

## **Evaluating Bharatiya Nyaya Sanhita, 2023: A Step Toward Balancing Rehabilitation and Punishment for Juveniles in India**

<sup>1</sup>Akansha Prasad, <sup>2</sup>Mrs. Darshi Sharma Guhey

<sup>1</sup>LLM Student, <sup>2</sup>Assistant Professor

<sup>1,2</sup>Department of Law, Kalinga University Raipur C.G.

<sup>1</sup>[akankshaprasad2808@gmail.com](mailto:akankshaprasad2808@gmail.com), <sup>2</sup>[darshi.sharma@kalingauniversity.ac.in](mailto:darshi.sharma@kalingauniversity.ac.in)

### **ABSTRACT**

On December 25, 2023, the Indian Penal Code of 1860 was superseded by the Bharatiya Nyaya Sanhita, 2023, which represented a major overhaul of the country's criminal justice system. This law went into effect on July 1, 2024, together with the Bharatiya Sakshya Adhiniyam and the Bharatiya Nagarik Suraksha Sanhita. The modifications represent a break from colonial legal frameworks with the goal of creating a system that is inclusive and in line with modern rights. The BNS still has some significant flaws, despite the Chief Justice of India and other legal experts hailing it as a revolutionary breakthrough.

**Keywords:** Indian Penal Code, Citizen Centric, Bharatiya Nyaya Sanhita, BNS, and shortcomings

### **INTRODUCTION**

The Indianization of colonial laws is marked by the Bharatiya Nyaya Sanhita, 2023 (BNS), which also represents a shift away from punishment as the primary principle of justice and towards a broader definition of justice. The adoption of these new legislation was referred to as a "watershed moment" by the Chief Justice of India. The need for a criminal justice system based on contemporary ideas that represent a fair relationship between the state and its citizens, moving away from colonial prejudices, was emphasised by Dr. Rajiv Mani, Secretary of the Department of Legal Affairs under the Ministry of Law and Justice. Sh. Tushar Mehta, the Indian Solicitor General, has underlined the historical necessity of these changes as well as the goal of this legislative makeover, which is to create a judicial system that is focused on the needs of the people.

The Indian Penal Code, 1860 was replaced as the country's new penal law on December 25, 2023, by the BNS. As per the Ministry of Home Affairs' notification that accompanied the new law, the Bharatiya Nagarik Suraksha Sanhita, 2023, and the Bharatiya Sakshya Adhiniyam, 2023, went into effect on July 1st, 2024. The need to update the IPC's antiquated provisions, which were still traces of the British pre-independence system, served as the catalyst for these

modifications period. These clauses were out of step with current debates about inclusiveness and changing rights.

In order to make the Indian Penal Code (IPC) more relevant to the legal and social environments of today, the Bharatiya Nyaya Sanhita, 2023 (BNS) aims to modernise and reform it. However, it might have some weaknesses or parts that could be altered, just like any lengthy legal document.

## LITERATURE REVIEW

Academics usually stress how important it is to make sure that a new penal code complies with fundamental legal requirements, such as proportionality, legality, and clarity. Legal theorists contend that in order to ensure justice and predictability in court rulings, a well-written penal code must provide clear definitions for offences and punishments (Hart, 1961; von Hirsch, 1976). A well-written penal code contributes to the preservation of the integrity of the legal system by offering precise rules.

Comparative legal studies that look at different countries' approaches to penal law greatly influence the process of developing a penal code. Critical benchmarks for the protection of human rights, such as the right to a fair trial, nondiscrimination, and proportionality in sentencing, are provided by international norms set by organisations like the United Nations and regional organisations (Zedner, 2004; Ashworth, 2013). As legal anthropologists and sociologists study how societal norms and customs shape criminal laws and how necessary legal reforms can adapt to changing social challenges, it is also critical that lawmakers take into account the social, cultural, and historical contexts of their jurisdictions (Feeley & Simon, 1992; Merry, 1988).

Administrative capability, legal professional training, public awareness, and civil society participation in the reform process are some of the real-world challenges that come with creating and enforcing a new penal code (Roberts & Roach, 2009; Allen, 2012). Researchers also examine how new criminal rules affect crime rates, legal procedures, and public views of justice. Case studies and longitudinal research provide insight into how legislative modifications impact criminal justice systems and encourage continuous debates over the efficacy of policies (Duff, 2007; Tonry, 2014). Additionally, moral issues surrounding criminal law, such as different conceptions of punishment (retributive, utilitarian, rehabilitative), are essential in guiding conversations regarding the creation of new codes, as legal theorists and philosophers debate the morality of criminal penalties and how they affect legislative procedures (Moore, 1997; Murphy, 2001).

In his 1961 work "Punishment and Responsibility: Essays in the Philosophy of Law," H.L.A. Hart emphasises the critical role that coherence and clarity play in the creation of penal laws, contending that these attributes are necessary to guarantee justice and efficacy in legal systems.

At the same time, Ashworth (2013) provides a comparative study of several legal systems in "Principles of Criminal Law," showing how various legal systems are interpreted and applied in diverse places. Zedner (2004) enhances this comparative viewpoint in "Criminal Justice," where he examines how international human rights norms impact both the implementation of criminal laws and their growth worldwide, emphasising the connection between human rights and legal practices.

In "Legal Pluralism," Merry (1988) explores the idea of legal pluralism in further detail, emphasising the need to take cultural variety into account while draughting criminal legislation in order to guarantee that they are in line with regional norms and values.

According to Roberts and Roach (2009) in "Critical Perspectives on Crime and Law," policymakers have intrinsic difficulties when attempting to strike a balance between social order and justice during the draughting process. With a focus on impact evaluations as essential instruments for policy creation, Tonry (2011) in "The Handbook of Crime and Punishment" offers a thorough summary of the research approaches used to analyse the impact of punitive legislation on crime rates and societal consequences.

Moore's (1997) work, "Placing Blame: A Theory of Criminal Law," provides an example of the ethical aspects of penal code reforms by highlighting the moral principles that ought to direct legislators in creating laws that advance justice.

Furthermore, in "Governing Through Crime," Simon (2007) criticizes the political forces that shape penal law draughting, contending that political agendas frequently shape punitive measures in response to societal fears rather than effective crime prevention strategies. Kerr (2015) addresses current issues by examining the effects of technological advancements on legal frameworks in "Cybercrime: Digital Cops in a Networked Environment," advocating for flexible legal responses to emerging forms of crime. Finally, Tonry (2018) lays out future directions for penal reform in "Crime and Justice, Volume 47: A Review of Research," arguing for evidence-based policies that change as society does.

### **SHORTCOMINGS OF BHARATIYA NYAYA SANHITA, 2023**

The following are some possible areas where the Bharatiya Nyaya Sanhita, 2023 (BNS) may have flaws or be identified:

1. The BNS noticeably leaves out necrophilia, which is defined as having sex with a deceased person, as a specified crime. This raises serious concerns about the comprehensiveness and efficacy of the legal system in addressing and punishing such morally repugnant behaviours. The lack of specific legislative provisions regarding necrophilia creates a significant gap in the criminal justice system, potentially allowing criminals to evade prosecution and deprive victims and their families of justice. This situation emphasises the urgent need for legislative evaluation and reform to guarantee

that all forms of sexual misconduct are appropriately classified as crimes and subject to the appropriate legal penalties.

2. The BNS's Section 69 addresses "sexual intercourse achieved through deceitful means," and its explanation states that such techniques include coercion through false promises of employment, a promotion, or marriage while hiding one's identity. This clarification raises concerns about the potential for "purchasing consent." For instance, if the promise of employment or promotion is fulfilled, it might not be regarded as a false promise. Given that it resembles a commodified form of consent, this raises the question of whether consent in such a situation can actually be considered free.
3. Activities that endanger India's integrity, unity, and sovereignty are included in Section 152 of the BNS. According to a legal expert, accusations of "endangering the sovereignty, unity, and integrity of India" could result from even a small payment to the publication of a magazine connected to a group the government believes is involved in seditious activity.

According to this clause, anyone who knowingly uses written or spoken language, symbols, money, visual aids, electronic communication, or any other kind of communication to incite or attempt to incite armed insurrection, secession, or other subversive acts faces harsh consequences, up to and including life in prison. The criteria for prosecution are greatly expanded in this section, which also adds the concept of financial support as a new component. The word "or otherwise" introduces a degree of ambiguity that permits multiple interpretations.

Although sedition is not specifically mentioned in the BNS, legal experts contend that Section 152 is a harsher version of the Indian Penal Code's (IPC) earlier sedition laws. Experts point out the possible chilling effect on free expression and dissent by speculating that even journalists who write critically about the administration could face prosecution under this strict clause.

Section 84 of the BNS highlights the acts of seducing, kidnapping, or holding a married woman in order to facilitate illegal relationships, exposing a clear gender bias in the laws governing marital unions. By allowing men to lawfully pursue people who meddle in their marriage, this article upholds the patriarchal traditions of the colonial era while safeguarding the husband's authority and interests.

4. Section 88 of the BNS deals with miscarriages, allowing a woman to seek one only if she is acting in good faith to preserve her own life. Although women now have more autonomy and choice to end a pregnancy for a number of reasons thanks to the MTP (Medical Termination of Pregnancy) Act and its amendments, this aspect has remained unchanged. Despite the MTP Act's acknowledgement of a woman's autonomy over her body, Section 88 of the BNS restricts it, permitting miscarriages only in situations when

there is a substantial risk to life. This discrepancy shows how outdated the BNS's regulations are in comparison to modern legal frameworks that aim to empower women.

5. When Section 377, which had previously made consenting homosexual actions unlawful, was eliminated from the BNS, things might have been handled differently. Rather than completely deleting the Act, it could have been better to amend it to criminalise non-consensual behaviour and safeguard consensual gay acts between consenting adults. Furthermore, the definition of rape has been enlarged to encompass piercing acts against any part of a woman's body. However, similar actions taken by a husband against the wishes of his wife are not considered rape due to the marital rape exemption (Exception 2 to Section 63). Therefore, women who were before allowed to accuse their husbands of sodomy are no longer able to do so under the current legal framework. The law allows people to defend themselves against sexual assault motivated by irrational desire. Nevertheless, the legal system does not provide victims of sodomy, regardless of gender, with sufficient protection or redress. This is a serious legal flaw that deprives some vulnerable populations of crucial protections against unwanted sexual behaviour.

6. The definitions of terms like defamation, infringement, and obscenity of women's modesty need to be clarified by the BNS.

Though it needs more accurate definitions for concepts like defamation, obscenity, and the breach of a woman's modesty, the BNS aims to modernise the legal system. Imprecise definitions may lead to inconsistent law enforcement and differing interpretations. For example, without a clear definition, defamation could be used to stifle free speech and expression by targeting people who rightfully disagree with or criticise something. Similar to this, the term "obscenity" is highly arbitrary and, in the lack of precise standards, may lead to the arbitrary targeting or banning of creative works, which would have an impact on writers, artists, and media outlets.

The phrase "infringement of a woman's modesty" also needs to be defined precisely in order to safeguard women's rights without running the risk of abuse. Legal proceedings can be complicated by ambiguous terminology, which can either allow criminals to avoid justice or, on the other hand, result in baseless allegations. A uniform understanding of these offences would be promoted by the establishment of precise and comprehensive definitions, which would help the judiciary and law enforcement administer the law equitably. This clarity is essential for preserving the integrity of the legal system as well as for protecting individual rights.

7. The opportunity to decriminalise some offences that would have been better handled as civil cases was wasted by the BNS. This recommendation was given by the Ministry of Home Affairs in the Committee on Draft National Policy on Criminal Justice Report from 2007. For instance, the BNS's Section 356 on defamation might have been eliminated, enabling the parties involved to resolve their differences amicably.



8. Non-trial resolutions, which can save resources that would otherwise be used for trials and can have significant financial ramifications, were not included in the revised criminal legislation. Non-trial resolutions are commonly used in a number of Western nations, such as the US and the UK.

In order to carry out such resolutions, the BNS may have identified certain economic offences as qualifying for this process, including bribery, cheating, dishonestly withdrawing or hiding property, and the creation of fake documents.

9. The BNS sets the minimum age of criminal responsibility at seven years old, or twelve if it is determined that the child is unable to understand the nature of their behaviour and the consequences of their actions. This minimum age is much lower than that in many other nations, and it conflicts with the United Nations Report of the Committee on the Rights of the Child, which suggests a minimum age of twelve for criminal culpability.
10. BNS Section 106(2), which imposes a maximum 10-year prison term on anyone involved in a fatal accident who decides not to report it to the police, is no longer in effect. In a press statement issued on January 2, the Ministry of Home Affairs (MHA) said that before deciding how to execute Section 106(2) BNS, the All-India Motor Transport Congress would be consulted. A strike by truck drivers who felt the clause was unduly harsh served as the impetus for the action.
11. The revision of Section 106(2) BNS is important for two reasons. First of all, it seems out of scale and unusual for the law to raise the maximum penalty for just escaping without informing authorities of an accident right away from five to ten years. This clause exclusively covers accidents that end in fatalities; it makes no mention of the requirement to care for people who may have suffered serious injuries and need immediate medical assistance. If the vehicle details are known, the sole potential benefit appears to be the recovery of legitimate automobile accident claims. Second, this clause appears to go against the fundamental right against self-incrimination, which is safeguarded by Article 20(3) of the Indian Constitution, which says that no one who is charged with a crime may be made to testify against their will.
12. The BNS's Section 112 BNS legislation pertaining to small organised crime may have several flaws that could make enforcement more challenging. The vague definition of "group or gang," which omits to outline the lowest membership requirement or the criteria for being labelled a gang member, is a significant problem. This ambiguity could result in uneven enforcement and prosecution, which would cause misunderstandings over what constitutes a criminal gang. The definition of "any other similar criminal act" is ambiguous and open to interpretation.  
Since it is uncertain if certain behaviours fall within this category, the lack of precision could result in inconsistent execution of the law. The concept of theft may not adequately handle new types of theft or innovative tactics brought about by technological

advancements, even while it covers a broad range of forms. Furthermore, because there are no precise rules for calculating acceptable periods of incarceration, the defined range of one to seven years may be overly large, running the danger of disproportionate punishment and variability in penalties. Similar to this, the fines clause is vague about minimum and maximum amounts, which could lead to arbitrary punishments that don't take into account the gravity of the offence or the circumstances of the offender. More accurate definitions, improved sentencing guidelines, more transparent criteria for fines, and a framework that is adaptable to new types of criminal conduct will all be necessary to address these issues.

13. The definition of "exploitation," which covers a range of practices but may be interpreted differently, is one aspect of human trafficking covered by Section 143 BNS. For example, practices akin to slavery are ambiguous and would benefit from particular examples or standards to guarantee consistent application. Furthermore, even while the law disregards a victim's consent, it may be difficult to prove that there was no real consent, especially in situations involving psychological manipulation or subtle pressure, indicating the need for thorough guidance on assessing coercion and consent. Furthermore, even though the harsh punishments for public employees and law enforcement personnel involved in trafficking are appropriate, it can be difficult to prove their complicity because of possible corruption and collusion in law enforcement, which could impede impartial investigations and prosecutions. Lastly, even though the legal framework permits graduated sentencing based on the number of trafficked individuals and the presence of minors, there are instances in which the severity of the crime does not always correspond with the number of victims; therefore, a more nuanced approach that considers the specifics of each case and the degree of exploitation would be helpful.
14. Although Section 144 addresses the exploitation of trafficked persons, the requirement that offenders "know" or "have reason to believe" that a person has been trafficked may create a potential loophole that would allow them to claim ignorance and make it more difficult to determine the accused's mental state. Furthermore, the inconsistent sentencing guidelines—three to seven years for adults and five to ten years for trafficked children—may not accurately reflect the seriousness of the exploitation, since particularly heinous crimes involving adults may call for harsher punishments. Additionally, while the emphasis on sexual exploitation is important, it may overshadow other important forms of exploitation, such as forced labour and domestic servitude, suggesting that broadening the scope to include these other types might improve protective measures. It is crucial to maintain consistency in the concepts and terminology used in Sections 143 and 144 BNS, as any ambiguity may lead to difficulties in interpretation and enforcement.
15. Improving the law's efficacy against exploitation and trafficking requires addressing its general flaws. This entails making sure that there are strong procedures for the efficient

application and enforcement of legal rules, as well as sufficient training for court and law enforcement staff and public awareness initiatives. Additionally, even while the legislation seeks to punish perpetrators, it frequently ignores crucial victim care, underscoring the necessity of all-encompassing victim assistance programs that offer reintegration services, mental health counselling, and legal aid. Furthermore, improving coordination and cooperation with other countries is essential for effectively combating these networks due to the global nature of trafficking. To enhance Sections 143 and 144 BNS in their fight against these horrible crimes, legislative reforms, more precise instructions, and effective enforcement tactics are required.

16. A decision about whether to file a case under the BNS or the UAPA must be made by an officer at least the rank of superintendent of police because the BNS acknowledges the overlap between its regulations and those of the UAPA.

Many of the BNS's provisions are also found in state laws that target organised crime, such as the Gujarat Control of Terrorism and Organised Crime Act of 2015 and the Maharashtra Control of Organised Crime Act of 1999, as well as the Unlawful Activities (Prevention) Act of 1967. This increases compliance responsibilities and related costs by creating redundant processes and methods for enforcing these violations. Furthermore, it creates ambiguity in the processes involved in handling such charges.

17. An investigative authority shouldn't have full discretion over which offence to prosecute when a legal violation is evident. In the 1952 case of *State of West Bengal v. Anwar Ali Sarkar*, the Supreme Court considered a similar situation. The West Bengal Special Courts Act, 1950, Section 5(1), gave the State Government the authority to define the kind of offences that could be decided by extrajudicial tribunals. The Supreme Court ruled that this article violated Article 14 because it gave the State Government unchecked power without any guiding principles. This goes against the conventional wisdom that states that when an act is designated as a terrorist act under both the BNS and the UAPA, the UAPA takes precedence because it is a unique statute, making the BNS prohibitions superfluous.

18. Adding overlapping crimes under the BNS appears to be an attempt to circumvent the UAPA's safeguards. The UAPA emphasises that the application of appropriate safeguards during enforcement is necessary due to its extensive powers.

Before a jurisdictional court may exercise jurisdiction under the Act, Section 45 of the UAPA requires prior governmental consent. However, this type of government approval is not necessary for BNS proceedings pertaining to terrorist acts. Furthermore, the UAPA allows contesting an organization's identification as a terrorist group, as specified in Sections 36 and 37 of the Act. Nevertheless, the BNS lacks these protections. The absence of these safeguards could have major consequences, including the misuse of its powers.



19. During the parliamentary presentation of the measures, it was declared that the new code will completely abolish the sedition charge, which was formerly covered by Section 124A of the IPC.  
But this same idea has been reinterpreted, and Sections 150 and 152 of the BNS now define sedition in a way that punishes acts that "threaten the integrity, sovereignty, and unity of India."
20. In *Mithu v. State of Punjab*, the Supreme Court declared Section 303 of the IPC unconstitutional, effectively abolishing obligatory death sentences in India. The ruling emphasised that while determining penalties in capital cases, the judiciary must take into account both aggravating and mitigating factors. This provision has been changed and reintroduced as Section 104 BNS, which stipulates that murderers serving life sentences must be executed or imprisoned for life. At first, any murder committed by a prisoner serving a life sentence was punishable by death under Section 303 of the IPC.
21. According to BNS Section 4(f), the court has the authority to order community service as a kind of punishment for offenders, requiring them to carry out unpaid labour that benefits the community. However, judicial authorities are free to construe community service broadly because there are no clear rules or standards about its character, administration, or length. Effective execution and supervision are necessary for the completion of community service for small theft charges (involving sums under five thousand rupees) under Section 303(2) BNS, which can be difficult. Various jurisdictions may have various requirements for community service supervision and enforcement.
22. According to the PIB press release from that date, the Home Minister told the Lok Sabha on December 20, 2023, that those charged with culpable homicide could be given a reduced sentence if they willingly notify the police of the incident and take the victim to the hospital for medical attention. But there are no such provisions in the BNS.

## CONCLUSION

It is essential to make sure that definitions are clear and accurate in order to minimise the possibility of varying interpretations and effectively solve current problems. In order to account for new types of crime and changing society dynamics, the legislative parts must also be updated on a regular basis. The possibility of arbitrary court rulings can be decreased by putting in place thorough judicial guidelines, which can also assist guarantee that judicial discretion is used consistently.

Furthermore, in order to propose significant changes to the *Bharatiya Nyaya Sanhita, 2023*, it is imperative that legal experts, grassroots judicial and police officers, advocates, law professors, women's rights activists, law students, public prosecutors, civil society representatives, and other stakeholders participate in the review process. By putting in place reliable systems for keeping

an eye on how these laws are being applied and procedures for getting input, any potential flaws can be quickly found and fixed.

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