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From Codes to Sanhitas: Power, Myths, and Problematic Continuities

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'The new criminal justice laws mark an important moment in how independent India will function. It may herald a descent towards greater authoritarian tendencies and a nullifying of the judicial role by reducing personal liberty to a plaything.'

In 2019, soon after securing a resounding electoral majority, the Bharatiya Janata Party (BJP) government let it be known that the reform of India's criminal justice system was part of its agenda for its second term in office. This announcement piqued interests and concern in equal amounts. 'Reform', after all, is much like the concept of beauty, carries different meanings for different groups. A 'reform' of the criminal justice system in the hands of a government that had built its base on majoritarian promises and policies raised concerns.

These concerns gained substance when, in May 2020, even as the country was under lockdown, the government announced the formation of a Criminal Law Reforms Committee to review the three primary criminal law statutes: the Indian Penal Code of 1860 (IPC), the Indian Evidence Act of 1872 (IEA), and the Criminal Procedure Code of 1973 (Cr.P.C.). The committee did not have a single woman or a single representative from a minority group. Probably there were still some who clung to the hope of a dispassionate exercise by such an unrepresentative body, but most of these hopes fell by the wayside some weeks later when the committee revealed its plans for carrying out the reform effort.

At a time when the elite were coming to grips with ideas of working virtually and the country reeling from the after-effects of the first lockdown (with more to follow), the committee announced an agenda which envisaged completing consultations on three laws – that had a 150-year operational history – within a span of 12 weeks, done entirely by way of responding to online questionnaires with 200-word limits. Criminal law reform in an entrance exam avatar!

A predictable outcry followed and led the committee to change its timelines, extending it to 24 weeks , and doing away with the word limit to boot. Perhaps seeing that the public was not willing to play nice, the pretence of consultations were soon entirely done away with. Not a single response received by the committee was made public; no report prepared by the committee ever made public. Citizens were now left completely at the mercy of leaks to the press speculating what the criminal process may look like, with news suggesting that some interim report may have been prepared and shared. (See here, here, and here).

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It felt like not even the press knew that the Home Minister had prepared to introduce three entirely new draft legislations on 11 August 2023. A supplementary list of business published that morning told us that the extant IPC, IEA, and Cr.P.C. would be replaced by the 'Bharatiya Nyaya Sanhita' (BNS) (replacing the IPC), the 'Bharatiya Sakshya Adhiniyam' (BSA) (replacing the IEA), and the 'Bharatiya Nagarik Suraksha Sanhita' (BNSS) (replacing the Cr.P.C.). This was the latest reminder that 'norms' of legislative pre-consultation were not obligatory aspects of a participative democracy consisting of citizens, but a benevolent offering of rulers to subjects, done as per convenience, only the most recent instance of a government legislating by ambush. The irony here complete in that the draft legislation was advertised as a decolonial measure.

It did not take long for the unruly public to examine the drafts to find that there was precious little different between the new laws and the colonial ones. Requests to send the bills for public consultation went unmet. By November, the BNS, BSA, and BNSS had been rubber-stamped by a select committee which spent more time lauding the idea of the laws rather than scrutinising their contents. Its reports were published without sharing the written or oral representations received by the committee. The bills were revised considering some of the recommendations and re-introduced in the winter session, 'debated', and finally passed by an opposition-bereft Parliament. From the time of their introduction on the floor of the Lok Sabha, it took less than 24 weeks for the BNS, BSA, and BNSS to be published in the Official Gazette on Christmas Day. (See here for a source collecting the bills, reports, comparative analysis, and the final versions of the laws).

At the time of writing, we find ourselves in limbo: the familiar old laws are beating a retreat, but the government is yet to notify the dates when the new ones will be brought into force, or even propose a concrete plan to this effect. Much of the growing commentary (both oral and written) that has emerged critically engaging with the new laws has analysed them to convincingly argue that the claims of the exercise being a decolonial effort are, to put it simply, a dishonest charade. A smaller set has emerged which tries to analyse the brass-tacks and determine whether the changes will be beneficial or not. The valedictory or celebratory pieces, expected as they are, have nevertheless been surprisingly few up to this point.

My effort here is to try and avoid treading the ground already covered by these existing contributions (my own position is clear through previous work). Instead, I want to focus on three specific themes – largely within the BNSS and its statement of objects but reflected in the other codes too – and build upon them. These are, firstly, the devaluation of the interests of accused persons in the criminal process, secondly, the myth of technology, and, thirdly, a short point about the possible shrewdness of the purported reform measures.

Accused persons — the forgotten participants

The Statement of Objects and Reasons for the BNSS has the following claim: "fast and efficient justice system is an essential component of good governance. However, delay in delivery of justice due to complex legal procedures, large pendency of cases in the courts, low conviction rates, insufficient use of technology in legal system, delays in investigation system, inadequate use of forensics are the biggest hurdles in speedy delivery of justice, which impacts the poor man adversely."

> The statement of objects entirely airbrushes the perspective of the 'poor man' (or any person for that matter) as an accused being prosecuted. The poor, after all, amount for a disproportionately large number of accused persons when compared to the rest.

This is a remarkable document for what it contains which is made even more remarkable because of its omissions. It contains a declaration which, if you look at it closely, only conceives of one recipient of the law, the prospective victim or complainant. It then points to measures that are introduced to alleviate this consumer's woes: introducing timelines in some parts of the process, supplying copies of First Information Reports, mandating use of technology for investigations, allowing for trials to continue even in the absence of accused persons, etc.

That these introductions by the BNSS are merely face-lifts which either confirm what was already due to victims, or introduce unenforceable targets, or even make the case of the victim worse off than before, may all be true and may make us wonder whether we needed a new law to achieve these objects in the first place. But it is not the point I wish to make. Rather, the point I wish to make is that the statement of objects entirely airbrushes the perspective of the 'poor man' (or any person for that matter) as an accused who is being prosecuted. The 'poor man', after all, amounts for a disproportionately large number of accused persons when compared to the rest of society.

Can it reasonably be said that the status quo was optimal to secure a fair investigation and trial for the accused, and that the preventive justice aspects of the existing Cr.P.C. were in great shape? Hardly so. The most serious indictment of the flaws in the status quo being the fact that more than three quarters of total prisoners across the country are undertrials — with the proportion being more than 90% in some parts such as the national capital. Yet, the accused is so completely othered and airbrushed from the narrative that even this issue is not seen as a problem. If it were, at least some effort may have been made to reconsider the system of arrest and bail which directly contributes to this undertrial population to make it more liberal. However, the few changes that have been made to these parts of the process, are designed to achieve precisely the opposite result.

The BNSS permits lengthier detention in police custody during investigations than before (Section 187 BNSS compared with Section 167 Cr.P.C.). On its most generous reading, the BNSS allows for police custody beyond the first 15 days of arrest. On its most draconian reading, the BNSS not only allows for police custody beyond the first 15 days of arrest, but also increases the total possible period of such custody. Both eventualities allow police to now offer the law as a proxy to justify denial of bail pending investigation as police may say that some interrogation remains.

Further, the BNSS practically neuters the right to bail when the accused persons have spent more than half their maximum possible sentence in prison (Section 479 BNSS compared with Section 436A Cr.P.C.). Now, all the police needs to do to render this right stillborn is add more than one offence in an FIR, which is how most FIRs are worded in any case. Besides making undertrial custody

possibly longer, the BNSS also brings a drastic addition to the arsenal of investigative powers available to police officers, allowing them to attach and seek confiscation of any assets of accused persons that are allegedly related to 'criminal activity' even before any court pronounces them guilty of a crime (Section 107 BNSS).

Take a moment to think about just how broad that formulation is, and then imagine such a clause being inserted without any right of appeal, or even without contemplating what happens in the event that the accused is ultimately found innocent, discharged, or is given a reprieve by higher courts, and then you will get to Section 107.

Through its statement of objects and its targeted changes to the existing regime of the Cr.P.C., the BNSS confirms that its pursuit of justice is a zero-sum game. Enhancing the rights of one side – the victim / complainant / prosecuting state – must necessarily come at the cost of worsening the position of the other, and there is no 'other' like the criminal accused.

In this regard, it marks a significant departure from previous legislative reappraisals of the criminal process by Parliament in 1955 and 1973 which pursued speedy justice without sacrificing the idea of a fair trial. The changes brought about in each of those iterations to how the criminal process operates were staggering compared to the salad dressing offered by the BNSS. The 1955 and 1973 legislation together brought about a separation of the executive and judiciary; they did away with committal proceedings; they removed a right to file revision petitions against interlocutory orders; they introduced costs for grant of adjournment, and also enhanced the scope of summons cases to simplify procedure. All of this was done to speed up the process.

But at the same time, they also introduced default bail during investigation and trial, as well as conferred upon the accused a right to receive the copies of police reports and supporting documents prior to trial. Much of which was fine-tuned only after substantial debate, both inside Parliament but also on the streets, in bar association offices, and countless other spaces during public consultations that stretched over nearly two decades.

The technology myth

A key part of the narrative for the current government has been the digital transformation of India. However, the idea of introducing science and technology has been around for centuries in the context of investigating offences, especially in India where it traces its lineage back to the use of fingerprints in detection and prosecution of crime. To that extent, the BNSS does not offer any radical departure from existing practices in avowing greater use of technology, but only builds upon existing approaches.

Besides the technology-driven approach not being a new contribution, a closer look at the BNSS and the realities of the Indian criminal process would show that a large part of this claim is, well, sheer bluster. The idea of 'crime-scene investigation' style mandatory forensic investigations comes with a decent-sized disclaimer – all states have at least five years to notify the date from which this process is to start (Section 176(3) BNSS). A state of limbo, within the existing state of limbo, if you may.

Further, nowhere does the act explain what is meant by 'forensic evidence' that we are expecting the police to gather in the first place. If the available material analysing the status of forensic and scientific laboratories across states is anything to go by, the five-year timeline appears less of a deadline and more a mirage. Once we clear the investigative portion, we meet the confusions within the BSA as to treatment of electronic evidence, which would only make matters worse at trial for such material.

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There is a second, more fundamental point here: the myth of technology's usefulness to solve crime and deliver justice. The endorsement of forensic science has come at a time when, globally, there are growing questions (here, and here) about the status of disciplines which traditionally fall in the forensic science domain – handwriting analysis, bite-mark, prints, narco tests, brain-mapping, DNA, fingerprint analysis – as being a science to begin with. Science is a term used to describe a discipline which examines phenomena and establishes a reliable cause and effect relationship to describe an occurrence.

According to scientists, very few of the practices covered by forensic science meet the rigour of science, as far too much room is left for interpretation of results. This room for interpretation allows for people reviewing material to arrive at subjective conclusions to suit the case. In other words, the authorities can game the system and make it seem like there is a scientific basis for pre-determined conclusions. Some kinds of technologies may certainly help the cause of reducing error rates, but merely batting for forensic science does not get us justice, nor does it guarantee solving crimes.

Finally, let us acknowledge the contradiction at the heart of this supposed advocacy of technology in investigations and trial. The pitch that sells us forensic science for solving crime in the BNSS is the same one that sells longer police custody for undertrials during an investigation and makes bail harder during trial. This is a contradiction in terms.

The entire point of using forensic science to solve cases is to reduce the reliance upon the accused as a source of proof – a person under duress will confess to anything, and being detained in police custody is shorthand for duress. Yet, at the same time, we retain the rules that have been relied upon by investigating agencies (blessed by courts) to continue investigations by relying upon that elusive confession backed by recoveries of objects as the clinching piece of evidence.

Simply put, by putting faith in science and technology but simultaneously tweaking the law to allow longer detention in police custody for the accused, the criminal process is attempting to try and have its cake and eat it too.

Gaming the reform agenda

The third theme is not specifically focused on the BNSS but zooms out to consider the broader 'reform' effort. As I had mentioned in the introduction, it is beyond dispute that the three new statutes are primarily retaining the existing structures of the IPC, IEA, and Cr.P.C. The retention is almost completely absolute in the case of the IEA that its replacement with the BSA has given us a curiously vacuous statement of objects for the Adhiniyam.

There are many conclusions and interesting observations to draw from this continuity about the nature of power, colonisation, etc. One of these is the idea that maybe by doing so very little to change the status quo, the government has smartly gamed the reform agenda. Bear with me for a moment as I establish this ludicrous idea a little.

Short of tearing down the old system entirely and rebuilding from the ground up, very few other legal replacements in the criminal process could have achieved drastic change. This would be at the cost of great upheaval in the short run, but arguably more stability in the long term. The government, obviously, knew this. In other words, it was always possible to make the older system work slightly better if certain other factors changed. For instance, policy advocates and even the Law Commission of India had argued that the low proportion of judges to cases for decades was contributing to the low disposal rate. If the government increased spending to meet that demand, then it was quite likely that the rate of disposals go up, at least in the short term.

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Now, let us play this hypothetical in the new paradigm of the BNS, BSA, and BNSS. After having made it appear that the old system was the problem, the government retains it in substance whilst changing the names. At the same time, it begins to resolve even a few of the institutional issues that had always plagued the functioning of the criminal process, say by increasing fiscal outlay for hiring more judges or setting up more online courts to deal with petty cases.

In the short run, such steps would help boost the numbers and lower pendency rates. While the real cause of the success would have been attributable elsewhere, all credit can go to the reforms and new laws. And who cares about the long term when the issues begin to accumulate.

The government need not even do anything as radical as increase spending for the lower tiers of courts and it can still claim that the reforms have worked by simply presenting the status quo – people spending time in custody as undertrials – as a feature of the system doing its job of keeping dangerous persons off the streets.

A reflection for our times

The executive branch has historically been acknowledged as the most visible form of the state and a barometer about what its true nature is. The most visible form of the executive branch, the police, have been the subject of much criticism over 75 years of independence for high-handedness in their methods. Despite which, the laws as enacted by different governments have continued to confer the same police with extraordinarily wide powers to curtail personal and civil liberties of citizens, merrily forgetting the concerns about their high-handedness in the process.

The new criminal laws with their stated objectives of increasing conviction rates, speedy trials, and strengthening law and order, join in this fabric of independent India's laws to form a beautiful tapestry of creating a hyper-powered executive to deal with the personal

liberty of citizens. This tapestry asks us to trust the state with these powers as it believes that only those who did something wrong would be at the receiving end of the lathi, that only those who have something to hide will want privacy, and those who committed a crime will be jailed pending the trial, which is surely going to return a conviction. Any aberrations, in the form of false FIRs, wrongful arrests, custodial deaths, or extra-judicial 'encounters', are simply that: aberrations.

Where the new criminal laws do make a departure from the tapestry and give us something new is in their refusal to countenance the idea that criminal procedure should carry safeguards for personal liberty as all exercises of state power may not per se be justified. At least earlier the legislature had attempted to maintain a semblance of fairness when it came to the lot of the criminal accused. In the 21st century present defined by instant, chest-thumping, and absolute justice, there is shrinking space for laws which are meant to halt that juggernaut of emotion with patient reasoning, calling for proof beyond reasonable doubt and respecting a presumption of innocence.

Make no mistake, the new laws mark an important moment in how independent India will function. It may herald a descent towards greater authoritarian tendencies and a nullifying of the judicial role by reducing personal liberty to a plaything. It may also prompt other, even more reactionary pieces of legislation to emerge soon with newer crimes and procedures to deal with special threats to the 'law and order' so cherished by the State.

The real fear is that by the time anybody realises how far the needle has shifted, we would already be used to the new status quo. Again, history bears witness. The 1955 amendments were decried during parliamentary debates as having 'mutilated' the criminal procedure. Yet, it is those very procedures which we are defending today.

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