Decolonising Criminal Law?

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On August 11, the last day of the ongoing session of Parliament, the Indian Government tabled a notice that it wished to introduce three new bills on the Floor of the House for consideration. These were proposed statutes to replace the holy trinity of Indian criminal law: The Indian Penal Code of 1860, the Criminal Procedure Code of 1973, and the Indian Evidence Act of 1872, were to be replaced by the Bharatiya Nyaya Sanhita, the Bharatiya Nagrik Suraksha Sanhita and the Bharatiya Sakshya Adhiniyam respectively.

Even though the reform was marketed as an attempt to break from the colonial origins of criminal law, it actually represents a resurgence of the colonial-style authoritarian approach, rather than an effort to build upon the relatively modest progress made half a century ago in advancing individual freedom and civil rights.

For now, these draft laws have been sent for consideration to a Legislative Committee and may yet fall by the wayside as India heads into a general election in 2024. Nevertheless, the development is arguably one of the most significant legislative developments on matters of criminal law in India for at least half a century and deserves greater scrutiny.

How did we get here?

That the ruling BJP government wished to ‘reform’ the existing criminal law architecture had been no secret — it was part of announcements made soon after re-election in 2019, followed by the formation of a Committee for Reform of Criminal Laws to helm the reform process in early 2020. One would have imagined that the imposition of one of the strictest lockdowns globally to deal with the spread of Covid-19 would have put this process on hold for the time being. However, in spite of this, at the end of May 2020, the Committee suddenly announced the start of an online consultation process, consisting of responding to questionnaires within relatively short timelines (which were slightly relaxed after an initial outcry).

The highly exclusive nature of this consultation exercise, given India’s average income, coupled with the apparently biased nature of the questionnaires, left anyone hoping for a truly democratic and participatory process of law reform severely disillusioned. In the three years that followed, no reports were published by the Committee, and no responses to the questionnaires were made public, but periodic news reports suggested something was afoot. But even so, there was hardly a whisper in the media that any draft laws had been prepared pursuant to this reform exercise, let alone drafts ready enough to be tabled in Parliament. Understandably, therefore, the introduction of draft laws on the last day of the Parliament session garnered considerable attention.

How was the ‘Decolonisation’ Attempt Received?

A primary, if not the only, prong for the government to justify replacing the existing trinity of laws appeared to present it as a ‘decolonisation’ or ‘indigenisation’ effort [even the word ‘Code’ or ‘Act’ was dropped in favour of heavily formal Hindi which is the dominant language in North India and one of India’s many official languages].

The Minister, while introducing the drafts, declaimed that the old laws were colonial impositions — even though the current Procedure Code had been enacted in 1973 — and replacing these with indigenous laws was to celebrate the spirit of India’s independence. Not to mention the pragmatic necessity of bringing newer laws that not only incorporated the impact of many judicial verdicts interpreting the old codes but also make the law more responsive to a vastly different societal context than the 19th century. For instance, it was stated that the colonial offence of sedition, the legal validity of which is currently pending adjudication before the Indian Supreme Court, was being repealed.

In the few weeks that have passed by, even those who were on the Committee have found it difficult to shower fulsome praise upon the draft laws, and their reception has been largely critical. That the laws offered precious little in terms of new ideas for a new India was made painfully apparent in how little was changed from the 19th-century colonial codes [see here for annotated comparisons with the earlier laws]. Claims such as the repeal of sedition were discovered as being falsehoods, as the existing offence was given a broader and more rights-effacing avatar than its colonial ancestor. The consensus view emerging so far is that repealing existing laws and introducing fresh ones would not only achieve very little reform but do so at the cost of throwing the entire criminal law administration into disarray for years to come.

Critiquing the Draft Laws

Having offered this brief roundup of the intriguing developments that reflected the opacity of the process by which the new draft criminal laws came to be introduced for discussion, I move to critique the re-codification exercise on two broad parameters. *First*, focusing on the procedural code, I argue that the effort embraces the colonial and anti-constitutional aspects of the existing Indian criminal codes; it continues the failure of the criminal laws to respect that very basic change in the citizen-state dynamic ushered in by India’s independence and recognition of fundamental rights. *Second*, the effort displays a startling lack of understanding about codification as a legislative and or law-reform exercise and worsens the *status quo* on matters of clarity as well as application.

The Constitution and Criminal Law

The idea to replace or reform the existing Indian criminal codes is not unsound in theory. What lies at the heart of the existing trinity, and is best highlighted through the Procedure Code of 1973, is a culture of command and control that was

necessary to run a colony, covered with a *veneer* of legality in the form of legal rules constraining the exercise of discretion by state actors.

The police are conferred with broad powers of arrest with scope for seeking detention in police custody for up to 15 days (section 167), with no general right of bail for all crimes. No rules of probable cause govern searches, with the law explicitly authorising the issuance of general warrants when deemed fit. Not to mention the existence of a sprawling set of preventive powers, enabling the police machinery to arrest and detain persons for being threats to public order (section 107, for instance).

These executive powers contained some self-defined legal limits to suggest there was a rule of law approach in place. But the so-called limits permit retention of unbridled executive power, with little or no recognition for basic civil liberties. For instance, the introduction of the search and seizure regime in 1882 was accompanied by an explicit acknowledgment by the administration that the rules for the colony were far broader than anything in the metropole as the colonial law was not concerned with issues of privacy. Any challenges to the alleged improper use of executive power would remain confined to an administrative law logic, requiring courts to defer greatly to the actions of the boots-on-the-ground.

The limited respect for civil liberties, coupled with a limited scope for judicial review of executive action, remained hard-wired within the statutory text even as they went against the constitutional logic. Retaining the existing colonial criminal codes with their culture of command and control while ushering in a new constitutional culture of justification was thus a serious contradiction in terms. Would the old order relent to the new? The answer was a resounding no and it was apparent before the end of the first decade of India's independence that the police, so long seen as 'bully boys' of the *Raj*, were not becoming the 'willing servants' of the new citizens of India.

The retention of old attitudes was made possible by a belief in those at the helm of affairs — across all branches of the State — to see newfound in the oppressively powerful state machinery which they had fought against not too long ago. A strong executive was necessary at a time when the country was yet to stand on its own two feet, and rather than focus on asking questions, citizens ought to *trust* those in power who were guided by the law. In this ‚trust us' mould of reasoning, the old features of oppression within legal structures were dissociated as being problematic facets of State power, to being problematic because they were used by a colonial power.

Combating this logic and placing curbs on executive power while widening independent judicial review were some of the driving motivations behind the push for a new criminal law architecture in the 1960s, a movement that ended with the new Code of Criminal Procedure, 1973, being enacted in 1974 (with moves for substantive changes to the Penal Code and Evidence Act falling through). While there were a few significant additions to protect individual liberty in the new Procedure Code, by and large the scheme of the old colonial law was retained, especially on matters of arrest and bail and preventive powers to keep the peace.

In the 2023 draft law to replace the existing Procedure Code, it is unsurprising and disheartening to witness a renewed embrace of the colonial culture of command

and control rather than an effort to build upon the significant, but few, moves made fifty years ago to claim more space for personal liberty and civil rights. If anything, calculated moves have been made to reverse some of these gains, for instance by expanding police powers for obtaining custodial detention before an indictment is laid (section 187 of the draft) and enabling trials (section 356) and property confiscations (section 107 of the draft) in absentia without little recourse in the event of improper use of such powers by the state. Despite the crisis of prolonged undertrial incarceration no efforts have been made to widen the scope for bail and judicial discretion while deciding such question, which continues to implement a legal regime enacted in 1923.

The chasm between the constitutional culture of justification and the wild-wild-west of criminal procedure could not be starker in how the new drafts seek to expand the already enormous search and seizure powers (yes, general warrants are still there) without adding any limitations on exercise of the powers (sections 94, 96 of the draft). Since it comes after a landmark Supreme Court ruling in 2017 affirming that the Indian Constitution protects a fundamental right of privacy, the message is loud and clear — there is no change to the place of citizens in the constitutional order as compared to those of subjects under colonial rule.

The Promise, and Premise, of Codification

Codification as a legislative or law reform exercise carries a rich and extensive history (especially across the European continent). The idea stems from a recognition that the existing morass of law is too disorderly and ought to be replaced by a comprehensive code which can speak to both the public and the professionals involved in the administration of justice with equal clarity. Once in place, the code requires periodic revisiting and updating for it to remain true to its ambition.

Since the landscape of law in India had indeed undergone tremendous transformation over the 150 years since the criminal codes were first brought in place, it made sense to revisit the codification effort. The language and structure of the codes was archaic and outdated. More importantly though, the general law of the codes gradually came to be surrounded by a thicket of special laws that dealt with different kinds of crime besides punishing aggravated forms of the same kinds of harm while introducing special rules (by and large liberty-reducing) of procedure and evidence (such as laws punishing terrorism, drug possession and sale, child sexual abuse, money laundering, corruption, food adulteration, etc.).

Revisiting the codes to make them more accessible and for harmonising the interplay between the general and special parts of criminal law are great ideas, even if these come at the cost of some administrative upheaval. Sadly, the new draft laws achieve a fraction in terms of the former goal and probably worsen the position in terms of the latter.

A look at the three proposed replacements shows that while considerable effort appears to have been made in redrafting the Penal Code, this has not been thought through, leaving rather basic problems. For instance, ‘insanity’ has been replaced by

‘mental illness’ (section 22 of the draft), but this has been done without changing the actual test for determining when a person can be declared as suffering from ‘mental illness’ to trigger the excusatory defence. Rather than redrafting, it is perhaps more accurate to say that the Penal Code has been rearranged. Even such rearranging is practically absent when it comes to the codes on procedural law and evidence, even though the evidence law was crafted for a setup catering to trial by jury (or assessors), which are not a part of the Indian setup since the 1960s and were formally ousted in the 1973 Code.

A cache of laws dealing with specific offences has sprung up alongside the codes and streamlining the machinery of criminal law administration across the general and special parts should have been a mainstay of any revisit of codification in India today. What we find instead is a deafening silence on this front, casting indelible doubts on the reform credentials of this endeavour. There is neither a trimming of the vast expanse of the general part offences nor any considered assimilation of the special part with the general part. Instead, the uneasy and confusing coexistence of the two shall continue, with more overlaps than before by introducing proposed offences punishing terrorism (section 109 of the draft) and organised crime (section 109) in the general part itself.

Nor is there any effort to clarify the vagaries of procedural and evidentiary rules across the vast savannah of special part statutes, which have fostered immense litigation over time and continue to do so. Are officers enforcing these laws akin to police? Are the reverse burdens imposed by them even applicable at the stage of bail? How does the right against compelled self-incrimination apply in these contexts? What is the position of victims across these statutes? How is jurisdiction determined? At present, answers to such questions which routinely arise in the application of special part statutes are context-specific and determined by arbitrary turns of phrase rather than any clear legal policy (see, example, here). If a codification attempt ignores such fundamental questions, one wonders if it is of any use at all.

Conclusion – All Hands On Deck

The proposed draft laws seeking to replace the existing Indian criminal codes are the outcome of an incredibly opaque and inscrutable process helmed by a committee that had no representation of persons from minority communities most directly affected by the enforcement of criminal laws and had one female member who was a government appointee. The Committee adopted arbitrary consultation processes, the government publicly adopted none except appointing the Committee, and not a single report out of the drafting process has yet been made publicly available to enable any meaningful debate or discourse.

There are many problems with the content of the new draft laws proposed to replace the existing criminal codes. The internet has had a field day with its incomplete sentences and glaringly obvious errors (an excusatory defence of involuntary intoxication appears to excuse any harm caused after voluntary intoxication, as seen under section 23 of the draft). These are problems that can be fixed. What cannot be

fixed, is the clearsighted and unequivocal embrace of the colonial logic of command and control displayed through this set of draft laws. It is yet another instance of what Mehta suggests is an ongoing effort in India to retain the exclusionary authoritarian structures of colonialism, but colouring those power-imbalances with an Indic flourish to somehow legitimise them.

The 2023 draft laws constitute perhaps the most obvious transgression of India's constitutional promise to instil a culture of justification for safeguarding civil liberties since the retention of permanent laws for executive detention without trial (or, preventive detention). To accept that the draft laws are part of a reform effort and an attempt to rid the country of its colonial past is to disbelieve the evidence of one's eyes and ears. If pushed through, they shall undoubtedly worsen the existing power-imbalance between the state and its citizens, not to mention worsen the *status quo* in respect of applying and administering criminal law. All hands on deck will be needed to spread awareness about the many problems of these new draft laws and hope that the idea can be sent back to the drawing board, and not become part of the statute book.
