

INDIA'S EXPANDED REACH IN CRIMINAL LAW: IMPLICATIONS FOR FOREIGN NATIONALS & COMPANIES

The recent enactment of the Bharatiya Nyaya Sanhita, 2023 (“BNS”), Bharatiya Nagarik Suraksha Sanhita, 2023 (“BNSS”), and Bharatiya Sakshya Adhinyam, 2023 (“BSA”) (collectively referred to as the “New Criminal Laws”) represents a significant departure from the past, empowering India to extend its reach beyond its territorial borders and prosecute individuals and entities abroad for crimes allegedly committed within Indian territory. While this marks a step towards greater crime-fighting prowess for Indian investigative authorities, it may mean increased vigilance for foreign nationals and companies operating within India.

In the following discussion, we analyse certain intricacies of these laws and their implications for stakeholders overseas. It sheds light on the potential apprehensions surrounding broad terms such as “abetting” and “instigating” as set out in the New Criminal Laws, and their potentially disruptive effect on international collaboration which is of particular note. Such concerns can be addressed through targeted risk assessments, formulating compliance protocols, and increased focus on positive engagement with Indian authorities, foreign entities may mitigate potential liabilities to better navigate their operations within the new legal framework.

1. Expanding the Net: Key Provisions and Comparisons

Previously, India's ability to prosecute offenses committed within India by parties situated abroad was limited by the confines of the older statutes, i.e., Indian Penal Code, 1860 (“IPC”), Code of Criminal Procedure, 1973 (“CrPC”), and Indian Evidence Act, 1872 (“IEA”), which primarily focused on offenses committed within India and offered limited tools for pursuing those involved from afar. However, one of the most notable features of the New Criminal Laws is their expansive reach.

The present analysis is confined to Section 48 of the BNS¹ and Section 107 of the BNSS², which are slated to be notified later this year. Section 48 of the BNS stipulates that the act of abetting a criminal act

¹ Section 48 of the BNS provides “A person abets an offence within the meaning of this Sanhita who, without and beyond India, abets the commission of any act in India which would constitute an offence if committed in India.”

² Section 107 of the BNSS provides “(1) Where a police officer making an investigation has reason to believe that any property is derived or obtained, directly or indirectly, as a result of a criminal activity or from the commission of any offence, he may, with the approval of the Superintendent of Police or Commissioner of Police, make an application to the Court or the Judicial Magistrate exercising jurisdiction to take cognizance of the offence or commit for trial or try the case, for the attachment of such property.

(2) If the Court or the Judicial Magistrate has reasons to believe, whether before or after taking evidence, that all or any of such properties are proceeds of crime, the Court or the Magistrate may issue a notice upon such person calling upon him to show cause within a period of fourteen days as to why an order of attachment shall not be made.

(3) Where the notice issued to any person under sub-section (2) specifies any property as being held by any other person on behalf of such person, a copy of the notice shall also be served upon such other person.

(4) The Court or the Judicial Magistrate may, after considering the explanation, if any, to the show-cause notice issued under sub-section (2) and the material fact available before such Court or Magistrate and after giving a reasonable opportunity of being heard to such person or persons, may pass an order of attachment, in respect of those properties which are found to be the proceeds of crime: Provided that if such person does not appear before the Court or the Magistrate or represent his case before the Court or Judicial Magistrate within a period of fourteen days specified in the show-cause notice, the Court or the Judicial Magistrate may proceed to pass the ex-parte order.

(5) Notwithstanding anything contained in sub-section (2), if the Court or the Judicial Magistrate is of the opinion that issuance of notice under the said sub-section would defeat the object of attachment or seizure, the Court or Judicial Magistrate may by an interim order passed ex-parte direct attachment or seizure of such property, and such order shall remain in force till an order under sub-section (6) is passed.

(6) If the Court or the Judicial Magistrate finds the attached or seized properties to be the proceeds of crime, the Court or the Judicial Magistrate shall by order direct the District Magistrate to rateably distribute such proceeds of crime to the persons who are affected by such crime.

(7) On receipt of an order passed under sub-section (6), the District Magistrate shall, within a period of sixty days distribute the proceeds of crime either by himself or authorise any officer subordinate to him to effect such distribution.

(8) If there are no claimants to receive such proceeds or no claimant is ascertainable or there is any surplus after satisfying the claimants, such proceeds of crime shall stand forfeited to the Government.

occurring within India from outside India, will now constitute an offence. This significantly enlarges the scope of a person situated abroad in being charged for abetting and instigating offenses, and potentially ensnares foreign nationals or entities who are alleged to have remote and/or tenuous involvement to crimes committed within India through advice, resources, encouragement etc.

Another noteworthy aspect of the New Criminal Laws is their impact on asset seizure and extradition. Section 107 of BNSS empowers Indian authorities to freeze the overseas assets of foreign nationals or entities charged with offenses under the BNS, irrespective of their location. This represents a significant expansion of the asset attachment envisaged within the New Criminal Laws, raising concerns about observance of due process while dealing with person situated outside India, and potentially impacting business transactions and investments in foreign jurisdictions.

2. Potential Concerns and Navigating the Landscape

A primary concern is the potential for misuse of broad terms like “abetting” and “instigating”, especially in the context of the far-reaching powers of the concerned Magistrate in attaching property by way of an *ex-parte* interim order³ under Section 107 of the BNSS. The subjective nature of these terms could lead to investigations, prosecutions and consequent attachment of property based on tenuous links to offenses committed in India, creating uncertainty and the possibility of arbitrary and undiscerning application of the law. It is also noteworthy that the new statute in its current form does not require the concerned Magistrate to pass an *ex-parte* interim attachment order “... for reasons to be recorded...” in such an order. In other words, the Magistrate is not required to provide reasons for the *ex-parte* interim attachment of property.

Another concern is the potentially disruptive effect on international collaboration. Foreign companies may hesitate to engage in business activities in India or with Indian parties, fearing unintended exposure to liability under the New Criminal Laws, particularly in industries that experience high volumes of cross-border transactions. This could stifle foreign investment and hinder international collaborations, potentially impacting India's economic growth and global integration.

Finally, the application of extraterritorial jurisdiction raises concerns about due process for foreign nationals and entities abroad. Questions regarding access to effective legal representation, and fair trial standards requires careful consideration and appropriate safeguards.

3. Recommendations for Foreign Nationals and Entities: Proactive Strategies and Informed Guidance

In light of these evolving legal realities, foreign nationals and companies operating in India or with Indian parties are advised to adopt proactive strategies and seek informed guidance to navigate this new landscape effectively. We have provided some of the key recommendations below:

3.1. Conduct Thorough Risk Assessments:

- Analyse potential exposure to liability under the New Criminal Laws, particularly for activities involving electronic platforms or transactions with Indian entities/nationals.
- Identify areas where operations or services may be susceptible to investigative/judicial scrutiny simply by virtue of association, for instance, operating intermediary or nodal accounts, which facilitate e-commerce.

Explanation. – For the purposes of this section, the word “property” and the expression “proceeds of crime” shall have the meaning assigned to them in clause (d) of section 111”.

³ Section 107 of the BNSS provides “... (5) Notwithstanding anything contained in sub-section (2), if the Court or the Judicial Magistrate is of the opinion that issuance of notice under the said sub-section would defeat the object of attachment or seizure, the Court or Judicial Magistrate may by an interim order passed *ex-parte* direct attachment or seizure of such property, and such order shall remain in force till an order under sub-section (6) is passed.”

3.2. Implement Robust Compliance Programs:

- Develop and implement internal policies and controls that mitigate the risk of involuntarily portraying aiding or abetting alleged offenses in India, especially online financial transactions.
- Formulate policies with clear guidelines for employee conduct while handling cross-border transactions or engaging with Indian entities/nationals.
- Conduct regular internal checks within the organisations on transactions and employee conduct to ensuring overall compliance with New Criminal Laws.

3.3. Seek Legal Counsel:

- Partner with experienced legal professionals who possess a deep understanding of the New Criminal Laws and their implications for foreign nationals and entities. Such professionals can assist in fostering open communication with Indian authorities and industry stakeholders to ensure transparency and clarity in application of the New Criminal Laws to the activities of foreign nationals or entities.
- Seek guidance from legal professionals on developing strategies to minimize potential risks and ensure compliance with the provisions of New Criminal Laws.
- Legal professionals possessing transborder understanding of criminal laws can also assist in coordinating with industry associations and government agencies to develop practical solutions for mitigating risks and fostering a mutually beneficial environment for international collaboration.

3.4. Stay Informed and Adaptable:

- Stay updated on the evolving interpretations and applications of these new laws by legal experts and Indian authorities.
- Ensure that you have the ability to adapt policies and practices necessary to comply with updated regulations and interpretations.
- Remain informed about potential legal challenges to the New Criminal Laws and their possible implications for foreign nationals and entities.

4. Conclusion: A Call for Collaboration and Understanding

India's expanded reach through criminal law undoubtedly presents challenges for foreign nationals and companies, however, it also offers opportunities for increased cooperation and shared responsibility in combatting crime. By adopting proactive strategies, seeking informed guidance, and engaging in constructive dialogue, foreign stakeholders can navigate this new legal landscape effectively. Building trust, encouraging transparency, and promoting fair and responsible application of New Criminal Laws will be crucial for fostering a positive and secure environment for international businesses and collaboration in the years to come.

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Practice Areas: Dispute Resolution

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