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Legislative Comment Bharatiya Nyaya (Second) Sanhita, 2023: A Critique

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ABSTRACT

Bharatiya Nyaya (Second) Sanhita, 2023 (BNS2, 2023) is one of the three newly passed Criminal Law Bills that have duly received the President's assent on 25.12.2023 and is supposed to substitute the Indian Penal Code, 1860 in the coming time. Though the new regime of laws purports to bring a paradigm shift in the realm of criminal laws by putting an end to the colonial code contemporarily in force, the BNS2, 2023 suffers from substantial hiatuses, which affords public attention and cannot be overlooked at the outset. Furthermore, it seems from the scheme of the newly enacted law that it inclines more towards the government and provides substantial provisions for stultifying the critiques from voicing their arguments against the government.

This Legislative Comment is intended to provide positive criticism, comprising two limbs of submissions taking two crucial aspects within its fold. The first submission, trailing the introduction, highlights the negative impact of deleting the equivalent of Section 377 of the IPC, 1860, from the BNS2, 2023. Meanwhile, the second submission highlights how the legislators have seemingly strengthened Section 124A of IPC, 1860, that is, the sedition law in force in India more in favour of the government. Towards the conclusion, the authors propose changes to the BNS2, 2023, filling up these shortcomings spotted and discussed in the two-fold submission.

I. INTRODUCTION

Law is the cornerstone of a functional human civilisation living in harmony. Without law and order in place, no society can exist. Law, an ever-evolving concept needed for the people and their welfare, is essential for the development of society. For the law to be effective, it must adapt to reflect the shifting moral standards, societal demands, and worldviews. Particularly when it comes to criminal law, it is proposed that it shall cover comprehensive aspects impacting society while not leaving a lacuna that may adversely impact any section of the society. The new Criminal Law Bills set to replace the existing criminal laws in force afford no exception to the same regard.

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BNS2, 2023, along with the Bharatiya Nagarik Suraksha (Second) Sanhita, 2023, and the Bharatiya Sakshya (Second), 2023, has been duly passed by both the houses of the parliament and received the assent of the Hon'ble President on 25th December 2023.³ Further in this comment, the authors discuss how BNS2, 2023 stands as an incomplete legislation with humungous hiatuses, leaving out the possibility of including the odds of a male, transgender person and beast being sexually vitiated and exploited. Following the first submission, the authors have described how the popular notion of deletion of sedition is a mere faux, as it seems, in essence, the BNS2, 2023 has retained the essence of the offence with certain modifications, making it much more vulnerable to exploitation while merely doing away with the word "sedition".

II. DISSENT TO CLAUSE 63 OF BNS2, 2023

It is averred that the new penal laws enclosed in the bounds of BNS2, 2023, suffer a material flaw insofar as the new definition of rape is discussed. Sticking to the old-fashioned approach of ruling out the possibility of an adult male being sexually violated is clearly reflected in Clause 63 of the BNS2, 2023, defining the offence "Rape". The new law unequivocally recognises solely women as victims of rape.⁴ The old colonial law somewhat patched the cavity with the application of Section 377, which no longer finds its essence in the BNS2, 2023. The absence of Section 377 serves as a grave error as it doesn't merely decriminalise sexual acts, as understood against the order of the nature, consented to by the engaging parties but also horrific crimes such as the rape of a male or a transgender person along with bestiality.

IPC, 1860, balanced the lacuna by recognising unnatural sex or sexual intercourse against the order of nature as a punishable offence,⁵ with the only problem being it initially even criminalised consented acts of sexuality including unnatural sex. During the reign of IPC, a fine balance was struck upon the determination of the matter of Navtej Singh Johar vs Union of India⁶, wherein the Hon'ble Supreme Court of India held Section 377 unconstitutional to the extent it criminalised consensual sex activities among two adults.⁷ Adult males are generally not considered much vulnerable to rape. However, on record, the stark reality shuns the popular opinion when barbaric incidents of a 36-year-old man getting thrashed, stripped and gang-

³ Shemin Joy, *Bills to replace criminal codes enacted into law as president Murmu gives nod*, Deccan Herald (Accessed: 27 December 2023, at 6:37 PM), URL: <https://www.deccanherald.com/india/bills-to-replace-criminal-codes-enacted-into-law-as-president-murmu-gives-nod-2824616> .

⁴ Bharatiya Nayana (Second) Sanhita, 2023, Bill No. 173 of 2023, Clause 63 (12th December, 2023).

⁵ Indian Penal Code, 1860, Section 377, No. 45, Acts of Parliament, 1860 (India).

⁶ Navtej Singh Johar vs Union of India, (2018) 10 SCC 1.

⁷ Ibid.

raped by a group of five men make it to the headlines of the newspaper.⁸ Earlier also, the paucity in law provided for no other provision to resort to other than Section 377 of IPC, 1860, in case of sexual violation of an adult male, albeit for minors, the law in place ensured gender neutrality ever since POCSO Act, 2012 came to force.⁹ BNS2, 2023, as it stands today, shall certainly disturb the remaining threads of law in the interest of adult male victims by taking away the very essence of Section 377 in its entirety. It is supposed that the same women-centric law shall even pass the test of constitutionality by virtue of Article 15 (3), which enables the state to enact laws containing special provisions for women or children.¹⁰

Another intriguing facet of BNS2, 2023, is that though it expressly regards and recognises transgender persons, the same law affords no protection to them when it comes to sexual offences.¹¹ A transgender person in law neither qualifies as a man nor as a woman in particular; moreover, as per Indian law, it refers to a person who has a gender different from the one assigned at birth.¹² Thus, it would not be wrong to preliminarily hold that transgender persons are out of the fold of Clause 63 of BNS2, 2023, as per the literal interpretation. However, the juxtaposition of Clause 63 of BNS2, 2023, with Clause 2 (10) of BNS2, 2023, leaves no room for doubt that a transgender person can be prosecuted on the charge of rape brought up by a woman. Besides the crucial issue of not taking into account the possibility of rape of a man or a transgender person, the paucity of adequate provisions in BNS2, 2023 further decriminalises bestiality as well, which would mean that a person will no longer be held criminally liable for raping or having intercourse with poor unvocal animals who are by nature not capable of raising their voice against the injustice. Pertinently, India as a country is no stranger to offences involving sexual violation and rape of beasts, and despite the hardships incurred in tracking down these cases, such cases to date get reported across India.¹³

III. DISSENT TO CLAUSE 150 OF BNS2, 2023

It is averred that BNS2, 2023 purports to remove sedition from the list of penal offences, while

⁸ Gargi Verma, *Navi Mumbai: Man gangraped after stopping for cigarette on way home*, The Indian Express (Accessed: 27, December 2023, at 7:02 PM), URL: <https://indianexpress.com/article/cities/mumbai/navi-mumbai-man-gangraped-after-stopping-for-cigarette-on-way-to-home-6029383/>.

⁹ Aneasha Mathur, *Bill to make sexual crimes gender neutral introduced in Parliament*, India Today, (Accessed: 27 December 2023 at 9:45 PM), URL: <https://www.indiatoday.in/india/story/bill-to-make-sexual-crimes-gender-neutral-introduced-in-parliament-1568504-2019-07-13>.

¹⁰ The Constitution of India, 1950, Article 15 (3) (India).

¹¹ Bharatiya Nayana (Second) Sanhita, 2023, Bill No. 173 of 2023, Clause 63 (12th December, 2023).

¹² The Transgender Persons (Protection & Rights) Act, 2019, Section 2 (k), No. 40, Acts of Parliament, 2019 (India).

¹³ Mabel Chandra, *Forensic Examination of Bestiality and Related Case Studies of India*, SIFS.INDIA, (Accessed: 27 December 2023 11:49 PM), URL: <https://www.sifs.in/blog-details/forensic-examination-of-bestiality-and-related-case-studies-of-india/47>.

a mere perusal of Clause 150 of the BNS2, 2023 sheds light on a stark reality that though the word "sedition" has been removed from the new law enclosing the penal offences, its negative essence continues to exist in twisted wording. The claim that sedition is in spirit retained by BNS2, 2023, is further explicitly strengthened by the Bharatiya Nagarik Suraksha (Second) Sanhita, 2023, giving direct reference to Clause 150 for deriving the definition of the term "*Seditious Matter*".¹⁴ It is pertinent to note that upon enactment, the clause will directly contradict and dilute the contemporary stance of the Hon'ble Supreme Court of India, which has ordered the Central and State Governments to refrain from registering further FIRs pertaining to sedition that is, under Section 124-A of IPC, 1860.¹⁵

The new particulars of the offence enshrined under the BNS2, 2023 criminalise acts that endanger India's sovereignty, unity, and integrity, with punishment ranging from life imprisonment to seven years with fine.¹⁶ Substituting the phrase '*the Government established by law*' with '*sovereignty, unity, and integrity of India*' broadens the scope of the offence by potentially including government bodies, institutions, and other allied entities within the fold of the law. This material alteration also seems to fly in the teeth of the dictum of *Kedarnath Singh vs State of Bihar*¹⁷, wherein the Hon'ble Supreme Court of India held "Government established by law" as a necessary subject to attract the offence of sedition different from the individuals engaged in administrative tasks. Also, in *Kedarnath Singh*¹⁸, the Apex Court shaped the jurisprudence by allowing a narrow interpretation of Section 124-A; the lack of similar jurisprudence guiding the interpretation of Clause 150 makes the expansive legislation vulnerable to misuse.

Clause 150 further seems to have expanded the horizons of sedition by expanding the actus reus by incorporating the terms "*electronic communication*" and "*by use of financial means*" without specifying a threshold in particular. The clause also seems to disturb the cause-effect relationship by inserting an undefined consequence, that is, "*subversive activities*" and "*encourages feelings of separatist activities*.", which in turn multiplies the possibility of implicating people for the offence specified in the clause potentially giving a wide range of powers to the government and its instrumentalities to stultify dissent in the absence of judicial interpretations sketching the line of limitation. The new law seems to appear more stringent in black and white and is likely to go in conflict with well-settled interpretations of the Hon'ble

¹⁴ Bharatiya Nagarik Suraksha (Second) Sanhita, 2023, Bill No. 174 of 2023, Clause 127 (12th December, 2023).

¹⁵ *S.G. Vombatkere v Union of India*, (2022) 7 SCC 433.

¹⁶ Bharatiya Nagarik Suraksha (Second) Sanhita, 2023, Bill No. 173 of 2023, Clause 150 (12th December, 2023).

¹⁷ *Kedar Nath Singh vs State of Bihar*, 1962 AIR 955.

¹⁸ *Ibid.*

Supreme Court of India in relevant matters, for instance, contemporarily as per the ruling of the Hon'ble Supreme Court of India in the matter of *Balwant Singh vs State of Punjab*¹⁹, mere raising of slogans such as "Khalistan Zindabad" does not tantamount to sedition; however, the new law seems to go in a conflict with this interpretation by adding the term "*encourages separatist activities*" without specifying its scope. Arguably paralleling the vagueness highlighted by the Apex Court in the matter of *Shreya Singhal vs Union of India*²⁰, the addition of these abovementioned terms also seems to bring back the vague and ambiguous grounds, thereby making the legislation more amenable to misuse by the government and its instrumentalities.

IV. CONCLUSION

The BNS2, 2023, in light of the hiatuses and shortcomings discussed above in two material laws, seems to be an ambitious step towards modernising India's criminal justice system. The authors vehemently disagree to incline on believing the public opinion that supports BNS2, 2023 as a game-changing law. According to the authors, the new penal law retains a plethora of colonial provisions that have simply been rearranged, reordered, merged or separated.

Like earlier, males and transgender persons are kept out of the purview of being perceived as subjects of sexual harassment.²¹ The new law makes the supper bitter by pushing them away from even being recognised as subjects of rape. The absence of a provision in BNS2, 2023 equivalent to Section 377 of IPC, 1860 took away the last semblance of protection that was guaranteed to men, transgender persons and beasts under it against the offence of rape, though not perfect as it only recognised rape by another man, denying the possibility that women can also be perpetrators of rape and not necessarily a mere accessory to the crime. This failure to safeguard subjects other than women against sexual offences in IPC was not treated by the new penal law. Instead, it was exacerbated by taking away the little it granted, highlighting an enormous flaw. The authors, therefore, recommend that by way of amendment, Clause 63 be made gender-neutral enough to encompass males and transgender people as probable victims of rape and further insertion of a provision to penalise bestiality.

Further, Clause 150 of the BNS2, 2023 criminalises the acts jeopardising India's sovereignty, unity and integrity. However, a comparative analysis reveals subtle modifications that mimic Section 124A while retaining the essence of sedition in all but name. With a mens rea requirement of "purposely or knowingly," Clause 150 expands the definition of

¹⁹ *Balwant Singh And Anr vs State of Punjab*, 1995 (1) SCR 411.

²⁰ *Shreya Singhal v. Union of India*, AIR 2015 SC 1523.

²¹ *Bharatiya Nayana (Second) Sanhita, 2023*, Bill No. 173 of 2023, Clauses 74-79 (12th December, 2023).

sedition while preserving its traditional forms. Glaring issues, from vagueness to potential criminalisation against dissent, underscore constitutional concerns. The expansiveness of the provision in the absence of precise definitions and lack of interpretation runs the risk of overboard application, akin to instances that led Section 124-A to abeyance, thereby multiplying the risk of malicious prosecutions and potential political abuse. Therefore, in light of the unaddressed issues and concerns, the authors recommend that explanations be affixed to Clause 150 for the new terminologies introduced by the legislators, accompanied by a set of illustrations to provide a clear and lucid threshold for attracting the offence stipulated in the clause, to restrict the overbroad application of the clause.
