

Colonialism Redux for the Digital Age? What to Make of India's New Criminal Codes

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The press bureau report for the day the government minister piloted three new pieces of legislation to replace India's colonial criminal codes through a largely empty People's House in the Indian Parliament quoted him as saying that

Prime Minister Shri Narendra Modi has urged to eradicate the mentality and symbols of slavery and pave the way for the creation of a great India with new confidence at the earliest. ... [T]hese new laws being brought in place of three old laws have been made on the basis of the three basic spirit of our constitution – freedom of the individual, human rights and the principle of equal treatment to all.[1]

The Promise of Utopian Criminal Code Reform

This, by all accounts, describes utopia: A legislation that takes away the yoke of colonialism — which in turn based its logic of criminality and dispensing justice on patriarchy and subjugation — from the matrices of the criminal process and replaces it with a democratic dream law giving the power back to the people.

The legislation forming the yoke of colonialism in question here referred to the criminal codes for British India in the 19th Century — the trinity comprising the Indian Penal Code of 1860 [IPC], the Code of Criminal Procedure of 1861 [CrPC] and the Indian Evidence Act of 1872 [IEA]. Arguably the most famous of the experiments conducted in the colonial “legal laboratory”[2] which were introduced subsequently in plenty of other British colonies across Asia and Africa, the legacy of the criminal codes was equally keenly felt in the metropole (which famously resisted the codification drive, of course).

The sun may have set on the British Empire in India in 1947, but the criminal codes lived on even as the independent Republic of India introduced a constitution quite at odds with the logic of the criminal codes. [3] India was by no means unique in this regard as many of the other former colonies also chose to retain the colonial legal regimes, and continue to do so while periodically amending the same.[4]

Until now, that is. In December 2023, the Indian Parliament passed legislation to repeal and replace the three criminal codes with what has been trumpeted as indigenous legislation removing the shackles of a colonial past. Thus, the *Bharatiya Nyaya Sanhita* 2023 [BNS] replaces the IPC, the *Bharatiya Nagarik Suraksha Sanhita* 2023 [BNSS] replaces the CrPC, and the *Bharatiya Sakshya Adhinyam* 2023 [BSA] replaces the IEA.

None of these statutes has yet been enforced, with the government suggesting that the rollout will take up to a year.^[5]

The India Codification Project in Global Context

From the perspective of global criminal law scholarship, and perhaps legal scholarship and policy more generally, codification has always been a fascinating site for research and analysis. For this reason, the repeal of the criminal codes in India raises issues of global significance apart from simply being a major legal development in a common law country.

The IPC and IEA incorporated existing common law traditions at the time of their enactment and they have been a part of conversations by lawyers and scholars across the globe on multifarious issues.^[6] The interaction of the general part normally contained in codes and the burgeoning special part of crime and evidence — consisting of newer crimes like terrorism and ideas like reverse burdens — would be issues that any codification project in the 21st century has to contemplate. Exploring how India has done this would naturally be of immense relevance to anyone working in this area.

While the CrPC being procedural in ambit did not often attract a global audience, it offered a rich source for comparative research for scholars interested in exploring issues of state power and personal liberty, besides more specific issues such as identifying the purpose behind conducting criminal trials. How a jurisdiction has reappraised these questions while overhauling its laws is, again, worthy of serious attention, especially at a time when exceptional emergency regimes have seemingly swallowed up the general rules of criminal procedure the world over.

Of course, it is entirely impossible to truncate such a study to the space offered by an intervention such as this. I instead will try to answer a broad question, such that even an interested foreign observer can grapple with these developments and try to make sense of them on their own terms.

That broad question is whether the re-codification enterprise carried out by the current Indian government attempts to grapple with any of the issues of importance that I have highlighted above. If so, going back to the valedictory remarks I quoted at the outset, surely the world would want to learn from India how to crack this enduring puzzle of making criminal laws more democratic.

The answer, alas, is that it has not, at least on my assessment and that of many others thus far.^[7] By the government's own admission, the BSA does not alter anything in the scheme of the IEA.^[8] The BNSS has not altered the scheme of preventive justice or investigation of crimes and pursuit of trials in the prevalent CrPC besides (i) investing police with greater powers with fewer sets of checks and balances — for instance, by seemingly allowing for detention in police custody to last up to ninety (90) days! — (ii) making bail more difficult, and (iii) introducing measures to speed up the trial process. Lastly, the BNS does alter the structure of the IPC, but has not attempted to streamline the special law of crime with the general law of crime and, moreover, has refrained from changing how the colonial law defined crimes.^[9]

According to the consensus there is precious little different in the substance of the laws. Is this yet another feather in the cap of the vaunted timelessness of the colonial criminal codes? Or is the absence of real change the result of a legislative process bereft of debate and discourse, considering that the government first appointed a committee to draft these

laws but refused to share its reports, then introduced the draft laws in parliament without mandatory prior consultation, referred the drafts to a hand-picked committee which conducted zero public hearings, and finally passed the laws in Parliament after suspending practically the entirety of the members of the opposition parties?[10] It is anyone's guess.

Colonialism Redux?

At the heart of this massive legislative effort by the current government of India has been a proclamation that the old criminal codes imbued a colonial mindset and were in dire need of replacement with a set of laws more attuned to the political setup of a democratic republic.[11] Have these laws replacing the criminal codes achieved this objective? Considering that there is hardly any change to anything apart from the form and appearance of the laws, the answer appears to be a clear 'no'. [12]

Take the example of sedition, the classic colonial crime. Even as the legislation replacing the IPC was tabled on the floor of the House in August 2023, the concerned Minister declaimed to great fanfare that the crime had been taken out of the statute books. To the extent that the IPC never had a crime defined as 'sedition' to begin with, the claim was bogus from the start. But what made this claim ring even more hollow was the existence of a surprisingly similar provision in the drafts of the new laws first published in August 2023. Perhaps this is why in December, the government began stating that the crime of sedition had not been erased altogether but replaced with "treason" (quite interesting when you think of it from a historical perspective).

Without getting bothered by the small issue of whether a crime like treason should be part of a law that is supposedly designed to throw off colonial baggage, let me try and deal with the terms of the provisions on their own merits. Section 152 of the BNS, which supposedly performs the task of replacing sedition with treason, oddly does not seem to travel very far from sedition as originally understood in the IPC itself. The colonial crime punished exciting or attempting to excite disaffection or hatred against the government, and it was this idea of punishing the *feeling* of disaffection as against plots to overthrow the king that demonstrated how sedition expanded on treason. A law replacing sedition would, naturally, retreat to its shell, but Section 152 of the BNS punishes exciting or attempting to excite "subversive activities" or encourages "separatist activities" or "endangers" the sovereignty or unity and integrity of the country. Since the law doesn't define "subversive activities" or "separatist activities", and again allows for punishing emergence of such feelings, it is difficult to put a finger on just how different treason is from sedition.

What was colonial about the erstwhile criminal codes was their conception of the individual-State relationship. In the way offenses were defined, prevented, investigated, and prosecuted under the criminal codes, one traced a distinct idea placing the State as beyond justification, and vesting each arm of the state with enormous powers to exercise its mandate. This subjugation of the individual, earlier a subject to the crown but later a citizen in an independent republic, was what a reasonable observer would assume was the problematic colonial element that had to be tackled. This, however, is exactly the ideology that the new laws affirm and entrench. The only difference being that the State does not need a physical presence in the 21st century to exercise its subjugation of the citizen but can now rely upon technology to assist in that enterprise.[13]

Rather than a decolonial masterstroke, the repealing and replacing of the criminal codes appears closer to being a colonial *redux*. The statutes do not seem to bring the criminal law closer to the logic and culture of justification that is supposed to be the cornerstone of a democratic republic but take great strides to ensure that the State can flex its muscles to the fullest while remaining insulated from any demands for accountability from citizens.

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[1] Press Release, Ministry of Home Affairs, Dec. 20, 2023 (<https://pib.gov.in/PressReleaselframePage.aspx?PRID=1988913>).

[2] Assaf Likhovski, 'A Colonial Legal Laboratory? Jurisprudential Innovation in British India' 69(1) *American Journal of Comparative Law* 44 (2021).

[3] Abhinav Sekhri, 'The Constitution and Criminal Justice' (May 2022) (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4122125).

[4] Singapore is a good example of this trend.

[5] Munishwar Sagar 'By December 2024, will roll out new laws in UTs', *Times of India* (Dec. 23, 2023) (<https://timesofindia.indiatimes.com/india/by-december-2024-will-roll-out-new-laws-in-uts/articleshow/106222106.cms?from=mdr>).

[6] An example being the 2011 collection of essays on the Indian Penal Code. See, *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (2011).

[7] See, e.g., Sidharth Luthra, 'New criminal bills don't make earthshaking changes to old laws. They would burden courts' *The Print* (Dec. 26, 2023) (<https://theprint.in/opinion/new-criminal-bills-dont-make-earthshaking-changes-to-old-laws-they-would-burden-courts/1900496/>); Anup Surendranath, 'New criminal law Bills endanger civil liberties', *Indian Express*, (Dec. 14, 2023) (<https://indianexpress.com/article/opinion/columns/new-criminal-law-bills-endanger-civil-liberties-9067305/>); Sidharth Luthra, 'Sidharth Luthra writes on proposed Criminal Codes: It's still colonial' *Indian Express* (Dec. 12, 2023) (<https://indianexpress.com/article/opinion/columns/sidharth-luthra-writes-on-proposed-criminal-codes-its-still-colonial-8904527/>); Neha Singhal, 'Reimagining crime and punishment in India', *Deccan Herald* (Nov. 23, 2023) (<https://www.deccanherald.com/opinion/reimagining-crime-and-punishment-in-india-2781756>);

[8] Parliament of India, Rajya Sabha (Department-Related Parliamentary Standing Committee on Home Affairs), *Report No. 248 on the Bharatiya Sakshya Bill, 2023* (10.11.2023) (https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/15/188/248_2023_'source=rajyasabha).

[9] A discussion on the lack of changes has been conducted in various posts on certain law blogs in India. See, for instance, p39ablog.com; theproofofguilt.blogspot.com.

[10] See, e.g., Derek O'Brien, 'How BJP Has Made a Mockery of Democracy', *Indian Express* (Jan. 5, 2024) (<https://indianexpress.com/article/opinion/columns/derek-obrien-writes-passage-of-criminal-law-bills-a-mockery-of-democracy-9095697/>).

[11] Press Release, Vice President's Secretariat, Dec. 27, 2023 ("Three new criminal code laws have unshackled Indian Criminal Justice system from colonial legacy – Vice President") (<https://pib.gov.in/PressReleaseframePage.aspx?PRID=1991032>). Readers interested may also see a similar press bureau post (<https://pib.gov.in/PressReleaseframePage.aspx?PRID=1988913>).

[12] See, 'New Criminal Laws Continue Colonial Logic, Expand Police Powers: Prof. Anup Surendranath' (<https://www.youtube.com/watch?v=jL8kCw-LStY>); Abhinav Sekhri, 'Decolonising Criminal Law?' *Verfassungsblog* (Sept. 4, 2023) (<https://verfassungsblog.de/decolonising-criminal-law/>).

[13] Ananya Bhardwaj, '3000 trainers, a task force, forensic vans: This is how 3 new criminal laws will be implemented' *The Print* (Jan. 3, 2024) (<https://theprint.in/india/governance/3000-trainers-a-task-force-forensic-vans-this-is-how-3-new-criminal-laws-will-be-implemented/1908549/>).

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