



INDIAN JOURNAL OF LEGAL AFFAIRS AND RESEARCH

VOLUME 3 ISSUE 1

Peer-reviewed, open-access, refereed journal

IJLAR

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Introduction

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Preface

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

Description

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

UNMAKING CRIME: A CRITICAL ANALYSIS OF DECRIMINALIZATION TRENDS IN INDIAN CRIMINAL LAW

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Abstract

This paper offers a critical examination of India's complicated story of penal reform from the colonial Indian Penal Code (IPC) to the Bhartiya Nyaya Sanhita (BNS). This analysis contends that the BNS is a legislation that is paradoxical in its decolonizing rhetorical stance because while it advances progressive reform, it simultaneously adheres to entrenched colonial and patriarchal continuities. Analysing India's unfolding through a comparative lens with the U.S. and U.K. contexts, the study shows that India's decriminalization was primarily driven by judicial activism as judiciary makes determinations toward a lofty rights-standards to which the legislature has been historically unable or unwilling to achieve. Through a thematic review of key offenses, from morality-based laws on sexuality and suicide to statutes governing dissent or gender-based violence, this report argues that BNS' contradictions are overwhelmingly a function of a sharp contrast between the legislative promise of the BNS and its substantive provisions. A central argument, therefore, is the need for penal reform encompassing philosophical commitments to end the current systems of oppression, and to make the statutory law consistent with the constitutional injunctions, by which it will be able to achieve dignity, equality, and liberty.

Keywords

Decriminalization, Indian Penal Code (IPC), Bhartiya Nyaya Sanhita (BNS), Constitutional morality, Social Change, Policy reform, Human rights, Legislative intent.

1. Introduction: The Contested Terrain of Indian Penal Reform

Decriminalization refers to removing criminal sanctions or penalties for certain behaviour and is an important response to the issue of over-criminalization, which occurs when laws continue to penalize behaviours that, in contemporary society, are inconsistent with social ideals or constitutional principles. Decriminalization is central to re-balancing the relationship between the state, individual autonomy, and social norms, as laws often move away from punitive responses to regulatory or rehabilitative responses. Within the Indian context, the 1860 Indian Penal Code (IPC) which created a unified code of criminal conduct, and was established as part of the colonial regime, has faced scrutiny for its role in the problem of over-criminalization in India. A historical critique of Section 377 as a "Spectre" of these colonial laws has been provided by legal expert Usha Ramanathan. Many of the IPC's provisions, which were inherited from Victorian morality, criminalized social mores and private behaviour rather than harm to the public, making them a tool of state power and control.¹ The persistence of these old laws in a democratic, post-colonial state has been the main point of contention in Indian legal discourse. The ongoing debate over the decriminalization of sex work, also illustrates this tension between morality, social norms, as well as legal reform.

In recent decades, the shift away from these punitive, morality-based laws has been significantly done by the Indian judiciary, mainly by the Supreme Court. In landmark judgments like *Navtej Singh Johar v. Union of India* (2018)² and *Joseph Shine v. Union of India* (2018)³, The judiciary intervened to repeal outdated clauses that were thought to be in conflict with the equality, privacy, and dignity tenets of the constitution. These courts' modifications changed the scope of state oversight and established a very high bar that puts rights at the forefront of criminal reform. This court-centred path is now juxtaposed against the recent introduction of the *Bhartiya Nyaya Sanhita* (BNS), which took effect on July 1, 2024, to replace the IPC. It is stated that the reason for replacing the IPC is "to modernise the criminal justice system" and eliminate colonial legacies. This paper critically analyses whether the BNS lives up to this promise. The main point is that the BNS (the modernized faults) is paradoxical legislation with inner contradictions. The BNS, on the

¹ Usha Ramanathan, *On eminent domain and sovereignty*, *India-Seminar*, No. 613 (2010).

² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

³ *Joseph Shine v. Union of India*, (2018) 5 SCC 1.

one hand, seeks reform (example: decriminalizing attempted suicide), while also reinforcing colonial continuities (e.g. the exception for marital rape, reimagining the sedition law). This analysis will highlight the disconnect between the legislature's rhetorical promise and its substantive provisions. The paper examines legal reforms related to this journey by using comparative legal methods, which compares the United States and the United Kingdom, which have considerably more analogous discussions regarding morality violations and personal autonomy. The analysis highlights the advantages, disadvantages, and potential future developments of this continuing socio-legal process by looking at these jurisdictions and placing India's decriminalization rhetoric within a larger global narrative of criminal law change.

2. The Judicial Catalysts of Decolonization (Pre-BNS)

Before the enactment of the BNS, the Indian judiciary, mainly the Supreme Court, served as the primary agent of penal reform. This approach was rooted in the Court's invocation of "constitutional morality," a doctrine that prioritizes the core values of the Constitution over majoritarian or public morality. This judicial stance not only invalidated outdated laws but also proactively affirmed constitutional principles as the ultimate arbiters of justice.

Constitutional Morality and the Disassembly of Morality-Based Offences

In two seminal rulings, the concept of constitutional morality was most forcefully expressed. The first, *Navtej Singh Johar v. Union of India* (2018), was a landmark case where a Constitution Bench read down Section 377 IPC to decriminalize consenting same-sex relationships. The Court upheld the requirement that the discriminatory sections of a colonial-era legislation be superseded by the constitutional values of equality, liberty, and human dignity as provided by Articles 14 and 21. The LGBTQ+ community was validated as "equal moral members" of the political community through a socio-legal process, rather than a simple mechanical repeal. This legal reasoning was built on the foundation of the privacy doctrine established in *Justice K.S. Puttaswamy v. Union of India* (2017)⁴. A crucial application of this jurisprudence was the decriminalization of homosexuality, which also went beyond the primarily liberal framework of defending a private act. The Court's ruling, according to Gautam Bhatia's commentary, contained the anti-

⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

subordination principle, which maintains that a legislation is unlawful not only because it treats certain groups unfairly but also because it intentionally perpetuates power disparities and social subordination.⁵ This marked a significant jurisprudential evolution, where the Court's role shifted from merely telling the state what it could not do (interfere with private lives) to mandating what the state must do (ensure substantive equality and dignity). The courts responded more forcefully to the interests of the LGBTQ+ community by enforcing constitutional morality on societal norms, which is a useful way for them to exercise their rights rather than a formal and abstract one. The legalization of Section 377 is further contextualized as a critical human rights issue for India in the work of legal expert Siddharth Narrain.⁶

A similar application of constitutional morality was seen in *Joseph Shine v. Union of India* (2018)⁷, wherein the Supreme Court invalidated the adultery-related Section 497 IPC. It was determined that the clause violated Articles 14 and 21 because it denied a woman's sexual autonomy and agency by treating her as her husband's property.⁸ A critical gender justice perspective on this decision is offered by legal expert Mrinal Satish, who emphasizes how it called into question the patriarchal foundations of the law. These court rulings set a high, rights-based bar for later legislative reform initiatives by demonstrating that the courts were prepared to overturn legislation based on patriarchal and colonial ideas of morality in the absence of legislative action.⁹

A Humane Shift: The Decriminalization of Attempted Suicide

For a long time, the crime of attempting suicide under Section 309 of the IPC constituted a contentious nexus of public health, morality, and criminal law.¹⁰ On this issue, judicial interpretation was nuanced. In *Gian Kaur v. State of Punjab* (1996), a Constitution Bench maintained the validity of Section 309, despite an earlier bench considering overturning the

⁵ Gautam Bhatia, *The Unbearable Wrongness of Koushal vs Naz Foundation, Constitutional Law & Philosophy* (Dec. 11, 2013), <https://indconlawphil.wordpress.com/2013/12/11/the-unbearable-wrongness-of-koushal-vs-naz-foundation>

⁶ Alankaar Sharma, *Decriminalising Queer Sexualities in India: A Multiple Streams Analysis*, 7 *Social Pol'y & Soc'y* 419 (Oct. 2008), <https://doi.org/10.1017/S1474746408004399>

⁷ *Joseph Shine v. Union of India*, (2018) 5 SCC 1

⁸ Indian Penal Code, No. 45 of 1860, India Code.

⁹ Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge Univ. Press 2017) (Eng.).

¹⁰ Indian Penal Code, No. 45 of 1860, India Code.

clause.¹¹ However, this ruling, which stated that the “right to life” did not include a “right to die,” also left the door open for Parliament to repeal or reform the law.

A policy shift began with the enactment of the Mental Healthcare Act (MHCA), 2017, which effectively neutralized Section 309 in practice.¹² According to Anup Surendranath, the MHCA reflected a more humanitarian view of human dignity by redefining suicide attempts as a public health concern associated with "severe stress" as opposed to a criminal offense.¹³ The BNS has since advanced this change by wilfully omitting a general offense corresponding to Section 309, and the provision of liability is confined to rare situations in which self-harming behaviour occurs with the intent to coerce public authorities. This is a compelling example of principled, rights-based law reform that prioritizes care over punishment.

One strong illustration of future criminal reform that will give procedural changes real substance is the decriminalization of attempted suicide. This is a rare instance of a successful multi-faceted process that included judicial interpretation, specific legislative change (MHCA), and a final reformatory structural reform by the BNS. In the vast majority of cases, the legislature has either fallen behind judicial outcomes or created ambiguous law. It demonstrates how a more humane significant legal framework can result from the junction of judicial ethos, legislative will, and rephrasing how society constructs a problem.

When seen from a comparative standpoint, India's reform fits into a larger global trend. A significant move towards a public health model was made in the UK when the Suicide Act of 1961 decriminalized both suicide and attempted suicide.¹⁴ In a similar vein, attempted suicide is no longer typically prosecuted in the United States and is instead mostly addressed through prevention, crisis intervention, and mental health therapy. They show that decriminalizing attempted suicide does not negate the protective role of criminal law; rather, it redirects protections toward support and prevention. The success of India will depend on whether Parliament and state governments are willing to uphold the MHCA's commitment to having operational mental health

¹¹ *Gian Kaur v. State of Punjab*, (1996) 2 SCC 648.

¹² Mental Healthcare Act, No. 10 of 2017, India Code.

¹³ Mental Healthcare Act, No. 10 of 2017, India Code.

¹⁴ Suicide Act 1961, 9 & 10 Eliz. 2, c. 60 (UK).

systems in place, which has not been turned into an implementation challenge in the U.K. and U.S., despite the fact that its trajectory is qualitatively consistent with these global movements.

3. The Legislative Paradox: Continuity and Contradiction in the Bhartiya Nyaya Sanhita

Although the BNS aimed to replace the IPC and heralded as a major milestone towards decolonizing the criminal justice system of India, the extensive analysis shows a new law filled with contradictions that advanced reform while also simultaneously retaining colonial continuities. The following table and later analysis illustrate this legislative paradox.

The Unresolved Anomaly of Sexual Autonomy

The BNS's approach to sexual offenses is a prime example of its contradictory nature. The most significant contradiction lies in its retention of the marital rape exception. BNS Section 63, which defines the offense of rape, explicitly states that "Sexual intercourse or sexual acts by a man with his own wife... is not rape".¹⁵ This is a direct continuation of the marital rape exception from the IPC's Section 375, and it stands in stark conflict with the constitutional principles of dignity, equality, and bodily integrity articulated in landmark judicial decisions such as *Puttaswamy* and *Joseph Shine*. The law effectively denies married women the right to bodily autonomy and consent, discriminating against them on the basis of their marital status.

The legislature has failed to provide remedy for this bad law, which results in basic injustice by keeping this outdated law in place. It is a purposeful legislative decision that disregards international human rights responsibilities, court precedent, and a 1971 Law Commission Report that suggested eliminating the exception.¹⁶ The legislature is more likely to repeal colonial laws that govern state authority than laws that challenge ingrained patriarchal values, as evidenced by the retention of this provision, which was directly taken from English colonial law, in a purported decolonization effort. Political resistance motivated by social values like the "sacred state of marriage" to defend not making marital rape a crime was the source of this legislative sloppiness.

¹⁵ Bhartiya Nyaya Sanhita, No. 45 of 2023, India Code.

¹⁶ Law Commission of India, *42nd Report: Indian Penal Code* (1971).

This represents a new interpretation of colonial continuity in maintaining a legal system that interprets women as acting without independent agency and autonomy, as well as a reframing and re-patriarchization of the law under a new section.

A similar contradiction is seen in the BNS's treatment of adultery. While the BNS omits the general offense of adultery from the IPC, it introduces BNS Section 84, which criminalizes "enticing or taking away... a married woman" with criminal intent for the purpose of "illicit intercourse".¹⁷ This rephrasing, as noted by academic Mrinal Satish, is a legislative failure that upholds the patriarchal idea that a man has property rights over his wife.¹⁸

Legislative Gaps and the Denial of Equality

The BNS's omissions reveal as much about its contradictions as its retained provisions. The most notable omission is the general offense under IPC Section 377, which criminalized "unnatural offences" and was primarily used to target sexual violence against men and transgender persons. Siddharth Narrain and other legal professors and activists have characterized this as a crucial human rights problem. A substantial "legislative gap" has been formed, despite the fact that the removal of this colonial-era clause is portrayed as a step toward decolonization. According to legal experts and activists, males and transgender people lack special legal rights against non-consensual sexual violence because there is no gender-neutral substitute. A glaring legislative failure occurred when the BNS ignored the Justice Verma Committee's recommendation to make rape a gender-neutral crime. This was a clear legislative failure on the part of the legislature.¹⁹

The judiciary's deference in the marriage equality case of *Supriyo v. Union of India* exacerbates this legislative inaction. Citing the separation of powers, the Supreme Court in that instance refused to give the right to marry, referring the issue to Parliament.²⁰ The courts, which were the primary decriminalization mechanism in *Navtej*, are now cautious, and the legislature has failed to address the legal gap that has been created. This leads to a significant dilemma. The first rights-

¹⁷ Bharatiya Nyaya Sanhita, No. 45 of 2023, India Code

¹⁸ Mrinal Satish, *Discretion, Discrimination and the Rule of Law: Reforming Rape Sentencing in India* (Cambridge Univ. Press 2017) (Eng.).

¹⁹ J.S. Verma Comm., *Report of the Committee on Amendments to Criminal Law* (2013).

²⁰ *Supriyo v. Union of India*, 2023 INSC 920.

based pledge made by the courts has not been realized because of the dichotomy of judicial restraint and legislative stagnation, even if there is a lack of political desire to accomplish fundamental reform. All people's fundamental rights go unmet because of the system's overall lack of political as well as legal will.

The Re-Criminalization of Dissent

Perhaps the most significant contradiction within the BNS is its treatment of the sedition law. For decades, Section 124A of the IPC was a contentious provision, widely criticized for being a colonial tool used to suppress political dissent and free speech. Despite removing the word "sedition," the BNS replaces it with Section 152, which is captioned "Acts endangering sovereignty unity and integrity of India."²¹

A critical comparison reveals that this is a change in name but a continuity of purpose, with the potential for even greater abuse. BNS Section 152 punishes anyone who "purposely or knowingly, by words...excites or attempts to excite, secession or armed rebellion or subversive activities, or encourages feelings of separatist activities."²² By replacing the previous, judicially specific terms ("hatred or contempt") with more ambiguous and expansive ones like "subversive activities" and "endangering sovereignty," the new clause gives the government more freedom to abuse its power against journalists and activists. In addition, the sentence for the offense has been raised from the three years specified by the IPC to up to seven years or life imprisonment.

Such regulations are really intended to have a "chilling effect" on free expression rather than to effectively prosecute. The old sedition statute had a relatively low conviction rate (only 12 out of 475 cases between 2014 and 2021), according to data from the National Crime Records Bureau (NCRB), suggesting that it was widely abused rather than successfully prosecuted.²³ By enacting a new provision with broader terms and providing more punishment, the legislature has effectively undermined the judicial safeguard established in *Kedar Nath Singh v. State of Bihar* (1962), which had narrowed the scope of sedition to "incitement to violence".²⁴ According to scholar Alok

²¹ Bharatiya Nyaya Sanhita, No. 45 of 2023, India Code.

²² Bharatiya Nyaya Sanhita, No. 45 of 2023, India Code.

²³ National Crime Records Bureau, *Crime in India Report* (2014-2021).

²⁴ *Kedar Nath Singh v. State of Bihar*, AIR 1962 SC 955.

Prasanna Kumar, this action shows a persistent preference for state authority over individual liberties. Dissent has been recriminalized by the BNS under a new, potentially riskier, and less judicially examined provision, rather than being fully decriminalized.²⁵

4. Over-Criminalization as a Systemic Problem

The Proliferation of Vague Laws

The BNS's paradoxes are not isolated incidents; rather, they are signs of a larger problem: overcriminalization. Although the quantity of laws is the traditional definition of overcriminalization, a more thorough examination shows that the problem is also qualitative. It is not only the fact that there are too many criminal laws, but many of them are also not properly defined, excessively general, and lack sufficient mens rea requirements. The BNS's recriminalization of sedition is the best example of the criminal code's poorly defined qualitative decline.

Researchers contend that courts, in their "misguided quest" to convict individuals charged with ambiguous statutes, can make the problem of over-criminalization worse. The BNS's Section 152 employs vague phrases, such as "subversive activities" and "endangering sovereignty," that perfectly embody this statement. This allows the state to criminalize nearly all dissent without having to prove a specified incitement to violence as required by the prior judicial standard. The wording's ambiguity increases the possibility of abuse against activists and journalists. As such, there's reason to believe that the BNS's new powers may not serve to provide remedy to the issues of over-criminalization, but rather represent a contemporary interpretation of it, and hence completely removing the dynamics of a population governed by very old and archaic colonial laws under the pretext of "legislatively based" overreach.

State Power and Punitive Populism

The BNS's focus on new, harsher crimes like mob lynching, and its maintenance of vague and sweeping laws, can be seen as an example of "punitive populism," a political approach in which being viewed as "tough on crime" is prioritized above the protection of individual rights and due process. This relates to the growing worry about the "criminalization of politics" in India, where

²⁵ Alok Prasanna Kumar, *Sedition and the Misuse of Laws*, 57 Econ. & Pol. Wkly. 10 (2022).

many elected politicians are accused of a variety of crimes and abuse their position of authority to circumvent or evade the law.

The existence of criminal politicians perpetuates a systemic inclination toward just carrying out or maintaining punitive laws that protect state power. The judiciary has called for proactive action, while the Law Commission and other bodies have frequently suggested actions to reduce the influence of criminal forces in politics.²⁶ In light of this, the BNS imposes harsher penalties and gives the government more discretion in repressing opposition, as seen by Section 152. This implies that political motivations that aim to demonstrate a certain level of strength and cement state power, even at the expense of an individual's rights, freedom and civil liberties, have a significant impact on the legislative process and are not solely motivated by or are based on a core decolonization objective.

5. Comparative Jurisprudence and Societal Contexts

India's decriminalization trajectory, which relies on multiple varieties of judicial action, is understandable through comparison. In other common law jurisdictions, penal reform can also be a controversial process, however, the involvement and participation of judges and legislatures appear to differ and offer potentially important lessons for India.

The Role of Courts and Legislatures

The Wolfenden Report from 1957 served as the catalyst for the slow, legislatively driven decriminalization of homosexuality in the United Kingdom. The report suggested that private homosexual relationships between consenting adults need to be exempted from criminal law, stating that laws should only address behaviours that violate public decency and not morality or ethics.²⁷ This paved the way for the *Sexual Offences Act 1967*, which decriminalized homosexual acts in private between men over the age of 21.²⁸ The law, however, was limited in scope, initially applying only to England and Wales and maintaining a higher age of consent for gay men.

²⁶ Law Commission of India, *42nd Report: Indian Penal Code* (1971)

²⁷ The Wolfenden Report, *Report of the Committee on Homosexual Offences and Prostitution*, Cmnd. 247 (1957).

²⁸ Sexual Offences Act 1967, c. 60 (UK).

The United States underwent a "patchwork" of legislative and judicial repeals of sodomy laws at the state level. The Illinois legislature was the first one to repeal its sodomy law in 1961, purportedly at the suggestion of the American Law Institute, and this process continued through the mid-to-late 20th century. This gradual process consequently resulted in the federal Supreme Court's landmark intervention in *Lawrence v. Texas* (2003), which invalidated sodomy laws across the United States. In *Lawrence*, the Court made it clear that the substantive due process clause of the Fourteenth Amendment protected the right to engage in intimate, consensual sexual activity.²⁹ This decision, which overturned the earlier *Bowers v. Hardwick* (1986)³⁰ ruling, was a breakthrough for the gay rights movement and it furthermore set the stage for later federal decisions on same-sex marriage.

he ruling in *Minister of Home Affairs v. Fourie* (2005) by the South African Constitutional Court provides a crucial point of reference. Similar to the marriage equality case in India, the South African Court had to deal with legislative inaction on same-sex couples' ability to get married. But the Court did not submit to the legislation. Rather, it unanimously determined that the common law definition of marriage, which did not include same-sex couples, was unconstitutional and ordered Parliament to enact a new law within a year to correct the flaw.³¹ This approach highlights a fundamental difference in judicial philosophy: a proactive judicial mandate versus judicial restraint. This shows that the legislative contradictions in India are not completely a failure of the legislature but are also, in part, a consequence of judicial restraint that has left the implementation of fundamental rights to a political process which is resistant to a detailed and comprehensive reform.

Lessons from Global Penal Reform

Even though varied legal systems have taken such different routes, the end result, ultimately, has been a shift away from moral offences toward a scheme that favours individual autonomy and dignity. The reform of homosexuality laws in the United Kingdom was a long, slow, legislative journey. The reform was driven by the publication of the 1957 Wolfenden Report, which led to

²⁹ *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁰ *Bowers v. Hardwick*, 478 U.S. 186 (1986)

³¹ *Minister of Home Affairs v. Fourie*, 1 All SA 273 (SCA).

the passing of the Sexual Offences Act in 1967, which permitted homosexual acts between consenting adults. This was very much a parliamentary process, which took place in the context of the sociopolitical discussions at the time and within the framework of a modernising British legal system, which was marked by fervent debates and a slow cultural shift.

Reform in the US was a patchwork of state repeals and court cases that led to a single, historic ruling by the Supreme Court. Illinois was the first state to eliminate its sodomy statute in 1961, following the American statute Institute's 1955 recommendation for decriminalization.³² After a setback in *Bowers v. Hardwick* (1986), the Supreme Court, in *Lawrence v. Texas* (2003), finally overturned its prior decision and invalidated all remaining state sodomy laws, affirming a constitutional right to privacy and liberty.

India's journey, with its reliance on judicial activism to strike down old and archaic laws, more closely mirrors the US trajectory. These examples provide a critical lesson for India, that while the judiciary can catalyse change, sustained and comprehensive reform requires robust legislative action to avoid legal voids and contradictions.

Societal Attitudes and Cultural Factors

The pace and character of decriminalization are significantly influenced by social ideas and ingrained cultural expectations. In India, the "sacred nature of marriage" is frequently invoked as an excuse for not making marital rape a crime and demonstrates a strong aversion to change outside of legal reform. Although legal change cannot occur in a vacuum, it has the potential to alter societal perceptions.

An important piece of evidence supporting this effect comes from an empirical study which was conducted by Jindal Global Law School. According to the study, sexual minorities' quality of life significantly improved when homosexuality was decriminalized in Delhi. The results further showed that the Delhi High Court's decision had led to a "reduction in harassment by state actors" and also an increase in "self-confidence" among the LGBTQ+ community. According to the

³² 1961: *The Decriminalization of Sodomy*, "Chicago Gay and Lesbian History 1924-1979, Gerber/Hart Library & Archives (2021), <https://exhibits.gerberhart.org/exhibits/show/chicago-lgbtq-history-1924-197/sodomy>

research, the decriminalization of homosexuality led to increased social acceptability and more significantly, self-acceptance. It also improved the self-esteem and self-worth of people who previously believed that their actions were not legal.³³ This clearly shows that legal changes, by affirming constitutional principles, can produce a positive shift in public perception and human dignity, producing real-world examples.

6. Findings

The analysis reveals that the BNS is a "Janus-faced" piece of legislation, which, while framed as a modernizing and decolonizing effort, simultaneously advances progressive reforms while retaining and even strengthening colonial and patriarchal continuities.

1. Judicial Activism

Prior to the BNS, the Indian judiciary, particularly the Supreme Court, has been at the forefront of penal reform by relying upon the "constitutional morality" doctrine to invalidate antiquated morality-based laws. This established a precedent, as was the case in *Navtej Singh Johar v Union of India* (2018), which decriminalised consensual same-sex relationships, and in *Joseph Shine v Union of India* (2018), which nullified the adultery law. Decriminalisation of attempted suicide illustrates one, of few, successful multi-faceted reforms accomplished through a combination of judicial interpretation, s. 115(1) of the Mental Healthcare Act 2017, and the BNS's substantive reform.

2. The Contradictions

The BNS' treatment of sexual offenses is another example of its contradictory nature. It keeps the marital rape exception, which literally counters constitutional principles of dignity and equality, and it re-frames the adultery law to support the patriarchal notion that a man has a property claim over his wife. Perhaps the biggest shortcoming, however, lies in how the BNS re-criminalizes dissent. The BNS replaces the already-tainted sedition law with a re-worded provision (Section 152) that is vaguer, and it increases penalties for those

³³ Dipika Jain, *Impact of the Decriminalization of Homosexuality in Delhi: An Empirical Study*, The Arkansas Journal of Social Change & Public Service (Jan. 13, 2013), <https://ualr.edu/socialchange/2013/01/13/impact-of-the-decriminalization-of-homosexuality-in-delhi-an-empirical-study>

guilty of the offense, as it actively undermines judicial safeguards, and, moreover, it is designed to have a “chilling effect” on free speech. The BNS also creates a “legislative gap” when it omits the offense that was previously recorded under IPC Section 377 without providing any gender-neutral or explicitly gendered alternative for sexual violence against men and transgender persons. This combination of inactivity and the judiciary’s recent turn to restraint creates a legal vacuum whereby fundamental rights will be certainly articulated in principle but will not present themselves in statutory law for citizens of all genders.

3. Comparative Context

India's route to decriminalization, depending on judicial activism, is clearly closer to the U.S. than the slow, gradual, legislatively-driven process of the U.K. An important takeaway for India is that while courts can act as a spark, extensive and enduring reform is achieved through strong legislative reform to address legal vacuums and contradictions identified in the BNS. The BNS paradoxes further underscore a deeper and ongoing ideological battle between a liberal, rights-based democracy and a political agenda based on majoritarianism and punitive populism.

7. Conclusion and Policy Recommendations

The road to decriminalization within the Indian criminal law system is a complicated, multi-layered process, and the BNS is an essential moment in that path. This review has indicated that the BNS represents an instance of "Janus-faced" reform: the BNS, on the one hand looks ahead to a modern, decolonized future, while it simultaneously remains firmly entrenched in the patriarchal and anti-dissent continuities of colonial times. This disjuncture creates an inherent tension between the BNS's reformist rhetoric and the substance of its provisions.

It is clear that India's decriminalization story is essentially a story of judicial activism, and the legislature is often far behind or introduces new statutes to create new contradictions. The marriage rape exception, the re-framing of adultery, and the re-criminalization of dissent by a new name are not singular deviations; rather they are indications of a continual systemic reluctance of a complete acceptance of constitutional values of dignity, equality, and liberty in the legislative domain. The

legislative abandonment in creating other gender-neutral alternatives to section 377 alongside the deference given to judges in the marriage equality case illustrates the ongoing political and legal inertia around the enjoyment of fundamental rights of all citizens.

This research indicates that in order to resolve these inconsistencies and bring India's criminal code into line with its constitutional principles, a clear course of action is required.

- **Adopt a Principled Decriminalization Roadmap:** The Parliament or a dedicated Law Commission should be given the responsibility of drafting a comprehensive plan to enact a future penal reform. This should be based on an unambiguous, harm-based standard which ensures that crime is reserved for acts that could clearly and presently threaten public order and safety of persons as opposed to private conduct or morality.
- **Legislative Follow-up to Judicial Decisions:** To avoid the legal voids and contradictions seen with the BNS, it is imperative for the legislature to promptly and comprehensively act in response to landmark judicial decisions. This includes drafting a gender-neutral law for sexual violence following the omission of Section 377 and legislating on the matter of marriage equality as contemplated by the Supreme Court in *Supriyo*.³⁴
- **Rights-Protective Drafting:** Future laws must be carefully crafted to steer clear of ambiguous and excessively general language. With its vague definitions of phrases like "subversive activities," BNS Section 152 is one example of a provision that has to be changed or deleted in order to conform to the standards of proportionality and due process.
- **Health-Centred Responses:** The successful decriminalization of attempted suicide gives us a starting point for a morally sound approach to criminal justice reform. Substance abuse is one of the many problems that must be addressed, with an emphasis on strengthening and funding health and social care systems rather than harsh criminal penalties.
- **Public Education and Institutional Training:** Legislative reforms, however progressive they may be, will not have an impact unless there is a meaningful change in institutional practice. There needs to be a national public education and training program for law enforcement, the courts, and other state actors to avoid the chance that the legislative

³⁴ *Supriyo v. Union of India*, 2023 INSC 920.

reforms will be incorporated into practice in a manner that calls on older racist and oppressive mentalities

In conclusion, the Bhartiya Nyaya Sanhita is a step toward penal reform, but it is not the final one. Its inconsistencies highlight legitimate worries about decolonization as a commitment to changing an oppressive and patriarchal institution rather than just renaming and renumbering. In the end, the effectiveness of the current criminal justice system will depend on how well it applies equity, justice, and dignity to all of its citizens, not merely on whether the laws are more lucid or cohesive than those of the past.

