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CRIMINAL JUSTICE: CONTINUITY OR TRANSFORMATION FROM IPC TO BHARATIYA NYAYA SANHITA, 2023?

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ABSTRACT

The revolutionary change in the Indian system of criminal law came in 2023 with the replacement of Indian Penal Code of 1860 by Bharatiya Nyaya Sanhita, 2023. The adoption of the BNS was part of a massive overhaul of colonial-era criminal legislation, seeking to modernise the content of criminal law as per the current socioeconomical conditions as well as the constitutional principles. This paper attempts to do a critical analysis of the answer to the question about whether the BNS effectuates a substantive reconfiguration of the criminal justice system in India or just does a rearrangement of the colonial bone structure of the IPC. Moreover, on top of the radical reforms including abolition of sedition, codification of offences in organised crime/terrorism, introduction of community service as a penalty, and victim-based reforms, the enquiry of continuity of underlining offences, principles and institutional frameworks are brought under scrutiny.

This analysis argues that although symbolically its criminal law decolonisation, the BNS is a process involving systematic and progressive reform but not wholesale rejection of the colonial legacy, based on a thorough doctrinal analysis of the statute law, the case law of the circuit courts and in the literature. This examination challenges the conclusion that the effectiveness of the BNS in delivering on the idea of the realisation of “nyaya” will actually depend on the interpretation of the constitution, the application of the constitution by the courts, and the rights orientated application of the provisions of the constitution.

KEY WORDS: Indian Penal Code, Article 21, Bharatiya Nyaya Sanhita, Criminal Regulation Reform, Decolonisation, Continuity, and Transformation.

CHAPTER 1

INTRODUCTION

The substantive criminal law in India has been the Indian Penal Code (IPC) of 1860, written by Lord T.B. Macaulay, which has served as a substantive law governing criminal law in the country over a hundred and sixty years.¹ Despite its colonial roots, the IPC has been praised because of its accuracy, uniformity and flexibility. Constitutional principles indicate that even after the promulgation of the Indian Constitution in 1950,² judicial practitioners continue to interpret the IPC in accordance with Constitutional principle, therefore, guaranteeing that it continues to be relevant.

Yet, over the recent years with the accelerated changes in society, technology, and even with its own laws and regulations, the IPC is becoming increasingly seen as not quite suited to deal with the modern situation of cyber fraud, organized criminality, and justice that places the victim at its core.³ As a retaliation, Parliament responded by enacting the Bharatiya Nyaya Sanhita (BNS) of 2023, among others, the Bharatiya Sakshya Adhiniyam and the Bharatiya Nagarik Suraksha Sanhita, as a joint dumping of criminal statutes.⁴ One of the most debated issues connected to this new set of laws is the belief by the government that the new laws represented a shift in colonial ideas of danda (punishment) to indigenous ideas of “nyaya” (justice).⁵

The paper will use a constitutional and comparative analysis approach to examine this question.

QUESTIONS FOR RESEARCH

1. Is there much difference about the Indian penal code of 1860 and the Bharatiya Nyaya Sanhita of 2023?
2. Are the changes that were implemented as part of the BNS a change in the criminal justice theory?
3. Does the BNS more conform with Articles 14 and 21 of the Constitution?

¹ Indian Penal Code, No. 45 of 1860, pmb. (India).

² INDIA CONST. art. 372.

³ K.D. Gaur, *Textbook on the Indian Penal Code* 12–14 (7th ed. 2019).

⁴ Bharatiya Nyaya Sanhita, No. 45 of 2023 (India).

⁵ Press Release, Ministry of Home Affairs, *Union Home Minister Introduces New Criminal Laws in Parliament* (Aug. 11, 2023).

GOALS OF THE RESEARCH

- To assess the similarities of conceptual and structural aspects of BNS and IPC.
- examine the provisions of revolutionary BNS.
- To determine the constitutional implications of the new Code.
- To identify whether the decolonization of criminal law by the BNS is achieved.

METHODS OF RESEARCH

This research utilizes the technique of doctrinal research with the use of original sources (statutes, court rulings) and the secondary sources (manuals, journal articles, reports, and online legal databases). The paper is analytical and comparative in nature.

CHAPTERIZATION

Chapter 1: Introduction

Chapter 2: Review of Literature

Chapter 3: IPC and BNS Continuity

Chapter 4: Transformative Changes Under The Bharatiya Nyaya Sanhita, 2023

Chapter 5: Constitutional and Critical Analysis

Chapter 6: Conclusion, Findings and Suggestions

CHAPTER 2

REVIEW OF LITERATURE

K.D. Gaur has called the Indian Penal Code, 1860 a masterpiece of the law that has made it ever pertinent due to its logical constructions, systematic structure, and clarity of thoughts. However, he also notes that there are still a number of provisions based on a very colonial culture and penal orientation.⁶

B.B.Pande argues that any substantive change in the criminal justice system of India should be based on constitutional morality in the form of the guarantees of equality and personal liberty of Articles 14 and 21 of the Constitution, and promote the normative values of justice, fair treatment, and respect to human dignity.⁷

⁶ K.D. GAUR, *TEXTBOOK ON THE INDIAN PENAL CODE* 10–12 (7th ed. 2019).

⁷ B.B. Pande, Criminal Law Reform in India: A Constitutional Perspective, 55 J. INDIAN L. INST. 1, 6–8 (2013).

On a more negative note, Ratanlal and Dhirajlal contend that in spite of gradual changes in the IPC due to judicial interpretation, legislative inertia has acted as a barrier to the complete modernization of the code and thus the contemporary democratic society continues to be governed by an essentially nineteenth-century code still in operation.⁸

Individual perspectives are also divergent in terms of a more recent scholarship on the Bharatiya Nyaya Sanhita (BNS), 2023. In his critical analysis of the new criminal codes, Gautam Bhatia urges that the new codes have many provisions, especially those dealing with national security, which extend coercive powers of the State by ambiguous and vaguely worded offenses thus posing a serious challenge to civil liberties.⁹ On the other hand, PRS Legislative Research federates that the BNS lays down a narrow range of new crimes and alters penalties, though the structure of the IPC and its crimes is preserved, which suggests a change of gradual reformation as opposed to the radical restructuring.¹⁰

The discussion of judicial discourse also offers an essential normative background to the issue of reform. The addition of substantive due process of Article 21 into the Supreme Court in *Maneka Gandhi v. Union of India* changed the very essence of the idea of individual liberty and had a significant effect on the criminal law.¹¹ Likewise, decisions like: *Joseph Shine v. Union of India*, *Navtej Singh Johar v. Union of India*, the Court highlights its policies concerning the independence, honesty, and constitutional morality as the principles of assessing criminal law.¹²

Regardless of these developments, the literature that has been preserved is rather descriptive and piecemeal. An overarching doctrinal review of whether the Bharatiya Nyaya Sanhita, 2023, actually alters the India model of criminal justice or the legacy of the colonial model to a fresh name and label is ominously deficient. This is the gap that this work attempts to fill.

⁸ RATANLAL & DHIRAJLAL, *THE INDIAN PENAL CODE* 3–5 (36th ed. 2020).

⁹ Gautam Bhatia, *The New Criminal Codes and Civil Liberties*, 58 *ECON. & POL. WKLY.* 12, 14–15 (2023).

¹⁰ PRS Legislative Research, *The Bharatiya Nyaya Sanhita, 2023 Bill: Highlights & Analysis* (2023), <https://prsindia.org>.

¹¹ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248, ¶¶ 5–7 (India).

¹² *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India); *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39 (India).

CHAPTER 3

IPC AND BNS CONTINUITY

There are also significant levels of structural and substantive continuity between the Indian Penal Code, 1860, and the Bharatiya Nyaya Sanhita, 2023. The BNS is basically a replica of the IPC organizational structure and incorporates most of the already existing offences with slight changes in the language and renaming of the provisions, no wholesale revision being done. The definitions of the most severe crimes murder and culpable homicide, theft, robbery, cheating, criminal breach of trust, defamation, and crimes against the peace are not significantly different than their counterparts under the IPC.¹³ This ruling of the law is the direct result of the desire to maintain the doctrinal stability and prevent disruption of the criminal justice system.

This continuity is further demonstrated by the maintenance of the basic rules of criminal responsibility. Due to the long-standing effect of the maxim *actus non facit reum nisi mens sit rea*, the issue of *mens rea* still remains critical in determining guilt under the BNS. Clauses in regard to abetment and joint liability as well as general exclusions and principles addressing intention, knowledge, recklessness, accident and insanity are substantially the same. Therefore, the vast canon of the legal precedents developed under the IPC will be relevant in interpreting the BNS.

In this aspect, the landmark judicial precedents will have a high chance of remaining in its authoritative position. The exposition made by the Supreme Court in *Virsa Singh v. State of Punjab* that laid down the test of murder under Section 300 of the IPC by placing stress on the intention to cause a specified bodily injury which was enough, in the natural order of things, to cause death is set to continue influencing the way the respective provision will be interpreted within the BNS.¹⁴

Punitive philosophy also expresses continuity. The primary types of punishments, such as incarceration, life imprisonment, fines, property forfeiture, and, according to some cases, the death penalty are retained by the BNS¹⁵, without any noticeable trend toward forms of

¹³ Bharatiya Nyaya Sanhita, No. 45 of 2023, chs. XVI–XX (India); Indian Penal Code, No. 45 of 1860, chs. XVI–XX (India).

¹⁴ *Virsa Singh v. State of Punjab*, A.I.R. 1958 S.C. 465, 468–69 (India).

¹⁵ Bharatiya Nyaya Sanhita, 2023, §§ 4–9.

retributive or reformatory punishment, although there are minor changes to the punishment of a particular offense. The fact that traditional punitive forms are perpetuated points to the fact that despite the fact that nomenclature has changed the conceptual basis of the penal consequence has not been changed.

One can observe benefits to this continuity. To courts, law enforcement agencies and those practitioners who have been used to IPC structure it makes it easy, predictable and stable to make the transition. Nonetheless, it also limits the transformational power of the BNS. Instead of courageous recalculations of criminal justice regarding modern constitutional and social realities, the code as we have it now seems to have been subdued by familiarity and administrative convenience by the legislature, and pretty much recreates the outline and substance of a nineteenth-century code.

Thus, although the IPC may possibly be symbolically replaced by Bharatiya Nyaya Sanhita, 2023, it is, in fact, continuity rather than discontinuity and maintains the same colonial order with minor changes.

CHAPTER 4

TRANSFORMATIVE CHANGES UNDER THE BHARATIYA NYAYA SANHITA, 2023

Some of the amendments in the Bharatiya Nyaya Sanhita, 2023 are meant to address the current realities in the social life of rigid a constitutional focus, and confront the changing face of criminality, although its substantive continuity with the Indian Penal Code, 1860. The revisions, despite being selective, are a concerted effort at modernising substantive criminal law.

4.1 Reorganisation of Offences Against the State and Abolishment of Sedition

This alteration of the IPC section 124A, which made sedition a criminal offence, is one of the most symbolically reverberating amendments.¹⁶ The BNS deletes this, which was historically a very abused section, historically a tool of inquisitions against political dissent. Any actions that threaten the indivisibility, unity and sovereignty of India are now punished by Section 152 of the BNS.¹⁷

¹⁶ Indian Penal Code, No. 45 of 1860, § 124A (repealed 2023).

¹⁷ Bharatiya Nyaya Sanhita, No. 45 of 2023, § 152 (India).

Although this movement has mostly been described as the breaking out of colonial restrictions to speech, critics and proponents of civil liberties have also been apprehensive. Although the text is written using alternative words, the new provision still has a potential of being broad and vague in its application. In *Kedar Nath Singh v. State of Bihar*, the Supreme Court did not find the constitutionality of sedition until its limited interpretation to acts provoking violence or a disturbance of the population.¹⁸ This precedent evokes similar issues. 21 Supplementing sedition with a fresh national-security crime is, therefore, an indicator of symbolic decolonisation as well as the possibilities of reforming the power of the state on speech.

4.2 General Review on Crimes in Liaison with Terrorism and Organised Crime

Another important trend is the inclusion of terrorism and organised crime offences into the general criminal code.¹⁹ Historically, special laws have dealt with such behaviour, including the MCOCA and Unlawful Activities (Prevention) Act, 1967. This appears to be the mainstreaming of these severe offences into the day-to-day criminal code by the legislature. The nascenting process of the merger throws questions on the normalisation of special criminal law and the degradation of the procedure. Coercive authority of the State might be increased by incorporating broadly defined crimes related to the crime of terrorism and organised crime to guarantee that the provisions of Article 21 concerning the guarantees of personal liberty are not violated.

4.3 Implementation of Community Service as a Punishment

Restricting the use of imprisonment and introducing community service, as a punishment on chosen minor crimes, fits within the paradigm shift: social responsibility and rehabilitation as opposed to imprisonment are indicative of restorative and reformative justice.²⁰

The community service is compatible with modern penological theory that supports the use of alternative forms of punishment instead of incarceration, especially with the juvenile and first-time offender. Issues on overcrowding and demoralizing impact of jail life are as well discussed. This step is one of the most visible alterations in the punitive theory in the BNS, but its application is not yet clear.

¹⁸ *Kedar Nath Singh v. State of Bihar*, A.I.R. 1962 S.C. 955, 969–70 (India).

¹⁹ Bharatiya Nyaya Sanhita, 2023, ch. VII; Unlawful Activities (Prevention) Act, No. 37 of 1967 (India).

²⁰ Bharatiya Nyaya Sanhita, 2023, § 4(f).

4.4 Gender-Sensitive Origin and Victim-centred Reorientation

Moreover, BNS tries to embrace the more victim-focused orientation (particularly concerning crimes against women and children). A push to recognize the rights, dignity, and agency of victims can be seen through both the application of gender-sensitive language and penalty more severe in cases of sexual offences.²¹ The move is supported by the Supreme Court when focusing on the rights and dignity of victims as part of the Article 21. However, critics argue that patriarchal assumptions are still present in criminal law and that the victim-centric system can never be realised with marriage rape not yet criminalised.

4.5 Technological and Cyber-Enabled Crime Identification

The statute, which was enacted upon the acknowledgment of the increasing trends of offences that can be committed through digital and electronic devices, aims to widen the scope of the criminal liability by reconsidering the application of the penal law with current trends of the digital era.²²

This is a necessary provision in an era of online fraud, identity theft, digital harassment and disinformation. Nevertheless, the level to which the technological capability, inquiry skills and adherence to the stipulated cyber laws suffices will define the effectiveness of these measures.

4.6 Assessment of Change Potential

The elimination of colonial remnants, the addressing of the modern security problem, the establishment of corrective punishment, and the understanding of victim rights and technological facts are the elements of the amendments that illustrate the effort to make criminal law modern. However, the reforms exist in otherwise traditional context that does not change much in the structure of the IPC and its ideological foundation.

In this regard therefore, instead of being a wholesale restructuring of the criminal justice system in India, the Bharatiya Nyaya Sanhita is a reform of cautiously incremental nature even though it has a few transformative elements.

CHAPTER 5

CONSTITUTIONAL AND CRITICAL ANALYSIS

Article 21 in the Indian Constitution ascertained that a rule that takes away life or personal liberty of a person should be just, fair, and reasonable. This criterion was upheld with

²¹ Id. ch. V.

²² Information Technology Act, No. 21 of 2000 (India); Bharatiya Nyaya Sanhita, 2023, §§ 2, 111.

conviction by the Supreme Court in *Maneka Gandhi v. Union of India*, thus substantive due process was established as the constitutional test in consideration of criminal laws.²³ The Bharatiya Nyaya Sanhita (2023) claimed to develop the concept of nanayata, however, some of its stipulations cannot be categorized as other provisions that take a threatening step regarding the constitution when compared to the standard.

It is also a point of concern that the inclusion of national-security offences in the BNS has been made. Article 19(1) (a) ensures the right to speech and expression but given the wide range of coverage criminalising the acts that are alleged to threaten the sovereignty, unity and integrity of India, the right is likely to be violated. Without the crop definition and proper protective measures, these limitations get exposed to the implications of being used to contain lawful political criticism and democratic commentary. The previous sedition law is an example of how unclear security crimes may be abused, thus requiring strict judicial review in order to make them reasonable and proportional.

There is a continuing constitutional conflict due to the continued process of criminalisation of defamation in the BNS. The Supreme Court in *Subramanian v. Union of India* has been deeply criticized as having preceded the valid appearance of Section 499 and 500 of the IPC on the basis of the right to reputation as an essential aspect of Article 21.²⁴ Instead of reviewing criminal libel law through the lenses of the emerging terms of democracy, the BNS seems to maintain the controversial status quo between Articles 19 and 21 by not enacting any changes in substance.

Another prominent constitutional issue is the fact the marital rape remains outside the liability of crime. This exception is still applied in the new order in spite of the gradual changes in the constitutional discourse acknowledging independence, honor and sexual self-governance. The words of the Supreme Court in *Joseph Shine v Union of India* where adultery was ruled unconstitutional as it treated women as property²⁵ and in *Navtej Singh v Union of India* where the Supreme Court emphasized the need to interpret the fundamental rights under constitutional morality and humanity seem not to resonate with this omission.²⁶ As a result, a certain hesitation can be seen to apply these principles to the sphere of sexual independency in

²³ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248, ¶¶ 5–7 (India).

²⁴ *Subramanian Swamy v. Union of India*, (2016) 7 S.C.C. 221, ¶¶ 184–85 (India).

²⁵ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39, ¶¶ 42–45 (India).

²⁶ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1, ¶¶ 101–04 (India).

marriage, in the inability to make marital rape criminal.

According to the scholars, the reform is more of a figurative than a practical initiative which is an act of decolonisation. Although the colonial terms might have been overhauled, Gautam Bhatia warns that the main idea of coercive criminalisation and the broad-based level of state power remains the same in the new act.²⁷ Against all expectations that might have indicated a significant change towards a less punitive and more rights-oriented type of justice, the emphasis on national security, harsh penalties and broad-based offences are the indicators of the continuation of the punitive orientation of criminal law.

Therefore, making generalizations about the Bharatiya Nyaya Sanhita providing a native and constitutionally anchored concept of criminal justice, there is, however, a multifaceted twist between continuity and reform in the provisions.

CHAPTER 6

CONCLUSION, FINDINGS AND SUGGESTIONS

CONCLUSION

A major shift in the evolution of criminal justice in India was the shift to writing a code of rules labelled Bharatiya Nyaya Sanhita (BNS), 2023, which underlies a conscious break with the colonial nomenclature and an attempt to reconcile the criminal law with the local notions of justice. However, a critical study of the doctrine shows that, in substance, the BNS is a reform that comes in slow and steady steps, and not a wholesale-scale overhaul of criminal law. It has retained the structure, the main criminal acts, and the philosophical approach towards penalties of the Indian Penal Code, 1860, though a number of progressive elements have been added, including the elimination of sedition, the acknowledgment of crimes that depend on computers, broader victim-oriented elements, and community service as a type of penalty.

The classical principles of criminal guilt such as significance of mens rea, wide exclusions and retributive measures of punishment still exist. As a result, the shift of the term danda to the term nyaya is primarily symbolic over being structural. Thus, the constitutional interpretation of rights inherent in the judiciary and the curative, responsible execution of the enforcement agencies will become the key to the fulfillment of the transformational potential of the BNS.

²⁷ Gautam Bhatia, The New Criminal Codes and Civil Liberties, 58 ECON. & POL. WKLY. 12, 15 (2023).

In this respect, the BNS cannot be considered an essential redefinition of criminal justice but an innovative step towards a reform in criminal law.

RESULTS

- Domination of Continuity: Great continuity in structure and doctrines define the movement of the IPC towards the BNS. Most offences, rules of liability and punishments have been preserved inwardly, so as to provide stability in the process but on the second off, restrict capacity to make substantive reforms.
- Selective Modernisation: The BNS brings in the elements of progressive: victim-oriented drafting, web-based crimes and community service. Nevertheless, these changes are modernisation in an already existing concept and not a drastic change in the penal philosophy.
- Strengthening of the State Authority: The introduction of rather generally worded national security and organised crime rules can be aroused with concerns about their possible misuse and loss of the civil liberties, which will indicate the increased role of the coercive state power.
- Partial Constitutional Alignment: In spite of the fact that the BNS is designed to capture the ideals contained in the Constitution, it is still partially aligned with Articles 14, 19, and 21. This becomes more stated considering the fact that even till today, the marital rape should not be subjected to punishment and the fact criminal defamation continues to exist.
- Symbolic Decolonisation: The reform would be symbolic and thus represent symbolic decolonisation, as it undoes some of the colonial logic behind the framework and orientation of criminal law; however, it does not fully address the bias and lack of colonial logic.

IDEAS

- Define and Strong Protective Measures: To have the rationality and proportionality, legislature must offer specificity and the use of procedural navigation to circumvent the misuse of national security and organised crime actions.
- Focus on decriminalisation: In order to alleviate over-criminalisation, a rational examination of crime should be done so as to decriminalise the behaviour that does not

necessitate the administration of criminal convictions especially in areas that concern speech and individual autonomy.

- Improving Restorative Justice: To encourage rehabilitation, social reintegration as opposed to incarceration, the community service scope and other restorative processes must be increased particularly minor and first-time offences.
- On-Going Judicial Review: In order to ensure that the interpretation process serves to foster justice, dignity, and individual freedom, the courts need to exercise close oversight when conducting constitutional review of the BNS based on Articles 14, 19 and 21.
- Capacity Building and Training: To make sure that the new code is utilized effectively, regularly and in a rights-aware way, national training courses on the new code to be carried out to police, prosecutors and courts officials.
- Regular Legislative Review: To evaluate its impact and promote evidence based forward-looking changes, the workings of the BNS must be periodically reviewed by both parliamentary and expert committees.

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