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The Bhartiya Nyaya (Second) Sanhita 2023: An Integrated Perspective – A Comprehensive Study and Analysis

Akhil Kumar K.S.^a

^aThe National University of Advanced Legal Studies, Kochi, India

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The Bhartiya Nyaya (Second) Sanhita 2023 (BNSS) has received the president's assent, marking a pivotal step toward replacing the age-old Indian Penal Code of 1860, which persisted for 163 years. Although several amendments were introduced over time, the archaic penal law was initially drafted with colonial and outdated provisions aimed at suppressing Indians who opposed the British crown, ensuring absolute control over the territory. This legacy continued post-independence; in response to various cases, the judiciary declared multiple sections of the IPC unconstitutional, prompting calls for governmental modifications. All the Legislations are the reflection of its temporal and authorial context. The Indian Penal Code of 1860 also has such reflections, the IPC with definitions that have become overly narrow, particularly regarding terms like 'gender,' 'India,' and 'electronic evidence.' As a result, offences were often characterized by patriarchal, homophobic, and unfair tendencies, necessitating an overhaul to align the present world's evolving standards. The new penal law, the Bhartiya Nyaya (Second) Sanhita, aims to address these issues by offering contemporary solutions. While the new law incorporates some elements from the IPC, introduces modifications, and new provisions to fortify India's criminal legal system, certain provisions remain subjective, relying on individual interpretation and potentially leading to confusion. Despite these improvements, the Bhartiya Nyaya (Second) Sanhita falls short in implementing recommendations from the Standing Committee. Key aspects, such as gender-neutral sections and specific provisions for healthcare workers and the LGBTQIA+++ community, are conspicuously absent. The government's opportunity to create a more updated legal framework in tune with today's evolving society appears to have been underutilized on many points during the formulation of the new penal law.

Keywords: *bns, judiciary, British legacy, framework, underutilized, government.*

THE EVOLUTION, PROGRESSION AND CHALLENGES OF THE INDIAN PENAL CODE

The increasing legislative powers of the different provinces or princely states in the early 19th century created heterogeneity in procedural and substantive legal systems; the conflict between the laws of various provinces created administrative difficulties for the British in India. The Charter Act 1833 provides provisions for the appointment of members of councils of the Governor General.¹ The same statute provided the provisions for the appointment of the Law Commission of India, the first Law Commission was set under the chair of Lord Thomas Babington Macaulay to thoroughly analyze the administration of justice in British India and submit its report.² The Law Commission analyzed and compared the different provincial laws and the most celebrated systems of Western jurisprudence³ and drafted the Indian Penal Code, enacted on 6 October 1860. The laws were highly biased towards Indians; their main aim was to tighten British control over India and suppress the Indians. Indians were not posted as commissioners, and even the commissioners opposed the modifications suggested by representative Indian experts. Some sections of Indian laws (Hindu and Mohammadan) were retained but disguised in English form.

Later, after independence, various modifications were made to align with the current circumstances, yet the fundamental framework of the code remained unchanged. The judiciary frequently comes across colonial and obsolete sections in the Indian Penal Code, prompting requests to the government for necessary modifications. However, Sections 124A (Sedition)⁴ and 310⁵ were highly used by the British against Indians to suppress them, and such sections continued to be a part of Indian penal law. The definitional clause of the Indian Penal Code has

¹ Charter Act 1833, s 40

² Charter Act 1833, s 53

³ Atul Chandra Patra, 'An Historical Introduction to The Indian Penal Code' (1961) 3(3) Journal of the Indian Law Institute <<https://www.jstor.org/stable/43949716>> accessed 03 January 2024

⁴ Indian Penal Code 1860, s 124A

⁵ Indian Penal Code 1860, s 310

been in existence for over 150 years, and terms like ‘gender,’ ‘electronic evidence,’ and ‘servants of the government’ have changed their meaning as the world has evolved and moved forward with the outdated conservative interpretations would lead to uncertainty and injustice. The primary objective of the Indian Penal Code was to punish criminals rather than ensure justice for the victims.

Undoubtedly, the Indian Penal Code was intricately and systematically crafted to encompass every crime within the society. To a certain extent, it was remarkably ahead of its time, as evidenced by its enduring status as India’s penal code even after more than 150 years. It would be unjust to diminish its significance in the Indian legal system as a whole. However, in a progressing and evolving nation like India, the penal laws should undergo reforms to align more closely with the principles of justice rather than mere punishment and to deliver resolutions to the issues present in the contemporary world, and that is why a new penal law is needed which addresses both old and emerging crimes that have developed over time, with more transparency and follow victim-centered approach.

ANALYSING THE MAJOR ELIMINATED SECTIONS OF IPC IN BHARTIYA NYAYA SANHITA

The new penal law of India, The Bhartiya Nyaya (Second) Sanhita 2023, has 358 sections categorized into 20 chapters compared to the Indian Penal Code 1860 which has 511 sections organized into 23. Several sections of the IPC were not incorporated into the Bhartiya Nyaya Sanhita in light of their irrelevance and colonial nature. The first change has been made to the name of the Code; IPC signifies punishment; however, BNSS signifies ‘*Nyaya*’, which means justice.

Apart from this, major removals have been made to the definitional clauses.⁶ Section 14 of IPC, which defines the term ‘Servant of Government,’ has been omitted in BNS due to its colonial nature, which simply portrays an employee of government as its servant. Section 18 defines ‘India’ as a territory of India excluding the State of Jammu and Kashmir. The exclusion of the

⁶ Indian Penal Code 1860

state of Jammu and Kashmir was only for applying the provisions of IPC since earlier, the state was following its separate penal law, the Ranbir Penal Code (RPC).⁷ However, with the enactment of the Jammu and Kashmir Reorganization Act, 2019,⁸ Article 370⁹ was nullified, resulting in the forfeiture of the state's special status. Consequently, the jurisdiction of the Indian Penal Code 1860 was extended uniformly throughout the country. As a consequence, Section 18¹⁰ currently presents an inaccurate definition. Section 29A,¹¹ which defines the meaning of 'Electronic record', is also notably absent in BNS. It is important to note that Section 29 of IPC defines the term 'Document'. Subsequently, the Information Technology Act of 2000 to address technologically advanced records inserted Section 29A.¹² While BSN does not define 'Electronic record', the term is used in various sections of BNSS, necessitating its interpretation in conjugation with the definition provided in the Information Technology Act 2000.¹³ The definition of the term 'Section' provided in Section 50¹⁴ has also not been incorporated into BNSS.

Apart from the abovementioned sections, several other sections of the Indian Penal Code of 1860 have not been incorporated in the Bhartiya Nyaya (Second) Sanhita 2023, partially or *in toto*.

Section 53A¹⁵ has not been inserted in the BNSS, which provides provisions for the Construction of reference to transportation or 'transportation for life' as a punishment. This section was used in the colonial era to deport the offenders to other places. However, after the enactment of the Code of Criminal Procedure (Amendment) Act of 1955,¹⁶ the code 'transportation' as a sentence has been done away with as a punishment.¹⁷ The sub-section (4)¹⁸ provides that if the phrase

⁷ Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, *The Indian Penal Code* (first published 1896, 30th edn, Lexis Nexis 2009)

⁸ Jammu and Kashmir Reorganization Act 2019

⁹ Constitution of India 1950, art 370

¹⁰ Indian Penal Code 1860, s 18

¹¹ The Indian Penal Code 1860, s 29A

¹² Ranchhoddas (n 7)

¹³ Information Technology Act 2000

¹⁴ Indian Penal Code 1860, s 50

¹⁵ Indian Penal Code 1860, s 53 (a)

¹⁶ Code of Criminal Procedure Act 1955

¹⁷ Ranchhoddas (n 7)

¹⁸ Indian Penal Code 1860, s 53A

‘transportation for life’ will be interpreted as referring to imprisonment of life, or if the phrase denotes transportation for a shorter duration, it should be considered as if it has been omitted. This section lacks relevance in the current penal system of India, and as a result, it has not been included in *Bhartiya Nyaya (Second) Sanhita, 2023*.

Section 124A (Sedition),¹⁹ often criticized as a draconian law due to its historical misuse by the British and subsequent governments of independent India to satisfy their interest, has not been inserted in the new penal law. Several judgments in the history of India came across the constitutional validity of Section 124A.²⁰ In the case of **SG Vombatkere v Union of India**, the court ordered the government not to register new cases and not to continue the investigation or take coercive steps in all pending proceedings under the provision until the government exercise of reviewing section 124A is complete.²¹

This section empowers the government to penalize individuals attempting to incite hatred, contempt, or disaffection towards the legally established government in India. The punishment may include imprisonment for life, with the option of adding a fine.²² Despite judicial refinements aimed at curbing misuse, the section remains contentious due to its narrow distinction between criticism of government and treason, leading to frequent misuse by authorities. According to data captured by *Article-14*²³ in the report ‘A Decade of Darkness,’ 867 cases under the Section were filed against 13,306 individuals in the country. Further, as the *Times of India* reported,²⁴ citing data compiled by the National Crime Records Bureau (NCRB): ‘A total 356 cases of sedition – as defined under Section 124 were registered and 548

¹⁹ Indian Penal Code 1860, s 124A

²⁰ Kruthika R and Varsha Singh, ‘Is Sedition Constitutional? From Tara Chand [1950] to Aditya Ranjan [2021]’ (*Supreme Court Observer*, 01 March 2021) <<https://www.scobserver.in/journal/is-sedition-constitutional-from-tara-chand-1950-to-aditya-ranjan-2021/>> accessed 03 January 2024

²¹ Debayan Roy, ‘Sedition: Supreme Court orders Section 124A IPC to be kept in abeyance; asks Central government, States not to register new cases’ *Bar and Bench* (11 May 2022) <<https://www.barandbench.com/news/supreme-court-orders-section-124a-ipc-kept-abeyance-asks-central-government-states-not-register-sedition-cases>> accessed 03 January 2024

²² Indian Penal Code 1860, s 124

²³ Constitution of India, art 14

²⁴ Bharti Jain, ‘Of 548 held, just 12 in 7 cases convicted’ *The Times of India* (10 May 2022) <<https://timesofindia.indiatimes.com/india/of-548-held-just-12-in-7-cases-convicted/articleshow/91451710.cms>> accessed 03 January 2024

persons arrested between 2015 and 2020. However, just 12 persons arrested in seven seditious cases were convicted in these six years. Therefore, in the new penal law (BNSS), the term 'government' has been substituted with 'sovereignty or unity and integrity'²⁵ to mitigate the unjust implications of the law on criticizing the government or authorities.

Section 153AA of IPC,²⁶ which provides punishment for knowingly carrying arms in any procession, organizing, or holding or taking part in any mass drill or mass training with arms, has also not been incorporated in the BNS. Several other sections on organized crime and its punishments have been incorporated instead.

Sections 264 - 267 (Chapter XIII) of the Indian Penal Code 1860,²⁷ which talks about the offenses relating to weights and measures, were introduced to combat consumer fraud and enhance public confidence by addressing unfair trade practices described as the fraudulent use of weight and measure instruments.²⁸ Initially devised to address common malpractices during the colonial and early 20th century, these sections became inadequate with technological advancements that took such malpractices to a higher level. The government enacted various legislations to adapt to the evolving landscape, including the Standards of Weight and Measures Act of 1976,²⁹ the Standards of Weight and Measures Rules of 1977,³⁰ and the Legal Metrology Act of 2009.³¹

Section 309 of IPC provides that 'Whoever attempts to commit suicide and does any act towards the commission of such offense shall be punished with simple imprisonment for a term which may extend to one year or with fine, or with both,' has also not been inserted in the BNSS. This has been excluded following the guidelines articulated in Section 115³² of the Mental Healthcare

²⁵ Bhartiya Nyaya Sanhita 2023, s 152

²⁶ Indian Penal Code 1860, s 153AA

²⁷ Indian Penal Code 1860, s 264-267

²⁸ Diya Rastogi, 'Offences pertaining to weights and measures under the Indian Penal Code, 1860' (*iPleaders*, 02 October 2021) <<https://blog.ipleaders.in/offences-pertaining-to-weights-and-measures-under-the-indian-penal-code-1860/>> accessed 03 January 2024

²⁹ Standards of Weight and Measures Act 1976

³⁰ Standards of Weight and Measures Rules 1977

³¹ Legal Metrology Act 2009

³² Mental Healthcare Act 2017, s 115

Act 2017,³³ which provides that an individual attempting suicide shall be presumed, unless proven otherwise, to be experiencing severe stress. As a result, such individuals shall not undergo any trial or punishment. The responsibility lies on the government to offer care, treatment, and rehabilitation to individuals with severe stress who have attempted suicide, aiming to diminish the likelihood of future suicide attempts. The criminalization of suicide has been a subject of debate in the Indian legal system; imposing penalties on individuals attempting suicide is seen as exacerbating their mental distress, potentially leading to more challenges rather than reducing suicide rates.³⁴ Instead of penalizing suicide attempters, providing adequate care and psychological treatment would be more effective in facilitating their rehabilitation and addressing the underlying issues. Hence, such a provision has not been incorporated into BNSS. However, Section 226³⁵ of BNSS stands as an exception; it stipulates that anyone attempting suicide with intent to compel or restrain a public servant from performing official duties shall be subjected to punishment.

Sections 310³⁶ define a ‘Thug’ as an individual who has been habitually associated with any other or others to commit robbery or child-stealing using or accompanied with murder,³⁷ and Section 311³⁸ which provides the punishment of life imprisonment and fine,³⁹ has also proved irrelevant in modern India. As society evolved, the concept of the ‘Thug’ vanished in India. The individuals who were once labeled as Thugs are now categorized as kidnappers, robbers, or murderers, reflecting the changing terminology and understanding of criminal activities in contemporary society.⁴⁰ Hence, the Bhartiya Nyaya (Second) Sanhita 2023 does not include any such provision.

³³ Mental Healthcare Act 2017

³⁴ Dhairya Kumar and Sanya Garg, ‘Decoding The Mental Healthcare Act, 2017: An In-depth Analysis Of India’s Mental Health Legislation’ *Live Law* (23 July 2023) <<https://www.livelaw.in/articles/decoding-the-mental-healthcare-act-2017-an-in-depth-analysis-of-indias-mental-health-legislation-233453>> accessed 03 January 2024

³⁵ The Bhartiya Nyaya Sanhita 2023, s 226

³⁶ Indian Penal Code 1860, s 310

³⁷ *Ibid*

³⁸ Indian Penal Code 1860, s 311

³⁹ Indian Penal Code 1860, s 311

⁴⁰ KD Gaur, *The Indian Penal Code*, (first published 1992, 6th edn, Universal Law Publishing 2016)

Section 376DA⁴¹ and Section 376 DB had been incorporated in IPC through The Criminal Law (Amendment) Act 2018⁴² that classify the punishment of Gang rape⁴³ into two subcategories: one for the gang rape of women under sixteen years of age, with life imprisonment as the highest penalty, and the other for the gang rape of women under twelve years of age,⁴⁴ with the highest penalty being death sentence.⁴⁵ The age-based differentiation in punishment has not been incorporated into the BNSS; the objective is to enhance the legal framework by imposing the highest degree of punishment on individuals convicted of gang rape against women under the age of eighteen.

Section 377⁴⁶ of the IPC which addresses unnatural offences has also not been incorporated into the BNSS. In a landmark 2018 judgment, a five-judge Supreme Court bench, in the case of *Navtej Singh Johar v Union of India*, partially invalidated Section 377 of the IPC, thereby decriminalizing same-sex relations between consenting adults.⁴⁷ This section violated Articles 14, 15, and 21⁴⁸ of the Constitution.⁴⁹ To conform to contemporary understandings of gender and eradicate colonial discriminatory provisions against the LGBTQIA+++ community, the BNSS excludes this provision in all its forms.

Section 444⁵⁰ addresses lurking house-trespass by night, and Section 446 of the IPC, dealing with housebreaking by night, have not been included in the BNSS. The BNSS defines lurking house

⁴¹ Indian Penal Code 1860, s 376DA

⁴² Criminal Law Act 2018, s 6

⁴³ Indian Penal Code 1860, s 376

⁴⁴ Indian Penal Code 1860, s 376DA

⁴⁵ Indian Penal Code 1860, s 376DB

⁴⁶ Indian Penal Code 1860, s 377

⁴⁷ Satya Prasoorn, 'Decriminalisation of Section 377: 5 Must Reads' (*Supreme Court Observer*, 19 October 2018)

<<https://www.scobserver.in/journal/decriminalisation-of-section-377-5-must-reads/#:~:text=On%20September%206th%2C%20the%20five,to%20engage%20in%20consensual%20intercourse>> accessed 03 January 2024

⁴⁸ Constitution of India 1950, art 21

⁴⁹ 'Supreme Court decriminalises Section 377: all you need to know' *The Times of India* (06 September 2018)

<<https://timesofindia.indiatimes.com/india/sc-verdict-on-section-377-all-you-need-to-know/articleshowprint/65695884.cms>> accessed 03 January 2024

⁵⁰ Indian Penal Code 1860, s 444

trespass⁵¹ and housebreaking⁵² separately in Section 443⁵³ and Section 445⁵⁴ respectively. Notably, unlike the IPC, the new penal law lacks the distinction in punishment for these offenses committed during the day or night. While the BNSS includes these offenses, it does not specifically differentiate between crimes committed during day and night, maintaining the same punishment for both situations.

The BNSS deliberately excludes Section 497⁵⁵ which addresses Adultery. This omission is in adherence to the significant 2018 Supreme Court judgment in the case of *Joseph Shine v Union of India*.⁵⁶ In this landmark ruling, the Court declared Adultery no longer a criminal offense but emphasized its significance as grounds for divorce.⁵⁷ The Court declared IPC Section 497 and Section 198 of the Code of Criminal Procedure unconstitutional, asserting that they violated fundamental rights outlined in the Constitution.⁵⁸ The Court criticized section 497 for treating women as the property of men, reflecting a conservative and colonial mindset that contradicts the principles of modern and evolving society.

COMPREHENSIVE EXPLORATION AND ASSESSMENT OF NEWLY ADDED PROVISIONS IN BHARTIYA NYAYA SANHITA

The Bhartiya Nyaya (Second) Sanhita 2023 includes several sections addressing issues in the contemporary world. While many of these problems existed in the past, they did not receive sufficient attention earlier.

In the BNSS 2023, section 69⁵⁹ is introduced, ostensibly aimed at addressing the ‘love jihad’ narrative by criminalizing deceptive promises of marriage. The inclusion of the phrase ‘sexual

⁵¹ Indian Penal Code 1860, s 453

⁵² Indian Penal Code 1860, s 456

⁵³ Bhartiya Nyaya (Second) Sanhita 2023, s 443

⁵⁴ Bhartiya Nyaya (Second) Sanhita 2023, s 445

⁵⁵ Indian Penal Code 1860, s 497

⁵⁶ *Joseph Shine v Union of India* (2019) 3 SCC 39

⁵⁷ ‘Adultery not a crime, Supreme Court strikes down Section 497 | 10 highlights’ *The Times of India* (27 September 2018) <<https://www.indiatoday.in/india/story/adultery-verdict-supreme-court-section-497-1350477-2018-09-27?onetap=true>> accessed 05 January 2024

⁵⁸ *Ibid*

⁵⁹ The Bhartiya Nyaya Sanhita 2023, s 69

intercourse not amounting to the offence of rape’ essentially extends the criminalization to consensual sexual activity as well.⁶⁰ The matter came into controversy following the Kerala High Court’s ruling in 2009 in the case of *Shahan Shah A v State of Kerala*.⁶¹ The Court asserted that there were indications of numerous instances where men engaged in sexual intercourse with women using deceptive identities, subsequently coercing them to change their religion. The Court also sought the government’s clarification on the credibility of this narrative. In response, the Director General of Police of the State of Kerala stated, ‘No organization or movement called ‘Love Jihad’ or ‘Romeo Jihad’ is so far identified as working in Kerala.’⁶² Nevertheless, the narrative gained momentum in the political sphere. The provision is somewhat vague, leaving room for interpretation that could be advantageous and detrimental. The definition lacks clarity, particularly in substantiating a person’s commitment to marriage. This ambiguity may inadvertently favor women over men, potentially leading to the misuse of the provision as a means to intimidate men.

The *Bhartiya Nyaya (Second) Sanhita* has also introduced a new provision addressing mob lynching. Section 103, Sub-section (2),⁶³ explicitly addresses murder committed by a group or mob and outlines the corresponding punishment. ‘As there is no law for lynching, it is difficult to give speedy justice to the victims of mob lynching. Incidents of lynching are generally reported under other criminal laws of IPC and CrPC.’⁶⁴ In response to the escalating incidents of mob lynching in the country, the Supreme Court of India has issued comprehensive guidelines to state governments and union territories to implement effective measures. In light

⁶⁰ Apurva Vishwanath, ‘Indian Penal Code to Nyaya Sanhita: What’s new, what is out, what changes’ *The Indian Express* (22 December 2023) <<https://indianexpress.com/article/explained/explained-law/indian-penal-code-to-nyaya-sanhita-whats-new-what-is-out-what-changes-9078213/>> accessed 05 January 2024

⁶¹ *Shahan Sha A and Ors v State of Kerala and Anrs* Crim MC No 253/2019

⁶² *Ibid*

⁶³ The *Bhartiya Nyaya Sanhita* 2023, s 103(2)

⁶⁴ Nargis Choudhury, ‘Mob Lynching as a New Offence Emerging in India: A Study with a Special Reference to Assam’ (2021) 1 Annual International Journal on Analysis of Contemporary Legal Affairs <<https://www.aequivic.in/post/aijacla-mob-lynching-as-a-new-offence-emerging-in-india-a-study-with-a-special-reference-to-assam>> accessed 05 January 2024

of the increasing incidents of mob lynching,⁶⁵ it is considered imperative to include a provision that explicitly addresses and imposes penalties for such.

The Bhartiya Nyaya (Second) Sanhita 2023 has introduced notable provisions concerning offenses affecting the human body. Furthermore, the penalties for these offenses have been enhanced for greater stringency.

The BNSS, 2023 introduces provisions for organized crimes under Section 111,⁶⁶ marking a significant addition, as there was no specific mention of organized crime.⁶⁷ Offenses such as drug trafficking, smuggling, human trafficking, illegal immigration, and money laundering could be categorized as organized crimes. However, they have their definitions and punishments in various other statutes and state laws such as Maharashtra Control of Organised Crimes Act, 1999 (MCOCA)⁶⁸ and Gujarat Control of Organized Crime Act, 2000.⁶⁹ The Indian Penal Code of 1860 did not comprehensively cover them. Their multi-tiered chain of command structure poses a challenge in addressing the entire issue comprehensively. The newly introduced provision offers a thorough definition and broadens its scope. This provision allows for the straightforward penalization of such acts without referencing multiple sections or provisions.

The Bhartiya Nyaya Sanhita, 2023, also addresses petty organized crimes, newly incorporated in Section 112.⁷⁰ Offenses falling under this category will result in imprisonment from one to seven years. This encompasses activities like theft, snatching, cheating, unauthorized selling of tickets, unauthorized betting or gambling, selling public examination question papers, or any other similar criminal act.⁷¹ The classification aims to handle such crimes more rigorously,

⁶⁵ *Tahseen S Poonawalla v Union of India and Ors* (2018) 7 MAD LJ 350

⁶⁶ The Bhartiya Nyaya Sanhita 2023, s 111

⁶⁷ 'Top 10 Changes Made by Bhartiya Nyaya Sanhita (BNS) vis- à-vis Indian Penal Code (IPC)' (*Taxmann*, 28 December 2023) <<https://www.taxmann.com/post/blog/top-10-changes-made-by-bns-vis-a-vis-ipc/>> accessed 05 January 2024

⁶⁸ Maharashtra Control of Organised Crimes Act 1999

⁶⁹ Gujarat Control of Organized Crime Act 2000

⁷⁰ Bhartiya Nyaya Sanhita 2023, s 112

⁷¹ *Ibid*

facilitating swift case resolution. Utilizing this provision for minor offenses streamlines proceedings, avoiding the complexities associated with multiple provisions.

Section 304,⁷² introduced in the Bhartiya Nyaya Sanhita 2023 addresses the common occurrence of snatching, a previously unaddressed offense in the Indian Penal Code 1860. This section presents a precise definition and stipulates a punishment of three years of imprisonment and a fine. Although snatching is a form of theft, it exhibits unique characteristics that justify a distinct legal categorization. Not all thefts qualify as snatching, and to effectively handle such cases, a dedicated provision is necessary, offering specificity rather than relying on general provisions related to theft. This distinction simplifies the adjudication process for cases involving snatching.

The newly added provision addressing terrorism in the Bhartiya Nyaya Sanhita 2023 is outlined in Section 113.⁷³ This section comprehensively defines a terrorist act and its various aspects. While such a provision was absent in the Indian Penal Code of 1860, other statutes, such as the Unlawful Activities (Prevention) Act 1967, covered it. Section 113 adopts the exact definition as the UAPA, characterizing an act as one 'with intent to threaten or likely to threaten the unity, integrity, security economic security, or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or any foreign country.'⁷⁴ The second draft of the Bhartiya Nyaya Sanhita also revises the punishment for terrorism, resulting in the death penalty from life imprisonment without parole to life imprisonment as provided in UAPA.⁷⁵ This heightened severity reflects the government's stringent stance against terrorism. Cases under the UAPA are adjudicated under the National Investigation Agency Act 2008, which establishes Special Courts for such matters. Under the

⁷² Bhartiya Nyaya Sanhita 2023, s 304

⁷³ Bhartiya Nyaya Sanhita 2023, s 113

⁷⁴ Unlawful Activities (Prevention) Act 1967, s 15

⁷⁵ G Mohan Gopal, 'Second Avatar of the Criminal Law Bills: The Key Changes' *The Wire* (15 December 2023) <<https://thewire.in/government/second-avatar-criminal-law-bills-has-anything-changed>> accessed 05 January 2024

Bhartiya Nyaya (Second) Sanhita, terrorism cases will be tried in Sessions Courts,⁷⁶ potentially increasing the number of Courts handling terrorism-related cases.

COMPARATIVE EVALUATION OF THE PROVISIONS OF INDIAN PENAL CODE, 1860 AND BHARTIYA NYAYA (SECOND) SANHITA, 2023

The Bhartiya Nyaya (Second) Sanhita of 2023 has assimilated the majority of provisions from the Indian Penal Code. Numerous existing provisions have undergone revision, accompanied by an increase in the severity of punishments to enhance legal stringency. Additionally, the definitions of several terms have been expanded and modified to align with the evolving dynamics of the contemporary world.

The recently enacted penal law introduces, for the first time, a clear definition of the term ‘child’ as any person below the age of eighteen years. Despite the frequent use of the term ‘child’ in the Indian Penal Code 1860, as it is mentioned ninety-six times, no specific definition was provided.

In Section 2 sub-section (10)⁷⁷ while it initially appears to endorse the inclusive use of the pronoun ‘he’ and its derivatives for any person, a closer examination reveals a contradiction when juxtaposed with the language used in the previous Indian Penal Code of 1860. This is because each legal statute reflects the societal norms prevalent during its inception. Since the Indian Penal Code was formulated in an era where patriarchy was widely accepted, it inherently perceived women as inferior to men in several of its provisions, such as Section 497.⁷⁸ However, as times evolved, numerous amendments were introduced to mitigate its male-centric approach, making it more neutral to a certain extent. The BNSS also defines the term ‘gender’ as any person, whether male, female, or transgender.⁷⁹ Section 96⁸⁰ of the Bhartiya Nyaya (Second) Sanhita, 2023, dealing with the procurement of a child, is a revised form of Section 366A⁸¹ of the

⁷⁶ ‘The Bhartiya Nyaya Sanhita, 2023’ (*Pre-Legislative Research India*) <<https://prsindia.org/billtrack/the-bharatiya-nyaya-sanhita-2023>> accessed 06 January 2024

⁷⁷ Bhartiya Nyaya Sanhita 2023, s 2(10)

⁷⁸ Indian Penal Code 1860, s 497

⁷⁹ Bhartiya Nyaya (Second) Sanhita 2023, s 2(10)

⁸⁰ Bhartiya Nyaya Sanhita 2023, s 96

⁸¹ Indian Penal Code 1860, s 366A

Indian Penal Code of 1860, specifically addressing the procurement of a minor girl. Consequently, this provision maintains a gender-neutral categorization for both offenders and victims.

Section 304A⁸² has undergone modifications and enhancements in Section 106⁸³ which addresses the offense of causing death by negligence. In the IPC, the maximum punishment for this offense was two years of imprisonment, a fine, or both. However, in the BNSS, the punishment is expanded to five years, coupled with a fine. Sub-section (2) of Section 106⁸⁴ further increased the sentence to imprisonment to 10 years if the vehicle's driver involved in the act escapes without promptly reporting the incident to a police officer or a magistrate. Subsection (2) of Section 106 displays an apparent bias towards drivers. Even if the act results from the victim's negligence, the driver can still be charged for not informing the authorities. This deviation from the intended goal of BNSS, which aims to uphold justice, is evident.

Section 124A⁸⁵ deals with sedition, and has been revised and incorporated into the Bhartiya Nyaya (Second) Sanhita as section 152.⁸⁶ Historically, section 124A was extensively employed by the British to persecute Indians, opposing their rule, and post-independence, it became a tool for the government to target dissenting voices.⁸⁷ The BNSS replaces sedition with treason, rendering sedition no longer an offense. Instead, Section 152⁸⁸ addresses the 'Act endangering sovereignty, unity, and integrity of India', and individuals convicted under this offense will be imprisoned for life or with imprisonment, which may extend to seven years, and shall be liable to a fine. This provision serves the dual purpose of safeguarding the freedom of speech while imposing penalties on those who exceed the boundaries and engage in treasonous activities. It

⁸² Indian Penal Code 1860, s 304A

⁸³ Bhartiya Nyaya Sanhita 2023, s 106

⁸⁴ Bhartiya Nyaya Sanhita 2023, s 106(2)

⁸⁵ Indian Penal Code 1860, s 124(A)

⁸⁶ Bhartiya Nyaya Sanhita 2023, s 152

⁸⁷ 'Union Home Minister and Minister of Cooperation Shri Amit Shah replied to the discussion on the Bhartiya Nyaya (Second) Sanhita, 2023, the Bhartiya Nagrik Suraksha (Second) Sanhita, 2023 and the Bhartiya Sakshya (Second) Bill, 2023 in the Lok Sabha today, the house passed the bills after discussion' (*Press Information Bureau* (20 December 2023) <<https://www.pib.gov.in/PressReleasePage.aspx?PRID=1988913>> accessed 06 January 2024

⁸⁸ Bhartiya Nyaya Sanhita 2023, s 152

aims to strike a balance by allowing the expression of ideas within the framework of free speech yet holding individuals accountable when their actions involve treasonous behavior.

Section 111⁸⁹ introduces a comprehensive provision encompassing a range of criminal activities, such as kidnapping, robbery, vehicle theft, extortion, land grabbing, contract killing, economic offense, cyber-crimes, trafficking of persons, drugs, weapons or illicit goods or services, human trafficking for prostitution or ransom as organized crimes. This provision now serves as an umbrella term for organized crime. Unlike in the previous Indian Penal Code, where these offenses existed but lacked specific provisions to address instances committed by organized groups, section 111⁹⁰ aims to rectify this gap. Apart from organized crime, these offenses have also been added separately in separate provisions in the BNSS. Previously, individuals were held individually for crimes carried out in an organized manner, lacking a collective approach. While sections like 400 and 401 did touch upon punishment for belonging to gangs of dacoits and thieves, various other offenses such as kidnapping, contract killing, and economic crimes were not explicitly covered. Incorporating Section 111 in the BNSS is a significant step toward fortifying the legal system, enabling authorities to address organized offenses comprehensively.

Section 242⁹¹ has undergone an amendment. It has been reintroduced as Section 178⁹² in the *Bhartiya Nyaya (Second) Sanhita* with the primary objective of safeguarding individuals from legal repercussions when they possess forged or counterfeit currency notes or banknotes. The revised legislation stipulates that keeping such generated or counterfeit currency notes is not offensive.⁹³ According to Section 178⁹⁴ of the BNSS, for an act to be classified as an offense, the possession of counterfeit currency notes must be coupled with the intent to use them as genuine. It safeguards individuals who may unknowingly possess such counterfeit notes without any nefarious intention.⁹⁵

⁸⁹ *Bhartiya Nyaya Sanhita* 2023, s 111

⁹⁰ *Ibid*

⁹¹ Indian Penal Code 1860, s 242

⁹² *Bhartiya Nyaya Sanhita* 2023, s 178

⁹³ Top 10 Changes Made by *Bhartiya Nyaya Sanhita* (BNS) vis- à-vis Indian Penal Code (IPC) (n 67)

⁹⁴ *Bhartiya Nyaya Sanhita* 2023, s 178

⁹⁵ *Ibid*

Section 303⁹⁶ of the IPC mandates the death penalty for individuals serving life imprisonment who commit murder.⁹⁷ The Supreme Court of India struck this down in 1983 in the case of *Mithu v State of Punjab*,⁹⁸ and the apex court held that the provision violates articles 14 and 21 of the constitution, creates an arbitrary distinction, and limits the Court's discretion, as it lacks a rational basis. Consequently, this provision has been modified and included in Section 104 of the *Bhartiya Nyaya (Second) Sanhita*. It introduces the possibility of life imprisonment for the entirety of an individual's natural life, in addition to the potential imposition of the death penalty.

The scope of Sections 378⁹⁹ and 379¹⁰⁰ has been expanded in the new penal law (BNSS), as it has been incorporated in Section 303.¹⁰¹ It involves intangible items, such as the theft of data like credit card skimming, identity theft, and misappropriation of intangible assets, which are now addressed under the broadened definition of movable property provided in Section 2 subsection (21) that provides a movable property, includes property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

The *Bhartiya Nyaya (Second) Sanhita* of 2023 introduces a novel form of punishment known as community service, expanding the old five categories of penalties in the Indian Penal Code. Previously limited to the death penalty, life imprisonment (rigorous and straightforward), forfeiture of property, and fines, the new legislation incorporated community services as an alternative punishment for certain offenses. Section 202¹⁰² (Public servant unlawfully engaging in trade), Section 209¹⁰³ (Non-appearance in response to a proclamation under section 84 of

⁹⁶ Indian Penal Code 1860, s 303

⁹⁷ *Ibid*

⁹⁸ Malavika Parthasarathy, 'Court in Review: Death Penalty' (*Supreme Court Observer*, 25 April 2022)

<<https://www.scobserver.in/journal/court-in-review-the-death-penalty/#:~:text=The%20SC%20stated%20that%20the,did%20not%20contravene%20Article%2019.>> accessed 06 January 2024

⁹⁹ Indian Penal Code 1860, s 378

¹⁰⁰ Indian Penal Code 1860, s 303

¹⁰¹ *Bhartiya Nyaya Sanhita* 2023, s 303

¹⁰² *Bhartiya Nyaya Sanhita*, s 202

¹⁰³ *Bhartiya Nyaya Sanhita*, s 209

Bharatiya Nagarik Suraksha Sanhita, 2023), Section 226¹⁰⁴ (Attempt to commit suicide to compel or restrain exercise of lawful power), Section 355¹⁰⁵ (Misconduct in public by a drunken person), Section 356 (Defamation),¹⁰⁶ now allows the imposition of community services as a punishment by Courts. Community service is ‘the work which the Court may order a convict to perform as a form of punishment that benefits the community, for which he shall not be entitled to any remuneration.’¹⁰⁷ This progressive approach by the government aims to address minor offenses by ensuring that individuals who commit crimes contribute positively to society, offsetting the problems they have caused. It is important to note that community service is reserved for minor offenses that can be effectively addressed through this unique form of punishment.

CRITICAL EVALUATION OF THE BHARTIYA NYAYA SANHITA 2023

Although the Bhartiya Nyaya (Second) Sanhita 2023 has introduced numerous revised and new provisions suitable for contemporary society, it has flaws. Some sections are ambiguously formulated, and their application heavily relies on individual interpretation. Despite the government withdrawing from the Bhartiya Nyaya Sanhita 2023 Bill and presenting a new Bill based on the Standing Committee of Home Affairs recommendations, several suggestions were not inserted into the enacted Bhartiya Nyaya (Second) 2023 Bill.

One specific concern lies in Section 106,¹⁰⁸ which addresses causing death by rash and negligent driving. Sub-section (2) stipulates that if someone causes a person’s death due to rash and careless driving, but it does not amount to culpable homicide, and they fail to report it to the police or a magistrate promptly, they can be punished with up to ten years of imprisonment and a fine. This provision inherently labels the driver as the wrongdoer, neglecting situations where the victim might have been rash and negligent. In accidents, drivers may attempt to flee instead of reporting the accident due to various factors such as fear, anxiety, or concern about mob

¹⁰⁴ Bhartiya Nyaya Sanhita, s 226

¹⁰⁵ Bhartiya Nyaya Sanhita, s 355

¹⁰⁶ Bhartiya Nyaya Sanhita 2023, s 356

¹⁰⁷ Top 10 Changes Made by Bhartiya Nyaya Sanhita (BNS) vis- à-vis Indian Penal Code (IPC) (n 67)

¹⁰⁸ Bhartiya Nyaya Sanhita 2023, s 106

reactions. The provision compelling the driver to report the accident could be problematic, potentially making them a criminal facing a decade of imprisonment. Such a strict provision leaves little room for the accused to prove their innocence. While enhancing the stringency of law is important, ensuring they are transparent and open to multiple interpretations is crucial.

Section 377¹⁰⁹ has been entirely removed, and it has not found a place in the *Bhartiya Nyaya (Second) Sanhita, 2023*. A portion of this section criminalizing consensual intercourse between same-sex individuals was declared unconstitutional by the Supreme Court in the case of *Navtej Singh Johar v Union of India*.¹¹⁰ The remaining provisions penalizing voluntary carnal intercourse with animals remained unaddressed in the new penal law. The BNSS fails to include provisions for non-consensual intercourse between same-sex individuals, creating a significant loophole. Such non-consensual acts constitute rape, but Section 63¹¹¹ of the BNSS begins with “A man is said to commit “rape” if he –” excluding the possibility of recognizing men as victims of rape. Despite various modifications and insertions in the BNSS, the absence of a provision to safeguard men denies them equal protection under the law.

Section 69¹¹² of the *Bhartiya Nyaya (Second) Sanhita, 2023*, addresses sexual intercourse involving deceitful means. This newly added section states that ‘Whoever, by deceitful means or by making a promise to marry to a woman without any intention of fulfilling the same, has sexual intercourse with her, such sexual intercourse not amounting to the offense of rape, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.’¹¹³ Deceitful means encompasses false promises of employment or promotion and inducement or marriage after concealing one’s identity. While the introduction of Section 69¹¹⁴ of BNSS is rooted historically, where women were judged based on their purity, it has some flaws. Although it eliminates the absurdity of categorizing consensual acts as rape, it retains the illogical aspect of criminalizing such acts, now under the concept of

¹⁰⁹ Indian Penal Code 1860, s 377

¹¹⁰ *Navtej Singh Johar and Ors v Union of India and Anrs* CrI WP 76/2016

¹¹¹ *Bhartiya Nyaya Sanhita*, s 63

¹¹² *Bhartiya Nyaya Sanhita*, s 69

¹¹³ *The Bhartiya Nyaya Sanhita 2023*, s 69

¹¹⁴ *Ibid*

false promise.¹¹⁵ According to the statistics from the National Crime Records Bureau (NCRB), 74 percent of rape cases under Section 376¹¹⁶ result in acquittals,¹¹⁷ indicating potential misuse against men. Section 69¹¹⁸ shares a similar tendency and can be prone to misuse. While the section defines deceitful means, it lacks clarity on determining whether a promise was made, especially in cases of consensual sexual intercourse. False promises are challenging to prove and can be misused against men, even to protect women. The underlying assumption in justifying such provision appears to be that women are conservative and naïve, which is a dubious standpoint. Even if this argument is accepted, the section exhibits impracticalities, making many men vulnerable to false accusations.¹¹⁹ To address these concerns, these sections should be revised with greater clarity and made gender-neutral to ensure the protection of all members of society.

Sections 76¹²⁰ and 77¹²¹ replacing Sections 354B and 354C of the Indian Penal Code of 1860, address offenses related to Assault or use of criminal force to a woman with intent to disrobe and Voyeurism, respectively¹²². However, a notable concern arises from the gender-specific language in these sections, explicitly designating the perpetrator as a man and the victim as a woman.¹²³ This inconsistency within the BNSS raises questions about the overall coherence and intention behind the gender-neutral language changes. Despite the BNSS's aim, as highlighted in the Statement of Objects and Reason (4),¹²⁴ to move towards gender neutrality, there is a lack of uniformity in addressing various offenses. Offences such as voyeurism, assault, or the use of criminal force with the intent to disrobe, as well as cruelty by in-laws, can be committed against men by women. However, the BNSS does not adequately consider these aspects. Consequently,

¹¹⁵ Arun Kumar, 'Section 69 BNS: Good Intention Law but Prone to Gross Misuse' (*CiteCase*)

<<https://citecase.in/section-69-bns-good-intention-law-but-prone-to-gross-misuse/>> accessed 07 January 2024

¹¹⁶ Indian Penal Code 1860, s 376

¹¹⁷ 'We need a movement like #MenToo because crime has no gender' *The Times of India* (17 May 2017)

<<https://timesofindia.indiatimes.com/city/delhi/we-need-a-movement-like-mentoo-because-crime-has-no-gender/articleshow/69366657.cms>> accessed 07 January 2024

¹¹⁸ *Bhartiya Nyaya Sanhita* 2023, s 69

¹¹⁹ Kumar (n 115)

¹²⁰ *Bhartiya Nyaya Sanhita* 2023, s 76

¹²¹ *Bhartiya Nyaya Sanhita* 2023, s

¹²² *Bhartiya Nyaya Sanhita* 2023, ss 76-77

¹²³ Kumar (n 115)

¹²⁴ *Bhartiya Nyaya Sanhita* 2023

except for a few provisions, the BNSS, despite its purported commitment to gender neutrality, appears to adopt a conservative approach when addressing offenses against men by women. In addition to that, Chapter 5 of the BNSS¹²⁵ addresses offenses against women and children and maintains gendered language. For instance, Section 63¹²⁶ uses ‘he’ and ‘man’ in relation to rape, and Section 64¹²⁷ defines a victim as a woman.¹²⁸

In addition to that, the Bhartiya Nyaya (Second) Sanhita, 2023 fails to address crimes against the LGBTQIA+++ community, despite the term ‘gender’ incorporating transgender in its definition. In a rapidly evolving world where offenses against the members of the LGBTQIA+++ community are increasing, it is imperative to include provisions for this community. The introduction of the BNSS offered an ideal opportunity to align with the principles of *NALSA v Union of India*¹²⁹ and *Navtej Singh Johar v Union of India* judgments,¹³⁰ extending protections to gay individuals. Simple modifications, such as replacing ‘woman’ with a gender-neutral term, could broaden the scope to protect transgender individuals and men who are victims of sexual assault by other men. Retaining a particular portion of Section 377¹³¹ could have addressed the non-consensual sex between men.

Section 113¹³² pertains to ‘Terrorism’ and delineates a comprehensive provision for this offense. Despite existing state legislation and the Unlawful Activities Prevention Act 1967¹³³ addressing similar crimes, the new provision enables the trial of such cases in Sessions Courts. It is anticipated that this will increase the number of courts and expedite the adjudication process. While acknowledging the positive aspect, it is imperative to recognize potential drawbacks. This provision grants the police the authority to register a case under BNSS or UAPA, both governed by distinct procedures. Unfortunately, the legislation lacks clarity on when a case should be

¹²⁵ *Ibid*

¹²⁶ Bhartiya Nyaya Sanhita 2023, s 63

¹²⁷ Bhartiya Nyaya Sanhita 2023, s 64

¹²⁸ Kumar, (n 123)

¹²⁹ *National Legal Services Authority v Union of India and Ors* C WP 400/2012

¹³⁰ *Navtej Singh Johar and Ors v Union of India and Anrs* Crl WP 76/2016

¹³¹ Indian Penal Code 1860, s 377

¹³² Bhartiya Nyaya Sanhita 2023, s 113

¹³³ Unlawful Activities Prevention Act 1967

registered under UAPA versus BNSS, potentially conferring unnecessary power to the police. Data from the Union Home Ministry presented in the Rajya Sabha reveals that 97.5 percent of individuals arrested under UAPA between 2016 and 2020 faced prolonged imprisonment while awaiting trial.¹³⁴ This data highlights the potential misuse of UAPA by the government, raising concerns about the likelihood of similar misuse under the new penal law provision. While acknowledging the imperative to handle offenses like terrorism rigorously, there could have been a more transparent and loophole-free legal framework.

Despite accepting several recommendations from the standing committee, the government overlooked some valuable suggestions in the BNSS. Surprisingly, the Union government rejected the socially conservative proposal by the Parliamentary Standing Committee to maintain adultery as a gender-neutral offense.¹³⁵ Regrettably, the second draft of the BNSS did not incorporate crucial recommendations from the Standing committee. These include suggestions to keep the criminalization of non-consensual sexual acts under IPC Section 377,¹³⁶ establish grounds for the Executive to justify sentence commutation, and introduce a special provision to safeguard healthcare workers. These recommendations have been integrated into the BNSS, and the law could have been significantly improved to address specific issues, but it remained silent on these crucial matters.¹³⁷

CONCLUSION

The Bhartiya Nyaya (Second) Sanhita 2023 was enacted to address issues inadequately covered by the Indian Penal Code of 1860. While introducing new definitions and other offenses, such as those related to snatching, organized crimes, petty offenses, and mob lynching, the law has made substantial amendments to outdated sections. Despite its positive aspects, the legislation falls short of addressing concerns such as discrimination against the LGBTQIA+++ community,

¹³⁴ 'UAPA Case Data Suggests That Process Is Indeed the Punishment' *The Wire* (20 July 2022) <<https://thewire.in/government/uapa-case-data-process-punishment-home-ministry-rajya-sabha>> accessed 07 January 2024

¹³⁵ Gopal (n 75)

¹³⁶ The Bhartiya Nyaya Sanhita 2023, s 377

¹³⁷ *Ibid*

sexual assault against men, and gendered language. While replacing the 163-year-old law, the government missed an opportunity to make it more in tune with contemporary social issues in certain matters. Several recommendations from the parliamentary standing committee were not incorporated, and certain sections are vaguely written, relying heavily on individual interpretation. Clarity is essential in legal language, and in some sections, this is lacking.

However, it would be an oversimplification to criticize the new penal law; certain sections have issues. Overall, the aim is to strengthen law and order and also focus on simplifying legal procedure so that the common man's ease of living is ensured, which it fulfills, not entirely but to a certain extent. These sweeping reforms signify a paradigm shift in the Indian legal framework, emphasizing justice over punishment.¹³⁸ In conclusion, the anticipated impact of this significant change in the form of the Bhartiya Nyaya (Second) Sanhita, 2023, is expected to fortify the Indian penal system. While acknowledging constant improvement, the overall assessment leans towards positivity. The legislation, with its amendments and provisions, represents a substantial step towards enhancing the legal framework in India. Nevertheless, the overreaching effect of the legal reforms indicates a commendable effort to strengthen and modernize the Indian Legal System

¹³⁸ Bhartiya Nyaya Sanhita 2023