
BALANCING ACT: NAVIGATING POLICE DISCRETION AND ACCOUNTABILITY UNDER THE BNSS

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ABSTRACT

This paper examines the paradox within the Bharatiya Nagarik Suraksha Sanhita (BNSS), that, on one hand, the BNSS monitors police actions at every stage, showing that the law doesn't fully trust the police. On the other hand, it also grants significant discretionary powers to the police, leaving room for misuse of authority in the procedural law. The paper analyses key stages of police involvement, from the registration of FIRs to the investigation process, to highlight how these gaps can be exploited. It begins by examining how Section 173 mandates the registration of an FIR while also introducing a provision for preliminary inquiry, giving police discretionary power. It then discusses the police's power to investigate under Sections 175 and 176, as well as their authority to record witness statements under Sections 180. Finally, the paper explores the magistrate's enhanced role in overseeing investigations to ensure police accountability, and to understand the evolving balance between police authority and judicial control, which makes our criminal procedural law lean towards the due process model.

INTRODUCTION

The criminal justice system in India is built on three major pillars: the judiciary, the prosecution, and the police, among these, the police play a crucial role as they are responsible for conducting investigations, which form the foundation of any criminal case, being the first point of contact with witnesses, victims, and suspects, the police hold significant authority in shaping the course of an investigation.¹ However, these interactions are not without restrictions, While the Bharatiya Nagarik Suraksha Sanhita (BNSS) imposes necessary restrictions to prevent abuse and ensure accountability. However, the lid of the container remains slightly open, allowing the police a degree of discretion in their decision-making. This paper will understand this delicate balance between discretion and limitation in particularly sections 173, 175,176, and 180.

THE FIR DILEMMA

The registration of an FIR marks the first stage of the process. Analyzing this step serves as a strong starting point for this discussion. Under Section 154 of the CrPC, now Section 173 of the BNSS, the police are obligated to register an FIR upon receiving information about a cognizable offense. However, this mandate was diluted in *Lalita Kumari v. Government of Uttar Pradesh*, where the police refused to register an FIR regarding the alleged kidnapping of a minor girl.² Where police's main contention was that they come across lot of false cases of such type, thus demanding for a 'breathing space' before registration of FIR.

The main issue in front of the above court was, "whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused".³ as in Indian society, accusation is as bad as conviction, where society sees you with judgy eyes, even before you are proven guilty.

To solve the issue court in this case came up with the concept of preliminary inquiry, where police before registering a FIR can conduct preliminary inquiry. This is only to ascertain whether cognizable offence is disclosed or not. The court further stated that the category of

¹ Pooja, 'Powers of Police: A Context of India According to Bharatiya Nagarik Suraksha Sanhita' [2024]

² *Lalita Kumari v Government of Uttar Pradesh & Ors* (2013) 2 SCC

³ *Ibid* para [22]

cases in which preliminary inquiry may be made are as under:

- a) Matrimonial disputes
- b) Commercial offenses
- c) Medical negligence cases
- d) Corruption cases⁴

Is the police getting more discretionary power through this?

Crpc didn't include the concept of preliminary inquiry but was followed in general as precedent laid in Lalita Kumari case, but this concept crystalize in section 173(3) of BNSS which explicitly include a preliminary inquiry to be conducted, upon receiving information regarding cognizable offence, the officer in charge of the police station is empowered to either conduct a preliminary enquiry within fourteen days to determine the existence of a prima facie case or proceed directly with the investigation if such a case is evident this decision, however, requires prior approval from a senior officer not below the rank of Deputy Superintendent of Police⁵.

This provision is being criticized for giving police officers greater discretionary power, as this could lead to situations where legitimate complaints will get dismissed, denying justice to victims.⁶

The provision goes against the Lalita Kumari, which mandates that FIRs must be registered without delay whenever information discloses a cognizable offense. Also, the 14 day period for conducting a preliminary inquiry under the BNSS is directly against the 7 days given in the Lalita Kumari case.⁷ This provision places the complainant at the mercy of police officers who may, for various reasons, decide against registering an FIR even if a cognizable offence is disclosed, leading to situations where legitimate complaints are not pursued, thereby denying

⁴ Ibid para [110]

⁵ Bharatiya Nagarik Suraksha Sanhita, 2023 s 173 (3)

⁶ Balancing Act: The Discrepancy Between Section 173(3) BNSS and the Supreme Court Ruling in Lalita Kumari' (NUJS SACJ, 2025) <https://www.nujssacj.com/post/balancing-act-the-discrepancy-between-section-173-3-bnss-and-the-supreme-court-ruling-in-lalita-kum> accessed 21 March 2025.

⁷ Lalita Kumari v Government of Uttar Pradesh & Ors (2014) 2 SCC

justice to the aggrieved party.⁸ this creates the possibility that the more influential party can influence the course and increase the corruption within the police department.

This results in a significant inconsistency, as the BNSS allows police discretion in cases involving more serious offenses punishable by three to seven years, in contrast, it mandates the immediate registration of FIRs for comparatively less severe offenses, where the punishment is up to two years, the rationale behind prohibiting preliminary inquiries for cognizable offences with less than three years of imprisonment is unclear.⁹

However, supreme court in several cases has emphasized again and again how FIR registration is important as soon as the info for cognizable offence is received. In the case Central Bureau of Investigation (CBI) and Anr. v. Thommandru Hannah Vijayalakshmi @ T. H. Vijayalakshmi and Anr, court stated as follow-

“9 (iii) A Preliminary Enquiry is only conducted when the information received is not sufficient to register a Regular Case. However, when the information available is adequate to register a Regular Case since it discloses the commission of a cognizable offence, no Preliminary Enquiry is necessary.”¹⁰

In another case the case Ravindra Sakhwar vs The State Of Madhya Pradesh court faced with the issue whether FIR in absence of preliminary enquiry is bad? Court held that *“the scope of a Preliminary Enquiry is not to ascertain the veracity of the information, but only whether it reveals the commission of a cognizable offence.”¹¹*

In the recent case of *Pradeep Nirankarnath Sharma vs The State of Gujarat* on March 17, 2025, the Supreme Court reaffirmed that a preliminary inquiry is only warranted when the information received does not *prima facie* disclose a cognizable offence and requires further verification, the Court also emphasized that if a preliminary inquiry results in the closure of the complaint, a copy of the closure entry must be promptly provided to the first informant, no

⁸ Balancing Act: The Discrepancy Between Section 173(3) BNSS and the Supreme Court Ruling in Lalita Kumari' (NUJS SACJ, 2025) <https://www.nujssacj.com/post/balancing-act-the-discrepancy-between-section-173-3-bnss-and-the-supreme-court-ruling-in-lalita-kum> accessed 21 March 2025.

⁹ Ibid

¹⁰ CBI and Anr v Thommandru Hannah Vijayalakshmi @ T H Vijayalakshmi and Anr (2021) SCC OnLine SC 923 para [9][iii]

¹¹ Ravindra Sakhwar v State of Madhya Pradesh (2024) MPHC.

later than one week.¹²

Enhanced magistrate role?

Under the CrPC, if the SHO declines to register an FIR, the complainant may submit the complaint to the SP through registered post, he/she is then required to ensure an investigation is conducted, in contrast, the BNSS allows the complainant to escalate the matter further by approaching the Magistrate with an affidavit if no relief is granted by the SP.¹³ Under Section 175(3) of the BNSS, the Magistrate has the authority to direct an investigation. While this provision strengthens the complainant's ability to seek judicial intervention, the Magistrate's supervisory power of the preliminary inquiry remains limited. The oversight is largely reliant on entries made in the General Diary.

EVALUATING SECTIONS 175 AND 176 BNSS

The next critical stage in the criminal justice process is the investigation, where the police play a pivotal role. Under Sections 175(1), 175(2), and 176 of the BNSS, the police are empowered to conduct investigations in cognizable offenses. However, knowing the distrust of Indian police, BNSS introduces an additional layer of judicial oversight, the Magistrate is required to carefully examine the complaint application, the accompanying affidavit, and the police officer's submissions before ordering an investigation.¹⁴ Further, **Section 175(4)** establishes a **protection mechanism** specifically for public servants. Before proceeding with any complaint against a public servant, the Magistrate must consider the version of the accused and obtain a report from their superior officer to verify the facts. However, this also faces criticism this new subsection, unlike Section 156 of the CrPC, raises concerns that it could be misused to protect officials from being held accountable. The stricter rules and extra steps might discourage people from filing genuine complaints.¹⁵

Over time, there has been enhancement of the magistrate's supervisory power in investigation. In *State of Bihar v. A.C. Saldanha* (1980), the Supreme Court held that a Magistrate has the authority to order the reopening of an investigation even after the police have submitted their

¹² Pradeep Nirankarnath Sharma v State of Gujarat (2025) SC

¹³ Pooja, 'Powers of Police: A Context of India According to Bharatiya Nagarik Suraksha Sanhita' [2024].

¹⁴ Bharatiya Nagarik Suraksha Sanhita, 2023 s 175 (3).

¹⁵ Comparative Analysis of Code of Criminal Procedure 1973 and Bharatiya Nagarik Suraksha Sanhita 2023' (Bar & Bench, 2023) <https://www.barandbench.com/columns/comparative-analysis-of-code-of-criminal-procedure-1973-and-bharatiya-nagarik-suraksha-sanhita-2023> accessed 21 March 2025.

final report.¹⁶ A landmark judgment further reinforcing this principle is *Sakiri Vasu v. State of U.P.*, where the Court clarified that Section 156(3) of the CrPC grants the Magistrate broad powers to ensure a proper investigation, this includes the authority to direct the registration of a FIR and to order further investigation if the police have failed to conduct it adequately, the Court emphasized that while the provision is briefly worded, it encompasses all incidental powers necessary to guarantee a thorough and fair investigation.¹⁷

A key clarification was made in *Union of India v. Prakash P. Hinduja & Another* (2003), where the Supreme Court observed that a Magistrate cannot interfere in an ongoing police investigation¹⁸. However, the Court in *Sakiri Vasu* distinguished this ruling, holding that such a restriction applies only when the police are conducting a proper investigation, If the Magistrate finds that the police have failed in their duty, they can intervene under Section 156(3), directing the officer-in-charge to conduct a proper investigation and even monitoring its progress.¹⁹

WITNESS STATEMENTS AND POLICE DISCRETION

Next, we turn our analysis to another crucial aspect of the investigation process — the recording of witness statements. Witness statements play a significant role in criminal trials, often influencing the outcome of the case.²⁰

The discretionary power granted to police officers under Section 161 of the Criminal Procedure Code (CrPC) to record or omit witness statements during investigations has been a subject of significant criticism. This discretion can lead to negligent or dishonest practices, undermining the integrity of the investigation process. Thirty-Seventh Report, the Law Commission of India highlighted this concern and recommended that police officers be legally obligated to document the statements of all witnesses whom the prosecution intends to examine at trial.²¹ Legal analyses have further criticized the challenges and manipulations in recording witness statements under Section 161 CrPC, investigating officers have been accused of

¹⁶ State of Bihar and Anr v JAC Saldanha and Ors (1980) 1 SCC 554.

¹⁷ Sakiri Vasu v State of Uttar Pradesh and Ors (2008) 2 SCC 409.

¹⁸ State of Karnataka and Anr v Pastor P Raju (2006) 6 SCC 728.

¹⁹ Sakiri Vasu v State of Uttar Pradesh and Ors (2008) 2 SCC 409.

²⁰ Arthita Halder, 'Protection to the Witnesses under CrPC' (2024) 4(2) Indian Journal of Law and Legal Research.

²¹ 'Examination of Witnesses and Record of Their Statements: Sections 161 and 162' (Advocate Khoj) <https://www.advocatekhoj.com/library/lawreports/codeofcriminalprocedure/12.php> accessed 21 March 2025.

engaging in practices like coercion, fabrication, and the deliberate omission of vital information.²²

Additionally, studies on police investigations in India have documented instances where officers exercise unacknowledged discretion in recording victim statements, particularly in sensitive cases like dowry-related deaths.²³ This discretion can lead to biased investigations and unjust outcomes.

To curb this issue courts in various cases have given guidelines to police for witness statement recording, **Justice R Suresh Kumar and Justice KK Ramakrishan** said witness statements are often recorded in a "stereo-type manner" and said "*The Investigation Officers do not record the statement as given by the witnesses and the same leads to a number of contradictions and improvement in the eye of the accused*"²⁴. While Section 161 CrPC, provides essential flexibility for effective investigations, the misuse of this discretion remains a significant concern.

CONCLUSION - THE WAY FORWARD

The Bharatiya Nagarik Suraksha Sanhita (BNSS) attempts to strike a balance between ensuring police accountability and granting them necessary discretionary powers. However, this duality often results in misuse of authority. While judicial interventions and legislative reforms have sought to regulate police discretion, issues like arbitrary decision-making in recording of FIR, manipulation of investigations, and selective recording of witness statements remains a serious concern. Strengthening the role of the judiciary, enforcing stricter oversight mechanisms, and ensuring the mandatory documentation of witness statements are crucial steps toward safeguarding the integrity of the criminal justice system. Moving forward, a more transparent and accountable investigative process is essential to restore public trust in the police and legal system.

²² 'Section 161 CrPC: Challenges and Manipulations in Witness Statement Recording' (Legal Service India) <https://www.legalserviceindia.com/legal/legal/article-16664-section-161-crpc-challenges-and-manipulations-in-witness-statement-recording.html> accessed 21 March 2025.

²³ Sreekanth Reddy and others, 'Perceptions of Medical Students Towards Witnessing and Reporting Medico-Legal Cases in India' (2015) 7(1) Journal of Forensic and Legal Medicine. <https://pmc.ncbi.nlm.nih.gov/articles/PMC4338498/> accessed 21 March 2025.

²⁴ 'Madras High Court: Witness Examination by Police under Section 161 CrPC Should Be Audio-Visually Recorded in Serious Offences' (Live Law, 2024) <https://www.livelaw.in/high-court/madras-high-court/madras-high-court-witness-examination-by-police-161-crpc-audio-visual-recording-serious-offences-238849> accessed 21 March 2025.