

## ERGO

*Analysing developments impacting business*

### HIT REFRESH: INDIA'S CRIMINAL LAWS (PART 1 OF 3): KEY HIGHLIGHTS OF BHARATIYA NYAYA SANHITA, 2023

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#### **Introduction**

In a far-reaching development for individuals and businesses with an India connection, three seminal legislations, namely, Bharatiya Nyaya Sanhita, 2023 (BNS), Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) and Bharatiya Sakshya Adhinyam, 2023 (BSA) were published in the Official Gazette on 25 December 2023. The said legislations will replace the long standing Indian Penal Code, 1860 (IPC), the Code of Criminal Procedure, 1973 (CrPC) and the Indian Evidence Act, 1872 (IEA) respectively. While the new legislations have already been published for general information, they are likely to come into force only later in 2024 due to administrative and logistical reasons.

In Part I of this ERGO series, we outline some of the significant changes introduced by the BNS which will substantially impact the criminal justice system in the country.

➤ **Economic offences and organised crimes:**

The IPC did not specifically deal with “economic offences” or “organised crimes” *per se*, which the BNS has sought to address.

Under the BNS, “organised crime” has been defined as any continuing unlawful activity including *inter alia* economic offences, cyber-crimes, extortion, land grabbing, trafficking of illicit goods or services, done by an individual or a group of people, either as an organised crime syndicate or on behalf of such syndicate, by use of violence or threat of violence or any other unlawful means to obtain direct or indirect material/ financial benefit. In this context:

- “Economic offences” have been defined to include criminal breach of trust, forgery, counterfeiting, *hawala* transactions, mass-marketing fraud or running any scheme to defraud several persons or doing any act in any manner with a view to defraud any bank or financial institution or any other organization for obtaining monetary benefits in any form; and
- “Continuing unlawful activity” has been defined to mean an activity prohibited by law which is a cognizable offence punishable with imprisonment of 3 or more years undertaken by any person either singly or jointly, as a member of an organised crime syndicate or on behalf of such syndicate, in respect of which more than 1 chargesheet has been filed before a Court within the preceding 10 years and where the Court has taken cognizance. In this regard, Section 2 (26) of the BNS defines “person” as including any company or association or body of persons, whether incorporated or not.

The BNS prescribes that if organised crimes lead to death of any person, the punishment is either death or imprisonment for life, along with a fine of not less than INR 1 million. Where organised crimes do not lead to death, the punishment ranges between 5 years' imprisonment to imprisonment for life, along with fine of not less than INR 0.5 million. The linkage of "economic offences" to such crimes poses an increased risk to businesses and their officers since they could be dragged within the purview of "organised crime" (that too without any prior conviction). Given that the BNS also penalizes abetment from outside India of offences committed in India, foreign entities can also be sought to be made liable for acts of their Indian subsidiaries or sister concerns.

➤ Selective gender neutrality for different sexual offences:

The BNS has made sexual offences gender neutral in a selective manner. For example: (1) "Sexual harassment" has been made completely gender neutral with respect to victims, but exclusively male for offenders; (2) The offences of voyeurism, assault or use of criminal force against a woman with intent to disrobe, etc. makes the offenders gender neutral while the victim can only be a woman; and (3) Only men can be perpetrators and only women can be victims under offences such as rape and stalking. Further, the BNS also criminalizes sexual intercourse with a woman under "deceitful means" which shall include inducement for, or false promise of employment or promotion, or marrying by suppressing identity. These developments will have to be factored in by businesses while dealing with cases of sexual offences at the workplace.

➤ Broader definition of "gender":

The BNS also widens the definition of the term "gender" to include transgender persons, i.e., in line with the definition contained under the Transgender Persons (Protection of Rights) Act, 2019.

➤ Terrorist acts:

In keeping with India's strong stance against all forms of domestic and international terrorism, the BNS contains a specific definition for "terrorist act" to mean any act committed with the intent to threaten or likely to threaten the unity, integrity, sovereignty, security, or economic security of India or with the intent to terrorize any section of the people in India or in any foreign country. The relevant section under the BNS on terrorist acts however results in two parallel legislations on terrorism [since the definition of "terrorist act" is similar to Section 15 of Unlawful Activities (Prevention) Act, 1967 (UAPA), India's special anti-terror legislation, as amended in 2013]. Therefore, there is likely to be some overlap in the implementation of processes under the BNS and UAPA.

➤ Community service:

A significant addition in the BNS is the introduction of community service as a form of punishment as an alternative to imprisonment and fines. This is applicable to certain lesser offences such as non-appearance in response to a proclamation, defamation, petty thefts, etc.

This is a welcome step as it will reduce the burden on prison infrastructure. However, there is a lack of clarity on what constitutes community service and how it shall be implemented, as the BNS has not clearly defined the term 'community service' nor does it contain any provisions on which authority shall be responsible for supervising the punishment given in the form of community service.

### Conclusion

The enactment of the BNS marks a significant stride towards modernizing India's legal framework. The formal recognition of organised crime and economic offences as serious threats to contemporary society, the inclusive definition of transgender persons along with more gender-neutral provisions for sexual offenses, the introduction of community service, etc reflects a progressive approach. However, there are likely to be challenges on certain fronts, including: (1) Retrospective application of serious penal provisions (eg: the definition

of "continuing unlawful activity" where previous chargesheets going back 10 years in time, that too even without any conviction, can attract the offence of "organised crime"); (2) Departure from the prevailing 'rarest of rare' jurisprudence to attract death penalty (eg: even an "economic offence" which has led to the death of a person could attract death penalty for the offender if the same falls within the purview of an "organised crime"); (3) Inequality in the protection of males and sexual minorities who could be victims of sexual offences; (4) Lack of clarity in the treatment of continuing offences which commenced during the subsistence of the IPC and continue after the coming into force of the BNS; (5) Failure to recognize marital rape as an offence; (6) Overlap between UAPA and BNS in respect of terrorist acts; and (7) Scope for misuse of vague terms by investigating authorities (such as "any other unlawful means" in the context of "organised crimes"), etc. The BNS, while a commendable effort at overhauling India's archaic criminal justice system, warrants ongoing scrutiny for effective implementation.

- Ganesh Prasad (Partner), Ganapathy Subbiah (Partner), BN Vivek (Principal Associate) and Insaf Ahamad (Associate).

For any queries please contact: [editors@khaitanco.com](mailto:editors@khaitanco.com)