

## Look Back and Move Forward: Transition from IPC to BNS

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### *Introduction*

India's tryst with its new criminal law regime commenced on July 01, 2024 ("**Effective Date**"). The Bharatiya Nyaya Sanhita, 2023 (**BNS**) repealed and replaced the Indian Penal Code, 1860 (**IPC**) as the primary penal legislation in India. The Bharatiya Nagarik Suraksha Sanhita, 2023 (**BNSS**) replaced the Criminal Procedure Code, 1973 (**CrPC**) and the Bharatiya Sakshya Adhinyam, 2023 (**BSA**) replaced the Indian Evidence Act, 1872 (**IEA**).

BNS, BNSS, and BSA together propose a complete overhaul of India's criminal justice system<sup>1</sup>. The new criminal laws aim to simplify legal procedure so that ease of living is ensured<sup>2</sup> by introducing modern policing principles with procedure adaptive with technological developments and updated models of penalization.

BNS claims to "*change the nature of the law towards providing justice rather than punishment*"<sup>3</sup>. The number of sections has reduced from 511 in IPC to 358 in BNS. More than 20 sections have been deleted and added, along with substantial re-arrangement in the structure of BNS vis-à-vis IPC. Given the significant impact BNS will have on the lives of each and every person, we anticipate challenges in the seamless adoption of the new criminal law regime. The need for certainty and clarity in the transition from IPC to BNS is essential for the efficient adoption of the new criminal law regime.

In this article, we examine the first question which possibly comes to mind when one thinks about transitioning from the old regime to the new criminal law regime – which acts will continue to be governed by IPC and which acts will now be punished under BNS? We also examine whether the repeal and savings provision under BNS is aligned with constitutional safeguards against retrospective application of substantive criminal law.

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<sup>1</sup> Pr. 1.1 of the 246<sup>th</sup> Report by the Parliamentary Standing Committee on Home Affairs on "The Bharatiya Nyaya Sanhita, 2023"

<sup>2</sup> Pr. 1.2 of the 246<sup>th</sup> Report by the Parliamentary Standing Committee on Home Affairs on "The Bharatiya Nyaya Sanhita, 2023"

<sup>3</sup> Pr. 1.3 of the 246<sup>th</sup> Report by the Parliamentary Standing Committee on Home Affairs on "The Bharatiya Nyaya Sanhita, 2023"

### *Transition from IPC to BNS*

It is abundantly clear that all acts and crimes committed on and after the Effective Date will be governed by and punishable under BNS and not IPC. What about crimes committed before the Effective Date?

Section 358 of BNS is the repeal and savings provisions which sets out the transitional provisions. Sub-section (2) of Section 358 provides that IPC's repeal will not affect:

- a. the previous operation of IPC or anything done or suffered under IPC;
- b. any right, privilege, obligation, or liability acquired, accrued, or incurred under IPC;
- c. any penalty, or punishment incurred in respect of any offences committed under IPC;
- d. any investigation or remedy in respect of any such penalty, or punishment; and
- e. any proceeding, investigation, or remedy in respect of any such penalty or punishment as aforesaid, and any such proceeding or remedy may be instituted, continued, or enforced, and any such penalty may be imposed as if IPC had not been repealed.

The Parliament has also added Section 358(3) to safeguard continuity in the criminal law regime in situations of transition by creating a deeming fiction that anything done under IPC will be considered to have been done under the corresponding provisions of BNS.

In India, statutes generally contain through a savings clause to ensure that proceedings which have already been instituted prior to a statute's repeal or amendment, can be completed and enforced. The Supreme Court, in *Hindustan Unilever Ltd. v. State of Madhya Pradesh*, reported at (2020) 10 SCC 751, interpreted the repeal and savings provision under the Food Safety and Standards Act, 2006 (FSSA) to clarify the transition from the Prevention of Food Adulteration Act, 1954 (PFA). Similar to Section 358 of BNS, Section 97 of FSSA repealed PFA but protected the punishments imposed under PFA. In *Hindustan Unilever's case*, the offence under PFA had been committed in 1989 (prior to FSSA) but the trial court passed its judgment only in 2015 (after FSSA). The Supreme Court held that a violation of PFA committed prior to FSSA coming into force will continue to be punishable as per the provisions of PFA and did not extend the benefit of lower punishment under FSSA.

Section 358 of BNS and the judicial precedents interpreting similar clauses are therefore clear that all acts and crimes committed before the Effective Date where enquiry or proceedings have

been initiated will continue to be governed by and punishable under IPC. However, what happens where the criminal act was committed before the Effective Date but the crime was discovered or reported only after it? Is Section 358(2) of BNS adequate to cover situations where the crime occurred but no enquiry, investigation, or proceedings started before the Effective Date? The short answer is – yes.

First, the language of Section 358(2) is broad enough to safeguard the application of IPC to a criminal act which occurred before the Effective Date, even if it was discovered or reported later. Anything done under IPC will continue to be governed by IPC and any liability accrued or incurred under IPC continues to be governed by IPC. It ensures that an accused is convicted under IPC and not BNS for any criminal act committed during the time IPC was in operation.

Second, criminal legislation cannot be retrospective application of criminal legislation is prohibited under Article 20(1)<sup>4</sup>.

Third, a legislation cannot be enforced retrospectively unless the legislation expressly or by necessary implication implies that it is intended to have retrospective effect<sup>5</sup>. There is no such provision enabling retrospective application of BNS.

Fourth, the legal maxim *lex prospicit non respicit* (meaning: law looks forward not backward) will apply to interpretation of the provisions of BNS. The idea behind this rule of interpretation is that a current law should govern current activities and laws passed today cannot apply to the events of the past<sup>6</sup>.

### ***New Offences Introduced by BNS***

BNS has introduced new offences such as (i) organized crime under Section 111; (ii) abetment by a person outside India has been made an offence under Section 48; and (iii) sexual intercourse by deceitful means under Section 69. Can the police or courts invoke the provisions of BNS for acts committed prior to the Effective Date since IPC did not provide for these new offences? The short answer is – no.

Article 20(1) of the Constitution of India protects all persons from law that retrospectively changes the consequences of actions that have been committed (*ex post facto* law). The first

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<sup>4</sup> *T. Barai v. Henry Ah Hoe*, (1983) 1 SCC 177

<sup>5</sup> *State of Bombay v. Vishnu Ramchandra*, AIR 1961 SC 307

<sup>6</sup> *G.J. Raja v. Tejraj Surana*, (2019) 19 SCC 469; *CIT v. Vatika Township Pvt Ltd*, (2015) 1 SCC 1

aspect of *ex post facto* law is that a person cannot be punished for an act which was not an offence at the time of commission of the act. This constitutional protection feeds itself on a basic principle of natural justice that no person can be convicted for conduct which was not a crime on the day of its commission<sup>7</sup>. A law enacted subsequently cannot make an act an offence if such act was not an offence on the date of its commission<sup>8</sup>.

### ***Higher punishment under BNS than in IPC***

The punishment for certain offences has been increased under BNS. For instance, the punishment for criminal breach of trust was punishable with imprisonment of up to three years and this punishment has been increased to imprisonment of up to five years under Section 316(2) of BNS.

The protection under Article 20(1) is not limited to new offences. It also provides that no person can be subjected to a penalty greater than the penalty which could have been inflicted as per the law in force when the offence was committed. This essentially means that enhanced punishment cannot be imposed if the punishment for an offence is increased after the offence has been committed. Thus, the maximum penalty that may be imposed for any criminal act committed before the Effective Date will be the penalty prescribed under IPC.

### ***Conclusion – Pain Before Gain***

Section 358 of BNS and Article 20 of the Constitution provide clarity and help determine the applicability of IPC and BNS. It is also helpful that the ingredients of offences and punishment prescribed for offences remain the same for most offences under IPC and BNS. It will however be essential to determine the date on which the offence was committed to ascertain whether IPC or BNS will apply. Despite the clarity in the general principles, we anticipate that courts will face questions on the applicable substantive criminal law (IPC or BNS) in multiple cases, especially those where the consequences under IPC and BNS diverge.

Courts will be required to analyze when the offence alleged was committed or completed prior to or post the Effective Date. Determining the applicable substantive law will be simpler in

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<sup>7</sup> *Kanaiyalal Chandulal Monim v. Indumati T. Potdar*, AIR 1958 SC 444; *State of Maharashtra v. Kaliar Koil Subramaniam*, (1977) 3 SCC 525; *Pyare Lal Sharma v. Managing Director*, (1989) 3 SCC 448

<sup>8</sup> *Soni Devrajbhai Babubhai v. State of Gujarat*, (1991) 4 SCC 298

cases where the offence was committed through a single act, where it is easier to identify when the offence was completed.

It will however be more onerous to determine which substantive law applies in case of continuing offences where the period of offence overlaps the IPC and BNS regime. For instance, when can the offence of cheating or criminal breach of trust be said to have been committed? Multiple acts typically constitute an offence of criminal breach of trust, such as entrustment of property and dishonest misappropriation<sup>9</sup>. The continuing nature of such offences is best explained from *Illustration (a)* to Section 316(1) of BNS. In this illustration, the executor of the will would have misappropriated or misused the assets of the deceased person once he obtains possession and power over them and the misuse would continue till the assets are not recovered. For instance, the deceased person passed away on April 01, 2024, and the executor misappropriated the assets to his benefit from June 01, 2024 onwards, with the misuse continuing once BNS came into force. The question before courts will be which substantive criminal law will apply to alleged criminal acts which overlap the IPC and BNS regime, *i.e.* which started prior to the Effective Date and continued after it.

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<sup>9</sup> *N. Raghavender v. State of Andhra Pradesh*, 2021 SCC OnLine SC 1232