds a significant transformation to meet the needs of digital era in Indian criminal justice system supplanting the long-standing Indian Evidence Act of 1872 (IEA)[2]. It was passed through both the Lok Sabha and Rajya Sabha on December 12th and December 21st, 2023, respectively, culminating in presidential assent on December 25, 2023, marks a watershed moment in legal history. The BSA's core objectives encompass modernizing, simplifying, and harmonizing the production and interpretation of evidence and that includes electronic evidence, within courtrooms nationwide. By integrating these obligatory provisions, this legislation aims to technologically empower the judicial system, fostering speedy and fair justice in view of Bharatiya Nagarik Suraksha Sanhita imposed time limit provisions. While retaining foundational elements from the IEA 1872, the BSA 2023 presents them in a revamped and contemporary usage. Furthermore, the BSA introduces several novel and important provisions aimed at facilitating judicial proceedings and augmenting transparency

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[2] Indian Evidence Act 1872 was drafted by James Fitzjames Stephen.

within the legal framework without any unnecessary delay in trial. The enactment of the BSA, comprising 170 Sections, entails modifications in 23 Sections, the repeal of 6 Sections, and the addition of 2 new Sections, collectively catering to the exigencies of Indian criminal cases.

Moreover, the amendments introduced in the BSA focus on reforms concerning electronic evidence in cyber forensics, which holds a critical role in criminal investigations. Cyber forensics involves applying scientific methodologies to identify, collect, examine, and analyze data from digital sources while ensuring the integrity of information and adhering to strict protocols for maintaining the chain of custody, all in accordance with legal rules of evidence. This area covers diverse investigation tasks including wireless examinations, media analysis, network inquiries, database examinations, mobile investigations, disk analysis, I.P. address tracing, email scrutiny, cloud computing analysis, and other methods of digital probing. In view of this significance, Sec. 2(a) defining audio- video electronic has also been inserted in BNSS[3].

Moreover, the primary objective of collecting electronic evidence is to establish a connection between the accused and the crime. This is achieved by systematic and meticulous preserving, extracting, evaluating, interpreting, and documenting digital data under the umbrella of a "fair and reasonable" procedure. The complexity of this task should not be underestimated, as it involves discovering facts through relevant data record, recovering deleted information, uncovering hidden or encrypted content and accuracy while safeguarding the integrity of the computer system. Ultimately, this process culminates in the presentation of testimonial evidence based on the findings collected during the forensic examination. Thus, there are three essential components of electronic evidence: the form of electronic records, encompassing digitally stored information like emails and databases; documentary such as physical documents and photographs; and oral evidence, consisting of verbal testimony and statement provided by witnesses or involved parties during legal proceedings as explained in Figure No.1 Inclusion of Electronic Evidence. These components collectively form what we can include in electronic evidence. This is based on the facts produced to the court through documents and oral evidence establishing credibility, truthfulness of the relevant facts and helping the court to determine the cases.

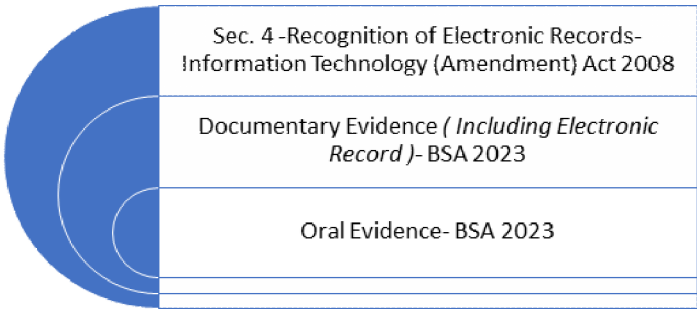


Figure No. 1 Inclusion of Electronic Evidence

[3] (a) "audio-video electronic" means shall include use of any communication device for the purposes of video conferencing, recording of processes of identification, search and seizure or evidence, transmission of electronic communication and for such other purposes and by such other means as the State Government may, by rules provide;

As per the above figure, the rise in computer usage, computer programmes, Internet of Things, Artificial Intelligence, Deepfake technology, Blockchain technology and the trend towards digital information storage have led to the amendments in Indian criminal laws to address the recognition of the advanced tools for the handling of digital evidence.

Meaning and Concept of Electronic Evidence

"Electronic evidence" encompasses information produced through electronic and mechanical means, pivotal in proving and disproving the facts and fact in issue in the legal contexts. This category includes data stored or procured in computer systems, computer programme or any IoT devices as well as information transmitted electronically through communication networks through magnetic or optical means for example floppy disks, hard drives, CDs, DVDs, cell phones, fax machines, USB sticks, digital cameras, memory cards, PDAs, answering machines, cordless phones, pagers, caller-ID devices, scanners, printers, copiers, and CCTV systems, serving as a repository for electronic data.

The term "Electronic Evidence" specifically depends on the electronic record as referenced in the BSA, 2023. An Electronic Record deals with a data record or information in the form of an image or sound that is stored, received, or sent electronically, or via microfilm or computer-generated microfiche[4]. They are legally recognized as per the Information Technology (Amendment) Act 2008[5].

In practical terms, it constitutes evidence presented before a court, commonly referred to as "Digital evidence." But a question is raised here:- How does an electronic record become a document or documentary evidence? To answer this question the BSA has included electronic and digital records as evidence in its amended definition of document. Which reads as under:—

In Sec.2(d), "document" is defined as "*any matter expressed or described or otherwise recorded upon any substance by means of letters, figures or marks or any other means or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter and includes electronic and digital records*"[6]. As per the above stipulated definition, document include digital documents stored in laptops and smartphones, emails, server logs, locational data, files stored on computers, messages, website content, and voice mail messages preserved on digital devices[7].

Not only above, the digital and electronic record' have been included in the definition of evidence as per Sec. 2(e) defining "evidence". It includes—

"(i) all statements including statements given electronically which the Court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry and such statements are called oral evidence;

(ii) all documents including electronic or digital records produced for the inspection of the Court and such documents are called documentary evidence[8]"

Provisions such as Sections 105, 176(1), 180, 183, 254, 265, 266, 316, 336, 355, 356, and 530 of the BNSS clearly emphasize the

[4] Sec 2(1)(t) of IT (Amendment) Act, 2008
[5] Sec. 4, IT (Amendment) Act, 2008
[6] Sec. 2(d) BSA 2023
[7] Sec. 2(d) Illustration iv, BSA, 2023,
[8] BSA, Sec. 2 (e) : also see Sec3 para 6 of Indian Evidence Act, 1872

significance of using audio-visual means in the inquiry, investigation, and trial of criminal cases, highlighting the essential role of Section 2(e)(i) of the BSA, 2023. Subsequently Sec. 2(e)(ii) provides the electronic and digital records can also be produced for inspection in court as documentary evidence.

There are some illustrations describing the oral and documentary evidence.

- During a trial, a witness testifies verbally in court regarding their observations of a traffic accident.
- A recorded phone conversation between two individuals involved in a business dispute is played as evidence during a hearing.
- An expert witness provides expert opinion through a video conference call regarding the authenticity of a piece of art.

Documentary Evidence

- A printed contract between two parties is submitted to the court as evidence of their agreement.
- Email exchanges between employees discussing a workplace incident are presented as evidence of harassment.
- CCTV footage from a Security camera captures the defendant committing the crime and is submitted as evidence during the trial.

Since an electronic record defined under IT (Amendment) Act, 2008 is legally recognized and considered as proper documentary evidence as per BSA 2023. In view of achieving the objectives of fair and speedy trial, the electronic word and it's implications have been added in various provisions of BSA. For example, Sec.15 of BSA not only provides admission as any statement, whether oral, documented but also included the word 'electronic form[9]', which implies an inference concerning a fact in question or a relevant fact. For example, 'A' sends an email to B discussing the terms of the contract. In one of the emails, B acknowledges receiving payment for goods delivered, which supports A's claim that the contract was fulfilled. In this scenario, the email exchange constitutes electronic evidence and falls under Sec.15 of (BSA). B's acknowledgment in the email serves as an admission, as it implies an inference regarding the fact of receiving payment for goods, which is relevant to the contract dispute. Thus, the text messages, emails, social media interactions, and GPS location data are relevant facts and can be produced through electronic records in the court.

Furthermore, any record entered in a public or official ledger, whether in physical or electronic form, documenting a pertinent fact related to the matter under consideration, and recorded by a public official in their official role or by an individual fulfilling a legal obligation, holds significance as relevant evidence[10]. In a fraud case, the prosecution introduces electronic banking transaction records obtained from the accused's bank account. The records contain entries showing suspicious transactions involving large sums of money transferred to offshore accounts. These entries, recorded by bank officials in compliance with banking regulations, serve as relevant evidence in demonstrating the defendant's involvement in fraudulent activities.

[9] Sec 2(1)(r) of IT Act, 2000 with reference to information means-"*Any information generated, sent, received or stored-in media, magnetic, optical, computer memory, microfilm, computer generated microfiche or similar device.*"

[10] Sec. 29 of BSA, 2023

Similarly, Sections 31 and 32 of BSA dealing with 'public nature documents' and 'law contained in books' are also modified with the word electronic. And the whole purpose is just to provide swiftness to the Indian justice system.

Primary and Secondary evidence

Primary evidence holds paramount importance in legal proceedings, serving as the cornerstone of evidentiary support. When a document is presented directly to the court for examination, it is classified as primary evidence. It is worth noting that in the legal context, if a document consists of multiple parts, each part retains as primary evidence, contributing substantially to the veracity and strength of the case. However, copies of a single original document do not qualify as primary evidence if they are all produced using the same process. Primary evidence takes precedence over Secondary evidence and is crucial for establishing the truth of the matter in question unequivocally. In this context, a very important question is raised here in what cases, the digital data or information stored in electronic or digital form can be considered as a primary or Secondary evidence as per BSA?

Apart from clauses of Sec.62 of IEA, 1872, the primary evidence as per BSA as given under Sec.57[11] has added 4 new explanations in comparison[12].

"Explanation 4.—Where an electronic or digital record is created or stored, and such storage occurs simultaneously or sequentially in multiple files, each such file is primary evidence."

Example: Original data relating to Phishing, Smishing, and E - Pharming recovered during digital forensic investigation of cybercrime, discovered by police and showed that the suspect's computer contains multiple encrypted files stored in different places in computer, iPad and laptop, each containing evidence of illegal activities such as financial fraud. Each encrypted file, stored simultaneously or sequentially even through cloud server will serve as primary evidence linking the suspect to the criminal activities.

"Explanation 5.—Where an electronic or digital record is produced from proper custody, such electronic and digital record is primary evidence unless it is disputed."

Example: In a Murder case investigation, the police obtain a suspect's cellphone records including text messages and call logs, from the accused or telecommunications company. The records are accompanied by a chain of custody documentation verifying their authenticity and integrity. Since the records are produced from proper custody, they are considered primary evidence in establishing the suspect's whereabouts and communications at the time of the crime.

"Explanation 6.—Where a video recording is simultaneously stored in electronic form and transmitted or broadcast or transferred to another, each stored recording is primary evidence."

Example: In a bank robbery case, surveillance cameras inside bank captured footage of the accused, his weapon and activity of stealing cash. The footage is simultaneously recorded on the store's DVR system and transmitted to a central monitoring station. Both the locally stored footage and the transmitted footage are primary evidence, providing clear visual documentation of the crime.

"Explanation 7.—Where an electronic or digital record is stored in multiple storage spaces in a computer resource, each such

[11] BSA Sec. 57
[12] Sec. 62, Indian Evidence Act, 1872

automated storage, including temporary files, is primary evidence."

Example: In POCSO case, investigators seize accused's computer and discover children's porn images stored in multiple locations, including hidden folders and encrypted drives. Forensic analysis reveals the presence of deleted files in temporary storage areas. Each of these automated storage spaces serves as primary evidence of the suspect's possession and distribution of illegal content, contributing to the prosecution's case.

These examples demonstrate how the explanations apply specifically within the context of criminal cases, where electronic or digital evidence plays a crucial role in investigating and prosecuting various offenses.

In addition, the Secondary evidence as given under Sec.58[13] included 3 more clauses (vi, vii, viii) in addition to the old law[14] :—

(vi) Oral admissions

These are considered as statements made by a person involved in a criminal case that are offered as evidence against them. This is in the reference of Sec. 22A of Indian Evidence Act 1872. It has been deleted now. The legal interpretation is that the stored data in CD/DVD/Pen Drive is not admissible without a certificate u/s 63 of the BSA. It is also clear that in the absence of such a certificate, the oral admission which is electronic record is not admissible.

(vii) Written admissions

These are written statements or documents where a person admits to certain facts relevant to the criminal case. This could include letters, emails, or social media messages explicitly acknowledging involvement in criminal activity. For example, in a drug trafficking case, law enforcement intercepts a series of text messages exchanged between two suspects discussing the transportation and distribution of illegal narcotics. One suspect sends a written admission via text message admitting their role in the drug operation. The intercepted messages serve as written admissions and incriminating evidence against both suspects.

(viii) In legal proceedings, the submission of an expert/ skilled examiner in document examination is deemed admissible evidence as Secondary one. This pertains particularly to situations where the original document comprises numerous accounts or documents that are not conveniently examinable in court.

For example, a crime investigation involving money laundering, embezzlement or fake bank loans, the prosecution calls a forensic accountant or as an expert witness. The accountant has examined numerous financial documents, including bank statements, invoices, and ledgers, which form the basis of the embezzlement scheme. The accountant testifies about discrepancies found in the documents and provides expert analysis regarding the fraudulent activities committed by the defendant.

Admissibility of Electronic Evidence

The admissibility of relevant facts is always determined by the court on the basis of the documents, statements, admission, expert views and their proof produced in the court. The next question is raised here that how and on what factors the digital or electronic record is admissible in court? Along with it, the other question who has to sign the certificate? As per BSA, 2023 there is a newly added Sec.61 that talks about the Electronic and Digital Record admissibility.

[13] BSA 2023
[14] Sec. 63 of Indian Evidence Act 1872

There are few provisions of BSA which discuss the admissibility in detail.

"Sec. 61:— Nothing in this Adhiniyam shall apply to deny the admissibility of an electronic or digital record in the evidence on the ground that it is an electronic or digital record and such record shall, subject to Sec.63, have the same legal effect, validity and enforceability as other document."

As discussed earlier, there was no legal recognition to electronic records before 2000. It happened just because of Information Technology Act 2000 which introduced Sec.4 that provides legal recognition to electronic records. Though it made many amendments in Indian Evidence Act 1872 but still it was in conflict in many cases. Now Sec.61 of the BSA (Newly added) extends the acceptance of electronic or digital records as evidence completely. It is granting the electronic records the equivalent legal validity, enforceability, and impact as paper documents. This implies that electronic or digital records cannot be dismissed solely due to their digital nature. Instead, they are afforded equal treatment to physical documents in legal proceedings. It is specifically outlined in Sec.63 of BSA like addressing particular conditions or exceptions regarding the admissibility or validity of electronic records. Apart from above, electronic records' contents can be authenticated according to Section 63[15].

In the realm of criminal law proceedings, the Indian Evidence Act of 1872, the adjudication of electronic records was governed by the provisions set forth in Sections 65A and 65B, which were incorporated via the 2000 amendment to the present Act. It was considered as the most significant change but created a conflict while elucidating the judicious handling of electronic evidence. For instance, in the case of *State (NCT of Delhi)* v. *Navjot Sandhu*[16], adjudicated by the Supreme Court. Herein, the judicial bench highlighted the paramount importance of meticulous adherence to legal protocols and standards throughout the process of admitting and evaluating electronic evidence. Of particular significance was the court's ruling regarding the admissibility of printouts depicting phone records, wherein it was determined that such evidence could be deemed admissible even in the absence of a certificate pursuant to Section 65B(4) of the Act. Subsequent to this judgment, the case of *Anvar P.* v. *Basheer*[17], presented further jurisprudential scrutiny into the nuanced intricacies surrounding the authentication and admissibility of electronic evidence within the legal framework. Though this present judgement overturned the previous ruling and set forth comprehensive guidelines concerning the essential content of a certificate. These guidelines aim to ensure the integrity and authenticity of electronic evidence presented in court proceedings. The prescribed criteria encompass various aspects, including the identification of the electronic record in question, a detailed description of the process by which the record was generated, provision of specific particulars regarding the device utilized in producing the record, acknowledgment of the conditions outlined under Sec.65B(2) of the Indian Evidence Act, and the endorsement by an individual holding an authoritative position responsible for the operation of the relevant device. By establishing these stringent requirements, the court sought to uphold the standards of evidence admissibility in the realm of electronic records, thereby enhancing the reliability and

[15] Sec. 62 of BSA, 2023
[16] 2005 SCC 16 208
[17] *Anvar P.* v. *P. K. Basheer & Ors* (2015) 10 SCC 473.

credibility of such evidence in legal proceedings.

In the subsequent case of *Sonu@Amar* v. *State of Haryana*[18], the court diverged from the established precedent set in the Anvar P. case and reexamined the necessity of Sec.65B(4) certificates. These certificates were reconsidered as a "mode of proof" and deemed curable defects in their absence. This perspective gained further support in the 2018 ruling of *Shafhi Mohammad* v. *State of Himachal Pradesh*[19]. However, the Supreme Court's position shifted in the *Arjun Panditrao Khotkar case*[20], where it elucidated several key aspects. This judgment focused on non-obstante clause within Sec.65B(1) Secures the imperative of adhering to the special procedure. It is outlined therein for the admissibility and proof of electronic records. Notably, it makes a clear distinction between the 'original' electronic document and its derived copies. Additionally, Sec. 65B(1) establishes a legal fiction where copies conforming to the conditions stipulated in Sec.65B(4) are considered admissible documents, thereby obviating the necessity for the original. It's noteworthy that while the original document, recognized as primary evidence, can be admitted without conforming to Sec.65B requirements, copies, as secondary evidence, must adhere to the conditions specified in Sec.65B.

The misunderstanding and non-compliance was observed in the application of Sec.65A and 65B IEA, which prompted legislative action reflected in Sec. 63 of BSA 2023 (based on Sec. 65B of Indian Evidence Act 1872). This legislation not only introduced stringent criteria in line with Sec. 61 and Sec 62 BSA, thereby addressing and rectifying the issues surrounding the admissibility and handling of electronic evidence.

Sec.63(1) of BSA 2023, defines document as any information which is available in print-outs, copied, stored, copied or recorded in magnetic, optical or semi- conductor (newly added word) through electronic record, is stored or produced by a computer or communication device is deemed to be a document. Also, the same is admissible as evidence in court, subject to certain conditions enumerated under Sec. 63(2). For instance, the computer output must have been generated during a period when the computer was regularly in use. Secondly, the information similar to that in the electronic record must have been routinely fed into the computer. Additionally, the computer or communication device must have been operating correctly during that relevant time of crime scene. It is pertinent to note that malfunction should not have affected the accuracy of the electronic record otherwise it may create a problem for admissibility in court. Furthermore, the information in the electronic record which is submitted to the court must be reproduced or be derived from the data fed into the computer during its ordinary course. To explain the criteria as mentioned under Sec. 63(2), the examples are given below:—

- Regular Use of Computer for Criminal Activity: In a cybercrime investigation involving a suspect accused of hacking into bank accounts, electronic records seized from the suspect's computer, such as network traffic logs and timestamps of unauthorized access attempts, can be admitted as evidence if it's shown the computer was regularly used for such criminal activities during the relevant period.

[18] (2017) 8 SCC 746.
[19] (2018) 2 SCC 801
[20] (2020) 7 SCC 1

- Routine Input of Information: Information similar to that contained in the electronic record should be regularly fed into the computer during the ordinary course of activities.
- Proper Operation of Devices: In an accident case, the working and accuracy with time stamp and capacity of hard disc or VDR contained in CCTV camera.

Additionally, Section 63(3), which addresses the definition of a single computer, previously Section 65B (3), has been revised to include terms such as "communication devices" apart from the existing term computer. This clause while modifying included within its ambit of function of any activity the word 'creating' along with storing or processing information for the purposes of any activity regularly carried on over that period as mentioned in clause (a) of sub-Section (2) was regularly performed by means of one or more computers or communication device. This is in relation to the certificate as provided in schedule.

Furthermore, Sec.63 (4) mandates the signature requirement provided in the schedule of BSA, 2023. This certificate is divided into 2 parts: Part A and Part B. The Part A of the format of certificate – 'to be given by party' and Part B- 'By Expert' as specified by BSA. Thus, Part A is provided by the owner, handler, operator, first responder, manager of communication, or the computer device in question. On the other hand, if a constable recorded the videography, the head constable or records head-mohrir can provide the certification. The chain of custody must clearly document changes and reasons for those changes. Part B requires a certificate from a person in a responsible official position who witnessed the events. On the other hand, in line with the earlier example, the SHO of the police station or the forensic team in-charge can sign the Part B. This certificate must include identification of the record, the manner of its production, and particulars of the device, conditions of Section 63 (2) and proper details of Secured Hash algorithm (SHA1, SHA 256, MD 5 or any other standard as determined by the Government). The first responder or SHO should submit the audio-video documentation in mirror copy, along with the primary evidence's chain of custody, properly certified. An officer of sufficient seniority, who has either witnessed the process or can attest to its authenticity, may also provide this certification to ensure compliance with the BSA[21]. The expert in this case is a responsible officer of sufficient seniority who is either himself evidence of the whole process or who can state to the best of his knowledge and belief that affirmation of the handler as to continuity & authenticity of it. The court can seek opinion of the Examiner of Electronic Evidence referred to in Section 79A of the Information Technology Act, 2000 and check all the hashing and chain of custody provided by the party[22]. The Central Government has already issued a Notification of Forensic Labs. This notification is mentioned below as *'Examiner of Electronic Evidence'* under Sec.79A of the Information Technology Act 2000.[23]

[21] SoP on Audio and Video Recording of Scene of Crimes, Ministry of Home Affairs. Available at: SOP of Audio-Video Recording for Scene of Crime (1).pdf (bprd.nic.in) (Accessed on 24.07.2024)

[22] Sec. 79A of Information Technology (Amendment) Act, 2008-" Central Government to notify Examiner of Electronic Evidence The Central Government may, for the purposes of providing expert opinion on electronic form evidence before any court or other authority specify, by notification in the official Gazette, any department, body or agency of the Central Government or a State Government as an Examiner of Electronic Evidence."

[23] Notification on Electronic Examiner. Available on https://www.meity.gov.in/notification-forensic-labs-%E2%80%98examiner-electronic-evidence%E2%80%99-under-Section-79a-information-technology. (Accessed on 8th May 2024)

S. No.	Forensic Labs	Location
1	Digital Forensic Laboratory, NFSU campus	Gujarat
2	Regional Forensic Science Laboratory (RFSL)	Surat, Gujarat
3	Cyber Forensics & Digital Evidence Examiners Laboratory	Kolkata, West Bengal
4	Forensic Wing Lab, Defence Cyber Agency (DCyA)	Rajaji Marg, New Delhi
5	Cyber Forensics Laboratory, Navy Cyber Group	Talkatora Annex, New Delhi
6	Cyber Forensic Division, State Forensics Science Laboratory	Thiruvananthapuram, Kerala
7	Cyber Forensic Laboratory, Air Force Cyber Group	New Delhi
8	Cyber Forensic Lab, CERT-In	—
9	Regional Forensic Science Laboratory, Northern Range	Dharamshala, Himanchal Pradesh
10	Cyber Forensic Laboratory, Army Cyber Group, DGMO	Signals Enclave, New Delhi
11	State Forensic Science Laboratory	Madiwala, Bangalore
12	Central Forensic Science Laboratory (CFSL)	Hyderabad
13	Directorate of Forensic Science	Gandhi Nagar, Gujarat
14	Computer Forensic and Data Mining Laboratory (CFDML), Serious Fraud Investigation Office (SFIO)	Delhi
15	Forensic Science Laboratory, Govt of NCT	Rohini, New Delhi

Table No: 1 - *Electronic Examiner in India under Sec. 79A of IT Act, 2000*

Source:- Ministry of Electronics and Information Technology (**MEITy**)

These notifications showed in table No. 1 designate various forensic laboratories across India. Their opinion can also be considered for the purpose of Sec 63(4) (c).

Presumptions in Electronic Transactions

In contemporary legal frameworks, provisions are established to facilitate the smooth functioning of electronic transactions. These provisions entail several presumptions outlined within relevant Sections of the law, ensuring the integrity and reliability of electronic records and signatures. Herein are the key presumptions elucidated under the BSA 2023, with reference to the IT Act 2000:

Presumption as to Gazettes and Official Records: Under Section 81, the Court assumes the authenticity of electronic or digital records if it purports to be the Official Gazette or records directed by law to be maintained by any entity. This presumption is applied if the electronic records are kept in the form required by law and produced from proper custody[24].The proper custody has been explained in the Explanation attached to Sec. 80 as the place which is looking after the documents[25] for safety purpose. The expression 'proper custody' has been used in various other provisions of BSA like Sec. 57, 80, 81, 93 etc.

[24] Bharatiya Sakshya Adhiniyam, 2023
[25] Sec. 81, Explanation

Presumption as to Electronic Agreements and Signatures: Section 85 provides a presumption in relation to the agreements which are electronic or digital in nature. This presumption is based on the affixed digital signatures of the parties on the documents[26].

Presumption as to Electronic Records and Signatures: Digital signatures and electronic records under Sec. 86 establish the truthfulness and Security of electronic records and the intention of parties in securing the electronic signature. However, it excludes these presumptions if they are not secured[27].

Presumption as to Electronic Signature Certificates: Section 87 outlines a presumption regarding Electronic Signature Certificates (ESCs). The Court presumes, unless proven otherwise, that the information listed in an ESC is correct. This presumption applies to all information except subscriber information not yet verified, provided the certificate was accepted by the subscriber[28].

Presumption as to Electronic Messages: It is a new change brought to BSA under Section 90. The telegraph message has been replaced by the electronic message. It presumes that an electronic message forwarded by the originator corresponds with the message fed into their computer for transmission. However, it refrains from making presumptions about the sender's identity[29].

Presumption as to Electronic Records Five Years Old: Section 93 allows the Court to presume that an electronic record, purported or proved to be five years old, had its electronic signature affixed by the person or their authorized representative, provided it is produced from proper custody[30].

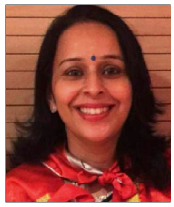
These presumptions, discussed in various Sections of the BSA, serve to streamline the legal acceptance and interpretation of electronic transactions involved in criminal cases while ensuring the integrity and reliability of electronic records and signatures.

Conclusion

In conclusion, the Bharatiya Sakshya Adhiniyam, 2023, offers a comprehensive framework for the admissibility of electronic evidence in legal proceedings, ensuring that digital records are treated with the same scrutiny and reliability as traditional forms of evidence. As a suggestion, continuous review and updates to the Bharatiya Sakshya Adhiniyam may be warranted to keep pace with technological advancements and emerging forms of electronic evidence. Additionally, increased awareness and training for legal professionals on handling electronic evidence could enhance the efficacy of the law in addressing contemporary challenges in the courtroom.

[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.

Human Trafficking and Legal Framework: Retrospective and Prospective



Dr. Sharanjit[1]

Abstract

Trafficking of persons is a borderless crime impacting thousands of people across the globe. Global conventions and domestic legislations endeavor to prevent and penalize this organized crime, however due to social, economic, cultural, political vulnerabilities and demand for commercial sex, the problem of human trafficking continues to shock humanity. It is the worst form of human rights violations. In the Indian context, strong legal framework exists to deal with different dimensions of human trafficking. The substantive criminal laws also incorporate specific provisions to punish human trafficking in varied forms.

Keywords: *Trafficking, abuse, child pornography, organized crime, gender neutral, transgender persons, compelled labour, commercial exploitation for sexual activities.*

Introduction

In the contemporary times, trafficking of individuals is a transnational organized crime. The entire world is impacted by this form of criminality, either with regards to origin of the victim, or a country of transit or the destination country.[2] Significant initiatives have been taken internationally as well as nationally to prevent and punish human trafficking.[3] It is one of the most serious forms of human exploitation wherein they are relegated to commodities and are bought/ sold for diverse forms of illegal purposes, thereby resulting in physical, sexual, psychological, economic, emotional abuse and violence.

Despite Constitutional dictums and legal provisions, the society is still struggling to combat human trafficking,[4] a modern-day slavery[5] taking place due to societal, monetary and other forms of vulnerabilities. Human trafficking is often considered to be a basket

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[2] As per the UNODC Global Report on Trafficking in Persons, 2022, most victims of cross-border trafficking are detected in neighbouring countries within the region of origin or nearby. The same principle is witnessed in domestic trafficking as well, where victims are trafficked from low-income areas of the country to the main towns or economic centres. Domestic trafficking may overlap with internal migration.

[3] The Convention for the Suppression of the Traffic in Persons and of Exploitation of the Prostitution of Others, 1949, the International Covenant on Civil and Political Rights, 1966, the Convention on the Elimination of Discrimination against Women, 1979, the United Nations Convention against Transnational Organised Crime, 2003, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children. The SAARC Convention on Preventing and Combating Trafficking in Women and Children 2002.

[4] Panchanan Padhi v. State of Odisha, AIR ONLINE 2020 ORI 72

[5] As per the Global Slavery Index 2023, the world's 20 richest countries account for more than half of the estimated 50 million people living in modern slavery. Among the G20 nations, India tops the list with 11 million people working as forced labourers. Source- https://www.thehindu.com.national.

full of crimes[6] due to the reason that human trafficking can occur for different purposes like commercial sexual exploitation, compelled labour, illegal trading of organs, labour of children, forced marriages,[7] recruitment of children as soldiers.[8]

This crime can also be studied from the perspective of inter-generational sex work where thousands of girls are driven to flesh trade by their own parents as a tradition.[9] Factors leading to this offence are gender bias (transgenders are also forced into flesh trade), natural disasters, conflict situations,[10] tourism and trafficking, industrialization and migration, harmful traditional, cultural practices etc.[11]. It is of a clandestine nature which makes the task of the police officers very difficult. The Apex Court rightly observed[12] that, "the victim women and children do not usually come to the brothel on their own will, but are brought through highly systematic, groups of individuals who buy and sell people into prostitution. Most instances of trafficking of children leads to commercial sexual exploitation.[13]

Defining Trafficking of Persons

Trafficking of persons has been dealt in various international documents.[14] It refers to the selection, transit, transfer, harboring, or receiving of people by threats, coercion, kidnapping, deceit, abuse of authority or vulnerability, or the offering or receiving of payments or benefits.

Bharatiya Nyaya Sanhita 2023[15] has also included this offence. The definition contained in Indian legislation[16] broadly covers all the parameters given in the UN Protocol. BNS has prescribed minimum mandatory punishment of seven years for human trafficking which can be upto 10 years. However, in case of multiple victims, the minimum punishment of 10 years has been provided which may be extended upto imprisonment for life.

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6 See various sections of Bharatiya Nyaya Sanhita, 2023, viz., sections 61,63,64, 70, 71, 74, 76, 79, 96,98,99,101, 111, 114, 116, 126,127, 129, 130,137, 138, 139,141, 142, 143, 144, 145, 146, 351. Special laws as discussed in this article are also relevant.

7 As per the Global Report on Trafficking in Persons, 2022 - 0.2% trafficking for removal of organs, 0.3% trafficking for illegal adoption, 0.7% trafficking for exploitative begging, 0.9% trafficking for forced marriages, 10.2% trafficking for forced criminal activity, 10.3% mixed forms of exploitation, 38.7% trafficking for sexual exploitation, 38.8% trafficking for forced labor. (Source - UNODC elaboration of national data. Based on a total of 36, 488 victims detected in 86 countries in 2020, p.23).

8 According to the Special Representative of the Secretary General on Children and Armed Conflict, the recruitment and use of children associated with armed groups always constitutes trafficking in persons; United Nations Human Rights Council, Annual Report of the Special Representative of the Secretary General for Children and Armed Conflict, A/HRC/37/47, Pages 15-16.

9 Anuja Agarwal, Chaste Wives and Prostitute Sister: Patriarchy and Prostitution among the Bedias of India, Routledge, New Delhi 2008.

10 In March 2022, the United Nations Secretary General stated, "for predators and human traffickers, war is not a tragedy - it is an opportunity". In 2020, before the escalation of the conflicts in Ukraine, about 12% of the total victims of trafficking in persons detected globally originated from a country affected by conflict. Source - as quoted in the UNODC Global Report on Trafficking in Persons, 2022.

11 With regards to harmful cultural practices refer to *Vishal Jeet* v. *Union of India*, AIR 1990 SC 1412.

12 *Bachpan Bachao Andolan* v. *Union of India*, (2011) 5 SCC 1.

13 Refer to the Law Commission of India 64th Report on the Suppression of Immoral Traffic in Women and Girls Act, 1956, Volume -7. See also the Law Commission of India, 146th Report, Sale of Women and Children, Vol 13th. The Law Commission of India 172nd Report on the Review of the Rape Laws.

14 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, Article 3(a).

15 The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), repealing the Indian Penal Code (45 of 1860).

16 (1) Whoever for the purpose of exploitation recruits, transport, harbours, transfers, or receives a person or persons, by - (a) using threats; or (b) using force, or any other form of coercion; or (c) by abduction; or (d) by practicing fraud, or deception; or (e) by abuse of power; or (f) by inducement, including the giving or receiving of

Laws Relating to Trafficking of Persons

Laws dealing with this serious criminality are numerous[17] which are briefly dealt with hereinafter.

The Constitution is our supreme law. Article 23 prevents trafficking in persons, Begar and other forms of compulsory labour. Similarly, Articles 39E as well as 39F also contains provisions dealing with this issue. These provisions emphasize that people's well-being and endurance are respected, and that no one is made to work against their age or strength due to lack of money and that childhood and youth should be protected against exploitation.[18] Constitution, in Part III, hits out at forced trade of persons.[19]

The Immoral Traffic Prevention Act, 1956[20]

It is a special legislation that provides punishment for keeping a brothel or allowing premises to be used as a brothel, penalty for surviving off the proceeds of prostitution, obtaining, coercing, or enlisting someone for the purpose of prostitution, and keeping someone in a place where prostitution is practiced, seducing/soliciting for purposes of prostitution, seduction in custody. This Act provides for specialized investigating officers, enhanced powers to make searches without the requirement of the search warrant, rescue of the person, closure of brothel, provision of protection homes, establishment of special courts among the other provisions.

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payment or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harbored, transferred or received, commits the offence of trafficking".
Explanation 1—The expression "exploitation" shall include any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, beggary or forced removal of organs.
Explanation 2—The consent of the victim is immaterial in determination of the offence of trafficking.
(2) whoever commits the offence of trafficking shall be punished with rigorous imprisonment for a term which shall not be less than seven years, but which may extend to 10 years, and shall also be liable to fine.
(3) where the offence involves the trafficking of more than one person, it shall be punishable with rigorous imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life, and shall also be liable to fine.
(4) where the offence involves the trafficking of a child, it shall be punishable with rigorous imprisonment for a term which shall not be less than 10 years, but which may extend to imprisonment for life, and shall also be liable to fine.
(5) where the offence involves the trafficking of more than one child, it shall be punishable with rigorous imprisonment for a term which shall not be less than 14 years, but which may extend to imprisonment for life, and shall also be liable to fine.
(6) if a person is convicted of the offence of trafficking of a child on more than one occasion, then such person shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.
(7) when a public servant or a police officer is involved in the trafficking of any person then, such public servant or police officer shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

[17] Constitution of India, 1950; Information Technology Act, 2000; Human Organ Transplantation Act, 1994; Bonder Labour (Abolition and Prohibition) Act, 1976; Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989; The Juvenile Justice (Care and Protection) Act, 2015; Protection of Children from Sexual Offences Act, 2012; The Transgender Persons (Protection of Rights) Act, 2019 etc.

[18] Furthermore, articles 14, 15(3), 19 and 21 are also important with regards to giving justice to the victims of human trafficking.

[19] *Francis* v. *Union Territory*, AIR 1981 SC 746, it was held that the right to life under article 21 should be taken to mean the right to live with human dignity.

[20] IMTP Act was enacted pursuance of the International Convention i.e. International Convention for the Prevention of Immoral Traffic signed at New York on 9th May 1950.

The Bonded Labour System (Abolition) Act, 1976

Keeping in mind the age-old practice of buying poor labour and holding them as bondage till the financial debt is settled, BLA, 1976 was enacted. The primary objective of this Act was to make adequate provisions for eradicating such a menace from Indian setup and also to ensure that persons who fall prey to such practices are rehabilitated.

The Transplantation of Human Organs and Tissues Act, 1994

This law has been enacted to curb commercial trading in human body parts for monetary gains. The legislation aims to regulate. The law addresses registration of hospitals that remove human organs and tissues. It also provides a number of offenses and associated penalties for illegal acts under this law.

The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989

POA has been brought on the statute book to protect communities which have been vulnerable historically like SC/ST communities. The Act lays down that if a non-member of ST/SC community compels a member of one of these groups to perform Begar or bonded labor other than any mandatory work imposed by government dealing with public purposes, such person/s shall be punished as per this law.

The Juvenile Justice (Care and Protection of Children) Act, 2015

JJ Act has been enacted to safeguard minors who have turned delinquent and also minors who need care.[21] JJ Act has exhaustively dealt with minors who need protection of law.[22] Therefore, children who are held bondage, forced into begging, living on streets, or residing with a person who is either the child's parent or guardian and who has harmed, exploited, abused, or neglected the child or has threatened to do so, a child who is missing or has run away, a child whose parents cannot be located despite making a sincere effort, a minor who has been, is being, or is likely to be abused, tortured, or exploited for the purposes of sexual abuse or unlawful acts etc are all included within the ambit of law. This law calls for the state government to establish welfare committees in this regard. Welfare committees are assigned particular duties as well as obligations concerning trafficked children, such as assisting sexually violated youngsters to get back on their feet.

In *Horilal* v. *Commissioner of Police*, *Delhi*,[23] the Supreme Court gave detailed guidelines to address the plight of children who go missing, including registration of FIR and creating institutional support mechanism for tracing them.[24]

With reference to child victims of trafficking, section 74 of the JJ Act is also important as this deals with prohibition regarding disclosing the name and other particulars about children. Section 75 penalizes cruelty to child.[25] Section 76 punishes the employment of minors for

[21] JJ Act takes into consideration the standards prescribed in the Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of the Juvenile Justice, 1985, the United Nations Rules for the Protection of Juveniles Deprived of the Liberty, 1990, Hague Convention on Protection of Children and Cooperation in respect of Intercountry Adoption, 1993 and other related international instruments.

[22] According to this law, a child in need of care and protection also includes a child who is discovered in violation of labor laws, begging, living on streets etc.

[23] W.P. (Crl.) 610 of 1996.

[24] Also refer to sections 32, 33, 39, 40, 41, 42 of the Juvenile Justice (Care and Protection of Children) Act, 2015

[25] Section provides that whoever having the actual charge of, or control over, a child, assaults, abandons, exploits, exposes or wilfully neglects the child or causes the child to be assaulted, abandoned, abused, exposed and treated in a manner likely to cause a child unnecessary mental or physical suffering shall be punishable with imprisonment for a term which may extend to 3 years or with fine of one lakh rupee or with both.

collecting alms.[26] Section 77 penalizes the administration of intoxicating liquor or drugs to a child. Section 81 deals with sale and procurement of children for any purposes.[27] Further, Section 83 provides penalty for exploitation of minors by militant groups.[28] Section 84 deals with offence of kidnapping and abduction of a child. Section 85 deals with the offence committed on disabled children. Section 87 deals with the abetment of offences under this Act. Inter country adoptions are also misused by human traffickers.[29]

The Information and Technology Act, 2000

IT Act deals with crimes committed using technology. Cyber pornography is illegal under section 67, which also punishes sending offensive content online. Section 67A addresses the penalties for publishing or sending electronically any content that includes sexually explicit acts, etc. Section 67B addresses the penalties for posting or sending electronic content that shows youngsters engaging in sexually explicit behaviour, etc.

The Protection of Children from Sexual Offences Act, 2012

This is a gender-neutral legislation[30] which deals with crimes of sexual assaults, aggravated sexual assaults, sexual harassment and pornography. A special mechanism is created for investigation, enquiry and trial of cases dealing with sexual assault on children by this legislation.

The Transgender Persons (Protection of Rights) Act, 2019

This is a welfare law which aims to prohibit discrimination against the transgenders and promotes inclusivity.[31] Section 18 addresses offenses and punishments. Apart from any government-imposed mandatory service for public objectives, it punishes forcing or luring a transgender person to engage in forced or bonded labor. Damage/injury, putting a transgender's life, safety, health, well-being-whether physical or mental-in jeopardy, a tendency to commit activities such as causing bodily, sexual, verbal, emotional, or monetary abuse, are punishable by maximum of two years in jail and a fine.

Importantly, the BNS, 2023 section 2(10) has refined the definition of gender to make it inclusive.[32]

Comparative Analysis of the Relevant Provisions dealing with Human Trafficking under IPC, 1860 vis-a-vis BNS, 2023

- In IPC, 1860, S. 370 dealt with trafficking of person, in BNS, 2023, S. 143 deals with similar offence. BNS by way of Explanation 1 'begging' is also added. Remaining ingredients are similar in both.

[26] It says that whoever employs or uses any child for the purpose of taking or causes any child to beg shall be punishable with imprisonment for a term which may extend to 5 years and shall also be liable to a fine of one lakh rupees: provided that if for the purpose of begging, the person imputes or maims the child, he shall be punishable with rigorous imprisonment for a term not less than seven years but which may extend to 10 years and shall also be liable to a fine of Rs.5 lakhs.

[27] This Section provides that any person who sells or buys a child for any purpose shall be punishable with rigorous imprisonment for a term which may extend to 5 years and shall also be liable to a fine of one lakh rupees: provided that where such offences are committed by person having actual charge of the child, including employees of a hospital or nursing home or maternity home, the term of imprisonment shall not be less than three years and may extend to 7 years.

[28] Section 83 deals with offence of using of children by militant groups and punishment can be rigorous imprisonment for a term which may extend to 7 years and fine of five lakh rupees.

[29] *Refer to Laxmikant Pande* v. *Union of India*, AIR 1984 SC 469

[30] *Sakshi* v. *Union of India*, AIR 2004 SC 3566

[31] *NALSAR* v. *Union of India*, (2014) SCC 438

[32] Gender is defined to mean "the pronoun "he" and its derivatives are used of any person, whether male, female or transgender"

- S. 370A IPC dealt with the offence of exploitation of a trafficked victim, in BNS it is S. 144 and the expression 'child'[33] has substituted 'Minor' which was used in the S. 370A IPC. S. 144 of the new law has enhanced the penalty from 5 years to 7 years.
- S. 371 IPC dealt with the crime of habitually dealing in slaves. Under BNS S. 145 penalizes this crime.
- S. 372 IPC dealt with the crime of 'sale of minor for purposes of prostitution, etc.', S. 373 dealt with 'buying minor for purposes of prostitution'. BNS, S. 98 deals with the selling of a child for the purposes of prostitution. While comparing the two provisions, this is reflected that in the new criminal law the word 'minor' is substituted with the word 'child'. Importantly, no change has been made in the penalty for this crime.
- S. 373 of IPC prohibits trade of children for commercial purposes. BNS, S. 99 criminalizes the offence of buying child for purposes of prostitution, etc. In the old colonial law under S. 373 no minimum mandatory punishment was provided. In contrast, BNS has laid down harsh punishment by providing for minimum mandatory imprisonment and also by increasing the maximum punishment.[34]
- S. 374 IPC criminalized unlawful compulsory labour. BNS S. 146 criminalizes it.
- IPC, S. 366A dealt with the offence of procuration of minor girl. Similarly, S. 366B dealt with the offence of importation of a girl from another country. BNS S. 141 now deals with importation of a girl or boy from intercountry.
- S. 372 IPC dealt with selling minor for purpose of prostitution. In BNS S. 98 criminalizes selling child for purposes of prostitution etc. No change has been made in the punishment under BNS.
- S. 111, BNS deals with organized crime and trafficking of persons and also trafficking of persons for sex work is included. It is noteworthy that IPC did not contain any provision with regards to the organized crime of this kind.

Justice to Victims of Trafficking

Indian judiciary acts as a true guardian of liberties. The Constitutional Courts have played a significant role in protecting the rights of victims. The Apex Court,[35] considering article 23's breadth and ambit, has specifically targeted "traffic in human beings," "begar," and other types of forced labor wherever they may be found.

The Apex Court[36] also dealt with the issue of education for children born to prostitutes and ordered constitution of a Committee[37] to look into human trafficking to suggest ways and means to deal with the problem. Similarly,[38] the Apex court took cognizance of the issues concerning the child victims of sexual abuse and the lack of sensitivity in the attitude of the authorities. In the case of *State of Rajasthan* v. *Om Prakash*,[39] The court underlined once more how important it is for judges to handle cases

[33] Section 2(3) BNS, 2023 defines "child" as any person below the age of 18 years.
[34] Section 99 provides minimum mandatory punishment of seven years and maximum punishment prescribed is 14 years.
[35] *People's Union for Democratic Rights* v. *Union of India*, AIR 1982 SC 1943.
[36] *Gaurav Jain* v. *Union of India*, AIR 1997 SC 3021.
[37] Mahajan Committee.
[38] *Laxmikant Pande* v. *Union of India,* (1984) 2 SCC 244.
[39] AIR 2002 SC 2235.

of child rape and sexual abuse with tact. Further, the top Court gave concrete suggestions regarding trials for sexual abuse or rape of children.[40] Again, the Apex Court[41] dealt with the matter while referring to articles 15(3), 21, 21A, 23 and 45 of the Constitution with regards to children who were sexually abused and violated.

Similarly in the case of *MC Mehta* v. *State of Tamil Nadu*, and others,[42] the court gave comprehensive recommendations for the safety of children working in hazardous industries. High Courts have also,[43] considered the menace of human trafficking, prostitution and their implication on the society. Again,[44] the constitutional court stressed the need for a specialized agency (anti-human trafficking unit) for probing forced commodification of sex. Such an FIR registered with the local police station must, within 24 hours be transferred to the specialized agencies for further investigation. Again, the Apex Court,[45] directed federal and provincial governments to take action against human trafficking, rescue and rehabilitate victims, and prosecute perpetrators.

Similarly, Apex Court[46] protected interest of bar dancers and their right to job for earning a living by upholding the Mumbai High Court's decision of quashing of the order banning dance in bars under a state law.[47] Discontinuance of bar dancing had led to loss of employment of a large number of bar dancers and some of them were forced into prostitution merely to survive as they had no other means of survival. The Supreme Court observed - "in our opinion it would be more appropriate to bring about measures which shall ensure the safety and improve the working conditions of persons working as bad dancers".

The Way Forward

The US report has pointed out that despite various efforts by the government of India and states, trafficking has not been adequately dealt with.[48] The major findings of this report are that the acquittal rate in trafficking cases was 84% in 2021. In February 2022, the MHA reported that 696 of India's 732 districts had AHTUs. To cope up with this, various other measures have been initiated including the steps taken by NCW.[49]

Suggestions

- The need of the hour is to bring the curtains down on human trafficking. International cooperation and use of mutual legal assistance treaties is imperative to safeguard the interests of the foreign victims from the other countries.
- Investigation needs to be done at source, transit and destination points. Investigating officers need to pin point the role played by predators, procurers, recruiters, supporters, transporters and exploiters of the victims and even the role of the family members of the victims The investigators must collect necessary information from the source of trafficking so that the local gang members who are responsible for recruitment or

[40] *Sakshi* v. *Union of India*.
[41] *Childline India Foundation* v. *Allan Johut Walers*, 2011 Cr.LJ 2305 (SC)
[42] AIR 1997 SC 699.
[43] *Tara Das* v. *State of Tripura*, Gauhati High Court, 2008; *Sahyog Mahila Mandal and others* v. *State of Gujarat,* (2004) 2 GLR 1764.
[44] *Ahid Mandal* v. *State of West Bengal*, Calcutta High Court, 2021.
[45] *Prajwala* v. *Union of India, Writ Petition* (c) No. 56 of 2004.
[46] *State of Maharashtra and another* v. *Indian Hotel and Restaurant Association and others*, AIR 2013 SC 2582.
[47] See Also, *Anuj Garg* v. *Hotel Association of India*, AIR 2008 SC 663.
[48] Report of the US Department of State, 2023 "Trafficking in Persons Report: India".
[49] In April 2022, the National Commission for Women initiated a unit to improve anti-trafficking responses, by law enforcement agencies and capacity building of Anti-Human Trafficking Units, the NIA in cross-border trafficking cases, including those involving Bangladeshi and Sri Lankan nationals.

engagement of a victim can be traced. Similarly, thorough investigation in destination places helps in determining the identification of groups, nature of exploitation, places of exploitation, property and assets of the gang members. Parallel financial investigations into money laundering should also be done proactively.

- Information sharing, inter-agency coordination, Intelligence sharing, maintaining database on traffickers and exploiters, involving NGOs for intelligence collection shall be useful in this clandestine offence. It is important to note that rescue in one case may provide intelligence for other crimes.
- Repeated interviews at several levels by the police officers should be avoided to prevent re-victimization.
- The investigating officer should incorporate the grave sections of the laws to prevent easy bail to the accused person. The police officer must register cases under the Immoral Traffic (Prevention) Act and other relevant laws as discussed in this research paper to ensure stringent punishments to the human traffickers. This apart, timely rescue operation is also important.
- Role of NGOs need to underscored and they should be allowed access and assistance at the police stations. The victims and the accused persons must be kept separately.
- There is an urgent requirement for scientific gathering of evidence including registers, tickets, hotel details, client details, medical records etc.
- The laws on immigration should also be strengthened to prevent migrant smuggling.
- Last but not the least 4 R's must always be remembered **-Rescue, Rehabilitation, Reintegration, Repatriation.**

Transforming Criminal Justice- International Implications

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Abstract

The success and failure of any Criminal Justice System in any country is largely dependent on the adaptation of the best possible practices of the investigating techniques and the appreciation and admissibility of the modern pieces of evidence by the judicial officers with a brave-heart. The modern society is driven by the technological advancements and new forms of scientific and forensic evidence. The change in the legislation of one country is the basis of the change in international law. The laws in one country may become the trend setters to the other countries and will develop a very strong international acceptance and implication in international law. This article is a small attempt to capture the glimpse of the modern scientific and forensic evidence in the criminal justice system in the light of the new legislations in India.

Keywords: *Criminal Justice System, Scientific and Forensic Evidence, International Implications, Criminal Procedure (Identification) Act, 2022, Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita, Bharatiya Sakshya Adhiniyam*

Introduction

Development is the key facet of Indian polity and economy in the last decade. The spectrum of the development has a constant impact on the various sectors of prime importance on the governance and law and order as well. The best and the potential impact is on the way the legislations have been seen and implemented prior to last decade and how they are and will be transformed in the coming times. The best example is the amendment of the Criminal legislations in India. The newly drafted and implemented Bharatiya Nyaya Sanhita, 2023, Bharatiya Nagarik Suraksha Sanhita, 2023 and Bharatiya Sakshya Adhiniyam, 2023, will see the change in a way in which the nation wanted it to be. These laws implemented on 1st July, 2024 will see a great transformation in terms of easy and clear mandate for the victim centric procedures, use of technology, not only in terms of improving the capability of the investigating agencies but also cracking the latches in the court proceedings by implementation of the video conferencing and other information communication based systems in day to day working of the courts and overall legal system.

The wholistic difference in the way a national law of the country is implemented always brings up some or the other difference in the international law and implementation. The

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smallest change in the criminal justice system always has a long-lasting implication on the international law.

Some of the major transformations

The international implications through the transformation in the criminal justice system can be seen with the examples of legislations and decisions of the Apex courts around the world, in some of the key transforming cases. The fundamental transformations in India have been brought through a law for the purposes of the identification of the criminals. The Criminal Procedure (Identification) Act, 2022 is passed in India with the intent of simplifying the identification of the criminals, especially in the cases where the offenders have been habitually involved in the commission of crimes. The attempt is made to cut down the time and efforts of the investigating agencies to prove the identity commission of the crime in subsequent cases by implanting the method of collection of DNA and other samples and recording it for future cases and trials as evidence.

The similar attribution of forensic evidence like DNA and appreciation of such evidence is seen in many countries in Europe. The marshalling and appreciation of DNA and other forensic evidence is at large scale use in United States of America. In the case of Maryland v. King in USA[2], the Supreme Court upheld the constitutionality of the State of Maryland's arrestee database on grounds that states can reasonably require arrestees to give DNA for identification purposes, just as they are forced to give fingerprints. Even though, the Fourth Amendment in the Constitution of US is becoming a ground of contest in US Courts. The Fourth Amendment is potentially giving challenge to DNA evidence in court in criminal cases. The Fourth Amendment in US Constitution is protecting the individuals from 'unreasonable searches and seizures'. No doubt the judicial interpretations will be establishing the law but majority of the courts in US and the different state courts are not undoing the effect of the Fourth Amendment. It will be truly interesting to look at the developments in the US through various judgments and comparatively in the Criminal Procedure (Identification) Act, 2022 in India.

Other than that, the methods of investigation have also changed. The dependency over the technical and forensic evidence has increased and is allowed by the courts as well as under the various provisions of the new legislations and court procedures through decisions of the apex courts. The changes in investigation mechanism are potentially demanding as the criminals are changing the methods of commission of crime as they are using the modern information communication technology and devices as a tool or as a target while commission of crime. The investigation agencies have to accordingly transform the investigation techniques and provide the evidence in the court, which can bring about the truth in the matter before the court.

The major transformation is seen in forensic investigation in the recent past. The scientific evidence in the form of DNA, blood samples, saliva, other bodily fluids and extracts can be useful piece of evidence. The investigating agencies have to be well acquainted with the scientific techniques involved in collection, recording and preserving the scientific evidence as well as producing it before the court. The modern modes of information communication technology pose a very big challenge regarding cyber crimes and investigation of digital devices and networks has increased at a paramount level. The investigating agencies are expected to keep pace with technology as that would be the

[2] 569 U.S. 435 (2013)

only way to succeed in technological investigation in modern times.

Other than the capacity building exercises for the investigating agencies, there has to be an equivalent conducive legal environment created by proposing the changes in the existing legislations and bringing out the provisions in the established legislations which could inculcate the scientific and forensic adaptation in the legal processes in the country as well as the whole world.

The Criminal Procedure (Identification) Act, 2022

The Criminal Procedure (Identification) Act, 2022 is a recent legislation that has been met with both praise and criticism. The Act empowers law enforcement agencies to collect certain identifiable information from a wide range of individuals, including convicts, persons arrested for an offence, and persons detained under any preventive detention law. The information that can be collected includes fingerprints, photographs, iris and retina scans, biological samples, and behavioural attributes.

The Act was passed in response to the increasing number of crimes in India. The government believes that the Act will help law enforcement agencies to identify and apprehend criminals more easily. However, the Act has been criticised by some for being an invasion of privacy. It is too early to predict the success and failure of this legislation before it is actually implemented in practice.

The Criminal Procedure (Identification) Act, 2022 has sown the seed of transformation of criminal justice system in India and it is in line with the technological advancements around the world. The handling of habitual criminals in light of the provisions of this law, will bring in a major transformation in India as well as abroad.

Forensic Evidence

The criminal justice system is heavily dependent on the material fact of what is collected as evidence during investigation. As the expectation of the law is to prove the case beyond any doubt, it creates a huge burden on the shoulders of the investigating agencies. The forensic evidence tries its level best to reduce the burden a bit. The major transformation is seen around the world in terms of scientific and forensic investigation with proper and modern tools to establish forensic evidence.

The difficult job of converting relevant fact into admissible fact can be made easy with accurate knowledge of evidence law, a strenuous investigation and absolute presence of mind in cross examination. But one must not forget that the outcome of the case is heavily dependent on what is brought before the court as material evidence. That is where, forensic science plays a key role.

Take into consideration, Princess Lady Diana's accidental death, A UK royal citizen with an Egyptian boyfriend crashed in the French tunnel in a German car with a Dutch engine driven by a Belgian driver, who drank Scotch (Scottish) whisky, followed by Italian paparazzi on a Japanese motorcycle and finally treated by an American doctor with Brazilian medicines. Only a lawyer and a forensic scientist can see a classic international forensic picture in narration of the accidental death of Lady Diana. For an ordinary person, it is an accidental death only. This is the difference between knowing facts and forensically knowing facts.

If investigation team takes forensics lightly, the evidence treats them ruthlessly. For example, in Arushi Talwar and Hemraj murder case, if it would not have rained, which washed the vital forensic evidence away and the investigation team would have been more

active and called the forensic team in time, definitely the result would have been different. The failure in investigation and forensic analysis of facts foils the result of any criminal case.

The want of any technical evidence due to volatile and incomplete statements and narrations of the witnesses and in some cases absence of witnesses makes it necessary for investigation team to rely heavily on forensic science. The development of various scientific techniques for identification and investigation are capable enough to reach the final conclusion in most of the matters. These forensic techniques gradually developed in Indian Legal System.

Use of Forensic Evidence

a) Identity of corpus

Sometimes, it may happen in some serious crimes such as murder that the deceased faces inhuman and unimaginable torture and during the attempt of destruction of evidence by the accused resulting into non-identification of the deceased. In such situations, it becomes difficult to identify the body of the deceased or there is no trace of the body itself. In such cases, the biological analysis in terms of blood stains, DNA analysis, fingerprints come to the rescue of the investigators in establishing the evidence or even in identifying the victim.

One such example can be cited of Tandoor Murder case.

i) Tandoor (Naina Sahani) Murder Case[3]

Some sensational murder cases which shattered the nation were also solved because of the proper use of forensic evidence. One such early case in point of time was Naina Sahani Murder case which is also known as Tandoor Murder Case. In this case, Sushil Sharma killed his wife Naina Sahani by shooting 3 bullets due to his suspicion that his wife had an extra marital affair with one Matloob Karim who was Naina Sahani's classmate and Sushil Sharma's fellow Congress Worker. After the murder, Sushil Sharma drove the body of the deceased from his residence to Bagiya Restaurant and then with the help of restaurant owner Keshav Kumar attempted to burn her body in tandoor (the cooking and baking fire arrangement) of the hotel.

Police recovered charred body from the tandoor and blood stained clothes and revolver of the accused. The investigation team sent the blood stained clothes and revolver to Lodhi Road Forensic Laboratory and later on, the investigation team also collected the blood samples of Harbhajan Singh and Jaswant Kaur, who were parents of deceased, Naina Sahani and sent it to Hyderabad Forensic Laboratory for DNA test.

According to the Laboratory report, it was proved that the charred body was of the offspring of Harbhajan Singh and Jaswant Kaur, which was definitely of the deceased Naina Sahani. As all the forensic evidences matched, the court found Sushil Sharma guilty in Tandoor Murder Case.

ii) In Bomb blast cases and decomposed corpuses

In bomb blasts and terrorist attacks, the biggest challenge is to identify the body of the deceased. In such cases, DNA profiling and blood samples help in determining the identity of the deceased. In Mumbai Serial Bomb Blasts in 1993, 2006 and 2011, the civilian casualties were huge in number and the body parts of the victims were spread in the area where the bomb blasts happened, it became difficult for the investigation team to take a count of the people killed in the blasts. To ascertain the number of people killed the

[3] Sushil Sharma v. Delhi Administration, 1996 CriLJ 3944

blood samples and the other forensic evidences were collected to identify the deceased.

Even in former Prime Minister Mr. Rajiv Gandhi's assassination which took place in Sriperumbudur in the state of Tamilnadu in May, 1991, the intensity of the bomb blast was so high that it took several hours to figure out exact number of people who died in the blast. In Mumbai Blasts and in Rajiv Gandhi's assassination case, the forensic evidence played a vital role in identifying the victims.

In the latest incidence of Sheena Bora murder case where accused were the parents of the deceased and were a TV channel owners, Indrani and Peter Mukharjee, the body of the deceased was found to be decomposed in the forests of Western Ghats in Konkan region of Maharashtra. The identification of the body of the deceased was through DNA testing.

b) Paternity Disputes

The cases of divorce involving the paternity disputes are in huge increase post Covid-19. The major family disputes having the issue regarding the paternity of the children can only be settled through the DNA profiling and other medically and scientifically proven tests. These tests are highly becoming major source of evidence around the world. There is a popular legal sanctity for such paternity tests and DNA Profiling to establish the paternity of child in many countries around the world.

In Rohit Shekhar v. Narayan Dutt Tewari[4], Delhi High Court issued directions against the Respondent to prove the paternity through DNA Test. After the Delhi High Court passed an order against Narayan Dutt Tiwari to undergo DNA test for determining paternity, he filed an appeal in Supreme Court claiming that there will be public humiliation if he is mandated to undergo DNA test for paternity. The Supreme Court held that there will not be any public humiliation as the DNA test report will be provided in a sealed envelope[5].

c) Cyber Forensics

Computer Frauds, Forgery, Cybercrimes, Debit and Credit Card Frauds are becoming common day by day. The investigation in such cases is heavily dependent on the expertise in the field of information technology and computer software. The role of the investigators and specified agencies such as cyber cells and Computer Emergency Response Team is increasing by leaps and bounds in the field of cyber forensics. The world has come closer in terms of computer network, but at the same time it has challenged our humanity to the core. The major advantage of the cotemporary criminals is the knowledge of technology for swift commission of crime as well as precise and clean destruction of evidence. Anything and everything under the sun, is having a potential cyber threat nowadays. The use of the smart gazette as non-removeable handcuffs is seen in practice in country like Germany where the convicts who are taken to community service or as a part of their daily duties to clean the environment and public places is the best example of usage of technology in criminal justice system. Such electronically compact GPS tracking with the handcuffs is useful in tracking the criminals not only within the jail premise but also when they are on their community service duties.

Our smart phones and social networking are adding tremendous scope for breach of privacy and individual crimes. Usage of mobile trackers for finding the missing individuals is quite common in India and around the world. In many criminal cases tracking of the mobile devices leads to many

[4] AIR 2012 Del. 151
[5] Narayan Dutt Tiwari v. Rohit Shekhar, (2012) 12 SCC 554 (Appeal in Supreme Court)

conclusive and assertive proofs. Techniques such as tracking IP Addresses and Mac Ids are utilized for finding locations of the criminals and terrorists by investigative agencies. As claimed by many, future warfare will be cyber warfare so digital forensic holds the key for future national security issues in India and abroad.

Sting operations are validated in India due to the decision of the Honourable Supreme Court of India in the case of Peoples Union for Civil Liberties v. Union of India[6], which upheld the constitutional validity of Section 5 of the Telegraph Act, 1885 which allows monitoring and interception as well as surveillance of telecommunication devices for the purposes of investigation and national security. The same is the position in terms of validity of the Sting operations around the world in many countries. The evidence from Sting operations is a reality in many countries. If not admissible, it is accepted as a relevant evidence internationally.

d) Ballistic Evidence

The use of arms and the proof of it, is the most factual evidence in criminal trial. Sometimes the offence involves the use of weapons and concealment of weapons as well. In such circumstances, the use of arms has to be proved with the help of expert evidence in the form of testimony of ballistic expert.

In the recent Gauri Lankesh murder case, the forensic experts have established the similarity of bullets and use of same gun in the killings of journalist Gauri Lankesh and Kannada author M.M. Kalburgi. The ballistic science has travelled so far in the recent past right from the usage of specific arms to the time of firing from the specific arms can be proved forensically in the criminal trial.

In famous 1999 Murder case of Jessica Lall in Delhi, the accused Manu Sharma was acquitted because there was no conclusive proof that the bullet was shot from his revolver. Subsequently, on the direction of Delhi High Court the case was filed against the ballistic expert Prem Sagar Manocha for perjury. The Ballistic Expert was acquitted by the Supreme Court for the want of conclusive evidence against him to help Manu Sharma[7].

The standards of ballistic evidence are almost common around the world. In India, currently the import of the foreign weapons for the personal use with the license is completely prohibited. The gun sellers are either using old and second hand foreign made guns or they are made and sold in India. The acceptability of ballistic evidence is well settled internationally and there is no adverse opinion in admissibility of the ballistic evidence in any legal system around the world.

Legality of Forensic Evidence

The Forensic investigation is rested on to questions as to its legality and rights conferred to individuals. Article 20(3) of the Constitution of India guarantees an individual of fair trial by expressing that no person shall be compelled to give any self-incriminating statement. But in State of Bombay v. Kathi Kalu Oghad[8], the Supreme Court held that giving thumb impression, specimen signature, blood sample, hair or semen by the accused does not amount to "being a witness" under Article 20(3) of The Constitution of India.

In Selvi and others v. State of Karnataka[9], the Supreme Court held that compulsory involuntary administration of Narco-analysis, polygraph examination and the Brain

[6] AIR 1997 SC 568
[7] AIR 2016 SC 290
[8] AIR 1961 SC 1808
[9] AIR 2010 SC 1974

Electrical Activation Profile violates the right against self-incrimination enumerated under Article 20(3) of the Constitution of India as the subject does not exercise conscious control over the responses during administration of the test. Article 20(3) is not only a trial right but its protection extends to the stage of investigation. Same is the status of the position in criminal justice system in many countries around the world.

The Hon'ble Supreme Court also held that provision of Section 27 of Indian Evidence Act, 1872 (under Section 23 of the Bharatiya Sakshya Adhiniyam) providing admissibility of Confessional statements are not within the prohibition of Article 20(3) of the Constitution unless compulsion has been used in obtaining information and any information or material that is subsequently discovered with the help of voluntary administered test results to be admitted.

Recently, in K.A. Puttaswamy v. Union of India[10], the Supreme Court held that the right to privacy is a fundamental right within the meaning of Article 21 of the Constitution of India. But while holding right to privacy right as fundamental right, Supreme Court carefully emphasized that no investigation under any provision of the law for the time being in force will affect the privacy.

This is done with a lot of caution and keeping sanctity of the investigation into consideration. Otherwise, the accused will take all the luxury of non-compliance of investigation procedure for his own advantage and will disapprove the technical evidence against him.

The Code of Criminal Procedure, 1973 was amended in 2005 to enable the collection of hosts of medical details from the accused persons up on their arrest. Since 2005, Section 53 of the Code of Criminal Procedure, 1973 (under Clause 183 of the Bharatiya Nagarik Suraksha Sanhita, 2023) provides that accused persons may be subjected to medical examination upon their arrest if there are reasonable grounds of believing that such examination will afford evidence as to crime and such medical examination may include blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and figure nail clippings by the use of modern scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in particular case.

However, this amendment is applicable under Section 53 of the Code of Criminal Procedure, 1973 (under Clause 183 of the Bharatiya Nagarik Suraksha Sanhita, 2023) to only Offence of Rape under Section 376 of the Indian Penal Code, 1860 (under Section 63 of the Bharatiya Nyaya Sanhita, 2023). This provision and the amendment are not applicable to complaint cases, and it does not enable the complainant in any other way.

Section 164 A of the Code of Criminal Procedure, 1973 (under Section 184 of the Bharatiya Nagarik Suraksha Sanhita, 2023) provides for the medical examination of the woman who is alleged victim of rape within 24 hours and such examination includes DNA Profiling of the woman. Now the practically difficult questions are that how many matters get reported to investigation within 24 hours of commission of rape? And how many medical practitioners are competent to collect DNA? And how many laboratories, centres or hospitals we have to facilitate DNA profiling in such cases?

Section 45 of the Indian Evidence Act, 1872 (under Section 39 of the Bharatiya Sakshya Adhiniyam, 2023) provides for the opinions of expert. The said provision gives power to

[10] AIR 2017 SC 4161

the court to call upon any expert of a specific science including that of Forensic Science for the opinion in any particular case. It is enriching the court with substantial help in the matters where the court or the judge is not an expert of any science or forensic science per se. The said provision envisages that Expert Opinion is not binding on the court as the "expert" of any science is an expert of that science but judge is an expert of the facts of the case.

But the major challenge is of the fact that the expert evidence is not binding on the court. The expert opinion must pass the test of corroboration of the other witnesses and direct evidence. Section 45 of the Indian Evidence Act, 1872 (under Section 39 of the Bharatiya Sakshya Adhiniyam, 2023) makes it weak evidence and so the courts take the opinions of the experts in the light of the other evidences and facts which are brought before it.

In the case of State of Maharashtra v. Damu Gopinath Shinde,[11] the Supreme Court held that without examining the expert as witness in the court, no reliance can be placed on the opinion alone. Mere assertion without mentioning the data or basis is not evidence, even if it comes from an expert.

Unlike India, many other countries, including United States of America and many countries in Europe, have difference in law. There is more acceptance and adaptation of the scientific and forensic evidence, not only in the investigation but also in the judicial process. The terminology of 100% science is the base for the investigation and trial in those countries. It means that the well-established scientific and forensic evidence is preferred more in the investigation as well as the trial by the investigating agency as well as the judicial officers. This is a key difference in India and western countries. The attempt is made by the enactment of the Criminal Procedure (Identification) Act, 2022 and the new legislations in the form of the Bharatiya Nyaya Sanhita, 2023 and Bharatiya Nagarik Suraksha Sanhita, 2023 and Bharatiya Sakshya Adhiniyam, 2023 to bridge the gap as much as possible.

Transformation by way of New Criminal Laws

The new criminal laws have come up as a change that could lead to substantial difference in the way the investigation, especially search and seizure will be done and the procedure in specific offences. For example, under Section 53 of the Bharatiya Nagarik Suraksha Sanhita, 2023 the provision is made for additional medical examination. This will suffice the purpose in heinous crimes where the investigation agencies cannot rely only on initial medical examination, as the specific type of medical examination may be required to prove the guilt of the accused. Previously, the permission of the court was the only recourse to the investigating agencies. Similarly, under Section 105 of the Bharatiya Nagarik Suraksha Sanhita, 2023, Videography of search and seizure process, including item list preparation and signing by witnesses, made mandatory. The challenges as to the procedure of search and seizure and foul play in the same can be addressed with the help of the digital records of the search and seizure procedure. Another important provision under Section 176(3) of the Bharatiya Nagarik Suraksha Sanhita, 2023, has turned the tables in investigation and collection of evidence. Under the said provision the Forensic experts are mandated to visit crime scene for offences punishable with 7 years or more. No doubt these changes will

[11] AIR 2000 SC 1691

add on the burden of the investigation agencies and the state to provide infrastructure, but looking at the developments in the field of forensic science and the legal procedure by virtue of the amendments in criminal laws, the transformation in the criminal justice system, seems possible.

Currently, India is in the transformational stage and all the stakeholders are in the stage of observation regarding the success and impact of the new legislations which might bring in a sea change in which the criminal justice system will work in India in the light of the new legislations.

Conclusion

These changes will definitely bring in the major implications in the overall implementation of the criminal law in India and abroad. The adoption of the forensic techniques and creating the legal provisions in alignment with the needs of investigation to prove the case against the accused is the need of the hour. The transformation of criminal justice in any country or even in the entire world will happen and will be a continued subject matter, till the time there is a continuous change in the use and modality of the technology. in the light of the provisions of the Bharatiya Nyaya Sanhita, 2023, Bharatiya Nagarik Suraksha Sanhita, 2023 and Bharatiya Sakshya Adhiniyam, 2023 India as a nation has make a remarkable inroad in transforming the criminal justice system, which is more victim centric in nature, together with the imposition of provisions and procedures which are inculcating the scientific and forensic techniques in real practical world.

Victim Centric Approach in the New Laws

Ms. Aastha Tiwari[1]

Abstract

Traditionally, the criminal justice structure has been tilted towards the accused. The phrase that "it is better to free ten guilty men than convicting one innocent man" shows this inclination. The strict standard of proving the guilt of the accused "beyond reasonable doubt" also favours the accused. However, recent rulings by India's Apex-Court have recognized the crucial role of victims in criminal proceedings, granting them extensive rights from investigation to appeal. This recognition finds expression in recent criminal laws such as the Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita, and Bharatiya Sakshya Adhiniyam of 2023, where the term "Nyaya" encompasses the accused, victims, and witnesses alike. Courts have underscored the struggle for victim rights, understanding that a legitimate grievance cannot be side-lined, with victims now empowered to actively engage in legal processes. This paradigm shift from victimology to actual victim justice is imperative. The recent overhaul of criminal laws reflects this shift, emphasizing victim participation, access to information, and ancillary rights. This article critically examines the evolution of victim justice, from past to present, and anticipates its trajectory into the future.

Keywords: *victim, criminal laws, BNS, BNSS, BSA, justice, victim-centric*

Introduction

Crime is a transgression not just against an individual, but against society as a whole. It is the state that takes on the duty of prosecuting the accused, and representing the collective interests of the community in seeking justice. However, amidst the legal proceedings, the victim often finds themselves relegated to the role of a passive observer, overshadowed by the adversarial battle between the prosecution and the accused. Former US President Ronald Reagan poignantly captured this disparity when he remarked, "*for too long, the victims of crime have been the forgotten persons of our criminal justice system*." Indeed, victims frequently find themselves marginalized within the legal process, their voices drowned out by the formalities and procedures of the courtroom. In this context, the concept of victim-centric laws emerges as a beacon of hope, aiming to rectify the imbalance and ensure that victims receive the attention, support, and recognition they deserve. These laws recognize that victims are not mere bystanders but individuals whose lives have been profoundly impacted by the commission of a crime. These laws acknowledge the pain and plight of the victim and make an effort to involve the victims in

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justice delivery system. By centring the needs and rights of victims, these laws aim to restore a sense of dignity, agency, and empowerment to those who have been harmed. They acknowledge that justice cannot be fully served unless the voices and perspectives of victims are heard and respected. Victim centric approach creates a more conscious and inclusive environment. It recognises the need to foster understanding and support for those affected by crime. In essence, victim-centric laws represent a crucial step towards realizing the norm that justice must not only be done but must also be perceived to be done for all parties involved. They embody a commitment to uphold the rights and dignity of victims and to building a justice system that is truly fair, inclusive, and compassionate.

The rewording of these new criminal laws serves a dual purpose: to modernize outdated colonial-era legislation and to establish mechanisms for safeguarding the rights of all citizens, including the accused, victims, and witnesses. The rechristening of the new Criminal Procedure Code as the Bharatiya Nagarik Suraksha Sanhita underscores its central objective, which extends beyond merely outlining procedural rights for victims. Rather, its fundamental aim is to ensure justice for every individual within the nation. This would have not been possible if recommendations from various agencies like the "VS Malimath Committee (2003)" and the "268th Report of India's Law Commission (2017)" would have not been there. These reports ameliorate the victim's right to participate in the bail proceedings and recommends a report on 'victim impact assessment' in such cases. It is imperative that the concerns of victims, including the social, mental, and physical impact of the offence and subsequent bail decisions, are accorded due contemplation. Historically, victims have been relegated to the periphery of criminal trials, their interests are often overshadowed and their protection relies solely on overburdened public prosecutors within the Indian court system, plagued by extensive backlogs.

Historical relevance of victim justice

The idea of victim protection was first conceived in the USA in 1970s when the wave of victim's right movement was at its peak. It was observed that ignoring the psychological impact of crime on victims, as well as disregarding their needs, have been identified as major causes of their predicament.[2] It was Warren Court Revolution which established a system that invariably favoured the accused, which eventually added to the imbalance in crime victims' rights.[3] As a consequence, the President's Task Force on Crime Victims was formed, and a report was produced. According to the report, there was a lack of balance in the court system since victims were oppressed by the institution designed to protect them. This oppression, as per the report, must be addressed at all cost.[4] To address this issue a law called Victim's Rights Act was passed in the US with the aim of ensuring dignity and privacy of the victim and securing fairness in the system where the victims could not only be the mute spectator but also be a participant.[5] The concept of victims' right evolved over a period of time in all its depth and dimension. In India, the historical development of victim jurisprudence evolved significantly from the ancient doctrine of "The King can do no wrong," which provided absolute immunity to the sovereign, to a more victim-centric approach embodied in Article 300 of the Constitution of India. This evolution reflects a shift from the era where victims had limited

[2] Mike Maguire, 'The Needs and Rights of Victims of Crime' (1991) Crime and Justice 363-433.
[3] Paul G. Cassell, Nathanael J. Mitchell and Bradley J. Edwards, 'Crime Victims' Rights during Criminal Investigations? Applying the Crime Victims' Rights Act before Criminal Charges Are Filed' (1973) 104 The Journal of Criminal Law and Criminology 63.
[4] Final Report, President's Task Force on Victims of Crime, 1982.
[5] Crime Victim's Rights Act, 2004.

recourse against the state to a modern legal framework that upholds the principles of justice and accountability. Article 300 establishes the liability of the government for wrongs committed by its servants, akin to that of a private individual, thus ensuring the protection of victims' rights. Landmark judgments by the Indian Supreme Court, such as Rudal Shah v. State of Bihar[6], Nilabati Behera v. State of Orissa[7], and D.K. Basu v. State of West Bengal[8], have further cemented the evolution of victim jurisprudence. These rulings have underscored the state's responsibility to compensate victims of wrongful detention, custodial violence, and other violations, thereby progressively expanding the scope of victim rights and remedies in the Indian legal system. In the US, the question as to whether victims have rights even before official charges are filed was also decided affirmatively by the US Court in *Does v. United States*[9], wherein the court reiterated the object and purpose of the Crime Victim's Rights Act and held that "*the victims to be kept updated about the developments taking place in the criminal process and the same does not begin with filing of formal charges but even during criminal investigation.*"

Paradigm shift from victim-oriented to justice-oriented approach

Over a few years, there has been a drastic change from victim-oriented approach to justice-oriented approach as victimology has evolved as a separate discipline. Initially, the focus was more upon the individual offender and individual victim-the interaction between a victim and an accused, the challenges faced by the victim, etc. The focus, however, subsequently shifted from understanding and realizing the causes of victimization and victimhood to having a more concrete meaning of victimology, which stressed upon legal recognition, access to justice, access to victim, services, assistance, and compensation. The awareness regarding victim justice in India was realized only in 2009 with the insertion of section 2(wa) in CrPC, 1973, vide the amendment act of 2009. Through this Act, the victims were granted three substantive rights-to hire a private counsel (with limited participatory rights)[10]; the right to be compensated under section 357A, CrPC and the right to file an appeal against the judgement of acquittal, conviction for lesser offence and inadequacy of compensation. Apart from these developments, legislations, like the POCSO and the SC/ST (Prevention of trocities) Act provide for more nuanced rights to the victims of specific offences. The intention of the new criminal laws is to enhance the efficiency, fairness, credibility, and accountability of the justice delivery system in India - to give due importance to the most important stakeholder in the criminal trial by providing them a right to participate, be informed and to get compensation for the loss suffered. The new definition of "victim" has been given under section 2(1)(y) of BNSS 2023, that defines victim as a 'person' (making it more gender neutral) who has suffered any loss/injury caused by act/omission of the accused person and includes the guardian or legal heir of such victim. This is a much wider definition which encompasses even the guardian or legal heir of the victim. By doing this, the locus standi of the victim has been diluted and therefore the cases where cognizance is taken only on a private complaint by the "aggrieved person" can now be filed by the guardian or legal heir apart from the person against whom the offence has been directly committed. The word "for which the accused person has been charged" which

[6] 1983 AIR 1086
[7] 1993 AIR 1960
[8] 1997 (1) SCC 416
[9] *Does v. United States*, 817 F. Supp. 2d 1337 (S,D, Fla. 2011).
[10] Limited through section 301 and 302 of the code of criminal procedure, 1973.

was there under section 2(wa) of CrPC has been omitted from the new definition; now a victim can get compensation even when the accused has not been formally charged of the offence. Thus, in an offence where victim is known, but accused is not known, compensation can still be provided to the victim. Jurisprudentially also, this change empowers victim to knock the doors of judiciary without bearing the pain and burden of involving accused in the matter. Victim centric approach in the new criminal laws has been seen from three dimensions – "participatory rights", "right to information", "right to compensation".

Participatory Rights

In an adversarial criminal justice system, such as India's, the accused and prosecution play the principal roles in the criminal procedure, with the judge serving as an umpire. The victim is only required at the stage of evidence as a prosecution witness. However, as stated above, by virtue of certain amendments made in CrPC and introduction of certain provision in BNSS, the victim has a much bigger role. Under the amended S.321 CrPC, "the victim can now appeal an acquittal decision, a conviction for a lesser offense, or insufficient compensation". This participation right is strengthened by amending S.24 (8) CrPC, which stipulated that courts may enable victims to employ a counsel to assist with the prosecution.

Additionally, the new Act gave victims of sexual assaults the right to have their statements recorded by a female police official in front of their parents/guardian, kin, or social-worker at home or at a location of their choosing. The Act included a proviso to this section stating that, to the extent possible, a woman judge or magistrate must preside over the in camera trial for such offences, even though the CrPC previously allowed for one. The court-mandated publishing of trial processes is allowed, subject to maintaining the anonymity of parties' names and addresses, safeguarding the victim's privacy. Regarding imparting justice through compensation, S. 357 CrPC gave the court the authority to mandate that the accused pay the victim's expenses after being found guilty. Section 357A CrPC, required State Governments to establish victim recompense programmes. The DLSA or State LSA has the authority to determine the amount of compensation and to mandate free medical care, first-aid facilities, or any other temporary remedy.

It is noteworthy to note that Section 360 of the BNSS, 2023 currently states that no court shall accept withdrawal from prosecution without first providing the victim an opportunity to be heard in that matter. This is a significant advancement in victim justice jurisprudence. Furthermore, the utilization of audio-visual technology methods for investigations is a significant addition to the new criminal code, which emphasizes a victim-centric approach. Section 176 of the BNSS describes the method for investigating cognizable offenses (equivalent to Section 157 of the CrPC). According to this provision, the victim's statement can be recorded using audio-video technological devices, such as a mobile phone. Additionally, witness statements can be recorded under Section 265(3) of the BNSS. This approach facilitates victim participation in investigations, making the process more accessible and less intimidating.

Right to Information

The right of the victims to seek information from the concerned authorities has been expanded under the new law in more ways than one. Where on one hand, Section 173 of BNSS empowers the victims to get a copy of the FIR free of cost ensuring that the victim has a documented record of the report made to the police, Section 193 of BNSS mandates the police officer to inform the victim about the progress of the investigation within 90 days. This 90-day period not only helps eliminate any

delays from the police but also assures the victim that the criminal justice system is diligently monitoring the various stages of their case. It safeguards the victim's right to information against procedural glitches that may arise due to police's unaccountability during the investigation. This is imperative for a system to be "victim-centric" for FIR is not only an important document and a corroborative piece of evidence but also a way to set the investigation in motion. Victim's participation at these stages showcases BNSS's tilt towards victim.

Right to register FIR regardless of jurisdiction and other rights

The new law provides that FIR can be registered at any police station regardless of the area where the offence is committed.[11] This concept is not new to Indian jurisprudence. It has already been recognized in plethora of judgements.[12] However, the new BNSS gives a statutory recognition to register such an FIR under S. 173 of the Sanhita. This is a blessing for victims who previously had to run from pillar to post to register their case because of jurisdictional issue. BPR&D has issued Standard Operating Procedure (SOP) regarding such FIR. This set of SOPs provides a basic structure of the procedure that may be followed by the police enforcement agencies for conducting the investigation seamlessly, as per which once the information regarding cognizable offence that has been committed beyond the jurisdiction of the police station has been received in a particular police station, the SHO or the officer on duty is required to record the details of the complaint in the, what is colloquially called as, Zero FIR register because the FIR number is prefixed with a "zero". Though, it is to be noted that that BNSS does not mention the word "Zero FIR". Section 173 (1) (ii) of BNSS also provides an option to register FIR through electronic means. The inclusion of technology in crime registration enables victims to reach out to the police without physically going to the police station. This promotes the reporting of cases that might otherwise go unreported due to the stigma attached to certain crimes. This can be particularly helpful for women and children who hesitate to report crimes against them due to societal pressure and stigma. There is a condition, though: the E-FIR must be signed by the informant within three days, which means the FIR will only be registered after getting signed by the informant. While this may seem like a restriction on the freedom given to the complainant, it is not. It is well-established law that in the case of a cognizable offense, the police have significant powers. Therefore, even if the informant fails to come to the police station to sign the FIR, the police do not need to abruptly stop the investigation. The officer can either go to the informant's location to get their signature, or if the informant is unwilling to be involved in the investigation, the officer can *be* the informant himself and continue the investigation. If the nature and gravity of the information requires immediate action by police, matter may be registered on behalf of the informant by the investigation officer himself, after verification of the facts and circumstances of the case. Having said that, the question whether that FIR can be used as a corroborative piece of evidence or will be hit by S. 181 of BNSS (S. 162 of erstwhile CrPC) is a something that can may be discussed and examined in another research. With regards to E-FIR, after registration it is thereby forwarded to the Investigation Officer for initial verification and if the alleged offence is punishable with more than three years but less than 7 years, the officer in charge of the police station may with the prior permission from an officer not below the rank of Deputy Superintendent of Police conduct a preliminary

[11] S. 173 (1), BNSS
[12] *State of Andhra Pradesh v. Punati Ramulu* 1994 Supp (1) SCC 590;

enquiry to gauge if there is a prima facie case for investigation.[13] Furthermore, history has it that despite having various mechanisms for their compensation, victims have always been inadequately compensated. Despite having various state compensation schemes and support from judiciary by way of umpteen progressive pronouncements, they are still in the same position as they were a decade ago.[14] To combat this, another victim centric approach is under Section 65 of BNS which provides that fine must be paid to the victim to meet the medical expenses and rehabilitation of the victim. Having rigorous punishment for committing sexual offences has been retained in the new laws.

Judicial trend for victim justice

The courts has played a key role in ensuring the rights of the victims in criminal trial. In *Maru Ram Case*[15], the Court observed, "*while reformative theory advocates reformation of victims and suggests that it is end of any criminal justice system, it is equally imperative that victims are rehabilitated and provided relief from the torture caused by the offender*". This perspective is often overlooked while debating for abolition of deterrent sentences, focusing only on the criminals' side. A similar view was taken in the *Mallikarjun Kodagali Case*[16], wherein the court held that "*the accused person's rights frequently take precedence over the victims' rights. To ensure that criminal trials run smoothly and fairly, a balance must be struck between the rights of the accused and victims*". The need for victims to participate in the criminal justice system through a legal representative was recognized by the Supreme Court in 1995 through the *Delhi Domestic Working Women's Forum Case*[17], wherein "the Court elaborated on the role of the victim's lawyer—which is not only limited to explaining the nature of proceedings or preparing and assisting her in the case, but it also extends to providing her with the guidance as to how she might obtain help from a different nature from other agencies, for instance, counselling or medical assistance".

As previously stated, in the *Jagjeet Singh Case*, the victim's absolute right to participate in a criminal trial at all phases, from inquiry to appeal, was acknowledged. In another celebrated decision of the Delhi High Court, the court juxtaposed the victim's participatory right with the legal mandate to keep her identity confidential in sexual offenses, and ultimately held that her right to be heard does not require her to be impleaded in the proceeding, as such impleading would reveal her identity.[18] However, in these cases, it is presumed that the victim is always a female. This anomaly has been solved under the new criminal law where victim is a not only a gender neutral person but also a guardian or legal heir of such person. Moreover, the court in this case expanded the scope of S. 439 (1A), CrPC and interpreted it to include right of victim to be heard at the juncture of anticipatory bail applications, suspension of sentence, so on and so forth. An identical provision has been inserted under S. 483 (2) of the BNSS which reinforces the spirit of victim participation. Furthermore, it is imperative that the presence of the victim must

[13] Section 173 (3) of BNSS
[14] *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).
[15] *Maru Ram v. Union of India*, 1980 AIR 2147.
[16] *Mallikarjun Kodagali v. State of Karnataka*, 2019 2 SCC 752.
[17] *Delhi Domestic Working Women's Forum v. Union of India, 1995 1 SCC 14*.
[18] *Saleem v. State (NCT of Delhi)* (2023) 2023 SCC OnLine Del 2190.

not be ceremonial; and to ensure that they are effectively heard the court may offer legal-aid assistance to the victim as and when required.[19] Prior to BNSS, 2023, prosecutor was allowed to withdraw a case anytime before the pronouncement of judgment with the permission of the court. However, victims were not given the opportunity to be heard at this stage, a practice that courts criticized on various occasions.[20] However, now post BNSS 2023, victim's participation at this stage has also been recognised.

Victim Centric Provisions Under the New Laws

Apart from the aforementioned victim-centric provisions, there are many other instances where victims find a central role. For example, under Section 397 of the BNSS, all hospitals, whether public or private, are required to provide medical treatment to victims of sexual offenses, free of cost. In order to materialise victim protection, provisions regarding witness protection scheme has been specifically mentioned. It is a trite fact that witness protection has been a significant concern in India. Witnesses often hesitate to tell the truth because they fear that doing so might cost them their lives. Powerful people can threaten them and coerce them to stay quite. There was previously no comprehensive witness protection scheme. However, before the new legislation, it was the state government's duty to prepare a witness protection scheme for each state. Now, this duty is explicitly mentioned under Section 398 of the BNSS. This is a welcome step for victims, as they are often key witnesses. Another provision which was already provided in the erstwhile CrPC[21] has been recapitulated under S. 399 of BNSS where compensation can be given to persons who are groundlessly arrested. This provisions is rather citizen centric and acts as a bridge between victim centric and accused tilted approach.

The propensity of these laws to protect victims are visible in many other provisions as well. Delays at various levels in the investigation and trial proceedings are identified and the same has been resolved by prescribing time limits for supplying copies of documents. There are many more provisions like that-Section 193 of BNSS, for instance, is a manifestation of victim's right to know about the progress of investigation within 90 days. Strict provisions about premature release of the convicts have also been recognised under Section 474 of BNSS. Furthermore, Section 107 (6) of BNSS provides for distribution of proceeds of crime according to which if the attached or seized property is the proceeds of crime, court can order distribution of proceeds of crimes to the victims, ensuring that victims of the crime receive compensation from the proceeds of illegal activities.

Conclusion

The recent overhaul of criminal laws marks a significant stride towards establishing victim-centric legislation in India. The term "victim" itself is inherently gender-neutral, affirming its applicability to all citizens of the nation. These new victim-centric laws not only prioritize the rights and welfare of victims but also streamline investigation processes through the integration of technology, ultimately expediting trials and providing swifter justice for victims. Provisions such as "Trial in absentia" further accelerate the legal process, sparing victims the prolonged wait for absconding offenders to appear in the court.

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[19] Ibid.
[20] *State of Kerala v. K. Ajith* 2021 SCC OnLine SC 510.
[21] S. 358 of CrPC

The realization of long-held aspirations for victim jurisprudence finds tangible expression in this robust statutory framework. However, the true efficacy of these reforms hinges on their effective execution—a task that necessitates comprehensive training initiatives. Increasing public awareness and understanding of victim-centric laws is essential for their effective implementation. This includes educating law enforcement officials, legal professionals, and the general public about the rights and protections afforded to victims under these laws, as well as the importance of prioritizing victim welfare in criminal proceedings. While retaining crucial provisions like non-disclosure of identity and in-camera proceedings, the new laws introduce key enhancements such as statutory recognition of zero FIR and witness protection, ensuring comprehensive safeguards for victims. These legislative advancements are poised to set a new standard for the Indian criminal justice system. Yet, their success hinges on heightened awareness and capacity-building efforts among investigating agencies, alongside the consistent implementation of standardized procedures. Striking a balance between the inquisitorial and adversarial systems, these victim-centric laws underscore a progressive approach by lawmakers, signalling a paradigm shift towards a more equitable and efficient legal framework. Continuous evaluation and refinement of victim-centric laws are essential to address emerging challenges and ensure their relevance and effectiveness over time.

Community Service in BNS 2023: A Paradigm Shift from Retribution to Restoration


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Abstract

This analysis examines the concept of community service, tracing its historical roots and exploring its role within the modern justice system. It argues that community service transcends mere punishment, functioning as a form of reparation that allows individuals to contribute positively and make amends for past transgressions.

The investigation begins with the ancient mythical tale of Heracles and the Augean Stables. Here, we find the Hercules burdened with the seemingly insurmountable task of cleaning the filthy stables - a consequence for his misdeeds. This mythological parallel serves to illustrate the potential for community service to act as a transformative experience, not simply a punitive measure. The analysis delves into the role of community service in rehabilitating offenders and its potential to mitigate crime rates. It posits that existing programs often fall short and proposes enhancements for improved efficacy. Further substantiating upon insertion of community service in place of punitive punishment for petty offense in Bharatiya Nyaya Sanhita (BNS) 2023, that replaced Indian Penal code, 1860. BNS adopts a personalized approach, aligning service tasks with each offender's capabilities and requirements, thereby enhancing its intrinsic value. Furthermore, BNS prioritizes mentorship and supportive networks, facilitating smoother reintegration of ex-offenders into society. By prioritizing rehabilitation over punitive measures, BNS presents a promising avenue for crime reduction and fostering a more equitable society. In short , We are moving towards the principle of 'Abhor the crime not the criminal'.

Keywords: *Community Service, Bharatiya Nyaya Sanhita 2023, Punishment, Sentencing, Law, Indian Penal Code, Nyaya, Justice.*

Introduction

Throughout history, justice has often been synonymous with retribution, with punishment seen as a way for society to atone for transgressions. However, The mythical tale of Heracles and the Augean Stables serves as a timeless allegory, highlighting the transformative potential of community service. Heracles' labour, initially a punishment, became a testament to his ability to contribute positively

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to the community through innovative problem-solving. In the modern retelling of the myth of Heracles and the Augean Stables, we find a thoughtful king who recognizes the potential in harnessing Heracles' strength for the betterment of the community. Instead than locking him up in a traditional jail, which would be expensive for the state to shelter and feed such a powerful man, the king devises a better plan, Hercules was commanded to cleanse the stable, a festering pit untouched for generations. The king sees an opportunity for Heracles to not only atone for his past actions but also to contribute meaningfully to society. This modern interpretation of the myth emphasizes the value of utilizing individuals' strengths for the greater good, turning what could have been a burden on the state into an opportunity for positive change and communal improvement.

Community service has become a globally recognized practice, with several states in India also embracing its implementation since a long time ago through the Judgements in their respective High Courts. The concept originated at the House of Correction in Bridewell Palace, London, around 1553. It aimed to combat idleness and vagrancy among vagabonds by engaging them in labour. Originating in the United States in 1966 with female traffic offenders in Alameda County, California, community service has since expanded as a valuable tool for addressing minor infractions of the law.[1] But what exactly is community service? Is it a punishment, a form of reparation, or a means of rehabilitation? While some may view it as a punitive measure, community service is more accurately described as a form of reparation. As articulated by Christopher Bright in a document prepared under the program of Prison Fellowship International, community service is about the offender taking action to rectify the losses[2] In India, the framework for punishment is outlined in Sections 53-75 of the Indian Penal Code (IPC). Section 53 specifically enumerates five types of punishments:

1. Death
2. Imprisonment for life
3. Imprisonment
4. Forfeiture of property
5. Fine

Previously, there was no provision for community service as a form of punishment, creating a notable gap when compared to global standards set by countries like the US, UK, and Spain. This gap has now been addressed by the introduction of the BNS (Bharat Nyaya Sanhita). Although judges previously had the discretion to impose community service as a punishment under the Criminal Procedure Code (CrPC), it was not formally recognized in the IPC until now.

Main Theories of Sentencing[3]

1. Desert or Retributive Theories

Punishment is justified as the natural or appropriate response to crime, based on a fundamental intuitive claim. The severity of the punishment should be proportionate to the degree of wrongdoing. Proportionality is the key concept in desert theory, as discussed in the writings of Kant and Hegel.

2. Deterrence Theories

Deterrence theories focus on preventing further offenses through a strategy of deterrence as the rationale for punishment. Major utilitarian writers like Bentham (1789; and cf. Walker 1991) and economic theorists such as Posner (1985) propose setting penalties at levels sufficient to outweigh the potential benefits of offending.

[1] 1977 3 SCC 287
[2] 2020 SCC Online MP 2193 : ILR 2020 MP 2691
[3] 2021 SCC Online MP 107

3. **Rehabilitative Sentencing**

   The goal here is to prevent further offending by the individual through rehabilitation, which may involve individual casework, therapy, counselling, and family intervention.

4. **Incapacitative Sentencing**

   The incapacitative approach aims to identify offenders or groups of offenders who are likely to cause serious harm in the future, warranting special protective measures against them.

5. **Restorative and Reparative Theories**

   These are not theories of punishment. Instead, they advocate for shifting from punishment towards restitution and reparation, aimed at restoring the harm done and calculated accordingly. Restorative theories are victim- centered and sometimes include reparation to the community for the effects of the crime. They propose less reliance on custody, favouring community-based sanctions that require offenders to work to compensate victims, and provide support and counselling to help reintegrate offenders into the community.

The concept of reparation further highlights the distinction between restitution, which addresses harm to individual victims, and community service, which addresses harm to the community at large. This nuanced approach aims to ensure that community service serves its intended purpose of repairing community losses, rather than being merely tacked on as an additional punitive measure. **(Vishal S Awtani v. State Of Gujarat on 2 December, 2020)**

Rooted in Tradition, Evolving for the Future

Throughout the tapestry of Indian history, the threads of justice for minor offenses have been woven with a focus on reconciliation and service to the community. Ancient legal texts, such as the venerated Dharmashaatra and the Arthashastra, laid the groundwork for this approach. These works emphasized the paramountcy of restoring social equilibrium over imposing punitive measures. This emphasis on societal repair manifested in early legal codes, which frequently incorporated provisions for community service. Offenders might be tasked with the refurbishment of public works, participation in communal endeavours, or contributions to charitable undertakings. This philosophy, centred on rehabilitation and atonement, stood in stark contrast to the Indian Penal Code,1860 (IPC), a legacy of the colonial era.

The IPC, devoid of the wisdom gleaned from these ancient traditions, relied heavily on incarceration, even for minor transgressions. This resulted in a system burdened by overcrowding and a dishearteningly high rate of recidivism. The IPC was mainly made for Britishers to rule Indians as a subject and to put them in Jails so that there are less people to control and manage. Generally they tried to put influencing personalities behind bars for the pettiest of offences so that they languish in jails instead of being out and revolting against the British Raj. They didn't wanted to transform us, they wanted to incarcerate us.

Historically also, Indian courts have occasionally utilized community service as a form of punishment for minor. A notable example is a 2022 Supreme Court case involving a doctor from West Bengal. The doctor, who had been accused of attempting murder as a teenager, was sentenced to plant 100 trees within a year (Sole S.K. v. State). Similarly, the Delhi High Court employed a similar approach in a separate case where, a couple was ordered to plant 100 trees as punishment for employing a minor for domestic work.

In the 2020 case of *Sunita Gandharva* v. *State of M.P*,[4] the Madhya Pradesh High Court explored the reach of bail conditions under Section 437(3) of the CrPC. They clarified that these conditions can extend beyond traditional limitations and encompass activities like community service and other programs aimed at rehabilitation. However, the court emphasized that these measures should be reasonable and not overly burdensome or bizarre.

Moving beyond traditional bail conditions, Indian courts have increasingly embraced community service as an alternative in recent years. Several cases from Madhya Pradesh exemplify this trend. In Shiv Kumar v. State of MP (2005), planting and caring for trees was a requirement for release. Similarly, Banti Jatav v. State of MP (2020) saw a defendant volunteer at a health centre, while Jitendra Parihar v State of Madhya Pradesh (2020) involved installing a water conservation system. Even blood donation was deemed an acceptable form of community service in Rishi Ahirwar v. State of Madhya Pradesh and Anr. (2017).[5] These diverse examples highlight the potential of community service as a constructive bail condition in India's justice system.

It's important to note that while these cases demonstrate a growing trend, there was no specific law or established guidelines for community service sentences in India. Before the advent of Bharatiya Nyaya Sanhita which replaced IPC, such decisions were left to the discretion of individual judges on a case-by-case basis. Judges used to decide the quantum of Punishments, mostly in settlement quashing proceedings, as a community service.

In a peculiar case involving quashing of an FIR for a petty offence, where the accused was a student and preparing for some competitive exams, Judge ordered him to be present in a local Government library and help in bookkeeping and other work in the library every day for 2/3 hours, for the remaining period he can sit in the library and study.

The new penal law, acknowledging this critical flaw, has ushered in a much-needed shift. Community service offers a far more constructive approach. Instead of languishing in confinement, offenders will now have the opportunity to contribute positively to their communities. From cleaning public spaces and assisting with environmental projects to volunteering at social service organizations, community service provides a chance for rehabilitation and atonement.

The Reformative Theory of Justice and its Challenges in the IPC

"The humane art of sentencing remains a retarded child of the Indian criminal system".

—Justice V.R. Krishna Iyer[6]

Criminal Justice System comes into play as soon as a crime is committed, it consists of four vital organs- The Police, The Prison, The Courts and The Prosecution. In India the objective of corrective action is majorly based on two theories: The Prevention and The Reformative Theory. The objective of the Prevention Theory is to bar a criminal and to prevent him from committing further crimes whereas The Reformative Theory aims to transform the criminal to weed out the criminal tendencies and to make him inclusive in the society, it is based on the approach that if an accused is supported in a particular way by the courts or by the law then the accused person can be transformed in a positive way, his frame of mind can be changed to a positive approach and he can be made beneficial to the society.

[4]AIR 1997 SUPREME COURT 1739
[5]Ashworth A. (1997). Sentencing in Mike Maguire, Rod Morgan, Robert Reiner (Ed.), The Oxford Handbook Of Criminology.
[6]Burt G. and Joe H. (1990). Criminal Justice, Restitution and Reconciliation. Monsey, NY: Criminal Justice Press.

According to the Reformative School of thought, the guilty mind is to be reformed and the criminal attitude is to be corrected by sentencing in the jail which must provide environment, facilities and opportunities for education, knowledge, professional, vocational, and spiritual guidance to convert a criminal into civilized gentleman.

The reformative theory of justice, centres on the Reconditioning and Social Reintegration of offenders as the primary objective of punishment within the criminal justice system. In the case of *Mohammad Giasuddin* v. *State Of Andhra Pradesh (1977)*,[7] Justice Krishna Iyer emphasized the importance of recognizing the potential for transformation in individuals, stating, "If every saint has a past, every sinner has a future, and it is the role of law to remind both of this." Consequently, the Court directed the government to ensure that the work assigned to prisoners is not repetitive, technical, or intellectually unstimulating. It advocated for opportunities for prisoners interested in pursuing higher education and encouraged activities such as basic tailoring and doll making for female inmates. As a result, the sentence in this case was reduced to 18 months, with a fine of Rupees 1200 imposed for cheating. Justice Krishna Iyer's philosophy underscored the belief in the potential for positive change in even the most hardened criminals. The reformative theory of punishment prioritizes rehabilitation, aiming to reform offenders through education and positive influences, envisioning prisons as institutions for fostering personal growth.

Globally the branches of Reformative Theory has spread over to non-custodial sanctions offering a range of community-based penalties. These allow offenders to stay employed and connected to family. Examples include probation with counselling or community service, fines to deter crime and aid victims, and restorative justice programs that bring victim, offender, and community together to heal. Treatment programs address root causes of crime, while diversion programs keep low-level offenders out of the system altogether.

Drafted in 1860, the Indian Penal Code (IPC) primarily outlines offenses and their corresponding punishments, traditionally imprisonment or fines. However, it lacks explicit provisions for non-custodial sanctions as alternatives. These alternatives, like probation or community service, have emerged through evolving criminal justice practices and judicial pronouncements. This gap in the IPC necessitated reform , Bharatiya Nyaya Sanhita, enacted in 2023, addresses this very issue by incorporating a more comprehensive legal framework for non-custodial sanctions.

A critical juncture demanding action: Need for Reforms

India's criminal justice system bears the weight of its colonial past. The Indian Penal Code (IPC), enacted in 1860, while a landmark for its time, struggles to meet the demands of a modern democracy. A glaring issue is the code's overreliance on incarceration. Jails designed for punishment, not rehabilitation, are overcrowded and inhumane. In Rama Murty v. State of Karnataka (1997),[8] the Supreme Court of India highlighted the dire conditions of Indian prisons, citing overcrowding, unhygienic conditions, inhumane treatment, trial delays, and communication deficiencies as major issues.

Around two decades after the judgement the ground reality remains the same. According to National Crime Record Bureau Report of 2021 India has 1319 prisons across the country with actual capacity of 4,25,609 persons however it accommodates 5,54,034 persons with the occupancy rate of a whooping 130.2%.[9]

[7]Crime in India (2021). NCRB.
[8]Koestler A. Drinkers Of Infinity: Essays 1955-1967.
[9]Mohammad Giasuddin v. State Of Andhra Pradesh (1977) SCI .

The same report mentions that, out of 5,54,034 only 1,22,852 are convicts and rest 4,27,165 are under trial prisoners.

The traditional system, heavily reliant on incarceration, failed to address the root causes of crime; Petty offenders, often first-time mistakes, were thrown into a harsh environment alongside hardened criminals. This not only burdened the state with the cost of housing and feeding them but also created a breeding ground for further criminalization, where the first-time criminals mix with the hardened criminals and at times when released work for them or with them.

This burdens the prison system and fails to address the root causes of crime. Community service as an alternative to imprisonment offers a promising path, prioritizing rehabilitation, restorative justice, and reducing the prison population. These new provision holds immense potential. It can alleviate the pressure on overflowing jails, allowing resources to be directed towards more serious offenses. Additionally, by instilling a sense of responsibility and offering the opportunity to learn valuable skills, community service fosters a more productive path for rehabilitation.

This shift represents a significant step towards a more progressive and humane justice system.

The Road to Community Service

The Bharatiya Nyaya Sanhita (BNS), marks a notable transition in the way petty offenses are handled. One of the most significant change is the introduction of community service as a potential punishment. This move away from solely relying on incarceration for minor crimes has been a long time coming, fuelled by various recommendations and discussions over the years.

A Chorus for Reform

The Law Commission of India, a body tasked with reviewing and recommending legal reforms, has likely played a crucial role. While there may not be a single dedicated report on community service, broader discussions on revamping punishments for minor offenses could have laid the groundwork. Parliamentary committees, particularly the Standing Committee on Home Affairs(HAC) (2023), had further solidified the case for community service during their examination of the BNS Bill.

Beyond Bureaucracy

The voices of legal scholars, social activists, and criminologists have undoubtedly contributed to this shift. Research and analyses highlighting the benefits of community service in rehabilitation and reducing recidivism rates likely resonated with policymakers. Studying successful practices from around the world might have also influenced the decision. Countries where community service has proven effective could have served as models for India's new approach.

A Public Conversation

The winds of change weren't confined to legal circles. Public discourse and media coverage calling attention to the limitations of the existing penal system and advocating for reform likely created a general momentum for change. This collective awareness might have spurred policymakers to embrace a more progressive approach to punishment.

A New Era of Justice: Community Service Introduced in India

Marking a significant development in the Indian legal system, the year 2023 witnessed the introduction of the Bharatiya Nyaya Sanhita (BNS).[10] This comprehensive code aims to

[10]Murugesan D. (2014). A Study of the Causal Factors Leading juveniles to be in Conflict with the Law in Tamil Nadu: Sociological Perspective

supersede the Indian Penal Code, addressing its limitations and aligning the legal framework with contemporary realities. The BNS promises a more streamlined and efficient approach to criminal justice, promoting both punitive and rehabilitative measures. By incorporating advancements in forensic science and addressing emerging criminal trends, the code seeks to ensure a more robust and responsive judicial system. The BNS represents a critical step towards a modernized legal landscape, fostering a more just and equitable society.

Hudson and Galaway have listed several advantages of community service :[11]

a. Reduces intrusion of the justice system, and reduce recidivism,

b. Agencies are benefitted by the labor provided by the offender,

c. Increases the community support within the criminal justice system,

d. Reduces cost,

e. Works as an alternative sentence for the courts

f. Offenders can also experience the need of other.

One of the key departures from the previous Indian Penal Code (IPC) is the inclusion of community service as an alternative to traditional punishments like imprisonment or fines. This means for certain crimes, like petty theft or public intoxication, offenders may be directed to give back to their communities through supervised work. This approach aims to move beyond pure punishment and encourage rehabilitation while benefiting the society directly.

⇨ Rehabilitation vs. Punishment

The BNS recognizes the importance of restorative justice, particularly for minor offenses. Community service offers an alternative to incarceration, aiming to rehabilitate offenders and foster a sense of accountability. This approach aligns with global trends that prioritize rehabilitation over mere punishment.

⇨ Tailoring Consequences to Offenses

The BNS targets community service for specific offenses, recognizing that not all crimes warrant identical punishments. This allows for a more nuanced response to minor offenses.

⇨ Offenses Eligible for Community Service

The BNS outlines various offenses for which community service may be prescribed. These include:

- Public Servants: Abusing Power for Illegal Trade (Clause 202)
- Disobeying the Law: Failure to Respond to Summons (Section 84 of Bharatiya Nagarik Suraksha Sanhita, 2023)
- Coercion Through Self-Harm: Attempting Suicide to Influence Legal Action (Clause 226)
- Petty Theft: First-Time Offenses Under Rs. 5,000 (Clause 303/2)
- Public Intoxication (Clause 355)
- Defamation (Clause 356)

This list provides a starting point, and the BNS may allow judges to consider additional minor offenses for community service as deemed appropriate according to the facts and circumstances of the given case.

The introduction of community service signifies a promising step towards a more balanced and restorative justice system in India. It prioritizes rehabilitation and fosters a greater sense of responsibility within communities.

[11]Pewtrusts Report. Time Served: The high cost, low return of longer prison terms

Beyond Incarceration

1. Reducing Recidivism: There is limited data available on recidivism rates in India specifically related to community service programs. However, a 2013 study by the Bureau of Police Research and Development found that recidivism rates among juveniles in India were 27%.[12] There is some evidence from other countries that community service programs can be effective in reducing recidivism. For example, a meta-analysis of 98 studies found that community service programs had a small but significant effect on reducing recidivism rates.

2. Cost-Effective and Sustainable: There is evidence to suggest that community service programs can be more cost-effective than incarceration. A 2010 study by the Pew Centre on the States found that the average annual cost of incarcerating an offender in the United States was $45,000.[13] In India, the cost of incarceration is likely to be lower, but it is still a significant expense. Community service programs, on the other hand, can be run for a fraction of the cost. For example, a 2003 study by the Urban Institute found that the average cost of a community service program in the United States was $1,200 per offender.

3. Promoting Responsibility and Learning: Community service programs can encourage responsibility and education among offenders. By participating in community service, offenders must face the impact of their actions, fostering empathy towards their victims and a deeper understanding of the consequences. Additionally, these programs offer opportunities to acquire new skills and gain valuable experience, aiding in their employment prospects and reintegration into society.

6. Tailored Approaches: Community service programs in India can be tailored to meet the needs of the community and the offenders. For example, some programs may focus on environmental clean-up, while others may focus on providing social services to the poor. Offenders can be placed in programs that are appropriate for their skills and interests.

By implementing community service as a restorative measure for minor offenses, India can cultivate a more comprehensive and compassionate justice system. This approach encourages rehabilitation, decreases recidivism, fortifies community bonds, and respects human dignity.

Community Service: A Path to Foster Offender Rehabilitation

Community service presents a persuasive alternative to conventional penal punishment for many offenders. Unlike incarceration, which emphasizes isolation and deterrence, community service focuses on rehabilitation and reintegration. This approach provides numerous benefits for the offender, the community, and the justice system as a whole.

- **Building a Bridge Back to Society:** Incarceration severs an offender's ties to family, employment, and community support system. These connections are crucial for successful reintegration upon release. Community service allows offenders to maintain these vital links, reducing the risk of recidivism. Imagine a single mother who committed a minor offense. Incarceration could cost her job and disrupt childcare, making it harder to get back on her feet. Community service, on the other hand, allows her to maintain employment and childcare routines, facilitating an easier transition back into a law-abiding life.
- **From Liability to Asset:** Many community service programs provide opportunities for offenders to develop job-related skills and

[12]THE BHARATIYA NYAYA SANHITA, 2023. NO. 45 OF 2023.
[13]*Vishal S. Awtani v. State Of Gujarat* Writ Petition (Pil) No. 108 Of 2020 SCC Online Guj 2814

gain experience in specific fields. For example, an offender might be placed in a program that teaches carpentry or landscaping. These newly acquired skills can significantly boost employability upon release, reducing the financial strain that can contribute to criminal activity. Furthermore, contributing to the community through service fosters a sense of purpose and responsibility, replacing feelings of resentment or hopelessness that can stem from incarceration.

- **Cost-Effectiveness:** Incarceration is a significant financial burden on the justice system. Community service programs, on the other hand, are generally much less expensive to operate. These cost savings can be redirected towards other vital social programs or initiatives aimed at crime prevention. The freed-up resources can be used to support programs that address the root causes of crime, creating a more sustainable approach to public safety.
- **Generating a Sense of Empathy:** Community service offers a powerful opportunity for offender transformation. Witnessing the positive impact of their work first-hand can spark empathy and a newfound perspective, acting as a catalyst for personal growth. This experience aligns perfectly with resocialization goals, allowing offenders to reintegrate into society through positive contributions. By actively participating in community betterment projects, they gain a sense of purpose and belonging, fostering a more positive and productive role within society.
- **Breaking the Cycle of Crime:** Prisons can be breeding grounds for criminal activity, exposing offenders to hardened criminals and negative influences. Community service allows them to avoid this environment and focus on positive change. By surrounding them with opportunities to contribute and develop positive skills, community service programs can help to disrupt the cycle of crime and create a path towards a more productive future.

The community service offers a multifaceted approach to offender rehabilitation. It fosters reintegration into society, equips offenders with valuable skills, allows for restorative justice, and reduces the financial strain on the justice system. While not a one-size-fits-all solution, community service serves as a powerful tool for promoting positive change and reducing recidivism, ultimately creating a safer and more just society for all.

Global Insights for Enhancing Community Service in India

India has a rich heritage of community service, but a forward-looking approach demands continuous improvement. By examining successful programs from across the globe, India can refine its strategy and unlock the full potential of community service initiatives.

1. Prioritizing Victim Needs: Shifting the focus towards victims' needs is a key takeaway from countries like Norway and Canada. Imagine restorative justice practices where offenders, with victim consent, have the chance to understand the impact of their actions. Community service could also involve tasks that directly benefit victims, like repairing damage caused by the crime. This victim-centric approach fosters a sense of accountability and promotes healing within communities.

2. Nuanced Accountability: Effective programs strike a balance between holding offenders accountable and facilitating their rehabilitation. While community service should deter future offenses, overly harsh or punitive approaches can be counterproductive. New Zealand offers valuable insights here, with

programs emphasizing goal-setting and progress monitoring within community service. This fosters a sense of accomplishment for offenders, motivating positive change and a genuine commitment to rehabilitation.

3. Reintegration as the Cornerstone: Countries like Australia showcase the power of using community service as a stepping stone for reintegration into society. This might involve connecting offenders with job training or educational opportunities alongside their service assignments. By equipping them with skills and fostering a sense of purpose, these programs aim to break the cycle of recidivism.

4. Culturally Sensitive Implementation: India's diverse population requires a community service approach that honours cultural sensitivities. Canada's programs, specifically created for indigenous communities, provide valuable insights. Customizing service options to align with cultural values and beliefs builds trust, enhances participation, and results in more effective programs.

5. Data-Driven Decisions: Regular and robust data collection and analysis are crucial to assess the impact of community service programs. The UK exemplifies this approach, investing in research to understand what works and constantly refine their programs. Implementing similar practices in India will allow for ongoing improvement and ensure programs deliver desired outcomes.

By incorporating these global lessons, India can transform its community service initiatives into powerful engines for social good. Prioritizing victim needs, implementing nuanced accountability, focusing on reintegration, and adopting culturally sensitive approaches will all contribute to a more effective and impactful system. This, in turn, will strengthen communities, promote rehabilitation, and ultimately, create a more just and equitable society.

Conclusion

India's longstanding tradition of community service reflected through Bharatiya Nyaya Sanhita stands to benefit significantly from adopting global best practices. By prioritizing the needs of victims, implementing a nuanced approach to accountability, and emphasizing reintegration, Indian community service programs can substantially enhance rehabilitation efforts, reduce recidivism rates, and foster more resilient communities.

To fully realize this potential, it is imperative to collaborate with established NGOs specializing in rehabilitation and community engagement. These organizations bring invaluable expertise, resources, and support that are essential for developing effective programs and ensuring their successful implementation.

However, for community service to thrive, several key areas require improvement. Clear guidelines and a robust infrastructure for managing placements and monitoring progress are paramount. Additionally, fostering a culture of restorative justice, where offenders comprehend and actively engage in repairing the harm they've caused, is crucial. Providing adequate resources to NGOs and offering proper training for supervisors are also vital components for the effective implementation of these programs. Courts should also be vigilant while awarding the Community service by sticking to principle of proportionality.

The recent inclusion of community service in the BNS marks a positive stride towards a more restorative justice system in India. While pinpointing the exact catalysts for this change may prove challenging, collaborative efforts have evidently played a pivotal role in propelling this reform forward. The focus now shifts towards ensuring the efficient implementation of community service programs, delivering on their promise of rehabilitation, and contributing to a fairer and more just society.

"The murderer has killed. It is wrong to kill. Let us kill the murderer." This succinctly encapsulates the paradox and pathology of the death penalty, as expressed by Mr. Bonsall of Manchester and quoted by Arthur Koestler in "Drinkers of Infinity ." Moving beyond such paradoxes, we now embrace Nyaya, a philosophy that seeks justice through more enlightened and humane means.

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