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DELINEATING JURIDICAL AND SOCIETAL SHIFTS: AN IN-DEPTH ASSESSMENT OF THE BHARATIYA NYAYA SANHITA, 2023

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ABSTRACT

This paper thoroughly explores the social and legal implications of the 2023 Bharatiya Nyaya Sanhita (BNS)², a newer version of the Indian Penal Code. The BNS's objectives and potential are examined in order to shed light on the complex relationship between legal reform and societal evolution. Through careful examination of reforms in education, security, and justice, this study aims to uncover their effects on Indian society and bring deeper insight to discussions on the advancement of both the legal and social spheres.

The 2023 BNS Bill³ has generated fervent discussions and ignited debates on its potential impact on society and the legal landscape, touching on various aspects of our lives in India. The Indian Penal Code (IPC)³ was replaced by the Bharatiya Nyaya Sanhita (BNS)⁴ on August 11, 2023, following a review by the Standing Committee on Home Affairs. The Bharatiya Nyaya (Second) Sanhita, 2023 (BNS2)⁵ was introduced on December 12, 2023, incorporating the Standing Committee's recommendations. BNS2 skillfully upholds IPC regulations while also implementing new infractions, eliminating previously-deemed unlawful acts, and bolstering consequences for specific breaches. Its design adeptly adapts to ever-changing societal and legal environments, striking a harmonious blend between progress and consistency.

The recent shift towards making adultery a gender-neutral issue has sparked discussions,

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²The Bharatiya Nyaya Sanhita, 2023

³Ibid, para 1

⁴The Indian Penal Code, 1860

⁵The Bharatiya Nyaya (Second) Sanhita Act, 2023

aiming to uphold equal treatment for both partners. Another hotly debated topic revolves around the elimination of sedition, ushering in a new era where speaking out against the government does not result in imprisonment. While some view this as a positive step towards more freedom of expression, others fear it may have consequences for national security.

The study assesses the consequences on justice and citizen security by looking at their complex effects. Each provision holds the potential for a multitude of outcomes, both advantageous and detrimental. This study explores the impact of the BNS Bill on justice and security, sparking important discussions about how society and the law interact in today's world.

Keywords : *Bharatiya Nyaya Sanhita (BNS) , Criminal Law, IPC (Indian Penal Code), Constitutional validity.*

INTRODUCTION

The Indian Penal Code (IPC) of 1860⁶ stands as the foundational legislation governing criminal conduct in India, covering a broad spectrum of offenses ranging from crimes against individuals to offenses against public order and morality. These include acts such as assault, murder, extortion, theft, unlawful assembly, rioting, defamation, and offenses against the state. Over the years, the IPC has undergone numerous amendments to adapt to evolving societal norms, legal interpretations, and emerging challenges.

Judicial interventions have played a significant role in shaping the IPC, leading to the decriminalization of certain behaviors deemed no longer fitting for legal prosecution. For instance, courts have struck down provisions criminalizing consensual same-sex relations, adultery, and attempted suicide, reflecting changing attitudes towards personal autonomy and individual rights.

⁶The Indian Penal Code (IPC) of 1860

Furthermore, various states have introduced amendments to the IPC to address specific concerns within their jurisdictions. These amendments often target issues such as sexual offenses, human trafficking, food and drug adulteration, and religious blasphemy, reflecting the diverse social and cultural landscape of India.

In response to evolving legal and social dynamics, the Bharatiya Nyaya Sanhita (BNS)⁷ was proposed as a successor to the IPC. The BNS aimed to modernize and streamline the legal framework governing criminal behavior, incorporating recommendations from the Standing Committee on Home Affairs. Subsequently, the Bharatiya Nyaya (Second) Sanhita, 2023 was introduced, refining the earlier draft based on feedback and further deliberation. The BNS² maintains the foundational principles of the IPC while introducing new offenses to address contemporary challenges and removing obsolete provisions invalidated by the courts. Additionally, it enhances penalties for certain offenses to deter criminal behavior and uphold societal order.

Overall, the evolution of criminal legislation in India reflects a dynamic interplay between legislative, judicial, and societal forces, aiming to strike a balance between justice, individual rights, and public welfare.

SALIENT FEATURES OF THE ACT.

Offenses Against the Body:

The BNS² maintains existing provisions of the IPC concerning offenses like murder, abetment of suicide, assault, and causing grievous hurt. Additionally, it introduces new offenses such as organized crime, terrorism, and group-related murder or grievous hurt.

⁷The Bharatiya Nyaya Sanhita, 2023

Sexual Offenses Against Women:

Retaining IPC provisions, the BNS2 addresses sexual offenses against women, including rape, voyeurism, stalking, and insulting modesty. It raises the age threshold for gangrape victims to be considered adults from 16 to 18 years and criminalizes sexual intercourse obtained through deceitful means or false promises.

Sedition:

The BNS2 eliminates the offense of sedition and instead penalizes acts promoting secession, armed rebellion, or subversion, as well as encouraging separatist sentiments or endangering India's sovereignty, unity, and integrity. Such acts may involve various forms of communication or financial means.

Terrorism:

Defined in the BNS2, terrorism encompasses acts intending to threaten national unity, security, or economic stability, or to instill fear among the populace. Punishments for terrorism range from death or life imprisonment to fines, depending on the severity of the offense.

Organized Crime:

The BNS2 incorporates organized crime, including offenses like kidnapping, extortion, contract killing, land grabbing, financial scams, and cybercrime committed on behalf of criminal syndicates. Penalties for organized crime vary from death or life imprisonment to fines, with amounts specified based on the outcome of the crime.

Mob Lynching:

Introducing a new offense, the BNS2 criminalizes murder or grievous hurt committed by five or more individuals on specified grounds such as race, caste, sex, language, or personal belief. Punishments for such offenses include life imprisonment or death.

Supreme Court Rulings:

The BNS2 aligns with select Supreme Court decisions, notably decriminalizing adultery and introducing life imprisonment as a penalty alongside the death penalty for murder or attempted murder by a life convict.

CRITICAL ANALYSIS**1. Imprisonment for life**

Clause 4(b)⁸ of the BNS introduces inconsistency by allowing for imprisonment for life as a potential sentence for certain offenses, while prescribing a whole life sentence for their aggravated forms. This undermines the rationale for imposing harsher penalties for aggravated offenses. For instance, Clause 64(1)⁹ penalizes rape with a range of sentences, including life imprisonment, while Clause 64(2) mandates a whole life sentence for aggravated rape, rendering the distinctions between sentences ambiguous. Similarly, Clause 101(1) imposes life imprisonment and the death penalty for murder, yet murder by a life-convict incurs only a whole life sentence and death penalty. If 'life imprisonment' under Clause 4(b) signifies a full life term, the disparity in punishments between murder and murder by life-convicts loses

⁸ Clause 4(b) of Bharatiya Nyaya (Second) Sanhita Act, 2023

⁹ Clause 64(1) of Bharatiya Nyaya (Second) Sanhita Act, 2023

significance. Such inconsistencies challenge the legislative intent to differentiate penalties based on the severity of offenses. Clarification is necessary to ensure coherence in sentencing and uphold the intended severity of punishment for aggravated crimes.

2. Gender specific provision

The BNS, like the IPC, fails to address sexual violence against men, as rape is construed as a gendered offense where the offender is exclusively male and the victim is female. The absence of a provision akin to IPC Section 377¹⁰ in the BNS means sexual assault on transgender individuals is not penalized. The categorization of gender into three classes excludes transgender individuals from the definition of 'woman,' rendering sexual assault against them unrecognized. Although the BNS claims to introduce gender-neutral provisions, only two related to 'criminal force and assault against women' are truly neutral. Offenses like disrobing (Clause 75, BNS)¹⁵ and voyeurism (Clause 76, BNS) are to be penalized regardless of the perpetrator's gender. However, sexual harassment (Clause 74, BNS) and stalking (Clause 77, BNS) remain offenses only when committed by men, despite recommendations for gender neutrality from the Justice JS Verma Committee. The BNS provisions maintain the gender specific approach seen in the 2013 IPC amendments.

3. Gang Rape

Clause 70(2) of the BNS consolidates gang rape offenses against women under 18, eliminating age qualifiers from IPC sections 376DA and 376DB²⁰. It designates gang rape of any minor woman as an aggravated offense akin to POCSO standards. Penalties under BNS for this offense include death penalty or life imprisonment, exceeding POCSO's 20-year minimum. However, ongoing legal challenges question the constitutionality of life imprisonment without parole, citing concerns over judicial discretion and fair trial rights. If BNS's life imprisonment lacks remission powers, constitutional issues persist, echoing concerns from IPC sections 376DA and 376DB.

¹⁰ Section 377 of The Indian Penal Code, 1860

4. Unsoundness of mind

The Bill replaces archaic terms like 'lunacy', 'unsoundness of mind', and 'insanity' with 'mental illness', aiming for modernization. However, in Clause 64(2)(k)²¹, addressing aggravated rape, the substitution of 'mental or physical disability' with 'mental illness' or 'physical disability' excludes victims with conditions like intellectual disability or dyslexia. Additionally, the offense of insulting a woman's modesty (s. 509 IPC)²² is reclassified under Assault and Criminal Force against Women as Clause 78²³. It penalizes acts intending to insult a woman's modesty, including electronic displays. Despite efforts to remove colonial terms, Clauses 78 and 73²⁴ retain language referring to the 'modesty of women', contrary to the Justice JS Verma Committee's recommendation to eliminate such language from statutes addressing sexual assault.

5. Mob lynching

The BNS introduces special categories within the offences of murder and grievous hurt to address mob lynching incidents. Clause 101(2)²⁵ deals with murder committed by 'five or more persons' based on the victim's social profile, punishable with a range of sentences including a minimum of seven years imprisonment. Clause 115(4)²⁶ addresses grievous hurt inflicted by five or more persons' for similar reasons, with the same punishment range as grievous hurt without mob lynching involvement. While the BNS doesn't create a distinct offence for mob lynching resulting in murder or grievous hurt, it introduces special provisions within existing offences. Clause 99²⁷ outlines the elements of murder, with Clause 101(2)²⁸ requiring murder to be committed 'on the ground of' specific factors, potentially adding a new intent requirement. The term 'acting in concert' in Clause 101(2) lacks clarity regarding its implications, suggesting it's not a deeming provision. Clause 115(4)²⁹ introduces a special intention requirement for grievous hurt due to mob lynching but doesn't differ in punishment from regular grievous hurt. This raises questions about the rationale behind this separate

category. Overall, the BNS aims to address mob lynching through special sentencing provisions within existing offences, though some aspects like intent requirements and punishment parity warrant further clarification.

6. Punishments for Murder and attempt to murder by life convicts

Clause 102 and Clause 107(2) of the BNS address the punishment for murder and attempted murder committed by life-convicts, respectively. Both clauses offer the death penalty or a whole life sentence as potential penalties. However, the mandatory minimum of a whole life sentence limits judicial discretion, akin to the death penalty, disregarding factors like the convict's potential for reform. This parallels challenges to whole life sentences in IPC sections 376 DA and 376 DB, which lack reasonable classification and data on murder frequency by life-convicts. Clause 107(2) further blurs the distinction between attempted murder and murder by prescribing identical punishments, raising concerns of arbitrariness and disproportionality. This could result in death penalties for non-homicidal offences followed by attempts to murder causing minor harm. Without addressing these issues, the constitutional validity of these clauses remains questionable.

7. Death by negligence

Clause 104(1) of the BNS replaces Section 304A IPC³⁴, enhancing the maximum punishment for causing death through rash or negligent acts to seven years and imposing fines. Clause 104(2)³⁵ introduces aggravated negligence with a maximum punishment of ten years for failing to report or fleeing the scene. While intended for hit-and-run cases, its application to all negligent acts causing death raises ambiguity. Fulfilling both requirements simultaneously may be challenging, potentially penalizing individuals unintentionally. The clause applies broadly, encompassing medical negligence cases where reporting may not be immediate or clear. Mandating reporting may conflict with constitutional rights against self-incrimination. (A20 (3)) These provisions aim to address negligence-related deaths but require clarity to prevent unintended consequences.

8. Organised crime and petty organised crime

Clause 110 of the BNS introduces the concept of "petty organized crime" without clear definitions and criteria, leading to several concerns. Firstly, the clause offers an illustrative list of crimes but includes a catch-all provision for "such other common forms of organized crime," creating ambiguity about its scope. It remains unclear which offenses qualify and whether they must result in financial gain. Additionally, while Clause 110 permits petty organized crime by any "criminal group or gang," these terms lack definition, leaving room for interpretation and potential misuse. Unlike Clause 109³⁷, there's no requirement for the involvement of an organized crime syndicate or a history of charge sheets filed, further muddying the waters. A notable discrepancy arises as crimes by mobile organized crime groups are specified under petty organized crimes but omitted from the organized crime definition in Clause 109³⁸. This inconsistency adds to the confusion surrounding the legislation's application and enforcement. Moreover, Clause 110(2)³⁹ replicates the issue found in Clause 109(2)⁴⁰, imposing identical punishment for both commission and attempted commission of petty organized crime— imprisonment of one to seven years, alongside a fine. This lack of distinction fails to account for the varying severity and culpability between completed and attempted offenses, potentially resulting in disproportionate punishments.

Overall, Clause 110⁴¹ raises significant concerns due to its vague terminology, lack of clear definitions, and inconsistent treatment of offenses compared to Clause 109. Without addressing these issues, the effectiveness and fairness of enforcing laws against petty organized crime remain questionable, potentially leading to arbitrary application and unintended consequences. Clarifications and revisions are necessary to ensure clarity, consistency, and fairness in combating organized criminal activities at all levels.

9. Terrorist Act

Clause 111 of the proposed legislation, the BNS, introduces the offense of 'terrorist act,' punishable by death or life imprisonment if resulting in death, and imprisonment ranging from five years to life otherwise. It also criminalizes related offenses like conspiracy and membership in a terrorist organization. The clause broadly defines 'holding proceeds of terrorism,' imposing severe penalties even for unknowingly possessing property derived from terrorism. While the UAPA similarly addresses terrorism, the BNS lacks procedural safeguards and grants broader powers to law enforcement, raising concerns about potential abuse. Unlike the UAPA, which allows government notification of terrorist organizations and individuals, the BNS lacks such mechanisms, leaving room for arbitrary designations. Additionally, the clause's vague language and lack of clarity on what constitutes terrorism pose further challenges. The absence of safeguards against abuse and the severity of consequences highlight potential issues with the BNS's approach to combating terrorism, echoing ongoing debates about the constitutional validity and impact of the UAPA. These concerns warrant careful consideration by the legal community and legislators.

CONCLUSION

A Well-Intentioned Framework Mired in Uncertainties

BNS appears to be a very inclusive bill in terms of covering a wider range of offenses including physical assault, rape, sedition or terrorism and mob lynching. Nevertheless, closer look at the Bill reveals loopholes and inconsistencies that might undermine its effectiveness and create significant questions concerning fairness and constitutionality.

Misaligned sentencing structures mostly regarding life imprisonment and aggravated offenses cause confusion thereby possibly undermining the intended gradations of severity. In addition to this, BNS fails to acknowledge the vulnerability for men as well as transgender individuals to sexual violence thus maintaining existing historical injustices.

In addition, gang rape provisions as they relate to constitutionalism and fairness; mental

health evaluations, mob lynching as well as punishment for life convicts need further examination. Further still there are ambiguities and indistinct definitions especially on organized crime classifications which all blur in a way that casts doubt on enforcement efficiency given its discriminatory potential while maintaining unclear guidelines on discrimination based on organised crime classifications cast doubt on its effectiveness.

Perhaps most concerning are the broad powers granted to law enforcement in combating terrorism. While national security is paramount, the lack of robust procedural safeguards and the possibility of arbitrary designations raise alarming questions about potential abuse and the erosion of fundamental rights.

In conclusion, while the BNS presents a framework addressing crucial national security and public safety concerns, its unclear definitions, inconsistent sentencing, and potentially unconstitutional provisions demand critical revision. Only through comprehensive amendments and unwavering commitment to constitutional principles can the BNS truly deliver justice, fairness, and the rule of law it aspires to uphold.