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Punishing the Unfinished Crime: A Critical Study of the State of Inchoate Offences under the Bharatiya Nyaya Sanhita, 2023

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ABSTRACT

The Bharatiya Nyaya Sanhita, 2023 (BNS), which came into force on 1 July 2024, represents the most comprehensive overhaul of India's substantive criminal law since the Indian Penal Code of 1860 was enacted under colonial auspices. While considerable scholarly attention has been directed toward the BNS provisions on organised crime, terrorism, and gender-based offences, the treatment of inchoate offences, namely attempt, criminal conspiracy, and abetment, has received comparatively limited critical scrutiny. This paper undertakes a rigorous doctrinal and comparative examination of the inchoate offence framework under the BNS, interrogating whether the legislative changes represent a meaningful jurisprudential advance or merely a relabelling exercise. Drawing upon established criminal law theory, judicial precedents of the Supreme Court of India and the High Courts, and comparative perspectives from English and American criminal jurisprudence, the paper analyses the extent to which the BNS addresses the persistent doctrinal tensions that plagued the IPC's inchoate regime: the indeterminate proximity test for attempt, the expansively drawn and constitutionally suspect scope of criminal conspiracy, and the tripartite complexity of abetment without explicit mens rea codification. The paper finds that while the BNS introduces certain structural reorganisation in the codification of these offences, it largely perpetuates the definitional ambiguities of its predecessor, foregoing an opportunity to adopt a principled liability threshold, a clearer mens rea standard, or a rationalised sentencing framework consonant with the degree of harm actually caused or risked. The paper concludes with specific doctrinal and policy recommendations calibrated toward bringing India's inchoate offence jurisprudence into alignment with contemporary criminal justice standards.

Keywords: *Bharatiya Nyaya Sanhita 2023, Inchoate Offences, Criminal Attempt, Criminal Conspiracy, Abetment, Indian Penal Code 1860, Punitive Reform.*

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I. INTRODUCTION

A central normative issue in the history of criminal law is how far the state can, or should, reach back down the causal chain of events. Punishment traditionally presupposes a completed wrong, a harm visited upon an identifiable victim. Yet the criminal law has long recognised that waiting for harm to be consummated before intervening is often neither pragmatically sensible nor morally defensible. The offences of attempt, criminal conspiracy and abetment are all part of the doctrine of inchoate liability, and the law's response to this tension is to allow the coercive machinery of the state to target criminality at its initial, incomplete or preparatory stages.¹

In India, the first systematic statement of this doctrine was made in the Indian Penal Code, 1860,² framed by the first Law Commission under the chairmanship of Lord Macaulay, which was greatly inspired by the utilitarian criminology of Jeremy Bentham and the codification movement in England in the nineteenth century. The IPC's concept of inchoate liability was divided into three categories: abetment (Sections 107-120), criminal conspiracy (Sections 120A-120B, added by the Criminal Law (Amendment) Act of 1913), and attempt (Section 511, as the residuary provision, together with specific attempt provisions scattered throughout the Code).

The Bharatiya Nyaya Sanhita, 2023 (BNS),³ introduced by the legislature as a fundamental reform of Indian criminal law and brought into force on 1 July 2024, was meant to replace Macaulay's code and to establish a system of law that would reflect Indian constitutional values and the latest thinking on penal law. The inchoate offences were restructured: abetment is now in Sections 45-60, criminal conspiracy in Section 61, and attempt in Section 62, with specific offence-paired attempt sections in various other parts of the Code. But the numerical restructuring has not been matched by any fundamental rethinking of the doctrines themselves, and the questions that have been debated under the IPC remain critically unresolved.

This paper asks whether the BNS effects a genuine jurisprudential change in the field of inchoate liability or simply continues, in new terms, the doctrinal flaws that led courts to criticise the IPC's inchoate system and produced scholarly discontent. It concludes that, in the area of inchoate liability, the BNS has opted for minimal disruption rather than principled reform, and thus for a group of provisions that are in theory underinclusive, in judicial practice

¹ ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* (7th ed. 2013).

² The Indian Penal Code, 1860, No. 45, Acts of Parliament, 1860 (India).

³ The Bharatiya Nyaya Sanhita, 2023, No. 45, Acts of Parliament, 2023 (India).

indeterminate, and in constitutional terms unhelpfully vague in identifying clear criminal norms.

A. Research Questions

This paper addresses three research questions. First, does the Bharatiya Nyaya Sanhita, 2023 introduce any meaningful doctrinal innovation in the structure and content of inchoate offences, or does it substantially replicate the framework of the Indian Penal Code, 1860? Second, what are the persisting doctrinal deficiencies in the legal tests for attempt, criminal conspiracy, and abetment under the BNS, particularly with regard to the mens rea threshold and the proximity-to-harm requirement? Third, how does India's inchoate offence framework compare with equivalent doctrines in English and American criminal jurisprudence, and what lessons can be drawn for legislative and judicial reform?

B. Hypothesis

The Bharatiya Nyaya Sanhita, 2023, despite its legislative aspiration to modernise Indian criminal law, substantially replicates the inchoate offence framework of the Indian Penal Code, 1860, perpetuating its doctrinal ambiguities with respect to the actus reus threshold in attempt, the constitutional overreach inherent in conspiracy liability, and the structural complexity of the abetment provisions, thereby failing to deliver a principled, harm-proportionate, and constitutionally defensible regime of preliminary criminal liability.

C. Research Objectives

The paper pursues three objectives. The first is to examine and critically appraise the substantive provisions relating to attempt, criminal conspiracy, and abetment under the Bharatiya Nyaya Sanhita, 2023, and to compare them systematically with the corresponding provisions of the Indian Penal Code, 1860. The second is to assess the adequacy of the judicial tests and doctrinal standards evolved by Indian courts for inchoate liability in light of contemporary criminal law theory and the constitutional requirements of fair labelling, legal certainty, and proportionality. The third is to draw upon comparative criminal law, particularly the English and American models, to formulate concrete legislative and policy recommendations for the reform of inchoate offence law in India.

D. Research Methodology

This research is primarily doctrinal in approach, engaging in a close analytical reading of statutory provisions, Supreme Court and High Court judgments, Law Commission Reports, and the legislative history of the BNS and its predecessor statutes. The comparative method

supplements the doctrinal analysis, drawing upon English criminal law as shaped by the Criminal Attempts Act 1981⁴ and the Serious Crime Act 2007,⁵ and upon American Model Penal Code jurisprudence,⁶ to contextualise Indian law within a wider theoretical framework. Secondary sources comprising peer-reviewed journal articles, standard criminal law treatises, and official government documents form the evidentiary basis for the literature review and theoretical discussions. The research does not involve empirical data collection; its conclusions are therefore derived from legal analysis, statutory interpretation, and comparative evaluation rather than from field research, survey data, or empirical investigation.

E. Literature Review and Research Gap

K.D. GAUR's seminal work on criminal law in India⁷ offered a doctrinal analysis of Sections 107-120B and Section 511 of the IPC, identifying the fundamental ambiguities in the definition of abetment and the indeterminate nature of the attempt threshold, without, however, an in-depth structural analysis. The compendious work of P.S.A. PILLAI AND K.I. VIBHUTE⁸ likewise catalogued judicial interpretations over decades and pointed to the increasing conflict between the wide ambit of conspiracy and the principles of individual responsibility.

From a more positivist perspective, GLANVILLE WILLIAMS⁹ doubted whether criminal conspiracy could fulfil any distinct analytical role beyond what attempt and abetment already achieve, suggesting that it was a prosecutorial convenience which risks criminalising the mere act of agreement without sufficient regard to the probability of harm.

Sanford Kadish's influential study of complicity¹⁰ showed that, in common law jurisdictions, facilitative criminal liability has long been under-theorised and has traditionally relied on intuitions of moral blame rather than structurally sound doctrines of secondary participation. Michael Moore's work on causation and criminal responsibility¹¹ further developed the philosophical challenges to attributing culpable causation to a person who merely inclines, aids or encourages another's free act, challenges that lie at the very core of abetment doctrine. The recommendations of the Forty-Second Report of the Law Commission of India, 1971¹² have

⁴ Criminal Attempts Act 1981, c. 47, § 1 (Eng.).

⁵ Serious Crime Act 2007, c. 27, §§ 44-46 (Eng.).

⁶ MODEL PENAL CODE § 5.01 (Am. L. Inst. 1962).

⁷ K.D. GAUR, CRIMINAL LAW: CASES AND MATERIALS (9th ed. 2019).

⁸ P.S.A. PILLAI & K.I. VIBHUTE, CRIMINAL LAW (14th ed. 2021).

⁹ GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART (2d ed. 1961).

¹⁰ Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323 (1985).

¹¹ Michael S. Moore, *Causation and the Excuses*, 73 CAL. L. REV. 1091 (1985).

¹² LAW COMM'N OF INDIA, FORTY-SECOND REPORT: INDIAN PENAL CODE (1971).

not yet been enacted despite raising many of the same issues as the BNS, and they therefore acquire a renewed relevance in light of the BNS's failure to address those concerns.

There was limited recorded discussion in Parliament on the inchoate offence sections, with most of the parliamentary debate focused on the politically salient provisions relating to sedition, terrorism and organised crime. This relative neglect, both legislative and scholarly, defines the research gap that this paper seeks to address.

II. THEORETICAL UNDERPINNINGS OF INCHOATE LIABILITY AND THE CHALLENGE OF CODIFICATION

The consequentialist rationale, grounded in Benthamite utilitarianism, argues that where conduct is likely to lead to harm, deterrence and incapacitation operate more effectively if the conduct is criminalised at the preparatory stage rather than after the harm has been realised. This approach has the virtue of pragmatic efficiency but also the vice of being potentially over-criminalising and of relying on probabilistic risk assessments that courts are not well equipped to make reliably. The subjectivist justification, advanced by Michael Moore and George Fletcher¹³, locates the evil of an inchoate act in the intention of the actor, contending that the criminal law should respond to an act that manifests that intention in much the same way as it responds to the completed act itself. A third, harm-based approach, found in the writings of Andrew Ashworth and Andrew von Hirsch, argues that punishment ought ultimately to reflect harm or the risk of harm, and that extending criminal liability to preparatory conduct should require not only a finding of bad intent but also a demonstration that the conduct creates a legally cognisable endangerment exceeding a threshold commensurate with the sanction to be imposed.

The answer to the key structural question of inchoate doctrine, namely where preparation ends and punishable attempt begins, differs across each of these frameworks. The proximity tests developed by the common law of England, including the “last act” test in *R v. Eagleton*¹⁴, the “more than merely preparatory” statutory test in the Criminal Attempts Act 1981, and the “substantial step” test of the American Model Penal Code, represent different calibrations of the balance between harm prevention and individual autonomy. Within the framework of the IPC, the Indian judiciary adopted an eclectic approach, deploying several tests without ever firmly settling on any one, so as to produce a jurisprudence that was both contextually sensitive and

¹³ See Moore, *supra* note 11; GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (2000).

¹⁴ *R v. Eagleton*, (1855) 6 Cox C.C. 559 (Eng.).

doctrinally unstable, ranging from *Abhayand Mishra*¹⁵ to *Sudhir Kumar Mukherjee v. State of West Bengal*.¹⁶

This theoretical pluralism presents a special challenge for codification, which should give courts advance guidance as to the standard to apply in deciding whether conduct is forbidden. The IPC's attempt provision, Section 511, with its circular formulation that one who “attempts to commit an offence ... and in such attempt does any act towards the commission of the offence” is guilty of attempt, conspicuously failed to achieve this aspiration. The BNS's similar provision in Section 62¹⁷ adopts a comparable formulation, which appears to have been a conscious choice by the parliamentary draftsmen but which, as this paper argues, is a missed opportunity for the kind of principled legislative guidance that has proved achievable and workable in the comparative experience of England and the United States.¹⁸

III. ATTEMPT UNDER THE BHARATIYA NYAYA SANHITA, 2023: LEGISLATIVE ARCHITECTURE AND JUDICIAL INHERITANCE

The BNS contains a provision analogous to the old Section 511 of the IPC in Section 62, which states that a person who attempts to commit an offence for which the Code provides imprisonment, or who attempts to cause such an offence to be committed, and in the attempt does any act towards the commission of the offence, shall be punished with imprisonment for a term not exceeding one-half of the longest term provided for the offence, or with the fine provided, or with both. This legislative silence is especially notable in the context of an announced reform process, given that the doctrinal inadequacy of the IPC's attempt standard was a well-documented criticism in the existing scholarship.

In *Abhayand Mishra v. State of Bihar*, the Court observed that an attempt is commenced when the accused, with guilty intention, has done something more than mere preparation but not necessarily the last act before the commission of the offence. The Court drew a distinction between preparation and attempt which the statute does not expressly articulate, but which it characterised as an implication of the statutory language. Later decisions clarified this stance, though not always consistently. In *State of Maharashtra v. Mohd. Yakub*,¹⁹ the Court held that acts so proximate in time and circumstance as to show that the offence would have been committed but for the intervention of circumstances independent of the will of the accused

¹⁵ *Abhayand Mishra v. State of Bihar*, AIR 1961 SC 1698 (India).

¹⁶ *Sudhir Kumar Mukherjee v. State of West Bengal*, AIR 1973 SC 2655 (India).

¹⁷ The Bharatiya Nyaya Sanhita, 2023, § 62 (India).

¹⁸ LAW COMM'N OF INDIA, *supra* note 12.

¹⁹ *State of Maharashtra v. Mohd. Yakub*, AIR 1980 SC 1111 (India).

amount to an attempt. In *Malkiat Singh v. State of Punjab*,²⁰ the Court observed that the distinction between attempt and preparation depends on the facts of each case, which, though flexible in practice, supplies neither a determinate legal standard nor much purchase for an appellate court reviewing the reasoning of the trial court.

Because the BNS has codified none of these judicially evolved tests, nor even the more theoretically refined “substantial step” test of the American Model Penal Code,²¹ the same doctrinal ambiguity persists in full force under the new regime. The “substantial step” formulation of the MPC is particularly significant because it combines a physical (actus reus) test, in that the step must be “substantial in relation to the planned offence,” with a corroboration test, in that the step must be “strongly corroborative of the actor's criminal purpose,” so that the threshold for liability is tied both to the actor's state of mind and to the objective nature of the act. Paul Robinson and Jane Grall's analysis of the MPC framework²² showed that this dual requirement is a more principled and administrable standard than the proximity-based tests of the English common law tradition, and their findings remain fully applicable in India.

The BNS also does not specify the mens rea elements of attempt. The general rule in India, as laid down by the Supreme Court in *Om Prakash v. State of Punjab*,²³ is that the attempt must be accompanied by the same state of mind as is required for the actual offence. The BNS does not expressly address these anomalies, and courts are left to resolve them as they arise, as under the IPC regime, which has produced inconsistent results, especially in cases of attempt to cheat and attempt to cause grievous hurt.

The Code also contains specific provisions that punish attempt to commit culpable homicide not amounting to murder (Section 110) and attempt to murder (Section 109). These are areas which the legislature evidently considers should be dealt with individually, and for that reason these specific provisions carry a higher and more precisely calibrated penalty than the half-maximum-sentence formula of Section 62. But the doctrinal question whether these special provisions displace or overlap the general attempt provision was a source of persistent confusion under the IPC, addressed but not conclusively settled in *Sudhir Kumar Mukherjee*,²⁴ and the BNS offers no specific answer, leaving it a live issue for future litigation.

²⁰ *Malkiat Singh v. State of Punjab*, AIR 1970 SC 713 (India).

²¹ MODEL PENAL CODE § 5.01.

²² Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681 (1983).

²³ *Om Prakash v. State of Punjab*, AIR 1961 SC 1782 (India).

²⁴ *Sudhir Kumar Mukherjee*, AIR 1973 SC 2655 (India).

IV. CRIMINAL CONSPIRACY UNDER THE BNS, 2023: THE PERSISTENCE OF A PROBLEMATIC DOCTRINE

The basic elements of criminal conspiracy, an agreement to do an unlawful act or a lawful act by unlawful means, make it potentially the broadest of all criminal provisions, since it requires no overt act in furtherance of the agreement and, in most forms, not even that the substantive offence be attempted. Criminal conspiracy was defined in these terms in Section 120A of the IPC, with Section 120B prescribing punishment. The BNS consolidates these provisions in Section 61, which is, for all practical purposes, identical in substance. Section 61(1) provides that the offence of criminal conspiracy is an agreement between two or more persons to commit an illegal act, or to cause an act to be done which is legal but is to be accomplished by illegal means; Section 61(2) provides that, where the agreement is to commit an offence punishable with death, imprisonment for life, or rigorous imprisonment for two years or more, every person who is a party to the conspiracy shall be punished as if he had abetted the offence. Where the conspiracy does not extend to so serious an illegality, punishment is limited to imprisonment for up to six months, a fine, or both.

The primary constitutional difficulty with conspiracy under Section 61 is that it may stand in tension with the constitutional values of freedom of expression and association under Articles 19(1)(a) and 19(1)(c) of the Constitution, in that it criminalises agreement itself and, in most cases, requires no overt act. This tension was addressed by the Supreme Court in *Kehar Singh v. State (Delhi Administration)*,²⁵ which held that, although conspiracy liability is constitutional, the standard of proof must be very high given the facility with which the offence can be framed and the hardship it inflicts on a person wrongly accused. In *State (NCT of Delhi) v. Navjot Sandhu @ Afsan Guru*,²⁶ the Supreme Court, in its landmark judgment in the Parliament attack case of 2001, explained the ingredients of conspiracy and held that a mere meeting of minds among the accused was insufficient, since the agreement had to be proved to be for a specific unlawful purpose. While important, these judicial guardrails are after-the-fact interpretive responses to a fundamentally over-broad statutory provision, and because the BNS retains the same statutory language, the constitutional concern remains just as live as it was under the IPC.

The BNS does not introduce an overt act requirement for conspiracy, which would have given the offence an actus reus foundation and partially remedied the constitutional concern. The Model Penal Code, generally accepted as the appropriate standard in American law, requires

²⁵ *Kehar Singh v. State (Delhi Admin.)*, AIR 1988 SC 1883 (India).

²⁶ *State (NCT of Delhi) v. Navjot Sandhu*, (2005) 11 S.C.C. 600 (India).

that at least one member of the conspiracy commit an act in furtherance of the agreement as a minimum actus reus requirement, so as to exclude conspiracies that have not progressed beyond words or thoughts. It is a significant legislative weakness of the BNS, with sixty years of comparative history available to it, that it has failed to impose any similar requirement, and thus continues to permit the kind of prosecutorial overreach that the overt act requirement was designed to prevent.

A further doctrinal issue concerns the relationship between conspiracy liability under Section 61 and common intention liability under Section 3(5) of the BNS (Section 34 of the IPC). The courts have often found it difficult to draw the line between an inchoate criminal conspiracy and a common intention arising at the time of the act, and the BNS offers no more analytical clarity than the IPC. The overlap poses particular challenges in cases of multiple defendants, where conviction under both provisions could cause confusion in sentencing and analytical circularity. The essential difference was identified in *Yash Pal Mittal v. State of Punjab*,²⁷ namely that conspiracy involves a meeting of minds beforehand whereas common intention may arise at the time of the act; yet this distinction becomes blurred where conspiracy is alleged and the agreement was formed only moments before the act, and neither the IPC nor the BNS supplies any temporal or causal criterion to resolve the ambiguity.

The Anglo-American comparative context is instructive here. Under English law, the scope of conspiracy was confined by the Criminal Law Act 1977,²⁸ which abolished the vague common law offences of conspiracy to corrupt public morals and to effect a public mischief, offences that had long attracted civil liberties criticism.

V. ABETMENT UNDER THE BNS, 2023: FACILITATIVE LIABILITY AND ITS DOCTRINAL COMPLICATIONS

The BNS's codification of abetment in Sections 45-60 is a distinctively Indian addition to the taxonomy of inchoate liability, with no precise equivalent in the English law of complicity or in the American Model Penal Code's law of accomplice liability. It is tripartite, in that abetment may be committed in three ways: by instigation, by conspiracy, and by intentional aid. This structure is both wider and more nuanced than the common lawyers' "aiding and abetting" formulation, but it is also more prone to definitional indeterminacy as to the mental culpability required for each mode.

²⁷ *Yash Pal Mittal v. State of Punjab*, AIR 1977 SC 2433 (India).

²⁸ Criminal Law Act 1977, c. 45 (Eng.).

The definition of abetment in the BNS reproduces that in the IPC: a person abets the doing of a thing if he instigates any person to do it; or if he, being a party to any act by which that thing is done, is a party to the doing of the thing; or if, with the intent to aid the doing of that thing, he does any act which, at the time of its doing, he knows or believes to be likely to facilitate the doing of that thing. Section 49 makes it clear that a person who is a party to the act of another, with knowledge of that act, is no less an abettor even though the other was not likely to do it, and the Explanation to Section 45 provides that to abet an act is to be a party to it, and that abetment extends to an act other than that abetted, provided it is done by a person whom the abettor knew or had reason to believe likely to do the act abetted. The material content of these provisions is the same as in the IPC, and nothing in the BNS suggests that the legislature engaged with the major doctrinal issues thrown up by decades of litigation under the IPC.

The instigation limb of abetment has been the most jurisprudentially contested part of the IPC and the BNS. In *Faguna Kanta Nath v. State of Assam*,²⁹ the Supreme Court held that instigation requires direct instigation, that is, a communication which acts on the mind of the person instigated so as to produce the criminal act; mere association with or proximity to a primary instigator is insufficient. In *Shri Ram v. State of U.P.*,³⁰ the Court explained that the test of instigation is essentially subjective, since it must be shown that the word or act of the instigator was intended or likely to have the effect of inducing the commission of the offence. While these are important limiting constructions, they are judicial glosses rather than legislative requirements, and the absence of an express mental element in the instigation limb of the BNS remains problematic for lower courts, which may not have ready access to these higher-court decisions.

The most litigated limb has been abetment by intentional aid, in part because it appears to have the widest application to persons only remotely involved in criminal ventures. In *Mahbub Shah v. King Emperor*³¹, emphasis was laid on the need for a narrow interpretation of facilitative liability so that it does not become a general law of secondary participation without safeguards for the morally innocent. In *Saju v. State of Kerala*,³² the Supreme Court held that a person cannot be convicted of abetment by aid merely for assisting another in the commission of an offence, unless it is established that he was aware that the assistance was to be so used. This knowledge requirement is an important limiting principle, but it is an additional element supplied by judicial gloss on a provision that does not incorporate it, and the lack of an explicit

²⁹ *Faguna Kanta Nath v. State of Assam*, AIR 1959 SC 673 (India).

³⁰ *Shri Ram v. State of U.P.*, AIR 1975 SC 175 (India).

³¹ *Mahbub Shah v. King Emperor*, AIR 1945 PC 118 (India).

³² *Saju v. State of Kerala*, (2001) 1 S.C.C. 378 (India).

mens rea element in the intentional-aid limb of Section 45 leaves open the possibility of convictions based on strict or constructive liability rather than genuine culpability.

The conspiracy offence in Section 61 gives rise to an interesting and under-examined overlap with the abetment-by-conspiracy limb of Section 45. A person who is party to a conspiracy to commit an offence is also, on the statutory language, an abettor of it, and a person who aids a conspiracy may be liable under Section 61 as well. The prospect of double punishment for what is in essence a single act of agreement was noted as a problem by IPC commentators. The Privy Council in *Mahbub Shah*³³ and the subsequent jurisprudence of the Supreme Court on the linkage of abetment and common intention³⁴ have not settled the matter satisfactorily, and the BNS retains both provisions without any distinguishing principle. In England, the Serious Crime Act 2007³⁵ introduced a more carefully drafted form of liability for encouraging or assisting crime, with three distinct mental-element variants corresponding to three degrees of culpability, demonstrating that the graduated facilitative liability which Indian law seeks to achieve through its three-part definition of abetment can be attained through more precise legislative drafting than either the IPC or the BNS has managed.

VI. THE PUNISHMENT PARADIGM FOR INCHOATE OFFENCES: PROPORTIONALITY, DETERRENCE, AND REFORM

The BNS follows the IPC's approach of fixing the maximum sentence for an attempt at one-half of the maximum for the completed offence under Section 62³⁶. The one-half formula presents distinct challenges in the Indian sentencing context. While Section 6 of the BNS (mirroring Section 57 of the IPC) provides that imprisonment for life shall be reckoned as twenty years for the purpose of calculating fractions, applying this rigid mathematical formula to the most serious offences, especially those punishable with death, fails to yield a nuanced or satisfactory sentencing framework. In less serious cases, the formula can produce sentences too low to deter, especially for economic offences, where the benefit of the completed offence is likely to far exceed the penalty for the attempt.

The BNS's approach to punishing conspiracy, calibrated to the gravity of the intended offence, is an imprecise attempt at proportionality and shares the same formal defect, in that it does not take account of the nearness of the conspiracy to the completed offence, the number of overt acts in furtherance of it, or the likelihood that the offence would have been committed but for

³³ *Mahbub Shah*, AIR 1945 PC 118 (India).

³⁴ *Topan Das v. State of Bombay*, AIR 1955 SC 364 (India).

³⁵ Serious Crime Act 2007, §§ 44-46 (Eng.).

³⁶ The Bharatiya Nyaya Sanhita, 2023, § 62 (India).

external factors. The absence of any formal sentencing guidelines for inchoate offences in Indian law, common to both the IPC and the BNS, is a deficiency that sits uneasily with the constitutional requirement that a sentence be proportionate to the gravity of the offence and the culpability of the offender, as highlighted in *State of Andhra Pradesh v. Kandimalla Subbaiah*³⁷.

The most positive change in the BNS regarding punishment lies not in Section 62 or even Section 61 but in the enhanced punishments for certain forms of abetment set out in Sections 49-60³⁸. In particular, enhanced liability is provided for abetment of offences against women, and the BNS expands the scope of penalty for certain facilitative conduct where grievous hurt is involved in the principal offence.³⁹

VII. COMPARATIVE PERSPECTIVES: ENGLAND, THE UNITED STATES, AND THE PATH NOT TAKEN BY THE BNS

Perhaps the most theoretically sophisticated approach is that of the American Model Penal Code. The MPC⁴⁰ defines attempt in Section 5.01 to include acts that are a “substantial step” towards the commission of the crime, while also requiring that the acts be “strongly corroborative of the actor's criminal purpose.” This dual requirement clearly combines the *actus reus* and *mens rea* elements of attempt liability, which the BNS conspicuously does not. Paul Robinson's element analysis of the MPC⁴¹ showed that the “substantial step” language affords a more rational relationship between the mental and physical elements of attempt than the traditional “last act” and “proximity” tests, which focus only on the objective nature of the act without regard to the extent to which it reflects criminal intent.

In English law, the offence of conspiracy was significantly recast by the Criminal Law Act 1977,⁴² which reduced the broad common law offence to a statutory offence of conspiracy to commit criminal offences and abolished the very wide common law offence of conspiracy to corrupt public morals, thereby narrowing the offence to the core of its principled rationale and its relationship with harm prevention. The American Model Penal Code, by contrast, requires an overt act in furtherance of the conspiracy for all but the most serious offences, an *actus reus* requirement absent from Indian law. The BNS retains the “illegal act or lawful act by illegal means” formulation, which is wider than the English and American standard, together with the

³⁷ *State of Andhra Pradesh v. Kandimalla Subbaiah*, AIR 1961 SC 1241 (India).

³⁸ The Bharatiya Nyaya Sanhita, 2023, §§ 49-60 (India).

³⁹ *Id.*

⁴⁰ MODEL PENAL CODE § 5.01.

⁴¹ Robinson & Grall, *supra* note 22.

⁴² Criminal Law Act 1977, c. 45 (Eng.).

overt-act-free design that has historically permitted prosecutorial overreach in cases of political opposition, trade union activity and social protest.

The Serious Crime Act 2007 (England)⁴³ provides a well-graded offence of encouraging or assisting crime, with Section 44 addressing intentional encouragement, Section 45 encouragement with a belief as to consequences, and Section 46 reckless encouragement. Each level carries a different moral weight and triggers different penalties, thereby formalising in law the gradation of facilitative liability that the BNS's undifferentiated abetment-by-aid provision lacks. The accomplice liability provisions of the MPC likewise require that the accomplice act “with the purpose of promoting or facilitating” the offence, a stronger and more explicit *mens rea* requirement than the abetment-by-aid provisions of Indian law, which the courts in *Saju* and other cases have had to supplement with interpretative elements that are neither regularly applied nor consistently formulated.

Table 1: Comparative Overview of Inchoate Offences: IPC 1860 vs. BNS 2023

Aspect	IPC 1860	BNS 2023	Change?
Attempt (general)	S. 511: “any act towards commission”; max one-half of prescribed sentence	S. 62: identical formulation retained; same penalty formula	Cosmetic: same wording, renumbered only
Attempt to murder	S. 307: up to 10 yrs; if hurt caused, up to life	S. 109: substantially identical; up to 10 yrs, or life if hurt caused	Minimal: renumbered
Criminal conspiracy	Ss. 120A-120B: agreement to commit illegal act; overt act not required for serious offences	S. 61: same definition; overt act still not required	None: substantive reproduction
Abetment (definition)	S. 107: instigation, conspiracy, intentional aid (tripartite)	S. 45: identical tripartite structure retained	None: exact reproduction

⁴³ Serious Crime Act 2007, §§ 44-46 (Eng.).

Abetment (punishment)	Ss. 109-115: graduated by whether offence committed	Ss. 49-60: marginally enhanced penalties for certain categories; structure retained	Marginal: enhanced in limited categories
Mens rea (explicit)	Not codified for attempt or conspiracy; “intentional” for abetment by aid	Not codified: same judicial supplement required	None
Proximity test (attempt)	Judicially evolved: <i>Abhayanand Mishra</i> , <i>Mohd. Yakub</i> ; no statutory standard	No statutory test introduced; same judicial formulas applicable	None: missed reform opportunity

The critical assessment that emerges from this comparative survey is clear: in the field of inchoate liability, the BNS has opted for minimal disruption rather than principled reform. The provisions have been renumbered, reordered and, in some instances, slightly reworded, but the basic doctrinal structure, namely the undefined proximity requirement for attempt, the absence of an act requirement for conspiracy, and the tripartite definition of abetment without any specific mens rea requirement, remains largely unchanged. The comparison with the reform projects of England and the United States, which addressed similar doctrinal pressures with more ambitious and more theoretically informed legislative responses, is not merely unflattering; because those models were available in the comparative literature long before the BNS was drafted, it raises legitimate questions about the depth and seriousness of the reform process that produced the new Code.

It is important to recognise that there may be reasons why radical reform is especially difficult in the Indian context. The enormous range of criminal behaviour in so large and diverse a country, combined with the substantial variation in legal capacity and training within the court system and the evidentiary realities of conspiracy cases, particularly those involving organised crime, terrorism and corruption, may justify a degree of legislative caution that would be unwarranted in a more homogeneous jurisdiction with a more uniformly resourced judiciary. Yet the minimum that principled criminal codification requires, namely an attempt definition that is not circular, a mens rea requirement for abetment by aid, and at least an overt act requirement for conspiracy, is modest enough to have been accomplished without jeopardising the existing criminal law system or burdening the administration of criminal justice. The BNS's

failure to make even these modest improvements suggests that the reform process was as much about symbolic re-branding and the decolonising of nomenclature as about doctrinal consistency, criminal justice theory or constitutional principle.

VIII. FINDINGS AND SUGGESTIONS

A. Principal Findings

First, the BNS makes no meaningful doctrinal innovation in the inchoate offence provisions of the IPC, merely renumbering and making minor editorial changes to the attempt, conspiracy and abetment provisions. The proximity test for attempt is not provided for by statute, the conspiracy offence retains its overt-act-free design, and the abetment provisions continue to lack an explicit mens rea requirement for abetment by intentional assistance.

Second, the judicial tests developed during the IPC era, such as the *Abhaynand Mishra* and *Mohd. Yakub* proximity standard for attempt, the *Kehar Singh* and *Navjot Sandhu* framework for conspiracy, and the *Saju* knowledge requirement for abetment by aid, will remain operative under the BNS regime.

Third, India's inchoate offence framework lies far from the reform positions taken by England and the United States. Facing similar doctrinal pressures, both jurisdictions enacted legislative reforms, namely the Criminal Attempts Act 1981, the Criminal Law Act 1977, the Serious Crime Act 2007 and the Model Penal Code, which rectified the most serious structural defects of the common law framework. India's choice not to draw on these reforms as comparative models was a significant missed opportunity for the coherence and constitutional defensibility of Indian criminal law.

B. Suggestions for Reform

Four legislative changes are recommended. First, the BNS should be amended to provide a clear, statutorily defined proximity standard for criminal attempt, moving away from the circular definition currently preserved in Section 62. The legislature should adopt a standard akin to that of the American Model Penal Code, defining a “substantial step strongly corroborative of criminal purpose” and including an illustrative, non-exhaustive list of acts that prima facie constitute substantial steps, allowing trial courts to adapt it to the variety of criminal conduct in India.⁴⁴

Second, the BNS should be amended to require at least one overt act in furtherance of the conspiracy for all offences other than those punishable by death or imprisonment for life, in

⁴⁴ Robinson & Grall, *supra* note 22.

order to harmonise Indian conspiracy law with the Model Penal Code standard and to impose a minimal actus reus requirement that would relieve the constitutional tension highlighted in *Kehar Singh* and other cases.⁴⁵

Third, a specific requirement of knowledge or purpose should be added to the BNS definition of abetment by intentional assistance in Section 45, codifying the principles enunciated in *Saju* and giving clear guidance to the courts, which have hitherto applied them on an inconsistent basis. The model of Section 44 of the Serious Crime Act 2007 in England, which requires the defendant to intend to encourage or assist the doing of the act, is instructive.

Fourth, the Law Commission of India should be mandated to prepare a dedicated report on the sentencing of inchoate offences, with a view to developing a structured sentencing regime that takes account of the nature of the intended harm, the seriousness of that harm, the degree of proximity of the inchoate offence to the completed offence, and the individual causal contribution of the accused. Such guidelines would address the proportionality concerns identified above and bring India's sentencing practice into closer alignment with constitutional requirements.

⁴⁵ MODEL PENAL CODE § 5.03 (Am. L. Inst. 1962).

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