

AN EXHAUSTIVE COMPARATIVE  
ANALYSIS OF CODE OF CRIMINAL  
PROCEDURE, 1973 AND BHARATIYA  
NAGARIK SURAKSHA SANHITA,  
2023

Presented by  
Aditya Chavan & Siddhantrao Molankar

# INTRODUCTION

- Justice Krishna Iyer said, “Procedure is the handmaid of justice”, meaning that the procedural rules are meant to serve justice and not to hinder it.
- The Indian criminal procedure operative to date was derived from the British Raj, which included the Code of Criminal Procedure, 1898 on which the Code of Criminal Procedure, 1973 (“CrPC”) was largely based. The Bharatiya Nagarik Suraksha Sanhita, 2023 (“BNSS”) replaces the existing CrPC.
- BNSS which is the Bharatiya Nagarik Suraksha Sanhita, also formerly known as the Code of Criminal Procedure or simply CrPC will officially replace the CrPC on the 1st of July, 2024 after almost being in action for 50 years this Act will officially cease to exist, but the real question on our minds must be "what does this new act offer to the Indian people?" The new BNSS Act repeals 9 sections from the existing act (CrPC) and ushers in changes in 160 sections alongside 9 new provisions.

- To address the persistent issues of complicated procedures, case pendency, low conviction rates, lack of technology adoption, and delayed justice delivery, the BNSS seeks to create a justice system with greater velocity and efficiency. The Suraksha (protection) of citizens from the unfair exploitation of the criminal procedure system made possible by the loopholes in the current system is the primary goal of the BNSS.
- Although the BNSS largely maintains the provisions of the current CrPC, it also seeks to streamline the criminal justice system, shorten trial times, strengthen police investigative capabilities, establish procedural timelines, and more.
- The BNSS which has replaced the CrPC contains 531 Clauses and provides for the use of technology and forensic sciences in the investigation of crime and furnishing and lodging of information, service summons, etc through electronic communication, among other things.

# NUMBER OF SECTION ADDED IN THE BNSS

Bharatiya Nagarik Suraksha Sanhita now has a total of 531 sections, up from 484 in the Code of Criminal Procedure. A total of 177 provisions have been changed in the Sanhita, introducing nine new sections and 39 new sub-sections and adding 44 new provisions and clarifications.

# WHY WE NEED BHARATIYA NAGARIK SURAKSHA SANHITA?

- As we know, the British made the old criminal law not to protect our rights but to strengthen and protect British rule, and they aimed to punish, not give justice. The new three laws were made to protect our rights provided by the constitution of India to all Indian citizens. As the government said, these laws were not to punish anyone but to give justice, and in this process, punishment will be given for preventing crimes.
- The Bharatiya Nagarik Suraksha Sanhita expands the scope of modernizing India's criminal justice system through digital technology, reducing reliance on physical documents, and expanding the definition of documents to include electronic records. BNSS provides Zero FIR and e-FIR provisions, allowing citizens to file FIR at any police station and electronically, making it more accessible to the public. In BNSS, there is more transparency with mandatory videography during searches, seizures, and recording trials.

# POSITIVE CHANGES

- A. Removal of Archaic and Insensitive Terms
- B. Clarity in some procedures
- C. Progressive Safeguards and/or changes
- D. Electronic/ Digital alternatives for existing processes
- E. Expediting processes and/or making processes time-bound

# A. REMOVAL OF ARCHAIC AND INSENSITIVE TERMS

Contrary to several valid criticisms regarding the inanity of renaming something, there are instances in which the practice can be a fantastic countermeasure against stigma.

1. The BNSS is commendable for replacing outdated and offensive terms like "*lunatic person*" and "*person of unsound mind*" with more appropriate ones. These references have all been replaced with more tactful phrases like "*person with mental illness*" or "*having intellectual disability*." Section 219(1)(a) of the BNSS, which corresponds to Section 198 of the CrPC, makes this clear. Section 357 of the BNSS, which corresponds to Section 318 of the CrPC, has also undergone a similar modification.

2. Of particular note is the introduction of Chapter XXVII or 27 of BNSS [Provisions as to Accused Persons With Mental Illness], which replaces Chapter XXV or 25 of CrPC [Provisions as to Accused Persons of Unsound Mind]. All relevant sections have been appropriately amended, with references to the Mental Healthcare Act of 2017. The phrase "*mental health establishment*" has appropriately replaced the term "*lunatic asylum*."

3. Other obsolete allusions have been eliminated, such as the section 10 deletion that eliminated the preposterous category of "Assistant Sessions Judges."

4. Similarly, the word "*Advocate*" has been appropriately replaced with "*Pleader*" in all references. "*Thug*" is another term that has been dropped, and references to crimes committed by "*Thugs*" have been eliminated from places like Section 201 of the BNSS, which is a direct match to Section 181 of the CrPC.



5. However, eliminating all references to the Metropolitan Area and its magistrates is one such deviation that will call for real changes to be made locally. The cities of Ahmedabad and the former presidency towns of Bombay, Calcutta, and Madras were designated as "metropolitan areas" under Section 8 of the CrPC. The relevant governments may also similarly classify any other major cities. The fact that judicial magistrates in these areas are referred to as "*Metropolitan Magistrates*" is one of the main effects of the same.

6. Such a pointless distinction has finally been eliminated per the new BNSS. This would imply that, regardless of the city, a judicial magistrate serving anywhere in the nation would be recognized as such and not as a "*Metropolitan Magistrate*." Additionally, Section 153 of the CrPC, which gave police the authority to enter any location without a warrant and examine or search for the accuracy of weights and measuring devices, is eliminated by the BNSS.

7. A further retrogressive clause, Section 64 of the CrPC, which limited the delivery of summonses to an adult "*Male*" family member, has been changed. Similarly, petitions for suspension or remission filed by "males" only who were older than eighteen (18) were scrutinized more closely under Section 432 of the CrPC. Now, as stated in BNSS Sections 66 and 474, respectively, the term "*Male*" has been appropriately removed.

## B. CLARITY IN SOME PROCEDURES

1. Proclaimed Offender - The updated legislation substantially alters and stipulates the position to be taken concerning Proclaimed offenders. Before the 2005 Amendment, Section 82(4) of the CrPC only allowed for the declaration of a "Proclaimed offender" about nineteen specific IPC offences: "302, 304, 364, 367, 382, 392, 393, 394, 395, 396, 397, 398, 399, 400, 402, 436, 449, 459, or 460." This resulted in circumstances where an individual could not be designated as a Proclaimed Offender if they continuously avoided court summonses or warrants for any other offence under the IPC's general penal code or any other special law. Anyone accused of an offence carrying a sentence greater than ten years in prison or other special offences may now be labelled a proclaimed offender if this seemingly arbitrary list of sections is removed.

2. Comparably, the BNSS has a new Section 356 that outlines a thorough process for holding an inquiry or trial if no one has been designated as a "Proclaimed offender." Even though the necessity of such severe actions as designating someone as a proclaimed offender may be questioned, the code has at least made the application of such measures' procedural requirements more clear for the time being.

3. Disputes regarding computation of Period of Limitation - The conflicts concerning the calculation of the statute of limitations have been resolved by adding a precise explanation to Section 516 of the BNSS, which corresponds to Section 468 of the CrPC. Section 462(1) of the BNSS, which corresponds to Section 421(1) of the CrPC, is another section that has been clarified. This section allows for the imposition of fines on those who have committed offenses. Currently, they can only be applied to those who have not made the required payment by adding the phrase "but no such payment has been made."

4. Bail - A new section 479 has been added at the outset of the newly created "Bail" chapter, or Chapter XXXV, to make clearer the meaning of some terms used in the legislation. The meanings of "Bail," "Bond," and "Bail Bond" are explained in clear and concise detail for the first time in this section. But the author also claims that words like "*Surety*" ought to have been defined here.

5. Capital Punishment - Even though the death penalty or the death penalty in general is cruel and inappropriate in many democracies, the Indian criminal justice system nevertheless acknowledges this. With the addition of Section 473, the procedural code has finally established a comprehensive process for "*Mercy Petitions in Death Sentence cases.*"

6. Timelines for procedures: The BNSS prescribes timelines for various procedures. For instance, it requires medical practitioners who examine rape victims to submit their reports to the investigating officer within seven days. Other specified timelines include:

- (i) giving judgment within 30 days of completion of arguments (extendable up to 60 days),
- (ii) informing the victim of the progress of the investigation within 90 days, and
- (iii) framing of charges by a sessions court within 60 days from the first hearing on such charges.

# C. PROGRESSIVE SAFEGUARDS AND/OR CHANGES

1. By implementing modifications regarding the application of forensic science in criminal investigations, BNSS is also keeping up with the times. In contrast to the previous version of the code, which only allowed for the collection of specimen signatures or handwriting samples, Section 311A of the CrPC or Section 349 of the BNSS now permits the collection of fingerprints and voice samples as well. According to the amended Section 329(4)(g) of BNSS, state governments are now permitted to notify scientific experts for Section 293(4)(g) of the CrPC, in addition to the central government.

2. In this regard, Section 176 of the BNSS or Section 157 of the CrPC may contain the most significant legal amendment overall. By introducing a new subsection (3), it is now required for a forensic team to visit the scene, gather samples, and record the procedure on video when the police learn of the commission of a crime carrying a sentence longer than seven years.

3. Even after the term "*Victim*" was defined for the first time in the CrPC in 2009, many protections that would have improved their circumstances were still absent. By adding some modifications regarding the same, BNSS moves this initiative in the right direction. *For example*, a proviso has been added to Section 232 of BNSS, which corresponds to Section 209 of CrPC, stating that an application filed by the victim must also be sent to the Sessions Court during the committal proceedings. Likewise, copies of records, such as police reports, that are required to be provided to victims or their advocates under Section 230 of the BNSS or Section 207 of the CrPC, must also be provided.



4. In the past, in Complaint Cases, if the complainant wasn't present, the accused would be released. The amended Section 272 of BNSS, which corresponds to Section 249 of CrPC, now allows the complainant to be fairly represented because the magistrate may allow the complainant to be present for up to 30 days before clearing the accused. In a similar vein, the court must give the victim's request for a withdrawal of prosecution consideration. To do this, a proviso corresponding to Section 321 of the CrPC has been added to Section 360 of the BNSS.

5. Apart from victims, even the accused have been allowed to be heard in Complaint cases. By adding a new proviso to Section 223 of BNSS or Section 200 of CrPC, now Accused must be heard before cognizance can be taken in complaints before Magistrates.

6. Section 193(3) of the BNSS, which corresponds to Section 173(2) of the CrPC, incorporates a new clause (ii) requiring the police to notify the victim or informant of the investigation's progress within 90 days. This notification can be sent electronically.

7. The addition of Section 398, which requires all state governments to notify a witness protection program, is another notable modification to the procedural law. However, the author claims that rather than leaving it up to the individual states' discretion, the new code could have included some guidelines as a stopgap within BNSS itself. The Ministry of Home Affairs Draft Guidelines and rulings from the Hon'ble Supreme Court of India, including *Mahender Chawla v. Union of India*, (2019) 14 SCC 615, could have served as a source of guidance.

8. Two new provisos have been added to Section 183(6)(a) of BNSS, which corresponds to Section 164(5A)(a) of the CrPC, adding further protections for judicial magistrates recording statements. First of all, a female judge ought to record a woman's statement if one is made. Second, the Magistrate is required to record the statement of any person accused of a serious offense, meaning that the accused could face a sentence of more than ten years in prison.

9. The addition of a proviso to Section 190(1) of BNSS, which corresponds to Section 170(1) of CrPC, is a welcome change. Now, the police are not required to arrest an accused person merely to get him to appear before a judicial magistrate if the investigation is finished but not submitted before the police report is. This modification appears to be under the historic ruling rendered by the Hon'ble Supreme Court of India in *Satender Kumar Antil v. CBI*, (2022) 10 SCC 51.

10. The provision under subsection (1) of Section 43 of BNSS, which corresponds to Section 46 of CrPC, providing protections for female arrestees has been extended. It is now necessary to inform the woman's friends or family about her arrest.

11. In addition, the code is being updated with some other compassionate amendments to show mercy to first-time offenders for less serious offenses and to concurrently address the growing number of prisoners awaiting trial. For instance, penalties have been drastically lowered for first-time offenders in Section 293 of BNSS, which corresponds to Section 265E of CrPC and deals with case disposal in plea bargaining procedures. Under Sections 293(c) and 293(d) of the BNSS, they can now be punished to 1/4th and 1/6th of the minimum punishment, as opposed to 1/2 and 1/4th punishment, respectively.

12. Section 483, a new provision, has been added to the BNSS in the chapter that governs bail grants. This was formerly known as Section 437A, which was added by the state amendment for Arunachal Pradesh. This means that the accused will have to sign a bond committing them to appear in court the following day, either before the trial or the appeal is over. This might be advantageous because the individuals in question won't need to be detained right away to appear in court.

13. A compassionate modification has also been made by including a proviso in Section 195(1) of BNSS, which corresponds to Section 175(1) of CrPC, concerning the police's authority to summon individuals. People in vulnerable categories will no longer be required to “attend at any place other than the place where they reside,” according to this proviso.

14. Additionally, BNSS has changed the parameters of anticipatory bail grants. Certain clauses that might have been interpreted as impeding the successful issuance of anticipatory bail have been eliminated. In particular, the proviso to Section 438(1), Sections 438(1A) and 438(1B) of the CrPC have been eliminated, and the amended Section 484 of the BNSS makes no mention of them. These provisions came with burdensome requirements, like ensuring the physical presence of an accused person seeking anticipatory bail or providing “*the Public Prosecutor with a reasonable opportunity of being heard*” during the hearing of the application. While it might occasionally be required to provide the prosecutor with this information or to arrange for a physical presence, it shouldn't have been required, as it was in the CrPC. A middle path could have been the substitution of the word ‘*shall*’ for ‘*may*’ in both these removed provisions.

15. Section 481 of the BNSS, which corresponds to Section 436A of the CrPC, has also undergone modifications. A first-time offender awaiting trial may now be eligible for mandatory bail after serving 1/3 of the sentence, as opposed to the previous 1/2 of the sentence, thanks to the addition of a proviso to subsection (1). Subsection (3) has been added to Section 481 to make this right effective. The jail superintendent will now be responsible for applying for the release of eligible inmates.

16. The addition of Section 105 to the BNSS, which requires police conducting searches under Section 185 (previously Section 165 of the CrPC) to electronically record the proceedings and forward them to the relevant magistrate, offers a significant safeguard. This would guarantee that the police wouldn't go overboard when conducting search operations.

17. Similarly, per Section 185(5) of the BNSS, copies of any records made during such a search must now be sent to the relevant magistrate within 48 hours. There had previously been no such time restriction.

18. The goal of the new law is to broaden the scope of legal aid services. Legal aid was previously granted "*in a trial before the Court of Session*" under Section 304(1) of the CrPC. But instead of this, "*in a trial or appeal before a Court*" has been added to section 341(1) of the BNSS, greatly expanding its scope.

19. Section 293 of BNSS corresponding to Section 265E of CrPC relating to disposal of cases in plea bargaining procedure, punishments have been significantly reduced for first-time offenders. Now they can be punished to  $\frac{1}{4}$ <sup>th</sup> and  $\frac{1}{6}$ <sup>th</sup> of the minimum punishment as compared to  $\frac{1}{2}$  and  $\frac{1}{4}$ <sup>th</sup> punishment respectively under Sections 293(c) and 293(d) of BNSS.



# D. ELECTRONIC/DIGITAL ALTERNATIVES FOR EXISTING PROCESSES

As part of the commitment to creating a digital India, the BNSS has added a historic new Section 532. Accordingly, all trials, inquiries, and proceedings, as well as the recording of relevant evidence, party examinations, summons, and warrant issuance, service, and execution, among other procedures, can now be completed electronically. For instance, the BNSS permits giving information as regards the commission of a cognizable in electronic form.

Another significant introduction under Section 176(3) of the BNSS, particularly in investigation offenses that are punishable for 7 years or more is the requirement for the officer in charge of a police station to cause a forensic expert to visit the crime scene to collect forensic evidence in the offense and also cause videography of the process on a mobile phone or any other electronic device. Further, this provision also confers powers on a State Government to notify utilization of the forensics facilities of another state until a forensics facility is available in that state.

1. In the proviso provided to Section 64(2) of BNSS as corresponding to Section 62 of CrPC, summons can now be served digitally as well. As per Sections 70(3) and 71(2) of BNSS, electronically served summons and their digital communication would also be considered valid.
2. Issuing summons/warrants under 'Issue of process' as given in Section 227 of BNSS corresponding to Section 204 of CrPC.
3. Notices by executive magistrates under Section 134 of CrPC and now Section 153 of BNSS can be served online.

4. Supply of Police Reports and other investigation-related documents under Sections 173(7) and 207 of CrPC can be done digitally as per Sections 193(8) and 230 of BNSS
5. Order of confirmation of Death Sentence under Section 412 of BNSS or Section 371 of CrPC.
6. Reading of Charges to the accused under Sessions Trial as per Section 251(2) of BNSS corresponding to Section 228(2) of CrPC.
7. As per the changes made to Sections 254 and 265 of BNSS as corresponding to Sections 231 and 242 of the CrPC, now prosecution evidence can also be recorded via digital means

8. Furthering the noteworthy cause of ease of investigation, statements by police during an investigation under Section 157 of CrPC, may be recorded electronically by phone as well. This has been done by adding a proviso to the same effect to the corresponding Section 176(1) of BNSS. Even FIRs can be legally registered by electronic communication as per the addition of clause (ii) to Section 173(1) which corresponds to Section 154 CrPC.

9. Another change that can be observed is that Section 182 of CrPC which discussed the procedure regarding “Offences committed by letters etc.”, has now been suitably modified to include ‘electronic communication’ as well as per Section 202 of BNSS. While considering the custody and disposal of perishable property during the trial, electronic records now need to be maintained the same as per the revised Section 499 of BNSS or Section 451 of CrPC.

## E. EXPEDITING PROCESSES AND/OR MAKING PROCESSES TIME-BOUND

1. Through the addition of Section 336 of the BNSS, a very timely provision has been added to speed up trials. The author of any report or document created by an investigator, scientific expert, or public servant who is intended to be admitted into evidence in court must appear in person. However, the court may order the successor officer of that person to appear due to unavoidable circumstances like retirement, death, excessive delay, etc. in getting that person.
2. In an additional move to speed up trials, a magistrate may now release an accused person in cases of baseless accusations after recording the reasons per the amended Section 274 of the BNSS or Section 251 of the CrPC pertaining to summons cases.

3. BNSS has acknowledged the role of other laws and agencies on several occasions. For example, under the amended corresponding Section 303(2) of BNSS, even "*Central government in cases instituted by its central agency*" can now pass a notification regarding prisoners, whereas previously only state governments could do so under Section 268(2) of CrPC.

4. The procedural law is finally giving recognition to the fact that special Judges equivalent to (Additional) Sessions Judges can be appointed under several legislations such as NDPS Act 1985, POCSO Act 2012, etc. In this line, Section 249 of BNSS corresponding to Section 226 of CrPC which relates to '*opening case for prosecution*' in a sessions trial, mentions '*any other law for the time being in force*'. Similarly, the same phrase has also been added to Section 306(2) of CrPC or the revised Section 343(2) of BNSS to signify that Special Judges could have been appointed under other laws as well.

5. In Sections 418 and 419 of BNSS corresponding to Sections 377 and 378 of CrPC, references to the agency under 'Delhi Special Police Establishment Act, 1946' have been removed and replaced by 'any agency under any Central Act'.

6. Many proceedings under this code, both judicial and executive, have now been mandated to become time-bound by providing maximum time limits in which they must be done. Some of the specific section-wise changes implementing this are:

- In proceedings for '*Conditional order for removal of nuisance*' under Section 152 of BNSS or 133 of CrPC, such proceedings are now mandated to be completed within 90 days as per a new proviso to Section 157 of BNSS as corresponding to Section 138 of CrPC.

- By amending erstwhile section 155 or the new section 174 of BNSS, the Police are required to send information regarding non-cognizable offenses to the concerned on a fortnightly basis.
- Medical examination of a victim of rape under new section 184(6) corresponding to the old section 164A(6) has been time bound by substituting the words '*within seven days*' instead of '*without delay*'.
- Police investigation during trials under section 173(8) of CrPC or Section 193(9) needs to be completed within 90 days.



- Inquest proceedings under Section 194 of BNSS or Section 174 of CrPC, Police are required to send a report within 24 hours to the concerned District/Executive Magistrate.
- ‘*Committal proceedings*’ by Magistrate to Sessions court under Section 232 of BNSS corresponding to Section 209 of CrPC have been mandated to be completed within 90 days from the date of taking cognizance. This can be extended to a maximum of 180 days by providing reasons in writing.
- As per Section 230 of BNSS corresponding to Section 207 of CrPC, a copy of the Police Report and other documents now need to be supplied to the accused within 14 days of the date of production/appearance. Earlier there was no time limit for the same as the then Section 207 simply mentioned ‘*without delay*’.

7. Section 218(1) of the BNSS, which is equivalent to Section 197(1) of the CrPC and refers to the "*Prosecution of Judges and Public Servants*," has an interesting proviso added to it that aims to shorten the time required for these prosecutions. This proviso states that the required sanction will be deemed to have been granted by the Government if the relevant government does not decide within 120 days.

8. The new BNSS code has time-bound some processes for both Sessions and Magistrate trials. Within 60 days of committal, the Accused must file an application if he wants to be released from custody in a Sessions trial in accordance with Section 250 of the BNSS, which is equivalent to Section 227 of the CrPC.

9. An interesting change has been incorporated to expedite trials under Section 242(1) of BNSS as corresponding to Section 219(1) of CrPC. Earlier, for offenses of the same kind within a span of a year given certain circumstances, a person could be charged and tried for a maximum of 'three' offenses at once. This limit has now been raised to 'five'.

10. A pertinent addition to shorten some trial proceedings is the addition of subsection (7) in Section 269 of BNSS corresponding to Section 246 of CrPC wherein prosecution evidence can be closed if the witnesses do not turn up despite taking all reasonable measures.

11. A noteworthy change done to the procedure to shorten the trial duration is the addition of sub-clause (b) to the proviso under Section 346(2) of BNSS corresponding to Section 309(2) of CrPC.

12. For efficacious disposal and custody of perishable property pending trial, the Magistrate Court shall pronounce an order for disposal/custody/delivery within thirty days as per newly added subsection 5 to Section 499 of BNSS corresponding to Section 451 of CrPC. As per the addition to Section 501 of BNSS or Section 453 of CrPC, an innocent purchaser of stolen property needs to be paid '*within six months*' of the date of passing of any compensation order to the same effect. Earlier, such a time frame was not provided.

13. Parties' woes usually don't cease after the conclusion of a trial as they might have to wait for indefinite periods for a copy of the judgment. As per Section 392(1) of BNSS or Section 353(1) of CrPC, judgment in every trial has to be pronounced within 45 days of termination of the trial. The said judgment needs to be uploaded online within 7 days of the pronouncement by the addition of a proviso to Section 392(4) of BNSS or Section 353(4) of CrPC.

# INADVERTENT ERRORS/ MISTAKES

Additionally, a few unintentional mistakes were made when drafting the BNSS. One such unintentional error, for example, can be found in Section 482(2) of the BNSS, which corresponds to Section 437(3) of the CrPC. Under the previous clause, accused persons in three main IPC chapters—Chapter VI, "Offences against State," Chapter XVI, "Offences against Human Body," and Chapter XVII, "Offences against Property"—may be subject to additional bail requirements. While the word "*Indian Penal Code*" has been removed from the new provision, it should have said "*Bharatiya Nyaya Sanhita, 2023*" instead of "*Bharatiya Nagarik Suraksha Sanhita, 2023*," which is illogical because the BNSS is a procedural code that does not define offences in the same way as substantive criminal laws.

1. In the explanation to Section 65 of BNSS or Section 63, a 'corporation' has still been defined with reference to the definition in the Societies Registration Act, 1860.

2. A major point of contention is the change to Section 262 of BNSS corresponding to Section 239 of CrPC, whereby now an '*accused may prefer an application for discharge in 60 days of framing of charges*'. While at first glance it might seem another laudable change to make processes time-bound, however, this results in a complete misapplication of settled law as discharge can occur before '*charges have been framed*'. Possibly, this could have been '*filing of Charge sheet or police report*'. But in the case of Section 250 of BNSS, a better clarification needs to be given for the timeline of discharge taking before '*framing of charges*'.

3. Another example of a mistake like this has been seen in Section 290 of the BNSS or Section 265B of the CrPC, which states that a plea bargaining application must be submitted within 30 days of the "*framing of charges*." It has long been thought that the best time to use plea bargaining is before charges are filed. The Hon'ble Delhi High Court held this as well in 2019 in the case of *Gaurav Aggarwal v. State*.

4. While all the references to the word '*Code*' in CrPC have been replaced with the word '*Sanhita*' in BNSS, noticeably in a very important new addition to BNSS i.e., Section 532, the word '*Code*' has still been used.

5. There is a typographical error where the word 'Policy' has been used in place of 'Police' in the newly added proviso to Section 187(5) of BNSS as corresponding to Section 167(2) of CrPC. Due to the same, the current draft reads it as '*Policy custody*' and not '*Police custody*'.

6. It has been claimed by the drafters that the draconian Section 124A of the Indian Penal Code i.e., '*Sedition*' has finally been dropped from the Indian law. However, Section 150 of the new Bhartiya Nyaya Sanhita, is analogous to if not worse even though it may not deploy the formal term – '*Sedition*'. Coming to the procedural aspect, the erstwhile CrPC and the new BNSS have equivalent sections namely 108 and 127 respectively. Both these sections are still titled '*Security for good behavior from persons disseminating seditious matters.*' Not only this, the reference to Section 124A of IPC in Section 108(1)(i)(a) of CrPC has now been replaced with Section 150 of Bhartiya Nyaya Sanhita in the corresponding Section 127(1)(i)(a) of BNSS.



# NEGATIVE CHANGES

## 1. BNSS expands the powers of the police

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

## 2. The procedure of police custody altered

The Constitution and CrPC prohibit detention in police custody beyond 24 hours. The Magistrate is empowered to extend it up to 15 days in case the investigation cannot be completed within 24 hours. He may further extend judicial custody beyond 15 days if he is satisfied that adequate grounds exist to do so. However, overall detention cannot exceed 60 or 90 days (depending on the offense).

The BNSS modifies this procedure. It adds that the police custody of 15 days can be authorized in whole or in parts at any time during the initial 40 or 60 days out of the 60 or 90 days period. This could lead to bail being denied during this period if the police argue that they need to take the person back into police custody.

This differs from laws like the Unlawful Activities (Prevention) Act, 1976, where police custody is limited to the first 30 days. The Hon'ble Supreme Court has held that as a general rule, police custody should be taken in the first 15 days of remand. The extension of 40 or 60 days should be utilized as an exception. The BNSS does not require the investigating officer to provide reasons when seeking police custody for someone in judicial custody.

### 3. Powers of detention amended

Article 22 of the Constitution requires a person in police custody to be produced before a judicial Magistrate within 24 hours. The CrPC also provides this. The BNSS retains this provision. It adds that police may detain or remove any person who resists, refuses, or ignores directions given by an officer to prevent cognizable offenses. Post detention, the detained person may either:

- (i) be produced in front of a Magistrate, or
- (ii) in the case of petty cases, be released when the occasion is past.

The phrase '*occasion is past*' is not defined.

#### 4. The power to use handcuffs may infringe on the accused's personal liberty

The BNSS provides for the use of handcuffs during arrest. Handcuffs may only be used to arrest: (i) a habitual or repeat offender who has escaped custody, or (ii) a person accused of offences such as rape, acid attack, organised crime, economic offences, acts endangering sovereignty, unity and integrity of India. The provision contravenes judgements of the Supreme Court and guidelines of the National Human Rights Commission.

The Hon'ble Supreme Court has held that the use of handcuffs is inhumane, unreasonable, arbitrary, and repugnant to Article 21. In extreme cases, when handcuffs have to be used, the escorting authority must record reasons to do so. Further, it has ruled that no prisoners undergoing trial can be handcuffed without obtaining judicial consent. The Court has therefore left the discretion to decide the use of handcuffs on the trial court.

## 5. Scope of mandatory bail limited in case of multiple charges

As per the CrPC, if an undertrial has served half the maximum imprisonment for an offence, he must be released on a personal bond. This provision does not apply to offences punishable by death. The BNSS retains this provision and adds that first-time offenders get bail after serving one-third of the maximum sentence. However, it adds that this provision will not apply to:

- (i) offence punishable by life imprisonment, and
- (ii) where an investigation, inquiry or trial in more than one offence or multiple cases is pending.

Since chargesheets often list multiple offences, this may make many undertrial prisoners ineligible for mandatory bail.

For example, in 2014, the Hon'ble Supreme Court held that illegal mining constitutes an offense under the Mines and Minerals (Development and Regulations) Act, 1957, and also qualifies as theft under the IPC. Similarly, rash and dangerous driving is a punishable offense under the Motor Vehicles Act, 1988 as well as the IPC. Persons accused in such cases will not be eligible to obtain mandatory bail.

Bail allows the Accused to be released from custody while awaiting trial, provided they meet certain conditions. Detention before conviction is done to ensure easy availability of an accused for trial and there is no tampering with evidence. If these are ensured, detention is not needed. The Hon'ble Supreme Court has held that *Bail is the rule and incarceration is the exception*. Further, it has been observed that undertrial prisoners should be released at the earliest and those who cannot furnish bail bonds due to poverty are not incarcerated only for that reason.

## 6. The scope for plea bargaining is limited

Plea bargaining was added to the CrPC in 2005. It is not allowed for offences punishable with a death penalty, life imprisonment, or imprisonment term exceeding seven years. The CrPC does not permit a bargain to be struck for a lesser offence or for compounding the offence – the accused will be considered to have confessed and been convicted of the offence. The BNSS retains this provision. This limits plea bargaining in India to sentence bargaining, that is getting a lighter sentence in exchange for the accused's guilty plea.

Further, the BNSS adds a stipulation that the accused must file an application for plea bargaining within 30 days from the date of framing of the charge. This time limit can impact the effectiveness of plea bargaining by limiting the opportunity for seeking a reduced sentence.



## 7. Congestion in the prison system

Restricting bail, and limiting the scope for plea bargaining could deter decongesting of prisons. As of December 2021, India's prisons housed over 5.5 lakh prisoners, with an overall occupancy rate of 130%.

In 2021, under-trials constituted 77% of the total prisoners in India. Approximately 30% of under-trial prisoners were in detention for a year or more. About 8% of under-trial prisoners were in detention for three years or more.

## 8. Successors deposing for transferred or retired officers

The BNSS states that if an officer who prepared a document or report for an inquiry or trial is unavailable, the Court will ensure that their successor officer deposes on the document. Officers covered by this provision include public servants, medical officers, and Investigating Officers (IOs). Reasons for unavailability include:

- (i) death,
- (ii) transfer,
- (iii) retirement, and
- (iv) likeliness to cause delay

While allowing successor officers to depose before the Court may help expedite cases, it may contradict the normal rules of evidence.

## 9. Safeguards on the attachment of property

Property that is derived or obtained, directly or indirectly, as a result of criminal activity is referred to as proceeds of crime. The CrPC provides police the power to seize property when it is:

- (i) alleged or suspected to have been stolen, or
- (ii) found under circumstances creating suspicion of commission of any offense.

This applies only to movable properties. The BNSS extends this to immovable properties as well. Provisions on the treatment of seized property in BNSS differ from the provisions in the Prevention of Money Laundering Act, 2002 (PMLA). The PMLA provides for the confiscation of property derived from money laundering in relation to specified offenses.

Certain safeguards provided under PMLA are not available under the BNSS. Under PMLA, attachment is provisional in nature for up to 180 days. A notice period of at least 30 days needs to be given to show cause why an attachment order must not be made. During the attachment, enjoying immovable property cannot be denied. The BNSS does not provide a time limit up to which property can be attached. It provides a show cause notice of 14 days to be given to the accused.

## 10. Overlaps with existing laws

Over the years, special laws have been enacted to regulate various aspects of criminal procedure. However, the BNSS retains some of the procedures.

## 11. Data collection for criminal identification

In 2005, the CrPC was amended to empower a Magistrate to obtain handwriting or signature specimens from arrested persons. The BNSS expands this provision by empowering the Magistrate to also collect finger impressions and voice samples. It also allows the collection of this data from persons who have not been arrested under any investigation.

The Criminal Procedure (Identification) Act, 2022 allows a broader range of data to be collected including fingerprints, handwriting, and biological samples. Such data may be collected from convicts, those who have been arrested for an offense, or non-accused persons as well, and can be stored up to 75 years. With a broader law recently being passed to allow for data collection of criminals and accused, the need for retaining data collection provisions and expanding on them in the BNSS is unclear. The constitutional validity of the 2022 Act is under consideration before the Hon'ble Delhi High Court.

## 12. Maintenance of senior citizens

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

## 13. Public order functions retained in BNSS

The CrPC provides for the procedure for the investigation and trial of offenses. It also contains provisions for security to maintain peace and maintenance of public order and tranquility. It contains provisions that allow a District Magistrate to issue orders needed to preserve public order. The BNSS has retained these provisions (in separate chapters).

Since trial procedure and maintenance of public order are distinct functions, the question is whether they should be included under the same law or if they should be dealt with separately. As per the Seventh Schedule of the Constitution, public order is a state subject. However, matters under the CrPC (before the commencement of the Constitution fall) under the Concurrent List.

14. The new BNSS seems to be more in line with a new Hon'ble Supreme Court verdict in *V. Senthil Balaji vs. State* in 2023. In this case, one of the findings of the Court is “*The maximum period of 15 days of police custody is meant to be applied to the entire period of investigation – 60 or 90 days, as a whole.*” The Court in ‘Senthil Balaji’ had also urged for a reconsideration of the ‘Anupam J. Kulkarni’ verdict by a larger bench.

The Kulkarni verdict and all the subsequent interpretations have been correctly decided. It is routinely seen that many people particularly those hailing from a marginalized background are often subject to extreme forms of cruelty in police custody. Many of the statutory safeguards such as a medical check-up are also not fully complied with. In such a situation, without taking adequate steps to ensure the full compliance of the existing safeguards, it may not be suitable to increase the ambit of police custody.



15. The law also introduces a new proviso to Section 187(5) of BNSS as corresponding to Section 167(2) of CrPC. The same is reproduced below:

*“Provided further that no person shall be detained otherwise than in police station under policy (sic) custody or in prison under Judicial custody or place declared as prison by the Central Government or the State Government”*

This, has seemingly come as a response to the ‘*Gautam Navlakha v. NIA*’ cases. One of the arguments raised by the defendants therein was that Section 167(2) can be interpreted to include “*house arrest*” as well. With the introduction of this proviso, the same cannot be done anymore.

# CONCLUDING REMARKS

- So far as the prescription of timelines for inquiry, investigation, and trial and formal adoption of audio-visual and electronic means to undertake various processes, the proposed changes are intended to introduce a more efficient and technologically aligned regime for the administration of criminal justice and move away from the language of British-era criminal laws. However, its efficacy in the real world depends not only on how such provisions are implemented and adhered to in letter and spirit, but also on ensuring that all Magistrates, law enforcement personnel, and allied agencies undergo the necessary training to implement the changes that the BNSS brings in its word and spirit.

- A few of the changes are undoubtedly concerning, though. Some extremely problematic aspects that should be carefully considered are expanding the scope of investigative powers under search and seizure, allowing for the collection of samples from a wider range of people, limiting the power of commutation, reintroducing preliminary inquiry before filing a formal complaint, bringing back handcuffs, and last but not least, altering the remand procedure. To better support any procedural law, it would be ideal to further integrate enhanced safeguards, better funding, and infrastructure into the criminal justice system.
- It should be noted that the much more recent CrPC of 1973 supersedes the much older IPC and Evidence Act, which were passed in 1860 and 1872, respectively. As a result, the criminal justice system was never a product of colonialism. Rather, the Indian Supreme Court tried to constitutionalize the criminal justice system for the good of society after the emergency, which is why many of the changes included in the CrPC came about.

- The name of the act itself appears to have been changed as part of the decolonization process (from a 1973 law), and all references to the word "*Code*" have been replaced with the word "*Sanhita*." On the other hand, some would counter that it still appears colonial because certain problematic elements are still present, such as the broad discretion given to the authorities in making arrests and conducting investigations.
- The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) was introduced in the Lok Sabha In August 2023, to replace the Code of Criminal Procedure, 1973 (CrPC), later examined by the Standing Committee on Home Affairs, leading to the introduction of the Second Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS 2) In December 2023 which successfully passed in both houses, seen as controversial, the name pertaining to the widely spoken language of Hindi is considered as the tool leading to the controversial name & nature of this Act and not it's actual contents, entirely due to Hindi being an official language and not the national language of India, a chair that will presumably remain dust-ridden.

- The West Bengal Bar Council observed 1st July as "Black Day" to protest against the new name of the law, but the name aside the needed reforms were certainly brought and the success of this new law in its attempt to modernize the judiciary has been acclaimed to be "very likely" by many well known Indian jurists.
- As an aspiring lawyer, I would like to sprinkle a hint of my own opinion, the law has certainly done its work in modernizing the framework of the former CrPC and its future-oriented outlook is also brilliant, the much-needed sense of direction was required in many laws and the BNSS has perfectly done the job of a compass, the path that this compass forms for future precedents and justice herself will be of peculiar interest not just to Indians but to anyone fond of the law, It's simply about the facet of time.

Thank you

---

---