

# CRITICAL ANALYSIS OF EXTENSION OF POLICE CUSTODY TO 90 DAYS UNDER NEW CRIMINAL LAW 187(3) OF THE BNSS: CONSTITUTIONAL & HUMAN RIGHTS CONCERN

by

Kaveri Chavan

## *Abstract*

*The new criminal law dealing with the police custody under BNSS previously CRPC has raised issues on basic human rights of the accused due to the extension of police custody from 15 days to 90 days, this new act of BNSS has been getting criticism for the prolonged period of custody. The new act has removed the period of police custody from first 15 days from the time of arrest and now the recent statute hampers accused fundamental rights, as police can summon indicted person at any time under the period of 60 or 90 days from the date of crime. The new criminal law can arise concerns on custodial torture which is very common in Indian police stations, it will raise concern over the mental and physical wellbeing of the person. It also raises concerns over the constitutional implications of the said act due to the ambiguity in framing article 187 will lead to different interpretations. The constant change in nature of the police custody and the judicial custody may arise issues and can hamper the fundamental rights of the accused.*

*Given paper discusses the issues of section 187 of the BNSS and analyses the concerns it brings to the common people, this article is solely restricted to the section that deals with police custody given in new law and the previous provisions of the same under CRPC.*

**Key words:** police custody, human rights, fundamental rights, BNSS

## 1) Introduction

### 1.1) overview of the new criminal law :

The three new criminal laws introduced by the Indian government are set to be implemented, that is, Bhartiya Nyaya Sanhita (BNS), Bhartiya Nagrik Suraksha Sanhita (BNSS), and Bhartiya Sakshya Adhiniyam (BSA), which replaced the Indian Penal Code (IPC) 1860, Criminal Procedure Code (CRPC) 1973, and Indian Evidence Act (IEA) 1872, respectively. BNSS provides procedures for arrest, prosecution, and bail. It has extended its maximum limit for granting police custody from 15 days to 90 days<sup>1</sup>, that is 15 days can be authorised in whole or in parts at any time during the initial 40 or 60 days out of the 60 or 90 days of judicial custody. The police custody of 15 days may spread over 60 days where the offence is punishable with at least 10 years of imprisonment, or 40 days for any other offence.<sup>2</sup> Due to this prolonged period of custody, the fabrication of evidence and threat to the accused has become a serious concern, which can lead to the violation of the human rights of the accused. The enhancement of the period for which a detenu can be kept in custody from 15 days contrasts with the decision of the Hon'ble Supreme Court in *CBI-v-Anupam J. Kulkarni* (1992)<sup>3</sup> where it was held that police custody after a period of 15 days would be impermissible. By increasing the period of detention under police custody, the new laws have left detainees exposed to the probability of threat, torture or inducement by the police<sup>4</sup>

### 1.2) What is police custody?

When following the receipt of information/complaint/report by police about a crime, an officer of police arrests the suspect involved in the crime reported, to prevent him from committing the

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<sup>1</sup> Available at

[https://prsindia.org/files/bills\\_acts/bills\\_parliament/2023/Bharatiya\\_Nagarik\\_Suraksha\\_Sanhita,\\_2023.pdf](https://prsindia.org/files/bills_acts/bills_parliament/2023/Bharatiya_Nagarik_Suraksha_Sanhita,_2023.pdf)

<sup>2</sup> ibid

<sup>3</sup> MANU/SC/0335/1992

V. Senthil Balaji vs. The State represented by Deputy Director and Ors. (07.08.2023 - SC) : MANU/SC/0839/2023

<sup>4</sup> sinha, shishir. 2023. "Criminal codes update." *the hindu businessline*, 12 04, 2023, 1. <http://surl.li/jywysv>.

offensive acts, such as an officer brings that suspect to the police station, it's called Police Custody.<sup>5</sup> The indicted person should be produced under 24 hours before the magistrate; this is in accordance with 22(2)[4] of the constitution and section 57 [5] of the CRPC. Custody allows law enforcement to question the suspect and gather information relevant to the investigation. By holding an individual in custody, authorities can prevent them from committing additional crimes while they are under investigation or awaiting trial. The Supreme Court, in a plethora of judgements, has acknowledged how effective and necessary custodial interrogation is, to collect evidence for proving an offence<sup>6</sup>.

### 1.3)Police custody and judicial custody :

The term that people get confused with is judicial custody, but it is a different concept altogether. Police custody begins at the point of arrest and lasts until formal charges are brought. Judicial custody starts after the individual has been formally charged and the case is being processed through the court system. If the police is not able to complete the investigation within 24 hours, they can ask for extension of police custody up to 15 days under section 167[6]<sup>7</sup>, which is granted at the discretion of the judicial magistrate if it is not granted, then the accused goes under Judicial custody.

### 2)Legal framework :

The Criminal Procedure Code in India (CRPC) was enacted in 1973 and came into force in 1974 has been replaced with Bhartiya Nagrik Surakshya Sanhita (BNSS) from 1st of July 2024. Law in this regard has widened its scope regarding the investigation of various severe offences and has simplified its procedure. The provisions regarding custody are as follows :

Section 167 and 167 (2) of CRPC,1973 deal with the period of police custody.

Section 187 (2) of BNSS, 2023 deals with the period of police custody, which

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<sup>5</sup>Available at: <https://districts.ecourts.gov.in/sites/default/files/fct.pdf>

<sup>6</sup> *M. Ravindran vs. Intelligence Officer, Directorate of Revenue Intelligence*, AIR 2020 SC 5245; *P. Chidambaram vs. Directorate of Enforcement*, AIR Online 2019 SC 1001

<sup>7</sup> Criminal Procedure Code, §167, No.6 of 1974, Act of Parliament (India).

replaced the CRPC Act.

Other articles that are being discussed in this paper :

Article 21 of the Indian Constitution, which deals with the right to life and personal Liberty. And other such related acts.

### **3)The new law on police custody and the criticism regarding it**

The very first thing we can observe while reading 187(3) is its very ambiguous framing of the section, which can lead to various interpretations. In this section, the very important words which made section 167(2)<sup>8</sup> not to grant beyond 15 days police custody have been omitted, and those are “otherwise than in police custody” from which it can be implied that the police custody can be granted beyond the further period. This extension is a serious incursion into the criminal justice system of India. V. Suresh, general secretary of People’s Union for Civil Liberties (PUCL), said, “The provision extending police remand is perhaps one of the dangerous provisions in the new law. The bar of police custody within the first 15 days from the 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. This effectively means 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 time beyond the first 15 days of arrest, even if he has been granted judicial custody. This prolongation is a very serious infringement on protections available for the accused, and exposes them to more police torture, intimidation, and other dangers.”<sup>9</sup> “The new law hits the spirit of custodial jurisprudence in India, where the police have not been trusted in ensuring the safety of people in their custody. You can end up going against the morality and spirit of the Constitution by changing procedural laws. The fundamental rights of citizens will be affected by the new

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<sup>8</sup> Criminal Procedure Code, §167, No. 2 of 1974, Act of Parliament (India).

<sup>9</sup> Sivaraman. 2024. “Concerns rise over BNSS provision on police custody.” *The hindu*, 06 30, 2024, 1. <http://surl.li/twsvvj>.

provision,” contended Henri Tiphagne, executive director, People’s Watch.<sup>10</sup> The proposed change is excessive and in stark contrast to even special legislations such as the UAPA(Unlawful Activity Prevention Act,1967), where the duration of police custody permissible is only thirty days; and the investigating officer is required to file an affidavit providing reasons for seeking police custody if the accused is in judicial custody.<sup>11</sup>

### 3.1)Human rights concern

In India, custodial torture is a serious issue that highlights the need for systemic criminal law reforms and their implementation by law enforcement agencies for better protection of individuals’ rights<sup>12</sup>. However, individuals have been guaranteed the right to life and personal liberty under Article 21 of the Constitution of India.<sup>13</sup> In 2019, India estimated that 1723 custodial deaths occurred, which constitutes 5 deaths every day.<sup>14</sup> Thus prolonged period of custody can lead to physical and mental well-being of the person, it can lead to heightened stress and anxiety. Police custody is a well-documented site for torture and other excesses. Expanding the duration and reach of such custody is bound to increase the potential for abuse, including

fabrication of evidence by the police.<sup>15</sup> There are factors in many prisons that have negative effects on mental health, including: overcrowding, various forms of violence, enforced solitude or conversely.<sup>16</sup> Extended police custody increases the accused’s vulnerability to forced confessions and other fabrication of evidence. For instance, the accused are tortured into signing blank papers, which are used by the police to fabricate ‘disclosure statements’. These statements usually involve the accused revealing the location of the dead body or other objects related to

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<sup>10</sup> Ibid

<sup>11</sup> S.43D UAPA deals with some unlawful and terrorist acts.

<sup>12</sup> Indulia. 2024. “Custodial Torture in India.” scc times.

<https://shorturl.at/g5KLLps://shorturl.at/g5KLL>

<sup>13</sup> ibid

<sup>14</sup> National Campaign Against Torture, “India: Annual Report on Torture 2019”, p. 6 ....

<https://www.seconline.com/blog/post/2024/03/23/custodial-torture-in-india-intersection-of-criminal-law-and-constitutional-rights/>

<sup>15</sup> mittal, and priyanka. 2023. “BHARATIYA NAGARIK SURAKSHA SANHITA, 2023 & CRIMINAL PROCEDURE CODE.” *Journal of research administration* 5, no. 2 (12): 9468-9473

<sup>16</sup> Mental health and prisons - prison policy initiative. Available at:

[https://static.prisonpolicy.org/scans/mh\\_in\\_prison.pdf](https://static.prisonpolicy.org/scans/mh_in_prison.pdf)

the crime. It is then shown as if the body/objects were ‘discovered’ by the police due to the accused’s statement.<sup>17</sup>

### 3.2) Constitutional concern :

This proposed change is bound to seriously undermine the accused’s fundamental rights under Art.21, including the rights to life, dignity, and physical and mental well being.<sup>18</sup> The National Human Rights Commission (NHRC) was constituted under the Protection of Human Rights Act, 1993<sup>19</sup>, despite these provisions available, there is an increase in custodial violence. Art.21 has been judicially interpreted to include the right against torture and assault by the state and its functionaries<sup>20</sup>.

The delay in the trial process can be challenged in the courts due to the provision given under the speedy trial under Article 21 of the Constitution <sup>21</sup>. Due to the prolonged custody period, the right of the accused to a speedy trial can be violated. The right to a speedy trial is a fundamental right available to the accused. Furthermore, the Court directed the cases relating to ‘under-trial prisoners’ to be treated and categorised as “priority sector litigation”<sup>22</sup>. Due to the extension of police custody to 90 days, there will most likely be a delay in the further procedure.

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### 4) Way forward :

Prolonged police custody can pose significant challenges for individuals, including the potential for abuse of rights and adverse effects on mental and physical well-being. Enforcing stricter legal limits on the duration of police custody is the very much need of the hour. There should

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<sup>17</sup> Project 39A, Death Penalty India Report, 2016.

<sup>18</sup> Shabnam v. Union of India (2015) 6 SCC 702 [14].

<sup>19</sup> Protection of Human Rights Act, 1993.

<sup>20</sup> D.K. Basu [17], [22].

<sup>21</sup> Article 21 of indian constitution 1950

<sup>22</sup> Available at , <http://surl.li/dqlpkt>

be amendments to the Police Custody Act due to its ambiguous framing, as it can lead to various interpretations and create major issues. This could provide a solution to the unnecessary prolongation. Rather than extending it to 60/90 days, a discussion should be conducted. Passing the bill without much deliberation is not advisable, as it's a national issue that hampers the basic fundamental rights of the people.

## 5) Conclusion:

With the possibility of the accused being sent to police custody at any point during the investigation period, the chances of the accused securing bail even during judicial custody might shrink. Consequently, it could impinge on the principally accepted rule of 'Bail is the rule, jail is the exception'<sup>23</sup>. Therefore, the speedy trial which is a fundamental right of the accused, can be violated due to the new criminal law, and many more issues that were discussed above need to be given thought and the right action. There is a need to put to right the changes in sec 187(3)<sup>24</sup> which might lead to misuse of powers. A technological, judicial balance is needed to cope with this issue, which affects constitutional and human rights of the people. Without delay, a dialogue needs to be made about the amendments needed in the new criminal law.

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<sup>23</sup> Available at the dispute resolution blog web page : <https://shorturl.at/SZ6xD>

<sup>24</sup> Bhartiya nagrik surakshya sanhita, §187, No. 3 of 2023, Act of Parliament (India).