THE INDIAN CRIMINAL LAW REFORMS OF 2024: AN ANALYSIS OF HUMAN RIGHTS AND JUDICIAL IMPLICATIONS

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ABSTRACT

The reforms of 2024 in the criminal justice system of India aims to decolonize the criminal legal framework. The Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagrik Suraksha Sanhita (BNSS), and Bharatiya Sakshya Adhiniyam are drafted to address human rights issues within criminal jurisprudence. This paper critically evaluates key changes introduced by these statutes with respect to human rights standards. Inclusion of 'transgender' persons in the definition of gender, replacing 'unsound mind' with 'mental illness', penalization of exploitation of children reflect the objective of inclusivity of marginalized groups and protection of the vulnerable. However, these provisions also raise human rights challenges. Provisions of handcuffing, remand and bail provisions may inadvertently create human rights concerns. The paper highlights these concerns emphasizing on the requirement of judicial interpretation of ambiguities. Inclusion of Zero FIR and an opportunity of being heard given to accused before Magistrate takes cognizance of an offence are also progressive aspects of the changes. Success of the reforms will heavily rely on judicial scrutiny and effective implementation by law enforcement agencies. The reformation is a significant step towards a human centric criminal justice system safeguarding the rights of both- the victim and the accused.

Introduction:

The origins of criminal jurisprudence in India can be traced back to the age of Manu.[1] Ever since, the evolution of the criminal justice system was principally a consequence of the invaders in the country.

Criminal laws codified by the British remained in effect until recently. The criminal justice system of India has undergone remarkable changes with the implementation of new laws that came into force on 1st of July, 2024. The Bharatiya Nyaya Sanhita has replaced The Indian Penal Code, 1860, The Bharatiya Nagarik Suraksha Sanhita has replaced The Criminal Procedure Code, 1973, and The Bharatiya Sakshya Adhiniyam has replaced The Indian Evidence Act, 1872. The Ministry of Home Affairs claimed that that the laws are pitched to introduce key changes and to decolonize the criminal justice system of India. Human rights under criminal jurisprudence are dealt with Articles 14, 20, 21 and 22 of the Constitution of India. Article 14 guarantees equality before the law and equal protection of laws within the territory of India. Article 20 provides protection against arbitrary and excessive punishment. Article 21 guarantees the right to life and personal liberty, ensuring that no person is deprived of their life or personal liberty except according to the procedure established by law. And lastly, Article 22 provides safeguards against arbitrary arrest and detention. The reforms are intended to provide for a fair and just procedure while ensuring speedy justice. However, the impact of these changes needs a comprehensive scrutiny from human rights perspectives for both, the victim and the accused.

The paper seeks to analyze the implications of the new laws focusing on a few key provisions that raise human rights concerns. The Supreme Court and High Courts of India have time and again interpreted criminal legislations in consonance with The Universal Declaration of Human Rights and other International covenants protecting the rights of victims and accused. Over the past seven decades, the Supreme Court, through landmark decisions, had settled most of the ambiguous or arbitrary laws that needed to be read in the light of Constitutional rights. Perhaps the new laws will potentially overrule some of these precedents, while some provisions will require to be interpreted afresh. The paper examines effectiveness of changes on marginalized groups such as the transgender persons due to inclusion of transgenders in the definition of 'gender', substitution of term 'unsound mind' by 'mental illness' which is critical to ensure that

[1] Essays on The *Indian Penal Code,* Indian Law Institute (1962) p.1.

their rights are protected. It also scrutinizes the newly added provision of employment of children in criminal activities and the law on endangering integrity and sovereignty of India.

Additionally, this paper also analyses the impact of key procedural changes brought about by The Bharatiya Nagarik Suraksha Sanhita that are likely to affect the rights of victims and accused. Introduction of Zero FIR, updated provision of remand and bail are merely additions to respective provisions intending profound reforms. Another crucial aspect requiring enquiry is the right of the accused to be heard before the court takes cognizance of an offence. Evidently, the legal framework is expected to strike a balance between justice, fairness and human rights.

Analyzing the Human Rights Impact of Key changes under the Bharatiya Nagrik Sanhita:

Inclusion of Transgenders:

"Everyone knows gender is a problem, yet no one thinks of it as a human rights issue"- Riki Wilchins

Human rights are indivisible and inalienable rights due to all. Articles 1, 2, 3, 5, 6, and 7 of the Universal Declaration of Human Rights (UDHR) address, respectively, the rights to equality; freedom from discrimination; life, liberty, and personal security; freedom from torture and degrading treatment; recognition as a person before the law; equality before the law.[2] Article 16 of the International Covenant on Civil and Political Rights, 1966 (ICCPR) advocates for the right to recognition of every human being. The Yogyakarta Principles on the application of International Human Rights Law in relation to Sexual Orientation and Gender Identity states that human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.[3] Principle 3 promotes right to recognition of all persons irrespective of their sexual orientation or gender in order to enjoy legal capacity.[4]

Conforming to the above mentioned principles and the decision of the Supreme Court in

[2] Marks, Suzanne M. "Global Recognition of Human Rights for Lesbian, Gay, Bisexual, and Transgender People." *Health and Human Rights*, vol. 9, no. 1, 2006, pp. 33–42. *JSTOR*, https://doi.org/10.2307/4065388. Accessed 21 Oct. 2024.
[3] *The yogyakarta principles - 2006* (2019) *South Asian Translaw Database*. Available at: https://translaw.clpr.org.in/international-conventions-declarations/the-yogyakarta-principles/ (Accessed: 30 October 2024).
[4] Ibid

National Legal Services Authority V. Union of India and others,[5] the Government of India drafted The Transgender Persons (Protection of Rights) Act, 2019. The Act purports to protect rights of transgender persons, recognizes their identity and penalizes discrimination against them. Transgender persons were amongst the most marginalized groups in our country. The Bharatiya Nyaya Sanhita, 2023 defines *"gender".—The pronoun "he" and its derivatives are used of any person, whether male, female or transgender*.[6] However, there are no practical implications of the inclusion of transgenders.

Section 377 of IPC was declared as unconstitutional and repealed after the decision of Supreme Court in *Navtej Singh Johar V. Union of India*[7]. The section criminalized both consensual and non-consensual sexual acts of adults of the same sex. As a consequence of decriminalization of the provision, sexual offences against the LGBT community and transpersons were not punishable. There are innumerable instances of sexual assaults and rape of persons of the transgender community. Section 18 of The Transgenders Persons (Protection of Rights) Act, 2019 penalizes acts of sexual abuse against transgenders with imprisonment up to two years like any other petty offence. All the provisions that make sexual offences and rape punishable under BNS are women centric. Thus, right to equality of the transgender community guaranteed under Article 14 of the Constitution is grossly violated.

The law that deals with rape is based on the assumption that rape can only be committed by a male upon a female.[8] However, report of a survey conducted by People's Union for Civil Liberties, Karnataka affirms that transgenders are victims of sexual assaults, most of which go unreported.[9] BNS, expectedly, should have widened the ambit of sexual offences and rape so as to extend protection to the transgender community. It is evident that inclusion of transgender persons in the definition of "gender" is futile as the Act nowhere provides for protection against any of the offences specifically to them.

[5] National Legal Services Authority v. Union of India AIR 2014 SC 1863 or (2014) 5 SCC 438:
[6] The Bharatiya Nyaya Sanhita, 2023, S. 2(10).
[7] AIR 2018 SC 4321.
[8] Gender RightsHuman RightsHuman Rights LawLaw and SexualityRule of LawSexual OffencesTrangender Rights *et al.* (2020) *Transgenders and rape law: Is equal protection of law still a pipe dream? – the leaflet*, *The Leaflet – An independent platform for cutting-edge, progressive, legal, and political opinion.* Available at: https://theleaflet.in/transgenders-and-rape-law-is-equal-protection-of-law-still-a-pipe-dream/ (Accessed: 30 October 2024).
[9] Human Rights violations against the transgender community, A study of kothi and hijra sex workers in Bangalore, India September 2003, Report by Peoples' Union for Civil Liberties, Karnataka (PUCL-K) accessed on https://queeramnesty.ch/docs/HR_Vioaltion_Transgender_India_PUCL2003_text.pdf.

172nd Report of Law Commission proposed for gender neutral law for rape considering the assertions of NGOs that young boys and the LGBTQ community were being subjected to sexual assaults causing physical and psychological trauma.[10] Nearly 77 countries have incorporated gender neutral laws for sexual offences like Denmark, USA and UK. Opening words of Universal Declaration of Human Rights state that "All human being are born free and equal in dignity and rights."[11] Thus, sexual orientation and gender identity cannot be a ground for discrimination.

Shift in Terminology from 'unsound mind' to 'mental illness':

BNS introduces another noteworthy change, that is, the term 'unsound mind' under IPC is replaced with 'mental illness'. Under the Chapter of General Exceptions, Section 22 provides that, "*Nothing is an offence which is done by a person who, at the time of doing it, by reason of mental illness, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."*[12]

The section provides for immunity from punishment to persons by reason of their mental illness. Section 2 (19) of the Act defines the term 'mental illness' as assigned under clause (a) of section 2 of the Mental Healthcare Act, 2017. The Mental Healthcare Act, 2017 comprehensively defines mental illness as,

"mental illness" means a substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by subnormality of intelligence;[13]

It is evident from the definition that the term is of broad scope and may require interpretation by the Courts time and again. The Supreme Court Committee was of the view that merely medical insanity cannot be a ground for valid defence.[14] The rationale behind extending

[10] SEN, RUKMINI. "Law Commission Reports on Rape." *Economic and Political Weekly*, vol. 45, no. 44/45, 2010, pp. 81–87. *JSTOR*, http://www.jstor.org/stable/20787533. Accessed 23 Oct. 2024.
[11] Article 1 *Universal declaration of human rights ohchr*. Available at: https://www.ohchr.org/en/universal-declaration-of-human-rights (Accessed: 29 October 2024).
[12] The Bharatiya_Nyaya_Sanhita,_2023 S.22.
[13] The Mental Healthcare Act, 2023 S.2(a).
[14] Observations/Recommendations 3.6.3 SC_Report_Bharatiya_Nyaya_Sanhita_2023.

exception to mentally ill persons is that their mental illness impairs judgement in order to understand the consequences of his/her actions. In cases when individuals with mental illness or mental retardation are accused of offences, law is supposed to strike a balance between public safety and intellectual and volitional capabilities of the accused.[15] A point of human rights concern in the definition is the exclusion of mentally retarded persons from accessing defence under Section 22.

Mental retardation refers to substantial limitations in intellectual functioning with different degrees, in different skill areas. There are four levels of severity of mental retardation that determine corresponding IQ (Intelligence Quotient) and EQ (Emotional Quotient). They are mild, moderate, severe and profound. Amongst other difficulties, mentally retarded individuals have limitations of intelligent rigidity, moral development, moral understanding and understanding sequences. Mentally retarded persons may engage in criminal behaviour due to poor impulse control, difficulty in handling mentally and emotionally stressful situations. The average mental age of those diagnosed with severe or profound mental retardation can be supposedly between 3-6 years and 3 years and below respectively. Consequently, such mentally retarded persons may be lacking *mens rea* if they happen to commit a crime in a fit of rage or aggression. In cases when their average mental age is below six, they may have limitations of moral understanding of their actions. Repeatedly, the Courts in India have asserted that unless a statute specifically rules out, *mens rea* is a necessary constituent in establishing guilt of an accused.

The definition of mental illness excluding mentally retarded persons may lead to violation of their human rights. They will be subjected to the same procedure as a normal person and be held guilty for commission of an offence without having regard to their disability. Declaration on the Rights of Mentally Retarded Persons, adopted on 20th December, 1971 by General Assembly Resolution 2856(XXVI), states that,

'Article 6 – The mentally retarded person if prosecuted for any offence, shall have a right to due process of law with full recognition being given to his degree of mental responsibility.'

Section 328, sub-section 1-A provided that in a case when a civil surgeon finds that accused is

[15] Ndunge, M. (2019) 'Cognition and Volition Impairment in criminal conduct: A look into the application of the M'Naghten Test in Kenya', *Strathmore Law Review*, 4(1), pp. 89–101. doi:10.52907/slr.v4i1.111.

of unsound mind, he shall be referred to a psychiatrist or clinical psychologist for prognosis of hic condition, which must be then reported to the Magistrate whether the accused is suffering from unsoundness of mind or mental retardation. Further sub-section 4 provided that when the accused is found to be mentally retarded and incapable of entering defence, he shall be dealt with as per section 330. Similar provision existed at the trial stage under section 329. Section 330 stated that owing to unsoundness of mind or mental retardation, if a person is unable to enter defence, he may be released on bail or kept in a place where psychiatric treatment can be given, depending upon nature of offence. Subsection (3) further provides for discharge of mentally retarded person if he cannot negotiate or defend himself due to his condition. Section 367 to 369 of BNSS, the term 'unsound mind' is substituted with 'mentally ill', thus excluding mentally retarded persons. They will be deprived of availing their right to bail, discharge or treatment at residential facility owing to their disability. Housing them with other inmates in prison can make them vulnerable to exploitation and abuse in prisons. Their condition could worsen potentially leading to self-harm and degradation in their condition violating fundamental rights guaranteed under Article 21 of the Constitution.

The mental age of a person can be ascertained with the help of prognosis by psychiatrists or psychologists. Another question that arises here is, considering the mental age of a mentally retarded person, can he avail defences under Sections 20 and 21 of BNS that extend criminal immunity to children below seven years of age and children between seven to twelve years of age (due to immature understanding)? Does the 'age' here have to be physical age of a person or mental age while determining his mental responsibility? The questions shall remain to be answered by the High Courts and Supreme Court as and when referred to the respective Courts for want of protection of rights of mentally retarded persons.

Criminalization of employing, hiring or engaging child to commit offence

A study of National Crime Records Bureau shows that there has been a consistent rise in number of juvenile crimes. The factors causing criminality among children and youth are poverty, substance abuse, broken homes, low education, technology, social media influence etc.[16] Children are also hired and employed for commission of crime. They are exploited for committing offences like theft, begging, drug trafficking, child pornography. Often, children

[16] 'factors influencing youth juvenile delinquency at Blue Hills Children's Prison Rehabilitation Centre in Gweru, Zimbabwe: An explorative study' (2016) *International Journal of Humanities, Social Sciences and Education*, 3(4). doi:10.20431/2349-0381.0304004.

are hired by crime syndicates for the reason that they generally go unnoticed by police authorities.

BNS has introduced a new provision that criminalizes employment, engagement and hiring of children to commit offence.

Section 95 states that, '*Whoever hires, employs, or engages any child to commit an offence shall be punished with imprisonment of either description which shall not be less than three years but which may extend to ten years, and with a fine; and if the offence be committed shall also be punished with the punishment provided for that offence as if the offence has been committed by such person himself.*[17]

The section intends to treat child employed, engaged or hired to commit offence as victims rather than an offender. The gravity of offence is evident from the period of imprisonment prescribed, which extends from three to ten years and with fine. Furthermore, it states that on the commission of crime, the offender shall be additionally punished with imprisonment provided for the offence so committed. Such offences were dealt with provisions of abetment under IPC. Although, prevention of juvenile delinquency requires a multi-faceted approach, this could be an effective measure to deter offenders who take advantage of vulnerability of children.

This law is in conformity with Article 53 of United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines).

53. Legislation preventing the victimization, abuse, exploitation and the use for criminal activities of children and young persons should be enacted and enforced.[18]

Acts Endangering Sovereignty, Unity and Integrity:

One of the primary functions of a State is to protect its sovereignty and integrity. Every sovereign nation has to be armed with legislation to punish the conduct of those who endanger the security and integrity. Acts that create public disorder are to be curbed. The IPC had a

[17] The Bharatiya Nyaya Sanhita, 2023 S.95.

[18] *United Nations Guidelines for the prevention of juvenile delinquency (the Riyadh guidelines) | ohchr*. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-guidelines-prevention-juvenile-delinquency-riyadh (Accessed: 29 October 2024).

provision for Sedition under Section 124A which made acts that bring or attempt to bring hatred or contempt, or excite or attempt to excite disaffection towards the Government established by law.[19] However, constitutionality of the same was under scrutiny on the ground of violation of Article 19(1)(a) *freedom of speech and expression* of the Constitution. The Supreme Court in *Tara Singh V. State of Punjab* had struck down Section 124A for being violative of freedom of speech and expression.[20] However, after the first amendment of the Constitution, the two phrases, 'in the interest of the security of the State' and 'public order' were added to Article 19(1)(2). This amendment apparently brought Section 124A within the purview of reasonable restrictions on right to freedom. Thereafter, the Supreme Court in *Kedarnath Singh V. State of Bihar*[21] meticulously interpreted the term 'public order' maintaining a balancing between security of State and freedom of speech and expression of the citizens.

BNS has repealed Sedition in its attempt to decolonize the criminal laws and introduced a new provision, that is, Section 152- Act endangering sovereignty, unity and integrity of India. The section states-

Whoever, purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial means, or otherwise, excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India; or indulges in or commits any such act shall be punished with imprisonment for life or with imprisonment which may extend to seven years, and shall also be liable to fine.[22]

The report of Supreme Court Committee on Bharatiya Nyaya Sanhita, applauded the Governmet for repealing Sedition and introducing the law without compromising the security of the State.[23] The language of the provision appears to be broad. This may potentially lead to misuse of the section. The term 'subversive' literally means- 'a systematic attempt to overthrow or undermine a government or political system by persons working secretly from within'.[24] The term is undefined under the Act due to which a wide range of actions will fall under its

[19] Indian Penal Code, S 124A.
[20] AIR 1951 EP 27.
[21] 1962 AIR 955, 1962 SCR SUPL. (2) 769.
[22] The Bharatiya Nyaya Sanhita, 2023, S.152.
[23] *Two hundred and Forty Sixth Report on The Bharatiya Nyaya Sanhita, 2023 (presented to the Chairman, Rajya Sabha on 10th November 2023).*
[24] *Definition of SUBVERSION*, Merriam-Webster: America's Most Trusted Dictionary, https://www.merriam-webster.com/dictionary/subversion (last visited Oct. 29, 2024).

purview It may include the action of legitimate questioning or criticizing the Government. Consequently there is a hazard of targeting peaceful protestors, legitimate opponents and activists. There is possibility of infringement of freedom of speech and expression. Further, terms like 'financial means', 'separatist activities' too lack clarity.

The law on Sedition was settled by the Supreme Court. However, vague and ambiguous terms in Section 152 of BNS may create a stir requiring fresh interpretation by the High Courts and the Supreme Court. The terms might be interpreted inconsistently by different courts in different cases. The role of Supreme Court in this regard will be crucial to settle the law.

Handcuffing: Balancing Security and Human Rights

Maneka Gandhi case[25] has tremendously expanded the scope of Article 21 covering a variety of rights within its ambit. Article 21 comprises of the term 'personal liberty' which includes all other relevant rights . The right to life and personal liberty enshrined in the article is not only confined to protection of limb and faculty but also includes 'the right to live with human dignity and not mere animal existence.'[26] One of the features of personal liberty is the rights of arrestee. On several occasions, the Supreme Court has condemned the violation of rights of arrestee, including use of fretters and handcuffing. Indiscriminate handcuffing is a violation of Articles 14, 19 and 21 of the Constitution.

Section 43, sub-section (3) of The Bharatiya Nagrik Suraksha Sanhita, 2023 (BNSS) provides-

(3) The police officer may, keeping in view the nature and gravity of the offence, use handcuff while making the arrest of a person or while producing such person before the court who is a habitual or repeat offender, or who escaped from custody, or who has committed offence of organised crime, terrorist act, drug related crime, or illegal possession of arms and ammunition, murder, rape, acid attack, counterfeiting of coins and currency-notes, human trafficking, sexual offence against children, or offence against the State.[27]

Hence handcuffing is made a rule at the time of arrest (upon consideration of gravity of offence), while producing before court, in case of habitual offenders, who escapes from custody

[25] Maneka Gandhi V. Union of India 1978 AIR 597.
[26] A.D.M. Jabalpur V. S. Shukla, A.I.R. 1976 S.C. 1207 .
[27] See The Bharatiya Nagrik Suraksha Sanhita, 2023, Section 43 (3).

and for offences mentioned in the provision. This outrightly overrules a number of decisions of the Supreme Court condemning handcuffing. In *Sunil Batra V. Delhi Administration,* the Supreme Court emphasized handcuffing should not be resorted to as a punishment. The Court further stated that indiscriminate use of handcuffs for accused when they are taken to and from court shall be stopped save in a small category of cases.[28]

In *Prem Shankar Shukla V. Delhi Administration*[29], Supreme Court ruled that The Supreme Court ruled that handcuffing is inhuman, unreasonable, and arbitrary. In *Citizens for Democracy V. State of Assam*[30], the Apex Court issued guidelines for the use of handcuffing at the time of arrest and later. Handcuffing should be used only to prevent escape of accused from custody. Supreme Court directed the police authorities to avoid handcuffing unless it is absolutely necessary and to preserve the dignity of an individual. Rule 47 (1) and (2) of *The United Nations Standard Minimum Rules for the Treatment of Prisoners* (also known as the Nelson Mandela rules) prohibits the use of chains, irons or other instruments of restraint. Rule 48 provides restrictive use of handcuffs only when lesser control is ineffective to be imposed for a limited period.[31] Section 43 of BNSS uses the term 'habitual offenders', which is not defined under the Act. Over-reliance on the past criminal records of a person cannot justify the infringement of his right to freedom.

The use of handcuffs does not have to be a normal practice but exercised cautiously when there is risk of fleeing of the accused. An accused may be declared as innocent at the end of trial, yet the humiliation caused to him due to handcuffing remains irreparable. It will be a significant setback to his reputation and dignity leading to social stigma.

Introduction of Zero F.I.R.

The filing of First Information Report (FIR) or a criminal complaint before the Magistrate initiates the process of criminal justice. Right to complain is the primary right of a victim. FIR implies a document prepared by the police when they receive information about a cognizable offence. *United Nations Declaration of Basic Principles of Justice for Victims of Crime and*

[28] (1978) 4 SCC 409.
[29] AIR, 1980 SC 1535.
[30] 1995 3 SCC 743.
[31] *The United Nations Standard Minimum Rules for the ...* Available at: https://www.unodc.org/documents/justice-and-prison-reform/Nelson_Mandela_Rules-E-ebook.pdf (Accessed: 29 October 2024).

Abuse of Power declares that victims are entitled to access to the mechanisms of justice and to prompt redress for the harm they have suffered (Article 4), and that Judicial and administrative systems should be created or reinforced as needed to ensure victims can seek redress through speedy, fair, affordable, and accessible formal or informal processes (Article 5)[32]

Section 154 of IPC and now Section 173 of BNSS deal with information in cognizable offences. Zero FIR means that an FIR can be lodged at any police station irrespective of the jurisdiction. This ensures quick action by the police authorities. The Supreme Court has repeatedly emphasized upon the necessity of the same in some landmark cases. In *Lalita Kumari V. Govt. of U.P.*[33]*,* The Supreme Court issued guidelines for mandatory filing of FIR if the information given to the police discloses commission of a cognizable offence. In *State of AP V. Punati Ramulu*[34] the Supreme Court held that, FIR in cases when place of crime does not fall within jurisdiction, have to be recorded and later forwarded to the police station having jurisdiction.

Section 173 (1) of BNSS states that –

Every information relating to the commission of a cognizable offence, irrespective of the area where the offence is committed, may be given orally or by electronic communication to an officer in charge of a police station,[35]

Through the words, '*irrespective of the area where the offence is committed*' BNSS has introduced the concept of Zero FIR. It shall ensure that the investigation process starts promptly, preventing loss of crucial evidences or witnesses for want of jurisdiction.

Remand and Rights of Accused:

Provision for remand under Section 176 of the Criminal Procedure Code, 1973 was consistent with Article 22 of the Constitution securing the right of accused to be produced before Magistrate within 24 hours of arrest, and right not to be detained beyond 24 hours without the authority of a Magistrate. However, there was an ambiguity as to the extent of police custody

[32]*Declaration of basic principles of justice for victims of crime and abuse of Power | Ohchr*. Available at: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse (Accessed: 29 October 2024).
[33]AIR 2014 SC 187 : (2014) 2 SCC 1.
[34] AIR 1993 SC 2644 : 1993 Cr. L J 3684.
[35] The Bharatiya Nagrik Suraksha Sanhita,2023 S.173(1).

beyond 15 days. The Supreme Court, in *CBI V Anupam J Kulkarni*[36] made it clear that police custody after 15 days shall be impermissible. Section 187 (2) states that-

Judicial Magistrate, considering whether the accused has been released on bail or if their bail has been cancelled, may grant Police custody for a term not exceeding fifteen days in the whole or in parts at any time in the initial 40 days (for offences where punishment is less than 10 years) or 60 days (for offences where punishment is 10 years or more).[37]

Thus, it clarifies that police custody cannot be granted for more than a total of 15 days (either in whole or partially) in the initial 40 or 60 days with respect to the offence committed. It is not mandatory now that police custody shall be granted in the initial 15 days immediately after arrest. Police authorities may seek remand either in whole or in part during the 40 or 60 days respectively. A plain reading of sub-section (3) may be misinterpreted by the executive that custody is not limited to 15 days. It was a common practice that the accused would get himself admitted in hospital during initial 15 days of custody to escape police remand. Section 187 shall resolve the problem which caused hindrance in the investigation process. Although, there may be instances when Police authority seeks remand in parts and in the meanwhile, during judicial custody, the Court may have granted bail. Later, if the police seek remand for the remainder of the 15 days, can the bail already granted be reversed? The Supreme Court will have to issue guidelines with respect to the ambiguity.

Examination of Complaint

Section 223 of BNSS corresponds to Section 200 of CrPC making it mandatory upon a Magistrate to examine the complainant and witnesses on oath while taking cognizance of an offence complained of. An additional mandate is imposed upon Magistrate under proviso to Section 223 of BNSS, which says that no cognizance of an offence shall be taken without giving an opportunity of being heard to the accused.[38] The section overrules decision of Supreme Court that accused has no right to be heard at the stage of examination of complainant or to cross examine his witnesses.[39] The provision shall ensure fairness preventing one sided decision. Intention of the provision is to reduce the possibility of false implication by giving

[36] (1992) 3 SC 141.
[37] The Bharatiya Nagrik Suraksha Sanhita,2023 S.187(2).
[38] The Bharatiya Nagrik Suraksha Sanhita,2023 S. 223.
[39] State of UP V. Surinder Mohan AIR 2000 SC 1862.

an additional opportunity. The provision is welcomed as it ensures the right to a fair trial for the accused.

Section 223 of BNSS may lead to delay in initiation of criminal proceedings. Further, the provision fails to mention as to what procedure shall be followed if the court concludes upon findings that accused was falsely vexed. The provision might defeat the timelines set by BNSS for criminal proceedings. In *Chandra Deo Singh V. P.C. Bose* [40] observed that a parallel trial before the Magistrate proceeds with the trial will potentially overburden the Court.

In a recent case, an issue arose before the High Court of Karnataka – whether on presentation of the complaint, notice should be issued to the accused? The Court issued guidelines for procedure under Section 223 directing that Magistrate shall examine the complainant on oath, examine witnesses and reduce the substance into writing. Subsequently, Magistrate shall issue notice to the accused giving him an opportunity of being heard. Thereafter, take cognizance of the offence.

Bail and Bond

An undertrial is a person who is either in remand or judicial custody while investigation is pending. There have been many incidents where under trial prisoners languished in jails for a period more than the maximum imprisonment prescribed for the offence they are charged with. The Supreme Court in *Hussainara Khatoon*[41] judgement observed that, "An alarmingly large number of men and women, including children are behind prison bars for years awaiting trial in courts of law. It is a crying shame on the judicial system which permits incarceration of men and women for such long periods of time without trial." Hence, 436A was inserted in CrPC by an amendment in the year 2005. The said provision stated that maximum period for which undertrial prisoner can be detained if offender has served half of maximum punishment provided for the offence, he shall be released on bail.[42] The provision was introduced with an intention of safeguarding the right to speedy trial of an accused guaranteed under Article 21 of the Constitution.

Section 479(1) of BNSS has an additional proviso which states that first-time offender shall be

[40] AIR 1963 SC 1430.
[41] AIR 1819, 1979 SCR (3) : 1980 (1) SCC 115.
[42] The Criminal Procedure Code, 1973, S. 436A.

released on a bond by the Court, if he has undergone detention for the period extending up to one-third of the maximum period of imprisonment specified for such offence under that law. The provision may further ease the burden of jails by ensuring release of a greater number of undertrials. Sub-section (2) states that an undertrial shall not be released on bail if an investigation, inquiry or trial in more than one offence or in multiple cases are pending against him.[43] Thus, it is evident that an accused may have to serve maximum punishment even if acquitted at a later stage, in all or any of the charged offences. The principle of presumption of innocence may be overlooked while hearing a bail application. Sub-section (2) takes away judicial discretion in adjudication of bail application where accused is tried for multiple cases.

In *Purkayastha v. State (NCT of Delhi)*[44] the Delhi High Court observed that "The Right to Life and Personal Liberty is the most sacrosanct fundamental right guaranteed under Articles 20, 21 and 22 of the Constitution of India. Any attempt to encroach upon this fundamental right has been frowned upon by this Court in a catena of decisions."

Conclusion

The three criminal laws- The Bharatiya Nyaya Sanhita, Bharatiya Nagrik Suraksha Sanhita and Bharatiya Sakshya Adhiniyam have marked a significant step towards decolonizing the criminal justice system of India. The legislative changes are an attempt to address the lacunae in safeguarding human rights of the victim as well as the accused. Inclusion of transgenders in the definition of gender, mental illness replacing unsoundness of mind and criminalization of persons employing children for commission of crimes are admirable measures to guarantee rights of groups marginalized under the old laws. However, the definitions will further require interpretation by the Courts for clarity and uniformity.

The procedural laws too have their implications. Some of those appear to be effective in curbing human rights infringement while others creating ambiguity leading to an impediment in achieving objectives of the said Acts. Ambiguous provisions of procedure will require a close scrutiny by the judiciary to fill in the gaps. Section 152 of BNS, laws of handcuffing will have to be supplemented by guidelines from the Supreme Court to prevent potential misuse and

[43] The Bharatiya Nagrik Suraksha Sanhita,2023, S. 579.
[44] 2024 SCC Online SC 934.

violation of fundamental rights. While inclusion of provisions of Zero FIR, remand procedures and bails are equally important.

The success of these changes will depend on the effective implementation by police and investigating authorities, and interpretation of the legislations by the judiciary. The laws introduced or amended with the aid of new laws will have to undergo a process of scrutiny and stand the test of time for its effective and desired implication.