DECODING THE NEW 'MADE IN INDIA' CODE OF CRIMINAL PROCEDURE: BHARATIYA NAGARIK SURAKSHA SANHITA, 2023

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Introduction

Historically, the criminal justice system in India was governed by the Code of Criminal Procedure, 1898. Post-independence, the Law Commission of India suggested an overhauling of the criminal procedure which led to the 1898 Code being replaced by the Code of Criminal Procedure, 1973 ("**CrPC**"), with the aim to improve the criminal procedure and justice system in the country.

The Government of India on August 11, 2023 introduced the Bharatiya Nyaya Sanhita, 2023 (New Penal Code), the Bharatiya Sakshya Bill, 2023 (New Evidence Act) and Bharatiya Nagarik Suraksha Sanhita, 2023 ("**BNSS**") (New Code of Criminal Procedure) in the Lok Sabha (lower house of the Parliament) with the stated objective of repealing pre-independence, 19th century colonial-era criminal laws, and as a mark of 75 years of Independence[1].

The BNSS in particular was introduced with the aim to provide for a faster and more efficient justice system to address the issues of delay in delivery of justice due to complex procedures, large pendency of cases in Courts, low conviction rates, low level of use of technology in legal system, delays in investigation, and inadequate use of forensics.[2]

On August 18, 2023, the Chairman of the Rajya Sabha (upper house of the Parliament), in consultation with the Speaker of the Lok Sabha, referred the BNSS to the Departmental Parliamentary Standing Committee on Home Affairs ("**Standing Committee**"), for examination and report within three months.

The Standing Committee presented its 247th report to the Rajya Sabha on November 10, 2023. Notably, the Standing Committee notes that BNSS does not violate the provisions of Article 348 of the Constitution (which provides that all Bills and Acts shall be in the English Language) as the text of the Bill remains in English.

In view of the recommendations of the Standing Committee, the new bills were withdrawn by the government and reintroduced in the Lok Sabha on December 12, 2023 with certain amendments as suggested by the Standing Committee. The Lok Sabha passed the bill on

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[1] See Press Release dated August 11, 2023 issued by Ministry of Home Affairs. Available at https://pib.gov.in/PressReleseDetail.aspx?PRID=1947941.
[2] Statement of Objects and Reasons of the BNSS.

December 20, 2023 and the Rajya Sabha passed the bill on December 21, 2023. The bills are now awaiting presidential assent.

The present article provides readers with a broad overview of some of the key changes that have been brought to the criminal procedure.

Key Features of BNSS

1. Certain new procedures pertaining to the registration of First Information Reports (FIRs).

1.1 Zero FIR

A critical change in so far as the registration of FIRs are concerned is the introduction of the concept of "Zero FIR".[3] A Zero FIR is an FIR registered at any police station, regardless of whether the particular police station has jurisdiction or not. Once the Zero FIR is registered, the concerned police station has to transfer the said FIR to the police station which has jurisdiction to investigate the case.[4]

The inclusion of Zero FIR was recommended by the Justice J.S. Verma Committee on Anti-Rape laws in the aftermath of Nirbhaya incident.[5] Pursuant to which, an advisory was issued by the Government of India on May 10, 2023 to register Zero FIRs but a provision for registration of Zero FIR was never included in the CrPC.[6]

Despite the above advisory, the investigating authorities often refuse to register Zero FIRs leading to delays in investigation and loss of evidence.

The BNSS now provides statutory backing to the concept of Zero FIR and makes it mandatory for the police station to register FIR where information regarding commission of a cognizable offence is received, irrespective of whether it has jurisdiction or not.

This provision is crucial as it is one of the ways by which the government seeks to tackle the issue of delays including delay in apprehending the accused and delay in recovery of evidence especially in cases where forensic evidence is involved or where there is a possibility of destruction or tampering with documents.

1.2 Registration of FIR based on complaints/information received through electronic communications

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[3] See Cl. 173(1) of BNSS, *"173.(1)* ***Every information relating to the commission of a cognizable offence, irrespective of the area where the offence*** *is committed may be given orally or by electronic communication and if given to an officer in charge of a police station…".*

[4] *Union of India v. Ashok Kumar Sharma*, (2021) 12 SCC 674, para 84.

[5] Justice J.S. Verma, *et. al*., Report of the Committee on Amendments to Criminal Law, (available at: https://spuwac.in/pdf/jsvermacommittereport.pdf, last visited on September 10, 2023).

[6] Letter from Ministry of Home Affairs to Additional Chief Secretary/Principal Secretary (Home) regarding registration of FIR irrespective of territorial jurisdiction and Zero FIR (available at: https://www.mha.gov.in/sites/default/files/AdvisoryFIR-290513.pdf, last visited on September 10, 2023).

Another welcome change in the BNSS is that it provides that FIRs can be registered via electronic communication (as prescribed) and it shall be taken on record on being signed within three days, by the person giving such information.[7]

An important step in implementing this provision would be to update and upgrade the police stations with necessary IT infrastructure and digitization and to ensure that email ids and other relevant details of every police station is available in public domain.[8] Further, it may be helpful to have government designated email addresses for investigating officers and police stations. This will ensure that a party is assured that they are dealing with a verified address on communications that have come from the police. It may be necessary for the government to ensure that there is a nodal person of contact/in-charge who would be responsible for complaints received by electronic communication.

It is however not clear how the police are expected to act forthwith upon receipt of information pertaining to the commission of a cognizable offence through electronic communication when the person giving such information has three days to sign the same and the electronic communication would have any sanctity only upon such signature. This could be resolved if certain safeguards are provided like insisting on the informant to submit his/her details including his identity card.

1.3 Preliminary inquiry

Clause 173 (3) of the BNSS provides statutory force to preliminary inquiry, which till date has been found in only some police regulations/manuals. Preliminary Inquiry is limited to cognizable offences punishable with imprisonment of three years or more but less than seven years. It has to be carried out in a time-bound manner i.e., within 14 days from receipt of information.

The Supreme Court in *Lalita Kumari v. Government of India* had held that when an information relating to a cognizable offence is received then it is mandatory for the police to register an FIR. However, the BNSS provides that a preliminary inquiry can be conducted to determine whether *prima facie* case is made out for registration of FIR even upon receipt of information of commission of cognizable offence. This is contrary to the direction of the Supreme Court which held that preliminary inquiry will be conducted only to ascertain whether cognizable offence is disclosed or not and not whether a prima facie case is made out or not. The judgment specifically barred preliminary inquiry in cases where the commission of cognizable offence is disclosed in the information.

Moreover, the requirement of preliminary inquiry to determine *prima facie* case would mean that the investigating agency can determine whether any case is made out or not even prior to investigation as per the provisions of BNSS. This would allow them discretion to refuse registration of FIR even upon disclosure of cognizable offence. The provision can be misused

[7] See Cl. 173 of the BNSS.
[8] On March 14, 2023, the Union Minister of State for Home informed the Lok Sabha that there are only 1.72 lakh computers in the country, however, spread unevenly i.e., Delhi's 225 police stations have as many as 9,472 computers, whereas Assam's 329 police stations have only 226 computers.

to harass victims / informants by giving wide discretion to investigating agency to refuse registration of FIR prior to investigation. This would also result in ante-dated FIRs.

1.4 Additional powers for attachment and forfeiture of property

It is interesting to note that BNSS seeks to provide Magistrate with powers to attach property identified as 'proceeds of crime'[9]. The powers are similar to those granted to the Directorate of Enforcement and Adjudicating Authority under the Prevention of Money-Laundering Act, 2002 ("**PMLA**"), however *sans* any safeguards under the PMLA.

The exercise of powers granted under BNSS is not restricted to schedule of offences but may cover all offences under the IPC. The use of the terms *"result of criminal activity"* gives the power significant latitude. Further, like under PMLA the power includes not just tracing the property but also attaching any equivalent of the property.

In addition to the powers that existed with the Magistrate to attach under the CrPC,[10] the magistrate may now attach properties. The Magistrate may do so upon an application of an investigating officer giving reasons to believe that the property is derived or obtained from a criminal activity or commission of offence. The same can be done in the following circumstances:

(i) The magistrate may direct attachment of property found to be 'proceeds of crime' after hearing all parties concerned.[11]

(ii) The magistrate may also pass an *ex parte* interim order attaching property if the magistrate is of the opinion that issuing notice to the owner of the property for attachment will defeat the object of the attachment or seizure.[12]

(iii) Once the magistrate determines that the property in question is a proceeds of crime, it will direct the District Magistrate to rateably distribute the property amongst those who were affected by the crime.

This provision comes with even less safeguards than the PMLA. Under the PMLA, an interim attachment by the Directorate of Enforcement has to be confirmed by an Adjudicating Authority appointed under the Act. For confirmation of attachment, a detailed complaint is required to be filed by the Directorate of Enforcement providing reasons for attachment. After considering the complaint and hearing the Directorate of Enforcement as well as the person whose property is being attached, the Adjudicating Authority has to provide 'reasons to believe' for confirmation of the attachment. This attachment is then subject to the decision of the Special Court which will determine after a detailed trial including recording of evidence

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[9] See Cl. 111 (c) of the BNSS which defines proceeds of crime as *"any property derived or obtained directly or indirectly, by any person as a result of criminal activity (including crime involving currency transfers) or the value of any such property."*.
[10] See Sections 83 and 105C(1) of the CrPC.
[11] See Cl. 107(2) of the BNSS.
[12] See Cl. 107(5) of the BNSS.

whether an offence of money laundering under the PMLA has been made out or not and the property is involved in money laundering or not.

None of the above safeguards have been provided in BNSS. BNSS gives the magistrate unbridled power to not just attach but also dispose off such property before arriving at any decision on the guilt of the accused. It may be worthwhile to note here that the Supreme Court in *Vijay Madanlal Choudhary v. Union of India*, 2022 SCC Online SC 929 had upheld the provision of attachment under the PMLA on the ground that the attachment can only be done after following these safeguards. Without the safeguards, this provision under the BNSS may not be able to withstand judicial scrutiny.

The exercise of power of interim attachment is a drastic measure. The BNSS empowers the Magistrate to pass an order of interim attachment without the requirement for the magistrate to give an opportunity to the accused to be heard. Surprisingly, an attachment order can also be passed by a court which does not even have the jurisdiction to try the matter i.e., a court which has jurisdiction to take cognizance of the matter or commit the matter for trial.

The constitutionality of such a provision may require to be relooked as such a provision would allow a magistrate to attach the property of the accused irrespective of whether the person accused of a crime has actually been held guilty of such crime or not. The attachment and distribution is allowed even at the stage of investigation. The provision is akin to punishment before trial as the person is deprived of his property without following procedure established by law. Moreover, this may overlap with the power of Directorate of Enforcement to attach properties under the PMLA.

Another change with respect to attachment of property is that the Court upon a written request from a police officer (not below the rank of Superintendent of Police or Commissioner of Police) can initiate the process of requesting assistance from a Court or authority in a contracting state for attachment or forfeiture of a proclaimed offender.[13] The intention behind this provision seems to be either to secure the presence of fugitives or confiscate properties of fugitives who are evading summons/investigation/trial and who have properties outside the country. However, there is a possibility of overlap between this provision and the Fugitive Economic Offenders Act, 2018, which also provides for requesting contracting states for execution of order of confiscation of property of fugitive offenders. While the presumption is in favour of special law, when the legislature enacts a law it is believed to know the state of law already existing.

1.5 Changes with respect to the provisions pertaining to arrest

Sections 41 and 41A CrPC have now been merged into one provision i.e., Clause 35. No significant improvements have been made with respect to the rights of arrestee except that now an arrestee can inform any person other than just a friend and relative, which could also include his lawyer.[14] As regards, the arrest of a woman, the BNSS places an obligation upon the police to inform the relatives of a woman where she is being held and information about such arrest.[15]

[13] See Cl. 86 of the BNSS.
[14] See Cl. 36 of the BNSS.
[15] See proviso to Cl. 43(1) of the BNSS.

The Bill also specifically allows handcuffing of certain categories of offenders like repeat, habitual offenders etc.[16] However, the Standing Committee observed that 'economic offences' should not be included in this category, as the term 'economic offences' encompasses a wide range of offences. Therefore, it may not be suitable for blanket application of handcuffing in all cases falling under this category. Based on this recommendation the term 'economic offences' has been removed from BNSS.

1.6 Amendment in terms of Satender Kumar Antil v. CBI, [(2022) 10 SCC 51]

Prior to 2022, the Courts insisted on arresting the accused at the time of filing of the charge-sheet by police and taking cognizance.[17] This was because of certain judicial precedents which interpreted Section 170 of the CrPC in a particular manner. The judgments pivoted on the language of Section 170 of the CrPC to hold that upon completion of investigation, if there is sufficient evidence or reasonable grounds, then the officer *"shall forward the accused **under custody** to a Magistrate empowered to take cognizance of the offence and to try the accused and commit him to trial*".

Fortunately, the correct position with respect to Section 170 of the CrPC was clarified by the Supreme Court in *Siddharth v. State of U.P.*, (2022) 1 SCC 676 and *Satender Kumar Antil v. CBI*, (2022) 10 SCC 51. The Supreme Court in the Siddharth and Antil judgments held that the use of the term custody in Section 170 of the CrPC did not mean police custody or judicial custody but only presentation of accused before the Magistrate at the time of filing charge-sheet. The Court thus clarified that it was not necessary to arrest the accused at the time of filing charge-sheet especially if the accused had not been arrested during investigation.

This clarification has now been adopted by the BNSS, which through Clause 190 proviso clarifies that it is not necessary for an accused to be taken into custody. The Clause states that if the person is not arrested, the police officer shall take security from such person for his appearance before the Judicial Magistrate. It further provides that the Judicial Magistrate to whom such report is forwarded shall not refuse to accept the same on the ground that the accused is not taken in custody.

1.7 Use of electronic mode at stages of investigation, inquiry and trial

One of the most significant and recurring feature in the BNSS is the introduction of electronic communication and audio-video electronic means for various procedures under the Bill. This is keeping in line with the objective of the BNSS to introduce an increased use of technology for legal procedures. Accordingly, the BNSS has introduced new definitions which define terms such as "audio-video electronic"[18] and "electronic communication".[19]

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[16] See Cl. 43(3) of the BNSS.
[17] *Siddharth v. State of U.P.*, (2022) 1 SCC 676; *Satender Kumar Antil* v. *CBI*, (2022) 10 SCC 51.
[18] See **Cl.2(1)(a)**, **audio-video electronic** *"shall include use of any communication device for the purposes of video conferencing, recording of processes of identification, search and seizure or evidence, transmission of electronic communication and for such other purposes and by such other means as the State Government may, by rules provide;".*
[19] See **Cl.2(1)(i)**, **electronic communication** *"means the communication of any written, verbal, pictorial information or video content transmitted (whether from one person to another, from one device to another or from a person to a device or from a device to a person) by means of an electronic device including a telephone, mobile*

Electronic Communications can now not only be used to pass on information to the police for the registration of the FIR, but also can be used for various other purposes.

Various courts have allowed the service of summons through electronic means including through instant messaging applications such as WhatsApp[20]. This now formally forms a part of the BNSS.

A summons to witnesses and accused and notices bearing the image of the court's seal can also be served by electronic communication. The form of electronic communication and manner of serving such summon in electronic communication is to be provided for by the State Government by way of rules. Such a service is considered a valid service.[21]

Statements can also be recorded by the investigating office by way of audio-video means.[22] Similarly, after filing of charge-sheet or complaint, it is also permissible for the investigating authority to supply documents, such as the police report etc. in electronic form.[23]

Keeping with the spirit of the bill, BNSS in Clause 530 specifically provides that all trials, inquires and proceedings may also be held in electronic mode i.e., by use of electronic communications or use of audio video electronic means. These would include (i) issuance, service and execution of summons and warrant; (ii) examination of complainant and witnesses; (iii) recording of evidence in inquiries and trials; and (iv) all appellate proceedings or any other proceeding.

1.8 Production of devices containing digital evidence.

A court or an officer in charge of a police station can compel production of electronic communication as also communication devices which are likely to contain digital evidence from the person who is in possession of such digital evidence.[24]

The positive aspect of having such a provision is that the production of original devices will ensure the genuineness of the digital evidence. Further, there would be several cases where the person in possession of the digital evidence may not be forthcoming with respect to the existence of such digital evidence. Therefore, even if such digital evidence has been deleted, with the aid of technology, such evidences can be retrieved.

While the provision recognises the prevalence of technology in the everyday world allowing for production and seizing of electronic devices, one may also need to bear in mind the dangers this may involve, such as manipulation and misuse of communications/devices by the authorities. The investigating authorities could also use the provision for a fishing and roving

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phone, or other wireless telecommunication device, or a computer, or audio-video players or camera or any other electronic device or electronic form as may be specified by notification, by the Central Government.".

[20] Order dated May 26, 2023 in COCP No. 959 of 2023, Amar Singh v. Sanjeev Kumar of the Punjab and Haryana High Court.

[21] See Cl. 64, 68, 94 and 227 of the BNSS.

[22] See Cl. 176 of the BNSS.

[23] See Cl. 230 and 231 of the BNSS.

[24] See Cl. 94 of BNSS.

enquiry i.e., the investigating authority may ask for the device for one purpose but use it for seizing unrelated material. The electronic devices will be available for the unrestricted use of the investigating authority.

The provision is in breach of right to privacy as well as privilege. The Supreme Court has infact been hearing a matter[25] wherein it will decide how the digital devices can be seized by the investigating agencies, when is it permissible to seize devices and what safeguards must be in place to protect personal sensitive information and legally privileged information. The Supreme Court in this case has stayed summons of the Directorate of Enforcement wherein they have sought all personal digital devices.

This provision coupled with Clause 208 of Bharatiya Nyaya Sanhita, 2023 (corresponding to Section 175 of the IPC) i.e., non-production of a document by a person legally bound to do so is punishable may result in misuse of this provision to conduct a fishing and roving inquiry. It also has far reaching implications on right to privacy[26] and protection of privilege.

The provision is also contrary to Section 227 of the Companies which protects disclosure of privileged documents to the Ministry of Corporate Affairs and Registrar of Companies as well as Sections 126 to 129 of the Evidence Act, 1872 which have now been replicated in Clauses 132 to 134 of the Bharatiya Sakshya (Second) Bill, 2023 (new evidence act) which too protect privileged communications.

1.9 Developments with respect to search and seizure

An important development with respect to search and seizure is audio-video recording of search and seizure including preparation of the list of all things seized (preferably by cell phone). A search without warrant is also to be recorded by audio-video means.[27] The recording is required to be forwarded to the Magistrate without delay.[28]

This is an important positive development which will prevent illegal search and seizure, tampering with evidence, planting of evidence etc. This may also be counter-productive as a video recording of signing of a seizure memo may be admitted as proof of seizure even though the same is against the right against self-incrimination.

1.10 Re: framing of charges and discharge

The law on discharge in a summon case has remained under uncertainty and was only settled recently in *Expeditious Trial of Cases Under Section 138 of NI Act, 1881, In re*, (2021) 16 SCC 116. The Supreme Court had held that there is no provision of discharge in a summons case. The BNSS however now provides for discharge in a summon-case.[29]

1.11 Adherence with timelines

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[25] Writ Petition (Criminal) No. 138 of 2021, Ram Ramaswamy v. Union of India.
[26] *K.S. Puttaswamy (Privacy-9J.) v. Union of India*, (2017) 10 SCC 1.
[27] See Cl. 185 of the BNSS (corresponding to Section 165 CrPC).
[28] See Cl. 105 of the BNSS.
[29] See Cl. 274 of the BNSS.

One of the major objectives of overhauling criminal laws was to provide for a time bound justice delivery system. Accordingly, the BNSS endeavours to address delays in the process of investigation and trial for which specific timelines have been prescribed. Illustratively,

(a) Committal proceedings shall be finished within a period of 90 days from the date of taking cognizance and such period may be extended by a period not exceeding 180 days;[30]
(b) Accused and victim shall be supplied a copy of police report and other documents no later than 14 days from the date of production of or appearance of accused;[31]
(c) Accused may prefer an application for discharge within a period of 60 days from the date of committal (trial before a Court of Session);[32]
(d) Charges are to be framed within the period of 60 days from the first date of hearing on charge (trial before a Court of Sessions);[33]
(e) A judgment of acquittal or conviction (trial before a Court of Session) has to be passed within 30 days from completion of arguments which can be extended by 45 days only by giving specific reasons;[34] and
(f) trial or inquiry shall be on a day to day basis and not more than two adjournments will be granted.[35]

This comes as one of the most welcome and necessary change when the country is facing a major backlog and pendency of trials.[36]

1.12 Rights of victim/informant

The BNSS seeks to introduce rights of the victim, which have mostly been provided by judgments of Indian Courts. A paramount and much-needed right of a victim is the obligation of the police officer to inform the victim of the progress of the investigation within a period of 90 days.[37]

Similarly, now the police after filing of charge-sheet are under an obligation to supply police report and other documents to the victim (if represented by an advocate).[38] The most critical change is that withdrawal of prosecution will only be allowed after hearing the victim.[39] Another critical insertion is that the Bill provides for a witness protection scheme to be laid down by the State Government.[40]

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[30] See Cl. 232 of the BNSS.
[31] See Cl. 230 of the BNSS.
[32] See Cl. 250 of the BNSS.
[33] See Cl. 263 of the BNSS.
[34] See Cl. 258 of the BNSS.
[35] See Cl. 346 of the BNSS.
[36] *Vakil Prasad Singh v. State of Bihar*, (2009) 3 SCC 355.
[37] See Cl. 193 of the BNSS.
[38] See Cl. 230 of the BNSS.
[39] See Cl. 360 of the BNSS.
[40] See Cl. 398 of the BNSS.

This is in addition to Clause 395 under the BNSS (corresponding to Section 357 of the CrPC) which provides that a Court can grant compensation when passing a sentence which includes payment of fine. Moreover, the BNSS also provides for victim compensation schemes[41] which has till date only been largely administrative schemes (like the Nirbhaya Scheme) given at the discretion of Statement Governments.

The BNSS however does not provide for rights of victim at the stage of sentencing like right to submit a victim impact statement, right to be informed of rights of victims at various stages of prosecution and trial, and right to be heard prior to granting pardon.

It is also important to have an effective and more importantly adequate witness protection scheme. It is relevant for the states to consider that witness protection scheme should provide for a time bound process to allow application for grant of protection.

Applicability of the BNSS

One of the most important aspects that is going to be considered by the courts once BNSS comes into force is its applicability to ongoing proceedings, trials, inquiries investigations etc. The repeal and savings clause of the BNSS[42] provides that if there is any appeal, application, trial, inquiry or investigation pending before the date on which BNSS comes into force, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the CrPC, as in force immediately before such commencement as if the BNSS had not come into force.

Conclusion

While several changes brought about by the BNSS can be said to accomplish the objectives it sought to achieve, like the introduction of timelines for time-bound investigation, inquiry and trial. However, many provisions of the BNSS could be perceived to be regressive without really wiping away the draconian colonial era laws.

The BNSS on one hand finally recognizes victim as a stakeholder in investigation, however, on the other hand, prevents the mandatory registration of FIR for a cognizable offence with the requirement of a preliminary inquiry to determine a *prima facie* case.

It was also hoped that a re-look at criminal laws would also bring in Sentencing guidelines like the UK and the US. However, the sentencing remains discretionary.

The fundamental rights of an accused have also not been given due consideration, for e.g., allowing remand through the entire period of investigation negates the right to bail of an accused, audio-video recording of seizure memo can be said to be violative of right against self-incrimination, attachment of property without trial could be argued to be violative of presumption of innocence. The enthusiasm to improve conviction rates should not come at the cost of fundamental rights of parties.

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[41] See Cl. 396 of the BNSS.
[42] See Cl. 531(2)(a) of the BNSS.

We will truly be able to break away from the colonial past when we break away from the approach of punishment rather than justice. Modernizing trials is not enough, what we need is a more coherent approach which balances rights of all stakeholders and upholds the fundamental rights of both victim and accused, while also ensuring speedy investigation and trial thereby truly meeting the objectives of the Bill.