

Flaws in the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS): A Critical Study

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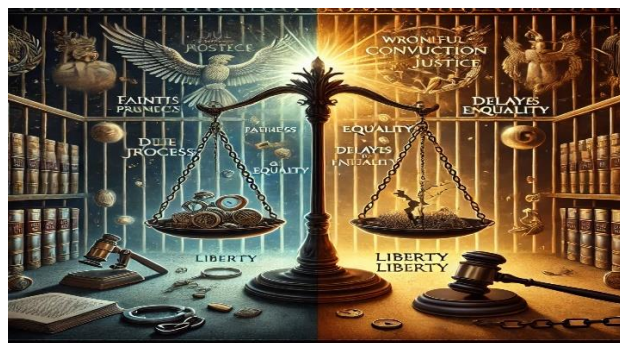
Abstract:

The successful execution and overall impact of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), may face significant challenges due to various pressing issues. Among these are vague protocols surrounding private arrests, mixed terminology related to police custody, and unclear guidelines regarding community service as a penalty. Furthermore, the BNSS fails to provide clear directions for filing electronic FIRs, employing audio-visual techniques for witness examinations, and outlining the process for reimbursing witness costs. Concerns also arise from the absence of well-defined grounds for bail cancellation, inadequate enforcement of the Witness Protection Scheme, and procedural deficiencies in the collection of forensic evidence. Furthermore, the BNSS fails to address alternative dispute resolution methods and relies on insufficient resources, such as officers' personal mobile phones, for important tasks like video documentation during search and seizure operations. These flaws have the potential to undermine the intended objectives of the BNSS and pose significant operational challenges.

Keywords: Bharatiya Nagarik Suraksha Sanhita, Private Arrest, Police Custody, Electronic FIR, Community Service, Forensic Evidence, Witness Protection, Bail cancellation.

1. Introduction:

The Bharatiya Nagarik Suraksha Sanhita (BNSS), launched in 2023, replaces the longstanding Criminal Procedure Code (CrPC) enacted in 1973, signifying a significant transformation within India's criminal justice system. This new law has sparked comprehensive scrutiny and assessment from academics, legal practitioners, and specialists in the area. They have examined the BNSS from multiple perspectives, particularly focusing on its capacity to modernize the legal processes within the country. However, this transformation has also raised important questions and concerns regarding its implementation and interpretation in various judicial contexts. As India navigates this change, the ongoing discourse surrounding the BNSS will be crucial in shaping its effectiveness and alignment with contemporary legal standards and societal needs.



The image above illustrates the strengths and weaknesses of a Criminal Procedure Code like BNSS highlighting justice's balance against corruption, wrongful convictions, and justice delays.

2. Literature Review:

Revamping criminal law is crucial for achieving a balance between the rights of defendants and the need for efficient prosecution. Contemporary legal frameworks emphasize procedural justice, ensuring that both the defense and the prosecution are afforded equal chances to present their arguments (Rawat & Verma, 2019). The implementation of alternative dispute resolution methods, including plea bargaining, has been proposed as a strategy to alleviate the pressure on the court system and accelerate the delivery of justice (Rao, 2019).

Reforms must prioritize the integration of forensic and digital evidence in judicial processes. As cybercrime continues to rise, experts emphasize the need to develop procedural laws that guarantee the admissibility of this type of evidence while protecting individuals' rights (Bhattacharya, 2020). Nations such as the United States have set forth definitive guidelines for the management of digital evidence, which could act as a blueprint for potential reforms.

An examination of any new criminal code should consider how criminal justice systems are adapting to changes in society, technology, and the law. Many jurisdictions, including India, still rely on colonial-era CrPC, which some lawyers argue are inadequate for addressing modern crime trends and advancements in technology (Mukherjee, 2017). The call for reform stems from the growing complexity of crimes like cyber fraud, terrorism, and white-collar offenses, which demand more effective procedural measures (Kumar, 2020).

The examination of international criminal codes, especially those in common law nations like the UK, USA, and Australia, provides important understanding of contemporary legal structures. These nations have implemented advanced procedural changes involving digital evidence and enhancing protections for both victims and the accused (Jones & Smith, 2019). Research indicates that integrating successful approaches from these legal systems may result in a more effective and open criminal justice system (Singh, 2022).

The current CPC has been significantly criticized for its procedural delays and the abuse of powers by law enforcement authorities. Reports have pointed out backlogs and slow processes that erode public confidence in the criminal justice system (Sharma, 2018). Furthermore, scholars argue that the current framework fails to adequately protect marginalized communities from power abuse during pretrial detention and investigation (Patel, 2021). Therefore, there is a call for reform and the establishment of clearer guidelines to regulate police powers and enhance judicial oversight. Comprehensive reforms based on international best practices and technological advancements are crucial to ensure an efficient and equitable criminal justice system (Kumar, 2020; Singh, 2022).

3. Flaws in the Bharatiya Nagarik Suraksha Sanhita, 2023:

The 2023 Bharatiya Nagarik Suraksha Sanhita (BNSS) has been enacted to supplant the 1973 Criminal Procedure Code (CrPC), marking a significant transformation in the Indian criminal justice framework. Legal experts and scholars have scrutinized this legislative development from multiple perspectives, underscoring its promise to modernize judicial procedures while also raising apprehensions about its execution and interpretation. This reform aims to enhance the efficiency of the justice system in India, necessitating a careful examination of its implications.

However, the Bharatiya Nagarik Suraksha Sanhita, 2023 has some major flaws which are noted below:

- According to Section 4(f) of the BNSS, the Court possesses the power to impose community service as a penalty for those found guilty. The Explanation accompanying Section 23 of the BNSS characterizes community service as a court-ordered task that a convict must perform as a form of punishment, explicitly stating that they will receive no payment for their labour. The inclusion of community service as a form of punishment in Section 4(f) of the BNSS has also sparked interest. Arghya Sengupta (2023) views this inclusion as a progressive step toward restorative justice. Concerns have emerged over the lack of specific guidelines for community service implementation, particularly regarding its length and the offenses that warrant this punishment. Without clear standards, disparities in sentencing may arise between different jurisdictions. Sengupta cautions that if these issues remain unresolved, this well-meaning provision could lead to inconsistent and unjust sentences, ultimately compromising the foundational principle of fairness in the legal system. Addressing these gaps is essential to ensure equitable punishment for all offenders.
- Section 40 of the BNSS alters the rules surrounding private arrests by instituting a mandatory six-hour window for individuals to hand over anyone they have arrested to the police. However, this section fails to outline the necessary steps for an individual who, due to unforeseen circumstances, cannot deliver the detainee to law enforcement within that timeframe. This absence of guidance is troubling, as it puts those in such situations in a quandary and points to a potential oversight in the legislation that warrants correction. The lack of clarity could create confusion, especially in rural or remote regions where accessing prompt police assistance may be challenging. Legal experts warn that neglecting to address these issues might lead to uneven enforcement and the potential for private citizens to misuse their arrest authority.
- The change in wording from "shall re-arrest" to "shall take him into custody" in Section 40(2) has also attracted significant attention. Legal analyst Abhinav Sekhri (2023) emphasizes that this change is not merely superficial but represents a shift in the handling of private arrests within the legal framework. Sekhri argues that the phrase "taking into custody" introduces nuances that could complicate the understanding of individuals' legal rights in such scenarios. This change introduces interpretive difficulties for both the judiciary and law enforcement, as they must discern the differences between arrest and custody. This situation brings to light the delicate balance between individual rights and governmental responsibilities.
- The BNSS's Section 43(3) differs from the recommendations of the Supreme Court in *Prem Shankar Shukla v. Delhi Administration* (1980) by allowing the use of handcuffs during arrests in specific situations. This provision permits the use of handcuffs on individuals with prior custody records or those accused of serious offenses such as rape, acid attacks, organized crime, drug-related crimes, or offenses against the state. This departure from established guidelines raises concerns about potential violations of recognized judicial precedents regarding the use of restraints during arrests.
- Raids and the subsequent confiscation of items often create challenges in finding witnesses who are willing to sign the seizure list, particularly when the operation is filmed in accordance with Section 105 BNSS. Currently, there are no clear protocols for police officers to address situations where individuals refuse to serve as witnesses for searches and seizures that involve audio-visual documentation. This absence of established guidelines complicates the process and may hinder the effectiveness and transparency of such operations, making it difficult to ensure accountability and uphold legal standards during evidence collection.

- Because the police lack specialized cameras for search and seizure operations as mandated by Sections 105 BNSS, many investigators resort to using their personal mobile phones for audio and video documentation. This reliance presents several issues, including short battery life, inadequate storage, recording interruptions, and the fragmentation of files. Consequently, it is essential to prioritize video documentation of these operations, utilizing mobile phones, when necessary, to ensure comprehensive and reliable recording in the absence of proper videography equipment. Enhanced measures for recording practices should be implemented to improve the integrity of the evidence collected during these critical procedures.
- In situations involving spontaneous recovery without video evidence - like vehicle inspections, Naka checks, hotel inspections, and surprise raids on illegal liquor establishments - the absence of video documentation may provide grounds for the defense to dispute the validity of the recovery under Section 105 of the BNSS. Capturing every action and duty of police officers on audio-visual recordings is not feasible, particularly during routine law enforcement operations. Therefore, the lack of such documentation could be exploited in legal proceedings, highlighting the challenges police face in balancing operational efficiency with documentation requirements in their daily responsibilities.
- Another area of concern is Section 173(1) of the BNSS, which deals with the process for electronic First Information Reports (FIRs). In this context, the informant is required to sign the FIR within three days of its submission. However, Vrinda Bhandari (2023) highlights practical challenges associated with this requirement. For instance, the legislation does not specify the actions police should take if the informant is unable to provide their signature within the prescribed timeframe, potentially causing delays or procedural inconsistencies in the investigative process. Additionally, the regulation lacks clarity on whether FIRs can be submitted in regional languages or if English is required, which creates barriers for those who do not speak English. Bhandari contends that although the digitization of FIRs is a beneficial advancement, the uncertainty regarding procedural matters may undermine the overall effectiveness of the system.
- Section 173(3) of the BNSS allows the officer in charge of a police station to conduct a preliminary inquiry within fourteen days upon being informed of a cognizable offence punishable by imprisonment of three to less than seven years, provided they obtain approval from at least a Deputy Superintendent of Police. The purpose of this inquiry is to establish the existence of a prima facie case, after which the investigation can proceed in accordance with the provisions outlined in Section 175. This regulation applies to nearly 98 offences under the Bharatiya Nyaya Sanhita, 2023 (BNS) and contradicts the Supreme Court's ruling in the Lalita Kumari case, which mandates the obligatory registration of FIRs upon receiving a complaint of a cognizable offence. Furthermore, this provision grants excessive power to the police in FIR registration, thereby infringing on the fundamental rights of ordinary citizens. In addition, the police have the power to conduct a preliminary investigation, which allows them to summon a suspect before officially filing a case. This practice could potentially violate fundamental rights and contribute to corrupt activities.
- According to Clause (ii) of Subsection 174 (1) of the BNSS, Magistrates are to receive the daily diary report for non-cognizable cases on a biweekly basis. However, the clause lacks clarity regarding the content of this report. It does not clarify whether the report should encompass details from the General Diary Entry, the Non-Cognizable Register, or if it should be a separate document specifically incorporating pertinent entries from either source. This ambiguity raises questions about the expected format and content of the report, necessitating further clarification for proper compliance.
- According to Subsection 176(3) of the BNSS, when police become aware of an offence punishable by seven years or more, the supervising officer at the police station must dispatch a forensic expert to the

scene to gather forensic evidence. This action must occur within a timeframe set by the State Government, specifically within five years, and the entire process must be documented through video recording using mobile phones or other electronic devices. If the state lacks sufficient forensic resources, the State Government will procure assistance from neighboring states until adequate facilities are established.

Currently, forensic science laboratories across various states are operating under significant strain, prompting concerns about the feasibility of analyzing forensic evidence from one state in another. Furthermore, funding for forensic investigations has been insufficient. Given the already heavy caseload these laboratories face, it is unclear how they will effectively handle the added pressure of additional cases involving forensic and digital evidence, particularly without the crucial financial resources needed to upgrade current facilities or build new forensic laboratories.

- As per Subsection 179 (1) of the BNSS, a police officer involved in an investigation has the authority to issue a written request for an individual's presence in their own police station or a neighbouring one, if that person is believed to possess knowledge regarding the relevant facts and circumstances of the case, based on available information or evidence. This prompts the inquiry into whether police officers can compel the attendance of individuals outside their jurisdiction and how the process for examining such witnesses would be implemented. This scenario raises important legal considerations about the extent of a police officer's power in engaging with witnesses who do not reside locally or in a police station area which is not adjacent.
- As outlined in Subsection 179(2) of the BNSS, the State Government has the authority to establish regulations that facilitate the reimbursement of justifiable expenses for individuals attending an examination and recording statement at a location other than their residence, as indicated in Subsection 179(1) of the BNSS, at the request of a police officer. However, the criteria for what constitutes reasonable expenses and how police will reimburse witnesses for these costs remain unclear. Consequently, no State Government has initiated any measures to implement related rules. This lack of clarity has impeded the establishment of a structured reimbursement process for those involved in legal proceedings.
- It is ambiguous under Section 180 of the BNSS and other related provisions whether a police officer conducting an investigation has the authority to record a witness's statement from a remote location or foreign country using audio-video technology. The current language does not provide clarity on this issue, leaving uncertainty about the procedural capabilities and limitations of the investigating officer concerning remote witness interviewing methods. This lack of specification raises questions about the legality and feasibility of employing modern communication tools to gather testimony from individuals who are not geographically accessible.
- Section 187(2) of the BNSS grants the police the authority to hold a suspect for up to fifteen days, whether in one stretch or in separate intervals, at any time within a sixty- or ninety-day detention timeframe. This is a departure from Section 167(2) of the Code of Criminal Procedure (CrPC), which allowed police to request custody only during the initial fifteen days of arrest. Some experts express concern that if a suspect is released on bail at any point during the sixty- or ninety-day period, the police could continue to seek their remand without any restrictions on such requests within that time frame.
- Trials in absentia are allowed under Section 356 BNSS, indicating that the victim's presence is not essential. However, this is contingent upon three conditions: the accused must be classified as an offender under Section 84(4) for serious offences, must have fled during the main trial (not during the investigation), and must not have been promptly apprehended. Once these conditions are satisfied, the

accused is considered to have forfeited their right to be present, which may result in unjust convictions and enable manipulative tactics by prosecutors and law enforcement. This practice jeopardizes the right to a fair trial and could lead to greater injustice while attempting to ease the court's proceedings.

- The "Witnesses' Protection Scheme" described in Section 398 of the BNSS suffers from a lack of established timelines and implementation protocols, which has resulted in a lack of proactive efforts from states to develop the scheme effectively. As a result, there is currently no documented instance of any state successfully setting up a "Witness Protection Scheme."

Critics, such as Rakesh Singh (2023), point out that although the provision is designed to safeguard witnesses, the absence of specific procedures and guidelines has led to a lack of attention from state authorities. This negligence poses a serious risk of exposing key witnesses in sensitive cases to intimidation, ultimately threatening the integrity of the justice system. Without a strong witness protection framework in place, essential witnesses involved in sensitive cases may face the risk of intimidation, thereby undermining the integrity of the justice system.

- Section 473 of the BNSS allows those sentenced to death to file mercy petition, detailing the process for the President and Governor to grant pardons under Articles 72 and 161 of the Indian Constitution. The amendment stipulates that only the condemned individual, their legal heir, or a relative can file for clemency, excluding others. Awareness of harsh prison conditions reveals that many death row inmates, often impoverished and with insufficient education, struggle to pursue pardon requests. Although courts recognize the right to reapply for clemency if circumstances change, the new provision restricts available options despite potential changes in a case's situation.
- Section 482 BNSS, which addresses anticipatory bail, has generated considerable discussion. Unlike its predecessor in the Criminal Procedure Code (CrPC), the BNSS eliminates specific criteria that courts previously utilized when evaluating anticipatory bail petitions, such as the seriousness of the crime and the defendant's prior convictions. Experts caution that this increased judicial discretion may result in varying outcomes for bail requests, as courts are afforded greater latitude in their rulings. While some academics defend this flexibility as essential for navigating the complexities of modern criminal cases, others, including Khosla, contend that the lack of definitive guidelines could lead to unfair applications of justice.
- Proviso 3 of Subsection 483 (1) of the BNSS outlines the authority to revoke bail for individuals who have been released on bail. However, it fails to detail the specific reasons that the High Court or Court of Session may invoke to cancel an accused person's bail. Similarly, Subsection 480 (5) of the BNSS permits any court that has granted bail under Subsection (1) or Subsection (2) to rescind that bail, when necessary, yet it does not provide any grounds for such cancellation in these subsections or in any other part of the BNSS.
- The BNSS failed to take advantage of non-trial resolution methods, which could have conserved resources generally allotted for trials and often led to substantial financial settlements. Such approaches are frequently utilized in several Western nations, including the United States and the United Kingdom. The BNSS might have permitted certain offenses to be settled through various means, including negotiation, mediation, arbitration, settlement conferences, collaborative law, restorative justice, and mini-trials.

For instance, this could involve negotiation for business conflicts stemming from contract violations, mediation for family disagreements, arbitration for labor disputes, settlement conferences for personal injury claims due to car accidents, collaborative law for amicable divorces, restorative justice practices

for juvenile offenses, and mini-trials for commercial disputes between large corporations regarding contractual issues.

- In cases related to POCSO and rape, investigating officer is required to file a charge sheet within 60 days. However, experts point out that the current condition of our forensic science laboratories makes it unlikely that they can provide expert opinions within this timeframe, as they are burdened by a substantial backlog of pending cases. This scenario brings to light concerns regarding the justice system's capacity to meet its stipulated deadlines while conducting comprehensive and precise investigations. The laboratories are experiencing considerable pressure and are struggling to keep pace with the demand for forensic analyses that are vital for these sensitive and critical cases.
- The BNSS permits authorities to attach properties during legal proceedings when it is suspected to be "proceeds of crime." This sweeping foreclosure power could significantly affect many people, including those who might unwittingly find themselves entangled in legal issues. The wide scope of these measures raises worries about how they might affect individuals who are unaware of their link to the alleged crimes, highlighting the need for meticulous implementation to protect the rights of innocent individuals while tackling criminal activity effectively. The introduction of these powers illustrates the fragile equilibrium between law enforcement and individual rights within the legal system.

The BNSS lacks the same level of safeguards as the Money Laundering Prevention Act when it comes to the confiscation of assets obtained through illegal activity. Unlike the latter, which offers specific legal frameworks for dealing with the proceeds of crime, the BNSS does not provide equivalent protection to prevent illegal asset confiscation. This discrepancy points to a significant gap in the legal protection available to the management of assets linked to criminal enterprises. As a result, individuals may face an increased risk of losing their assets without the strong protections afforded by a more comprehensive anti-money laundering law.

- Individuals held in custody who have been sentenced to up to half the maximum term for their offenses are eligible for bail under the Code of Criminal Procedure. However, the BNSS does not offer this option to those facing multiple charges. Since many cases involve allegations under various sections, access to bail may be limited. Consequently, numerous offenders may be deprived of the opportunity for early release, potentially worsening issues of prison overcrowding. This situation gives rise to concerns about the fairness and effectiveness of the judicial process.
- The BNSS does not have a well-organized and coherent system for determining punishments, leading to inconsistent and arbitrary outcomes. This deficiency makes it challenging to navigate the framework and often results in unpredictable punishments. When there is no precisely outlined approach, the imposition of punishments becomes open to individual interpretation, which can vary significantly among those enforcing the rules. Consequently, this lack of consistency undermines the system's integrity and allows for potential bias and unfair treatment. A more methodical and logical framework is essential to ensure the equitable and consistent application of punishments, thereby enhancing trust and accountability within the regulatory landscape.
- BNSS does not recognize sexual assaults experienced by transgender individuals and other members of the LGBTQ+ community and focuses exclusively on women's experiences. This narrow approach neglects the abuse and violence faced by different identities within the community and perpetuates their marginalization. By ignoring the unique struggles of trans and non-binary individuals, BNSS contributes to a culture where their victimization goes unnoticed. It is essential to broaden the

understanding of sexual assault to include all individuals and to ensure that everyone's experience and pain in society is recognized and addressed.

4. Conclusion:

Bharatiya Nagarik Suraksha Sanhita (BNSS) of 2023 brings significant changes to India's criminal justice system, yet it encounters multiple challenges in implementation. Unclear private arrest procedures and inconsistent custody terminology, along with deficiencies in the electronic FIR process, result in uncertainties for law enforcement agencies. Furthermore, the absence of explicit guidelines for community service as a punishment and insufficient forensic resources hinder operational effectiveness. These flaws could jeopardize the BNSS's ability to modernize the legal framework. To guarantee the system's efficiency and fairness, it is essential to tackle these issues by providing clearer guidelines, enhancing forensic capabilities, and ensuring better procedural clarity.

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