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# Critical Analysis on Section 187 of Bharatiya Nagarik Suraksha Sanhita, 2023

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ABINAYA S.<sup>1</sup>

## ABSTRACT

*The Bharatiya Nagarik Suraksha Sanhita, 2023, introduces significant changes to the Criminal Procedure Code, 1973, particularly in the realm of police custody. This research paper delves into a critical analysis of Section 187 of the BNSS Act, focusing on its impact on the rights of the accused, especially in relation to Articles 20, 21, and 22 of the Indian Constitution.*

*Key areas of exploration include the constitutionality of Section 187(3), which omits the phrase "otherwise than in police custody," potentially leading to extended police detention beyond the 15-day limit. This paper examines the implications of considering the accused's bail status under Section 187(2), analyzing its potential impact on the principles of bail under the CrPC. Furthermore, the research scrutinizes the definition of custody under Section 187(5) BNSS, comparing it with the broader understanding of custody under the CrPC and judicial precedents.*

*By employing a doctrinal research methodology, this paper aims to shed light on the potential challenges posed by Section 187 of the BNSS Act to the rights of the accused and the principles of fair trial. It concludes by emphasizing the importance of striking a balance between the need for effective investigation and the protection of individual liberties, advocating for a cautious and nuanced interpretation of the provisions to safeguard the fundamental rights enshrined in the Constitution.*

**Keywords:** Custody, Fair Trial, Bail, Constitutional Rights, Section 187 BNSS.

## I. INTRODUCTION

Custody holds paramount importance in the realm of criminal law and procedure, especially with the emergence of new legislative Acts, notably the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as BNSS), poised to replace the Code of Criminal Procedure, 1973 in the foreseeable future. This impending transition brings forth significant amendments to criminal procedural laws, with a pivotal focus on the custody of arrested persons during investigations. Section 58 of the BNSS, akin to Section 57 of the CrPC, explicitly stipulates that arrested individuals cannot be held in police custody beyond 24 hours. Section 187 of the BNSS

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assumes a crucial role when investigations extend beyond this initial period, mandating the accused to be presented before a magistrate for the determination of custody. This Section serves as a replacement for Section 167 of the CrPC, introducing noteworthy modifications. While it retains fundamental concepts such as timelines of 60 or 90 days and default bail, it deviates significantly from Section 167.

A key departure lies in Section 187(2) of the BNSS, granting any magistrate the authority to authorize detention, irrespective of jurisdiction. In contrast, sub-Section 3 necessitates a jurisdictional magistrate, allowing detention beyond 15 days but omitting the phrase "otherwise than police custody," thereby implying the extension of police custody. The Section explicitly instructs magistrates to consider the accused's bail status when determining custody. These alterations raise critical questions regarding potential violations of the accused's rights, increased risks of custodial torture, violence, and the potential for evidence fabrication. Consequently, this study aims to conduct a comprehensive and critical analysis of Section 187. It seeks to interpret, compare, and contrast the Section with the existing CrPC provisions, assessing its constitutional validity through the invocation of Articles 20, 21, and 22 of the Constitution, along with scrutiny under international law and conventions.

#### **(A) Research objectives**

1. To assess the changes incorporated under Section 187 BNSS and compare it with Section 167 of CrPC.
2. To critically analyze the constitutional validity of Section 187 (3) BNSS concerning articles 20, 21, and 22 of the Indian constitution.
3. To examine the language and intent of Section 187 (2) BNSS, focusing on the requirement to consider the accused's bail status.
4. To scrutinize the legal definition of custody under CrPC, other statutes, and judicial precedents and explore whether Section 187 (5) introduces any novel concepts regarding custody that deviate from established legal norms.

#### **(B) Research Questions**

The research questions are as follows:

1. Whether Section 187(3) BNSS withstand constitutional scrutiny with regard to Articles 21, and 22 of the Indian Constitution?
2. Whether the consideration of the accused bail status, as required in Section 187(2) BNSS creates a justifiable legal criterion for authorizing the detention, and how it interacts

with the principles of bail under CrPC?

3. Whether Section 187(5) BNSS, specifying the kinds of permissible custody, aligns with the Section 167 of CrPC?

### **(C) Research methodology**

The research methodology adopted in this study is doctrinal in nature. Both primary and secondary sources are used to collect the data such as statutes, conventions, books, journals, articles, web sources, etc. Analytical and exploratory thinking will be involved.

### **(D) Scope and Limitation**

The project is solely focused on conducting a critical analysis of Section 167 of the Criminal Procedure Code and Section 187 of Bharatiya Nagarik Suraksha Sanhita (BNSS) Act, along with other relevant sections pertaining to the aforementioned provisions.

## **II. CONSTITUTIONAL LITMUS TEST: SCRUTINIZING SECTION 187 (3) BNSS**

Section 167 (2) (a) of CrPC provides that the Magistrate may authorize the detention of an accused person beyond 15 days otherwise than in the custody of police, if the Magistrate is satisfied that adequate grounds exist. However, shall not authorize detention for a total period beyond 60 days or 90 days depending on the statutory mandate.<sup>2</sup> While, Section 187 (3) of the BNSS, states that the Magistrate may authorize detention of an accused person beyond 15 days, if the Magistrate is satisfied on the existence of adequate grounds. The important difference lies in the omission of the phrase “*Otherwise than in the custody of police*” in Section 187 BNSS. The omission creates ambiguity and arbitrariness as on the literal interpretation of the Section, it paves way for police custody to extend beyond 15 days till 60 days or 90 days depending upon the nature of offense.<sup>3</sup> This provides an exceptionally greater power to the police during the period of investigation which may be fatal to the rights of the accused persons and fair trial.

### **(A) Analysis of Section 167 (2) of The Code of Criminal Procedure**

Prior to the enactment of the Code of Criminal Procedure (CrPC), Section 167 of the Code of Criminal Procedure, 1898 (the "1898 Code"), governed the maximum period for remanding an accused to custody, whether police or judicial, to 15 days. However, this timeframe often proved insufficient for completing complex investigations, leading to a practice where investigating officers filed "preliminary charge-sheets" after the remand period expired. Subsequently, the State would request the Magistrate to postpone the trial commencement and authorize further

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<sup>2</sup> The Code of Criminal Procedure § 167, 1973.

<sup>3</sup> The Bharatiya Nagarik Suraksha Sanhita, §187, 2023.

remand under Section 344 of the 1898 Code until the investigation concluded and the final chargesheet was filed. Concerns were raised by the Law Commission of India<sup>4</sup> regarding this practice, noting that accused individuals were often held in custody for several months without a final report filed, leading to conflicting judicial opinions regarding the Magistrate's obligation to release the accused if the police report was not filed within 15 days.

As a result, the Law Commission recommended a provision for continued remand beyond 15 days to balance the requirements of thorough investigation with safeguarding individual liberties. It proposed a maximum time limit for detention without filing a police report, drawing parallels with English law where even serious offenders couldn't be indefinitely detained until trial commencement. These recommendations were reiterated in subsequent Law Commission reports,<sup>5</sup> emphasizing the need to prevent the misuse of provisions like Section 344 of the 1898 Code, which allowed for extended remands beyond statutory periods.

These suggestions were incorporated into the drafting of the new CrPC, which replaced the 1898 Code. The Statement of Objects and Reasons of the CrPC emphasized the importance of fair trials, timely investigation, and simplicity in procedures to ensure justice, especially for marginalized communities. Consequently, Section 167(2) of the CrPC was enacted, setting time limits for remanding accused individuals and granting them the right to bail if these limits were exceeded. This provision aimed to compel investigating agencies to act promptly and efficiently, ensuring timely justice delivery and upholding the principles of Article 21 of the Constitution, protecting personal liberty against arbitrary detention. The courts, in interpreting such provisions, have emphasized the importance of prioritizing personal liberty and expeditious investigations over technical formalities.

In landmark cases such as *Central Bureau of Investigation v. Anupam J. Kulkarni*<sup>6</sup> and *Buddha Singh v. State of Punjab*<sup>7</sup>, the Supreme Court has held that there cannot be any police custody beyond 15 days from the date of arrest as per Section 167 of the CrPC. But such custody cannot further be held to be a bar for invoking a fresh remand to such custody like police custody in respect of an altogether different case involving the same accused". However, in the case of *Central Bureau of Investigation v. Vikas Mishra @ Vikash Mishra*, the Supreme Court stated that the decision taken in *Anupam Kulkarni* requires reconsideration.<sup>8</sup> It requires reconsideration as no accused is permitted to play with the investigation and/or the court

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<sup>4</sup> Law Commission Report No 14 on Reforms of the Judicial Administration (Vol II, 1948, PP 768-760).

<sup>5</sup> Law Commission Report No.41, The Code of Criminal Procedure, 1898 (Vol 1, 1969, pp 76-77.)

<sup>6</sup> *Central Bureau of Investigation v. Anupam J Kulkarni* (1992) 3 SCC 141.

<sup>7</sup> *Buddha Singh v. State of Punjab* (2000) 9 SCC 266.

<sup>8</sup> *Central Bureau of Investigation v. Vikas Mishra @ Vikash Mishra*, 2023 LiveLaw SC 283, para 7.7.1

process. The Right of custodial interrogation or investigation is significant to unearth the truth. If an accused is purposely and successfully trying to frustrate the judicial and custodial process, then the police custody beyond 15 days could be granted.<sup>9</sup> The maxim of *commodum ex injuria sua nemo habere debet*<sup>10</sup> is attracted i.e. no one cannot be allowed to benefit from his own wrongful act and the maxim “*actus curiae neminem gravabit*” i.e. due to Court proceedings or acts of court, no party should suffer is applicable.<sup>11</sup> A police officer is not empowered to keep an arrested person in custody a minute longer than is necessary for the purpose of investigation and it does not give him an absolute right to keep a person in custody till 24 hours.<sup>12</sup> In the case of *R.K. Nabachandra Singh v. Manipur Administration*<sup>13</sup>, the High Court held that it is the duty of the police to produce the accused forthwith before the Magistrate, if the police officer considers that the investigation cannot be completed within 24 hours. If the police officer fails to produce the arrested person within 24 hours, then the officer shall be held guilty of wrongful detention.<sup>14</sup>

The main purpose of providing right of the accused to be brought before the magistrate within a period of not more than 24 hours of arrest was to deter arrest and detention aimed at coercing confessions or compelling individuals to provide information, to avoid misuse of police stations as makeshift prisons and to ensure prompt access to a judicial officer separate from the police or bail or discharge matters.<sup>15</sup>

As per the literal interpretation of the Section 167 (2) CrPC, it is notable that police custody detention is typically viewed unfavorable by the law. Section 167 is designed to shield the accused from potential misconduct by “certain overzealous and unscrupulous police officers”<sup>16</sup> If warranted by circumstances, individuals in judicial custody can be transferred to police custody, or vice versa, within the specified time limit of 15 days, as provided under Section 167(2) of CrPC.<sup>17</sup> The Courts have provided narrow and strictest interpretation to this section wherein during the course of investigation it is disclosed that more serious offences were committed in relation to the same occurrence then, police is not entitled for further custody

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Indore Development Authority v. Manoharlal* (2020) 8 SCC 129; *Mrutunjay Pani v. Narmada Bala Sasmal* AIR 1961 SC 1353, para 5

<sup>11</sup> *Indore Development Authority v. Manoharlal* (2020) 8 SCC 129; *Bharat Damodar Kale v. State of A.P.* (2003) 8 SCC 559; *Rashmi Kumar* (1997) 2 SCC 397.

<sup>12</sup> *State v. Ram Autar Chaudhry* AIR 1955 All 138.

<sup>13</sup> *R. K. Nabachandra Singh v. Manipur Administration* AIR 1964 Gau 39.

<sup>14</sup> *Sharifbai v. Abdul Razak* AIR 1961 Bom 42.

<sup>15</sup> *Mohammed Suleman v. King Emperor* (1925-26) 30 CWN 985, 987.

<sup>16</sup> *Central Bureau of Investigation v. Anupam J Kulkarni* (1992) 3 SCC 141.

<sup>17</sup> *Kosanapu Ramreddy v. State of Andhra Pradesh and Ors*, AIR 1994 SC 1447.

beyond 15 days on the grounds of addition of offences.<sup>18</sup> If such extension is entertained then, it would enable the police to continually add more serious offenses at different stages and repeatedly seek further detention in police custody. This would gravely undermine the fundamental purpose of Section 167.<sup>19</sup> However, this limitation does not apply to a different-occurrences in which the complicity of the arrest is disclosed as it would amount to different transaction altogether.<sup>20</sup> Moreover, the remand of an accused who is arrested at the stage of further investigation has to be dealt as per provision 167 (2) of CrPC and police cannot be denied the opportunity to have the police custody.<sup>21</sup> Recently, the Supreme Court in the case of *V. Senthil Balaji v. State*<sup>22</sup>, clarified that under Section 167(2), the 15- day period of police custody can encompass shorter periods of custody sought throughout the entirety if a 60 or 90-day investigation.

The Court's rationale was based on the phrase "time to time"<sup>23</sup>, which clearly indicates that the authority to grant custody is not limited to the initial 15 days of remand but it extends throughout the entire investigation period. This provision does not pertain to judicial custody as opposed to police custody; rather, it signifies that custody may be required as new materials emerge during the course of the investigation, necessitating the accused's confrontation, subject to the Magistrate's satisfaction. The Court emphasized that a proviso must be interpreted in light of the language used in the main provision, not the other way around, thereby differing from the precedent *Central Bureau of Investigation v. Anupam J Kulkarni*.

The judgement further elaborates that within this provision lies the foundation of liberty, enabling further investigation when it is determined that such cannot be completed within 24 hours. This is not merely a procedural aspect but contains inherent substantive elements. Framed within the framework of Articles 21 and 22(2) of the Constitution of India, 1950, it is introduced to ensure fairness. By limiting custody to 24 hours, the provision aims to acknowledge and respect the liberty of the accused, with an independent authority in the form of the Magistrate tasked with overseeing this aspect. The Magistrate's exercise of such power is not impeded by any form of jurisdictional constraint. Merely, by virtue of designation, the Magistrate assumes such authority.

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<sup>18</sup> *Budh Singh v. State of Punjab* (2000) 9 SCC 266.

<sup>19</sup> *Central Bureau of Investigation v. Anupam J Kulkarni* (1992) 3 SCC 141.

<sup>20</sup> *S. Harisimran Singh v. State of Punjab* 1894 CriLJ 253.

<sup>21</sup> *CBI v. Dawood Ibrahim Kaskar* AIR1997 SC 2424.

<sup>22</sup> *Senthil Balaji v. The State* 2023 INSC 677.

<sup>23</sup> *State of Rajasthan v. Basant Agrotech (India) Ltd.*, (2013) 15 SCC 1.

### **(B) Interpretation of section 167 CrPC & Its Constitutionality**

The legislative intent for introducing Section 167 (2) CrPC in the year 1978 was to emphasize the importance of completing investigations within a specified time frame by providing maximum period. There are two main objects behind this section, “one is to ensure expeditious investigation and a fair trial and another is to set down a rationalized procedure that protects the interests of the indigent sections of the society. This serves as a limb of Article 21 i.e., Right to life and personal Liberty<sup>24</sup>. It also incorporates the presumption of innocence. It imposes a duty on investigating agencies to expedite investigations to prevent prolonged incarceration of suspects. Failure to do so results in the accused being released. This right is absolute and unequivocal, benefiting the suspect.”<sup>25</sup> This provision creates a fine balance between individual liberty and adequate investigation. The prescribed time limit enables an accused individual to secure release for incarceration, subsequently expediting trial proceedings. Additionally, it facilitates thorough investigations through the utilization of police custody.

Article 21 of the Indian Constitution states that “*no person shall be deprived of his life or personal liberty except according to procedure established by law*”. The procedure cannot be arbitrary, unfair or unreasonable.<sup>26</sup> The inception of Section 167 (2) CrPC and the provision of “default bail” within its proviso are intricately connected to Article 21, representing a legislative embodiment of the constitutional principle that no individual shall be detained except as per legal procedures. It was even observed that right to bail cannot be suspended even during pandemic situation, emphasizing that the primacy is given to the accused’s right to liberty over the state’s right to continue the investigation and submit a charge-sheet.<sup>27</sup>

As a result of the entitlement provided by this provision, courts must duly uphold it, rendering any detention beyond this period unquestionably unlawful and violating the individual's liberty. Hence, it is incumbent not only upon the investigating agency but also upon the courts to ensure that the accused benefits from the provisions of Section 167(2).

Section 164 is in line with the Article 22 of the Indian Constitution whereby it adheres to the constitutional mandate of producing the arrested person in custody before a Magistrate within a period of twenty-four hours<sup>28</sup> and the arrested person shall not be in custody beyond the statutory mandate without the authority of a magistrate<sup>29</sup>. The accused person has all the right

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<sup>24</sup> The Indian Constitution, art 21, 1950.

<sup>25</sup> Satender Kumar Antil v. Central Bureau of Investigation (2022) 10 SCC 51.

<sup>26</sup> Maneka Gandhi v. Union of India (1978) 1 SCC 248.

<sup>27</sup> S. Kasi v. State (2021) 12 SCC 1.

<sup>28</sup> The Criminal Procedure Code, §57, 1973.

<sup>29</sup> The Criminal Procedure Code, §164 (a) (b) 1973.



to be informed of the ground of such arrest, right to consultation and defend himself/herself by legal practitioner of one's choice, adhering to the directives outlined in *D.K. Basu v. Satet of West Bengal*.<sup>30</sup> Therefore, the scheme of Section 167 of CrPC is unambiguous and it is intended to protect the accused person from the methods which may be adopted by some overzealous and unscrupulous police officers, sometimes influenced by the vested interests. However, it is equally acknowledged that while police custody is not the sole aspect of an investigation, it remains a crucial necessity, especially in the probing of severe and grave crimes. Recognizing this, the legislature has permitted limited police custody.<sup>31</sup>

### **(C) Analyzing Section 187(3) in Light of Precedents and Section 164 CrPC**

The golden or cardinal rule of interpretation of any statutory provision, is to read the statutes literally<sup>32</sup> as intended by the legislature<sup>33</sup> and given their ordinary<sup>34</sup> natural meaning<sup>35</sup>. An act of judicial surgery, when there is no requirement for a purposive interpretation should be avoided unless the natural meaning of the word leads to an interpretation that is contrary to the object of the Act, violative of the Constitution, makes the provision unreasonable and arbitrary.<sup>36</sup> It is also well established that the proviso of a statute must be given interpretation limited to the subject matter of the enacting provision<sup>37</sup> i.e., "*words are dependent on the principal enacting words to which they are tacked as a proviso, they cannot be read as divorced from their context.*"<sup>38</sup>

The section clarifies whether the 15 days of police custody should occur initially or be spread out over the entire 60 or 90-day investigation period, as interpreted differently in various judgments. It unequivocally states that police custody cannot exceed 15 days but can be sought either continuously or intermittently within the 40-day period for a 60-day detention and within the 60-day period for a 90-day detention, depending on the circumstances of each case. Moreover, the magistrate may extend the accused's detention beyond 15 days, subject to the statutory limit set forth in Section 187(3), if sufficient grounds exist.

However, the removal of the phrase "otherwise than in the custody of police" raises questions about whether police custody can be sought for the entire 60/90-day period, creating ambiguity

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<sup>30</sup> *D.K. Basu v. State of West Bengal* (1997) 1SCC 416.

<sup>31</sup> *Senthil Balaji v. The State* 2023 INSC 677.

<sup>32</sup> *Kanai Lal Sur v. Paramnidhi Sadhukhan* AIR 1957 SC 907.

<sup>33</sup> *Aswini Kumar Ghose v. Arabinda Bose* (1952) 2 SCC 237.

<sup>34</sup> *Jugalkishore Saraf v. Raw Cotton Co. Ltd* AIR 1955 SC 376.

<sup>35</sup> *Rakesh Kumar Paul v. State of Assam* (2017) 15 SCC 67.

<sup>36</sup> *Ibid.*

<sup>37</sup> *Dwarka Prasad v. Dwarka Das Saraf* (1976) 1 SCC 128.

<sup>38</sup> *Thompson v. Dibdin* 1912 AC 533 (HL).

in the law's interpretation. Considering precedent, Section 187(3) must be read in conjunction with Section 187(2), which establishes the maximum 15-day period for police custody, while Section 3 pertains to judicial custody akin to Section 164 of the CrPC.

Construing the provision in favor of police custody for the entire 60/90 days may jeopardize the accused's life and personal liberty, contravening Article 21's requirement for reasonable legal procedures. Fundamental rights must not be infringed upon by legislation, as upheld in numerous judgments<sup>39</sup> Nevertheless, the Constitution of India as well as International human rights to arrest any person as a part of its primary role of maintaining law and order.

Therefore, while analyzing the section, we must consider the Law Commission's fundamental principles<sup>40</sup>:

1. Ensuring accused persons receive a fair trial adhering to the principles of natural justice.
2. Preventing delays in investigations and trials, which harm both individuals and society.
3. Ensuring legal procedures are straightforward and provide equitable treatment, especially for economically disadvantaged sections of society.

If the legislative intention were to extend police custody to 60 or 90 days, it would impose a significant burden on constitutional rights, particularly those of the accused. Such an extension could result in severe human rights violations, including the heightened risk of torture, coerced confessions, and detainee abuse, which is especially concerning given India's history of custodial violence.<sup>41</sup> Furthermore, prolonging police custody could potentially deprive individuals of fundamental legal rights, such as the right to a speedy trial and access to legal counsel, thereby undermining due process. It could also exacerbate the strain on an already overburdened judicial system, as evidenced by the disproportionately high number of undertrial detainees and the alarming delays in case adjudication. Extended custody periods may also increase the likelihood of false confessions due to pressure, intimidation, or exhaustion, leading to wrongful convictions and injustices, particularly impacting marginalized communities who may lack resources and representation.

Moreover, data reveals that a significant portion of undertrial prisoners belong to marginalized communities, highlighting the potential for discriminatory outcomes. Instances of abuse or mishandling of suspects during prolonged custody could further diminish public trust in law

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<sup>39</sup> The Indian Constitution, art 13 (2), 1950; *Maneka Gandhi v. Union of India* (1978) 1 SCC 248.; *D.K. Basu v. State of West Bengal* (1997) 1SCC 416.

<sup>40</sup> Law Commission Report No.41, *The Code of Criminal Procedure*, 1898.

<sup>41</sup> Project 39A, *Death Penalty India Report*, Volume II, 2016 pp 20 onwards; *National Campaign against Torture*, India Annual Report on Torture-2002, 2021

enforcement agencies, ultimately eroding confidence in the legal system. Overall, such measures would severely undermine the judicial process and constitute a grave violation of the law, posing significant threats to justice, fairness, and human rights which is violative of Article 21 of the Indian Constitution.<sup>42</sup>

Considering these factors, there are only two plausible interpretations. Firstly, Section 164(3) of the CrPC specifically addresses extensions to judicial custody beyond the initial 15 days. Secondly, any extension of police custody beyond this period should be exceptionally rare and permitted only in the most compelling circumstances, as determined by the Magistrate based on sufficient and reasonable grounds. This second scenario must be approached with the utmost caution to prevent serious implications and threats to the integrity of justice as a whole.<sup>43</sup>

### III. BAIL STATUS CONSIDERATION IN SECTION 187 (2) BNSS

A part of Section 167 (2) of CrPC states that “the Magistrate to whom an accused is forwarded, may, whether or not he/she has jurisdiction, from time to time authorize the detention of the accused in such custody as the Magistrate thinks fit” whereas under Section 187 (2), “A magistrate to whom an accused is forwarded, may whether has jurisdiction or not *“taking into consideration whether such person has not been released on bail or his bail has been cancelled”* authorize from time to time, the detention of the accused in such custody as the Magistrate thinks fit. ”. Question arises that if already bail is granted or bail granted and not cancelled, where is the requirement for the police officer to forward the accused to the Magistrate arises.<sup>44</sup> The language is also unclear and it’s unclear as to how the magistrate’s decision on remand is sought to be guided, based on the bail status of the accused.<sup>45</sup> Section 187 (2) in continuation states “that Magistrate may authorize custody for a term *not exceeding fifteen days in the whole, or in parts, at any time during the initial forty days or sixty days out of detention period of sixty days or ninety days as the case may be*”. It is to be noted that the initial time period for detention is not provided in Section 167 (2) of CrPC.

According to Section 167(2) of the CrPC, “a Magistrate cannot authorize the detention of an accused in police custody beyond 15 days to safeguard the rights of the accused and limit

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<sup>42</sup> The 247<sup>th</sup> Report on BNSS, 2023, Department-related Parliamentary Standing Committee on Home Affairs, November 2023.

<sup>43</sup> D.K. Basu v. The State of West Bengal (1997) 1 SCC 416; Nilabati Behera v. State of Orissa (1993) 2 SCC 746; State of Orissa (1993) 2 SCC 746; State of Madhya Pradesh v. Shyamsunder Trivedi (1995) 4 SCC 262; Parakash Kapadia v. Commissioner of Police (Ahmedabad City) 2014 SCC online Guj 11365.

<sup>44</sup> The 247<sup>th</sup> Report on BNSS, 2023, Department-related Parliamentary Standing Committee on Home Affairs, November 2023, Dissent Note pp 11 of 16.

<sup>45</sup> A substantive Analysis on Bharatiya Nagarik Suraksha Sanhita Act , 2023 and Bharatiya Sakshya Act , 2003: A Substantive Analysis, Project 39A, National Law University Delhi, October 2023, pp 55.

prolonged police access”<sup>46</sup>. However, “the Magistrate does possess the power to order detention beyond this period under circumstances other than police custody. Once the accused has been in custody for either 90 days or 60 days, as applicable, an indefeasible right to be released on bail accrues in favour of accused”<sup>47</sup>, commonly referred to as default bail or statutory bail. This provision ensures that the investigation process is not misused by police or investigating agencies to indefinitely detain individuals by prolonging investigations.<sup>48</sup> The right to default/statutory bail persists even if regular bail application is pending adjudication. The entitlement to default bail must be granted as a matter of indefeasible right <sup>49</sup>once the conditions under Section 167 (2) are satisfied. It is not just a statutory right but also a fundamental right to personal liberty<sup>50</sup> as upheld by the Supreme Court<sup>51</sup>. Both house arrest and transit remand are included in the calculation of custody periods under Section 167 CrPC.

In the 247<sup>th</sup> Parliamentary Standing Committee report, questions were raised as to what prompted the drafting committee to set 40 days and 60 days as the maximum periods for granting police custody? This is not an isolated concern. It is being stated in the report that with this provision in place, no accused would be eligible for bail until the expiration of 40 days or 60 days, depending on the case. Such a scenario could lead to numerous consequences. Alternatively, it should be explicitly stated that mere filing of a petition by a policer officer for police custody will not be sufficient grounds for the refusal of bail. This could be included as an addition to the third proviso in Section 482.<sup>52</sup> Otherwise, as held in the catena of judgements and with reference to Section 167 (2) CrPC, the Default /Statutory Bail can be claimed only after 60 or 90 days depending on case-to-case basis.

#### IV. CUSTODY DEFINED: INTERPRETING SECTION 187 (5) BNSS

Section 167 of the CrPC, utilizes the terminology of ‘custody’ and ‘*other than in custody of the police*’, typically allowing for either police or judicial custody. However, Section 187 BNSS introduces a novel provision following sub section 5. The proviso states that “*no person shall be detained otherwise than in police station under police custody or in prison under Judicial custody or place declared as prison by the Central government or State government.*”<sup>53</sup>

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<sup>46</sup> Gouri Shankar Jha v. State of Bihar (1972) 1SCC 564.

<sup>47</sup> The Code of Criminal Procedure, §167 (2) CrPC 1973.

<sup>48</sup> M. Ravindran v. Directorate of Revenue Intelligence (2021) 2 SCC 485, para 11.

<sup>49</sup> *Ibid.*

<sup>50</sup> Uday Mohanlal Acharya v. State of Maharashtra (2001) 5 SCC 453, para 13.

<sup>51</sup> Bikramjit Singh Acharya v. State of Punjab (2020) 10 SCC 616, para 29.

<sup>52</sup> 247<sup>th</sup> Report on BNSS, 2023, Department-related Parliamentary Standing Committee on Home Affairs, November 2023, Dissent Note pp 11 of 16.

<sup>53</sup> The Bharatiya Nagarik Suraksha Sanhita, §187 (5) proviso, 2023.

Nonetheless, the proviso retaining that “*if the individual is a woman under eighteen years of age, the detention must be permitted in the custody of a remand home or recognized social institution*”, remains unchanged from Section 167 CrPC.

It is crucial to discern the disparity between custody and detention, as they are distinct concepts not explicitly defined within CrPC. This section pertains to the Magistrate’s authorization of detaining the accused in custody. Custody can pertain to either the court or the investigating agency, whereas detention is typically carried out solely by the investigating agency before the accused is presented before the Magistrate. When detention is authorized, it effectively transitions into custody.<sup>54</sup> This section specifically refers to physical custody of the arrested person.

This section restricts the interpretation of custody to lockups in police stations and jails/prisons, excluding other forms of custody and limiting a broader interpretation. However, recent court interpretations have expanded the notion of custody under Section 167 of the CrPC to include custody by investigating agencies like the Enforcement Directorate<sup>55</sup> and the Central Bureau of Investigation<sup>56</sup>, transit remands<sup>57</sup> for interstate transfers of accused individuals, and even house arrest. Despite the ongoing necessity for these various forms of custody, their exclusion from permissible custody under Section 187 may have detrimental effects in practice. This could lead to situations where an accused's liberty is curtailed without contributing to default bail eligibility, as it would not be considered 'custody' under Section 187. Additionally, the Supreme Court has clarified that 'custody' under Section 167 CrPC encompasses custody by other investigating agencies besides the police alone<sup>58</sup>. This interpretation is in line with the recommendations of the 37th Law Commission report, which emphasized that Section 167 should not be narrowly construed to apply only to police custody<sup>59</sup>. However, it's important to note that enforcement officials are distinct from police officers, as statements made to the latter may not be admissible as evidence before trial courts under the CrPC.<sup>60</sup> As per the Statute’s language, custody is limited to police stations by police officers and to prisons for judicial custody, potentially excluding other agencies from the scope of Section 187.

## V. SUGGESTION AND CONCLUSION

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<sup>54</sup> Sundeep Kumar Bafna v. State of Maharashtra (2014) 16 SCC 623.

<sup>55</sup> Senthil Balaji v. The State 2023 INSC 677.

<sup>56</sup> Gautam Navlakha v. National Investigation Agency 2021 SCC online SC 382.

<sup>57</sup> *Ibid.*

<sup>58</sup> Senthil Balaji v. The State 2023 INSC 677.

<sup>59</sup> Law Commission Report No.37 on the Code of Criminal Procedure, 1889, February 1969.

<sup>60</sup> Vijay Madanlal Choudhary v. Union of India (2022).

The author of this paper asserts that Section 187(3) of the BNSS should be comprehensively examined alongside other subsections within the Section. Notably, Section 187(2) outlines a specific time frame for police custody, capped at 15 days in total or as part of a 40/60-day period. This interpretation aligns with Section 167 of the CrPC, thereby ensuring compliance with Articles 21 and 22 of the Indian Constitution while effectively balancing the arrest process with the protection of individual liberty. If the legislative intent was to extend police custody to 60/90 days, it should only be invoked exceptionally, with the magistrate's discretion, to avoid infringing upon Articles 21 and 22. However, there remains uncertainty regarding the inclusion of the phrase "taking into consideration whether such person has not been released on bail or his bail has been cancelled."

Default/statutory bail under Section 167 is akin to the provision after 60/90 days. The issue arises regarding regular bail, where the initial 40 or 60 days may preclude bail application filing. It's imperative to introduce a provision stipulating that mere police custody application shouldn't warrant bail rejection under this section. Section 187(5) narrowly defines custody, limiting it to police stations by police officers and prisons for judicial custody, excluding house arrest and other investigative agencies like ED and CBI. The author suggests clarifying the wording of Section 167 of the CrPC to reduce ambiguity in judgments and interpretations regarding the 15-day remand, either wholly or partially decided by the legislature.

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