



WHEN LAWS GUARD AND GAG: THE DOUBLE- EDGED SWORD OF INDIA'S CRIME CONTROL REFORMS

*Nancy Singh**

Abstract

In 2023, India undertook a landmark reform of its criminal justice system by replacing three colonial-era laws—the Indian Penal Code, the Code of Criminal Procedure, and the Indian Evidence Act—with the Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS), and Bharatiya Sakshya Adhiniyam (BSA). These new statutes seek to modernize the legal process, incorporate digital-era tools, and respond more effectively to emerging threats such as terrorism, mob lynching, and organized crime. However, this shift also brings with it significant concerns regarding executive overreach, vague legislative language, and potential misuse of expanded state powers. This paper critically engages with these developments through the thematic framework of “The Guard” and “The Gag,” exploring how the same legal architecture that promises public safety may also suppress dissent, civil liberties, and the rights of marginalized communities.

Keywords: Crime Control Reforms, Bharatiya Nyaya Sanhita (BNS), Civil Liberties, Executive Overreach, National Security, Comparative Legal Analysis.

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Student, LL.B. 6th Semester, University Institute of Laws, Panjab University Regional Centre Ludhiana. Email Id- nancysingh094@gmail.com, Contact No.-9781407635

I Introduction

WHEN A state rewrites its criminal laws, it also redefines its relationship with its citizens. The reconfiguration of India's legal framework necessitates an evaluation of its true intent—whether it safeguards rights or strengthens executive authority.

In 2023, India initiated a historic transformation of its criminal justice system by replacing its three colonial-era laws—with the Bharatiya Nyaya Sanhita (BNS), the Bharatiya Nagarik Suraksha Sanhita (BNSS), and the Bharatiya Sakshya Adhiniyam (BSA)¹. This legal overhaul was presented as a long-overdue move to align India's justice system with contemporary realities, technological advancements, and evolving threats. The necessity of such reform cannot be denied, especially in a country where outdated laws often hinder effective policing, prosecution, and protection of citizens.

Yet, as these new laws come into force, they raise a fundamental dilemma: Can the law remain a shield for the innocent while being a sword against the guilty? Or does this shift risk turning the law into a tool of suppression—especially against dissenting voices and vulnerable communities? When legal provisions are broadly worded or unevenly applied, the boundary between security and surveillance, between justice and overreach, begins to blur. It is this double-edged nature of criminal legislation that this paper seeks to interrogate.

¹ Ministry of Home Affairs, Government of India, "Press Release on the introduction of Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita, and Bharatiya Sakshya Adhiniyam (2023)".

Focusing on three major areas of contemporary concern—terrorism, mob lynching, and organized crime—this paper examines how the new laws attempt to address these threats. By analyzing the legislative responses within BNS and BNSS, and comparing them with global counterparts in the UK and South Africa the study aims to assess whether these reforms strike the right balance between national security and constitutional freedoms.

II The Guard: Strengthening Crime Control

Redefining Crime in a New Age

One of the primary justifications for India's 2023 criminal law overhaul was the urgent need to combat increasingly complex and violent forms of crime. The Bharatiya Nyaya Sanhita (BNS) and the Bharatiya Nagarik Suraksha Sanhita (BNSS) seek to address national security threats² and law enforcement gaps by modernizing definitions, streamlining procedures, and equipping authorities with stronger enforcement tools. This section explores how the new laws attempt to guard society against three major threats—terrorism, mob lynching, and organized crime—while highlighting the key structural changes introduced to aid effective prosecution and control.

Terrorism as a Mainstream Offence

Although the Unlawful Activities (Prevention) Act (UAPA)³ continues to serve as the principal anti-terror law in India, the BNS introduces a significant change by incorporating a statutory definition of terrorism

² See Statement of Objects and Reasons, Bharatiya Nyaya Sanhita Bill, 2023.

³ The Unlawful Activities (Prevention) Act, 1967 (Act 37 of 1967).

directly into the penal code. Section 113 of the BNS⁴ criminalizes acts that cause or are intended to cause death, damage to public infrastructure, or instill fear within general populace with the purpose of compromising the nation's unity, integrity, sovereignty, security or economic interest. This inclusion strengthens India's legislative arsenal by removing the exclusive dependency on special laws like the UAPA and integrating terrorism into the mainstream criminal framework.

Furthermore, the BNSS introduces procedural reforms—such as allowing extended police custody for up to 90 days in grave offences⁵, broader surveillance powers, and the recognition of digital evidence⁶—to strengthen the efficiency of investigations in terrorism-related matters. These measures aim to equip law enforcement agencies with the tools necessary to respond promptly and effectively to modern threats, particularly those involving encrypted messaging, transnational operations, and decentralized networks.

Mob lynching: From Neglect to Recognition

For the first time in Indian legislative history, mob lynching has been expressly recognized as a punishable offence. Under Section 103(2) of the BNS, murder committed by five or more persons on grounds such as race, caste, community, sex, or personal belief is now classified as a separate and aggravated form of homicide, carrying punishments ranging from life imprisonment to the death penalty. This development responds to a disturbing rise in vigilante violence and hate crimes, which

⁴ The Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), s. 113.

⁵ The Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023), s.187.

⁶ *Id.*, ss. 106–107.

had previously been prosecuted under generic provisions like Section 302 (murder) without addressing the group-based nature of such acts.⁷

By introducing a focused provision, the law aims to deter collective violence and sends a strong signal about the state's commitment to protecting vulnerable groups. It also seeks to break the cycle of impunity, often seen in cases of communal or caste-based violence, by clarifying the criminal liability of all participants in a lynching mob.

Targeting Organized Criminal Networks

The BNS also takes a firm stand against organized crime, which was not explicitly defined under previous criminal statutes. Section 111 of the BNS now criminalizes acts committed by criminal gangs for financial gain⁸, extortion, contract killings, drug trafficking, or human smuggling. This section draws inspiration from global anti-mafia and anti-cartel frameworks and is a notable step toward acknowledging and combating the networked, profit-driven nature of modern criminal syndicates.

Additionally, the new provisions allow for enhanced investigative powers, such as the attachment and forfeiture of property, which enable authorities to dismantle the economic base of criminal organizations. This is in line with practices adopted in Italy under its anti-mafia legislation⁹, where attacking the financial backbone of criminal groups has been key to long-term disruption.

⁷ *Tehseen S. Poonawalla v. Union of India*, (2018) 9 SCC 501.

⁸ Government of India, "Organized Crime and Financial Intelligence Report" (Ministry of Home Affairs, 2021).

⁹ Legislative Assembly of Italy, Anti-Mafia Code, Law No. 646/1982 (Italy).

Digital Tools and Procedural Modernization

Beyond these targeted definitions, the BNSS introduces several systemic reforms to improve the efficiency and effectiveness of criminal proceedings including admissibility of digital evidence. Courts can now rely on electronic records, digital signatures, and surveillance data as primary evidence, reducing dependency on oral testimony and written documents. In serious offences, the use of forensic techniques¹⁰, including DNA analysis and fingerprinting, has been made mandatory—helping reduce wrongful arrests and increasing conviction rates. Further, by allowing electronic registration of FIRs and online court appearances, the system becomes more accessible and reduces unnecessary delays. Authorities can now confiscate properties obtained through criminal proceeds even during trial stages, thus ensuring that crime does not continue to pay while the judicial process is underway.

Real-World Context: The April 2025 Pahalgam Attack

A striking reminder of the ongoing threat posed by terrorism is the April 2025 Pahalgam massacre, where 26 civilians, including tourists, were gunned down at a Himalayan destination in Jammu & Kashmir. This attack, one of the deadliest in recent years, underscores the urgent need for a responsive legal framework capable of addressing transnational and decentralized threats. The incident validates the legislative push for integrated anti-terror enforcement mechanisms within the general criminal system.

¹⁰ Directorate of Forensic Science Services, “Annual Report on Forensic Infrastructure in India” (Ministry of Home Affairs, 2022).

Following such incidents, enhanced police custody provisions, digital evidence admissibility, and faster investigation timelines under the BNSS are seen as essential tools. While the UAPA has often been criticized for its stringent bail provisions and potential misuse, it has also enabled successful prosecution in serious terror cases. For instance, in July 2023, a special NIA court in Delhi convicted an individual affiliated with the Islamic State for planning attacks and attempting to radicalize others through online platforms. The conviction was secured based on forensic analysis of encrypted communications, digital evidence, and formal investigation procedures under UAPA. This illustrates that when applied with judicial care and procedural integrity, such laws can serve their intended purpose of protecting national security without compromising due process.

Together, these developments mark a significant step forward in India's capacity to confront contemporary security threats. By recognizing new forms of crime and equipping the justice system with faster and more effective tools, the reforms reflect the "guarding" side of law—where the intent is to shield society from violence, fear, and systemic criminality. However, as the paper will later explore, the line between protective law and punitive overreach can be perilously thin—particularly in a democracy that must also safeguard dissent and minority rights.

III The Gag: Risks of Overreach & Misuse

While the 2023 criminal law reforms in India aim to address modern crime and enhance national security, they also raise serious concerns about the potential misuse of state power. Laws that are intended to protect can, if not carefully drafted and implemented, end up restricting

fundamental rights. This section examines how the Bharatiya Nyaya Sanhita (BNS) and Bharatiya Nagarik Suraksha Sanhita (BNSS) may be prone to overreach, particularly through vague definitions, expanded police powers, and insufficient checks on authority—ultimately creating space for the suppression of dissent and the targeting of marginalized communities.

Ambiguous and Broad Legal Language

Some of the new provisions introduced under the BNS suffer from lack of clarity, making them susceptible to arbitrary interpretation. For instance, Section 113, which defines terrorism, includes terms like “intent to strike terror” or “threaten the unity and integrity of India.” While these objectives are important, their open-ended nature allows room for subjective interpretation by enforcement agencies. Similar concerns arise with Section 69, which criminalizes actions “endangering the sovereignty” of the nation, but without clearly outlining the threshold for such danger. This ambiguity resembles the issues once associated with the repealed sedition law, where dissenting opinions were often mistaken for anti-national activity.

Past experiences suggest that special laws created for national security have often been invoked against political activists, journalists, students, and minority communities. The Unlawful Activities (Prevention) Act (UAPA) is a key example—despite its low conviction rate, many individuals have faced long periods of pre-trial detention under its provisions. With similar trends now likely under BNSS, especially with extended police custody periods and relaxed standards for electronic surveillance, the risk of abuse becomes substantial.

The concern is not just about the presence of strict laws, but about how they might be used selectively—sometimes to suppress criticism of the government or to criminalize peaceful protests. In a democratic framework, laws must not become tools to silence voices that question authority.

Overlapping Powers: General vs. Specialized Laws

i. BNSS and the Quiet Expansion of Executive Power

While the Unlawful Activities (Prevention) Act (UAPA) has long been criticized for its harshness, it remains a special law governed by rigid procedures, central oversight, and higher judicial thresholds. In contrast, the Bharatiya Nagarik Suraksha Sanhita (BNSS), through its inclusion of terrorism and mob lynching within the regular criminal justice framework, grants wide-ranging powers to local law enforcement with fewer checks and balances. This shift subtly decentralizes state power while also making it more susceptible to routine abuse.

ii. Custody and Detention Procedures

Under UAPA, the investigation period before filing a charge sheet can be extended to 180 days, but only with the permission of a court¹¹. While this is severe, it is subject to stricter judicial scrutiny. BNSS, on the other hand, permits extended police custody beyond the traditional 15-day period for serious offences, such as terrorism and mob lynching, up to a maximum of 90 days¹². Though this extension seems balanced, the absence of central oversight and reduced need for justification make it

¹¹ *Supra* note 3, s. 43D (2).

¹² *Supra* note 5, s. 187(2).

easier for police to misuse custody provisions, particularly during politically charged cases.

iii. Bail Provisions and Trial Oversight

The Unlawful Activities (Prevention) Act (UAPA) imposes particularly stringent conditions for bail. Under Section 43D (5), bail may be denied if the court believes there is a reasonable basis to presume the accusations are true, making it exceptionally difficult for the accused to secure release during trial. However, cases registered under UAPA are adjudicated by specially designated courts, often overseen by higher authorities such as the National Investigation Agency (NIA), which adds an additional layer of procedural formality and central oversight. In contrast, offences under BNSS—though serious—follow standard bail and trial procedures. There is no special court or central review mechanism required, meaning bail and trial are left to ordinary sessions courts, which are already overburdened. This makes it easier for political actors to influence outcomes or delay justice, either by denying bail arbitrarily or by prolonging trials.

iv. Investigation and Authority

UAPA investigations are handled by specialized agencies such as the NIA, which operate under the direct oversight of the Ministry of Home Affairs. This centralization, while sometimes criticized for politicization, ensures a layer of procedural formality and scrutiny¹³. BNSS, by contrast, places the power of investigation into the hands of local police officers, including SHOs and DSPs. This means that serious national security

¹³ National Investigation Agency Act, 2008 (Act 34 of 2008), ss. 3–6.

offences can now be pursued at the local level without specialized training, experience, or national oversight—opening the door to politicized policing and misuse at the grassroots level¹⁴.

v. Evidence and Surveillance

Under the new legal regime, both UAPA and BNSS allow for the use of digital and electronic records. However, BNSS now permits seizure, search, and surveillance with less judicial oversight, especially under the Bharatiya Sakshya Adhiniyam. The distinction lies in the ease of procedural access—BNSS provides police more tools with fewer institutional filters.

vi. Why BNSS Is More Vulnerable to Misuse

Although UAPA remains harsh and deeply controversial, its application is limited and exceptional. BNSS, however, normalizes these extraordinary powers by bringing them into day-to-day policing¹⁵. Because the BNSS grants enhanced custody powers to regular police officers, requires no central government sanction for initiating proceedings, allows for vague interpretations of offences like terrorism or mob lynching, and follows standard criminal procedure with no specialized court structure. It becomes significantly easier for political actors to manipulate, especially in cases involving dissenters, student activists, or members of minority communities.

¹⁴ Law Commission of India, “277th Report on Wrongful Prosecution (Miscarriage of Justice): Legal Remedies, 2018” (August, 2018).

¹⁵ Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* 115 (Oxford University Press, New Delhi, 2016).

Hidden Dangers in Familiar Forms

The real risk with BNSS is that it blurs the line between exceptional and routine. When extraordinary powers are folded into general criminal procedure, they no longer feel exceptional—and are thus easier to use, and harder to challenge. This makes it all the more urgent to introduce procedural safeguards, such as mandatory judicial oversight, review boards, and centralized monitoring, especially for cases involving terrorism, mob violence, or protest-related offences.

Illustrative Cases of Misuse

Several recent instances underline how powerful legal provisions, when misapplied, can cause grave injustice. Safoora Zargar, a student activist, was arrested under the Unlawful Activities (Prevention) Act (UAPA) during the anti-Citizenship Amendment Act (CAA) protests in 2020¹⁶. Despite being pregnant (more than three months) and lacking direct evidence of violent conduct, she was detained for over two months in overcrowded prison during the time of pandemic.

In Manipur, amidst ethnic tensions, journalists from the Editors Guild of India faced criminal charges for allegedly promoting enmity through their reporting. This action raised significant concerns about press freedom and the use of legal provisions to suppress journalistic work.¹⁷

Father Stan Swamy, an 84-year-old tribal rights activist (reportedly the oldest person to be accused of terrorism) was arrested under the UAPA

¹⁶ BBC News, "Safoora Zargar: Bail for pregnant India student blamed for Delhi riots" *BBC*, June 23, 2020.

¹⁷ International Federation of Journalists, "India: Manipur authorities file cases against four journalists" *IFJ*, Sept. 6, 2023.

in 2020. Despite his age and health conditions, including Parkinson's disease and also contracted covid-19, he was denied bail and adequate medical care, leading to his death in custody in 2021¹⁸. The U.S. State Department's 2023 Human Rights Report highlighted significant abuses in India's northeastern state of Manipur, including attacks on minorities and suppression of media outlets critical of the government.

Use of UAPA and Riot Cases Against Anti-CAA Protesters (2020)

During and after the anti-CAA protests in Delhi, several student activists and protesters were charged under UAPA and other harsh provisions. Umar Khalid, former JNU student leader, was arrested¹⁹ in 2020 under UAPA for allegedly being part of a conspiracy in the Delhi riots. Despite the absence of direct evidence of violence, he has been in custody for over four years, with repeated denials of bail and without trial. Devangana Kalita, Natasha Narwal, and Gulfisha Fatima—all young women activists—were similarly charged with serious offences despite mostly being involved in organizing peaceful protests. The Delhi High Court later granted them bail, observing that dissent cannot be equated with terrorism²⁰.

¹⁸ United States Commission on International Religious Freedom (USCIRF), "Stan Swamy", Religious Prisoners of Conscience Database, *available at*: <https://www.uscirf.gov/religious-prisoners-conscience/forb-victims-database/stan-swamy> (last visited on 24 April 2025).

¹⁹ The Print Staff, "Bond, Romeo, Juliet & WhatsApp group chats: Why Umar Khalid was denied bail in Delhi riots case" *The Print*, March 15, 2022.

²⁰ The Hindu Bureau, "2020 Delhi riots: Supreme Court dismisses Delhi Police appeal against bail to activists" *The Hindu*, May 3, 2023.

Arrests During Farmers' Protests (2020–2021)

During the farmers' protest against the three farm laws, there were widespread allegations of misuse of police powers. Multiple FIRs were lodged against protesters for blocking roads, damaging property, or for alleged sedition, particularly in Punjab and Haryana. Protesters were booked under IPC sections 124A (sedition), 153A (promoting enmity), and 505 (inciting violence). These charges were criticized as being disproportionate and intended to intimidate the protestors. Journalists like Mandeep Punia, reporting from the Singhu border, were detained without proper charges. He was covering police violence and alleged collusion with mobs attacking protest sites. Disha Ravi, a 22-year-old climate activist, was arrested by Delhi Police for allegedly editing and sharing a "toolkit" in support of the farmers' protests. She was charged with sedition, criminal conspiracy, and promoting enmity, sparking widespread outrage. Critics called it an overreaction to digital advocacy, and the Delhi HC later ruled in favor of protecting free speech.²¹

The Bhima Koregaon Case

Background: In 2018, several activists, lawyers, and scholars—including Sudha Bharadwaj, Gautam Navlakha, and Varavara Rao—were arrested under the Unlawful Activities (Prevention) Act (UAPA) for allegedly inciting violence at a Dalit gathering in Bhima Koregaon, Maharashtra.²²

²¹ *The Caravan*, "Disha Ravi: Delhi Police FIR on Greta Thunberg farmers' protest toolkit", *The Caravan*, 14 February 2021, *available at*: <https://caravanmagazine.in/news/disha-ravi-toolkit-fir-delhi-police-greta-thunberg-farmers-protest-conspiracy> (last visited on 26 April 2025).

²² Supreme Court Observer, "The Bhima Koregaon Arrests: The Story So Far", *SC Observer*, 1 March 2023, *available at*: <https://www.scobserver.in/journal/the-bhima-koregaon-arrests-the-story-so-far/> (last visited on 26 April 2025).

Despite lack of conclusive evidence, most of the accused have been imprisoned for years without trial. The investigation has been criticized for alleged fabrication of digital evidence and vague allegations. The NIA (National Investigation Agency) took over the case, raising further concerns about political influence and delay of justice. This case illustrates how broad anti-terror laws can be misused to target intellectuals, dissenters, and rights activists, often without clear or timely judicial recourse.

Global concerns about Human Rights Violation

In recent years, human rights defenders (HRDs), activists, and non-profit organizations have increasingly found themselves at the receiving end of criminal investigations, freezing of assets, and terrorism charges — often without clear justification. This pattern has raised concerns among global watchdogs. As Aakar Patel, Chair of the Board at Amnesty International India, aptly stated:

“The Indian authorities have weaponized laws to crack down on the human rights work by HRDs, activists and non-profit organizations in the country. Authorities are using bogus foreign funding and terrorism charges to target, intimidate, harass and silence critics, in clear violation of FATF standards.”²³

Recent critiques by international human rights bodies highlight the risk of disproportionate enforcement authority. Meenakshi Ganguly, Deputy Asia Director at Human Rights Watch, warns that “India’s three laws together have created a dangerous arsenal with debilitating

²³ Amnesty International, “India: Stop Abusing Counterterrorism Regulations” *Amnesty International*, November 3, 2023.

consequences for civil society and human rights activists.” She further cautions that “The FATF should not allow the Indian government to exploit the organization’s recommendations for its political purposes – to silence all forms of dissent.”²⁴

A balance must be struck between empowering the state to fight crime and safeguarding the rights of individuals. While reforms under BNS and BNSS have strengthened the enforcement side, they risk crossing into dangerous territory if ambiguous language and unrestrained authority are not paired with appropriate institutional safeguards. In a democracy, laws must protect both safety and freedom—not one at the cost of the other.

IV From Draft to Enactment: A Political Turn

The Promise of Reform

The transition from the draft versions of the Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagarik Suraksha Sanhita (BNSS), and Bharatiya Sakshya Adhiniyam (BSA) to their final enacted forms in December 2023 was not merely technical—it was deeply political. Although the reforms were projected as a move towards decolonization and modernization of India’s criminal law, the legislative process revealed significant shifts that reflected the central government’s priorities, including a growing emphasis on state control and surveillance over procedural balance and participatory law-making.

²⁴ Human Rights Watch, “India: Stop Abusing Counterterrorism Regulations – Financial Action Task Force Review Should Document Crackdown on Dissent” *Human Rights Watch*, November 3, 2023.

Lack of Transparent Consultation and Civil Society Concerns

Introduced in Parliament in August 2023²⁵, the bills were subsequently forwarded to the Standing Committee on Home Affairs²⁶. While the committee did seek inputs from experts and civil society groups, the final enacted versions of the laws bypassed much of the substantive criticism and suggestions raised during consultations. Legal experts had flagged several vague provisions, requested clearer definitions of offences like terrorism, and recommended judicial safeguards on procedural powers. Despite being raised during consultations, most concerns were either overlooked or insufficiently accommodated in the enacted versions²⁷.

Strategic Language and Political Timing

Between the draft and the final versions, several significant changes were observed. One notable concern in the final version of the Bharatiya Nyaya Sanhita is the inclusion of broad and undefined phrases such as “acts endangering the sovereignty, unity, and integrity of India” under Section 69. These expressions bear a strong resemblance to the language previously used in sedition laws. Despite being flagged during consultations, these terms remain undefined in both the draft and enacted versions, leaving significant room for subjective interpretation. Historically, such vague terminology has been employed to stifle dissent, curb freedom of speech, and criminalize peaceful protest.

²⁵ *Supra* note 1.

²⁶ “Standing Committee on Home Affairs”, Report on the Bharatiya Nyaya Sanhita, BNSS and BSA, November 2023.

²⁷ PRS Legislative Research, “The Bharatiya Nyaya Sanhita, 2023 – Bill Summary”, *PRS India*, August 2023, available at: <https://prsindia.org/billtrack/the-bharatiya-nyaya-sanhita-2023> (last visited on 27 April 2025).

Secondly, in some areas, procedural checks recommended during drafting—such as stronger provisions for independent review or pre-trial protection against wrongful detention—were softened or omitted. This shifted the balance in favour of enforcement power over constitutional protection.

Fast-tracked Legislative Passage

The final versions of BNS, BNSS, and BSA were passed in Parliament in December 2023 within a span of three days, during a time when a significant portion of opposition MPs were suspended²⁸. This raised serious concerns about democratic process and the lack of meaningful debate on laws that fundamentally reshape criminal justice in India.

Political Intent and Legislative Control

The legislative journey of these laws highlights how political will can shape not just the content of law but its very character. What began as a technical legal reform ended as a legislative consolidation of state power—marked by opaque consultations, rapid passage, and retention of vague, subjective terminology. These developments suggest that the new criminal codes were not merely about modernizing the law, but also about redefining the boundaries of state authority and citizen liberty in a politically charged environment.²⁹

²⁸ The Hindu Bureau, “New Criminal Laws Passed Amid Suspension of Opposition MPs” *The Hindu*, December 21, 2023.

²⁹ Gautam Bhatia, Criminal Law Reform or Authoritarian Consolidation?, Indian Constitutional Law and Philosophy Blog, December 2023, *available at*: <https://indconlawphil.wordpress.com/> (last visited on 27 April 2025).

V Global Lessons in Balancing Security and Liberty

A Comparative Study of the United Kingdom and South Africa

As India embarks on a new chapter in its criminal justice history, it is important to look beyond its borders to draw lessons from systems that have managed—sometimes imperfectly—to balance security with liberty. Two countries in particular offer relevant insights: the United Kingdom, from which much of India's legal heritage is drawn, and South Africa, a developing constitutional democracy that emerged from a repressive past into one of the world's most rights-anchored systems. Both jurisdictions have dealt with the complexities of crime control, protest regulation, and executive overreach—and have developed tools to restrain abuse while preserving public order.

1. United Kingdom: Policing Power with Legal Restraint

The UK offers a particularly meaningful comparison given India's shared colonial legal roots. Over time, the UK has strengthened protections for civil liberties while also grappling with rising security threats.

i. Human Rights Act and Judicial Review

The Human Rights Act, 1998, which incorporates the European Convention on Human Rights (ECHR) into domestic law, provides a robust framework for testing executive actions—including surveillance, preventive detention, and protest restrictions—against the principles of necessity and proportionality. Courts are empowered to interpret laws in

conformity with human rights obligations and can issue declarations of incompatibility if statutes violate fundamental rights³⁰.

ii. Protest Regulation and Police Powers

In recent years, the UK enacted the Police, Crime, Sentencing and Courts Act, 2022³¹, expanding police powers to impose conditions on protests, including noise restrictions and disruption thresholds. This law faced strong public opposition and ongoing legal challenges for being vague and disproportionate. The fact that it is subject to judicial review and parliamentary scrutiny, however, ensures that such powers are not absolute.

iii. Oversight Institutions

Surveillance and digital interception are governed under the Investigatory Powers Act, 2016—often called the “Snooper’s Charter”—but their use is reviewed by the Investigatory Powers Commissioner, a retired judge³². This kind of independent oversight mechanism helps prevent unchecked state intrusion.

Lesson for India: Criminal laws must be subject to external oversight, and any expansion in police power—such as the power to arrest, search, or surveil—must be clearly defined, judicially reviewable, and proportionate to the threat posed.

³⁰ The United Kingdom Human Rights Act, 1998.

³¹ The United Kingdom Police, Crime, Sentencing and Courts Act, 2022, c. 32.

³² The United Kingdom Investigatory Powers Act, 2016, c. 25.

2. South Africa: Rights-Based Policing in a Transitional Democracy

South Africa, emerging from the shadow of apartheid, presents a compelling model of how state power can be constitutionally restrained in the interest of democracy, dignity, and equality.

i. Bill of Rights and Constitutional Supremacy

The Constitution of South Africa, enacted in 1996, situates the Bill of Rights³³ as the foundation of its legal framework. It upholds essential liberties such as equality, freedom of expression, and procedural due process, even when dealing with terrorism or organized criminal activity. The doctrine of proportionality is firmly woven into South Africa's legal reasoning and constitutional interpretation.

ii. Independent Police Oversight

The Independent Police Investigative Directorate³⁴ (IPID) is a civilian agency that investigates police misconduct, abuse of power, and custodial violence. Its statutory independence ensures that executive and police actions are accountable to civilian bodies—not just to the state.

iii. Constitutional Court and Landmark Rulings

In *S v. Makwanyane* (1995)³⁵, the South African Constitutional Court abolished the death penalty, holding that even harsh punishment must comply with the rights to life and dignity. The court routinely examines

³³ Constitution of the Republic of South Africa, 1996, c. 2.

³⁴ The South Africa Independent Police Investigative Directorate Act, 2011.

³⁵ *S v. Makwanyane and Another*, (CCT3/94) [1995] ZACC 3.

laws and executive decisions against human dignity, equality, and freedom, even in matters of national security³⁶.

Lesson for India: India's new laws must be tested not only for their intent but also for their impact on democratic rights. Establishing independent institutions like IPID, and incorporating judicial principles like dignity and necessity, can create a legal system that is both secure and just.

The UK and South Africa, though vastly different in history and context, show that democracies can strengthen crime control without abandoning their constitutional commitments. India's reforms must not only learn from these models in content, but also adopt their structural safeguards—ensuring that the machinery of law does not outgrow the moral compass of the Constitution.

VI Recommendations

The 2023 reforms to India's criminal justice system reflect a genuine attempt to address emerging threats and align law enforcement with modern realities. However, to ensure that these laws act as a shield and not a gag, it is imperative to introduce robust safeguards that prevent misuse, protect constitutional values, and uphold the rule of law. Below are a set of balanced, actionable recommendations:

Judicial Oversight and Independent Review Mechanism

To check executive overreach and arbitrary prosecution, provisions involving national security or preventive detention must include

³⁶ South African Human Rights Commission, "Annual Report on the State of Police Oversight" 2022.

mandatory judicial scrutiny. For instance, arrests made under terrorism or organized crime charges should be reported to a designated judicial authority within 24–48 hours. Independent Review Boards, comprising retired judges, civil society members, and legal experts, should periodically assess the application of sensitive provisions, especially in cases involving protestors, minorities, or journalists. Surveillance approvals—especially for digital interception—must go through a three-tiered clearance system, including judicial oversight.

Clearer Definitions and Legislative Precision

To avoid the misuse of vague or overbroad provisions, statutory terms like “anti-national activities,” “organized crime,” or “disrupting public order” must be narrowly and clearly defined, leaving no room for subjective interpretation by law enforcement. Guidelines must be issued by the Ministry of Home Affairs or the Law Commission outlining thresholds of evidence for invoking certain offenses like terrorism or mob lynching.

Police and Prosecutor Capacity Building

Training modules should be developed in consultation with human rights experts and constitutional scholars to sensitize police and prosecutors about individual rights, non-discrimination, and due process. Efforts should be made to establish a National Academy for Criminal Justice Reforms that offers continuous education on the new laws, forensic methods, and ethical standards. Community policing models that promote trust and collaboration, especially in marginalized areas prone to over-policing, should be encouraged.

Transparency in Data Disclosure

The publication of annual reports on arrests, bail, convictions, and acquittals under BNS, BNSS, and BSA, disaggregated by community, gender, and region, must become a mandate. Efforts should be made to create public dashboards that track implementation trends—this empowers civil society to monitor patterns of misuse or disproportionate targeting.

Protection for Whistleblowers and Journalists

Provisions for the immunity of journalists, researchers, and activists working in the public interest, unless there is clear and present danger proven through judicial findings, must be included. Whistleblowers within police or prosecution departments should be granted legal protection and incentives to report abuse of new powers.

Constitutional Audits and Sunset Clauses

Laws related to national security or extraordinary powers should undergo a “constitutional audit” every five years by a parliamentary committee and judicial advisory panel. Introduce sunset clauses for contentious provisions like extended police custody or preventive detention, requiring Parliament to renew them with a fresh justification and debate.

Reforms are not inherently harmful, but unchecked power can be. To truly modernise India’s justice system, the state must combine strong enforcement with stronger accountability. These recommendations aim

to preserve the spirit of the new laws while ensuring that they remain tools of justice rather than instruments of fear.

VII Conclusion

The Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita, and Bharatiya Sakshya Adhinyam have been framed as measures to address the growing complexity of crime, encompassing threats such as terrorism, mob violence, and organised criminal networks. On the surface, these reforms promise greater clarity, efficiency, and streamlined procedures. However, their implementation reveals a deeper tension between the objectives of governance and the imperatives of individual freedom, between the pursuit of order and the necessity for democratic accountability.

This paper has shown how these new laws embody both potential and peril. Their ability to guard society against genuine threats is undermined if they also gag democratic expression, suppress dissent, or disproportionately target the marginalised. The concern is not merely legal but constitutional—about whether the principles of liberty, dignity, and fairness can survive beneath layers of unchecked executive power. India must not trade liberty for control. The true test of reform lies not in the strength of its punishments, but in the integrity of its protections.

The intent of reform must not be allowed to collapse under the weight of its own concentrated discretion. India must not merely enact strong laws—it must enforce them justly, transparently, and accountably. That is the only way these reforms will truly serve justice—not power.