

A comparative analysis of the new criminal codes and the existing codes

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1 Introduction

The Bharatiya Nyaya Sanhita Bill, the Bharatiya Nagarik Suraksha Sanhita Bill, and the Bharatiya Sakshya Bill (collectively, **New Bills**) were introduced in the Parliament on 11 August 2023 to replace the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973 (**CrPC**) and the Indian Evidence Act, 1872 (collectively, **Existing Codes**), respectively. These New Bills were referred to the Parliamentary Standing Committee on Home Affairs (**Standing Committee**) for detailed evaluation and review on the same day that they were introduced. The Standing Committee report was adopted by the Parliamentary Committee on Home Affairs on 6 November 2023. In light of the recommendations of the Standing Committee, the government withdrew the New Bills on 12 December 2023.

The New Bills were then modified by the government in accordance with the Standing Committee's recommendations and introduced on 12 December 2023 itself, as the Bharatiya Nyaya (Second) Sanhita, the Bharatiya Nagarik Suraksha (Second) Sanhita, and the Bharatiya Sakshya (Second) Adhinyam (collectively, **New Codes**). The New Codes were passed by the Parliament on 21 December 2023, and received presidential assent on 25 December 2023. However, they are yet to be notified.

On 25 December 2023, the government has enacted a new version of the criminal codes - Bharatiya Nyaya (Second) Sanhita, Bharatiya Nagarik Suraksha (Second) Sanhita, and Bharatiya Sakshya (Second) Adhinyam. This article builds on the earlier comparative analysis of the first version of the new criminal bills with the existing codes. It also delves a step further into what modifications have been made by this second enacted version vis-à-vis the first set of bills.

This update discusses the differences between the New Codes and the New Bills. (To read our detailed comparative analysis of the New Bills and the Existing Codes, click [here](#).)

2 Proposed changes in the Nyaya (Second) Sanhita

The notable changes in the Nyaya (Second) Sanhita are in the definitions of '*organised crime*' and '*economic offences*' in accordance with the suggestions of the Standing Committee and incorporating '*community service*' as a new mode of punishment for minor offences.

a. *Changes in the definition of 'organised crime'*

The Nyaya (Second) Sanhita has incorporated minor changes to the '*organised crime*' provision. The definitions of '*economic offences*' and '*organised crime syndicate*' have been modified and are now identical to the ones in the Maharashtra Control of Organised Crime Act, 1999 and the Gujarat Control of Organised Crime Act, 2003. Additionally, the definition of '*benefit*' in the provision has also been dropped.

The changes in the Bharatiya Nyaya Sanhita Bill and the Nyaya (Second) Sanhita with respect to the provision relating to '*organised crime*' and its ingredients are captured below.

Ingredients in the provision of ' <i>organised crime</i> ' under the Bharatiya Nyaya Sanhita Bill	Ingredients in the provision of ' <i>organised crime</i> ' under the Bharatiya Nyaya (Second) Sanhita
<i>"economic offences" include criminal breach of trust; forgery, counterfeiting of currency and valuable securities, financial scams, running Ponzi schemes, mass-marketing fraud or multi-level marketing schemes with a view to defraud the people at large for obtaining the monetary benefits or large scale organised betting in any form, offences of money laundering and hawala transactions.</i>	<i>"economic offence" includes criminal breach of trust, forgery, counterfeiting of currency-notes, bank-notes and Government stamps, hawala transaction, mass-marketing fraud or running any scheme to defraud several persons or doing any act in any manner with a view to defraud any bank or financial institution or any other institution or organisation for obtaining monetary benefits in any form.</i>
<i>"organised crime syndicate" means a criminal organisation or group of three or more persons who, acting either singly or collectively in concert, as a syndicate, gang, mafia, or (crime) ring indulging in commission of one or more serious offences or involved in gang criminality, racketeering, and syndicated organised crime.</i>	<i>"organised crime syndicate" means a group of two or more persons who, acting either singly or jointly, as a syndicate or gang indulge in any continuing unlawful activity.</i>

The changes made to '*economic offences*' reword the definition and remove explicit reference to '*money laundering*', possibly to avoid overlap between the Prevention of Money Laundering Act, 2002 and the Bharatiya Nyaya (Second) Sanhita. Whereas the change in the definition of '*organised crime syndicate*' to mean a group of "*two or more persons*" instead of "*a group of three or more persons*" has widened the ambit of application of the provision on '*organised crime*'.

The Bharatiya Nyaya Sanhita Bill had defined '*petty organised crime*' as any crime that caused "*general feelings of insecurity among citizens*" and was widely criticised for its apparent vagueness.

The Standing Committee therefore recommended redrafting the provision to ensure definitional clarity. Accordingly, the Nyaya (Second) Sanhita re-defines the scope of '*petty organised crime*' to mean "*theft, snatching, cheating, unauthorised selling of tickets, unauthorised betting or gambling, selling of public examination question papers or any other similar criminal act.*"

b. *Community service as a mode of punishment*

The Nyaya (Second) Sanhita introduces community service (by inserting Section 4 (f)) as a new form of punishment for offences such as defamation, theft of property (worth less than INR 5,000), and public intoxication. Inclusion of community service as a mode of punishment would mean that courts would now be inclined to impose such punishment for minor infractions instead of imposing fine or simple imprisonment, as is the norm under the Indian Penal Code.

However, the absence of a definition of '*community service*' means that the exact nature of community service that would be awarded remains to be specified by the courts on a case-to-case basis. The Standing Committee also flagged this absence of a clear definition and clarity in its report, yet this lacuna persists in the Nyaya (Second) Sanhita. However, community service in other jurisdictions has generally been in the nature of volunteering in shelters, religious centers, institutions providing assisted care, etc., and philanthropy.

Although the aspect of community service has served as a common non-custodial penalty in other jurisdictions, it has also been in vogue in India, i.e., in Section 18 (1)(c) of the Juvenile Justice (Care and Protection of Children) Act, 2015 (as punishment for offences committed by children in conflict with law). Additionally, the Nyaya (Second) Sanhita prescribes that a default in the performance of community service would lead to simple imprisonment.

The purpose behind the introduction of community service seems to be to ease pressure from an already overburdened prison apparatus (considering three-fourths of the prisoners languishing in jails are undertrials).

3 Proposed changes in the Nagarik Suraksha (Second) Sanhita

The main changes brought about in the Nagarik Suraksha (Second) Sanhita are aimed towards giving statutory recognition to '*zero FIR*' and preliminary inquiries, allowing registration of E-FIRs, change in the reporting requirement of '*criminal breach of trust*', and specifying timelines for filing discharge applications or discharging an accused in the absence of a complainant.

a. *Statutory backing to 'zero FIR'*

The Nagarik Suraksha (Second) Sanhita has now given a statutory mandate for the registration of a '*zero FIR*'. Unlike a first information report (**FIR**), which is restricted by jurisdiction, a zero FIR is an FIR that can be registered at any police station, irrespective of whether the concerned police station has jurisdiction or not. Once a police station registers a zero FIR, it must transfer such FIR to the police station which has the requisite jurisdiction to investigate the case.

The introduction of zero FIR simplifies the procedure for registration of FIRs. It is likely to help in tackling the issue of delays arising due to procedural irregularities in the registration of an FIR.

b. *Preliminary inquiry*

The Nagarik Suraksha (Second) Sanhita gives statutory backing to the conducting of preliminary inquiries (PI) by the police for certain categories of cases (punishable for three years but less than seven years) to determine if a *prima facie* case exists before registering an FIR. Such PI is to be conducted within a time-bound period of 14 days from the date of receipt of the information. The provision for a preliminary inquiry was absent under the old laws.

This provision, however, is a stark divergence from the settled principles on PI decided by the Supreme Court in *Lalita Kumari v Government of India* where the Court categorically held that registration of an FIR is mandatory if the information given discloses the commission of a cognizable offence and no PI is permissible in such a situation. Consequently, under the Nyaya Suraksha (Second) Sanhita, there are more than 98 different offences where the period of imprisonment ranges between three to seven years, and in each of these cases, an investigating officer would have the absolute discretion to ascertain whether there is a *prima facie* case that would merit the registration of an FIR.

Further, this new provision for a preliminary inquiry mirrors the scheme of the Prevention of Money Laundering Act, 2002, where a contentious question arises as to whether, in the absence of an FIR, a person is being summoned as an accused or as a witness during a PI.

c. *Registration of E-FIR*

The Nagarik Suraksha (Second) Sanhita provides that an FIR may be registered if a complaint/information is received by way of an electronic communication to an officer in charge of a police station. Such an E-FIR shall be taken on record provided it is signed by the person giving such complaint/information within three days of receipt, and the contents of the complaint/information are entered by the officer in a book, which is to be maintained for this purpose, in the prescribed format.

However, it remains unclear whether police officers can act immediately upon receipt of an electronic communication or investigate an offence only once the sender's signature is recorded. The sanctity of an E-FIR without the recording of the signature of the person giving such information/complaint or completing other procedural formalities remains open to challenge.

d. *Introduction of new timelines during various phases of investigation and trial*

Apart from the timelines for filing of chargesheet, framing of charges and pronouncement of judgments, which have been discussed in the previous update, the Nagarik Suraksha (Second) Sanhita has also introduced specific timelines for filing of a discharge application and for discharging of an accused in the absence of the complainant.

A timeline of sixty days from the date of framing of charges in warrant cases has been given to an accused to file an application for discharge and sixty days in a sessions case from the date on which the case is referred to a court of sessions by a magistrate.

Additionally, the Nagarik Suraksha (Second) Sanhita grants discretion to the magistrate to discharge the accused in cases where the complainant remains absent even after being given thirty days to be present.

e. *Changes in the reporting requirement of 'criminal breach of trust'*

The Nagarik Suraksha (Second) Sanhita has also incorporated minor changes to the provision on reporting requirements on commission or of the intention to commit '*criminal breach of trust*' under the Nyaya (Second) Sanhita.

The requirement to report under the Nagarik Suraksha (Second) Sanhita only casts an obligation to report commission or the intention to commit '*criminal breach of trust*' by a specific set of people (i.e., public servant, or a banker, merchant, factor, broker, attorney, or agent in the course of their business) similar to Section 39 of the CrPC. Whereas the Nagarik Suraksha Sanhita Bill specified reporting of '*criminal breach of trust*' by any person.

4 Ambiguity regarding application of the New Codes

The Repeal and Savings clause of the Nagarik Suraksha (Second) Sanhita provides that pending investigations, cases, trials, and inquiries will not be affected by the repeal of the CrPC and will continue to be governed by it.

However, the introduction of the New Codes is bound to create ambiguities in the criminal justice system. For instance, in cases where the police file a closure report which is accepted, and the aggrieved party wishes to revive the litigation, it would be unclear which legislation would apply. Similarly, in cases that are closed for the non-appearance of a person who was a proclaimed offender, it is unclear whether it would be possible to revive such a case using the Nagarik Suraksha (Second) Sanhita clauses, which allow for trial *in absentia*.

Uncertainty regarding the implementation of the New Codes has already materialised in the form of pleas filed before the Supreme Court and the Delhi High Court seeking directions into the viability of the laws, and issuance of practice directions in relation to cases where the cause of action arose prior to the enactment of the New Codes, respectively. Recently, the Karnataka High Court registry published objections about petitions not being filed in accordance with the New Codes, even though they are yet to be notified.

5 Conclusion

While it will be interesting to see how the facet of preliminary enquiry will play out in coming days, statutory backing for zero FIR and E-FIR and the introduction of timelines are welcome reforms in tune with best practices in technology and the evolution of criminal procedure across decades.

To aid implementation, the government has constituted a special task force under the Bureau of Police Research and Development to ensure the training of all key officials before the implementation of the New Codes so that the transition is smoother. A module to train law enforcement officials and lawyers as part of the '*Training of Trainers (TOT) programme*' has also been proposed. Additionally, to ensure last mile connectivity, the government has proposed to send five trainers to each district around the country to train the law enforcement officials in the district.

Further, the Central Academy for Police Training has been tasked with training judicial officers to deal with the New Codes. However, the training and recruitment of law enforcement officials, technological integration, and upgrading of forensic infrastructure need to keep pace with the proposed implementation of the New Codes by December 2024. Otherwise, the application of the laws is bound to face roadblocks.

Until the New Codes are notified and the courts provide clarity on various aspects of their implementation, it will be interesting to see how the law enforcement and judicial apparatus deal with the application of New Codes in the interim.

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