Comments on the Bharatiya Nyaya Sanhita Bill, 2023, the Bharatiya Nagarik Suraksha Sanhita Bill, 2023 & the Bharatiya Sakshya Bill, 2023

Submission to the Parliamentary Standing Committee on Home Affairs

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VIDHI | Centre for Legal Policy

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** Minor changes have been made post the submission to the Standing Committee for further context and clarity.*

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Introduction

On 11th of August 2023, three landmark Bills were tabled in the Lok Sabha. Brought to replace the colonial era Indian Penal Code, 1860 ('IPC'), the Indian Evidence Act, 1872 ('IEA') and the Code of Criminal Procedure, 1973 ('CrPC'), these Bills purport to transform India's criminal justice system, eliminate signs of slavery, and lay the foundation of the criminal justice system in 'justice' and not 'punishment'.

Bharatiya Nyaya Sanhita Bill, 2023

The Bharatiya Nyaya Sanhita Bill, 2023 ('BNS'), tabled to replace the IPC, aims to modernise India's criminal justice system and create a citizen-centric legal structure. It also aims to introduce community service as a form of punishment; make offences gender-neutral; deal with organised crimes and terrorism; and, add new offences relating to secession and armed rebellion.

The BNS incorporates some new offences, such as the offence of Organised Crime (Clause 109-110), Terrorist Acts (Clause 111), Acts endangering sovereignty, unity, and integrity of India (Clause 150); Murder by a group of five or more persons on the ground of race, religion, caste etc. (Clause 101), Making or publishing fake news (Clause 195), Sexual intercourse by employing deceitful means (Clause 69) etc. It also increases punishments for various offences and adds mandatory minimum punishments for at least four offences.

Bharatiya Nagarik Suraksha Sanhita Bill, 2023

The Bharatiya Nagarik Suraksha Sanhita Bill, 2023 ('BNSS'), tabled to replace the CrPC, aims to establish citizen-centric criminal procedures and address judicial pendency, delays in investigation, low conviction rates, and inadequate use of forensics.

The BNSS adds provisions that restrict the power to arrest in certain cases; provide for use of technology in investigations; introduce mandatory bail provisions; and establish timelines for various processes. It also, however, bolsters the discretion with the police to seek custody of accused persons (Clause 187), allows the use of handcuffs for a wide range of offences (Clause 43) and permits trial in absentia (Clause 356).

Bharatiya Sakshya Bill, 2023

The Bharatiya Sakshya Bill, 2023 ('BSB'), tabled to replace the IEA, aims to update India's law on evidence in recognition of the technological advancements undergone over the past many years.

Among other things, the BSB provides for the admissibility of electronic or digital records as primary evidence (Clause 57 and 61) and expands the scope of secondary evidence to include oral admissions, written admissions and evidence of a person who has examined a document (Clause 58).

Before the Parliamentary Standing Committee on Home Affairs

Over the past decade, Vidhi Centre for Legal Policy ('Vidhi') has been working on the issue of criminal justice reforms. It has also been engaging with the larger questions of reimagining Crime & Punishment for 21st century India.

In this note, we examine the aims and objectives of the three Bills, the key provisions that have been introduced, and make recommendations for suitable amendments to the Bills.

We rely primarily on our data-backed understanding of the issues plaguing the criminal justice system, frameworks for principle-based criminal law-making and international best practices for reforming criminal laws.

Comments on the Object and Approach of the Bills

Decolonisation & Modernisation of the Criminal Justice System

The Bills have a laudable aim to decolonise India's criminal justice system. This is a necessary first step in reforming and modernising India's criminal justice system, particularly because the criminal laws were used to aid India's colonisation - by inspiring terror in the minds of people and by suppressing dissenting voices.

Even though the IPC consolidated criminal law in India, it was still rooted in problematic conceptions. The native Indian population was seen as 'aboriginal savages' and deemed unworthy of reformation. This laid the foundation of India's penal policy and has continued post-independence.

Unfortunately, the three Bills do not address these underlying assumptions about the utility of criminal law and punishments in India and fall short of decolonising on the following counts:

1. ***Lack of clear principles and pathways for decolonisation:*** The colonial logic of domination governed the citizen-state relations in pre-independence India. The new Bills do not reflect any deviation from this or even an acknowledgement of the change in nature of the citizen-state relationship post-independence.

   These Bills continue to over-rely on the deterrent capabilities of jail terms; see Indian citizens suspiciously; and use vague provisions to protect police power - all central to the colonial nature of the existing IPC.

   Barring the overarching aim of decolonising and modernising India's criminal justice system, nothing in the three Bills lays down, in clear terms, the penal philosophy of the modern postcolonial Indian state. These Bills don't convey the

object of criminal law in India or what the state deems an act worthy of criminalisation.

An opportunity lost to create a principle-based criminal law-making framework: Rewriting of the criminal laws provided an opportunity to reimagine crime and punishment in India rooted in progressive reformatory conceptions of justice. It provided an opportunity to lay down the guiding principles for criminal law-making in India and also recognise the limitations on the legislature's power to criminalise.

A principled framework for criminal law-making could have also given legislative recognition to the incremental efforts of the Courts to limit the scope of criminal law by striking down provisions criminalising begging[1], homosexuality[2], attempt to suicide[3] and adultery.[4] In these cases, the courts have laid down a general guiding principle that discourages criminalisation if it violates fundamental rights, personal autonomy, or if the criminal provision is discriminatory.

This is particularly necessary considering how over 400 union laws use criminal provisions to secure compliance with social and regulatory matters, evidencing a crisis of overcriminalisation.

2. ***Retention of a colonial penal philosophy and irrational punishments:*** The BNS continues to over-rely on imprisonments, mandatory minimum sentences and the death penalty to invoke fear in the minds of people - the colonial doctrine of punishment.

A focus on rehabilitation and reformation could have laid the foundation of the Indianisation of our criminal justice system, particularly considering the

[1] *Harsh Mander v Union of India* (2018) SCC OnLine Del 10427
[2] *Navtej Singh Johar and others v Union of India, Ministry of Law and Justice* (2018) 1 SCC 791
[3] *P. Rathinam v Union of India* (1994) 3 SCC 394
[4] *Joseph Shine v Union of India* (2019) 3 SCC 39

objective of these Bills is to ensure 'justice' and not 'punishment'. Adoption of community service for a handful of offences, that too not to the exclusion of jail terms, shows the hesitance to embrace a shift in the penal philosophy.

An opportunity lost to rationalise punishments: Rewriting of these laws also provided an opportunity to ensure that punishments for all crimes are proportionate and have a reasonable nexus with the object of criminalisation. It provided an opportunity to revise the colonial era punishments and lay down a guiding framework for prescribing the form and quantum of punishments. This would have gone a long way in addressing the issue of arbitrariness in the prescription of punishments, which currently is fairly ubiquitous.

For instance, failing to give notice of a treasure valued more than ten rupees can attract imprisonment for up to one year[5] and being unclean can attract a two-year imprisonment for navy personnel.[6] The offence of assault or using criminal force carries a punishment of three months,[7] while flying a kite dangerously can lead to a prison term of two years. The punishment for the offence of money laundering[8] and assaulting or using criminal force with the intent to disrobe a woman[9] is the same - imprisonment for a minimum term of three years which may extend to seven years.

3. ***Retention of colonial tools:*** The BNS continues to retain specific provisions that were used by the colonial government to protect its interests and suppress dissent. Provisions like sedition and criminal defamation were used as tools to police native Indians and detain leaders of the freedom movement.

[5] The Indian Treasure-trove Act, 1878, s 20
[6] The Navy Act, 1957, s 53
[7] The Indian Penal Code, 1860 s 352
[8] The Prevention of Money-Laundering Act, 2002, s 4
[9] The Indian Penal Code, 1860 s 354B

Retention of these inherently colonial provisions in the BNS and the addition of the offence of 'endangering sovereignty, unity and integrity of India' (Clause 150), akin to the offence of sedition under Section 124A of the IPC, does little in the way of decolonisation.

4. ***Imbibing Victorian morality in 21st-century India:*** The IPC was designed to serve as a tool for 'civilising' native Indians as per Victorian standards of morality. This Victorian moral imprint was starkly visible in provisions that criminalised homosexuality, adultery, enticing a married woman, and even the marital rape exemption. These provisions not only reflect the imposition of conservative and repressive values but have also perpetuated cultural imperialism for over a century in India.

   These Victorian moralities and sensibilities reflect in the BNS in the form of the marital rape exception (exception 2 under Clause 63); offences that assume the inferiority of, or deny agency to, women (Enticing a married woman under Clause 83); and offences that link assault and harassment of women to their 'modesty' (Clauses 73 and 78).

5. ***Disconnect between the proposed laws and the aim of speedy justice:*** The BNSS's vision of ensuring swift justice is propelled by the fixation of timelines for time-bound investigation, trial, and pronouncement of judgments, but it is not clear how such provisions will be enforced. It is also unclear as to how these timelines were arrived at, and whether they are informed by data from trial courts across the country.

   This also fails to acknowledge the several factors that delay criminal proceedings such as poor investigation techniques, improper service of summons, inadequate scrutiny by police and prosecutors, inadequate logistics to deal with the volume of criminal matters, and even the issue of overcriminalisation.

It is important that impact assessment tests are instituted to determine the workability and impact of setting up these timelines on the Police and the Judiciary. It is also necessary that a comprehensive review of the rules of criminal procedure is undertaken, so as to identify the misuse or non-observance of rules and processes that create bottlenecks during investigations and trials.

Making a citizen-centric criminal justice system

1. ***Making the criminal justice process citizen-centric:*** The BNS and BNSS continue to view Indian citizens suspiciously, and enable the law enforcement machinery wide powers to curtail their liberty on mere apprehension.

   The criminal justice procedure under the BNSS is not a substantial departure from the colonial legacy of the judicial process and powers given to the police. The Bill seems to have missed the opportunity to lay down a criminal justice process that is citizen-friendly and not a maze of legalese.

   Excesses of police and policing, another remnant of the colonial state, do not appear to be on the agenda for this set of reforms. For a comprehensive overhaul of the criminal justice process, it is imperative that due attention be paid to amending the Police Act, 1861. Furthermore, the BSB does nothing towards the regulation of modern policing methods such as Biometric Systems and Facial Recognition Technologies which are increasingly being used to aid policing across the country.

   This was also an opportunity for incorporating the guidelines and directions of the Supreme Court such as the D.K. Basu guidelines into the statute, to guarantee such protection to citizens. A citizen-friendly police force is essential for building trust between the citizens and the state.

2. ***Language of the law that enables and empowers citizens:*** One of the objectives of criminal law is to delineate conduct that will be punished, so that the citizens can accordingly act in their interactions with each other. However, the retention and introduction of vague phrases, such as 'promoting disharmony,' 'obscenity,' 'misleading information' etc. not only set unclear standards of citizen behaviour, but also enable arbitrary use of police power.

   In order to make the law citizen-centric, it is important that the provisions should be simple and accessible, not ambiguous and archaic. A plain language approach to drafting the three laws, which ensures that the laws are Simple, Accessible, Rational and Actionable (SARAL) is desirable.

Comments on specific provisions of the Bills

S. No	Provisions	Comments
Bharatiya Nyaya Sanhita Bill		
1.	Community Service (Clause 4)	BNS has recognised community service as a form of punishment under Clause 4. However, it is only applicable to a select number of low- stake offences, such as theft of low-value goods, defamation, public misconduct, etc. However, the BNS stipulates no guidelines on what constitutes community service and how this punishment will be executed. This ambiguity will either lead to the underutilisation of community service or the imposition of arbitrary punishments in the name of community service.
2.	Rape & Aggravated	Retaining the same position as under the IPC, both rape and aggravated forms of rape are made punishable with a

	Rape (Clause 64)	minimum term of ten years extendable up to imprisonment for life under the BNS. In effect, there is no difference in the punishments for rape and aggravated forms of rape. Based on the logic of deterrence, aggravated forms of rape should attract a higher punishment as it is more heinous in nature. With no difference in the punishments, the two offences become practically indistinguishable.
3.	Gender Neutrality in Sexual Offences	One of the objectives of the BNS was to ensure gender neutrality. However, the law adopts a very inconsistent approach. While the offence of 'Procuration of Child' under Clause 94 has been made completely gender neutral; few offences such as 'Voyeurism' (Clause 76) and 'Assault to disrobe a woman' (Clause 75) have been made gender neutral only in respect of the offender and the victim can still only be a woman. Offences such as rape (Clause 63), sexual harassment (Clause 74) and stalking (Clause 77) continue to be completely gendered wherein only a man can be the perpetrator and a woman the victim. This is in complete disregard of the fact that even men and sexual minorities can be victims of sexual offences. The BNS, therefore, does not account for the lived realities and vulnerabilities of the LGBTQIA+ community, and offers no legal protection to gender and sexual minorities.

4.	Enticing a married woman (Clause 83)	While the provision on adultery (Section 497, IPC) has been excluded, the provision criminalising 'enticing or taking away a married woman with the intention of having illicit sexual intercourse' (Section 498) has been retained. The offence of adultery was struck down by the Supreme Court for its discriminatory treatment of women as mere chattel, a reasoning that logically extends to the provision concerning the enticement of a married woman as well. The provision is deeply rooted in 19th-century Victorian morality and relies on the antiquated gender stereotypes that deem women to be passive beings with no sexual autonomy. In light of the fundamental principles of equality, non-discrimination and privacy enshrined in the Constitution, a provision like this should have no place in law.
5.	Causing Miscarriage (Clause 86)	BNS has imported Section 312 of IPC as it is, essentially continuing to criminalise abortion. It has curtailed the access to the right to abortion without considering the amendment of the Medical Termination of Pregnancy Act, 1971, and the landmark judgement of *X v. Principal Secretary* (2022). BNS, hidden in archaic, Victorian language, also misses the opportunity to update the statute in alignment with current medical-legal terminology.
6.	Unnatural offences	Section 377, IPC, which criminalised sodomy and bestiality, was read down in the case of *Navtej Singh Johar v. Union of India* (2018). While consensual same-sex intercourse was

		decriminalised, bestiality and non-consensual same-sex intercourse continued to be offences. The BNS has completely omitted Section 377, effectively decriminalising bestiality and leaving no safeguards against non-consensual same-sex intercourse. Given that rape continues to be a gendered offence, safeguards under section 377 should have been retained.
7.	Murder by a group of five of more people (Clause 101)	Mob Lynching has been recognised under the provision dealing with punishment for murder [Clause 101(2)] The current formulation of the provision fails to effectively address the challenges associated with the prosecution of mob lynching cases. There are various procedural and evidentiary issues, which make it difficult to obtain a conviction in cases of mob violence. For instance, identification of accused persons, determination of guilt, witness protection etc. can substantially be different from a normal murder trial. The introduction of a special provision on mob lynching, therefore, should have been complemented by special procedural and evidentiary provisions. Additionally, the provision does not recognise the various stages and the different roles that individuals can play in the commission of the offence. Mobilisation, organising, preparing, abetting etc., of mobs should have been separately recognised with clearly laid out evidentiary thresholds and graded punishments.

8.	Terrorist Act (Clause 111)	Acts of terrorism have been added under Clause 111 of BNS. The offence has been made punishable with death or imprisonment for life without the benefit of parole. The provision is very loosely drafted with wide and overarching provisions on conspiracy, facilitation and preparation for terrorist acts. This exacerbates the risk of misuse through arbitrary arrests and undue harassment. Additionally, terrorism is currently criminalised through special laws such as the Unlawful Activities (Prevention) Act, 1967 ('UAPA'). UAPA prescribes special procedures for the investigation and prosecution of offences, and lays down special safeguards against the misuse of these special powers. With the addition of these offences in the BNS, two parallel and overlapping processes have been created.
9.	Acts endangering sovereignty, unity and integrity of India (Clause 150)	BNS has omitted the offence of sedition but a new offence has been added that criminalises exciting secession, subversive activities, encouraging separatist feelings etc. The framing of this provision has a striking resemblance to that of sedition. It continues to criminalise ambiguous acts of 'exciting secession' and 'encouraging feelings', without defining subversive, secessionist, and separatist activities. Due to the vague and ambiguous drafting of this provision, there is a concerning potential for misuse, akin to the issues seen with the sedition law. The provision can potentially be used to silence and harass dissenters.
10.	Promoting enmity	Both these offences are very loosely drafted. Phrases such as 'causing disharmony' or 'feelings of enmity, hatred and

	between different groups (Clause 194) Imputations and assertions prejudicial to national integration (195)	ill-will', which are common to both the provisions, are too vague and ambiguous to qualify as substantive criminal offences. This vagueness in law makes it susceptible to abuse, arbitrary police action and undue harassment.
11.	Making or Publishing false information [Clause 195(d)]	Making or publishing false or misleading information has been criminalised under the BNS and has been made punishable with imprisonment up to three years. However, the provision suffers from vague and ambiguous drafting. The provision uses the phrases 'misleading information' and 'information jeopardising the sovereignty, unity and integrity or security of India' without defining what each of these terms mean. This has potential to be misused to curtail free speech and freedom of the press.
12..	Obscenity related provisions (Clauses 292-294)	BNS has imported the obscenity related provisions as it is from the IPC. These provisions were introduced in the 19th century to enforce Victorian standards of morality upon India. Not only are these provisions extremely conservative and regressive, but are also vague and ambiguous.

		Under the current formulation of obscenity laws, the word 'obscene' has not been defined anywhere and therefore the question of obscenity is left to judicial determination. The courts have applied various tests to decide the question of obscenity on a case-to-case basis. This, however, has made the obscenity law extremely ambiguous and subject to the individual moralities of the judges. The lack of a proper definition also makes the law susceptible to misuse by the police. There is a need to define obscenity in consonance with the current social values and attitudes.
13.	Defamation (Clause 354)	The BNS continues to criminalise defamation by replicating Section 499 of the IPC. The provision criminalises any expression, both oral and written, intended to harm the reputation of any person. The clause uses vague phrases such as 'lowering the moral or intellectual character of a person' and 'hurtful to the feelings of the family' making it ambiguous and susceptible to abuse, arbitrary police action and undue harassment. The provision has been routinely abused to suppress voices of women who spoke out against sexual harassment during the 'MeToo' movement; and to stifle dissent, humour and satire. The need for such a provision must also be revisited, particularly when an alternative civil remedy against defamation is available.
Bharatiya Nagarik Suraksha Sanhita Bill		

14.	Preventive arrests under CrPC (Clause 172, 170; Clauses 125-129)	The provisions for preventive action by the police (Clause 170) and imposition of security for keeping good behaviour (Clauses 125-129) have been retained in the BNSS. Rather than limiting this discretion of the police by instituting safeguards against arbitrary arrests, BNSS has added another provision (Clause 172) granting the power to detain or remove any person resisting or refusing to follow the directions passed by a police officer. These provisions grant unfettered discretion to police to arrest people with minimal oversight. NCRB data shows that out of the total 1,48,20,298 arrests made in 2021, 89,00,174 (60.5%) were made under the preventive arrests provisions of the CrPC. This data evidences that the preventive powers vested with the police are already misused, and giving them more power will only worsen the situation.
15.	Power to issue order in urgent cases of nuisance or apprehended danger (Clause 163)	BNSS has retained section 144 of the CrPC which grants unbridled power to a magistrate to issue urgent orders. The provision has been used as a tool to clamp down on any public gatherings or assemblies. It has also been used for non-essential and non-urgent purposes such as regulating business. There is a need to institute safeguards against the arbitrary use of this provision.
16.	Procedure when	Clause 187 of the BNSS proposes to increase the period during which a person could be sent to police custody.

	investigation cannot be completed in 24 hours (Clause 187)	Under Section 167 of the CrPC, a magistrate could extend the initial police custody for up to 15 days following the arrest. However, BNSS has altered this by providing that the custody period of 15 days can be spread over a period of 40 days or 60 days, depending upon the gravity of the offence. This has increased the discretionary powers of the police for seeking remand, which raises concerns about the potential for misuse of these extended periods of custody and the absolute terror this can induce in the minds of the accused.
17.	Using handcuffs while effecting the arrest of a person (Clause 43)	Section 46 of CrPC lays down that reasonable force can be used to effect an arrest of a person. The practice of handcuffing, however, has been criticised in various cases, and it has been stipulated that handcuffs should be used only as a last resort (*D.K. Basu v. State of West Bengal*, 1996). BNSS allows for the use of handcuffs in specific cases. These include cases where the person is being arrested for a grave offence such as murder, rape, acid attack etc. or when the person is a repeat or a habitual offender. This provision raises concerns about the potential infringement of the accused's dignity and human rights.
18.	Inquiry trial or judgement in absentia of the proclaimed offender (Clause 356)	BNSS has introduced a provision that permits the continuation of trial and delivery of a judgment even if the accused's attendance cannot be obtained. The absconding offender shall be deemed to have waived their right to be present and tried in person.

		This provision raises concerns regarding the conduct of a fair trial as it completely undermines the principles of natural justice. While expediting trials to reduce delays is essential, it should not come at the cost of compromising fairness and the accused's rights.
19.	Power to conduct a preliminary enquiry (Clause 173)	The police have been vested with the power to conduct a preliminary enquiry related to the commission of any cognisable offence punishable for three years or more but less than seven years. This is a contravention of the Supreme Court ruling in the case of *Lalita Kumari v. Government of Uttar Pradesh* (2013). The court in this case underlined that where information given to the police discloses the commission of a cognizable offence, the registration of a First Information Report ('FIR') will be mandatory. Allowing for a preliminary inquiry before registering an FIR can potentially lead to delays in the initiation of criminal proceedings. This raises concerns about potential harassment of victims due to non-registration of FIR.

Concluding remarks

The three Bills present an opportunity to truly decolonise and Indianise the criminal justice system. They also present an opportunity to make the systems citizen-centric and uphold constitutional values in criminal processes. Unfortunately, in their present form, the Bills fall short of their stated objectives.

Making India's criminal justice system more responsive and effective will require an evidence-based approach rooted in the ideas of reform and rehabilitation. It will require limiting the scope of criminal law, rationalising punishments, and laying down a clear sentencing policy. It will also need an evaluation of the functioning of our institutions, such as the police and prisons, which continue to operate based on colonial-era principles.

A principle-based criminal law-making policy; pre-legislative fiscal, justice and community impact assessments of criminal legislations; and a framework for periodic review of criminal laws will also go a long way in modernising the criminal justice system.

Further Readings

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