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NEW CRIMINAL LAWS: THE BLEND OF INDIANIZATION AND COLONIALITY IN BHARAT

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ABSTRACT

The trajectory of India has evolved from the rule of monarchy and coloniality to contemporary times where now there is a written constitution for effective administration and governance. However, when the constitution was drafted the provisions of the constitution were borrowed mainly from countries that colonized India before 1947 and the effect of colonization can also be seen in contemporary times when the laws are drafted for a swift transition from coloniality to Indianization. Still, the provisions are drafted in such a manner that the aspect of "Coloniality" is reflected in it which is ingrained in the minds of the lawmakers. This work attempts to understand the extent of the blend of coloniality and Indianization in the new criminal laws as these laws are claimed to be made in India and the names of these laws also include the word "Bhartiya" in it. It will also address the emerging challenges that can emanate from the advent of these new criminal laws.

INTRODUCTION

The origins of the criminal justice system in India can be traced back to the 19th century when Thomas B Macaulay was the Chairman of the Law Commission of India and under his directions, the Indian Penal Code (1860) was made.[1] This code provides for stringent punishments and penalties for the offenders. It was not only this substantive law but procedural law such as the Code of Criminal Procedure Code (1898) (amended as per 41st Law

[1] Chakshu Roy, 'IPC is History: In 1837, How Macaulay Cracked the Code' *The Indian Express* (31 August 2023) https://indianexpress.com/article/opinion/columns/ipc-is-history-in-1837-how-macaulay-cracked-the-code-8889911/ accessed 26 April 2025.

Commission report)[2] and the Indian Evidence Act (1872)[3] are also the "coercive blessings" bestowed upon us by the colonial rulers.

The limitations of such laws were experienced with the time when our nation had to witness several challenges ranging from child sexual abuse, gang rape and imposition of unrealistic fines by the old penal statute are now replaced by the new laws.[4] Earlier draconian laws such as the sedition under section 124A of the IPC had severe punishments but now the new made in India "Bhartiya Nyaya Sanhita" (BNS 2023) has deleted sedition which is a revolutionary reform as it was misused as a provision for restricting freedom of speech and expression which is a fundamental right under part III of the Indian constitution.[5]

The new India criminal laws were passed when 146 opposition MPs were suspended from the parliament which gave rise to the questions of sanctity of the new laws.[6] Nevertheless, the new laws were made keeping in mind the new criminal activities, the need of digital evidence, community service and to change the course of the justice system from punishments to the reformation of the offenders.

THE TRAJECTORY OF BHARAT WITH NEW CRIMINAL LAWS

The new criminal laws received presidential assets on 25th December 2023 and were enacted on 1st July 2024.[7] These laws are made to cater to the dynamic needs of society although there are many instances where the provisions of old criminal laws have been inserted within the fabric of the new criminal laws.

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[2] Law Commission of India, *41st Report: The Indian Penal Code* (1969) https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082436.pdf accessed 26 April 2025.

[3] *The Indian Evidence Act 1872* https://www.indiacode.nic.in/bitstream/123456789/15351/1/iea_1872.pdf accessed 26 April 2025.

[4] S Datta, 'History Revision: Why India's Colonial Laws Haven't Changed' (2014) 43(2) *Index on Censorship* 122 https://doi.org/10.1177/0306422014537155 accessed 26 April 2025.

[5] Shrushti Taori and Tatva Damania, 'Balancing Free Speech and National Security: A Critical Analysis of Section 152 of the Bhartiya Nyaya Sanhita and Section 124-A of the IPC' (*LiveLaw*, 19 April 2024) https://www.livelaw.in/lawschool/articles/balancing-free-speech-national-security-critical-analysis-section-152-bhartiya-nyaya-sanhita-section-124-a-ipc-259465 accessed 26 April 2025.

[6] PRS Legislative Research, *Functioning of the 17th Lok Sabha* (2024) https://prsindia.org/files/parliament/vital_stats/Functioning-17th_Lok_Sabha.pdf accessed 26 April 2025.

[7]President Droupadi Murmu Gives Assent to the Three Criminal Code Bills' *The Hindu* (26 December 2023) https://www.thehindu.com/news/national/three-bills-to-replace-british-era-criminal-laws-get-presidents-assent/article67674266.ece accessed 26 April 2025.

ANALYSIS OF THE THREE NEW CRIMINAL LAWS

(a) The Bhartiya Nyaya Sanhita (2023)

The BNS is made to cater for the needs of the reformatory justice system. The changes made in BNS are manifold ranging from uniform definitions of transgenders as per section 2[8] to community service as a punishment under sections (202-356(2)).[9]

The offence against women and children has been given precedence in chapter V which was scattered in the erstwhile penal code of 1860.[10]

The BNS provided for the amalgamation of all three offences namely attempt, abetment and conspiracy under one umbrella of Chapter IV.[11]

Community service as a way of reformative punishment has been introduced in section 4 of the BNS.[12] This section sheds light on community service which is a punishment that can be imposed under sections 202-356(2).

The offence of snatching has been introduced for the first time in BNS under section 304 which was not the case with the old penal provision and the police had to take a lot of discretion to treat these activities as either robbery or theft.[13]

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[8] Bharatiya Nyaya Sanhita 2023, s 2(9)-gender". The pronoun "he" and its derivatives are used of any person, whether male, female or transgender.

[9] Irfan Rashid and Arpit Pandey, 'Community Service under the BNS: Progress, Pitfalls, and Potential' (2024) NLIU Law Review https://nliulawreview.nliu.ac.in/blog/community-service-under-the-bns-progress-pitfalls-and-potential/#:~:text=It%20is%20pertinent%20that%20community,defaulting%20on%20completing%20community%20service accessed 26 April 2025.

[10] Bharatiya Nyaya Sanhita, 2023, 'Chapter V: Of Offences Against Women and Children, Of Sexual Offences' https://prsindia.org/files/bills_acts/bills_parliament/2023/Bharatiya_Nyaya_Sanhita,_2023.pdf accessed 26 April 2025.

[11] Bharatiya Nyaya Sanhita, 2023, 'Chapter IV: Of Abetment, Criminal Conspiracy and Attempt, Of Abetment' https://prsindia.org/files/bills_acts/bills_parliament/2023/Bharatiya_Nyaya_Sanhita,_2023.pdf accessed 26 April 2025..

[12] Bharatiya Nyaya Sanhita, 2023, 'Chapter II: Of Punishments, Section 4(f)' https://prsindia.org/files/bills_acts/bills_parliament/2023/Bharatiya_Nyaya_Sanhita,_2023.pdf accessed 26 April 2025.

[13] Press Information Bureau, 'Mob Lynching and Snatching Related Provisions in New Criminal Laws' (2023) https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2080661 accessed 26 April 2025.

The new penal provision also has removed any distinction on the basis of age between the offenders of gang rape of a minor girl and section 70(2) provides for Life Imprisonment or death penalty for these types of offences.[14]

The blend of UAPA[15] have proved to have given more powers to the rank of police officials at SP and above who can decide under section 113 whether to register a case under provisions of UAPA or BNS if the offender is involved in some terrorist activity.[16]

(b) The Bhartiya Nagarik Suraksha Sanhita (2023)

i. Preliminary inquiry

Clause 173(3) of the BNSS provides statutory force for preliminary enquiry by police which to date no other provision provides.[17] Preliminary enquiry is done in cognizable offences. The Supreme Court in the case of *Lalita Kumari vs. Government of India*[18] held that it is necessary to register an FIR for cognizable offences. However, as per the new procedural law, a preliminary enquiry is to be conducted by the investigating officer to ascertain whether an offence has been committed or not.

ii. Blend of PMLA and BNSS

It is interesting to note that BNSS seeks to provide the Magistrate with powers to attach property identified as 'proceeds of crime.[19] The powers are like those granted to the Directorate of Enforcement and Adjudicating Authority under the Prevention of Money-Laundering Act, 2002 ("PMLA").

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[14] Bharatiya Nyaya Sanhita, 2023, 'Section 70: Gang Rape, Clause 2' https://prsindia.org/files/bills_acts/bills_parliament/2023/Bharatiya_Nyaya_Sanhita,_2023.pdf accessed 26 April 2025.

[15] Unlawful Activities (Prevention) Act, 2019, https://legislative.gov.in/actsofparliamentfromtheyear/unlawful-activities-prevention-act-2019 accessed 26 April 2025.

[16] Bharatiya Nyaya Sanhita, 2023, 'Chapter VI, Section 113: Terrorist Act, Clause (6)' https://devgan.in/bns/section/113/#:~:text=BNS%20Section%20113%20%2D%20Terrorist%20act,order%20by%20doing%20an%20act%2C accessed 26 April 2025.

[17] Pushkraj Deshpande and Yohaan Abraham, 'Overview of Criminal Investigations and Trials under BNSS, BNS, BSA – Part I' (2024) Bar & Bench https://www.barandbench.com/law-firms/view-point/overview-criminal-investigations-trials-bnss-bns-bsa-part-i accessed 26 April 2025.

[18] Lalita Kumari v Govt of U.P. and Ors (Writ Petition (Criminal) No 68 of 2008, Supreme Court of India, 12 November 2013).

[19] Bharatiya Nagarik Suraksha Sanhita, 2023, 'Chapter VII: Process to Compel the Production of Thing, Section 107: Attachment, Forfeiture or Restoration of Property' https://prsindia.org/files/bills_acts/bills_parliament/2023/Bharatiya_Nagarik_Suraksha_Sanhita,_2023.pdf accessed 26 April 2025..

Under the new procedural laws, the properties of the accused can now be attached by the magistrate under a reasonable belief that the property is obtained by the accused after indulging in criminal activity or commission of the offence.

iii. Retaining old provisions in a new fashion

Sections 41 and 41A CrPC have now been merged into one provision i.e., Section 35.[20] As per the new provision, the arrestee can inform his relatives friends and his advocate about the arrest. However, for women arrestees, the police will inform their relatives or friends about their arrest and the place and information of their arrest. Section 190 proviso states that if the person is not arrested, the police officer shall take security from such person for his appearance before the Judicial Magistrate.[21]

iv. Use of electronic mode at stages of investigation, inquiry, and trial

BNSS introduced the use of electronic communication and audio-video electronic means for various procedures under the Bill. This is keeping in line with the objective of the BNSS to introduce an increased use of technology for legal procedures. Accordingly, the BNSS has introduced new definitions which define terms such as "audio-video electronic"[22] and "electronic communication"[23] etc.

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[20] Bharatiya Nagarik Suraksha Sanhita, 2023, 'Chapter V: Arrest of Persons, When Police May Arrest Without Warrant' https://prsindia.org/files/bills_acts/bills_parliament/2023/Bharatiya_Nagarik_Suraksha_Sanhita,_2023.pdf accessed 26 April 2025..

[21] Bharatiya Nagarik Suraksha Sanhita, 2023, 'Chapter XIII: Information to the Police and Their Powers to Investigate, Section 190: Cases to be Sent to Magistrate, When Evidence is Sufficient' https://prsindia.org/files/bills_acts/bills_parliament/2023/Bharatiya_Nagarik_Suraksha_Sanhita,_2023.pdf accessed 26 April 2025.

[22] Bharatiya Nagarik Suraksha Sanhita, 2023, 'Chapter I: Preliminary, Section 2: Definition (1) Clause (a) "Audio-Video Electronic"' https://prsindia.org/files/bills_acts/bills_parliament/2023/Bharatiya_Nagarik_Suraksha_Sanhita,_2023.pdf accessed 26 April 2025.

[23] Bharatiya Nagarik Suraksha Sanhita, 2023, 'Chapter I: Preliminary, Section 2: Definition (f) "Electronic Communication"' https://prsindia.org/files/bills_acts/bills_parliament/2023/Bharatiya_Nagarik_Suraksha_Sanhita,_2023.pdf accessed 26 April 2025.

The BNSS also provides for victim compensation schemes (like the Nirbhaya Scheme) which were given at the discretion of State Governments**.** It was proposed to be done as per recommendations of the 1996 law commission[24].

(c) The Bhartiya Sakshaya Adhiniyam (2023)

The BSA(2023) incorporated the use of digital evidence as per sections 2(1)(d) production of documents which includes digital documents[25] and sections 2(1)(e) which deals with information given electronically.[26]

Furthermore, the introduction of section 52 which gives power to the court to scrutinise extraterritorial operations, international treaties etc. has also made its ambit wide.[27]

Sections 57,[28] 58,[29] 62[30] and 63[31] provide the base of secondary evidence, admissibility of electronic evidence and primary evidence.

Section 57 highlights a new explanation of primary digital evidence. Section 62 explains the legality of digital evidence which includes admissible evidence from mobile, documents, computer software engines etc.

i. New terminologies

The language of the BSA (2023) has been modernised to include words like ‘’advocate’’ instead of ‘’vakil’’ and deletion of words such as “pleader’’, “barrister”, “her majesty’’ etc.[32]

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[24] **Vibha Mohan**, 'Revisiting Victim Compensation in India' (2023) Manupatra https://docs.manupatra.in/newsline/articles/Upload/6F5E12E5-2A56-49A9-BF1B-CBE1DF4F8726.2-F__criminal.pdf accessed 26 April 2025

[25] Bharatiya Sanhita Act, 2023, 'Section 2: Definition (d) "Document"' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.

[26] Bharatiya Sanhita Act, 2023, 'Section 2: Definition (e) "Evidence"' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.

[27] **Md Imran Wahab**, 'Bharatiya Sakshya Adhiniyam, 2023: An Overview of Key Amendments' (2024) *International Journal for Multidisciplinary Research* https://www.ijfmr.com/papers/2024/6/30136.pdf accessed 26 April 2025.

[28] Bharatiya Sakshya Adhiniyam, 2023, 'Section 57: Primary Evidence' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.

[29] Bharatiya Sakshya Adhiniyam, 2023, 'Section 58: Secondary Evidence' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.

[30] Bharatiya Sakshya Adhiniyam, 2023, 'Section 62: Special Provisions as to Evidence Relating to Electronic Record' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.

[31] Bharatiya Sakshya Adhiniyam, 2023, 'Section 63: Admissibility of Electronic Records' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.

[32] Saurabh Bindal and Pranav Mathur, 'What’s New in Indian Evidence Law? A Look at BSA, 2023' (2023) Fox Mandal https://www.foxmandal.in/whats-new-in-indian-evidence-law-a-look-at-bsa-

NEW PENAL PROVISIONS IN THE CRIMINAL LAWS

The Bhartiya Nyaya Sanhita introduces many new penal provisions and punishments for the crimes that are committed today. We will explore some of their interpretations and loopholes.

(a) Abetment

Section 48 of the BNS criminalises the abetment of offences to include persons outside India as well as abetment committed within India. Offences can now be prosecuted under this act, which was not in the IPC.[33]

(b) Deceitful means of sexual intercourse

Section 69 of the BNS includes the provision of deceitful sexual intercourse under false pretext of marriage which was not included in the IPC.[34] However, this clause, deceit conceptually vitiates consent; so, does breach of promise which involves the accused not having any intention of going through with the promise. Hence, the meaning of "not amounting to rape" under the section is not clear.

(c) Gender neutrality

Section 75 of the BNS indicates provisions of assault intending to outrage the modesty of a woman and compelling her to perform sexual intercourse[35] and section 76 indicates provisions of voyeurism that are made gender neutral by the inclusion of the word "whoever" in the starting which has increased the scope of this section.[36]

2023/#:~:text=The%20BSA%20also%20resolves%20to,language%20that%20aptly%20replaces%20them accessed 26 April 2025.

[33] Bharatiya Sakshya Adhiniyam, 2023, 'Section 48: Abetment Outside India for Offence in India' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.

[34] Bharatiya Sakshya Adhiniyam, 2023, 'Section 69: Sexual Intercourse by Employing Deceitful Means, etc.' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.

[35] Bharatiya Sakshya Adhiniyam, 2023, 'Section 75: Sexual Harassment' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.

[36] Bharatiya Sakshya Adhiniyam, 2023, 'Section 76: Assault or Use of Criminal Force to Woman with Intent to Disrobe' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.

(d) Possession and use of seal, plates and other instruments

Section 341(1) criminalises possession of seals, plates and other instrument[37] and section 341(4)[38] criminalises the use of items in section 341(1) which itself is a new provision that was absent in IPC.

(e) Circulation of false information

Section 351(1) of the BNS criminalises the circulation of false information which was absent in the IPC.[39] This provision includes mutiny by the three wings of the defence forces, inducement to commit an offence against the state and inducement to commit an offence against some class of persons. The legitimacy of this provision can be challenged as there are many instances where politicians make hate speech to target opposition parties and their actions, and provide incentives clandestinely which can create havoc.

EMERGING CHALLENGES AND THE NEW CRIMINAL LAW

The new criminal laws are plagiarised works of the old criminal laws. The names of these laws have been changed to Indianize them as "Bhartiya" which is against the provisions of Article 348 of the Indian constitution which clearly states that English would be the language to be used in the High Courts, Supreme Court, Acts and the Bills.[40]

Furthermore, these laws have not criminalised marital rape which was a huge contention in the IPC.[41] This section aims to highlight some challenges in the digital age, criminal bureaucracy and readiness for the new laws.

[37] Bharatiya Sanhita, 2023, 'Section 341(1): Counterfeiting of Seal, Plate, or Other Instrument for Forgery' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.
[38] Bharatiya Sanhita, 2023, 'Section 341(4): Fraudulent Use of Counterfeit Seal, Plate, or Instrument' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.
[39] Bharatiya Sanhita, 2023, 'Chapter XIX: Criminal Intimidation, Insult, Annoyance, Defamation, etc., Section 351: Criminal Intimidation' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.
[40] Constitution of India, 'Part XVII: Official Language, Chapter III, Article 348: Language to be Used in the Supreme Court and in the High Courts and for Acts, Bills, etc.' https://cdnbbsr.s3waas.gov.in/s380537a945c7aaa788ccfcdf1b99b5d8f/uploads/2024/07/20240716890312078.pdf accessed 26 April 2025.
[41] Anushka Pandey, Preeti Pratishruti Dash and Mrinal Satish, 'Bharatiya Nyaya Sanhita: Decolonising or Reinforcing Colonial Ideas?' (2023) National Law School of India University https://www.nls.ac.in/blog/bharatiya-nyaya-sanhita-decolonising-or-reinforcing-colonial-ideas/ accessed 26 April 2025.

These new laws are just like “old wine in a new bottle” because the spirit of the sections resonates with the interpretation of the old criminal laws. Section 124A of the IPC dealt with sedition[42] and section 150 of the BNS deals with acts endangering the sovereignty and integrity of India.[43] The main loophole in this legislation is that the union government has replaced sedition and disaffection with secession, armed rebellion and subversive activities encouraging feelings of separatist activities, thereby also introducing an element of thought crime.

The BNSS(2023) also has some provisions that aim to highlight the deterrent principle of law in the criminal justice system. The colonial laws were already draconian but the new laws are making it worse by denying bail to the accused under section 187(3)[44] and increasing remand in police custody for an extended period thus violating the principle of “**Bail is the rule and Jail is an exception**” as laid down in *Prem Prakash Vs. Union of Indian and ors. (1984).*[45]There have been remarkable changes in the digital age and so to cater to those needs the BSA (2023) is also equipped with provisions of digital evidence as secondary evidence which is a good step as evident from section 57.[46] The major irony is that it requires a “certificate of authentication” for primary evidence (similar to section 65B of IEA)[47] which also raises the question of classifying this original record as primary evidence.

The new laws aim to increase the powers of the bureaucracy but at the same time these laws can be challenged as the blend of UAPA and other such laws will only politicise the use of law as a weapon rather than reformation and to have political gains. Investigating agencies like the Anti-Corruption Bureau (ACB) or the Central Bureau of Investigation (CBI) (often called “caged parrots”) should be made as autonomous as possible.

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[42] Indian Penal Code, 1860, 'Section 124A: Sedition' https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&orderno=133 accessed 26 April 2025.

[43] Indian Penal Code, 1860, 'Chapter VII: Offences Against the State, Section 150: Concealing with Intent to Facilitate Design to Wage War' https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&orderno=133 accessed 26 April 2025.

[44]Indian Penal Code, 1860, 'Chapter XIII: Information to the Police and Their Powers to Investigate, Section 187(3): Procedure When Investigation Cannot Be Completed in Twenty-Four Hours' https://www.indiacode.nic.in/show-data?actid=AC_CEN_5_23_00037_186045_1523266765688&orderno=133 accessed 26 April 2025.

[45] Prem Prakash v Union of India & Ors [1984] INSC 151 (22 August 1984) 1984 Latest Caselaw 151 SC.

[46] Bharatiya Sakshya Adhiniyam, 2023, 'Section 57: Primary Evidence' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BSA%202023.pdf accessed 26 April 2025.

[47] Indian Evidence Act, 1872, 'Chapter V: Documentary Evidence, Section 65(B): Admissibility of Electronic Records' https://www.indiacode.nic.in/show-data?actid=AC_CEN_3_20_00034_187201_1523268871700&orderno=71 accessed 26 April 2025.

The white-collar crimes such as money laundering, extortion, cyber crimes etc. also can't escape the long arms of the new laws because the use of words such as organised crimes (inclusive of cybercrimes) in section 111 of BNS,[48] attachment or forfeiture of property by magistrates in proceeds of crime under section 107 of BNSS[49] etc. is a remarkable step to increase to the width of the law in these new areas.

CONCLUSION

The new Made in India criminal laws aim to modernise the laws of the colonial era framework. These laws reflect the contemporary realities of the digital society as they address issues of community service as a reformative punishment procedure, digital evidence, gender neutrality, etc. However, concerns are prevalent in society because the laws remain like a mute spectator in areas such as marital rape, etc. While the aim is to shift from deterrence to reformation, some draconian provisions are made even more draconian, which will spark debate about their effectiveness, fairness, and implementation. Therefore, the aspect of the balance between "coloniality" and "Indianization" is tilted more towards colonization.

[48] Bharatiya Nyaya Sanhita, 2023, 'Section 111: Organised Crime' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BNS%202023.pdf accessed 26 April 2025.
[49] Bharatiya Nyaya Sanhita, 2023, 'Section 107: Attachment, Forfeiture or Restoration of Property' https://wccb.gov.in/WriteReadData/UserFiles/file/Notification/BNSS%202023.pdf accessed 26 April 2025.