

OVERVIEW OF THE BHARATIYA NYAYA SANHITA, 2023

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Introduction

The Bharatiya Nyaya Sanhita, 2023 (“BNS”) was enacted on December 25, 2023, repealing and replacing the Indian Penal Code, 1860 (“IPC”) as the new penal code of the country.

While the 5th Law Commission under the Chairpersonship of Mr. K.V.K. Sundaram had carried out an extensive review of the IPC¹ as well as the Code of Criminal Procedure, 1898², it was only the criminal procedure code which was revamped and re-enacted as the Code of Criminal Procedure, 1973. The IPC continued as a relic of pre-independence British-era housing outdated provisions that did not align with the evolving modern rights and inclusion based discourse.

The IPC has now after nearly 150 years been re-enacted with the stated objective of repealing colonial laws and “*streamlining provisions relating to offences and penalties*”³. Amongst others, the BNS aims to give precedence to offences against women and children and offences against State. It introduces community service as a punishment for petty offences. The BNS also brings about changes to fines and punishments for various offences.⁴

This article provides a broad overview and analyses some of the key changes made to the penal code of the country.

Key Features of BNS

1. Of offences against property

1.1 Dishonest misappropriation of property (Section 314)

BNS now provides for a minimum punishment of six months for dishonest misappropriation of property. Further, the offence is now punishable with imprisonment along with fine as opposed to imprisonment or fine or both under IPC. The emphasis on imprisonment has gone up in this context.

¹ See 42nd Report of the Law Commission of India on the Indian Penal Code dated 2 June 1971.

² See 41st Report of the Law Commission of India on the Code of Criminal Procedure, 1898 dated 24 September 1969.

³ Statement of Objectives and Reasons.

⁴ Supra Note 1.

1.2 Criminal Breach of Trust (Section 316)

Criminal breach of trust as provided under Sections 406 – 409 of IPC have been clubbed in one provision under Section 316. Further, Criminal Breach of Trust is now punishable with imprisonment which may extend to a term of five years instead of three years under IPC.⁵

1.3 Cheating (Section 318)

Similarly, all forms of cheating under IPC in Sections 417, 418 and 420 have been clubbed into a single provision i.e., Section 318 of the BNS. The punishment for cheating has been increased to imprisonment which may extend to three years as opposed to one year under IPC⁶. For offence of “*cheating with knowledge that wrongful loss may ensue to person whose interest offender is bound to protect*” i.e., a more egregious form of cheating, the punishment has been increased to imprisonment which may extend to five years as against three years under IPC⁷.

2. Of offences affecting the human body

2.1 Organised crime

Section 111 of the BNS introduces the offence of “organised crime”, borrowing it largely from specialised state legislations aimed at curbing organised criminal activity, such as the Maharashtra Control of Organised Crime Act, 1999 (“**MCOCA**”), the Gujarat Control of Organised Crime Act, 2015 (“**GCOC**”), etc.

The definition of organised crime⁸ under the provision is vague and unclear and uses catch-all phrases, which leaves room for unfettered discretion and arbitrariness on the part of the investigating agencies to prosecute persons based on these vague and undefined terms. For example, the definition uses terms such as land grabbing, contract killing, cybercrimes etc., which are not defined anywhere in the Sanhita. Additionally, it uses “economic offence”. Economic offence is couched in vague terms using overbroad phrases such as “hawala transaction” and “mass-marketing fraud” which otherwise have not been defined anywhere in the BNS or other statutes, potentially adding to further confusion.

Pertinently, “hawala transactions” as understood are prohibited under the Foreign Exchange Management Act, 1999, however, are not criminal offences under the said Act. Similarly, “mass-marketing fraud” are also covered under Prize Chits and Money Circulation Schemes (Banning) Act, 1978.

⁵ Section 316(2) of BNS.

⁶ Section 417 of IPC.

⁷ Section 418 of IPC.

⁸ “*Any continuing unlawful activity including kidnapping, robbery, vehicle theft, extortion, land grabbing, contract killing, economic offence, cyber-crimes, trafficking of persons, drugs, weapons or illicit goods or services, human trafficking for prostitution or ransom, by any person or a group of persons acting in concert, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence, threat of violence, intimidation, coercion, or by any other unlawful means to obtain direct or indirect material benefit including a financial benefit, shall constitute organised crime.*”

Similarly, Section 112 defines petty organised crime⁹. The definition of petty organised crime also uses extremely vague and subjective terms such as “trick theft”, “pick pocketing”, “card skimming”, “unauthorised selling of tickets”, etc. It also makes punishable “any other similar criminal act”. Thus, the ambit of the offence remains patently unclear leaving ample space for discretion of investigating authorities in prosecuting persons.

Introduction of “*organised crime*” as an offence under a central statute while the same continues to be an offence under separate state statutes¹⁰ may create jurisdictional problems between different agencies. Although, in view of Article 254 of the Constitution, in case of repugnancy, the BNS will prevail.

2.2 Causing death by negligence (Section 106)

The offence of causing death by negligence has undergone a significant change under the BNS. The punishment for causing death by rash and negligent act has been increased to imprisonment which may extend to five years and with fine. Earlier such an offence was punishable with two years or with fine or both under IPC.¹¹

2.3 New specific offences arising out of negligence

Section 106 provides for death by rash and negligent act of a medical practitioner while performing a medical procedure. The offence is punishable with imprisonment which may extend to two years and with fine.¹² This offence should be read in light of the judgment of the Supreme Court in *Jacob Mathew v. State of Punjab*, (2005) 6 SCC 1, which laid down guidelines to ensure that the offence is not misused against doctors.

The Supreme Court held that negligence under civil law may not necessarily be negligence in criminal law. It *inter alia* held that for negligence to amount to an offence, the element of *mens rea* must be shown to exist.

A provision seemingly to punish hit-and-run cases has also been introduced in the BNS.¹³ The BNS now provides that whoever causes death by rash or negligent driving of vehicle, and thereafter escapes from the scene of incident without reporting to the police or a magistrate, will be punished with a maximum of ten years’ imprisonment and shall also be liable to fine.

⁹ “Whoever, being a member of a group or gang, either singly or jointly, commits any act of theft, snatching, cheating, unauthorised selling of tickets, unauthorised betting or gambling, selling of public examination question papers or any other similar criminal act, is said to commit petty organised crime.

Explanation.—For the purposes of this sub-section “theft” includes trick theft, theft from vehicle, dwelling house or business premises, cargo theft, pick pocketing, theft through card skimming, shoplifting and theft of Automated Teller Machine.”

¹⁰ Maharashtra Control of Organised Crimes Act 1999, Uttar Pradesh Control of Organised Crimes Act, 2017, Gujarat Control of Organised Crime Act, 2015, Karnataka Control of Organised Crime Act, 2000, et al.

¹¹ Section 304A of IPC.

¹² Section 106(1) of BNS.

¹³ Section 106(2) of BNS.

The country has been plagued with increased incidents of rash driving, hit-and-run cases and road rage cases. According to the National Crime Records Bureau, reckless driving claimed more lives than murder in the year 2021. Hence, this provision seems to be specifically provided to discourage hit-and-run cases.

2.4 Mob Lynching

In view of the increasing cases of mob-lynching and hate crimes in the country, the BNS now specifically provides for punishment of murder in cases of mob-lynching.¹⁴ The provision states that where a group of five or more acting in concert commits murder on grounds of race, caste or community, sex, place of birth, language, personal belief or any other similar ground then each member of such group shall be punished with death or with imprisonment for life, and shall also be liable to fine.

2.5 Deletion of offences

The BNS in line with the judgment of the Supreme Court in *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 has deleted the offence under Section 377 of IPC. This is a welcome decision in line with human dignity.

The offence of attempt to commit suicide, as found under Section 309 of the IPC, has also been omitted in the BNS. This is a progressive omission that views attempt of commit suicide as a mental healthcare crisis, as opposed to a crime.

The Supreme Court in *Joseph Shine v. Union of India*, (2019) 3 SCC 39, had struck down the offence of adultery, noting it to be archaic, arbitrary, and paternalistic. Despite the recommendation of the Parliamentary Standing Committee Report¹⁵ to re-introduce adultery in the penal code, applicable to both men and women, BNS omits adultery as an offence.

3. Overlap with Unlawful Activities (Prevention) Act, 1967

3.1 Offences Relating to Terrorism

A “terrorist act” is a new offence defined under the BNS.¹⁶ It is relevant to note that the offence relating to terrorism has been included under the chapter dealing with offence affecting human body. Traditionally, it has been found in chapter dealing with offence against state.

The offence of committing a terrorist act overlaps with the UAPA¹⁷ which already defines and provides for the offence of terrorist act. The definition of a terrorist act under BNS exactly mirrors the definition of terrorist act under the UAPA. Therefore, it is unclear why the new

¹⁴ Section 103 of BNS.

¹⁵ See Report No. 246 of the Parliamentary Standing Committee on Home Affairs. Available at https://prsindia.org/files/bills_acts/bills_parliament/2023/SC_Report_Bharatiya_Nyaya_Sanhita_2023.pdf.

¹⁶ Section 113 of the BNS.

¹⁷ Sections 15 and 16 of the UAPA.

offence of terrorist act has been provided for in the BNS. This is especially since UAPA is a special statute enacted for providing a more effective mechanism for prevention of *inter alia* terrorist activities.

Besides the above, there are other overlapping offences between the BNS and UAPA, such as the following:

<u>Offence under BNS</u>	<u>Offence under UAPA</u>
Section 113(3)	Section 18
Whoever conspires or attempts to commit, or advocates, abets, advises or incites, directly or knowingly facilitates the commission of a terrorist act or any act preparatory to the commission of a terrorist act, shall be punished with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.	Whoever conspires or attempts to commit, or advocates, abets, advises or incites, directly or knowingly facilitates the commission of, a terrorist act or any act preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.
Section 113(5)	Section 20
Any person who is a member of an organisation which is involved in terrorist act, shall be punished with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine.	Any person who is a member of a terrorist gang or a terrorist organisation, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine.
Section 113(6)	Section 19
Whoever voluntarily harbours or conceals, or attempts to harbour or conceal any person knowing that such person has committed a terrorist act shall be punished with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and shall also be liable to fine: Provided that this sub-section shall not apply to any case in which the harbour or concealment is by the spouse of the offender.	Whoever voluntarily harbours or conceals, or attempts to harbour or conceal any person knowing that such person is a terrorist shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and shall also be liable to fine: Provided that this section shall not apply to any case in which the harbour or concealment is by the spouse of the offender.
Section 113(7)	Section 21
Whoever knowingly possesses any property derived or obtained from commission of any terrorist act or acquired through the commission of any terrorist act shall be	Whoever knowingly holds any property derived or obtained from commission of any terrorist act or acquired through the terrorist fund shall be punishable with imprisonment

punished with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine.	for a term which may extend to imprisonment for life, and shall also be liable to fine.
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The BNS recognises that the provisions of BNS and UAPA are overlapping and accordingly, provides that an officer not below the rank of Superintendent of Police shall decide whether to register a case under the BNS or the UAPA¹⁸.

An investigating authority cannot be given unfettered discretion to decide which offence to prosecute a person for when an offence is made out under law. The judgment of Supreme Court in *State of West Bengal v. Anwar Ali Sarkar*, (1952) 1 SCC 1, was dealing with a similar situation. Section 5(1) of the West Bengal Special Courts Act, 1950 gave power to the State Government to decide what classes of offences or offences can be decided by the Special Courts. The Supreme Court held such a provision to be violative of Article 14 as it gave unfettered power to the State Government without any guideline.

This is contrary to the general rule that – if an act falls within the definition of a terrorist act under both the BNS and UAPA, the special statute – i.e., the UAPA – will prevail, rendering the provisions of the BNS redundant.¹⁹

The introduction of the overlapping offence under the BNS seems to be ostensibly to avoid the safeguards provided under the UAPA. The UAPA recognises that given the wide reaching powers under the UAPA, the same should come with safeguards.

Section 45 of the UAPA mandates obtaining sanction of the relevant government before a jurisdictional court can take cognizance under the Act. The offence of terrorist act (as under the BNS) does not require obtaining sanction for initiation of proceedings before court. In addition to the above, the UAPA provides for challenge to notification of declaration of an organisation as a terrorist organization, under Sections 36 and 37 of the Act. The same safeguard has not been provided under the BNS. The removal of these safeguards will have widespread ramifications including potential misuse of the provisions.

3.2 Offence of sedition

The most welcome change in the BNS is the deletion of offence of sedition provided under Section 124A of the IPC. This is in line with the statement of the Union of India before the Supreme Court on May 11, 2022 that it is re-examining and reconsidering the provision of sedition.²⁰

¹⁸ Explanation to Section 113(7) of BNS.

¹⁹ *Sharat Babu Digumarti v Govt (NCT of Delhi)*, (2017) 2 SCC 18

²⁰ Writ Petition (Civil) No. 682 of 2021, S.G. Vombatkere v. Union of India.

The offence of sedition was nothing but a vestige of colonial past introduced to punish any form of rebellion against the British Government. It had no place in a democratic society governed by rule of law.

Though offence of sedition under Section 124A of IPC has been deleted, it seems to have been replaced by Section 152 of BNS which deals with acts endangering sovereignty, unity and integrity of India. A comparison of the two provisions is as under:

Sedition under Section 124A of the IPC	Section 152 of BNS
<p>Whoever, by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.</p> <p>Explanation 1.--The expression "disaffection" includes disloyalty and all feelings of enmity.</p> <p>Explanation 2.--Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.</p> <p>Explanation 3.--Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.</p>	<p>Whoever, 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 or endangers sovereignty or unity and integrity of India; or indulges in or commits any such act shall be punished with imprisonment for life or with imprisonment which may extend to seven years, and shall also be liable to fine.</p> <p>Explanation.—Comments expressing disapprobation of the measures, or administrative or other action of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite the activities referred to in this section do not constitute an offence under this section.</p>

A comparison of the above provisions show that instead of punishing inciting feelings of disaffection towards the Government established by law in India, Section 152 punishes secession and separatist activities, armed rebellion, subversive activities or any act which endangers sovereignty or unity and integrity of India. This seems to overlap with Section 13 of the Unlawful Activities (Prevention) Act, 1967 (“UAPA”) which punishes “*unlawful activity*”. Unlawful activity under the UAPA²¹ is defined as cession and secession activities, acts which disclaims, questions, disrupts or intends to disrupt the sovereignty and territorial integrity of India and which causes or intends to cause disaffection against India, similar to Section 152 of BNS.

The punishment under Section 152 has also been enhanced. The minimum punishment under Section 152 is seven years as opposed to three years under Section 124A. Further, the offence is no longer punishable with only fine as was the offence of sedition.

Section 152 of BNS retains Explanation 2 and 3. This is seemingly in view of the observations of the Supreme Court in *Kedar Nath Singh v. State of Bihar*, 1962 Supp (2) SCR 769. The Supreme Court for upholding the constitutionality of sedition had relied upon the Explanations to Section 124A to hold that mere expression of disapprobation of measures with the view to improve or alter by lawful means would not be punishable. The Supreme Court held that expressing disapprobation of actions without exciting feelings would also not be penal.

It is most interesting to note that Section 152 specifically uses the term “electronic communication” and makes the acts of secession, cession et al, done via electronic communication punishable. Electronic Communication as defined in BNSS²² cover communications by means of mobile, telephones, laptops etc. This when read with Section 20 of the Telecommunications Act, 2023 which permits interception of telecommunication equipment, could potentially lead to extensive and continued fishing and roving inquiry into probable secession and separatist activities even without there being any concrete evidence of it.

In view of the above, regulations are required for regulating power under the Telecommunications Act, 2003 for interception. In *People’s Union for Civil Liberties (PUCL) v. Union of India* (1997) 1 SCC 301, the Supreme Court emphasised that in the absence of just and fair procedure for regulating the exercise of power under an Act, it is not possible to safeguard the rights of the citizens guaranteed under Articles 19(1)(a) and 21 of the Constitution of India. Therefore, unless and until, the legislature lays out detailed procedure to regulate/ monitor the interception of private information and data exchanged between two or more persons, the provision as it exists, is insufficient to take care of the fundamental rights.

4. Of Punishments

²¹ Section 2(o) of the UAPA.

²² Section 2(i) of the BNSS.

An essential inclusion in the BNS is the incorporation of community service as a form of punishment, under Section 4(f). Community Service has been defined²³ in the Bharatiya Nagarik Suraksha Sanhita, 2023 (“**BNSS**”) (new criminal procedure code) as work which the Court may order a convict to perform as a form of punishment that benefits the community and for which he is not entitled to any remuneration.

It's worth noting that the BNS has introduced a non-custodial and reformatory form of punishment—community service—for petty offences, marking a significant departure from traditional punitive measures.

Interestingly, though the debate over whether defamation should at all be a criminal offence or not has not been resolved in the BNS, community service has been introduced as an alternative punishment for defamation.²⁴ This is a positive reform in making the offence of defamation less punitive.

Punishment in the form of Community service is presently applicable to limited offences. These offences are minor offences such as misconduct by a drunken person in public²⁵, public servant unlawfully engaging in trade²⁶, non-appearance in response to a proclamation²⁷ and three other offences including defamation.

It may be worthwhile to introduce community service as a punishment for other minor offences as well. This would signify a more comprehensive shift away from punitive and custodial measures toward a more reformatory approach.

In this context, it may be important to note that community service has also been provided as an alternative punishment for theft where stolen property is less than five thousand rupees and the person has been convicted for the first time. Community service, is however only applicable when the person returns the value of the property or restores the stolen property.²⁸ Unfortunately, this provision renders community service as a punishment somewhat redundant. An individual who steals an amount as minimal as five thousand or less, will in all likelihood not be able to pay such an amount and would thus be given custodial punishment. Thus, undermining the intended use of community service.

While, BNS retains “forfeiture of property” as a form of punishment, it may be redundant. The provision for attachment and forfeiture of property under the BNSS²⁹ renders “forfeiture of property” as a punishment redundant. This is because forfeiture under BNSS is not limited to certain offences but applicable for all property obtained or derived out of criminal activity or commission of offence, irrespective of the nature of offence.

²³ Section 23 of BNSS.

²⁴ Section 356(2) of BNS.

²⁵ Section 355 of BNS.

²⁶ Section 202 of BNS.

²⁷ Section 209 of BNS.

²⁸ Section 303(2) of BNS.

²⁹ Section 107 of BNSS.

Applicability of BNS

The repeals and savings clause of the BNS repeals IPC, however, it protects the previous operation of IPC or anything done or suffered under the IPC. The BNS also makes Section 6 of the General Clauses Act, 1897 applicable.³⁰

Quite interestingly, while it *inter alia* saves penalty, punishments as well as proceedings, investigation or remedy in respect of any such penalty or punishment under the IPC³¹, the BNS provides that anything done or any action taken under the IPC shall be deemed to have been done under the corresponding provision of the BNS. This provision unfortunately raises issues of retrospective application of the new penal code in violation of Article 20 of the Constitution, which provides that no person shall be convicted of any offence except for violation of law in force at the time of commission of act.

Conclusion

The BNS brings in some positive changes (such as deletion of sedition as an offence, adding of transgender in the definition of gender³², expansion/introduction of stringent offences against women and children, introduction of community service as a form of punishment, etc.), however, without any vision or coherence in policy behind the changes.

A classic example of this is the introduction of changes to offences against women and children. BNS seeks to bring in more stringent provisions in respect of offences against woman and child³³. New offences have been introduced which deals with the offence of sexual intercourse by a person in authority³⁴ and which deals with sexual intercourse by employing deceitful means³⁵. However, BNS continues to recognise marital rape as an exception to rape and has failed to make the offence of rape gender neutral. This seems inconsistent with the stated objectives of giving precedence to crimes against women and children.

Despite the new law, there continues to be a complete absence of coherence in the sentencing process. There is no clarity whether we follow deterrence, rehabilitation or retribution principles of sentencing. The sentences have been enhanced and offences added without there being any principle behind these changes. The legislature needs to be understand that merely increasing punishment is not enough to prevent crimes. While community service has been introduced as a reformatory form of punishment, it is limited to only six offences without any basis and there is continued reliance upon custodial punishment. Thus, there needs to be coherence in sentencing with greater reliance on reformatory sentencing procedure, probation, community service, and non-custodial sanctions as means of rehabilitation.

³⁰ Section 358 of BNS.

³¹ Section 358(3) of BNS.

³² Section 2(1) of BNS.

³³ See Statement of Objects and Reasons.

³⁴ Section 68 of BNS.

³⁵ Section 69 of BNS.

Similarly, in today's day and age, solitary confinement cannot continue as a form of punishment. Solitary confinement ought to have been abolished especially in view of the evolution of human rights and rights guaranteed under Article 21 of Constitution including rights to live with dignity, civil liberties, rights of prisoners and the increased emphasis of mental health.

In addition, the overlapping of offences under BNS and special statutes as well as vague and undefined terms in the statute will only lead to more confusion and ensuing increase in litigation. This will overburden the courts and increase pendency of cases.