OF LAW, JUSTICE AND PEOPLE:

An Analysis of Selected Provisions in the New Criminal Codes, 2023

People's Union for Democratic Rights

June 2024

https://www.pudr.org/

INTRODUCTION

The Winter Session of the 17th Lok Sabha Winter Session concluded with the passage of, arguably, the three most significant post-Constitution legislations, namely, Bharatiya Nyaya Sanhita, 2023 (BNS), Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) and Bharatiya Sakshya Adhiniyam, 2023. These Codes replace the Indian Penal Code (IPC) of 1860, the Code of Criminal Procedure (CrPC), 1973, and the Indian Evidence Act of 1872, respectively. Soon after the enactment, the Truck Drivers Association called for a nation-wide strike, against one of the provisions of the BNS- Section 106(2)- which makes it an offence to cause death by rash and negligent driving punishable by a maximum term of 10 years, if the person escapes without reporting the incident to a police officer or a Magistrate soon after. The truckers' protest against enhancement of penalty for negligent driving was a reaction against non-consultative legislation and the protest was called off on 3 January 2024, only after the Government held meetings with the representatives of the association and assured them that the law will come into force after due consultation with the transport association.

The truckers' protest highlights the ills of a non-democratic legislative process which the new codes have come to represent. In a democracy, which works on the promise of popular sovereignty in which people legislate for themselves through their representatives, the assurance of consultation with stake holders in particular, and the public at large, should be the bedrock of legislations rather than a post-facto response to people's agitations which threaten the routine governance, like the truckers' protests which had disrupted the supply chain of essentials commodities. While the protest is an extremely significant development and brings to fore the questions of democratic accountability being posed by the people, there are no reports on any subsequent discussion with the All India Motor Transport Congress, which shows that the government has not delivered on its promise.

It has been announced that the new codes will be made enforceable for 1st July 2024. In the build-up to the enforcement, the MHA has launched several initiatives to spread awareness on the new provisions through explainers, flyers, reading material and apps which claim to educate the masses. These initiatives emphasise that the existing codes (IPC and CrPC) were punishment centric while the new enactments are pro-poor, pro-victim and substitute justice for punishment, as the goal of the criminal justice system. However, a section wise comparison of BNS with IPC, the substantive law in the country, makes it amply clear that the majority of the IPC has been retained. Besides deleting the offences of homosexuality and adultery which had been already nullified by the Supreme Court, and decriminalizing the colonial category of

'thugs', the BNS has introduced only a few, less than a dozen, new offences in the name of an overhaul. Given that the offences under the BNS, repeat provisions of the IPC while making some of them more stringent, an important question to consider is their impact on the civil liberties and democratic rights of citizens. Focusing on how the BNS affects the rights of citizens and the character of democratic legislative procedure, this report analyses three aspects of the law. First, the report addresses how an erosion of democratic norms related to legislative conduct, was carried out in the name of 'enactment' in the Parliament. Second, the report offers a study of selected provisions in the BNS that infringe on the legitimate exercise of the Fundamental Rights. Third, it comments on the harsher penalties in the BNS and ties them with adjacent provisions in the BNSS which cumulatively produce an effect which is detrimental to the spirit of a rehabilitative criminal justice system. In the conclusion, it examines how the new justice system which is being presented as victim-centric, builds a stringent carceral system in India in which 'jail' is likely to replace 'justice'.

The invocation of 'Bharatiya' in the nomenclature of the new codes is meant to transcend the governance of justice system which until now was carried through the 'colonial codes'. However, not only are the majority of the existing codes reproduced in the new, some of the offences which were particularly created to serve the colonial purpose, have also been retained. For instance, the gamut of laws broadly termed as political, or in legal parlance called laws dealing with 'Offences against the State' have remained unchanged with the only exception being the redefinition of sedition, reproducing the relationship between the law and its subjects originally envisaged by the colonial state. These include broad and far reaching scope of offences related to 'waging war'. Retributive forms of punishments such as Death Penalty and Solitary Confinement which have been abolished in many liberal jurisdictions, have been retained from the IPC. Greater powers have been reserved for the Executive via the use of broad and ambiguous phrasing of offences which provide scope for law enforcing agencies to interpret at will, a scope that works in tandem with the enhanced police powers envisaged in the Criminal Procedure Code- BNSS (See Box 1). One of the glaring features of the revisions being carried out through the new codes is the disregard for settled jurisprudence in specific areas of law (such as use of handcuff as a violation of human rights and dignity, limited judicial review of mercy petitions, permissible limit of freedom of expression in matters of political speech, etc.) which this report throws light on. In this report we reflect upon some of the select provisions of the BNS and their impact on civil liberties.

Box 1: Executive Overreach in the BNSS

- Police may be granted custody of the accused for a period of 15 days (with provision of upto 60 to 90 days) in whole or parts at any time during the maximum period of detention contrary to the existing practice of police custody being granted custody for only the *initial* 15 days (S.187 (2) (3))
- Police has powers to make detention without the need to present the person to a judicial magistrate if released within 24 hours for petty offences (S.172(2))
- Handcuffs can be used despite the existence of a developed jurisprudence in India against the use of handcuffs (S.43(3))

For other sections of the BNSS which have an impact on citizen's liberties, see analysis by Project 39A.

THE RITES OF PASSAGE: A MOCKERY OF LEGISLATIVE PROCEDURE

On 20 December, even as 95 Opposition MPs remained suspended, the Lok Sabha passed the three criminal code bills. Importantly, 34 members, of which 25 belonging to the ruling party, participated in the discussion which lasted 3 hours and 10 minutes in the Lok Sabha. Only 3 opposition MPs raised criticisms of the specific provisions in the Bills and highlighted the need to debate on the Bills in the presence of the Opposition. The proposals were disregarded and the Bills were passed without any amendment. A day later, on 21 December, while 46 members remained suspended, the three Codes were passed in the Rajya Sabha with a total of 40 members participating, no less than 30 of whom belonged to the ruling party. The discussion spanned 2 hours and 3 minutes precisely. The three Codes, which overhaul the entire criminal justice system, were passed at a time when a record number of 146 members of Parliament remained suspended and when debates and discussion in both houses did not span any more than 5 hours and 13 minutes, with a token participation of a mere 19 non-BJP members in the entire Parliament. Notably, in the Question Hour all questions asked by the suspended members were removed from the list of questions listed for responses.

The passage of the Codes prior to being tabled a second time in the Parliament in December 2023, was just as curious. While the Home Minister, in the Rajya Sabha exalted the 'democratic' process of consultation with stakeholders since 2019, it is important to remember that the drafts of the Bills were made public only in August 2023 when they were first tabled in the Parliament and subsequently referred to a 30 member Parliamentary Standing Committee

for Home Affairs. This was in violation of the Pre-Legislative Consultation Policy which was adopted by the Government of India in 2014, and which mandates the Ministry concerned to publish in the public domain the draft legislation or at least the essential elements of the proposed legislation, its broad implications, for a minimum period of thirty days before introduction in the Parliament.

According to its report submitted on 10 November, 2023, the Parliamentary Committee held 12 meetings between August and November 2023, of which a section by section consideration of the provisions of the BNS were held over three meetings only. A total of 19 domain experts were consulted by the Committee to review the draft Bills. The Committee claimed that these experts 'welcomed' the Bill for its focus on justice rather than punishments and for creating a citizen-centric legal structure. While submitting the report, the Committee did not append the relevant minutes of the meetings and merely added a disclaimer which said that they will be appended later. All members of the Opposition in the Committee, however, spoke to the press about filing notes of dissent, with at least seven of them handing out their dissent notes appended with the Report. The dissenting notes highlight the lack of deliberation within the Committee, the absence of diversity in the domain experts invited, and a clear inclination among those present towards the ruling dispensation. The detailed section wise recommendations of the Committee based on consultations with the experts and the internal meetings, span a meagre 27 pages, while the Notes of Dissent span close to 150 pages in the final report.

In Parliament, on 12 December, 2023 the Bills were curiously withdrawn and reintroduced the same day in their second avatar, having incorporated some of the recommendations of the Committee. The reintroduction was listed in the supplementary agenda of the Lok Sabha, giving no prior intimation to the MPs about the business of the House a day before, as per practice. The glaring absence of the views of the dissenting members in the revised bills were noticeable, as the Bills smoothly sailed through the two Houses causing the most significant overhaul of criminal law in India till date (See Box 2). While deficit in legislative deliberation on laws which have deleteriously impacted people's fundamental freedoms has been witnessed before (See Box 3 for a historical overview of how the undemocratic law-TADA, was passed and renewed in the Parliament), the magnitude of the erosion of democratic legislative conduct in the passage of the three codes, is unprecedented.

Box 2: Enactment in a Parliament without Opposition

Lok Sabha	Rajya Sabha
Passed on 20 December, 2023	Passed on 21 December, 2023
95 Opposition members remained suspended	46 Opposition members remained suspended
Discussion lasted 3 hours and 10 minutes	Discussion lasted 2 hours 3 minutes
34 MPs participated of which 25 belonged to the ruling party	40 MPs participated of which 30 belonged to the ruling party

Box 3: History Repeats

The Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA) was an anti-terror legislation with extremely vague provisions and provided for extended period of detention, parallel courts, police confessions as admissible evidence in courts, etc.

- The Law was initially enacted for a period of two years, but extended every two years with the final extension granted in 1993.
- The Conviction rate in TADA as reported in October 1993 by the Union Home Ministry, was 0.81%.
- On all four occasions the Bill for extending TADA was introduced along with some other bill in the Parliament that helped deflect the debate.

Year	Duration of Parliamentary Discussion on TADA	Members participated
1985	6 hours	34
1987	4 hours	18
1989	1 hour 30 mins	9
1991	3 hours 30 mins	17
1993	1 hour 10 mins	8

Source: Relevant Lok Sabha Debates, cited in PUDR's Lawless Roads, 1993

Globally, India's conviction rate (50%) is significantly lower, and, in January 2023, the Home Minister had stated that India's conviction rate would improve if the then IPC, CrPC and Evidence Act were amended such that there would be a "strengthened" "mechanism of

punishment on a scientific basis, so that all the observations of forensic science can be used to punish the criminal". Several months later, the Prime Minister lauded these claims and called the passage of the Bills a historic one. And, in his speech in the Rajya Sabha, the Home Minister claimed that these Codes are 'world-class' insofar as they are advanced and scientific and also 'Bharatiya' insofar as they recall 'past' principles and are citizen-centric. However, a close reading of some of the offences and punishments in the BNS demonstrate that they are deeply undemocratic, and that they abridge the constitutional guarantees of people.

AN INFRINGEMENT ON FUNDAMENTAL RIGHTS

1. Section 113, BNS: Terrorism

The inclusion of terrorism (Section 113) within the BNS has been explained as the resolution—संकल्प—of the government to make India 'terrorist free'. The awareness literature put out by the MHA for the public claims that the Section 'fortifies the legal arsenal in India against terrorism'. How exactly is this achieved in the BNS? 'The Statement of Objects and Reasons' to the BNS states that a new offence of 'terrorist acts' has been introduced, when all that BNS does is rehearse the existing sections of the Unlawful Activities Prevention Act (UAPA). As PUDR has noted, there is an almost glaring section wise reproduction of the most frequently used sections of UAPA, with the characteristic ambiguity of these sections. While the MHA explainer lists out the features of the new section, it skips mentioning that all of these provisions already exist under UAPA.

For instance, BNS Section 113(1)(c), which is a replica of S.15(1)(c) of UAPA, reads "whoever…..detains, kidnaps or abducts any person and threatening to kill or injure such person or *does any other act* in order to compel the Government of India, any State Government or the Government of a foreign country or an international or inter-governmental organisation or *any other person* to do or abstain from doing *any act*….commits a terrorist act". If the ambit of terrorist activity willingly includes '*any other act*', and if the list of targeted individuals/groups includes '*any other person*', who are compelled to do or abstain from doing '*any act*', then the crime of terrorism is reduced to just about anything which the executive is at liberty to decide. Such vagueness in language deliberately widens the interpretative scope as

it broadens the definition of terrorist activity beyond detention, kidnap, abduction or threat to kill. In short, the use of vague clauses strengthens the executive grip over an alleged accused.

In verbatim, the Subclause 1 of the BNS reproduces S.15 of the UAPA (Terrorist Act), Subclause 2 reproduces S.16 (Punishment for Terrorist Act), Subclause 3 reproduces S.18 (Punishment for Conspiracy), Subclause 4 reproduces S.18A (Punishment for organising of terrorist camps), Subclause 5 reproduces S. 20 (Punishment for being member of terrorist gang or organisation), Subclause 6 reproduces S.19 (Punishment for harbouring), and Subclause 7 reproduces S.21 (Punishment for holding proceeds of terrorism). The BNS section on "Terrorist Act' ends with an *Explanation* which states that it is up to the police, not below the rank of a superintendent of police, to decide whether a case will be registered under the purported section of the BNS or the UAPA. The duplication of the offence leaves the following questions unanswered.

- What is the purpose of having two laws which have the same ambit of criminality?
- UAPA is a special anti-terror legislation which creates its parallel regime of investigation, arrest and trial. Since its provisions have been reproduced in BNS which is an ordinary code, how can the same offence be tried under a special law in one instance and under an ordinary law, in another? Does this mean that certain acts alleged to be terrorist will be ordinary in one instance and extraordinary in another?
- What is the rationale of entrusting a police officer to decide when to use the UAPA or the BNS against acts which are similarly defined in both?

From PUCL's five year study of the NCRB data on number of people arrested and convicted under UAPA, it is evident that the conviction rate is an abysmal 2.8%. Undoubtedly, this figure would be far lower if statistics were available on the rate of acquittal in these cases which reach the higher judiciary in appeal. In 2022, according to the NCRB, 41 persons were convicted as against 172 acquittals and 15 discharges. If one looks at the NCRB figures for cases in which trials were completed, then again it shows that only in a mere 18.2% cases, conviction was ordered in 2022. However, despite the low conviction rate, the total number of cases registered under the UAPA have continued to rise. In 2022 alone, as per the NCRB figures, 1,005 new cases of UAPA were registered, and 4,037 cases were pending investigation by the year end, with an 80% pendency rate on police disposal of UAPA cases. In short, government statistics bear witness to the fact that the UAPA, in a majority of cases, stands as a misapplied law whose overbroad application is premised on its vaguely worded provisions.

Since the BNS section on terrorism closely follows some of the oft-used sections in the UAPA, such a duplication will lead to an amplification in the total number of registered cases under the BNS or under the UAPA, or both. But will such amplification help undertrial prisoners who remain incarcerated for long years? Because, what remains unanswered is how such a duplication in the BNS will help address the lengthy pre-trial detention period, a problem that is evident from the fact that 3,558 cases were pending trial in 2022. Equally, how the BNS can help change the long-drawn struggles that prisoners via their lawyers have had to fight for securing bail, remains unclear. Since no clarity has been provided on the intent of duplication in the Parliament, there is no understanding of how the bringing in of terrorism in the general law, in addition to a special law, will change the coercive and inefficient ways in which terrorist acts continue to be investigated and judicially dealt with.

The Home Minister in the Parliament rhetorically remarked that none except the terrorists should be afraid of the new law. But given the rate at which the ambiguous, overbroad provisions of UAPA have been used against journalists, activists, human rights defenders, etc. under successive governments (see here and here), and considering the fact that the BNS reproduces the same law, the offence can be a threat to anyone. The infamous Bhima-Koregaon conspiracy gives a microcosmic view of why the terrorism discourse in the country must be a concern for everyone, as human rights activists, journalists and lawyers have spent years behind the bars waiting for years for the trial to begin. Some have been granted bail on the glaring statement by various levels of courts that there is no evidence to support their involvement in any terrorist act. Given that the regime of UAPA has been restrictive of the exercise of our Fundamental Rights guaranteed under Article 19 and 21 of the Indian Constitution, the BNS section will also adversely impact the constitutional guarantees, is no longer just a presumption (see Box 3).

Box 4: BNS and BNSS impact Constitutional Guarantees such as:

- **Article 19(1) Right to Freedom:**
  - (a) to freedom of speech and expression
  - (b) to assemble peaceably and without arms
  - (c) to form associations or union
- **Article 21:** Right to Life and Personal Liberty
- **Article 22:** Protection against arrest and detention in certain cases.

The protection includes the right to be informed of grounds of custody, right to be defended, right against arbitrary detention

2. Section 152, BNS: Redefined Sedition

One of the much-touted achievements of the new era laws is the abolition of the offence of sedition (S. 124 A IPC) for its "chilling effect" on the right to freedom of speech and expression, guaranteed under Article 19 of the Indian Constitution. In his speech in the Rajya Sabha, the Home Minister reiterated that the colonial era section had been deleted. However, he vociferously stated, that if anyone were to defame the nation, then that should be considered a grave crime and that such a person should be prosecuted accordingly. Hence, Section 152 of the BNS re-states many of the objectives of S. 124 A IPC under a new head. The redefined offence of sedition now criminalizes acts and expressions 'exciting secession or armed rebellion or subversive activities', or 'encouraging feelings of separatist activities' or 'endangering sovereignty, or unity, and integrity of India'. Much like Section 113 defining 'Terrorist Act', this section too works with ambiguous phrases which have no definition in law like 'sovereignty of India', 'subversive activities' etc. Sedition law worked with an identified target which was the Government of India and criminalized expressions of disaffection against it. While the BNS section overtly does not criminalize expressions against the government, the wide and ambiguous wordings are broad enough to also include anti-government expressions.

This new section has been presented by the Government as 'a paradigmatic shift in treason laws of the country', and it actively takes the language of 'deshdroh', as opposed to rajdroh (sedition), and in doing so, it is purported that colonial interests have been replaced by the interest of the Swatantra Bharat. While this is being claimed as a pro- free speech replacement, democratic jurisprudence across the globe has viewed both sedition and treason as archaic laws

which have been found to be exercising undue restraint on freedom of speech in modern democracies.

The position in law on political speech has also accordingly evolved in India and the judiciary has settled it that for an expression to be criminalized, it must tend to violence or incite violence. The BNS section does not import the necessary criteria of incitement to violence in restricting acts and expressions. Going by the clause, perfectly peaceful and democratic acts critical of the ruling dispensation can be labelled as 'subversive', and thus criminal. Since it will be up to the investigating agency to determine whether a given crime should fall under S. 152 or not, it is possible that the use of this section may be politically motivated, as was obvious in the indiscriminate use of sedition in the IPC. Much against the projection made by the government that it wants to repeal the sedition law and that it has exhibited the necessary political will to do so, the NCRB figures are suggestive of an increasing use of S. 124A by the government, with 76 FIRs registered in 2021 alone, the same year in which the constitutional validity of the law was challenged in the Supreme Court. It must be recalled that the sedition law had been suspended by the Supreme Court in May 2022 pending review. Importantly, in Court, the government had opposed all efforts at invalidating the law and had urged the Court not to intervene and had asked for time for a re-examination of the law by the Executive. The Law Commission which was entrusted with the task of reviewing the law by the MHA in 279th report tabled in May 2023, had recommended that the law be retained. The replacement of erstwhile sedition law with new section in the BNS with an even broader scope and ambiguity, and which allows full reign to the Executive over its implementation, needs to be viewed within this timeline of events.

3. Other speech-restrictive provisions

The BNS has not only revamped sedition but also retained other colonial provisions which have been historically notorious for casting similar "chilling effect" on the constitutional right to speech, such as outraging religious feelings and insult to religion (Clauses 296, 297), defamation (Clause 354), etc. In addition, the BNS adds another speech-restrictive dimension to an existing provision, 'Imputations, assertions prejudicial to national integration' (S. 153B, IPC). This extremely wide provision of the IPC which penalized all forms of expressions that threaten national integration and promote communal disharmony, has been incorporated as section 197 in the BNS with an addition. It now makes punishable to 'make or publish false or

misleading information, jeopardising the sovereignty, unity and integrity or security of India'. Characteristic of the revisions made in BNS, this provision too allows interpretative liberty to the Executive to decide on what is 'misleading', and whether or not it will 'jeopardise' a definition-less construct called 'sovereignty, unity, integrity and security of India'.

A REGIME OF HARSHER PUNISHMENTS:

Contrary to the Prime Minister's assertion that the new criminal justice system is directed towards a "new era" of "laws centred on public service and welfare", and the Home Minister's view that the laws are "victim centric", the specific provisions of life imprisonment and death penalty in the BNS envisages a harsher regime of punishments than what was before, besides the reproduction of the punishment of solitary confinement from the IPC.

Death Penalty

Besides continuing with the crimes that already attract death sentence in the existing IPC, the BNS has introduced four new offences which are punishable by death, namely- gang rape of a woman under 18 (Clause 70(2)), murders by a mob (Clause 103 (2)), Organized Crime (Clause 111), Offence of a Terrorist Act (Clause 113). The total number of offences punishable by death in the BNS has risen from 11 to 15. PUDR has argued that such a step is contrary to the judicial trend of declining death sentences, globally as well as from the recent jurisprudence emerging from the Supreme Court.

Focusing on mob lynching (Clause 103 (2)), a new crime under the BNS which the Home Minister drew attention to, it is worth noting that the provision of death penalty has been reserved for murders committed by a "group of five or more persons acting in concert" "on grounds of race, caste, community, sex, place of birth, language, personal belief or any other similar ground". Attention needs to be paid to the projection of the provision and its actual wording. The Government has claimed that the provision has been introduced to address the rising instances of mob lynching in the recent years, but in the language of the provision the category of 'mob' has been dropped . In choosing to work with the category of 'group of five or more acting in concert', the law does not address the dynamism of a mob which is not a premeditated group and the violence resorted to may be completely unplanned, hence might be difficult to prove if they were acting in concert. The law also remains silent on how can premeditated intent necessary for determining the 'rarest of rare' crime be determined in a group, who need not necessarily be part of an organized crime (Clause 111) or a terrorist act

(Clause 113)? Effectively, in the name of curbing mob violence the Executive has added a new offence in its arsenal of provisions punishable by death.

The case of Organized Crime (Cl 111) is equally damning as the offence has been modelled on the existing state special laws such as the Maharashtra Control of Organised Crime Act (1999), and the Gujarat Control of Terrorism and Organised Crime Act (2015), etc. Vaguely worded, the BNS' definition of organized crime lacks clear-cut definitions for categories such as 'gang', 'mafia', 'crime ring', 'gang criminality', and where 'organized crime syndicate' is defined as a 'criminal organization' without any clarity on the meaning of the latter. Such vaguely worded and ambiguously phrased language is particularly disturbing as one of punishments under this offence is that of death penalty.

In March 2023, while reviewing the death sentence awarded to Surendra Koli in the infamous Nithari killings in NOIDA, UP, a three-member bench of the Supreme Court had stated that the "rarest of rare" doctrine requires that the death sentence not be imposed only by taking into account the grave nature of crime but only if there is no possibility of reformation in a criminal'. (Para 89 of *Review Petition (Crl.) Nos 159-160 of 2013)*. Importantly, in the dictionary a mob is defined as a "large crowd of people, especially one that is disorderly and intent on causing trouble and violence". In short, the higher presence of death penalty provisions in the BNS as well as the specific provision of mob lynching is contrary to the received jurisprudence which advocates strict standards for determining rarest of crimes while retaining its belief in reformation of criminal.

Adding to the regime of death penalty are the new limitations imposed on the grant of mercy by the Executive to convicts sentenced to death, through the introduction of Section 472 in BNSS. While the section in BNSS by creating a timeline for necessary steps to be taken in order to file a mercy petition, tries to expedite the process and this can be viewed as an attempt to address the problem of inordinate delay in deciding on the mercy petition, the timeline itself appears unreasonable. It imposes a strict timeline of 30 days for the convict to file a petition once his/her appeal has been dismissed by the courts and the same has been informed by the jail superintendent. The petition can only be filed by the convict or their family unlike the existing practice where petitions could be filed by interested third parties. In the event that convicts lose contacts with family or fail to find appropriate legal aid to help them with paper work, the timeline of 30 days becomes too short and may result in many convicts losing the opportunity to file a petition. Additionally, in the existing mercy jurisprudence there is a limited provision for judicial review of the decision on the grant of mercy by the President, on

procedural grounds. The BNSS takes away the right to seek judicial review of mercy petition in clearly stating that Courts cannot question or review the grounds for President's pardons or commutations.

Life Imprisonment

While the definition of life imprisonment remains as "imprisonment for life" in the General Chapter on punishments in the BNS, the clause, "till the end of natural life", has been retained for specific offences. More importantly, unlike the erstwhile IPC which had first introduced the punishment till end of life for specific sexual offences, the BNS uses the end-of-life punishment for a larger number of offences including punishment of murder by life convict, attempt to murder, voluntary causing grievous hurt, kidnapping or maiming a child for begging. As argued by PUDR, the contradictory purpose—of revising the general definition but retaining the end-of-life clause in specific offences—is two-fold. "For one, the punishment regime under the BNS is a harsher one as it includes a longer list of offences, as compared to the IPC, for which imprisonment for life till the end of natural life can be awarded. Second, the BNS reflects the tendency of the higher judiciary, which has, of late, interpreted life term as the end of a convict's natural life without remission as an alternative to the death penalty (*Union of India v. V Sriharan @Murugun*). However, unlike the Courts which have favoured imprisonment till end of natural life as a replacement for Death Penalty, the BNS has reproduced and enhanced both categories of non-reformative punishments- death penalty and life term till the end of natural life."

CONCLUSION: TOWARDS A CARCERAL REGIME

The Indian Penal Code (IPC), the Code of Criminal Procedure (CrPC), and the Indian Evidence Act are foundational pillars of the criminal justice system in India. There is no denying that these codes need reform and the same has been pointed out over the years, in court decisions, Law Commission recommendations, government appointed bodies, civil society interventions, and people's movements. Notwithstanding this long history, the reform carried out through the Bharatiya Nyaya Sanhita (BNS), the Bharatiya Nagarik Suraksha Sanhita (BNSS) and the Bharatiya Sakshya Adhiniyam, not only dispenses with the democratic procedures, but substantively dilutes the existing guarantees and disregards the existing jurisprudence.

Our review of the new codes shows that offences with increasing scope and expansive ambiguity, will create a regime of incarceration by criminalizing legitimate political acts and arming the state with the power of imprisonment. The thrust of harsher punishments and increased offences which jail people until death make it clear that the new penal code is a pro-imprisonment one. This is evidenced not in the fact that the BNS enhances penalty for existing offences hence the convicts will likely spend more number of years in jail once sentenced for an enhanced term. Additionally, Section 475, BNSS restricts the discretionary power of the government by limiting the scope of commutation of a death sentence to a sentence of life imprisonment alone. In CrPC, Death Penalty could be commutated to any sentence. This will prolong the term of convicts in jail.

Besides, the provisions of BNSS are likely to result in increasing the undertrial prison population. This can be explained through a contradictory trend in BNSS. On the one hand, Section 479(1), for the first time introduces a proviso which states that the first-time offenders can be released on bond, after having completed one-third of the maximum duration of the sentence for which they are undergoing trial. In a significant move, the responsibility of making an application to the court for such a release has been placed on the Jail superintendent- a proviso (Section 479(3)) which can be seen as taking a step in the right direction in decongesting jails and ensuring the rights of the undertrial. On the other hand, marking a shift away from CrPC which excluded only those facing trial for offences punishable by death, from being released after having completed one-half of the maximum sentence as an undertrial, the BNSS excludes even undertrials for offences punishable by a life term. Since undertrials for offences punishable for life term cannot be released on bond after having served half a sentence, and the number of offences punishable by a life term has increased in BNS, the undertrial prison population is certain to swell up, besides the fact that a large number of undertrials will lose their right to be released even after serving half the punishment, on mere accusation, without any proven guilt.

As per the recent Prison Statistics (2022), there were a total of 573,000 prisoners across 1330 prisons in India. The figure of undertrials stood at 75.8% and the occupancy rate rose to 131.4%, a figure higher than the previous two years. The figures are stark and they suggest that despite the decrease in prison population by 5% in 2022 because of the campaign undertaken by National Legal Services Authority and which identified 25000 undertrial prisoners eligible for release, the prison population has only grown. Prison conditions particularly those related to health and medical facilities continue to remain harsh and anti-prisoner. Given this reality,

it is hardly conceivable that we need a penal code that is likely to increase the already burdened and inhospitably confined prison population. And yet, that is what the BNS purportedly points to and time will tell the extent to which the BNS will tilt the balance of the criminal justice system towards greater incarceration and retributive justice.