

# Legislative Brief

## The Bharatiya Nagarik Suraksha (Second) Sanhita, 2023

The Bharatiya Nagarik Suraksha Sanhita, 2023 was introduced in Lok Sabha on August 11, 2023. It seeks to replace the CrPC, 1973. The Bharatiya Nagarik Suraksha (Second) Sanhita, 2023 was introduced on December 12, 2023 and the previous bill was withdrawn. The earlier bill was examined by the Standing Committee on Home Affairs.

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### Highlights of the Bill

- ◆ The Bharatiya Nagarik Suraksha (Second) Sanhita, 2023 (BNSS2) seeks to replace the Criminal Procedure Code, 1973 (CrPC). The CrPC provides for the procedure for arrest, prosecution, and bail.
- ◆ The BNSS2 mandates forensic investigation for offences punishable with seven years of imprisonment or more. Forensic experts will visit crime scenes to collect forensic evidence and record the process.
- ◆ All trials, inquiries, and proceedings may be held in electronic mode. Production of electronic communication devices, likely to contain digital evidence, will be allowed for investigation, inquiry, or trial.
- ◆ If a proclaimed offender has absconded to evade trial and there is no immediate prospect of arresting him, the trial can be conducted and judgement pronounced in his absence.
- ◆ Along with specimen signatures or handwriting, finger impressions and voice samples may be collected for investigation or proceedings. Samples may be taken from a person who has not been arrested.

### Key Issues and Analysis

- ◆ The BNSS2 allows up to 15 days of police custody, which can be authorised in parts during the initial 40 or 60 days of the 60 or 90 days period of judicial custody. This may lead to denial of bail for the entire period if the police has not exhausted the 15 days custody.
- ◆ The power to attach property from proceeds of crime does not have safeguards provided in the Prevention of Money Laundering Act.
- ◆ The CrPC provides for bail for an accused who has been detained for half the maximum imprisonment for the offence. The BNSS2 denies this facility for anyone facing multiple charges. As many cases involve charges under multiple sections, this may limit such bail.
- ◆ The use of handcuffs is permitted in a range of cases including organised crime, contradicting Supreme Court directions.
- ◆ The BNSS2 retains provisions of the CrPC related to maintenance of public order. Since trial procedure and maintenance of public order are distinct functions, the question is whether they should be regulated under the same law or be dealt with separately.
- ◆ Recommendations of high level committees on changes to the CrPC such as reforms in sentencing guidelines and codifying rights of the accused have not been incorporated in the BNSS2.

## PART A: HIGHLIGHTS OF THE BILL

### Context

The Code of Criminal Procedure, 1973 (CrPC) is a procedural law established for the administration of the Indian Penal Code, 1860 (IPC). It governs the procedure for investigation, arrest, prosecution, and bail for offences. The CrPC was first passed in 1861 to address the problem of multiplicity of legal systems in India.<sup>1</sup> Since then it has been revised on multiple occasions. In 1973, the erstwhile act was repealed and replaced by the existing CrPC, and changes like anticipatory bail were introduced.<sup>2</sup> It was amended in 2005 to add changes such as provisions for plea bargaining and rights of arrested persons.<sup>3</sup>

Over the years, the Supreme Court has interpreted the CrPC in varied ways and revised its application. These include: (i) mandating the registration of an FIR if the complaint relates to a cognisable offence, (ii) making arrests an exception when the punishment is less than seven years of imprisonment, (iii) ensuring bail for bailable offence is an absolute and in-defeasible right and no discretion is exercised in such matters.<sup>4</sup> The Court has also ruled on procedural aspects such as establishing guidelines for custodial interrogations and emphasising the importance of speedy trials.<sup>4</sup> However, the criminal justice system continues to face challenges like case backlogs, trial delays, and concerns about treatment of underprivileged groups.<sup>5</sup>

The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) was introduced in Lok Sabha on August 11, 2023 to replace the Code of Criminal Procedure, 1973 (CrPC). The Bill was examined by the Standing Committee on Home Affairs. Incorporating some recommendations of the Committee, the Bharatiya Nagarik Suraksha (Second) Sanhita, 2023 (BNSS2) was introduced on December 12, 2023. The BNSS was withdrawn.

### Key Features

The CrPC governs the procedural aspects of criminal justice in India. The key features of the Act include:

- **Separation of offences:** The CrPC classifies offences into two categories: cognisable and non-cognisable. Cognisable offences are those in which the police can arrest and initiate an investigation without a warrant. Non-cognisable offences require a warrant, and in some cases, a complaint by the victim or a third party.
- **Nature of offences:** The CrPC deals with various types of criminal offences, ranging from traffic violations to murder. It distinguishes between bailable and non-bailable offences, specifying the offences for which an accused has the right to bail from police custody.

The BNSS2 retains most of the provisions of the CrPC. Key changes proposed include:

- **Detention of undertrials:** As per the CrPC, if an accused has spent half of the maximum period of imprisonment in detention, he must be released on personal bond. This does not apply to offences punishable by death. The BNSS2 adds that this provision will also not apply to: (i) offences punishable by life imprisonment, and (ii) persons against whom proceedings are pending in more than one offence.
- **Medical examination:** The CrPC allows medical examination of the accused in certain cases, including rape cases. Such examination is done by a registered medical practitioner on the request of at least a sub-inspector level police officer. The BNSS2 provides that any police officer can request such an examination.
- **Forensic investigation:** The BNSS2 mandates forensic investigation for offences punishable with at least seven years of imprisonment. In such cases, forensic experts will visit crime scenes to collect forensic evidence and record the process on mobile phone or any other electronic device. If a state does not have forensics facility, it shall utilise such facility in another state.
- **Signatures and finger impressions:** The CrPC empowers a Magistrate to order any person to provide specimen signatures or handwriting. The BNSS2 expands this to include finger impressions and voice samples. It allows these samples to be collected from a person who has not been arrested.
- **Timelines for procedures:** The BNSS2 prescribes timelines for various procedures. For instance, it requires medical practitioners who examine rape victims to submit their reports to the investigating officer within seven days. Other specified timelines include: (i) giving judgement within 30 days of completion of arguments (extendable up to 45 days), (ii) informing the victim of progress of investigation within 90 days, and (iii) framing of charges by a sessions court within 60 days from the first hearing on such charges.
- **Hierarchy of Courts:** The CrPC establishes a hierarchy of courts for the adjudication of criminal matters in India. These courts include: (i) Magistrate's Courts: subordinate courts responsible for the trial of most criminal cases, (ii) Sessions Courts: presided over by a Sessions Judge and hear appeals from Magistrate's Courts, (iii) High Courts: have inherent jurisdiction to hear and decide criminal cases and appeals, and (iv) Supreme Court: hear appeals from High Courts and also exercise its original jurisdiction in certain matters. The CrPC empowers the state governments to notify any city or town with a population of more than one million as a metropolitan area. Such areas have Metropolitan Magistrates. The BNSS2 removes the classification of metropolitan areas and Metropolitan Magistrates.

## PART B: KEY ISSUES AND ANALYSIS

### The Bill may expand the powers of the police

The CrPC governs the powers of the police to maintain public order, prevent crimes, and undertake criminal investigations. These powers include arrests, detention, search, seizure, and use of force. These powers are subject to restrictions to safeguard individuals from misuse of police powers leading to excessive use of force, illegal detentions, custodial torture, and abuse of authority.<sup>6</sup> The Supreme Court has also issued various guidelines to prevent such arbitrary exercise of police powers.<sup>4,7</sup> The BNSS2 amends the provisions related to detention, police custody and use of handcuffs, which may present some issues.

#### Procedure of police custody altered

*Act:* Section 167  
*Bill:* Clause 187 (2)

The Constitution and CrPC prohibit detention in police custody beyond 24 hours.<sup>8</sup> The Magistrate is empowered to extend it up to 15 days in case investigation cannot be completed within 24 hours. He may further extend judicial custody beyond 15 days if he is satisfied that adequate grounds exist to do so. However, overall detention cannot exceed 60 or 90 days (depending on the offence). The BNSS2 modifies this procedure. It adds that the police custody of 15 days can be authorised in whole or in parts at any time during the initial 40 or 60 days out of the 60 or 90 days period. This could lead to bail being denied during this period if the police argue that they need to take the person back in police custody.

This differs from laws like the Unlawful Activities (Prevention) Act, 1976, where police custody is limited to the first 30 days.<sup>9</sup> The Supreme Court has held that as a general rule, police custody should be taken in the first 15 days of remand.<sup>10</sup> The extension of 40 or 60 days should be utilised as an exception. The BNSS2 does not require the investigating officer to provide reasons when seeking police custody for someone in judicial custody. The Standing Committee (2023) recommended that the interpretation of this clause be clarified.<sup>11</sup>

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

*Act:* Section 46 (2)  
*Bill:* Clause 43 (3)

The BNSS2 provides for the use of handcuffs during arrest. Handcuffs may only be used to arrest: (i) a habitual or repeat offender who has escaped custody, or (ii) a person who has committed offences such as rape, acid attack, organised crime, drug related crime, or offence against the State. The provision contravenes judgements of the Supreme Court and guidelines of the National Human Rights Commission.<sup>12</sup>

The Supreme Court has held that the use of handcuffs is inhumane, unreasonable, arbitrary, and repugnant to Article 21.<sup>13</sup> In extreme cases, when handcuffs have to be used, the escorting authority must record reasons to do so.<sup>13</sup> Further, it has ruled that no prisoners undergoing trial can be handcuffed without obtaining judicial consent.<sup>14</sup> The Court has therefore left the discretion to decide use of handcuffs on the trial court.<sup>12</sup> The Standing Committee (2023) recommended excluding economic offences from the offences where handcuffs may be used.<sup>11</sup> The BNSS2 has removed this category.

### Rights of the accused

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

*Act:* Section 436A  
*Bill:* Clause 479

As per the CrPC, if an undertrial has served half the maximum imprisonment for an offence, he must be released on a personal bond. This provision does not apply to offences punishable by death. The BNSS2 retains this provision and adds that first-time offenders get bail after serving one-third of the maximum sentence. However, it adds that this provision will not apply to: (i) offences punishable by life imprisonment, and (ii) where an investigation, inquiry or trial in more than one offence or in multiple cases are pending. Since chargesheets often list multiple offences, this may make many undertrial prisoners ineligible for mandatory bail.

For example, in 2014, the Supreme Court held that illegal mining constitutes an offence under the Mines and Minerals (Development and Regulations) Act, 1957, and also qualifies as theft under the IPC.<sup>15</sup> Similarly, rash and dangerous driving is a punishable offence under the Motor Vehicles Act, 1988 as well as the IPC.<sup>16</sup> Persons accused in such cases will not be eligible to obtain mandatory bail.

Bail allows accused to be released from custody while awaiting trial, provided they meet certain conditions.<sup>17</sup> Detention before conviction is done to ensure easy availability of an accused for trial and there is no tampering with evidence. If these are ensured, detention is not needed. The Supreme Court has held that bail is the rule and incarceration is the exception.<sup>18</sup> Further, it has observed that undertrial prisoners should be released at the earliest and those who cannot furnish bail bonds due to poverty are not incarcerated only for that reason.<sup>19</sup>

#### Scope for plea bargaining may be limited

*Act:* Section 265A-I  
*Bill:* Clause 293- 297

Plea bargaining is an agreement between the defence and prosecution where the accused pleads guilty for a lesser offence or a reduced sentence. Plea bargaining was added to the CrPC in 2005.<sup>3</sup> It is not allowed for offences punishable with a death penalty, life imprisonment, or imprisonment term exceeding seven years. The CrPC does not permit a bargain to be struck for a lesser offence or for compounding the offence – the accused

will be considered to have confessed and been convicted of the offence. The BNSS2 retains this provision. This limits plea bargaining in India to sentence bargaining, that is getting a lighter sentence in exchange for the accused's guilty plea.

Further, the BNSS2 adds a stipulation that the accused must file an application for plea bargaining within 30 days from the date of framing of charge. This time limit can impact the effectiveness of plea bargaining by limiting the opportunity for seeking a reduced sentence.

### Congestion in the prison system

Restricting bail, and limiting the scope for plea bargaining could deter decongesting of prisons. As of December 2021, India's prisons housed over 5.5 lakh prisoners, with an overall occupancy rate of 130%.<sup>20</sup> In 2021, under-trials constituted 77% of the total prisoners in India.<sup>20</sup> Approximately 30% of under-trial prisoners were in detention for a year or more.<sup>20</sup> About 8% of under-trial prisoners were in detention for three years or more.<sup>20</sup>

### Safeguards on attachment of property

Property that is derived or obtained, directly or indirectly, as a result of criminal activity is referred to as proceeds of crime. The CrPC provides police the power to seize property when it is: (i) alleged or suspected to have been stolen, or (ii) found under circumstances creating suspicion of commission of any offence. This is applicable only to movable properties.<sup>21</sup> The BNSS2 extends this to immovable properties as well. Provisions on the treatment of seized property in BNSS2 differ from the provisions in the Prevention of Money Laundering Act, 2002 (PMLA). The PMLA provides for confiscation of property derived from money laundering in relation to specified offences.<sup>22</sup>

Certain safeguards provided under PMLA are not available under the BNSS2. Under PMLA, attachment is provisional in nature for up to 180 days.<sup>22</sup> A notice period of at least 30 days needs to be given to show cause why an attachment order must not be made.<sup>22</sup> During the attachment, enjoying of immovable property cannot be denied.<sup>22</sup> The BNSS2 does not provide a time limit up to which property can be attached. It provides a show cause notice of 14 days to be given to the accused.

### Overlaps with existing laws

Over the years, special laws have been enacted to regulate various aspects of criminal procedure. However, the BNSS2 retains some of the procedures.

#### Data collection for criminal identification

In 2005, the CrPC was amended to empower a Magistrate to obtain handwriting or signature specimens from arrested persons.<sup>23</sup> The BNSS2 expands this provision by empowering the Magistrate to also collect finger impressions and voice samples. It also allows collection of this data from persons who have not been arrested under any investigation. The Criminal Procedure (Identification) Act, 2022 allows a broader range of data to be collected including fingerprints, handwriting, and biological samples.<sup>24</sup> Such data may be collected from convicts, those who have been arrested for an offence, or non-acused persons as well, and can be stored up to 75 years. With a broader law recently being passed to allow for data collection of criminals and accused, the need for retaining data collection provisions and expanding on them in the BNSS2 is unclear. The constitutional validity of the 2022 Act is under consideration before the Delhi High Court.<sup>25</sup>

#### Maintenance of senior citizens

Under CrPC, a Magistrate may order a person having sufficient means to make a monthly allowance for the maintenance of their father or mother (who are unable to maintain themselves). If the order is not followed, the Magistrate may issue a warrant for levying the amount due and sentence the person to imprisonment of up to a month or till the payment is made. The BNSS2 retains this provision which duplicates the provisions of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. That Act requires state governments to constitute Maintenance Tribunals to decide on the maintenance payable to senior citizens and parents.<sup>26</sup> The Tribunal may issue a warrant for levying the amount due, and sentence the person to imprisonment of up to a month or till the payment is made. That Act specifically overrides all other laws.

### Public order functions retained in BNSS2

The CrPC provides for the procedure for investigation and trial for offences. It also contains provisions for security to maintain peace, and maintenance of public order and tranquillity. It contains provisions that allow a District Magistrate to issue orders needed to preserve public order. The BNSS2 has retained these provisions (in separate chapters). Since trial procedure and maintenance of public order are distinct functions, the question is whether they should be included under the same law or if they should be dealt with separately. As per the Seventh Schedule of the Constitution, public order is a state subject.<sup>27</sup> However, matters under the CrPC (prior to the commencement of the Constitution fall) under the Concurrent List.<sup>28</sup>

*Act:*  
Sections  
102, 105C  
*Bill:*  
Clause 107

*Act:* Section  
311A  
*Bill:* Clause  
349

*Act:* Sections  
125- 128  
*Bill:* Clause  
144- 147

*Act:* Section  
144  
*Bill:* Clause  
163

## Recommendations of various Committees

Table 1 provides a list of key recommendations of various Committees and Law Commission constituted by the central government to advise the government on criminal reforms.

**Table 1: Key recommendations of various Committees and the Law Commission on CrPC**

Recommendations	Whether incorporated in the Bill
<b>Broader reforms in the criminal justice system</b>	
Constitute a statutory committee to prescribe sentencing guidelines under the Chairmanship of a former Supreme Court judge or Chief Justice of a High Court. <sup>29</sup>	No.
Rights of the accused as recognised by the Supreme Court be included in CrPC. <sup>30</sup>	No.
Procedure when investigation cannot be completed in 24 hours (CrPC s.167) - Maximum period of police custody to be 30 days in respect offences punishable with sentence more than seven years. <sup>29</sup>	No. The maximum period of police custody is 15 days. It may be spread over: (i) 60 days where the offence is punishable with at least 10 years of imprisonment, or (ii) 40 days for any other offence. (BNSS2 Clause 187).
Provide compensation to people who are wrongfully accused. <sup>30</sup>	No.
<b>Arrest<sup>31</sup></b>	
An arrested person must be examined by a medical officer after arrest (CrPC s.54). The officer must record any injuries on the person and the approximate time of such injuries. The examination must be repeated every 48 hours during the detention.	Partly. Does not provide for a medical examination every 48 hours of detention. (BNSS2 Clause 53).
<b>Statements/ Confessions to Police</b>	
Statements to police (CrPC s.162) - Statements to be read over and signed by the statement maker and a copy given to him. Such statements can be used for contradicting and corroborating the statement maker. <sup>30</sup>	No. Original provision retained in BNSS2 Clause 181.
<b>Bail<sup>32</sup></b>	
Person arrested to be informed of grounds of arrest (CrPC s.50) - cannot be meaningful unless the arrestee is informed in writing in a language he understands.	No. Original provision retained in BNSS2 (Clause 47).
Upon postponement or adjournment of the trial, the Court will release the accused on bail or remand him to further custody and record the reasons CrPC s.309 (2).	No. Original provision retained in BNSS2 (Clause 346)
When bail is denied, the court must provide a brief explanation for the refusal.	No.

Notes: This Table highlights some important recommendations made by various committees and Law Commission on CrPC. It is not an exhaustive list.

Sources: See endnotes; PRS.

1. Stokes, [Anglo-Indian Codes](#), Vol. 2, pages 2-3.
2. [The Code of Criminal procedure](#), 1973.
3. [The Code of Criminal Procedure \(Amendment\) Act](#), 2005.
4. AIR 1997 SC 610, [D.K. Basu v. State of West Bengal](#), Supreme Court, December 18, 1996, 1979 AIR 1360, [Hussainara Khatoon v. State of Bihar](#), Supreme Court, February 12, 1979.
5. [Report No. 78](#), Law Commission of India, 1979.
6. [Report No. 273](#), Law Commission of India, 2017.
7. 1978 AIR 597, [Maneka Gandhi v. Union of India](#), Supreme Court, January 25, 1978.
8. [Article 22](#), The Constitution of India, 1950, [Section 51](#), The Code of Criminal Procedure, 1973.
9. [Section 43D](#), the Unlawful Activities (Prevention) Act, 1967.
10. 1992 AIR 1768, [Central Bureau of Investigation v. Anupam J. Kulkarni](#), Supreme Court, May 8, 1992.
11. [Report No. 247](#), 'the Bharatiya Nagarik Suraksha Sanhita', Standing Committee on Home Affairs, November 10, 2023.
12. ['Guidelines regarding Arrest'](#), National Human Rights Commission.
13. 1980 AIR 1535, [Prem Shankar Shukla vs. Delhi Administration](#), Supreme Court, April 29, 1980.
14. 1995 3 SCC 743, [Citizens for Democracy v. State of Assam](#), May 1, 1995.
15. Criminal Appeal 499 of 2011, [State of NCT of Delhi vs Sanjay](#), Supreme Court, September 4, 2014.
16. [Section 184, the Motor Vehicles Act](#), 1988, [Section 279](#), The Indian Penal Code, 1860.
17. [Chapter XXXIII, 'Provision as to Bail and Bonds'](#), The Code of Criminal Procedure, 1973.
18. 1977 AIR 2447, [State of Rajasthan v. Balchand](#), Supreme Court, September 20, 1977.
19. 2016 3 SCC 700, [In re: Inhuman Conditions in 1382 Prisons](#), Supreme Court, February 5, 2016.
20. [Prison Statistics of India \(2021\)](#), National Crime Records Bureau.
21. 2019 20 SCC 119, [Nevada Properties Pvt. Ltd. V. State of Maharashtra](#), Supreme Court, September 24, 2019.
22. [Section 3, 5, 8](#), the Prevention of Money Laundering Act, 2002.
23. [Section 311A](#), The Code of Criminal Procedure, 1973.
24. [The Criminal Procedure \(Identification\) Act, 2022](#).
25. W.P. (CRL) 869/2022, [Harshit Goel v. Union of India](#), Delhi High Court.

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26. [The Maintenance and Welfare of Parents and Senior Citizens Act, 2007](#).
  27. Entry 1, List II, [Seventh Schedule](#), The Constitution of India.
  28. Entry 2, List III, [Seventh Schedule](#), The Constitution of India.
  29. [Committee on Reforms of Criminal Justice System \(Malimath Committee\): Report: Volume I](#), 2003, Ministry of Home Affairs.
  30. [Report No. 277](#), Law Commission of India, 2018.
  31. [Report No. 177](#), Law Commission of India, 2001.
  32. [Report No. 268](#), Law Commission of India, 2017.

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