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RIGHTS OF THE ACCUSED AND FAIR TRIAL
GUARANTEES UNDER THE BHARATIYA NAGARIK
SURAKSHA SANHITA, 2023: AN EVALUATIVE STUDY OF
PROCEDURAL JUSTICE IN INDIA

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ABSTRACT

The enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) to replace the Code of Criminal Procedure, 1973 (CrPC) marks a pivotal moment in India's criminal procedure landscape. While the legislative overhaul has been widely celebrated as a step toward decolonizing the criminal justice framework, it raises profound questions about the adequacy of procedural safeguards for the accused. This paper undertakes a comprehensive evaluative study of the rights of the accused and fair trial guarantees under the BNSS, 2023. Through a doctrinal and comparative analysis, the paper critically examines key provisions relating to arrest, bail, remand, rights during investigation, access to legal aid, speedy trial mechanisms, and the admissibility of evidence, including electronic records. The study identifies significant continuities and departures from the repealed CrPC, assessing whether the new framework strengthens or dilutes constitutional guarantees under Articles 20, 21, and 22 of the Constitution of India. Particular attention is paid to the expanded powers of police custody, the use of handcuffs, extended periods of remand, and the implications of the new provision permitting trial in absentia. The paper concludes that while the BNSS introduces several progressive elements, including victim-centric reforms and timelines for investigation, certain provisions raise legitimate concerns regarding the balance between state power and individual liberty. The paper recommends a calibrated approach to implementation, legislative amendments to address constitutional lacunae, and robust judicial oversight.

Keywords: Bharatiya Nagarik Suraksha Sanhita 2023; Rights of Accused; Fair Trial; Criminal Procedure; Bail Reform; Police Custody; Remand; Article 21; Procedural Justice; Criminal Justice Reform India

INTRODUCTION

On August 11, 2023, the Union Home Minister introduced three landmark Bills in the Lok Sabha aimed at comprehensively overhauling India's colonial-era criminal laws. These three legislations the Bharatiya Nyaya Sanhita, 2023 (BNS), the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), and the Bharatiya Sakshya Adhinyam, 2023 (BSA) collectively replaced the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, and the Indian Evidence Act, 1872, respectively.¹

The Bharatiya Nagarik Suraksha Sanhita, 2023 in particular governs the procedural machinery of criminal justice from the registration of a First Information Report (FIR) to the execution of a sentence. The CrPC, which it replaces, had been amended numerous times since its enactment but retained the essential colonial architecture designed to serve the interests of the British administration rather than the rights of Indian citizens.

The introduction of the BNSS was accompanied by government representations that it would modernize the criminal procedure, ensure victim justice, leverage technology, and reduce the pendency of cases. However, it has simultaneously attracted sustained criticism from legal practitioners, constitutional scholars, civil liberties organizations, and Parliamentary Standing Committees who have flagged provisions that may compromise the rights of individuals and the integrity of fair trial guarantees.

India's criminal procedure has always operated under the constitutional shadow of Articles 20, 21, and 22, which enshrine the right against double jeopardy, the right to life and personal liberty, and the rights of arrested persons respectively. The Supreme Court of India has, over decades, read expansive procedural guarantees into these provisions from the right to legal

¹ Statement of Objects and Reasons, Bharatiya Nagarik Suraksha Sanhita Bill, 2023, introduced in Lok Sabha on August 11, 2023.

representation and the right to a speedy trial² to the right to be informed of grounds of arrest³ and the right against self-incrimination.⁴

Against this constitutional backdrop, this paper undertakes a systematic evaluation of the BNSS, 2023 as it relates specifically to the rights of the accused and fair trial principles. The paper is organized into the following sections: a review of existing scholarship, a precise statement of the research problem, the study's objectives and questions, the theoretical framework employed, the methodology adopted, key findings organized thematically, a discussion of their implications, and recommendations for reform.

LITERATURE REVIEW

Historical Evolution of Criminal Procedure in India

The Code of Criminal Procedure has had a long and contested history in India. The CrPC of 1973 replaced the earlier Code of 1898, which in turn drew from Macaulay's Law Commission recommendations of the mid-nineteenth century.⁵ Scholars such as Upendra Baxi have argued that Indian criminal procedure was fundamentally designed as an instrument of colonial surveillance and control, with suspect communities treated as objects rather than subjects of the law.⁶

The Law Commission of India, across its numerous reports particularly the 37th, 41st, 154th, and 277th Reports has called for systemic reforms in arrest procedures, bail, remand, and trial mechanisms.⁷ These recommendations formed part of the consultative background to the BNSS but were not all uniformly adopted.⁸

Scholarship on Rights of the Accused

V.R. Krishna Iyer J.'s landmark judgments in the 1970s established the philosophical foundation for bail jurisprudence in India, treating personal liberty as the rule and detention as

² Hussainara Khatoun v. Home Secretary, State of Bihar, AIR 1979 SC 1360; Abdul Rehman Antulay v. R.S. Nayak, AIR 1992 SC 1701.

³ D.K. Basu v. State of West Bengal, AIR 1997 SC 610, where the Supreme Court held that the grounds of arrest must be communicated to the arrested person as well as to a friend, relative, or well-wisher.

⁴ Nandini Satpathy v. P.L. Dani, AIR 1978 SC 1025; the right against self-incrimination under Article 20(3) extends to the stage of police interrogation.

⁵ B.B. Mitra, Code of Criminal Procedure (Eastern Law House, Calcutta, 1986), Historical Introduction.

⁶ Upendra Baxi, *supra* note 2, pp. 56-78.

⁷ Law Commission of India, 41st Report on the Code of Criminal Procedure, 1898 (1969); 154th Report on the Code of Criminal Procedure, 1973 (1996); 277th Report on Wrongful Prosecution (2018).

⁸ Parliamentary Standing Committee on Home Affairs, Report on the Bharatiya Nagarik Suraksha Sanhita, 2023 (November 2023), para 3.

the exception.⁹ Subsequent scholars, including R.V. Kelkar and S.N. Misra, produced exhaustive commentaries on CrPC provisions relating to arrest and bail, which remain central reference points for any analysis of the BNSS.¹⁰

The issue of police custody and custodial violence has received sustained scholarly and judicial attention. The Supreme Court in *D.K. Basu v. State of West Bengal*¹¹ laid down a detailed code of conduct for arresting authorities, several elements of which have been sought to be codified in the BNSS.

Critiques of the BNSS, 2023

The Parliamentary Standing Committee on Home Affairs, in its report submitted in November 2023, flagged multiple concerns with the BNSS, including the extension of police custody from 15 to 60/90 days for certain offences, the provision for trial in absentia, and the implications of Section 173 for undertrial prisoners.¹²

Organizations such as the Indian Civil Liberties Union and the People's Union for Civil Liberties have published analytical critiques arguing that the BNSS, far from decolonizing criminal procedure, has in several respects expanded executive and police power at the expense of individual rights.¹³

Comparative law scholars, including those associated with the Commonwealth Human Rights Initiative, have drawn parallels between India's reform trajectory and criminal procedure reforms in South Africa, the United Kingdom, and Canada, where robust statutory rights of the accused are embedded within the procedure codes themselves.¹⁴

RESEARCH PROBLEM

The central problematic that motivates this research lies in the tension between the stated reformatory objectives of the BNSS, 2023 and its actual normative content as it pertains to the rights of accused persons. India's criminal justice system has long been criticized for excessive pre-trial detention, overcrowded prisons, delayed trials, custodial abuse, and denial of effective legal aid all of which compound into systemic violations of the right to a fair trial.

⁹ *State of Rajasthan v. Balchand*, AIR 1977 SC 2447 per Krishna Iyer J., 'bail is the rule, jail is the exception.'

¹⁰ R.V. Kelkar, *Criminal Procedure* (EBC Publishing, Lucknow, 6th edn, 2020), Chapters 4-6; S.N. Misra, *Code of Criminal Procedure* (Central Law Publications, 21st edn, 2022), Chapter 5.

¹¹ *D.K. Basu v. State of West Bengal*, AIR 1997 SC 610.

¹² Parliamentary Standing Committee on Home Affairs, *supra* note 9, paras 17-22.

¹³ People's Union for Civil Liberties, *Analysis of the New Criminal Laws* (October 2023), available at www.pucl.org.

¹⁴ Commonwealth Human Rights Initiative, *Criminal Justice Reforms in Commonwealth Countries: A Comparative Study* (2023).

If the BNSS represents a genuine departure from the colonial model, one would expect its provisions to meaningfully address these structural deficits. However, a textual and contextual reading of key BNSS provisions particularly those relating to arrest, bail, police custody, remand, trial in absentia, forensic investigation, and the admissibility of electronic evidence suggests that the reform is at best partial and at worst regressive in some domains.

The problem is further compounded by the fact that approximately 75% of India's prison population consists of undertrials¹⁶ persons who have not been convicted of any offence but remain incarcerated during the pendency of trial. Any procedural reform that does not squarely address this reality must be critically evaluated for its adequacy.

OBJECTIVES OF THE STUDY

The present study pursues the following specific objectives:

- (i) To map the key provisions of the BNSS, 2023 that directly govern the rights of the accused and compare them with corresponding provisions of the repealed CrPC.
- (ii) To evaluate the BNSS provisions relating to arrest, bail, remand, and custody against the constitutional guarantees under Articles 20, 21, and 22 of the Constitution.
- (iii) To critically examine the new provisions on police custody extension, trial in absentia, and forensic investigation as potential derogations from fair trial standards.
- (iv) To assess the BNSS provisions on legal aid, timelines, and electronic evidence from the perspective of accused persons' rights.
- (v) To draw upon comparative criminal procedure jurisprudence from selected jurisdictions to evaluate the adequacy of the BNSS framework.
- (vi) To formulate specific legislative and policy recommendations for strengthening the procedural rights of the accused within the BNSS framework.

RESEARCH QUESTIONS / HYPOTHESES

Research Questions

The study is guided by the following primary and secondary research questions:

Primary Question: Does the Bharatiya Nagarik Suraksha Sanhita, 2023 adequately protect and strengthen the rights of accused persons and the principles of fair trial, or does it represent a dilution of existing procedural safeguards?

Secondary Questions:

- (a) Does the expansion of police custody periods under the BNSS comply with the constitutional mandate under Article 22 and the Supreme Court's directions in D.K. Basu?
- (b) Does the bail framework under the BNSS reflect the Supreme Court's jurisprudence on personal liberty?
- (c) Is the trial in absentia provision under Section 356 of the BNSS consistent with fair trial norms under international human rights law?
- (d) Do the BNSS provisions on electronic evidence and forensic investigation adequately protect the rights of the accused?
- (e) What lessons can India draw from comparative criminal procedure reforms in other jurisdictions?

Hypotheses

H1: The BNSS, 2023 contains several provisions that potentially compromise the fair trial rights of accused persons, particularly in the areas of pre-trial custody and trial in absentia.

H2: The bail framework under the BNSS, while retaining the broad structure of the CrPC, does not systematically address the problem of excessive undertrial detention.

H3: The BNSS fails to incorporate international fair trial standards as elaborated in the ICCPR and the UN Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules).

THEORETICAL/CONCEPTUAL FRAMEWORK

This paper operates within the framework of procedural justice theory, as developed by scholars such as Tom Tyler, who argues that perceptions of legitimacy in the legal system depend significantly on the fairness of procedures employed, rather than merely on outcomes.¹⁵ Additionally, the paper draws on the due process model of criminal procedure articulated by Herbert Packer, which posits that the primary goal of the criminal process should be the prevention of governmental oppression of the individual and the preservation of human dignity.¹⁶ Packer's due process model is counterpoised against the crime control model, and the paper examines whether the BNSS shifts the equilibrium between these two models.

The concept of constitutional conformity, as developed by Indian constitutional scholarship particularly in the works of M.P. Jain and S.N. Jain provides the doctrinal framework for

¹⁵ Tom R. Tyler, *Why People Obey the Law* (Princeton University Press, 2006), pp. 3-17.

¹⁶ Herbert Packer, *The Limits of the Criminal Sanction* (Stanford University Press, 1968), pp. 149-173.

evaluating BNSS provisions against fundamental rights.¹⁷

The paper also engages with the normative framework of international human rights law, specifically Article 14 of the International Covenant on Civil and Political Rights (ICCPR), which codifies minimum fair trial guarantees including the right to be presumed innocent, the right to be informed promptly of charges, the right to legal assistance, and the right to examine witnesses.

RESEARCH METHODOLOGY

The present study employs a primarily doctrinal research methodology supplemented by comparative and empirical elements.

Doctrinal Analysis

The study involves a textual analysis of the BNSS, 2023, with cross-referencing against the repealed CrPC, 1973. Relevant constitutional provisions, Supreme Court judgments, High Court decisions, and Parliamentary Committee Reports have been systematically examined. The analysis focuses on identifying textual continuities, modifications, and new insertions that affect the rights of the accused.

Comparative Method

The study draws upon the criminal procedure frameworks of the United Kingdom (Police and Criminal Evidence Act, 1984), Canada (Canadian Charter of Rights and Freedoms, 1982), South Africa (Criminal Procedure Act, 1977), and the United States (4th, 5th, 6th, and 14th Amendments to the Constitution), as well as the European Convention on Human Rights (Article 6), to benchmark the BNSS against international best practices in fair trial protection.¹⁸

Secondary Data

Statistical data from the National Crime Records Bureau (NCRB) Prison Statistics India Reports, the National Legal Services Authority (NALSA), and the Supreme Court's suo motu proceedings on prison conditions have been utilized to contextualize the normative analysis

¹⁷ M.P. Jain and S.N. Jain, *Principles of Administrative Law* (LexisNexis, 8th edn, 2017), pp. 112-130.

¹⁸ Justice J.S. Verma Committee Report on Amendments to Criminal Laws (January 2013), Chapter 8 (comparative analysis).

with empirical realities.¹⁹

Sources

Primary sources include the text of the BNSS, 2023, the Constitution of India, Supreme Court and High Court judgments, Law Commission Reports, and Parliamentary Standing Committee Reports. Secondary sources include peer-reviewed journal articles, books, and reports from civil society organizations.

DATA ANALYSIS

Arrest and Grounds of Arrest

Section 35 of the BNSS broadly corresponds to Section 41 of the CrPC and provides for arrest without warrant in cognizable offences. Section 35(3) BNSS now mandates the recording of reasons in writing before making an arrest a codification of the Supreme Court's direction in *Arnesh Kumar v. State of Bihar*.²⁰

However, Section 43(3) BNSS introduces a provision authorizing handcuffing of persons accused of specific serious offences a significant departure from the pre-BNSS position in which handcuffing was judicially prohibited except in extreme circumstances, as held in *Prem Shankar Shukla v. Delhi Administration*.²¹

The authorization of handcuffing raises concerns regarding the right to dignity under Article 21. The Supreme Court had consistently held that handcuffing is a relic of colonial barbarity and should be resorted to only in extreme cases with recorded justification. The BNSS provision, while it sets out categories of offences, may be interpreted by enforcement agencies as a general license.

Bail Provisions

The BNSS retains the tripartite structure of bail bailable offences, non-bailable offences, and anticipatory bail broadly tracking the CrPC framework. Section 479 BNSS introduces a significant reform by providing for bail to undertrials who have served half the maximum sentence for the offence though with an exception carved out for capital offences, which mirrors the CrPC.²²

¹⁹ National Crime Records Bureau, *Prison Statistics India 2022*, supra note 16.

²⁰ *Arnesh Kumar v. State of Bihar*, (2014) 8 SCC 273.

²¹ *Prem Shankar Shukla v. Delhi Administration*, AIR 1980 SC 1535.

²² Section 479, *Bharatiya Nagarik Suraksha Sanhita, 2023*; see also Law Commission of India, *268th Report on Amendments to Criminal Laws (2017)*, para 4.5.

Critics have noted that the BNSS does not introduce a statutory presumption in favour of bail, as recommended by the Law Commission's 268th Report. The persistence of discretionary bail, combined with the absence of mandatory bail hearings within a fixed period, means that the systemic problem of excessive pre-trial detention is not structurally addressed.

Police Custody and Extended Remand

One of the most contested provisions of the BNSS is Section 187, which modifies the remand mechanism under the erstwhile Section 167 CrPC. Under the CrPC, police custody could not exceed 15 days in aggregate during the initial remand period of 60/90 days. Section 187 BNSS extends this by permitting Judicial Magistrates to authorize police custody 'for a term not exceeding fifteen days in whole or in part at any time during the initial period of forty days.'²³ The practical implication of this change is significant: whereas under the CrPC, police custody was effectively limited to the first 15 days after arrest (the first remand period), the BNSS permits the grant of police custody at any point within the first 40 days of the 60/90 day investigation period. This effectively extends the total period during which an accused may be subjected to police custody and interrogation a development that civil liberties advocates and the Parliamentary Standing Committee flagged as potentially enabling custodial abuse and coerced confessions.

Trial in Absentia

Section 356 of the BNSS introduces a new provision permitting trial in absentia for proclaimed offenders. While the object is to prevent the accused from using prolonged non-appearance as a delaying tactic, the provision raises fundamental fair trial concerns. Article 14(3)(d) of the ICCPR guarantees the right to be tried in one's presence, and the UN Human Rights Committee has consistently held that this right can only be derogated from in exceptional circumstances with adequate procedural safeguards.²⁴

The BNSS provision, while providing for representation by a state-appointed counsel, does not address concerns about the quality of such representation or the right of the accused to present their defence personally. Comparative experience from France and Germany, which permit limited trial in absentia, indicates that robust procedural safeguards are essential to prevent the provision from becoming a tool of oppression.

²³ Section 187(2), Bharatiya Nagarik Suraksha Sanhita, 2023.

²⁴ UN Human Rights Committee, General Comment No. 32 on Article 14 (2007), para 36: 'Trial in absentia requires that, notwithstanding the absence of the accused, all due steps have been taken to inform defendants of the charges and to notify them of the proceedings.'

Electronic Evidence and Forensic Investigation

The BNSS introduces several provisions reflecting the increasing role of technology in criminal investigation, including mandatory forensic examination for offences punishable with seven years or more (Section 176(3)). While this is a progressive step toward evidence-based investigation, it raises concerns about the rights of the accused during forensic examination particularly in relation to the use of narco-analysis, brain mapping, and polygraph tests, which the Supreme Court in *Selvi v. State of Karnataka* held to violate Article 20(3).²⁵

DISCUSSION

Progressive Elements

The BNSS incorporates several improvements over the CrPC that merit acknowledgment. The mandatory recording of reasons before arrest (Section 35(3)), the introduction of victim impact statements in sentencing, the provision for bail to undertrials (Section 479), the mandatory supply of FIR copies to the informant, and the codification of timelines for trial and investigation collectively represent a step toward greater procedural accountability.

Regressive Elements and Constitutional Concerns

However, the extended police custody, the handcuffing provision, the trial in absentia without adequate safeguards, and the insufficient attention to the quality and availability of legal aid for the accused suggest that the BNSS's reformatory ambitions are not uniformly realized. The persistence of provisions that concentrate power in the hands of investigation agencies, without corresponding enhancement of judicial oversight mechanisms, risks reproducing the structural inequalities of the colonial system in a new statutory garb.

The absence of a statutory right to be produced before a magistrate within 24 hours in all cases (as distinct from the existing constitutional mandate under Article 22(2)), the lack of a statutory entitlement to legal aid from the first moment of detention, and the absence of audio-visual recording of interrogation as a mandatory legal requirement (rather than as a best practice) represent missed legislative opportunities.

Comparative Perspective

The United Kingdom's Police and Criminal Evidence Act, 1984 mandates the recording of police interviews, limits custody without charge to 24 hours (extendable to 36/96 hours with

²⁵ *Selvi v. State of Karnataka*, (2010) 7 SCC 263 (holding that narco-analysis, brain mapping, and polygraph tests administered without consent violate Article 20(3)).

safeguards), and provides for an independent custody officer to oversee the treatment of detainees. Canada's Charter jurisprudence has developed a doctrine of derivative evidence exclusion that deters police misconduct. These models suggest that it is entirely feasible to design criminal procedure that is both effective and rights-respecting.²⁶

CONCLUSION

The Bharatiya Nagarik Suraksha Sanhita, 2023 represents a significant but incomplete reform of India's criminal procedure. While it introduces several progressive elements, particularly in victim protection and procedural timelines, it falls short of establishing a comprehensive rights-based procedural framework for accused persons. Several provisions notably the extended police custody, the handcuffing authorization, and the trial in absentia raise constitutional concerns and deviate from international fair trial standards.

A genuinely decolonized criminal procedure must go beyond renaming colonial statutes in Sanskrit it must interrogate and dismantle the structural power asymmetry between the state machinery and the individual citizen that has historically characterized India's criminal justice system. This requires legislative courage, judicial vigilance, and an unwavering commitment to the constitutional values of liberty, equality, and dignity.

RECOMMENDATIONS / SUGGESTIONS

On the basis of the foregoing analysis, the following recommendations are offered:

- (i) Amendment of Section 187 to restore the 15-day aggregate limit on police custody during the initial remand period, thereby preventing the effective extension of interrogative custody.
- (ii) Amendment of Section 43(3) to restrict the authorization of handcuffing to cases of demonstrated risk of escape or violence, with written judicial authorization being made mandatory.
- (iii) Introduction of a statutory entitlement to free legal aid from the moment of detention not merely at the stage of first production before a Magistrate in consonance with Article 39A.
- (iv) Mandatory audio-visual recording of all police interrogations and confessions, as

²⁶ Andrew Ashworth, *The Criminal Process: An Evaluative Study* (Oxford University Press, 3rd edn, 2005), pp. 22-45.

recommended by the Law Commission in its 185th Report, as a safeguard against custodial abuse.²⁷

- (v) Amendment of Section 356 to provide that trial in absentia may proceed only upon the court's satisfaction that the accused has been personally served, that adequate state-funded legal representation is in place, and that the right to retrial upon surrender or apprehension is expressly preserved.
- (vi) Enactment of a statutory presumption in favour of bail for undertrials, reversible only upon recorded judicial satisfaction of specific grounds of risk.
- (vii) Constitutional review of forensic examination powers to ensure that no forensic technique that compels self-incrimination can be administered without the accused's informed consent.

LIMITATIONS OF THE STUDY

This study is subject to certain limitations. First, as the BNSS came into force on July 1, 2024, the body of judicial interpretation of its provisions is nascent, and the paper necessarily relies on textual analysis rather than an established corpus of case law on the new legislation. Second, the study's comparative analysis is limited to selected common law and civil law jurisdictions and does not engage in depth with criminal procedure reforms in Global South nations. Third, the empirical data relied upon is secondary in nature and does not include primary fieldwork.

SCOPE FOR FUTURE RESEARCH

Future research may profitably examine: the emerging judicial interpretation of contested BNSS provisions, particularly on remand and bail, in High Courts and the Supreme Court; empirical studies on the implementation of the BNSS at the station level in terms of arrest practices, custody conditions, and legal aid delivery; gender-sensitive analysis of the BNSS provisions affecting women accused; and longitudinal studies tracking undertrial population trends post-BNSS implementation.

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