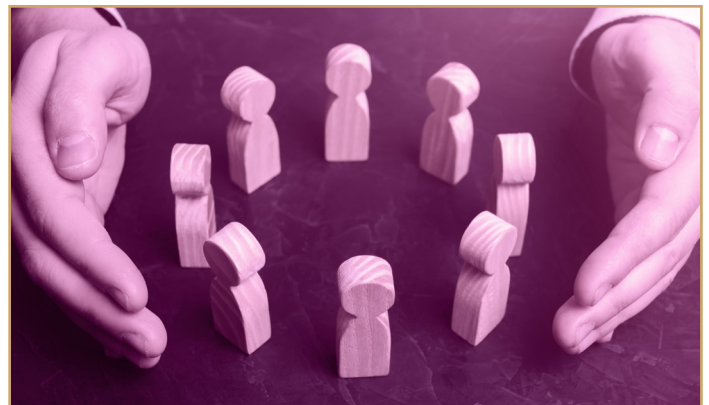


The Bharatiya Nagarik Suraksha (Second) Sanhita, 2023 | A primer on the legislation replacing the Code of Criminal Procedure, 1973¹ (2/3)

1. The Bharatiya Nagarik Suraksha (Second) Sanhita, 2023, which aimed to replace the existing Code of Criminal Procedure, 1973 (“CrPC”) was passed by the Parliament in the recently concluded winter session, following which presidential assent received on December 25, 2023. Along with the BNSS, the Bharatiya Nyaya Sanhita, 2023 (which replaces the Indian Penal Code, 1860 (“IPC”)) and the Bhartiya Sakshya Sanhita, 2023 (which replaces the Indian Evidence Act, 1872 (“Evidence Act”)) have also been passed by the Parliament and have received presidential assent. Once notified, it will be called the ‘Bharatiya Nagarik Suraksha Sanhita, 2023 (“BNSS”).
2. To allow India’s criminal justice system (judiciary and police machinery) to prepare and equip itself for a monumental overhaul, the three laws are reported to come into force after some months and not immediately.
3. This note summarizes the notable changes to the CrPC which have been proposed in the BNSS. The ‘Clauses’ as referred to in the BNSS are referred to as ‘Sections’ in this note for ease of reference.
4. Summarily, the BNSS has sought to introduce stringent timelines in the investigation, inquiry, and trial processes in our criminal justice system, apart from certain new provisions for conducting trial *in absentia* against persons who have absconded, and allowing police custody beyond 15 days, if there exist



adequate grounds for doing so. The BNSS also seeks to formalize the adoption of electronic communication and electronic forms in investigation, inquiry and trial including police processes, taking evidence and in Court processes. Some of the most significant changes which have been made to the CrPC are summarized as under:

Introduction of new definitions

5. In the Section 2 of the BNSS setting out definitions, the concept of “audio-video electronic means” has been introduced. The expression “investigation” has a newly inserted explanation that now states that were any provisions of a Special Act are inconsistent with

¹ Authors: Ankoosh K Mehta, Faraz Alam Sagar, Kapil Arora, Sara Sundaram, Nikhil Varshney, Srinivas Chatti, Rinkel Singh and Darshan Patankar, Sangram Parab, Nitya Ravichandran, Stuti Bhargava, Arunima Phadke, Aman Siwach.

the provisions of the BNSS, the special Act shall prevail. Consequently, investigation or inquiry under acts such as the Prevention of Money Laundering Act, 2002 or the Narcotic Drugs and Psychotropic Substances Act, 1985 shall take precedence over the BNSS in case of any inconsistency.

Establishing a Directorate of Prosecution

6. In Section 20 of the BNSS, the concept of Directorate of Prosecution has been introduced for each of the states to establish (with a prescribed hierarchy) with the stated purpose of monitoring cases by scrutinizing police reports, expediting proceedings, and providing opinions on filing of appeals, wherever applicable.

In relation to First Information Report (“FIR”)

7. Section 173 of the BNSS allows citizens to lodge a FIR at any police station for a cognizable offence, irrespective of the jurisdiction. It mandates that the FIR be transferred to the station which would have jurisdiction over the place where the crime was committed, within 15 days. The provision also introduces electronic registration of FIR, which would have to be signed by the person making it, within 3 days of it being taken on record.

In relation to arrest

8. Section 35 of the BNSS now consolidates Sections 41 and 41A of the CrPC² into one section. In case of an offence punishable for less than 3 years, and where a person is infirm or above 60 years of age, an arrest can be made only if an officer not below the rank of Deputy Superintendent of Police grants prior permission for such arrest.
9. As regards arrest by a private person, a time limit of six hours has now been introduced within which the private person will have to make over such person so arrested to the Police. Under Section 43 of the BNSS, a police officer is permitted to use handcuffs when arresting an accused or producing him before the

court in certain cases, mostly relating to serious and heinous offences such as organized crime, offences against the State, terrorist acts, etc. It is notable to mention that economic offences have been removed from the blanket provision of handcuffing in all cases.

10. Further, as regards arrest of a woman, in Section 43(1) of the BNSS, an obligation has been cast on the police to effectuate the arrest of a woman only by a female police officer or unless the circumstances so require. Section 51(3) introduces an obligation upon a medical practitioner to forward without delay the examination report of an accused to the investigation officer.

On Attachment and seizure of property

11. A new provision has been introduced under Section 107 of the BNSS, by which a police officer can make an application to the Court or Judicial Magistrate with the approval of the Superintendent or Commissioner of Police for attachment of certain properties where such properties are derived or obtained, directly or indirectly, as a result of criminal activity or from the commission of any offence or which are proceeds of crime. Notably, as per the explanation to this section, the word ‘proceeds of crime’ is defined in Section 111 of the BNSS (which provides certain definitions under the chapter VIII pertaining to reciprocal arrangements) and is akin to the definition of the term under the Prevention of Money Laundering Act, 2002.
12. Further, under Section 497 of the BNSS (corresponding to Section 451 of the CrPC³) a new provision has been inserted stipulating that the Magistrate shall within 14 days from the production of the property, prepare a statement of such property containing its description, along with photographs and videography of the property, if necessary.

Power to remove obstructions by a police officer

13. Section 172 of the BNSS is a newly inserted provision which casts an obligation on persons to conform to the lawful directions of a police officer in the fulfilment of

² Section 41. When police may arrest without warrant; Section 41-A. Notice of appearance before police officer

³ CrPC - Section 451. Order for custody and disposal of property pending trial in certain cases

any of his duty under the relevant chapter pertaining to the preventive action of the Police. Further, the Police officer has the power to detain or remove any person resisting, refusing, ignoring, or disregarding to conform to any direction given by such police officer. The police officer may either present such person before a Magistrate or in petty cases, release him within a period of 24 hours. While seemingly innocuous, this provision appears to further empower the police in their exercise of their authority under the provisions of the BNSS.

Introduction of timelines

Preliminary enquiry and investigation

14. One of the more significant changes sought to be brought about through the BNSS is the attempt to address the delays in investigation and trial. Specified timelines have been prescribed for various stages of the criminal process including to complete the investigation and file a final report and for trial of the offence. For instance, it is mandatory for a Magistrate to decide whether to take cognizance of the chargesheet within a period of 14 days.
15. In Section 173(3) of the BNSS (which corresponds to Section 154⁴ of the CrPC), for offences punishable for 3 years or more but less than 7 years, the officer in charge may with the prior permission of the Deputy Superintendent of Police proceed to conduct a preliminary enquiry within 14 days to ascertain if there exists a *prima facie* case and proceed with the investigation where there exists one. Section 173 of the BNSS also specifies that information in relation to a cognizable offence can be given to police, irrespective of the area where the offence has been committed, either orally or through electronic communication.
16. Another change is found in Section 173(4) (corresponding to Section 154(4) of the CrPC) which provides that the complainant may file an application to the Magistrate to register an FIR only if the Superintendent of Police



does not investigate the case or direct a subordinate police officer to investigate, in accordance with the BNSS.

17. Further, Section 155⁵ of the CrPC (under Section 174(1) of the BNSS) has been augmented by introducing a time period of a fortnight for a police officer to forward the daily diary report to the Magistrate.
18. As regards the police officer's power to investigate cognizable offences, the BNSS now provides that the Superintendent of Police may require the Deputy Superintendent of Police to investigate the offence. The BNSS further provides that a Judicial Magistrate may take cognizance of a complaint against a public servant.
19. Crucially, Section 193 of the BNSS (corresponding to Section 173⁶ of the CrPC) now casts an obligation on the Police to inform the victim or informant of the progress of the investigation including by electronic communication within a period of 90 days. Further, the BNSS also permits further investigation after the chargesheet has been submitted to the Magistrate but now requires that such further investigation shall be completed within 90 days, but which may be extended with the permission of the Court.

⁴ CrPC – Section 154. Information in Cognizable cases

⁵ CrPC – Section 155. Information as to non-cognizable cases and investigation of such offences

⁶ CrPC – Section 173. Report of police officer on completion of investigation (also referred to as Final Report or Charge Sheet)

Sanction for prosecution

20. Section 218 of the BNSS (corresponding to Section 197⁷ of the CrPC) now provides that the Government shall take the decision of whether to grant sanction for prosecution of judges or public servants within 120 days from the date of receipt of the request for sanction and if it fails to do so, the sanction shall be deemed to have been accorded.

Committal to the Sessions Court

21. In cases involving offences which are triable exclusively by a sessions court, which are required to be committed by the Magistrate under Section 209⁸ of the CrPC, the corresponding Section 232 of Bill stipulates a time period of 90 days to commit the offences to the sessions court, which may be extended for a period not exceeding 180 days for reasons to be recorded in writing.

Framing of charge, trial, and judgement

22. In relation to framing of charges, a timeline of 60 days has been specified (in Section 251(1)(b) of the BNSS) for the Sessions judge from the date of the first hearing to frame in writing a charge against the accused.

23. Section 258(1) of the BNSS (corresponding to Section 235(1)⁹ of the CrPC) provides that after hearing arguments and points of law, the judge shall give a judgment within 30 days from the completion of arguments, which may for specific reasons extend to a period of 45 days, for reasons to be recorded in writing.

24. Finally, the BNSS under Section 392, provides that the Court shall upload a copy of the judgment on its portal within 7 days from the date of judgment.

Discharge

25. In relation to discharge, Section 262 of the BNSS (corresponding to Section 239¹⁰ of the CrPC) provides a time limit to the accused to prefer an application for discharge within a period of 60 days from the date of

supply of copies of documents under Section 230 of the CrPC. On the same subject of discharge, Section 274 of the BNSS (corresponding to Section 251¹¹ of the CrPC) has a newly inserted proviso providing that if the Magistrate considers the accusation as groundless, he shall, after recording reasons in writing, release the accused and such release shall have the effect of discharge.

Summary trial

26. The BNSS now provides that the Magistrate may, after giving the accused a reasonable opportunity of being heard, for reasons to be recorded in writing, try in a summary way, all or any of the offences not punishable with death or imprisonment for life or imprisonment for a term exceeding 3 years, provided that no appeal shall lie against any such decision of a Magistrate.

Use of electronic communication and video conferencing in investigation, inquiry and trial

27. The BNSS has sought to adopt electronic communication and video conferencing facilities at various stages including at the time of inquiry, investigation, and trial. For instance, the BNSS permits giving information as regards commission of a cognizable in electronic form.

Issuance of process

28. Further, a summons issued by a Court under Section 63 (corresponding to Section 61¹² of the CrPC), or a Police officer under the newly inserted Section 64(2), or a witness under Section 71, or a warrant may also be in the form of electronic communication. Section 94 of the BNSS (corresponding to Section 91¹³ of the CrPC) now permits a Court or an officer in charge of a police station to summon electronic communication which is likely to contain digital evidence. Section 231 of the BNSS provides that supply of copies of statements and documents to accused in other cases triable by Court of Session are permitted to be issued by the Magistrate in an electronic form.

⁷ CrPC – Section 197. Prosecution of Judges and public servants

⁸ CrPC – Section 209. Commitment of case to Court of Session when offence is triable exclusively by it

⁹ CrPC – Section 235. Judgement of acquittal or conviction

¹⁰ CrPC – Section 238. When accused shall be discharged

¹¹ CrPC – Section 251. Substance of accusation to be stated

¹² CrPC – Section 61. Form of summons

¹³ CrPC – Section 91. Summons to produce document or thing

Use of audio-visual electronic means in investigations

29. Under Section 176 of the BNSS providing for procedure for investigation of cognizable offence (corresponding to Section 157¹⁴ of the CrPC), the statement of the victim may also be recorded through audio-video electronic means including a cell phone, as also that of a witness under Section 265(3) of the BNSS. Similarly, Section 185 of the BNSS (dealing with search by a police officer corresponding to Section 165¹⁵ of the CrPC) requires the search to be recorded through audio-visual electronic means preferably by cell phone.

Conduct of proceedings through electronic means

30. Section 355 of the BNSS (corresponding to Section 317¹⁶ of the CrPC) now inserts a new explanation to sub-section (2) providing that personal attendance of the accused includes attendance through audio video electronic means.

31. On the same vein, Section 530 of the BNSS now allows that all trials, inquiries and proceedings including issuance, service and execution of summons and warrant; examination of complainant and witnesses; recording of evidence in inquiries and trials; and all appellate proceedings or any other proceeding may be held in electronic mode, by use of electronic communication or use of audio-video electronic means. The Parliamentary Panel Report on the erstwhile Bharatiya Nagarik Suraksha Sanhita Bill, 2023 had however raised concerns regarding data security and the possibility of unauthorized breaches due to an increased use of technology. The Report, therefore, recommended that the adoption of electronic means for communication and trials should only be done post means of secure usage and authentication of electronically available data is possible. However, the BNSS does not seem to account for any additional safeguards, presently.

Forensic experts

32. Another significant introduction under Section 176(3) of the BNSS, particularly in investigation offences which are punishable for 7 years or more is the requirement for the officer in charge of a police station to cause a forensic expert to visit the crime scene to collect forensic evidence in the offence and also cause videography of the process on mobile phone or any other electronic device. Further, this provision also confers powers on a State Government to notify utilization of the forensics facilities of another state until forensics facility is available in that state.

Cheating through electronic means

33. From the perspective of economic offences, particularly in relation to the offence of cheating, Section 202(1) of the BNSS corresponding to Section 182¹⁷ of the CrPC now includes cheating by electronic communications and a Court within whose local jurisdiction such electronic communications or letters or messages were sent or were received has been empowered to try such offence.

Custody of an accused

34. Under Section 187(2) of the BNSS (corresponding to Section 167(2)¹⁸ of the CrPC), a Magistrate to whom an accused is forwarded, may authorize detention of custody of the accused for a term not exceeding 15 days in the whole, or in parts at any time during the initial 40 days out of 60 days or 60 days out of 90 days. Notably however, the Magistrate may now authorize detention in police custody beyond the period of 15 days if there exist adequate grounds for doing so. However, such detention shall not exceed 90 days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of 10 years or more, or 60 days in case of any other offence. It has been clarified that the introduced flexibility shall also address situations wherein high-profile accused may feign illness and

¹⁴ CrPC – Section 157. Procedure for investigation

¹⁵ CrPC – Section 165. Search of police officer

¹⁶ CrPC – Section 317. Provision for inquiries and trial being held in the absence of the accused in certain cases

¹⁷ CrPC – Section 182. Offence committed by letters etc.

¹⁸ CrPC – Section 167. Procedure when investigation cannot be completed in twenty-four hours

get admitted to hospitals to obviate police custody. While this change is seemingly applicable for serious crimes, the intended usage and effect, when viewed in conjunction with the proposed changes to the IPC, will have to be examined further to avoid abuse before such provisions are made into law.

35. Further, the BNSS provides that if the accused is not in custody (corresponding to Section 170 of the CrPC), the police officer shall take the security from such person for his appearance before the Magistrate and the Magistrate to whom such report is forwarded shall not refuse to accept the same on the ground that the accused is not taken in custody.



Bail and Anticipatory Bail

36. The definitions of bail, bond, and bail bond have also been added to Section 2 of the BNSS. The BNSS now provides that where an investigation, inquiry, or trial in more than one offence or in multiple cases are pending against a person, he shall not be released on bail by the Court.
37. More importantly, with regard to anticipatory bail under Section 438¹⁹ of the CrPC, the new Section 482 of the BNSS omits the factors contained in Section 438(1) for grant of anticipatory bail. Further, Section 438(1A) and (1B) stand omitted.

Cognizance of special law and cases against public servants

38. The BNSS, under Section 210(1) now permits a magistrate to take cognizance of any offence also in relation to a complaint filed by a person authorized under any special law which constitutes an offence.

39. Further, the Magistrate may also take cognizance against a public servant arising in the course of discharge of his official duties subject to (i) receiving a report containing facts and circumstances of the incident from the officer superior to such public servant; and (ii) after consideration of the assertions made by the public servant as to the situation that led to the incident so alleged.

Trial against an absconding person

40. Another significant addition through the BNSS is the introduction of Section 356, which provides for an inquiry, trial to be conducted or a judgement to be passed against a proclaimed offender, *in absentia*.
41. In trying a proclaimed offender who has absconded to evade trial and where there is no immediate prospect of arresting him, it shall be deemed to operate as waiver of the right of such person to be present and tried in person, and the Court shall, after recording

¹⁹ CrPC – Section 438. Direction for grant of bail to person apprehending arrest.

(1) When any person has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section; and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including-

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the Court;

(iv) such other condition as may be imposed under sub-section (3) of section 437, as if the bail were granted under that section.

reasons in writing, in the interest of justice, proceed with the trial in the like manner and with like effect as if he was present, under this Sanhita and pronounce the judgment. Further, the proclaimed offender shall not prefer an appeal unless he presents himself before the Court of Appeal. Further, no appeal against conviction shall lie after the expiry of three years from the date of judgment. This introduction appears to be squarely aimed at prosecuting those accused who have escaped Indian jurisdiction, and its efficacy will lie on who such inquiries and trials are actually conducted.

Other relevant provisions

In relation to trial

42. Section 269(7) of the BNSS (corresponding to Section 246²⁰ of the CrPC) which is newly inserted provides that where despite giving opportunity to the prosecution and after taking all reasonable measures,, if the attendance of prosecution witnesses cannot be secured for cross examination, it shall be deemed that such witness has not been examined for not being available, and the Magistrate may close the prosecution evidence for reasons to be recorded in writing and proceed with the case on the basis of the materials on record.
43. Section 336 of the BNSS provides that where any document or report prepared by a public servant, scientific expert, medical officer of investigating officer is purported to be used as evidence in any enquiry, trial or other proceeding under this Code and (i) such public servant, expert of officer is either transferred, retired or died; or (ii) such public servant, expert or officer cannot be found or is incapable of giving deposition or securing the presence of such public servant, expert or officer is likely to cause delay in holding the inquiry, trial or proceeding, the Court shall secure presence of successor officer of such public servant, expert or officer who is holding that post at the time of such deposition to give deposition on such document or report. However, the section also provides that no public servant, scientific expert, or

medical officer shall be called to appear before Court unless their report is disputed by any of the parties to the trial or other proceedings.

Witness protection program

44. By virtue of Section 398 of the BNSS, the concept of witness protection scheme has been formalized, which it is provided shall be notified by every state government.

Withdrawal from prosecution

45. In relation to withdrawal from prosecution covered under Section 321²¹ of the CrPC, Section 360 of the BNSS now provides that no Court shall allow withdrawal from prosecution without giving an opportunity of being heard to the victim in that case.

Compoundable Offences

46. Section 359 of the BNSS (corresponding to Section 320²² of the CrPC) now removes adultery for the table of compoundable offences. It provides for compounding with the permission of the Court for the offence of defamation, specified under Section 356(2) of the BNSS, as against the President or the Vice- President or the Governor of a State or the Administrator of a Union Territory or a minister in respect of his public functions when instituted upon a complaint made by the public prosecutor.

Clarifications with respect to Limitation period and Superintendence of the High Court

47. The BNSS now clarifies that (i) for computing the period of limitation, the relevant date shall be the date of filing complaint under Section 223 or the date of recording information under Section 173; and (ii) that every High Court shall so exercise its superintendence over Sessions Courts in the state.

²⁰ CrPC – Section 246. Procedure where accused is not discharged

²¹ CrPC – Section 321. Withdrawal from prosecution

²² CrPC – Section 320. Compounding of offences

Conclusion

48. In a nutshell, in so far as the prescription of timelines for inquiry, investigation and trial and formal adoption of audio-visual and electronic means for to undertake various processes, the proposed changes are intended to introduce a more efficient and technologically aligned regime for administration of criminal justice and move away from the language of British-era

criminal laws. However, its efficacy in the real world depends not only on the manner in which such provisions are implemented and adhered to in letter and spirit, but also on ensuring that all magistrates, law enforcement personnel, and allied agencies undergo the necessary training to implement the changes that the BNSS brings in its word and spirit.

Key Contacts:

Cyril Shroff
Managing Partner
cyril.shroff@cyrilshroff.com

Ankoosh Mehta
Partner (Co-Head - White Collar & Investigations)
ankoosh.mehta@cyrilshroff.com

Faraz Alam Sagar
Partner (Co-Head - White Collar & Investigations)
faraz.sagar@cyrilshroff.com

Contributors:

Kapil Arora
Partner

Sara Sundaram
Partner

Nikhil Varshney
Director - White Collar & Investigations

Srinivas Chatti
Principal Associate

Rinkel Singh
Senior Associate

Darshan Patankar
Associate

Sangram Parab
Associate

Nitya Ravichandran
Associate

Stuti Bhargava
Associate

Aman Siwach
Associate

Arunima Phadke
Associate

Disclaimer

All information given in this alert has been compiled from credible, reliable sources. Although reasonable care has been taken to ensure that the information contained in this alert is true and accurate, such information is provided 'as is', without any warranty, express or implied as to the accuracy or completeness of any such information.

Cyril Amarchand Mangaldas shall not be liable for any losses incurred by any person from any use of this publication or its contents. This alert does not constitute legal or any other form of advice from Cyril Amarchand Mangaldas.

Should you have any queries in relation to the alert or on other areas of law, please feel free to contact us on cam.publications@cyrilshroff.com

Cyril Amarchand Mangaldas
Advocates & Solicitors

100⁺ years of legacy

1000 Lawyers

Over 170 Partners

Peninsula Chambers, Peninsula Corporate Park, GK Marg, Lower Parel, Mumbai 400 013, India
T +91 22 2496 4455 E cam.mumbai@cyrilshroff.com W www.cyrilshroff.com
Presence also in Delhi-NCR | Bengaluru | Ahmedabad | Hyderabad | Chennai | GIFT City | Singapore