EGi
Editors Guild of India

29 July 2024

Shri Amit Shah,

Minister of Home Affairs of India,

Ministry of Home Affairs, North Block,

New Delhi - 110001

Subject: Editors Guild of India's concerns on new Criminal Laws with respect to press freedom, journalistic work and an additional layer of safeguard

Hon'ble Home Minister Shri Shah,

We are writing to you on behalf of the Editors Guild of India, the apex body representing senior editors in the country. Since our inception in 1978, the Editors Guild has been steadfast in its mission to uphold and protect the freedom of the press, a cornerstone of our democracy.

As you are well aware, freedom of the press is a facet of the fundamental right of free speech and expression which is protected under Article 19(1)(a) of the Constitution of India. The members of the press have a duty to inform the citizenry and the press acts in the capacity of a trustee or surrogate of the public, as the "eyes and ears of the citizenry". A free press is the hallmark of a democracy and deserves to be shielded from frivolous prosecution for acts done in the course of their duty

We are writing to bring to your notice, a long standing concern of ours, with respect to the manner in which criminal laws have been used against journalists, as tools to intimidate and harass them.

Over the years and under successive governments, many provisions under the criminal code, the so-called offensive speech laws in IPC- sections 153A and B, 295A, 298, 502, and 505, have been liberally used to file FIRs against journalists whose reporting has been critical of governing establishment. This has been done by governments across states and party lines.

Journalists, as part of their professional duty, are meant to report on sensitive issues, throw light on uncomfortable facts, and speak truth to power. They literally have to play with fire as part of their professional work.

And therefore, it has become a norm under several governments, both at centre and in states, and across party lines, to have criminal complaints filed against journalists by seemingly non-stage agents, but who are acting with full support of the state machinery, and those

complaints are readily registered as an FIR, with a possibility of arrest. In some cases, journalists have been imprisoned for long durations, as the cases have moved at a snail's pace in courts, and in others, while there may not have been an arrest, yet the process of defending against frivolous complaints has itself become a punishment.

We are now writing to you in the context of the new criminal laws, which were notified earlier in the month, and which we feel further expands the powers of law enforcement agencies.

As it is, between 2019 and 2023, a slew of legislation has been passed by Parliament dramatically expanding the reach of criminal laws by way of amendments to existing laws or by way of introducing new statutes outright. Expansion of substantive criminal law has often been accompanied by procedures designed to expand police powers and truncate civil liberties. Examples include the amendments to the Prevention of Money Laundering Act 2002 [PMLA]; the Unlawful Activities (Prevention) Act 1967 [UAPA]; the Foreign Contributions (Regulation) Act 2010 [FCRA], and; the introduction of the Criminal Procedure Identification Act 2022 [CPIA].

Now, with the notification of the Bhartiya Nyaya Sanhita 2023 [BNS] and Bharatiya Nagarik Suraksha Sanhita 2023 [BNSS] to replace the Indian Penal Code 1860 and Criminal Procedure Code 1973, respectively, we feel there is even greater cause of concern.

We are attaching a note with this letter to highlight some important points of concern with the new laws. The reason we are specifically raising these is because we fear all these provisions can be potentially used against journalists, as has been the case in the past under IPC as well as Cr.P.C. The Guild urges a thorough review of these criminal laws from this perspective. We suggest substantive consultation with organisations like ours in this regard.

A case for journalistic exception

We also are of the opinion that given the precedent in the manner in which criminal laws have been used as tools of harassment and intimidation against journalists, with a potential of setting a chilling effect, there is a legitimate case for a journalistic exception in the registration of FIRs. Far too often we have seen that process is the punishment and that there is a case for protecting members of the press/media from frivolous criminal complaints and indiscriminate state/police action in relation to acts done in the course of their duty. And we re-iterate, this has been the case under governments across party lines.

Therefore we strongly feel that before a criminal complaint is registered as an FIR against a journalist, with a reference to a journalistic work done by them, there be an additional and thorough layer of review. It is our strong belief that there is a need for a deep consultation and formulation of some set of guidelines for regulating prosecutions against members of the press/media for actions in the course of their duty. While this will require a detailed review, we would like to propose a mechanism whereby any such complaint against a member of press is reviewed by a high ranking Police Officer, and that it is brought to the knowledge of Press Council of India, for an opinion on whether further investigation of the complaint/information would be an unreasonable burden on the freedom of profession and freedom of expression of the alleged offender as a member of the press. We feel some such set of guidelines can go a long way in preventing the misuse of these laws against journalistic activities.

Respected Sir, we seek an engagement and dialogue with you and the Home Ministry, for driving a constructive conversation around these important issues, as the provisions of the new Criminal Laws can pose grave danger to freedom of press.

We look forward to receiving a response from you.

Sincerely,

Anant Nath	**Ruben Banerjee**	**K Ve Prasad**
President	General Secretary	Treasurer

Annexure on specific provisions of laws:

Bharatiya Nyaya Sanhita 2023 [BNS]

A. Treason (Section 152), and the re-introduction of Sedition

a. The purported removal of the offence punishable under Section 124-A of the IPC, traditionally known as Sedition, was widely advertised at the time of passing the BNS. The section was put under abeyance by the Supreme Court in 2022, in response to a petition filed by the EGI, challenging the law, and after recording the Government's submission that it will reconsider the law. It is clear, however, that the removal of Section 124-A is only in letter but not in spirit, as it has been rechristened in the form of Section 152 BNS punishing "acts endangering sovereignty, unity, and integrity of India".

b. Section 152 punishes conduct that "excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India". The kind of conduct is "words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial means, or otherwise" or a person who "indulges in or commits any such act".

c. Section 124-A IPC punished someone who "brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards the Government established by law in India" by way of "words, either spoken or written, or by signs, or by visible representation, or otherwise", where 'disaffection' included "disloyalty and all feelings of enmity".

d. The scope of physical conduct under Section 152 BNS is clearly broader than 124-A IPC, as it now goes beyond speech acts (written or oral) to also cover use of financial means to achieve certain alleged objectives.

B. Imputations Prejudicial to National Integration (Section 197)

a. Section 197 of the BNS corresponds to Section 153B of the IPC, but it contains an important addition — it criminalises any person who "makes or publishes false or misleading information, jeopardising the sovereignty, unity and integrity or security of India." This is an extremely broad category of conduct. While there may be some means to determine 'false' information, there is no arbiter of what may be 'misleading', and absolutely no objective means to determine when any purportedly false or misleading information 'jeopardises' the unity and integrity or security of

India. What makes the provision even more problematic is that it is classified as a cognizable and non-bailaible offence.

C. Organised Crime (Sections 111-112) and Terrorism (Section 113)

a. The BNS has introduced offences of Organised Crime (Section 111), Petty Organised Crime (Section 112) and Terrorism (Section 113) into the general criminal law. Prior to this, such crimes were prosecuted by way of specific statutes. In matters of organised crime, such statutes were passed by every state, largely modelled on provisions of the Maharashtra Control of Organised Crime Act 1999. Terrorism related offences had been dealt with under a federal statute, the UAPA.

b. The potential for these offences to be misused for targeting journalists has become clear over the past decade. Organised Crime can include any person within its ambit who has two charge sheets or complaints against them pertaining to a host of allegations which can include mundane offences such as criminal breach of trust.

c. The Terrorism offence is modelled on existing UAPA offences, which have been used with alarming alacrity against journalists. The introduction of Sections 111 to 113 in the BNS has not been accompanied by a repeal of these existing statutes at the state or federal level. What we have, then, is the possibility of the same alleged act being prosecuted under two separate statutes, which carry different procedural regimes for prosecution.

d. Having the same offence prosecutable under two separate regimes, where one regime is clearly more severe in its curbing of personal liberty than the other, throws up critical issues of how police discretion shall be exercised when dealing with such cases.

Bharatiya Nagarik Suraksha Sanhita 2023 [BNSS]

The BNSS contains a handful of critical changes that have significantly expanded the police power to prevent and investigate crime, at the expense of truncating protections for individual liberty. Besides being generally of concern for all citizens, the provisions are especially important for journalists.

A. Arrest and Bail

There are some major changes on matters of custody and bail:

a. There is a marked change in the length of possible pre-trial incarceration during an investigation. The existing rule restricting detention in police custody to only fifteen

days and that too within the first fifteen days of arrest, has been changed. Under Section 187 BNSS, it appears that now detention in police custody can be granted within the first forty days of arrest for cases where alleged offences are punishable up to 10 years, and within the first sixty days of arrest for cases where alleged offences are punishable beyond 10 years. The language is also unclear as to whether the maximum permissible period for detention in police custody is limited to fifteen days.

b. There is an important change to provisions regarding default bail where persons have spent more than half the maximum possible jail sentence as an undertrial. Section 479(2) drastically alters this rule, specifying that in any case where the "investigation, inquiry or trial" is pending in "more than one offence or in multiple cases", it would nullify the mandate to release a person on bail. Since police invoke more than one offence routinely while registering cases, such a qualification has practically rendered the beneficial rule practically redundant.

B. Powers of Search and Seizure (Sections 94, 96, 185, and related clauses)

a. There is no change to the antiquated regime governing the search and seizure powers of police, barring insertion of 'electronic communication' and 'communication device' in Section 94 [which corresponds to Section 91 of the Cr.P.C.]. The problems with that regime of search and seizure are well known and the subject of litigation that is pending before the Supreme Court. In essence, the regime (i) confers wide and arbitrary powers upon police enabling erosion of privacy disrespecting the proportionality principle and (ii) permits violations of the right against compelled self-incrimination.

C. Attachment & Confiscation of Proceeds of Crime

a. A significant new feature of concern is contained in Section 107 of the BNSS, which has inserted provisions for 'attachment, forfeiture or restoration of property'. In one fell swoop, BNSS now carries provisions akin to PMLA allowing for forfeiture of property of persons. The provisions are comparably broader and more draconian than the PMLA

    i. PMLA applicability is restricted to allegations arising in certain kinds of cases identified as 'Scheduled Offences' and enables attachment of property that may have been derived out of commission of these offences. However, Section 107 applies to property that may be derived or obtained, indirectly or directly, as a result of a "criminal activity or the commission of any offence".

    ii. PMLA only allows for attachment of property during the pendency of a case, permitting the actual confiscation of property after a conviction is

delivered by the criminal court. Section 107 BNSS allows for confiscations even without any conviction, and does not envisage any redressal mechanism in case a person is eventually acquitted at trial.

b. The breadth of Section 107 makes it a highly charged tool in the hands of the police, allowing for targeting movable and immovable assets of any potential accused (read journalist / news organisation) and even securing orders for confiscation all during the pendency of a trial.