PROJECT 39A, NATIONAL LAW UNIVERSITY DELHI

Bharatiya Nyaya Sanhita Bill, 2023

A SUBSTANTIVE ANALYSIS

॥ न्यायस्त्र प्रमाणं स्यात् ॥
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Published in August 2023

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ABBREVIATIONS

Article	Art.
Bharatiya Nagarik Suraksha Sanhita, 2023	BNSS
Bharatiya Nyaya Sanhita, 2023	BNS
Clause	Cl.
Code of Criminal Procedure, 1973	CrPC
Gujarat Control of Terrorism and Controlled Crime Act, 2015	GujCOCA
Indian Penal Code, 1860	IPC
Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023	Information Technology Amendment Rules 2023
Information Technology Act, 2000	IT Act
Maharashtra Control of Organised Crime Act, 1999	MCOCA
Prevention of Money Laundering Act, 2002	PMLA
Prevention of Terrorism Act, 2002	POTA
Protection of Children Against Sexual Offences Act, 2012	POCSO
Terrorist and Disruptive Activities (Prevention) Act, 1987	TADA
Unlawful Activities (Prevention) Act, 1967	UAPA
Uttar Pradesh Control of Organised Crime Act, 2017	UPCOCA

Introduction

This substantive analysis of the Bharatiya Nyaya Sanhita Bill 2023 aims to assess the major changes being proposed to offences as they currently exist in the Indian Penal Code, 1860. On a simple textual comparison, it is evident that large portions of the IPC have been retained verbatim in the BNS. However, in the parts where major changes have been made there is much to analyse and understand. The introduction of offences, the importing of offences from other legislations (with some changes), and deletion of IPC offences have important implications that need to be assessed.

In this substantive analysis of provisions, there are 11 issues that in our opinion are the most prominent changes proposed in the BNS and which we have analysed in-depth. The other changes that do not receive a detailed assessment have been identified towards the end of this document for the reader's convenience.

In terms of the issues that are analysed in detail there are serious concerns of expansive criminalisation through vague and unclear language. The use of vague and unclear language has plagued the IPC since its inception and it is instructive that such drafting language continues to be used. The vagueness, effectively, widens the scope of police powers and exacerbates concerns about the arbitrary exercise of such powers. The provisions on 'false and misleading information' and 'acts endangering sovereignty, unity, and integrity of India' are prime examples of this. Curiously, in provisions of the BNS that bring in offences from other existing legislations on terrorism and organised crime, the scope of activities that have been criminalised is wider. Also, the protections envisaged under those legislations (even though those protections were themselves inadequate) have not been incorporated in the BNS or in the Bharatiya Nagarik Suraksha Sanhita Bill 2023. In provisions like sexual intercourse by deceitful means/promise to marry without intention of fulfilling it, the BNS seems to have worsened the legal position in its attempt to convert the judicial position into a legislative provision. However, there is a proposed provision to make the legislative provision on the marital rape exception as applicable to minor wives consistent with the Supreme Court's decisions. While retaining the marital rape exception, the proposed provision makes the exception applicable only for wives who are above 18 years. The inclusion of 'community service' as a possible punishment is certainly a progressive development. However, in a worrying trend, punishments across the board have been enhanced, and includes sentences of life imprisonment without parole. Another change that the BNS proposes is replacing 'unsoundness of mind', a

phrase which commentators have for long criticised because of its vagueness, with mental illness. However, a simple swapping of the phrases does not resolve the problems associated with provisions such as the insanity defence. Such a swapping, in fact, may create conflicts with existing legislation on mental health and disability.

The proportion of text retained from the IPC in the BNS alongside the changes raises an obvious question. Why is the repeal of the entire IPC and re-enactment of a new substantive offences law required when amendments would surely suffice? It is evident there is significant reordering and changes in placement of the provisions but the content of the provisions are to a very large extent a verbatim reproduction of IPC provisions. This extensive verbatim retention of IPC provisions does not justify an exercise of repeal and re-enactment. Repeal and re-enactment will unleash widespread administrative and legal confusion in the police and other investigation agencies, the bar, different levels of judiciary and also prisons. It is doubtful where such widespread consequences can be justified for an exercise that is for most parts only about moving around existing provisions in the IPC.

Imprisonment for Life

Clause 4(b)

The BNS has proposed a change with regards to the definition of *'imprisonment for life'* under Cl. 4(b), defining it as *'imprisonment for the remainder of a person's natural life'*. The IPC under s. 53 provides only for the punishment of life imprisonment simpliciter; certain offences of a sexual nature provide for imprisonment for the remainder of a person's natural life.

I. Current legal interpretation of 'imprisonment for life'

Courts have interpreted imprisonment for life simpliciter to mean imprisonment for the remaining period of the person's natural life ('whole life sentence').[1] However, ss. 432 and 433, CrPC provide the appropriate government with the power to suspend, remit, or commute a sentence imposed by any court for any offence. The only restriction in such power is provided under s. 433A, CrPC where release of a person sentenced to imprisonment for life is not permitted till they have served at least fourteen years of their actual sentence.

As to whether a whole life sentence can restrict the executive powers of remission, the Supreme Court in *Shatrughna Baban Meshram v. State of Maharashtra* opined that the statutory prescription of a life sentence that shall mean the remainder of a person's life can "certainly restrain" such powers.[2]

Besides, executive power to remit sentences can be taken away by Constitutional courts. The Supreme Court in *Union of India v. Sriharan alias Murugan*[3] upheld the position in *Swamy Shraddhananda (II) v. State of Karnataka*[4] that High Courts and the Supreme Court can impose the punishment of a whole life sentence and place it beyond the pale of executive remission based on the circumstances of a

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[1] *Gopal Vinayak Godse v. State of Maharashtra* (1961) 3 SCR 440.

[2] (2021) 1 SCC 596.

[3] (2016) 7 SCC 1; the dissenting opinion authored by Justice UU Lalit in *Sriharan* observed that it is not within the powers of courts to impose a special category of fixed term sentence that restricts the exercise of power of remission before the expiry of such stipulated period. Justice Lalit noted that this prohibits the exercise of statutory power designed to achieve rehabilitative purposes.

[4] (2008) 13 SCC 767.

particular case. The legal position stipulated in *Sriharan*, however, does not impinge upon the Constitutional powers of the President and Governor under Arts. 72 and 161 respectively to grant pardon, which cannot be restricted by statutes or judgments of the courts.[5]

II. Potential interpretations of Cl. 4(b)

The intent and implication of the proposed change in definition under Cl. 4(b) of the BNS are not clear. One possible reading is that Cl. 4(b) simply reflects the legal position that life imprisonment in fact means a whole life sentence - with the government's powers of early release untouched. It is then unclear why some provisions introduced through the BNS state 'imprisonment for life' as a possible sentence while some others specifically prescribe 'imprisonment for life, which shall mean the remainder of that person's natural life.' For instance, the offence of organised crime is punishable with imprisonment for life as a possible sentence under Cl. 109(6). However, punishment for murder by life-convicts in Cl. 102 specifically states that the death penalty and imprisonment for life, which shall mean the remainder of that person's natural life are the two possible sentences. If life sentence means till the end of natural life then using two different articulations across the BNS only creates confusion about the legislative intent.

Notably, Cl. 111 BNS that introduces the offence of 'terrorist act' provides life imprisonment without parole as a possible punishment.[6] This is the only provision in the BNS that explicitly restricts parole for a life sentence.

Table 1 provides a list of offences where imprisonment for life is prescribed along with those offences where life sentence till the end of natural life (whole life sentence) is explicitly stated as a possible sentence.

[5] *Maru Ram v. Union of India & Ors.* (1981) 1 SCC 107.

[6] Refer to note on Cl. 111, BNS on pg. 35.

Table 1: Offences punishable by imprisonment for life and whole life sentence

Imprisonment for life	Imprisonment for life, which shall mean the remainder of that person's natural life (whole life sentence)
Cl. 62 Attempt to commit offences punishable with imprisonment for life	Cl. 64(2) Rape by person in authority
Cl. 64(1) Rape	Cl. 65(1) Rape on a woman under sixteen years of age
Cl. 79 Dowry death	Cl. 65(2) Rape on woman under twelve years of age
Cl. 87 Causing miscarriage without women's consent	Cl. 66 Inflicting injury leading to death or persistent vegetative state due to offence of rape
Cl. 88 Death caused due to miscarriage	Cl. 70 Gang rape
Cl. 101 Murder	Cl. 71 Repeat sex offenders
Cl. 103 Culpable homicide not amounting to murder	Cl. 102 Murder by life-convict
Cl. 105 Abetment of suicide of child or person with mental illness	Cl. 107(2) Attempt to murder by life convict, if hurt is caused
Cl. 107 Attempt to murder (1) if hurt is caused to any person by such act	Cl. 137(2) Maiming a child for purposes of begging
Cl. 109 Organised crime	Cl. 141 (6) Person convicted of the offence of trafficking of a child on more than one occasion (7) Public servant involved in trafficking of any person
Cl. 111 Offence of terrorist act	
Cl. 117(2) Voluntarily causing grievous hurt for any other purpose	
Cl. 122(1) Voluntarily causing grievous hurt by use of acid, etc.	
Cl. 137(1) Kidnapping	

Cl. 138 Kidnapping or abducting in order to murder or for ransom	
Cl. 141 (3) Trafficking of more than one person (4) Trafficking of a child (5) Trafficking of more than one child.	
Cl. 143 Habitual dealing in slaves	
Cl. 145 Waging of war against the Government.	
Cl. 146 Conspiring to commit offences against the State	
Cl. 147 Collecting arms, etc., with the intention of waging war against the State	
Cl. 150 Acts endangering sovereignty, unity and integrity of India	
Cl. 151 Waging war against Government of any foreign State at peace with India	
Cl. 154 Public servant voluntarily allowing prisoner of state or war to escape	
Cl. 156 Aiding escape of, rescuing or harbouring such prisoner	
Cl. 157 Abetting mutiny, or attempting to seduce a soldier from his duty	
Cl. 158 Abetment of mutiny	
Cl. 176 Counterfeiting, or performing any part of the process of counterfeiting, coin or bank notes	
Cl. 177 Using as genuine, forged or counterfeit coin, etc.	
Cl. 179 Making or possessing instruments or materials for forging or counterfeiting coin etc.	
Cl. 228(1) Giving or fabricating false evidence with intent to cause person to be convicted of capital offence	
Cl. 261(b) Resistance or obstruction to the lawful apprehension of any person	
Cl. 306(7) Extortion by threat of accusation of an offence punishable with death	

Cl. 307(4) Attempt to commit robbery causing hurt	
Cl. 308(3) Murder in dacoity	
Cl. 308(6) Belonging to a gang associated for habitually committing dacoity	
Cl. 314(5) Criminal breach of trust by public servant etc.	
Cl. 315 Receiving of stolen property	
Cl. 324 Mischief by fire etc.	
Cl. 325 Mischief with intent to destroy rail or aircraft etc.	
Cl. 329(7) Grievous hurt caused whilst committing house-trespass or house-breaking.	
Cl. 330 House trespass to commit offence	
Cl. 336 Forgery of a valuable security, will etc.	
Cl. 337 Possession of forged documents mentioned in Cl. 336	
Cl. 339 Making or possessing counterfeit seal, etc. to commit forgery	
Cl. 341 Fraudulently destroying or defacing a will	

Cl. 4(b) raises another kind of irregularity. Many offences under the BNS lay down imprisonment for life as a possible sentence for an offence while prescribing a whole life sentence for the aggravated form of the same offence. In such a scenario, the penological basis for a higher sentence for the aggravated offence is defeated. For instance, Cl. 64(1) of BNS penalises rape with a sentence ranging from ten years to life imprisonment, while Cl. 64(2) of BNS penalises aggravated form of rape with the same sentence but for the remainder of natural life of the offender. If 'life imprisonment' always means a whole life sentence as per Cl. 4(b), the punishments become the same, and the legislative intent for a stricter penalty for aggravated rape is frustrated. Similarly, the punishment for murder under Cl. 101(1) of BNS is imprisonment for life and the death penalty. However, the possible sentence for murder by a life-convict is a whole life sentence along with the death penalty. If imprisonment for life means full life as per Cl. 4(b) then the difference in punishment between murder and murder by life-convicts becomes pointless.

Sexual Offences

Clauses 63, 64, 70, 73, 74, 75, 76, 77, 78

While the substance of the provisions dealing with sexual offences under the BNS, are largely similar to the IPC, a few changes have been proposed.[7] The Bill introduces a new chapter titled 'Offences Against Women and Children' to deal with sexual offences. Similar offences under the IPC are part of the chapter on 'Offences Affecting the Human Body'.[8] The implication of such restructuring is that the BNS does not recognise sexual offences unless they are committed against a woman.[9] The BNS does not provide for a separate offence to cover rape of men and transgenders. Additionally, the Bill proposes minor changes to provisions relating to rape of women under the age of 18. It renumbers existing rape provisions and attempts to harmonise the treatment of gang rape of minor women with the POCSO.

I. Gendered provisions

'Rape' even in the IPC, is a gendered provision – where the offender can only be a man and the victim, a woman.[10] The only provision across statutes[11] which penalises

[7] Annotated Comparison of the IPC with the BNS.

[8] Sexual offences, offences causing miscarriage etc and, assault and criminal force against women, and some offences under kidnapping and abduction which are all presently under Chapter XVI, IPC (Offences Affecting the Human Body); and Offences relating to marriage presently under Chapter XX, IPC, have been included in this chapter in BNS. Offences of disclosing identity of victim in certain cases (s. 228A, Chapter XI IPC) and words, gestures, intended to insult the modesty of women (s. 509, Chapter XXII IPC).

[9] Woman includes both an adult i.e. woman over the age of 18, as well as a female child below the age of 18.

[10] Justice JS Verma, 'The Report of the Committee on Amendments to Criminal Law', (23 January 2013), last accessed on 30.08.2023: Recommended that definition of rape be expanded to be neutral to the gender of the victim.

[11] Sexual assault of male children is penalised under the POCSO.

rape of an adult man is s. 377,[12] which does not find a place in the BNS.[13] It follows that BNS fails to penalise sexual violence against men.

The BNS categorises gender into three classes – man, woman, and transgender.[14] Transgender here includes a transwoman irrespective of whether they have gone through sex reassignment surgery etc, and any person who self identifies as a woman but the gender assigned at their birth is not female. This category of persons is excluded from the purview of 'woman' and hence sexual assault against them is not recognised as rape.[15] As there is no provision similar to s. 377, IPC in the BNS, the Bill also does not penalise sexual assault committed on a transgender person.[16] Similar to the IPC, sexual assault committed by anyone other than a man, including a transgender or transman, is not an offence under the BNS.[17]

Notably, the statement of objects and reasons of the BNS mentions that 'various offences have been made gender neutral.' However, this does not apply to the offence of rape. In fact, only two provisions under the category of 'criminal force and assault against woman' have been made gender neutral.[18] The victim in all these offences (as evident from the categorisation) remains a woman, but the proposed offences of assault or use of criminal force with the intent to disrobe (Cl.

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[12] *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1: the Supreme Court read down s. 377, IPC as violative of Arts. 14, 15, 19, and 21 of the Constitution to the extent that it penalised consensual sexual acts of adults. Post this decision, s. 377, IPC is read to penalise only acts which are non-consensual.

[13] Note that even though this provision itself doesn't find a place in the BNS, the term 'unnatural lust' is mentioned under Cl. 38(d), BNS: 'When right to private defence extends to causing death', and s. 138(4): 'Kidnapping child for ransom, murder etc'.

[14] Cl. 2(9), BNS, 'Gender'; in the explanation, s. 2(k) of the Transgender Persons Act, 2019 defines 'transgender person' as '*a person whose gender does not match with the gender assigned to that person at birth and includes trans-man or trans-woman (whether or not such person has undergone sex reassignment Surgery or hormone therapy or laser therapy or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as kinner, hijra, aravani and jogta*'.

[15] Jigyasa Mishra, 'Raped, Mocked By Police For Seeking Justice: India's Rape Laws Do Not Cover Transwomen', (Article 14, 7 July 2022), last accessed on 24.08.2023.

[16] Note that offences against transgendered persons including 'sexual abuse' are penalised under s. 18 of the Transgender Persons Act, 2019, and are punishable with a term of imprisonment of at least 6 months but which may extend to 2 years.

[17] Note that such sexual assault may be penalised as hurt/grievous hurt.

[18] These sections seek to replace s. 354, ss. 354A to 354D, and s. 509, IPC.

75, BNS) and voyeurism (Cl. 76, BNS) are to be penalised irrespective of whether committed by a man or a woman.[19] Inexplicably, sexual harassment (Cl. 74, BNS) and stalking (Cl. 77 BNS) continue to be an offence only when committed by a man. The Justice JS Verma Committee constituted to propose amendments to the rape law in the aftermath of the gang rape and murder of a young woman in New Delhi in December 2012 recommended making these offices (disrobing, voyeurism, and stalking) gender neutral.[20] The 2013 amendments to the IPC defined these offences only when committed by a man and the proposed provisions of the BNS retain that approach.

II. Range of punishments

The Bill borrows age-based classification of rape victims from the IPC and POCSO[21], and prescribes different sentencing options for the rape of minors under the ages of 18,[22] 16,[23] and 12[24] respectively. The range of punishments for rape of minors of different ages is largely the same across the IPC, POCSO, and the BNS.

In Cl. 4(b), the BNS proposes that a sentence of life imprisonment should be read as a sentence of 'life imprisonment until the remainder of one's natural life' ('whole life sentence').[25] This does away with separate punishments for rape and aggravated rape. Cl. 64(1) punishes rape simpliciter with ten years to life imprisonment whereas Cl. 64(2) punishes aggravated forms of rape with ten years

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[19] BNS seeks to replace the words 'A man' with 'whoever' for both these offences.

[20] Justice JS Verma, 'The Report of the Committee on Amendments to Criminal Law', (23 January 2013), pg. 130, last accessed on 30.08.2023.

[21] Protection of Children from Sexual Offences Act, 2012.

[22] S. 376 IPC; Cl. 64(1), BNS; s. 4(1) POCSO: prescribed sentencing options are imprisonment for ten years, life imprisonment, and fine.

[23] S. 376(3) IPC; Cl. 65(1), BNS; s. 4(2) POCSO: prescribed sentencing options are rigorous imprisonment for twenty years, life imprisonment which shall mean imprisonment for the remainder of that person's natural life, and fine.

[24] S. 376AB, IPC; Cl. 65(2), BNS; s. 5(m) r/w s. 6 POCSO: prescribed sentencing options are imprisonment for twenty years, imprisonment for life which shall mean the remainder of that person's natural life and fine, and death.

[25] Justice JS Verma, 'The Report of the Committee on Amendments to Criminal Law', (23 January 2013), pg. 239, last accessed on 30.08.2023: Recommended that a legislative clarification be introduced that life imprisonment must always mean imprisonment for 'the entire natural life of the convict', in line with relevant judicial pronouncements; *Mohd. Munna v. Union of India* (2005) 7 SCC 417*; Gopal Vinayak Godse v. State of Maharashtra* (1961) 3 SCR 440.

to life imprisonment for the remainder of a person's natural life. If life imprisonment must always mean the remainder of one's natural life under Cl. 4, the punishments are identical and the legislative intention behind providing a separate aggravated offence is frustrated.[26]

III. Gang rape of women under the age of 18

Cl. 70(2) introduces a new offence of gang rape of a woman under 18 years of age, proposing two changes worth noting. *First*, Cl. 70(2) merges s. 376DA and s. 376DB, IPC and removes age-based qualifiers to consider gang rape of a minor woman as an aggravated offence. Under the Bill, gang rape of *any* minor woman is an aggravated offence, which is also the position under POCSO.[27] *Second*, this new offence proposes that gang rape of all minor women be punishable with death or with whole life sentence. The IPC currently provides this sentencing option only for the gang rape of a woman under 12 years under s. 376DB. The BNS does not prescribe the death penalty for gang rape of older women.

The minimum sentence for gang rape under the Bill, i.e. whole life sentence, is also greater than the minimum sentence under POCSO, i.e., rigorous imprisonment for 20 years. It must be noted that whole life sentence is a possible punishment for gang rape of minors under all three texts.

Writ petitions challenging the constitutionality of a punishment of whole life sentence are pending before the Supreme Court.[28] Where this is the only prescribed punishment for an offence under the IPC, as under s. 376DA, the challenge to the constitutionality of this provision is *inter alia* due to the lack of judicial discretion to impose a lesser punishment. It is argued that removing this discretion makes a convict's personal circumstances and their probability to reform and rehabilitate irrelevant at the stage of sentencing. In doing so, it negates the

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[26] The only other difference between the punishments under Cl. 64(1) and Cl. 64(2) is an error made in the Criminal Law (Amendment) Ordinance 2013 and not corrected in the Criminal Law (Amendment) Act, 2018; the minimum punishment for rape simpliciter under Cl. 64(1) is *rigorous imprisonment of either description* for 10 years whereas aggravated forms of rape under Cl. 64(2) carry a minimum sentence of *rigorous imprisonment* for 10 years. The error is clear: 'rigorous imprisonment' cannot be 'of either description'. This error is not as significant in the IPC because the maximum punishment under s. 376(1) and s. 376(2) is different.

[27] S. 5(6), POCSO.

[28] *Nikhil Shivaji Golait v. State of Maharashtra* WP Crl 184 of 2022; *Mahendra Vishwanath Kawchale v. Union of India* WP Crl 314 of 2022.

accused person's right to a fair trial by taking away their right to be meaningfully heard on the question of sentence. If these impugned IPC provisions are removed and replaced by Cl. 70(2) of the Bill, the fate of these constitutional challenges is uncertain. If 'life imprisonment that shall mean imprisonment until the remainder of one's natural life' under the Bill is understood to exclude powers of remission or early release under Cls. 475, 476 of BNSS, the constitutional concerns around ss. 376DA and 376DB IPC will extend to Cl. 70(2) of BNS as well.

IV. Age of consent for married women

Another significant change is that the age of consent for a married woman under the definition of rape (Cl. 63 BNS/ s. 375 IPC) is proposed to be increased from 15 to 18 years. Exception 2 to s. 375 IPC provides that sexual intercourse between a man and his own wife, wife not being under the age of 15, is not rape. The change in age of consent seeks to give legislative effect to the Supreme Court's judgment in *Independent Thought v. Union of India* (2017),[29] where the marital rape exception exception was read down to the extent that it allowed sexual intercourse between a man and his minor wife over the age of 15 years. Cl. 63 of the BNS retains the marital rape exception.

V. Colonial and archaic language/provisions

Throughout the Bill, archaic and problematic terms like 'lunacy', 'unsoundness of mind', and 'insanity' have been replaced with 'mental illness'.[30] In Cl. 64(2)(k), which provides for an aggravated form of rape [presently under s. 376 (2) (l), IPC], this change not only alters the nomenclature but also affects the substance of the provision. Here, the proposed change is to replace the term 'mental or physical disability' with 'mental illness' or 'physical disability'. The impact of this is that it excludes the rape of a woman who suffers from a 'mental disability' such as intellectual disability, dyslexia or autism.[31]

The offence of 'word, gesture, or act intended to insult the modesty of a woman' (s. 509 IPC) has been brought under the category of Assault and Criminal Force against Women as Cl. 78 in the BNS. The proposed provision states that '*whoever, intending to insult the modesty of any woman, utters any words, makes any*

[29] (2017) 10 SCC 800.

[30] As defined under s. 2(s) of the Mental Healthcare Act, 2017.

[31] Note that 'mental illness' as under the Mental Healthcare Act, 2017 excludes 'mental disability' and the same is included under the Rights of Persons with Disabilities Act, 2016.

sound or gesture, or exhibits any object in any form, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman'. The text in bold has been proposed presumably to include any display in electronic form.

Although the purpose of these new bills was, *inter alia,* to remove colonial and archaic terms, the language of 'modesty of women' has been retained in Cl. 78 as well as in Cl. 73 which punishes 'assault or criminal force to woman with intent to outrage her modesty'. It is pertinent to note that the Justice JS Verma Committee Report recommended that non-penetrative sexual assault be penalised under s. 354 IPC without reference to 'modesty of women' as the phrase was deemed inappropriate.

Sexual Intercourse by Employing Deceitful Means

Clause 69

In Cl. 69, the BNS criminalises sexual intercourse that does not constitute rape. This includes sexual intercourse based on deceitful means or on a promise to marry a woman without having any intention to fulfil the same. In the explanation to the provision, 'deceitful means' is said to include '*the false promise of employment or promotion, inducement or marr(y)ing (sic) after suppressing identity*'.

Sexual intercourse based on false promise to marry has for long been criminalised as rape in India through judicial pronouncements. Such cases have been treated by the judicary as 'rape' under s. 375 IPC. This interpretation relies on the definition of 'consent' under s. 90, IPC, as per which consent given under misconception of fact, such as a false promise to marry, is not consent. Not delivering on the promise vitiates consent, leading the sexual intercourse to be interpreted as rape. S. 90 has two elements. Firstly, consent of the woman should be based on a misconception of a fact. Secondly, the offender should know or have reason to believe that the consent was given under a misconception. Cl. 69 impacts both these aspects. Knowledge on part of the offender that the sexual intercourse was in fact based on a promise is no longer relevant. In addition, Cl. 69 ousts the consent of women. This means that irrespective of whether the promise of employment, promotion or marriage had a bearing on the consent of the woman to sexual intercourse, if such promise is established to be false, the sexual intercourse can be punished under Cl. 69.[32]

I. Gender neutrality of offender

S. 69 is gender neutral so far as the accused is considered as it uses the neutral term 'whoever' to describe an offender. Thus, a woman having sexual intercourse with another woman by making a false promise of employment or promotion could be punished under this provision.

[32] Neetika Vishwanath, 'Controlling women's sexual autonomy' *(The Hindu,* 31 August 2023*)*, last accessed on 31.08.2023.

II. Judicial interpretation of false promise to marry as rape

After various conflicting High Court judgments on the applicability of s. 90, IPC to rape under false promise to marry,[33] the position was clarified by the Supreme Court in *Uday v. State of Karnataka* (2003).[34] The Court held that whether false promise to marry amounts to rape must be decided on a case-by-case basis, depending on whether (a) consent was taken under a false promise of marriage with no intention of being fulfilled, and (b) the alleged offender believed that consent was given on the basis of the false promise. Since then, the Supreme Court, in cases such as *Deelip Singh v. State of Bihar* (2005)[35], *Deepak Gulati v. State of Haryana* (2013)[36], and *Naim Ahamed v. State (NCT of Delhi)* (*2023)*[37] has added another dimension to this analysis: whether consent was under a false promise from the very beginning, or whether a promise, genuinely made, *later* became false for any reason. Simply put, the Supreme Court has held that sexual intercrouse pursuant to a false promise to marry is rape but failing to fulfil a *genuine* promise to marry is not.[38]

Determining whether a promise is genuine or whether there was 'intent to marry' has proven challenging, and a critique of this jurisprudence has been that the courts have enforced social hierarchies including caste.[39] In cases where the marriage was deemed socially unacceptable on account of differences of religion, caste, or class, courts have acquitted the accused; assuming that the women knew such a promise was not likely to be fulfilled. Cl. 69 retains the language of *intent* without providing clarification on how this is to be understood, and as such, the above critique of this legal position may still be valid.

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[33] In some decisions such as *Jayanti Rani Panda v. West Bengal* 1983 SCC OnLine Cal 98 and *Hari Majhi v. West Bengal* 1989 SCC OnLine Cal 255 it was observed that a joint reading of ss. 90 and 375, IPC provides that sexual intercourse under false promise to marry can be deemed rape (conviction was not upheld in either of these cases). In others, this interpretation has been rejected, such as *Mir Wali Mohammad v. Bihar* 1990 SCC OnLine Pat 168; and *Sarimoni Mahto v. Amulya Mahto* 2002 SCC OnLine Jhar 373.

[34] (2003) 4 SCC 46.

[35] (2005) 1 SCC 88.

[36] (2013) 7 SCC 675.

[37] 2023 SCC Online SC 89.

[38] *Pramod Suryabhan Pawar v. State of Maharashtra* (2019) 9 SCC 608.

[39] Arushi Garg, Consent, Conjugality and Crime: Hegemonic Constructions of Rape Law in India*, Social & Legal Studies,* Volume 28, Issue 6, 2019, pg. 737.

Besides, 'deceitful means' under Cl. 69 *inter alia* includes 'marrying after suppressing identity', which could include suppression of any part of one's identity - gender, caste, faith or religion. This poses the risk of Cl. 69 being used to foster intra-caste/faith and other socially approved relationships.

III. Undermining sexual autonomy of women

Criminalising sex based on deceit with a possible sentence as high as 10 years also raises concerns about the sexual autonomy of women. The approach embedded in Cl. 69 sees women inevitably as victims who can be manipulated into having sexual intercourse and need the protection of criminal law.[40]

IV. Overlap between Cl. 68 and Cl. 69

Cases of sexual intercourse by deceitful means under Cl. 69 may be similar to cases under Cl. 68, which criminalises the abuse of a fiduciary relationship or position to seduce a woman under one's charge or custody, into having sexual intercourse.[41] Neither Cl. 68 nor Cl. 69 amount to rape. The difference between the two is that the latter makes sexual intercourse an offence when 'deceitful means' are employed, Cl. 68 does so when a fiduciary relationship is exploited to seduce a woman. In practice, there is likely to be significant overlap between these provisions. However, the punishment under these sections is different, as offences under Cl. 68 BNS / s. 376C IPC are punishable with imprisonment 5 years[42] to 10 years; while convicts under Cl. 69 can be punished for up to 10 years imprisonment.

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[40] Neetika Vishwanath, The Shifting Shape of the Rape Discourse, *Indian Journal of Gender Studies,* Volume 25, Issue 1, 2018.

[41] S. 376C, IPC.

[42] Cl. 68, BNS and s. 376C, IPC both prescribe a punishment of 'rigorous imprisonment of either description'.

Mob Lynching

Clause 101(2) and Clause 115(4)

Cls. 101(2) and 115(4) of the BNS introduce new provisions against the 'heinous'[43] crime of mob lynching. Without specifically using the term 'mob lynching', special categories have been created within the offence of murder and grievous hurt by 'a group of five or more persons' motivated by the social profile of the victim, specifically their '*race, caste or community, sex, place of birth, language, personal belief and any other ground*'.[44]

I. Background

The inclusion of special provisions for mob lynching appears to be a step in the direction recommended by the Supreme Court in *Tehseen S. Poonawalla v. Union of India*.[45] Recognising the growing problem of mob vigilantism and its implications on the rule of law, the Supreme Court had urged Parliament to create a special law against mob lynching and provide adequate punishment for the same. The Court also introduced certain preventive, remedial and punitive measures, including guidelines for effective investigation and trial, as well as special provisions regarding monetary compensation to victims of mob lynching. These other guidelines have not been included in the proposed criminal law bills.

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[43] PIB Delhi, 'Union Home Minister and Minister of Cooperation, Shri Amit Shah introduces the Bhartiya Nyaya Sanhita Bill 2023, the Bharatiya Nagarik Suraksha Sanhita Bill, 2023 and the Bharatiya Sakshya Bill, 2023 in the Lok Sabha, today' (Press India Bureau, 11 August 2023), last accessed on 30.08.2023.

[44] Cl. 101 (2), BNS Punishment for murder: '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 ground each member of such group shall be punished with death or with imprisonment for life or imprisonment for a term which shall not be less than seven years, and shall also be liable to fine'.

[45] Writ Petition (Civil) No. 754 of 2016 dt.17.07.2018.

II. Confusions in the punishment framework

This special category of murder has been introduced within 'Punishment for murder' (Cl. 101). While murder is punishable with death or life imprisonment, Cl. 101(2) provides a range of sentences - mandatory minimum of seven years imprisonment, life imprisonment or the death penalty, against 'five or more persons acting in concert'. Curiously, this is the first time a punishment less than life imprisonment has been stipulated for murder.

On the other hand, Cl. 115(4) which deals with the offence of voluntarily causing grievous hurt includes a special category of grievous hurt committed by 'five or more persons' on grounds of social profile of the victim. The offence here is also punishable with a term of imprisonment extending up to seven years, which is the same as the punishment for grievous hurt simpliciter.

III. Observation on identified grounds

The proposed Cl. 101(2) and Cl. 115(4) do not include religion as one of the social indicators/markers. In *Tehseen S. Poonawalla*, the Supreme Court recognised religion as a prominent factor in instances of mob lynching. Further, anti-mob lynching laws sought to be introduced by a few states,[46] also recognise religion as a motivating factor for the offence of lynching.

Instead, the provisions in the BNS employ the phrase 'personal belief or any other ground', without any definitional clarity. While it is possible to interpret the scope of this phrase broadly to include religion within its ambit,[47] the absence of an explicit mention of religion in the provisions sits rather oddly. This is particularly so considering religion continues to be mentioned in other provisions of the BNS; such as Cl. 194 which criminalises enmity between groups on the grounds of 'religion, race, place of birth, residence, language, caste of community or any other ground', and Chapter XVI pertaining to offences relating to religion.

In any case, the language of Cl. 101(2) and Cl. 115(4) and their apparent implications, raise serious questions about the purpose behind including these provisions. They dispel any assumptions about mob lynching being an aggravated form of murder and grievous hurt.

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[46] Manipur Protection from Mob Violence Ordinance, 2018; West Bengal (Prevention of Lynching) Bill, 2019; Jharkhand (Mob Violence and Mob Lynching Prevention) Bill, 2021; Rajasthan Protection from Lynching Bill, 2019.

[47] *S.R. Bommai v. Union of India* (1994) 3 SCC 1, para 182.

IV. Concerns with provision for murder caused by mob lynching

The BNS does not create a new offence of mob-lynching resulting in murder, but only introduces a special category of murder, with a special range of punishment. This is introduced by way of an additional sub-clause in Cl. 101 'Punishment for murder'.

Cl. 99 provides the ingredients constituting the offence of murder, the *actus reus* (act or omission) and *mens rea* (criminal intent). However, a special qualification has been introduced in Cl. 101(2) - that the murder must be committed '*on the ground of race, caste or community, sex, place of birth, language, personal belief or any other ground*'. It is unclear whether this creates an additional requirement for intent to murder on the basis of the social profile of the victim. The phrase 'any other ground' has also not been qualified and creates an ambiguity on whether it relates to the social profile of the victim or could extend to other reasons as well.

Additionally, though Cl. 101(2) uses the term 'acting in concert' to determine involvement of persons in the offence, the implication of this phrase and whether it creates common intention for murder, is unclear. This is because Cl. 101(2) is not a deeming provision; unlike the provision for gang rape (Cl. 70) where the persons involved have been deemed to have committed the offence of rape. Instead, it appears that for Cl. 101(2) to apply, the 'five or more persons acting in concert' should first be found guilty of murder, as provided for by Cl. 99, and thereafter punished under Cl. 101(2). Therefore, from the language of Cl. 101(2), it appears that it only provides punishment for murder involving a special fact situation or a special category of murder and does not create a separate offence.

Curiously, a reduced range of punishment for murder due to mob lynching, has been introduced in Cl. 101(2), compared to the offence of murder simpliciter. The inclusion of a range of sentences might be to account for the different degrees of involvement and the role of multiple accused in a case of mob lynching. This rationale is also in tandem with jurisprudence on individualised sentencing and judicial discretion in cases of multiple accused. However, this provision creates an anomaly, where though all the accused have been found guilty for murder, the option for a punishment of at least 7 years imprisonment has been introduced only in special cases of murder caused by mob lynching. The relevance of differing levels of involvement of multiple accused is equally relevant for the purposes of punishment in instances of murder, beyond mob lynching. As Cl. 101(2) has been added as a separate section, those convicted of murder under Cl. 99 cannot be additionally punished under Cl. 101(1). In such cases, only Cl. 101(2) would be applicable.

Therefore, far from recognising mob lynching as an aggravated form of murder, this provision creates an anomalous situation where a minimum sentence of seven years is permissible only in cases of murder caused by mob lynching.

V. Concerns with provision for grievous hurt caused by mob lynching

The purpose behind including a separate sub-clause for mob lynching in the provision for 'Voluntarily causing grievous hurt' (Cl. 115) is unclear. Cl. 115(4) provides a special category of grievous hurt, by introducing a special requirement of intention, requiring that the commission of grievous hurt by 'five or more persons' must be motivated by the social profile of the victim. Notably, this provision would only be applicable against persons directly causing (or intending to cause) grievous hurt, and would not include other persons inciting or involved in planning or 'acting in concert'[48], because of the omission of this particular phrase from the provision.

However, there is no difference in the punishment provided for this special category of offence and the offence of grievous hurt simpliciter; both provide for punishment for a term of imprisonment which may extend to seven years. Therefore, there appears to be no difference in the treatment of grievous hurt and grievous hurt due to mob lynching, and raises questions about the legislative intent behind introducing this separate category of offence.

[48] This is in contrast to even the provision for punishment for murder for mob lynching (Cl. 101(2), BNS), or the offence of organised crime (Cl. 109, BNS).

Punishment for Murder and Attempt to Murder by Life-Convicts

Clause 102 and Clause 107(2)

Cl. 102 and Cl. 107(2) of the BNS provide the punishment for the offence of murder and attempt to murder (if hurt is caused), respectively, committed by prisoners undergoing the sentence of life imprisonment (life-convict). Both sections prescribe death penalty or a whole life sentence as possible punishments. This part discusses issues with the mandatory minimum of a whole life sentence, assuming that it is different from a sentence of imprisonment for life.[49]

I. Background

Cl. 102 seeks to replace s. 303, IPC on punishment for murder by life-convict, which was declared unconstitutional by the Supreme Court in *Mithu v. State of Punjab*.[50] S. 303 prescribed mandatory death penalty for murder committed by a life-convict. The Court held that mandatory imposition of a death sentence restricts judicial consideration of factors relating to the crime and the criminal in individual cases. Further, it creates an unreasonable classification between convicts serving sentences other than life imprisonment and life-convicts. The section was held to be arbitrary and unreasonable as it disregarded the nature of the previous offence for which the sentence of life imprisonment was imposed while imposing the death penalty for a subsequent offence of murder.

Cl. 107 replaces s. 307 (2) IPC, which currently prescribes a mandatory death sentence for the attempt to murder by a life-convict. It is important to note that despite the ruling in *Mithu* on s. 303 IPC, this section is still in force.

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[49] Refer to note on Cl. 4(b), BNS at pg. 3 which discusses whether the sentence of imprisonment for life is different from imprisonment for the remainder of that person's natural life.

[50] (1983) 2 SCC 277.

II. Mandatory minimum of whole life sentence restricts judicial discretion and dismisses reform

Cls. 102 and 107(2) seek to address the issues raised in *Mithu* by introducing the whole life sentence as an alternative to the death penalty. The introduction of a mandatory minimum of a whole life sentence, restricts judicial discretion to impose a sentence of life imprisonment (with the possibility of remission), depending on individual factors such as the culpability of the convict or their probability of reform.[51] A whole life sentence extinguishes a convict's hope of being released from prison and their reintegration into society. Therefore, a statutorily mandated whole life sentence is similar to the death penalty, as it renders the consideration of reform and rehabilitation meaningless.[52]

It is pertinent to note that whole life sentences as prescribed under ss. 376DA and 376DB of the IPC are currently under challenge before the Supreme Court.[53]

III. No valid basis for prescribing aggravated punishments for life-convicts

Cls. 102 and 107(2) do not resolve the issues regarding the arbitrary and unreasonable classification of persons serving life imprisonment as highlighted in *Mithu*, which are as follows:

1) No reasonable basis for drawing a distinction between persons who commit murder while serving life imprisonment from those serving fixed term sentences or those who have already undergone such sentences.

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[51] In *Union of India v. V. Sriharan* (2016) 7 SCC 191, by a 3:2 majority, the Constitution Bench of the Supreme Court held that in offences punishable by death, constitutional courts (i.e. the Supreme Court and High Courts) can restrict the State's powers of premature release or remission of sentence under the CrPC. Such powers may be exercised to either restrict the consideration of premature release either for a fixed term or for the whole life of the convict. Such power to restrict remission has not been extended to trial courts.

[52] Similar provision of mandatory minimum of whole life sentence has been introduced for the repeat sex offenders under Cl. 70 BNS, and for trafficking of a child below the age of 18 years on more than one occasion under Cl. 141(6) BNS and trafficking of any person by a public servant or police officer under Cl. 141(7) BNS.

[53] *Mahendra Vishwanath Kawchale v. Union of India*, WP (Crl.) 314 of 2022; *Nikhil Shivaji Golait v. State of Maharashtra*, WP (Crl.) 184 of 2022.

2) As with the IPC, the BNS proposes life imprisonment as a punishment for a wide range of non-homicidal offences.[54] Therefore, the motive and circumstances of the previous offence for which life imprisonment was prescribed as the punishment, may have no relation to the subsequent offence of murder, for which a mandatory minimum of a whole life sentence can be imposed.

3) There was no data to indicate the frequency of murders by life convicts in order to justify the imposition of a mandatory minimum of whole life sentence.

Without resolving these issues as explained in *Mithu*, the constitutional validity of these clauses would be suspect.

IV. Cl. 107(2) collapses the distinction between the offence of attempt to murder and murder

Cl. 107(2) prescribes the punishment of death or whole life sentence in case of attempt to murder by a life convict, where hurt is caused. This raises serious concerns of arbitrariness as it erases the distinction between the offence of *attempt to murder* (if hurt is caused) and *murder* committed by a life-convict, by prescribing the same punishment. Further, the death penalty as a possible punishment for attempt to murder where hurt is caused by life-convicts has no reasonable basis and appears disproportionate. This may lead to a situation where a convict serving life imprisonment for a non-homicidal offence such as forgery, if subsequently convicted for attempt to murder resulting in simple hurt may be sentenced to death.

[54] Refer to Table 1 on offences punishable by imprisonment for life and whole life sentence at pg. 5.

Death by Negligence

Clause 104

Cl. 104(1), BNS seeks to replace s. 304A IPC on causing death through a rash or negligent act which does not amount to culpable homicide. However, Cl. 104(1) enhances the maximum punishment from two years as prescribed in s.304A to seven years and additionally mandates imposition of a fine. The reason for these changes is not clear from the Statement of Object and Reasons in the Bill. The maximum punishment may have been enhanced as a response to repeated observations made by the Supreme Court regarding the inadequacy of punishment under s. 304A, in the context of increased vehicular accidents.[55]

Further, Cl. 104(2) introduces an aggravated form of death by negligence with a maximum punishment of ten years for persons who 'escape from the scene of the incident or fail to report the incident to a Police officer or Magistrate soon after the incident.' This aggravated form of the offence may have been introduced to address hit and run accident cases, to ensure that the accident is immediately reported and the victims receive timely medical support.[56]

However, Cl. 104(2) will apply to all forms of rash or negligent act which may cause death. From a textual reading of the clause, it is unclear whether both requirements regarding 'escaping from the scene of the offence' and 'failure to report to the police officer or magistrate' need to be fulfilled to qualify as an aggravated form of causing death by negligence. There may be situations where a person can fulfil one of the requirements only by violating the other. For example, in case of a vehicular accident where the person does not have a mobile phone, reporting to the police or magistrate may not be possible without leaving the scene of the incident. Similarly, in accident cases, a person might be compelled to leave the scene of offence due to apprehension of assault by bystanders. Such

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[55] *State of Punjab v. Dil Bahadur* 2023 SCC OnLine SC 348 para 11; *Abdul Sharif v. State of Haryana* (2016) 15 SCC 204 paras 4-6; *State of Punjab v. Saurabh Bakshi* (2015) 5 SCC 182, paras 25-26.

[56] S. 2(12A) of Motor Vehicles Act, 1988, introduced in 2019, defines the term 'golden hour' as the hour-long period following the traumatic injury during which prompt medical care may avert the possibility of death. As per S. 162 in Chapter XI (w.e.f 1.04.2022), insurance companies shall provide schemes for treatment of road accident victims during the golden hour.

instances may fall within the purview of Cl. 104(2), even if there is no intention to disregard the law.

It should be kept in mind that the provision is not limited to instances of motor vehicle accidents, but to all cases of death by negligence and the requirement to report the incident to the police or the magistrate may be unmet as the person may be unaware of their role in the death of the victim or whether their act was rash or negligent. For instance, in cases of medical negligence where the death may not be immediate, or the cause of the death is unclear or whether it was caused due to the negligence of the medical staff, a person may fail to report the incident to the police or the magistrate, and be liable for a higher punishment.

Finally, the requirement to mandate reporting of the incident to the police or the magistrate may compel a person to be a witness against themselves and violate their right to self-incrimination under Art. 20(3) of the Constitution.

Organised Crime and Petty Organised Crime

Clause 109 and Clause 110

Cls. 109 and 110 of the BNS have, for the first time, introduced 'organised crime' as an offence under a central law, which would be applicable throughout the country. Prior to this, 'organised crime' was penalised in some states through state legislations.[57]

Organised crime under Cl. 109 refers to a continuing unlawful activity carried out by (a) groups of individuals acting in concert, either singly or jointly, or as a member of or on behalf of an organised crime syndicate, (b) by the use of violence, threat of violence, intimidation, coercion, corruption or other unlawful means (c) to gain direct or indirect material benefit (including financial benefit). Cl. 109 provides an illustrative list unlawful activities that it covers, which include – (i) kidnapping (ii) robbery (iii) vehicle theft (iv) extortion (v) land grabbing (vi) contract killing (vii) economic offences (viii) cyber-crimes having severe consequences (ix) trafficking in people, drugs, illicit good or services and weapons and (x) human trafficking racket for prostitution or ransom.

Cl. 110 penalises common forms of organised crime by criminal groups or gangs that cause general feelings of insecurity among citizens, as 'petty organised crime'. It also provides an illustrative list of 15 unlawful activities, including various forms of theft, procuring money in an unlawful manner in a public transport system, illegal selling of tickets, and selling of public examination question papers.

This part compares Cls. 109 and 110 of the BNS with provisions of the existing state legislations on organised crime and highlights the issues of arbitrariness and vague scope of these clauses.

[57] For example, Andhra Pradesh Control of Organised Crime Act, 2001; Arunachal Pradesh Control of Organised Crime Act, 2002; Telangana Control of Organised Crime Act, 2001; Gujarat Control of Terrorism and Organised Crime Act, 2015; Karnataka Control of Organised Crime Act, 2000; Maharashtra Control of Organised Crime Act, 1999; Uttar Pradesh Control of Organised Crime Act, 2017.

I. Background

As per the statement of objects and reasons of the BNS, Cls. 109 and 110 have been introduced to effectively deal with the issue of organised crime in the country and to deter the commission of such activities. While Cl. 109 borrows heavily from the existing state legislations on organised crime as described below, Cl. 110 creates a separate category of 'petty organised crime', distinct from 'organised crime', for the first time.

II. Comparison with existing organised crime legislations in India

Cl. 109 of the BNS in relation to 'organised crime' borrows heavily from the MCOCA,[58] which has been extended to New Delhi,[59] and the GujCOCA.[60] Andhra Pradesh,[61] Arunachal Pradesh,[62] Karnataka,[63] Telangana,[64] and Uttar Pradesh[65] have acts which are identical to MCOCA and GujCOCA. Further, Haryana[66] and Rajasthan[67] have introduced similar bills on organised crimes. It is important to note that the Supreme Court and various High Courts have upheld the constitutional validity of several provisions in these statutes.[68]

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[58] MCOCA.

[59] GSR 6(E), Extension of MCOCA to Delhi, Ministry of Home Affairs, January 2, 2002.

[60] GujCOCA.

[61] Andhra Pradesh Control of Organised Crime Act, 2001.

[62] Arunachal Pradesh Control of Organised Crime Act, 2002.

[63] Karnataka Control of Organised Crime, Act 2000.

[64] Telangana Control of Organised Crime Act, 2001.

[65] Uttar Pradesh Control of Organised Crime Act, 2017 (UPCOCA) (similar to GujCOCA).

[66] Haryana Control of Organised Crime Bill, 2020.

[67] Rajasthan Control of Organised Crime Bill, 2023.

[68] *State of Maharashtra v. Bharat Shanti Lal Shah* (2008) 13 SCC 5: the Supreme Court upheld the validity of the provisions of the s. 2(1)(d),(e) and (f) and ss. 3 and 4 of MCOCA; *Zameer Ahmed Latifur Rehman Sheikh v. State of Maharashtra* (2010) 5 SCC 246: Supreme Court upheld that the State government was competent to enact laws pertaining to insurgency as they fall under the term 'public order' in the State list; *Mohd. Irfan v. State of Delhi* 2018 SCCOnline Del 13223: the Delhi High Court rejected the challenge to provisions of s. 3(1)(ii) of MCOCA on the ground that it prescribes mandatory imposition of minimum fine.

Table 2 compares various definitions under the BNS, MCOCA and GujCOCA.[69] Since legislations in other states are identical to MCOCA or GujCOCA, the analysis has been restricted to these two legislations.

Table 2: Comparative analysis of definitions under the BNS, MCOCA and GujCOCA

Particulars	BNS[70]	MCOCA	GujCOCA
Organised crime	**Activity:** Continuing unlawful activity[71] by the effort of groups of individuals acting in concert, singly or jointly	**Activity:** Continuing unlawful activity by an individual, singly or jointly[72]	**Activity:** Continuing unlawful activity and terrorist act, by an individual, singly or jointly[73]
	Membership: As a member of an organised crime syndicate or on behalf of such syndicate	**Membership:** As a member of an organised crime syndicate or on behalf of the syndicate[74]	**Membership:** As a member of an organised crime syndicate or on behalf of the syndicate[75]
	Mode: By use of violence, threat of violence, intimidation, coercion, corruption or related activities or other unlawful means	**Mode:** By use of violence, threat of violence, intimidation, coercion or other unlawful means[76]	**Mode:** By use of violence or threat of violence or intimidation, coercion or other unlawful means[77]

[69] MCOCA and GujCOCA provide for separate special procedures for the offence of organised crime; however these are not available in BNS or BNSS; BNSS only provides that during the time of arrest, the police may handcuff a person who has committed the offence of organised crime, as more specifically provided therein.

[70] Cl. 109, BNS.

[71] Includes an illustrative list of unlawful activities as mentioned above.

[72] S. 2(e), MCOCA.

[73] S. 2 (e), GujCOCA includes an illustrative list of unlawful activities – (i) terrorism (ii) extortion (iii) land grabbing (iv) contract killing (v) economic offences (vi) cyber-crimes having severe consequences (vii) running large scale gambling rackets (viii) human trafficking racket for prostitution or ransom by an individual. Among the above, UPCOCA includes unlawful activities such as illegal mining, extraction of forest produce etc. in its definition.

[74] S. 2(e), MCOCA.

[75] S. 2(e), GujCOCA.

[76] S. 2(e), MCOCA.

[77] S. 2(e), GujCOCA.

	Object: To obtain direct or indirect, material benefit[78] (including financial benefit)	**Object:** To (i) gain pecuniary benefit or (ii) gain undue economic or other advantage (for himself or any other person) (iii) promote insurgency[79]	**Object:** In case of economic offences, with the aim to obtain monetary benefits or large scale organised betting in any form[80]
Continuing unlawful activity	Activity prohibited by law including an illustrative list of ten unlawful activities	Activity prohibited by law for the time being in force[81]	Activity prohibited by law for the time being in force including an illustrative list of eight unlawful activities[82]
	Classification: Such unlawful activity must be cognizable offence	**Classification:** Such unlawful activity must be cognizable offence, punishable with three years or more[83]	**Classification:** Such unlawful activity must be cognizable offence, punishable with three years or more[84]
	Mode: Singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate	**Mode**: Singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate[85]	**Mode**: singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate[86]

[78] Explanation (i) to the Cl. 109(1) provides that benefit includes property, advantage, service, entertainment, the use of or access to property or facilities and anything or benefit to a person whether or not it has any inherent or tangible value, purpose or attribute.

[79] S. 2(e), MCOCA.

[80] S. 2(d), GujCOCA. UPCOCA includes objects such as - (i) spreading terror (ii) overthrowing the government (iii) indulgence in anti-national activities etc.

[81] S. 2(d), MCOCA.

[82] S. 2(c), GujCOCA.

[83] S. 2(d), MCOCA.

[84] S. 2(c), GujCOCA.

[85] S. 2(d), MCOCA.

[86] S. 2(c), GujCOCA.

	Continuing nature: More than one charge-sheet has been filed before a competent court within the preceding period of ten years and that the court has taken cognizance of such offence.	**Continuing nature**: More than one charge-sheet has been filed before a competent court within the preceding period of ten years and court has taken cognizance of such offence.[87]	**Continuing nature**: More than one charge-sheet has been filed before a competent court within the preceding period of ten years and court has taken cognizance of such offence.[88]
Organised crime syndicate	**Members** – Members include (i) criminal organisation or (ii) group of three or more persons	**Members**: Group of two or more persons[89]	**Members**: Group of two or more persons[90]
	Mode: Acting singly or collectively in concert, as a syndicate, gang, mafia, or crime ring indulging in commission of one or more serious offences or involved in gang criminality, racketeering and syndicate organised crime	**Mode:** Acting singly or collectively as a syndicate or gang indulging in activities of organised crime[91]	**Mode:** Acting singly or collectively as a syndicate or gang indulging in activities of organised crime[92]

[87] S. 2(d), MCOCA.
[88] S. 2(c), GujCOCA.
[89] S. 2 (f), MCOCA.
[90] S. 2(f), GujCOCA.
[91] S. 2(f), MCOCA.
[92] S. 2(f), GujCOCA.

III. Broadening of the scope of organised crime

The BNS has introduced several changes to the definition of 'organised crime' as compared to MCOCA and GujCOCA. Firstly, under MCOCA and GujCOCA, 'continuing unlawful activity' was restricted to any unlawful activity which is a cognisable offence punishable with imprisonment of three or more years, in respect of which more than one charge-sheet had been filed in the last ten years. However, the BNS has broadened the scope of continuing unlawful activity, by including all cognisable offences within its purview.

Secondly, unlike MCOCA and GujCOCA, BNS has introduced the phrase '*by the effort of groups of individuals acting in concert*' in the definition of organised crime. It is unclear whether this creates an additional requirement for common intention amongst the members of the group towards the commission of that particular continuing unlawful activity, or if it simply refers to the common objective that the individuals have by virtue of being members of the group.

Thirdly, BNS defines organised crime as any continuing unlawful activity that leads to direct or indirect material benefit, including financial benefit. While 'material benefit' has not been defined, 'benefit' has been defined in the explanation to Cl. 109, to include 'anything of benefit to a person, whether or not it has any inherent or tangible value, purpose or attribute.' Such a broad and vague definition may result in a significant expansion of the scope of organised crime under the BNS.

IV. Vagueness in the definition of organised crime syndicate

The BNS defines an organised crime syndicate as meaning a criminal organisation or a group of three or more persons indulging in certain acts in the manner specified. In doing so, BNS, for the first time, introduces the phrase 'criminal organisation'. This term has not been separately defined, and it is unclear which organisations would be classified as 'criminal', and the process, if any, to be followed for such classification.

Additionally, MCOCA and GujCOCA restricted the definition of organised crime syndicate to groups that were indulging in activities of 'organised crime', which was defined in the Acts. However, the BNS broadens the definition by including within it, criminal organisations or groups which indulge in the commission of 'one or more serious offences', the scope of which is unclear. Further, other phrases in the definition including 'gang criminality' and 'racketeering' have also not been defined.

V. Issues of arbitrariness while defining the offences related to organised crime

Cl. 109(2) to 109(7) define various offences related to organised crime and their respective punishments. The issues regarding these provisions have been highlighted below:

a. No distinction between the commission of an offence and its attempt

Cl. 109(2) arbitrarily erases the distinction between the *attempt to commit* an organised crime, and the *commission* of organised crime, by prescribing the same punishment. Cl. 109(2)(a) prescribes the punishment of death or imprisonment for life, in case the offence results in death of any individual, while in any other case, Cl. 109(2)(b) prescribes the punishment of not less than five years which may extend to imprisonment for life. It may be noted that under MCOCA[93] and GujCOCA,[94] while the punishment for commission of the offence which may result in death is higher than the punishment for the attempt to commit such an offence, they prescribe the same punishment for the commision of an offence and its attempt in all other cases.

Further, like MCOCA[95] and GujCOCA,[96] there is no requirement for a separate *mens rea* for causing death of a person under Cl. 109(2), BNS. Therefore, under this clause, irrespective of the person's knowledge that death is likely or their intention to cause death, they may be sentenced to death, in case the commission of an organised crime or its attempt leads to the death of any individual.

b. No requirement for knowledge or intention while facilitating organised crime

Cl. 109(3) does not require knowledge or intention on part of the person assisting or facilitating the commission of an organised crime. This is a significant departure from MCOCA[97] and GujCOCA,[98] where knowledge on part of the person facilitating an organised crime was a necessary requirement. This may result in persons being punished for inadvertently facilitating preparatory acts without their knowledge. For instance, a person who buys clothes for a group of people, who then use the same

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[93] S. 3, MCOCA.
[94] S. 3, GujCOCA.
[95] S. 3(1), MCOCA.
[96] S. 3 (1), GujCOCA.
[97] S. 3(2), MCOCA.
[98] S. 3(2), GujCOCA.

to disguise themselves and commit an organised crime of robbery, could be punished under this clause. Despite the absence of knowledge on their part, the person who bought the clothes may be held liable for facilitating acts preparatory to the organised crime.

c. Issues with clause on harbouring and concealing

Cl. 109(5) makes it an offence to harbour or conceal, or attempt to harbour or conceal a person who has committed an organised crime. Similar to GujCOCA (and unlike MCOCA),[99] the BNS requires the harbouring or concealing to be intentional. However, it additionally penalises harbouring or concealing or attempting to do so, of a person who '*believes that his act will encourage or assist the doing of such crime*'. This is vaguely worded, and may be equivalent to harbouring or concealing a facilitator or someone who assists the commission of organised crime.

Further, the proviso to Cl. 109(5) specifies that this sub-clause would not apply where the harbouring or concealment is done by the spouse of the offender. There appears to be no reasonable basis for creating this exemption. Additionally, there is no clear basis for why such an exemption has been limited to the offence of harbouring or concealing any person involved in an organised crime.

VI. Petty organised crime under Cl. 110

Cl. 110 creates the category of 'petty organised crime' as distinct from 'organised crime' for the first time and is a category not created in any other similar legislation. Cl. 110 penalises any crime that causes 'general feelings of insecurity' among citizens relating to common forms of organised crime, committed by organised criminal groups or gangs including mobile organised crime groups. The clause provides an illustrative list of common forms of organised crimes, including various forms of theft, procuring money in an unlawful manner in a public transport system, illegal selling of tickets, and selling of public examination question papers.

Unlike Cl. 109, Cl. 110 does not provide for the manner in which such crimes may be committed, such as using violence, threat or intimidation. Further, there is no requirement for directly or indirectly obtaining material benefit through the commission of organised crime under Cl. 110. Some issues with Cl. 110 are as follows:

a. The phrase 'any crime that causes general feelings of insecurity among citizens' is vague, and may result in the clause having a very expanded scope.

[99] S. 3(3), GujCOCA.

b. The clause provides an illustrative list of crimes that would fall within its ambit, and has a catch-all provision- 'such other common forms of organised crime'. While the crimes specified seem to be those that result in a financial benefit; the scope of this provision is unclear.

c. Under Cl. 110, petty organised crime can be committed by any 'criminal group or gang.' However, the term 'criminal group or gang' has not been defined. Further, unlike Cl. 109, there is no requirement for the crime to be committed by an organised crime syndicate with more than one chargesheet filed before a competent court within the preceding 10 years.

d. It is peculiar that crimes committed by mobile organised crime groups are specifically included in the definition of petty organised crimes, but not in the definition of organised crime in Cl. 109.

e. Like Cl. 109(2), Cl. 110(2) arbitrarily provides for the same punishment for both commission and attempt to commit petty organised crime - imprisonment of a term of one year that may extend to seven years along with fine.

Terrorist Act

Clause 111

Through Cl. 111, the offence of 'terrorist act' has been introduced in the BNS. Where the act results in the death of any person, it is punishable with death or life imprisonment without parole; otherwise, it is punishable with imprisonment which may range from five years to life. Alongside, a slew of related offences have also been introduced in the same clause. It may be noted that presently, offences relating to terrorism are dealt with under the UAPA[100]. In this regard, i.e. providing a law for prosecution of terror offences, the UAPA is a descendant of the repealed laws - the TADA[101] and the POTA.[102] Terrorism was introduced into the UAPA through an amendment in 2004, right after the repeal of the POTA.

The UAPA (and the erstwhile TADA and POTA) is a *special* legislation. Special legislations are purportedly created to address special situations by enacting a new legal structure. In criminal law,[103] a special legislation creates new offences and further provides special investigative and adjudicatory procedures to be followed in the prosecution of offences defined thereunder.[104] The provisions of the CrPC, to the extent they are inconsistent with the special provisions of the UAPA, are inapplicable to prosecutions under the statute.[105]

I. Terrorist act and intent - expansion

Under terror laws, ordinary crimes are recast as a 'terrorist act' if they are committed with a specific intent.[106] A similar structure has been retained in Cl. 111, where a variety of acts are recast as terrorist acts, but the qualifying special intent has been modified. While under the UAPA, the intent must be to '*threaten... the unity, security, economic security or sovereignty of India or with intent to strike*

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[100] Unlawful Activities (Prevention) Act, 1967.

[101] Terrorist and Disruptive Activities (Prevention) Act, 1987.

[102] Prevention of Terrorism Act, 2002.

[103] S. 41, IPC: 'A "special law" is a law applicable to a particular subject'.

[104] Kunal Ambasta, Designed for Abuse: Special Criminal Laws and Rights of the Accused, *Nalsar Law Review*, Volume XIV, Issue 1, 2020, pg. 3.

[105] S. 43C, UAPA.

[106] S. 15, UAPA.

terror'; in Cl. 111, the intent must be to '*threaten the unity, integrity and security of India, to intimidate the general public... or to disturb public order*'. Thus, a different, and lower, threshold of 'intimidation of public' or 'disturbance of public order'. This is a significant departure from the intent to *strike* terror conceptualised and criminalised under the UAPA.

Striking terror has been interpreted in case laws under the POTA,[107] to elevate it beyond 'mere criminality' or a 'law and order' problem.[108] Intimidation generally refers to any threats to a person's life, property, etc. under the IPC;[109] whereas, under the TADA, it is only intimidation of a public *which is used to acquire or maintain power* that reaches the level of 'terrorism'.[110] Thus, without explanations or qualifiers in Cl. 111, intimidation of the public (or a segment thereof) appears to be a lower and more ambiguous threshold for characterising an act as a 'terrorist act'. Ambiguity in penal provisions, leading to overbroad application of laws, is a recognised ground for striking them down as unconstitutional.[111] Clarity, judicial or otherwise, would be of utmost necessity for this provision to operate restrictively and constitutionally.

Although the acts covered under the provision largely mirror s. 15(1) of the UAPA, a few notable changes have been introduced in Cl. 111. Destruction of public facilities or private property is criminalised, whereas under the UAPA, only destruction of property used by the Government is within the scope of terror acts. The concern of overbroad application of the provision, when combined with a vaguely worded intent, may be reiterated. Additionally, acts which cause '*extensive interference with, damage or destruction to critical infrastructure*' have also been recognised under this clause. This is in recognition of the evolving reality of transnational

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[107] *PUCL v. Union* (2004) 9 SCC 540; *Mohd. Khalid v. State of West Bengal* (2002) 7 SCC 334, paras 42, 46: "'Terrorism' has not been defined under TADA nor is it possible to give a precise definition of 'terrorism' or lay down what constitutes 'terrorism'. It may be possible to describe it as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential or producing on the society as a whole."

[108] *PUCL v. Union* (2004) 9 SCC 540, para 584.

[109] S. 503, IPC.

[110] *Hitendra Vishnu Thakur v. State of Maharashtra* (1994) 4 SCC 602, para 7; Black's Law Dictionary, cited in *Yakub Memon v. State of Maharashtra* (2013) 12 SCC 1, para 809, defining terrorism as "the use of threat or violence to intimidate or cause panic, esp. as a means of affecting political conduct" (8th edition, pg. 1512).

[111] *Shreya Singhal v. Union of India* (2015) 5 SCC 1; John F. Decker, Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws, *Denver Law Review*, Volume 80, Issue 2, 2002.

terrorism;[112] interference with critical infrastructure, which are often vulnerable to cyber attacks, have become the modus operandi in transnational terror cases.

In this regard, although there is no globally accepted definition of which infrastructure is 'critical' to the nation, a few identifying marks are: it includes physical infrastructures (such as power plants, hospitals), as well as a virtual infrastructure allowing the physical components to operate; and generally, interference with or destruction of it would have a detrimental impact on the provision of essential services necessary for the social or economic well-being of the country, or its security.[113] It may be noted that deliberately causing damage to a petroleum or gas pipeline, with the intent to sabotage or with the knowledge is currently already criminalised.[114] It is unclear whether infrastructure such as roadways will fall within the ambit of 'critical infrastructure' and therefore potentially implicate acts which are frequently used for protests.

Finally, acts which 'destabilise or destroy the political, economic, or social structures of the country, or create a public emergency or undermine public safety' have also been included in the provision. The legislative intent of adding 'social structures', or its ambit, is unclear, and creates serious potential for abuse.

The punishment for a terrorist act if it results in death may range from life imprisonment without parole to death. This is a legislative innovation currently unseen in the IPC, where parole[115] (a power reserved for the executive to allow temporary release of prisoners) has been legislatively restricted. Mandatory restriction of parole by the legislature not only raises questions on separation of powers; but also has implications for the policy of reformation which underlies the

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[112] David Fidler, Whither the Web?, *Georgetown Journal of International Affairs,* Volume 16, Issue 8, 2015 Special Issue.

[113] Samuli Hataaja, Cyber operations against Critical Infrastructure under norms of responsible state behaviour and international law, *International Journal of Law and Information Technology,* Volume 30, Issue 4, 2022, pg. 1423.

[114] S. 15(4) of the Petroleum and Minerals Pipelines (Acquisition of Right of User in Land) Act, 1962: Deliberately causing damage to a petroleum or gas pipeline, with the intent to sabotage or with the knowledge it will result in death, is punishable with rigorous imprisonment of ten years to life, or with death.

[115] Under Indian law, parole is the conditional temporary release of a prisoner, generally under supervision of a parole officer, who has served part of the term for which he was sentenced to prison on grounds which may be special (such as the death of a family member) or general (such as need for farming land, construction of home, etc). The ultimate decision-making authority on parole differs from state to state, and may be either the District Magistrate and the State Government.

criminal justice system.[116] By entirely withholding this opportunity, the BNS may prevent this ideal from benefiting prisoners convicted of terrorism and militate against the stated objective of the criminal justice system.

II. Other offences relating to terrorism

Beyond this, the sub-clauses to Cl. 111 also criminalise conspiracy, abetment, and preparation for terrorist acts (punishable with imprisonment which may range from five years to life imprisonment); membership of a terrorist organisation (punishable with imprisonment which may extend for life); and harbouring and/or concealment of a person who has committed a terrorist act (punishable with imprisonment which may range from three years to life). These provisions substantially mirror provisions in the UAPA, including the punishments prescribed for said offences.

An expansive offence of 'holding proceeds of terrorism' has been introduced through Cl. 111 (6) whereby holding '*any property, directly or indirectly, derived or obtained from commission of terrorist act or proceeds of terrorism*' is a criminal offence. This is a lower threshold in comparison to the UAPA, as this clause does not have a requirement of 'knowingly' holding property derived from proceeds of terrorism. Simultaneously, holding even 'indirectly' derived property has been criminalised. The implications of this could be severe, as unknowingly holding property which may have at any, but not proximate, point been bought with proceeds of crime, is criminalised. An identical phrase is found in the PMLA[117], whereunder the Supreme Court accorded a similarly expansive definition to the phrase.[118] However, under the PMLA, the consequences are less serious, as holding proceeds of crime merely leads to *attachment* of the property; whereas, Cl. 111 creates a new offence punishable with imprisonment. The holding of proceeds under this clause without the express requirement of 'knowingly' or 'purposely' doing so also makes the offence closer in colour to issues of strict liability. While the PMLA takes a similar approach, the criminal liability and consequences imposed by the BNS under this clause is a serious cause for concern with respect to the mens rea requirement and its implications.

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[116] Press Release accompanying the Model Prisons Act, 2023 (not a legislation), proposed by the MHA, which specifically mentions that prisons are not to be seen as places of retributive deterrence, but as "reformative and correctional institutions where the prisoners are transformed and rehabilitated back into society as law abiding citizens".

[117] Prevention of Money Laundering Act, 2002.

[118] *Vijay Madanlal Chaudhary v. Union of India* 2022 SCC OnLine SC 929.

III. Terrorist organisation

Explanation (c) to Cl. 111(6) defines 'terrorist organisation', which includes any organisation which may have been notified as a terrorist organisation by the Government under the UAPA. However, the clause goes beyond the UAPA to include any entity controlled by any terrorist that commits, participates, contributes etc. to an act of terrorism; or is *'otherwise involved in terrorism'*. Though the UAPA uses the term 'terrorism' extensively, it hasn't been defined. Identifying this lacuna, the official statement accompanying the BNS stated that terrorism has now been defined under this Bill.[119] However, similar to the UAPA, the clause defines a terrorist act, but not terrorism.

As organisations may be deemed to be 'terrorist' based on 'involvement in terrorism', the lack of definition raises additional issues of ambiguity in law. It also raises the question of which acts amount to terrorism, above and beyond what has already been defined as a terrorist act. Consequently, determination of which organisation is a 'terrorist' organisation is left entirely and without sufficient guidance in the hands of any police officer under this scheme. Simultaneously, the new definition of 'terrorist acts' creates the possibility of significantly lower of thresholds for organisations to be deemed 'terrorists'.

Contrast the expansive scope of the provision with the regime under the UAPA, where the Central Government has the sole discretion to notify, through public announcement, organisations which are deemed to be 'terrorist'.[120] It also provides procedures for denotification of terrorist organisations and review mechanisms.[121] Cl. 111 does not provide for those mechanisms and in their absence, an organisation may be deemed to be 'terrorist' in perpetuity at the instance of a police officer. Simultaneously, all members (who may not be aware that the organisation is now a 'terrorist organisation' or has committed 'terrorist acts') may be liable for a serious offence which is punishable with life imprisonment.

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[119] Press Release, MHA, accompanying the introduction of the Bill in Lok Sabha, last accessed 30.08.2023.

[120] S. 35, UAPA.

[121] Ss. 36 and 37, UAPA.

IV. Person designated as 'terrorist'

A final addition to the clause is the definition of a 'terrorist' provided in Explanation (a). It covers persons who participate in or commit (or attempt or conspire to commit) a terrorist act; and any person who '*develops, manufactures, possesses, acquires, transports, supplies, or uses weapons, explosives, or releases nuclear, radiological or other dangerous substance, or causes fire, floods or explosion*'. This latter provision is concerning to the extent that it does not require any intention (such as to threaten unity, to intimidate the general public, or even to strike terror). Therefore, a literal reading would imply that a person could be a 'terrorist' for even accidentally causing a fire. Though seemingly absurd, the example serves to illustrate the extent to which power and authority may be abused through this provision.

Being a terrorist, however, has no direct consequences under the clause, as it does not penalise *being* a terrorist. However, the person may not even be informed that they are being designated as a 'terrorist', as neither the clause nor the BNSS necessitate notifying said person. This must, however, be juxtaposed with the definition of a 'terrorist organisation', which refers to an entity controlled by a terrorist, which 'is otherwise involved in terrorism'. In the absence of any public notification designating a person as a 'terrorist', as well as the aforementioned lack of definition for 'terrorism', it yet again creates the potentiality for abuse of the provision.

The UAPA was similarly amended in 2019, to classify persons as 'terrorists' without any legal consequences of being a 'terrorist'.[122] However, the said amendment reserves this power only to the government, rather than any officer,[123] and requires public notification. It was strongly opposed in Parliament, for the social consequences it may lead to for a person deemed to be terrorist in the absence of legal procedure (and accompanying due process and fair trial).[124] Similar concerns arise with this Explanation. The UAPA amendment has also been challenged in the Supreme Court, for it allows persons to be designated as

[122] Unlawful Activities (Prevention) Amendment Act, 2019.

[123] Unlawful Activities (Prevention) Amendment Act, 2019, s. 35(1)(a): '*The Central Government may, by notification, in the Official Gazette, – add an organisation to the First Schedule or the name of an individual in the Fourth Schedule*'.

[124] Lok Sabha Debates (24.07.2019), pg. 113, <https://eparlib.nic.in/bitstream/123456789/786392/1/lsd_17_01_24-07-2019.pdf>.

terrorists without being heard or judicial scrutiny, and acts as an indirect restriction on the exercise of fundamental rights.[125]

Admittedly, a point of distinction remains that the power vested in the government under the UAPA to notify individuals as terrorists is unfettered insofar as the provision provides no guidance as to who can be classified as a terrorist, which has not been replicated in the BNS. Another caveat may be flagged - Cl. 111 does not provide for the *public* notification of a person designated as terrorist, its potential for causing social exclusion and harm to the person may not be identical to the UAPA provision.

V. Absence of safeguards

Procedural safeguards provided in the UAPA, have not been reflected in the BNSS for a terrorist act. These include: (a) only senior police officers[126] being allowed to investigate a terrorist act; and (b) mandatory sanction to be obtained from the Central or state Government, based on a review of the evidence, before cognizance can be taken of a terrorist offence. These safeguards play an important role in checking abuse of power, testified to by their long history in the TADA and the POTA as well.[127] In 2018, the sanctioning process was turned into a 2-step process precisely to filter out cases where evidence did not warrant prosecution, particularly in view of the ambiguity in the definition of the offence.

These safeguards are also necessitated due to the deviation of the UAPA from the CrPC in that the UAPA severely restricts rights of the accused and enlarges State powers in respect of bail, police custody, and attachment of property. Accused persons under Cl. 111 may continue to benefit from the provisions on bail and attachment in the BNSS, as it does not provide for terror-specific exceptions. However, it is unlikely that the UAPA will not be invoked alongside these provisions and it is likely that the terror-specific exceptions on issues like bail will operate through that. More concerningly, the absence of the above-mentioned safeguards

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[125] Supreme Court Observer, 'Constitutionality of UAPA Amendment', last accessed 30.08.2023.

[126] These include the Assistant Commissioner of Police or Deputy Superintendent of Police.

[127] S. 20-A(2), TADA: 'No court shall take cognizance of any offence under this Act without the previous sanction of the Inspector-General of Police, or as the case may be, the Commissioner of Police.'; s. 50, POTA: 'No court shall take cognizance of any offence under this Act without the previous sanction of the Central Government or, as the case may be, the State Government'. S. 51, POTA: 'Officer competent to investigate offences under this Act'.

becomes alarming in view of the vagueness which permeates Cl. 111, as discussed above, and the serious consequences attached to being labelled as a terrorist or tried for a terrorist offence.

It may be noted that the constitutional validity of the UAPA (as well as the UAPA amendment highlighted early) is currently under consideration by the Supreme Court,[128] on a variety of issues including and beyond the concept of terrorism, such as denial of anticipatory bail and power to declare an association 'unlawful'. The legal community and the legislature may have to assess its impact on Cl. 111 in view of the similarities between Cl. 111 and the UAPA.

[128] Writ petition filed in *Biyumma v. Union of India* (2018), <https://www.livelaw.in/pdf_upload/pdf_upload-371029.pdf>, last accessed 30.08.2023.

Acts Endangering Sovereignty, Unity and Integrity of India

Clause 150

Cl. 150 of the BNS seeks to criminalise 'Acts endangering sovereignty, unity and integrity of India' and punishes them with imprisonment for life or with imprisonment which may extend to seven years and fine. The minimum punishment for the offence has been increased from three years to seven years. The clause, it needs to be said, is in the same vein as s. 124A of the IPC. The provision may not be labelled 'sedition', but the spirit of that provision has been retained and potentially, covers a wider range of acts which themselves suffer from ambiguity and vagueness in their current form, creating implications for its constitutionality. A look at the journey and jurisprudence on sedition is a good place to reflect upon the implications for this clause.

In the recent past three noteworthy developments regarding the crime of sedition have taken place. First, the Supreme Court has placed s. 124A of the IPC in abeyance.[129] Second, the Law Commission of India in its 279th report recommended retaining the crime of sedition on the statute books.[130] Third, while introducing the new criminal law bills, the Home Minister proclaimed in the Lok Sabha that the crime of sedition has been done away with.[131]

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[129] *S.G. Vombatkere v Union of India,* WP(C) 682/2021 order on 11 May 2022 (Supreme Court): "We hope and expect that the State and Central Governments will restrain from registering any FIR, continuing any investigation or taking any coercive measures by invoking s. 124A of IPC while the aforesaid provision of law is under consideration.' From order dated 31 October 2022 it emerges that the Attorney General also assured the Supreme Court that the Central Government is reconsidering the law regarding sedition and will abide by the 11 May 2022 order of the Supreme Court", last accessed 30.08.2023.

[130] Law Commission of India, 'Usage of the Law of Sedition' (Law Commission of India Report No. 279, 2023).

[131] PIB Delhi, 'Union Home Minister and Minister of Cooperation, Shri Amit Shah introduces the Bhartiya Nyaya Sanhita Bill 2023, the Bharatiya Nagarik Suraksha Sanhita Bill, 2023 and the Bharatiya Sakshya Bill, 2023 in the Lok Sabha, today' (Press Information Bureau, 11 August 2023), <https://pib.gov.in/PressReleseDetail.aspx?PRID=1947941>, last accessed 28.08.2023.

Table 3 below compares the text of s. 124A IPC and Cl. 150 of BNS, and highlights the changes introduced in the BNS.

It may also be noted that s. 108 of the CrPC which provides for obtaining security for good behaviour from persons disseminating seditious matters has been substantially retained in Cl. 127 of the BNSS. Any publication punishable under Cl. 150, BNS is referred to as 'seditious matter' in Cl. 127, BNSS.[132] Therefore, while the word sedition has been removed in defining the offence in the BNS, the procedural law of the BNSS retains references to 'seditious matter'. This indicates that despite changes in the wording of Cl. 150, it has essentially retained the crime of sedition[133] and raises concerns whether Cl. 150, BNS will continue to be interpreted in light of sedition.

While Cl. 150 has retained the modes of committing sedition, namely 'by words...visible representation', the prohibited actions have been replaced. In the IPC, s. 124A criminalises exciting or attempting to excite '*hatred, contempt or disaffection towards the Government*' established by law. The BNS criminalises exciting or attempting to excite '*secession, armed rebellion or subversive activities, or encouraging feelings of separatist activities that endanger the sovereignty or unity and integrity of India'*. In addition to a change in the entity ('government of India' in s. 124A as opposed to 'India' in Cl. 150) which is the object of the provision and the expansion in the range of activities that could be considered as threatening the 'unity and integrity' of the country, the clause has also added new means of committing the offence by including 'electronic communication' and 'financial means', and the *mens rea* requirement of 'purposely or knowingly' committing such an act.

I. The vice of vagueness

Unlike the IPC, there are no explanations provided in Cl. 150 to indicate the meaning and scope of these terms. For instance, 'subversive activities', in the absence of a legal definition, indicates neither the nature of activity that may be termed 'subversive' nor the degree of harm that must occur nor the object of such harm to qualify as a subversive activity. For e.g., the Cambridge Dictionary defines 'subversive' as 'trying to destroy or damage something, especially an established political system'. Oxford Languages defines 'subversive' as 'seeking or intended to subvert an established system or institution' and 'subvert' as '[to] undermine the

[132] Cl. 127, BNSS.

[133] For this reason, the offence described in Cl. 150, BNS continues to be referred to as 'sedition' in this research brief.

power and authority of (an established system or institution).' The standard is broad enough to include within its ambit legitimate protests and dissents against the government, as they are often directed at challenging the legitimacy and authority of decisions and actions taken by the government.

The lack of accompanying legal definitions in the BNS or other legislations therefore creates a risk of overbroad application, rendering the provision vague and arbitrary - grounds on which legal provisions have previously been struck down.[134] In *Shreya Singhal v. Union of India,*[135] the Supreme Court held s. 66A of the IT Act to be unconstitutional and one of the main grounds was that terms like 'grossly offensive or of menacing character', 'annoyance', 'inconvenience', 'danger', 'enmity', 'hatred', 'ill will', which were used to constitute the offence were vague and ambiguous, making the provision amenable to abuse by officials. Similarly, there is no clarity provided on what amount of financial support or what nature (whether direct or indirect) of financial contributions would amount to using 'financial means' to commit the offence.

The Explanation to the clause also appears to be incomplete, making it unclear. While it mentions certain acts and their purpose - comments expressing disapprobation of measures and actions of the Government[136] to alter them through lawful means - it does not indicate whether such acts are to be considered as offensive or if they lie outside the scope of this section and are not to be considered an offence. Thus, it does not capture the meaning of Explanation 3 to s. 124A, IPC that it is seemingly modelled on.

II. Vagueness in the object of harm

A significant departure in Cl. 150 is the lack of a discernible object of protection as identified in the IPC. The IPC requires exciting disaffection, hatred or contempt towards '*the Government established by law in India*', whereas Cl. 150 mentions endangering the *'sovereignty, or unity and integrity of India*'. The former lends itself to conceptualising the government as an identified and separate entity

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[134] *Maneka Gandhi v. Union of India* (1978) 1 SCC 248; *Shreya Singhal v. Union of India* (2015) 5 SCC 1; *State Of Bombay & Anr. v. F.N. Balsara* 1951 SCC 860; *Chintaman Rao v. State of Madhya Pradesh* AIR 1951 SC 118.

[135] (2015) 5 SCC 1.

[136] The reference to the 'Government' in the explanation is also significant considering the fact that Cl. 150, BNS has otherwise omitted reference to the 'Government established by law' as the object of protection, as was done in s. 124A, IPC. Instead Cl. 150 refers to 'India' as the object of protection.

whereas the latter expands the scope of offence because the nation is a necessarily abstract concept and does not lend itself to specificity. The term could refer to the government, public figures or even society and communities generally. Such ambiguous (and overbroad) delimitation of the object of harm impacts the threshold of harm required for an act to constitute sedition. The effect of such a departure from the IPC may be understood or even constrained by examining the judicially evolved standards in determining who may be said to constitute the 'Government' under s. 124A, IPC, which has in turn acted as a safeguard against an overbroad application of the provision.

In *Kedar Nath Singh v. State of Bihar*[137] the Supreme Court describes 'Government established by law' as the visible symbol of the State necessary for its continuity and stability and as different from individuals engaged in carrying on the tasks of the administration at the time. The existence of an exceptional provision like sedition was thus justified on two grounds - it delimited a specific object that needed protection and it indicated the level of harm that has to be inflicted to constitute sedition - that is, for an act to constitute sedition, it must threaten the continued existence of the State or its stability.

The impact of such clarity is seen in the judgment of *State through Superintendent of Police, CBI/SIT v. Nalini and Ors*[138] where the Supreme Court was interpreting s. 3 of the now repealed the TADA[139] which was a more stringent law and contained a similar object of harm - 'Government as by law established'. The Court here held that the assassination of Rajiv Gandhi, former Prime Minister of India, did not amount to a terrorist act because he was not the sitting Prime Minister of the country and targeting him did not constitute an attempt to strike fear in the Government of the Centre or State.

In identifying 'India' as the object of harm and in failing to precisely define specific actions that constitute the offence, Cl. 150 creates a tenuous link between the act and its impact.

[137] 1962 SCC OnLine SC 6.

[138] (1999) 5 SCC 253.

[139] S. 3, TADA.

III. Criminalising dissent

The Supreme Court in *Kedar Nath* highlighted the important difference between disloyalty to the Government and strong criticism of its measures. The Court categorically held that the freedom of speech and expression under the Constitution (Art. 19(1)(a)) includes criticism or comment against the Government and its measures in the strongest words possible. The freedom exists as long as the act does not incite people to violence against the Government or intend to create public disorder. Freedom of speech was to be the norm and sedition the exception. The decision therefore clarified the scope of sedition with the aim to protect dissent from becoming a criminal offence. In *Balwant Singh v. State of Punjab,*[140] the accused raised slogans like 'Khalistan Zindabad' which is connected to a movement that seeks a separate State for Sikhs in India. The Supreme Court held that casual slogans raised without creating disturbance or inciting people to create disorder cannot by itself amount to sedition. While the Court has demonstrated a strong tendency towards protecting freedom of speech, whether this spirit and tendency has translated into practice is questionable.[141] Cl. 150 has the potential to further erode this protection. For instance, it is likely that the mere raising of slogans like the aforementioned one, without any incitement to violence or disorder, may be understood as a secessionist act or arousing feelings of separatist activities or subversive activity. Thus, the expansion of the spirit of sedition in Cl. 150 generalises a provision which is meant to operate in exceptional circumstances, and expands its scope beyond that of s. 124A as established by judicial precedents. This may raise concerns about the ability of the law to fulfil its intended purpose and distinguish between sedition and mere dissent.

IV. Lowered threshold of harm

Another concerning question raised by Cl. 150 is the status of safeguards which were judicially read into the definition of sedition. The need for the safeguards was the vague language of s. 124A, specifically the use of the words 'hatred', 'contempt', and 'disaffection'. While on first glance, Cl. 150 might seem like a step towards certainty, it is necessary to understand the judicial evolution of safeguards regarding the offence of sedition before commenting so.

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[140](1995) 3 SCC 214.

[141] Article 14, 'A Decade of Darkness: The Story of Sedition in India', last accessed 28.08.2023.

The words used in s. 124A, IPC lend themselves to multiple possible interpretations, and therefore to ambiguity and vagueness. This is evident from the conflicting interpretations of the section by the Federal Court in *Niharendu Dutt Majumdar v. King Emperor,*[142] which interpreted the terms 'hatred', 'contempt', and 'disaffection' narrowly to only include situations affecting public order, and several decisions of the Privy Council such as *King-Emperor v. Sadashiv Narayan Bhalero,*[143] which interpreted the same words broadly to include mere arousal of feelings even if they did not affect or tend to affect public order.

In *Niharendu,* the Court explained that sedition was criminalised to avoid anarchy, which the Court described as a situation where no respect is felt for the government and its laws, and they cease to be obeyed. The test laid down in *Niharendu* was 'the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency.' This judgment of the Federal Court was overruled by the Privy Council in *Sadashiv,* in favour of a literal reading of s. 124A that did not restrict the interpretation of the phrase 'excite disaffection' to exciting disorder but included within it hatred, enmity, dislike, hostility, contempt and every form of ill-will to the government. The standard in *Sadashiv* was lowered to 'exciting' certain bad feelings towards the government as opposed to *Niharendu* which required that the seditious act lead to, or tend or intend to lead to, public disorder or violence. It was further observed in *Sadashiv* that there was no intensity threshold for the feelings aroused either.

The question was finally decided by the Supreme Court in *Kedar Nath* where it preferred the test laid down in *Niharendu,* and therefore restricted the application of s. 124A. Therefore, any claim that Cl. 150 introduces certainty by using concrete expressions is misleading as the judiciary has interpreted s. 124A narrowly. It remains unclear whether the standard of affecting public order will be imported to the new offence or whether the standards mentioned in the section will apply literally. The existing language in the IPC, which was restrictively interpreted in *Kedar Nath,* has been completely replaced. The words 'hatred', 'contempt', and 'disaffection' are nowhere to be found in Cl. 150 of the BNS.

[142] 1942 SCC OnLine FC 5.

[143] 1947 SCC OnLine PC 9.

Notably, one of the main arguments raised by the petitioners in the ongoing challenge in the Supreme Court[144] is the vagueness and subjectiveness of the standard of 'tendency or intention to create public disorder', which was held to be the gist of the offence in *Kedar Nath*. Cl. 150 arguably introduces even more vague thresholds such as 'excites or attempts to excite *subversive activities*' and '*encouraging feelings* of separatist activities'. Neither does the section define the terms nor is there any judicial guidance on their interpretation. The vagueness as well as the lowered threshold brought in by these terms makes the clause constitutionally suspect.

Further, Cl. 150 specifically criminalises acts which *encourage feelings* of separatist activities. *Kedar Nath* specifically held that criminalising mere raising of feelings of hatred, enmity, dislike, hostility, contempt and other forms of ill-will towards the government would be an unreasonable restriction on the freedom of speech. While the exact feelings, the arousal of which is criminalised, are different, it remains to be seen whether the spirit in which *Kedar Nath* approaches sedition will continue to govern the application of Cl. 150.

The judicial guidance that had evolved with reference to the crime of sedition developed with a view to safeguard the freedom of speech and expression and to balance it against public order in a manner that was acceptable for a democratic State. This guidance is nowhere to be found in Cl. 150 of the BNS. It is as vague as s. 124A originally was, if not more. The lack of legislatively provided definitions in the BNS indicates a need for fresh judicial intervention which would necessarily involve reinventing the wheel. In the meantime, before clarity is read into the provision, it will be open to abuse. In fact, commentators have indicated that Cl. 150 of the BNS is even more subjective and prone to abuse than s. 124A.[145] The clause

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[144] Tanima Kishore, Petitioner's Submissions in *Kishorechandra Wangkhemcha v. Union of India,* <https://www.scobserver.in/wp-content/uploads/2021/09/Kishore_Wangkhemcha_v._Union_of_India1.pdf>, last accessed on 28.08.2023 ; Aparna Bhat, Petitioner's Submission in *People's Union for Civil Liberties v. Union of India,* <https://www.scobserver.in/wp-content/uploads/2021/09/Sedition_WritPetition_PUCL.pdf>, last accessed on 28.08.2023.

[145] PTI, 'Bharatiya Nyaya Sanhita Bill allows using draconian police powers for political ends: Kapil Sibal' (The Hindu, 12 August 2023), last accessed on 28.08.2023; Lubhayathi Rangarajan, 'Home Minister Amit Shah Says Sedition Is Dead. But Its Replacement Is More Fearsome Than The Colonial Law Ever Was' (Article 14, 14 August 2023), last accessed 28.08.2023; Chitranshul Sinha, 'Sedition law is not gone, it's set to be more draconian' (Indian Express, 12 August 2023), last accessed on 29.08.2023.

has the potential to criminalise dissent and is therefore antithetical to the democratic ideals of the constitution.

Sedition, as it exists in s. 124A, has seen an increase in use in the recent years (before the Supreme Court's abeyance order) through targeting of social media posts, and has been used as a tool to quell protests. Cl. 150 of the BNS seems to be poised to continue this legacy instead of offering a break from its colonial past.

V. Mens rea

It is to be considered whether the *mens rea* requirement through the use of the words 'purposely or knowingly' in Cl. 150 can be seen as an improvement compared to s. 124A IPC. It would be erroneous to argue that s. 124A did not contain a *mens rea* requirement. Even though the provision does not use intention or knowledge (or any variations of it), s. 124A cannot be said to be a strict liability offence. The Supreme Court's case law has been clear that "in the absence of any ostensible public purpose or necessary implication from the statute, it is a sound rule of construction adopted in England – and accepted in India – to construe a provision creating an offence in conformity with common law. Mens rea by implication must be excluded only where it is absolutely clear that implementation of the object of the statute would otherwise be defeated".[146] Even going as far back as *Ravule Hariprasad Rao v. State*[147] and *State of Maharashtra v. MH George,*[148] it has been held that where an offence is created by a statute, however comprehensive and unqualified the language of the statute, it is usually understood as silently requiring that the element of mens rea should be imported into the definition of the crime, unless a contrary intention is expressed or implied. From this position of law it is evident that merely introducing the words 'purposely or knowingly' cannot be seen as an improvement on s.124A. *Mens rea* was always a requirement under s.124A and this is made evident in *Kedar Nath*.[149]

[146] Union of India v. Ganpati Dealcom Private Ltd (2023) 3 SCC 315.

[147] 1951 SCC 241.

[148] (1965) 1 SCR 123.

[149] 1962 SCC OnLine SC 6, para 26.

Table 3: Comparison between s. 124A, IPC and Cl. 150, BNS

S. 124A, IPC - Sedition	Cl. 150, BNS - Acts endangering sovereignty, unity and integrity of India
Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards, 2*** the Government established by law in 3[India], 4*** shall be punished with 5[imprisonment for life], to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine. Explanation 1.-- The expression "disaffection" includes disloyalty and all feelings of enmity. Explanation 2.--Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section. Explanation 3.--Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.	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.

False and Misleading Information Jeopardising the Sovereignty, Unity and Integrity of India

Clause 195(1)(d)

S. 153B of the IPC[150] has been recast as Cl. 195 of the BNS with an addition where Cl. 195(1)(d) criminalises the making or publication of *false and misleading information jeopardising the sovereignty, unity and integrity or security of India*. This offence is punishable with three years of imprisonment, or fine, or both. An action becomes prohibited by Cl. 195(1)(d) when the following elements are met- i) there must be some information which is made or published, ii) such information must be 'false or misleading' and iii) such 'false or misleading information' must have the impact of 'jeopardising' the 'unity, sovereignty and integrity or security of India'. However, in light of the Supreme Court's decision in *Shreya Singhal v. Union of India,*[151] Cl. 195(1)(d) may potentially bring up concerns over the reasonableness of this restriction on the freedom of expression as per the requirements of Art. 19 (2) of the Constitution.

I. Overbroad and vague provision

In *Shreya Singhal*, the Court struck down s. 66A of the IT Act[152] which penalised anyone who sent electronic information which could be 'grossly offensive or had menacing character', or messages sent for the purpose of 'causing annoyance or inconvenience' for violating the requirement of reasonable restrictions to the freedom of expression under Art. 19(2). While doing so, the Court held that any law restricting the freedom of expression could not be phrased vaguely,[153] but had to be precisely and narrowly worded, in a manner that enabled the public to reasonably understand and foresee the activities being prohibited. Further, it held

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[150] S. 153B, IPC criminalises specific actions which involve imputations or assertions prejudicial to national integration.

[151] (2015) 5 SCC 1.

[152] S. 66A, IT Act, 2000.

[153] *Chintaman Rao v. State of Madhya Pradesh* 1951 AIR 118: "The law even to the extent that it could be said to authorize the imposition of restrictions in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right".

that Art. 19(2) can prohibit only expression which incites harm, disorder or violence, and which has a direct relation to the violence caused.[154] In doing so, the Court distinguished between three categories of speech including- i) the discussion of ideas, ii) the advocacy of ideas (however offensive or shocking) and iii) speech inciting another to act upon an idea which could directly cause disorder or violence. A reasonable restriction under Art. 19(2) can then only extend to the third category of speech-speech which *incites*, as opposed to *jeopardises*.

The phrasing of Cl. 195(1)(d) raises three potential causes for concern. First, the lack of definition for the phrases 'false and misleading', and 'jeopardising' renders the clause vague and in need of clarity on the nature and scope of the information the publication of which is being prohibited. The unqualified nature of 'false and misleading' under Cl. 195(1)(d) leaves it open to multiple interpretations, and is hence entirely left in the hands of discretionary decision makers. Similarly, the word 'jeopardises' can cover a wide, unforeseeable range of consequences. The consequences of such publication, which can be seen as 'jeopardising the unity, sovereignty and integrity or security of India',[155] remain unclear, leaving the public with little means to foresee how the consequences of such information may be construed as jeopardisation. Second, the provision nowhere indicates that such publication should be with the *intention* of causing 'jeopardy'/harm, as is required under Art. 19(2). Further, Cl. 195(1) (d) extends its ambit to even the 'making' of such information, denoting that the mere creation of such material without publication can attract punishment. In effect, criminalising the mere making of such information can potentially subvert the constitutional requirement to directly incite *others* to cause violence.[156]

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[154] *Superintendent, Central v. Ram Manohar Lohia* 1960 SCR (2) 821: "there must be proximate and reasonable nexus between the speech and the public order".

[155] Generally, the words 'sovereignty, integrity and unity' of India have been interpreted by the courts in various contexts, including constitutional interpretation, defining the scope of anti-terror legislations [such as the POTA] and other laws relating to national symbols and imagery [Prevention of Insults to National Honour Act, 1971]. The provisions pertaining to the prohibition of acts prejudicial to the unity, sovereignty or integrity of India in these legislations have typically criminalised specific acts as being prejudicial per se. For example, s. 15 of the UAPA. However, the word 'sovereignty' has been difficult to interpret, given the conceptual variations inherent to it.

[156] Possession of offensive and incendiary literature has been dealt with by the Supreme Court in other contexts such as deciding whether such possession amounts to a terrorist act under s. 15 of the UAPA, or constitutes membership in a banned organisation under s. 10 of the UAPA. In July 2023, the Court in *Vernon Gonsalves v. State of Maharashtra,* Criminal Appeal No. 639 of 2023, held that mere possession of such literature alone could not be construed as a terrorist act. However, whether such possession can attract a penalty

II. Impermissible executive and judicial subjectivity

The Information Technology Amendment Rules 2023[157] - which uses the same phrasing ('fake', 'false' and 'misleading') for the issuance of directions blocking information so identified by a government fact checking unit- is currently under challenge before the Bombay High Court for violating the requirements of Art. 19(2).[158] Cl. 195(1)(d) extends the use of this constitutionally suspect phrasing beyond the digital medium, and expands the degree of State intervention for the same by criminalising such information (as opposed to merely blocking it).

This provision is the latest in a series of interventions seeking to regulate information disorder in India. Prior regulatory efforts have included orders issued under s. 69A, IT Act,[159] and the aforementioned impugned Rules. Despite the need to regulate widespread information disorder and to mitigate its subsequent harms, providing a definition or clear cut identifiers for disinformation has remained a highly difficult task[160] given the subjectivity of assessing truth or falsity. This is not to say that criminal law does not address the issue of assessing what qualifies as false information. It does so in other contexts, including false statements on oath, giving of false evidence etc.[161] However, unlike Cl. 195(1)(d), provisions requiring the assessment of false information clarify requirements including an accused's belief or knowledge and the use of such falsehood to cause the harm stipulated.

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under s. 10 remains unclear post the review in *Arup Bhuyan v. State of Assam,* Review Petition (Criminal) No. 417/2011.

[157] Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules, 2023.

[158] Kunal Kamra v. Union of India, WP(L)/9792/2023.

[159] *X Corp v. Union of India*, Writ Petition No. 13710 of 2022 (Karnataka High Court): where the petitioner, an intermediary platform, had challenged the directions issued under s. 69A of the IT Act to block specific content and accounts for sharing 'false' and 'misleading' information.

[160] Noted by the Canadian Supreme Court in *R v. Zundel* [1992] 2 SCR 731 at para 136; UN Special Rapporteur on Freedom of Expression, Submission on Annual Thematic Report on Disinformation, March 2021, Centre for Law and Democracy (2001), pg. 3.

[161] For example, ss. 171G, 177 (furnishing false information), 181 (false statement on oath or affirmation to public servant authorised to administer an oath or administration), 191 (giving false evidence), IPC. The provisions come with further qualifiers including the requirement to prove the accused's knowledge or belief in the falsity, and the intention to use such falsity to cause the harm that the provisions seek to prevent. The offence in this case requires a mens rea element, as opposed to Cl.195 (1) (d), BNS.

The lack of important qualifiers in Cl. 195(1)(d) complicates matters given the peculiarities of information disorder in a social ecosystem. Additionally, there are varying categories of speech that can be covered under 'false and misleading' which involve varying degrees of liability. False information in the context of information disorders may be classified as either disinformation or misinformation. While disinformation is the publication of false information with full knowledge/belief in its falsity and with the aim of causing some harm[162] misinformation refers to the mere reproduction or dissemination of such information, and does not necessarily require the level of intent in disinformation.[163] However, the lack of distinction between misinformation and disinformation under Cl. 195(1)(d) raises questions on the degree of liability necessary to attract sanction[164] and it is unclear whether the provision is also directed at persons who may only be strictly liable for misinformation,that is, without intention or knowledge of the wrongfulness of the act.

III. Ineffective approach

In light of these requirements, and the context which Cl. 195(1)(d) seeks to address, the criminalisation of 'false and misleading' information highlights three concerns. There is first the onerous task of balancing the constitutional requirement to frame precisely worded penal provisions against the contextual challenge in defining disinformation (and perhaps misinformation). Even in the instance that an ideal provision (which achieves such balance) is framed, such provisions can only cover a narrow range of actions within the larger ecosystem of information disorder. Commentators have suggested that in such a scenario, a penal provision may remain largely inadequate in regulating the problem of information disorder in

[162] UN Special Rapporteur on Freedom of Expression, Submission on Annual Thematic Report on Disinformation, March 2021, Centre for Law and Democracy (2001), pg. 3.

[163] UN Special Rapporteur on Freedom of Expression, Submission on Annual Thematic Report on Disinformation, March 2021, Centre for Law and Democracy (2001), pg. 3.

[164] Criminal sanctions may be attracted for varying levels of liability. While the general rule requires both mens rea (purpose, intention and knowledge from the part of the offender on the wrongfulness of the offence) and actus reus for criminal liability, the degree of liability may be lowered in specific offences. For example, specific offences relating to environmental degradation may fall under strict liability, which only requires the commission or omission of an act, and not intention.

society.[165] The challenges and the weaker potential of criminal law in ultimately addressing the issue effectively casts doubt on the regulatory mechanism (criminalisation) adopted, and prompts questions on the need for alternative regulatory approaches which are more effective and less restrictive on questions of life, liberty and expression.

[165] Rebecca K Helm & Hitoshi Nasu, Regulatory Responses to 'Fake News' and Freedom of Expression: Normative and Empirical Evaluation, *Human Rights Law Review*, Volume 21, Issue 2, June 2021, pgs. 302–328.

Other Changes

I. Community service as punishment

In a first, Cl. 4(f) of BNS introduces 'community service' as a punishment for six offences. Community service has been provided for multiple 'petty' offences across BNS.[166] Table 4 provides a list of the six offences for which this punishment has been prescribed.

Table 4: Offences that provide for community service as a punishment

Clause	Punishment
Cl. 200 Public servant engaging in unlawful trade	Punishable with simple imprisonment for a term which may extend to one year, or with fine, or with both or with community service.
Cl. 207 Non-appearance in response to a proclamation under Cl. 82[167] of Bharatiya Nagarik Suraksha Sanhita 2023	Punishable with imprisonment for a term which may extend to three years or with fine or with both or with community service.
Cl. 224 Attempt to commit suicide to compel or restraint exercise of lawful power	Punishable with simple imprisonment for a term which may extend to one year or with fine or with both or with community service.
Cl. 301(2) First offence of theft of property (value under Rs. 5000)	Punishable only with community service.
Cl. 353 Misconduct in public by a drunken person	Punishable with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to one thousand rupees, or with both or with community service.

[166] Statement of Objects and Reasons, BNS 2023.

[167] Cl. 82, BNSS deals with the procedure on arrest of a person against whom a warrant has been issued.

Cl. 354(2) Defamation	Punishable with simple imprisonment for a term which may extend to two years, or with fine, or with both or with community service.
Cl. 200 Public servant engaging in unlawful trade	Punishable with simple imprisonment for a term which may extend to one year, or with fine, or with both or with community service.
Cl. 207 Non-appearance in response to a proclamation under Cl. 82[168] of Bharatiya Nagarik Suraksha Sanhita 2023	Punishable with imprisonment for a term which may extend to three years or with fine or with both or with community service.
Cl. 224 Attempt to commit suicide to compel or restraint exercise of lawful power	Punishable with simple imprisonment for a term which may extend to one year or with fine or with both or with community service.
Cl. 301(2) First offence of theft of property (value under Rs. 5000)	Punishable only with community service.
Cl. 353 Misconduct in public by a drunken person	Punishable with simple imprisonment for a term which may extend to twenty-four hours, or with fine which may extend to one thousand rupees, or with both or with community service.

While introduction of community service is an important change to criminal law in India, neither the principle on which these offences have been chosen is evident nor is the term to which a person may be sentenced to community service.

[168] Cl. 82, BNSS deals with the procedure on arrest of a person against whom a warrant has been issued.

II. Abetment outside India for offence in India

Cl. 48 expands the meaning of abetment to include abetment by persons outside of India without and beyond India of offences committed in India.

III. Snatching as theft

Cl. 302 of the BNS introduces snatching as a separate offence and as a special category of the offence of theft. The clause states, *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 moveable property.* However, the need for the provision is unclear since snatching can be covered within the offence of theft. Further, the sentence for snatching is the same as the first offence of theft with three years as the maximum punishment with no mandatory minimum sentence. The clause, thus, creates no difference between the penal consequences of theft as first offence and snatching.

IV. Offences against children

Some changes proposed in the BNS relate to offences against children which include creation of new offences or changes to the ones in the IPC. The newly added Cl. 93 of the BNS punishes a person who hires, employs or engages any person below the age of 18 years to commit an offence. The punishment will be the same as that provided for the offence committed by the child as if the offence has been committed by such person himself. The explanation to Cl. 93 states that using a child for sexual exploitation or pornography is included within its meaning. This raises questions about overlaps with the Juvenile Justice (Care and Protection of Children) Act, 2015 and the Protection of Children from Sexual Offences Act, 2012.

Additionally, Cl. 135 of the BNS proposes to make changes to s. 361 of the IPC. While s. 361 criminalises kidnapping of girls below the age of 18 years along with kidnapping of boys under 16 years, Cl. 135 proposes to make kidnapping of all children below 18 years of age an offence.

V. Grievous hurt resulting in permanent disability or permanent vegetative state

Cl. 115 proposes to replace s. 322, IPC and introduces permanent disability or permanent vegetative state within the definition of grievous hurt. Additionally, the clause carries an enhanced sentence if the grievous hurt results in permanent disability or permanent vegetative state, and prescribes a minimum punishment of 10 years which may extend to imprisonment for life. Similarly, s. 326A, IPC that deals with 'voluntarily causing grievous hurt by use of acid etc.' is replaced by Cl. 122(1) and also incorporates 'permanent vegetative state' as an impact of the offence.

Effect of Repeal

The BNS through Cl. 356 repeals the IPC. Such a whole scale repeal and replacement with largely similar provisions raises the issue of case laws that interpret the IPC provisions. Would those decisions also control the reading and interpretation of the provisions in the BNS that are a verbatim reproduction of the IPC provisions? Or would the effect of the repeal and re-enactment of verbatim provisions be that the judicial interpretations of previous provisions are no longer binding?

Justice TL Venkatarama Ayyar's opinion in a Constitution Bench decision of the Supreme Court in *Bengal Immunity Company Limited* v. *State of. Bihar*[169] held that when a statute is repealed and the same words are retained in provisions of a new enactment, "*they should be interpreted in the sense which had been judicially put on them under the repealed Act*". He reasoned that the legislature must be deemed to be aware of the previous interpretation and the verbatim re-enactment of the provision must be taken to mean that it accepts that interpretation. Justice Ayyar's reasoning has been subsequently adopted by the Supreme Court in *Sakal Deep Sahai Srivastava v. Union of India and Anr.*[170] (on provisions concerning the Limitation Act, 1908 and the Limitation Act, 1963) and *Pradip J Mehta v. Commissioner of Income Tax, Ahmedabad*[171] (on provisions concerning the Income Tax Act, 1922 and the Income Tax Act, 1961).

In light of these averments, the provisions in the BNS that have been retained from the IPC will continue to be governed by the judicial interpretation given to those provisions under the IPC.

[169] AIR 1955 SC 661.
[170] (1974) 1 SCC 338.
[171] (2008) 14 SCC 283.

ANNEXURE

I. Clause 4 – Punishments

The punishments to which offenders are liable under the provisions of this Sanhita are—

(a) Death;

(b) Imprisonment for life, that is to say, imprisonment for remainder of a person's natural life;

(c) Imprisonment, which is of two descriptions, namely:—

(1) Rigorous, that is, with hard labour;

(2) Simple;

(d) Forfeiture of property;

(e) Fine;

(f) Community Service.

II. Clause 63 – Rape

A man is said to commit "rape" if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:—

(i) against her will.

(ii) without her consent.

(iii) with her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

(iv) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

(v) with her consent when, at the time of giving such consent, by reason of mental illness or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(vi) with or without her consent, when she is under eighteen years of age.

(vii) when she is unable to communicate consent.

Explanation 1.— For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.— Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1– A medical procedure or intervention shall not constitute rape.

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.

III. Clause 64 – Punishment for rape

(1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,—

(a) being a police officer, commits rape,—

(i) within the limits of the police station to which such police officer is appointed; or

(ii) in the premises of any station house; or

(iii) on a woman in such police officer's custody or in the custody of a police officer subordinate to such police officer; or

(b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c) being a member of the armed forces deployed in an area by the Central Government or a State Government commits rape in such area; or

(d) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e) being on the management or on the staff of a hospital, commits rape on a woman in that hospital; or

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) commits rape during communal or sectarian violence; or

(h) commits rape on a woman knowing her to be pregnant; or

(i) commits rape, on a woman incapable of giving consent; or

(j) being in a position of control or dominance over a woman, commits rape on such woman; or

(k) commits rape on a woman suffering from mental illness or physical disability; or

(l) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(m) commits rape repeatedly on the same woman, shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.—For the purposes of this sub-section—

(a) "armed forces" means the naval, army and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary

forces that are under the control of the Central Government or the State Government;

(b) "hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c) "police officer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861;

(d) "women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children

IV. Clause 69 – Sexual intercourse by employing deceitful means, etc.

Whoever, by deceitful means or making by promise to marry to a woman without any intention of fulfilling the same, and 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 the false promise of employment or promotion, inducement or marring after suppressing identity.

V. Clause 70 – Gang rape

(1) Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.

(2) Where a woman under eighteen years of age is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine, or with death:

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this sub-section shall be paid to the victim.

VI. Clause 73 – Assault or criminal force to woman with intent to outrage her modesty

Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will there by outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.

VII. Clause 74 – Sexual harassment and punishment for sexual harassment

(1) A man committing any of the following acts—

(i) physical contact and advances involving unwelcome and explicit sexual overtures; or

(ii) a demand or request for sexual favours; or

(iii) showing pornography against the will of a woman; or

(iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.

(2) Any man who commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section (1) shall be punished with rigorous imprisonment for a term which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

VIII. Clause 75 – Assault or use of criminal force to woman with intent to disrobe

Whoever assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

IX. Clause 76 – Voyeurism

Whoever watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shall also be liable to fine.

Explanation 1.—For the purpose of this section, "private act" includes an act of watching carried out in a place which, in the circumstances, would reasonably be expected to provide privacy and where the victim's genitals, posterior or breasts are exposed or covered only in underwear; or the victim is using a lavatory; or the victim is doing a sexual act that is not of a kind ordinarily done in public.

Explanation 2.—Where the victim consents to the capture of the images or any act, but not to their dissemination to third persons and where such image or act is disseminated, such dissemination shall be considered an offence under this section.

X. Clause 77 – Stalking

(1) Any man who—

(i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman; or

(ii) monitors the use by a woman of the internet, e-mail or any other form of electronic communication, commits the offence of stalking:

Provided that such conduct shall not amount to stalking if the man who pursued it proves that—

(i) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking had been entrusted with the responsibility of prevention and detection of crime by the State; or

(ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

(iii) in the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine.

XI. Clause 78 – Word, gesture or act intended to insult modest of woman

Whoever, intending to insult the modesty of any woman, utters any words, makes any sound or gesture, or exhibits any object in any form, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years, and also with fine.

XII. Clause 101 – Punishment for murder

(1) Whoever commits murder shall be punished with death or imprisonment for life, and shall also be liable to fine.

(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 ground each member of such group shall be punished with death or with imprisonment for life or imprisonment for a term which shall not be less than seven years, and shall also be liable to fine.

XIII. Clause 102 – Punishment for murder by life-convict

Whoever, being under sentence of imprisonment for life, commits murder, shall be punished with death or with imprisonment for life, which shall mean the remainder of that person's natural life.

XIV. Clause 104 – Causing death by negligence

(1) Whoever causes the 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 seven years, and shall also be liable to fine.

(2) Whoever causes death of any person by doing any rash or negligent act not amounting to culpable homicide and escapes from the scene of incident or fails to report the incident to a Police officer or 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.

XV. Clause 107 – Attempt to murder

(1) Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.

(2) When any person offending under sub-section (1) is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death or with imprisonment for life, which shall mean the remainder of that person's natural life.

Illustrations.

(a) A shoots at Z with intention to kill him, under such circumstances that, if death ensued A would be guilty of murder. A is liable to punishment under this section.

(b) A, with the intention of causing the death of a child of tender years, exposes it in a desert place. A has committed the offence defined by this section, though the death of the child does not ensue.

(c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of the first paragraph of this section.

(d) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A's keeping; A has not yet committed the offence defined in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section.

XVI. Clause 109 – Organised crime

(1) Any continuing unlawful activity including kidnapping, robbery, vehicle theft, extortion, land grabbing, contract killing, economic offences, cyber-crimes having severe consequences, trafficking in people, drugs, illicit goods or services and weapons, human trafficking racket for prostitution or ransom by the effort of groups of individuals acting in concert, singly or jointly, either as a member of an organised crime syndicate or on behalf of such syndicate, by use of violence, threat of violence, intimidation, coercion, corruption or related activities or other unlawful means to obtain direct or indirect, material benefit including a financial benefit, shall constitute organised crime.

Explanation.—For the purposes of this sub-section,––

(i) ''benefit'' includes property, advantage, service, entertainment, the use of or access to property or facilities, and anything of benefit to a person whether or not it has any inherent or tangible value, purpose or attribute;

(ii) "organised crime syndicate" means a criminal organisation or group of three or more persons who, acting either singly or collectively in concert, as a syndicate, gang, mafia, or (crime) ring indulging in commission of one or more serious offences or involved in gang criminality, racketeering, and syndicated organised crime;

(iii) "continuing unlawful activity" means an activity prohibited by law, which is a cognizable offence undertaken either singly or jointly, as a member of an organised crime syndicate or on behalf of such

syndicate in respect of which more than one charge-sheets have been filed before a competent court within the preceding period of ten years and that court has taken cognizance of such offence;

(iv) "economic offences" include criminal breach of trust; forgery, counterfeiting of currency and valuable securities, financial scams, running Ponzi schemes, mass-marketing fraud or multi-level marketing schemes with a view to defraud the people at large for obtaining the monetary benefits or large scale organised betting in any form, offences of money laundering and hawala transactions.

(2) Whoever, attempts to commit or commits an offence of organised crime shall,—

(i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life and shall also be liable to fine which shall not be less than rupees ten lakhs;

(ii) in any other case, be punishable 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 rupees five lakhs.

(3) Whoever, conspires or organises the commission of an organised crime, or assists, facilitates or otherwise engages in any act preparatory to an organised crime, shall be punishable 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 rupees five lakhs.

(4) Any person who is a member of an organised crime syndicate shall be punishable 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 rupees five lakhs.

(5) Whoever, intentionally harbours or conceals or attempts to harbour or conceal any person who has committed the offence of an organised crime or any member of an organised crime syndicate or believes that his act will encourage or assist the doing of such crime shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than rupees five lakhs:

Provided that this sub-section shall not apply to any case in which the harbour or concealment is by the spouse of the offender.

(6) Whoever, holds any property derived, or obtained from the commission of an organised crime or proceeds of any organised crime or which has been acquired through the organised crime syndicate funds shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life and shall also be liable to fine which shall not be less than rupees two lakhs.

(7) If any person on behalf of a member of an organised crime syndicate is, or at any time has been in possession of movable or immovable property which he cannot satisfactorily account for, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for ten years and shall also be liable to fine which shall not be less than rupees one lakh and such property shall also be liable for attachment and forfeiture.

Explanation.–– For the purposes of this section, "proceeds of any organised crime" means all kind of properties which have been derived or obtained from commission of any organised crime or have acquired through funds traceable to any organised crime and shall include cash, irrespective of person in whose name such proceeds are standing or in whose possession they are found.

XVII. Clause 110 – Petty organised crime or organised crime in general

(1) Any crime that causes general feelings of insecurity among citizens relating to theft of vehicle or theft from vehicle, domestic and business theft, trick theft, cargo crime, theft (attempt to theft, theft of personal property), organised pick pocketing, snatching, theft through shoplifting or card skimming and Automated Teller Machine thefts or procuring money in unlawful manner in public transport system or illegal selling of tickets and selling of public examination question papers and such other common forms of organised crime committed by organised criminal groups or gangs, shall constitute petty organised crimes and shall include the said crimes when committed by mobile organised crime groups or gangs that create network of contacts, anchor points, and logistical support among themselves to carry out number of offences in region over a period before moving on.

(2) Whoever commits or attempts to commit any petty organised crime, under sub-section (1) shall be punished with imprisonment for a term which shall not be less than one year but which may extend to seven years, and shall also be liable to fine.

XVIII. Clause 111 – Offence if terrorist act

(1) A person is said to have committed a terrorist act if he commits any act in India or in any foreign country with the intention to threaten the unity, integrity and security of India, to intimidate the general public or a segment thereof, or to disturb public order by doing an act,––

(i) using bombs, dynamite or any other explosive substance or inflammable material or firearms or other lethal weapons or poison or noxious gases or other chemicals or any other substance (whether biological or otherwise) hazardous in nature in such a manner so as to create an atmosphere or spread a message of fear, to cause death or serious bodily harm to any person, or endangers a person's life;

(ii) to cause damage or loss due to damage or destruction of property or disruption of any supplies or services essential to the life of the community, destruction of a Government or public facility, public place or private property;

(iii) to cause extensive interference with, damage or destruction to critical infrastructure;

(iv) to provoke or influence by intimidation the Government or its organisation, in such a manner so as to cause or likely to cause death or injury to any public functionary or any person or an act of detaining any person and threatening to kill or injure such person in order to compel the Government to do or abstain from doing any act, or destabilise or destroy the political, economic, or social structures of the country, or create a public emergency or undermine public safety;

(v) included within the scope of any of the Treaties listed in the Second Schedule to the Unlawful Activities (Prevention) Act, 1967.

(2) Whoever, attempts to commit or commits an offence of terrorist act shall,––

(i) if such offence has resulted in the death of any person, be punishable with death or imprisonment for life without the benefit of parole, and shall also be liable to fine which shall not be less than rupees ten lakhs;

(ii) in any other case, be punishable 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 rupees five lakhs.

(3) Whoever, conspires, organises or causes to be organised any organisation, association or a group of persons for terrorist acts, or assists, facilitates or otherwise conspires to engage in any act preparatory to any terrorist act, shall be punishable 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 rupees five lakhs.

(4) Any person, who is a member of terrorist organisation, which is involved in terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than rupees five lakhs.

(5) Whoever, intentionally harbours or conceals or attempts to harbour or conceal any person who has committed an offence of any terrorist act shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to imprisonment for life, and shall also be liable to fine which shall not be less than rupees five lakh:

Provided that this sub-section shall not apply to any case in which the harbour or concealment is by the spouse of the offender.

(6) Whoever, holds any property directly or indirectly, derived or obtained from commission of terrorist act or proceeds of terrorism, or acquired through the terrorist fund, or possesses, provides, collects or uses property or funds or makes available property, funds or financial service or other related services, by any means, to be used, in full or in part to carry out or facilitate the commission of any terrorist act, shall be punishable with imprisonment for a term which may extend to imprisonment for life and shall also be liable to fine which shall not be less than rupees five lakhs and such property shall also be liable for attachment and forfeiture.

Explanation.— For the purposes of this section,––

(a) "terrorist" refers to any person who—

(i) develops, manufactures, possesses, acquires, transports, supplies or uses weapons, explosives, or releases nuclear, radiological or other dangerous substance, or cause fire, floods or explosions;

(ii) commits, or attempts, or conspires to commit terrorist acts by any means, directly or indirectly;

(iii) participates, as a principal or as an accomplice, in terrorist acts;

(b) the expression "proceeds of terrorism" shall have the same meaning as assigned to it in clause (g) of section 2 of the Unlawful Activities (Prevention) Act, 1967;

(c) "terrorist organisation, association or a group of persons" refers to any entity owned or controlled by any terrorist or group of terrorists that—

(i) commits, or attempts to commit, terrorist acts by any means, directly or indirectly;—

(ii) participates in acts of terrorism;—

(iii) prepares for terrorism;—

(iv) promotes terrorism;—

(v) organises or directs others to commit terrorism;—

(vi) contributes to the commission of terrorist acts by a group of persons acting with common purpose of furthering the terrorist act where the contribution is made intentionally and with the aim of furthering the terrorist act or with the knowledge of the intention of the group to commit a terrorist act; or

(vii) is otherwise involved in terrorism; or

(viii) any organisation listed in the First Schedule to the Unlawful Activities (Prevention) Act, 1967 or an organisation operating under the same name as an organisation so listed.

XIX. Clause 115 – Voluntarily causing grievous hurt

(1) Whoever voluntarily causes hurt, if the hurt which he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

(2) Whoever, except in the case provided for by sub-section (3), voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Explanation.—A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said voluntarily to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

Illustration.

A, intending of knowing himself to be likely permanently to disfigure Z's face, gives Z a blow which does not permanently disfigure Z's face, but which causes Z to suffer severe bodily pain for the space of fifteen days. A has voluntarily caused grievous hurt.

(3) Whoever commits an offence under sub-section (1) and in the course of such commission causes any hurt to a person which causes that person to be in permanent disability or in persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life.

(4) When grievous hurt of a person is caused by a group of five or more persons on the ground of his, race, caste, sex, place of birth, language, personal belief or any other ground, each member of such group shall be guilty of the offence of causing grievous hurt, and shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

XX. Clause 150 – Acts endangering sovereignty unity and integrity of India

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.

XXI. Clause 195 – Imputations, assertions prejudicial to national integration

(1) Whoever, by words either spoken or written or by signs or by visible representations or through electronic communication or otherwise,—

(a) makes or publishes any imputation that any class of persons cannot, by reason of their being members of any religious, racial, language or regional group or caste or community, bear true faith and allegiance to the Constitution of India as by law established or uphold the sovereignty and integrity of India; or

(b) asserts, counsels, advises, propagates or publishes that any class of persons shall, by reason of their being members of any religious, racial, language or regional group or caste or community, be denied, or deprived of their rights as citizens of India; or

(c) makes or publishes any assertion, counsel, plea or appeal concerning the obligation of any class of persons, by reason of their being members of any religious, racial, language or regional group or caste or community, and such assertion, counsel, plea or appeal causes or is likely to cause disharmony or feelings of enmity or hatred or ill-will between such members and other persons; or

(d) makes or publishes false or misleading information jeopardising the sovereignty unity and integrity or security of India, shall be punished with imprisonment which may extend to three years, or with fine, or with both.

(2) Whoever commits an offence specified in sub-section (1) in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies, shall be punished with imprisonment which may extend to five years and shall also be liable to fine.

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