

COMPARITIVE STUDY OF BNSS AND CRPC: EMPHASIZING ON VITAL PROCEDURAL REFORMS

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BEST CITATION – VEDANTA MALLIK, COMPARITIVE STUDY OF BNSS AND CRPC: EMPHASIZING ON VITAL PROCEDURAL REFORMS, INDIAN JOURNAL OF LEGAL REVIEW (IJLR), 5 (11) OF 2025, PG. 847-892, APIS – 3920 – 0001 & ISSN – 2583-2344

ABSTRACT

This research comprehensively examines the transformative impact of the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, on India's criminal justice system, indicating a transition from colonial-era legislation to address contemporary issues. The study investigates four critical reforms: Trials in Absentia, Redefining Criminal Complaints, Mechanisms of Mercy Petitions, and Digital Justice. The study evaluates, through a comparative analysis of historical precedents, international treaties, and judicial interpretations, whether the BNSS achieves an optimal balance between procedural efficiency and fundamental rights.

Trials in Absentia creates a structured way to deal with delays caused by the flight of accused people. It includes protections like mandatory notifications and legal representation. Still, there are worries about fairness in the process and the possibility of exploitation. The revised Criminal Complaints mandate compels magistrates to hear the accused before cognizance, which cuts down on pointless lawsuits but makes it harder to figure out when and how to employ specialized provisions. Mercy Petitions now set deadlines to help with chronic delays, but there are still ethical issues with presidential discretion that need to be worked out. Digital Justice uses technology like electronic summons, virtual testimonies, and forensic advances, but it also faces problems like digital inequities and cybersecurity concerns.

The dissertation focuses on the BNSS's victim-centered approach, but it also points out problems with the process that could hurt the rights of the accused. It emphasizes the need for clear courts, strong infrastructure, and moral leadership to make sure that the improvements lead to a modern, equitable criminal justice system. The BNSS is a significant step forward in the law, but it will only work if it is carefully carried out, constantly changed, and firmly committed to the fundamental principles of fairness and human dignity.

CHAPTER 1 : TRIAL IN ABSENTIA

ORIGIN & INTERNATIONAL CONVENTIONS ON ABSENTIA TRIALS

The literal meaning of the term "Trial in Absentia" is the continuation of a criminal proceedings regardless of the absence of the accused party and it has been adopted from a Latin phrase which is "in Absentia" which means "in the absence". Trial in absentia has been a controversial topic in the international criminal law as the acceptable standard of the due process of law that is to be followed during the

course of these proceedings have always been vague. Now, there are a number of international conventions which have prohibited such trials. E.g.: ICCPR (International Covenant on Civil and Political Rights) & ECHR (European Convention of Human Rights).¹ But few International conventions have allowed "Trial in Absentia" in cases where the accused party has not been located or it is determined that it is necessary to conduct the proceedings to protect and uphold justice. E.g.: IMT (International Military Tribunal).²

It is crucial that we understand the rationale behind the principle of trial in absentia in order to better understand its importance & requirement in international as well as domestic laws. Absconding from criminal trials is the most common tactic used by an accused in his attempt to evade justice and absentia trials prevent the accused from dictating the proceedings of the case against him. It protects the interest of justice for the victim and reduces inconvenience for the witnesses as well as the judges by ensuring that the trials proceed as per the schedule. And it also aids the court to avoid delay and challenges which arise in a trial consisting of multiple accused parties.³

There are three primary requirements for absentia trials to come to fruition and they are mentioned as follows:

- ❖ The accused party has been called upon for attending the trials by following the due process prescribed in law.
- ❖ The notification regarding the trials have been duly served to the accused party or parties.
- ❖ The failure of the accused party to attend the trial on the due date is inexcusable and is against the interest of justice.

As per the Article 6 of the ECHR (European Convention on Human Rights) which expands upon the right to fair trial, the act of absence in a trial does not amount to violation of the principles of right to fair trial and the accused should be allowed to be defended appropriately and the counsel of the accused is to be permitted to plead the case regardless of the attendance of the accused. There are certain safeguards that are to be followed by the ECHR during the course of such absentia trials,⁴ which are mentioned as follows:

- ❖ It is required that the accused has effective knowledge regarding the proceeding and hearings of the case against him.
- ❖ It is crucial for the accused to be represented by a counsel and the burden falls

upon the state to make sure that the counsel of the accused has represented him in an effective manner without the presence of any form of pressure or undue influence.

- ❖ It is required that the accused party is granted the right to a retrial or an ex novo trial in the presence of the accused party.

As per Article 14 (3) (d) of the ICCPR (International Covenant on Civil and Political Rights) the fundamental rights include the right to be present in a trial that concerns oneself, the right to of an accused party to defend themselves through a counsel pr by their personal capacity and the right of the accused to be properly represented even in situations where the accused cannot afford the trial.⁵

Lastly, as per the ICC (International Criminal Courts) which is established to provide a set of international standard for the conduct of criminal trials states in its Article 63 that absentia trials are prohibited but it does not etch in stone such prohibition as it also provides exceptions to this article in circumstances where the accused even if present in the court during the course of the trial against him disrupts the court proceedings, and in such cases the accused party can be removed from the chambers and be required to observe the remaining proceedings digitally.⁶

1.2 ABSENTIA TRIALS IN INDIA AS PER THE CODE OF CRIMINAL PROCEDURE, 1973

In India before the introduction of the B.N.S.S. (The Bharatiya Nagarik Suraksha Sanhita, 2023) the method of dealing with a absconding accused was different to what it is now and the provisions regarding “Trial in Absentia” were scattered throughout the Cr.P.C. (The Code of Criminal Procedure, 1973). In order to better understand the changes and draw a proper comparison between the old laws relating to absentia trial and the new laws regarding the absentia trials we need to thoroughly understand all the provisions relating to “Trial in Absentia” as per the Cr.P.C., which are mentioned as follows.

As per Section 82 of the Cr.P.C. which relates to the “Proclamation of person absconding” in cases where the competent court regardless of whether the evidence has been taken or not has the reason to believe that the accused person or persons against whom a warrant has already been issued has either absconded or is concealing himself in order to make sure that the warrant may not be executed, in such cases the competent court may by the way of publishing a written proclamation require him to appear on a specified date, time and place within 30 days of the date on which such proclamation was published.⁷ The procedure that deals with how the proclamation is to be published and served upon an absconding accused is mentioned in detail under Sec. 82 (2) of the Cr.P.C..⁸

Now, as per Section 83 of the Cr.P.C. which relates to the “Attachment of property of person absconding” the competent court after issuing the proclamation as per the procedure provided under the Sec. 82 of the Cr.P.C. has the authority to order the attachment of any property

regardless of whether the property is movable or immovable or both, which belongs to the absconding person, but it is crucial that at the time of order of attachment of such property the said property is within the district of the court or if not then it is to be done with the help of an endorsement of the District magistrate of the district where such property is located.⁹ The abovementioned section 82 & 83 of the Cr.P.C.. Specifically dealt with the proclamation in order to secure the attendance of the accused person as well as the power of the competent court to pass an order to attach the property of the absconding individual to recover the damages to an extent in cases the absconding person does not comply with the order of proclamation as per Sec. 82.

As per Section 273 of the Cr.P.C. which relates to “The Evidence to be taken in presence of accused”. According to this particular section all the evidence that is related to the case at hand

concerning the accused party is to be taken in the presence of such party unless it is expressly provided otherwise or in a rare case where the attendance of the accused party is dispensed by the competent court but the presence of his counsel.¹⁰

Now, there is an exception to this rule that is given under the Section 299 of the Cr.P.C. which provides us with the procedure that is to be followed in cases where the recording of evidence can be done in the absence of the accused party. That if it is proved that the accused person or persons have absconded and also that there is no probability that the accused may be arrested, the competent court can order the examination of witnesses to the case who are brought by the prosecution without the presence of the accused party and it can also record their statements in the court of law.¹¹ Also, it provides for these statements of witnesses to be to be used against the accused upon his arrest if the deponent at the time of the arrest of the accused is incapable or cannot be found without delay which may negatively affect the case and cause inconvenience or be unreasonable.

Also, under the same section it is provided that in cases of an offence which is punishable with and form of capital punishment or imprisonment for life is committed by the accused party/parties or unknown person, the High court or a sessions judge has the authority to pass a direction to the Magistrate of first class to hold an inquiry and examine any witness who can provide the court with any evidence in relation to such offence and any statement to the court by such witness given to the court of law can be taken up as evidence against the accused if he is apprehended subsequently and the deponent is dead or incapable of giving any evidence at that point in time.¹²

As per section 317 of the Cr.P.C. which is the provision that relates to the inquiries and trial being held in the absence of the accused in certain cases and it provides the competent

court the authority that allows the judge or magistrate to decide that at any stage of the trial or inquiry the attendance of the accused party is not required in the interest of justice he can dispose of the accused party's attendance with reason to be recorded by the court in writing. Or even in cases where the accused party has disrupted the proceeding of the court the magistrate or the judge can dispose of the personal attendance of the accused party in case he is represented by a counsel and continue the court proceedings in the absence of the accused party with the power to direct the person attendance of the accused party at any subsequent stage of the proceedings.¹³

Also, if the accused party if not represented by a counsel and the magistrate or the judge at any stage requires the personal attendance of the accused, he may with his reasons to be recorded in writing adjourn the inquiry or order the case of such an accused to be tried separately.

Now that we have gone through all the relevant sections of the Cr.P.C., 1973 which relate to "Trial in Absentia" we need to understand to what extent did the Code of Criminal Procedure recognize "Trial in Absentia" and what was the position of the Cr.P.C. as far as "Trial in Absentia" is concerned.

The Code of Criminal Procedure, 1973 did not recognize all the essentials of a "Trial in Absentia" rather it only recognized certain procedures which relate to absentia trials where the accused in absconding and not present in the court during the course of his trial, few examples of the procedures which were recognized by the Cr.P.C. are the segregation of trial between the accused parties which are present from the absconding party as well as the procedure of the recording of evidence in such trials.

It can be clearly drawn from the abovementioned relevant provisions of the Cr.P.C., that the Cr.P.C. requires that each and every piece of evidence that is relevant to the case is to be taken during the course of the trial

in the presence of the accused party, or in case the attendance of the accused is dispensed with by the court with reasons provided in writing such evidence is to be recorded in the presence of the counsel of the accused.¹⁴ But there are a few exceptions to this rule which are discussed as follows:

❖ In case the accused party has absconded with no probability of his arrest in the near future:¹⁵ In such a case the court has the authority to examine the witnesses which are produced by the prosecution and the statements of those witnesses can be recorded, these depositions may be used by the court in case the absconding accused party is subsequently arrested and the deponent cannot be produced in the trials at that time, in simple terms the court has the authority to pre-record the evidence by witnesses produced by the prosecution in the absence of the accused party as a security. So, that it may be used against the accused once he/she is apprehended and the witnesses cannot be secured.

❖ In case the personal attendance of the accused party is not required in interest of justice, or in case the accused disrupts the court proceedings:¹⁶ In such a case the court can dispose with the attendance of the accused party in case such party is represented by a counsel with the power to order the accused party's personal attendance at any point during the subsequent stages of the proceedings. And in cases the accused is not represented by a counsel the court may adjourn with such trial or inquiry or order a separate trial of such accused segregating the absconding party and only continuing with the accused parties which are present during such proceedings.¹⁷

In simple terms as per the CrPC, an accused person used to have to show up personally before the courts to provide the bail bonds. This was subject to certain exceptions, such circumstances where the accused was absconding and there was no real probability of

arresting them, or where the offence was committed by unknown person/persons even the evidence in a trial would be taken in the presence of the accused to ensure justice. Even the investigation and the trial could only take place in the absence of the accused where (a) the Court disregarded the accused's personal attendance, or where the accused was represented by a counsel. And in case the accused person had failed to show up before the court, the case would be sent to a cold storage and the trial would be suspended, to be revived once the accused shows up or was apprehended at a later stage.¹⁸

The Indian Judicial system had made sure to adopt the principles of "Trial in Absentia" with care and proper caution and the absentia trials were only utilized in circumstances where the justice was hindered due to the absconding accused party and there was no other reasonable way of ensuring the attendance of the accused party in the court, and such trials never violated any principles of natural justice or the accused party's right to a fair trial¹⁹ as per the international conventions such as ICCPR or ECHR as discussed above.

1.3 ABSENTIA TRIALS IN INDIA AS PER THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023

With the introduction of the B.N.S.S. (Bharatiya Nagarik Suraksha Sanhita, 2023) there has been addition of few new provisions in relation to "Trial in Absentia" as well as some changes in the provisions that existed under the Cr.P.C.. There are provisions under the B.N.S.S. which retain few provisions of the Cr.P.C., such as the power of the court to proceed in case the accused disturbs the proceedings of the court or scenarios where the attendance of the accused party is not mandatory. But there is also the introduction of new and transformative changes under the B.N.S.S. as far as the absentia trials are concerned like, the introduction of a new provision that allows for an inquiry, a trial and a judgement to be passed in cases of an absconding accused if the accused party is declared to be a proclaimed

offender.

Under the B.N.S.S. it is mentioned that in case an individual is declared to be a proclaimed offender regardless of whether he has been charged jointly with other accused party or not as far as he has tried to evade trials and absconded from the proceedings of the court and there is no possibility of his arrest in the near future, it can be considered that such individual has waived off his right to be present during the trials against him. And the court has the authority to proceed with the trials as if the absconding accused was present during the course of the trial and such court can even pronounce the judgement in such matters, provided that the reasons of the absconding accused party has been recorded in writing.²⁰

In the B.N.S.S. the section 84 is the section that is in correspondence with the section 82 of the Cr.P.C. i.e. discussed above. In order to understand how the B.N.S.S. deals with the absconding accused in a trial we need to have a look at what is meant by the term "Proclaimed Offender", As per Section 84 (4) of the B.N.S.S. after the publication of a proclamation in accordance with the procedure given under section 84, if an individual accused in an offence i.e. punishable with either an imprisonment of 10 years, imprisonment for life or a capital punishment and such individual absconds from the trial proceedings on the date specified to him via the proclamation under section 84, the court has the authority to announce such individual to be a proclaimed offender after making inquiries the court thinks fit.²¹

A proclaimed offender is an individual who has evaded the law or the authorities concerned and is ultimately been announced as a criminal by a court of law, there are certain criteria that are to be fulfilled before the court announces an absconding accused as a proclaimed offender. Firstly, the court concerned needs to issue two warrants consecutively for the arrest of such person and those warrants need to be separated by in the very least thirty days.²² Secondly the

court has to publish a notice in the local newspaper in the locality where such person resides ordinarily or after the court makes an inquiry and it thinks fit that such person is to be announced as a proclaimed offender for their absence in the trial proceedings.²³

Now, after a person is declared to be a proclaimed offender the main change between the Cr.P.C. and the B.N.S.S. can be observed as there is the addition of a completely new section under the B.N.S.S. i.e. section 356 which deals with the procedure of inquiry, trial or ultimately a judgement in the case of absence of a proclaimed offender, in order to understand the section properly and draw a comparison between the old and the new law a detailed review and understanding of this section is required.

As per section 356, in a situation where an individual is declared to be a proclaimed offender regardless of whether he is charged separately or jointly with other accused, the act of evading the trial proceedings by an accused individual despite the best efforts of the court to secure his presence is to be treated as his declaration to waive off his right to be present during the trial proceedings against him in a court of law. This allows the court to continue with the trial in the interest of justice as if the absconding individual was present during the trial proceedings and under the B.N.S.S. the court also has the authority to pronounce the judgement in the absence of the absconding party.²⁴

Now, there are certain conditions that are to be met in order for the court to proceed with trial in absentia. Firstly, the court is not authorised to commence the absentia trials in unless a period of about 90 days has elapsed from the date of the framing of charge.²⁵ Secondly, the court needs to make sure that certain procedures are complied with such as the issuance of two arrest warrants which are consecutively issued with 30 days interval, making sure that such proclamation is published in a national or a local newspaper which is in circulation around

the last known address of the absconding party.²⁶ Thirdly, the information of the summoning of the accused party being relayed to any relative or friend of the accused.²⁷ Lastly, the clipping regarding the trial's commencement be affixed in some conspicuous part of the accused party's house as well as on display in the police station that is nearest to the absconding individuals last known location.²⁸

It is to be noted that in case the proclaimed offender is not represented by a counsel an advocate is to be assigned to such absconding accused at the expense of the state.²⁹ The depositions recorded by a competent court can be used as evidence against the proclaimed offender provided that the accused when apprehended during the course of the trial be given an opportunity to examine all evidence which were recorded by the competent court during the course of his absence.³⁰ It is also directed that the all the evidence being recorded by the court be recorded in an audio or video format if practical in order to preserve such record and it is to be stored according to the directions passed by the court.³¹ Also, in case the accused party absconds voluntarily from the trial proceedings after the commencement of the trials such absence is not to prevent the continuity of the trial or pronouncement of judgement even if such accused is apprehended at a later stage during the trial or at the conclusion of the proceedings against him.³²

As far as appeals are concerned it is clearly mentioned in section 356 (7) that no appeal will be made available to the absconding accused against the judgement of the court passed during his absence if he does not personally attends the court requesting an appeal against such judgement, but it is to be noted that no appeal against his conviction will be entertained in case the absconding accused seeks it after the lapse of a period of three years from the date on which the judgement was pronounced.³³

Now that we have completed the detailed review of all the relevant provisions relating to “Trial in Absentia” under the B.N.S.S. we need to analyse the new position of absentia trials under the B.N.S.S. so that we can perform a proper comparison between the old and the new laws.

As per the Sections 355 (which is in correspondence with Section 317 of the Cr.P.C. which is discussed above) and 356 of the B.N.S.S, these established clauses allow provisions for “Trials in Absentia”. Interestingly, the B.N.S.S. preserves Section 317 of the Cr.P.C. inside Section

355. Section 355 of the B.N.S.S. and it states that a court may continue in case the accused disrupts the proceedings or if their physical presence is superfluous. Still more importantly, the

B.N.S.S. created a special clause allowing for enquiry, trial, or judgement in absentia of the declared offender. The B.N.S.S. states that the trial may proceed in the absence of the person designated as a declared offender under Section 84 should they have absconded to avoid trial and there is no immediate chance of apprehending the accused. Actively absconding from the trial will be seen as a waiver of the person's right to be present and tried personally.³⁴ The following are the essentials for an absentia trial:

❖ The absconding accused has been established as a proclaimed offender by the competent court.

❖ The reason for the absence of the accused is an attempt made by him to evade trial and disrupt the court proceedings in order to escape justice.

❖ The absconding accused cannot be expected to be arrested immediately in the near future.³⁵

If we are to consider the safeguards provided in the in the B.N.S.S. the intent is to maintain equilibrium between the need of time bound disposal of cases and the duty of courts to

uphold the right of a fair trial which is guaranteed to every citizen by the constitution of India. In the light of the abovementioned dilemma the B.N.S.S. provides a number of safeguards so that the concerned courts can proceed with absentia trials only in certain cases where it is evident and a declaration has been made regarding the absconding accused being a proclaimed offender. It is also to be noted that it is the duty of the courts to ensure that two warrants have been consecutively served with 30 days along with the obligation placed upon the courts to refrain from proceeding with absentia trials unless a period of 90 days has elapsed from the date of framing of charge. And attempts have been made by the court as per the procedure expressed in section 84 of the B.N.S.S. to make sure that the proclamation has reached the absconding accused party.³⁶

The courts also have to allow the proclaimed offender if he is apprehended at a later stage of the proceedings to examine all the evidence that has been recorded against him by the witnesses during the course of his absence but it is also stated in the B.N.S.S. that such appearance of the accused shall not derail the proceedings that have been continuing during the course of his absence. Also, the requirements for the absconding accused to file an appeal against the judgement is to be upheld in order to protect the interest of justice and the rights of the victim, while preserving the accused individuals right to appeal.³⁷

Now it is evident that the B.N.S.S. has take a more victim centric approach towards criminal proceedings by incorporating the principles of “Trial in Absentia” making sure that the absconding accused cannot escape the law and disrupt the court proceedings or increase the burden on the courts allowing for speedy disposal of cases. Also, it is to be mentioned that as discussed above in detail that the new provisions also have adequate safeguard in order to ensure that absentia trials are not initiated an absconding accused without a proper attempt by the court to procure the

accused individuals personal attendance. But it is of utmost importance that these provisions are used in a judicious manner with proper precaution and are not passed at the in order to secure a speedy disposal in any criminal case in order to preserve the right to fair trial available to every accused.

14. ARE CRIMINAL PROCEEDINGS BEING HANDLED IN THE SAME MANNER AS CIVIL PROCEEDINGS?

These new amendments in the recent laws have made trial in absentia possible and provided the judiciary more freedom to deal with criminal cases which may cause undue delay, the new laws arm the criminal courts with procedure which allows for speedy disposal of cases while being considerate regarding the rights of the accused even though it is clearly more centred towards the protection of victim's rights. But this raises the question that are the criminal proceedings being handles in a similar manner in which the courts handle civil proceedings, or does this new approach of trial in absentia in criminal laws does give proper regard to the right of fair trail of the accused.

In order to clearly understand the argument mentioned above we need to take a look at ex-parte proceedings under civil laws. An ex-parte decree is not the general rule but an exception similarly to the process of "Trial in Absentia" and this exception allows the court to overlook the general rule of pronouncing an adjudication in the presence of both the parties to the case. It is basically "Decree in Absentia" it allows the pronouncement to take place even if on the date of hearing the defendant is absent and only the plaintiff is available. The C.P.C. (Civil Procedure Code, 1908) allows the passing of an ex-parte decree if in case the defendant fails to appear in a proceeding where he was supposed to be present.³⁸

There are few instances when the court can pass an ex-parte decree. Firstly, as per Order 8, Rule 10 of the C.P.C. a defendant is supposed to submit his written statement within a period

of 30 days from the date of service of summons an extension can be provided to this period but it cannot exceed 90 days and if the defendant fails to do so the court can pass an ex-parte decree. Secondly, Order 9, Rule 6 of the C.P.C. states that the court can try a case ex-parte and pass a decree for the same if the defendant fails to appear on the day fixed for summons and only the plaintiff appears. Also, it is required that the summons were duly served to the defendant and he also had sufficient time to respond and appear in the court on the date fixed for summons.³⁹

Now it is to be noted that an ex-parte decree is not final and the defendant is provided with remedies against such a decree. For ex: According to Order 9, Rule 13 of the C.P.C. the ex- parte decree passed in absence of the defendant can be set-aside, provided that the defendant satisfies the court that the summons were not duly served or a sufficient cause had prevented him from appearing on the date fixed for summons. The defendant can also file an appeal against the original ex-parte decree under Section 96 (2) of the C.P.C. or a review can be preferred as per section 114 of the C.P.C. against the ex-parte decree.⁴⁰

In order to better understand this scenario, we can refer to a case from the Karnataka High Court (G.H. Abdul Qadri v. Muhammed Iqbal, CrI. RP. No.1323/2019)⁴¹ where the question of "can criminal trials proceed ex-parte in cases where the accused repeatedly tries to evade summons" was raised, it was mentioned that according to Section 299 of the Cr.P.C. the process of recording of evidence if they are absconding or trying to evade trial. It was ultimately held that ex-parte proceeding are permissible under section 299 of the Cr.P.C. in case the accused avoids court proceedings deliberately. However, the absconding accused cannot be denied his rights to a fair trial, and it was stated that the right to fair trial must be safeguarded even if the trial initially proceeds ex-parte.⁴²

The court held that there was a need to

balance the interest of speedy trials along with the right to fair trial given to an accused, and a strict adherence to the procedural requirements mentioned under section 299 are to be complied with, and ultimately it was held that the trials can proceed ex-parte in order to make sure there is no indefinite delay but the procedure for a fair trial cannot be diluted to achieve a speedy disposal of the case.⁴³

Now, it is clear that in the B.N.S.S. “Trial in Absentia” has been recognised and it is given significance in order to promote speedy trial and disposal of cases, the new provision not only allows the recording of evidence in absence of the accused but it goes even further by providing procedures which allow for inquiry, trial and even the pronouncement of judgements in absence of the accused. This is a substantial change and even though the new statute allows “Trial in Absentia” it does not however compromise on the strict requirement of compliance with the procedure mention in the B.N.S.S. for conducting an absentia trial.

The question that is raised here is that usually civil proceedings are usually not as serious as criminal proceedings as criminal proceedings involve punishments and it seems unfair to pronounce a judgement against an accused without his personal attendance in the trial proceedings, even though the accused may be trying to evade justice but there is still a chance that the published proclamation did not reach the accused as it is well known that the mechanism for serving the proclamation is not as robust so as to not have any leaks, although there may be remedies available to the accused but a mistake in publishing of the proclamation may lead to miscarriage of justice and cause suffering to an innocent individual.

However, it still seems that this victim centric approach may aid the courts in dealing with the burden of cases by enabling speedy trials but is of utmost importance that we realise the gaps in this system and make sure that proper remedies are provided to the accused in order

to prevent any miscarriage of justice. It is important that criminal proceedings are dealt with more care and precision with little to no room for any lapse as in comparison to civil proceedings criminal proceedings can prove to be extremely detrimental sometimes causing irreparable damage.

1.5. CRIMINAL JUSTICE IN INDIA, ABSENT BUT ACCOUNTABLE

In order for fair and successful administration of justice both the parties of a criminal case are required to be present, but it becomes problematic when one of the parties absconds or flees from justice. And as per the International Convention and Covenant India is part of it can be inferred that the presence of an accused at his own trial is important. In order to uphold his right to defend himself. But it cannot be refused that the tendency of an accused to flee from a criminal case is very high and this can be supported by the views of the Supreme Court in the case of Surya Baksh Singh vs State of Uttar Pradesh, where it was observed that there was an alarming rise of cases where the convicts have filed appeals with the view to escape undergoing sentences and get bail to ultimately become unresponsive and flee. It is evident that the criminal justice system is being toyed with by these convicts who dishonestly try to escape their sentences.⁴⁴

In order to further this argument, the cases of Hussain vs Union of India⁴⁵ & Bachche Lal Yadav v. Akhand Pratap Singh⁴⁶, can be referred to as in the initial case it was stated that absconding of one of the accused from the trial was the main reason behind the delays in the case and in the latter case it was stated that absenteeism in criminal trials was the major reason for unreasonable delays in criminal proceedings.

Considering the above-mentioned judgments, it can be confidently stated that the act of fleeing away or absconding of an accused from a criminal trial has become a major hurdle for the courts, that hinders the expeditious disposal of criminal cases. Now, under the code of criminal

procedure, 1973 absence of one-party during recording of evidence or while inquiry was being conducted is exempted only in exceptional situations. Section 299 of the CrPC stated that in case either an accused person has absconded and there is no immediate prospect of his arrest then the competent court could examine the witness in his absence and record their disposition. But a further limitation was placed as this disposition given against him could only be used in an inquiry or a trial in which he was charged, and in cases where the witness was deemed dead, incapable of giving evidence or he could not be procured without an insurmountable amount of delay or inconvenience that is unreasonable.⁴⁷

Furthermore, section 299 (2) of the CrPC had bestowed the high courts and the courts of session with the power to give directions to any first-class magistrate to hold an inquiry and examine a witness and use the deposition of such witness as evidence against any person, if in case the witness was incapable of giving evidence or was beyond the limits of India. Alongside this section 317 of the code of criminal procedure 1973 allowed for certain cases where an inquiry or a trial could be conducted even in the absence of the accused. Disposing off his attendance but it would be entertained only in exceptional cases where the personal attendance of the accused was not necessary in the interest of justice or the accused had disrupted the proceedings of the court and was represented by a pleader.

These provisions may seem enough to curb the problem of absenteeism in criminal trials. But the courts in India have requested the appropriate governments to bring necessary amendments in criminal laws in order to better deal with such absenteeism of the accused party in criminal proceedings. In the case of Hussain v. Union of India⁴⁸, the Apex Court directed the Indian government to undertake measures that would prevent delays in criminal trials which were caused by the absence of the accused. Also, in the case of Hari Singh v. State of Jharkhand⁴⁹, the court noticed that the co-

accused had been absconding for 15 years and directed the Home Secretary of the government of Jharkhand to present the problem associated with the absence of accused during criminal trials before the government in order to urge the state government to make amendments.

Also, in case of Kader Khan v. State of West Bengal⁵⁰, the court observed that no amendments had been made in section 299 (1) of the CrPC even after the Supreme Court's request to the government in the case of Hussain v. Union of India, as this was causing a loss of evidence valuable to a case due to an archaic law as it did not recognise the evolution of law regarding the waiver of fair trial rights of an absconder.

It is clear that the absence of proper provisions for dealing with situations, where an accused's absence in criminal proceedings hinders the courts from serving justice. As these procedural requirements of presence of the accused during a trial irrespective of unreasonable delays being caused by the actions of the accused went against the principal established by Justice Krishna Iyer. In the case of Sushil Kumar Sen v, State of Bihar⁵¹, it was stated that "the procedure is the handmaid of justice and not its jealous mistress" meaning that the procedural requirements are established only to show a path to achieve justice. And delays in criminal trials caused by absence of the accused violate the cardinal principle of law which states that "justice delayed is justice denied".

Considering all the above arguments the Indian government introduced the provisions of trial in absentia into criminal proceedings through the help of certain provisions in the BNSS, 2023. For example: by the virtue of section 356 of the BNSS the provision that relates to inquiry, trial or judgement in absence of the proclaimed offender has been incorporated. This provides for presumptions in cases when an individual is declared to be a proclaimed offender, as it is considered that such individual

has absconded in order to evade trial and due to there being no imminent prospect of his arrest it is considered that such individual has wavered his right to be present in the court and tried in person. This provision does away with the requirement of the accused person's presence at the time of trial or at the time of pronouncement of judgement but as a precautionary measure a limitation has been imposed which prohibits the codes to not commence the trial in absentia unless a period of 90 days has passed from the date of framing of charges.⁵²

In order for a balance to be struck between the rights of the accused and the society. Procedural requirements have to be complied with before initiation of trial in absentia, these procedural requirements include the issuance of execution of two consecutive warrants of arrest that are to be sent within an interval of 30 days, publishing in national or a local newspaper or informing the relative of the absentee regarding the commencement of the trial. This balance is made clear by the fact that in case a proclaimed offender appears before the court during such trials then the court is empowered to allow him to examine every any evidence which may have been taken against him in his absence as it is essential to protect the interest of justice.

The voluntary absence of an accused after the commencement of a trial is not supposed to prevent the continuation of the trial or the pronouncement of justice. Even if such accused is arrested and produced in the court during the conclusion of the trial. Also, in order to protect the interests and rights of the victim no appeal will lie against a judgement that is passed under this section after the expiry of three years from the date of the judgement. And an appeal shall lie before the lapse of three years only in cases where the proclaimed offender presents himself before the Court of appeal. In conclusion, it can be stated that the criminal justice system has been amended and the introduction of trial in absentia of proclaimed offenders reflects that the demand

of the Supreme Court as well as multiple high courts have been obliged with by balancing the interest of both the parties of a criminal trial and adoption of a victim-oriented approach in criminal trials.

CHAPTER 2: REDEFINING CRIMINAL COMPLAINTS TO MAGISTRATES

2.1. INTRODUCTION

A Criminal Complaint is the first step towards enabling the courts to take further action in any matter which may have a criminal undertone, there are essentially two ways of filing a criminal complaint, it is either done by the way of an F.I.R. (First Information Report) which can be considered the most crucial document in any court proceedings as it is a written document which is prepared by the police which contains all the information which relates to the offence that could be gathered by the officer-in-charge, it is generally given orally to such officer and then reduced into writing and it is to be signed by the informant. Or a criminal complaint is made privately to a magistrate and such complaints are defined under section 2 (h) of the BNSS (Bharatiya Nagarik Suraksha Sanhita, 2023) which states that it refers to any allegation made by any individual either orally or in writing against an individual known or unknown to him has committed an offence, to a magistrate with an expectation to take action against it in accordance to this Sanhita can be termed as a private criminal complaint, but these complaints do not involve a police report.

The Code of Criminal Procedure, 1973 has been replaced by the Bharatiya Nagarik Suraksha Sanhita, 2023., and with this there has been a change in the procedure for filing a criminal complaint before a magistrate. This change will be discussed in detail with reference to the old laws which were perceived as incomplete and thought by many to have surprising omissions but with the introduction of the new statute those lapses have now been accounted for and changes such as the mandatory requirement of a magistrate to provide an

opportunity to the accused to be heard and explain his side of the incident has been made into a requirement for registering a criminal case.

Now it is not unrecognized that many of the registered criminal complaints are unsubstantiated and that such complaints are supposed to be submitted for additional review in order to make sure that the accused if summoned to the court is summoned in a substantiated matter. It is essential that we understand that any matter in which an individual is summoned to a court has negative implications connected to them and these implications carry the potential to derail a person's life and liberty especially if the matter is related to a criminal proceeding.

2.2. HOW CRIMINAL COMPLAINTS OPERATED IN Cr.P.C.

The provisions which used to govern the working of criminal complaints to a magistrate were provided under Chapter XV of the CrPC, 1973. Section 200 to 203 established the procedure of dealing with private complaints, the purpose of these sections was mainly the segregation of unsubstantiated cases from cases which actually had any substantial grounds. This allowed the courts to prevent false proceedings against innocent individuals and their harassment with false charges. Now, in order to file a criminal complaint, there are certain essential ingredients which are mentioned as follows:

- ❖ That the allegations must strictly be made only to a magistrate and not to any other judicial or police officer.
- ❖ That the allegations are to be made with an expectation from the complainant that the magistrate will be taking an action as per the Code.
- ❖ That the allegations made by the complainant to the magistrate must not be complaints without an intention of any action being taken against the accused.
- ❖ That the allegations that are

made in said complaint must be regarding an offence committed but there is no need for the complaint to specify an offender.

❖ That the complaint that is being made to the magistrate must not necessarily be from the individual who has suffered an injury but it can be made by any individual who happens to know about the occurrence of such offence.

In order to clearly understand the working of a private criminal complaint made to a magistrate we will go through all the provisions under the CrPC, 1973 which are related to criminal complaints made to a magistrate. Beginning with Section 200 of the Code of Criminal Procedure, 1973 which relates to the "Examination of complainant" and as per this section the magistrate who is supposed to be taking the cognizance of the offence reported through a complaint needs to examine the complainant as well as the witnesses (if any) on oath and the findings of said examination are to be reduced to writing and be signed by the magistrate & the complainant as well as the witnesses (if any).

Also, in cases where the complaint is made through writing the magistrate is not required to examine the complainant or the witnesses, in case the complaint is made by a public official who is acting in discharge of his official duties, in case if the complaint is made by the court or in cases if the magistrate makes over the case for the purpose of an inquiry or a trial to another magistrate as per the procedure mentioned under section 192 of the CrPC it is also to be kept in mind that in case the complainant and the witnesses have already been examined by the magistrate who made over the case to another as per section 192 there is no need for the re-examination of the complainant or the witnesses.

Coming to section 201 of the CrPC which relates to the "Procedure by magistrate not competent to take cognizance of the case" as per this section, in case a complaint is made to a magistrate who happens to not be

competent to take cognizance of the offence he is supposed to return the complaint for it to be presented in a court that is competent to take the matter if the complaint is in writing or in case where the complaint is not in writing, it is supposed to be directed to a proper court by the magistrate.

Now as per section 202 of the CrPC which deals with “Postponement of issue of process” a magistrate if he is authorised to take cognizance of an offence receives a complaint or if he receives a complaint by virtue of section 192, he has the authority postpone the issue of process that is to take place against the accused if he thinks it to be fit. Furthermore, the magistrate can either choose to inquire further into the details of the case himself or he can direct an investigation through a police officer or any individual he thinks to be fit for the purpose of the investigation, which will aid him in coming to a conclusion that whether he is supposed to continue with the proceedings or not.

It is to be recognized that the magistrate cannot give directions for an investigation where it is evident to him that the offence committed is exclusively triable by the court of sessions. It is also to be kept in mind that if an individual other than a police officer is empowered by a magistrate to conduct an investigation in a matter such person shall enjoy the same powers as a police officer in charge of a police station with only the exception being the power to arrest without a warrant.

Lastly, section 203 of the CrPC which relates to “dismissal of complaint” as per which in cases where after the consideration of the statements made by the complainant or the witnesses (if any) on oath as well as the inquiry or investigation under section 202 the magistrate still comes to a conclusion that there is no proper ground to pursue the criminal proceedings further he has the authority to dismiss said complaint and all he is supposed to do is record his reasons for doing the same.

On the basis of the explanations provided above of all the relevant sections it is evident that the decision of whether or not to pursue a criminal complaint against an accused completely relied on the opinion and partial or possibly biased information provided by the complainant or the witnesses (if any). If in such cases the court could pursue a criminal proceeding against an innocent person it could hard his social image and possibly ruin his life. This approach seems lacklustre and needed amendments in order to preserve and uphold individual rights and give the accused individual to present his side for a proper consideration where the magistrate would not have to rely on one-sided information, such amendment could allow to greatly reduce the burden of the courts and would considerably decrease registration of false cases.

2.3. CRIMINAL COMPLAINTS UNDER B.N.S.S., 2023: RECTIFICATION OF A SURPRISING ERROR

It is well known that the Bharatiya Nagarik Suraksha Sanhita, 2023 replaced the age-old Criminal Procedure Code, 1973 and ever since it came into effect since 1st July 2024 it has introduced some procedural reforms which were much needed while retaining most of the elements of the CrPC, 1973. Now the main motive of the government behind the introduction of this new code was to provide better, faster and more efficient judicial system to the people. One such reform was brought into section 223 of the BNSS (section 200 as per the CrPC) which specifically dealt with the “Examination of complainant” followed by section 201, 202 & 203 which outlined with subsequent procedural actions.

Earlier a magistrate who was taking a private complaint of any offence needed to examine both the complainant as well as the witness (if any) on oath while reducing their statements into writing while making sure that such statements are also signed by the complainant or the witnesses. It is also to be noted that the former statute did not mention any provision which required the accused to be heard before

the lodging of a criminal complaint against him, this lapse has been corrected under section 223 of the BNSS.

Beginning with the section 223 of the Bharatiya Nagarik Suraksha Sanhita, 2023, this section deals with the “examination of complainant” and it provides that a magistrate who has the jurisdiction of a matter and who is supposed to be taking cognizance of the matter is to examine both the complainant as well as the witnesses (if any) on oath it is similar to the older statute’s section 200 but where it differs from the CrPC is that it provides that no magistrate can take cognizance of any offence complained of without providing the accused in such matter an opportunity of being heard.

This fresh proviso provides the accused individuals an opportunity to of being heard by the magistrate before he takes cognizance of the matter, it is evident that the intent of the legislature behind incorporating this proviso was to allow the accused to have an opportunity of being heard and to rule out the possibility of the court taking cognizance and initiating a criminal proceeding against the accused without their knowledge and in their absence. Now why is important for the accused to be informed regarding the court taking cognizance of a matter which implicates him as in most instances it is thought that “cognizance” if merely the act of the judiciary taking notice of a complaint and most of the times it may not come to fruition.

But in the case of S.K. Sinha Chief Enforcement Officer v. Videocon International & Ors the supreme court stated that the term “cognizance” although may not be defined under the CrPC means “be aware of” and when this word is used in reference to the court it means “to take notice judicially” and in case where the court takes notice of a criminal act it is with a view of initiating a proceeding against the accused. “To take Cognizance” do not necessarily involve a formal action by the court rather it is when a magistrate applies his mind on a complaint regarding a suspected

commission of an offence. Cognizance is supposed to be taken prior to a criminal proceeding’s commencement, it is basically a necessity and a precedent in order for a court conduct trial.

Now, if we are to read the abovementioned meaning of the term “cognizance” with section 223’s proviso we can make an argument as to that the magistrate is supposed to issue a notice to the accused and grant him an opportunity to present his explanation before making a decision which will determine whether or not has the accused committed any offence. Also, the proviso is not explicit i.e. it does not provide as to at which stage does the court needs to notify the accused individual about the complaint.

It is evident that since the statute has been introduced recently there have not been many instances where the courts have discussed the scope of section 223 of the BNSS. But the Karnataka High Court in its decision in the case of Sri. Basanagouda R. Patil (Yatnal) v. Sri. Shivananda S. Patil provided a clarification on the procedure that the courts have to follow in cases related to section 223,

“The difficulty in the proper interpretation of section 223 of the BNSS is that whether the complaint is to be presented to the accused at the very first instance without recording the statements of the complainant or the witnesses (if any) or is the court supposed to send the notice to the accused individual after it is done with the process of recording the statements of the complainant. It is mandated in the proviso that the complainant is to be examined on oath while the magistrate takes cognizance but it is also provided that any magistrate cannot take cognizance of an offence without providing the accused in the matter an opportunity to be heard.

In order to clarify the abovementioned dilemma, we need to focus on the language provided in the statute. So, the magistrate when in the process of taking cognizance of the offence shall have the statement of the complainant

and the witnesses with him on oath. And the cognizance of the complaint is to come after the statements have been recorded and then the notice is to be sent to the accused as according to the statute the accused is to be given an opportunity to be heard.

An example to understand the working of section 223 is that in a situation where a complaint is brought before the magistrate as per section 223, on presentation of such complaint the magistrate is to mandatorily examine the complainant and witnesses (if any) on oath while recording the substance of his statement in to writing which is to be signed by the magistrate, the witnesses as well as the complainant. The cognizance is not to be taken at this stage of the complaint and according to the proviso the magistrate is supposed to issue a notice to the accused and provide him with an opportunity to present his case. Then after the accused's side is been heard is when the magistrate is supposed to take cognizance of the matter. Recently in the case of Suby Antony v. Respondent No.1 the Kerala High court held that a notice to an accused cannot be issued till the examination of the complainant and the witnesses (if any) is completed by the magistrate.

Now, coming to section 225 of the BNSS which relates to the "Postponement of issue of process" as per which a magistrate who is competent to take cognizance in a matter is given the power to postpone the issue of process in a matter where the accused party resides beyond his jurisdiction. Furthermore, he can either inquire into the matter on his own accord or he can order a police officer or any other individual to perform an investigation in order to determine whether or not are there any sufficient ground for him to proceed in the matter.

In the CrPC the procedure dealing with the postponement of issue of process was well settled. And the purpose behind inquiry under section 202 of the CrPC was to determine the truth of the situation and to establish that there

was indeed enough material in order to commence the proceedings against the accused. The purpose behind this section was to provide the magistrate time to deliberately look into each detail of the case in order to avoid a named accused from being summoned in the court to face unnecessary and frivolous charges and also to explore the case to find if there are any grounds that may support the allegations.

It was determined in the case of Vadilal Panchlal v. Dattatraya Dulaji Ghadigoanker⁷² that the scope of an inquiry as per section 202 is limited to the ascertainment of only approval or rejection of the allegations made in a complaint on the basis of:

- ❖ The materials placed before the court by the complainant.
- ❖ If a prima facie case has been made out to follow up with the issue of process.
- ❖ To be decided only on the basis of the complainant's side.

It is also proved that in the proceedings of postponement of issue of process as per section 202 of the CrPC the accused party does not have a say and is not to be heard on whether the process should be issued against him or not. And because it is established that the accused did not have a say in the issue of process section 225 of the BNSS is unchanged from its corresponding section in the CrPC.

Lastly, coming to section 226 of the BNSS which is in correspondence to section 203 of the CrPC which states that after the taking the statements of the complainant as well as the witnesses on oath as well as after considering the investigation or inquiry ordered by the magistrate under section 225, if in the opinion of the magistrate the does not have sufficient ground he has the power to dismiss the complaint with reasons recorded in writing.

It is known that section 226 has not undergone any change and Section 226 does not consider the accused's objection at the stage of taking cognizance as a relevant cause for rejecting

the complaint, in spite of the proviso to Section 223(1) making it obligatory to offer opportunity of hearing to the accused before taking cognizance.

The malpractice of false criminal complaints being filed by people in India as a negotiating tactic was a major problem. The accused wouldn't have any knowledge regarding the initiation or filing of a criminal complaint against him till the date they would receive summons from the court. And even in cases where the accused would even be made aware of such complaint, he was not granted any right to appear in court and contest the same before the cognizance was taken, barring the accused from presenting their side of the story to the magistrate.

As per the old statute the innocent party would be presented with no alternative but to wait for the summons to be sent to him by the court taking cognizance of the matter, and only after that point could the accused have the right to challenge the action of the magistrate taking cognizance of the matter against him in a higher court or through revision, but this wouldn't be made available to the accused without costing him time and unnecessary expenses.

The defendant's inability to challenge the decision of the magistrate to take cognizance has been misused and as there no obverse narrative could be presented and the complainant had to only file a complaint and satisfy the magistrate in a one-sided presentation of facts it was fairly easy to file a criminal complaint an accused party. It is well known that a criminal proceeding being set in motion could be grievous for the accused's reputation, although there were measures in place to curb the registering of false criminal cases, they were not necessarily very effective.

Now, as discussed in detail above the proviso to section 223 of BNSS requires for the court to issue a notice to the accused after recording the statements of the complainant and witnesses in oath but prior to taking cognizance

of such offence. This provided the accused an opportunity to be heard. Also, in a case the Kerala High court held that as per section 223 of the BNSS the opportunity given to the accused to be heard was not merely a formality, as the notice sent to the accused would contain the statements of the complainant as well as the witnesses (if any) allowing the accused to be prepared when he appears in court to present his narrative to the magistrate.

Also, in case the magistrate was to take cognizance without applying due diligence even after hearing to the accused's side the aggrieved party would still be left with other remedies to challenge the decision of the magistrate to take cognizance in this matter. This addition to the new statute allows for balance in assessment of a criminal complaint allowing for a case with no sufficient grounds to be dismissed and this change in the BNSS could be the most important step towards promoting justice and equity.

2.4. THE WELCOMED CHANGE WITH A FLAWED INTERPRETATION

The Karnataka High Court in the case of *Basanagouda R. Patil v. Shivananda S. Patil*⁷⁹ interpreted the first proviso of section 223 of the BNSS and it observed that in order to clear the flummery surrounding the interpretation of this section, it is necessary to interpret the language used in the section. As per this section the magistrate while he is taking cognizance of an offence needs to have the statement of the complainant as well as the witnesses (if any) on oath. The process of taking cognizance under section 223 of the BNSS would arise after the sworn statement of the complainant as well as the witnesses have been recorded and it is at that juncture when a notice is to be sent to the accused. As according to this section's first proviso the accused is granted an opportunity to be heard before the cognizance is taken.

A simplification of the procedure to be followed for section 223 of the BNSS would be that a complaint is made to the magistrate as per

section 223 of the BNSS and upon such presentation the duty would fall on the magistrate to examine the complaint and record the statements of the complainant and the witnesses (if any). The magistrate is also supposed to reduce the substance of the statements made by the complainant and the witness into writing. Following this the magistrate is now supposed to issue a notice in the name of the accused and give him an opportunity to be heard and after the accused is heard the magistrate can take cognizance of the matter. It is presented by Justice V. Ram Kumar that the cognizance of the offence being taken after recording in the sworn statement of the complainant and his witnesses is flawed.⁸⁰

The Kerala High Court in the case of Suby Antony v. JFCM-III⁸¹, where Notice to the accused is sent before proceeding to record the sworn statement of the complainant and his witnesses by the magistrate was found to be illegal by the high court. The magistrate was corrected and directed to record the sworn statement before issuing a notice to the accused the order of the high court was duly followed. But in the opinion of the Justice V. Ram Kumar it can be compared to putting the card before the Horse and not the other way around. According to him if the above is allowed to continue it would set incorrect precedents for the future.

It is stated by the Justice V. Ram Kumar that the deviation of section 223 (1) of the BNSS from section 200 of the CrPC was uncalled. Even if the proviso was welcome as it was considered to be a correction of an obvious mistake, the interpretation by the judiciary of the first proviso of section 223 of the BNSS, where the notice is issued to the accused after recording the sword statement of the complainant and his witnesses is incorrect. And it goes against the settled principles of law.⁸²

2.5. INTERPLAY BETWEEN N.I. ACT & BNSS

Upon reading section 223 (1) of the BNSS, it would be apparent that this section would be applicable to any complaint filed under section

138 of the Negotiable Instruments Act (hereinafter “N.I. Act”). Also, before taking cognizance of such offence the accused shall be given the opportunity to be heard, which can cause delays in the disposal of cases under section 138 of the N.I. Act leading to an alarming rise of pendency in cases which would defeat the purpose of section 138 of the N.I. Act.

Section 142 of the N.I. Act deals with taking cognizance of the offence under section 138 of the act, and Section 142 (1) (a) Of the N.I. Act mentions that notwithstanding anything in the CrPC, 1973. No court can take cognizance of an offence that is punishable under the section 138 of the N.I. Act except in cases a complaint is made in writing by the payee or the holder in due course of the cheque. Section 142 (1) b of the N.I. Act mentions that such complaints are to be made under one month from the date on which the cause of action arose as per section 138 clause (c) of the N.I. Act. Lastly, Section 142 (1) (c) of the N.I. Act, mentions that no court that is inferior to a metropolitan magistrate or a judicial magistrate of first class is to try any offence that is punishable under section 138 of the N.I. Act.⁸³

As per section 4 (2) of the BNSS that is corresponding to section 4 (2) of the CrPC, which requires all the offences that have been committed under any statute other than the BNSS to be inquired or tried and dealt with as per the provisions of the BNSS, with the exception of any other enactment which provides a different mode of inquiry or trial for those offences. And as per section 5 of BNSS, which is corresponding to section 5 of the CrPC and states that nothing that is contained in the BNSS shall in absence of a contrary provision affect the special or local laws for the time being in force or any special jurisdiction or power conferred by any special form of procedure by any other law for the time being in force.

In view of few legal experts the provisions of section 4 (2) and section 5 of the BNSS along with the special procedure for taking

cognizance of a matter mentioned under section 142 (1) (a) of the N.I. Act. The first proviso of section 223 of the BNSS would have no application to a complaint filed for an offence under section 138 of the N.I. Act. But in view of Justice V. Ram Kumar there exists a flaw in this view. As this argument fails because section 142 (1) of the N.I. Act, would have an overriding effect on the provisions of the BNSS as section 142 (1) only excludes the provisions of the BNSS for the matters that are specifically mentioned in Clause (a), (b) and (c) of section 142 (1), this means that section 142 (1) does not universally override or exclude all the provisions mentioned in the BNSS that relate to taking cognizance of an offence. The non-obstante clause in section 142 (1) must be read narrowly and to be applied in areas addressed explicitly. The provisions of section 142 (1) of the N.I. Act regarding taking cognizance does not conflict or nullify the broader procedural requirements of the BNSS. Thus, the provisions which include giving the accused an opportunity to be heard before taking cognizance of a matter can apply to section 138 of the N.I. Act.⁸⁴

Nothing in the first proviso of section 223 of the BNSS is inconsistent with the provisions mentioned in section 142 (1) of the N.I. Act. Therefore, there is no finding that the special provisions in section 142 (1) of the N.I. Act relate to taking cognizance of an offence that is punishable under section 138 of the N.I. Act as it would override the general provision of the BNSS. However, in a recent case the Madras High Court while it was issuing directions regarding express disposal of cases under section 138 of the N.I. Act, held that since the N.I. Act has given a special procedure, it would be considered a special law under section 5 of the BNSS. Which would make the procedure of hearing the accused at the stage of taking cognizance as per section 223 (1) of the BNSS not applicable to complaints which are made under section 138 of the N.I. Act.

As per the foundational principle of criminal law, the cognizance is taken against an offence and not the offender. Under section 223 (1) of

the BNSS the bar is specifically on taking cognizance of an offence without providing the accused an opportunity to be heard. This procedural safeguard may ensure fairness, but it introduces complexities especially as far as section 138 of the N.I. Act is concerned. As the N.I. Act deals with cases relating to dishonour of cheques which are person specific cases, Owing to the nature of the offence. Now, if in these cases it is established that cognizance is taken against the offender rather than the offence the complaints might fall beyond the scope of section 223 (1) of the BNSS. This Exception arises because under section 138 of the N.I. Act the identification of the person who issued the dishonoured cheque is required, which makes the offender crucial to the prosecution process.⁸⁵

The Supreme Court in the case of Harihara Krishnan v. Thomas⁸⁶ had observed that in case the prosecution is under section 138 of the N.I. Act, the concern of cognizance being taken against the offence and not the offender would not be appropriate. As the offence under section 138 of the N.I. Act being person-specific, and the provisions dealing with taking cognizance of matters that are contained in the section should give way to the procedure that is described under section 142 of the N.I. Act.

According to the definition mentioned under section 2 (1) (h) of the BNSS, a complaint can be made against a known or an unknown person. But according to section 138 of the N.I. Act a complaint can only be made against a known person and the individual who has drawn the cheque shall be specifically mentioned in the complaint that is filed for the offence under section 138 of the N.I. Act. Which establishes that the N.I. Act prescribes a special procedure and the general procedure of hearing the accused at the stage of taking cognizance mentioned in section 223 (1) of the BNSS will clearly not be applicable to any of the complaints that are made under section 138 of the N.I. Act, as per the Supreme Court through the case of Harihara Krishnan.

CHAPTER 3: MECHANISM OF MERCY PETITIONS & CLEMENCY

3.1. INTRODUCTION

In contemporary times one of the most discussed topics of law are “mercy petition” & “commutation of sentences”. Times are changing and the most of the countries across the globe are marching towards abolishing death penalty, India is also working towards reforms on mercy petition and death penalty. Generally, a mercy petition is filed when an individual is sentenced to death by the court of law, and according to the Constitution of India a mercy petition can be granted either by the president or by the governor according to Art. 72 and Art. 161 of the constitution.⁸⁷

It has been over 70 years of independence but the nations laws have been subjected to countless hurdles throughout these years and it is even true for mercy petitions. Some of the main hurdles are the long delays which stretch over multiple years, inefficient system that hinders the identification of clemency cases, etc. The current structures negative effects are apparent in implementation of the laws relating to mercy petitions, and the toll is paid by the prisoners why are subjected to “misery” which is violative of Art. 21 of the constitution.

Most of the countries which have laws regarding mercy petitions do not contain a provision that specifies the time limit for execution of the death penalty, and it is recognized that a delay in the process could be a violation of the humane treatment of the convict. As per the case of Sunil Batra v. Delhi Administration⁸⁸ if an individual is kept in isolation or solitary confinement for elongated period of time it could amount to violation of Art. 21. Also, the SC in T.V. Vatheeswaran v. State of Tamil Nadu⁸⁹ stated that a delay of more than two years could be violative of Art. 21 and such delays can be considered as a ground for halting capital punishment.

In the 262nd law commission report⁹⁰ it was presented that 140 countries had abolished

death penalty, which in turn implied that a laws on mercy petition were not required. But, the “retributive theory” of punishment is what defends the death penalty which in turn requires the laws on mercy petition, and it is reflective of the famous quote by Mahatma Gandhi “an eye for an eye will make the whole world blind”. In reality the law for death penalty exists in India and mercy petitions operate as a solution to capital punishments.⁹¹

3.2. THE COMPARISON OF RELEVANT PROVISIONS ON MERCY PETITION BEFORE AND AFTER THE BNSS

A petition filed by a convict which is directed to the president or the governor of a state requesting him to change the order of capital punishment into a life imprisonment showing him mercy is termed to be a mercy petition. An individual sentenced to a capital punishment can file for a mercy petition within a period of seven days from the date on which he is informed by the superintendent of the police regarding the rejection of the appeal or a special leave petition (SLP) filed by him in the supreme court, also known as the last constitutional resort but at the same time it is a right available to a convict.

The concept of a mercy petition is common and followed in many countries across the world such as the United States of America, the United Kingdom, Canada & India, as the idea of one day being pardoned for their crimes helps in reforming the prisoners and aids the prison institutions by keeping the prisoners within the norms of the institution. A mercy petition is crucial as it may save the life of a convict who has been awarded a capital punishment by the court which may also result from a rare miscarriage of justice.

It is not impossible for the court to pronounce a judgement that may result in a huge miscarriage of justice or a grave violation of human rights. And it is the basic right of a convict to seek mercy from the head of the state i.e. is the president.

The philosophy that is behind the mechanism of mercy petitions is to allow the socialised and civilised citizens of a country to recognise the act of pardoning a convict and the act of forgiving allowing us to believe in humanity. As according to the ancient Vedic texts or the Hindu culture that is deep rooted in the jurisprudence of the country the act of forgiveness has always been seen as a noble act.

In India before the introduction of the BNSS the Provisions relating to pardon were mentioned and dealt with by the virtue of the Indian Constitution. The power to pardon was never absolute and unrestricted and it was always subject to guidelines which were mentioned by the judicial bodies and changed according to the changing times and the laws. The power to pardon was mentioned under Article 72⁹² of the Indian Constitution for the president and Article 161⁹³ of the Indian Constitution for the governor of a state.⁹⁴

In all the cases where the punishment was to be awarded and the capital punishment was pronounced, the president was provided the right to pardon, suspend or even cancel the punishment awarded to the convict. Now, as mentioned above in situations where the case is falling under the jurisdiction of a state of India, the power to grant a mercy petition is transferred to the governor of the said state and the governor enjoys the same powers which the president enjoys in relation to remit, pardon or even suspend the punishment altogether

The said powers were exercised by the president or the governor through the concerned articles as per the Constitution of India but it is to note that the head of the state was bound by the advice of the state government before pronouncing his judgement.

When an accused files for a mercy petition such person is required by the law to mention the grounds on which he has applied for mercy, these grounds that are provided by the said

convict are necessary in order for the head of the state to grant him a pardon and these grounds play a central role in allowing the convict to be released on the order of the president. It is to be noted that the act of granting a pardon by virtue of a mercy petition is not an absolute right of the prisoner, therefore he cannot claim it. The mercy that is granted to the convict is generally granted on the grounds of his health either being physical or mental or the financial condition of his family where he is the sole bread earner.⁹⁵

Historically, the power of pardon or clemency was enjoyed by the British monarch and it used to be absolute as well as unrestricted and lacked any form of judicial scrutiny. Later, with the introduction of the Indian Constitution this power found its place under Article 72 as well as Article 161 of the Indian Constitution and the president of India was granted the power to pardon a convict barring any person in the armed forces.

The power to pardon a convict was also dealt with by few sections of the CrPC⁹⁶ as under section 432, 433A, 434 and 435. The power was also described under section 54 and 55 of the Indian Penal Code 1860.⁹⁷ The president's mercy was based on advices he receives from the home minister and the power to pardon vested in the president extends to the whole of India. Now, the power to pardon as mentioned in the Indian Constitution is not based on the British system of granting pardons rather it is based on the American system, as in the United Kingdom the act of pardoning a convict is treated as Grace by the royalty. But in the U.S.A. the power is purely derived out of the constitution.

The power to grant a mercy petition enjoyed by the president is to be exercised under the provisions mentioned in the Indian Constitution. This power is believed to serve a greater purpose and for public good and welfare as by inflicting a lesser punishment than what was initially decided upon in the judgement passed by the court, it is to be noted that this power is exercised by the president in accordance with

the facts and the circumstances of each case.

Now, it is widely noted that the power to pardon is subject to certain lapses and there have been suggestions made to implement changes in order to improve the current status of mercy petitions as the Home Ministry of India suggested that a time limit should be fixed for death row convicts to file a petition in the Supreme Court and a period of only 7 days are to be provided to a convicted individual for filing a mercy petition from the date of issue of the death sentence.⁹⁸

Before the Introduction of the BNSS there was no fixed time for filing a mercy petition resulting in unwarranted delays which hindered justice. It was also interestingly stated that the delay in filing of mercy petition would result in violation of the right to life granted under

Article 21 of the Constitution of India. As a fixed time for filing a mercy petition is required to protect the rights of the victims, their families and to balance the greater public good. An unnecessary delay in filing of a mercy petition would inevitably result in mental trauma and severe stress being placed on the minds of the convicts.

The government of India aimed to bring a change in this system of mercy petitions and make the guidelines more victim centric and not in interest of the convict. To protect the precious time of the courts, this change would also allow to reinstate the faith of the people in the Indian judicial system which was shattered by the undue delays in pronouncement of punishment.

A delay in approval or rejection of a mercy petition results in procrastination which would inflict serious mental health problems on the convict resulting in mental torture. In the case *Mohd. Afzal Guru v. State of Delhi* which serves as a cornerstone for the argument of delays in mercy petitions resulting in human rights violation, it was stated by the court that there needs to be a 14 days gap between the

communication of the rejection of the mercy petition filed by the convict and his family members from the actual execution date of the death sentence.⁹⁹

Whenever there is a delay in approval or rejection of the mercy petition and such delay is unreasonable or unexplainable a duty is placed on the courts to take matters in their own hands and decide a reasonable time limit for the disposal of the mercy petition. Also, it is irrelevant whether a person is given a death penalty on terrorism charges or any other charges, there should not be any distinction in disposing off their mercy petition and the duty & responsibility to inform the convict about the rejection of the mercy petition is placed upon the jail superintendent. The Apex Court had stated in *Maru Ram vs Union of India*¹⁰⁰ that the constitutional powers are not to be exercised arbitrarily or with a mala-fide intent and their needs to be proper restrictions and guidelines regarding the use of such powers.

The courts in the course of exercising their judicial powers in some cases may award death penalty to the convicts of a heinous crime and in the process of exercising these powers there is a possibility that such a judgement may result in a breach of human rights of the convicts or a miscarriage of Justice on the part of the court in order to make sure that such lapses do not occur and to uphold the rights provided under article 21 of the constitution the mercy petitions were introduced.

The mercy petition is defined as a basic right of a convict to seek mercy from the president or the governor of the state but it is to be noted that mercy petition cannot be claimed as an absolute right by a convict. In *Kehar Singh vs Union of India*¹⁰¹, the Supreme Court of India stated that the right to life and personal liberty that are guaranteed to every citizen of India by virtue of Article 21 of the Constitution of India is of the utmost importance. Now as stated above Article 72 and 161 of the Indian Constitution empowered the president and the

governor to grant pardons, respites or remissions of a punishment or even suspend or remove the sentence of any convict, and also that a president is to act on the aid and advice of the Council of Ministers before exercising his power under Article 72.

With the introduction of the new substantive laws by the government of India the process for presenting the commutation of a sentence or a mercy petition before the president or the governor of a state in accordance to Article 72 or 161, have been outlined under section 472 & 473 of the BNSS.

Section 473 of the BNSS is introduced in order to streamline the procedure of mercy petitions and as per section 473 (1), A convicted individual sentence to death can file for a mercy petition through his legal heirs or any other relative. Now the convicts can file a mercy petition before the high court against the decision of death sentence passed by a session court and if the petition is dismissed by the high court the convicts have the right to approach the Supreme Court through a special leave petition. Further the convicts also have the right to file a review and then a curative petition before the Supreme Court. Now, at first glance these remedies might appear to be sufficient. But, with the introduction of section 437 of the BNSS the time available to the convicted individual to utilize the judicial remedies available to him has been limited.¹⁰²

As per clause (1) of section 437 of the BNSS¹⁰³ a convicted individual has to file for an appeal before the governor of a state or the president within a period of 30 days from the dismissal of the special leave petition applied in the Supreme Court. Also, the time provided to a convict for filing a curative petition before the Supreme Court of India is 30 days after the dismissal of a special leave petition.

In cases there are multiple convicts in a case and one of them files a mercy petition clause 3 of section 473 of the BNSS¹⁰⁴ provides that the superintendent of police needs to make sure that the other convicts who have not already

filed for a mercy petition file for the same within a period of 60 days. If he convicts fail to do so the superintendent of the jail is supposed to provide their names & addresses alongside the case record and all the other details relating to the case to the central or the state government for the consideration of a mercy petition.

The 7th Clause of section 473 of the BNSS provides that any order that is issued by the president under article 72 of the Indian Constitution are conclusive and cannot be challenged. Also, no court has the right to inquire or question the decision made by the president or the reasoning that is used by him to arrive at such decision. But, In the case of *Epuru Sudhakar vs Govt of Andhra Pradesh*¹⁰⁵, it was held by the court that there is a possibility of a judicial review if:

1. The order is passed without the application of mind.
2. The order happens to be mala-fide.
3. The order is passed on an irrelevant consideration by the president.
4. The materials relevant to the case have been kept out of consideration while coming to the conclusion.
5. The order happens to be arbitrary in nature.

These remedies stand even though clause 7 of section 473¹⁰⁶ of the BNSS restricts the power of the court to intervene with the decision of the president. Because as per article 32 of the Constitution of India the judiciary has the power to review a president's decision and that power cannot be limited by virtue of a statutory provision.

3.3. ARE THERE RELIGIOUS VALUES CONNECTED TO GRANTING MERCY?

A set of beliefs followed by a group of people can be considered to be a religion. Now, the world has seen plenty of religions but the core principles of all the religions have commonality.

And these commonalities are the values which essentially empower humanity as a whole because they represent concepts such as compassion, a want for peace and granting mercy. It is important for us to look at mercy or pardons from a religious point of view as it will allow us to view mercy petitions from a different perspective especially in India which is a melting pot of multiple religions and cultures.

For example, if we are to consider the Islamic teachings which are very strict towards heinous crimes, it is stated that if an individual saves a life, it is to be treated as though he has saved the life of all men but if an individual takes a life, it is to be treated as him having been killed all men. If we are to consider the teachings of the Quran forgiveness or mercy is even allowed to a murderer if such murderer has been forgiven by the family members of the victim. Now, it is evident that the power to forgive or grant mercy lies with the victim's family as far as the Islamic teachings are concerned but what it establishes is that the values of forgiveness and mercy exist even for the most serious crimes.¹⁰⁷

Moving forward to the Christian teachings dating back to the New Testament the authority of granting Mercy was vested with the leaders of the state and the earliest formal inclusion of the power of granting mercy or pardon was in the constitution of the USA. Although the meaning and scope of such power was to be interpreted by the judiciary it reflected the powers that were granted to the monarchs in earlier times.¹⁰⁸

The role of the judiciary is significant in popularising this line of thought as indicates of United States vs Wilson¹⁰⁹ it was stated that a pardon being an act of Grace Exempting the convict from the punishment inflicted upon him by law this interpretation by the court regarding forgiveness and pardoning power was reviewed and ultimately upheld by the Supreme Court of the United States in the case of Burdick vs United States¹¹⁰ paving the way for mercy petitions to be formally adopted.

Lastly, coming to the teachings of the Hindus, the Vedas provided us with the term

“Prayashchita” this term is a reflection of how even during the early stages of Hinduism the concept of forgiveness or mercy was laid down for the individuals or criminals who showed repent for the mistakes they had made. This line of thought formed the essence of the Indian society as we know it and these values have been deeply embedded into the Indian culture as we find it to be relevant in today's day and age.

3.4. WHAT ARE MERCY PETITIONS TO US?

The mercy petitions were introduced with the intention of saving the lives of individuals who were subjected to a gross miscarriage of justice or to give the repenting convict a chance at life again. Because when a convicted individual processes the fear of being sentenced and hanged, he pleads for mercy and it is expected that such fear would work as an incentive for the convict to change his behaviour if he is granted a pardon, as Mercy petitions are based on the reformatory theory and the main intention behind them is to correct the behaviour of the convicted individuals.

Countries such as United States of America, India and Canada have laws relating to mercy petitions, as these laws are believed to add a touch of balance to the laws which provide harsh punishments such as a death penalty. Also, there is no obligation placed upon the president or the governor to mandatorily accept all mercy petitions filed before them and most of the petitions have been rejected.¹¹¹

The scope of article 72 of the Indian Constitution was discussed in the Ranga Birla case¹¹² (Kuljeet Singh @ Ranga v. Union of India) where the capital punishment was pronounced for one of the convicts. The convict had argued that the president had rejected his mercy petition without any reason being provided for such decision. However, the Supreme Court in its decision upheld the rejection of the mercy petition stating that the president is the holder of a discretionary power and he is not required to provide reasons for such rejections. This reasoning was once again upheld by the

Supreme court in *Kehar Singh vs Union of India*¹¹³ where it was held that an individual cannot demand his mercy petition to be accepted and the granting of mercy petition by the president was an act of lenience towards the convict making it a privilege and that cannot be claimed as a right.¹¹⁴

It might seem that the law is unfair to the convicts by providing the president the discretionary power to reject a mercy petition without providing for a proper reason for such decision but it is to be accounted for that the Constitution of India provides the convicts a right to make an appeal before the president for mercy while it imposes a duty on the president to duly evaluate all the relevant facts of the case before deciding to allow or reject the mercy protection even though it is not the duty of the president to take such decisions.

The most brutal and controversial case that relates to death penalty and the mercy petition has to be the *Nirbhaya* rape case, where the convicts were sentenced to capital punishment but due to the lengthy process that is involved with filing of mercy petitions the death penalty was being postponed. Resulting in the societies' outcry for justice being delayed. Ultimately the Supreme Court had to step in and put a cap on the undue delays in the procedure.

Due to these repeated delays arising because of the filing of mercy petitions the Delhi High Court stated that laws which are put in place to uphold the rights of individuals cannot be abused by them to escape justice.¹¹⁵ And the Supreme Court was urged by the Central government to put in place necessary guidelines in order to curb such malpractices. A move in favour of the victim was sought in order to reinstate the faith of the society in rule of law and a limit was placed on the convicts to file a mercy petition. The Supreme Court also confirmed that the right to mercy petition granted to the convict was being used as a privilege which went against the interest of the victim since the death penalty was awarded to the convict because of the sufferance of the

victim and an undue privilege being granted to the convict cannot be upheld.¹¹⁶

This case gave rise to a dire need of an amendment in the existing rules which were initially placed to assure the interest of a death row convict but ultimately ended up being abused as a privilege by such convicts to postpone the execution of their death sentence. Therefore, warranting a reconsideration. It was argued before the Supreme Court that a lack of time limit for availing the legal and constitutional remedies such as a mercy petition available to a convict was detrimental to justice. And the court needs to account for the interests of the victim as well as the society at large by laying down guidelines to further the interest of justice.¹¹⁷

In the *Nirbhaya* case we witness an abuse of the procedure laid down to protect the rights and interests of convicts. Which exposed the need for guidelines to not just prevent the misuse of the process but to ensure the interest of the victim and their family members along with the society at large. The court was urged to fix a specific time in which a convict could opt for a curative petition after dismissal of his appeal by the Supreme Court. This led to a shift in the laws relating to mercy petitions as they finally went from being inclined towards the convict to a more balanced approach ultimately leading to the right to file for a Mercy Partition being balanced alongside the delay in serving justice not being overlooked.

3.5. POWER OF CLEMENCY IN INDIA.

The Act of pardoning a convict is considered to be an act of mercy or forgiveness and these acts are being practised since ages, the reasoning behind the act of pardoning is to prevent injustice which is either being caused by harsh or unjust laws or from an arbitrary judgement.

This is why the act of pardoning was vested in an authority that is totally different from the judiciary.

As per the Indian Constitution mercy petitions

are not the only way through which the convicts can seek forgiveness as there are other powers of clemency vested in the head of a state. And these powers of clemency extended to the president allow him to commute suspend or remit the sentence awarded to the convict as Article 72¹¹⁸ not only allows the president to hear a mercy petition but also vests in him the power to suspend remit or commute the sentence awarded to a convict. Also, the governor of state enjoys similar powers under Article 161¹¹⁹ of the Indian Constitution¹²⁰

A general rule of punishment is that an individual can only be sentenced or punished once the charges against him have been proved in the Court of law. Which means if an individual is not provided a fair trial or a proper investigation was not carried out in his case that individual is eligible to be granted a pardon as he might still be innocent.

Earlier, the court stated in the case of Maddela Yerra Channugadu & Ors¹²¹ that a pardon can be granted even before the conviction or trial has been undertaken by the court. This gave rise to a question that whether releasing a convicted prisoner who is waiting for the confirmation of their sentence by the court could amount to interference with the due process of the court and hinder justice. This also resulted in the government preventing the proper disposal of a case, but it remained to be the case and such powers were exercised by the government at any time after the commission of the offence.

This decision was upheld in the high court in the case of Nanavati vs State of Bombay¹²² where the court decided to uphold the order passed by the governor of suspension of life sentence of Nanavati. But in the case of Mirza Muhammad Hussain vs State of U.P. the court held that the essential function of the judiciary cannot be altered or modified as it would negatively affect the due course of a proceeding and the court directed the arrest of individuals who were released on a grant of pardon by the government prematurely.¹²³

Now, moving to provisions other than the constitutional provisions which deal with the power of the government to suspend remit or commute sentences. As per section 432 (1)¹²⁴ when an individual has been sentenced to a punishment for an offence the appropriate government has the authority to suspend the execution of such sentence either wholly or partly at any time with or without conditions. Moving forward to section 432 (2)¹²⁵, according to which when an application is sent to the appropriate government requesting a suspension or remission of a sentence the government is required to ask the presiding judge in the matter about his opinion on whether the application should be entertained or refused. The concerned judge is supposed to forward the record of the trial alongside his reasoning for whatever his opinions in the case may be. And Section 432 (3)¹²⁶ provides for consequences in case the conditions are not fulfilled.¹²⁷

Now, according to section 433 of the CrPC the commutation powers are exclusively under the executive and are not even available to the higher courts. Also, no court has the authority to mandate the appropriate government to commute a sentence, but the court may give a recommendation for commutation in certain cases.¹²⁸

As per section 433A of the CrPC a restriction is imposed on the powers of remission or commutation of sentences given to the government. Because whenever a life imprisonment sentence is imposed on a person for committing an offence which is punishable by death such person will not be eligible for release from jail unless and until they complete serving a period of at least 14 years in imprisonment. But it is to be noted that the provisions mention in section 433A of the CrPC do not affect the constitutional power of the president or the governor to grant a pardon.¹²⁹

The powers conferred to the state government by virtue of section 432 and 433 can be exercised by the Central government under

section 434 of the CrPC. Also, section 457 of the CrPC provides for relief to be granted to a pregnant woman if such woman is sentenced to death and the high court can commute her death sentence to a life imprisonment.

The Indian Penal Code in section 54 provides the state and the central government authority to commute a death sentence to another punishment and section 55¹³⁰ grant the appropriate government the power to commute a life imprisonment to an imprisonment for a term not exceeding 14 years. For example: if an accused is released from the prison at the end of a 14-year imprisonment which was a result of commutation of life imprisonment under section 55 such accused will not be considered to have served a life imprisonment. But if an accused whose imprisonment has been remitted under section 433 of the CrPC will be considered to have served a life imprisonment.¹³¹

Now, as per section 32A¹³² of the Narcotics drugs and psychotropic substances Act, 1985. The government is prohibited from suspending, limiting or commuting the sentence of an accused person with only the exception of section 27¹³³ which provides the punishment for consumption of narcotics drugs or psychotropic substances. In the case of Tara Singh & Ors. vs Union of India¹³⁴ the new Punjab jail manual laid down rules for remission of convicts based on their good conduct and performance of duties allotted to them while they served time in prison. But these benefits were not made available to individuals who were convicted under the NDPS Act on the grounds that section 32A of the NDPS Act bars any such entitlement of the convict to receive remission.¹³⁵

The Supreme Court dealt with the question of whether the governor's power to grant remission under the Constitution of India would override the effects of section 32A of the NDPS Act.

The court observed that the constitutional powers bestowed on the president and the governor are different from the provisions of the

CrPC. Although, the right to claim relief under such statutory provisions have been taken away by the act, the right to seek relief under the constitutional remedies provided on the article 72 and 161 still remain.

In the case of Maru Ram & Ors. vs Union of India¹³⁶ Justice Krishna Iyer had expressed his views that all the public power including the constitutional power must not be exercised arbitrarily or with a mala-fide intent. The guidelines for fair and equal executions are crucial for proper exercise of such power as the power to pardon is a crucial part of the constitution and should be dealt with responsibly.¹³⁷

There are major changes brought by the BNSS, the first of these major changes is related to the limits that have been imposed on the commutation of a death sentence under section 433A of the CrPC. As according to this a death sentence could be commuted to any other sentence that is mentioned in the IPC, but the BNSS places restrictions on these discretionary powers of the government by limiting the scope of commutation of a death sentence to a life imprisonment at maximum. The BNSS also provides for remission to a convict whose death sentence was commuted to a life imprisonment if such convict has completed 14 years in imprisonment as per section 476¹³⁸ of the BNSS.

Section 475(a)¹³⁹ of the BNSS limits the power of the government to be directly involved in commuting a death sentence to any other term of sentence and section 475 (b)¹⁴⁰ of the BNSS provides for the commutation of a sentence of imprisonment of life to an imprisonment of a term that is not less than seven years. The CrPC provided for a term which did not exceed 14 years but the BNSS removes the upper limit of 14 years created by the CrPC instead creating a lower limit of seven years. Removing any restrictions placed upon the court regarding the maximum punishment that can be imposed while commuting a sentence of life imprisonment.

Therefore, the changes brought through section 475 of the BNSS limits the power of commutation granted to the government while also enhancing the punishments.¹⁴¹

Now moving forward to a newly added provision that is section 475 (c) of the BNSS which states an imprisonment for a 7- or 10- years term can be commuted to an imprisonment that is not less than three years. This clause does not mention a range between seven to ten years of imprisonment but specifically only applies to terms of imprisonments that are either 7 or 10 years. There is also no mention of the description of the imprisonment on whether such imprisonment will be simple or rigorous, which leaves a possibility of overlap with section 475

(d) that applies to all the sentences that are rigorous in nature.¹⁴²

This can be understood through an example that is suppose, If X and Y are convicted separately and sentenced to be punished under section 69 of the BNS¹⁴³ with imprisonment which may extend to 10 years and a fine with the imprisonment being of either description i.e. simple or rigorous. X is sentenced to a rigorous imprisonment of 7 years.¹⁴⁴ Whereas, Y is sentenced to a rigorous imprisonment of 8 years. Now, as per section 475 of the BNSS the only sub clause of this section that is applicable to Y is 475 (d) which allows for commutation of sentence of a rigorous imprisonment to a simple imprisonment, only allowing Y to get his sentence commuted from a rigorous imprisonment of 8 years to a simple imprisonment of 8 years. Whereas, X can opt for a defence under 475(c) as well as (d) of section 475 and if subclause

(c) of section 475 is applied to X's sentence of seven years his sentence would be commuted to that of a sentence that is not below three years. But if section 475(d) is applied to X's condition his sentence could be commuted from a rigorous imprisonment to a simple imprisonment at most, which allows for a

disparity to exist.¹⁴⁵

Comparison of powers of commutation		
Sentence	Cr.PC	BNSS
<i>Sentence of Death</i>	Section 433(a) Any other punishment provided by the IPC	Clause 474(a) Imprisonment for life
<i>Sentence of life imprisonment</i>	Section 433(b) Imprisonment for a term not exceeding 14 years or fine	Clause 474(b) Imprisonment for a term not less than seven years
<i>Sentence of imprisonment for 7 years or 10 years</i>	Nil	Clause 474(c) Imprisonment for a term not less than 3 years
<i>Rigorous imprisonment</i>	Section 433(c) simple imprisonment for any term to which that person might have been sentenced or fine	Section 474(e) simple imprisonment for any term to which that person might have been sentenced
<i>Imprisonment less than 7 years</i>		Clause 474 (d) fine

3.6. COMMUNICATION OF SENTENCE.

“Right to life” is widely regarded as the most crucial right for any democracy and it is ensured to everyone under Article 21 of the Indian Constitution, and the Supreme Court of India is constantly trying to widen the scope of right to life. In the case of Shatrughan Chauhan vs Union of India¹⁴⁶, which is considered a milestone for the Indian judiciary as the court had stated that a person's right to life would even be upheld after he has been sentenced to death and would continue till such person takes his last breath. The most important ground for commutation of a sentence is considered to be an unfair delay in the disposal of mercy petition by the head of the state. Justice V.R. Krishna Iyer described death penalty to be a murder committed by the judiciary and he stated that it was no different than a murder being committed by a criminal.¹⁴⁷

This act of passing a capital punishment may even be categorised as inhumane or excessive owing to its irreversible nature, because it offers the accused no chance at reformation. This is also why two third of the countries in the world have as of today abolished death penalty¹⁴⁸, this statement by Justice V.R. Krishna Iyer could even be perceived to be the first step of the Indian judiciary towards the abolition of capital punishments in India. Following this the court had also laid down guidelines in order to safeguard the interest of the death row convicts and make sure that mercy petitions filed by such convicts are dealt with ardently.¹⁴⁹

The president and the governor are bestowed with the power to pardon, respite or remit a convict and this power is treated as a constitutional responsibility and holds great amount of significance. This power is exclusively enjoyed by the executive and is totally different from the judicial power that is exercised by the courts. Because this power is not supposed to alter judicial records or to absolve the convict, but it is supposed to pardon him while providing him an opportunity to reform.

The importance of Article 21 of the constitution is paramount and it has been reiterated multiple times by the Supreme Court.¹⁵⁰ Because this article provides that no person is to be deprived from his life or personal liberty except in accordance with the procedure established by law. And this protection is available to all persons as stated above even extending to death row convicts. This means that an unexplained delay in the disposal of a mercy petition filed by a death row convict subjects him to severe mental, physical as well as psychological suffering. Which will in turn violate his rights under Article 21 of the constitution. It can be stated that the courts here are acting as protector of the fundamental rights guaranteed to every citizen under the constitution and it is not to be viewed as overriding the pardon of power bestowed upon the head of the state and the court would only infringe in this matter on the grounds of violation of fundamental rights of a citizen.¹⁵¹

As far as the power of the head of the states are concerned, they are discretionary in nature and operate on presumption that a constitutional authority would only act after application of mind.

Therefore, limiting the scope of judicial review of the executive orders passed under Article 72 and 161 of the constitution. But it is also established by the court that there is scope for a judicial review of executive orders, if those orders are found to be passed arbitrarily or with Mala-fide intent or in case such order is based

on a consideration that is wholly or partly irrelevant.¹⁵²

There are multiple grounds on the basis of which the commutation of a death sentence could occur, the first ground on the basis of which commutation of death sentence occurs is undue delay the court noticed a disturbing trend of delays in the disposal of mercy petitions as the average time for disposal of a mercy petition was ranging from five months to four years and in some exceptional cases it had even gone up to as much as 12 years. Such a long delay in the disposal of a mercy petition without a reason or explanation would inadvertently amount to violation of article 21 of the convict. As the procedure which is supposed to deprive a person of his life needs to be just fair and reasonable from all aspects.¹⁵³

The court had also emphasised on the rights of a fair procedure at all stages of a judicial process, and such delays in execution of death penalty due to pending review of the mercy petitions was inexcusable. Because it subjected the convicted individual to severe trauma, agony and psychological distress.

The Universal Declaration of human rights in the year 1948 alongside the United Nations Covenant on civil and political rights had declared the cruel or degrading treatment of prisoners unlawful. India being a signatory of both of these declarations needed to follow the philosophy of humane treatment of prisoners and uphold the rights of convicted individuals without discrimination. This helped the courts to recognise the delay as a ground for commutation of death sentence of convicted individuals.¹⁵⁴

Moving forward to another ground on the basis of which commutation of death sentence can occur is insanity or mental illness of the accused. If an accused files for the commutation of death sentence on the grounds of mental illness by contending that the unusual delay in disposal of his mercy petition is the cause of his mental illness. Then on the basis of a well settled criminal law principle and human

rights jurisprudence, such person would not be deemed fit for infliction of a capital punishment. The major question here before the Supreme Court was to consider insanity as a ground for commutation of death sentence. This was answered as India being a member of the United Nations and having been ratified numerous conventions and covenants passed by the U.N. and one of such resolution happened to answer this question. As it stated that death penalty should not be imposed on an individual who is suffering from a mental disorder.¹⁵⁵

Also, the UN had stated that capital punishment cannot be inflicted upon a pregnant women, recent mothers or mentally retarded convicts.¹⁵⁶ The same report had also suggested that there is a need for legislations to bring the national laws in line with international standards. William Blackstone in his book “Commentary on the laws of England” stated that idiots and lunatics must not be punished for their acts if such acts were committed while they were not in a sound state of mind.

According to the state jail manuals of Uttar Pradesh as well as Uttarakhand a convict should not be executed if he develops insanity after he is convicted. And the execution of his capital punishment should be postponed till the time he is pronounced to be fit in body and mind. The Supreme Court after taking references from various documents issued by the U.N., treaties signed by India, International Laws, and European conventions came to the finding that mental insanity, mental illness or schizophrenia were definitely a ground for commutation of death sentence of a convict.¹⁵⁷

Statutory confinement was stated to be one of the issues that could be a ground for commutation of death sentence as most of the petitioners who had filed for mercy petitions contended that due to being kept in solitary confinement after the confirmation of death penalty by the Supreme Court amounted to violation of Article 14, 19 and 21 of the Indian constitution and it would be considered

torture. The state submitted that the convicts were kept in statutory segregation for security reasons and such segregations were completely different from statutory confinement.

The Supreme Court in a landmark judgement¹⁵⁸ distinguished between solitary confinement and non-punitive custodial isolation of a convict who was waiting for the execution of capital punishment. The court laid down a clear distinction stating that a convict on death row cannot be subjected to solitary confinement unless specific directions are issued by the court. It was also stated that as per section 30 (2)¹⁵⁹ of the prison rules Act, the expression “To be confined in a cell” and “apart from all other prisoners” would not amount to confinement in a solitary cell as the prisoner may be confined to the limits of the same cell but apart from the other prisoners which would not amount to solitary confinement.

The court also stated that a prisoner is not to be considered awaiting the execution of his death sentence until and unless his mercy petitions are rejected, and the prisoners who are waiting for their mercy petitions to be disposed would not fall under the purview of this section. The Supreme Court also stated that solitary confinement is rigorous and is not to be passed unless it is expressly stated by the court. Ultimately, the court did not consider solitary confinement to be one of the grounds on which commutation of death sentence can be passed.¹⁶⁰

Lastly, coming to the most important ground for commutation of death sentence i.e. procedural lapses, as the home ministry had laid down an elaborate procedure for the purpose of handling mercy petitions.¹⁶¹ These guidelines issued by the Home Ministry laid down and placed a strict responsibility upon jail superintendents as well as the Ministry of Home Affairs, as the procedure is elaborate and clearly states that the convicts who are awaiting execution of their capital punishment are entitled to be treated fairly in the light of

article 21 of the Indian Constitution. In Conclusion, the Supreme Court of India decided that a blanket procedure cannot suffice and they need to look into each procedural lapses in every case separately without providing for a general instruction which would cover all the cases as procedural lapses can be in many forms.¹⁶²

CHAPTER 4: JUSTICE IN THE DIGITAL AGE: ELECTRONIC TRIALS & DIGITAL FORENSICS

4.1. INTRODUCTION

The new criminal procedure that has replaced the Code of Criminal Procedure, 1973 is the Bhartiya Nagarik Suraksha Sanhita, 2023. This act was passed by the Indian Parliament in December 2023 and it was published in the official gazette after it had received the president's approval. The date of enactment of the BNSS, 2023 was 1st July 2024. It can be termed as a legislative achievement and a trophy for India's continuous effort in strengthening its criminal justice system to protect the welfare of its people. One of the key reasons for the implementation of the BNSS was the changing environment, security risks and technical breakthroughs of current times as the BNSS was aimed at curbing the progressive strategies of the criminals while improving the nation's security.¹⁶³

The BNSS aimed at increasing its effectiveness and efficiency through implementation of technology and modernise the criminal justice system of India to incorporate the tools and technologies of current times and make sure that the criminal justice system is not left behind by the rapid advancements of technology. As technology is intended to be utilized in solving the issues faced by the criminal justice system. Because it would improve the ability of security organisations as well as law enforcement officers through its extensive capabilities. The BNSS aims to accomplish multiple goals through the integration of Technology By transforming the existing criminal justice system of India and enhance the efficiency accessibility along with

improving the administration of justice in criminal procedures.

4.2. REVAMPED PROVISIONS FOR DIGITAL JUSTICE

The BNSS aims to provide the residents of India with a Safe, more robust and responsive environment, which guarantees there will be progressive change as this act of replacing the CrPC with the BNSS brings along with it several provisions which integrate technology into the criminal justice system of India. Seeking to improve the administration and accessibility of justice. There have been new additions as more terminologies have been added in the statute. For example: section 2 (1) (a) defines electronic communications and section 2 (1) (i) includes the service of summons and notices via electronic means along with audio-video conferencing for deposition of evidence as well as recording of search and seizure procedures. These changes reflect the new landscape that integrates technology into investigation, trials and other judicial procedures.

Section 63¹⁶⁴ of the BNSS introduces technology in the procedure for issue of summons and services as the courts are now empowered to issue summons electronically with a picture or a digital signature serving as the authentication of that summons. Also, summons can be served electronically under section 70 of the BNSS. In order to make sure the process is efficient as well as transparent. Section 64 of the BNSS Provides for a register that allows the police station as well as the courts to contain the addresses, phone numbers, email addresses as well as other information of the person who is supposed to be summoned. There is also section 94 which provides for the creation of electronic communication and includes communication devices that may contain digital evidence.

A new provision that has been added into the BNSS is section 105, which requires that the procedure of search and seizure as well as recreation of the list of seized items and the signature of the witnesses to be videotaped. In

order to ensure accountability and transparency of the investigation. It also allows the use of cell phones for the purpose of videotaping. The need of zero FIRs was recognised under section 173 of the BNSS which now allows the police to register information that may reveal an offence that has been committed beyond the boundaries of such police station. In addition to this there is also the lodging of electronic FIRs or E-FIR, that allow the lodging of complaints via electronic communications and allows the individual who is giving such information 3 days to sign the E-FIR before it is taken on record.

Additionally, in case if an electronic device is missing the police may include information about the chain of possession of such device as per section 193 (3) (i) (h). Furthermore, section 193

(3) (ii) mandatory requires the police officer to notify the victim or the informant regarding the status of the investigation within 90 days of the commencement of such investigation. This step is taken in efforts make the new statute victim-centric. Also, technology or electronic communication is recognised as a legitimate form of communication for relaying information to the informant or the victim.

Now, it is well established that the antics of the accused in certain cases may cause undue delay in proceedings. As it was possible for the accused to very well deliberately avoid the service of summons and other papers. But with the introduction of section 193 (8) of the BNSS, the responsibility of providing the accused with the copies has been assigned to a police officer who is required to submit a certain number of copies of the police report alongside other important documents to the magistrate at the Time of filing of charge. Also, process of providing the documents to be shared electronically has been incorporated in the statute with the goal of making the procedure more citizen friendly and compatible with today's technologically advanced world.

This procedure is further fastened by section

230 of the BNSS, which states that the magistrate is supposed to provide the accused with documents that the magistrate has received within the period of 14 days from the date of the accused party's appearance in the court. The provision allowing the documents to be shared electronically makes the supply of such documents faster and easier and these changes in the procedure allows the BNSS to adjust to the digital age.

Section 202¹⁶⁵ deals with offences which involve fake communications via e-mail, telecommunication or any other technological means this is a progressive approach that allows the courts of the local jurisdictions where these communications were received to try such offences. Section 208 provides for inclusion of jurisdiction of the court where a crime that is lodged is for the offence that is committed beyond the boundaries of India. Similarly, section 227 of BNSS addresses the issue of process warrants and summons to be served electronically.

A deadline for providing copies of the police reports alongside other documents to the court by the parties i.e. the accused as well as the victim has been set out under section 230 of the BNSS. This deadline is supposed to be met under 14 days from the date of accused's appearance in court. In case there are very large number of pages in the document, then electronic copies of those documents can be provided. Similarly, under section 231 of the BNSS allows electronic copies of statements and documents in sessions proceedings.

Also, the accused party is required to file for a discharge application within a period of 60 days from the date of committal under section 250 of the BNSS, in order to minimise delay and guarantee a timely trial in sessions matter. Section 251 of the BNSS provides a period of 60 days for the purpose of framing of charges from the initial hearing on the charge and in order to improve the efficiency, section 251 (2) provides for the utilisation of audio and video methods of communication with the accused

and section 254 of the BNSS allows for the use of audio and video communication methods in session case for the purpose of deposition of evidence or testimonies by the witnesses, police officers, police officials and the experts. This helps in speeding up the process of criminal procedures with the help of technology. A similar clause is inserted in section 265 of the BNSS which allows for electronic methods for the purpose of examination of witnesses in warrant proceedings.¹⁶⁶

The accused is supposed to be examined electronically with the help of audio-video conferencing equipment that is specified by the state government under section 308 of the BNSS. Additionally, section 316 of the BNSS States that the accused party's signature is mandatory to be received within a period of 72 hours after the accused has been examined through video conferencing. It can be stated that this clause is an example of the dedication to utilize technology in the legal processes, while balancing procedural integrity with prompt documentation. Section 336 of the BNSS, provides that the court is supposed to ensure the attendance of public servant or experts, whenever a document or report is presented as evidence that was created or submitted by them. And for such depositions audio and video conferencing methods have been integrated into the procedure. Also, if in case the accused party is in detention he may be presented to hear the verdict through audio-video conferencing as per the provisions of section 392.

Lastly, as per section 530 of the BNSS all the trials investigations and the procedures can be rendered to be technologically compatible and can be conducted electronically with utilisation of audio or visual electronic means or via electronic communication. The measures taken in the BNSS are intended to balance the interest of all the engaged parties to ensure efficiency and justice. Additionally, the BNSS also provides the technological advancements to the nation's criminal justice system, which ensures justice to the people instead of

gruelling delays.

The abovementioned provisions make it clear that the BNSS, 2023 departs from the procedures mentioned in the CrPC, 1973 as it introduces technological changes in order to keep up with the societal changes. Ex: Chapter XXXIX provides all the miscellaneous provisions that are related to electronic trials. As the main objectives of the BNSS is to improve the efficiency, accessibility and transparency of the judicial procedure while also making it significantly more cost-effective. Because, the BNSS expedites the process of trials by reducing the time for hearings and judgments while it makes the judicial proceedings more accessible to the litigants who reside in remote areas. Also, because the proceedings are being recorded and are accessible in real time it significantly improves the transparency. But, most importantly in reduces the costs that are associated with physical trials as travel and logistics costs are ruled out.

Now, it is expected that with the introduction of electronic trials under the BNSS there will be several improvements in the criminal justice system of India. As it would result in reduction of backlogs of cases because the trials will be expedited with the help of electronic proceedings. It would improve the confidence of the public in the judiciary because of the enhanced transparency and accessibility provided under the BNSS. These changes under the BNSS will bring a transformative change and modernise the Indian criminal justice system. Furthermore, as the legal community adapts to these changes electronic trials would pave the way for further improvements in the Indian judiciary.¹⁶⁷

The BNSS clearly intends to employ technology in order to simplify judicial proceedings. This indicates a departure from the previous conventional techniques that were mentioned in the CrPC, 1973. As today's time is dominated by technology. With the promotion of electronic documents and paperless operations the BNSS intends on improving efficiency of the judicial

procedures as the CrPC was dependent upon the manual procedures, which were one of the core cause of delays and administrative difficulties. The BNSS has established a standard for integration of technology into procedural laws opening new opportunities for efforts to be made in other regions to incorporate technology. and provide for E-summons, virtual presentation and video conferencing because these technological innovations provide for improved operational efficiency and better communication.

In contemporary times every sector is incorporating electronics into their procedures in order to make their workings more time efficient and economical. But the incorporation of digital means into the judicial sector does not come without drawbacks. Recently, a study has been published which was conducted by multiple British scientists who developed an algorithm that is capable of predicting the outcome of rulings by the European Court of Human Rights. this prediction is based on an automated system that refers to almost 600 judgments passed by the European Court of Human Rights. This change is not just limited to Europe, but around the world artificial intelligence has evolved and seeped into multiple industries, and judiciary is no exception as multiple artificial intelligence algorithm specifically tailored to cater to the needs of the judicial system have been developed or are under development. A few examples can be taken from the United Kingdom where the judiciary has developed an online automated tool for small claims pertaining to civil matters called the online dispute resolution.¹⁶⁸

The United States of America is no exception as they have also developed an algorithm called COMPAS. Which is primarily used in the criminal justice system by the U.S. courts & probation services. The main aim of this system is to aid in determination of whether an individual can claim for suspension of his sentence or further custodial methods are required. Also, the U.S. is working on developing a method that will predict judicial decisions on the basis of

evidence and determine whether there was any prejudice in the matter.

A debate on the incorporation of artificial intelligence in the judicial system is inevitable, as we need to determine the primary question of “How will artificial intelligence be incorporated in the judicial system?”. Primarily, two forms of algorithms can be developed to aid the judicial system which are:

- ❖ Algorithms that support decision making aka “supporting algorithm”.
- ❖ Algorithms that are self-sufficient and can pass a decision on their own aka “decision algorithm”.

As far as algorithms supporting decision making are concerned, they are aimed at providing judges with support in their decision-making process by improving efficiency of the judicial procedure. The complete opposite of this are algorithms that can make or pass their own decisions and are aimed at automating the judicial system. And it would negate requirement of any human input. This is where the main criticism against these algorithms arises giving birth to the question that “Whether these artificial intelligence algorithms would be able to understand respect and uphold fundamental human rights?”.

The European Convention of Human Rights provides the right to fair trial under Article 6.¹⁶⁹ and the Charter of Fundamental Rights of the European Union provides the right to an effective remedy alongside a right to fair trial under Article 47.¹⁷⁰. These requirements could support the use of algorithm allowing the court's access to more efficient tools in resolving pending litigation. Artificial intelligence could be used as an auxiliary tool for the judicial process if it is used merely for assistance, aiding the judges in examination of admissibility of evidence or even go as far as to assist the judges in judicial processes.

This Pre procedural assistance would allow the litigant an opportunity to evaluate their actions

with the help of the algorithms. As these algorithms have a large amount of judicial information at their disposal, whether it be the statutory provisions or case laws. Furthermore, these algorithms have an ability to guess the probability of receiving a preferable judgement in a case, even though it may not be absolute but the statistics or graphs provided by these algorithms guarantee some sort of security before proceeding with a case as the litigant would be able to assess that going to the judge would be preferable or not, and if not he can settle for an alternative resolution which might prove to be more suitable in certain cases. This can also be useful for the courts as it may decrease the burden placed upon the courts, reducing congestion and promoting alternative ways for resolution of disputes between the parties.

During the analysis of the nature of decision making done by these algorithms it is possible that they are susceptible to numerous risks, if they are incorporated into the judicial system and the existence of these risks gave rise to a major concern regarding the incorporation of decision-making algorithms in the judicial process. At the moment there is no certainty regarding the availability of any solution to these risks which makes it even more important for us to focus on these risks and promote further discussions with legal philosophers, judges as well as experts in this field, before the incorporation of decision-making algorithms.

The data regarding these algorithms having any positive impact on judicial processes are scarce. Regardless, these algorithms work as the mathematical translation of human language and these translations can be criticised on their objective morality and neutrality. Furthermore, the information collected by these algorithms on existing jurisprudence does not consider the motivations of the judge but only the facts of the case before passing the final decision. This lack of precision and subjectivity risks the right to fair trial.

We are also to consider that these algorithms could negatively influence the decisions of judges influencing the judges in their decision-making process and the independence of choice could come under question. Most importantly, if the artificial intelligence utilises older judgments precedents or case laws it could also negate scope of further evolution in the legal field. It could also risk the impartiality of judges as by considering the algorithm's data, the judges might form an opinion on the case prior to hearing both the parties which could lead to partiality in few cases.¹⁷¹ The automation of the decision-making process could hinder effective remedies as if these algorithms help in determining the admissibility of cases, they may reject few cases which would remove the access to court.

These algorithms cannot uphold the motivations of the justice system because they lack them, because:

- ❖ The decisions proposed by these algorithms are nothing more than an auto generated answer to a question which might lack the reasoning used to reach such decision.

- ❖ This lack of motivation exists in the process that is followed by these algorithms to reach these decisions. As these algorithms only consider the facts, the law and proposes the final decision without taking into account the motivation of judges in past decisions. These motivations are not analysed by these algorithms in their decision-making process as they are limited by the technology of our time because they can only recognise key terms from past cases and reapply past decisions to a corresponding situation that is currently placed before them. Which does not allow these algorithms to provide a subjective opinion or produce personal reasoning

- ❖ This lack of motivation in these algorithms will never simulate any form of evolution in upcoming case laws because the subjective perspective that is accounted for by a human by taking consideration of the social

context is lacking in these algorithms.

❖ These algorithms are limited merely to mechanical application of law and mechanical use of previous case laws. Which will always lack the subjective consideration brought by humans.

❖ These algorithms can only reproduce past behaviour and lack the ability to reproduce reasoning, which makes the process biased as the application of law is not similar to a mechanical process.

It should be considered that these algorithms lack accountability and incorporation of such system can lead to creation of an archaic society which would inevitably disrupt the foundation of our society as the trust of the people may be withdrawn from the state or even the judiciary itself.

Ethical questions which require deeper research have surfaced after the Introduction of artificial intelligence tools in the judiciary and further research on these questions is crucial as it is related to the right to a fair trial, which is of the utmost importance, and also a right that is not mentioned but is to be protected is right to privacy. Artificial intelligence does not only have negative implications as this would inevitably improve the efficiency but we need to be aware that incorporation of advanced technology requires specialised knowledge and there still may be risks in respect to the fundamental rights of individuals.¹⁷²

If we are to refer to a foreign provision that is Article 17 of law on judicial power of Latvia an obligation misplaced upon the court upon examining any case to establish an objective truth as the whole shall assess all the evidence on its own conviction. The question that whether a judgement that is passed by an artificial intelligence algorithm be perceived as fair in all cases arises as the scientists who develop the processing systems have relied on the assumption that the analysis of a court's past judgements would be sufficient to reach a reliable prediction of a cases outcome

because these artificial intelligence algorithms presume the activity of the judges would be based upon the scientific understanding of the laws and facts. But there still remains the question that whether will it ever be possible to integrate the basic principles of natural law school into the consciousness of artificial intelligence algorithm. Which makes it challenging for these algorithms to reach an outcome of a case on the basis of general principles of law enacted by the state.

If we are to consider the current situation of these artificial intelligence algorithms it can be stated on the basis of few current cases that it is too early for us to put our trust completely on conclusions proposed by these artificial intelligence tools an example of this would be from United Kingdom where in proceedings for maintenance of the spouse the artificial intelligence tool used by the court decide upon the amount of maintenance on the basis of a form the spouses were asked to fill pertaining to their income, but due to a mistake that occurred in the calculation system which went unnoticed in multiple cases this led to determining incorrect income and an incorrect decision was passed by the courts as a result.

Artificial intelligence is only useful as a tool if it provides support to the courts in decision making processes because these tools are much more efficient in presenting large amounts of information in a structured format. Reliance being placed upon these tools is questionable. These existing artificial Intelligence tools do not produce the result that matches or surpasses humans ability to think rather these artificial intelligence tools lack the power of reasoning as well as intellectual abilities and these tools are still developing and are not capable to protect fundamental rights of humans they can still provide or analyse structured information but they cannot match the ability of any learned judge in applying legal norms while taking into consideration crucial human principle of equality.¹⁷³

It can be argued that with progress in science and technology artificial intelligence tools can become supporting entity for a country's legal or judicial system without coming in contradiction with fundamental rights principles of Democratic state or the rule of law as today the technology might face challenges in ensuring fair trustworthy and controllable responses from artificial intelligence tools but with the current rapid development in technology especially in artificial intelligence it is sure to overcome these shortcomings with time concerned authorities can also come up with proposals that will regulate the implementation of artificial intelligence in the judicial system for the development of a better ecosystem through the introduction of a trustworthy artificial intelligence to this regulation shall be based on human values fundamental rights and an objective to provide the people and with the onfidence to embrace the solutions presented by these ai tools.¹⁷⁴

In conclusion, artificial intelligence in judicial can be considered as an advantage but the functioning of these artificial intelligence algorithms should be governed by a proper framework to prevent any infringement of fundamental rights especially the right to fear trial because ai tools are not fully developed and cannot be trusted to protect the fundamental rights of humans because they lack reasoning and the ability to process idea such as the principle of equality proportionality alongside a reasonable application of legal provisions.

The incorporation of digital technology into judicial processes has substantially altered legal systems globally, improving efficiency, accessibility, and transparency. Digital trials, which include electronic filing, virtual hearings, and the presenting of digital evidence, have gained significant prevalence. During the COVID-19 pandemic swift modifications in the U.S. legal system, resulted in the extensive implementation of virtual hearings. Courts utilized video conferencing services to facilitate hearings, maintaining the continuity of

judicial proceedings in compliance with public health regulations.

The case of United States v. Thomas J. O'Reilly¹⁷⁵ in the District Court for the Northern District of Ohio illustrates the efficient implementation of virtual hearings. The defendant was charged with wire fraud and money laundering. Owing to pandemic restrictions, the initial appearance and following sessions were held over video conferencing. This method enabled the judge, prosecution, defence, and defendant to engage remotely, preserving the trial's integrity and compliance with legal standards. And this resulted in the aforementioned impact:

- ❖ Continuity of Judicial Proceedings: Virtual hearings facilitated the advancement of cases without considerable delays under pandemic-related restrictions.

- ❖ Access to Justice: Defendants and legal representatives may engage in proceedings remotely, therefore diminishing logistical obstacles.

- ❖ Public Health Compliance: Remote hearings reduced the danger of viral transmission, in accordance with public health guidelines.

India's judiciary has also used digital technology via projects such as the E-Courts Project, with the objective of improving efficiency and accessibility. The Supreme Court's approval of virtual hearings has been crucial in this transition. In Gaur Singh Nishad v. State of Chhattisgarh and Ors.¹⁷⁶, a criminal case regarding unlawful mining utilized virtual hearings to overcome issues related to geographical distances and logistical restrictions. The judge, prosecution, defence, and witnesses engaged by video conference, facilitating a fair trial without unwarranted delays, which improved accessibility as individuals from rural regions could participate in court procedures without the necessity of substantial travel, Efficiency in Proceedings as virtual participation optimized the trial process,

minimizing adjournments and procedural delays. Cost Reduction was also seen as removal of travel and lodging expenditures for participants resulted in substantial financial savings.

4.3. NEW LAWS AND FORENSIC REVOLUTION

The introduction of new criminal laws in India facilitated parting away from laws of British origin, as the focus of criminal jurisprudence has shifted from “punishment” to “justice” because the Indian Parliament has introduced several changes with the new substantive laws. However, there is still a department that has only witnessed few amendments and left a broad scope for improvement. We will thoroughly analyse the legal framework surrounding forensic evidences while comparing the old and new criminal laws of India.

The purpose of forensic sciences was to reduce human errors as well as cognitive biases from judicial decisions. As forensic opinions are based on science which is neutral, impartial and inspires confidence, which aids in reaching the truth behind a fact before the pronouncement of a judgement. Forensic evidences are generally provided by a third party that is an expert in such field and it is considered to be corroborative evidence, making sure that justice is duly imparted.¹⁷⁷

It is also to be noted that forensic evidence is subject matter of procedural laws and provisions under the evidence act apply to any disputes, while the CrPC addressed the procedures that were adopted in order to adjudicate such criminal matters. The procedural laws that deal with these cases in India used to be the Indian evidence Act, 1972 and the Criminal Procedure Code, 1973 but they are now replaced by Bharatiya Sakshya Adhinyam, 2023 (hereinafter referred to as “BSA”) and the Bhartiya Nagarik Suraksha Sanhita, 2023. Evidently a few minor changes have been incorporated in the procedural laws of India after the introduction of the new substantive laws.

The term “forensic” has not been used in the BSA and neither was it ever used in the Indian evidence Act. However, a scientific expert is referred to as a “forensic expert” but there is no requirement for an expert to be from a scientific or a non-scientific background as he can belong to either discipline. Now, one may think that an expert opinion can be relied upon to finally adjudicate a matter, but interestingly an expert’s opinion is not absolute and nor is it free of errors. This is the main reason behind forensic reports of experts being used as corroborative evidence and not as primary evidence in judicial proceedings.¹⁷⁸

Section 45 of the Indian evidence Act has been replicated under Section 39 of BSA, with only the exception, i.e. the inclusion of the phrase “any other field” which is meant to specify that other disciplines of expertise are included. If we are to scrutinise section 45 and section 39, we can find that the term expert has not been defined explicitly, but the only explanation that is given is that it defines a “especially skilled person” of a field. This lack of explicit definition is the main cause behind the conundrum of what or who is really an expert, which was also discussed by the Supreme Court of India.

In the case of Sri Chand Batra v. State of U.P.¹⁷⁹, where an excise inspector was admitted as an expert under section 45 of IEA in order to determine the specified liquid in the case was illicit liquor or not through a smell test, because the inspector had gathered vast experiences by dealing in similar matters over a period of many years. This is an example of imperfect legal interpretation of the term “expert” and this could be a major cause for miscarriage of justice or wrongful convictions. Furthermore, in the case of State of H.P. v. Jai Lal¹⁸⁰, the apex court of India provided that the expression “specially skilled” under section 45 of the IEA means that an individual must have done special studies or has acquired special experience with adequate subject knowledge in order to be considered an expert.

Similarly, the English law that relates to experts

suffers from an ambiguity regarding the definition of an expert. This ambiguity seems to be consistent in all countries that have borrowed the U.K model. However, according to the Federal Rules of Evidence in U.S.A. provides a comprehensive list of opinions and expert testimony. It also provides for a procedure allowing the witness to qualify as an expert based on his knowledge, skill, experience, training or education in the subject-matter. It also provides for criteria regarding the admissibility of an expert's testimony, which are mentioned as follows:

- ❖ The expert's specified scientific or technical knowledge for understanding of the fact or the evidence.
- ❖ The expert's testimony is based on established facts and data.
- ❖ The expert's testimony is a byproduct of reliable principles and proved method.
- ❖ The expert had properly applied those principles and methods to the facts of the case.

These legal provisions prevent unreliable sciences to be considered as evidence in the Court of law. In France, the judges usually select the experts from a list that is published by the courts. These experts are required to adhere to the code of conduct that ensures professionalism, impartiality and independence. Australia has a similar standing in order to qualify as an expert, as the possession of a particular qualification will not guarantee the status of an expert. These are few benchmarks that are holistic and ensure an intelligent as well as reliable evaluation of facts and India needs to adopt similar benchmarks for qualification of an expert.¹⁸¹

An inalienable part of the right to fair trial is the cross-examination of a witness,¹⁸² and as far as the cross-examination of a forensic expert is concerned Section 329 of BNSS, states that the court if it may deem fit can summon and examine any expert on the subject-matter of his

report. Furthermore, section 330 of the BNSS, states that a forensic report can be challenged by the accused within a period of 30 days after the supply of such documents. but the court may give relaxation on this time limit with reasons for such relaxation being recorded in writing. We need to understand that an expert report is merely an opinion of an individual who has specialised knowledge on such subject matters, and these reports cannot be admissible unless they have been thoroughly examined by the judiciary for their procedural fairness. These expert reports being the opinion of the expert only aid the court in exploring the truth as non-substantive cooperative evidence which means that they are not binding on the court.

The Apex Court in the case of State of Haryana v. Bagirath¹⁸³, stated that "The opinion given by an expert is merely opinion-based evidence and will not hold substantive value unless the expert giving such opinion is examined as a witness in the court". Also, in the case of Kumho Tire Co. Ltd. v, Carmichael¹⁸⁴, Supreme Court of U.S. stated that the court needs to carefully scrutinise the expert in order to make sure that his statements are relevant and reliable.

As per section 176 (3) of the BNSS upon the receipt of information that relates to an offence which is punishable for seven years or more, the officer in charge of the police station is supposed to make sure that the forensics expert visits the crime scene, in order to collect the forensic evidence. This process needs to be video-graphed, and the provision also provides for the video to be taken on a mobile phone. This provision is likely to burden the 7 existing central forensics science laboratories¹⁸⁵ and the 29 state forensic science laboratories along with the 50 regional laboratories scattered throughout multiple states.

India has a large population and with the escalation in crimes we need to introduce changes and improve our forensic services to meet the requirements of section 176 (3) of the BNSS. this provision of the BNSS provides a

simple relief that it needs to be executed within a period of five years from the date of notification by the government, but despite having this time the government will inevitably face challenges in building sufficient forensic facilities and it would be more sensible to have a public private partnership (PPP) model to address and overcome this challenge. However, a public private partnership could prove to be detrimental as the most essential part of forensic evidence is secrecy which might be compromised by private laboratories.¹⁸⁶

The challenge of protecting the integrity of forensic samples is the most vital part for assessing the admissibility of a forensic opinion or evidence. It directly correlates to the genuineness of such forensic samples and ensures that these samples have not been manipulated or contaminated. It is only after assessing the integrity and purity of these samples the code determines the admissibility of these samples. There are three most important points that are to be kept in mind in order to preserve these sample, these points are mentioned as follows:

- ❖ The crime scene being properly guarded and protected.
- ❖ The chain of custody has not been manipulated with and is protected.
- ❖ The anonymity of the samples is protected via the process of coding and decoding.

Crime scene management (CRM) is essential to protecting the evidence as the time of reporting of crime and the response time of the police to reach the crime scene should be as little as possible. This enhances the probability of getting the best clues from that crime scene as any delay caused by the police in attending a crime scene would inevitably enhance the possibility of loss, contamination, tampering or even manipulation of crucial evidences. The crime scene needs to be protected by boundaries and only control access is to be

provided to essential officials. The research is to be conducted by trained professionals and the crime scene needs to be photographed or video-graphed, as soon as the police reaches the crime scene. It may seem miniscule but it is essential to deploy proper techniques for seizure of samples and evidence from the crime scene, as it maintains the chain of custody (CoC) removing any doubts regarding tampering or manipulation of the evidence. The CoC of a crime scene could be considered the most crucial document that establishes the genuineness of a forensic sample through lodging every transfer of sample with the details like time of collection of such sample to its final disposal which ensures Accountability on every stage.¹⁸⁷

A proper COC Can be considered a piece of evidence along with the forensic opinion report during the court proceedings. The CoC illustrates the integrity of the sample because it is signed by each handler who acknowledge the receipt and transfer of the said sample and with its tampering-evident packaging, it is easier to detect any possibility of tampering with the evidence. It is to be noted that forensic reports suffer from corrupt practises globally and India is not an exception to such practises. This is what calls for robust coding and decoding of samples as a crucial procedure in order to establish each sample being accurately tracked, documented and protected from any form of tampering or manipulation. This process of coding and decoding involves each sample being assigned a unique identifier, which could be in form of a barcode or a QR code securing the information of the sample along with the date, time and location. In today's era we can even utilise blockchain technology, which could prove to be of great assistance in the coding and decoding process.

The formation of a forensic opinion involves scientific processes, which are duly approved by the concerned authorities. The formal procedure is when such authorities evaluate and recognise an institution based on its compliance with the predetermined standards

to ensure consistency accuracy and credibility of such opinion. This process involves the assessment certification and constant monitoring of those institutions and it's obligatory for forensic institutions in order to maintain the quality and reliability of the process. Different jurisdictions have their agencies which accredit the reliability of a forensic institution, for example: America has the "American Society of Crime Laboratory Director (ASCLD/ LAB)/ Laboratory Accreditation Board" and the U.K. has the "United Kingdom Accreditation Services" that is the U.K.A.S. India has the "National Accreditation Board for Testing and Calibration Laboratory" a.k.a. the "N.A.B.L.".¹⁸⁸

During the course of a judicial proceeding the judge needs to examine and ascertain the relevance of a forensic opinion, which will serve as corroborative evidence in the matter. The admissibility of a forensic report is largely challenged by two pointers, mentioned as follows:

- ❖ Reliability
- ❖ Validity

The reliability test is carried out by the Frye test or the Daubert test, which ensure the reliability of the evidence and include pointers such as the reproducibility and the certainty of the evidence. Whereas, the validity test is much more complex because it connects fundamental principles with the observations of the test. Constant vigilance over the forensic department is required in order to regulate forensic services and professionals and the broad purpose of these regulating bodies are defined as follows:

- ❖ To ensure quality assurance as well as quality control.
- ❖ To maintain the credibility and trust on these institutions.
- ❖ The standardisation of practises to ensure Proper accreditation and certification of these bodies.

❖ A proper complaint resolution mechanism along with ethical guidelines.

A regulatory body is essential to uphold a high standard of accuracy, professionalism and ethics, which increases the trust in the legal system. An international example of such a regulating body exists in the United Kingdom as well as in the U.S.A. as these bodies ensure the compliance and accreditation standard through constant oversight and monitoring of forensic institution. They also conduct investigation on complaints which relate to any form of professional misconduct or negligence that could result into errors or irregularities in the forensic report. These bodies also in some cases work as advisory to the courts and the governments in matters relating to forensic evidences.¹⁸⁹

The Anokhilal case¹⁹⁰ was the first case in India where the accused was discharged on the basis of DNA evidence. There was penetrative sexual assault in the case with a nine-year-old girl and the accused was arrested under the POCSO Act. The accused was awarded death penalty Within a period of 34 days from the date of the incident, based on a DNA report that was interpreted as inculpatory evidence. In the following three months the high court of Madhya Pradesh had confirmed the sentence of death penalty and in the appeal the Supreme Court directed the court to conduct a de novo trial and to examine the forensic expert's report. During the course of the second trial, the judge had avoided summoning the DNA experts which grossly violated the directions given by the Supreme Court and ordered a death penalty.

Following this the DNA report was challenged in the high court of Madhya Pradesh and a direction for retrial and examination of the DNA expert was given. In this trial the Defence had contested by challenging the "last scene together theory" and flawed forensic evidence. the DNA report appeared to depose the testimony and, in the cross-examination, it was revealed that the DNA report was exculpatory,

excluding Anokhilal and indicating the presence of a third person's DNA in the vaginal swab.

The trial court acquitted Anokhilal and the special judge observed that the DNA of the other man had been found in the vaginal slides and anal slides of the deceased. Which conclusively proved that the crime of rape was not committed by the accused. It was reiterated by the special judge that the report on basis of which the judgement was passed was prepared by scientists and was absolute evidence and the likelihood of such evidence favouring the prosecution or the defence didn't exist. Which led to the judgement that in contrast to all the evidence in the case the accused was entitled to the benefit of the DNA report which established the involvement of a person other than the accused in the crime of rape.

This case has exposed the police and the prosecution's misconduct along with the lack of knowledge of forensics, and it further questioned the provision of section 329 of the BNSS as it grants exemption to the expert from adducing testimony and facing cross-examination and illustrated the importance of cross-examination.

In the case of *Rahul v. State (NCT of Delhi)*¹⁹¹, a young girl was abducted in a crowded area, from New Southwest Delhi in a moving car while she was returning home from work with two other girls. Later, her dead body was recovered by the police in a mustard field from Rewari that is a district in Haryana, which was nearly 30 kilometres away from the location where she was abducted from. Additionally, based on the confessional statement of the three accused, other corroborative evidence and the incriminating DNA report formed the basis for filing the charge sheet and the accused were convicted by the trial court, and this decision was also upheld by the High Court.

However, with reference to the case of *Manoj v. State of M.P.*¹⁹², which is a notable case on the topic of DNA profiling, the Supreme Court had

stated that DNA evidence is merely an opinion as per section 45 of the IEA and its value can vary from case to case. The court dismissed the DNA evidence and held that the possibility of tampering with the evidence could never be ruled out. It was held that because the trial court as well as the High Court did not explain the basis of their findings and whether the DNA report and the techniques used by the expert were reliably applied in the matter, the Supreme Court released the accused and stated that a DNA report is highly vulnerable. This case brought up the issue that if the CoC is compromised in a matter, the forensic report becomes unreliable even if such report is inculpatory.

The recent enactment of the new substantive laws seems to have significantly strengthened forensic evidence's role in the criminal justice system, with the enhanced reliability and admissibility of forensic evidence this enactment has marked a transformative point towards integrating forensic experts into judicial procedures. As the law now mandates prompt attendance of forensic experts in case of serious crimes. However, there is still a need to enhance the forensic infrastructure to ensure adequate supply of qualified experts in order to protect the rights and privacy of individuals. But these new laws promise a better future for forensics in India.¹⁹³

With the introduction of the new laws the aim of the Legislature is to modernise the criminal justice system and to make it more efficient, effective and accessible. Technological advancement has facilitated these reforms, streamlined judicial processes and enhanced citizen protection. But the primary role of these enactment was to create a fair legal system that is in tune with today's digital era and the diversified needs of the society. Due to these technological innovations and evolving threats the importance of digital forensic evidence has also grown many folds in India as the new law emphasises on the role of audio and video recordings to support the police in investigations conducted on crime scenes.¹⁹⁴

Section 105 of the BNSS provides for “recording of search and seizure processes through audio-video electronic means”, as under this provision the police officers are required to video-graph any place they are conducting a search on or whenever they seize any items. This recording is to be corroborated with a list of seized items and forwarded to the district magistrate, the sub-divisional magistrate or a judicial magistrate of first class immediately. It is mandatory as per the BNSS to collect the forensic evidences on crime scene where the offence committed was punishable with 7 or more years. Section 176 (1) of the BNSS states that Evidence provided by rape victims are to be recorded at the residence or any place of preference of such victim and preferably by a female officer in presence of the parent, guardian or a social worker. Section 180 (3) allows the witnesses statement to the police to be recorded via audio-video electronic means but it is at the discretion of the police officer recording such statements.

There are many other provisions in the BNSS which prove that the legislature with the introduction of the BNSS has tried to integrate technology at every possible stage as the BNSS provides a much-needed change in admissibility of digital forensics in India. This practise has several advantages as digital forensics are essential in investigation of cyber-crimes and with the BNSS now providing a legal foundation for collection and utilisation of this evidence, it encourages exhaustive litigations and prosecutions in cyber-crime cases.¹⁹⁵

There are multiple cases in which a judicial trend can be observed. which had tried to integrate digital forensics in the procedure via judgement. In the case of State (NCT of Delhi) vs Navjot Sadhu¹⁹⁶, the court had addressed the question relating to the admissibility of electronic recordings and stated that such recordings can be accepted without a certificate under section 65B (4) of the IEA. Later, this judgement was overruled by Anvar PV v. Basheer¹⁹⁷, which reinstated the requirement of

a certificate under section 65B (4) of the IEA, and the Supreme Court also emphasised on the necessity of this certificate. Later, in the case of Manu Sharma

v. State (NCT of Delhi)¹⁹⁸, A crucial role in the conviction of the accused was played by digital evidences. Also, Madras High Court in case of Unnikrishnan v. State¹⁹⁹, that digital photographs can be considered primary evidence if they comply with section 65B of the IEA.

In the case of P Gopalkrishnan v. State of Kerala²⁰⁰, the Supreme Court had stated that electronic records that are saved on a memory card or a pen drive are to be treated as documents. and the accused should be allowed to access the cloned copies of these documents for the purpose of his defence. BNSS has marked a significant advancement in the inclusion of digital forensics into the Indian legal framework as it plays an important role by providing clear protocols for acquisition, storage and presentation of digital forensic during the course of a legal proceeding. However, it is still to be noted that India has not capitalised on digital forensics yet and further developments are required.

CHAPTER 5: CONCLUSION

The Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, represents a sea change in India's criminal justice system with the goal of striking a balance between the demands of efficiency, accountability, and human rights versus technological advancement and changing societal expectations. through its changes, which include digital justice, mercy petition mechanisms, redefining criminal complaints, and trials in absentia. By bringing India's legal system into line with modern international norms, the BNS's aims to address systemic inefficiencies brought about by colonial-era legislation. The successful implementation of these reforms depends on their meticulous implementation, judicial interpretation, and ongoing adjustment to emerging issues.

Trials in absentia highlight the hard balance between expediting proceedings and maintaining procedural fairness, even yet they are required for fugitive justice. Due process is upheld by the BNSS's safeguards, which include required declarations and legal assistance for defendants who are not present. However, considering the potential for abuse, especially where procedural errors or insufficient notice jeopardize the accused's rights, a thorough court examination is necessary. In order to maintain the idea that delayed justice does not equate to denied justice, courts must ensure that the designation of "proclaimed offender" is not used to circumvent constitutional protections.

The BNSS redefines Criminal Complaints by requiring magistrates to hear the accused prior to taking cognizance. This addresses a persistent unfairness in the CrPC, thereby diminishing frivolous litigation and safeguarding individuals from capricious harassment. Nonetheless, uncertainties in interpreting the timing and scope of such hearings, particularly under specialized statutes such as the Negotiable Instruments Act, necessitate more explicit legislative direction and alignment with judicial rulings. The court must address these issues to ensure that procedural modifications do not serve as instruments of delay.

The modifications to Mercy Petitions underscore the conflict between humanitarian concerns and retributive justice. By implementing timetables and procedural strictness, the BNSS mitigates the Kafkaesque delays occasionally faced by death row inmates. The discretionary authority of constitutional entities is a double-edged sword that necessitates transparency and accountability to avert capriciousness. The Nirbhaya and Shatrughan Chauhan cases underscore that although society's inclination for retribution is comprehensible, the state's obligation to uphold human dignity—even for the condemned—must remain inviolable.

The most transformative aspect of the BNSS,

Digital Justice, pledges to modernize India's judicial system through technology-driven efficiency. Electronic trials, digital forensics, and video-recorded evidence herald a future characterized by expedited and transparent justice. If the digital divide continues, this vision may lead to exclusion, depriving vulnerable populations of access to these innovations. The necessity of reconciling innovation with inclusivity and accountability is underscored by cybersecurity concerns, ethical dilemmas in AI-driven decision-making, and the demand for a resilient forensic infrastructure.

The BNSS represents a significant advancement towards a victim-centered, technologically adept criminal justice system. The project's success will hinge on three fundamental pillars: judicial insight to interpret changes in accordance with constitutional principles, legislative adaptability to rectify deficiencies through amendments, and social oversight to guarantee that reforms benefit both the disadvantaged and the powerful. India's shift should be informed by global expertise emphasizing equity, transparency, and adaptability. The BNSS is an evolving framework, not a definitive conclusion, that must adapt to align with the aspirations of a billion individuals for whom the primary promise of democracy is equity.

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