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Bharatiya Nyaya Sanhita: Decolonising or Reinforcing Colonial Ideas

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Introduction

The Bharatiya Nyaya Sanhita ('BNS'), the Bharatiya Nagrik Suraksha Sanhita ('BNSS'), and the Bharatiya Sakshya Adhiniyam ('BSA') were the three criminal codes that were implemented by the Indian Parliament in December 2023. These codes were intended to replace the Indian Penal Code, 1860 ('IPC'), the Criminal Procedure Code, 1973 ('CrPC'), and the Indian Evidence Act, 1872 ('IEA'), respectively. The Presidential sanction was granted to the bills, which subsequently appeared in the Official Gazette on December 25, 2023. Notification of the date they will enter into force has not yet occurred.

The purported objective of these three bills is to "decolonize" British-era criminal legislation. To justify this legal reform initiative, the Union Government has repeatedly invoked the slogans of decolonization, justice, and citizen-centric legislation. Before evaluating the efficacy of the new laws in achieving this objective, it is necessary to identify the colonial characteristics of these three statutes.

This article examines the BNS, which was designed to succeed the IPC. It examines the ways in which the measure fails to achieve its purported objective of decolonization. Our thesis posits that the BNS exacerbates the authority of the police and the state, maintains penalties rooted in antiquated moral principles, and enlarges the punitive apparatus by instituting broad and ambiguously defined offenses.

Transgressions committed against the sovereign

An enduring characteristic of colonialism is the state's persistent and unrestricted augmentation of its police powers over its subjects. The recent criminal legislation fails to significantly deviate from the colonial mindset of a super powerful government. On the contrary, through the augmentation of police authority and the establishment of regulations pertaining to imprecisely defined yet severely sanctioned transgressions, they exacerbate the power struggle between the government and its populace. IPC chapter 'Offences Against the State', which contains Section 124A's sedition offence, is arguably the most significant vestige of colonialism in

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our criminal laws in this regard. Although the chapter in the BNS remains essentially unaltered, the term'sedition' has been substituted with a new offence known as 'Act endangering sovereignty, unity, and integrity of India' (section 152 of the BNS), which differs from its equivalent in the IPC in certain respects.

Section 124A of the Indian Penal Code pertains to actions that incite animosity, disdain, or alienation towards the government. Conversely, Section 152 of the BNS imposes penalties on conduct that incite "subversive activities," foster "separatist sentiments," or pose a threat to the "sovereignty, unity, and integrity of India." Although the term'sedition' has been omitted from the penal statute, the newly introduced provision seems to be just as restrictive of rights as its predecessor.

Additionally, the BNS fails to provide an elucidation regarding the criteria for "exciting subversive activities" or "fostering sentiments of separatist activities." In the years following independence, the judiciary has been presented with numerous occasions to interpret Section 124A of the IPC, specifically with regard to its implications for the constitutionally protected right to freedom of expression. As a result of these rulings, the section's authority has been restricted to speech that poses an immediate danger to public order. Given this, the parameters of Section 152 of the BNS, which is an entirely novel provision featuring revised criteria, become ambiguous, as the standards established by the courts in their rulings concerning Section 124A of the IPC are no longer applicable.

The Union government has determined that the new provision criminalises 'treason' (deshdroh) rather than's edition' (rajdroh), on the grounds that it is no longer an offence to criticise the government. Nevertheless, this in no way constitutes a deviation from the IPC. Criticisms of governmental actions that fail to incite animosity and discontent, as defined in the Explanation to Section 124A of the IPC, are exempt from entering the scope of such comments. An analogous exception is establish under Section 152 of the BNS. Thus, the manner in which the standards established by the new provision differ significantly from those established by the older provision remains ambiguous. Furthermore, an ongoing issue regarding sedition law pertains to the manner in which it has been exploited by the government to suppress opposition by means of extensive detention and apprehension. As the majority of cases fail to result in convictions (NCRB Data for 2022, 2021, 2020, 2019 and 2018 illustrates), the penalty is the criminal procedure itself. Broadly worded provisions that authorize law enforcement agencies to detain individuals have facilitated this. Further elaborating on the standards for these offenses will merely amplify their deleterious consequences.

Remains of antiquated moralism

The incorporation of Victorian morality into the IPC is a significant indication of its colonial heritage. This is demonstrated through provisions such as the marital rape exception (Section 375, IPC) and the criminalization of abortion (Section 312, IPC), as well as through language such as "provoking the modesty of a woman" (Section 354, IPC) and the definition of indecency (Section 292, IPC). We proceed to examine each of these individually.

A waiver regarding marital rape

The rape exception in matrimony is founded on the concept of irrevocable assent that occurs during matrimony. This notion was initially presented by Matthew Hale, who argued that a husband cannot be held liable for rape against his wife, given that their marriage signifies her irrevocable assent to sexual intercourse. This principle, which originated in English common law, was subsequently incorporated into the IPC. Although the exception was invalidated by the House of Lords of the United Kingdom in 1991, it persisted within the IPC. The recommendation put forth by the Justice Verma Committee (2013) to eliminate this exception was not incorporated into the subsequent IPC amendment. The matter is presently before the Supreme Court. A petition contesting the constitutionality of the provision was recently decided in a divided opinion by a Division Bench of the Delhi High Court. In light of the current endeavor to eradicate colonial-era regulations from the criminal justice system, the implementation of the BNS could have served as an ideal occasion to terminate the exception and acknowledge the sexual autonomy and corporeal integrity of married women. Section 63 (offense of rape) of the BNS, nevertheless, maintains the exception.

Disrespecting the decorum of females

The terminology of'modesty' in Sections 354 and 509, which originates from a patriarchal conception of sexual violence, is an additional significant colonial legacy evident in the IPC. As previously discussed, the emphasis on'modesty' in Section 354 of the IPC inevitably redirects the discourse towards determining what qualifies as a woman's modesty and whether she possessed the requisite'modest character' to begin with, in order to assert that her modesty was provoked. This diverges from the conventional definition of sexual assault as an infringement upon the victim's corporeal autonomy, thereby permitting ethical considerations to influence judgments regarding sexual violence. In light of this, the Justice Verma Committee had suggested that Section 354 be rewritten and rephrased. It was recommended that the phrase "outraging the modesty of women" be substituted for the term "sexual assault" in the provision. This modification was not incorporated into the 2013 IPC amendment. Incorporating it into the revised Code would have signified a significant deviation from rhetoric that invoked colonial moral principles, which were founded upon ideals of modesty, chastity, and honor in our

legal system. The word'modesty' is retained, however, in Sections 74 and 79 of the BNS.

Sexual obscenity

The provisions of the IPC pertaining to indecency are an additional illustration of the moral conservatism that characterized laws during the colonial era. Public indecent actions are punishable under Section 294 of the IPC, while the sale, exhibition, and publication of obscene material are all punishable under Section 292. To ascertain what qualifies as "obscenity" as defined in these sections, one must consider whether the materials or actions in question are "lascivious," cater to "prurient interests," or have the potential to "deprave and corrupt" individuals. The UK House of Lords ruled in R v. Hicklin that materials that "deprave and corrupt those whose minds are open to such immoral influences" are all indecent. This test was incorporated into Indian law by the 1965 Udeshi v. Maharashtra decision of the Supreme Court. The Court rendered a verdict that deemed indecent any content that "treated with (sic) sex in a manner appealing to the carnal side of human nature, or had that tendency." This meant that any content with the potential to provoke sexual desire would be considered indecent as defined by the provision. In the 2014 case of Sarkar v. West Bengal, the Supreme Court introduced a marginally altered criterion for determining obscenity known as the "community standards test." The court ruled that obscene materials consist of sex-related content that "provoke lustful thoughts" and stipulated that "the obscenity must be assessed from the perspective of an ordinary person, using contemporary community standards." Both of these standards for indecency are derived from the section's overly general and subjective language; they rely exclusively on individual and communal moral standards to ascertain the objectionability of a given material. In recent times, the Supreme Court has rendered a decision affirming that criminalization ought to be guided by constitutional morality rather than individual morality. This is the sole method by which it is possible to guarantee that the criterion for criminalization does not exclusively hinge on an individual's personal moral compass. Introducing changes to these provisions would have constituted a positive stride in the process of decolonizing the legal system. Regrettably, the BNS has maintained the precise language used in the IPC provisions pertaining to indecency.

Criminalization of the procedure

Abortion is made a criminal offense under Section 312 of the IPC, an additional vestige of moralism in our criminal code. A violator of this provision who intentionally induces a miscarriage in a woman is subject to legal repercussions. This includes expectant women who elect to terminate their pregnancies. Except in cases where the miscarriage is intentionally instigated to preserve the life of the expectant woman. Additional exceptions are introduced to this provision by the Medical Termination of Pregnancy Act, 1971 (the "MTP

Act"), which shields physicians from criminal liability when they conduct abortions in accordance with the conditions specified in the Act. The liberalization of abortion access under the MTP Act is contingent upon the establishment of exceptions to the general principle that criminalizes abortion procedures. The implementation of a rights-based framework regarding abortion, which was once again an overlooked opportunity, would have significantly advanced the process of decolonization.

Conclusion

Through their failure to seize this opportunity to amend the law on these matters, the new Codes have legitimized and strengthened the colonialism that already existed in our criminal statutes. Aside from the specific provisions outlined above, the absence of substantive reform in the enforcement of the laws is undoubtedly the most formidable obstacle to the logic of decolonization. The differential application of the law to European and 'native' populations constituted a significant portion of the colonial logic underlying the legislation. Even among the "natives," criminal case outcomes were determined by social standing, caste, and class. As evidenced by prison statistics demonstrating that the criminal legal system has a disproportionate effect on oppressed castes and religious minorities, this colonial mentality persists to this day. Although the newly enacted criminal legislation purports to prioritise the interests of the public in the administration of justice, it makes no mention whatsoever of rectifying the discriminatory consequences or ensuring compliance with the laws. Indeed, the reinforcement of the state within a progressively unequal society will exacerbate these disparities. Furthermore, in light of the fact that substantial portions of BNS, BNSS, and BSA have been copied verbatim from the IPC, CrPC, and IEA, a significant opportunity to reform the inequities of the criminal justice system has been lost .

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