

Shortcomings of the Bharatiya Nyaya Sanhita, 2023: An Analytical Perspective

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Abstract:

The Bharatiya Nyaya Sanhita, 2023 was enacted on December 25, 2023, to supplant the Indian Penal Code of 1860, marking a significant reform in India's criminal justice system. This legislation, along with the Bharatiya Nagarik Suraksha Sanhita as well as Bharatiya Sakshya Adhiniyam, took impact on 1st July 2024. The changes signify a departure from colonial legal frameworks, aiming for a system aligned with contemporary rights and inclusivity. While the Chief Justice of India and various legal experts have praised the BNS as a transformative step, it still exhibits notable shortcomings. For instance, it fails to address necrophilia, leaving serious offences unregulated. Moreover, Section 69's treatment of "deceitful means" in sexual relations raises issues regarding consent, particularly in contexts involving job offers or promotions. Section 152, which deals with threats to national sovereignty, could lead to overly broad interpretations that impede free expression. Additionally, Sections 84 and 88 reveal gender biases and outdated perspectives on marital rights and women's reproductive decisions. These challenges highlight the urgent need for further review and reform to ensure BNS fulfils its goal of creating a just and equitable legal system.

Keywords: Bharatiya Nyaya Sanhita, BNS, Citizen Centric, Indianisation, Indian Penal Code, Shortcomings

1. Introduction:

Bharatiya Nyaya Sanhita, 2023 (BNS) signifies the Indianization of colonial legislation and reflects a transition from punishment as the fundamental tenet of justice to a more comprehensive interpretation of justice. The Chief Justice of India described the implementation of these novel laws as a "watershed moment." Dr. Rajiv Mani, Secretary of the Department of Legal Affairs under the Ministry of Law and Justice, underscored the necessity for a criminal justice framework founded on modern concepts that embody an equitable connection between the state and its residents, departing from colonial biases. The Solicitor General of India, Sh. Tushar Mehta has emphasized the historical imperative for these modifications, highlighting the aim to establish a citizen-centric justice system through this legislative overhaul.

The BNS was enacted on December 25, 2023, superseding the IPC (Indian Penal Code), 1860 as the nation's novel penal legislation. The Bharatiya Nagarik Suraksha Sanhita, 2023, as well as the Bharatiya Sakshya Adhiniyam, 2023, commenced on 1st July 2024, as per a notification from the Ministry of Home Affairs accompanying the new legislation. The impetus for these changes arose from the necessity to modernize outdated provisions of the IPC, which remained as remnants of the pre-independence British

era. These provisions failed to align with contemporary discussions around evolving rights and inclusivity.

The Bharatiya Nyaya Sanhita, 2023 (BNS) seeks to modernize and reform the Indian Penal Code (IPC) to enhance its relevance to today's legal and social landscapes. Nevertheless, as with any extensive legal text, it may contain certain vulnerabilities or aspects that could be manipulated.



(The image above fundamentally highlights the disconnect between outdated laws and the current needs of society, calling for changes in the justice system.)

2. Literature Review:

Scholars frequently highlight the necessity of ensuring that a new penal code aligns with essential legal principles, including legality, proportionality, and clarity. Legal theorists assert that an effectively constructed penal code must offer precise definitions for offences and penalties, which in turn guarantees fairness and predictability in judicial decisions (Hart, 1961; von Hirsch, 1976). By providing clear guidelines, a well-drafted penal code helps to maintain the integrity of the legal system.

The process of creating a penal code is significantly informed by comparative legal studies that examine approaches to penal law in various jurisdictions. International standards, established by entities such as the United Nations and regional organizations, offer critical benchmarks for the protection of human rights, including fair trial rights, non-discrimination, and proportionality in sentencing (Zedner, 2004; Ashworth, 2013). Additionally, it is vital for lawmakers to consider the social, cultural, and historical contexts of their jurisdictions, as legal anthropologists and sociologists investigate how societal norms and customs shape criminal laws and how necessary legal reforms can adapt to changing social challenges (Feeley & Simon, 1992; Merry, 1988).

The practical obstacles associated with drafting and implementing a new penal code may include administrative capacity, legal professional training, public awareness, and civil society's engagement in the reform process (Roberts & Roach, 2009; Allen, 2012). Scholars also analyse the repercussions of new penal codes on legal practices, crime statistics, and public perceptions of justice. Longitudinal studies and case studies shed light on how legislative changes influence criminal justice systems and stimulate ongoing discussions about policy effectiveness (Duff, 2007; Tonry, 2014). Furthermore, ethical considerations related to penal law, including various punishment theories (retributive, utilitarian,

rehabilitative), play a crucial role in informing discussions about drafting new codes, as philosophers and legal theorists engage in debates over the moral justifications for criminal sanctions and their effects on legislative processes (Moore, 1997; Murphy, 2001).

H.L.A. Hart (1961) in his publication "Punishment and Responsibility: Essays in the Philosophy of Law" underscores the essential role that clarity and coherence play in the formulation of penal laws, asserting that these qualities are vital for ensuring justice and effectiveness in legal systems. In parallel, Ashworth (2013) offers a comparative analysis of various legal frameworks in "Principles of Criminal Law," demonstrating how different jurisdictions interpret and implement penal laws. This comparative perspective is enriched by Zedner (2004) in "Criminal Justice," who investigates the influence of international human rights standards on development as well as execution of penal statutes globally, highlighting the interconnectedness of legal practices and human rights.

Further examining the social implications of penal law, Merry (1988) discusses the concept of legal pluralism in "Legal Pluralism," stressing the necessity of incorporating cultural diversity into the drafting of penal laws to ensure alignment with local norms and values. Roberts and Roach (2009), in "Critical Perspectives on Crime and Law," address the inherent challenges policymakers encounter while trying to balance justice and social order during the drafting process. Meanwhile, Tonry (2011) in "The Handbook of Crime and Punishment" provides an extensive overview of research methodologies employed to evaluate the effectiveness of penal laws on crime rates and societal outcomes, focusing on impact assessments as crucial tools for policy development.

The ethical dimensions of penal code reforms are exemplified in Moore's work (1997) "Placing Blame: A Theory of Criminal Law," which emphasizes the moral foundations that should guide lawmakers in crafting laws that promote fairness. In addition, Simon (2007) critiques the political dynamics influencing penal law drafting in "Governing Through Crime," arguing that political agendas often shape punitive measures in response to societal fears rather than effective crime prevention strategies. Addressing contemporary issues, Kerr (2015) explores the ramifications of technological advancements on legal frameworks in "Cybercrime: Digital Cops in a Networked Environment," calling for adaptive legal responses to new forms of crime. Lastly, Tonry (2018) outlines future directions for penal reform in "Crime and Justice, Volume 47: A Review of Research," advocating for evidence-based policies that evolve with societal transformations.



(The image above depicts the positive attributes of a Penal Code, encompassing every facet of justice.)

3. Shortcomings of the Bharatiya Nyaya Sanhita, 2023:

Some potential areas where loopholes could be found or recognized in the Bharatiya Nyaya Sanhita, 2023 (BNS) are hereinunder:

- The BNS notably omits necrophilia - which is defined as having intercourse with a deceased person - as a specified crime. This absence raises serious questions about the thoroughness and effectiveness of the legal system in tackling and penalizing such morally reprehensible behaviours. The absence of concrete legislative provisions concerning necrophilia creates a substantial gap in the criminal justice system, potentially enabling criminals to avoid prosecution and depriving victims along with their families of justice. This situation highlights the urgent need for legislative evaluation and reform to ensure that all forms of sexual misconduct are properly classified as crimes and subject to necessary legal penalties.
- Section 69 of the BNS pertains to "sexual intercourse achieved through deceitful means," with its elucidation indicating that such methods include inducement via false assurances of job, promotion, or else marriage while obscuring one's identity. This clarification prompts questions regarding the possibility of "purchasing consent." For example, it might not be considered a false promise if the employment or promotion promise is kept. This prompts the inquiry of whether consent in such a context can genuinely be deemed free, as it resembles a commodified type of consent.
- Section 152 of the BNS addresses activities which jeopardize the unity, sovereignty, as well as India's integrity. A legal expert noted that even a simple donation towards publishing a magazine associated with an organization that the state deems to be engaging in seditious activities could lead to charges of "endangering the sovereignty, unity, and integrity of India." This provision stipulates that individuals who intentionally employ spoken or else written language, symbols, financial resources, visual representations, electronic communication, or else any other means to provoke or attempt to provoke secession, armed insurrection, or else subversive activities may incur severe penalties, including life imprisonment. This section significantly expands the criteria for prosecution, introducing the notion of financial support as a new element. The inclusion of the phrase "or otherwise" adds a level of ambiguity that allows for a wide range of interpretations. While the BNS does not explicitly mention sedition, legal scholars argue that Section 152 represents a more severe version of the previous sedition laws found in the Indian Penal Code (IPC). Experts suggest that even journalists who write critically about the government could be prosecuted under this stringent provision, highlighting the potential chilling effect on free expression and dissent. Section 84 of the BNS exposes a pronounced gender bias in the legal regulation of marital partnerships, emphasizing the acts of enticing, abducting, or detaining a married woman to enable illicit connections. This article embodies the patriarchal customs of the colonial period by permitting husbands to legally pursue others who interfere with their marriage, thus protecting the husband's interests and power. Conversely, wives are not granted equivalent rights when their husbands leave them for another woman, underscoring a legal structure that diminishes a woman's consent and autonomy by regarding her as property. Thus, this law sustains outdated as well as patriarchal concepts, neglecting to advance gender equality and equity in marriage relationships.
- The BNS addresses miscarriage under Section 88, permitting a woman to seek one only in good faith in order to save her own life. The MTP (Medical Termination of Pregnancy) Act and its revisions have given women greater freedom and agency to choose to terminate a pregnancy for a variety of reasons, however, this component has not changed despite these progressive advancements. Despite

the MTP Act's recognition of a woman's autonomy over her body, Section 88 of the BNS nevertheless places restrictions on it, allowing miscarriages only in cases where they represent a serious risk to life. This difference highlights a big gap between the BNS's antiquated rules and contemporary legal systems that seek to empower women.

- It could have been handled differently when Section 377, which had previously made consenting homosexual acts illegal, was removed from the BNS. It could have been more beneficial to modify the clause to protect consensual homosexual actions between consenting adults while criminalizing non-consensual conduct, rather than repealing the section entirely.

Additionally, penetrating acts against any portion of a woman's body are now included in the expanded definition of rape. Nevertheless, because of the marital rape exemption (Exception 2 to Section 63), such activities committed by a husband against the will of his wife are not classified as rape. As so, under the existing legal framework, women who were previously able to file sodomy accusations against their husbands are no longer able to do so.

The law permits individuals to protect themselves from sexual assault driven by unnatural lust. However, in cases of sodomy, the legal framework fails to offer adequate protection or remedies for victims, irrespective of their gender. This represents a considerable legal shortcoming, leaving certain vulnerable groups without essential safeguards against non-consensual sexual acts.

- The BNS requires greater clarity in its definitions of terms such as Defamation, Infringement, as well as the Obscenity of the modesty of women.

The BNS seeks to modernize the legal framework, yet it requires more precise definitions for terms such as defamation, obscenity, and the violation of a woman's modesty. Inconsistent law enforcement along with varying interpretations might arise from imprecise definitions. For instance, in the absence of a precise definition, those who legitimately criticize or disagree with something could be the focus of defamation, which might be employed to restrict free speech and expression. Similarly, the term "obscenity" is quite subjective, and in the absence of clear criteria, it could result in arbitrary censorship or targeting of creative works, which would affect media outlets, writers, as well as artists.

The term 'infringement of a woman's modesty' also necessitates a precise explanation to protect the rights of women without the misuse risk. Ambiguous language can complicate legal proceedings, enabling offenders to evade justice or, alternatively, leading to unfounded accusations. Establishing clear and detailed definitions would foster a consistent understanding of these offences, assisting law enforcement and the judiciary in applying the law fairly. This clarity is vital not just for safeguarding individual rights but also for maintaining the integrity of the legal system.

- The BNS squandered the chance to decriminalize a number of offences that were better served as civil cases. The Ministry of Home Affairs made this suggestion in their 2007 Report of the Committee on Draft National Policy on Criminal Justice. For example, the BNS's Section 356 on defamation may have been removed, allowing the impacted parties to settle the matter as a civil dispute.
- The new criminal statutes did not incorporate non-trial resolutions, which can conserve resources that would otherwise be allocated to trials and often result in substantial financial implications. In several Western countries, including the US and the UK, non-trial resolutions are frequently utilized. The BNS might have designated some economic offences as eligible for this process in order to carry

out such resolutions, such as bribery, cheating, dishonestly removing or concealing property, and the creation of fraudulent documents.

- The minimum age of criminal responsibility is set by the BNS at seven years old, or twelve years old if it is found that the child is incapable of comprehending the nature of their conduct and the repercussions of those actions. The United Nations Report of the Committee on the Rights of the Child proposes a minimum age of twelve years for criminal responsibility, which is in conflict with this minimum age, which is significantly lower than that in many other countries.
- The application of BNS Section 106(2), which sets a potential 10-year prison sentence for anyone engaged in fatal accidents but chooses not to notify the authorities, has been put on suspension. The Ministry of Home Affairs (MHA) stated in a press release dated January 2 that the All-India Motor Transport Congress would be consulted before making a decision about the enforcement of Section 106(2) BNS. The move was prompted by a strike by truck drivers who claimed the provision was excessively punitive.

Because of 2 reasons, the reconsideration of Section 106(2) BNS is crucial. Firstly, an increase in the potential sentence from five to 10 years for merely fleeing without reporting to law enforcement immediately after an accident appears disproportionate and is unique in the law. This provision does not address the need for caring for individuals who may have been severely injured and require urgent medical attention; it only applies to accidents resulting in fatalities. The only conceivable advantage seems to involve recovering appropriate motor accident claims if the vehicle details are known. Secondly, this provision seems to contravene the basic right against self-incrimination as protected in Article 20(3) of the Constitution of India, which states that no one accused of a crime shall be forced to testify against their own interests.

- There are a number of possible holes in the BNS's Section 112 BNS regulations related to small organized crime that could make enforcement more difficult. A notable issue is the ambiguous definition of 'group or gang,' which fails to specify the minimal membership threshold or the grounds for classification as a gang member. This vagueness may lead to inconsistent enforcement and prosecution, resulting in confusion on the definition of a criminal gang.

The phrase "any other similar criminal act" is broadly defined as well as subject to interpretation. The absence of specificity may lead to inconsistent application of the law, as it is unclear whether actions are included in this classification. Despite the fact that the definition of theft encompasses a wide range of forms, it might not sufficiently address new categories of theft or creative approaches brought about by technological breakthroughs.

Additionally, the established range for imprisonment, spanning from one to seven years, maybe excessively broad, risking disproportionate sentencing and variability in penalties due to the absence of clear guidelines for determining appropriate durations of imprisonment. Similarly, the provision regarding fines lacks defined minimum or maximum amounts, potentially resulting in arbitrary fines that do not reflect the offence's seriousness or else the offender's situation. Addressing these concerns will necessitate more precise definitions, better sentencing guidelines, clearer criteria for fines, and a flexible framework to adapt to new forms of criminal activity.

- Section 143 BNS addresses the trafficking of persons, particularly the definition of "exploitation," which encompasses various forms but may be subject to interpretation; for instance, practices similar to slavery are vague and would be improved with specific examples or criteria to ensure uniform application. Additionally, while the law considers a victim's consent irrelevant, there could be

challenges in demonstrating the absence of genuine consent, particularly in cases involving psychological manipulation or subtle coercion, suggesting a need for comprehensive guidelines on evaluating consent and coercion.

Moreover, although the severe penalties for public servants and police officers involved in trafficking are appropriate, proving their complicity can be problematic due to potential corruption and collusion in law enforcement, which may obstruct unbiased investigations and prosecutions. Finally, while the legal framework allows for graduated sentencing based on the number of trafficked individuals and the presence of minors, there are situations where the crime's severity does not necessarily align with the victim count; thus, a more nuanced approach that assesses each case's circumstances and the extent of exploitation would be beneficial.

- Section 144 pertains to the exploitation of trafficked individuals; nevertheless, the requirement that offenders must "knowingly" or "have reason to believe" a person has been trafficked may engender a possible loophole, enabling them to assert ignorance and complicating the challenge of establishing the accused's mental state. Moreover, the inconsistency in sentencing - five to ten years for the exploitation of trafficked children as well as three to seven years for adults - may not sufficiently represent the severity of the exploitation, as particularly egregious cases involving adults might deserve more severe penalties.

Moreover, although the focus on sexual exploitation is crucial, it may dominate other critical forms of exploitation, for example, forced labour as well as domestic servitude, indicating that expanding the scope to include these other types might improve protective measures. It is essential to maintain uniformity in the concepts and terminology employed in Sections 143 as well as 144 BNS, since any ambiguity may result in challenges in interpretation along with enforcement.

Addressing the general loopholes in the law is essential for improving its effectiveness against trafficking and exploitation. This involves ensuring robust mechanisms for the effective implementation and enforcement of legal provisions, alongside adequate training for law enforcement and judicial personnel, as well as public awareness campaigns. Furthermore, while the law aims to penalize offenders, it often overlooks essential support for victims, highlighting the need for comprehensive victim assistance programs that provide legal aid, mental health counselling, and reintegration services. Additionally, given the international dimension of trafficking, enhancing cooperation and coordination with other jurisdictions is crucial for tackling these networks effectively. Legislative amendments, clearer guidelines, and practical enforcement strategies are necessary to strengthen Sections 143 and 144 BNS in their fight against these heinous crimes.

- The BNS recognizes the overlap between its regulations and those of the UAPA, thereby requiring that an officer of no less than the level of Superintendent of Police decide whether to initiate a case under the BNS or the UAPA.

Numerous provisions of the BNS overlap with specific legislation, including the Unlawful Activities (Prevention) Act of 1967 and state statutes targeting organized crime, such as the Maharashtra Control of Organised Crime Act of 1999 as well as the Gujarat Control of Terrorism and Organised Crime Act of 2015. This leads to redundant procedures and mechanisms for prosecuting these offences, hence elevating compliance burdens along with associated expenses. Moreover, it generates uncertainty in the proceedings when dealing with such offences.

When a legal infraction is obvious, an investigative authority shouldn't be given complete choice in deciding which offence to prosecute. The Supreme Court addressed a comparable scenario in the

State of West Bengal v. Anwar Ali Sarkar, (1952) case. Section 5(1) of the West Bengal Special Courts Act, 1950, authorized the State Government to specify the categories of offences that could be adjudicated by Special Courts. Since the State Government was granted unrestricted authority without any guiding principles, the Supreme Court decided that this clause violated Article 14.

This contradicts the usual premise that when an act is classified as a terrorist act under both the BNS and the UAPA, the UAPA, being a special statute, prevails, rendering the prohibitions of the BNS unnecessary.

It seems that the purpose of adding overlapping offences under the BNS is to get around the protections provided by the UAPA. The UAPA underscores that its broad powers necessitate the implementation of suitable safeguards during enforcement.

Section 45 of the UAPA mandates prior governmental consent before a jurisdictional court may take jurisdiction under the Act. On the other hand, BNS proceedings concerning terrorist actions do not require this kind of government authorization. Furthermore, as stated in Sections 36 and 37 of the Act, the UAPA permits challenging the designation of an organization as a terrorist group. However, these safeguards are absent from the BNS. Serious repercussions, including potential abuse of its provisions, could result from the lack of these protections.

- It was stated during the bills' parliamentary presentation that the sedition offence, which was previously covered by Section 124A of the IPC, will be entirely eliminated under the new code. However, this same concept has been reformulated, with a revised version of sedition being presented under Sections 150 and 152 of the BNS designed to penalize actions that “threaten the integrity, sovereignty, and unity of India.”
- The decision of Supreme Court in *Mithu v. State of Punjab* deemed Section 303 of the IPC unconstitutional, essentially doing away with mandatory death sentences in India. The verdict underscored that the judiciary must consider both aggravating and mitigating elements when adjudicating sentences in capital cases. This clause has been modified and reintroduced as Section 104 BNS, which mandates the death penalty or life imprisonment for individuals serving a life sentence who commit murder. Section 303 of the IPC initially mandated the death penalty for any murder committed by a prisoner serving a life sentence.
- In accordance with BNS Section 4(f), the court may mandate community service as a form of punishment for criminals, compelling them to perform unpaid tasks which assist the community. /However, there are no specific guidelines or criteria for the nature or administration or duration of community service, resulting in broad interpretation by judicial officers. The performance of community service for petty theft offences (involving amounts below five thousand rupees) under Section 303 (2) BNS relies on effective implementation and supervision, which may present challenges. Enforcement and supervision of community service may vary across different jurisdictions.
- The Home Minister stated in the Lok Sabha on December 20, 2023, as noted in the PIB press release from that date, that individuals accused of culpable homicide may receive a mitigated sentence if they voluntarily report the incident to the police and convey the victim to the hospital for medical treatment. However, the BNS lacks any analogous provision.
- To safeguard public safety and national security, Section 113 of the BNS imposes stringent anti-terrorism measures. However, there are worries that security agencies can abuse its broad definitions and severe penalties, risking civil liberties. To avoid singling out dissenters, security authorities need

to define terrorist acts precisely and adhere to legal requirements. Cases should be actively reviewed by the judiciary in order to maintain transparency as well as the process. While Section 113 BNS aims to counter terrorism, it is imperative to prioritize individual rights to prevent abuse of authority.

4. Conclusion:

To effectively address existing shortcomings, it is crucial to ensure that definitions are both precise and clear, thereby minimizing the risk of varied interpretations. Additionally, regular updates to the legislative sections are necessary to accommodate emerging forms of crime and shifting societal dynamics. Implementing comprehensive judicial guidelines can also help ensure that judicial discretion is exercised consistently, reducing the likelihood of arbitrary judicial decisions.

Furthermore, involving legal experts, judicial and police officers working at the grassroots level, advocates, professors of law, women's rights activists, law students, public prosecutors, civil society representatives, and other stakeholders in the review process is essential for suggesting meaningful amendments to the Bharatiya Nyaya Sanhita, 2023. Establishing robust mechanisms for monitoring the implementation of these laws, along with processes for gathering feedback, will enable timely identification and rectification of any loopholes that may arise.

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