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## LEGALONUS LAW JOURNAL

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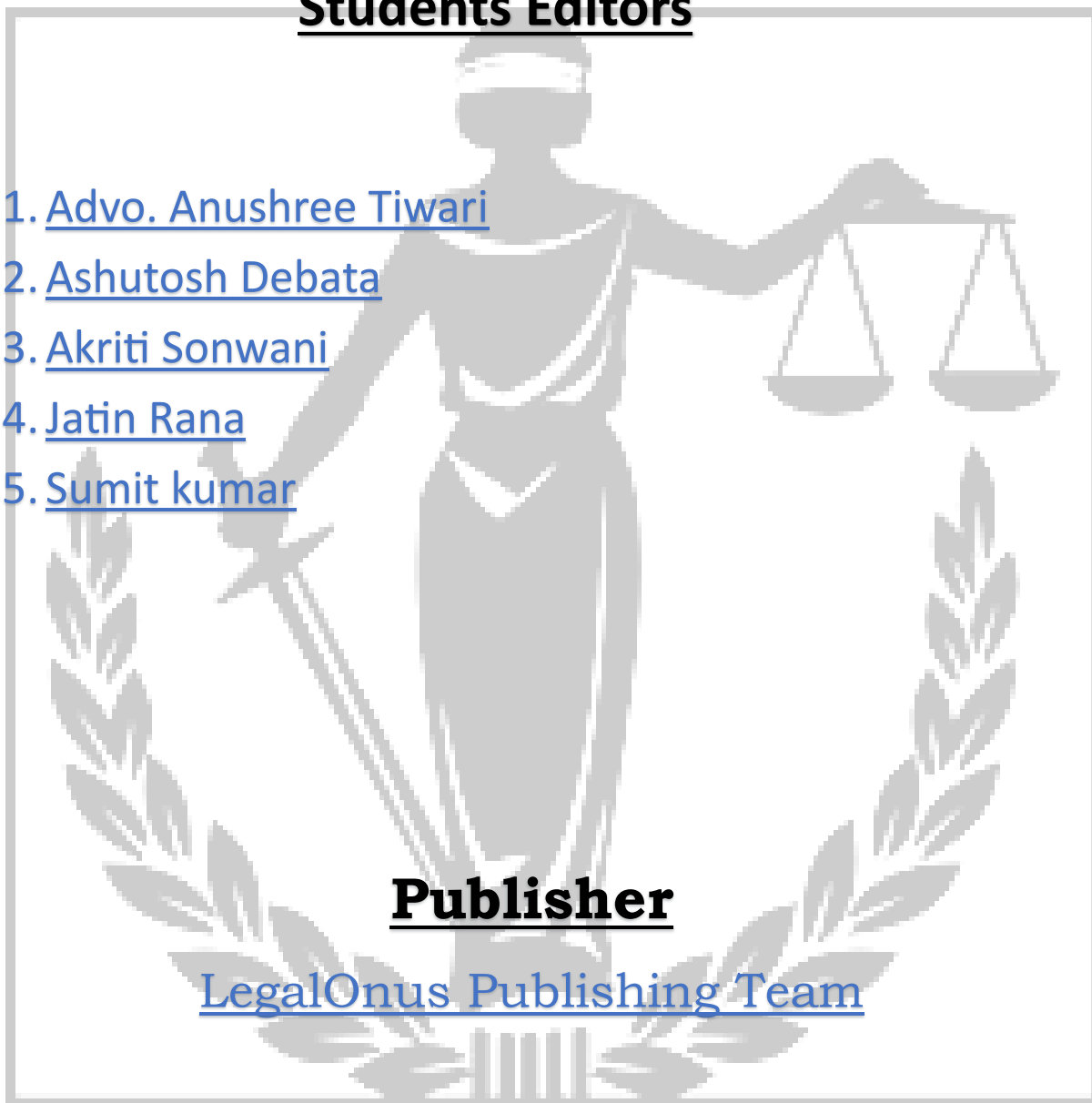
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## COMPREHENSIVE REVIEW OF BHARATIYA NYAYA SANHITA: ESSENTIAL INSIGHTS AND ANALYSIS

-Anuja Jalan

### Abstract

Long awaited criminal law reformations have finally come in force, Bharatiya Nyaya Sanhita replacing the archaic Indian Penal Code marks a significant milestone in India's legal landscape. This enactment to replace the 163-year-old IPC has ignited both anticipation and skepticism. As we dissect this legal transformation, let's explore its nuances, strengths, and potential areas for refinement. While evidentiary and procedural reforms remain essential, our exploration centers on the BNS's impact, adaptability, and the delicate balance it strikes between tradition and modernity. The BNS signifies a long-awaited rejuvenation. While amendments to the IPC occurred over time, a complete overhaul was inevitable. A cursory glance at the revamped law reveals a modernized approach and momentous transformations. By systematically re-categorizing and consolidating offenses, the BNS simplifies legal understanding for practitioners, scholars, and the public. It addresses the shortcomings of the IPC, harmonizing provisions and removing redundancies. . However, the litmus test lies in whether this evolution truly aligns with our dynamic society or leaves room for further improvement.

**Keywords:** *Bharatiya Nyaya Sanhita (BNS), Gender Neutrality, Community Service, New Criminal Law Regime, Organized Crime.*

### Introduction

The **Bharatiya Nyaya Sanhita** has re-categorized and consolidated offenses, making it much more convenient and accessible. The previous Indian Penal Code, being an archaic law that underwent multiple amendments, led to the scattering of provisions to some extent. The recent revamping through the BNS has addressed this issue. The BNS has systematically organized offenses into relevant categories, simplifying legal understanding for practitioners, scholars, and the public.

By grouping similar offenses together, such as that against women & child, it enhances clarity and ease of reference. The BNS represents a significant overhaul, addressing the shortcomings of the IPC. It harmonizes provisions, removes redundancies, and aligns with contemporary legal principles. In response to evolving circumstances, numerous adaptations have been implemented. In this compilation we will explore the same. Our purpose is to analyze these adaptations, gaining deeper insights and improving our understanding of their significance.

### Expansion of Scope & Accountability

There are various instances how Indian criminal law has expanded its scope—whether through redefining movable property or asserting jurisdiction over offenses committed beyond India's borders.

Under the Indian Penal Code, there was no direct equivalent to **Section 48<sup>1</sup>** of the **Bharatiya Nyaya Sanhita**. This new provision addresses abetment outside India for offenses committed within India. It holds individuals accountable if they abet acts in India that would constitute an offense if committed within the country. Essentially, it recognizes the global nature of criminal activities and ensures that abetment across borders is treated seriously. If someone overseas assists in hacking an Indian computer system, they can be held liable under Section 48. Abetting financial fraud or money laundering within India from abroad falls under this provision too. Though determining jurisdiction and gathering evidence across borders can be challenging and legal mechanisms for extradition and cooperation becomes crucial. Knowing that abetment beyond India is punishable reinforces deterrence.

In the recent criminal law refurbishment, the Bharatiya Nyaya Sanhita maintains the age of consent to constitute offence of rape while significantly raising the threshold age for wives to 18 years, aligning it with the legal age for marriage. *Consequently, any sexual act with a wife below 18 years, even within marital relationships, is now punishable as rape<sup>2</sup>*. By eliminating redundancy

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<sup>1</sup> Section 48. A person abets an offence within the meaning of this Sanhita who, without and beyond India, abets the commission of any act in India which would constitute an offence if committed in India.

<sup>2</sup> Sec. 63 Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.



between consent and marriageability ages, the amendment enhances clarity and consistency in our legal framework. Previously, the IPC considered sexual acts with wives below 16 years as rape offenses, but this provision became redundant due to the legal age for marriage. The amendment emphasizes safeguarding a minor's right to consent until they are capable of informed decisions. Notably, even if the perpetrator is the husband, any sexual act with a wife below 18 years is now subject to legal consequences. This legal provision recognizes that marriage does not automatically imply consent, especially when one of the spouses is a minor. Despite legal reforms, child marriage persists in India. Studies reveal that this harmful practice continues to affect young lives, necessitating ongoing efforts to eradicate it.

'In 2021, researchers identified over 13.4 million women and more than 1.4 million men aged 20-24 who had experienced child marriage. Shockingly, approximately one in five girls and nearly one in six boys were married below India's legally permissible age for marriage<sup>3</sup>.'

Ongoing efforts, including awareness campaigns and education, are crucial to eradicate this harmful practice and protect the rights of minors. **Section 63 Exception 2 of BNS** is a welcome move, which will indirectly curb this societal evil.

New provision as to theft u/s 303 BNS extends protection to incorporeal property in this digital age. The recent expansion of **Section 303** within the **Bharatiya Nyaya Sanhita** signifies a crucial shift in our legal framework. Traditionally, theft laws focused on corporeal property—tangible assets like goods, vehicles, or jewelry. In contrast to the current broadening of its scope, includes incorporeal property as well. **Movable property as defined u/s 2(21)** brings about this sweeping change.

*"(21) "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;"*

This encompasses electronic data, virtual currency, intellectual property, and other intangible assets. In our tech-driven era, intangible assets hold immense value. Data, digital identities, and

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<sup>3</sup> Prevalence of Girl and Boy Child Marriage: A Repeated Cross-sectional Study Examining the Subnational Variation across States and Union Territories in India, 1993-2021, Jewel Gausman, Rockli Kim, Akhil Kumar, Shamika Ravi, S.V. Subramanian, The Lancet Global Health, December 15, 2023, doi: 10.1016/S2214-109X(23)00470-9

crypto currencies are critical components of modern life. Unfortunately, these incorporeal properties are vulnerable to theft, fraud, and cybercrime. Online frauds have surged, exploiting vulnerabilities in digital systems. By explicitly covering incorporeal property under theft provisions, the BNS aims to protect individuals and businesses from such crimes. Notwithstanding that the amended Information Technology (IT) Act, 2000 already addressed aspects of cybercrime. Treating incorporeal property theft under the same head as traditional theft ensures consistency and accessibility. This change not only increases public awareness but also equips law enforcement executives to tackle these matters efficiently.

Section 303 reflects the need to safeguard our digital lives. By recognizing the value of intangible assets and explicitly addressing their theft, the BNS adapts to the realities of the digital age.

### **Community Service as Punishment**

The recent addition of community service as a form of punishment within India's criminal law framework is a significant step forward. For quite some time, scholars and jurists have advocated for this inclusion. Although there have been instances of awarding community service through judicial activism, there was no explicit mechanism for it until now. Community service has stood the test of time and geography, proving effective in addressing certain types of offenders—especially first-timers or those involved in minor crimes. It serves a dual purpose: rehabilitating the offender by allowing them to explore human cohesion, while also benefiting the broader community. Over time, it fosters a sense of giving back to society among citizens. Additionally, community service helps alleviate the burden on prison infrastructure and the judiciary. While the inclusion of community service in our criminal law regime might have been overdue, it's a positive step nonetheless. There's no harm in adopting this form of punishment; in fact, it contributes to a more effective and modern judicial system.

## Unaddressed Concerns & Omissions

The recent enactment of the **Bharatiya Nyaya Sanhita** brought significant changes, including the complete removal of **Section 377** from the IPC. This provision criminalized consensual sexual acts “against the order of nature,” including same-sex relationships. Earlier, a judicial pronouncement<sup>4</sup> partially invalidated Section 377, decriminalizing consensual adult homosexual relationships. However, the BNS now entirely eliminates Section 377, signaling a progressive shift towards inclusivity but challenge remains. Advocacy for transgender rights and addressing animal offenses will likely prompt future amendments. While the BNS recognizes transgender individuals, it fails to comprehensively protect them against sexual offenses. Also it does not specifically address sexual offenses against animals. Without direct provisions, the Prevention of Cruelty to Animals Act, 1960, becomes the only recourse for punishing such offenses, as cruelty. It is being advocated that BNS is gender neutral but at ground level, to some extent, it treats perpetrators equally, regardless of gender. However, the focus shifts when we consider victims of sexual offences, be it rape, or other offences such as voyeurism, stalking or likewise, it is still gender-centric. It primarily protects women<sup>5</sup> and leaves men, transgender and animals out of this protective umbrella. In this ultra-modern age, offences such as enumerated above, are not limited against women alone. To ensuring equal protection for all genders and addressing offences beyond women remains a critical challenge.

**Bharatiya Nyaya Sanhita** doesn't encompass adultery, leaving it outside the purview of criminal liability, in conformation to the highly celebrated judicial pronouncement<sup>6</sup> of 2019. Whether consider marriage a sacrament or a contract, penalizing adultery in today's age, where spouses have distinct identities, rights, and responsibilities, unlike the past may be seen as over-policing by the state. A consensual act outside wedlock could be considered a marital failure, potentially a ground for divorce. While introducing adultery as a gender-neutral offense may be a step

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<sup>4</sup> Navtej Singh Johar V. Union Of India, (2018) 10 SCC 1;

<sup>5</sup> Sec 2 (35) “woman” means a female human being of any age;

<sup>6</sup> Joseph Shine v. Union of India, (2018) 2 SCC 189.

forward, it doesn't fully address the issue. Autonomy and individual rights should guide legal decisions. Imposing laws on personal relationships risk curtailing freedom of speech, expression, and the right to life. Beyond dissolution of marriage, criminalizing adultery seems excessive. Summarily, the BNS's omission of adultery acknowledges the complexities of modern relationships. Balancing individual autonomy and societal norms remains knotty.

Under the updated criminal law, possessing counterfeit currency notes is no longer punishable<sup>7</sup>. However, intentionally using such counterfeit currency as genuine remains an offence. This change is a positive departure from the previous law, ensuring innocent possession is safeguarded.

### **Novel Offences and Stricter Penalties**

A commendable addition to our criminal law is Section 69<sup>8</sup> of the BNS which navigates relationships and employment. The inclusion of **Section 69** in the BNS marks a significant step in our legal landscape.

#### **There are two Facets of Section 69:**

**Live-In Relationships:** the term Live-in hasn't been used in the Sanhita and even a single act of sexual nature is sufficient to constitute the offence. The provision tackles situations where individuals induce women partners into live-in arrangements or otherwise have sexual intercourse with such partner without any genuine intention of subsequent marriage. Such cases have been alarmingly prevalent, both nationally and globally.

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<sup>7</sup> 180. Whoever has in his possession any forged or counterfeit coin, stamp, currency-note or bank-note, knowing or having reason to believe the same to be forged or counterfeit and intending to use the same as genuine or that it may be used as genuine, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both. Explanation.—If a person establishes the possession of the forged or counterfeit coin, stamp, currency-note or bank-note to be from a lawful source, it shall not constitute an offence under this section.

<sup>8</sup> 69. Whoever, by deceitful means or by making 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 offence 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. Explanation.—“deceitful means” shall include inducement for, or false promise of employment or promotion, or marrying by suppressing identity.



**Employment and Career Inducement:** Section 69 also addresses instances where sexual favors are demanded in exchange for employment or career growth. This phenomenon extends beyond the infamous “casting couch” in the entertainment industry; it occurs in various other sectors as well.

By explicitly addressing these issues, Section 69 aims to deter perpetrators. It sends a strong message that deceptive intentions will not go unpunished. Increased prosecution is expected, as the provision empowers victims to seek justice when their trust is exploited.

**While there are challenges and uncertainties** awaiting on the enforceability of the same, such as;

- **Proving Intent:** Demonstrating that the intention to marry was absent from the outset can be complex. Was it a genuine promise or mere deceit? Courts will grapple with this question.
- **Post-Fallout Scenarios:** What if a couple’s relationship sours and one party decide against marriage? How do we discern genuine intent at different stages of the relationship? In a way, it makes break-ups illegal. If a relationship doesn’t culminate in marriage, men may find themselves vulnerable to harassment.
- **Risk of Misuse:** While Section 69 serves a crucial purpose, misuse is possible. Each case must be carefully evaluated to prevent unwarranted harassment.

Section 69 acknowledges the realities of modern relationships and workplace dynamics. It balances deterrence with the need for cautious application. As we navigate this legal terrain, ensuring fairness and protection for all parties remains paramount.

Now let’s delve into another entrant, the provisions related to mob lynching under **Section 103(2)<sup>9</sup>** of the **Bharatiya Nyaya Sanhita** and explore the practical challenges anticipated to pop-up before courts in such cases. Section 103(2) defines mob lynching as murder committed by five

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<sup>9</sup> (2) When a group of five or more persons acting in concert commits murder on the ground of race, caste or community, sex, place of birth, language, personal belief or any other similar ground each member of such group shall be punished with death or with imprisonment for life, and shall also be liable to fine.

or more persons acting in concert based on factors like race, caste, community, sex, place of birth, language, personal beliefs, or similar grounds. Each member of the group involved in mob lynching is equally punishable.

Although looking at increasing instances of crowd wrath, such a mechanism in place is need of the hour, but a carefully curated system is also inevitable. The current language ensue possibility of following practical challenges:

- **Collective Responsibility:** Holding an entire group accountable for an offense is complex. Determining individual roles and intentions within a mob can be challenging.
- **False Charges:** False accusations by police personnel or others can occur. Innocent individuals may be wrongly implicated.
- **Evidentiary Burden:** Proving the collective intent of a group requires robust evidence. Witnesses may fear retaliation.
- **Judicial Dilemma:** Courts must balance justice with the rights of accused individuals.

To address these challenges we need a fair and rigorous investigation procedure, ensuring unbiased collection of evidence. Also cautious ascertainment of individual liability, differentiating between active participants from passive bystanders is sine-qua-non. Legal safeguards to prevent false charges and protection of innocent, together with public awareness about consequences of mob violence are vital.

Notably, the BNS omits religion as a specific motivating factor for mob lynching, nevertheless, the term 'other similar grounds' has allowed scope for vast judicial interpretation. Practical implementation of mob lynching also faces hurdles. Balancing collective responsibility with individual rights remains a judicial challenge. Future mechanisms should safeguard against false charges and promote justice.

Furthermore, under the BNS, **Section 106(1)**<sup>10</sup> addresses causing death by rash or negligent acts. The punishment for hit-and-run offenses has been significantly increased from **two years to five**

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<sup>10</sup> 106. (1) Whoever causes death of any person by doing any rash or negligent act not amounting to culpable homicide, shall be punished with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine; and if such act is done by a registered medical practitioner while performing medical procedure, he shall

**years** of imprisonment. This change aims to deter reckless behavior and enhance accountability. It also introduces a specific provision for negligence by registered medical practitioners. Although this aspect was previously covered under **Section 304A** of the old Penal Code, the BNS emphasizes its gravity by explicitly mentioning it. However, the punishment for medical negligence remains unchanged at **two years** of imprisonment. Balancing the need for justice with the complexities of medical practice is crucial at the same time onerous. The express provision underscores the importance of holding medical professionals accountable.

Section 106(2)<sup>11</sup> focuses on offenders who cause death due to rash and negligent driving but escape without reporting the incident to authorities. The law imposes imprisonment of up to **ten years** and a fine for such actions. Legislators aim to prevent mob violence by encouraging offenders to promptly inform the police or a magistrate after the incident. By allowing the offender to escape the scene and the crowd's wrath, the law seeks to strike a balance between accountability and safety. Section 106(2) outlines intricate details, but its practical application faces challenges, therefore it has been kept on hold and hasn't been enforced with other provisions of the Sanhita. Misinformation led to unrest among truck driver unions, highlighting the fear of mob lynching. The requirement to report "soon after the incident" lacks a clear definition in the new law, potentially causing confusion. Properly defining the reporting timeframe is essential to avoid ambiguity. Courts must consider the urgency of reporting while ensuring the offender's safety.

Yet another exemplary introduction in the list of offences by **Bharatiya Nyaya Sanhita** is **Sec 111**<sup>12</sup>. It encases a comprehensive definition of **Organized Crime** and encompasses offences

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be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.

<sup>11</sup> Sec 106(2) Whoever causes death of any person by rash and negligent driving of vehicle not amounting to culpable homicide, and escapes without reporting it to a police officer or a Magistrate soon after the incident, shall be punished with imprisonment of either description of a term which may extend to ten years, and shall also be liable to fine.

<sup>12</sup> 111. (1) Any continuing unlawful activity including kidnapping, robbery, vehicle theft, extortion, land grabbing, contract killing, economic offence, cyber-crimes, trafficking of persons, drugs, weapons or illicit goods or services, human trafficking for prostitution or ransom, by any person or a group of persons acting in concert, singly or jointly,

committed in a planned, systematic manner within a group. For the first time, the BNS categorizes continuing offenses separately. This recognizes the ongoing nature of certain crimes, increasing their gravity. The term 'Economic offences' has been duly defined under the said provision as;

*“(iii) “economic offence” includes criminal breach of trust, forgery, counterfeiting of currency-notes, bank-notes and Government stamps, hawala transaction, mass-marketing fraud or running any scheme to defraud several persons or doing any act in any manner with a view to defraud any bank or financial institution or any other institution or organisation for obtaining monetary benefits in any form.”*

Providing such an inclusive explanation ensures that financial crimes are appropriately addressed. Organized crime is rampant in our society but was previously not regulated as a distinct category. While individual occurrences of these offenses were punishable, treating them as continuing offenses emphasizes their severity. By explicitly targeting organized crime, the BNS curbs people's tendency to associate with such groups. It disrupts the perception of crime as a lucrative avenue for offenders. **Section 111(4)**<sup>13</sup> criminalizes membership in a crime syndicate, imposing appropriate penalties. This move aims to create a deterrent mechanism against syndicate formation, effectively nipping it in the bud. It recognizes its prevalence, ensures appropriate punishment, and discourages criminal associations.

The inclusion of **Section 112**<sup>14</sup> in the BNS marks a significant step toward addressing **Petty Organized Crime**. It encompasses various petty offenses, including snatching, pick pocketing, and

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either as a member of an organized crime syndicate or on behalf of such syndicate, by use of violence, threat of violence, intimidation, coercion, or by any other unlawful means to obtain direct or indirect material benefit including a financial benefit, shall constitute organized crime.

<sup>13</sup> Sec 111(4) Any person who is a member of an organised crime syndicate shall be punished with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than five lakh rupees

<sup>14</sup> 112. (1) Whoever, being a member of a group or gang, either singly or jointly, commits any act of theft, snatching, cheating, unauthorized selling of tickets, unauthorized betting or gambling, selling of public examination question papers or any other similar criminal act, is said to commit petty organised crime. Explanation.—For the purposes of this sub-section "theft" includes trick theft, theft from vehicle, dwelling house or business premises, cargo theft, pick pocketing, theft through card skimming, shoplifting and theft of Automated Teller Machine.



illegal betting. Under the old law, conviction rates for such offenses varied across India. BNS aims to standardize convictions and enhance efficiency. Victims often hesitate to report petty offenses due to fear, inconvenience, or lack of confidence in the legal system, letting the offenders go unpunished. Treating these offenses as organized crime encourages victims to come forward, aiding investigations and facilitate booking groups involved in such activities. It will have deterrence effect as swift justice discourages repeat offences and reduces individual criminal activities. Economic hardships often drive teens and young individuals toward petty crimes. Regulation of the same would discourage individuals to indulge in such criminal activities.

Another new offence in BNS is **Snatching** u/s 304. According to **Section 304(1)**<sup>15</sup> of the BNS, any theft becomes snatching when:

- The offender suddenly, quickly, or forcibly seizes, secures, grabs, or takes away movable property.
- This action is committed with the intent to steal.

The IPC lacked a specific provision for snatching, leading to ambiguity in categorizing such cases. By introducing this offence, BNS provides a clear legal framework for dealing with snatching incidents. Snatching covers theft of movable property, including personal belongings, mobile phones, and valuables etc. The sudden nature of snatching often leaves victims shocked and vulnerable. Dedicated provisions allow better analysis of snatching incidents and crime patterns. Law enforcement can now take targeted actions against offenders involved in snatching. BNS punishes solo perpetrators of snatching differently that those who operate in a gang organized manner as u/s 112; making the later more severe by awarding maximum imprisonment of up to seven years.

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<sup>15</sup> 304. (1) Theft is snatching if, in order to commit theft, the offender suddenly or quickly or forcibly seizes or secures or grabs or takes away from any person or from his possession any movable property.

### Shift from Sedition

The Bharatiya Nyaya Sanhita introduces a significant shift from the traditional concept of sedition. **Section 152<sup>16</sup>** of the BNS reframes the offense previously covered under Section 124A of the Indian Penal Code as acts endangering India's sovereignty, unity, and integrity. Is it just a colorable legislation putting forth same sedition law under cloak? Are the two same according to pith and substance theory? There's an ongoing debate about the sedition law being violative of freedom of speech, and has been considered a archaic law where power can be misused by the ruling government to shut down any voice raised against them; while this new provision has broadened the spectrum thereby punishing activities which are detrimental towards the country as a whole, it is not protecting any government or government body.

Unlike sedition, which primarily targeted acts against the government, this provision aims to safeguard broader national interests. BNS attempts to strike a balance by addressing threats to national integrity while avoiding undue restrictions on legitimate criticism. Globally, treason laws vary, and BNS aligns with modern trends by emphasizing the country's overall well-being.

### Concluding Remarks:

Bharatiya Nyaya Sanhita, replacing the outdated Indian Penal Code, introduces transformative provisions while maintaining a delicate balance. Noteworthy aspects include global accountability for offenses, recognition that marriage doesn't imply tacit consent making any sexual act with a wife below 18 years punishable as rape, strengthening restraint on child marriage and Section 69's acknowledgment of contemporary realities. However, the BNS falls short in

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<sup>16</sup> 152. Whoever, purposely or knowingly, by words, either spoken or written, or by signs, or by visible representation, or by electronic communication or by use of financial mean, or otherwise, excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities or endangers sovereignty or unity and integrity of India; or indulges in or commits any such act shall be punished with imprisonment for life or with imprisonment which may extend to seven years, and shall also be liable to fine. Explanation.—Comments expressing disapprobation of the measures, or administrative or other action of the Government with a view to obtain their alteration by lawful means without exciting or attempting to excite the activities referred to in this section do not constitute an offence under this section.

comprehensive protection against sexual offences, voyeurism, or stalking etc irrespective of gender. Transgender individuals have found their long due recognition under the enactment but it fails to extend equivalent safeguards. Also crimes against animals have been overlooked. Gender neutrality in treating perpetrators contrasts with gender-centric protection for victims. Challenges lie in practical implementation, medical accountability, and ascertaining collective responsibility amongst others. Summarily, efforts to bring our criminal law at par with societal advancements are laudable, while it is pertinent to note there's scope of refinement. Overtime, through case to case basis judicial interpretation would aid in a lucid understanding. BNS strives for justice while acknowledging practical complexities. Its impact will unfold with time, and future mechanisms must safeguard against misuse while promoting fairness.

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