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NEW CRIMINAL PROVISIONS: REFORM OR REBRANDING?

-Chanchal Bhati

Introduction

India's criminal law tradition has entered a new chapter with the recent commencement of the Bhartiya Nyaya Sanhita, 2023(BNS), Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) and Bharatiya Sakshaya Adhinyam, 2023 (BSA). These codes have replaced the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, and the Indian Evidence Act, 1872, respectively. In doing so, the Government has declared it to be a historic step in the “decolonisation” of criminal law, and pledged to usher in a “new era of citizen-friendly, technology-enabled and justice-delivering criminal law system”.

While there is no doubt that this legislative shift marks a significant milestone in India's long-standing criminal jurisprudence, there is also little doubt that this reform exercise has been more symbolic than substantive. India's new criminal laws make some important procedural changes, but leave much of the substance untouched. This begs the question: “Has India had a change of its criminal law system, or has it only changed the labels?”

What Does 'Decolonisation' Really Mean?

Decolonisation, as advanced by the Government, is indeed a noble goal. Because much of India's criminal laws were indeed formulated by the colonial masters, with the objective of protecting their own lives and property, and not the natives'. For such an objective, the very foundations of India's criminal justice system were questioned and restructured, with the focus on maintaining law and order, and protecting colonial interests. An independent India, on the other hand, is expected to focus more on protecting her citizens, and other constitutional values such as liberty, equality, and justice. However, decolonisation of criminal law does not simply entail renaming

statutes or replacing English terms with regional equivalents. Rather, it requires examining whether the very foundations of the system have changed. With this background, let us turn to the key substantive and procedural changes brought about by the new criminal laws.

The Progressive Reforms Introduced by the New Laws

As noted earlier, the new criminal laws do bring about some significant procedural changes. For instance, the BNSS leverages extensively on technology, such as by using electronic summons, maintaining digital records, and using video conferencing in judicial proceedings. Similarly, the BSA specifically provides for the admissibility of electronic and digital evidence. The BNS, meanwhile, covers new areas such as terror activities, mob lynching, and cybercrimes. Moreover, the new laws provide for mandatory forensic examination of digital evidence for specific offences, and specific timelines for investigation and trial for certain offences which is expected to speed up the process of criminal justice delivery. All these are positive changes that are needed in a country like India, where police corruption and procedural delays have been major impediments in crime investigation and punishment.

However, as noted earlier, such procedural changes can only take criminal justice delivery so far. Because of the very nature of criminal law, any changes made to procedural laws must be complemented by corresponding changes to substantive laws, as well as additional safeguards to prevent abuse of process by the state. This brings us to the next point.

While decolonization may have been a noble goal, the changes made to a substantive criminal laws barely scratch the surface. A large proportion of offences covered under the BNS have been directly taken from the Indian Penal Code, with no substantive changes made to them. Similarly, much of the procedural law covered under the BNSS is similar to what existed under the Code of Criminal Procedure, 1973. The BSA, similarly, retains much of the Indian Evidence Act, 1872. Therefore, it is safe to assume that much of India's extensive criminal law jurisprudence will continue to be relevant, even under the new laws. Indeed, while the new laws make sense on paper, they do not represent any paradigm shift in India's criminal law system.

Constitutional Concerns Under the New Criminal Laws

a. Expanded Police Custody and Article 21

Another issue pertains to the newly inserted sections in the BNSS pertaining to police custody. Under the earlier law, police custody was only available for a limited time i.e. till the first appearance of the accused before the Magistrate. However, the new law provides for extending police custody in phases, within the limits of the investigation period prescribed for different offences. Proponents of the change argue that this provision will help investigators deal with complex cases, and particularly those involving use of digital evidence. Critics, on the other hand, argue that prolonged police custody is a recipe for custodial torture which violates Article 21 of the Constitution. It remains to be seen how this particular issue will be resolved by the Courts.

b. Sedition Replaced or Repackaged?

A similar debate has ensued around the new law relating to offences affecting India's sovereignty, unity and integrity. Notably, Section 124A of IPC relating to sedition has been omitted from the BNS, with critics arguing that its removal marked a pro-justice step towards decolonisation. However, the same critics have simultaneously lambasted the new law for inserting a new section which criminalises certain actions and speech that could be perceived as threatening India's sovereignty, unity, integrity and security. While the intent of this provision may be to protect India from internal security threats, its wording has been challenged as being too overly broad, and violative of Article 19 (1) (a) of the Constitution. Ultimately, it remains to be seen how this particular provision will withstand the tests of constitutional scrutiny.

Legislative Reform Alone Is Not Criminal Justice Reform

In many ways, the debates around India's new criminal laws illustrate the larger issue of criminal law reform in general that there is no point in merely changing laws, if such changes do not lead to concomitant institutional reforms. Put otherwise, merely changing the law books is not sufficient for reforming the entire criminal justice delivery system. Institutional capacity, including forensic, police, judicial, and administrative, must be enhanced for any criminal law reform to truly bear fruits. The new criminal laws, as currently constituted, will undoubtedly make life easier for investigators, prosecutors, and judges. However, for criminal justice delivery to truly accelerate, India must invest more in building its criminal justice infrastructure. Only then will the true potential of these laws be actualised.

Conclusion

India's new criminal laws are undeniably momentous. They represent the most significant legislative changes to India's substantive criminal laws in a very long time. For all their faults and virtues, they modernise India's procedural criminal laws, and address several contemporary challenges such as cyber-crimes, mob lynching, and terror financing. On the other hand, these laws largely retain much of the earlier criminal law structure, while only making limited procedural changes. Most notably, they extend the investigative powers of the police in matters pertaining to cyber-crimes. Therefore, India has not radically overhauled its criminal law system. At the same time, it has not simply renumbered the laws either. Rather, India has made a number of procedural and technical changes to its criminal laws which will help move the criminal justice delivery process in a positive direction. However, whether India's citizens will soon see a faster and more efficient criminal justice system is yet to be seen.