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Jan Vishwas Act, 2023: Symbol of a Broken Legislative Process

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The Jan Vishwas Act, 2023 has amended 42 laws by decriminalising offences under them to improve the "ease of doing business". While this would usually be a reason to celebrate, the legislation seems to have been hijacked by powerful lobbies. The process of amendment too has been arbitrary & opaque.

One of the key legislations passed by Parliament in its monsoon session was the Jan Vishwas Act, 2023 that amended 42 legislations with the intention of decriminalising offences under them. The government had touted this legislation as a means to decriminalise "minor offences", which would improve the "ease of doing business" in the country.

In a country like India, which for the most part is a carceral state, any talk of decriminalisation would usually be a reason to celebrate. Except that the Jan Vishwas Act, 2023 has been hijacked by powerful lobbies for their own interests. For example, the pharmaceutical industry managed to get a key penal provision in the law that punishes manufacturers of sub-standard drugs placed in the list of compoundable offences. This means that manufacturers can escape imprisonment by paying a paltry fine.

Similarly, the bureaucracy in the Ministry of Communications managed to get the whole of "Chapter X" of the Indian Post Office Act, 1898 deleted from the law. This chapter contained criminal punishments for officers of the post office for a range of offences, including the "opening, detaining or delaying postal articles". The choice of such provisions does not square with the government's claim that they will improve the "ease of doing business" in India. These are just two examples in a legislation covering 42 different laws.

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The important question is how did such sweeping measures sail through Parliament in a legislation meant to decriminalise only "minor offences" to improve the "ease of doing business"? The answer is two-fold — first, a chaotic pre-legislative process. And, second, a parliamentary process that is opaque, if not exclusionary. Both issues deserve more detailed examination.

A failed pre-legislative policy

The exercise of selecting offences for decriminalisation to improve "ease of doing business" began in 2020 when the press reported on a directive from the cabinet secretary to all ministries to identify "minor offences" that could be decriminalised. Some ministries began a public consultation process by shortlisting some provisions of the law for decriminalisation and soliciting public comments on it. But the process was not uniform across the government and many ministries did not put out any consultation papers for public comment.

After two years, the Jan Vishwas Bill, 2022 was suddenly introduced in Parliament by Minister of Commerce Piyush Goel without following the requirements of the Pre-Legislative Consultation Policy adopted on 5 February 2014 in the final days of the United Progressive Alliance (UPA) government. Governments may change but a policy remains in place until it is repealed. As per this policy, pre-legislative consulting is to take place before a bill is introduced in Parliament by placing the bill in the public domain for public comment.

The policy also requires the government to "set out clearly the policy problem that is to be addressed through the provision of supportive evidence and analysis, that the options that it has considered and the reasons for the choices the government have made in bringing forward a legislation". It further requires the government to put out an assessment of the impact the legislation will have on the communities affected by it, on the environment, and so on.

In the case of the Jan Vishwas Act, neither a draft bill nor the accompanying policy document was published for consultation before the bill was introduced in Parliament. But did the bureaucracy at least prepare an internal policy assessment on the lines recommended in the pre-legislative consultative policy, even if it failed to publish it for public consultation?

Since the Cabinet Secretariat's "Handbook on Writing Cabinet Notes" requires Cabinet Notes to contain a "justification" laying out the "essentiality of the legislation", I filed a request under the Right to Information Act requesting a copy of the Cabinet Note. After some wrangling, the Department for Promotion of Industry and Internal Trade (DIIPT), which was the nodal ministry for this bill, provided me a copy of the note, which can be accessed here.[1]

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This note is helpful only to the extent that it provides a bit more detail on the framework that was supposed to be followed by different ministries to identify provisions to be decriminalised. In its pertinent part, the note states, "Frauds, mala fide actions and criminal activities by businesses deserve the strongest measures. However, for legitimate technical or procedural lapses of non-serious nature, civil liability is adequate as a deterrent rather than imprisonment". This statement is too vague for any serious policy making exercise. For example, what is it that qualifies as "criminal activities" in a decriminalisation exercise? Similarly, what is the framework to determine if something is of a "non-serious nature"?

Given this vague framework, it is no surprise that there is no common thread of logic running through the 42 legislations covered by the Jan Vishwas Act. As a matter of fact, many of the offences covered under the Act are those that cause serious harm to the general public. The following are three examples of the offences that have been decriminalised by replacing prison terms with monetary fines, or by making the offences "compoundable". The last means that where an offence is punishable with a prison term and a monetary fine, the prosecution is withdrawn if the fine is paid.

The first example is Section 27(d) of the Drugs and Cosmetics Act, which punished several offences with imprisonment for a minimum of one year and maximum of two years and/or a fine of Rs. 20,000. The range of offences included the manufacture of "Not of Standard Quality" (NSQ) drugs in India. While the pharmaceutical industry has portrayed NSQ drugs as harmless, this is simply not true. NSQ drugs that lack enough of the active ingredient or are contaminated can end up causing serious harm to patients.

In addition, Section 27(d) also criminalises the breach of licence conditions by proprietors of pharmacies. This includes a failure to employ pharmacists to dispense medicine and a failure to store drugs as required. Both these offences are serious. The failure to employ a pharmacist to oversee the dispensing of drugs can cause prescription errors and a failure to store drugs properly can cause drugs to degrade and lose their efficacy. Yet, the Jan Vishwas Act converts Section 27(d) into a compoundable offence—on paying the fine of Rs. 20,000, first-time offenders can avoid the minimum prison term prescribed in the provision.

The second example pertains to "Chapter X" of the Indian Post Office Act, 1898, which has been deleted by the Jan Vishwas Act. Several provisions in "Chapter X" dealt with serious offences. For example, Section 52 punished postal officers for "theft, dishonest misappropriation, secretion, destruction, or throwing away of postal articles" with imprisonment up to seven years and also a fine. Similarly, Section 53 punished postal officers for "opening, detaining or delaying postal articles" with imprisonment of two years or a fine, or both. By any measure, both these provisions dealt with serious offences that could cause severe harm and loss to citizens.

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The third example has to do with certain offences in the Agricultural Produce (Grading and Marking) Act, 1937. This is a provision that deals with grading agricultural produce according to standards laid down by the government, and AGMARK is a "certification mark" under this law. Another example is the Basmati Rice Grading and Marking Rules, 2013, which is notified under this law for grading basmati exports.

These certifications are meant to guarantee to consumers and trading partners that a particular agricultural product complies with certain standards under Indian law. Section 4 of this law criminalised the unauthorised use of any "grade designation mark" notified under this law with imprisonment of six months and a fine not exceeding Rs. 5,000. Similarly, under Section 5, the punishment for counterfeiting "grade designation marks" was imprisonment for a term not exceeding three years and a fine not exceeding Rs. 5,000.

The Jan Vishwas Act has decriminalised both the above provisions by doing away with imprisonment as a punishment and increasing the fine to Rs. 15 lakh. This is surprising because the misuse of grade designation marks or counterfeiting of grade designation marks is the equivalent of defrauding or cheating consumers of their money by making them pay more for something that is of an inferior quality. Why should such offences not be punishable with imprisonment?

The Cabinet Note surprisingly does not provide any serious context, analysis, or justification for any of these provisions being decriminalised by the Jan Vishwas Act. It is clear that the Cabinet had little idea about the legislation that it was approving. But were the individual ministers who consented to legislations administered by their ministry being included in the Jan Vishwas Act briefed on the justification and consequences of the decriminalisation?

I tried to ascertain this by filing requests under the Right to Information Act, 2005 with the Ministry of Health for its file notings on the amendments in the Jan Vishwas Act to the Drugs and Cosmetics Act, 1940 and the Pharmacy Act, 1948. A file noting is basically the document where the ministry records all its internal discussions, and it should have contained the assessment if it had been conducted by the Ministry of Health.

Although the file notings on the amendments to the Pharmacy Act, 1948 were provided to me by the "Allied Health Services Section of the Ministry", the file notings for the more contentious amendments to the Drugs and Cosmetics Act, 1940 were not provided by the "Drug Regulation Section" of the same ministry. The public information officer denied this information on the grounds that it pertained to other offices as well and that "culling out of information" that I requested "would disproportionately divert the resources of the public authority". The information was denied under Section 7(9) and 11(1) of the RTI Act.

This is a surprising ground to reject a request for information because file notings have been computerised across all ministries through a program called eOffice and the public information officer could have easily extracted the required notings with a couple of keystrokes. This is true for even the Ministry of Health, as can be seen from the file notings provided to me regarding the amendments to the Pharmacy Act, 1948. An appeal against the denial of information in relation to the amendments to the Drugs and Cosmetics Act, 1940 is pending before an appellate authority.

Opaque and Non-consultative

After its introduction in Parliament, the Jan Vishwas Bill was referred to a Joint Parliamentary Committee (JPC) for further examination. The parliamentary committee process provided a golden opportunity to correct the lack of pre-legislative consultation by inviting the public to provide feedback on the bill and also inviting experts to depose before the committee. Such consultations are par for the course for JPCs and not extraordinary.

For example, the JPC on the Personal Data Protection Bill, 2019 invited 26 organisations (mostly private companies) to depose before it. It also received 133 written comments in response to its public notice. Similarly, the JPC on the Biological Diversity (Amendment) Bill, 2021 invited 17 official institutions, along with 30 experts/stakeholders from outside the government, to depose before it. This JPC also received 206 written comments from other stakeholders. Clearly, the JPCs have been sites for significant democratic participation even in the past when a majoritarian government in control of the Lok Sabha has ignored democratic niceties.

Shockingly, the JPC examining the Jan Vishwas Bill did not invite either public comments or any experts from outside government. It invited only bureaucrats from the government to depose before it and provide it with background notes on the provisions covered by the bill. The JPC does not anywhere explain why it did not consult anybody outside the government.

To make matters worse, the Lok Sabha Secretariat has refused to provide a copy of the transcripts of the depositions before the JPC under the RTI Act on the grounds that "the evidence/proceedings are of the confidential nature". The reply can be accessed here.

This is not the first time the Lok Sabha has denied information on this ground. Its usual stand is that the "evidence" tendered before a parliamentary committee, including transcripts of depositions, can be made public only if it is laid on the floor of the house. If not, the "evidence" is considered "confidential". As I have argued elsewhere, this approach of the Indian Parliament towards treating some depositions before parliamentary committees as "confidential" is a complete misunderstanding of the concept of "parliamentary privilege".

> The lack of candour on the part of the bureaucracy is hardly surprising. This is why it is so important for the JPC to invite public comments and experts from outside the government while it is scrutinising any legislation.

In the United Kingdom, from where India inherits the law on parliamentary privileges, people submitting written submissions to parliamentary committees are advised to keep their submissions confidential until such time that the content of the submission is vetted by the parliamentary staff, if they want to enjoy parliamentary immunity. This is because once the submission is taken on the record, the content of the submission receives the same legal immunity enjoyed by parliamentarians for statements made in the house. The vetting process is meant to ensure compliance with parliamentary rules. This rationale has been completely twisted out of context in India to treat the evidence tendered before some parliamentary committee during a policy making exercise as confidential unless the same is tabled before Parliament.

Thus, the only insight the public has into the proceedings of the JPC report is the content of its final report, which was tabled before Parliament. But these reports do not tend to be very detailed on the deliberations and interactions between the committee and the bureaucrats deposing before it. From what little of this interaction is in the final report of the JPC, it is clear that the bureaucracy has not been very transparent with either the JPC or the general public.

For example, although the government has been justifying the deletion of criminal offences on the grounds of "ease of doing business" in public, it justified some deletions on the grounds that they were covered by other legislations when it appeared before the JPC. For example, on Chapter X of the Indian Post Office Act, the JPC report states that the Ministry of Communications in its note justified the deletion of Sections 52 (penalty for theft, dishonest misappropriation, secretion, destruction, or throwing away of postal articles) and 53 (penalty for opening, detaining or delaying postal articles) from the law "in view of other extant Rules, laws and provisions that can be applied to serve the same purpose".

The discussion in the report makes a cursory reference to the Indian Penal Code (IPC) but does not specifically mention any other law which contains such a similar offence. As far as the IPC is concerned, there is no punishment for theft or destruction or opening of postal articles.

Similarly, the bureaucracy has not been candid about the ramifications of placing Section 27(d) of the Drugs and Cosmetics Act in the list of compoundable offences. The JPC report reproduces verbatim portions of the background note submitted by the Health Ministry, along with portions of the Secretary's deposition before the JPC. There is nothing in these extracts to suggest that the Health Ministry fully briefed the JPC on the possible ramifications of NSQ drugs on public health or that Section 27(d) also covered offences related to violations of licence conditions by pharmacies.

The lack of candour on the part of the bureaucracy is hardly surprising. This is why it is so important for the JPC to invite public comments and experts from outside the government while it is scrutinising any legislation.

Jan Vishwas 2.0

The government has already announced that it is working on a second version of the Jan Vishwas Act to decriminalise even more offences. While there is no denying that there are several offences under existing laws that deserve to be decriminalised, the opposition needs to pile pressure on the government to comply with the Pre-Legislative Consultative Policy so that the general public can also participative in the process of law making.

Prasant Reddy T is co-author of 'The Truth Pill: The Myth of Drug Regulation in India'.

Footnotes:

1 RTI reply of 28 September of DIIPT to RTI Question No. DOIPP/R/T/23/00299 dated 31.08.2023 - reg. (E-179545)