

India's New Criminal Laws: Reform or Repression?

The swift and unanticipated passage of the three new criminal laws 'Bharatiya Nagarik Suraksha Sanhita (BNSS) Act 2023', 'Bharatiya Nyaya Sanhita (BNS) Act 2023', and 'Bharatiya Sakshya Adhinyam Act (BSA) 2023'—through the Indian Parliament on December 20, 2023, that too by ignoring Parliamentary Norms and Procedure (as many as 146 Members of Parliament (MPs) were “arbitrarily” suspended when they were hurriedly passed - has sparked serious concerns about their constitutionality and their potential to erode the very foundation of India's democracy. Scheduled to come into effect from July 1, 2024, these laws encompass provisions that are draconian in the sense that they grant unbridled powers to the police, therefore threatening of the very foundations of constitutional democracy in India. The news laws in fact violate the principles of **Liberty, Equality and Non-Discrimination enshrined in the Constitution of India.**

Article 14: Equality before the law

Article 14 of the Indian Constitution guarantees **Equality before the Law and Equal Protection of the Law** within the territory of India. This principle of equality is a cornerstone of a democratic society, ensuring that no individual or group is discriminated against by the state.

The new criminal laws, particularly in their broad and vague definitions of offenses such as '**Sedition**' and '**Terrorism**', create a fertile ground for selective and biased prosecution. **Section 152 of the BNS 2023**, which criminalises acts that "endanger" the sovereignty and integrity of India, can be used to target political opponents, dissidents, and activists. The vague terminology such as "subversive activities" can be interpreted in an arbitrary manner, leading to unequal treatment under the law and booking of legitimate democratic acts as “acts of terrorism”.

Furthermore, the provision that criminalises "**resisting, refusing, ignoring or disregarding any direction given by a police officer**" (BNSS 2023) exacerbates the risk of discriminatory enforcement. This provision enhances Police Powers significantly, paving the way for abuse and corruption, and undermining the Principle of Equality before the Law by creating a legal environment where ordinary citizens can be subjected to arbitrary and unequal treatment.

Article 19: Protection of certain rights regarding freedom of speech, right to peaceful assembly, dissent, etc.

Article 19 of the Constitution guarantees several fundamental freedoms, including the right to freedom of speech and expression, the right to assemble peaceably without arms, and the right to form associations or unions. These freedoms are essential for the functioning of a democratic society.

The new laws pose a severe threat to all these rights. The redefined **Sedition Section** of the Law under **Section 152 of the BNS, 2023**, essentially criminalises any speech or action deemed (by authorities/government/law enforcement) as "anti-national" or against the "integrity of the nation". In addition to this, a new legal weapon for targeted, biased, political persecution has also been introduced through the **Crimes of Organised Crime and Petty Organised Crime**. This provision can be easily misused to suppress legitimate dissent and critique of the government, thus stiffening the fundamental right to freedom of speech. Another assault on our democratic right to protest is the criminalisation of the use of fasting as political protest. Under **Section 226 of BNS, the act of fasting as an expression of dissent** has been categorised as an “**attempt to commit suicide with the intent to compel or restrain any public servant from discharging his official duty**”, and has been made punishable with imprisonment for a term which may extend to one year. Its main purpose appears to only be to prohibit the use of fasting as a protest or political weapon.

Article 21: Protection of Life and Personal Liberty

Article 21 of the Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law. This article has been interpreted by the Supreme Court to include various rights, such as the right to live with human dignity, the right to privacy, and the right against arbitrary arrest and detention.

The new laws significantly threaten personal liberty. The expansion of the potential for selective prosecution and the broad definitions of offenses like sedition and terrorism can lead to arbitrary arrests and detentions. **Furthermore, 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 **new criminal laws also introduce harsher punishments and expand police custody during investigations, which can result in prolonged pre-trial detention.** Under present law, Section 167 (2) and (2a) of the CrPC, 1973, a Magistrate can extend police custody to a maximum of 15 days in case investigation cannot be completed within 24 hours, after which customarily, judicial custody follows. Maximum limit for overall detention is 60-90 days (depending on the nature of offence). A major change has been introduced through **Section 187(2) and (3) of the BNSS 2023 which is the new avatar of erstwhile Section 167 (2) and (2a) of the CrPC, 1973.** The deletion of the cautionary “otherwise than in custody of the police” in the newly incarnated Section 187(3) opens the risk of prolonged police custody to a staggering 40-60 days!

Through these laws, the Modi Regime has particularly ignored the Higher Judiciary's firm stance against practices like handcuffing and arbitrary detention (*Prem Shankar Shukla vs. Delhi Administration, 1980 SCC 526; Citizens for Democracy vs. State of Assam, 1995 SCC 743*). Worse, the provisions of BNSS further allows only for the “discretionary” recording of FIRs by the police, once again, ensuring an imbalance in the powers of the police vis a vis the rights of citizens.

The requirement for all persons, including those not accused of any crime, to provide their biometrics to the government (BNSS) also infringes upon the right to privacy, which has been recognised as a fundamental right under Article 21 (*Justice K.S. Puttaswamy vs. Union of India, 2017*). This provision creates an intrusive surveillance mechanism that can be used to monitor and control the populace, undermining the **Right to Privacy and Personal Liberty**.

To sum up, in brief, we list some of the chilling features of the new Criminal Code as requiring special attention:

- (1) the criminalisation of legitimate, lawful, non-violent democratic speech or actions as ‘terrorism’;
- (2) the broadening of the offence of sedition in a new and more vicious avatar (what could be called “sedition-plus”);
- (3) the expansion of the potential for “selective prosecution” — targeted, politically-biased prosecution of ideological and political opponents;
- (4) the criminalisation of a common mode of political protest against government through fasting;
- (5) encouraging the use of force against any assembly of persons;
- (6) exponentially enhancing ‘police raj’ by criminalising “resisting, refusing, ignoring or disregarding to conform to any direction given by [a police officer]”;
- (7) enhancing handcuffing;
- (8) maximising police custody during investigation;
- (9) making the recording of a FIR discretionary for the police;
- (10) dialling up the pain of imprisonment;
- (11) compelling all persons (even those not accused of any crime) to provide their biometrics to the government; and
- (12) Shielding of some of the Sangh parivar’s activities.

Conclusion

The Bharatiya Nagarik Suraksha Sanhita (BNSS) Act 2023, Bharatiya Nyaya Sanhita (BNS) Act 2023, and Bharatiya Sakshya Adhinyam (BSA) Act 2023, represent a significant departure from the democratic principles enshrined in the Indian Constitution. The broad and vague definitions of offenses, the enhancement of police powers, and the introduction of harsher punishments collectively pose a grave threat to civil liberties and fundamental freedoms.

These laws undermine the Principles of Equality Before the Law, Freedom of Speech and Assembly, and Protection of Life and Personal Liberty, as guaranteed by Articles 14, 19, and 21 of the Constitution. They create a legal environment conducive to arbitrary and discriminatory enforcement, stifling dissent, and enabling state surveillance and control over the populace. Worst of all, they violate the expanded jurisprudence developed by India’s constitutional courts on critical issues related to personal liberty.

In light of these concerns, it is imperative to stay the implementation of these laws and conduct a thorough re-examination of their implications. They require a detailed deliberation in Parliament. A democratic society must ensure that its laws are in alignment with its Constitutional values and the most recent Jurisprudence emanating from the Courts that guarantee the rights and freedoms of all Citizens. The new criminal laws, in their current form, represent a severe deviation from these values and threaten to shift the balance of power to the Police and State and thereby erode Participative Democracy and the Democratic Fabric of the nation.



Citizens for Justice and Peace | cjp.org.in | info@cjp.org.in