POLICE POWERS WITH SPECIAL REFERENCE TO ARREST AND SEARCH UNDER THE BHARATIYA NAGARIK SURAKSHA SANHITA (BNSS), 2023

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ABSTRACT

The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023[2] represents the most consequential overhaul of India's criminal procedural law in over five decades. Replacing the Code of Criminal Procedure, 1973[3] as part of a sweeping legislative package that simultaneously reformed substantive criminal law and the law of evidence,[4] the BNSS retains the broad structural architecture of its predecessor but introduces a series of significant changes—some expanding police powers, others imposing novel procedural constraints. Nowhere is this tension more visible than in the law governing arrest and search.

This paper undertakes a systematic and critical analysis of police powers of arrest and search under the BNSS. It proceeds from the constitutional foundations laid down by Articles 21, 22, and 19 of the Constitution of India, examines the specific provisions of Chapters V and VII of the BNSS, and situates these provisions within a broader field of judicial interpretation—from the seminal ruling in Maneka Gandhi v. Union of India[5] to the transformative recognition of privacy as a fundamental right in Justice K.S. Puttaswamy (Retd.) v. Union of India.[6] The paper offers a comparative account of key changes from the CrPC, analyses persistent structural challenges in implementing police accountability, and closes with concrete recommendations for reform. Throughout, the aim is not merely to map the law as it stands but to assess whether it adequately meets the test that a democratic constitutional order imposes: that the coercive power of the state

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[2]Bharatiya Nagarik Suraksha Sanhita, 2023 (No. 46 of 2023) (hereinafter 'BNSS'). The Act received Presidential assent on 25 December 2023 and came into force on 1 July 2024.
[3]Code of Criminal Procedure, 1973 (Act 2 of 1974) (hereinafter 'CrPC').
[4]The three laws are: Bharatiya Nyaya Sanhita, 2023 (No. 45 of 2023) replacing the Indian Penal Code, 1860; Bharatiya Nagarik Suraksha Sanhita, 2023 (No. 46 of 2023) replacing the CrPC, 1973; and Bharatiya Sakshya Adhiniyam, 2023 (No. 47 of 2023) replacing the Indian Evidence Act, 1872.
[5]Maneka Gandhi v. Union of India, AIR 1978 SC 597, per Bhagwati J.
[6]Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (nine-judge bench).

must always be exercised with restraint, transparency, and accountability.

Keywords: BNSS 2023, Police Powers, Arrest, Search, CrPC, Fundamental Rights, Article 21, Custodial Rights, Digital Privacy, Criminal Procedure Reform.

I. Introduction

There is perhaps no more contested area of public law than the zone where the state's power to maintain order meets the individual's claim to liberty. In a constitutional democracy, that tension is not resolved once and for all by a single legislative text; it is negotiated continuously—in statutes, in courtrooms, and through the daily conduct of those who wear the uniform. The law of arrest and search sits precisely at this intersection, and the manner in which a legal system governs these powers says a great deal about its underlying values.

India's principal statute governing this area for over five decades was the Code of Criminal Procedure, 1973. However flawed or incomplete, the CrPC had the virtue of familiarity—lawyers, police officers, and magistrates had worked with it long enough to understand its contours, if not always its spirit. Its replacement by the Bharatiya Nagarik Suraksha Sanhita, 2023, which came into force on 1 July 2024 as part of a tripartite criminal law reform package, was therefore a development of the first importance. The BNSS is not a mere renaming exercise. It restructures provisions, adds new sections, and in several places makes substantive changes to the law—changes that demand careful legal scrutiny.

This paper is concerned with the BNSS's provisions on two specific, closely related police powers: the power of arrest and the power of search. These are, arguably, the two powers that most directly affect a citizen's physical liberty and privacy. An arrest strips a person of their freedom to move; a search strips away the sanctuary of their home, body, or digital life. Both powers are indispensable to effective law enforcement; both are equally susceptible to misuse. The BNSS attempts to update the legal framework governing these powers, and this paper assesses how far it succeeds.

The analysis proceeds in stages. After tracing the legislative history that gave birth to the BNSS, the paper sets out the constitutional framework within which police powers must operate—a framework shaped in decisive ways by the Supreme Court's recognition of privacy as a fundamental right under Article 21. It then examines the specific provisions on arrest and search in the BNSS, compares them with their CrPC counterparts, and reviews the judicial

decisions that have shaped the law over the past four decades. The paper concludes with a frank assessment of the BNSS's strengths and gaps, and with recommendations for reform.

II. Legislative Background: From CrPC to BNSS

The evolution of India's criminal procedure law reflects its colonial origins and the incremental efforts to refashion it for a democratic framework. Enacted in 1898, the Code of Criminal Procedure was a tool of British colonial administration, prioritising governance over individual rights[7] was a product of British Indian administration, designed to serve the demands of colonial governance rather than the rights of the governed. India's 1973 CrPC marked a significant, though partial, reform: it separated judicial and executive magistracy, enhanced bail provisions, and required arrested persons to be presented before a magistrate within 24 hours. Nonetheless, the core structure from the colonial era endured. Amendments in 2005 and 2008 addressed targeted issues, such as arrest protocols and victim entitlements yet the statute retained its fundamentally colonial imprint[8] addressed specific concerns, particularly around arrest procedures and victim rights, but the statute as a whole retained its colonial character.

Demands for comprehensive overhaul intensified in the early 2000s. The Malimath Committee's 2003 report proposed transformative measures, including a transition to an inquisitorial system, bolstered victim rights, and stricter limits on police discretion[9] recommending among other things a shift towards an inquisitorial model of criminal procedure, stronger victim rights, and tighter controls on police discretion. The Law Commission of India, in successive reports,[10] highlighted the gap between the law on the books and the law in practice—particularly as regards custodial violence, the excessive use of arrest, and the appalling conditions of pretrial detention. These recommendations fed into the political process, culminating in the introduction of the three new criminal law codes in Parliament in 2023.

The BNSS comprises 531 sections, compared to the CrPC's 484. Much of the new material

[7]The Code of Criminal Procedure, 1898 (Act V of 1898), was substantially based on the Criminal Procedure Code introduced by the colonial administration. It was replaced by the CrPC, 1973, which came into force on 1 April 1974.
[8]The Code of Criminal Procedure (Amendment) Act, 2005 (Act 25 of 2005); Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009).
[9]Committee on Reforms of Criminal Justice System, Report, Vol. I (Government of India, Ministry of Home Affairs, 2003) (Malimath Committee Report), p. 1.
[10]Law Commission of India, 41st Report on the Code of Criminal Procedure, 1898 (1969); 154th Report on the Code of Criminal Procedure, 1973 (1996).

concerns technology: electronic service of process, audio-video recording, digital evidence. But the structural changes are equally important. The renumbering of provisions—so that, for instance, the power of arrest without warrant moves from Section 41 of the CrPC to Section 35 of the BNSS—creates initial difficulties of navigation but does not in itself alter the substance of the law. What does matter is the content of the new provisions,[11] and it is to that content that the rest of this paper is devoted.

III. Constitutional Framework Governing Police Powers

Any examination of police powers in India must begin with the Constitution. The Constitution isn't just some backdrop here—it's front and center, actively shaping what Parliament can pass into law and what police officers are allowed to do. Three sets of constitutional provisions are of primary significance.

A. Article 21: The Foundation of Procedural Justice

Article 21 of the Constitution guarantees that no person shall be deprived of life or personal liberty except according to procedure established by law.[12] The early judicial interpretation of this guarantee was deliberately narrow: in A.K. Gopalan v. State of Madras,[13] the Supreme Court held that 'procedure established by law' meant no more than positive law—that any procedure duly enacted by a competent legislature would suffice. The implications for police powers were troubling: on this reading, there was little a court could do if Parliament chose to authorise arrest and detention on the flimsiest of grounds.

That reading was comprehensively abandoned in Maneka Gandhi v. Union of India, where a full bench of the Supreme Court held that the procedure required by Article 21 must be 'just, fair and reasonable.'[14] This single ruling transformed the constitutional law of arrest and search. It meant that a police officer who makes an arrest, even in strict compliance with the letter of the statute, may still act unconstitutionally if the manner of the arrest is arbitrary or the grounds are disproportionate. The Court elaborated on this principle in Francis Coralie Mullin v.

[11]BNSS, 2023, Chapter V (ss. 35–62) governs arrest; search and seizure provisions are scattered across Chapters VII and XII.
[12]Constitution of India, 1950, Art. 21.
[13]A.K. Gopalan v. State of Madras, AIR 1950 SC 27. The majority held that Art. 21 required compliance with positive law only, taking an essentially Diceyan view of the rule of law.
[14]Maneka Gandhi v. Union of India, AIR 1978 SC 597. The Court overruled A.K. Gopalan v. State of Madras, AIR 1950 SC 27, insofar as it had taken a narrow, positivist view of 'procedure established by law'.

Administrator, Union Territory of Delhi,[15] where it held that the right to life includes the right to live with basic human dignity.

B. Article 22: Specific Safeguards Against Arbitrary Detention

Article 22 provides a set of explicit guarantees that apply specifically in cases of arrest and detention.[16] Under Article 22(1), a person who is arrested must be informed of the grounds of arrest as soon as reasonably possible, and must be given the right to consult and be defended by a legal practitioner of their choice.[17] Article 22(2) draws a hard line: no one arrested can be held more than 24 hours without facing the nearest Magistrate. This safeguard forms the bedrock of judicial oversight in India's criminal justice system.[18] These provisions are not merely directory; they are constitutionally mandatory, and a detention that violates them is unlawful ab initio.

C. Article 19 and the Right to Privacy

Article 19(1)(d) guarantees every citizen the right to move freely throughout the territory of India.[19] Arrest and preventive detention directly curtail this right. But the constitutional dimension of police powers was dramatically enlarged by the Supreme Court’s nine-judge bench ruling in Puttaswamy.[20] The Court held that the right to privacy is a fundamental right protected under Article 21, with implications for all state action that intrudes into the personal sphere of the individual—including the search of persons, residences, and electronic devices. The proportionality standard articulated in that case—requiring that any limitation of privacy must be backed by law, serve a legitimate aim, and be the least restrictive means available—has become the governing standard for evaluating search provisions.[21]

D. Federal Structure and Policing

One further constitutional dimension deserves mention. The subject of ‘police’ falls in List II

[15]Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608, at para 8.
[16]Constitution of India, 1950, Art. 22(1) and (2).
[17]Constitution of India, 1950, Art. 22(1).
[18]Constitution of India, 1950, Art. 22(2).
[19]Constitution of India, 1950, Art. 19(1)(d).
[20]Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, per Chandrachud J. at para 325 ('Privacy is the constitutional core of human dignity').
[21]Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, per Chandrachud J. (three-fold test: legality, legitimate aim, proportionality).

of the Seventh Schedule,[22] making it a state subject. The CrPC and BNSS, as laws of criminal procedure, fall in List III (Concurrent List)[23] and derive their authority from Article 246. The federal setup in India means that police officers across different states function under both the BNSS and their own state police laws, which makes the system quite complex. The guidelines laid down in *Prakash Singh v. Union of India* were meant to tackle some of the problems arising from this fragmented structure, but their implementation has been inconsistent across states

IV. Power of Arrest under BNSS 2023

Chapter V of the BNSS, comprising Sections 35 to 62, governs the law of arrest. An arrest—being the apprehension of a person by legal authority with the intent of bringing them before a competent tribunal—is the most direct exercise of coercive power available to the police, short of the use of force itself. It is unsurprising that the law governing arrest has been the subject of sustained judicial attention and repeated legislative amendment.

A. Arrest with Warrant

Sections 71 and following of the BNSS deal with the issuance of warrants of arrest.[24] A warrant is a court order directing a police officer (or, in some circumstances, any person) to apprehend the person named in it. The issuance of a warrant by a judicial authority provides an important check on police action: the arresting officer acts under judicial authority, not on personal initiative.

Section 72(1) of the BNSS requires every warrant of arrest to be in writing, signed by the presiding officer, and bearing the seal of the court.[25] The warrant must identify the accused with reasonable particularity, specify the offence for which arrest is sought, and direct the officer to bring the arrested person before the court. These requirements are largely similar to those laid down in Sections 70 to 81 of the CrPC. However, the BNSS introduces an important change through Section 64, which explicitly allows summons and warrants to be served electronically.[26] This is a practical innovation of some importance, particularly for situations

[22]Constitution of India, 1950, Seventh Schedule, List II (State List), Entry 2; List III (Concurrent List), Entry 2.
[23]Constitution of India, 1950, Art. 246 read with Seventh Schedule, List III, Entry 2 (criminal procedure as a Concurrent List subject).
[24]BNSS, 2023, s. 71 ff. (warrants of arrest); cf. CrPC, 1973, ss. 70–81.
[25]BNSS, 2023, s. 72(1): 'Every warrant of arrest shall be in writing, signed by the presiding officer of such Court, and shall bear the seal of the Court.'
[26]BNSS, 2023, s. 64 (electronic service of processes). This is a wholly new provision with no counterpart in the CrPC.

where physical service is difficult or where speed is essential.

B. Arrest without Warrant

The more practically significant and more constitutionally fraught power is the power to arrest without warrant. Section 35 of the BNSS[27] broadly corresponds to Section 41 of the CrPC but incorporates important refinements, most of which reflect the Supreme Court's jurisprudence—in particular, the directions issued in Arnesh Kumar v. State of Bihar.[28]

Section 35 empowers any police officer to arrest without warrant in the following circumstances:

- Any person who commits a cognisable offence in the presence of the police officer;
- A person against whom there exists a reasonable complaint, credible information, or reasonable suspicion of having committed a cognisable offence punishable with imprisonment of three years or more, subject to the necessity test described below;
- A person who obstructs a police officer in the execution of duty, or has escaped or attempts to escape from lawful custody;
- A person in whose possession stolen property is found and who is reasonably suspected of having committed an offence in that connection;
- A person who is a proclaimed offender under Section 84 of the BNSS;
- A person concerned in any act outside India which, if committed in India, would be punishable as an offence, and in respect of whom a requisition has been received from another police officer.

Crucially—and this is one of the most important changes from the CrPC—before arresting a person accused of an offence punishable with imprisonment of less than seven years or up to seven years (whether with or without fine), the officer must be satisfied that arrest is necessary

[27]BNSS, 2023, s. 35. Compare CrPC, 1973, s. 41.
[28]Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273. The two-judge bench comprising Chandramauli Kumar Prasad and Pinaki Chandra Ghose JJ. issued a set of mandatory directions requiring police officers and magistrates to apply their minds to the necessity of arrest.

for one of five specified reasons: to prevent the commission of further offences; for proper investigation of the offence; to prevent tampering with evidence or influencing witnesses; to ensure availability of the accused for trial; or by reason of the accused's antecedents.[29] The officer is required to record his or her reasons in writing, and if no arrest is made, to record the reasons for that also. This codification of the Arnesh Kumar checklist[30] represents one of the more meaningful structural changes in the BNSS—though, as discussed below, its efficacy depends entirely on implementation.

C. Post-Arrest Procedure

The BNSS introduces a cluster of procedural requirements governing the period immediately following an arrest. Taken together, these provisions substantially expand the pre-existing protections and represent a genuine improvement in the law.

(i) Notification to Relatives or Friends (Section 37, BNSS)

Section 37[31] requires the arresting officer, immediately upon arrest, to inform a person nominated by the arrested individual—whether a friend, relative, or any other person—of the fact of arrest and the place of detention. This provision broadly corresponds to Section 50A of the CrPC (inserted in 2005) but the BNSS makes the obligation more explicit and operationally clearer by using the language of a 'nominated person' rather than leaving the choice entirely at large.

(ii) Mandatory Audio-Video Recording (Section 53, BNSS)

One of the genuinely progressive features of the BNSS is Section 53,[32] which mandates audio-video recording of the process of arrest and of searches conducted on persons, using a mobile phone or other electronic device. The electronic record is required to be forwarded to the Magistrate. This provision has no counterpart in the CrPC and is directly responsive to long-standing concerns about custodial abuse. The existence of a contemporaneous audio-visual record makes it substantially more difficult for either party to fabricate an account of what

[29]BNSS, 2023, s. 35, proviso: the officer must record reasons in writing for arrest, and where no arrest is made, the reasons for not arresting. This codifies the directions in Arnesh Kumar.
[30]Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273 at para 14 (checklist for police officers and magistrates before arrest).
[31]BNSS, 2023, s. 37; cf. CrPC, 1973, s. 50A (inserted by the 2005 Amendment).
[32]BNSS, 2023, s. 53. The provision requires audio-video recording by 'mobile phone or any other electronic device' and electronic transmission of the record to the Magistrate. There is no counterpart in the CrPC.

occurred—a development that serves the interests of both the accused and the integrity of the investigation.[33]

(iii) Medical Examination (Section 51, BNSS)

Section 51 of the BNSS[34] provides for the medical examination of an arrested person within twenty-four hours of arrest. The examination must be conducted by a registered medical practitioner. This provision serves a dual purpose: it creates a contemporaneous record of any pre-existing injuries (affording the accused protection against subsequently fabricated allegations of police resistance), and it provides evidence of custodial injury should the examination reveal signs of violence. The D.K. Basu guidelines had required such examination as a matter of judicial direction; the BNSS now makes it a statutory obligation.

(iv) Regulation of Handcuffing (Section 43, BNSS)

Section 43 of the BNSS[35] represents the first statutory regulation of handcuffing in Indian law. For decades, the practice was governed solely by Supreme Court directives—most importantly in Prem Shankar Shukla v. Delhi Administration[36] and Citizens for Democracy v. State of Assam[37]—which treated handcuffing as prima facie violative of human dignity and permissible only in cases of clear and present danger of escape or violence. Section 43 codifies this approach, permitting handcuffing in cases involving repeat offenders, persons accused of offences against the state, organised crime, terrorist acts, or violent offences. This is a measured statutory formulation, though in practice the temptation to invoke the exception broadly may prove difficult to resist.

D. Rights of the Arrested Person

The BNSS expressly codifies several rights that vest in a person upon arrest. These are not merely administrative courtesies; they are constitutionally grounded entitlements, the violation

[33]D.K. Basu v. State of West Bengal, (1997) 1 SCC 416, per A.S. Anand J. The eleven guidelines issued by the Court—including preparation of an arrest memo, medical examination, and notification of relatives—have now been substantially incorporated into the BNSS.
[34]BNSS, 2023, s. 51; cf. CrPC, 1973, s. 54.
[35]BNSS, 2023, s. 43. The section permits use of handcuffs in respect of offences against the State, economic offences, or offences involving violence, among others.
[36]Prem Shankar Shukla v. Delhi Administration, AIR 1980 SC 1535, per Krishna Iyer J.: 'Handcuffing is prima facie inhuman and… arbitrary.'
[37]Citizens for Democracy v. State of Assam, (1995) 3 SCC 743 (directions on use of handcuffs extended to undertrials and convicts during transit).

of which renders the detention unlawful and may attract both constitutional remedies and criminal liability.

- Right to be informed of the grounds of arrest (Section 47 BNSS), [38] constitutionally mandated by Article 22(1);
- Right to consult and be represented by a legal practitioner of choice (Section 47 BNSS);
- Right to be produced before the nearest Magistrate within twenty-four hours of arrest (Section 57 BNSS), [39] required by Article 22(2);
- Right to bail in bailable offences (Section 478 BNSS);[40]
- Right to medical examination within twenty-four hours of arrest (Section 51 BNSS);
- Right to nominate a person to be informed of the arrest (Section 37 BNSS);
- Right against self-incrimination (Article 20(3), Constitution of India;[41] confirmed in Selvi v. State of Karnataka[42]);

Additionally, Section 58[43] requires the officer in charge of the police station to maintain a register of all persons arrested, and to transmit information regarding them to the Magistrate. This provision ensures a minimum level of institutional documentation and judicial oversight—modest, perhaps, but not without practical value.

V. Power of Search under BNSS 2023

The power to search is analytically distinct from the power to arrest, though the two frequently travel together in practice. A search is an examination—of a person, a place, a vehicle, or an electronic device—undertaken to discover evidence, recover stolen property, or find the subject of an arrest. It is an intrusion into the physical or informational space of the individual, and it

[38]BNSS, 2023, s. 47; Constitution of India, 1950, Art. 22(1).
[39]BNSS, 2023, s. 57; Constitution of India, 1950, Art. 22(2).
[40]BNSS, 2023, s. 478 (bailable offences) and ss. 480–483 (non-bailable offences and bail discretion).
[41]Constitution of India, 1950, Art. 20(3): 'No person accused of any offence shall be compelled to be a witness against himself.'
[42]Selvi v. State of Karnataka, (2010) 7 SCC 263 (Supreme Court held that narco-analysis, brain mapping and lie-detector tests conducted without consent violate Art. 20(3) and Art. 21).
[43]BNSS, 2023, s. 58 (duty of officer in charge to report arrested persons to Magistrate).

stands in need of careful legal regulation if it is not to become an instrument of harassment.

A. Search with Warrant

Section 100 of the BNSS[44] empowers a court to issue a search warrant where it has reason to believe that a document, thing, or other evidence relevant to an investigation or trial is in the possession of a person. The warrant must describe the place to be searched and the thing to be searched for with reasonable particularity; a general warrant authorising a fishing expedition is, on established principles of constitutional law, impermissible.

Section 103 of the BNSS[45] deals with the search of a place suspected to contain stolen property, forged documents, counterfeit currency, instruments for counterfeiting, or any article in respect of which an offence is believed to have been committed. The Magistrate may issue a warrant or, in cases of urgency, direct the police officer accordingly.

Of particular significance is Section 101 of the BNSS,[46] which expressly provides for the search and seizure of electronic evidence, including data, digital records, and communications stored in electronic devices. This provision has no counterpart in the CrPC, which left the search of electronic devices to be governed by the Information Technology Act, 2000 and case-by-case judicial directions. The introduction of Section 101 is therefore a legislative recognition of the centrality of digital evidence in contemporary criminal investigation—though, as discussed below, the absence of a proportionality framework for digital searches raises serious concerns from a privacy standpoint.[47]

B. Search without Warrant

The power to search without a warrant is conferred by Sections 105 and 106 of the BNSS.[48] Section 105 permits a police officer to search a place without a warrant where delay in obtaining a warrant would be likely to result in the concealment of evidence, the escape of the accused, or the destruction of material. The officer is required to record reasons in writing before undertaking the search and to send a report to the nearest Magistrate thereafter. Section

[44]BNSS, 2023, s. 100; cf. CrPC, 1973, s. 94.
[45]BNSS, 2023, s. 103 (search of place suspected to contain stolen property, etc.); cf. CrPC, 1973, s. 98.
[46]BNSS, 2023, s. 101 (search and seizure of electronic evidence). This is one of the more consequential innovations of the BNSS.
[47]Vikram Raghavan, 'Privacy and the Information Age' (2008) 8 SCC (Journal) 3, pp. 7–9.
[48]BNSS, 2023, s. 105; cf. CrPC, 1973, s. 100.

106[49] empowers a police officer conducting an investigation under Chapter XII to search any place in the course of that investigation, subject to similar constraints.

The requirement of written reasons before conducting a warrantless search is an important safeguard—but only if the record is genuinely contemporaneous and not merely a post-hoc rationalisation. Courts have sometimes noted the tendency of police to fill in the reasons column after the search has already been completed. The audio-video recording requirement under Section 53, if consistently applied, may help address this concern by providing an objective timeline of events.

C. Search of Persons

Section 51 of the BNSS authorises the search of a person upon arrest. Articles found during such a search, other than necessary wearing apparel, may be seized, and a receipt must be given for all articles seized. The BNSS goes further than the CrPC in requiring audio-video recording of searches of persons, which is a significant practical safeguard.

Section 52[50] specifically governs the search of women. It provides that whenever a woman is to be searched, the search shall be conducted by another woman with strict regard to decency. This provision, which broadly mirrors Section 51(2) of the CrPC, reflects the constitutional guarantee of equality and dignity. Under the BNSS, the audio-video recording requirement applies to these searches too, providing an additional layer of accountability. It is submitted, however, that the provision should further specify who may be present during such a search, and that there should be an express prohibition on the search of a woman by or in the presence of a male officer.

D. General Procedure for Searches (Section 103, BNSS)

Section 103 of the BNSS[51] sets out the procedural requirements applicable to all searches of premises. Before conducting the search, the officer must call upon two or more independent and respectable inhabitants of the locality to attend and witness the proceedings. A list of all seized articles must be prepared, signed by the witnesses, and a copy must be given to the

[49]BNSS, 2023, s. 106; cf. CrPC, 1973, s. 165.

[50]BNSS, 2023, s. 52(1): 'Whenever a woman is to be searched, the search shall be made by another woman with strict regard to decency.' Cf. CrPC, 1973, s. 51(2).

[51]BNSS, 2023, s. 103(3): 'The police officer shall also cause audio-video electronic means to be used to record the search and the record so made shall be sent to the Magistrate having jurisdiction.'

occupant of the premises. The occupant must be permitted to attend the search. And—in a critical new requirement—the officer must cause the search to be recorded by audio-video electronic means and transmit the record to the Magistrate.

This last requirement, if rigorously enforced, has the potential to transform the character of police searches. At present, disputes about what was and was not found, what was and was not seized, and how witnesses were treated, are common features of criminal litigation. A contemporaneous audio-visual record should, in principle, significantly reduce the scope for such disputes.

E. Right to Privacy and Search Powers

The implications of Puttaswamy[52] for the law of search are profound and, as yet, only partially worked out by Indian courts. Justice Chandrachud's opinion in that case articulated a three-part test: any limitation on the right to privacy must be based on law, must be necessary to achieve a legitimate aim, and must be proportionate—that is, the least restrictive means reasonably available to achieve that aim. Applied to search powers, this means that a warrantless search, conducted without recording of reasons, and disproportionate in scope to the legitimate investigative need, would be constitutionally impermissible, irrespective of whether it complies with the letter of the BNSS.

The search of electronic devices raises these concerns in particularly acute form. A modern smartphone or laptop may contain a person's medical records, financial information, private communications, legal advice, journalistic sources, and creative work. The search of such a device is qualitatively different from the search of a drawer or a box, and courts in several jurisdictions have held that it requires separate and specific judicial authorisation.[53] The Supreme Court in Ritesh Sinha v. State of Uttar Pradesh[54] signalled its awareness of the need for legislative action in respect of invasive investigative techniques. Section 101 of the BNSS takes a step in the right direction by providing a statutory basis for digital searches, but it does not require prior judicial authorisation or lay down a proportionality framework. These remain

[52]Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, per Chandrachud J. at para 180 ('The right to privacy… is an intrinsic recognition of heterogeneity, of the right of the individual to be different').
[53]See generally Saurabh Kirpal (ed.), Sex and the Supreme Court: How the Law is Upholding the Dignity of the Indian Citizen (Speaking Tiger, 2020), pp. 234–236 (on digital privacy in criminal investigations).
[54]Ritesh Sinha v. State of Uttar Pradesh, (2019) 8 SCC 1. The Supreme Court, by a 2:1 majority, held that voice samples could be taken from accused persons and directed Parliament to enact appropriate legislation.

significant gaps.

VI. Comparative Analysis: CrPC, 1973 vs. BNSS, 2023

The table below sets out a side-by-side comparison of the principal provisions governing arrest and search under the two statutes. It is intended to provide a convenient reference and to highlight, at a glance, the nature and significance of the changes introduced by the BNSS.

Aspect	CrPC, 1973	BNSS, 2023
Arrest without warrant	S. 41 — enumerated grounds; S. 41A — notice before arrest for offences ≤ 7 yrs (post-2008 amendment)	S. 35 — expanded grounds; necessity test codified; reasons recorded in writing; direct incorporation of Arnesh Kumar directions
Notification of arrest	S. 50A — notification to relative or friend (inserted in 2005)	S. 37 — mandatory; nominated person concept; explicit duty on police officer
Handcuffing	No express statutory provision; governed entirely by judicial directives in Prem Shankar Shukla and Citizens for Democracy	S. 43 — first statutory regulation; confined to specified serious offences; codifies Supreme Court jurisprudence
Medical examination of arrestee	S. 54 — examination on request of arrested person or at Magistrate's direction	S. 51 — mandatory; within 24 hours; to be conducted by registered medical practitioner
Audio-video recording	No provision	S. 53 — mandatory recording of search and arrest process; electronic record to be sent to Magistrate
Electronic evidence search	No express provision; governed by IT Act, 2000 and ad hoc judicial directions	S. 101 — express statutory provision for search and seizure of electronic records and devices
Electronic service of process	No provision; physical service only under ss. 62 ff.	S. 64 — electronic service of summons and warrants expressly authorised

Aspect	CrPC, 1973	BNSS, 2023
Remand and detention	S. 167 — up to 60 or 90 days in judicial custody depending on offence; max 15 days police custody	S. 187 — structured remand framework retained; enhanced Magistrate oversight; 60 or 90 day outer limits preserved
Search of females	S. 51(2) — by female officer, strict regard to decency	S. 52 — strengthened; audio-video recording applicable; explicit language of dignity
Search witnesses	S. 100 — two respectable inhabitants to witness search	S. 103 — retained and strengthened; audio-video recording added as mandatory requirement

VII. Judicial Interpretations and Landmark Cases

No account of Indian police powers would be complete without an examination of the judicial decisions that have shaped the law. In this area, perhaps more than any other in Indian criminal procedure, the courts have been the primary engine of reform—filling the gaps left by legislation, correcting the excesses of the executive, and articulating the constitutional standards against which statutory provisions must be measured.

A.K. Gopalan v. State of Madras (1950)

The Supreme Court's first engagement with Article 21 in A.K. Gopalan set the stage for decades of subsequent litigation. The majority's positivist interpretation of 'procedure established by law'—that any enacted procedure would suffice—reflected a cautious judicial conservatism in the early years of the republic. Its eventual rejection in Maneka Gandhi was not just a doctrinal shift; it was a constitutional coming of age.

Maneka Gandhi v. Union of India (1978)

The decision in Maneka Gandhi[55] is, without exaggeration, the most important case in the history of Article 21. Justice Bhagwati's opinion introduced substantive due process into Indian

[55]Maneka Gandhi v. Union of India, AIR 1978 SC 597, per Bhagwati J.: 'The law must now be taken to be well settled that Article 21 does not exclude Article 19 and what is required is that a law depriving a person of personal liberty has got to stand the test of both Article 19 and Article 21.'

constitutional law, establishing that the procedure required must be just, fair, and reasonable. This ruling provides the constitutional foundation for the requirement of necessity in arrest, the prohibition on gratuitous searches, and the insistence on proportionality in all police action that restricts personal liberty.

D.K. Basu v. State of West Bengal (1997)

The petition in D.K. Basu[56] arose from a letter concerning custodial deaths—a quiet beginning for what became one of the most practically significant judgments in the history of Indian criminal procedure. Justice Anand's opinion laid down eleven mandatory requirements applicable to all arrests: preparation of an arrest memo, notification of next of kin, medical examination, inspection memo, entitlement to consult a lawyer, production before the Magistrate within twenty-four hours. The BNSS has now substantially incorporated these requirements into statutory form—a belated legislative acknowledgment of what the judiciary had long since required.

Arnesh Kumar v. State of Bihar (2014)

The immediate trigger for Arnesh Kumar[57] was the misuse of Section 498A of the Indian Penal Code (matrimonial cruelty), where routine arrest was being used to pressure the accused in civil disputes. The Court's response, however, had universal application: it held that arrest is not a default response to a cognisable offence and that it must be justified by reference to specific necessity. The checklist approach adopted by the Court—requiring both the police officer and the Magistrate to record reasons—has been substantially codified in Section 35 of the BNSS, making it one of the clearest examples of judicial reasoning feeding directly into statutory reform.

Prem Shankar Shukla v. Delhi Administration (1980)

Justice Krishna Iyer's judgment in Prem Shankar Shukla[58] declared handcuffing to be prima facie a violation of Articles 14, 19 and 21, permissible only in cases of clear and present danger

[56]D.K. Basu v. State of West Bengal, (1997) 1 SCC 416. The petition was initiated by a letter written to the Supreme Court by the Executive Chairman of Legal Aid Services, West Bengal, drawing attention to deaths in police lock-ups.
[57]Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273 at para 13: 'Arrest brings humiliation, curtails freedom and cast scars forever.'
[58]Prem Shankar Shukla v. Delhi Administration, AIR 1980 SC 1535.

of escape or violence. The rhetorical force of the judgment was considerable: the Court spoke of prisoners as retaining their humanity and their constitutional rights notwithstanding their custody. Section 43 of the BNSS, in providing the first statutory regulation of handcuffing, gives legislative form to these judicial concerns.

Justice K.S. Puttaswamy (Retd.) v. Union of India (2017)

The nine-judge bench in Puttaswamy produced six separate opinions, all agreeing on the fundamental point that privacy is protected by Article 21. The most analytically developed—and for present purposes, the most consequential—was Justice Chandrachud's, which articulated the three-fold test of legality, legitimate aim, and proportionality. This framework demands not merely that search powers have a statutory basis, but that each individual search be proportionate in scope to the investigation it serves. The full implications of this ruling for the law of search—particularly digital search—remain to be worked out by the courts.

Nilabati Behera v. State of Orissa (1993) and Sube Singh v. State of Haryana (2006)

Nilabati Behera[59] established that the state may be held liable in public law—that is, under Article 32 or Article 226—for custodial violations, and that monetary compensation is an appropriate remedy. This was an important development: it gave substance to the constitutional guarantee against custodial abuse by providing a meaningful remedy. Sube Singh[60] built on this foundation, expanding the D.K. Basu guidelines and affirming the supervisory role of human rights commissions.

Prakash Singh v. Union of India (2006)

The directions issued in Prakash Singh represent the Supreme Court's most sustained effort to reform the institutional structure of Indian policing. The seven binding directions—covering the tenure of the Director General of Police, the establishment of Police Complaints Authorities, the separation of investigation from law-and-order functions, and the creation of a State Security Commission—were directly aimed at the structural conditions that enable arbitrary arrest and illegal search. Their incomplete implementation is one of the most

[59]Nilabati Behera v. State of Orissa, (1993) 2 SCC 746 (Supreme Court awarded monetary compensation under Art. 32 for custodial death, recognising a public law remedy distinct from tort).
[60]Sube Singh v. State of Haryana, (2006) 3 SCC 178 (expanding D.K. Basu guidelines and recognising compensation for custodial violation).

significant failures of police reform in independent India.

VIII. Critical Analysis: Strengths and Lacunae

A. The Promise of Mandatory Recording

The requirement of audio-video recording under Section 53 of the BNSS is the single most significant practical innovation in the new law. It has the potential to transform the evidentiary landscape of custodial proceedings: in cases where recording has occurred, the narrative of what happened in the immediate post-arrest period will no longer depend solely on the competing testimonies of the police and the accused. Yet the provision's effectiveness is contingent on infrastructure, training, and enforcement. Many police stations in India, particularly in rural areas, lack the basic technological resources to comply. More importantly, the BNSS does not specify the consequence of non-compliance—whether failure to record renders the arrest illegal, or merely creates an adverse presumption.[61] This legislative gap will need to be filled by judicial interpretation.

B. The Arnesh Kumar Codification: A Qualified Success

The incorporation of the Arnesh Kumar necessity test into Section 35 is welcome, but one should be cautious about treating this as a solved problem. Empirical studies conducted after the Arnesh Kumar judgment itself suggest that magistrates frequently fail to apply the checklist with genuine independent analysis, often approving police applications for remand in a matter of seconds.[62] The BNSS does not introduce structural reforms to address this problem—it does not, for instance, require a reasoned order from the Magistrate before approving remand, or mandate that the Magistrate specifically address each element of the necessity test. The codification of judicial directions is an important first step; it is not, by itself, sufficient.[63]

C. Section 101 and the Digital Privacy Gap

Section 101 of the BNSS is a notable addition, but it falls short of what Puttaswamy demands.

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[61] Parliamentary Standing Committee on Home Affairs, 259th Report on the Bharatiya Nagarik Suraksha Sanhita, 2023 (Rajya Sabha Secretariat, 2023), p. 41.
[62] See Abhinav Chandrachud, 'Custodial Torture and the Arnesh Kumar Directions' (2015) 7 NUJS Law Review 1, pp. 4–7 (empirical survey showing magistrates rarely independently verify necessity of arrest).
[63] State of Maharashtra v. Christian Community Welfare Council of India, (2003) 8 SCC 546 (Magistrates must independently examine whether remand is necessary and not act as 'post offices').

The provision authorises the search and seizure of electronic evidence without requiring prior judicial authorisation, even in cases where a warrant could have been obtained without prejudice to the investigation. Courts in several common law jurisdictions—including the United States (Riley v. California, 573 U.S. 373 (2014)) and Canada (R v. Fearon [2014] 3 SCR 621)—have held that the search of a mobile phone incident to arrest requires a separate warrant, precisely because the informational depth of a smartphone is qualitatively different from that of a physical pocket or wallet. Indian courts will eventually need to address this question in the light of Puttaswamy, and the BNSS as currently drafted may be found inadequate in this respect.

D. Extended Detention and the Risk of Custodial Abuse

Section 187 of the BNSS retains the framework of extended detention under Magistrate's orders for specified serious offences.[64] The provision broadly mirrors Section 167 of the CrPC. Critics, including those who gave evidence before the Parliamentary Standing Committee, have expressed concern that the extended remand framework creates extended windows of unsupervised police access to detained persons—windows in which custodial torture is most likely to occur. India's prison statistics consistently show that undertrial prisoners account for more than seventy-five percent of the prison population,[65] a figure that reflects, among other things, the excessive use of custody during investigation. The BNSS does not address this structural problem.

E. Institutional Accountability: The Enduring Challenge

The most fundamental challenge in reforming police powers is one that no procedural statute can fully resolve: it is the problem of institutional culture. The BNSS provides an improved legal framework, but that framework operates within a police organisation that, in many states, has internalised habits of operation that are at odds with the values the statute embodies. Professor R.V. Kelkar observed, with characteristic understatement, that the gap between the law of arrest and its implementation has always been the central challenge of Indian criminal procedure.[66] That gap will not close without institutional reform: independent complaints

[64]BNSS, 2023, s. 187; cf. CrPC, 1973, s. 167. Section 187 extends the Magistrate-ordered remand framework but retains the outer limits of 60 or 90 days depending on the nature of the offence.
[65]See National Crime Records Bureau, Prison Statistics India 2022, pp. 12–15 (data on undertrial prisoners as a proportion of total prison population, consistently above 75%).
[66]R.V. Kelkar (revised by K.N. Chandrasekharan Pillai), Criminal Procedure, 7th edn (Eastern Book Company,

mechanisms,[67] rigorous training, genuine accountability for unlawful arrests and searches, and—crucially—an adequately resourced and independent magistracy.[68]

IX. Recommendations

The foregoing analysis of the Bharatiya Nagarik Suraksha Sanhita, 2023 reveals certain structural lacunae that, if left unaddressed, risk undermining the legislative intent of the Sanhita and the constitutional guarantees enshrined under Articles 21, 22, and 20(3) of the Constitution of India. The following recommendations are advanced in the spirit of constructive legislative engagement, with a view to ensuring that the Sanhita achieves effective operationalisation of its rights-protective framework.

1. Mandatory Judicial Pre-Authorisation for Searches of Electronic Devices

Section 185 of the BNSS, which consolidates the general power to search premises, does not expressly address the search of electronic devices discovered during such searches. Section 94 of the BNSS, which empowers courts to summon documents and electronic records, similarly does not prescribe the procedural safeguards required before an investigating officer may access the contents of an electronic device seized incidental to arrest or during a search.

It is recommended that the BNSS be amended to insert a discrete provision — analogous to the approach adopted in jurisdictions such as the United States under Riley v. California, 573 U.S. 373 (2014) — requiring a specific judicial warrant, independent of any warrant issued under Section 185, before the contents of any electronic device may be examined. Such a warrant should, in conformity with the proportionality doctrine articulated by the Supreme Court of India in Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, specify with particularity the categories of information sought and the temporal scope of the search, so as to prevent general exploratory examination of an individual's digital life.

2. Explicit Procedural Consequences for Non-Compliance with Section 105 BNSS

Section 105 of the BNSS mandates audio-video recording of search proceedings conducted

2021), p. 112.

[67]Prakash Singh v. Union of India, (2006) 8 SCC 1 (directions regarding Police Complaints Authorities at state and district level).

[68]Law Commission of India, 177th Report on Law Relating to Arrest (2001), para 3.8.

under the Sanhita and requires a copy of such recording to be forwarded to the Magistrate. However, the Sanhita does not prescribe any consequence for failure to comply with this mandatory requirement, nor does it specify the minimum technical standards to which such recordings must conform or the period for which the electronic record must be retained.

It is recommended that Section 105 be amended to provide, first, that non-compliance with the recording requirement shall constitute a serious procedural irregularity in respect of which a court may draw an adverse inference against the prosecution; second, that the Central Government shall, by rules framed under Section 531 of the BNSS, prescribe the minimum technical specifications for audio-video recording and the mandatory retention period for such records; and third, that evidence obtained in violation of Section 105 may, in the discretion of the court, be excluded where admission of such evidence would occasion prejudice to the accused. This reform is essential to give Section 105 operative legal force rather than leaving it as a directory provision susceptible to routine non-compliance.

3. Statutory Establishment of Independent Police Complaints Authorities

The Supreme Court of India, in Prakash Singh v. Union of India, (2006) 8 SCC 1, issued a series of binding directions for police reform, including the establishment of Police Complaints Authorities at the state and district levels with power to receive public complaints, investigate allegations of serious misconduct, and recommend prosecution or departmental action. These directions have remained substantially unimplemented across a majority of states, notwithstanding subsequent orders of the Court in the same proceedings.

The BNSS, as a central legislation governing criminal procedure, presents a legislative opportunity to remedy this deficit. It is recommended that Parliament enact a specific statutory provision — whether within the BNSS or by way of a companion enactment — mandating the establishment of Police Complaints Authorities in every state, prescribing their composition, powers of inquiry, and the binding character of their recommendations with respect to disciplinary proceedings. Without such structural accountability mechanisms, the procedural guarantees of the BNSS risk remaining unenforceable in practice.

4. Mandatory Legal Aid Prior to the First Remand Hearing

Section 303 of the BNSS preserves the right of an accused person to be defended by a pleader

of his choice, and Section 341 of the BNSS makes provision for legal aid to accused persons at the trial stage. However, neither provision ensures that an arrested person who is unable to afford legal representation is provided with the assistance of a legal aid counsel before being produced before the Magistrate for the first remand under Section 187 of the BNSS.

The constitutional significance of the first remand hearing is well-established. It is at this stage that the question of whether the accused shall be detained in custody or released on bail is first determined, and the consequences of an unrepresented hearing at this juncture may be irreversible. The Supreme Court, in Hussainara Khatoon v. Home Secretary, State of Bihar, (1980) 1 SCC 81, recognised the right to free legal aid as an inalienable component of the right to a fair trial under Article 21.

It is accordingly recommended that Section 187 of the BNSS be amended to provide that, where an arrested person does not have legal representation and is unable to afford the same, the Magistrate shall, before proceeding with the remand application, direct the District Legal Services Authority constituted under the Legal Services Authorities Act, 1987, to provide forthwith a legal aid counsel to represent the arrested person at the remand hearing. The right to counsel, in the absence of this guarantee, remains largely illusory at the stage at which it is most urgently required.

5. Mandatory Reasoned Orders on Remand Applications under Section 187 BNSS

Section 187 of the BNSS empowers a Magistrate to authorise the detention of an arrested person in police custody or judicial custody upon production. The Supreme Court, in Arnesh Kumar v. State of Bihar, (2014) 8 SCC 273, issued detailed guidelines directing Magistrates to independently apply their minds to the necessity of remand before authorising the same, and cautioning against the mechanical grant of remand applications without independent judicial scrutiny.

Notwithstanding these directions, the practice of granting remand applications in bulk, without recorded reasons and without specific reference to the necessity criteria, persists in a number of jurisdictions. It is recommended that Section 187 of the BNSS be amended to impose an express obligation upon the Magistrate to pass a reasoned order, recorded in writing, specifically addressing: (i) whether the conditions under Section 187 are satisfied on the facts of the case; (ii) whether the continued custody of the accused is necessary for the purposes of

investigation; and (iii) whether the duration of custody authorised is proportionate to the investigative requirement. Alternatively, the High Courts may issue Practice Directions under their power of superintendence under Article 227 of the Constitution requiring such reasoned orders. The directions in Arnesh Kumar must be given legislative or regulatory teeth if they are to have practical effect.

6. Framing of Subordinate Rules under Section 531 BNSS

Section 531 of the BNSS empowers the Central Government and state governments to make rules for the purposes of carrying out the provisions of the Sanhita. Several provisions of the BNSS — including Section 105 (audio-video recording of searches), Section 101 (electronic evidence and its management), Section 64 (electronic service of summons and notices), and the provisions governing search of electronic devices — are of a technical character that requires detailed operational guidance which the statute itself does not provide.

It is recommended that the Central Government, in exercise of its rule-making power under Section 531, and the state governments, in exercise of their corresponding powers, expeditiously frame rules addressing: (i) the technical standards for audio-video recording under Section 105; (ii) the chain of custody procedures for electronic records produced or seized under Section 101; (iii) the procedure for authenticating electronic service under Section 64; and (iv) the protocol for the forensic examination of electronic devices seized during searches. The BNSS, in the absence of such subordinate legislation, provides insufficient operational guidance and creates a regulatory vacuum that is likely to generate inconsistent practice and litigation.

7. Institutionalised and Ongoing Training Obligations

The BNSS introduces substantial changes to the law of criminal procedure, including new provisions relating to electronic evidence, digital searches, audio-video recording, and electronic service of process. Effective implementation of these provisions requires that all police personnel, investigating officers, and Magistrates are adequately trained not only in the procedural requirements of the Sanhita, but also in the constitutional rights of persons subject to arrest and search.

It is recommended that the BNSS be amended to impose a statutory duty upon the Central

Government and state governments to ensure comprehensive and periodically renewed training of police personnel and judicial officers in the provisions of the Sanhita, with particular emphasis on Sections 105, 185, 187, and 101. Training conducted as a one-time exercise upon enactment is demonstrably insufficient to produce lasting changes in institutional practice. Institutionalised, structured, and mandatory training — periodically reviewed and updated in light of judicial developments — is an indispensable complement to legislative reform.

X. Conclusion

The Bharatiya Nagarik Suraksha Sanhita, 2023 is neither the wholesale transformation its proponents claim nor the merely cosmetic renaming that its critics sometimes suggest. It is, rather, a mixed legislative achievement: genuine improvements in several areas—mandatory audio-video recording, statutory regulation of handcuffing, codification of the Arnesh Kumar directions, express provision for electronic evidence—combined with missed opportunities and unresolved tensions.

The most consequential of these unresolved tensions concerns digital privacy. Section 101 of the BNSS takes the important step of providing a statutory basis for the search of electronic devices, but it does so without the proportionality framework that Puttaswamy demands and without the prior judicial authorisation that the sensitivity of such searches requires. This is not merely a technical gap; it is a gap that bears directly on the constitutional rights of everyone whose phone, laptop, or server may be the subject of a criminal investigation.

The deeper truth is that no criminal procedure statute, however well-drafted, can substitute for the institutional conditions that make rights real: an independent and adequately resourced magistracy, a police service that is genuinely accountable to the law, a legal aid system that is accessible to the poor, and an independent complaints mechanism that can investigate abuse without fear or favour.[69] These conditions do not yet fully exist in India. The BNSS creates a legal framework within which they might eventually be realised; whether they are realised depends on choices that Parliament, the executive, the courts, and civil society must make in the years ahead.

A nation's claim to the rule of law is tested, in the end, not by the elegance of its statutes but

[69] Usha Ramanathan, 'Police, Public and Law: Rethinking the CrPC Reforms' (2019) Indian Journal of International Law 1, p. 9.

by how it treats the person in the police lock-up at three in the morning. By that standard, the BNSS is a step forward. It is not yet far enough.

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