38th Annual Dr. Ramanadham Memorial Lecture

2023

The Proposed Bhartiya Nyaya Sanhita and Democratic Rights

People's Union for Democratic Rights

June 2024

About Dr. Ramanadham

A. Ramanadham, a medical doctor by profession, founded one of the district units of APCLC in Warangal town. He started his career as a government doctor and soon got disillusioned with the unethical medical practices and left his job to set up his own Children's Clinic, in 1968 in Warangal. Dr. Ramanadham's involvement with civil liberties was inseparable from his professional role as a doctor. Dr. Ramanadham tried to create a space for democratic values wherever he went and in whatever he did. With APCLC, Dr. Ramanadham was actively involved in investigating fake encounters, custodial torture and deaths which invited the wrath of the police. On 2nd September 1985, at Kazipet railway station, SI Yadagiri Reddy was shot dead by unidentified assailants, believed to be Naxalites. Next morning his body was carried in a funeral procession in which a number of armed policemen participated. The procession was led by the district Superintendent and the Deputy General of Police. When it neared the Children's Clinic, a group of policemen broke into the clinic. They ransacked the clinic and assaulted the compounder and the patients. They then proceeded to the neighbouring shop, Kalpana Opticals, where they found Dr. Ramanadham and shot him at point blank range.

About this Year's topic

Every year PUDR organizes Dr. Ramanadham memorial lecture on a specific theme and its impact on democratic rights. The 38th Annual Ramanadham lecture was delivered on 14 October 2023, on **The Proposed Bhartiya Nyaya Sanhita And Democratic Rights**. In August 2023, three new Bills- Bharatiya Nyaya Sanhita, 2023 (BNS), Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) and Bharatiya Sakshya Adhiniyam, 2023- were tabled in the Parliament seeking to replace the existing Indian Penal Code (IPC), Code of Criminal Procedure (CrPC), and Indian Evidence Act of 1872, respectively. While the bills claimed to replace the colonial codes with 'Bharatiya' legislations in the name of substituting punishment with justice, majority of the provisions in the new codes were the same. Some new provisions were introduced which appeared to significantly infringe on the existing liberties of the people and disregarded the existing rights jurisprudence evolved in India post-independence.

Against this background, PUDR organized and invited **Anup Surendranath** to deliver the lecture. He is Professor of Law and the SK Malik Chair Professor on Access to Justice at National Law University, Delhi. At NLU Delhi, Professor Surendranath is also the Founder and Executive Director of Project 39A (a criminal justice programme).

The lecture was delivered in October when only the first version of the new criminal bills had been released to the public. The bills were subsequently referred to a Parliamentary Standing Committee which produced its report on 10th November 2023, after which the bills were amended and passed by both houses of the Parliament in December 2023. The Acts then received presidential assent on 25th December 2023 and the Government of India released a gazette notification dated 24th February 2024 stating that the laws would come into force from 1st July 2024. Some of the provisions discussed in this lecture have undergone specific changes, including a change in the serial order. The final sections under which the provisions appear in the Acts have been indicated at relevant places in the text of the lecture produced in this report, to direct the reader to codes. For an analysis of the changes between the first version of the Bills and the laws that were ultimately passed by Parliament, reference may be made to Project 39A's,

Bharatiya Nyaya (Second) Sanhita Bill, 2023, the Bharatiya Nagarik Suraksha (Second) Sanhita Bill, 2023, and the Bharatiya Sakshya (Second) Bill, 2023: Analysis of Key Changes

PUDR released a report, *Fettering People's Rights***,** examining the select provisions of the BNS from a civil liberties perspective in January 2024. The analysis included comments on many of the provisions discussed in the Ramanadham lecture too. PUDR, subsequently brought out an updated version of the report in June 2024 ***OF LAW, JUSTICE AND PEOPLE: An Analysis of Selected Provisions in the New Criminal Codes, 2023***, which extended its analysis to a select provisions in the BNSS too and tracked the developments building to the enforcement of the codes. The report can be accessed on the PUDR website.

The Proposed Bhartiya Nyaya Sanhita and Democratic Rights[1]

- ***Professor Anup Surendranath***

Introduction[2]

The recurrent rhetoric concerning the criminal law overhaul, through the introduction of the *Bhartiya Nyaya Sanhita, Bhartiya Nagrik Surakha Sanhita, and Barthiya Sakshya Adhiniyam,* has been one of 'reform' and 'decolonisation'. The lecture explores these two motifs in law, and criminal law in specific, and attempts to locate the overhaul in (or away from) these discourses. It evaluates the overhaul, using the tools of the narratives it has set for itself, and attempts to see through the veneer of these narratives. It explores the specific changes that have taken place in the aforementioned bills (now Acts) and argues that the narratives are mere rhetoric and that the changes instead of reforming and decolonising criminal law, leave it more draconian and colonial than ever before.

The language of reform, when used for criminal law, in the past has meant a process of rationalisation through the creation of a universal subject, who is an independent moral possessing free will. Accordingly, reform has ignored social conditions that may push people to do crime. Academic writing since then has shown the indefensible nature of this position. The lecture traces this critique and argues that any reform going forward must contextualise criminal law and move away from the universal subject. It argues that the reform seems politically motivated and is a classic case of penal populism, while noting that the bills in a real sense do nothing to 'reform' criminal law in the direction indicated above.

The language of decolonisation, to mean something, the lecture argues, must first point out the colonial aspects of the law and objections thereto that it seeks to change. Decrying something as colonial and hence undesirable, skips an essential step in the process of understanding what is objectionable in the law other than the time period it was made in. An exploration of our colonial

[1] Delivered online on 14 October 2023.

[2] The speaker acknowledges the efforts of Pulkit Goyal and Nadia Shalin (IV-year students at NLU Delhi) in providing research assistance in developing this lecture.

experience reveals irreconcilable differences which furthers the critique that the term 'colonial' does not mean any one thing. The lecture identifies specific objectionable colonial experiences to arrive at an understanding of what decolonisation would mean for our criminal law and then measures the new bills (now Acts) against these experiences. An honest attempt at decolonisation, the lecture argues, would require a participative process, increased accountability from the state and the undoing of the assumptions of the colonial subject that ascribes criminality to certain people. The lecture concludes the section by noting that the overhaul is marked with colonial continuities and the reform process in specific highly reminiscent of legal reform during colonial times. The last section attempts the minimal and impactful changes that have taken place and argues that they move away from the proclaimed rhetoric of reform and decolonisation.

'Reform'

Universal individualism

For centuries, common law used concepts like wilfulness and malice to determine criminal fault. The growth and increased influence of psychology and psychiatry on criminal law led to an empirically based conception of criminal responsibility that accounted for mental concepts like knowledge, intention, motive, recklessness and belief.[3] This evolution from fault-based liability to responsibility was ushered in alongside the idea that mental capacity was a matter of social knowledge, capable of being investigated and proved in a court of law.[4] Today, the foundational principles of criminal liability may be classified as capacity, conduct, responsibility and the lack of a defence. Principles like legal clarity, non-retroactivity or the presumption of innocence also indicate the law's commitment to treating individuals as moral agents who are independent, rational and have free will, and whose conduct must be assessed by the extent of their responsibility rather than only on the outcome of their actions.[5]

[3] Guyora Binder, 'The Rhetoric of Motive and Intent' (2002) 6(1) Buffalo Criminal Law Review 1; Jeremy Horder, 'Gross Negligence and Criminal Culpability' (1997) 47 University of Toronto Law Journal 495
[4] Roger Smith, *Trial by Medicine: Insanity and Responsibility in Victorian Trials* (Edinburgh University Press 1981)
[5] Nicola Lacey and Lucia Zedner, 'Legal Constructions of Crime' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn, OUP 2012) 172

The penal equation therefore can be largely reduced to: crime plus responsibility leads to punishment. Responsibility here encompasses principles of capacity and availability of defences, as defined by the law. Under this 'free choice' model, the legal enquiry is to locate a voluntary human act. The causal enquiry does not go beyond it.[6]

Such a conception obfuscates individual social conditions that have a bearing on responsibility.[7] Criminal law ignores the implications of socio-political relations and structures and other criminogenic conditions and prefers an abstract universal individualism that treats all actors as having equal degrees of autonomy and therefore responsibility for their actions.[8] Alan Norrie examines the claims of determinism and exposes the indefensibility of this free-choice model. Determinism finds expression in the legal system, most notably, in the defence of duress where an act is excused if the actor was under duress. Here both intention and reason to commit the act are present yet responsibility is limited due to an internal motivating fear driven by external conditions.[9]

Determinists argue that the same logic applies not only to being held at gunpoint but also to social conditions like an intolerable socio-economic background.[10] If justice requires attribution of fault before conviction, determinism poses an indefeasible challenge to criminal law. The identification of threat to property or person as excusing conditions is politically determined and the law offers no rationale why it should not be extended to situations like economic, political, and social insecurity. The veneer of the free-choice model cracks if the law is forced to account for the fact that individuals do not exercise their free will in choosing the circumstances under which they act.

---

[6] Many times, it doesn't even go that far and instead relies on a reasonable person standard. (Erin Kelly, 'Free Will and Criminal Law' in Kevin Tempe, Meghan Griffith and Neil Levy, *The Routledge Companion to Free Will* (Routledge 2017) Even defences in criminal law, which can broadly be classified into exemptions, justifications, and excuses, emphasise on moral agency and free will of its subjects by considering circumstances which in a free will model deprive the subject of a fair opportunity to conform to the law. (*See* Lacy and Zedner (n 5) 171-172.)

[7] Bhaskar argues that there is a conceptual difference between reasons for action and causes of action and that such reasons arise from the specific situations people find themselves in. (Roy Bhaskar, *The Possibility of Naturalism: A Philosophical Critique of the Contemporary Human Sciences* (3rd edn, Routledge 2005) ch 3). Marx also argues that people act in situations they don't choose for themselves but which are encountered, given and transmitted from the past (Karl Marx and Frederick Engels, *Marx Engels: Selected Works* (7th reprint, Progress Publishers Moscow 1986) 96)

[8] Lacy and Zedner (n 5)

[9] Alan Norrie, 'Freewill, determinism and criminal justice' (1983) 3 Legal Studies 1 60-73, 64 responding to H. L. A. Hart, *Punishment And Responsibility* (OUP 1968) and A Kenny, *Free Will and Responsibility* (Routledge 1978)

[10] Alan Norrie (n 9) 64

The deterministic nature of such circumstances has been further explored in the field of psychology. There has been a paradigm shift in how the causal origins of criminal behaviour may be understood. Craig Haney describes the classical view of the crime master narrative which characterises criminal behaviour as an individual-level phenomenon where the actor is personally and exclusively the causal locus of their criminal behaviour. No matter how insurmountable or intolerable their social contexts are, their choices are viewed as wilful and cognisant of the consequences they have on others. Hence criminal behaviour reflects the inherent "badness" of the person and justifies penal measures, punishment focussed crime control policies, and even capital punishment.[11] The narrative of "no possibility of reformation" which is used to justify death sentences reflects this crime master narrative.

Similarly, when reporting on crime, the media frequently focuses on the identity and characteristics of the criminal that may explain their criminal behaviour. There is little to no attention given to larger structural forces that may have contributed to this behaviour.[12] A total social vacuum is thus constructed, which is rarely questioned by the public and often used as the basis for policy decisions.

The "situational revolution" in psychology has attacked this crime master narrative by recognising the impact of past experience and immediate social situations on one's behaviour. This paradigm recognises the tendency to identify the primary causal significance in the subject themselves as a cognitive bias. It understands human behaviour as being shaped and determined by social, cultural and economic environments as well as by life history of events, beliefs and relationships. Traumatic, risk-filled social histories and immediate criminogenic contexts are therefore two important determinants of one's behaviour. Additionally, the structure of the situation in which criminal behaviour precipitates also exerts a powerful influence on the behaviour. Multiple criminogenic risk factors have been identified in a vast body of research,[13]

[11] Craig Haney, *Criminality in Context: The Psychological Foundations of Criminal Justice Reform* (American Psychological Association 2020) 18
[12] *ibid* 20
[13] Thomas Holmes, Richard Rahe 'The Social Readjustment Rating Scale' (1967) 11 Journal of Psychosomatic Research 213–218; Ann Masten, Norman Garmezy, 'Risk, vulnerability, and protective factors in developmental psychopathology' in Benjamin Lahey, Alan Kazdin (eds.), *Advances in Clinical Child Psychology* (8th vol, Springer 1985)

including childhood maltreatment and neglect, chronic unemployment, homelessness, racial discrimination and poverty.[14]

Any meaningful reform of the criminal law must therefore displace its long-held behavioural assumptions and recognise the impact of risk factors on choice-making. Widening the insanity defence beyond diagnostic psychiatry and contextualised forensic investigation into backgrounds and social history are examples of reforms that can enable context-based determinations of guilt.[15] The proper deconstruction of the crime master narrative also necessitates accounting for social factors and psychological forces at the stage of sentencing. It requires development of alternative punitive measures, curbing our over-reliance on imprisonment and the restructuring of prison life to minimise re-traumatizing effects. Such measures may effectuate real reform and take the law further in its goal to control crime.

Yet, the newly introduced criminal bills do little to reform the penal equation. Well-established psychological insights as well as empirical evidence from the disproportionate representation of socio-economically backward classes in India's prisons, should ideally motivate the state to question the universal individualism that continues to shape the criminal justice system. Instead, the bills provide for harsher sentences, expanded "victim rights" and increased criminalisation.

Political motivations for criminal law reform

These reforms, which have been characterised as a complete upheaval of the criminal justice system, bring limited substantive changes and yet hold immense political significance.[16] They represent the state's intention to appear tough on crime and persuade the allegiance of its voter base. The apparent rise of "heinous" offences and the evident failure of the state to deter such offences has made crime a central issue for the Indian voter base, with a particular focus on violent crimes and sexual offences.

However, public attitudes on crime are often based on misperceptions about the rise in crime rates, misunderstandings about the actual severity of the justice system and a perceived

[14] Haney (n 11) ch 2
[15] ibid ch 9
[16] The Vice President describes the bill as a "monumental & revolutionary change that the Bhartiya Dand Sanhita has now become the Nyaya Sanhita" in Vice President's Secretariat, 'Text of the Vice-President's speech - 100th Jayanti of Justice Konda Madhava Reddy, Hyderabad' (*Press India Bureau*, 27 December 2023) <https://pib.gov.in/PressReleasePage.aspx?PRID=1990985>

imbalance of rights between the victim and the accused.[17] While the general public has little knowledge about criminal law doctrine, there is majoritarian consensus on what are the desirable outcomes of a working criminal justice system – higher rates of conviction, shorter trial periods and harsher sentences are common demands.[18] Collective anger and vengeance motivate public insistence that the state should do more. The political legitimacy of responding to such public opinions that are poorly informed is therefore questionable.

As a result, politically motivated reform is less concerned with improving substantive rules and existing institutions than it is with generating desirable outcomes and taking symbolic stances.[19] For such changes to be politically rewarding they must be easily understood by the public, symbolically potent and expressive. It is understandable therefore that nuance is traded for sensationalism and effective change for short-term electoral gains. The introduction of the three criminal law bills by the Home Minister follows such a strategy. The introduction of the Zero FIR for the first time and the apparent repeal of the colonial crime of sedition are examples of promises that serve as worthy applause lines but fall apart under the most basic scrutiny. The Zero FIR is not a novel legislative invention rather it has been legislatively and judicially mandated in the past.[20] Similarly, far from being repealed, the crime of sedition has merely been renamed and arguably even been broadened in its scope under clause 150 of the Bhartiya Nyaya Sanhita ("BNS").

Criminal law reforms that are politically motivated also lead to punitive populism where punishment is valued over prevention.[21] The latter would involve addressing criminogenic conditions and structural changes, which would involve higher costs and long-term results. These do not bring immediate political benefits. Demonstrative measures like mandatory sentencing,

[17] Mike Hough, Julian V Roberts, 'Public Opinion, Crime and Criminal Justice' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn, OUP 2012) 279

[18] For instance the Indian Women's Movement's demands before the Verma Committee for punishments of life imprisonment without parole or remission or mandatory minimum sentences to be included in the Criminal Law (Amendment) Act 2013, as a response to the Nirbhaya rape case. Such a use of criminal law as a site for feminist reform has been critiqued in Preeti Pratishruti Dash, 'Rape adjudication in India in the aftermath of Criminal Law Amendment Act, 2013: findings from trial courts of Delhi' (2020) 4 Indian Law Review 2, 244-266

[19] William J. Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 Michigan Law Review 505

[20] Ministry of Home Affairs, 'Advisory on comprehensive approach towards crimes against women' (12 May 2015) No. 5011/22/2015 - SC/ST - W <https://www.mha.gov.in/sites/default/files/2022-09/AdvisoryCompAppCrimeAgainstWomen_130515_0%5B1%5D.pdf>; *State of Andhra Pradesh v. Punati Ramulu and Others* AIR 1993 SC 2644; *Kirti Vashisht v. State* 2019 SCC OnLine Del 11713.

[21] John Pratt, *Penal populism: Key ideas in criminology* (Routledge 2007); Julian Roberts and others, *Penal Populism and Public Opinion: Lessons from Five Countries* (OUP 2003) as cited in Maguire and others (n 5) 283

harsher sentences or increased police powers, signal a greater commitment to crime control despite its (demonstrated) limited capacity to yield significant results.[22]

David Garland argues that such penal populism is motivated by the politically urgent need to do something decisive about crime, resulting in often impulsive and unrealistic measures. This often accompanies a refusal to acknowledge the limits of the sovereign state, ignore underlying structural problems, and disregard evidence that crime does not readily respond to severe sentences, expanded police powers or greater use of imprisonment.[23] Ultimately, nuances of penological realism are subordinated to political ends. The refusal to acknowledge the social nature of crime results in the hyper-individualised strategies of increased criminalisation and incarceration. Thus, in responding to public outcry, the state informs public opinion and entrenches the 'bad apples' narrative that conveniently legitimises state-sanctioned marginalisation of lawbreakers upon whom lies the sole responsibility for their freely made choices.

Democratising the criminal justice system therefore requires an acknowledgement of the inadequacy of free-will as a basis for criminal responsibility and the incapacity of criminal law to perform the task of crime prevention and control. There is a need to abolish and reconstruct both the form and the function of the law. Its form because there needs to be a shift in focus from the attribution of fault to the context which precipitates criminal behaviour. Its function must be fundamentally transformed, from deterrence of freely choosing, autonomous individuals to the reform of criminogenic structures and conditions.[24] Reform of substantive law must therefore be accompanied by measures of poverty eradication, psychosocial support, increased state support for child development and other structural reforms geared at preventing the occurrence of crime.

Decolonising Criminal Law

The recent efforts in criminal law reform have been directed at "decolonising" criminal law. However, it is unclear what that means. The term "colonial" itself is contested: its usage as a

[22] David Garland, The Culture of Control: Crime and Social Order in Contemporary Society (OUP 2001) 132-133
[23] ibid
[24] Norrie (n 9) 73

form of criticism for laws suggests something uniform, essential, and objectionable to the experience of colonial laws. Used as criticism then, the term "colonial" cannot refer merely to the period in which such laws were created as it is hard to see why the temporality of such laws affords grounds for objections to them.[25] Neither can it be used to refer to all things authoritarian and oppressive as not all things authoritarian and oppressive are colonial in their origin.[26] This section argues that the experience of criminal law lacked any uniformity and explores the implications of this on the practice of decolonisation through criminal law reform. It explores criminal law legislation, the processes of investigation, trial, and issuance of sentences in an attempt to bring out the contradictions and discontinuities in the colonial experience of criminal law. It explores both friction across these different stages and within these stages to suggest that any attempts at decolonisation are misguided without understanding the nuances of the colonial experience.

Before the colonial intervention in criminal law, the law treated criminal acts as private wrongs which resulted in claims for compensation and retaliation, even in cases of homicide. Company regulations redefined crime by formalising the claim of the "state upon individual subjects, cutting through identities and claims which came in the way."[27] The Indian Penal Code 1860, the first draft of which was prepared in 1837, created a universal category of a legal subject. The law applied to every individual regardless of race, cast, class, and status.[28] Just a year before this, in 1836, the Thuggee Act XXX was passed, which criminalised membership of thug gangs. It considered the "thugs" to be communities socialised into criminality, whose members were engaged in a profession of crime.[29] This Act criminalised peripatetic professions and ways of life that escaped the grasp of taxation and policing.[30] This logic was further perpetuated in 1871 with the Criminal Tribes Act.[31]

To then treat "colonial" as equally applicable as critique to the Indian Penal Code 1860, the Thuggee Act, and the Criminal Tribes Act 1871 blurs what is exactly meant by the critique. The

[25] Arudra Barra, 'What is "colonial" about colonial laws" (2016) 31(2) American University International Law Review 137, 141
[26] ibid
[27] Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (OUP 1998) ix
[28] ibid
[29] ibid 169
[30] ibid 186
[31] Mark Brown, 'Race, Science and the Construction of Native Criminality in Colonial India' (2001) 5 Theoretical Criminology 345

experiences of these laws and their intended outcomes were widely different. On the question of punishments awarded for these crimes, the law during colonial times had taken contradictory stances as well. While on the one hand, it was engaged in rationalising punishment by getting rid of punishments it considered cruel such as severing of limbs, on the other hand, it also expanded the usage of the death penalty.[32]

Another question that arises in reference to the Indian Penal Code is: why was a colonial government interested in codification? The law in India, at least how the British perceived it, before codification was too varied across different presidencies, imprecise, and difficult to work with.[33] There were also issues of conflicting laws and the untrained civil servants who were entrusted with the implementation of these laws, as well as unclear legal sources.[34] Macaulay, a key figure in the Indian Codification experiment and the key architect of the Indian Penal Code, deemed Indian's not fit to govern themselves. So through codification he sought to give "good government" to people he could not give "free government" to.[35] The colony was also to serve as a lab for experimenting with codification the lessons from which could be carried back to the metropole.[36]

The undemocratic situation of the country also helped. As Macaulay noted, "The work of digesting a vast and artificial system of unwritten jurisprudence is far more easily performed, and better performed, by few minds than by many … It is a work which especially belongs to a government like that of India—to an enlightened and paternal despotism."[37] As Kolsky has shown, codification and uniformization was also carried out to solve the issue posed by the presence of non-official Europeans who otherwise slipped through the cracks in jurisdictions of the dual system of law and law courts.[38] This risked creating, as Macaulay described, "a new breed of Brahmins, authorised to treat all native population as Pariahs." The results of these efforts were the three criminal codes: the Indian Penal Code 1860, the Code of Criminal

[32] Jörg Fisch, *Cheap Lives and Dear Limbs: The British Transformation of Bengal Criminal Law, 1769-1817* (Ergon Verlag 1983) chs II & IV
[33] Singha (n 27) vii
[34] Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (CUP 2010) 640
[35] ibid 631
[36] ibid 633
[37] Hansard's, 3d series, vol 19, 531.
[38] Kolsky (n 34) 635

Procedure 1861, and the Indian Evidence Act 1872 which largely, on paper, treated all people equally and without discrimination on grounds of caste, class, and race.[39]

The objectives behind codification of the Indian Penal Code, described by Macaulay himself, were premised on utilitarian and liberal ideas such as creating a clear, unequivocal, concise, and exhaustive penal code such that "nothing that is not in the code ought not to be law", ensuring administrative efficiency in ascertaining truth while inflicting the least suffering possible, and achieving uniformity through the elimination of difference in legal status accorded to persons belonging to different races or sects.[40] At the same time the Indian Penal Code also had an ulterior motive of formalising and legitimising British rule after the 1857 revolt.[41] The Indian Penal Code "became a legislative priority because restoring the semblance of legality, in a manner that aimed to enhance the rule of law and minimise the future need to resort to arbitrary emergency measures or military intervention, became a political priority."[42] So, while the Indian Penal Code represented liberal ideas, its aim of making the law more effective and legitimate represented an exercise of sovereignty by a colonial government.[43]

Colonial difference also played out during adjudication. Equality of legal status did little to resolve the issues posed by substantive inequalities between the colonised and the colonisers. Everyday acts of violence by the Britishers against the natives went unpunished despite the application of now uniform laws. Non-official Britishers thus continued to act with impunity as prosecuting Britishers for crimes against natives proved difficult because of biases against the natives. The testimony of a native was generally considered unreliable. The natives were considered as possessing a "notorious disregard for truth."[44] Medical jurisprudence developed to seek objective knowledge and facts because of the perceived unreliability of the natives which instead served to mitigate European criminal culpability.[45] White perpetrators of violence claimed faults and diseases in the body of the native victim as the causes of death. A common

[39] The Criminal Procedure Code maintained a system of privileges for the Europeans "such as a right to a jury trial with majority of European jurors, amenability only to British judges and magistrates, and limited punishments." Kolsky (n 34) 658

[40] Barry Wright, 'Macaulay's Indian penal code: historical context and originating principles' in Wing-Cheong Chan, Barry Wight and Stanly Yeo (eds), *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Routledge 2011) 22-23

[41] ibid 21-22

[42] ibid

[43] ibid 24-25

[44] Kolsky (n 34)

[45] ibid 135

defence raised by the white perpetrators of violence was the "diseased spleen" defence according to which death was caused not as a result of actions of the accused but because of an underlying internal disease which rendered the native body fragile.[46] This defence, afforded to the white perpetrators, would result in a conviction, if at all, only for a less serious crime with a lesser punishment than murder.

The immunity afforded by criminal law to a privileged class of citizens vis a vis the everyday violence it commits on the marginalised is a feature of the criminal justice administration that has carried forward from colonial times. As Baxi noted, "Modern India seems to have at least two parallel legal systems: one for the rich and resourceful and those who wield political power and influence and the other for the small men without resources and capabilities to obtain justice or fight injustice."[47] As Shourie writes:

> *Observe how many of these fellows (the powerful and the rich) get the Hyderabadi goli. Observe how they get anticipatory bail for the asking. Observe, once the cases start, the innumerable clauses and sub-clauses these fellows are able to invoke in their favour. And contrast all this with the helplessness of the simple tribal who is dispossessed of his land by sahukar from the plains, who retreats in the forest and clears some land to keep himself from starving, and who is then arrested for violating the Forest Act.*[48]

The routine violence is perhaps most evident in the anti-beggary laws aimed at criminalising ostensible poverty such as the Bombay Prevention of Begging Act 1959.[49] Even when laws might appear neutral on their face, they still might be discriminatory in effect. As Pradhan and Sonovane show in the case of the Madhya Pradesh Excise Act Amendment in 2021, which introduced the death penalty for spurious liquor offences, has a disparate impact on Vimukta and Adivasi communities who are traditionally occupied with liquor manufacturing.[50] Ramanathan has argued that a more worrying anxiety with reference to status-based offenses is the paucity of

[46] ibid 136
[47] Upendra Baxi, *Crisis of the Indian Legal System* (Vikas Publishing House Pvt Ltd 1982) 4
[48] Arun Shourie, *Symptoms of Fascism* (Vikas 1978) 210-211 as cited in Baxi (n 47) 4-5
[49] See Usha Ramanathan, 'Ostensible Poverty, Beggary and the Law' (2008) 43(44) Economic & Political Weekly 33. Even though the criminalisation provisions of the act were declared unconstitutional by the Delhi High Court in *Harsh Mander v. Union of India and Karnika Sawhney v. Union of India* W.P.(C) 10498/2009 (Delhi High Court), it does not take away from the point that the routine violence of the law has been directed towards certain class of persons. Similar laws continue to exist in other states, notably, Punjab Prevention of Beggary Act 1971, Andhra Pradesh Prevention of Begging Act 1977, Bihar Prevention of Beggary Act 1951.
[50] Aditit Pradhan and Nikita Sonovane, 'Death by Excise Policing: The Widening Web of Carcerality in India' (2021) 56(45-46) Economic & Political Weekly 25

debate and public attention given to these offences. "The law, too, bears bold signatures of unconstitutionality which, if it had affected classes more proximate to power, would assuredly have faced severe tests in courts, legislatures and on the streets of democratic protest."[51]

During investigation, instances of custodial torture in colonial times were blamed on the native police, and more precisely on the native character of the police. It was treated as a fact of their precolonial repertoire which had to be reformed, along with other horrible practices like hook swinging, infanticide, etc. This was done by the colonial regime to wash its hands off the practice of torture.[52] Thus the colonial powers saw no contradiction in their role as a colonising power and their attempts to curb torture when torture itself was being used for their ends. The reforms were driven by the fear that widespread use of torture could delegitimise colonial penal practice. It neatly avoided the inextricable link between torture and functions of the police in colonial India. The police undertook torture to produce information for the purposes of investigation. There were attempts to reform and modernise the police force to curtail the use of police violence. It was the repeated "discovery" of torture by the police for the purposes of investigation as well as the official attempts to curb custodial torture that formed part of the colonial experience.[53] Significantly, the criminal codes contained provisions that disincentivised torture by police. Sections 25 and 26 of the Indian Evidence Act 1872 made confessions to police and in police custody inadmissible as evidence.

There were also pronouncements by the judiciary interpreting provisions of criminal law that enhanced the safeguards available to all accused. In *Pulukuri Kottaya v King Emperor,* section 27 of the Evidence Act was interpreted to render inadmissible knowledge about the prior use of recoveries. So parts of a confession to police which might have described the usage of a murder weapon were rendered inadmissible by section 27 of the Indian Evidence Act. There were also cases on the other end of the spectrum. *King-Emperor v. Sadashiv Narayan Bhalero*[54] interpreted section 124A of the Indian Penal Code 1860 (sedition) broadly to include mere arousal of the feeling of hatred despite the possibility of a narrow interpretation.[55]

[51] Usha Ramanathan (n 49) 39
[52] Anupama Rao, 'Problems of Violence, States of Terror: Torture in Colonial India' (2001) 36(43) 4125
[53] ibid
[54] 1947 SCC OnLine PC 9.
[55] See *Niharendu Dutt Majumdar v. King Emperor* 1942 SCC OnLine FC 5.

Anxieties about native mendacity also led to the development of forensic techniques in serology in India and its wide spread use.[56] The techniques were used to differentiate human blood from animal blood and to prevent fabrication of evidence.[57] Methods to address police excesses were opaque and public accountability of the police was minimal. It was however this fear of use of torture to obtain evidence that led to legislative reform through the Criminal Procedure Code and the Indian Evidence Act which contained safeguards against the usage of evidence obtained through torture.[58]

All these are significantly different tendencies simultaneously present in law made, interpreted, and enforced by a colonial power. To use the term colonial to refer equally to these outcomes would be to ascribe to the term colonial opposing tendencies: one that searches for objective and scientifically rigorous means of proof; one that adopts unreliable shortcuts to proof; and one that tries to combat the shortcut to proof. So, it is pointless to criticise a law for just being colonial. It is more helpful, as Barra asserts, to explicitly state the normative objections to these laws. Understood in this sense, a normative objection that arises from the reading of the various tendencies of the criminal law noted above is the logic behind criminal law reform. Even when the English took arguably positive steps such as rendering inadmissible admission obtained by a police officer, the change was directed towards ulterior motives such as distancing themselves from accountability.

More specifically, it is the characterisation of the colonial subject, which was driving these changes, which is objectionable. The colonial subject has been characterised as one that cannot govern itself and thus needs the enlightened and paternal despotism of the English to be governed. The indigenous colonial subject has been characterised as suspicious and socialised into criminality. The colonised have been labelled as liars and thus the need was felt to develop and rely on forensic evidence as the native's testimony was unreliable. The state has been characterised as opaque and not accountable to its population. This is reflected in the steps taken to combat police brutality where the colonisers tried to distance themselves from it and again placed the blame on the "native police". Even native bodies have been characterised as weak and

[56] Mitra Sharafi, 'The Imperial Serologist and Punitive Self-Harm: Bloodstains and Legal Pluralism in British India' in Ian Burney and Christopher Hamlin (eds), *Global Forensic Cultures: Making Fact and Justice in the Modern Era* (John Hopkins University Press 2019)
[57] ibid
[58] Anil Kalhan and others, 'Colonial Continuities: Human Rights, Terrorism, and Security Laws in India' (2006) 20 Columbial Journal of Asian Law 93, 110; Barra (n 25) 168

diseased to protect the white perpetrator of violence. All these cumulatively constructed the image of a colonial subject.

And the image in postcolonial India has continued. Criminalisation of identities and ways of life has continued into the present, and in some instances has gone beyond what even the colonial era laws dared to do.[59] The colonial continuities are reflected in the fact that denotified tribes are still treated as criminal.[60] The effect of these legislations was (and is) to restrict the movement of tribes considered habituated to crime and so criminal law was (and is) used as a means of population management rather than as a means to protect, prevent, and punish.[61] Further ostensible poverty continues to be criminalised in a similar manner as it was pre-independence in legislations such as the European Vagrancy Act 1874, the Bengal Vagrancy Act 1943, the Bombay Beggars Act 1945, etc.[62] Even provisions for bail, which require monetary security, have a disparate impact on the poor. Thus, poverty is also one of the contributing factors to the large undertrial population of India. As the Supreme Court noted in *Hussainara Khatoon:*

> *"One reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pretrial detention is the highly unsatisfactory bail system, which suffers from a property-oriented approach. It proceeds on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. Even after its re-enactment, the Code of Criminal Procedure continues to adopt the same antiquated approach. Where an accused is to be released on his personal bond, it insists that the bond should contain a monetary obligation requiring the accused to pay a sum of money in case he fails to appear at the trial… This system of bails operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting themselves released on bail."*

[59] Mark Brown, 'Postcolonial penality: Liberty and repression in the shadow of independence, India c. 1947' (2017) 21(2) Theoretical Criminology 186, 202 "This armature of control has been described here primarily in terms of continuity, but it is worth observing that at a number of points—from decisions about the removal of children from parents, to the incorporation of habitual offender measures into the ordinary machinery of law—the postcolonial state went farther than its colonial predecessor had been willing to go."

[60] Dilip D'Souza 'Denotified, Still 'Criminal'?' (1991) 34(51) Economic & Political Weekly 3576

[61] Mark Brown, 'Race, science, and the construction of native criminality in colonial India' (2001) 5 Theoretical Criminology 345, 363; Harry Blagg and Thalia Anthony, *Decolonising Criminology: Imagining Justice in a Postcolonial World* (Palgrave Macmillan 2019) 6

[62] Sneha Priya Yanappa and Avinash Reddy, 'Colonial roots, criminalising the vulnerable: Why India's laws against begging need an urgent rehaul' (*Scroll*, 16 April 2023)

Activists agree that this issue cannot be solved without systemic reform in the criminal justice system.[63]

Kalhan has also demonstrated that there are remarkable continuities in the antiterror legislations such as the Unlawful Activities Prevention Act in terms of overbroad and ambiguous definition of terrorism, detention procedures which infringe on due process, etc.[64] India has continued with the Police Act 1961 which was modelled after the Irish paramilitary model of policing meant not to protect but to perpetuate British rule.[65]

Jai Bhim, a Tamil film based on real events, recently depicted the routine torture and violence faced by members of the adivasi community, the suspicions of criminality that surround them, and the wrongful targeting by the police they experience. Another continuity worth mentioning is the use of criminal law for production of knowledge and surveillance which is reflected in the Criminal Procedure (Identification) Act 2022. As Baxi writes, "In many a society, the bulk and generality of postcolonial 'citizens' are hapless victims of 'governance' beyond the pale of accountability. For them, the law itself assumes the face of fate."[66]

These colonial continuities define the reality of the Indian criminal justice framework and these realities reflect several objectionable colonial tendencies which are major issues that any meaningful exercise in Criminal Law reform and decolonisation will need to address. The reality of the Indian criminal justice experience is the routine torture and excesses of police authority and lack of accountability. In 2020, for example, NCRB recorded 76 custodial deaths which gave rise to only 45 registered cases. Only 12 police officers were arrested, 8 chargesheeted, and 0 convicted.[67] Since NCRB methodology relies on FIRs, it likely underreports instances of custodial violence.[68] NHRC in 2020 registered 90 cases of custodial death. An independent report by the National Campaign Against Torture found 111 deaths in police custody in the same time period.[69] The actual data on deaths due to custodial violence is potentially still higher.

---

[63] Ashutosh Sharma, 'Long forgotten: India's pretrial and undertrial prisoners' (*Frontline: The Hindu* 14 December 2022)
[64] Anil Kalhan and ors, 'Colonial Continuities: Human Rights, Terrorism and Security Laws in India (2006) 20(1) Columbia Journal of Asian Law 93, 97
[65] ibid 111
[66] Upendra Baxi, 'Postcolonial Legality' in Henry Schwarz and Sangeeta Ray (eds), *A Companion to Postcolonial Studies* (Blackwell 2005) 551
[67] National Crime Records Bureau, Crime in India 2020 (vol III, Ministry of Home Affairs 2021) 1001-1002, 1006
[68] ibid vi-vii
[69] National Campaign Against Torture, India: Annual Report on Torture 2020 (NCAT 2021) 10

The prevalence of custodial violence has led to a situation where the citizen needs to be protected from the police. There is a need felt to surveil and police the police. Accordingly, the fear of custodial violence has prompted the Supreme Court to pass directions for installing CCTV cameras in every police station.[70] It also directed the setting up a Central Oversight Body which would review the CCTV footage from time to time and release reports.[71]

Decolonisation or improvement would imply undoing the assumptions about the subject, which continue to form the bases of criminal law in India, and moving them to the realm of the citizen. One of the ways to do this is to include a diverse set of persons in the processes and consultations for reform. It is to see the governed as competent to have a say in the policies which they will be governed by. Additional steps would include granting more rights to subjects to convert them into citizens. As Baxi writes, the purpose of decolonization should be to move a right-less people into the world of human rights.[72] The alterations introduced in the bill do not move in this direction and nowhere is an alternate construction of the citizen (not subject) forwarded in these Bills. There is a reluctance to radically reimagine the criminal justice system that is more responsive and accountable to the needs of the persons involved.

Process of Reform: Procedural issues with the Committee for Reforms in Criminal Laws

In May 2020, while the country was in the grips of the pandemic, the 5 member 'Committee for Reforms in Criminal Law' (hereinafter 'the Committee') was constituted. In its original composition, the Committee consisted of the Vice Chancellors of NLU Delhi and DNLU, Jabalpur, the Registrar of NLU, Delhi, a Senior Advocate and a retired judge from Delhi Higher Judicial Services, all males. After significant backlash, one female member was included.

Any attempt to reform the criminal laws must proceed from an acute appreciation of the politics of criminal law - its disproportionate impact on marginalised communities, its propensity for misuse, the severe lack of access to justice and the state's tendency to use criminal law in legitimating coercive action and violence against its own citizens. Such confrontation with the deeply political nature of criminal law and therefore its reform, necessitates an unwavering commitment to the democratic values of representation, deliberation, participation and

[70] *D.K. Basu v. State of W.B.*, (2015) 8 SCC 744 [38.5]-[38.6]; *Paramvir Singh Saini v Baljeet Singh* SLP (Crl) 3543/2020 (Supreme Court)
[71] *Shafhi Mohammad v. State of Himachal Pradesh* (2018) 5 SCC 311
[72] Upendra Baxi (n 66)

transparency. It is on this front that the Committee left itself open to criticism, which it then also received in substantial volumes in the form of open letters and representations by women lawyers[73], queer feminists and other activists,[74] civil society groups, and advocates, [75] former judges, academics and bureaucrats and law students.[76]

Aside from the underrepresentation of women in the Committee, there was also a severe lack of representation of social groups who have been most victimised by the operation and misuse of criminal law. This includes Dalits and Muslims who are disproportionately incarcerated, Adivasis whose rights have been criminalised or transgender people and sexual minorities who have been invisibilised by the law and targeted by the police. It is difficult to see how the institutional biases that are inherent in the criminal justice system can be addressed without ensuring such diversity. Further, the absence of constitutional law scholars, legal historians, experts in criminal law and jurisprudence, retired High Court or Supreme Court judges, trial court advocates or more senior advocates, also makes the competence of the Committee to undertake such a mammoth task, questionable. It remains unclear why an apparent upheaval of this extent was carried out of a university instead of being delegated to a Law Commission which historically has involved area experts, lawyers etc working under a specific mandate and established procedures to ensure inclusion and transparency.

Another glaring problem since the inception of the committee was a lack of clarity about its terms of reference, methodology and process. Six questionnaires were designed to facilitate the participation of the public, two each on the IPC, CrPC and Evidence Act. This reflected a predetermination of what issues were to be prioritised in this reform process and an inadequate

[73] Indira Jaising and ors, 'Re: National Level Committee for Reforms in Criminal Laws: Serious Concerns Re Composition, Time Frame and Methodology adopted by the Committee' available at <https://theleaflet.in/wp-content/uploads/2020/07/Letter_NLUD.pdf>

[74] Abir Neogy, 'Resolution Against the Committee for Reforms in Criminal Laws' (18 October 2020) available at <https://www.livelaw.in/news-updates/severely-exclusionary-queer-feminists-activists-seek-disbanding-of-criminal-law-reforms-committee-165193>

[75] All India Democratic Women's Association, 'Memo to Home Minister on Committee for Reforms in Criminal Laws' available at <https://aidwaonline.org/memo-home-minister-committee-reforms-criminal-laws>; National Alliance of People's Movements, ' sub: Unrepresentative nature of the Committee to Reform the Crimina Law and flawed process for carrying out Criminal Law Reform - Reg' available at <https://napmindia.wordpress.com/2020/08/13/napm-letter-to-union-home-minister-disband-the-criminal-law-reform-committee-stop-law-reform-during-covid-19-consult-all-sections-of-citizens/>;

[76] Gopal Gowda and ors, 'letter dated 16 July 2020 to The Chairperson and Members. (16 July 2020) available at <https://www.livelaw.in/pdf_upload/pdf_upload-378381.pdf>; Aftab Alam and ors, 'Transparency in the Functioning of the "Committee for Reforms in Criminal Laws"' (8 July 2020) available at <https://theleaflet.in/wp-content/uploads/2020/07/Response_Reforms-Committee.pdf>

understanding of the interconnectedness of these criminal law statutes. The open consultations were meant to receive responses on issues which had not been specifically identified in the questionnaires, however there is no clarity on how these responses were used or what was the methodology adopted to prepare its final report.[77]

This mode of participation which was both open and voluntary conceals structural barriers to participation and the real risk of exclusive representation of majoritarian voices. The latter risk arose from the Committee's abdication of its responsibility to proactively ensure diversity.[78]

The questionnaires were drafted in legalese and offered no context in order to solicit informed responses and productive deliberation. This then excluded voices outside the legal landscape and ignored the interdisciplinarity of criminal law. Further there was no provision to accommodate different vernacular languages and no alternative route to participate except through the Committee website. This significantly diminished the participation of large sections of the population, considering low levels of internet access and the resultant exclusionary politics of technology. The problem is compounded by the debilitating effects of the pandemic and the short timelines provided to respond to these hefty questionnaires. Background resources provided on the website, presumably to enable informed participation, were largely limited to Law Commission Reports, other Committee reports and articles by the then Convenor of the Committee itself – all in English. This hardly comprises a fair representation of perspectives and rather betrays a priority for state institutions.

The Committee has since issued public notices to clarify and respond to various criticisms. These assure the public that the questionnaires were "products of extensive research, analysis and

[77] Anup Surendranath and Maulshree Pathak, 'Dangerous haste to reform criminal law' (*Frontline*, 6 September 2020) <https://frontline.thehindu.com/cover-story/dangerous-haste/article32532770.ece> last accessed 12 October 2023; Sanchita Kadam, 'A closer look at the new Criminal Law Reforms Committee Concerns raised about it being hasty and non-inclusive' (*CJP*, 26 August 2020) <https://cjp.org.in/a-closer-look-at-the-new-criminal-reforms-committee/> last accessed 12 October 2023; Ayushi Garg and ors, 'LAW REFORM AND DELIBERATIVE DEMOCRACY: Lessons for the Committee for Reforms in Criminal Laws (India)' (The University of Sheffield Centre for Criminological Research, Occasional Paper No 9 2020) <https://drive.google.com/file/d/1bhhY-o2qxGnU1v61V7m6AUqCHqOC3cLB/view> last accessed 12 October 2023;

[78] Ibid; Arushi Garg and Rishika Sahgal, 'Colonial processes, decolonial aims: on Committee for Reforms in Criminal Law' (*The Hindu*, 19 August 2020) <https://www.thehindu.com/opinion/op-ed/colonial-processes-decolonial-aims/article32388008.ece> last accessed 12 October 2023

discussions" and revealed the method of identifying the issues.[79] These assurances however were not accompanied by a disclosure of the background sources or research used to undertake this process.

The lack of methodological rigour and justifications for inclusion or exclusion of issues in the questionnaires, unfortunately manifests itself in the haphazard and piecemeal reforms proposed in the three new bills. Until date neither the public responses received in consultations nor the final report prepared by the Committee have been published. This final layer of opacity has rendered, both, the (albeit unsatisfactory) deliberative process and the Committee's purported mandate of decolonization, void and meaningless for we ultimately have no way of knowing the extent to which the Committee's recommendations have been reflected in the three bills.

Characterising Changes in the New Bills

A textual analysis of the bills shows that not much has changed. Some overarching uniform changes that may be noted are a general increase in the quantum of punishment, an increase in mandatory minimums and fines,[80] and the scant introduction of community service as a form of punishment.[81] The changes, where they modify the existing law, reflect a broadening in the scope of what is criminalised as the state arrogates more power to itself.

This is reflected in the new categories of offences that have been introduced in the Bharatiya Nyaya Sanhita ("BNS"). Cls 109 and 110 of the BNS (now, Sections 111 and 112 in the final Code enacted in December 2023, hereafter, the Act) create a new category of offences - organised crime. Cl. 109 (Section 111 in the Act) borrows heavily from existing state legislation on organised crime, like the Maharashtra Control of Organised Crime Act 1999 ("MCOCA"),

[79] Committee for Reforms in Criminal Laws, 'Public Notice: Regarding Consultative Exercises' (25 August 2020) CRCL/PN/8/2020 <https://criminallawreforms.in/wp-content/uploads/2020/08/Public-Notice-Regarding-Consultatitive-Exercises.pdf>

[80] Indian Penal Code 1860, s 117 compared with Bhartiya Nyaya Sanhita, cl 57; Indian Penal Code 1860, s 188 IPC compared with Bharatiya Nyaya Sanhita, cl 221 BNS (Section 223 in the Act); Indian Penal Code 1860, s 206 compared with Bharatiya Nyaya Sanhita, cl 241 (Section 243 in the Act)

[81] Bharatiya Nyaya Sanhita, cls 200, 207, 224, 301, 353, 354 (Sections 202, 209, 226, 303, 356 in the Act)

Gujarat Control of Organised Crime Act 2015 ("GujCOCA") etc, whereas cl. 110 (Section 112 in the Act) creates an entirely new offence of petty organised crime.

MCOCA defines organised crime as continuing unlawful activity by an individual singly or jointly as a member of an organised crime syndicate or on behalf of the syndicate by use of violent or unlawful means to gain pecuniary benefit, undue economic or other advantage, or promote insurgency. GujCOCA differs slightly as it includes not just unlawful activity but also terrorist acts. It also does not specifically mention insurgency but includes monetary benefits and large-scale organised betting. Continuing unlawful activity has been defined in MCOCA and GujCOCA as an activity prohibited by law for the time being in force. Further, the unlawful activity must be a cognisable offence punishable with imprisonment for three years or more, conducted singly or jointly or as a member of an organised crime syndicate or on behalf of such syndicate. MCOCA and GujCOCA define an "organised crime syndicate" as a group of two or more persons acting singly or collectively as a syndicate or gang indulging in activities of organised crime.

Cl. 109 of the BNS (Section 111 in the Act) uses the phrase "material benefit" instead of "pecuniary benefit" (MCOCA) or "monetary benefit" (GujCOCA). "Material benefit" has been defined in the explanation in broad and vague terms "anything of benefit to a person, whether or not it has any inherent or tangible value, purpose or attribute". Further "Continuing unlawful activity" in cl. 109, BNS has been extended to all cognisable offences and not only to those punishable with imprisonment of three or more years. The BNS also defines an organised crime syndicate to include a 'criminal organisation', a phrase that has nowhere been defined in the bill. It is unclear who, how, and on what parameters can an organisation be labelled as criminal. The definition of "organised crime syndicate" has been extended to cover not just organised crime but also the commission of "one or more serious offences", the scope of which is unclear. Other phrases such as "gang criminality" and "racketeering" which have been used to define an "organised crime syndicate" in the BNS, also do not have statutory definitions.

Subclause (3) of cl 109 of the BNS which penalises facilitating organised crime has gotten rid of the mens rea requirement for the offence, which is present in the MCOCA and GujCOCA. This has significant ramifications as someone who, without any knowledge, aids the commission of an organised crime would be covered under the sweep of the clause. Further, subclause (5)

criminalises not only a person who harbours persons involved in organised crime but also persons who "*believes that his act will encourage or assist the doing of such crime".* This can be interpreted to extend the offence to cover the harbouring of not just persons involved in organised crime but also facilitators.

Cl. 111 of the BNS (Section 113 in the Act), for the first time, introduces the offence of a terrorist act into the penal code, which is a general legislation. Before this, terror offences had only been dealt with through special legislation such as POTA, TADA, and UAPA. Under terror laws, ordinary acts are recast as terrorist acts when committed with a specific intention. Cl. 111 follows a similar structure, however, the qualifying special intent has been modified to include "intimidate the general public…or to disturb public order". This is a significant dilution of the mens rea standard compared to the UAPA which relies on a mens rea standard of "striking terror". Further, cl. 111 makes the destruction of private property and critical infrastructure also a terrorist offence whereas the UAPA only criminalises the destruction of government property. "Critical infrastructure" has also not been defined anywhere in the BNS.

Acts which "destabilise or destroy the political, economic, or social structures of the country, or create a public emergency or undermine public safety" have been included in the list of terrorist acts which is also vague and open to abuse, especially the usage of the phrase "social structures". The punishment for the offence includes a life sentence without parole which is a completely new sentence and essentially places the criminal beyond the pale of reformation. A new offence of "holding proceeds of terrorism" has also been introduced in cl. 111 in its subclause (6) of the BNS. The clause criminalises holding "any property, directly or indirectly, derived or obtained from commission of terrorist act or proceeds of terrorism". This lacks a mens rea requirement which is otherwise present in the UAPA. It also substantially mirrors the modified offence of money laundering under the PMLA which also criminalises the mere possession of proceeds of a crime.

The word "terrorism", which has been used to define a "terrorist organisation", has also not been defined anywhere in the BNS. The determination of which organisation is a terrorist organisation, accordingly, has been left without much direction. UAPA, on the other hand, has some safeguards in terms of how an organisation can be labelled as a "terrorist organisation". It requires a notification from the central government and also provides for denotification and

review mechanisms which are absent in the BNS and the Bharatiya Nagrik Suraksha Sanhita ("BNSS") bills.

Even the definition of a terrorist under the BNS includes the commission of acts such as transporting supplies and causing fire and floods without any mens rea requirement. While being designated as a terrorist is bereft of legal consequences, the provision also provides no obligation to communicate to a person that they have been termed as such. The corresponding provision in the UAPA requires notification and empowers only the central government to label a person as a terrorist. The UAPA contains other important procedural safeguards as well: (a) only senior police officials can investigate terrorist offences, and (b) sanction of central government based on evidence is required before cognizance of a terrorist act can be taken. Similar safeguards are not present in the BNS

Cl. 150 (Section 152 in the Act) which criminalises acts that endanger the sovereignty, unity, and integrity of India replaces section 124A of the IPC, which criminalises acts of sedition. This clause also suffers from the vice of vagueness. It changes the object of protection from a defined entity, "government of India" to an abstract entity, "India". "India" could be used to refer to the government, public figures, or even society in general. The ambiguous and overbroad object of protection has a direct impact on the nature of acts that are criminalised. The clause uses various undefined terms such as "subversive activities" to define the offence of endangering the sovereignty, unity, and integrity of India. The phrase, "subversive activities" can have varying interpretations which affect the degree of the act being criminalised. It can mean acts which seek to subvert established institutions or merely seek to undermine authority. Further, it does little to actually decriminalise legitimate dissent which has been one of the principal complaints against the section. Instead, it may broaden the scope of criminalising dissent as it lowers the threshold of harm to mere arousal of feelings of separatist activities as opposed to something that affects public order.It is noteworthy that the criminalisation of arousal of feelings was held unconstitutional in *Kedar Nath Singh v. State of Bihar.*[82]

Cl. 195(1)(d) (Section 197 (1)(d) in the Act) criminalises the making or publication of false and misleading information which jeopardises the sovereignty, unity and integrity or security of India. It has three requirements: (a) making or publishing of some information, (b) the

[82] 1962 SCC OnLine SC 6

information made or published must be false or misleading, and (c) the false and misleading information jeopardises "unity, sovereignty and integrity or security of India". As is evident, this section also uses the vague phraseology of "sovereignty, unity and integrity or security of India." Further, the terms, "false and misleading" and "jeopardising" have not been defined in the BNS and thus what counts as false and misleading or what jeopardises the sovereignty, unity and integrity of India remains vague and in the hands of the decision-makers. The provision criminalises the mere making of such information without publishing it and also lacks a mens rea standard. This subverts the constitutional requirement of incitement of disorder or violence to restrict free speech.

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rules 2023 uses similar phrasing of "fake", "false" and "misleading" for issuing directions for blocking content. The same is currently under challenge before the Bombay High Court in *Kunal Kamra v. Union of India.*[83] Cl. 195(1)(d) (Section 197 (1)(d) in the Act) goes beyond by not restricting itself to the digital medium and criminalising the making or publishing of such information. While criminal law has traditionally dealt with the criminalisation of false information in the context of perjury or providing of false evidence, it is generally accompanied by a mens rea requirement which this clause lacks. Further, it is impracticable to define with precision what is false and misleading, especially given the subjectivity in judging truth claims. Any precise law will potentially be inadequate and not achieve its purpose. The provision also contributes to a worrying trend of establishing a state monopoly over truth, as is also seen with the new IT rules.

Cl. 4(b) defines "imprisonment for life" as "imprisonment for the remainder of a person's natural life". This is a significant departure from the IPC which provides for only life imprisonment simpliciter, save in certain offences, after the 2013 amendment, which provide for imprisonment for the remainder of a person's natural life. What differentiates life imprisonment simpliciter from imprisonment for the remainder of natural life is the possibility of suspension, remission, or commutation. The only restriction on suspension, remission, or commutation of a life sentence simpliciter is provided in section 433A CrPC according to which a person must undergo at least 14 years of imprisonment before being released in any of the above ways.

[83] WP(L)/9792/2023 (Bom HCt)

The sentences in the nature of whole life sentences were engaged with for the first in *Swamy Shraddhananda (II) v. State of Karnataka* as an acceptable alternative to the death penalty for cases that did not quite fit into the "rarest of the rare" category.[84] *Swamy Shraddhananda (II)* was affirmed in *Union of India v. Sriharan* which held that only the High Court and Supreme Court had the power to impose such modified sentences.[85] However, it was ambiguous whether such sentences could be imposed only when a death sentence was being commuted. Importantly, in both these decisions, the whole life sentence is justified as an alternative to the death sentence. The ambiguousness was exploited in *Shiva Kumar v. State of Karnataka* to hold that the modified sentence can be awarded even when cases are not commutation cases and where the death penalty has not been awarded or asked for.[86] However, *Shiva Kumar* maintained that only the superior courts can impose such a sentence.[87]

Since the 2013 Amendment to the IPC, these sentences have found their way into the wording of the statute, even for offences that don't have the death penalty as a punishment.[88] Its introduction for crimes which don't have the death penalty as a potential punishment takes it beyond the grounds on which it was justified. In *Shatrughna Baban Meshram v. State of Maharashtra,*[89] it was held that these provisions also limit possibility of remission for convicts. The use of such sentences has been expanded in the BNS.[90] In fact, because of the definition of life imprisonment in cl. 4(b), it is unclear whether every life sentence is potentially a whole life sentence.

The BNSS also expands the power of the police to seek remand. Cl. 187(2) of the BNSS allows for police remand for a total period not exceeding 15 days but within the first 40 or 60 days of the detention period, depending on the punishment for the crime. So, essentially, this allows the police to seek remand even after the first 15 days, which is not possible under the existing jurisprudence on police remand under section 167(2) CrPC.[91] Cl. 44(3) (Section 43(3) in the Act) also increases the scope of the use of handcuffs by police in arresting accused persons. The

[84] (2008) 13 SCC 767
[85] (2016) 7 SCC 1
[86] SLP (Crl) 3400/2017 (Sup Ct) decided 28 March 2023
[87] ibid
[88] Indian Penal Code 1860, ss 370(6), 370(7), 376, 376D, 376DA,
[89] (2021) 1 SCC 596
[90] Bhartiya Nyay Sanhita cls 102, 107, 137 (Sections 104, 109, 139 in the Act)
[91] Livelaw News Network, 'Bharatiya Nagarik Suraksha Sanhita (New CrPC Bill) Allows Police Custody After First 15 Days Of Arrest' (*LiveLaw*, 13 August 2023) available at <https://www.livelaw.in/top-stories/bharatiya-nagarik-suraksha-sanhita-new-crpc-bill-allows-police-custody-after-first-15-days-of-arrest-235096#>

Supreme Court in *Sunil Batra v. Delhi Administration* declared the blanket use of handcuffs as unconstitutional and held that the use of handcuffs in each case must be justified and that handcuffs cannot be used as a form of punishment.[92] It noted that handcuffs should be avoided in non-violent offences, however, cl. 44(3) (Section 43(3) in the Act) permits the use of handcuffs in cases, *inter alia*, of economic offences, drug-related offences, and counterfeiting of currency. These are not violent crimes and there seems to be no means-end connection between handcuffing an economic offender. Handcuffs here appear as punishment, which the Court in *Sunil Batra* specifically prohibited.

The BNSS also does little to strengthen victims' compensatory justice or to extend to victims facilities like psychosocial support, rehabilitation, or counselling that are often crucial to mitigate the impact of crime. Some rights to information and participatory rights have also been envisioned by the bills. For instance, the right to receive a copy of the FIR, police report, witness statements etc.[93] or to be informed about the progress of the investigation.[94] These rights, however, are really only available to a victim who is represented by an advocate and in the absence of accompanying provisions for free legal aid and representation, these rights are of limited significance.

Victims' rights provide a convenient rhetoric to officials who desire greater state control through law-and-order crime policies.[95] Victims' rights have been used as an all-purpose justification for legitimising penal repression, retributive sentiments, harsher sentences and increased criminalisation. E.g., the interests of the victims were considered as a ground justifying the creation of the whole life sentence in *Union of India v Sriharan.* The real interests and needs of the victims take a back seat. The misperception that the criminal justice system grants more rights to the accused than to victims and the resultant need to balance the scales also contributes to this approach.[96]

---

[92] 1979 SCR (1) 392
[93] Bhartiya Nagrik Suraksha Sanhita, cls 193 and 230.
[94] Bhartiya Nagrik Suraksha Sanhita, cl 193(3).
[95] Robert Elias, *Victims Still: The Political Manipulation of Crime Victims* (SAGE Publications 1993) ch 1
[96] *Girish Kumar Suneja v. Central Bureau of Investigation* (2017) 14 SCC 809, [53]: *"*It is now time for all of us including the courts to balance the right of an accused person vis-à-vis the rights and interests of individual victims of a crime and society. Very often, public interest is lost sight of while dealing with an accused person and the rights of an accused person are given far greater importance than societal interests and more often than not greater importance than the rights of individual victims*.";* Carolyn Hoyle, 'Victims, the criminal process, and restorative

The larger structural issues faced by victims at the hands of the criminal justice system, remain obfuscated and unaddressed. For instance, judgements like *Lalita Kumari*, have held that the police have a mandatory duty to register an FIR when information discloses a cognisable offence.[97] Yet there is a pervasive issue of non-registration of FIRs which necessitated stricter provisions to limit police discretion and hold them accountable. The institutionalisation of the Zero FIR in the BNSS is insufficient to address this long-standing crisis. Similarly, the reforms do not address the well-documented re-victimisation of victims of sexual offences at the hands of state machinery. The harassment of these victims at the stage of registering FIRs, the prevalent use of the archaic two-finger test in their medical examination[98] and their frequent humiliation during the trial itself, indicate that the need for victim-centric reforms goes beyond participatory and compensatory justice.

In failing to confront this inconvenient reality, the bills opt to use victims and their plight as a potent rhetorical device in the "service of severity"[99] - to increase criminalisation, introduce harsher sentences and amass greater coercive power.

Conclusion

The lecture has demonstrated that any meaningful 'reform' of criminal law would require criminal law to take the context of the criminal more seriously and that the present changes resemble a classic case of penal populism through the increase in criminalisation and enhancement of sentences. The lecture has also argued that any criticism of the old laws as 'colonial' is inadequate without any normative criticism of the same. It then proceeded to

---

justice' in Mike Maguire, Rog Morgan and Robert Reiner (eds), *The Oxford Handbook of Criminology* (5th edn, OUP 2012)

[97] *Lalita Kumari v. Government of Uttar Pradesh* (2014) 2 SCC 1.

[98] Tanya Arora, Patriarchy and Virtue: Why is the outlawed practice of the Two Finger Test still in practice in India?' (*Citizens for Justice and Peace*, 2 November 2022) available at <https://cjp.org.in/patriarchy-and-virtue-why-is-the-outlawed-practice-of-the-two-finger-test-still-in-practice-in-india/#:~:text=The%20court%20also%20stated%2C%20%E2%80%9CAny,shall%20be%20guilty%20of%20misconduct.%E2%80%9D>; PTI, ''Cancel licence of doctors who still conduct two-finger test': Rape survivors submit letter to apex court, call for action' (*The Hindu*, 10 August 2019) available at <https://www.thehindu.com/news/cities/Delhi/cancel-licence-of-doctors-who-still-conduct-two-finger-test/article28970779.ece>

[99] Andrew Ashworth, 'Victims' Rights, Defendants' Rights and Criminal Procedure' in A Crawford and J Goodey (eds), *Integrating a Victim Perspective within Criminal Justice* (Ashgate 2000) 186

normatively criticise penal laws which were in use during the colonial times and also signalled the colonial continuities that have survived into the present and will continue to survive even after the criminal law is 'reformed' and 'decolonised'. Specifically, it was pointed out that penal law has lacked accountability measures, has held unsavoury assumptions about its subjects, and has not developed in a democratic way with public participation - a narrative that has continued into the present criminal reforms.

The third part has offered a critique of the various notable changes in the criminal laws suggested to be introduced. The section also sought to substantiate the claims made in the previous two sections. None of the changes explored contextualise the crime with the help of the social status of the crime or deal with the criticism of the free-will model in general. On the other hand, the increased criminalisation, the use of handcuffs, and the change in how 'life imprisonment' is defined showed a manifest enhancement of penalties and substantiated a charge of penal populism. None of the provisions studied have introduced enhanced accountability measures, given citizens more rights, nor has the reform process been accessible. The 'decolonised' criminal law would continue to treat the marginalised as it did before.

On the other hand, the third section demonstrates that the changes have introduced considerable uncertainty through the usage of vague terminology. The introduction of terror offences, which are generally reserved for special statutes and which contain special safeguards, into the general criminal law, to be governed by the ordinary criminal procedure is also a worrying trend. The creation of new offences such as threatening the sovereignty of India and spread of false information restrict the space for the exercise of civil rights rather than providing more rights to citizens. Even the evocation of victims' rights seems like a veneer to justify harsher punishments and increased criminalisation without actually helping the victims.