

ERGO

Analysing developments impacting business

HIT REFRESH: INDIA'S CRIMINAL LAWS (PART 2 OF 3): KEY HIGHLIGHTS OF BHARATIYA NAGARIK SURAKSHA SANHITA, 2023

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Introduction

In a significant move aimed at overhauling the criminal justice delivery system in India, the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) has been recently introduced to replace the long-standing Code of Criminal Procedure, 1973 (CrPC). Although published in the Official Gazette on 25 December 2023, due to administrative and logistical reasons, the said enactment is expected to come into force only later in 2024.

In part II of this ERGO series, we outline some of the significant changes introduced by the BNSS which will substantially impact the administration of criminal justice in the country:

Key Changes under the BNSS, 2023:

➤ Registration of FIRs made simpler:

The BNSS specifically permits the registration of an FIR at any police station in so far as cognizable offences are concerned, i.e., irrespective of the area where the offence was committed (Zero FIR). Previously, victims of serious offences could not lodge complaints without visiting the jurisdictional police station even when they were not in a position to do so. To remedy this lacuna in the CrPC, the Apex Court had in recent years judicially introduced the concept of 'Zero FIR', which the BNSS now statutorily recognizes. Once the Zero FIR is filed, the filing police station will transfer the same to the jurisdictional police station for investigation.

In addition to the above, while recognizing that information pertaining to the commission of cognizable offences can be given through electronic means (eventually leading to the registration of an FIR), the BNSS stipulates that the taking on record of such information shall be conditional upon being signed by the informant within 3 days.

➤ Concept of 'preliminary enquiry' introduced:

The BNSS has also statutorily introduced the concept of a '**preliminary enquiry**' when the alleged offences carry a prison term of 3 to 7 years. To ascertain whether there even exists a *prima facie* case for proceeding further in a matter, the in-charge police officer may, with prior permission from an officer not below the rank of a Deputy Superintendent and depending upon the nature and gravity of the offence, proceed to conduct a "preliminary enquiry" within a period of 14 days. This is however without prejudice to the power of the in-charge officer to directly carry out a full-fledged investigation.

➤ Overarching powers conferred for attachment and forfeiture of property:

The BNSS drastically expands the Magistrate's power to attach properties identified as 'proceeds of crime', i.e., any property derived or obtained directly or indirectly by any person as a result of criminal activity. It is pertinent to highlight that such powers can be exercised irrespective of the nature of offence alleged to have been committed, and irrespective of whether the property is movable or immovable. The Magistrate can now attach a property (including on an *ex parte* basis) on an investigating officer's application stating that the property stems from criminal activity. Provision for attachment includes the authority to distribute proceeds of crime to affected persons, presenting a paradigm shift in process.

However, the BNSS lacks certain safeguards in this regard including *inter alia* the conferral of power to distribute property even before the guilt of the accused is established. While such an approach is ostensibly victim-friendly, the same can cause serious due process concerns for the accused and also disturb the chain of custody of material evidence, which has traditionally been a crucial aspect of criminal trials.

➤ Transparency in recording of search and seizure:

To curb the menace of illegal searches and seizures as well as tampering of evidence, the BNSS mandates audio and video recordings while conducting searches and seizures (preferably using a mobile phone). This process *inter alia* contemplates audio-video recording of the preparation of the list of seized items and signing of such lists by witnesses as well as prompt forwarding of recordings to the Magistrate within 48 hours of conducting the search or seizure, etc.

➤ Rights of victims and witnesses:

The BNSS aims to provide enhanced accountability to victims and informants. In a complete departure from the CrPC, police officers have been mandated to update victims on the investigation's progress within a period of 90 days from the date on which the information was recorded by the officer in charge of the police station i.e., from the date of registration of the FIR. Moreover, post filing of the charge-sheet, an obligation has been cast upon the authorities to furnish reports and related documents to the victim, if represented by Counsel.

Additionally, withdrawal by the prosecution now necessitates a victim's hearing. Courts have also been empowered to grant compensation to victims as part of sentencing of the accused. In a much awaited move, the BNSS also introduces a State governed witness protection scheme, which if implemented in the right spirit, can go a long way in preventing witnesses from turning hostile.

➤ Changes in procedure relating to police custody:

Under the CrPC, an arrested person is required to be produced before the Magistrate within a period of 24 hours of arrest. The Magistrate is empowered to extend police custody for a period of 15 days in case the investigation cannot be completed within 24 hours. Beyond 15 days, the Magistrate is empowered to detain the person only in judicial custody, with the maximum limit for overall detention being 60 or 90 days (depending on the nature of offence).

➤ On the other hand, the BNSS stipulates that once the arrestee is produced before the Magistrate within 24 hours, police custody of 15 days can be authorised in whole or in part, at any time during the initial 40 days out of the overall 60 days period (for lesser offences) or at any time during the initial 60 days of the overall 90 days period (for more serious offences). This can lead to considerable uncertainty and harassment for accused persons since the police can intermittently seek police custody at their whims.

➤ Technology friendly approach

Apart from searches and seizures being recorded by electronic means, the BNSS also specifically permits electronic service of summons, warrants and reports as well as electronic conduct of inquiries and trials (including recording of evidence and examination of witnesses). This is a welcome move which can lead to faster and more efficient disposal of matters.

Conclusion

The BNSS contains several positive changes which, if implemented properly at the ground level, can certainly speed and streamline the criminal justice system. This includes the recognition of Zero FIRs, the active embracing of technological advancements across various stages in the life cycle of a criminal matter, accountability towards victims and conferral of rights that were hitherto unheard of. The BNSS contemplates a more transparent and victim-friendly approach when compared to the CrPC.

However, there are several areas of concern, particularly in relation to the manner in which the rights of an accused/ arrested person can be severely impacted. This includes the arbitrary and uncertain manner in which police custody can be sought for and extended, thereby affecting personal liberty; and the rather harsh and biased manner in which property rights can be curtailed without adequate safeguards. On the other hand, the broad powers conferred upon police officers to conduct preliminary enquiries instead of investigation can also lead to severe abuse, at the peril of victims.

To sum up, the changes brought about by the BNSS are likely to have a very substantive impact on individuals as well as businesses while dealing with criminal matters, whether as victims or accused.

- *Ganesh Prasad (Partner), Ganapathy Subbiah (Partner), Trimurthi B S (Principal Associate), Tejas Shetty (Senior Associate) and Aditya Pattanayak (Associate).*

For any queries please contact: editors@khaitanco.com