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24th June, 2024

PUCL: Critique of the 3 new Criminal Laws:

The BNS, BNSS and the BSA
Turning a De Facto Police Regime to a De Jure Police State

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A careful scrutiny of the 3 new laws passed in December, 2023 – the Bharatiya Nyaya Sanhita (BNS), the Bharatiya Nagarik Suraksha Sanhita (BNSS) and the Bharatiya Sakshya Adhiniyam (BSA) – reveals a concerted attempt to:

(a) ***Weaponise the law by criminalising ordinary acts*** of democratic and peaceful means of expressing dissent and opposition to state policies as exemplified by

(i) the introduction of a new provision of `Terrorist Act" (sec. 113 of the BNS) even though the very same provisions in sec. 113 already exist, word for word, in the Unlawful Activities Prevention Act (UAPA), 1967 as sections 15 to 21! The sinister design behind introducing this provision is exposed when we consider that the new offence of `Terrorist Act' is included in Chapter VI covering `Offences against the human body' and not in Chapter VII of the BNS which covers `Offences against the state'. We shall explore the reasons for this deliberate positioning of this provision subsequently.

(ii) In a brazen `sleight of hand' move, to introduce a new 21st Century version of sedition law! At the time of introducing the BNS in Parliament in December, 2023, the Home Minister claimed a moral high ground by stating that the government had decided to delete the colonial era offence of `sedition' (sec. 124A of IPC) without mentioning that the very same provision was being re-introduced as a new provision, section 152 of the BNS, covering `acts endangering sovereignty, unity and integrity of India'. The new law was even more stringent and dangerous than the previous sedition clause in the IPC.

(b) ***Systematically dismantling the key element of criminal jurisprudence*** – the `presumption of innocence' and the `right to free and fair trial' through a series of provisions in the BNSS and BNS, very consciously and deliberately introduced to change the character of criminal jurisprudence.

(c) ***Centralising powers of the police, providing immunity and ensuring `impunity'*** of police and state officials for gross and rampant misuse and abuse of law by police officers by denying provisions to fix accountability and command responsibility.

Weaponising the law by Criminalising Ordinary Democratic Acts

1. **Sec. 113, BNS, Terrorist Act**: One of the most disturbing, and in fact, dangerous, provisions in the new penal law of the country is Section 113 of the Bharatiya Nyaya Sanhita (BNS) titled `terrorist act' which has been included in Chapter VI, `***Of Offences Affecting the Human Body***'. The point to be noted at this juncture is that Sec. 113 BNS is a newly introduced provision.

2. The definition of terrorist act in Sec. 113 (1), BNS is identical, word for word, to sec. 15 of the UAPA. The rest of the provisions, viz., sec. 113 (2) to (7) of the BNS is once again an identical reproduction of the provisions of sec. 16 to 21 of the UAPA. (a very minor change requires to be pointed out; in the explanation of `counterfeit Indian Currency' provided in sec. 113(1)(b) BNS, the term "high quality" present in sec. 15(1)(iiia) UAPA has been dropped).

3. The question which has to be asked is the purpose behind the government introducing this new offence, sec. 113, BNS, in the general penal law of India when the same offence is already provided for in the Unlawful Activities Prevention Act, 1967 (UAPA). Apart from the suspicion that there is some ulterior political motive behind the introduction of the new offence in the BNS is a much more disturbing question about the consequences of having such a provision in the general penal law of the land. The apprehension of the vast potential for abuse against political dissenters and those raising questions of accountability against the government is very real given the experience of how UAPA has been used in the last 10 years.

4. It should be pointed out that many offences included in `terrorist act' defined both in BNS and UAPA are so broad and imprecise, that thousands have been imprisoned for many years under UAPA charges for pursuing non-violent campaigns on local issues and democratic rights. A study of the misuse of UAPA by the PUCL[1] has revealed that the conviction rate in UAPA cases is less than 3%. It also needs to be noted that during the period 2015 – 2020, about 8,371 persons were prosecuted under UAPA and languished in jails for periods between 5 to 10 years. The list of UAPA arrested people included human rights defenders, grass roots workers and social activists, academics, lawyers, students, Adivasis, and others questioning the government languish. Trials have taken anywhere from 3 to 8 years to conclude and invariably people's lives are shattered with thousands imprisoned in jail for many years as undertrial prisoners before getting acquitted by trial courts.

5. Is there any ulterior purpose behind the introduction of sec. 113 BNS, `terrorist act' is Chapter VI, covering offences against the `human body' and not in Chapter VII "Offences against the state"?

6. The answer to this question becomes clear when we examine sec. 217 of the BNSS which requires **previous sanction to prosecute** for offences under Chapter VII (Offences against the State), from the concerned government before any court can take cognisance of any offence under the chapter. Thus, by including sec. 113 BNS, the crime of `terrorist offence' in Chapter VI (Offences against the human body), the government has ensured that there is no need for previous sanction to prosecute from the concerned, state or central government'.

7. Yet another aspect needs to be noticed about safeguards in UAPA which is missing in the introduction of sec. 113 in BNS. In view of widespread complaints of misuse of UAPA prosecutions, two (2) oversight mechanism were introduced in UAPA: sec. 45 UAPA made it mandatory for the government to (a) constitute an `independent authority' to independently review the evidence gathered in the investigation and to make a report to the government about the prosecution and (b) the government was required to study the Report before granting sanction to prosecute. This safeguard

[1] See https://pucl.org/wp-content/uploads/2023/05/PUCL-28.09.2022.pdf
'UAPA: Criminalising Dissent and State Terror - Study of UAPA Abuse in India 2009 - 2022"

mechanism in the UAPA is missing in the provision covering terrorist act in sec. 113 of the BNS.

8. By no stretch of imagination can anyone justify the categorization of `terrorist act' as an offence `against the human body' and not as an `offences against the state". The very definition of terrorist offence as provided in sec. 113 shows that it covers "any act with the intent to threaten or likely to threaten the unity, integrity, sovereignty, security or economic security of India or with the intent to strike terror or likely to strike terror in the people or any section of the people….". Thus, by including sec. 113, `Terrorist Act' in Chapter VI covering `Offences against the human body' the intention was very clearly to arm the state with vast draconian police powers without the need to worry about oversight bodies or accountability for launching prosecutions under sec. 113 of BNS.

9. It is important to point out here that sec. 113 Explanation states that an officer not below the rank of Superintendent of Police shall decide whether to register the case under sec. 113 BNS or under the UAPA. No explanation has been provided as to the circumstances when sec. 113 BNS will be invoked as against the UAPA. In the absence of specific provision ensuring oversight of the decisions of police officials and imposing accountability on police officers for abuse of powers and wrongfully invoking terrorist offence, the Explanation is as a toothless protection, if indeed it was provided as an oversight mechanism.

10. Having exposed the deliberateness behind the introduction of sec. 113 BNS defining `terrorist act', we need to also point out the loosely worded and imprecise definition of what constitutes a `terrorist act'. Such a loosely defined offence only gives a handle to the state (government) through its police wing to act arbitrarily and use the full police might of the state against anyone advancing genuine democratic grievances demanding social, economic and political justice or accountability or against human rights violations. It is important to point out that across India there exist many social and environmental movements challenging many industrial, infrastructure and developmental projects who can be accused of threatening economic security. The fact that the ruling government chose to use the same definition of `terrorist act' as used in sec. 15 of UAPA without introducing the safeguards, clearly exposes the diabolic intention to arm the state with untrammeled and uncontrolled powers without any

pretence of accountability. The centralization of powers with the police and state agencies without any provision imposing accountability, is a pattern we see recurrently reflecting in other provisions of the triumvirate of laws – BNS, BNSS and BSA.

The old sedition law in a new avatar! Sec. 152 BNS: `Act endangering sovereignty, unity and integrity of India'

11. It's very interesting to note that in a batch of petitions challenging the constitutionality of sec. 124A, IPC, sedition law, the Supreme Court had passed interim orders in May, 2022 directing that all pending trials, appeals and proceedings in sedition cases be kept in abeyance and fresh cases not be registered under sec. 124A anywhere in India. These orders came to be passed by the Supreme Court in the background of overwhelming evidence of the widespread misuse of sec. 124A across India. After elaborate research covering the use of sedition law during the decade 2011-2021, Art. 14 published a report titled "A Decade of Darkness", highlighting 13,000 people implicated in over 800 cases of sedition implicating people participating in public protests, social media posts, criticism of government policies and programmes and even over cricket matches!! The study noted that over 500 cases of sedition were filed after the BJP came to power during 2014 – 19. Overall, the conviction rate was 0.1%.

12. Despite being a party to the SC proceedings and knowing well about the extent of misuse of sedition law, instead of dropping sedition law altogether, a new avatar of the sedition law has been introduced through sec. 151, Bharatiya Nyaya Sanhita, 2023. This not only retains most of the objectionable and problematic provisions of sec. 124A IPC, but actually adds a number of other provisions making the coverage and sweep of the new law, wider and more potent. All this makes it likely to be misused against citizens demanding and seeking accountability.

13. The definition of the new provision of sedition in sec. 152 BNS includes the following broad, sweeping and imprecise terminology:
    a. Whoever, purposely or knowingly, by
    b. Words, either spoken or written, or by signs, or by visible representation, or by electronic communication,
    c. Or by use of financial means or otherwise
    d. Excites or attempts to excite

e. Secession or armed rebellion or subversive activities, or
f. Encourages feelings of separatist activities, or
g. Endangers sovereignty or unity or integrity of India.
h. Punishment has been enhanced from life imprisonment to 3 years (Sec. 124A IPC) to life imprisonment to 7 years (sec. 152 BNS).

14. What constitutes `subversive activities' or `separatist activities', how does one assess or evaluate encouragement of "**feelings**" of separatist activities or what constitutes acts endangering sovereignty or unity or integrity of India have not been defined or explained in the BNS. In the background of such imprecise, broad, sweeping and ambiguous provisions, sec. 152 too will be prone to potential misuse and abuse. In a vast, diverse country such as India, highlighting grievances of different castes and communities or groups can be construed as encouraging feelings of separatist tendencies or activities. The claim of the law makers that sec. 152 BNS is better defined and more precise than sec. 124A IPC because the former now covers `sovereignty, or unity or integrity of India' whereas the latter covered only the `government' hides the fact that the sweep of the new provision, sec. 152 BNS is much more potent and can cover a wide gamut of activities which the state can dub as acts encouraging feeling of subversive or separatist activities or endangering the sovereignty, unity and integrity of India. It is perceivable, that in the future, protests by people of the south who feel discriminated by the north in terms of financial devolution or developmental funding despite being the major contributors to tax revenue in India can be roped in and implicated under sec. 152 BNS. Or even if a caste group articulates its grievance that it is being discriminated in terms of reservation benefits, educational quotas or development funding can be prosecuted for promoting separatist feeling!!

15. What makes clear that the introduction of sec. 152 BNS was a deliberate, thought through matter can be gauged by the enhancement of punishment from 3 years to 7 years. It is thus clear that the aim is to concentrate police powers with the state in a manner in which it is not accountable for misuse or abuse. The clear aim is also to muzzle and silence democratic voices by criminalising democratic and non-violent protests, agitation and campaigns of citizens against policies and programmes of state agencies and governments. Sec. 152 thus joins a vast arsenal of laws meant to be weaponised against any form of democratic assertion and dissent.

Systematically dismantling the key element of criminal jurisprudence

16. **Dismantling the Principle of Presumption of Innocence**. One of the key principles underlying the criminal justice system in India is the legal dictum that any person accused of a crime is presumed to be innocent until proved guilty beyond reasonable doubt. The new laws systematically violate this principle in multiple ways.

17. **Prominent display of details of persons arrested, including digital display**.
Sec. 37 of the BNSS provides that there shall be a designated police officer in every police station, and in every district, who shall not only be responsible for maintaining the information about the names and addresses of persons arrested, nature of the offence with which they are charged but will also ensure that this **information will be prominently displayed in any manner, <u>including in digital mode</u> in every police station** and at the district headquarters. This provision is a serious incursion into both the right of privacy of the person accused of a crime as also their right to the presumption of innocence until proved guilty. It has to be kept in mind, that the sheer fact of display of personal details of arrested/ accused persons especially in digital mode, will be considered by ordinary people as an indication of their guilt and involvement in the crime.

18. There are a number of other serious ramifications affecting the rights of arrested persons caused by display and dissemination of information about arrested and accused persons. First and foremost is the right to fair trial. In these days of widespread digital media communication, any display about the personal details of any arrested or accused person, will affect the process of conducting `Identification parades' and also influence the minds of potential witnesses and victims about the involvement of a person. Such responses can always be manipulated by the police to the detriment of arrested/ accused persons and will be a serious violation of the fundamental rights of the persons concerned.

19. An equally worrisome issue which has to be borne in mind when considering the issue of digital display of personal details of arrested persons, including providing personal details, is the threat that will be posed to their lives from victims and their relatives and the community at large also. It can encourage vendetta attacks and revenge violence. Examples can be quoted about such revenge attacks occurring in the case of honour killings. So the right to life and liberty of the arrested or accused persons is very much

of concern because of the provision of directing prominent display about personal details of arrested persons through digital media.

20. It should be pointed out that sec. 37 of BNSS referred to above, is modelled on section 41-C of the Criminal Procedure Code. Sub-section 2 of sec. 41-C stipulated that the names and addresses of persons arrested shall be displayed only in the display board kept outside the control rooms at every district. Similarly, sec. 41-C (3) mandated that a data base shall be maintained at the state level in the Police HQs and did not provide for digital mode as now stipulated. Unfortunately, these provisions were omitted to be replaced with the provision in sec. 37 BNSS stipulating digital display.

21. The deliberateness in eroding this key principle is to be found scattered amongst other provisions which erode the valuable rights of the persons accused of a crime even before they have had the chance to defend themselves through a fair trial process and exonerate themselves of the charges levelled against them. This is evident in the following provisions.

Violating Right to Dignity: Mandatory handcuffing – sec. 43(3) BNSS – a new provision

22. One of the most egregious and problematic new provisions included in the BNSS is through Sec. 43 titled, "Arrest how made". Sec. 43(3) is a new provision which did not exist in the CrPC and provides that 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 a person before the court. Though the rest of the provision delineates the situation when the policeman may decide to use the handcuff, the new provision knocks out the law prevailing before the introduction of sec. 43(3) BNSS which required the policeman to obtain the specific permission from the concerned criminal court, to handcuff the person after showing cause as to why such handcuffing is required. In short, the rule was the right of the accused not to be handcuffed, unless sufficient cause is shown by the police officer, and the court accepts and permits the same. The jurisprudence on handcuffing was expanded in a number of major SC rulings including ***`DK Basu vs State of West Bengal'*** (1997) which stipulated that "The use of handcuffs or leg chains should be avoided and if at all, it should be resorted to strictly in accordance with the law repeatedly explained and mandated in judgement of the

Supreme Court in `***Prem Shankar Shukla vs Delhi Administration'*** (1980)". In the Prem Shankar Shukla case the apex court held that using handcuffs is abhorrent to human dignity and infringes upon Art. 21 of the Indian Constitution. In flagrant violation of these cautionary prescription, which are effectively the law of the land, the new provision of sec. 43(3) BNSS now empowers the police officer to use handcuffs as a rule, without the protection of judicial oversight and justification.

23. It is evident that the fundamental principle of criminal law, viz, the presumption of innocence in favour of the accused was read by the Supreme Court as flowing from Art. 21, fundamental right to life which includes the right to be treated with dignity and arbitrary actions of the police.

Negating Fundamental Right to Free and Fair Trial

24. One of the most fundamental principles of the criminal justice system in India arising from the principle of the right to presumption of innocence is the fundamental right to free and fair trials. Through various provisions in the BNSS, this fundamental right is sought to be curtailed if not abandoned altogether. One key provision in this regard is the provision of trial by video conferencing. So far, under the CrPC, video conferencing was permitted only for remand purposes; with the main provision that throughout the trial process, the accused persons will be brought to court to enable them to participate in the trial process. However, through sec. 251(2) of the BNSS, a new addition has been made permitting framing of charges through Audio-Video electronic means. Similarly, old sec. 273 of the CrPC providing that evidence should be taken in the presence of the accused has been tweaked in sec. 308, BNSS by adding an exception to the need for the physical presence of the accused in court to include presence through Audio-Video electronic means also. It is thus seen that the framers of the BNSS have very consciously and deliberately infringed the right to free and fair trial by allowing for video conferencing throughout the investigation and trial process. This seriously infringes on the accused person's right to mount proper and effective defence as the exercise on the right will be seriously compromised through a process allowing for electronic video conferencing methods. It should be noted that for accused persons who have not secured bail, the requirement for compulsory presence in court during trial proceedings enables the accused persons to interact with their counsels and effectively participate in preparing their defence against the charges laid against them. During

these times, they are also enabled to meet their family members in court. All these valuable rights will be effectively effaced by the provision of video conferencing and seriously violates Art. 21 right to life and protection of law.

Waiver of right to trial: sec. 356, BNSS

25. The BNSS has introduced a new provision in sec. 356 providing for 'inquiry trial or judgement in absentia of proclaimed offender'. This new section provides that in the case of a person declared as a 'proclaimed offender who has absconded to evade trial' and there is no immediate prospect of arresting him, it shall be deemed to operate as the waiver of the right of such person to be present and tried and the trial court can proceed with the trial as though the person is present and pronounce judgement. It is necessary to point out that this provision is a serious infringement on some key principles of criminal trial, including the principle of '*audi altarem partem',* meaning that no one shall be condemned without being heard. Another key principle is the provision of cross-examination of such witnesses as an important right of the accused, which enhances the probative value of the evidence, which are all part of the right to fair trial, implicit in Art. 21. With sec. 356, empowering the court to go ahead with the trial as though the individual was physically present is therefore a serious incursion into Art. 21.

Ex-parte Attachment or seizure and distribution of property pending trial

26. In line with the tenor of the new laws arming the police/ state with enormous powers to be exercised right from the stage of arrest and before the conclusion of trial establishing the guilt of the accused, the BNSS introduces a new provision for seizure, attachment and distribution of property pending trial. Thus in sec. 107 which provides that a police officer investigating a case has reason to believe that any property (of the accused) is derived from or obtained directly or indirectly as a result of the criminal activity, he can approach the jurisdictional court before whom a criminal case has been lodged to attach the property. Sec. 107(5) to (7) provides that if the Court "is of the opinion that issuance of notice under the said sub-section would defeat the object of attachment or seizure" the court may "pass order of ex parte direct interim attachment or seizure of such property" (sec. 107(5). Not stopping at this, sec. 107(6) BNSS provides that if the court or Magistrate finds the attached or seized properties are proceeds of

crime, the Court shall order the District Magistrate "to rateably distribute such proceeds of crime to the persons who are affected by such crime" within a period of 60 days. The point to be noted here is that such drastic powers can be exercised on mere accusation of the police officials and even before giving an opportunity of fair trial to prove his innocence or guilt. This executive inroad into valuable fundamental rights of citizens is an affront to another fundamental right – the right to free and fair trial!

Violation of right to privacy – requirement to give specimen signatures or handwriting – sec. 349 BNSS

27. Another illustration that the entire thrust of the BNSS is towards concentrating powers in the police to the detriment of valuable rights of accused is seen in sec. 349 of BNSS which repeats section 311-A of the Criminal Procedure Code, with however a very important modification. Sec. 349 BNSS provides that if the jurisdictional Magistrate is satisfied that for the purposes of any investigation or proceeding, he may make an order to "***any person***" to give specimen signatures or finger impressions or handwriting or voice samples, subject however to the condition (proviso) that no order shall be made unless the person has been arrested at some time in connection with such investigation or proceeding. The BNSS has now introduced a proviso to this condition permitting the Magistrate "for reasons to be recorded in writing, order <u>any person</u> to give such specimen or sample <u>without him being arrested</u>".

28. Thus, through a legislative `sleight of hand' a stumbling block on the powers of the police in the pre-trial stage has been gotten over through a simple expedient of providing a proviso to a proviso in the new law, overriding what was a fetter on the powers of the police! This is yet another intrusion into valuable protections given by the Criminal Procedure Code through an amendment in 2005, which itself was in response to verdicts of the Supreme Court balancing the need for investigation with the rights of accused persons as part of the right to fair and free investigation arising from Art. 21 of the Constitution of India.

Centralising powers of the police, providing immunity and ensuring `impunity'

Extending powers of remand: sec. 187 BNSS (sec. 167 CrPC)

29. Perhaps one of the most controversial changes brought about in criminal law is the provision providing for extension of time of police custody from a maximum of 15 days under the CrPC to 60/90 days (u/s 187 (3) BNSS). It is well recognised that the period when the accused is kept directly in the custody of the police is the time when maximum pressure from the police is effected – including the reality of the police using extrajudicial measures like physical torture, emotional pressures and other similar measures to break the will of the arrested persons. It is in recognition of this salutary principle that sec. 167 (2) Proviso of the CrPC provided for a maximum of 15 days of police custody from the time of arrest, after which the arrested person has to be mandatorily kept in judicial custody. This means that the accused person will have to be lodged in judicial custody in the nearest central prison. This thereby ensures a measure of protection from the police as the accused person is technically under the oversight of the judiciary, even though they may be in prison. This provision has been recognised by the Supreme Court in several cases to be an elementary part of the rule of law and administration of criminal justice system. A further feature of the law in the subject is that police remand under u/s 167 of the CrPC cannot be granted at the asking of the police but is a judicial decision taken by the jurisdictional Magistrate who is required to look into the papers including the FIR and the status of investigation and to pass a judicially-reasoned order as to whether the request of the police seeking physical custody of the accused should be granted or not. In any case, the maximum period was limited to 15 days from the time of arrest.

30. This very important protection has been totally demolished through the changes brought about in the law relating to remand, spelt out in sec. 187 of the BNSS. A careful reading of sec. 187 reveals the following:
    (i) The bar of maximum of 15 days of police custody within the first 15 days from time of arrest is removed permitting the Magistrate to order police custody for a period of 15 days anytime during the initial 40-60 days of detention (sec. 187(2). This effectively means that the earlier bar on seeking police custody once the remanding Magistrate grants judicial custody is lifted. Thus the Magistrate may order that any accused person can be shifted from judicial custody back to police

custody at any tim e beyond the first 15 days of arrest, even if he has been granted judicial custody.

(ii) At this juncture, it is very significant to note that even the maximum period of police custody of 15 days has been further diluted in sec. 187 (3). A comparison of sec. 167 (2)Proviso (a) CrPC and sec. 187(3) BNSS shows that while the entire wording of sec. 167(2) Proviso (a) CrPC has been retained in sec. 187(3) – a very crucial phrase has been omitted: "*The Magistrate may authorise the detention of the accused person,* ***otherwise than in the custody of the police*** ….". The effect of the omission of the above terms means that the original bar of police custody of 15 days is effectively removed!! Thus, the Magistrate for reasons to be recorded, may authorise the detention of the accused person (in police custody) for a total period of 90 days (in cases where offences are punishable with death or life imprisonment or for a term of 10 years) or 60 days (in cases of other offences). This prolongation of the period of police custody is a very serious infringement on the protections of the accused, exposing them to torture, intimidation and other dangers.

(iii) It is important to understand the scope of the new provision, sec. 187 BNSS:

a. There is no maximum period to the number of days of police custody that can be ordered (60 or 90 days, depending on the offence).
b. The cap of maximum 15 days of police custody starting from the date of arrest has been removed.
c. The well-recognised principle that once an accused person has been remanded to judicial custody, the person shall ordinarily not be permitted to be taken back into custody by the police has been set aside.
d. In effect, the accused person may move between police custody and judicial custody as though there is no difference in the nature of the custody.
e. Here, the salutary caution of the Parliamentary Standing Committee that extending the police custody has a potential for misuse and that there is a need to bring about an amendment to this provision to provide greater clarity has not been considered in the final version of the clause.

Arming the police with untrammeled powers – sec. 172 BNSS

31. An indication that one of the core thrusts in the new criminal laws is to concentrate the powers in the police is indicated by sec. 172 of the BNSS which provides that

all persons shall be bound to conform to the lawful directions of a police officer. The same clause also provides that any person who (a) resists (b) refuses (c) ignores or (d) disregards to conform to any direction may either be taken into custody by such police officer and produced before a Magistrate or release him in petty cases within a period of 24 hours. It should be noted that this new provision is not accompanied by any related provision providing for protection of citizens in the context of abuse of this power, thereby arming the police with impunity and immunity from action for wrongful use of their powers.

Accountability of abuse of power by public servants: new obstacles in sec. 175 BNSS

32. New fetters on the powers of Magistrates from taking cognisance of any complaint against a public servant arising in the course of discharge of their official duties has been placed in sec. 175 (4) BNSS, which is a new sub-section. This provision stipulates that any Magistrate empowered to take cognisance of any offence on a complaint lodged before the Magistrate may order investigation subject to two conditions (a) receiving a report on the facts and circumstances of the incident from the officer's superior to the public servant accused of abuse of power in discharge of official duties and (b) after considering the response of the public servant as to the situation that led to the incident.

33. A similar embargo providing impunity to the police is provided in sec. 223 of the BNSS which comes in Chapter XVI Complaints to Magistrates. While the main part of sec. 223 'examination of complainant' is a reproduction of sec. 200 CrPC, a new provision has been added in sec. 223 (2) BNSS which makes all the difference in terms of a citizen seeking remedy against abuse of power by officials.

34. This new provision viz. sec. 223 (2) places a condition on a court taking cognisance of a complaint against a public servant for any offence alleged to have been committed in the course of discharge of their official functions or duties. It is stated that no cognisance can be taken unless (a) the public servant accused of abuse of power is given an opportunity to explain the situation that led to the alleged incident and (b) a report regarding the facts and circumstances of the incident is obtained from the officer superior to such public servant.

35. The experience all over the country is that it is almost impossible to get any public servant to admit to their wrongdoing or a superior officer giving an impartial report of a subordinate misusing or abusing their power. What sec. 223 (2) has done is to give a legal cover to what has been a systemic administrative practice thereby ensuring that any citizen is totally stymied from approaching courts with complaints of abuse of power by public servants.

36. Yet another well-thought provision erasing accountability of the police is seen in sec. 176 BNSS regarding 'procedure for investigation'. This section provides for the power of the police officer to initiate investigation on receipt of information of the commission of a cognizable offence, which he is empowered to investigate without prior permission of the jurisdictional Magistrate. The same section also provides that if the police officer receiving the complaint considers that it is not of such a serious nature or that there is not sufficient ground for starting an investigation, he shall not investigate the matter. It is to be noted that the main part of sec. 176 (1) and (2) is a verbatim reproduction of sec. 157 CrPC. However, in a very significant omission, the requirement under u/s 157 (2) CrPC that in the event that the police officer decides not to investigate or cause an investigation into the complaint, intimation of this decision must be provided to the informant. This very vital element of accountability that allows the informant/complainant to seek other remedies in criminal law has been omitted in sec. 176 (2) of the BNSS. In simple terms the new provision in sec. 176 BNSS can be interpreted to mean that the police officer receiving the complaint is under no obligation to inform the informant that their complaint is not going to be investigated. There can be no other purpose for this omission barring to once again ensure impunity on the part of the police officer.

Power to remit/commute sentences: sec. 477 BNSS
Shift from `Consultation' to `Concurrence' - Violation of federal principles

37. Sec. 477 BNSS providing for the power of State Government to remit or commute a sentence has undergone a very subtle change which strikes at the very root of the principles of federalism embodied in the Indian Constitution. Sec. 477 BNSS is almost a verbatim reproduction of sec. 435 CrPC with one singular change. While in the old sec. 435 of the CrPC, the State Government is empowered to exercise powers after

"consultation with the Central Government", this has been replaced with "concurrence". The change from 'consultation' to 'concurrence' strikes at the root of federal principles underlying the Indian Constitution. The change in terms is not a cosmetic change but highlights a common pattern in the BNSS which is to centralise all powers with the police and concentrate all authority with the Central Government.

Criminalising protests: criminalising hunger strikes: sec. 226 BNS

38. Sec. 226 of the Bharatiya Nyaya Samhita covers, "attempt to commit suicide to compel or restrain exercise of lawful power" and is a new provision introduced in the penal law of India. This new provision seeks to criminalise anyone attempting to undertake hunger fasts as a form of civic protest and makes them liable to one-year simple imprisonment, or with fine, or with both or with community service. Right from the time of Gandhi and the Satyagraha Movement, which was an elementary part of the independence movement, launching hunger strikes by leaders has been an accepted form of a non-violent approach to articulating democratic demands. Non-violent and democratic approaches to articulating demands have always been recognised as legitimate forms of democratic protest in India. What sec. 227 does now is to criminalise yet another form of democratic protest by clothing it as a crime resulting in punitive action, all of which will only deter citizens from exercising their fundamental right to organise, articulate dissent, question and oppose governmental schemes, policies etc.

Undermining victim's access to justice: Preliminary Enquiry in Cognisable cases Sec. 173(3) BNSS

39. In a very shocking manner, contrary to the unanimous decision of a Constitutional Bench ruling in `Lalitha Kumari' (2014) case, a new provision, sec. 173(3) BNSS has been added stipulating that in complaints of cognizable offences punishable with three to seven years imprisonment, the officer in charge of the police station may with prior permission of the Deputy SP or higher rank officer, proceed to conduct "preliminary enquiry" of 14 days to ascertain whether there exists a "prima facie" case for proceeding with investigation when there exists a prima facie case. What is objectionable is that the Supreme Court has unambiguously stipulated that in cases when a cognizable offence is made out, irrespective of the punishment involved, the police officer will have to

mandatorily register a FIR and proceed with the investigation. The SC has categorically clarified that the prevalent widespread practice of the police adopting the pretext of `preliminary enquiry' to delay registering FIRs in cognizable cases is unacceptable and against the spirit of the law. The Court clarified that preliminary enquiry can be undertaken only in complaints when it is not clear whether any cognizable offence is made out and has noticed a small number of such instances when preliminary enquiry may be undertaken. When seen against this background, it becomes clear that sec. 173(3) BNSS is clearly unconstitutional and meant to thwart access to justice for victims.

40. It should be noted that a vast majority of the offences listed in the BNSS providing for sentences of three to seven years imprisonment covers cases involving gender related crimes, crimes against property and so on. The effect of sec. 173(3) BNSS will eventually end in eroding the rights of victims to obtain justice through the initiation of FIR which is the beginning of criminal investigation process.

41. The full import of the legislative provision undermining victims access to justice via sec. 173(3) BNSS becomes clear when we juxtapose sec. 173(3) with sec. 176(2) BNSS; thus while sec. 173(3) permits `preliminary enquiry' in cognizable offences carrying punishment between 3 to 7 years, sec. 176(2) BNSS has omitted the need for the police officer to notify the informant the fact "that he will not investigate the case or cause it to be investigated" which was provided in sec. 157(2) of the CrPC from which sec. 176 has been copied.

Community service: Sec. 4(f) BNS and sec. 23 BNSS

42. Both the new laws, the BNS and the BNSS, have introduced a new punishment, "community service". While sec. 4 (f) of the Bharatiya Nyaya Samhita states that amongst punishments like death, imprisonment for life and rigorous and simple imprisonment, a new punishment namely 'community service' can be imposed.
Similarly, sec. 23 of the BNSS providing for sentences which Magistrates may pass explains that 'community service' shall mean the work which the court may order a convict to perform as a form of punishment that benefits a community for which he will not be entitled to any compensation. 'Community service' as a form of punishment has been provided in sec. 226, BNS covering attempt to commit suicide; sec. 303 (2), BNS covering theft of property less than five thousand rupees; sec. 355, BNS covering drunken behaviour in public and sec. 356, BNS covering defamation.

43. The point to be noted is that in no place in both these laws has the content of what will constitute 'community service' been explained barring the explanation provided in sec. 23 of the BNSS referred to above. Given the context of arbitrary and problematic orders passed by courts as part of bail conditions or punishment for minor offences, the lack of a proper definition of what is covered by 'community service' is a matter of concern. It should be noted that the Parliamentary Standing Committee on the DNS had specifically recommended that the term 'community service' should be suitably defined so as to prevent confusion in the implementation of the law in the future. However, what stands out is the fact that the recommendations of the Standing Committee have been ignored and no explanation has been introduced covering the content of what will constitute 'community service'.

44. The Supreme Court has in '*Aparna Bhat vs State of Madhya Pradesh*' (*2021*), voiced its concern over High Court judges imposing conditions while granting bails especially in cases involving gender-based crimes like `outraging modesty of a woman'. The SC pointed out that using `rakhi' as a condition for bail "transforms a molester into a brother, by judicial mandate. This is wholly unacceptable and has the effect of diluting and eroding the offence of sexual harassment. The apex court also noted that there were numerous examples of courts imposing, in the name of community service, conditions like planting tree saplings, enlisting as 'Covid Warriors', donating to 'PM Cares Fund', tying rakhi to rape survivor, presenting a gift to a survivor and so on. The Supreme Court in particular pointed out that imposing such conditions by judges perpetuates societal stereotypes in the name of compelling 'community service' as part of bail conditions. This salutary caution has been consciously ignored in the final drafting and promulgation of the BNS and BNSS.

Gender related offences

45. No provision for forcible rape of men by men and transgenders

The new BNS has totally omitted sec. 377 IPC titled `unnatural sex'. It must be pointed out that sec. 377 IPC was struck down by the Supreme Court in *`Navtej Singh Johar vs Union of India*' (2018) to the extent that it criminalised consensual same-sex relations between adults. The court however held that, in instances of non-consensual, forced sex between adults, including carnal intercourse with minors and acts of bestiality (sex with animals) the provisions of sec. 377 IPC could still be invoked.

46. However, with the total omission of sec. 377 IPC in the new Bharatiya Nyaya Sanhita, there is no remedy available for victims of rape by a man by another man or rape of a transgender. The Parliamentary Sub-Committee had drawn the attention to the effect of this omission pointing out, "Sec. 377 IPC can still be invoked when there is non-consensual sex/ rape of a man by another man. A woman can also initiate proceedings against her husband for unnatural sex under sec. 377 IPC. If per Nyaya Sanhita, these acts are not offence, it means that the victims of sodomy, buggery etc will have no remedy available under it. So, if a man is raped by another man, what is his remedy". Unfortunately, the recommendations of the Parliamentary Sub-Committee were not taken into consideration when the final version of the BNS was adopted by Parliament.

47. Non-recognition of marital rape: sec. 63, Exception2, BNS

Despite the demands of women's movement to recognise marital rape as an offence, the present BNS continues to exclude marital rape as an offence providing in Exception 2, "Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape".

48. ***Retaining offence of adultery – sec. 84 BNS*****:**

Refusal to adopt gender neutral provision

It is pertinent to point out that a Constitutional Bench of the Supreme Court in the case of `Joseph Shine' (2018) had struck down sec. 497 IPC - the offence of adultery, holding that it violated the woman's right to dignity resulting in the infringement of Art. 21 of the Constitution. The Parliamentary Sub-Committee had recommended that a gender-neutral provision of adultery could be included as a safeguard to the institution of marriage. This recommendation to adopt a gender-neutral provision was rejected when the Bill was passed.

49. Sec. 84 BNS is a verbatim reproduction of sec. 498 IPC, with the tile, "***Enticing or taking away or detaining with criminal intent a married woman***". What the BNS did in copying sec. 498 IPC was to once again use a gendered stereo-typical definition of the offence of adultery using the same language that the Constitution Bench frowned upon. It is apposite to keep in mind that Justice JF Nariman pointed out that sec. 497 was an archaic provision which had lost its rationale. "Ancient notion of man being the perpetrator and woman being victim of adultery no longer holds good" and further It treats women as chattel, and has chauvinistic undertones. In the same ruling Justice Chandrachud pointed out, "Autonomy is intrinsic in dignified human existence. Sec.

497 denuded the woman from making choices. The law in adultery is a codified rule of patriarchy. Society attributes impossible attributes to a woman, Raising woman to a pedestal is one part of such attribution". Unfortunately neither the dictum of the SC nor the recommendations of the Parliamentary Committee to use gender-neutral formulations was accepted when the BNS was finally passed.

Hate crime: introduction of a new crime

50. In recent years, we have witnessed the horrifying spectacle of mob lynchings and killing of people belonging to minority communities including Muslims, Dalits, and other identities. The Supreme Court has in several landmark judgements and in particular the *`Tehseen Poonawalla' case, 2018* come down heavily on mob lynchings pointing out that hate crimes is an outcome of intolerance, ideological dominance and prejudice which should not be tolerated lest it results in a reign of terror. The court particularly pointed out that "extra-judicial elements and non-state players cannot be allowed to take the place of law or the law-enforcing agency". The court went on to recommend that parliament should consider enacting a special law against mob lynchings and also indicated a number of strategies to be undertaken covering preventive, remedial and punitive measures.

51. It is very striking that the Bharatiya Nyaya Samhita has introduced a new provision in sec. 117 (4) of the BNS covering an offence committed by five or more persons causing grievous hurt to a person on ground of his "caste or community, sex, place of birth, language, personal belief, or any other similar ground" and provided for a sentence of seven years and fine.
    Sec. 103 of the BNS covering punishment for murders provides for punishment with death or imprisonment for life and fine in cases where such assaults lead to death of the person so attacked.

52. There are two striking aspects of this new law. Firstly, the term 'mob lynching' or 'hate crime' is nowhere mentioned in the BNS or for that matter in the other two laws also. Secondly, is the fact that among the categories on which such mob lynchings can take place covering race, caste, community, etc the term 'religion' or 'religious beliefs' has not been specifically mentioned. This raises a suspicion as to whether there is a reluctance to accept the fact that in many instances, mob lynchings take place because

of religious differences. And whether this deliberate omission is itself part of a larger sense of prejudice or bias against religious minorities.

Conclusion

53. In conclusion it should be pointed out that we have only discussed some of the most glaring contradictions and problems reflected in the passage of the BNS, BNSS and the BSA 2023. However, what is clear is that the three new laws presage a slow but sure shift in direction towards putting in place a ***de jure police*** state for all of India. As such, these laws will be among the most consequential reforms with implications for the human rights for all those residents in the territory of India. If the Constitution is of any concern, these laws ought not to come into force. All democratically minded groups will have to join together to oppose laws which aim to put in place a police state in India.

24th June, 2024

People's Union for Civil Liberties

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