

LEGAL DYNAMICS OF ARREST AND STATUTORY DUTIES OF ARRESTING OFFICER UNDER BHARATIYA NAGARIK SURAKSHA SANHITA, 2023

by

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ABSTRACT

The enactment of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) marks a transformative shift in the administration of criminal justice in India, repealing and replacing the Code of Criminal Procedure, 1973. Among its most critical facets is the procedural codification governing the deprivation of personal liberty via arrest. While maintaining the constitutional balance under Article 21, the BNSS incorporates structural mechanisms, electronic governance, and explicit duties upon the arresting officer to prevent arbitrary detention. This paper critically examines the statutory framework of arrest under Chapter V of the BNSS, with particular emphasis on Sections 35, 36, 37, 47, and 53. It evaluates the mandatory duties imposed upon arresting personnel, including identification protocol, intimation of grounds, preparation of the arrest memo, designated police control room recordation, and medical examination safeguards. Through doctrinal analysis and comparative statutory evaluation, this paper demonstrates how digital compliance mechanisms and explicit supervisory safeguards under the BNSS institutionalise the principles laid down in landmark judicial rulings such as *D.K. Basu v. State of West Bengal* and *Armesh Kumar v. State of Bihar*. Finally, the paper assesses practical challenges in grassroots compliance and proposes recommendations for institutional capacity building.

Keywords: Bharatiya Nagarik Suraksha Sanhita, BNSS 2023, Law of Arrest, Arresting Officer, Personal Liberty, Section 35 BNSS, Criminal Procedure.

I. INTRODUCTION

The authority of the state to deprive a citizen of physical freedom without a judicial warrant is an extraordinary executive power that directly impinges upon the fundamental guarantee of liberty under Article 21 of the Constitution of India.¹ An arrest inflicts immediate reputational damage, restricts personal movement, and subjects the individual to the coercive apparatus of law enforcement. Consequently, Indian constitutional jurisprudence has consistently maintained that personal liberty is the rule, while custodial confinement without trial must remain an exceptional, justifiable necessity.² For five decades, the procedural framework governing arrest was situated within the Code of Criminal Procedure, 1973. Despite major legislative interventions in 2008 and 2010, routine and mechanical arrests continued to characterise everyday policing. This pattern required persistent judicial corrections, notably in *Joginder Kumar v. State of U.P.*, *D.K. Basu v. State of West Bengal*, and *Arnesh Kumar v. State of Bihar*.

II. THE PRE-ARREST THRESHOLD: SUBSTANTIVE RESTRAINT UNDER SECTION 35

Section 35 of the BNSS (corresponding to Section 41 of the CrPC) serves as the primary substantive filter against arbitrary police custody. The statute rejects any administrative presumption that an officer may automatically effect an arrest merely because an offense is cognizable.

Under Section 35(1)(b) of the BNSS, where an offense is punishable with imprisonment for a term extending up to seven years, an arresting officer cannot execute a custodial arrest without satisfying two concurrent statutory hurdles:

- **Reasonable Suspicion:** The officer must have credible information or reasonable suspicion that the accused has committed the specified offense; and

¹ INDIA CONST. art. 21

² *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248.

- **Custodial Necessity:** The officer must be satisfied that custodial arrest is strictly necessary to: (a) prevent the commission of further offenses; (b) conduct a proper investigation; (c) prevent evidence tampering or disappearance; (d) protect witnesses from inducement, threat, or promise; or (e) secure the presence of the accused before the court.

Mandatory Written Recording of Reasons

Section 35(1)(b)(ii) mandates that the officer shall record reasons in writing while making such arrest. The statutory proviso further requires that where an arrest is not made, the officer must equally record reasons in writing for not making the arrest. This codification gives direct statutory force to the ruling in *Arnesh Kumar v. State of Bihar*.³

Special Threshold for Senior and Infirm Persons (Section 35(7))

A progressive safeguard introduced in the BNSS is Section 35(7). In cases involving offenses punishable with imprisonment for less than three years, no arrest shall be made without prior written permission from an officer not below the rank of Deputy Superintendent of Police (DSP) if the suspect is infirm or is above sixty years of age. This statutory barrier directly shields elderly and vulnerable citizens from summary detention.

The Pre-Arrest Notice of Appearance: Section 35(3)

Where custodial arrest is not strictly justified under the necessity checklist of Section 35(1), the officer is under a positive statutory duty to issue a formal Notice of Appearance under Section 35(3) (corresponding to Section 41A CrPC).⁴ So long as the individual complies with the terms of the notice and cooperates with the inquiry, the officer is prohibited from arresting them for the offense specified, unless reasons are recorded in writing indicating emergent custodial need.

III. EXECUTION OF ARREST: IDENTIFICATION AND PHYSICAL DEMARCATION (SECTIONS 36 & 43)

Section 36 of the BNSS codifies the directives of D.K. Basu into statutory provisions. Every arresting officer is bound to wear visible, accurate identification displaying their name and

³ (2014) 8 S.C.C. 273, 17.

⁴ *Satender Kumar Antil v. CBI*, (2022) 10 S.C.C. 51, 24 (holding compliance with pre-arrest notice to be mandatory).

designation, prepare an arrest memo attested by a witness, and obtain countersignature of the arrestee.⁵

Limits on Physical Restraint (Section 43)

Under Section 43(1) of the BNSS (corresponding to Section 46 CrPC), an arrest is executed by actually touching or confining the body of the person to be arrested, unless there is submission to custody by word or action. Where a suspect indicates willingness to accompany the police without resistance, physical manhandling or touching is prohibited. Section 43(2) permits the officer to use all necessary means to effect arrest only when the suspect forcibly resists or attempts to evade. Section 43(4) retains the safeguard that this provision grants no authority to cause the death of any person not accused of an offense punishable with death or life imprisonment.

The Revised Handcuffing Framework: Section 43(3) BNSS

Departing from the judicial ban against mechanical restraints articulated in *Prem Shankar Shukla v. Delhi Administration*,⁶ Section 43(3) of the BNSS introduces an explicit statutory parameter. The arresting officer is permitted to use handcuffs, keeping in view the nature and gravity of the offence, strictly for habitual offenders, escape risks, or individuals accused of serious, enumerated offences including organised crime, terrorism, drug trafficking, rape, or murder. Reasons for applying handcuffs must be contemporaneously recorded in the case diary.

Mandatory Safeguards for Female Arrestees

Recognising constitutional protections under Articles 15(3) and 21, Section 43 establishes specific gender safeguards that govern every arresting officer:⁷

- **Presumption of Oral Submission:** Under the proviso to Section 43(1), where a woman is to be arrested, her submission to custody on oral intimation is presumed, and no male police officer shall touch her body under any circumstances.
- **Female Officer Mandate:** The physical arrest, search, and personal handling of a female arrestee must be performed exclusively by a female police officer.

⁵ BNSS § 36. See also *D.K. Basu*, (1997) 1 S.C.C. 416, 35.

⁶ *Prem Shankar Shukla v. Delhi Admin.*, (1980) 3 S.C.C. 526, 22.

⁷ INDIA CONST. arts. 15(3), 21.

• **Temporal Nocturnal Prohibition:** Under Section 43(5), an absolute prohibition bars the arrest of a woman after sunset and before sunrise. Where exceptional circumstances warrant nocturnal custody, the female officer must submit a written report and obtain prior written permission from the Judicial Magistrate First Class having local jurisdiction.

IV. DUTIES OF IMMEDIATE INFORMATION AND DISSEMINATION (SECTIONS 47 & 48)

The denial of communication creates fertile ground for custodial excesses. Under Section 47, the officer must immediately communicate full particulars of the offence and the grounds of arrest and inform the accused of their right to bail in bailable offences. Under Section 48, the officer is duty-bound to inform a nominated friend or relative and make an immediate entry in the station register.

V. INSTITUTIONAL TRANSPARENCY: DIGITAL LOGGING UNDER SECTION 37

A primary structural modernization introduced by the BNSS is the creation of a statutory digital transparency regime under Section 37. A designated officer in every district must maintain a digital register of all arrests, and details of the arrestee and arresting officer must be prominently displayed outside every police station by digital and electronic means.

VI. POST-ARREST CUSTODIAL DUTIES: MEDICAL AUDIT & REMAND LIMITS

1. Mandatory Contemporaneous Medical Examination (Section 53)

Under Section 53 of the BNSS, the arresting officer is duty-bound to ensure that the arrested individual is physically examined by a registered medical practitioner immediately after custody is used.⁸ The examining physician must prepare a contemporaneous report recording all existing marks of injuries, abrasions, and fractures, along with their estimated time of origin. The officer is legally obligated to furnish a copy of this medical report to the accused or their advocate, establishing a baseline against custodial violence.

2. The Absolute Twenty-Four-Hour Production Rule (Section 58)

Executing the non-derogable command of Article 22(2) of the Constitution, Section 58 of the BNSS strictly commands that no police officer shall detain an accused person in police custody for a duration exceeding twenty-four hours, excluding journey time. Beyond this limit, further detention is unlawful without judicial remand granted under Section 187 of the BNSS.

⁸ BNSS § 53(1).

VII. LEGAL CONSEQUENCES OF DERELICTION AND PROCEDURAL VIOLATIONS

The procedural requirements articulated throughout Chapter V are mandatory statutory conditions precedent. A failure by an arresting officer to adhere to these provisions attracts significant legal repercussions:

- **Illegality of Remand and Bail Entitlement:** Where an arrest is executed in flagrant contravention of Section 35, the jurisdictional Magistrate cannot validate unlawful executive custody by granting remand, and the accused is entitled to release on bail.
- **Contempt of Court and Departmental Sanctions:** Any police officer authorising or executing an arrest without satisfying statutory necessity criteria is liable to departmental disciplinary proceedings and summary contempt under the Contempt of Courts Act, 1971.⁹
- **Public Law Compensation -** An arrest carried out in violation of statutory procedures infringes Article 21, entitling the victim to monetary damages payable by the state under the constitutional tort doctrine.

VIII. CRITICAL ANALYSIS AND INSTITUTIONAL CHALLENGES

While the BNSS represents a major statutory advancement by codifying judge-made safeguards and introducing digital transparency under Section 37, several operational hurdles persist:

- **Scrutiny by Remand Magistrates:** Magistrates must not treat remand under Section 187 as a routine administrative endorsement.

Every remand application must be accompanied by the Section 35 checklist, written reasons, and the medical memo under Section 53. Custodial detention must be refused whenever these records are absent or perfunctory.

- **Operationalisation of Electronic Portals:** The mandate under Section 37 for digital publication requires reliable technological infrastructure and regular institutional audits to ensure stations update their electronic registers in real time.

⁹ Arnesh Kumar, (2014) 8 S.C.C. 273, ¶ 12; The Contempt of Courts Act, 1971, No. 70, Acts of Parliament, 1971 (India).

VIII. CRITICAL JURISPRUDENTIAL INTERPLAY AND OPERATIONAL DILEMMAS

The procedural codification of Chapter V under the BNSS marks an ambitious step toward structured police accountability; however, its practical implementation uncovers deep doctrinal friction with settled constitutional principles. A holistic evaluation reveals three critical operational dilemmas that challenge the statutory equilibrium between executive power and personal liberty.

1. The Handcuffing Conundrum: Statutory Authorisation vs. The *Prem Shankar Shukla* Doctrine

Section 43(3) of the BNSS represents a conspicuous legislative recalibration of physical restraint jurisprudence. For over four decades, the Supreme Court of India maintained a near-absolute constitutional prohibition against routine mechanical restraints. In *Prem Shankar Shukla v. Delhi Administration*, Justice Krishna Iyer declared that to bind a person in chains is *prima facie* unconstitutional, arbitrary, and an assault on human dignity under Articles 14, 19, and 21.¹⁰ This stance was fortified in *Citizens for Democracy v. State of Assam*, where the Apex Court held that no prisoner or arrestee could be handcuffed or fettered—whether in transit, at the police station, or in jail—without prior judicial sanction obtained from an independent Magistrate upon recorded reasons.

By codifying explicit executive discretion under Section 43(3), the BNSS permits an arresting officer to utilize handcuffs, keeping in view the nature and gravity of the offense, for repeat offenders, escape risks, or individuals accused of serious, enumerated crimes (including organized crime, terrorism, offenses against the state, human trafficking, rape, and murder).

- **Circumvention of Magisterial Filter:** The text of Section 43(3) places the subjective discretion to apply mechanical restraints squarely in the hands of the arresting officer at the time of apprehension, relying merely on a contemporaneous entry in the case diary rather than prior magisterial permission.
- **Presumption of Restraint by Charge:** By categorizing offenses where handcuffs are statutorily contemplated, there is a risk that ground-level personnel will equate the

¹⁰ *Prem Shankar Shukla*, (1980) 3 S.C.C. 526, ¶ 26.

nature of the allegation with an automatic license to handcuff, discarding the individualized assessment of escape propensity mandated by the Constitution.

2. The Remand Regime under Section 187: Fragmented Police Custody and Judicial Scrutiny

The statutory obligations of an arresting officer do not conclude upon presenting the suspect before the court under the twenty-four-hour rule (Section 58); they directly condition the legality of initial magisterial detention under Section 187 of the BNSS (corresponding to Section 167 CrPC).

A critical procedural alteration under Section 187(3) is the legislative departure from the longstanding rule in *CBI v. Anupam J. Kulkarni*. Under the CrPC framework, police custody could strictly be authorized only during the first fifteen days of remand; thereafter, the accused could solely be relegated to judicial custody. Conversely, Section 187 allows the fifteen-day police custody to be authorized in parts or spells across an expanded window—either during the initial forty days (for offenses punishable up to ten years) or sixty days (for offenses punishable with death, life imprisonment, or ten years or more).

This fragmented custody regime amplifies the necessity of magisterial vigilance:

- **Scrutiny as an Antidote to Subversion:** Because an accused may face multiple custodial interrogations weeks after the arrest, the Remand Magistrate can no longer treat Section 187 as a routine administrative rubber stamp. The Magistrate is under a positive judicial duty to scrutinize the initial Section 35 checklist, written reasons for arrest, and contemporaneous injury reports under Section 53 before granting any subsequent spell of police custody.
- **Risk of Retaliatory Remand:** The ability of police officers to seek custody in later stages of the investigation could be weaponized to repeatedly destabilize default bail timelines or subject the accused to prolonged psychological pressure, rendering the baseline medical report under Section 53 the only viable safeguard against progressive custodial ill-treatment.

3. Institutionalization of Digital Transparency: Section 37 and Data Privacy Tensions

Section 37 of the BNSS introduces an indispensable modernizing tool by obligating the State to establish district and state-level Police Control Rooms and mandating designated Assistant Sub-Inspectors to maintain digital registers of all arrests. The public display of arrestee details outside police stations through physical and electronic media addresses the pernicious practice of unacknowledged, informal detention (*incommunicado* custody).

However, operationalizing this digital mandate introduces profound institutional hurdles:

- **The Digital Infrastructure Gap:** Grassroots police stations in rural and remote jurisdictions often lack uninterrupted high-speed network access, secure server hardware, and specialized personnel to handle real-time database synchronization. If the digital register is not updated contemporaneously with the physical arrest memo under Section 36, the statutory safeguard becomes redundant.
- **Tension with the Right to Privacy and Informational Self-Determination:** Prominently publishing the names, residential addresses, and alleged offenses of arrestees on electronic boards outside stations directly engages the fundamental Right to Privacy recognized in *K.S. Puttaswamy v. Union of India*. Prior to conviction, an arrestee retains the constitutional presumption of innocence. Indiscriminate digital broadcasting of arrest data in the public square risks permanent reputational injury, social ostracization, and public shaming, running counter to the principles of data minimization and protection of personal liberty.

IX. CONCLUSION

The procedural duties imposed upon arresting officers under Chapter V of the Bharatiya Nagarik Suraksha Sanhita, 2023 reflect an effort to harmonize effective crime investigation with constitutional liberties. By transforming the judicial directives of D.K. Basu and Armesh Kumar into positive statutory obligations under Sections 35, 36, 47, and 48, mandating written justification, and creating digital accountability under Section 37, the BNSS circumscribes arbitrary police discretion. Ultimately, the preservation of personal liberty under Article 21 depends not merely on statutory enactments, but on the rigorous enforcement of these duties by supervising police authorities and the judiciary.