Vol. XLIII No. 3 July-September, 2024

COMMON CAUSE

www.commoncause.in

POLICY-ORIENTED JOURNAL SINCE 1982

Price: Free distribution to members Regn No. 39331/1982

Common Cause is in the vanguard of India's anti-corruption movement and the fight for stronger public institutions since the 1980s. We make democratic interventions through PILs and bold initiatives. Our landmark PILs include those for the cancellation of 2G licenses and captive coal block allocations, against the criminalisation of politics, for Internet freedom and patients' right to die with dignity. Please visit commoncause.in for more information on our mission and objectives. We also run special programmes on police reforms and cleaner elections.

Common Cause runs mainly on donations and contributions from well-wishers. Your support enables us to research and pursue more ideas for a better India.

Now you can donate using our new payment gateway.

You may also deposit directly into our bank account (details are given below) and send us an email at commoncauseindia@gmail.com, providing information such as donor's name, address and PAN number for issuance of the donation receipt.

Name: Common Cause
Bank: IndusInd Bank
Branch: Vasant Kunj, New Delhi
S.B. Account No.: 100054373678
IFSC Code: INDB0000161
Address: Common Cause,
Common Cause House, 5, Institutional Area,
Nelson Mandela Marg, Vasant Kunj, New Delhi - 11 00 70
(Phone numbers: 011 26131313 and 45152796)

WILL THE NEW LAWS TRANSFORM JUSTICE SYSTEM?

Or Will the Cure Be Worse Than the Disease?

Dear Readers,

This issue of your journal tries to make sense of the three new criminal laws enacted to 'decolonise' and 'overhaul' our criminal justice system. Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS) and the Bharatiya Sakshya Adhiniyam (BSA) have replaced the age-old Indian Penal Code (IPC), Criminal Procedure Code (CrPC), and the Indian Evidence Act respectively. On the face of it, Indianising the colonial-era Acts appears laudable but are the new laws able to fulfil their purpose? We try to unravel this in the following pages.

In a nutshell, the new laws introduce several innovative procedures such as time-bound completion of trials, online and zero FIRs, and expansion of offences like terrorism, gang rape and deceitful sexual intercourse. Community service will now be a lighter form of punishment and forensic sciences will be reinforced. Their main criticism has been around expanded police powers and restriction of civil liberties. While the first-time provisions will have to pass the test of time, they need to be studied thoroughly as the devil is always in the details.

Common Cause also needs to follow the new laws for its ongoing and future PILs. We have repeatedly pointed out legal lacunae and legislative vacuums in areas of citizenship rights and the integrity of anti-corruption agencies. It was natural for us, therefore, to examine the laws not only for our fellow citizens but also against our own experiences and expectations. Let me recount some of the obvious problems with the new provisions which concern our day-to-day work.

We were happy to note that something as undemocratic as sedition has been removed from the new statutes. We at Common Cause believe that a civilised society should have no place for stifling dissent in the name of national security or arresting those who criticise or question government policies. This is precisely why we have challenged sedition through our PILs. However, we were shocked to read the full text in which only the label of sedition has been removed while its core provisions have not only been retained but also made, absurdly, more severe and stringent.

Common Cause also brings out the Status of Policing in India Reports (SPIR) on the powers and performance of the police. We were duly concerned that the BNSS removes the limit of 15-day police remand and blurs the line between police and judicial custody which ends up increasing the possibilities of torture and custodial violence (this also happens to be the theme of the next SPIR due in the next few weeks). It is disheartening that the mandatory enquiry in cases of abuse and atrocities by the police can now be done by any magistrate instead of the judicial magistrate earlier.

It is perplexing that the laws were pushed through parliament without proper debate or contestation after 146 opposition MPs were suspended from the House. The Opposition later called the exercise a "cut and paste job" as large portions of the older laws have been repeated verbatim. While the discussions must continue, it is to be seen if the new laws bring a transformative shift or if the cure turns out to be worse than the disease.

As always, your views, comments and suggestions are welcome.
Please write to us at contact@commoncauseindia.in

Vipul Mudgal
Editor

BHARATIYA NYAYA SANHITA (BNS) 2023

Some Frequently Asked Questions

Udit Singh*

Why was Bharatiya Nyaya Sanhita (BNS) 2023 enacted?

The stated objective of enacting the three new criminal laws, including Bharatiya Nyaya Sanhita or BNS, is to 'decolonise' the Indian criminal justice system. It has been claimed that the BNS proposes to provide speedy 'nyaya' (justice), rather than 'dand' (punishment).

Isn't it good to decolonise laws?

However, critics say that most of the 'colonial' provisions of the old criminal laws have been retained without any change. Raising doubts over the government's claim of 'decolonisation', some experts have stated that the new laws have retained approximately 75 to 90 per cent of the old 'colonial' provisions.

What is new under BNS?

Section 4 of BNS provides 'community service' as a new form of punishment, one which was not provided under the IPC. However, there is no clarity regarding the meaning of this form of punishment and how would it be executed.

Has the BNS removed the colonial offence of 'sedition'?

Section 124A of the IPC dealt with the offence of 'sedition'. Under Section 152 of BNS the word 'sedition' has been removed. However, a new phrase -- 'Act endangering sovereignty, unity and integrity of India' -- has been used. This phrase has a wider meaning. The use of vague words like 'purposely' or 'excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities' tends to broaden the ambit of the provision and may lead to the criminalisation of many more activities which may otherwise be non-criminal acts per se. Hence, the idea of sedition seems to have been made stricter and given a new name.

> ***"The use of vague words like 'purposely' or 'excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities' tends to broaden the ambit of the provision and may lead to the criminalisation of many more activities which may otherwise be not criminal acts per se."***

What is the new provision regarding 'mob lynching' under BNS?

Section 103(2) of the BNS provides that when a group of five or more persons acting in concert commit murder on the grounds of race, caste or community, sex, place of birth, language, personal belief or any other similar ground, each member of such group shall be punished with death or with imprisonment for life, and shall also be liable to fine. However, the phrase 'acting in concert' has not been defined.

It is to be noted that there was no analogous provision in the IPC.

How is 'snatching' defined under BNS?

Section 304(1) of BNS defines 'snatching' as 'Theft is snatching if, in order to commit theft, the offender suddenly or quickly or forcibly seizes or secures or grabs or takes away from any person or from his possession any movable property'.

Section 304(2) of BNS provides for punishment for 'snatching': 'Whoever commits snatching, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine'.

* *Udit Singh is a Legal Consultant at Common Cause.*

There is no clarity as to how the offence of 'theft' is different from the offence of 'snatching' under BNS as the punishment for both is similar.

What is the change regarding 'hit and run' cases under BNS?

Section 106(2) of BNS states that whosoever causes death of any person by rash and negligent driving of a vehicle not amounting to culpable homicide, and escapes without reporting it to a police officer or a magistrate soon after the incident, shall be punished with imprisonment of either description of a term which may extend to 10 years, and shall also be liable to a fine.

There was no equivalent provision in the IPC. It is to be noted that this particular provision has not been brought into force yet by the government.

Has 'Attempt to Suicide' been criminalised under BNS?

This is partially correct. Section 226 of the BNS states that whosoever attempts to commit suicide with the intent to compel or restrain any public servant from discharging his official duty shall be punished with simple imprisonment for a term which may extend to one year, or with a fine, or both, or with community service.

It is to be noted that there was no corresponding provision in IPC.

Section 115 of the Mental Healthcare Act, 2017 (MHA, 2017) provides that notwithstanding anything contained in section 309 of the IPC, any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under the said code. This provision decriminalised 'attempt to suicide' as an offence under Section 309 of the IPC.

> ***"There is no provision in BNS providing a definition of 'unnatural offence' or a punishment for it."***

However, BNS does not have any provision equivalent to Section 115 of MHA, 2017. Section 226 of BNS is carved out as an exception which criminalises attempt to commit suicide to 'compel or restrain the exercise of lawful power'. This particular provision may lead to the prosecution of people observing hunger strikes.

How does the BNS deal with 'unnatural offences'?

There is no provision in BNS providing a definition of 'unnatural offence', or a punishment for it. Section 377 of the IPC states that whosoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to 10 years, and shall also be liable to a fine.

A five-judge bench of the Supreme Court in *Navtej Singh Johar & Ors. v. Union of India*[1] held this provision as unconstitutional, to the extent that it covered consensual sexual acts. By completely removing Section 377 from BNS, there is no possible legal remedy for forced or non-consensual sexual acts against men, trans persons and animals.

What about a life convict committing a murder?

Section 104 of BNS provides that whosoever, being under sentence of imprisonment for life, commits murder, shall be punished with death or with imprisonment for life, which shall mean the remainder of that person's natural life.

There was a corresponding provision in IPC (Section 303) too for murder by a life convict, for which the only punishment was a death sentence. However, a five-judge bench of the Supreme Court in *Mithu v. State of Punjab*[2] struck down Section 303 of IPC for being violative of Articles 14 and 21 of the Constitution.

Section 303 has been reintroduced in BNS in the form of Section 104 with a modification that allows for a mandatory whole life sentence, i.e., life imprisonment till the person's natural life.

References

1. AIR 2018 SC 4321
2. 1983 AIR 473

BHARATIYA NAGARIK SURAKSHA SANHITA (BNSS) 2023

Some Frequently Asked Questions

Rishikesh Kumar*

What is the Bharatiya Nagarik Suraksha Sanhita?

The BNSS 2023 has replaced the Code of Criminal Procedure (CrPC) 1973, marking a major shift in India's criminal justice system. A key highlight of BNSS is its emphasis on technology, enabling faster and more transparent justice. From e-FIRs and app-based complaints to mobile-based investigations and video-recorded crime scenes, BNSS integrates digital tools across all stages -- making justice quicker, more accountable, and tamper-proof.

Section 154 of BNSS allows electronic FIRs through emails, portals, or mobile apps, cutting delays and enabling remote filings. Investigative processes, including arrest and seizure memos, will now be video-recorded to prevent manipulation. This tech-driven approach aims to enhance fairness and accuracy.

BNSS has, however, faced criticism for retaining 75 per cent of CrPC's provisions, raising concerns about whether it is truly 'decolonised'. Police custody under Section 187 has been extended from 15 days to 60 or 90 days, sparking fears of potential misuse. Vague crime definitions, like 'false information' and 'acts endangering sovereignty', add to the concerns as they could lead to arbitrary enforcement. Moreover, the controversial provision allowing trials in absentia, challenges the accused's right to defend themselves.

How does BNSS reshape the laws on detention and arrest?

BNSS introduces significant changes to the laws on detention and arrest, especially regarding police custody. Under the CrPC, police custody was limited to a maximum of 15 days, providing crucial protection against prolonged police control. However, Section 187 of the BNSS omits this safeguard, allowing Magistrates to authorise police custody for periods beyond 15 days. This creates a risk of extended police control, which can increase the potential for custodial violence and abuse.

While the BNSS retains the broader timelines present in the CrPC of 60 or 90 days for detention and default bail, the removal of the 15-day limit on police custody undermines the protection previously enjoyed by the accused. This change violates the right to personal liberty under Article 21 of the Constitution, which includes protection against torture and custodial abuse, as upheld by the Supreme Court in D K Basu v. State of West Bengal[1].

> ***Section 154 of BNSS allows electronic FIRs through emails, portals, or mobile apps, cutting delays and enabling remote filings.***

The distinction between police and judicial custody is crucial here: police custody is typically harsher as the accused remains under direct police control, while judicial custody places the accused in jail, where institutional safeguards are in place. The BNSS, by weakening the limits on police custody, erodes safeguards against police excesses, potentially compromising the dignity and rights of undertrials.

Is it more difficult to secure bail under the BNSS?

BNSS has brought notable changes to bail provisions, redefining terms like 'bail', 'bail bond', and 'bond', which were previously undefined in the CrPC. BNSS has also altered how long someone can be held before trial and revamped the rules for anticipatory bail.

One of the key reforms is the

** Rishikesh is Advocacy Consultant at Common Cause*

provision for early release of first-time offenders who have served up to one-third of their sentence while awaiting trial -- something the CrPC did not allow. However, BNSS has introduced restrictions, such as denying bail if multiple cases are pending, even if the trial is incomplete. This is a major shift from previous rules, which granted automatic bail to undertrials who had served half their sentence without the conclusion of a trial.

Critics argue that BNSS tightens bail provisions, shrinking civil liberties. It disregards the Supreme Court's 2023 ruling in Satender Kumar Antil v. CBI[2], which emphasised 'bail, not jail' and condemned the overpopulation of undertrial prisoners, stressing the presumption of innocence. BNSS may worsen the crisis of overcrowding of prisons by undertrials, making bail harder to obtain and justice harder to achieve.

Does the BNSS undermine civil liberties?

The BNSS dramatically expands police authority, sparking serious concerns about the balance between law enforcement powers and civil liberties. One of the most alarming changes is the increase in police custody duration -- from the current 15-day limit under the CrPC to 60 or 90 days, depending on the offence. This unprecedented extension vastly raises the risk of police excesses, with detainees being more vulnerable to coerced confessions, torture, and fabricated evidence. The longer a person is held in police custody, the greater the threat of abuse, violating fundamental rights under Article 21 of the Constitution.

Unlike 'special laws' like UAPA under CrPC, where investigations are handled by officers of the rank of Superintendent of Police or higher, under the BNSS, even a Station House Officer (SHO) can investigate serious offences, including terrorism-related charges. This dilution of oversight heightens the risk of misuse and undermines accountability.

BNSS reintroduces handcuffing without requiring prior court approval, a stark departure from the existing practice where police had to seek court permission. This not only enhances police power but also impacts the dignity of individuals, creating an atmosphere of unchecked authority.

In essence, BNSS shifts the balance heavily in favour of the police, eroding key safeguards meant to protect citizens from abuse.

> ***"BNSS reintroduces handcuffing without requiring prior court approval, a stark departure from the existing practice where police had to seek court permission."***

What are Zero FIR and e-FIR under the BNSS?

Zero FIR and e-FIR under BNSS are game-changing reforms that are reshaping how citizens engage with law enforcement in India.

Zero FIR removes the barriers of jurisdiction, allowing victims to report crimes at any police station. This means that if you witness or experience a crime, you can immediately seek help without the stress of figuring out jurisdictions etc. This swift access is crucial in emergencies, ensuring that help is always within reach.

E-FIR takes this convenience to the next level by enabling citizens to file complaints electronically through WhatsApp or email. This saves time and encourages more people to come forward without the hassle of a physical visit. Once a complaint is submitted online, the complainant has 72 hours to confirm it in person, making the process both efficient and user-friendly.

For more serious offences, with potential jail terms of 3 to 7 years, the system allows police to conduct a preliminary inquiry for up to 14 days before officially filing the FIR. This measure helps filter out baseless complaints.

References

1. AIR 1997 SC 610
2. (2022) 10 SCC 51

BHARTIYA SAKSHYA ADHINIYAM (BSA) 2023

Some Frequently Asked Questions

Mohd Aasif*

What's new in the Bhartiya Sakshya Adhiniyam (BSA) 2023?

The admissibility of electronic and digital records is a new addition to the Bhartiya Sakshya Adhiniyam (BSA) 2023, which was introduced to replace the Indian Evidence Act 1872. BSA, by including modern-world technology such as electronic records on emails, server logs, computer documents, laptops or smartphones, messages, websites, locational evidence and voice mail messages stored on digital devices, semi-conductor memory and communication devices, has broadened the definition of documents. BSA emphasises that digital and electronic records will have the same legal effect, validity and enforceability as other documents.

> ***BSA fails to provide any safeguards to prevent tampering during the search, seizure and investigation of such evidence despite the guidelines laid down by the Karnataka High Court in 2021.***

What are the challenges to the admissibility of digital records?

Digital or electronic evidence can easily be tampered with. This fact has been recognised by the Supreme Court of India in *Anvar PV v. PK Basheer and Others case*[1]. BSA fails to provide any safeguards to prevent tampering during the search, seizure and investigation of such evidence despite the guidelines laid down by the Karnataka High Court in 2021.

How does BSA affect the power of the judiciary?

BSA restricts the courts' demand for privileged communication between the ministers and the President of India to be produced before it. This can have a bearing on the transparency of the judicial process.

What is the main criticism of BSA?

BSA attracted criticism for being almost completely borrowed from the Indian Evidence Act (IEA) of 1872, with minuscule changes to the original text. The amendments that include digital media as part of evidence are already part of the Information Technology Act of 2000. Though the Home Minister claimed to free IEA from colonial attributes, only its name seems to have been Indianised. This also attracted criticism of Hindi hegemony from the speakers of India's other scheduled languages.

> ***Though the Home Minister claimed to free IEA from colonial attributes, only its name seems to have been Indianised. This also attracted criticism of Hindi hegemony from the speakers of India's other scheduled languages.***

What has been repealed from the BSA?

It removes provisions related to telegraphic messages.

References

1 Anvar PV v PK Basheer [2014] 10 SCC 473

* *Mohd Aasif is Research Executive at Common Cause*

HOW THE EXPERTS DECODE THE NEW LAWS?

Common Cause-CJAR Discussion on their Aims and Efficacy

Pic credit: Mohd Aasif

RTI Activist Anjali Bhardwaj Opens the Dias for the Experts to Decode the Three New Criminal Laws

Common Cause, in partnership with the Campaign for Judicial Accountability and Reforms (CJAR) invited some of India's best legal minds to a panel discussion on 'Decoding the New Criminal Laws' on February 26, 2024 at the India International Centre to discuss and analyse the new laws. The participants were **Prof. Mohan Gopal,** eminent jurist and the former Director of the National Court Management Systems Committee of the Supreme Court of India and the former Director (Vice-Chancellor) of the National Law School of India, Bengaluru; **Ms Vrinda Grover,** eminent Supreme Court lawyer, researcher, and human rights activist; **Prof. Anup Surendranath,** who teaches criminal and constitutional law at NLU Delhi and the Executive Director of its well-known criminal justice programme, Project 39A; **Mr Sarim Naved,** eminent criminal lawyer and forensic expert, and **Justice Madan B Lokur,** retired Judge of the Supreme Court of India and a former Chief Justice of Andhra Pradesh and Gauhati High Courts who is currently the judge of the Supreme Court of Fiji. The discussion was moderated by **Ms Anjali Bhardwaj,** the co-convenor of the National Campaign for People's Right to Information (NCPRI) and a founding member of Satark Nagrik Sangathan. Please visit https://www.youtube.com/@commoncauseindia9531 to watch a video of the event. The programme started with Dr Vipul Mudgal introducing Common Cause and the CJAR as organisations with a rich history of working for probity in public life, access to justice, and judicial reforms. While welcoming the panellists and those present, he said that every aspect of the new laws must be discussed and deliberated before their enactment. Initiating the discussion, the moderator, Anjali Bhardwaj, brought to the attention of the house that the Bills were passed in Parliament without any discussion, and when over 140 opposition members were suspended from the House. The laws meant to overhaul the country's criminal justice system and with far-reaching impact on all our lives must be understood thoroughly, she said.

Before opening the floor for the panellists, she highlighted the areas of concern, mainly police custody and torture, the offences concerning terrorism, provision for trial in absentia, and vague and broadly worded offences open to misuse.

Following are the edited excerpts of the panel discussion:

Prof. Mohan Gopal

What we are seeing is a concentrated attack on Article 19, particularly on three clauses of Article 19 - 19(1)(a), which concerns speech and expression; 19(1)(c), which is about association and union; and, 19(1)(b), regarding assembly.

When 19(1) was introduced, there were no reasonable restrictions on it; they were introduced later during the early years of the Congress government by the 1st amendment and then the 15th amendment. Now there are several restrictions but they are quite specific.

These three common elements are being attacked on the grounds of public order. We actually are fighting against an attempt to destroy order. We are fighting for the rule of law. We are fighting for the rights that will ensure peace and harmony in society. The first challenge is to defend Article 19 and particularly Article 19(1)(a), (b) and (c).

Terrorism, Treason, and Petty Crime: We need to focus on double barrelling of terrorism and organised crime. One barrel was bad enough and now we have two barrels. There is no order on how this is going to work. The police vested with the statutory power can decide under which statute, BNS or UAPA, or both, (the accused) will be charged with, depending on whichever is convenient for them, and then convicted and punished.

We also have petty organised crime, which is actually targeted at the lower, economically marginalised social groups. It is very easy to charge someone with petty organised crime.

But the big one is Section 152. (According to Section 152 of BNS, *'Whoever, purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial mean, or otherwise, excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India; or indulges in or commits any such act, shall be punished with imprisonment for life or with imprisonment which may extend to seven years and shall also be liable to fine.'*) I would not dignify by calling it treason; I would call it sedition plus. It is a lie that the sedition has been deleted; it is sedition plus treason, not just treason. As the Home Minister has said, they have converted Raj droh into Desh droh. And desh we know means the Hindu Rashtra. It is basically an effort to attack those who question their idea of the nation.

Unless we are ideologically and politically combative, there's a very limited scope to defend it in the court, trying to get bail and acquittal for the convicted.

Criminalising Religious Offences: Let's look at Section 302, which is not new. We are looking at instruments that are used against us. Section 302 of BNS says, *'Whoever, with the deliberate intention of wounding the religious feelings of any person, utters any word or makes any sound in the hearing of that person or makes any gesture in the sight of that person or places any object in the sight of that person, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.'*

So, we have the full panoply of provisions on causing division between communities and groups. All of those are still in place and have been misused under Sections 153 and 153A,

except 153 AA, which has been deleted. Section 153 AA was never notified under the influence of Nagpur. It said that organising mass drills carrying weapons, including lathis, in public is a crime. That has been deleted, which means BNS is exhorting us to have mass drills and carry arms on the street.

Open-ended Definitions of Organised Crime: Let's come to Section 111 and Section 112. Section 111 deals with organised crime and Section 112 with petty organised crime. The definition of organised crime is very open-ended and includes any 'continuing unlawful activity'. This means activity prohibited by law, and one can be charged under it if a chargesheet is filed. There's no need for conviction; a chargesheet is filed and you can be accused of working with an organised group and can be charged with organised crime.

Then there is petty organised crime which is directed at the poor of the country. It (Section 112) says, *'Whoever being a member of group either singly or jointly commits any act of theft snatching, cheating, unauthorised selling of tickets, unauthorised betting or gambling, selling public examination question papers or any other similar or similar criminal act is said to commit petty organised crime'. The definition of theft has been expanded from the earlier penal code. Theft includes, 'trick theft, theft from vehicle, dwelling houses of business premises, cargo theft, pickpocketing, theft through card scheming, shop-lifting and theft of ATMs.'* The penalty is, *'Whoever commits any petty organised crime shall be punished with imprisonment which shall not be less than one year but which may extend to seven years and shall also be liable to fine'.*

Further, a law has been introduced saying you have to obey public officials. There is a provision saying that you have to obey any lawful direction of any police officer *(Clause 172 under BNSS in 'Preventive Action of the Police').* If the police officer says you are not obeying his lawful order, he can detain you for 24 hours on the spot. Imagine what that would do to people from the marginalised sections.

Criminal law was an instrument to define crime and punishment. But now we have a penal law which has nothing to do with crime and punishment. An element has been introduced in it which will be used to suppress dissent and opposition. We are seeing a new and unprecedented use of the criminal law. We will have to invoke constitutional law in trial courts from the date of applying the bail onwards.

Vrinda Grover

Today, I think, the journey from 'subject and citizen' has moved to 'suspect and supplicant'. The manner in which the crimes are codified, the citizen is the suspect and it is the state which has nothing to answer for. And supplicant because all that we can seek is the benefits of PDS, rations, and NREGA, which keeps us at a subsistence level of existence.

We are not being seen as rights holders. This is now a regime to control, suppress and contain the Indian citizenry. Particularly if there is any challenge -- which can even be through an article -- to any powers that the state may exercise. I would want to foreground Article 21 of the Indian Constitution which deals with personal liberty and right to life. We need to constantly keep Articles 19 and 21 in focus. The new laws must meet the test of constitutionality.

Systemic Silence: What are the 'silences' in the new laws? Torture is something that a colonial regime inflicts on its subjects to control and put fear in them. National Human Rights Commission's (NHRC) reports have been annually recording multiple cases of torture across the country. It's a different matter that they usually only talk of compensation and have only once asked for prosecution. But there is absolute silence in codifying it. Although the Indian state signed the convention against torture at the UN in 1977 and said it will enact a separate law – it is a requirement under the Indian Constitution to have a domestic law before you ratify.

In 2005, an amendment was made in the Code of Criminal Procedure that if any person dies, disappears or is raped in police custody or police action, there will be a judicial magistrate inquiry. The criminal procedure code of BNSS has a very interesting provision -- judicial magistrate has been replaced with a magistrate. The magistrate can be an executive magistrate, an SDM, or a district magistrate. To expect a district magistrate or an SDM to conduct an inquiry to probe whether the police has been responsible is not something that -- our experiences will verify – will turn out well.

Let me give you an example of extrajudicial killings, euphemistically called encounters in this country. There was the death of a farmer in police firing in Haryana (in February 2024). The Haryana police said the farmer didn't die because of their bullet. There is a controversy over the facts. How will it be resolved? If the law was to be adhered to, there should have been a judicial magistrate inquiry into the matter. But the judicial magistrate has been removed and the magistrate has been brought back. So, we have actually moved back to colonial powers rather than moving forward.

Police Remand and Torture: Another aspect I would like to link torture to is the expansion of the period within which the police remand can be taken. The earlier law said the police could take 15-day police remand after arrest within the first 15 days. Once the first 15 days of arrest were over, the police could not take a person into police custody under ordinary law for investigation or recovery. That kept a check on coercion, torture, etc., by the police.

As I read Section 187 *(of BNSS)*, it says those 15 days can be staggered over a period -- if an offence is such that the chargesheet is to be filed within 60 days, then till the 40th day; if the chargesheet is to be filed within 90 days, as in a murder case, then till the 60th day. The total period remains 15 days. You can send a person to judicial custody but the police can say that 'I want to ask one more question'. The person then can be brought out.

This is going to have ramifications. First, the ability to coerce, torture and the power of the police over of the person arrested is going to amplify because the remand doesn't end in the first 15 days. Second, when you apply for bail, the first thing the prosecutor and the IO are going to say in court is that we still need to do custodial interrogation as our investigation is not complete. They just have to move an application. Anything can be written in it and nobody can ask serious questions. They will say, we are still investigating it, still looking at the CDR -- taking anybody's devices is completely routine whether it is required in the case or not. Pre-chargesheet bail is thus going to be stultified to the point of negation. Actually, the more time we give the police, the less rigorous the investigation will be.

Handcuffing -- Loss of Dignity: Another aspect of torture is handcuffing, I remember in the Parliament attack case, the police were not allowed to handcuff anybody. People were brought to Patiala House -- if the police wanted to handcuff somebody, it had to move an application in the court and the court had to be satisfied with the reasons. Today the cop is going to decide. So, the point of dignity is totally lost.

Rights of Men, Transgender Persons and Women: Another gap is regarding Section 377 of IPC that criminalised unnatural

sex. It was held unconstitutional by the Supreme Court to the extent that it covered consensual sexual acts. By completely removing Section 377 from BNS, there is no possible legal remedy for forced or non-consensual sexual acts against men, transgender persons and animals. POCSO covers boys and girls till the age of 18. What is the protection for adult men and transgender men -- transgender men, in any case, face severe police and custodial sexual violence.

I want to point out another aspect here. There's a misunderstanding that in India women have a right to abortion. A colonial perspective in the penal code has been retained in the BNS which says that even if a woman voluntarily tries to have an abortion, she will be penalised. The Medical Termination of Pregnancy Act was created as an exception to the penal provision so that doctors and medical professionals were not penalised when enabling an abortion. You can have an abortion, but the doctor gets to decide, not the woman. If a woman does it voluntarily, she can be punished and those provisions continue to be here.

Offences by Public Servants: What was the shortest chapter of IPC? It was on offences by the state. What is the shortest chapter of BNS? It is the offences by public servants. Many of us worked to create a law that took on the impunity of mob violence, particularly communal violence. What was the public servant doing at that time? What was the civil servant or administrative authority doing? If this was the 'Bharatiya' non-colonial law, it would have created accountability of the public servant and the civilian authority to the citizen. It does not do so at all. Chapter 12, which is from Section 196 to Section 201, does not create any such accountability despite there being a wealth of documentation as to what it does to us.

Prof Anup Surendranath

I have a different position on police custody provision. I think the new law expands police custody to the whole of 60 or 90 days rather than saying that 15 days of custody can be taken anywhere within 60 or 90 days. The reading that I have of the new clause of the BNSS is that it expands possible custody because it omits a crucial clause. A set of words from Section 162 of CrPC said the 'magistrate may authorise the detention of the accused otherwise than in the custody of the police'. The new law deletes the words 'otherwise than in the custody of the police' and says you can have custody of 60 or 90 days, depending upon the offence. So, for me, there is an expansion of the potential of police custody currently from total of 15 days to a total of 60 or 90 days, depending on what the offence is. There is a lack of clarity on this.

Narrowing of Bail Provision: There is a massive shrinking of bail provisions in the BNSS. Under Section 433 of CrPC, if you had served half of your sentence without a conviction, you could be let out. Those who were not eligible for this benefit were prisoners sentenced to death. Under the new law, this exception is broadened; it says even if you are sentenced to life imprisonment you cannot take the benefit of this provision. It is a very significant expansion of exclusion and, therefore, narrowing of bail provision.

There is also a provision that says if there is a pending inquiry or trial against you, you will not

be given bail. It is possible that within one case there could be multiple offences. The provision is saying if there are multiple offences pending against a person, he shall not be released on bail. This is a staggering provision in terms of the impact it will have on the ground. If a person has a pending inquiry or trial, it also excludes him from the provision of getting bail if half the maximum sentence is served and the trial has been concluded.

Issues With Forensic Evidence: The new laws are big on forensic evidence. A change is sought to be brought in through Section 176(3) of BNSS regarding all offences which potentially can carry a punishment of seven years or more. Forensic evidence shall necessarily be collected and the law gives five years to the state to implement this provision. There is a push for 'scientific investigation'.

I want to delve into how scientific investigations are being constructed in the new laws. Even earlier, certain government experts were exempted from being called to court for the reports they had given. The new laws expand the universe of the government and scientific experts are exempted from being called to court.

Also, the samples that can be collected from a person have been expanded under the new laws. In addition to signatures and handwriting under the earlier law, fingerprints and voice samples can be collected not just from persons arrested in connection with an offence -- either currently in custody or previously arrested -- it extends to anybody the magistrate wants.

Challenging Genuineness of Documentary Evidence: Perhaps the most crucial exemption is in Section 330 of BNSS where it says that genuineness of the document has to be challenged initially *(within 30 days)* if you want that to be examined by the court. One party has to challenge the genuineness of the document. It also extends it to the expert opinion: Unless a party challenges the genuineness of the expert opinion, that expert cannot be called to court. It is no longer open to the court to call an expert witness and examine whether the report of that expert is genuine or not unless it is challenged by one of the parties. Who will bear the brunt? It is the poor and it obviously would raise questions on the quality of legal aid.

Further, what can be challenged is only the genuineness of the report. One cannot challenge that the science (in the report) is invalid -- how valid is bite mark evidence, or how valid is footprint evidence, or how valid is blood spatter evidence? So, while there's an expansion of the use of forensic evidence, there is constriction of judicial scrutiny of that forensic evidence.

Definition of Terrorism: Under the UAPA, whatever is its worth, terrorism charges are investigated by an officer of the rank of Superintendent of Police (SP) or above. But now, by bringing the same definition of terrorism under BNS also, the investigation into a terrorist offence can be done by an SHO or at a local police station as well. Even the bare minimum protections in the UAPA have been taken away in terms of who is investigating this case.

The Intersection Between Constitutional Law and Criminal Law: The weak intersection between criminal law and constitutional law is going to haunt us. Constitutional reflection and constitutional jurisprudence on criminal law are rather weak. Is there any discourse on what we should criminalise and what we can't criminalise, or what is the proportionate punishment for certain offences?

Then there is the issue of vagueness that runs across legislations, be it UAPA, PMLA and many other IPC provisions. Why is there a stress on overhaul (of earlier laws)? What is the political significance of using the word overhaul when 80-85 per cent of text is exactly the same as in earlier laws; mostly it is reordering? The remaining 15 per cent is full of problems. It might be useful for all of us to reflect on what is being attempted here.

Sarim Naved

The way the new laws have been drafted, troubled me. For example, regarding forensic evidence they say that offences punishable for more than seven years will have a forensic examination. Why not offences punishable by less? The idea is to get to the truth, not to have a gradation of offences. What happens if the forensic examination is not done? Does the investigation completely fizzle out and everybody goes scot-free?

Bail Provisions: In the debate we have about bail, I tend to stand with the interpretation that 15 days of police remand can be split because there's Section 480 *(regarding giving bail in case of non-bailable offence)* where it says that in certain cases if police custody is not taken in the first 15 days, bail can be given. The police can't say that don't give bail just because it might need custody later.

Vaguely Worded Evidence Act: In the new laws, nothing much has changed. Ninety per cent of laws are the same, especially the Evidence Act where 99 per cent of what it used to be earlier, apart from changes in section numbers and headings. But there is confusion regarding secondary evidence – that a person who is an expert in examining a document or other documents (pertaining to a case), can get evidence about that. I don't know what that means. It could be very narrow or it could be very wide. A CBI officer, for example, could say there is no need to bring evidence about these documents or proof as we have an expert.

Terrorism and Organised Crime: What has been said in terrorism and organised crime sections is brazen. Never in the history of this country, the police had a choice to prosecute a person under two laws for the same offence -- under the IPC or UAPA. Why should the accused not know what he'll be prosecuted under? The rule of law is that a special law will always have precedence over general law. That doesn't seem to be the case now.

There is an issue with defining things under the new laws. There is a section that says that 'every state government must bring a witness protection scheme'. But what will be in the scheme and who is going to fund it? Or, every state will a have different scheme. This is pure laziness. You can't delegate the entire power to the state government.

Public Servants -- Terrifying Powers: There is a terrifying provision that says contempt of a lawful order by a public servant can put a person in jail for 24 hours prior to being produced before a magistrate. There is no counter to it. A policeman could say don't stand here, and if I say no, technically I'm in jail. It is not linked to any offence, it is not linked to any act; it is bizarre.

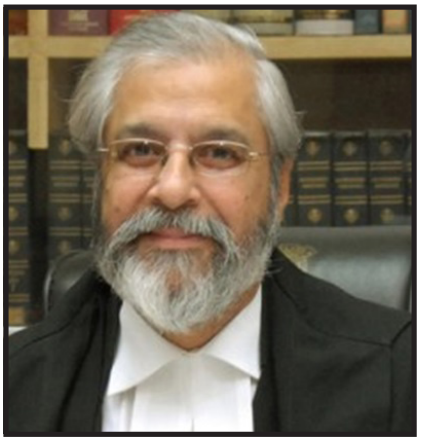
Issues about Audio & Video Evidence: There is some focus on audio and video evidence. That's excellent because post-Covid we all are struggling with it. But there are problems with it too. Even wonderful things like every search and procedure should be video recorded. But I know what is going to happen, nothing will be filed in the court. Videos will be corrupted, something will be blocked by a hand and there will be no consequences. The biggest colonial aspect of this law is that the state or police officers face no consequences when they violate a person's rights. This has continued.

There is no clarity about how audio and video evidence should be recorded, or about summons to be sent through 'electronical' means. What is meant by electronical means? Perhaps it will be served on my phone number. But maybe the number is five years out-of-date. What happens then? Then there is a provision for trials in absentia. But if I'm not served the

summons, it's easy to put me in that stream. I have no remedies after I find out that I have been convicted inabsentia.

There is a provision that says that judgment is to be given in 45 days. That's very nice. But the problem is that there is also a provision that says you will have to file a discharge application within 60 days. So, if it's done on the 61st day, what happens? Do I give up my right to plead not guilty? What is the thought behind it?

Justice Madan B Lokur



Purpose of New Legislation:
"When we look at the criminal justice system, we look at five players in the system. One is the accused and the second is the prosecutor -- these are the two key players. Then there is the witness, who is extremely important, the victim of the crime and the society, that is all of us.

The purpose of the legislation that has come out in the newspapers and through statements made by persons in the authority, is that the present criminal justice system is in bad shape and it takes years for cases to get decided. So, we want to expedite the disposal of cases and that is why we need to have a new legislation. Colonialism is also one aspect because the system was such that it gave rise to delays.

From that point of view, I think it is important that society gets involved because society is the one that actually has an interest in the cases being decided quickly. That has already been seen – the Parliament attack case was decided by the trial courts in less than a year, in just about a year in the High Court and similarly in a year in the Supreme Court. So, in two three years the Parliament attack case, which was very important, was decided. We had the Nirbhaya case which was also decided soon. So, expeditious trial is possible. I really don't see the reason for bringing about these changes.

Repercussions for an Accused:
From the point of view of an accused person, what will be his interest in the law? One, is that the investigation should be completed quickly. The underlying premise of producing a person before court within 24 hours is that the investigation should be completed within that time. If it is not completed within 24 hours, you ask the magistrate for remand. You justify the remand by saying that there is a good reason to believe that this person has committed the offence and I need to further investigate this person for these reasons. There are certain parameters laid down by the Supreme Court for this – the person may influence the witness or destroy the evidence, etc. Therefore, he should be kept in custody, police custody or judicial custody.

Some of the provisions which deal with investigation don't seem to keep in mind that police have to try and complete the investigation within 24 hours. These provisions seem to suggest that the investigation could go on. The accused person could be remanded to the police at any time. The accused is also interested in having the chargesheet filed against him quickly. If the prosecution believes he is guilty, file the chargesheet and prove the case. If he is not guilty or you don't have evidence, why keep him in custody by saying we are going to file the chargesheet at any point of time. Now this system of supplementary chargesheets has become more or less the rule. You file a chargesheet and then you say further investigations are required, and we will file a

supplementary chargesheet.

This not only keeps the accused under threat, it also gives the prosecution a reason to keep that person in custody. The provision of default bail has been completely diluted by the recent Judgement of the Supreme Court. Even though the investigation was not complete and the chargesheet had not been filed, a person was entitled to statutory bail under CrPC after 60 days and in some cases after 90 days. That provision has been given a go-by. .

I don't know to what extent the new code changes the position. In any case, there is a judgement of the Supreme Court, there is a very little that a magistrate can do about it. The bail jurisprudence has not been liberalised. In fact, it has made it even more stringent.

As far as the accused is concerned, he is in trouble. Earlier he would have been given bail; the fact that courts are not giving bail is all together another matter. But if you could have got bail under the earlier provisions, perhaps he will not get bail under the new law. So, the law is functioning detriment to the accused in matters of bail, which means a loss of personal liberty.

The accused is also interested in the trial. I'm not sure whether there is any provision for expediting the trial other than saying that don't grant adjournments for asking. It is good to say that. Under the Civil Procedure Code, there is a provision that there should be no more than three adjournments. I don't think it has ever been implemented. So, what is it really expediting the trial?

Complications with Electronic Evidence: It is nice to talk about electronic evidence, videography, etc. But there is a complication in that as well. Today we have all kinds of videos going around – made through artificial intelligence, morphing of images, etc. If somebody says it's not his face in the video, what are you going to do? Are you going to send it to a forensic laboratory? If you are going to do that, how are you going to expedite the trial.

As far as the terms of liberty of an accused is concerned, I don't think the purpose of bringing the new code has succeeded. On the contrary, it has got defeated by some of the provisions.

Witness Left in the Cold Again: There has been no provision for witness protection for a long time. This was an opportunity to do so, but it has not been done. You read in a newspaper about a person who has been a rape victim, she probably has been beaten up for something. What kind of protection does she have? We had instances of parents of rape victims being threatened. What kind of witness protection do we have? Has the new code provided for that?

The chaos is one thing. The load on the court will increase because of the interpretation of various provisions. As it is, courts are overburdened. If you are going to ask them to keep interpreting each new section, it is going to take time. Also, you are going to get different interpretations. There will be an appeal or revision filed in the High Court and the matter will get delayed. So, from the points of view of the judiciary and the witness, I don't think any dramatic purpose is going to be served.

Rights of the Victim: By and large, provisions of the law are more in favour of the prosecution. I'm not particularly worried about that, they can look after themselves. There have been some amendments in law, which give certain rights to the victims. I'm not sure whether those rights have been increased or retained (in new laws). They appear to be the same.

If you have to bring changes, these are the areas which concern us as a society. Why should the victim go through this, why should the family of the victim go through this? The effort should have been to look at the interests of the accused person – which, I think, is a constitutional right -- as well as witnesses who have nothing to do with the crime. In the new law, they should have strengthened the rights of the victim by enabling the victim to say what he or she wants to say in court, filing the appeal and taking the matter to a logical end. All this has been given a go by.

IMPRISONMENT TILL THE END OF NATURAL LIFE

Reeking of Retribution and Vengeance

Udit Singh*

The concept of punishment is as old as the concept of crime. The aim and purpose of punishment keep on changing according to the time and needs of society, the latest being the rehabilitation and reformation of offenders. But no society has ever proved with substantial evidence that the purpose of punishment has been achieved.

The courts and legislature stick to the need for stricter punishment when the public starts losing faith in the justice delivery system. The courts and legislature act as 'anxiety barometers'[1] which echoes the degree of anxiety in society. But do the courts and lawmakers have to go by society's perception of justice? Are their decisions not supposed to be independent of public outcry of retributive justice?

The five-judge bench of the Supreme Court in *Union of India v. V. Sriharan*[2] with a 3:2 majority upheld the Swamy Shraddananda's[3] ratio, which provides for infliction of a special form of indeterminate life sentence without remission. The court stated that this type of special sentence shall only be imposed by the High Courts and the Supreme Court. Parliament has also adopted this special life sentence -- life imprisonment till the person's natural life vide amendments in IPC in 2013[4] and 2018[5] for several offences.

The newly enacted BNS, which came into force on July 1, 2024, has incorporated "imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life", as a punishment for at least eight offences.[6]

This article examines the nature of the indefinite life sentence vis-à-vis the fundamental rights of a convict. It further analyses whether imposing such whole life sentences would ever achieve the reformative goal of the punishment. Finally, it makes an argument to abolish the whole life sentences without remission.

Imposing 'Civil Death'

Imprisonment for life without any hope of release can be the most serious punishment on many grounds. It amounts to 'civil death', which eliminates the possibility of life outside jail for the convict. Life imprisonment without remission or parole indicates that either the prisoner should die in prison, or there is no possibility for change. The lack of communication with the outside world affects the prisoners both physically as well as mentally, especially when they are kept in solitary confinement.

The sentence of life imprisonment without remission is based on two propositions. First, it gives a message that the crime committed by the convict is so brutal and culpable that the proportional punishment for the same is life imprisonment without any hope of release and the convict deserves to die in prison. This approach indicates retribution of the worst order. Second, from a utilitarian perspective, such punishment elucidates that the offender is beyond reformation and rehabilitation and, therefore, he or she can never be integrated into society again.

Dolovich[7] states that life sentence without parole is an exclusionary strategy and irrevocable exile. In one stroke, the target is permanently exiled, foreclosed from ever making a case for release:*"it is thus to be expected that a system committed to permanent exclusion would embrace the use of life sentence without parole."*[8]

It has been rightly pointed out that life sentence without parole promises that the convict will never re-emerge, never reintegrate and never yet again move freely in the shared public space. In this context, what will be the motivation to participate in educational or

** Udit Singh is a Legal Consultant at Common Cause.*

other rehabilitative programs for the convict if he is never going to be integrated into the society again? Are the courts in India embracing exclusion by branding prisoners sentenced to life imprisonment without remission as 'non-citizens'? These questions need to be addressed for developing an understanding of the successful rehabilitation of convicts.

The court usually ignores the good behaviour and improvement shown by the convict while serving a prison sentence. The potential of a prisoner to reform should not be decided on the basis of the brutality of the crime committed by him or her; rather it should be determined by considering the good conduct of the prisoner in the jail and his behaviour in prison should be reviewed from time to time.

Thus, the very nature of this special life sentence is retribution and vengeance, which is being justified by the courts and legislature in the name of reformation.

Underlying Belief: An Alternative to Death Sentence?

The life imprisonment without remission or parole is being awarded as an alternative to the capital punishment. But no punishment should be shielded as an alternative to another punishment without looking into the nature of the sentence itself.

> ***"Life sentence without parole is an exclusionary strategy and irrevocable exile."***

The situation of the life convict without remission is that of one who is on indefinite death row. The prisoner is mentally and emotionally destroyed in the process. Practically, a life sentence without remission is not different from a death sentence as both are irrevocable in nature. The only difference which can be derived is that while in a death sentence there is an execution date, the sentence of life imprisonment without remission is without any such execution date. Also, there is no concrete and substantial data which shows that the death penalty has a deterrent effect. If capital sentence does not deter then how can it be concluded that indefinite life imprisonment without remission will have a deterrent effect?

The sentence of life imprisonment without remission denies the fundamental freedoms to the prisoner without any hope of restoration and reintegration into society. The basis and reasoning for imposing such harsh and irrevocable punishment is that the convict is beyond reformation.

Violation of Right to Dignity

The special life imprisonment infringes upon the right to dignity of the convict. It leads to a complete denunciation of the convict as a person. It is inaccurate to state that the one-time irrevocable punishment fulfils the mandate of proportionality. Also, a life sentence without any hope of release discourages the convict's reformation and rehabilitation.

From a human rights perspective, such a special sentence does not have any place in modern penology as two wrongs do not make a right. Life imprisonment without remission is dehumanising as the court presumes that the convict is beyond reformation. The very fact that the convict is sentenced to die in prison, is a violation of one's human dignity as there is no possibility for the convict to reintegrate into society.

No hope for release can lead to mental and emotional torture of the prisoner, thereby violating one's human rights. Also, the court, while pronouncing the sentence of life imprisonment without remission, makes a one-time decision that the convict is beyond reformation and not fit to join society again. Such presumption is flawed as nobody knows the future and depriving prisoners of the chance to be penitent and reform themselves violates their fundamental rights. If there is no hope for release, the prisoner may not follow the way of self-reflection and the whole purpose of reformation is defeated.

The Kenyan Example

In the latest development, the Kenya Court of Appeal, in the case of J*ulius Kitsao Manyeso v. Republic* (2023), has declared the imposition of mandatory life imprisonment as unconstitutional, The Court noted:"…..mandatory life imprisonment is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under Article 27 of the Constitution. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under Article 28."

In March 2024, the Kenyan High Court, in the case of *Justus Ndung'u Ndung'u v. Republic*, struck down the punishment of life imprisonment. The Court found it unjustified not specifically on the facts of the case, but rather on the basis that the sentence of life imprisonment itself was unconstitutional. It observed: *"A life sentence is a sentence sui generis. In that, whereas it is philosophically supposedly imprisonment for a duration of time only, it is in actual sense imprisonment that is indeterminable, indefinite, uncompletable, mathematically incalculable, and therefore quantifiable only for the convict's entire remainder of his lifetime."*[9]

Defeating the Purpose of Reformation

The Prison Statistics India, 2022, states that 75,629 of the total number of 1,33,415 convicts are sentenced to life imprisonment, which constitutes 56.7% of the total convict population. However, there is no study which provides the data regarding the number of prisoners sentenced to indefinite life sentences without remission. Also, the same report indicates that out of the total number of 1,25,533 released convicts, only 3,159 convicts have been provided with financial assistance on their release and 1,622 have been rehabilitated during the year 2022. Considering the pace and process of rehabilitation of prisoners in India, an indeterminate life sentence without remission will make the reformation and reintegration of prisoners more complex, if not impossible.

In this sense, it seems life sentence without remission has failed both deterrence as well as reformative theory of justice. The whole idea of reformation of prisoners has no place in such a special sentence of life imprisonment. With no hope of release, the prisoners would not self-reflect or introspect, which is fundamental for reformation.

If a person has to remain in jail for the remainder of life, the purpose of punishment i.e. reformation of offenders, which the Supreme Court has preached time and again, is completely defeated. This sentence should be declared unconstitutional for being violative of Article 21 of the Constitution and therefore abolished. A modern society does not have any place for such retributive and inhumane sentences.

> ***"Life imprisonment without remission is dehumanising as the court presumes that the convict is beyond reformation."***

References

1 Mathiesen, T. (2006). Prison on Trial (3rd ed.). Waterside Press (p. 21).

2 (2016) 7 SCC 1.

3 Swamy Shraddananda v. State of Karnataka (2008) 13 SCC 767.

4 Sections 370(6), 370(7), 376, 376A, 376D, 376E of Indian Penal Code, 1860; The Criminal Law (Amendment) Act, 2013 (Act No. 13 of 2013).

5 Sections 376(3), 376AB, 376DA, 376DB of Indian Penal Code, 1860; The Criminal Law (Amendment) Act, 2018 (Act No. 22 of 2018).

6 Sections 64(2), 65(1), 65(2), 66, 70(2), 117(3), 143(6), 143(7); The Bharatiya Nyaya Sanhita, 2023.

7 Dolovich, S (2012). Creating the Permanent Prisoner, in Jr. J. Ogletree, Charles and Sarat, Austin (eds), Life without Parole: America's New Death Penalty?. New York University Press (p. 110).

8 Ibid.

9 Bhatia, G. The High Court of Kenya Strikes Down Life Imprisonment (Constitutional Law and Philosophy, 25 March 2024) https://bit.ly/4dQ2PMV accessed 10 April 2024.

COMMON CAUSE EVENTS

Pic credit: Fahas Abdullah

Vipul Mudgal addressing the gathering at the book launch event

Memoirs of a Top Cop: Unforgettable Chapters*

On September 1, 2024, Common Cause and the Indian Police Foundation co-organised a book launch of well-known former DGP Prakash Singh at the India International Centre, New Delhi. Justice Madan Lokur graced the event as the chief guest.

Justice Lokur, in his address, recalled his encounters with Mr Singh while filing the PIL on police reforms. "He filed the PIL with fantastic research which led to a commendable judgement," he said.

The former judge quoted some of the life mantras from the book that Mr Singh had followed during his years of service. "He dedicated his life to establishing the rule of law without compromise and used to keep his resignation in his pocket if he was made to compromise with the values enshrined in the Constitution," added the former judge.

'Memoirs of a Top Cop: Unforgettable Chapters' is one of many books Mr Singh has authored on issues related to police and governance. In this book, he recalls some unforgettable experiences during his service.

In an attempt to go beyond being just a policeman, he filed a PIL seeking police accountability.

Consequently, the Supreme Court passed seven substantive guidelines in the *Prakash Singh v UOI* including the one to establish Police Complaints Authorities for the first time in the history of police administration. Mr Singh though rued the non-implementation of guidelines even after 27 years of the judgment.

Vipul Mudgal, director and chief executive of Common Cause, spoke about his association with Mr Singh as a journalist. Mr Singh liked to spend time with the constables, the lowest rung of his colleagues, not because it was a matter of public relations but because Mr Singh believed that every one deserved equal grace. The book is not about Mr Singh, it is about the issues in the police administration and governance which he experienced, he said. Mr Singh, as I have understood from the book, is a man born into a relative privilege but has given back more to the society, he added. He said police reforms were more about police accountability rather than political correctness. Our views are important and valuable but our integrity is priceless, he said, reflecting on the author's distinguished service.

** The report was prepared by CC Intern Fahas Abdullah*

Online Consultation on Social Audits and Policing

On July 13, 2024, a group of domain experts held an online meeting to discuss the potential for social audit of the police in India. This was a follow-up to a larger discussion on revising and broadening the existing social audit standards.

The consultation was organised by the Social Accountability Forum for Action & Research along with Devika Prasad and Devyani Srivastava, both of whom have worked extensively on policing. Radhika Jha from Common Cause took part along with representatives from other civil society organisations, academics and researchers.

Some of the issues discussed were the possibility of adapting the Objectives and Minimum Principles of social audits to policing, existing provisions for auditing in legislations such as the Juvenile Justice Act, 2015, and learning from, as well as distinguishing the social audits from, community policing models.

Online Consultation on AI: Setting Priorities for the Global Coalition for Tech Justice"

On July 11, 2024, the Global Coalition for Tech Justice organised an online meet on the priority areas of concern around artificial intelligence, particularly during elections and in human rights spaces.

Radhika Jha from Common Cause participated in the meeting as a Steering Committee representative.

Among the topics discussed in the meeting were challenges arising out of the use of AI in elections and democracies, such as the use of AI to target human rights activists, journalists and civil society members, targeting of women and girls, the shortcomings of AI tools in countering online hate speech and fake news, etc. Member organisations from various countries joined the meeting.

General Assembly Meeting of Global Coalition for Tech Justice

On July 25, 2024, the Global Coalition for Tech Justice convened a general assembly of over 150 member organisations and individuals. The discussion took stock of the efforts and impact made by the Coalition on ensuring tech justice and the impact of Big Tech on elections across the world, as well as a review of the issues focused on by the Coalition.

Radhika Jha from Common Cause participated in the meeting as a member of the Steering Committee and talked about the learnings and activities of the Coalition and some avenues for going forward.

Data for Justice: A Colloquium on Criminal Justice in India

The India Justice Report team, in collaboration with Project 39A, National Law University, Delhi, organised a two-day colloquium on criminal justice in India on September 7-8, 2024.

The panelists included former judges, economists, academicians as well as researchers, who spoke about the need for data in criminal justice, the challenges of dealing with official data, different ways of creating data and the future of data in criminal justice.

Some eminent speakers included S Muralidhar, Former Chief Justice of Odisha High Court, Mahesh Vyas, Managing Director and CEO of the Centre for Monitoring Indian Economy and Karthik Muralidharan, Tata Chancellor's Professor of Economics, University of California, San Diego. Vipul Mudgal, Radhika Jha and Udit Singh from Common Cause participated in the colloquium.

OFFENCES AGAINST WOMEN

Sections In BNS Perpetuate Stereotypes

Swapna Jha*

While making the law regarding offences against women gender-neutral, is a positive change, the omission of IPC's Section 377 and marital rape as an offence disregards Article 14 of the Constitution.

Chapter V of the BNS specifically addresses offences against women and children. It includes Sections 63 to 99, covering various crimes such as rape, voyeurism, stalking, and other forms of sexual violence.

Definition of Rape: Glaring Omissions

Section 63, defining "rape" is verbatim to Section 375 of the IPC [as amended by the Criminal Law (Amendment) Act, 2013] wherein only a "man" is a perpetrator and a "woman" is a victim. However, the provision under Section 377 of IPC, which penalised the rape of an adult man, does not find a place in the BNS. Thus, it follows that BNS fails to penalise sexual violence against men. This change to India's rape laws represents a blatant disregard for the fundamental right to equality enshrined in Article 14 of the Indian Constitution. This revision falls short on numerous counts, leaving a significant portion of the population vulnerable and perpetuating a dangerous misconception about rape.

Section 63 also provides that sexual intercourse or sexual acts by a man with his own wife, the wife not being under 18 years of age, is not rape. Under Section 375 of IPC the age limit was 15 years. This provision clearly violates Articles 14 and 15 of the Constitution as it negates a married women's consent to sex and perpetuates sexual and gender stereotypes about the subordination of a woman's individuality.

Section 64 (1) punishes the rape accused with 10 years to life imprisonment whereas Section 64(2) punishes aggravated forms of rape with 10 years to life imprisonment for the remainder of a person's natural life.

Section 65 of BNS deals with punishment for rape and combines both age categories (under 12 and under 16) into a single section, simplifying the legal framework.

Under Section 66, the punishment for causing death or resulting in a persistent vegetative state of the victim is **r**igorous imprisonment for a term which shall not be less than 20 years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

> ***Section 69 is certainly chauvinistic and against the fundamental premise of the element of*** *quid pro quo* ***involved in acts that amount to "sexual harassment' under the POSH Act.***

Section 69: Open to Misuse

Section 69 in the BNS is a new addition to the law. It pertains to sexual intercourse by employing deceitful means. It says: "–"Whoever by deceitful means or by making false promises to marry a woman without an intention of fulfilling the same, has sexual intercourse with her, such an act not amounting to rape shall be punished with imprisonment which may extend to 10 years and shall also be liable to fine."

As per the Explanation given, "deceitful means" shall include inducement for, or false promise of employment or promotion, or marrying by suppressing identity.

This provision needs deliberation as to how the law treats break-ups in relationships. If a woman decides to file a complaint against her former partner, will he/she be found guilty under Section 69? If yes, this would open the floodgates of complaints and increase the possibility of the Section being

* *Swapna Jha is a Senior Legal Consultant at Common Cause*

misused. It downplays the role of women in consenting to engage in such sexual relationships. Also, does the explanation to Section 69 mean that if a woman could be induced into sexual intercourse under a 'false promise of employment or promotion', the promiser must fulfil the promise and no offence is made out?

Section 69 is certainly chauvinistic and against the fundamental premise of the element of *quid pro quo* involved in acts that amount to "sexual harassment' under the POSH Act. This section is gender neutral as it uses the neutral term 'whoever' to describe an offender. Thus, a woman having sexual intercourse with another woman by making a false promise of employment or promotion could be punished under this provision.

Gender Neutral Sections

Section 354C of the IPC, which saw only men being offenders of voyeurism, has been changed in the BNS by incorporating gender neutrality. Section 77 of the BNS uses the term 'whoever' as opposed to the term 'any man' (as provided in the IPC) to refer to the perpetrator. This moderation makes a huge difference by protecting women from cases where men use women to commit voyeurism (capture images) as the IPC completely excluded the possibility of charging women for the said offence.

However, the following sexual offences remain unchanged wherein only a "man" is a perpetrator and a "woman" is a victim: Section 63 (rape), Section 74 (assault or use of criminal force for outraging the modesty of a woman), Section 75 (sexual harassment by physical advances, coloured remarks, showing pornography, demanding or requesting sexual favours), Section 76 (assault or use of criminal force with intent to disrobe), Section 78 (stalking), and Section 79 (word, gesture or act intended to insult modesty of a woman).

> ***"In a nutshell, the laws appear to be a grave failure in the aspect of leaving the marital rape provision untouched despite several Supreme Court judgements emphasising the outdated character of the exception."***

Sections 85 and 86, which deal with cruelty towards married women, are under challenge as the law is prone to be misused without any prescribed guidelines.

BNS has excluded adultery from the criminal code, thereby endorsing *Joseph Shine v. Union of India, (2018)*[1], which decriminalised adultery by declaring the provision as ultra vires the Constitution.

Sections on Offences Against Children

Section 95 of BNS provides that whoever hires, employs or engages any person below the age of 18 years to commit an offence, shall be punished with imprisonment of either description or fine provided for that offence as if the offence has been committed by such person himself. Hiring, employing, engaging or using a child for sexual exploitation or pornography is covered within this Section.

Under Section 99 (buying a minor for purposes of prostitution, etc.) minimum mandatory punishment is introduced as seven years, and the upper limit of imprisonment is extended up to 14 years in BNS, in place of 10 years in IPC. Words "any person under the age of eighteen years" are replaced by the word "child'.

In a nutshell, the laws appear to be a grave failure in the aspect of leaving the marital rape provision untouched despite several Supreme Court judgements emphasising the outdated character of the exception. It does not consider recommendations of the Justice Verma Committee (2013) making the offence of rape gender-neutral and including marital rape as an offence. Similarly, Section 69 is not just marred by the malicious risk of gross misuse but also reeks of impracticalities. The intention of the legislature may be good but it can turn out to be one of the most misused sections.

References

1. 2018 2 SCC 189

BAIL PROVISIONS IN BNSS

Will New Laws Reduce Overcrowding of Prisons?

Asma Shuaib*

Bail jurisprudence in India is derived from Article 21 of the Constitution, the right to life and personal liberty, which cannot be denied except through procedure established by law which must be 'just, fair and reasonable'. In the *Gudikanti Narasimhulu and Ors. v. Public Prosecutor*[1], Justice V.R. Krishna Iyer observed, "The issue of bail is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process."

The government has claimed that the new provisions in the Bharatiya Nagarik Suraksha Sanhita (BNSS) have increased the scope of bail and will thus reduce the problem of overcrowding in prisons. This article analyses the revised bail provisions in the context of this claim.

Chapter XVIII of BNSS (from Section 478 to Section 482) deals with provisions on bail and bail bonds. The substantive changes from their corresponding sections in CrPC are mainly three -- insertions of definitions of bail, bail bond, and bond; changes in provision regarding the maximum period of detention of an undertrial; and, changes in provision on anticipatory bail.

Maximum Period of Detention for Undertrials

A significant change is seen in Section 479, which corresponds to Section 436A CrPC (inserted vide the Criminal Law (Amendment) Act, 2005). According to Section 436A CrPC, if an undertrial prisoner had undergone detention for a period extending up to half of the maximum period of imprisonment specified for the offence, not being an offence punishable with death, he shall be released on bail by the Court. The provision was added to recognise the right to a fair and speedy trial of undertrial prisoners.

While CrPC excluded only persons accused of offences punishable with death from this provision, Section 479 of BNSS excludes prisoners accused of offences punishable with life imprisonment as well.

> ***"While CrPC excluded only persons accused of offences punishable with death from this provision, Section 479 of BNSS excludes prisoners accused of offences punishable with life imprisonment as well."***

Thus, the application has been made narrower as it excludes a wide category of undertrial detainees who have served half of their maximum period of imprisonment.

Further, Section 479 (1) provides an insertion of a proviso which states that a person, who is a first-time offender, shall be released on bail if the person has undergone one-third of the maximum sentence prescribed for the offence. This benefit is not made subject to any other consideration, such as the seriousness of the offence or judicial discretion, and remains a matter of right for an undertrial who has not been convicted previously.

The Supreme Court on August 23, 2024, while hearing a PIL initiated to address the issue of overcrowding of prisons in India[2], held that Section 479 of BNSS would apply retrospectively to the undertrials across the country. Thus, the provision will apply to all undertrial prisoners in cases registered before July 1, 2024.

Provision with Problems

Interestingly, Section 479 (2), which is an addition to its counterpart in CrPC, limits the purpose of this Section. Sub-clause (2) provides that where an investigation, inquiry, or

* *Asma Shuaib is a Research Intern at Common Cause*

trial in more than one offence, or multiple cases are pending against a person, he shall not be released on bail by the court. This provision raises problems on multiple grounds.

Firstly, the language of the provision is extremely wide. According to an analysis by Project 39A[3], investigation, inquiry, or trial in 'more than one offence' could also include a situation where a person is accused under several sections for a series of acts forming a part of the same transaction, given that it is differentiated from 'multiple cases'. As such, this sub-clause excludes a substantial number of persons from the benefit of this provision.

Secondly, this sub-clause does not consider the nature of 'other cases' and thus, fails to account for the possibility of the other offence the person is accused of being bailable or non-cognisable. There may also be a situation where the person is not required to be in custody for investigation, inquiry, or trial of such other offence.

Thirdly, the sub-clause makes the operation of this provision inapplicable even where a person accused of multiple offences has served half of the maximum prescribed punishment in all of those offences.[4]

Fourthly, the grant of regular bail is usually guided by what is referred to as the triple test -- the ascertainment of whether the accused is at flight risk, possibility of tampering with the evidence and influencing witnesses. Also, the Apex Court has held that the gravity of the offence may also be an additional consideration which may be ascertained by the sentence prescribed for the offence alleged to have been committed[5]. However, merely the number of offences charged against a person seems to be an inexplicable ground to deny bail as the accused is most often charged with more than one offence in almost all serious cases.

> ***"A legal obligation on the jail superintendents to make use of bail provisions is relevant in the absence of an effective legal aid system in prisons."***

Through the inclusion of these broad exclusions, this sub-clause defeats the purpose of this provision, as it substantially narrows the scope and denies the right conferred by the provision to a wide category of persons who were earlier entitled to this relief under CrPC. Further, this sub-clause allows for misuse by filing frivolous complaints against a person already in custody, to prevent them from release under this provision.[6]

Sub-clause (3) of 479 is another notable insertion that casts a statutory responsibility on the superintendents of jail where the accused is detained, to apply for bail under this provision. In *Bhim Singh v. Union of India,*[7] the Supreme Court assigned the duty of looking at eligibility under Section 436A to the Magistrates and Sessions Judges. However, a legal obligation on the jail superintendents to make use of bail provisions is relevant in the absence of an effective legal aid system in prisons.

Changes Brought in Anticipatory Bail Provision

The CrPC disallowed granting of anticipatory bail to persons accused of committing gang rape on a woman under 16 (Section 376DA) and 12 years (Section 376 DB) of age, as specified in sub-section 4 of Section 438 CrPC. However, sub-clause (4) of 482 BNSS excludes persons accused of committing gang rape on a woman who is under 18 years of age from seeking anticipatory bail. Thus, the scope of anticipatory bail provision in BNSS has been reduced compared to the provision in CrPC.

Recent SC Judgments on Bail

The Supreme Court has time and again reiterated that bail is the rule and has pronounced various pro-liberty judgments in recent times. In a breakthrough judgment in *Javed Gulam Nabi Shaikh v. State of Maharashtra*,[8] the Apex Court granted bail to a person booked under UAPA, stating that if a prosecuting agency cannot protect the right to speedy trial of an accused, then it cannot oppose his bail

application on the ground that the offence was serious.

The Court stated, "*If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution, then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime*". The Court added that the trial courts and the High Courts in the country have forgotten that bail is not to be withheld as a punishment.

In the same case, the Court observed "*The over-arching postulate of criminal jurisprudence that an accused is presumed to be innocent until proven guilty cannot be brushed aside lightly, howsoever stringent the penal law may be.*" The sub-clause (2) of 479 BNSS is palpably contrary to this tenet of presumption of innocence, as it denies bail to an accused based on the existence of a pending investigation, inquiry, or trial in more than one offence.

> ***Though in BNSS the maximum period of detention for undertrials has been reduced for first-time offenders and the jail superintendents have been empowered to assist the accused in bail applications, the scope of bail as a right has been substantially constrained, with unreasonable exceptions.***

Recently, the Supreme Court step-sided the narrow reading of the law and stated that 'bail is the rule, jail is the exception' principle stands true even in cases of special statutes like the UAPA *(Jalaluddin Khan v. Union of India)*[9] and the PMLA *(Prem Prakash v. Union of India*[10] *through the Directorate of Enforcement),* which have stringent bail provisions. While granting bail to the former Delhi Deputy CM Manish Sisodia in the money laundering case, the Supreme Court took into consideration the long period of pre-trial incarceration and the fact that the trial was unlikely to conclude in the near future. These recent interventions by the Apex Court rekindle hopes for undertrial prisoners, despite the new stricter statutory provisions on bail.

Conclusion

Though in BNSS the maximum period of detention for undertrials has been reduced for first-time offenders and the jail superintendents have been empowered to assist the accused in bail applications, the scope of bail as a right has been substantially constrained, with unreasonable exceptions. This change, rather than providing a solution to the problem of overcrowding of prisons, may further deteriorate the existing condition, particularly for undertrial prisoners. The outcome of the retrospective application of Section 479 BNSS is expected to be much limited in scope considering the wide range of exceptions under the provision. It is unclear if the latest Supreme Court rulings expanding bail jurisprudence to even special statutes will help the bail applications of prolonged detainees under UAPA and PMLA cases. However, it can be said that with the insertion of a sub-clause excluding a larger category from availing bail, the release of undertrials languishing inside prisons over more than half of their maximum imprisonment period, will be considerably restricted under the new laws or left for judicial discretion rather than being upheld as a matter of right under Article 21.

References

1 1978 AIR 429.

2 W.P.(C) No. 406/2013.

3 Project 39A Criminal Law Blog, Criminal Law Bills 2023 Decoded #22: Provisions Pertaining to Bail and Bonds. https://bit.ly/4dPEZRH

4 Ibid.

5 *P. Chidambaram vs Central Bureau of Investigation*, AIR 2019 SUPREME COURT 5272.

6 Supra note 3.

7 (2015) 13 SCC 605.

8 SLP(Crl) No. 3809/2024

9 Crl. A. No. 3173/2024

10 SLP (Crl.) No. 5416 of 2024

IPF COMMENTS AND RECOMMENDATIONS

Think Tank Writes to Parliamentary Committee

The Indian Police Foundation (IPF), an independent think tank dedicated to working for a professional, ethical, and service-oriented police force, compiled its comments and recommendations as a memorandum to the Parliamentary Committee working on the three new criminal laws. After a rigorous and exhaustive study of the Draft Criminal Law Bills and extensive consultations with police officers from across India, the memorandum was forwarded by former DGP Mr N Ramachandran, the President of the IPF, to Mr Brij Lal, MP, and Chairman of the Parliamentary committee.

The Executive Summary of the memorandum is enclosed below. (For the full text please visit the website https://www.policefoundationindia.org/)

IPF calls for fundamental changes in the three criminal law statutes; we need much greater imagination and innovation to deal with a deeply flawed criminal justice system ridden with numerous gaps. There is a need for far more consultation and systemic changes to meet the aspirations of an emerging nation.

The British colonial administration used the Indian police to suppress the natives, but they never trusted the brown policeman. This inherent distrust of the police was built into the colonial criminal laws. The laws gave the police extensive powers of arrest, detention and use of force, with limited resources and accountability against misuse. In the absence of adequate resources or training, policepersons used crude methods to maintain law and order, investigate crimes and question witnesses and accused. The presumption that police cannot be and should not be trusted, continues to be ingrained in the new criminal law bills BNS, BNSS and BSB and no efforts have been made in them to fundamentally reform India's law enforcement and crime investigation. Below is a gist of IPF's major recommendations:

1. The regressive provisions in the criminal laws continue to undermine police efficiency and the quality of police investigations even 75 years after independence. IPF calls for changes that bring credibility in the investigation process and make the prosecution apparatus more effective.

2. Empower the police, allow them operational freedom to function, but institute strong accountability standards, with zero tolerance against misuse.

3. Bring Clarity and Precision: There are too many errors, ambiguities, inconsistencies and even incomplete sentences. The new codes should provide clear and precise definitions of procedures and legal provisions to minimise ambiguity and variances in interpretation.

4. The legislations should establish clear and realistic timeframes for both investigations and trials, to expedite the criminal justice process and reduce the backlog of cases. This should of course be supported by the provision of essential resources, including personnel, forensic facilities, technology, mobility, communication and other infrastructure for realisation of these timelines. Without these foundational resources, the police will struggle to meet the high demands and expectations of citizens.

5. Retain existing Section numbering schemes: Considering that the substantive changes introduced by the proposed legislations are relatively

few, with the new bills largely retaining the essence of the prior laws while incorporating a few changes to accommodate the evolving nature of crime and justice, we recommend that the existing section numbering schemes may be retained in all three laws, inserting new legal provisions, and deleting obsolete ones through suitable amendments, to preserve legal continuity and a smoother transition to the new framework.

BHARATIYA NYAYA SANHITA (BNS)

6. Special Acts: To avoid variances in definitions and confusion, we recommend that offences which are already defined under Special laws like the UAPA Act 1967, Juvenile Justice Act 2015, Prevention of Corruption Act 1988, Prevention of Cruelty to Animals Act, 1960, and FSSA Act 2006, should not be repeated in the BNS.

7. Mob lynching: Clause 101 (1) (2) concerning murder or grievous hurt by persons acting in concert on grounds of race, caste, community, etc., should be carefully redrafted to address 'mob lynching'. The term 'acting in concert' needs a precise definition. In the listing of grounds for the offence, 'religion' should be added. Mob lynching is a heinous offence, but Clause 101(2) amounts to dilution of the punishment for murder committed by a group of persons acting in concert, as it could end in a sentence of 7 years whereas for the offence of murder, the punishment is death or life imprisonment.

8. Re-draft BNS Clause 150 regarding acts that endanger the sovereignty, unity, and integrity of India, akin to sedition laws. To prevent its misuse, clear definitions and safeguards must be incorporated into the provision, eliminating vague terms like "subversive activities." These safeguards should require reasonable evidence of acts to excite secession, armed rebellion, separatist activities, violence or public disorder that endangers the sovereignty, unity and integrity of India, before filing FIRs. Also, provide for oversight by senior officers, and establish review mechanisms to prevent arbitrary use, ensuring that the law is not weaponised for political purposes.

9. Similarly, Clause 195 deals with imputations or assertions prejudicial to national integration. A sub-clause (d), that was not in the IPC has been inserted making "false or misleading information jeopardising the sovereignty, unity and integrity or security of India" an offence. We recommend that this clause may be omitted, as mere statements without incitement to violence or clear subversive activities, if criminalised, would be liable to misuse. In any case, these clauses are broadly covered in Clauses 111 and 150.

10. While welcoming new non-incarcerative punishments like Community Service, IPF recommends the implementation of electronic tagging systems for non-violent convicts, by which authorities can effectively monitor and rehabilitate offenders while allowing them to serve their sentences in less restrictive environments, which can help reduce prison congestion.

BHARATIYA NAGRIK SURAKSHA SANHITA (BNSS)

11. Procedural law should empower the police for effective law enforcement, while defending the constitutional rights of citizens.

12. Modernise Arrest Laws, Reduce Unnecessary Arrests and Decongest Prisons: While empowering the police to effectively handle crime, terrorism and violence, serious reform of

arrest laws is called for. It is important to introduce legal and administrative safeguards to stop the colonial-era practice of indiscriminate and arbitrary arrests, detention and incarceration.

a. IPF recommends that the Parliament, while enacting the BNSS, should review and streamline the existing provisions of arrest under Section 41 CrPC, integrating the principles laid down by the Supreme Court of India in *Joginder Kumar v. State of UP (AIR 1994 SC 1349), Arnesh Kumar v. State of Bihar (2014) 8 SCC 273, and D K Basu v. State of West Bengal (AIR 1997 SC 610).*

b. Prohibit arbitrary arrests; a person should not be arrested unless absolutely necessary under the law and in the interests of maintenance of peace, crime prevention, investigation and prosecution of crime.

c. Add a subclause mandating that when an accused person is presented for remand, the Magistrate must review the recorded justifications for arrest. If the justification supports remand, he should make explicit comments to that effect in the remand order; however, if the Magistrate is unconvinced, he may order the release of the accused on bail.

d. Police should respect the honour and dignity of persons while making arrests, searches, and seizures. While exercising police powers, no deliberate inconvenience, insult or humiliation should be caused.

13. With a view to reducing overcrowding of prisons, especially by reducing the number of Under Trial Prisoners (UTPs), a proviso may be added that no arrest shall be made under offences which are punishable with imprisonment for two years or less, unless the offence is committed in the presence of the police officer and even in such cases, the SHO shall release the accused on bail on his own personal bond.

14. India's criminal laws should adopt the universally accepted and sound principle that statements recorded by police of witnesses as well as suspects have to be truthful. If statements made under oath are found to have been based on deliberate deception and falsehood, there must be consequences like perjury. Enforce accountability for all parties, including police officers, witnesses, and suspects, who practice deception and fabricate statements. Police officers who deliberately fabricate and falsify evidence must be awarded major punishments including removal from service.

15. Separate custody management from police stations. Establish Custody Management Centres / Central Lock-ups at Circle, Sub-division and District levels, each with dedicated and trained custody officers. The custody centres should have all basic facilities like full CCTV coverage, lock ups, hygienic toilets/ bathrooms arrangements for food and medical attendance where necessary. This will help reduce custodial violence.

16. BNSS should enable modern principles of interviewing witnesses and scientific interrogation of accused and suspected persons. IPF recommends introducing Section 180A in the BNSS, outlining the procedures for interviewing accused or suspects, enabling the recording of such interviews using tamper- proof audio-video devices and allowing for interviews in the presence of a lawyer, with stringent protocols for sealing and submission of the recorded conversation to the magistrate, ensuring transparency and accountability in the investigative process.

17. To ensure the integrity and fairness of the interrogation process, several crucial measures should be established. Firstly, an interrogation room should be linked to the custody centre, allowing for proper and controlled questioning of the accused. A dedicated and well-trained custody officer should be assigned to ensure strict compliance with statutory requirements and the "duty of care" towards individuals in custody.

18. We recommend that the Bar Council of India should establish a code of ethics and guidelines for lawyers assisting clients during police interrogations, ensuring their proper conduct and safeguarding the accused's rights, without defeating the purpose of police investigations.

19. We recommend that a national police interrogation and interview training framework should be recommended to educate police officers in appropriate and scientific interrogation techniques and the respect of individuals' rights. These safeguards would potentially incentivise lawful behaviour among police officers, as lawfully obtained statements would become admissible in court.

20. Statements made by witnesses and recorded in writing by a police officer must be signed by the person making the statement. Redraft Clause 181 of the BNSS which retains the provision from Sec 162 CrPC, prohibiting police officers from obtaining the signature of witnesses on their recorded statements. This is another colonial era legal provision that perpetuates distrust of the police.

21. Re-organise the prosecution system: Prosecution being a state subject, states may be mandated to establish a dedicated cadre of prosecutors. Currently, temporary public prosecutors, often practicing lawyers, handle prosecution in Sessions Courts and High Courts, leading to limited dedication and interest, with unlimited scope for chaos. A dedicated cadre of prosecutors will help develop professionalism and nurture talent.

22. Appoint a police officer of the rank of Director General of Police / ADGP as the Director of Prosecution in consultation with the Advocate General of the State, for better coordination, systemised monitoring and also making appeal and follow up decisions.

23. Multiple FIRs: The evil and often deliberate practice of registering numerous FIR's in multiple police stations in the country, based on contents of various electronic / print / social media needs to be taken note of by the new law, introducing better clarity in the procedural law. The lack of legal clarity has not only become a tool of harassment, but it has also led to the affected persons approaching High Courts and Supreme Court to club them, causing unnecessary work for Constitutional Courts. BNSS should address this.

24. The concept of Preliminary Enquiries by SHOs introduced in BNSS Bill's Clause 173(3) for offences punishable for three to seven years may have justification in certain cases, but is likely to exacerbate burking of crimes, delays in registration and harassment. We recommend that BNSS should incorporate principles laid down in the Lalita Kumari judgment, allowing preliminary inquiries only in rare cases with safeguards against misuse. Stringent penalties should deter false and frivolous FIRs while ensuring that genuine complaints are not ignored.

25. Though Supreme Court has held that no First Information Report (FIR) is necessary for

the police to investigate, it is desirable to write this in the law as a sub-section (1) of Clause 175.

26. Clause 45(3) should address existing ambiguities on the use of handcuffs. It should allow for the use of handcuffs by the police when arresting dangerous persons, habitual and repeat offenders, escapees, or individuals involved in serious crimes like terrorism, organised crimes, crimes against the State, drug offenses, illegal possession of weapons, murder, rape, human trafficking, sexual offenses against children, among others. Currently, this clause limits handcuff usage to specific circumstances. It should be clarified whether handcuffing is permissible when escorting individuals to court or prison.

27. There is no mention of Police Commissionerate system in the new BNSS Bill. Police Commissionerate in major Indian cities have proven to be a highly effective model for streamlining law enforcement and expeditious police service delivery. The system allows the appointment of senior police officers as Police Commissioners, who have extensive experience and expertise in handling the complexities of urban policing, and who can provide the leadership and coordination to address the multifarious and complex law enforcement needs of urban areas. We strongly recommend that suitable enabling clauses be added in Chapter II to establish Police Commissionerate systems wherever required.

28. The new laws should factor in the Crime Criminal Tracking and Networking System (CCTNS) and the Inter-operable Criminal Justice System (ICJS), instead of recognising only manual processes and paper registers.

29. Empower the constabulary: Considering that many well-educated persons are joining the constabulary today, the new laws should enable selected subordinate staff to participate in investigative process, as may be determined by the Superintendent of Police.

BHARATIYA SAKSHYA BILL (BSB)

30. As a first step towards reform, it is recommended to insert an exception to Clause 23 of the Bharatiya Sakshya Bill, together with suitable changes in Clause 148, allowing admissibility of statements and confessions made before the police and recorded by police officers during the course of investigation and following the procedure as prescribed in the BNSS, under strict safeguards such as the use of tamper-proof audio-video recording, presence of a defence lawyer, sealing and submission to the magistrate, informing the accused of their rights, and the requirement of corroborative evidence.

31. Establish strong accountability standards against any form of misuse or abuse of the process of recording statements / confessions by accused and suspected persons.

32. For the above scheme to succeed, it is important to build / make available the resources and supportive infrastructure like the introduction of body-worn cameras, CCTVs at police stations and Custody Facilities capable of recording the proceedings and produce the artifacts in the trial with the required chain of custody.

33. Considering the inadvertent errors that have crept in as pointed out in the comments on individual Bills, we recommend a clause-by-clause review of all the three Bills. Even if it is time-consuming, this is essential as these enactments will have a lasting impact on our criminal justice system over long years to come.

COMMON CAUSE CASE UPDATES

Public Interest Litigation

Supreme Court Cases

Petition to Completely Ban Export of Iron Ore: Common Cause filed a writ petition in April 2021, to completely ban the export of iron ore (whether in the form of pellets or otherwise). Alternatively, it sought the levy of export duty of 30%, on the export of iron ore in all forms, including pellets (except pellets manufactured and exported by KIOCL, formerly known as Kudremukh Iron Ore Company Limited). The petition also prayed to initiate proceedings under Section 11 of the Foreign Trade (Development & Regulation) Act, 1992 and Section 135(1) of the Customs Act, 1962. In addition, it sought the levy of appropriate penalties as per law against mining companies exporting iron ore pellets in contravention of the provisions of India's export policy.

By exporting iron ore pellets, they have been evading the duty chargeable on the commodity. The petition prayed for a thorough and independent investigation into the role of public officials in allowing the same. Notice was issued on September 24, 2021, directing the respondents to file their response within four weeks from the date of the order. The UOI filed its response on November 11, 2021, which was taken on record by the Court. The matter was taken up on subsequent dates.

However, on May 21, 2022, the government increased the export duty from 0% to 45% on iron ore pellets. Recently, the export duties on certain steel products and iron ore imposed in late May were removed and the duty on iron ore pellets was reduced to nil again. The matter was taken up on January 17, 2023, and after hearing the counsels, the Court directed the matter to be listed for March 29, 2023. On the said date the Court heard the IAs filed by the parties and directed the matter to be listed for May 9, 2023. The matter was taken up on May 9, 2023, by the bench of Justice Bopanna and Justice Dutta who recommended the matter be listed on a non-miscellaneous day in the 3rd week of July, 2023. On October 16, 2023, the matter was mentioned before the Court and the matter was directed to be listed on November 7, 2023, when the Court heard the counsels and directed the matter to be listed for January 23, 2024. The matter was listed on April 9, 2024, when the court directed to complete the pleadings. On July 30, 2024, exchange of pleadings was completed. The UOI submitted that the Writ Petitions are wholly misconceived as the matters pertain to the Export-Import Policy of the Union Government. Moreover, because of the time-to-time change of policy, there can be no Court intervention on the policy of export of a particular commodity and whether it is to be freely exported or exported only on payment of customs duty. On September 3, 2024, the matter was adjourned due to ill health of one of the petitioners. The matter is likely to be listed on October 15, 2024.

Petition Seeking Directions to Implement the Recommendations of the National Electric Mobility Mission Plan, 2020 (W.P. (C) 228/2019)

Common Cause has partnered with CPIL and Jindal Naturecure Institute to seek directions for the implementation of the recommendations of the National Electric Mobility Mission Plan, 2020, promulgated in 2012 by the Ministry of Heavy Industries (nodal agency for the automobile sector), and the recommendations of Zero Emission Vehicles: Towards a Policy Framework, promulgated in September of 2019 by the Niti Aayog to curb the problems of Climate Change, Air pollution, and the cost of importing fossil fuels to India.

This petition has been filed under Article 32 as the fundamental rights of citizens to health and clean environment guaranteed under Article 14 and Article 21 of the Constitution of India.

On March 5, 2019, taking note of the contentions of the petitioners, the court ordered the government to apprise it of the status of implementation of the FAME-India scheme.

On January 17, 2020, the Ministry of Road Transport & Highways of India through its Secretary was impleaded as a respondent in the petition and the Bench issued a notice to the ministry.

On February 19, 2020, the bench consisting of CJI and Justices Gavai and Surya Kant observed that issues pertaining to the source of power of public and private electric vehicles have a great impact on the environment of the whole country and all such issues must be discussed simultaneously. The court sought the assistance of authorities empowered with decision-making specifically on the following:

procurement of electric vehicles; providing charging ports; feebate system, i.e., imposing a fee on vehicles with high emissions and providing a subsidy on electric vehicles; use of hydrogen vehicles; any other alternate means of power for vehicles; overall impact on import and environment.

On March 11 2024, the matter was heard along with suo motu writ petition (c) no. 4/2019 by the Coram of Justice Surya Kant and KV Vishwanathan. The respondents were granted four weeks to file the counter affidavit.

On May 6 2024, upon hearing, the court granted four weeks to the respondents as requested. On July 22, 2024, upon hearing the counsel the Court granted four weeks to Mr. Devashish Bharukha, learned Senior Counsel representing the UOI to file the counter affidavit, along with all the policy decisions taken by the UOI from time to time to promote electric vehicles. The court also impressed upon Mr. Bharukha to inform the learned Attorney General for India to assist the court in the matter on the next date of hearing.

Fair Working Conditions for Domestic Workers:

Common Cause, the National Platform for Domestic Workers (NPDW), and Aruna Roy filed a writ petition in the Supreme Court seeking fair and humane working conditions for domestic workers. The petition prays to recognise domestic work as "service for pay," establish guidelines for their human rights protection and direct the government of India to implement measures such as minimum wage notification, compulsory leaves, maternity benefits, collective bargaining, first response complaints authority, and socio-economic rights like pension and healthcare.

Admitted on November 22, 2018, the Supreme Court's division bench on July 10, 2024, directed the petitioners to withdraw the petition with the liberty to file a fresh one considering developments since 2018.

Contempt Petition Against Lawyers Strike:

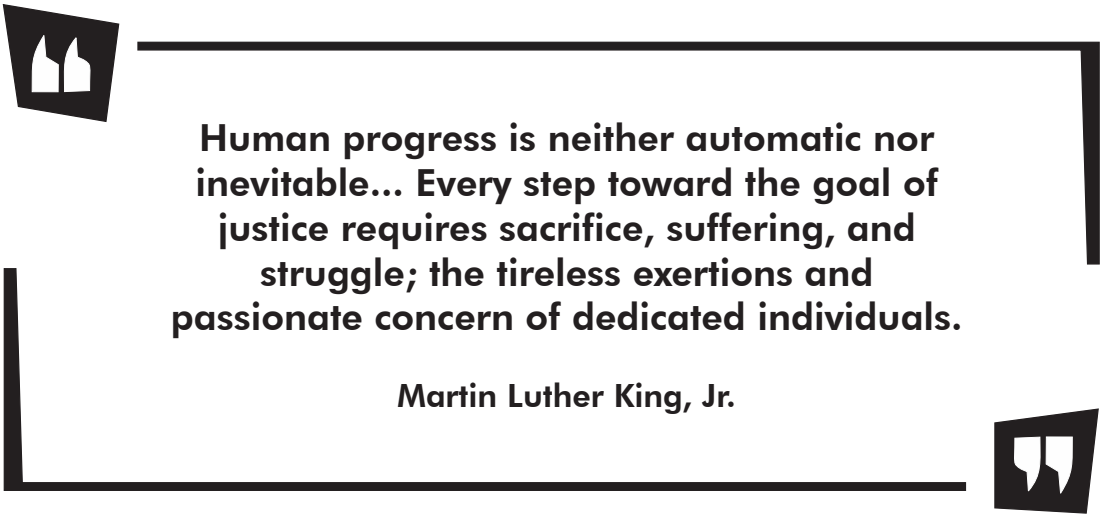
The contempt petition filed by Common Cause against the strike of lawyers in Delhi High Court and all district courts of Delhi on the issue of conflict over pecuniary jurisdiction has led to the submission of draft rules by the Bar Council of India (BCI).

On January 24, 2024 The BCI counsel had stated that the rules may be examined by the Court and the suggestion of the court, if any, shall be accepted by the BCI without any condition.

On February 6, 2024, arguments by the counsels were heard by the court. On February 9, 2024, the court appointed Justice Muralidhar, as Amicus, to examine the rules in the context of the existing judgments and objections and to submit his report. On May 3, 2024, the matter is ordered to be listed on August 13, 2024.

On August 27, 2024, Dr. S. Muralidhar, learned Senior Counsel submitted that as Amicus Curiae, he had held a hybrid meeting with the Bar

Council of India on April 29, 2024, and given suggestions which were also put in writing. Though the Bar Council of India had taken a stand that it would consider the suggestions in its meeting, but no such meeting was convened. The counsel for the BCI requested that the Amicus Curiae should forward his formal report to it. The Court observed that considering the nature of the issues involved, such modalities were required for the reason that ultimately, the final suggestion/report by the Amicus Curiae would be submitted to the Court after considering the suggestions given by the BCI. Accordingly, the Court requested the BCI to hold a meeting within four weeks from the date of the hearing and provide its response to the Amicus Curiae who would then submit his final report to the Court within the next four weeks. The matter is likely to be listed on November 5, 2024.



Please email us at commoncauseindia@gmail.com if you want a soft copy of the report.

Status of Policing in India Report 2023

Surveillance and the Question of Privacy

Jointly prepared by Common Cause and its academic partner, Centre for the Study of Developing Societies (CSDS), the Status of Policing in India Report 2023: Surveillance and the Question of Privacy, is a study of public perceptions and experiences regarding digital surveillance in India .

SPIR 2023 analyses data collected from face-to-face surveys conducted with about 10,000 individuals from Tier I, II and III cities of 12 Indian states and UTs to understand perceptions around digital surveillance. The study also involved a Focused Group Discussion (FGD) with domain experts, in-depth interviews with serving police officials, and an analysis of media coverage of surveillance-related issues.

Please email us at commoncauseindia@gmail.com if you want a soft copy of the report. It can also be downloaded from commoncause.in

Printed & Published by Vipul Mudgal on behalf of Common Cause, 5 Institutional Area, Nelson Mandela Road, Vasant Kunj, New Delhi 110070, Printed at PRINTWORKS, C-94, Okhla Industrial Area, Phase - 1, New Delhi - 110020
Editor-Vipul Mudgal Tel No. 26131313, 45152796, email: commoncauseindia@gmail.com, website:www.commoncause.in