#### CENTRE FOR PRACTICING LAW PRACTICING NYAYA SHASTRA



NUANCES OF CRIMINAL TRIAL:
PROSECUTION Vs. DEFENCE UNDER
THE NEW LEGAL REGIME OF BHARITYA
NYAYA SANHITA, 2023, BHARITYA
NAGARIK SURAKSHA SANHITA,
BHARITYA SAKSHYA ADINIYAM 2023

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#### Background Note on BNS, BNSS, BSA, 2023



 Three Factors largely paved way for replacing the existing IPC, Cr.P.C and Evidence Acts:

Judicial Contribution & Recommendations

Law Commission Recommendations

Contribution from the Legal Fraternity & Civil Society



### Principle Objective of repealing/replacing of the existing I.P.C. Cr.P.C & Evidence Act

- 1. To provide a victim centric justice as against the idea of awarding punishment to the offender;
- 2. To provide simple, consistent, transparent, and accountable procedure;
- 3. to provide time bound evidence based speedy trial for enforcement;
- 4. To strengthen the aim of the prosecution by giving it the aid of forensic science while conducting investigation;
- 5. to enhance the responsibility of the Police to inform the victim about the process of investigation.

#### Principle Objective contd.



- 6. To increase the age limit of rape victim from the age of 15 to 18 years and to bring it in consistent with the newly enacted IPC provisions.
- 7. To introduce new provision for mob lynching.
- 8. To remove all provisions which relate to colonial era.
- 9. To establish a forensic science university to enable it to be Integrated with the Department of the Home Affairs, Police Stations and the offices of Public Prosecutors, the prisons and the Courts.
- 10. To permit appearance of the Accused, experts and victims through electronic media.
- 11. The bills have been introduced to make them evolving and to encapsulate the developing technology.



#### BHARITYA NYAYA SANHITA, 2023



## Scheme of the Bharitya Nyaya Sanhita, 2023

- **❖BNS** is contains 358 Sections divided into 20 chapters as against 511 Sections divided into 23 chapters provided under the Indian Penal Code, 1860
- Chapter V has been added exclusively to penalize offences against Women & Children;
- **❖**Key features of the new Penal Law: approximately 28 sections have been deleted, some of the existing sections have been merged or amended to bring them in tune with the recent trends in law and/or in consistent with other laws in force in India





- Section 53A: (Construction of reference to transportation).
- Section 55: (Commutation of Sentence for imprisonment for life).
- Section 55A: (Definition of Appropriate Government)
- Section 116 Second part deleted- ("if abettor or person abetted be a public servant whose duty is to prevent offence").
- ❖ Section 124A- (Sedition).
- Section 150- (Hiring, or conniving at hiring, of persons to join unlawful assembly).
- Section 151- (Knowingly joining or continuing in assembly of five or more persons after it has been commanded to disperse).
- Section 239- (Delivery of Coin, possessed with knowledge that it is counterfeit).

#### Deleted Offences: Indian Penal Code,1860

- Section 240- (Delivery of Indian coin, possessed with knowledge that it is counterfeit).
- Section 241 to 251 have been deleted.
- Chapter XIII (Offences Relating to Weights and Measures).
- ❖Section 250- (Delivery of coin, possessed with knowledge that it is altered).
- **❖** Section 376(3)- (Punishment of Rape).
- [(3) whoever commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extent to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall be liable to fine"]



### **Newly added Offences:** Bharitya Nyaya Sanhita, 2023

- ❖ Section 2 (3)- Definition of "Child".
- Section 48- Abetment outside India for offence in India.
- Section 69- Sexual intercourse by employing deceitful means etc.
- Section 95- Hiring, employing or engaging child to commit a offence.
- ❖ Section 103(2) Punishment for Murder.
- Section 106(2)- Causing Death by Negligence.
- ❖ Section 111- Ogranized Crime.
- Section 112- Petty Organized Crime.
- ❖ Section 113- Terrorist Act.

#### Newly added Offences: Bharitya Nyaya Sanhita, 2023

- ❖ Section 117(3)(4)- Voluntarily causing grievous hurt.
- Section 152- Acts endangering sovereignty, unity and integrity of India.
- ❖ Section 195(2)- Assaulting or obstructing public servant when suppressing riot, etc.
- Section 197 (1)(d)- Imputations, assertions prejudicial to national integration.
- Section 226- Attempt to commit suicide to compel or restrain exercise of lawful power.
- Section 304- Snatching.
- Section 324- Mischief.

#### Newly added Offences: Bharitya Nyaya Sanhita, 2023

- Section 341(3)(4)- Making or possessing counterfeit seal etc, with intent to commit forgery punishable under Section 338.
- ❖ Section 358- Repeal and savings.

### **Challenges:**Bharitya Nyaya Sanhita, 2023



- Death Penalty has a punishment has not been abolished inspite of Law Commission Reports which suggested to rehabilitative aspects of justice should not be lost sight of.
- ❖There is scope of confusion on economic offences as parallelly there are special statutes already in place eg. UAPA Act,1976, National Security Act,1980 etc.
- There is enhancement of period of imprisonment has been enhanced.
- The law is still silent on marital rape.
- ❖ Sedition is not completely removed as an offence Section 105 has been substituted instead.
- No protection of men against sexual violence. There is no gender neutrality in offences.
- Theft comes under petty offences. It is difficult in situation where there is massive theft operations taking place.



# BHARITYA NAGARIK SURAKSHA SANHITA, 2023



- **❖BNS** is contains 531 Sections divided into 39 chapters as against the 484 Sections divided into 37 Chapters
- **\*KEY HIGHLIGHTS**
- The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) seeks to replace the Criminal Procedure Code, 1973 (CrPC). The CrPC provides for the procedure for arrest, prosecution, and bail.
- BNSS mandates forensic investigation for offences punishable with seven years of imprisonment or more. Forensic experts will visit crime scenes to collect forensic evidence and record the process.
- All trials, inquiries, and proceedings may be held in electronic mode. Production of electronic communication devices, likely to contain digital evidence, will be allowed for investigation, inquiry, or trial.
- If a proclaimed offender has absconded to evade trial and there is no immediate prospect of arresting him, the trial can be conducted and judgement pronounced in his absence.
- Along with specimen signatures or handwriting, finger impressions and voice samples may be collected for investigation or proceedings. Samples may be taken from a person who has not been arrested.



New definition clauses have been included under Section 2 i.e.

Section 2(1)(a)- Audio video electronic means.

Section 2(1)(b)- Bail.

Section 2 (1) (e)- Bond.

Section 2 (1) (i)- Electronic Communication.

- New explanation to "Investigation" has been added under Section 2(1)(I) says BNSS shall prevail over any special acts definition.
- Under Section 6- Concepts of Metropolitan Area and Metropolitan Magistrate are now abolished. (Section 6 of CrPC,1973).
- ❖ Under Section 15- Special Executive Magistrates shall be appointed by state government who is not below the rank of Superintendent of Police. (Section 21 of CrPC, 1973).
- ❖ Under Section 20- District Directorate of Prosecution shall be established in every district consisting of many Deputy Directors or Assistant Directors of Prosecution and also under Section 25 eligibility of Directors or Deputy Directors of Prosecution are specified. (Section 25A of CrPC,1973).

- Under Section 20(2) new post of Assistant Directors of Prosecution have been established.
- Under Section 25A Roles and Responsibilities of Director/Deputy Director/Assistant Director of Prosecution are prescribed.
- Under Section 23 Monetary limit on fines which can be imposed by Judicial Magistrates of First Class and Judicial Magistrate of Second Class have been enhanced. (Section 29 of CrPC,1973)
- Community Service as a form of punishment under Section 23 has been added.
- ❖ Maximum Punishment has been increased from 14 years to 20 years.
- Section 34 Definition of "Proclaimed Offender" has been added.
- New Sub-Section 7 has been added to Section 35 provides no arrest without prior permission of an officer not below the rank of DSP in cases where offences are punishable for less than 3 years and the person is infirm or above 60 years of age (Section 41 & 41A of CrPC,1973).

#### SIGNIFICANT CHANGES IN ARREST PROCEDURE

- **❖**Section 40 makes changes to private arrest provisions by setting deadline of 6 hours from such arrest within which the private person effecting private arrest shall handover the person to police. (Section 43 of CrPC,1973).
- **❖** Section 43(3) provides police officer consider the nature and gravity of offence can use handcuffs while arresting a person who qualifies under certain categories such as repeated offenders, habitual offender etc. (Section 46 of CrPC,1973).
- **❖** Section 50 Arrest to seize offensive weapons from the arrestee shall be made immediately after arrest. (Section 52 of CrPC,1973).
- **❖** The definition of "Registered Medical Practitioner is added for examination of accused or person accused of rape.
- **❖** Section 54 mandated Identification Process shall be recorded using any audio-video electronic means (Section 54A of CrPC,1973).
- **❖** Section 82(2) mandates that on arrest of a person, the police officer shall give information regarding the arrest and place of arrest to designated police officer or such officer of another district where the arrested person resides (Section 57 of CrPC,1973).

#### SIGNIFICANT CHANGES IN INVESTIGATION PROCEDURE

- **❖Section 173 Information regarding commission of cognizable offences can be given to officer in charge of police station by electronic communication. This shall be taken on record within 3 days by person giving it and also such electronic communication shall be entered into a book to be kept by police officer. (Section 154 of CrPC,1973).**
- **❖Section 173 (3) Preliminary enquiry is conducted on receipt of information relating to the commission of any cognizable offence which is made punishable for 3 years and not less than 5 years (Section 154 of CrPC,1973).**
- ❖The preliminary enquiry shall be completed within 14 days and then when prima facie case is made out, the police officer shall proceed with investigation.
- **❖Section 174 the officer who is undertaking investigation shall forward daily dairy report of all such cases fortnightly to the Magistrate (Section 155 of CrPC,1973).**

- Section 185 Search by police officer shall be conducted through audio-video electronic means. And the copies of record made under this section shall be sent not less than 48 hours to the Magistrate. (Section 165 of Cr.PC).
- Section 179 gives exemption of witnesses to attend police station for recording of statements.

#### SIGNIFICANT CHANGES IN INVESTIGATION PROCEDURE

- **❖There is time bound investigation of 2 months of offences of rape and gang rape and also extended to offences under POSCO (Section 173 of CrPC,1973)**
- **❖Police officer is duty bound to inform progress of investigation within 90 days by any means including electronic communication to the informant or the victim. (Section 173 of Cr.P.C).**
- **❖Time limit for completion of investigation during the trial shall be 90 days** which may extend with the permission of the court.
- **❖Incases** of enquiries relating to suicide etc the enquiry report shall be sent to DM or SDM within 24 hours unlike earlier where there was no timeline set (Section 174 of Cr.P.C).
- **❖Section 230 requires the police officer to supply free of cost to the accused Copy of Police Report and all the documents without delay and not beyond 14 days from the date of production or appearance of the accused (Section 207 of Cr.P.C).**
- **❖Similarly even the victim is entitled to copy of Police Report and all the documents not beyond 14 days. (Section 207 of Cr.P.C).**

#### SIGNIFICANT CHANGES IN PROVISIONS RELATING TO SUMMONS

- Section 63 allows Court to issue summons in encrypted or any other forms of electronic communication with image of seal of court or digital signature. (Section 61 of Cr.P.C).
- ❖ Section 64(2) Electronic Summons are served by electronic communication in form and such manner as state government may by rules provide (Section 62 of Cr.P.C).
- All summons through electronic means are considered as duly served and a copy of electronic summons shall be attested and kept as proof of summons.

- ❖ Section 105 says search and seizure shall be through audio-video electronic means and the police officer without delay shall forward such recording to the District Magistrate, Sub-Divisional Magistrate or Judicial Magistrate of First Class.
- Section 107 Attachment and Forfeiture a detail procedure is provided under BNSS.
- ❖ Section 152 to 162 Public Nuisance there is elaboration of procedure. Under section 154 there is provision which allows for audio video conferencing instead of appearing in person and showing cause. (Section 133 to 143 of Cr.P.C).
- ❖ Section 157 sets a timeline on completion of proceedings within a period of 90 days which may be extended with reasons for a period of 120 days. (Section 138 of Cr.P.C).

### Deleted Provisions: Code of Criminal Procedure,1973

- Section 28(3) Sentences which High Court and Sessions Judge may pass is omitted.
- Section 27 Now Summons can be served by electronic communication.

#### Newly added Provisions: Bharitya Nagarik Suraksha Sanhita, 2023

- ❖ Section 2(1)(a)- Audio-video electronic.
- ❖ Section 2(1)(b)- Bail.
- ❖ Section 2(1)(d)- Bail Bond.
- ❖Section 2(1)(e)- Bond.
- ❖ Section 2(1)(i)- Electronic Communication.
- ❖ Section 35(7)- When police may arrest without warrant.
- Section 86- Identification and attachment of property of proclaimed person.
- Section 105- Recording of search and seizure through audio-video electronic means.

#### Newly added Offences: Bharitya Nagarik Suraksha Sanhita, 2023

- Section 107- Attachment, forfeiture or restoration of property.
- Section 172- Persons bound to conform to lawful directions of Police.
- Section 336- Evidence of public servants, experts, police officers in certain cases.
- Section 356- Inquiry, trail or judgment in absentia of proclaimed offender.
- Section 398- Witness protection Scheme.
- Section 472- Mercy Petition in death sentence cases.
- Section 530- Trial and proceedings to be held in electronic mode.



### **Challenges:**Bharitya Nagarik Suraksha Sanhita, 2023

- ❖BNSS expands the maximum limit of police custody under general criminal law from 15 days to either 60 days or 90 days.
- ❖No corresponding guidelines on usage of electronic media in search and seizure or identification process. There is scope for abuse.
- ❖ Dearth of scientific ability in investigation procedure, there is a need to train police officers.
- ❖Non-availability of forensic facilities in various states in India.
- There is mandatory requirement of preliminary enquiry under BNSS of certain cognizable offences by police officer. There is scope of misuse of power.



# BHARITYA SAKSHYA ADINIYAM, 2023



### Scheme of the SAKSHYA ADINIYAM, 2023

**❖BNS** is contains 170 Sections divided into 12 chapters as against Section 167 of Indian Evidence Act, 1872 divided into 11 Chapters.



#### Scheme of Bharitya Sakshya Adiniyam 2023

- The act provides that "Evidence" includes any information given. electronically, which would permit the appearances of witness, accused, experts and victims through electronic means
- ❖It seeks to expand the scope of secondary evidence to include copies made from original by mechanical process, copies made from or compared with original, counterparts of documents as against the parties who did not execute them and oral accounts of contents of a document given by a person and giving it matching hash value of original record will be admissible as proof of evidence in the form of secondary evidence.
- ❖New form for Section 65B Affidavit is added which is now under the section 63(4)(c)



#### Deleted Provisions: Indian Evidence Act 1872

- Section 22A: When oral admissions as to contents of electronic records are relevant;
- Section 26: Confession by Accused while in Police Station not to be proved
- Section 27: How much of information received from accused may be proved
- Section 28: Confession made after removal of impression caused by inducement, threat or promise relevant.
- Section 29: Confession otherwise relevant not to become irrelevant because of promise of secrecy etc.



#### Deleted Provisions: Indian Evidence Act 1872

- Section 45A: Opinion of Examiner of Electronic Evidence;
- Section 47A: Opinion as to electronic signature when relevant;
- Section 82: Presumption as to document admissible in England without proof of seal and signature
- Section 88: Presumption as to telegraphic messages
- Section 113: Proof of cession of territory
- Section 127: Section 126 to apply to interpreters etc.
- Section 166: power of jury or assessors to put questions



### **Newly added Provisions: Bharitya Sakshya Adhiniyam 2023**

Section 2(2): Words and Expressions

Words and expressions used herein and not defined but defined in the Information Technology Act, 2000, the Bharatiya Nagarik Suraksha Sanhita, 2023 and the Bharatiya Nyaya Sanhita, 2023 shall have the same meanings as assigned to them in the said Act and Sanhitas.

• Section 61: Electronic or Digital Record: Nothing in this Adhiniyam shall apply to deny the admissibility of an electronic or digital record in the evidence on the ground that it is an electronic or digital record and such record shall, subject to section 63, have the same legal effect, validity and enforceability as other document



### **Challenges: Bharitya Sakshya Adiniyam 2023**

- •Digital evidence to be admissible as 'secondary evidence' needs to be 'authenticated' through a certificate (section 63) signed by any person 'in charge of the computer or communication device' and an expert.
- •The IEA provides that if a fact is discovered as a result of information received from an accused in police custody, that information can be admitted if it distinctly relates to the fact discovered. The BSA retains this provision. (Please section 23 of the BSA and corresponds to section 25 of the IEA)
- •Over the years, the Supreme Court and various Law Commission reports have highlighted that facts may have been discovered in custody due to the accused being subject to duress and torture.
- •The Law Commission (2003) recommended that fact discovered in police custody using threat, coercion, violence, or torture should not be provable



#### THANK YOU