

Unlawful Police Detention in India: A Critical Analysis of the CrPC, 1973 and BNSS, 2023

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Abstract: Unlawful detention by police continues to undermine constitutional guarantees of liberty in India. Despite safeguards under the Code of Criminal Procedure, 1973 (CrPC), arbitrary arrests and custodial excesses persist. The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS), which replaces the CrPC, introduces procedural refinements but raises questions about substantive reform. This paper critically analyses the continuities and departures between the CrPC and BNSS, focusing on police powers of arrest and detention, judicial oversight, and accountability mechanisms. Drawing on constitutional jurisprudence, statutory provisions, and international standards, it argues that while BNSS modernises procedure, systemic reforms in police accountability and judicial review remain indispensable.

Keywords: unlawful detention, police powers, CrPC, BNSS, custodial rights, judicial oversight.

Introduction - Unlawful detention by police represents a persistent challenge to India's criminal justice system. The constitutional guarantee of personal liberty under Article 21 is compromised when police powers of arrest are exercised arbitrarily. The CrPC, 1973, codified procedural safeguards, yet misuse remains endemic. The BNSS, 2023, seeks to modernise criminal procedure, but its effectiveness in curbing unlawful detention requires critical evaluation. The replacement of the Code of Criminal Procedure, 1973 ('CrPC') by the Bharatiya Nagarik Suraksha Sanhita, 2023 ('BNSS') marks a significant development in India's criminal justice system. The stated objectives of the BNSS include expediting trials, leveraging technology, and enhancing procedural transparency. This article examines whether these reforms meaningfully strengthen safeguards against unlawful detention or merely restate existing protections without addressing enforcement failures.

Conceptual Framework of Unlawful Detention: Unlawful detention refers to deprivation of liberty without lawful authority or due process.¹ Constitutional safeguards under Articles 21 and 22 prohibit arbitrary arrest, while India's obligations under the ICCPR reinforce this prohibition.² Indian courts have consistently held that even brief illegal detention constitutes a violation of Article 21 of the Constitution.³ The concept extends beyond formal legality to include arbitrariness, unfairness, and lack of proportionality in the exercise of police power.

Police Powers under the CrPC, 1973: Sections 41–44 CrPC empower police to arrest without warrant under specified circumstances.⁴ Section 57 mandates production before a magistrate within 24 hours. Judicial interpretation,

notably in *DK Basu v State of West Bengal*, underscored procedural safeguards against custodial abuse.⁵ Despite codification, misuse of arrest powers remains rampant, disproportionately affecting marginalised communities.

The BNSS, 2023: Continuities and Departures: The BNSS retains much of the CrPC framework but introduces refinements in documentation and digital processes.⁶ It enhances provisions for informing the arrested person of rights, including access to legal aid.⁷ However, it lacks robust accountability mechanisms for police misconduct. Comparative analysis reveals alignment with global trends of digitisation but insufficient embedding of independent oversight.

A. Retention of Core Safeguards: The BNSS largely retains the CrPC framework:

1. Section 35 BNSS corresponds to Section 41 CrPC,
2. Section 47 BNSS mirrors Section 50 CrPC,
3. Section 58 BNSS replaces Section 57 CrPC,
4. Section 187 BNSS replaces Section 167 CrPC.

The twenty-four-hour rule and magistrate oversight remain intact.

B. Procedural and Technological Reforms: The BNSS introduces:

1. Electronic transmission of arrest and remand documents,
2. Audio-video production of accused persons before magistrates,
3. Digital maintenance of arrest records.

While these measures enhance efficiency and transparency, they do not create new substantive rights nor impose penalties for illegal detention.

C. Limitations of BNSS Reforms: The BNSS does not:

1. Codify a right to compensation for unlawful detention,
2. Provide independent oversight over police detention practices,
3. Prescribe penal consequences for violation of arrest safeguards.

As a result, unlawful detention persists as an institutional practice rather than a procedural aberration.

Judicial Oversight and Remedies: The writ of habeas corpus under Articles 226 and 32 remains a vital remedy against unlawful detention.⁸ Courts have awarded compensation for custodial violations, as in *Nilabati Behera v State of Orissa*.⁹ Yet judicial remedies are reactive rather than preventive, contingent on individual litigation.

Role of Legal Aid and Civil Society: The Legal Services Authorities Act, 1987, provides for free legal aid,¹⁰ but implementation is uneven. Civil society organisations play a crucial role in documenting and challenging unlawful detention. Institutional strengthening of legal aid and independent monitoring bodies is essential to curb systemic abuse.

Recommendations:

1. Establish independent police complaints authorities with binding powers.
2. Mandate automatic judicial scrutiny of detentions beyond 24 hours.
3. Institutionalise early access to counsel through strengthened legal aid.
4. Train police in human rights and procedural safeguards.
5. Use technology for real-time monitoring of arrests and detentions.

Conclusion: The BNSS, 2023, represents a legislative attempt to modernise criminal procedure, but its success in preventing unlawful detention depends on structural

reforms in police accountability and judicial oversight. Without robust institutional mechanisms, procedural codification risks becoming symbolic rather than substantive. The Bharatiya Nagarik Suraksha Sanhita, 2023 represents an incremental reform rather than a transformative shift in the law governing police detention. While technological integration may improve procedural compliance, unlawful detention continues to stem from deeper structural and institutional failures. Meaningful protection of personal liberty requires enforceable accountability, judicial vigilance, and a rights-oriented policing framework. Without these, unlawful detention will remain a systemic feature of India's criminal justice system rather than an exception.

References:-

1. Constitution of India 1950, art 21.
2. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art
3. *Bhim Singh v State of J&K* (1985) 4 SCC 677.
4. Code of Criminal Procedure 1973, ss 41–44 (Act No 2 of 1974, published in the Gazette of India, Extraordinary, Part II, Section 1, 25 January 1974).
5. *DK Basu v State of West Bengal* (1997) 1 SCC 416 (Supreme Court of India).
6. Bharatiya Nagarik Suraksha Sanhita 2023, ss 35–40 published in the Gazette of India, Extraordinary, Part II, Section 1, 25 December 2023).
7. *ibid* s 62.
8. Constitution of India 1950, arts 32, 226.
9. *Nilabati Behera v State of Orissa* (1993) 2 SCC 746 (Supreme Court of India).
10. Legal Services Authorities Act 1987, s 12 (Act No 39 of 1987, published in the Gazette of India, Extraordinary, Part II, Section 1, 11 October 1987).
