

## **BHARATIYA NAGARIK SURAKSHA SANHITA, 2023 & CRIMINAL PROCEDURE CODE: A COMPARISON OF ARREST AND INVESTIGATION PROCEDURE**

**Priyanka Mittal**

Guest Faculty, Centre for Police Administration, Panjab University.

### **1. INTRODUCTION**

The scope of the article would be restricted to only substantial changes made in criminal procedure law by doing an exhaustive comparative analysis of provisions from Crpc and BNSS<sup>i</sup> with regard to procedure of arrest and investigation. With speedy justice as its primary goal, a significant change in the BNSS is the introduction of timelines for various steps in the investigation and trial. These timelines have been reviewed briefly towards the end of this article. Note that previous attempts to address delays through measures like fast track courts have had limited success due to systemic constraints such as heavy caseloads and shortage of judges. It is thus unclear if these timelines would be able to ensure quick disposal, without simultaneous institutional investments. More concerning is the likely adverse consequence of rushed proceedings on the quality of investigation and fair trial rights of the accused.<sup>ii</sup>

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

Another category of amendment is the inclusion of audio-video measures in investigation, such as the mandatory need for such recording in search and seizure proceedings. Though some concerns with this proposal are discussed in the brief, inclusion of these measures is in line with the legislative and judicial trend of expanding the use of technology towards ensuring better transparency.

Further, contrary to settled jurisprudence that use of handcuffs on arrestees violate human dignity under Art.21 of the Constitution, BNSS provides statutory sanction for handcuffing of a 'habitual, repeat offender' by the police, without requiring an individualised assessment of the tendency to escape or consideration of less restrictive measures. Another significant change is that BNSS expands the category of experts who are exempted from coming to court to include not just government scientific experts as under the CrPC, but also any expert certified by the State or Central governments. This disregards existing jurisprudence that emphasises the importance of

meaningful examination of forensic evidence by courts, including the accuracy and reliability of the expert opinion.

## **2. PROPOSED AMENDMENTS IN THE BILL**

While there are some beneficial amendments, several provisions of BNSS have a significant potential for abuse. Some provisions subvert benefits presently conferred by law, often with serious consequences to constitutional rights of the accused. Further, some changes in the BNSS have led to absurd consequences. Proposed amendments in procedure of arrest and investigation has been discussed below:

### **2.1 Procedure of Arrest**

#### ***Arrest without Warrant***

While section 41 of CRPC allows power of police to arrest without warrant. An addition has been made in it through Cl.35 of BNSS which Inserts an additional requirement that a police officer cannot arrest without prior permission of an officer not below the rank of Deputy Superintendent of Police where the offence is punishable with imprisonment below three years *and* where the accused is infirm or above sixty years of age.

#### ***Arrestee's right to inform***

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

#### ***Designated police officer***

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

#### ***Arrest by Private Person***

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

#### ***Use of Handcuffs***

Cl.43(3) of the Bill makes a new addition to s.46 CrPC, which empowers the police to use handcuffs for habitual, repeat offenders who have escaped from custody and who have committed a variety of bodily, social offences including organised crime, terrorist acts, drug related crime, sexual offences, murder, acid attack, human trafficking, offences against the State, illegal possession of arms and ammunition, or economic offences amongst others. Hence, discretionary powers are given to police for the use of handcuffs. However, this clause falls short of well settled constitutional thresholds, established to protect a person's right to dignity under Art.21, that must be met for the exercise of handcuffing powers.

### ***Information of arrest***

Cl.48(1) of the Bill inserts obligation on persons making an arrest to provide information of such arrest and place of arrest to the police officer designated in the district, as provided under Cl.37(b) who is to be not below the rank of ASI.

### ***Medical Examination***

Cls.51 and 52 of the Bill Enables any police officer to seek the medical examination of the arrestee for purposes of investigation and collection of bodily samples, by replacing the phrase '*police officer not below the rank of a sub-Inspector*', under the existing ss.53 and 53A CrPC, with '*any police officer*'. Thereby, widening the scope to '*any police officer*' creates greater risk of improper collection of samples by junior officers who may not have the required skills, training or experience. Given the intimate nature of the samples and their use for forensic analysis, this may adversely affect an accused's right to a fair trial and right to privacy. Further, Cl.53 of BNSS enables the medical practitioner to conduct one more examination of the arrestee if the practitioner finds it necessary. Presently, as per the *D.K. Basu*<sup>iii</sup> guidelines the medical practitioner is required to conduct medical examinations once every 48 hours when the arrestee is in custody. Contrary to this, Cl.53(1) does not mandate multiple examinations ('one more examination') and instead leaves this issue to the discretion of the medical practitioner.

### ***Production of Arrestee before magistrate***

Cl.58 of the Bill inserts a phrase to the effect that an arrestee may be produced before a Magistrate, within the first 24 hours of arrest, even if such Magistrate does not have jurisdiction. By excluding the provision of jurisdiction it protects the rights of person so arrested that now the arrested person can be presented before any magistrate whether having jurisdiction or not.

## **2.2 PROCEDURE OF INVESTIGATION**

### ***Introduction of Zero FIR***

The BNSS has institutionally recognised the right to register Zero FIRs under Cl.173.<sup>iv</sup> Therefore, the Bill prohibits the police from using a lack of territorial jurisdiction as a reason to avoid their duty to record first information and helps to eliminate one of the hurdles faced by victims in registering an FIR. While being an important safeguard, this is not an innovation of the BNSS and has been previously mandated by the Central Government and substantially enforced by the judiciary in various instances. In *Lalita Kumari*, the Supreme Court held that the police have a mandatory duty to register an FIR when the information given discloses a cognizable offence.<sup>v</sup>

### ***Informant's signature***

For initiating the proceedings under BNSS Bill, 2023 under Section 173(1) Information can be given orally or via electronic communication after taking on record has to be signed within three days by informant. This timeline as to signature of informant is not mentioned in Crpc.

### ***Preliminary inquiry***

Cl. 173(3) of the Bill provides that for any information of cognizable offence, which is made punishable between 3-7 years, the police officer with prior permission of the DSP rank officer may conduct a prima enquiry within 14 days and conducts investigation only if prima facie case exists.

### **Search and Seizure**

Cl. 185 of the Bill requires search of a made to be recorded through audio video electronic means preferably by mobile phone. Cl. 185(5) makes it mandatory to forward copy of search to magistrate empowered to take cognizance of the offence within 48 hours. The inclusion of this provision in investigation is a positive move geared towards ensuring greater transparency and accountability in police investigation, protecting the rights of both accused and victims, and improving the quality of evidence. Moreover, Cl.105 significantly extends the scope of audio-video recording during search and seizure, to include the process of preparing a list of seized items and the signature of witnesses. Transparency in search and seizure proceedings, in this manner, has the potential to deter against fabrication of evidence and subversion of the safeguard requiring the presence of independent witnesses to these proceedings.

### ***Victim's Right To Know***

Cl.193(3) of the BNSS requires the police to inform the victim of the progress in the investigation within ninety days and therefore allows the victim to be aware of possible lapses and delays in the investigation. At the same time, there exists no statutory mechanism for victims to hold the police accountable or seek redressal for such lapses or inordinate delays in investigations, which ultimately limits the utility of the right. However this right is available to victims only if they are

represented by an advocate. Thus, in the absence of a vested right to free legal aid and assistance for victims, a large portion of victims will not have recourse to these rights.

### ***Forensic Expert***

Cl.176(3) introduces a mandate for the collection of forensic evidence at the crime scene by a 'forensics expert' in all offences punishable by imprisonment of seven years or more. In such cases, forensic experts will visit crime scenes to collect forensic evidence and record the process on mobile phone or any other electronic device. If a state does not have forensics facility, it shall utilise such facility in another state.

### ***Detention Period***

Cl. 187(3) of the Bill allows detention in police custody to be authorised beyond the period of fifteen days provided under the CrPC, and for the entire detention period of sixty or ninety days. Police custody is a well-documented site for torture and other excesses. Expanding the duration and reach of such custody is bound to increase the potential for abuse, including fabrication of evidence by the police. The proposed change is excessive and in stark contrast to even special legislations such as the UAPA where the duration of police custody permissible is only thirty days; and the investigating officer is required to file an affidavit providing reasons for seeking police custody if the accused is in judicial custody.

### ***Duty of police to inform***

Another change that has been laid down by the legislative is that as per Section 193(3)(ii) Police is duty bound to inform about the progress of investigation within 90 days to the victim or complainant by any means including electronic communication.

### ***Audio-Vedio recording of statements***

Cl.176(1) of the Bill also provides an option of audio-video recording of any statement made during police investigation. The scope of this proviso is wide enough to include disclosure statements of accused before the police, besides the statements of other witnesses (audio-video recording for which is already permitted under s.161 CrPC, retained in Cl.180 BNSS). This is an important safeguard to deter against torture and coercion of the accused during custodial interrogations. However, a crucial limitation is that this is not a mandatory requirement.

## **2.3 CONCLUSION**

As discussed above, by and large most of the changes are well meaning and much needed. However, few of the changes are certainly alarming. For instance, broadening the scope of investigative powers under search and seizure, ability to get samples from a larger set of people,

reintroduction of preliminary inquiry before FIR, bringing handcuffs back and last but not the least – the changes in remand procedure; are some of the very problematic aspects which must be viewed with caution. Ideally, better funding and infrastructure along with increased safeguards should be further incorporated in the criminal justice administration to better complement any procedural law.

## **REFERENCES**

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<sup>i</sup> An Exhaustive Comparative Analysis of Code of Criminal Procedure, 1973 and Bharatiya Nagarik Suraksha Sanhita, 2023 available at: <https://www.barandbench.com/columns/comparative-analysis-of-code-of-criminal-procedure-1973-and-bharatiya-nagarik-suraksha-sanhita-2023>, (last accessed on 13<sup>th</sup> October, 2023)

<sup>ii</sup> Project 39a, National Law University, Delhi

<sup>iii</sup> DK BASU v. State of West Bengal AIR 1997 SC 610.