
Increased Police and Magistrate Powers under BNSS: A Cause for Concern or Procedural Efficacy?

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Abstract

Through victim-centric changes (such as direct asset distribution under S.107) and procedural modernization (required audiovisual evidence under S.185), the Bhartiya Nagarik Suraksha Sanhita (BNSS) represents a revolutionary departure from colonial criminal process. This report highlights a crucial conflict, though: whereas the BNSS improves rights in some areas, it also increases police and judiciary authority without sufficient protections, raising the possibility of systemic abuse. Central concerns include preventive powers, preliminary enquiries, handcuffing, and ex-parte asset attachments. The historical abuse of these powers against dissidents and underprivileged communities is demonstrated by judicial precedents (Medha Patkar, Rajender Singh Pathania). A rights-protection deficiency results from the BNSS's limited operational scopes or lack of strong transparency requirements (such as written reasons and judicial oversight timetables). The study comes to the conclusion that the BNSS runs the possibility of sustaining colonial-era authoritarianism under the pretense of indigenization if immediate changes are not made, such as sunset clauses for attachments and court consent for handcuffing. This would place the onus of protecting rights on an overworked judiciary.

Introduction

The Bhartiya Nagarik Suraksha Sanhita for a long time had been seen as a means to achieve indigenization of colonial criminal procedural laws. The primary rationale for this was that the colonial laws had a suppressive nature, and it did in fact, ultimately reflect in our own framework which were the root causes for judicial activism leading to landmark judgements such as *Hussainara Khatoon case*¹ or *Khatrri vs State of Bihar*² with regards to procedural delays and accountability.

A lot of the newer reforms have been introduced which had previously been demanded. There is a divergence in the BNSS from the CrPC. It is not merely old wine in a new bottle. While the legislators have primarily sought to implement the recommended precedential reforms positively for the parties to the case, and usually negatively for the enforcing authorities to eradicate arbitrary discretion. This goes in line with the victim-centric reforms, enhancing of rights of accused, incorporation of scientific mechanisms, and simplification of procedure. However, an exception to this arises with regards to enhancement of police and magistrate powers.

There has been an effort on behalf of the legislators to not only retain some of the more archaic provisions of police and magistrate's authority, but also numerous provisions to upgrade them. The law will remain unenforced if there is inadequate authority with the law enforcing bodies themselves. The police and the magistrate have the sole responsibility of upholding the procedure, but without safeguards to authority, it remains vulnerable to exploitation.

This is why, it becomes imperative to assess whether the powers granted to the police and magistrate come off as excessive or have been adequately implemented with proper legislative safeguards to curb such authoritative discretion. The purpose of this research devolves down to an extensive judicial and legislative analysis of the implications of these provisions to ultimately determine whether they are beneficial or detrimental to the evolution of criminal procedural laws in the country.

¹ *Hussainara Khatoon & Ors. v. State of Bihar*, AIR 1979 SC 1369

² *Khatrri & Ors. v. State of Bihar*, AIR Online 1980 SC 102

List of Relevant Changes in the BNSS

New Provisions	Enhanced Power
S. 172	Police can now detain or remove any person resisting or refusing to follow the directions passed by the police officer. ³
S. 173(3)	Mandates preliminary inquiry to be carried out within 14 days from receipt of cognizable offence punishable with imprisonment of more than 3 years but less than 7 years. ⁴
S. 107	Allows for attachment of any property derived from the commission of any offence. Also allows for interim attachment without the requirement for the Magistrate to give the opportunity to the accused to be heard. ⁵
S. 86	Requesting assistance from a contracting state for attachment or forfeiture of a proclaimed offender. ⁶
S. 43(3)	Permitted usage of handcuffs for apprehending accused alleged of committing specified grave crimes. ⁷
S. 185(1)	Police officer is required to record the grounds of his belief for conducting search at a place in the case-diary. ⁸
S. 185(2)	Any search conducted must be recorded through audio-video electronic means. ⁹
S. 185(5)	Makes the police officer accountable to send the copies of any record made within 48 hours to the nearest magistrate. ¹⁰

³ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 172

⁴ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 173(3)

⁵ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 107

⁶ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 86

⁷ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 43(3)

⁸ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 185(1)

⁹ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 185(2)

¹⁰ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 185(5)

As clearly visible, certain new powers have been granted to the police which seem to be easily exploitable as listed in sections 43(3), 86, 107, 172, and 173(3). Whereas section 185 has introduced new provisions which clearly aim to limit the powers of the police when it comes to the search process. The research will tackle each new provision individually.

Preventive Action

The chapter of preventive action as a whole is not a new concept. It has been fully carried over from the Code of Criminal Procedure to the BNSS. They are encapsulated under Chapter XII titled preventive action of the police from section 168 to section 172. This provision has always been quite controversial. There has been severe misuse by the police who have invoked “breach of peace” to suppress peaceful dissent of protesters.¹¹ The court has responded to this with granting of compensation and declaring such an act in violation of Article 21.¹² There has been misuse in non-criminal matters as well to which the court has held such action illegal.¹³

The concept of preventive action isn't necessarily a legislative invention. Preventive detention has been explicitly endorsed in the Constitution under Article 22.¹⁴ It acknowledges the legislative authority of the parliament to enshrine a law based on preventive detention and further asserts certain safeguards. It is ultimately a necessary step to prevent a greater evil.¹⁵ However, the constitutional safeguards are often undermined or neglected in general. In *Rajender Singh Pathania vs State of NCT of Delhi*, the apex court had to quash certain arrests made on mere suspicion.¹⁶ In *Cherukuri Mani vs State of Andhra Pradesh*, the authorities bypassed Article 22(4) by ignoring the 3-month limit without advisory board review.¹⁷ The court also acknowledged the rampant misuse of preventive detention in the Allahabad High Court NSA Statistics.¹⁸

¹¹ *Medha Patkar v. State of Madhya Pradesh & Anr.*, 2008 Cri LJ 47

¹² *Id.* at 31.

¹³ *Keshar Kumar v. State*, 2008 Cri LJ 233 (Del)

¹⁴ The Constitution of India, art. 22

¹⁵ *Haradhan Saha & Anr. v. The State of West Bengal & Ors.*, AIR 1974 SC 2154

¹⁶ (2011) SCC OnLine SC 1091

¹⁷ (2014) SCC OnLine SC 439

¹⁸ Kaunain Sheriff M., “94 out of 120 orders quashed: Allahabad High Court calls out abuse of NSA in Uttar Pradesh” *The Indian Express*, Apr. 7, 2021

However, the Court itself cannot be considered a guardian angel against misattribution of discretion. In *Union of India vs Dimple Happy Dhakad*, the court endorsed the state's subjective satisfaction of preventive detention in custody.¹⁹ Excessive police discretion combined with lack of uniformity in judicial precedents regarding safeguards to this necessary evil should have been a cue to the legislators to put an absolute provision in the BNSS. A counter to such uncertainty will always be codified law, yet the drafters have gone the opposite direction and introduced section 172. This provision pertains to two elements:

- Any police giving any order in fulfilment of his duty, has a binding effect on the person being ordered.
- On refusal of compliance, the police has unfettered discretion to detain or remove them.

There are two inherent safeguards in this provision. In clause (2), the police is to either take such person before a Magistrate, or, in petty cases, release him as soon as possible within 24 hours. The other safeguard in clause (1) is that the police, can only do this, in fulfilment of any of his duties. This would limit the police powers to defined police duties. However, the judicial interpretation of 'duty' has been broadly defined. Court's have historically interpreted police directions to be justified if they are "reasonably connected to maintaining public order".²⁰ There are also various provisions which give vague duties to the police such as preventing disturbance, which would enable overreach in such cases. 'Ignoring' or 'Disregarding' also remain ambiguous. The BNSS has sought to increase transparency by inclusion of 'written justification' in various provisions for any action taken by any authority, but this is clearly absent in the given provision. Perhaps a deliberate inclusion, this burdens the court with inserting safeguards into the provision through precedential authority and doesn't solve the problem proactively, as it has always done.

The new provision will only work towards enhancing authoritative discretion for the remaining preventive action sections in the BNSS, which have not been modified in the slightest. Overall, preventive action has been strengthened without the balance needed with adequate safeguards and leaves the floor open for excessive exploitation.

¹⁹ *Union of India v. Dimple Happy Dhakad*, AIR 2019 SC 3428

²⁰ *Kharak Singh v. The State of Uttar Pradesh & Ors.*, AIR 1963 SC 1295

Preliminary Enquiry

A major change has been implemented with regards to powers of the police to investigate. Section 173 of the BNSS, an adaption of Section 154 of the CrPC, includes a new provision endorsing preliminary enquiry. Preliminary enquiries had never been statutorily permitted but had been allowed for certain cases with prior judicial precedents such as corruption against public servants²¹ or complex economic offences.²²

It was eventually standardized in the *Lalita Kumari* judgement wherein, the Court held that the police have no authority or justification to postpone registration of FIR and that investigation cannot and should not be done before the registering of an FIR for cognizable offences. There are only a handful number of circumstances wherein it would be permitted.²³

The scope of preliminary inquiry has been broadened under Section 173(3). It now mandates the police to conduct a preliminary enquiry for any cognizable case which is punishable above 3 years and below 7 years.²⁴ Preliminary enquiries were particularly prohibited by the Supreme Court due to their obstruction of timely investigations and their propagation of class divide. With the large-scale underhanded corruption that goes ignored, the police will be in a position to coerce the victim to get their FIR registered. For any crimes which are politically motivated, it would be particularly harder to get the FIR registered when political forces are able to suppress police authority for registration of FIR against them.

Another issue comes from the 14-day period delineated to conduct this enquiry. This provision completely defeats the purpose of timely investigation. Certain offences keep amplifying with time for example, in cases of domestic abuse, child labour, or doing any act which endangers human life or personal safety of others. A preliminary enquiry would also give time or opportunity to the accused to destroy the evidence before formal investigation procedures initiate and would go against effective investigation methods.

²¹ *P. Sirajuddin etc. v. State of Madras etc.*, AIR 1971 SC 520

²² *Shashikant v. Central Bureau of Investigation & Ors.*, AIR 2007 SC 351

²³ *Lalita Kumari vs State of Uttar Pradesh & Ors.*, [2013] 14 SCR 713

²⁴ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 173(3)

The rationale for its inclusion seems to hinge on unburdening the court and police of frivolous and false cases. This has been a rising concern in the country with the statistics backing it. However, the trade-off is quite questionable. The bench in *Lalita Kumari* was adamant about the prohibition of preliminary enquiries and for all the right reasons. Class divide, hindrances in investigation, defeating of the purpose of law, and large potential for exploitation should not be sacrificed for procedural efficiency. There is also no safeguard against this besides from the judicial precedent which is now in conflict with the new law. This also goes against the victim-centric approach that the BNSS had sought to achieve. The inclusion of this provision should be considered very controversial and problematic and is likely to be confronted by the Courts in the near future.

Handcuffs

The usage of handcuffs was initially permitted by the police in the colonial era for certain exceptional cases and completely barred for women.²⁵ In 1978, the Court declared that the usage of handcuffs is a direct violation of dignity under Article 21 and violation of freedom of movement under Article 19. Justice Krishna Iyer called it a slur on our culture.²⁶ It has also ruled that handcuffs should require prior judicial approval and be the last resort.²⁷ In *Citizens for Democracy vs State of Assam*, ULFA detainees were handcuffed in hospitals despite the heavy security, to which the Court mandated compensation.²⁸

Despite definitive rulings, the usage of handcuffs did not subside. It was still heavily used against marginalised groups. The National Human Rights Commission reported against its rampant misuse and its punitive usage. In 2015, the United Nations Standard Minimum Rules for the treatment of Prisoners prevents the usage of such inherently degraded means of restraint.²⁹ Despite the international understanding, the BNSS drifts away from these principles and has permitted the usage of handcuffs for a number of offences in Section 43.³⁰

²⁵ Police Regulations Bengal, 1943, reg. 330

²⁶ *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579

²⁷ *Prem Shankar Shukla v. Delhi Administration*, AIR 1980 SC 1535

²⁸ AIR 1996 SC 2193

²⁹ United Nations Standard Minimum Rules for the Treatment of Prisoners, r. 47

³⁰ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 43

The usage of handcuffs is shunned upon due to a plethora of reasons. Handcuffs have historically been a symbol of oppression. They were used to mistreat slaves and disproportionately torture prisoners. Another key aspect is that the core philosophy of Indian criminal jurisprudence, and one of the major principles of criminal law, is that a person is presumed innocent until proven guilty. The usage of handcuffs is a presumption of guilt, even if only symbolically. This is a grave violation of human dignity.

Onto a more practical aspect, the NHRC's report that there is a widespread usage of handcuffs against marginalised groups who are unaware of their rights. Moreover, certain crimes cannot be held on the same scale for usage of handcuffs as others. Rape, acid attack, sexual offences against children may find justified usage but crimes related to counterfeiting of coins is also placed in the same strata. Overall, however, the crimes enumerated are undoubtedly one of the worst in the society, and usage of handcuffs for such crimes is a grave violation of dignity and social standing with the symbolic gesture that the usage of handcuffs brings to those accused of it, especially if they may be innocent. The gravity of the offence is also to be decided by the police officer making the arrest, once again with no visible transparency such as recording of any reasons. The usage of handcuffs is not internationally, jurisprudentially, or ethically aligned thus, making its inclusion very questionable on its intentions.

Attachment of Proceeds

Section 107 introduces the provision for attachment, forfeiture or restoration of property.³¹ The particularly interesting aspect is its handling of proceeds of crime. In order to understand, let's go through the complete procedural flow of Section 107.

The initiation is done by the police, who needs prior SP approval or Commissioner of Police approval, to apply for attachment of property. The court will analyse if this property qualifies as 'proceeds of crime' before ordering for the attachment.

³¹ The Bhartiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s. 107

The magistrate then issues a show-cause notice for 14 days to allow the person to explain why this shouldn't be attached. Unlike the previously discussed provisions, this one has so far not neglected the principles of natural justice. The Court must then form an opinion. There would be regular hearing after the reply and an ex-parte proceedings if there is no response.

So far, the new provision seems like a nice addition. This is also because, while a similar provision exists in the Prevention of Money Laundering Act, which operates post-conviction, this provision endorses pre-trial seizure with adequate safeguards in place. Furthermore, if declared proceeds of crime, the proceeds would be distributed to persons affected, and then to the government if there lies no other claim. This puts the victims on a higher pedestal and is a brilliant and innovative step towards appending the lack of victim-centric reforms in the PMLA.

However, the heart of the contention in this provision lies in clause (5). This clause allows for interim attachment of proceeds of crime if the magistrate observes that the notice would defeat the attachment objectives. The purpose of this provision arises from the need to prevent liquidation of assets or siphoning of assets in the 14-day notice period. This has become extremely necessary in the modern world with the advent of anonymised and untraceable technology. This provision should too be considered a necessary violation of principles of natural justice just as preventive action is.

Thus, naturally, the question arises is that whether there are adequate safeguards to prevent arbitrariness. Unlike normal police seizure, neither the magistrate nor the police can act unilaterally. The magistrate must be convinced and satisfied that there needs to be an interim order for attachment of such properties.

Secondly, a similar provision exists in the Prevention of Money Laundering Act. Under section 5, the Magistrate can pass interim orders to seize or attach property.³² However, there are two crucial safeguards that have not been implemented under the relevant scheme in the BNSS. The provision under the PMLA puts a limit of 180 days on the attachment of such property. Subsequently, the Magistrate is obligated to record his reasons in writing for such attachment.

³² The Prevention of Money-Laundering Act, 2002 (Act 15 of 2003), s. 5

Both of these safeguards are lacking. The ex-parte attachment can go on to be severely abused with indefinite delays on their attachment. The 180-day limit ensured ample time for investigation and principles of natural justice to be followed through. A simple deadline would go ways into preventing procedural harassment and exploitation. Recording the reasons for attachment will always be a welcome step towards transparent procedural flow since there really isn't any inherent hinderance which can be caused from mandating it.

The key concern here is the violation of the principles of natural justice. This can be mitigated to an extent by immediate post-attachment hearings. A relevant deadline should be added for post-attachment hearing as well. The addition of a sunset clause is also a debatable point. This would imply that the attached proceeds would be released on the failure to account for any reasonable evidence to back up their attachment after a certain period of time. While such a sunset clause seems in line with the remainder of the BNSS provisions, it becomes imperative to understand the nature of offences where this provision would be applies. Similar to the Prevention of Money Laundering Act, these provisions are primarily meant for large-scale economic offences, although they can be applied in other conditions as well. In order to unravel offences of such scale, the investigation process has to go through a number of layers to uncover the roots of the crime. A sunset clause could end up being too pressurising on the already overburdened law enforcement.

Conclusion

With respect to fulfilling the evolution of victim-centric reforms, procedural simplification, rights of accused, and clear and transparent judicial process, the BNSS seems to have taken the right step. The concerning part is that it has clearly embraced regressive authoritative tools while simultaneously striding towards progressive reforms and thus, undermining its own reforms. The CrPC was critiqued for its colonial rigidity, but with the above-mentioned provisions, the BNSS could risk developing more measures for arbitrariness.

To the above-mentioned provisions, certain safeguards are needed. A majority of them require a written justification for better transparency or attached deadlines to prevent indefinite procedural harassment. These enhancements can easily be exploited to becoming tools of oppression rather than instruments of justice and thus, betraying its promise of indigenisation. It is improper to expect the court's to constantly uphold or wave safeguards into the provisions and thus, there should have been explicitly mentioned provisions and there is no doubt that these will be contested in the future.