



DECRIMINALISATION VS. OVERCRIMINALISATION: RETHINKING PENAL PROVISIONS IN THE BHARATIYA NYAYA SANHITA 2023

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ABSTRACT

This article examines the Bharatiya Nyaya Sanhita 2023's impact on India's criminal law framework, analyzing the tension between promised decriminalisation and continued overcriminalisation. The replacement of the Indian Penal Code 1860 with the BNS was projected as comprehensive modernisation through systematic decriminalisation and constitutional alignment. However, critical analysis reveals selective recriminalisation with expanded state powers, broader definitional scope for serious offences, and retention of problematic colonial-era approaches under a new nomenclature. Through comparative analysis with international criminal law reforms and constitutional scrutiny of fundamental rights implications, this study demonstrates that while the BNS eliminated peripheral colonial anachronisms, it simultaneously expanded criminal liability through vague terrorism provisions, mandatory minimum punishments, and broad anti-national activity definitions. The article argues that genuine criminal law reform requires systematic decriminalisation principles, constitutional compliance review, and proportionality assessment rather than selective modernisation that perpetuates overcriminalisation patterns.¹

Keywords: Bharatiya Nyaya Sanhita, Decriminalisation, Overcriminalisation, Criminal Law Reform, Constitutional Rights, Terrorism Provisions, Fundamental Rights.

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¹ The Bharatiya Nyaya Sanhita, 2023 - Official Gazette (Ministry of Home Affairs)

<https://www.indiacode.nic.in/bitstream/123456789/20062/1/a2023-45.pdf>; PRS Legislative Research, 'The Bharatiya Nyaya Sanhita, 2023' <https://prsindia.org/billtrack/the-bharatiya-nyaya-sanhita-2023>.² Press Information Bureau, 'New Criminal Laws' (1 July 2024)

<https://www.pib.gov.in/Pressreleaseshare.aspx?PRID=2082757>; PUDR, 'Review Death Penalty Punishments in Bharatiya Nyaya Sanhita 2023' <https://www.pudr.org/press-statements/review-death-penalty-punishments-in-bhartiya-nyaya-sanhita-2023/>.³ Law Commission of England and Wales, 'Criminal Law Reform' (Various Reports, 2020-2023).

⁴ Constitution of India 1950, arts 14, 19, 21; Shreya Singhal v Union of India (2015) 5 SCC 1 <https://indiankanoon.org/doc/110813550/>.

INTRODUCTION

The replacement of the Indian Penal Code 1860 with the Bharatiya Nyaya Sanhita (BNS) 2023 represents the most significant transformation of India's criminal law framework since independence. The BNS received Presidential assent on 25 December 2023 and (by government notification) many of its provisions came into force on 1 July 2024; the Act itself allows staggered commencement by official notification. Introduced alongside the Bharatiya Nagarik Suraksha Sanhita and Bharatiya Sakshya Adhiniyam, the BNS promised comprehensive modernisation of colonial-era criminal jurisprudence through systematic decriminalisation, procedural streamlining, and constitutional alignment.

The government's reform narrative emphasised three core objectives: removing outdated colonial provisions, reducing criminalisation of minor offences, and incorporating technological advancement for expedited justice delivery. Home Minister Amit Shah proclaimed the reforms would create a "modern, Indian criminal justice system" freed from colonial baggage and aligned with contemporary constitutional values.

However, critical examination of the BNS reveals a complex reality that challenges this reform rhetoric. Rather than systematic decriminalisation, the Act demonstrates selective recriminalisation with expanded state powers, broader definitional scope for serious offences, and retention of problematic colonial-era approaches under a new nomenclature. The fundamental question emerges: has the BNS achieved genuine criminal law reform, or has it merely reorganised existing overcriminalisation within a seemingly modernised framework?

This analysis examines the tension between decriminalisation promises and overcriminalisation realities in the BNS, evaluating its constitutional implications and comparative international positioning.²

THE PROMISE OF DECRIMINALISATION: REFORM RHETORIC AND REALITY

The BNS reform process began with explicit governmental commitments to reduce India's criminal law burden through strategic decriminalisation. Official statements emphasised

⁵ The Bharatiya Nagarik Suraksha Sanhita, 2023; The Bharatiya Sakshya Adhiniyam, 2023; Press Information Bureau (n 2). ⁶ Amit Shah, Parliamentary Speech on Criminal Law Reforms cited in Press Information Bureau (n 2). ⁷ BPRD, 'Comparison Summary BNS to IPC' <https://bprd.nic.in/uploads/pdf/COMPARISON%20SUMMARY%20BNS%20to%20IPC%20.pdf>; PUDR (n 2).

removing "archaic provisions," simplifying business-related offences, and focusing criminal law on genuinely harmful conduct rather than regulatory compliance.

While the BNS removed the old Section 124A IPC in form, it enacted Section 152 (acts endangering the sovereignty, unity and integrity of India) — a new provision with overlapping contours that has prompted litigation and commentary alleging it effectively 'repackages' sedition-type offences. The government presented this transformation as evidence of democratic modernisation, removing colonial-era terminology, while critics argue the substance remains largely intact. Similarly, several obsolete provisions relating to coin counterfeiting, telegram interception, and colonial administrative structures were eliminated, demonstrating legislative housekeeping.

Business-related reforms showed genuine decriminalisation intent. The BNS reduced penalties for various commercial offences, recognising that criminal sanctions for regulatory violations created disproportionate compliance burdens. Provisions relating to minor business disputes, contractual disagreements, and administrative non-compliance received civil rather than criminal treatment, acknowledging the distinction between regulatory violations and genuine criminal conduct.

Technological integration represented another modernisation aspect. The BNS incorporated provisions for electronic evidence, digital documentation, and online procedural compliance. These changes reflected recognition that modern criminal justice requires technological adaptation rather than analogue procedures applied to digital realities.

However, closer examination reveals that decriminalisation occurred primarily in peripheral areas while core criminal law expanded significantly. The BNS replaces Section 124A IPC in form but enacts Section 152, which critics argue replicates sedition-type constraints; the constitutionality of Section 152 is under judicial scrutiny. Sections 147-156 contain broad anti-national activity provisions that potentially encompass more conduct than the original sedition framework. Business decriminalisation focused on minor regulatory matters while serious economic offences received enhanced treatment with mandatory minimums and expanded definitions.

The reform process also demonstrates how critics frame the retention of colonial-era approaches under a new nomenclature. While many provisions are modernised, some offences continue to be framed as state-protective crimes with broad language. The fundamental

architecture of overcriminalisation—broad definitional scope, extensive state discretion, and presumptive criminalisation of social problems—remains largely intact according to civil liberties commentators.³

THE REALITY OF CONTINUED OVERCRIMINALISATION

Despite decriminalisation rhetoric, the BNS demonstrates systematic overcriminalisation through expanded definitions, enhanced penalties, and broader criminalisation scope. This expansion occurs through multiple mechanisms that collectively increase rather than decrease the criminal law's reach.

Section 113 (terrorist act), located in the BNS under offences affecting the human body, represents the most significant overcriminalisation concern. Section 113 provides that a 'terrorist act' includes acts done with 'intent to threaten or likely to threaten the unity, integrity, sovereignty, security, or economic security of India' and prescribes very harsh penalties, including death or life imprisonment. This definition potentially criminalises legitimate political dissent, economic criticism, and social activism under terrorism charges, carrying life imprisonment or the death penalty.

Unlike the repealed sedition provision, which under *Kedar Nath Singh v State of Bihar* required proof of incitement to violence or public disorder, the terrorism provisions in Section 113(1) criminalise mere "likelihood" of threatening broadly defined national interests. This lower threshold, combined with expanded definitional scope, creates greater speech chilling effects than the colonial sedition law it nominally replaced.

The BNS addresses mob lynching through aggravated group-murder and grievous-hurt provisions (Section 103(2) and Section 117(4)), which demonstrate well-intentioned overcriminalisation.¹⁴ Section 103(2) treats murder by a group of five or more persons acting in concert, including on identity-based grounds, with severe penalties. While addressing genuine social evil, the provision's broad language potentially criminalises spontaneous group conflicts, protest activities, and collective action that results in harm. The mandatory minimum

⁸ Press Information Bureau (n 2); Amit Shah (n 6). ⁹ India Today, 'Supreme Court Notice to Centre on Plea Claiming BNS Revived Sedition Law' (9 August 2025) <https://www.indiatoday.in/india/law-news/story/supreme-court-notice-to-centre-on-plea-claiming-bns-revived-sedition-law-2768590-2025-08-09>. ¹⁰ The Bharatiya Nyaya Sanhita, 2023, ss 230-235 (repealed IPC provisions listed). ¹¹ The Bharatiya Nyaya Sanhita 2023, ss 4-6; Chapter XI. ¹² India Today (n 9); The Bharatiya Nyaya Sanhita 2023, ss 147-156.

punishment of seven years imprisonment, combined with presumptive non-bailable status, creates disproportionate penalties for varying levels of group culpability.

Sexual offence provisions show similar expansion patterns. While protecting vulnerable populations represents legitimate criminalisation, the BNS broadens definitions and increases penalties beyond proportionality principles. The inclusion of "digital rape" and expanded molestation definitions, while addressing contemporary concerns, creates potential criminalisation of consensual adult conduct and ambiguous digital interactions.

Economic offences receive enhanced treatment through mandatory minimum punishments and expanded conspiracy provisions. 23 offences carry mandatory minimum punishments under the BNS (government handbooks and comparative tables identify these). Section 61, dealing with criminal conspiracy, broadens liability for agreement to commit offences regardless of actual harm or substantial steps toward completion. This expansion criminalises preparatory conduct previously handled through attempt law, creating earlier intervention points with disproportionate penalties.

The retention of vague language represents perhaps the most concerning overcriminalisation aspect. Phrases like "acts against the nation," "public order," and "economic security" in Sections 147-156 provide minimal guidance for legal compliance while granting enforcement authorities broad discretionary power. Such vagueness violates constitutional due process requirements and enables arbitrary enforcement.⁴

CONSTITUTIONAL IMPLICATIONS AND FUNDAMENTAL RIGHTS CONCERNS

The BNS's overcriminalisation trends raise serious constitutional questions about fundamental rights compatibility, particularly regarding Articles 14, 19, and 21. These concerns become acute when examining how expanded criminal provisions interact with constitutional guarantees of equality, free expression, and personal liberty.

Article 14's equality guarantee prohibits arbitrary state action and requires reasonable classification for differential treatment. The BNS's vague definitions and broad discretionary provisions create substantial arbitrariness concerns. When "terrorist acts" can include

¹³ BPRD (n 7); PUDR (n 2). ¹⁴ Kedar Nath Singh v State of Bihar [1962] 2 SCR 769; The Bharatiya Nyaya Sanhita 2023, s 113(1); Shreya Singhal v Union of India (n 4). ¹⁵ The Bharatiya Nyaya Sanhita 2023, ss 63-70; PUDR (n 2). ¹⁶ BPRD, 'Delhi Police Handbook' https://bprd.nic.in/uploads/pdf/1715852525_852f82459fd399a38f9f.pdf; BPRD (n 7).

undefined threats to "economic security," or "acts against the nation" lack precise definitional boundaries, and enforcement becomes inherently arbitrary. Citizens cannot reasonably predict what conduct violates criminal law, violating the constitutional requirement that laws provide fair notice.

The mandatory minimum punishments throughout the BNS raise additional Article 14 concerns by preventing individualised sentencing based on specific circumstances. When Section 103 requires a minimum seven-year imprisonment for all mob lynching cases regardless of individual culpability, participation level, or harm caused, it creates arbitrary treatment of diverse factual situations.

Article 19's free speech protections face significant pressure from expanded anti-national activity provisions. While the Constitution permits reasonable restrictions on free speech for sovereignty, integrity, public order, and other specified grounds, the BNS's broad terrorism definitions potentially encompass protected political expression. When criticism of government economic policies can constitute threats to "economic security," the distinction between permissible restriction and impermissible censorship collapses.

The Supreme Court's decision in *Shreya Singhal v Union of India* established strict constitutional standards for speech restrictions, requiring narrow tailoring, clear definitions, and a genuine connection between restricted speech and protected state interests. The BNS's terrorism provisions appear to violate these standards through overbroad definitions and speculative harm thresholds.

Article 21's due process protections require that criminal laws meet procedural fairness standards and proportionality principles. The BNS's mandatory minimum punishments violate proportionality by preventing consideration of individual circumstances in sentencing. When minor participants in group conflicts face identical seven-year minimums as primary instigators, punishment becomes disconnected from individual culpability.

The expansion of offences with mandatory minimum punishments throughout the BNS may create additional due process concerns. When mandatory minima and enhanced penalties for serious-classified offences make bail practically harder, presumptive pre-trial detention may become more common rather than exceptional, potentially eroding the constitutional presumption of innocence. The Supreme Court's emphasis in *Arnesh Kumar v State of Bihar*²⁴

on avoiding unnecessary arrests appears to face tension with the BNS's statutory changes that enhance penalties and create more serious-classified offences.

Federalism concerns arise from the BNS's uniform national application despite varying state contexts and priorities. Criminal law's concurrent list placement contemplates federal-state cooperation, but the BNS's mandatory provisions limit state adaptation to local conditions and priorities. States facing different crime patterns, resource constraints, and social contexts must apply identical criminal frameworks regardless of appropriateness.⁵

COMPARATIVE ANALYSIS: INTERNATIONAL APPROACHES TO CRIMINAL LAW REFORM

Examining international criminal law reform provides a valuable perspective on the BNS's approaches and alternatives. Developed democracies have generally moved toward decriminalisation, proportionality, and restorative justice, contrasting sharply with India's expansion-focused reforms.

The United Kingdom's approach to criminal law reform emphasises systematic review and evidence-based decriminalisation. The Law Commission regularly examines criminal provisions for contemporary relevance, constitutional compatibility, and enforcement effectiveness. Obsolete provisions receive repeal, while new criminalisation requires demonstrated necessity and proportionality. The Sexual Offences Act 2003 exemplifies this approach—comprehensive reform based on extensive consultation, clear definitional boundaries, and graduated penalties reflecting harm levels.

British reforms also emphasise decriminalisation of minor offences through administrative penalties, restorative justice, and civil enforcement mechanisms. Drug possession, minor assault, and regulatory violations increasingly receive non-criminal treatment, reserving criminal sanctions for genuinely harmful conduct requiring state intervention.

Singapore's criminal law reforms demonstrate systematic modernisation without overcriminalisation expansion. The Penal Code (Amendment) Act 2019 updated colonial-era

¹⁷ Constitution of India 1950, arts 14, 19, 21. ¹⁸ Constitution of India 1950, art 14; The Bharatiya Nyaya Sanhita 2023, s 113; Kartar Singh v State of Punjab (1994) 3 SCC 569. ¹⁹ Constitution of India 1950, arts 19(1)(a), 19(2); The Bharatiya Nyaya Sanhita 2023, s 113. ²⁰ Constitution of India 1950, art 21; The Bharatiya Nyaya Sanhita 2023, ss 103, 113; Sanjay Chandra v CBI (2012) 1 SCC 40. ²¹ Arnesh Kumar v State of Bihar (2014) 8 SCC 273; BPRD (n 16). ²² Constitution of India 1950, Seventh Schedule, List III.

provisions while maintaining clear definitional boundaries and proportionate penalties. New provisions addressing cybercrime, financial fraud, and contemporary concerns received careful definitional crafting to avoid overbreadth while ensuring adequate coverage.

Significantly, Singapore's reforms included sunset clauses for controversial provisions, mandatory legislative review periods, and empirical assessment requirements. These procedural safeguards ensure that expanded criminal provisions remain necessary and effective rather than becoming permanent features regardless of utility.

Germany's approach emphasises constitutional compliance review and proportionality assessment for all criminal provisions. The Federal Constitutional Court regularly examines criminal laws for fundamental rights compatibility, requiring clear definitional boundaries, genuine harm relationships, and graduated penalties. This constitutional oversight prevents the arbitrary expansion characteristic of systems lacking systematic review.

The German system also demonstrates a sophisticated distinction between criminal law and regulatory enforcement. Administrative violations, business compliance issues, and minor social conflicts receive civil rather than criminal treatment, preserving criminal law's moral condemnation for genuinely wrongful conduct.

In contrast, the BNS demonstrates concerning alignment with authoritarian models emphasising state security, broad definitions, and presumptive criminalisation. The expansion of anti-national activity provisions, mandatory minimums, and vague language parallels approaches in systems prioritising state control over individual rights protection.⁶

TOWARD PRINCIPLED CRIMINAL LAW REFORM

The BNS's mixed record suggests that meaningful criminal law reform requires systematic principles rather than ad hoc modernisation. International best practices and constitutional requirements point toward several essential reform principles that should guide future criminal law development.

First, genuine decriminalisation requires a comprehensive review of existing provisions rather than the selective elimination of obvious anachronisms. Every criminal provision should face

²³ Law Commission of England and Wales (n 3). ²⁴ Sexual Offences Act 2003 (UK); Law Commission of England and Wales (n 3). ²⁵ Singapore Penal Code (Amendment) Act 2019; Nishith Desai Associates, 'Part I - Review of Bharatiya Nyaya Sanhita, 2023' <https://nishithdesai.com/NewsDetails/13888>. ²⁶ German Federal Constitutional Court, Criminal Law Decisions (Various, 2020-2023).

regular sunset review, requiring positive justification for continuation rather than presumptive permanence. The Law Commission should conduct a systematic empirical assessment of criminal law effectiveness, identifying provisions that create compliance burdens without corresponding social benefits.

Second, new criminalisation should meet strict necessity and proportionality standards. Before creating new criminal offences, legislators should demonstrate that civil remedies, regulatory enforcement, and existing criminal provisions cannot adequately address identified harms. New criminal provisions should include clear definitional boundaries, graduated penalties reflecting harm levels, and sunset clauses requiring periodic reauthorisation.

Third, constitutional compliance should receive systematic rather than occasional attention. All criminal provisions should face regular constitutional review for fundamental rights compatibility, particularly regarding due process, equality, and free speech protections. The Supreme Court's constitutional criminal law jurisprudence should be systematically incorporated into legislative drafting rather than awaiting case-by-case challenges.

Fourth, federal-state coordination should permit appropriate local adaptation within national frameworks. While maintaining essential uniformity, criminal law should allow state modification based on local conditions, priorities, and resources. Mandatory provisions should be limited to genuinely national concerns requiring uniform treatment.

Fifth, technological integration should enhance rather than expand criminal law. Digital evidence, online procedures, and technological enforcement should improve existing criminal justice efficiency without creating new criminalisation opportunities. Technology should serve due process and efficiency rather than enabling broader state surveillance and control.⁷

CONCLUSION: RETHINKING CRIMINAL LAW'S CONSTITUTIONAL ROLE

The BNS represents a missed opportunity for genuine criminal law reform that balances modern governance needs with constitutional rights protection. While eliminating obvious colonial anachronisms and incorporating technological capabilities, the Act perpetuates and expands the overcriminalisation patterns that characterise India's criminal justice challenges.

²⁷ Law Commission of England and Wales (n 3); German Federal Constitutional Court (n 26); Singapore Penal Code (Amendment) Act 2019. ²⁸ Constitution of India 1950, arts 14, 19, 21; Shreya Singhal v Union of India (n 4); Armesh Kumar v State of Bihar (n 21).

True criminal law reform requires recognising that criminal sanctions represent the state's most coercive power, requiring exceptional justification and careful constitutional limitations. Rather than presumptive expansion, criminal law should embrace presumptive restraint, reserving criminal sanctions for conduct that genuinely requires state intervention through moral condemnation and punishment.

The path forward requires systematic legislative review guided by constitutional principles, empirical effectiveness assessment, and international best practice integration. Future reforms should prioritise decriminalisation over recriminalisation, proportionality over severity, and individual rights protection over state power expansion.

India's criminal law framework can achieve genuine modernisation through principled reform that honours both contemporary governance needs and constitutional democratic values. The BNS, despite its limitations, provides a foundation for continued reform toward criminal justice that serves both effective governance and constitutional democracy. The next phase of criminal law development must learn from the BNS's mixed legacy to create a criminal justice system worthy of India's constitutional aspirations.⁸

²⁹ The Bharatiya Nyaya Sanhita 2023 (n 1); PUDR (n 2); Constitution of India 1950, art 21. ³⁰ Law Commission of England and Wales (n 3); German Federal Constitutional Court (n 26); Constitution of India 1950.