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## **Police Powers of Arrest Under the BNSS: Discretion, Accountability and Administrative Challenges in India**

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# Police Powers of Arrest Under the BNSS: Discretion, Accountability and Administrative Challenges in India

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## Abstract

*The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) passes into law on 1st July 2024 will create an entirely new set of criminal procedure rules regarding arrest, including modifying previous actions taken through amendments to the Criminal Procedure Code (CrPC) and judicial precedent that established certain rights. Many of the existing arrest protections have origins that derive from constitutional jurisprudence and amendments to the CrPC made after the ruling of D.K. Basu; LAN. BNSS introduces new design features that directly address the historical struggle between the right of police to have discretionary power and the need for police to justify their actions in accordance with established law and rights. This paper looks at police authority in making arrests under BNSS with respect to arrestings without warrants and the associated notice-to-appear policy through three dimensions: (1) the use of discretionary authority as a necessary tool in uncertain and rapidly changing environments; (2) the need for accountability through documentation, transparency and oversight by magistrates; and (3) the difficulty of effectuating policy due to (among other issues) the police having insufficient staffing, supervisory capability, infrastructure, and training and lacking incentives to comply with the policy. The doctrinal comparison of arrest authority contained in the CrPC (Sections 41, 41A-41D, 46, 50/50A, etc.) as compared to BNSS (particularly Sections 35-38 and related) and the theory of policing as set forth in rule-of-law policing, procedural justice and street-level bureaucracy, and the empirical context of governmental statistics and the media/public records from courts will be used to support the argument that BNSS will largely preserve the safeguards created by the Supreme Court force but now will identify the commander of police station(s) as the individuals to provide the accountability, which if properly resourced may improve transparency, but if not may engender a culture of merely maintaining compliance instead of actively achieving the spirit of the legislation. In conclusion, implementable recommendations include increased audit readiness for arrest decision-making documentation; greater supervision of the "necessity" determination; improved access to legal representation during interrogations (as low friction as possible); and state-level operational standard operating procedures (Standard Operating Procedures) for BNSS, which are developed for*

*the level of capacity that the local jurisdiction can achieve (citing the example of the current state of West Bengal).*

**Keywords:** *Police discretion; accountability, Procedural justice, Custodial safeguards, BPRD DoPO.*

## **Introduction**

### **Overview**

Arrest is the most powerful and direct exercise of state power over a person. It marks the transition from an abstract to a physical intrusion on a person who has been arrested. For over fifty years, the power of arrest in India has been exercised under the Code of Criminal Procedure 1973 (Crpc). On July 1, 2024, the Bharatiya Nagarik Suraksha Sanhita 2023 (BNS) took effect to replace the CrPC as part of a larger effort to overhaul India's criminal justice system. One of the most significant aspects of this change is the rewrite of police arrest power. While keeping much of the CrPC's structure, the BNS will have different procedures for arrest discretion. Section 35 of the BNS replaces Section 41 of the CrPC and keeps the arrest need framework while reorganizing notice provisions and adding additional safeguards, including requiring supervisory approval before arresting elderly or infirm individuals for minor offences. Although the law attempts to ensure that arrest is not automatic merely because it is legal, the "law of the land" and the "law in action" do not always match.

The first judge of freedom of a citizen is actually the police officer at the police station in India, who has to deal with a significant amount of administrative and political pressure while working long hours. Decisions to arrest individuals are done 'on-the-spot' and often in resource-poor settings. Because of this, reforming the Criminal Procedure Code (CrPC) into the BNSS requires consideration of both the legal doctrines and institutions surrounding either act. The Supreme Court of India has established the legal standards regarding police officers' powers of arrest. In the D.K. Basu decision, the Supreme Court identified minimum procedural safeguards for preventing police abuse through custodial torture and illegal detention of individuals. The Supreme Court also established the principle in the Arnesh Kumar case that arrest is not an automatic obligation to take someone into police custody, and that all police officers must prepare a written record of their reasons for an arrest, setting out the specific justification for making the arrest. Together, these two cases create the standard for both the revised CrPC and BNSS, as they are both built on the same theoretical basis established by the Supreme Court in the above-mentioned decisions. In addition to the above-mentioned MSVBN changes, the BNSS introduces additional procedural changes such as the development of digital records and more stringent record-keeping procedures (e.g., creating written records of actions taken by officers involved in arrests) and greater emphasis on transparency through the

assignment of specific officer appointments within the police department responsible for creating documentation related to arrest actions. While all of these features can improve the accountability of police officers for their actions, the extent of improvement will be dependent upon the level of operational proficiency of the police agency.

Published by the Bureau of Police Research and Development (BPR&D), the Data on Police Organization (DoPO) Report 2024 shows many types of structural issues like large-scale vacancies and limited infrastructure.

The answer to the question, “Does an overly-documentation-based police procedure operate properly in a resource-poor police policing environment?” is based primarily on the administrative context, with particular emphasis on the large differences at the regional level. For instance, in West Bengal, police operations continue to be governed by very traditional regulatory systems of operation and diary-based recordkeeping dating back to the colonial era. The police General Diary is the main reference used by the police to document all of the arrests and activities occurring in the police station. Contrarily, Kerala has pursued a community-based policing approach, utilising a much greater emphasis on notification-based systems used as tools to maintain compliance. The regional variations in administrative context demonstrate further that the statutory reform processes are patterned by the region’s administrative culture and the operational practices of their administrative institutions. However, the experience of arrest governance is not simply a story of police misconduct; as discussed above, police officers are faced with enormous institutional pressures including the long hours they work, performing multiple functions (investigation, law, order, protection of VIPs) and limited social welfare support.

The DoPO 2024 metrics used in this research indicate that the police continue to experience severe staffing shortages, and malcontent with the current state of housing. The conditions under which these officers are expected to be able to exercise nuanced and quasi-judicial discretion for every decision to arrest a person create great practical difficulties. A comprehensive analysis will thus have to take both the risk of exceeding authority and the structural impediments to police personnel into account.

This paper is based on the premise that the BNSS is not intended to limit police officers' authority to arrest; rather, it seeks to formalize and document their arrest activity and how it is done. Whether the BNSS provides an actual protection of individual liberty will depend on the enforcement of the BNSS by supervisors, the scrutiny of the BNSS by judges, the culture of the various police agencies, and the administrative systems that are in place to support police officers. Therefore, this research uses a hybrid method of doctrine-based comparison,

administrative analysis, policing theory, and assessment of capacity to assess whether the overall effect of the change from CrPC to BNSS is to meaningfully alter the balance of power between the state and the individual in India.

## **Review of Literature**

- **D.K. Basu v. State of West Bengal**

The Supreme Court established mandatory procedural protections against custodial torture and unlawful confinement in *D.K. Basu v. State of West Bengal*. The Court identified that arresting persons is a major violation of their liberty and established a series of each province's guidelines to curb increasing incidences of custodial torture. Such guidelines included requiring arresting officers to be identifiable, requiring arrest memos with signatures of witnesses, providing notification to a friend or family member of the person arrested, performing a health check-up on the arrested person, and gathering information regarding the arrest in a control room. These protections were found to arise out of Article 21 and Article 22 of the constitution, and the effect of the Supreme Court's decision was to require that all arrests be carried out under the supervision of the constitution and not former police-only practices.

### **Key Takeaways for this Paper**

The foundation of the *D.K. Basu* case forms the foundation of hold law and accountability in India regarding the process of arresting an individual. The guidelines set forth in the BNSS were direct legislative incarnations of these guidelines. This case supports the argument presented in the Article, that the BNSS does not create new standards for liberty but instead codifies safeguards that the judiciary has developed. Furthermore, it shows that accountability and documentation are imperative to avoiding the misapplication of the power to arrest.

- **Arnesh Kumar v. State of Bihar**

In *Arnesh Kumar v. State of Bihar*, the Supreme Court evaluated the systematic and mechanical arresting of people charged with crimes that could be punished by a prison sentence of up to seven years. The Court determined that police must provide justification for an accusation's arrest by proving that it was necessary, rather than just proving that it was lawful. Police are required to write down their reasoning for any arrests they make and to also write down their reasoning for not making an arrest. The Court ordered magistrates, before they approve such detention based on the necessity of arrest, to independently determine whether the arrest is actually necessary. The Court reiterated its earlier ruling, stating, "arrest is not mandatory simply because it is lawful."

### **Key Takeaways for this Paper**

The Arnesh Kumar decision has clear implications regarding the framework of Section 35 of the BNSS. The BNSS concept of necessity-to-arrest mirrors the Arnesh Kumar decision's framework. The Arnesh Kumar decision helps support one of the Article's claims that BNSS is intended to proceduralize discretion in how the police exercise their power to arrest rather than totally eliminate that discretion. The Arnesh Kumar decision also helps provide clarity on the role of magistrates in keeping the police accountable as an additional means of checking the police's power.

- **Joginder Kumar v. State of U.P.**

The Supreme Court in *Joginder Kumar v. State of U.P.* made a distinction between having the authority to arrest vs. whether a person should actually be arrested. The Court warned against making routine arrests based only on someone's accusation of wrongdoing and stated that an arrest should not be used to harass someone. The Court recognized that making an arrest can cause social and reputational harm to the arrested person. The Court emphasized that police officers are to consider the liberty of all citizens when exercising their discretion regarding making arrests.

### **Key Takeaways for this Paper**

This case serves as the theoretical basis for what will later become known as the 'necessity' principle as operationalized in Arnesh Kumar and as set out in BNSS Sec. 35. This case supports the Article's theoretical position that arrest should be viewed as something that is only permissible if there is a legitimate, reasonable necessity to arrest someone, and that an arrest should not be viewed as something that is automatic as a result of a person being accused of committing a crime. This case also substantively supports the constitutional/look at how an arrest is a decision that may affect the liberty of an individual.

- **Bureau of Police Research and Development, *Data on Police Organizations (DoPO) Report 2024***

The DoPO 2024 provides national-level data in the following areas: (i) sanctioned strength, actual strength, police-population ratio, and infrastructure, (ii) welfare indicators, (iii) vacancies in police forces and the disparity in police infrastructure among the various States. This data would show that there are pressures on police systems, including shortages of staffing, deficits in welfare of constables, and other systemic pressures.

### **Key Takeaways for this Paper**

The DoPO framework will also be important in assessing the administrative feasibility of BNSS arrest safeguard procedures. The Article uses the DoPO framework to demonstrate that good law can become mere symbolic compliance

if institutional capacity remains weak. This support for the overall thesis of the Article is that arrest reform should be factored into administrative realities.

- **Police Regulations of Bengal, 1943**

West Bengal has established a General Diary as the lawful regulation for documenting all arrest related information, i.e. all arrests made by the police (i.e. all arrests), all charges on which an arrest has been made, all seizures made on arrest and all activity in connection with each arrest made at the police station. By being a continuous record of police activity in chronological order, the General Diary gives a clear picture of how arrests are administered at the station level.

**Key Takeaways for this Paper**

Accurate Diary entries will be essential for BNSS safeguards (such as arrest memos and documentation requirements) to be verified and monitored. Thus supporting the argument for the research that the agency's record-keeping culture determines whether the statutory safeguards are effectively functioning.

- **Policing Theory: Procedural Justice and Street-Level Discretion**

According to Procedural Justice Theory, a way for police to have legitimacy in their interactions with citizens is to be fair, respectful, neutral and give people a voice in the process. Additionally, the Street-level Bureaucracy Theory states that many officers working at the street level have the opportunity to use their discretion when making arrests because their resource, time, and supervisory levels are often limited.

**Key Takeaways for this Paper**

The Article's findings of continuing arrest discretion despite the existence of statutory checks, underscore both theories provide an understanding as to why this situation exists. It is also important because they provide evidence that misuse may be due to structural pressures rather than officer misconduct or evil intent. Therefore, it reinforces the need to ensure that legal safeguards and institutional capacity are aligned with officer welfare.

**Research Objectives**

1. To conduct a detailed examination of the scope and structure of how arrests are made by Law Enforcement Officers (LEOs) within Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), specifically referencing Section 35 and the procedural safeguards related thereto
2. To conduct a comparative analysis of arresting offenders under the Code of Criminal Procedure, 1973 (CrPC), and the BNSS; evaluate how the revisions to these two Codes are substantive reforms versus procedural reorganizations
3. To review the dynamics of arresting offenders (discretion) based on data collected from the Data on Police Organizations (DoPO) report, 2024; and the

law enforcement issues that exist while trying to implement the provisions of BNSS

4. To review the historical case law by the Supreme Court of India regarding the balance between accountability as a result of exercising arrest powers versus operational challenges unique to each of the Law Enforcement agencies for arrest powers.

### **Research Methodology**

In this project, a multi-disciplinary, doctrinal method is employed to study the police power to arrest under the Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023 by examining the law (doctrine), practice (administration), and capacity (institution) of the police organization.

(a) The research compares the provisions related to arrest between the Code of Criminal Procedure, 1973 (CrPC) and the BNSS, section-by-section, concentrating on CrPC Sections 41 and 41A and on Sections 35 through 38 of the BNSS and will assess the principle of necessity to arrest, the mechanism of providing notice to appear, and the procedure safeguards for all administrative action, to determine whether the BNSS has introduced new substantive law on the power to arrest or merely reorganised and retained existing procedural safeguards.

(b) The study includes empirical data from the Bureau of Police Research and Development, Data on Police Organizations Report (2024), using information related to police strength, police infrastructure, and police welfare indicators to determine whether the safeguards provided in the BNSS can be implemented practically within the constraints of the resources available to police organizations at the time of this research.

(c) A qualitative review of the police administrative material will be completed in relation to the West Bengal Police Regulations (WBPDR) and the Kerala Police Manual to examine the record-keeping mechanisms, supervisory structures, and the variations in the policing culture which may effect the governance of arrests. The research includes analysis of relevant Supreme Court Cases as well as a review of reported examples of judicial involvement regarding the arrest process. Theoretical constructs related to policing such as procedural fairness and street-level discretion are applied to provide context as to how arrest power functions in practice. Through this framework, researchers attempt to create a connection between statutory research and the real-world institutional context.

## **Research Gap**

Although there has been a lot of overlap over time between statutory arrest powers found in the BNSS compared to the CrPC, the vast majority of criminal law scholars are focused mostly on writing use of dictionaries or law textbooks focused purely on statute by statute written commentary, and there appears to be a lack of focus on bridging the statutory provisions of criminal law with the administrative realm of police arrest governance. The creation of a complete "arrest governance model" would connect all of the sections of the BNSS that deal with arrest: s.35 (necessity and recorded reasons), ss.36-38 (procedural safeguards), and s.37 (transparency infrastructure - control rooms, designated officers, digital displays), but there is a lack of analysis in the literature using explicit criteria (for example, proportionality, administrability, accountability, and risk of abuse) to determine whether or not these reforms will actually work. Additionally, there have been limited studies of police station-level implementation, such as daily diary/register systems, workflow compliance, and staff capacity as reported in the DoPO 2024 data, as well as studies on the degree of professional stress, work load and lack of adequate infrastructure that affect the discretionary arrest decisions of individual police officers, thus leaving officer welfare unchecked. Furthermore, little is known about the role of magistrates and prosecutors regarding accountability for enforcement of the BNSS, or how arrest failures during BNSS (e.g., use of boilerplate reason, incomplete memoranda, failure to timely update digital display) have been recorded in the literature. Finally, there are only a small number of studies that incorporate policing theory (e.g., street-level bureaucracy, procedural justice, organizational compliance, etc.) into explanations of why legal reforms are successful or unsuccessful.

## **Introduction And Conceptual Framework: Arrest as Discretion in a Rule-of-Law State**

### **1.1 Why arrest is the central site of state coercion**

The physical exercise of state power over individuals is best represented by the act of arresting someone. The arrest is a legal way for the state to physically restrain a citizen, take them away from their family, friends, and community and hold them in custody for an unknown period (up to many days or even months) before the question of whether they are guilty is determined. Arrest is not just an administrative action; it is a Constitutional principle (Articles 21 and 22 of the Constitution of India) that protects citizens from arbitrary detention (by guaranteeing them the right to live and have their personal liberty). An unlawful/unnecessary arrest can result in multiple human rights violations, such as psychological trauma; social stigma associated with being arrested; economic/reputational harm. In attempting to improve the governance around arrests, the Indian legislature has transitioned from the CrPC to the BNSS (2023) and established codified procedural safeguards and expanded on the type of administrative and technological resources available to police officers. Sections 35-38 of the BNSS demonstrate a structured attempt to strike a balance between citizens' rights and police operational needs. The arrest decision is no longer only about whether to person is placed into custody or released; there are now also requirements for preliminary investigations, necessity checks, and police supervision over the arrest, including the need to document, notify, and display electronically all arrest-related data.

The purpose of these provisions is to provide clear accountability and transparency in how squads use coercion to manage crowd situations. By establishing the requirements for procedures for coercive actions by squads, the BNSS also provides a set of operational procedural protections for the police; however, the operational context or environment in which arrest decisions are made are time constrained (i.e., the police are often making decisions in a matter of minutes), resource constrained (i.e., the police will usually have limited information available to them), and in some cases have high-pressure environments (i.e., there are crowds of people, there may be domestic violence or disorderly activity, an economic crime is occurring, and there is a possibility that witnesses will be intimidated or evidence will be destroyed). As a result, in such situations, police officers must quickly assess whether a custodial detention is warranted, if a non-custodial notice will serve the needs of the police (and/or the community), and how to carry out those three functions regardless of whether they have or have not made an arrest and/or have provided the requisite documentation to their immediate supervisor. These operational realities illustrate that the regulation of arrest is not just a legal issue, it is also an

administrative/organizational issue. Thus, arrest decisions are simultaneously made based on constitutional, procedural, and practical law, which creates where law, discretion, and operational constraints converge at the time of the arrest.

## **1.2 Policing theory lens: why discretion persists (and why it can be shaped)**

Understanding why discretion persists in arrest decision-making requires a theoretical lens that incorporates both human behavior and organizational structure.

**(a) Street-level bureaucracy: discretion under constraints:** As the quintessential "street-level bureaucrats," front-line police officers are the bridge between law and society, where they work to translate formal legal rules into lived experiences. Police officers must use their discretion when they encounter insufficient staffing, inadequate information, or high stakes and are required to use their discretion for the purposes of public safety. For example, an officer working a festival in West Bengal may receive multiple complaints of minor offences almost simultaneously, requiring him/her to prioritise multiple arrests that may result in a rapidly changing scene. While there are many legal reasons for an officer to arrest a person, he/she may make the arrest based on heuristics regardless of the number of time(s) he/she could choose to issue a notice or a summons. Section 35 of the BNSS attempts to consider these factors and requires police officers to document their reasons for arresting or not arresting a person so that their discretionary decisions are explainable, auditable, and proportionate.

**(b) Procedural justice: legitimacy and compliance:** Procedural justice theory asserts that when citizens feel respected, heard and perceive that rules are applied unfairly, they will often obey the law. A person's experience at the time of arrest is very important; how the person is treated at the moment of arrest can have an effect upon how that person will perceive police for many years. Sections 36-38 of the Bill of Rights Act (BNSS) provide a number of measures to achieve procedural justice principles by improving transparency and communication, including:

1. visible identification of police officers
2. witness verification of arrest
3. notice to relatives or friends of the arrest; and
4. limited access to legal counsel

Even where the arrest was made for a lawful reason, the arrest can result in hostility or lack of cooperation if the process appears to be arbitrary, disrespectful or humiliating. In contrast, if BNSS procedures are implemented respectfully, they may help to establish legitimacy, encourage cooperation and build public confidence.

**(c) Organizational compliance: paperwork as both protection and burden:**

The BNSS s37 reinforces accountability through documentation via administrative layers and digital display control rooms and assigned officers. Compliance theorists state that an officer and the citizen are both protected by documenting decision making as it establishes a verifiable record; however, excessive or poorly done documentation can introduce ritualistic behaviour, as is so with providing a "tick-box" as having provided accountability. Likewise, when officers are working above capacity and are exhibited by the 20-25% average rate of officer vacancies throughout many states as per DOPO data 2024, the quality of documentation will likely be compromised. Thus, the administrative formalisation at BNSS will be effective only if capacity and infrastructure are aligned with expectations, or otherwise the value of the documentation pattern will become ceremonial in nature.

**1.3 Avoiding the “villainization trap”: officer welfare as a variable**

The integration of officer welfare into arrest governance is one of the principal contributions of this research. While there is a substantial amount of literature on arrest that covers aspects pertaining to the rights of citizens, which is indeed a significant area of study, it fails to address sufficiently the professional burdens and personal struggle placed upon police officers. Officers that are overworked and poorly resourced are under multiple stresses including working 18-hour shifts during community festivals or periods of civil unrest, working in understaffed structures where one officer has to provide the level of service normally provided by three officers, poor housing conditions, and the continual threat of injury. According to DOPO 2024, over 60% of personnel within constabulary live in unsatisfactory housing and the historical staffing deficiencies and infrastructural deficits experienced within police departments negatively impact the cognitive and operational capacity of police officers to make nuanced decisions. These stressors also contribute to what might be referred to as a “risk-of-blame” incentive to over-arrest, or re-arrest individuals, simply because the personal, professional, and political consequences to police officers when they do not make an arrest are severe (i.e., police officers face public scorn, internal disciplinary actions, litigation if a person that police officers did not arrest re-offends or does not face justice). The layered accountability from the BNSS may also put additional pressure on police officers, and may inadvertently contribute to the incentive to over-arrest, unless the BNSS also provides professional protections and systemic supports for police officers.

Incorporating welfare issues into arrest governance changes the concept of accountability from a purely punitive or rights-based model to one that finds support from the institutions within which the authority operates. Reform efforts should acknowledge that officers will be more likely to use lawful restraints when they have clearly established procedures, supportive supervision and reasonable operational expectations. For instance, the DSP authority to use restraint

procedures for elderly/infirm persons can provide not only a proportionality safeguard for civilians but also a level of protection for officers by providing supervisory compliance that will ensure defensible decisions.

## **The Law of Arrest Under BNSS And CrPC: powers, Safeguards, and what actually changed**

### **2.1 Arrest without warrant: BNSS Section 35 as the core decision rule**

Section 35 of BNSS 2023 has altered the Police's power of arrest without warrant, which is the most significant method of coercion used operationally by Police, as this method of arrest allows Police to quickly detain individuals in circumstances where the delay in doing so may jeopardize the investigation, jeopardize public safety and/or result in the accused not appearing before the Courts at the appropriate time. In Section 35 of the BNSS 2023, there are various examples of times where arrest without warrant can occur including (1) the Police officer witnessing the commission of an offence, (2) credible information or reasonable belief of a cognizable criminal offence, (3) an individual who has been proclaimed as an offender, (4) possession of an item that the Police suspect may be stolen, (5) obstructing the Police officer in the performance of his/her duties, (6) attempting to escape from Police custody, (7) being a deserter, and (8) when the Police can obtain a requisition from another Province, State or Country for the purposes of arresting a person.

A significant new requirement under the BNSS 2023 is the need for each Police officer who arrests an individual for an offence punishable by up to 7 years, to have reasonable believe it was necessary to arrest that individual for one or more of the following reasons: to prevent the individual from committing any other offence; or to protect the interests of an individual who may have any information about or who is a witness to the commission of that offence; and/or to ensure that evidence is preserved and/or not tampered with and/or to ensure that the offender attends the Courts as required. In addition to these new requirements, the BNSS 2023 requires Police officers to prepare a written explanation for why they arrested (or did not arrest) the offender, therefore making the process by which an officer exercises his/her discretion and/or authority to arrest the offender, from being a non-transparent and non-auditable process to a process that will be transparent, auditable and subject to scrutiny.

### **Normative evaluation:**

- **Positive:** BNSS strengthens justiciability by requiring documented reasons and linking discretion to specific investigative or public safety purposes.
- **Risk:** Without supervision or magistrate review, written reasons may degrade into boilerplate statements, undermining the accountability function.

## **2.2 Notice to appear: BNSS recentering the non-custodial pathway**

Notice to Appear (NTA) under the BNSS s.35(3)-(6) establishes a non-custodial alternative to custody by setting out a process for an issuing authority to require an individual who is not to be arrested (unless it is operationally necessary) to be issued a notice that directs the individual to appear for their scheduled booking at a police station or court. This section of the BNSS is intended to reduce the unnecessary use of custody; provide for pre-trial release from custody; alleviate demands on police and judicial systems; and provide guidelines regarding the enforcement of an individual's compliance with issuance of notices, in order to maintain operational flexibility while prioritizing liberty.

- In comparison, the NTA established under the BNSS shares a similar structure with the notice to appear established under section 41A of the Criminal Procedure Code (CrPC). However, unlike the CrPC, the BNSS incorporates a concept of notice compliance into a broader accountability framework of accounting for notice compliance in a digital and administrative setting (BNSS s.37), which links the issuance of notices with control room records and designated officer oversight.

Normative Evaluation:

**Positive Reactions:** The BNSS supports liberty, reduces unnecessary incarceration of individuals, and supports the principles of procedural justice by establishing that the issuance of non-custodial measures is the norm and lawful.

**Administrative Barriers:** The BNSS will be effectively implemented on the basis of successful tracking of service of notices and attendance at scheduled court dates. Because many under-resourced police agencies suffer from staffing shortages and have significantly high workload, timely and precise notice enforcement is significantly burdened.

## **2.3 DSP permission safeguard for elderly or infirm persons in minor offences**

The BNSS specifies that before an individual over 60, or who is medically incapacitated, can be arrested under a provision of law (i.e., a vehicle seizure), the arresting officer must receive permission from someone at least the same rank as a Deputy Superintendent of Police (DSP). The purpose of this level of review is to balance the need to protect the community from potential harm while allowing officers some degree of discretion. This is done for three reasons: (1) to prevent officers from using obstruction to effect arrest; (2) to promote proportionality in the officer's decision-making; and (3) to provide an opportunity for the officer to justify their actions in the event the decision to arrest is made.

- When compared to the Criminal Procedure Code (CrPC), the BNSS introduces a safeguard that does not exist in the CrPC. This means the BNSS is creating a new law with a clear explicit intent to provide for the use of proportionality and risk as it relates to arrests.

A normative analysis of this policy as it relates to arrest decisions indicates:

- Positive: Creates a significant "friction" point in the arrest process to prevent unnecessary harm and establishes a formalized supervisory review process for balancing the officer's discretionary authority with protections for citizens.
- Risk: The possibility exists that in police stations with inadequate supervision or high vacancy rates, the officer may receive a quick and easy stamp of approval from a DSP, which could create a bottleneck to police operations or allow for inconsistent policing practices.

## **2.4 Procedural safeguards: codifying and administratively thickening D.K. Basu standards**

BNSS s.s.36–38 integrate long-standing judicially mandated safeguards, building on the *D.K. Basu v. State of West Bengal (1997)* framework.

### **2.4.1 Arrest memo, witness attestation, and intimation (BNSS s.36)**

BNSS s.36 requires that:

- Arresting officers visibly display identification;
- A memorandum of arrest is prepared, countersigned by the arrestee, and attested by a witness (family member or respected individual);
- Intimation of arrest is sent to a relative or friend of the arrestee.

These safeguards ensure contemporaneous record-keeping, protect both citizens and officers, and operationalize transparency into the arrest process.

**Comparison with CrPC:** Closely aligned with CrPC 41B-type provisions, but BNSS integrates these obligations with a mandatory supervisory structure (designated officers) and digital recordkeeping (BNSS s.37).

### **2.4.2 Transparency infrastructure: control rooms + designated officer + digital display (BNSS s.37)**

Administrative accountability grows through BNSS s.37, which establishes numerous oversight nodes to strengthen administrative accountability. These consist of:

- Control rooms at district/state level that collate and present data on arrests made.
- Officers who are designated to oversee compliance with laws and regulations (e.g., at least ASI officers).
- Digital displays (e.g., real-time updates) that provide a mechanism for public accountability.

Impact of This Development: The result of the increased administrative "thickening" of the oversight system that has resulted from BNSS is decreased risk of clandestine detention and will enable timely location of individuals being held in detention. However, this system will place an increased burden on rural jurisdictions, which do not have adequate communication or logistical resources.

- Comparison to CrPC: Although the logic associated with operating a control room was specified in the CrPC s.41 c statute, BNSS has created a higher-level designated officer role and a requirement for digital infrastructure in order for operations and audits to occur according to BNSS's specifications.

### **2.4.3 Counsel access during interrogation (BNSS s.38)**

BNSS s.38 guarantees that arrestees can consult an advocate during interrogation, balancing anti-coercion safeguards with operational needs. This codifies and slightly limits the broader rights envisioned in D.K. Basu, reflecting a compromise between investigative expediency and citizen protection.

## **2.5 Constitutional floor: grounds of arrest and Article 22(1)**

Article 22(1) of the Canadian Charter of Rights and Freedoms mandates that a police officer must inform the individual being arrested of a reason for that arrest. This constitutional requirement cannot be modified by BNSS. Court decisions regarding police accountability and judicial review of the police's actions further emphasize that those arrested must be given written notice as to the basis of their arrest. BNSS has implemented a number of reforms and procedures which make it impossible to properly implement these protections without providing a justification for the arrest. Courts continue to declare any arrest made without adherence to these safeguards to be unlawful or in "bad faith", thus demonstrating that simply creating legislation does not guarantee adherence to it and that proper record keeping and operational controls are integral parts of the effective enforcement of any legislative requirement.

## **Accountability in practice: Supreme Court Guidelines v. Administrative Capacity (DoPO Frame)**

In policing, accountability refers to the multiple layers that make up the legal, administrative, and operational responsibilities of police agencies. The guidelines established by the BNSS 2023 include definitions of arrest authority and set out safeguarding provisions, but those provisions and definitions must be effectively implemented at each police station and overseen by magistrates/supervisors to be successful. This section will discuss how the understanding of arrest governance in India is influenced by Supreme Court doctrine, policing practices at district police stations, and limitations of police department capacity to conduct arrests.

### **3.1 Supreme Court standards: the doctrinal spine of arrest accountability**

The jurisprudential basis for arrest accountability in India is found in significant Supreme Court cases that clarify the limits of lawful arrest and provide procedural protections against unlawful detention. The three significant cases of *Joginder Kumar v. State of Uttar Pradesh* (1994), *D.K. Basu v. State of West Bengal* (1997) and *Arnesh Kumar v. State of Bihar* (2014) create the basis for arrest practices in the era of BNSS.

In *Joginder Kumar*, the Court ruled that there must be justification for an arrest beyond that of just being legally allowed. This principle is also included in the test of “necessity to arrest” in BNSS, which requires arresting officers to consider whether arresting an individual will be necessary to prevent harm to additional people; preserve evidence; ensure cooperation of witnesses and ensure they come to court as needed. The Court also indicated that the exercise of arrest power on a routine basis has the potential to erode public confidence in law enforcement and constitutional protections found in Articles 21 and 22 of the Constitution of India.

The case of *D.K. Basu* provided a complete set of procedural protections for arrests, including the creation of arrest memo documents; notice to family or friends of the arrest; witness signatures on the arrest memo; medical examination of the person arrested; and allowing for transparency through the use of police control rooms. The provisions of BNSS §§ 36-38 establish the protection provided in *D.K. Basu* as statutory law and provide administrative guidelines for the police to apply.

The *Basu* Guidelines established aspirations and supervised police delivery of service but did not create mechanisms for accountability in daily work of Police Stations as BNSS does by giving explicit roles to officers, duties of performance and requiring digital reports.

*Arnesh Kumar* made necessary arrest a requirement through the creation of legal obligations of police officers to record reasons for arrests. Written record of reasons for arrest and consideration of Notice to Appear prior to remand are now judicially reviewable. Thus, *Arnesh Kumar* provides information on the concept

of necessity as a justiciable and auditable element of arrest, irrespective of procedural requirements. Nevertheless, as noted by the Supreme Court, courts must assess whether reasons recorded for arrest were actually deliberative or simply perfunctory.

Prakash Singh's directives focused on developing complaint processes in policed service delivery, officer reform and accountability from external sources. Despite having been issued before BNSS was created, these directions still apply: even with the existence of a detailed statutory framework, citizens must have reasonable access to report on alleged abuse of arrest authorizations. The Police Complaint Authority supports the principle that the existence of procedural safeguards is only meaningful if there is an associated effective means of remedy.

### **3.2 West Bengal administrative lens: General Diary discipline as a compliance backbone**

Supreme Court decisions dictate the standard of doctrine but the degree to which they can be implemented will depend upon the administrative environment in place at police stations. In examining the implementation of BNSS in West Bengal's police system, the legislative vehicle consisting of the WBPDR serves as an interesting perspective on the implementation of BNSS. The General Diary (GD) will be the main logging document for each arrest, crime report, and any significant activities that occur at the police station (i.e., external training, etc.) from the time the police officer arrives until the officer leaves.

BNSS creates numerous points of records for compliance through the completion of the arrest memorandum, notification to family member(s), accessing legal counsel, the control room, and the digital display, to name a few. The GD provides a record keeping system that allows for each of these records to be tied together to form an accurate audit trail but it will require that the stations employ GD discipline in order to authenticate the records through cross-validation of records such as arrest memos, control room entries and GD numbers. By tying GD numbers to arrest memos and control room entries, the stations will be able to create an authorized time sequence for the station that allows for protective measures for police officers as well as for those arrested. Using GD discipline to establish an administrative link between records will help create a secondary source of protecting the safety and security of the police officers and will provide quicker access for the judicial review of police action. Furthermore, GD discipline will provide the tools for systematic inspections and audits. Sub-Divisional Officers or Superintendents will be able to review a sample of at least 1 month of records and determine the consistency of arrest memos with the notification to family members, witness attestations and digital entries to demonstrate that the police officers have complied with BNSS. This process exemplifies how the station administration can make BNSS's accountability concepts a reality by transforming the statutory requirements into an enforceable process. Many legal analyses of arrest powers fail to incorporate this "record

ecology,” yet it is often the difference between ritualistic compliance and meaningful accountability.

### **3.3 Administrative capacity constraints: DoPO as the implementation feasibility frame**

DoPO 2024 provides important empirical information to understand why BNSS safeguards may not work in practice. DoPO has detailed data on staffing levels, infrastructure, supervisor-to-officer ratios, intensity of training, and implementation of technologies by state. This information can be used to develop a model of practical constraints: statutory requirements, no matter how comprehensive their drafting, have no value other than the available resources to implement them. According to DoPO 2024, lack of adequate personnel continues to be a significant factor that negatively impacts the quality of discretionary judgement by police officers. For example, when an officer is assigned multiple beat areas or when a police officer is assigned to festival or protest security for an extended period of time, they will be less able to consider alternative forms of release (i.e., written promise to appear) or complete accurate memo documentation of the rationale for making a particular arrest.

The lack of appropriate levels of supervision compounds this issue because, typically, necessity reasons are approved only by signature or appear to have minimal substantive review before they are signed, approval of "no undue hardship" for the elderly or infirm are given with little more than a cursory review, and the storing of images that appear on a digital display at the police precinct is frequently overlooked or delayed. The use of benchmarked standard operating procedures by state police departments will enhance police accountability and transparency. For instance, police departments in states such as Kerala, which have higher staffing levels, enhanced training processes, and better police station infrastructure, implement the notice-to-appear and procedural safeguards in a more consistent fashion than police departments in states with lower staffing levels, reduced training capabilities, or inferior police station infrastructure.

### **3.4 Contemporary BNSS-era signals: courts and police leadership in practice**

Several recent decisions have shown how different types of accountability arise out of the interaction of judicial review, administrative procedure and organizational behaviour. The higher courts and the Supreme Court have struck down the arrests in cases when measurements of BNSS had been circumvented by law enforcement, particularly when police did not provide a reason for arresting an individual or the arrest memos were deficient. Courts have enforced the compliance of BNSS rules which show the need for providing an incentive for law enforcement to follow proper procedure before making an arrest based upon need. To achieve compliance with the BNSS standards, police departments have developed standardized memos to assist their officers in understanding how the BNSS standards apply and to be able to complete a step by step process in

determining their compliance. These agencies demonstrate that compliance is not only achieved through legal compliance but also through the use of structured procedures and support systems which are associated with administrative accountability. However, in addition to there being boilerplate reasons provided as the basis of an arrest, failure to notify victims, and delays associated with electronic records, these issues will continue to be reported to illustrate the misalignment between ideal (statutory) laws and actual operational practice.

### **3.5 Synthesis: Accountability as a systemic ecosystem**

BNSS arrest authorities cannot simply rely on each individual officer to comply with the law; instead they are part of a broader system involving Judiciary, Police admin & station levels, record keeping, digital technology, and HRM. Officers have discretion to exercise within constraints (Magistrates act as second gate to remand); once officers have exercised their discretion, they create officer emergent reporting and operationally apply 'necessity' and 'proportionality' checks through supervisory processes. These include the various auditable compliance-related administrative processes such as GD cross-validations, control room updates, and digital displays that make up the backbone of audit compliance.

In summary we can gain insight from the integration of these elements to see that accountability is more than just following laws; it is also an organisational problem. The DoPO 2024 states there are capacity constraints so organisational problem combined with procedural complexity will require interventions specific to the area. Therefore, providing no means of these elements working together to provide accountability for BNSS will result in them becoming a ceremonial construct (statutory duties can be satisfied without being substantially effective).

## **Findings, Normative Assessment, And Recommendations: Making BNSS Arrest Governance Work**

This chapter evaluates whether the framework strengthens accountability, respects citizen liberties, and remains operationally feasible for officers.

### **4.1 Findings: The Operational Reality of BNSS Arrest Governance**

**1: Strengthening “arrest as exception” requires active auditing of necessity reasons:** BNSS s.35 carries on the legacy of the Criminal Procedure Code (CrPC) in that an arrest must, in principle, be both justified and reasonable and makes it clear that documentation of the reasons for the arrest must be made. Although this would theoretically discourage the routine use of custody, the practical application of this requirement is heavily reliant upon adequate levels of oversight by superiors. In the absence of proper oversight, police officers working under stress may have their reasons for arrest reduced to generic phrases that may not serve the purpose of the statute. The same is true of the protective provision of

the designated supervising police person for the elderly and/or infirm charged with minor offences, which is meant to introduce a check against the use of disproportionate force; the same limitations apply to its use unless the supervisory culture supports the provision and the reasons for the provision of the designated supervising police person are adequately documented.

**2: Notice-to-appear is effective but administratively intensive:** The BNSS Act, sections 35(3) through (6), cover the use of the non-custodial route for an accused's release, and these sections have great potential to reduce unnecessary arrests, uphold individual liberty, and relieve the congestion found in lock-up facilities. However, Notice of Service requires detailed tracking systems with respect to both the confirmation of the accused being served with notice, when that notice was served, and the follow-up on whether an accused has complied with those requirements. At times, Police Station workloads (particularly in rural or high-crime areas) that have scarce staff, can lead to inconsistent application of this system and limit its usefulness. DoPO 2024 highlights that, with the existing capacity constraints, one officer is often completing multiple functions at the same time, making it impossible to follow through on the detailed administrative steps.

**3: Transparency infrastructure can transform accountability or become ceremonial:** BNSS section 37 (7) / (8) established the requirement for "Control Rooms," "Designated Officers" and "Digital Displays" of persons arrested in order to provide an administrative accountability system that would allow families, courts and oversight bodies to monitor the current status of those being detained. However, this transparency architecture is only as effective as the provision of the minimum level of technological infrastructure, clear workflows, and sufficient time for Designated Officers at police stations to perform their role. In police stations where there is no computer, limited or no connectivity, and no practices for the creation of digital records, this system is at risk of becoming a "tick box" exercise eroding the trust that police officers have by the public and undermining public confidence in the police.

**4: Procedural safeguards protect both citizens and officers:** The principles of D.K. Basu and Arnesh Kumar are reflected in the arrest memo, witness attestation, intimation and access to counsel that are outlined in Section 36 - 38 of the BNSS; in practice these protections provide two-fold benefits: One: Protection against arbitrary detentions for an individual who has been arrested. Two: Creation of verifiable, contemporaneously dated documents which protects and guards individual officers against claims of misconduct. Unfortunately, due to personnel and infrastructure constraints, when implementing these protections at a police station, errors occur e.g., witness signatures missing, incomplete

intimation log or control room dashboard updates not timely; these issues expose officers to potential scrutiny and stress due to being subjected to judicial review.

**5: Officer welfare significantly influences arrest discretion:** Data and field reports collected for DOPO 2024 suggest that the exercise of discretion is significantly affected by increasing workloads and working longer hours, being exposed to hostile members of the public, and poor living conditions. Officers may choose to over-arrest, as a defense against being held accountable for not taking action (e.g., failing to arrest someone or delaying an arrest) if their only option available (notice to appear, or similar non-custodial measures) was sufficient under the law to provide them with legally valid means to take action against the suspect. Any procedural reforms implemented that do not consider these stressors, related to both the officer's professional and personal lives, may create a compliance based solely on the officer's actions; while the spirit of compliance will not have been observed.

#### **4.2 Normative Assessment: Evaluating BNSS Reforms**

According to normative theory in drafting the legislation to govern arrest, the BNSS is a meaningful step forward. The BNSS combines necessity, proportionality and transparency into a single, coherent framework. The CrPC simply provides the officer with rules and leaves the majority of the interpretation of the rules (hence the discretion) up to the officer. However, BNSS makes an effort to structure discretion by using multiple levels of safeguards such as supervisory reviews, digital transparency, notification requirements, and judicial oversight. The effectiveness of these procedural safeguards may be contingent upon infrastructure capacity, staffing levels, and training. Where there is a lack of capacity, inadequate staffing levels, or inadequate training, procedural safeguards may end up functioning as only ritualistic activities and the level of discretion exercised may revert back to a pre-BNSS model of practice. Moreover, the use of written reasons for decisions and the emphasis on the use of non-custodial alternatives demonstrate the importance of citizens adhering to the statutes as well as police organizations. If there are no mechanisms for auditing, cross-validating records and maintaining a supervisory culture that supports the use of the statutes, then there is no guarantee that even the most well drafted statutes will provide protection for citizens or provide protection for police officers. Proportionality must also be included in the normative assessment.

When it comes to minor offences with vulnerable people, the new requirement that a DSP must give approval before any actions are taken is an exceedingly creative obtrusion of review/oversight into operational decision-making. In addition, the planned oversight of control room operations and digital display use at both the control room and your Facility is consistent with global best practice in regards to procedural transparency.

Developing these types of procedures will not only make sure that people have their rights protected but will also create a sense of legitimacy and trust in police and promote procedural justice.

### **4.3 Recommendations: Implementing BNSS in Practice**

**Operationalizing Necessity Documentation:** Standardized requirement checklists should be established for the implementation of BNSS s.35. Such checklists should require that each justification factor include specific objective evidence entries. Countersigning by a supervisor must be required in high-risk situations (i.e., offences with a maximum penalty of seven years or more, vulnerable arrestees, and situations where the alternative of a notice to appear could have been used). This will reduce the use of boilerplate reasoning and provide a method of auditing accountability at the police station and magistrate level.

**Strengthening Notice-to-Appear Regime:** An integrated digital and physical notice service register (as a means of tracking delivery, attendance and a follow-up) will be established to keep track of, monitor, document and record delivery, attendance and follow-up within each subdivision of registered recipients and to provide protection to officers in cases where a failure to comply is unavoidable or cannot be prevented. By effectively establishing the notice service register it will ultimately create custody pressure for delivering services, which can encourage lawful use of discretion.

**Reducing Administrative Errors:** By using uniform arrest memo templates per BNSS s.s.36-38 with regular internal audits, we can help reduce some of the frequently occurring errors, including: \* Missing witness signatures \* Failure to provide timely notifications \* Incomplete digital updates Inspections will be conducted primarily at higher volume locations and linked to officer training to help enforce accountability and understanding of procedures.

**Implementing Transparency Infrastructure Efficiently:** A simpler means of executing Technology Solutions will allow for a minimal and easy to use device, with connection to that device along with digital logging/record keeping and audit trails vs Several complex devices that require difficult and on-going maintenance at a remote location. Adequate duration should be afforded to the appointed officer to ensure the execution of duties assigned to the officer(s) will not only have nominal effects but also demonstrate some connection to operation (i.e. balance between statutory compliance and operational practicality).

**Leveraging General Diary Practices in West Bengal:** According to the GD framework set forth by West Bengal, the GD will serve as a tool for both verifying arrest memoranda and validating the GDS received in the control room against

GD entries. In addition, randomly sampling and retaining a subset of 10-20 arrests every month can allow us to measure compliance with the established guidelines as well as promote continuity of evidence collection for administrative purposes throughout the state's law enforcement agencies. Assembly of a similar type of sampling method may be desired in those states that currently have lower levels of documentation.

**Magistrate and Supervisory Alignment:** Whenever a remand is considered, a real evaluation is to be performed to decide if meeting each of the requirements of remanding the person can be established; not merely an update on the original police case against the accused person. Additionally, providing magistrate training concerning BNSS s.35 principles and complying with Arnesh Kumar would assist in fulfilling the second level of accountability. More specifically, supervisors must support lawful refusals to arrest with an aim to support decreasing 'risk of blame' which could increase the frequency of arrests.

**Officer Welfare Measures:** It is necessary to establish an environment in which officers can effectively address their fatigue, be given predictable shift schedules, have access to counselling, and have a supportive supervisory structure. An officer's ability to lawfully restrain a subject and follow the principles of procedural justice can be increased to the extent that they perceive a lower chance of risk, or a culture of support from their administration. A properly constructed overall strategy that allows for integration of welfare and accountability will improve both police officers' rights and the efficiency of policing.

## **Conclusion**

The transition from CrPC, 1973 to the BNSS, 2023 represents a substantial change in the Indian Criminal Justice System and how the powers of arrest will be regulated. By codifying the concepts of necessity, procedural safeguards and administrative transparency, the BNSS will facilitate the transformation of the arrest process from a largely discretionary/nontransparent action to a structured/auditable process. Sections 35 - 38 of BNSS, as well as the creation of designated officers, control rooms and digital display mandates, illustrate a legislative intent to balance the individual liberty of citizens with the law enforcement agency's operational realities. When comparing the provisions of both BNSS and CrPC, the most visible doctrinal continuity exists with respect to the doctrines of necessity for an arrest and notice to appear in court. The notable differences between the two laws include the addition of proportionality checks, oversight by higher authorities and accountability for administrative matters in everyday police practices per the BNSS as compared to the CrPC. The example of requiring DSP approval when arresting elderly or disabled persons for minor offences, as well as establishing structured notice regimes, provides evidence of this transformation.

The implementation of procedures of justice, the establishment of legitimacy, and the elimination of conflict are typically seen from a normative lens as a means by which to hold accountable to the way that law enforcement agencies conduct their respective businesses. The only way for law enforcement to legitimately serve its collective purpose through a well-defined procedure or set of procedures is to have the resources necessary to carry out state agency functions, also known as the policing function. In West Bengal, the capacity of state police departments to effectively discharge their policing functions is hindered due to staffing shortages, inadequate policing infrastructure, and policing personnel being overwhelmed by the volume of their workloads, all of which adversely influence the decision-making of police officers. The manner in which West Bengal police have maintained their General Diaries demonstrates an example of how administrative discipline can form a solid base for compliance with the Bank Statement Summary Database (BNSS) standard; however, the compliance of police officers with the BNSS standard will ultimately rely upon the alignment of administrative discipline with supervisory accountability, electronic record-keeping, and oversight by a magistrate. In the absence of either the existence of such checks and balances or the appropriate level of maintenance of such checks and balances, the strongest statutory protections may simply be measured by words alone.

When developing strategies to achieve a balanced approach to police accountability, consideration must also be given to the welfare of law enforcement officers. Like most other professions, officers have to deal with long working hours, exposure to violent criminal behaviour, user pressure from the public, and fear of reprisal when making decisions concerning arrest, just as they do when following the guidelines established by law enforcement agencies.

If officers are working in a supportive and safe environment and are provided with the safety measures and resources to reduce the risk of operationally related injuries while responding to calls for service, it is most likely that they will have success in their ability to self-restrain themselves during the implementation of BNSS reforms. Furthermore, if the process for issuing warrants and enforcing offenses is clear and easy to understand and enforce, and officers are provided with the necessary resources, their likelihood of success will be greater.

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