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# RE-EVALUATING THE TRAFFICKING LENS: A CRITIQUE OF THE BHARATIYA NYAYA SANHITA (BNS) AND ITS IMPLICATIONS FOR THE BEDIA COMMUNITY

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## ABSTRACT

The introduction of the Bharatiya Nyaya Sanhita, 2023 (BNS) represents a significant departure from colonial penal legislation. However, this essay contends that its handling of sexual exploitation and trafficking reveals a continuance of carceral logic, especially in its effects on historically oppressed and de-notified groups like the Bedia. The BNS runs the risk of confusing sex work, poverty, and community customs with criminal activity by using a broad trafficking lens, which would allow for new kinds of surveillance and discretionary policing.

The study will shed light on how the new penal framework perpetuates the structural vulnerabilities of the Bedia community despite their formal de-notification in 1952 through a doctrinal analysis of trafficking-related provisions under the BNS, read alongside constitutional guarantees of equality, dignity, and livelihood. The paper will also highlight the enduring colonial presumptions under modern legislative reform by placing these provisions within the larger jurisprudence on individual liberty and state power.

The study will argue that the BNS compromises constitutional guarantees and runs the risk of maintaining historical stigma through contemporary statutory wording in the absence of a clear distinction between forceful exploitation and consenting adult behaviour. The necessity of a rights-based interpretive approach that balances trafficking law with constitutional morality and the daily realities of de-notified tribes is emphasized in the conclusion.

**Keywords:** Bharatiya Nyaya Sanhita, 2023; Trafficking Law; De-Notified Tribes (DNTs); Bedia Community; Criminalization; Constitutional Morality; Police Discretion; Sex Work; Historical Stigma; Penal Reform.

## 1. Introduction

The Indian Penal Code, 1860 (IPC), a legislation firmly ingrained in colonial rule and moral regulation, was legally replaced by the Bharatiya Nyaya Sanhita, 2023 (BNS), marking an important turning point in India's criminal law reform. Although the BNS has been presented as a contemporary, victim-focused, and nationally based criminal framework, there are significant constitutional and socio-legal issues with its substantive continuity with the IPC, especially when it comes to offenses involving trafficking and sexual exploitation. These worries are most evident when it comes to how they affect historically marginalized groups like the Bedia, who were officially de-notified in 1952 but still retain the stigma of being a "criminal tribe" under colonial law.<sup>1</sup>

The trafficking structure created by the Criminal Law (Amendment) Act, 2013, which was passed in the wake of the Nirbhaya case, is retained in Section 143 of the BNS, which replaces Section 370 of the IPC.<sup>2</sup> The post-2013 administration established a punitive and carceral strategy that often blurs the lines between trafficking, traditional livelihoods, and consensual adult sex work, even as it worked to increase protections against coercive exploitation. A "trafficking lens" that puts criminalization and rescue ahead of agency, dignity, and socioeconomic context runs the risk of being reinforced if this paradigm is transplanted into the BNS without significant recalibration.

The BNS poses a threat to the Bedia community, whose women have traditionally used performance-based and sexual labour as a means of subsistence in the absence of land rights, education, or other forms of employment. Through purportedly progressive statutory language, the new penal code runs the risk of reinforcing colonial legacies rather than eradicating them.

### 1.1. The Broadened Definition of Trafficking Under the BNS

The BNS poses a threat to the Bedia community, whose women have traditionally used performance-based and sexual labour as a means of subsistence in the absence of land rights, education, or other forms of employment<sup>3</sup>. Through purportedly progressive statutory

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<sup>1</sup> Ministry of Social Justice & Empowerment, Report of the National Commission for De-Notified, Nomadic and Semi-Nomadic Tribes (2008), <https://socialjustice.gov.in>

<sup>2</sup> Criminal Law (Amendment) Act, No. 13 of 2013, § 10, India Code (2013).

<sup>3</sup> Bharatiya Nyaya Sanhita, No. 45 of 2023, § 143, India Code (2023).

language, the new penal code runs the risk of reinforcing colonial legacies rather than eradicating them.

### 1.1.1. The Problem of Consent

One of the main criticisms of the trafficking framework under the BNS and the IPC is that it treats consent in an unclear manner. The statute does not offer clear direction on how permission is to be evaluated in situations of poverty, caste marginalization, and traditional vocations, despite the fact that it legally invalidates consent where banned means are established<sup>4</sup>. In reality, when women from stigmatized areas engage in sex work, law enforcement agencies usually assume that there is no consent, so denying them legal subjectivity.

In other situations, the Supreme Court has recognized the difference between trafficking and consenting adult sex work. The Court clearly acknowledged sex workers as citizens with rights and a right to dignity under Article 21 of the Constitution in *Budhadev Karmaskar v. State of West Bengal*<sup>5</sup>. Nevertheless, trafficking trials, where rescue-oriented operations frequently result in incarceration, loss of livelihood, and family separation, have not effectively incorporated this fundamental recognition.

Even in the absence of force or third-party control, Bedia women—whose introduction into sex work is often driven by structural deprivation rather than personal coercion—are often classified as trafficked persons due to the failure to discern agreement from compulsion. This doctrinal discrepancy is not addressed by the BNS.

### 1.1.2. “Exploitation” as a Catch-All Category

Sexual exploitation, prostitution, forced labour, slavery-like acts, servitude, and the removal of organs are all included in the remarkably broad definition of "exploitation" under Section 143<sup>6</sup>. Such a broad scope may be desirable from a normative standpoint, but it also makes it possible to combine quite different types of injury under one criminal heading. For communities like the Bedia, where entire households are frequently implicated during police raids on the grounds

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<sup>4</sup> Indian Penal Code, No. 45 of 1860, § 370, India Code (prior to repeal).

<sup>5</sup> *Budhadev Karmaskar v. State of W.B.*, (2011) 11 S.C.C. 538 (India).

<sup>6</sup> Bharatiya Nyaya Sanhita § 143 Explanation, India Code (2023).

of suspected organized exploitation, this has serious ramifications.

Trafficking-related crimes disproportionately target underprivileged and nomadic communities, according to empirical data from National Crime Records Bureau (NCRB) reports. Low conviction rates reflect over-inclusive case registration.<sup>7</sup> The emphasis on "rescue" operations often leads to the imprisonment of family members, such as spouses, mothers, and sisters, who are viewed as traffickers rather than as participants of an unofficial, survival-based economic framework.

The BNS permits collective punishment and perpetuates hereditary stigma by viewing exploitation as a catch-all notion disconnected from socioeconomic realities. In essence, the law moves away from dealing with coercive harm and toward controlling morality and visibility, especially in populations that have previously been labelled as abnormal.

Therefore, despite the BNS's claims to modernize India's legal system, its trafficking provisions show a concerning continuity with colonial and post-colonial control tactics. The Bedia community views the expanded definition of trafficking as a renewed site of monitoring rather than protection, necessitating a reevaluation based on social fairness and constitutional morality rather than carceral expansion.

## **2. Historical Context: From “Criminal Tribes” to “Trafficked Victims”**

It is impossible to comprehend the Bedia community's current legal position without taking into account the colonial criminal architecture created by the Criminal Tribes Act of 1871. The Act, which designated entire villages as hereditary offenders and subjected them to registration, monitoring, compulsory settlement, and regular police control, was passed as a preventive policing tool<sup>8</sup> Under this system, the Bedia were categorized based on colonial concerns about migration, sexuality, and non-conforming livelihoods rather than personal guilt. In this view, criminality was a hereditary position rather than an act.

The Bedias were officially "de-notified" in 1952 and the Criminal Tribes Act was repealed upon independence, but the Act's structural logic of suspicion was never completely

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<sup>7</sup> Nat'l Crime Records Bureau, *Crime in India 2022: Volume I*, Ministry of Home Affairs, Govt. of India, <https://ncrb.gov.in>.

<sup>8</sup> Criminal Tribes Act, No. 27 of 1871, Acts of the Governor-General of India (repealed 1952).

eliminated<sup>9</sup>. Rather, it moved into administrative monitoring, habitual offender statutes, and post-colonial policing techniques, guaranteeing that de-notification remained primarily symbolic. Independence did not result in substantive citizenship since the Bedia were still associated with sexual immorality and deviance.

When combined with modern trafficking legislation and rescue-focused enforcement tactics, the Bharatiya Nyaya Sanhita, 2023 poses a challenge to the emergence of neo-criminalization. Although the terminology has changed—from "criminal tribes" to "trafficked victims"—the fundamental reasoning behind control is still quite similar. Communities that were once policed as intrinsically criminal are now governed as intrinsically weak, incapable of giving permission, and always in need of government intervention.

### **2.1. The Surveillance State and the Politics of “Rescue”**

The rescue-rehabilitation paradigm used in contemporary anti-trafficking enforcement increases police discretion under the pretense of protection. Regardless of any proof of force, deceit, or third-party control, raids carried out in violation of trafficking and immoral traffic laws frequently result in the mass incarceration of women from the Bedia community.<sup>10</sup> These operations often turn welfare goals into tools of surveillance since they are based on presumptions of victimhood rather than actual harm.

Research from government-appointed organizations has shown how so-called rescue operations frequently result in children being separated from their families for extended periods of time, custodial incarceration in shelter homes, and the start of criminal actions against family members and community members<sup>11</sup>. These interventions are reminiscent of the colonial practice of using family disruption and spatial confinement to manage "dangerous" societies. The coercive aspect of governmental power is not significantly lessened by the transition from overt punishment to paternalistic protection.

The Supreme Court has issued a warning against confusing rescue with incarceration, especially when doing so compromises an individual's right to personal liberty under Article

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<sup>9</sup> Ministry of Home Affairs, Govt. of India, Report of the Criminal Tribes Act Enquiry Committee, 1949–50 (1951), <https://digitalcommons.law.uw.edu> (archived copy).

<sup>10</sup> National Human Rights Commission, Trafficking in Women and Children: A Report on Law Enforcement Practices (2004), <https://nhrc.nic.in>

<sup>11</sup> Ministry of Social Justice & Empowerment, Report of the National Commission for De-Notified, Nomadic and Semi-Nomadic Tribes (2008), <https://socialjustice.gov.in>

21<sup>12</sup>. However, these constitutional protections are rarely put into practice at the local level in the context of de-notified tribes like the Bedia, which permits preventive detention to resurface in administrative form. De-notification will continue to be insufficient as long as this stigma persists. Bedia women are deprived of agency, choice, and citizenship as long as they are portrayed as either eternal victims or criminals. Thus, the shift from colonial criminality to modern trafficking is a reconfiguration of the same regulatory tendency, which rules vulnerable people through exclusion, suspicion, and rescue rather than a break.

## 2.2. The Stigma of Livelihood and Legal Displacement

The law becomes a tool of displacement rather than a mechanism of protection when a community's traditional way of life is solely seen through the prism of organized crime. Criminal law provides no practical way out for the Bedia, whose intergenerational engagement in performance-based and sexual labour has historically been moulded by caste discrimination, landlessness, and the lack of other employment.<sup>13</sup> Rather, it undermines the very concept of survival.

Trafficking laws reduce structural poverty to criminal intent by portraying such livelihoods as proof of exploitation per se. The constitutional acknowledgment of the right to livelihood as a fundamental part of the right to life is disregarded by this formulation. The outcome is a judicial system that penalizes communities for their failure to adhere to prevailing moral and economic standards rather than for actual harm.

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## 3. The Gap in Rehabilitation

The Bharatiya Nyaya Sanhita, 2023's excessive focus on punitive criminalization without a matching framework for long-term rehabilitation and socioeconomic reintegration is a

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<sup>12</sup> *Budhadev Karmaskar v. State of W.B.*, (2011) 11 S.C.C. 538, 548–49 (India).

<sup>13</sup> Virginius Xaxa, Denotified Tribes in India: A Sociological Perspective, 42 *Econ. & Pol. Wkly.* 3495 (2007), <https://www.epw.in>.

structural flaw. The statute's operational rationale is nevertheless strongly rooted in arrest, incarceration, and prosecution, despite its purported victim-centric approach to trafficking. Instead of being integrated as a legal right inside the criminal justice system, rehabilitation is handled as an incidental issue and assigned to disjointed executive programs.

For communities like the Bedia, where criminal law interventions regularly meet with ingrained poverty, gendered vulnerability, and historical exclusion from formal labour markets, this imbalance is especially problematic. Penal intervention frequently becomes cyclical—rescue followed by release, re-entry into precarious employment, and renewed criminalization—in the absence of structured rehabilitative paths.

### 3.1. Rescue Without Resources

The way that "rescue" efforts end in jail incarceration rather than substantive assistance is one of the most enduring criticisms of India's anti-trafficking system. People who are suspected of being trafficked are frequently placed in shelter houses under protective custody, frequently for unspecified lengths of time and without their knowledge or agreement.<sup>14</sup> Many of these shelter homes operate in conditions that are identical to those of detention facilities, with limited mobility, a lack of privacy, and no access to legal remedies, according to numerous government and court-mandated studies.<sup>15</sup>

Crucially, these facilities rarely offer long-term livelihood planning, trauma-informed psychosocial care, or specialized vocational training. Confinement in shelter houses often leads in skill erosion rather than capacity growth for women from the Bedia community, whose economic survival has long depended on informal and stigmatized labour. The lack of community-based rehabilitation or market-relevant training guarantees that "rescue" turns into a transient disruption rather than a long-term escape from vulnerability.

Under Article 21 of the Constitution, the Supreme Court has acknowledged that forced imprisonment in protective homes presents grave problems, even when it is justified as welfare.<sup>16</sup> But the distinction between protection and punishment is nevertheless blurred by

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<sup>14</sup> Immoral Traffic (Prevention) Act, No. 104 of 1956, §§ 16–17, India Code (authorizing protective custody).

<sup>15</sup> Ministry of Women & Child Development, Govt. of India, Study on Conditions of Shelter Homes for Women (2017), <https://wcd.nic.in>.

<sup>16</sup> *Gaurav Jain v. Union of India*, (1997) 8 S.C.C. 114, 137–38 (India).

trafficking enforcement, especially when marginalized women are thought to be incapable of making their own decisions.

### **3.2. Economic Vulnerability and the Risk of Clandestine Work**

The BNS runs the risk of making vulnerability worse rather than better by criminalizing the social and economic institutions that support the Bedia community without also developing workable alternatives. Family members, middlemen, and community networks that serve as unofficial networks of mutual support in the absence of government assistance are often implicated in trafficking convictions<sup>17</sup>. Affected people have little legal options for survival after these networks are dismantled by criminal law.

Empirical evidence suggests that aggressive criminalization of sex work and associated livelihoods does not eliminate the practice but displaces it into more clandestine and dangerous settings.<sup>18</sup> For Bedia women, this displacement often translates into heightened exposure to violence, reduced bargaining power, and increased dependence on exploitative intermediaries—outcomes that directly contradict the stated objectives of trafficking laws.

The constitutional right to livelihood, as recognized by the Supreme Court, imposes a positive obligation on the State to avoid policies that render survival itself unlawful.<sup>19</sup> In failing to integrate economic rehabilitation into the core of its trafficking framework, the BNS risks violating this obligation by transforming poverty into a site of penal governance.

## **4. The Risk of Over-Policing and Discretionary Power**

The broad discretionary jurisdiction that the Bharatiya Nyaya Sanhita, 2023 grants law enforcement organizations, especially in the investigation and prosecution of crimes related to human trafficking, is one of its distinguishing characteristics. Although discretion is an essential part of administering the criminal justice system, its uncontrolled use in situations characterized by historical criminality and caste stigma presents grave constitutional issues. For the Bedia community, discretionary power serves as a means of translating hereditary

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<sup>17</sup> Ministry of Social Justice & Empowerment, Report of the National Commission for De-Notified, Nomadic and Semi-Nomadic Tribes (2008), <https://socialjustice.gov.in>

<sup>18</sup> UNAIDS, Sex Work and the Law in Asia and the Pacific (2010), <https://www.unaids.org>.

<sup>19</sup> *Olga Tellis v. Bombay Mun. Corp.*, (1985) 3 S.C.C. 545, 572–73 (India).

distrust into modern penal practice rather than as an impartial enforcement tool.

#### **4.1. Presumption of Guilt and the Criminalization of Household**

Ordinary household financial activities are frequently treated as presumptive evidence of trafficking or exploitation in trafficking prosecutions involving the Bedia group. Women's earnings, whether from performance, unofficial labor, or sex work, are often labeled as "proceeds of trafficking," putting family members at risk of criminal prosecution as either facilitators or beneficiaries of exploitation.<sup>20</sup> By requiring accused individuals to prove the legality of their livelihood rather than needing the State to prove force, deception, or abuse, this strategy essentially reverses the burden of proof.

Such assumptions are similar to the reasoning behind the Criminal Tribes Act of 1871, which imputed criminality based on status rather than behavior.<sup>21</sup> The BNS runs the possibility of resurrecting this status-based crime under a contemporary legal pretense by neglecting to limit police discretion with explicit evidential criteria. Law enforcement is allowed to rely on stereotype and visibility rather than individualized judgment since there are no legal safeguards that separate peaceful economic activity from exploitative conduct.

From a constitutional perspective, this approach conflicts with Article 14's guarantee of equality before the law and the assumption of innocent. The Supreme Court has underlined time and time again that proof of responsible behavior, not widespread suspicion or social identity, is the basis for criminal culpability.<sup>22</sup> However, these values are frequently compromised in favor of fast policing when it comes to trafficking enforcement.

#### **4.2. Denial of Agency and the Construction of “Involuntary Victims”**

The systematic deprivation of agency to Bedia women inside the trafficking framework is a comparable effect of discretionary overreach. Regardless of their own expression of consent or choice, the law often assumes incompetence, portraying women from stigmatized areas as victims by default. They lack legal standing to specify their situation, contest rescue efforts, or

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<sup>20</sup> National Crime Records Bureau, *Crime in India 2022: Volume I* (2023), <https://ncrb.gov.in> (noting low conviction rates in trafficking cases despite high registrations).

<sup>21</sup> Criminal Tribes Act, No. 27 of 1871, Acts of the Governor-General of India (repealed 1952).

<sup>22</sup> *State of Punjab v. Baldev Singh*, (1999) 6 S.C.C. 172, 188 (India).

bargain for safer working conditions as a result of this paternalistic construction.<sup>23</sup>

For more than ten years, Indian constitutional doctrine has recognized sex workers as independent, rights-bearing individuals. The Supreme Court made it clear in *Budhadev Karmaskar v. State of West Bengal* that sex workers have a right to dignity and cannot be treated like second-class people.<sup>24</sup> This understanding hasn't, however, been reflected in trafficking enforcement tactics, where moralized tales of rescue and rehabilitation frequently take precedence over agency.

There are specific legal repercussions for denying agency. Involuntary confinement in shelter homes, exclusion from decision-making processes, and denial of access to legal remedies or livelihood possibilities are all common experiences for women classified as victims.<sup>25</sup> In actuality, victimization turns into a legal status that deprives people of their autonomy and exposes their communities and families to criminal penalties.

This strategy is at odds with constitutional morality, which under Article 21 requires respect for individual choice, bodily autonomy, and decisional privacy<sup>26</sup>. The BNS trafficking framework runs the risk of sustaining a carceral form of protection that compromises the same rights it purports to protect by compressing vulnerability into incapacity.

## 5. Key Recommendations

- i. **Unambiguous Statutory Differentiation in BNS Section 143:** To avoid overly wide criminalization, clearly distinguish between coercive trafficking and voluntary adult sex work.
- ii. **Evidentiary Standards for Arrests and Raids:** Require previous judicial authorization based on specific evidence before conducting raids or searches related to human trafficking.
- iii. **Adult Agency Presumption:** Acknowledge that adult women have a rebuttable

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<sup>23</sup> Prabha Kotiswaran, *Dangerous Sex, Invisible Labor: Sex Work and the Law in India* 173–76 (2011), <https://law.wisc.edu>

<sup>24</sup> *Budhadev Karmaskar v. State of W.B.*, (2011) 11 S.C.C. 538, 548 (India).

<sup>25</sup> Ministry of Women & Child Development, Govt. of India, *Study on Conditions of Shelter Homes for Women* (2017), <https://wcd.nic.in>

<sup>26</sup> *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1, 298–99 (India).

presumption of agency unless there is evidence of coercion, deceit, or abuse.

- iv. Sensitization of Judges towards De-Notified Tribes:** To reduce stereotyping based on caste and community in bail, remand, and punishment, obligatory training modules should be implemented.
- v. Reviewable and Time-Bound Protective Custody:** To protect individual liberty, impose statutory restrictions on shelter-home confinement with recurring judicial review.
- vi. Decriminalization of Associational Liability:** Limit the prosecution of family members or community members unless there is proof of direct exploitative control.
- vii. Community-Led Rehabilitation Design:** Involve Bedia community members in the creation and execution of policies for rehabilitation and reintegration.
- viii. Legal Aid at the Point of Rescue:** During rescue, custody, and rehabilitation processes, Legal Aid should ensure prompt access to independent legal advice.
- ix. Data Transparency and Accountability Audits:** Publication of disaggregated data on trafficking cases, raids, rescues, and conviction rates is mandated under Data Transparency and Accountability Audits.

## **6. Conclusion: Toward a Nuanced Jurisprudence**

With the transition from the Indian Penal Code to the Bharatiya Nyaya Sanhita (BNS), the legal framework pertaining to trafficking is at a crucial juncture between advancement and the continuation of prejudices from the colonial past. In summary, even though the BNS is presented as a decolonial project, it is clear that it runs the risk of solidifying the same punitive reasoning that has disenfranchised the Bedia population for more than a century. The application of a strict "trafficking lens" under Section 143, which ignores the complex relationship between caste, historical stigma, and socioeconomic survival, is at the heart of the problem. The bill essentially revives the ghost of the Criminal Tribes Act by broadening the concept of exploitation without offering any protections for voluntary labour or traditional livelihoods. As a result, a "neo-criminalization" environment is created in which the state primarily engages in monitoring rather than help, and the Bedia household is perceived as a

possible location of organized crime rather than a domestic sanctuary.

The paradoxical "protection" that the existing legal system puts on the Bedia women is its tragedy. The state deprives the same people it purports to save of their agency and dignity by relying on a rescue-and-rehabilitation paradigm that frequently leads to the forcible separation of families and the incarceration of women in shelter homes. The BNS functions as a blunt tool that incorrectly labels structural poverty as a criminal decision for a group that has historically been de-notified but never fully de-stigmatized. Beyond this "victim" vs "trafficker" dichotomy, a truly just jurisprudence must acknowledge the Bedia community as a group of people whose options for employment and living are limited by a history of systemic exclusion. In order to achieve true reform, the legislation would need to make a clear distinction between marginalized livelihoods that call for socioeconomic assistance rather than police action and coercive trafficking, which must be pursued with the full force of the state.

In the end, the state's perspective must change from a "policing lens" to a "citizenship lens" if the Bedia community is to survive. The provision of land rights, high-quality education, and workable economic alternatives that enable the community to negotiate their place in the contemporary economy on their own terms should mark the end of this chapter in Indian legal history rather than more raids or broader criminal definitions. The BNS must protect the most vulnerable without deleting their agency or history if it is to full-fill its promise to be an authentically Indian code of justice. Only when the law stops viewing the Bedia community as a "problem to be solved" and starts treating them as equal stakeholders in the democratic project will justice be served, guaranteeing that individual safety is never attained at the expense of the community's dignity and right to exist. In order to move toward a future where the "trafficking lens" is ultimately replaced by a framework of empowerment and restorative justice, the BNS's real test will be its capacity to undermine the systems of exploitation while also defending the rights of people it aims to protect.