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FROM COLONIAL CONTROL TO CONSTITUTIONAL NYAYA: A
CRITICAL COMPARATIVE ANALYSIS OF INDIA’S REFORMED
CRIMINAL LAW ARCHITECTURE (BNS, BNSS, AND BSA, 2023)

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1. Introduction: The Jurisprudence of Colonial Repeal

For over a century and a half, the administration of criminal justice in India operated upon a statutory triad conceived in the aftermath of the 1857 Rebellion. Drafted primarily by Thomas Babington Macaulay (IPC) and Sir James Fitzjames Stephen (IEA), the 1860 and 1872 enactments were instruments of imperial statecraft. Their foundational philosophy was rooted in utilitarian authoritarianism: the preservation of Crown sovereignty, the maintenance of public order through deterrence, and the prioritization of offences against the State above offences against the human body or individual dignity. Even the Code of Criminal Procedure, though substantially re-enacted in 1973 following the 41st Law Commission Report, retained the institutional skeleton of the 1898 colonial code, treating the police primarily as a force of coercion rather than a citizen-centric investigative agency.

The enactment of the **Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023)**, the **Bharatiya Nagarik Suraksha Sanhita, 2023 (Act 46 of 2023)**, and the **Bharatiya Sakshya Adhiniyam, 2023 (Act 47 of 2023)**—which received Presidential assent on December 25, 2023, and took effect on July 1, 2024—marks a deliberate legislative effort to pivot from *Danda* (colonial punishment) to *Nyaya* (constitutional justice).

Statutory Domain	Repealed Colonial / Post-Colonial Statute	New Enactment (Effective July 1, 2024)	Structural Change in Sections
Substantive Criminal Law	Indian Penal Code, 1860 (IPC)	Bharatiya Nyaya Sanhita, 2023 (BNS)	Consolidated from 511 Sections (23 Chapters) to 358 Sections (20 Chapters)

Statutory Domain	Repealed Colonial / Post-Colonial Statute	New Enactment (Effective July 1, 2024)	Structural Change in Sections
Criminal Procedure	Code of Criminal Procedure, 1973 (CrPC)	Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS)	Expanded from 484 Sections (37 Chapters) to 531 Sections (39 Chapters)
Law of Evidence	Indian Evidence Act, 1872 (IEA)	Bharatiya Sakshya Adhinyam, 2023 (BSA)	Streamlined from 167 Sections (11 Chapters) to 170 Sections (12 Chapters)

2. Substantive Divergence: Indian Penal Code (1860) vs. Bharatiya Nyaya Sanhita (2023)

2.1 Structural Reordering and Prioritization of Offences

Under the IPC of 1860, structural priority was accorded to the preservation of the regime. Offences against the State (Chapter VI), Offences relating to the Army, Navy, and Air Force (Chapter VII), and Offences against Public Tranquility (Chapter VIII) preceded crimes affecting the human body (Chapter XVI) and crimes against women. The BNS inverts this hierarchy. Apart from preliminary definitions, punishments, and general exceptions (Chapters I–IV), **Chapter V of the BNS opens directly with "Offences against Woman and Child" (Sections 63–99)**, followed immediately by **Chapter VI on "Offences Affecting the Human Body" (Sections 100–146)**. By consolidating scattered provisions and eliminating archaic colonial references (such as references to the British calendar, Presidency towns, and the Queen's coin), the BNS compresses 511 sections into 358 without sacrificing substantive breadth.

2.2 From Sedition (Section 124A IPC) to Sovereignty Offences (Section 152 BNS)

Few provisions of the IPC drew fiercer constitutional scrutiny than Section 124A (Sedition), which criminalized bringing into hatred or contempt, or exciting disaffection towards, the Government established by law. Following the Supreme Court's interim stay on Section 124A in *S.G. Vombatkere v. Union of India* (2022), the legislature omitted the word "sedition" entirely from the BNS.

However, in its place, the BNS introduces **Section 152**, which penalizes "*Acts endangering sovereignty, unity and integrity of India.*" A rigorous textual comparison reveals significant jurisprudential shifts:

- **Object of the Offence:** Whereas Section 124A IPC protected the "*Government established by law*" (an executive entity), Section 152 BNS shifts protection to the "*sovereignty, unity and integrity of India*" (the Nation-State itself).
- **Actus Reus and Modes of Commission:** Section 152 explicitly incorporates modern vectors of communication, criminalizing anyone who "*purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial mean, or otherwise, excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities...*"
- **Doctrinal Critique:** While the inclusion of "*purposely or knowingly*" establishes a clearer *mens rea* threshold than the strict liability tendencies of colonial sedition prosecutions, the phrase "*subversive activities*" remains undefined in the statute. Legal scholars argue that without strict judicial reading-down in line with *Kedar Nath Singh v. State of Bihar* (AIR 1962 SC 955)—which limited sedition to incitement to imminent violence or public disorder—Section 152 risks operating as an expansive net with a higher minimum punishment (life imprisonment or imprisonment extendable to seven years, compared to three years or life under the IPC).

2.3 Codification of New-Age Offences: Organised Crime, Terrorism, and Mob Lynching

The IPC lacked standalone machinery to address syndicate crime or terrorism, forcing law enforcement to rely either on general conspiracy provisions (Section 120B IPC) or specialized statutes such as the Unlawful Activities (Prevention) Act, 1967 (UAPA) and state-level enactments like the Maharashtra Control of Organised Crime Act, 1999 (MCOCA).

1. **Organised Crime (Section 111 BNS) and Petty Organised Crime (Section 112 BNS):** Section 111 imports the conceptual architecture of MCOCA into general national law, defining an "organised crime syndicate" and criminalizing continuing unlawful activities including kidnapping, contract killing, extortion, land grabbing, cyber-crimes with severe consequences, and human trafficking. Section 112 creates a distinct category of "petty organised crime" to tackle organized snatching, shoplifting, ticket black-marketing, and public examination paper leaks by organized gangs.
2. **Terrorist Act (Section 113 BNS):** For the first time, the definition of a "terrorist act" is incorporated directly into the general penal code, closely mirroring Section 15 of the UAPA. Crucially, the explanation to Section 113(7) stipulates that an officer not below the rank of Superintendent of Police (SP) shall decide whether to register a case under the BNS or the UAPA. While this centralizes terrorist offences within the general code, it introduces administrative discretion at the SP level regarding whether an accused will face ordinary trial procedures under the BNSS or the stringent bail barriers of Section 43D(5) of the UAPA.
3. **Mob Lynching and Hate Murder (Section 103(2) BNS):** Addressing the Supreme Court's directives in *Tehseen S. Poonawalla v. Union of India* (2018), Section 103(2) bifurcates the punishment for murder. When a group of five or more persons acting in concert commits murder on the ground of "*race, caste or community, sex, place of birth, language, personal*

belief or any other similar ground," each member of the group faces death or imprisonment for life, alongside a fine.

4. **Deceitful Sexual Intercourse (Section 69 BNS):** Previously, Indian courts adjudicated cases of sexual intercourse obtained via a false promise of marriage through a convoluted reading of "misconception of fact" under Section 90 read with Section 375 of the IPC. Section 69 BNS separates this from the offence of rape, creating a distinct, standalone offence penalizing sexual intercourse obtained through "*deceitful means*" (explicitly defined to include false promises of employment, promotion, inducement, or marrying by suppressing identity) with imprisonment up to ten years.
5. **Hit-and-Run Provision (Section 106(2) BNS):** Enhancing accountability beyond the flat two-year sentence under Section 304A IPC, Section 106(2) prescribes up to ten years imprisonment for causing death by rash and negligent driving where the offender escapes without reporting the incident to a police officer or Magistrate soon after the collision. (Note: The implementation of Section 106(2) has remained subject to executive consultation with transport unions).

2.4 Integration of Restorative Penology: Community Service

Under Section 53 of the IPC, punishments were strictly retributive or incapacitative (Death, Life Imprisonment, Rigorous/Simple Imprisonment, Forfeiture of Property, and Fine). **Section 4(f) of the BNS** introduces **Community Service** as a sixth statutory punishment. Applicable to six minor offences—including petty theft of property valued under Rs. 5,000 upon restoration (Section 303(2)), public intoxication causing annoyance (Section 355), defamation (Section 356), attempt to commit suicide to compel or restrain the exercise of lawful power by a public servant (Section 226), and non-appearance in response to a proclamation (Section 209)—this reform represents India's first statutory step toward restorative justice and prison decongestion.

2.5 Constitutional Omissions and Lingering Lacunae

In alignment with landmark Supreme Court jurisprudence, the BNS excises provisions previously declared unconstitutional or partially read down:

- **Section 377 IPC** (unnatural offences) has been omitted in entirety. While this honours the decriminalization of consensual homosexual acts in *Navtej Singh Johar v. Union of India* (2018), its complete deletion without a gender-neutral sexual assault clause leaves a troubling statutory vacuum: non-consensual penetrative sexual assault committed against adult men or transgender persons, or acts of bestiality, no longer have a specific felony provision equivalent to Section 377, leaving victims to rely on lesser hurt or assault provisions.
- **Section 497 IPC** (Adultery, struck down in *Joseph Shine v. Union of India*, 2018) and **Section 309 IPC** (Attempt to commit suicide generally) are wholly omitted from the BNS.
- Conversely, **Exception 2 to Section 63 BNS** retains the marital rape exception (raising the age threshold of the wife from 15 to 18 years in line with *Independent Thought v. Union of India*, 2017), leaving the broader constitutional challenge to marital rape immunology pending before the Supreme Court.

Offence / Legal Concept	IPC, 1860 Provision	BNS, 2023 Provision	Core Substantive Shift
Murder & Mob Lynching	Sec. 302	Sec. 103(1) & 103(2)	Sec. 103(2) specifically codifies murder by a mob of 5+ on grounds of caste, race, belief, language, or sex.
Sedition vs. Sovereignty	Sec. 124A	Sec. 152	"Sedition" repealed; replaced with acts endangering sovereignty, unity, and integrity, adding electronic/financial modes.
Organised Crime	None (relied on Sec. 120B / State Acts)	Sec. 111 & Sec. 112	Pan-India codification of syndicate crime, cyber-syndicates, extortion, and petty organised crime.
Terrorism	None (governed by UAPA, 1967)	Sec. 113	Incorporates UAPA-style definition into ordinary penal law; SP empowered to choose between BNS and UAPA registration.
Deceitful Intercourse	Adjudicated under Sec. 375 r/w Sec. 90	Sec. 69	Separate offence for sex via false promise of marriage, job, or promotion (up to 10 years imprisonment).
Snatching	Treated as Theft (Sec. 379) or Robbery (Sec. 390)	Sec. 304	Created as a distinct offence involving sudden, quick, or forcible seizure of movable property (up to 3 years).
Cheating	Sec. 420	Sec. 318	Reorganized under Offences Against Property

Offence / Legal Concept	IPC, 1860 Provision	BNS, 2023 Provision	Core Substantive Shift
			with enhanced fines and explicit digital scope.
Defamation	Sec. 499 / Sec. 500	Sec. 356	Retains criminal defamation but introduces Community Service as an alternative sentencing option.

3. Procedural Transformation: CrPC (1973) vs. Bharatiya Nagarik Suraksha Sanhita (2023)

While the BNS alters what constitutes a crime, the **Bharatiya Nagarik Suraksha Sanhita (BNSS)** re-engineers the daily mechanics of policing, investigation, remand, and trial.

3.1 Citizen-Centric Access: Zero FIR and e-FIR (Section 173 BNSS)

Under Section 154 of the CrPC, the practice of registering a "Zero FIR" (recording information of a cognizable offence regardless of territorial jurisdiction and subsequently transferring it) existed primarily through judicial directives (*Lalita Kumari v. Govt. of U.P.*, 2014) and executive circulars. **Section 173(1) of the BNSS** elevates both **Zero FIR** and **e-FIR** to an explicit statutory mandate:

- Any citizen may communicate information relating to a cognizable offence orally or **by electronic communication**, irrespective of the area where the offence is committed.
- For electronic information, it is taken on record once signed by the informant within **three days** of transmission.
- However, **Section 173(3) BNSS** introduces a controversial procedural filter: for cognizable offences punishable with imprisonment between **three years and less than seven years**, the Officer-in-Charge of the police station may, with the prior permission of an officer not below the rank of Deputy Superintendent of Police (DSP), conduct a **preliminary inquiry within 14 days** to ascertain whether a *prima facie* case exists before registering the FIR. Critics note that this partially dilutes the strict mandatory registration rule of *Lalita Kumari* for mid-tier felonies.

3.2 Mandatory Forensic Investigation and Videography

To combat the systemic malady of coerced confessions and fabricated recoveries ("planting" of evidence), the BNSS makes technological documentation mandatory:

- Search and Seizure Videography (Section 105 BNSS):** All searches under Chapter VII and seizures of property must be recorded via **audio-video electronic means** (preferably

a mobile phone), and the recording must be forwarded without delay to the District Magistrate, Sub-divisional Magistrate, or Judicial Magistrate of the first class.

- **Compulsory Crime Scene Forensics (Section 176(3) BNSS):** For all offences punishable with imprisonment for **seven years or more**, a forensic expert must visit the crime scene to collect forensic evidence and record the process via mobile phone or other electronic equipment. Recognizing infrastructural disparities across states, the statute allows states a transitional window of up to five years to operationalize this mandate fully.

3.3 The Remand and Police Custody Debate: Section 187 BNSS vs. Section 167 CrPC

Perhaps the most consequential civil liberties divergence in the BNSS lies in **Section 187** (replacing Section 167 CrPC). Under the settled interpretation of Section 167(2) CrPC in *CBI v. Anupam J. Kulkarni* (1992 3 SCC 141), police custody could **only** be authorized during the **first 15 days** following an accused's first production before a Magistrate; beyond those initial 15 days, any further detention (up to 60 or 90 days) had to be exclusively in judicial custody (prison).

Section 187(2) of the BNSS fundamentally alters this protection by permitting the Magistrate to authorize detention in police custody not exceeding 15 days **"in the whole, or in parts, at any time during the initial forty days or sixty days out of the detention period of sixty days or ninety days, as the case may be."**

- **Constitutional Implications:** Instead of exhausting police custody in a single continuous 15-day block at the start of the investigation, investigating agencies can now fragment the 15 days into multiple smaller tranches spread across the first 40 days (for offences punishable up to 10 years) or 60 days (for offences punishable with death, life, or 10+ years). Defence counsels and human rights scholars argue that holding the threat of re-transfer from judicial custody back to police lock-ups for up to two months exerts immense psychological coercion on the accused, potentially undermining the right against self-incrimination under Article 20(3) and hindering early regular bail applications.

3.4 Statutory Timelines, Trials in Absentia, and Undertrial Relief

To address India's pendency crisis (exceeding 4.4 crore criminal cases in the district judiciary), the BNSS imposes binding statutory clocks on every actor in the criminal justice chain:

- **Medical Reports (Section 184(6) BNSS):** Medical practitioners examining rape survivors must forward the examination report to the Investigating Officer within **7 days**.
- **Victim Progress Updates (Section 193(3)(ii) BNSS):** Police must inform the victim or informant of the progress of the investigation within **90 days** via electronic means.
- **Framing of Charges (Section 251(1)(b) BNSS):** In Sessions cases, charges must be framed within **60 days** from the date of the first hearing on charge.
- **Adjournment Cap (Section 346 BNSS):** Courts are restricted to granting a maximum of **two adjournments** per party even when circumstances are beyond their control.

- **Pronouncement of Judgment (Section 258(1) BNSS):** After the termination of trial arguments, the Judge must give a judgment within **30 days** (extendable to **45 days** for recorded reasons).
- **Trial in Absentia of Proclaimed Offenders (Section 356 BNSS):** Departing from the CrPC rule that trials cannot proceed without the physical or virtual presence of the accused (save for recording evidence under Section 299 CrPC), Section 356 BNSS empowers courts to conduct a full trial and pronounce judgment against a **proclaimed offender** who has absconded to evade trial, provided 90 days have elapsed since the framing of charges and dual notices have been published.
- **Liberalized Bail for Undertrials (Section 479 BNSS):** Strengthening Section 436A CrPC, Section 479 mandates that a **first-time offender** (never previously convicted) shall be released on bail by the court if they have undergone detention for a period extending up to **one-third** of the maximum period of imprisonment specified for that offence (unless the offence is punishable by death or life imprisonment, or multiple cases are pending against the accused).

4. Evidentiary Modernization: Indian Evidence Act (1872) vs. Bharatiya Sakshya Adhiniyam (2023)

Drafted in an era of quill pens and paper ledgers, the Indian Evidence Act of 1872 treated electronic records as an anomaly, grafting Section 65A and Section 65B onto the statute via the Information Technology Act, 2000. The **Bharatiya Sakshya Adhiniyam (BSA), 2023** integrates digital evidence into the core fabric of evidentiary definitions.

4.1 Elevation of Electronic Records to Primary Evidence

- **Expanded Definition of "Document" (Section 2(1)(d) BSA):** Explicitly includes electronic and digital records—such as emails, server logs, documents on computers, laptops, or smartphones, website messages, cloud data, location evidence, and voice mail messages stored on digital devices.
- **Expanded Definition of "Evidence" (Section 2(1)(e) BSA):** The definition of oral evidence is widened to include **statements given electronically**, allowing witnesses, victims, and experts to testify via audio-video conferencing from designated locations without requiring physical courtroom attendance.
- **Primary Status (Section 57 BSA):** Under the IEA, electronic outputs taken from a computer were invariably categorized as secondary evidence requiring certification. Explanations 4, 5, and 6 to Section 57 of the BSA elevate electronic or digital records to **Primary Evidence** where the record is created or stored simultaneously or sequentially in multiple files, or where it is produced from proper custody (unless disputed), or where a video recording is simultaneously stored in electronic form and transmitted or broadcast.

4.2 Section 63 BSA vs. Section 65B IEA: Standardizing Digital Admissibility

The interpretation of Section 65B(4) of the IEA was plagued by a decade of judicial oscillation, from *Anvar P.V. v. P.K. Basheer* (2014) to *Shafhi Mohammad v. State of H.P.* (2018), before finally settling in *Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal* (2020 7 SCC 1).

Section 63 of the BSA codifies the *Arjun Panditrao* mandate while adding technical rigour:

1. It expands the scope of devices from mere "computers" to include any "**communication device**" or device used to store or process information.
2. Crucially, the BSA introduces a **standardized statutory format in "The Schedule"** appended to the Act. Under Section 63(4), the certificate of authenticity must now consists of two distinct parts: **Part A** (to be filled by the party/owner managing the device) and **Part B** (to be filled by an **Expert**, specifying the cryptographic **Hash Value**—such as SHA-256 or MD5—of the electronic record along with the algorithm used). While the mandatory inclusion of a cryptographic hash value prevents post-seizure tampering of digital evidence, defence practitioners note that requiring a Part B Expert Certificate for routine citizen-submitted evidence (such as a victim's WhatsApp screenshot or CCTV footage) may create practical bottlenecks if forensic certification labs are overburdened.

Evidentiary Principle	Indian Evidence Act, 1872	Bharatiya Sakshya Adhiniyam, 2023	Legal Impact
Oral Evidence	Sec. 3 (Physical statements in court)	Sec. 2(1)(e)(i)	Includes statements made electronically via video conferencing.
Electronic Records as Primary Proof	Treated largely as Secondary Output under Sec. 65B	Sec. 57 (Explanations 4–7)	Electronic records stored simultaneously/sequentially and from proper custody treated as Primary Evidence .
Admissibility Certificate	Sec. 65B(4) (No statutory template)	Sec. 63(4) r/w The Schedule	Prescribes a mandatory two-part Schedule Certificate (User Part A + Expert Part B with Hash Value).
Secondary Evidence Scope	Sec. 63	Sec. 58	Expands secondary evidence to include oral admissions, written admissions, and evidence of

Evidentiary Principle	Indian Evidence Act, 1872	Bharatiya Sakshya Adhiniyam, 2023	Legal Impact
			a person who has examined voluminous documents.
Joint Trials	Sec. 30	Sec. 24	Explanation II clarifies that a trial of multiple persons continues to be a joint trial even if a co-accused absconds or fails to comply with a proclamation.

5. Transitional Jurisprudence and Prospective Application

A critical operational question following the July 1, 2024 implementation date concerns the applicability of the new laws to pending investigations, trials, and appeals. Governed by the savings clauses in **Section 358 of the BNS**, **Section 531 of the BNSS**, and **Section 170 of the BSA**, read alongside Article 20(1) of the Constitution (protection against *ex post facto* criminal laws), the Indian High Courts and the Supreme Court have crystallized the following transitional rules:

- Substantive Offences (BNS):** Any offence committed prior to July 1, 2024—even if the FIR is registered on or after July 1, 2024—must be charged and adjudicated under the substantive provisions of the **IPC, 1860**, as penal liability attaches at the time of commission of the act.
- Procedural Continuity (BNSS):** Under Section 531(2)(a) of the BNSS, if any appeal, application, trial, inquiry, or investigation was already **pending** immediately before July 1, 2024, it continues to be disposed of in accordance with the **CrPC, 1973**. However, for any FIR registered on or after July 1, 2024, the investigation, remand, and trial procedure is governed exclusively by the **BNSS, 2023**.

6. Critical Evaluation: Constitutional Tensions and Institutional Capacity

While the legislative intent of the 2023 Sanhitas is to create a transparent, technology-driven, and timely justice system, a balanced scholarly assessment identifies four structural fault lines that require vigilant judicial oversight:

- The Forensic Infrastructure Deficit:** Section 176(3) of the BNSS mandates forensic crime scene visits for all offences carrying a sentence of seven years or more, and Section 63 of the BSA demands expert hash-value certification for electronic evidence. However, India faces a chronic shortage of accredited Forensic Science Laboratories (FSLs) and trained cyber-forensic examiners. Without massive budgetary allocation and recruitment at

the district level, mandatory forensic protocols risk becoming a new cause of procedural delay or technical acquittals rather than an engine of speedy justice.

2. **Expansion of Police Powers vs. Liberty (Article 21):** The combination of a 14-day preliminary inquiry before FIR registration (Section 173(3) BNSS), fragmented police custody across 40 to 60 days (Section 187(2) BNSS), and the authority of police officers to apply handcuffs during arrest or production across a wider class of economic, organized, and repeat offences (Section 43(3) BNSS, modifying the strict baseline of *Prem Shankar Shukla v. Delhi Administration*, 1980) tilts the procedural balance noticeably toward the investigating agency.
3. **Duplication of Special Laws in General Penal Law:** By importing the definitions of "Terrorist Act" (Section 113 BNS) and "Organised Crime" (Section 111 BNS) into the regular penal code while keeping the UAPA and state-level MCOCA statutes simultaneously on the statute book, the legislature has created overlapping penal regimes. In the absence of objective statutory guidelines governing when a Superintendent of Police should invoke the BNS versus the UAPA, such dual criminality invites challenges under the doctrine of manifest arbitrariness under Article 14 of the Constitution.
4. **Linguistic and Structural Continuity:** Despite the narrative of total overhaul, approximately 75% to 80% of the textual provisions of the IPC, CrPC, and IEA have been retained verbatim or with minor grammatical adjustments, albeit under completely reshuffled section numbers. While this preserves the rich body of judicial precedent developed by the Supreme Court over the past seventy-five years, the wholesale renumbering imposes a significant transitional compliance cost on the bar, the bench, and the police constabulary.

7. Conclusion

The transition from the IPC, CrPC, and IEA to the *Bharatiya Nyaya Sanhita*, *Bharatiya Nagarik Suraksha Sanhita*, and *Bharatiya Sakshya Adhinyam* represents a watershed moment in post-colonial Indian legal history. By prioritizing crimes against women and children, statutory Zero FIRs, mandatory search videography, electronic trials, and restorative community service, the new framework directly confronts twenty-first-century realities that nineteenth-century imperial codes could never envision. Yet, decolonization is not achieved merely by substituting Latin and Victorian nomenclature with Sanskrit titles, nor by expanding the coercive reach of the executive. True decolonization of criminal law lies in transforming the relationship between the State and the citizen—from that of ruler and subject to that of constitutional trustee and rights-bearing individual. As the new codes mature in practice, the constitutional courts of India must serve as the ultimate crucible, ensuring that the quest for technological efficiency and public order under the new Sanhitas remains firmly anchored to the golden triangle of Articles 14, 19, and 21 of the Constitution.

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