

Passing of new criminal law bills: A missed opportunity for reform?

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Columns

The absence of pre-legislative consultation and lack of significant reform make one question the need for such a hasty move.



Criminal laws

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Parliament unanimously passed three new criminal law bills - the Bharatiya Nyaya (Second) Sanhita (BNS) replacing the Indian Penal Code, the Bharatiya Nagrik Suraksha Sanhita (BNSS) replacing the Code of Criminal Procedure and the Bharatiya Sakshya Adhinyam (BSA) replacing the Evidence Act. The bills that form the bedrock of the criminal justice system in India were passed with minimal pre-legislative consultation.

The bills have resulted in a substantial increase in police powers, raising concerns about potential human rights violations due to the inadequacy of safeguards against the excesses of law enforcement agencies. Furthermore, instead of implementing the recommendations of several Law Commissions for the betterment of the criminal justice system, the bills have made superficial and cosmetic changes to the criminal laws of India.

Rajya Sabha Chairman and Vice-President of India Jagdeep Dhankar observed that the passage of the bills was historic and that the new legislation is going to end colonial-era criminal laws. Union Home Minister Amit Shah said that the bills mark a new beginning in the history of India's criminal justice system, making it more modern, while keeping the citizen at the centre of the criminal justice system and shifting the focus from punishment and deterrence to justice and reformation. He said that the previous laws were primarily enacted to protect the Britishers and their regime, and did not protect Indians. It was touted that for the first time, the criminal justice system will be based on legislation drafted and passed by Indians.

Lack of pre-legislative consultation

The fact that the three bills were passed without any pre-legislative consultation in a representative style constitutional democracy, where the will of the people should prevail, raises some serious concerns. The bills were passed without any opposition, and even the committee that passed the bills operated in complete secrecy. The will of the people is represented by their elected political officials in Parliament. Voices of dissent seek to protect the constitutional value of 'democracy', encourage a vibrant culture of dialogue, debate, and discussion in our Parliament, and provide legitimacy to law and its processes.

While the passage of some of the bills in the past such as Right to Information Act in 2005 and the Karnataka Police Bill in 2011, complied with pre-legislative processes, there are several other bills, such as the Delhi Special Police Establishment (Amendment) Bill, 2014 and the Aadhaar Bill where consultation processes were not followed. This growing lack of consultation in law-making has far-reaching consequences. The importance of a transparent consultation process and public participation in the law-making process cannot be stressed enough. Back in 2014, The Ministry of Law and Justice issued a notice for pre-legislative consultation with relevant stakeholders. However, in the absence of political will, the designing of a comprehensive system for pre-legislative consultation seems unlikely.

Key changes in the laws

Expansion of police powers

The BNSS expands the maximum limit of police custody from 15 days to either 60 days or 90 days (depending on the nature of the offence). Section 187(3) of the Bill, which corresponds to Section 167(2)(a) of the CrPC, does not contain the phrase 'otherwise than in the custody of the police,' implying that the prescribed 15-day-period of police custody can now be an

aggregate of shorter periods of custody sought over the entire period of investigation lasting 60 or 90 days. This provision substantially increases police powers, heightens exposure to police excesses, and is a threat to civil liberties of individuals. Prolonged detention is likely to be misused, especially against those belonging to poor, needy and marginalized sections of society, who may be subjected to severe custodial violence.

Defining ‘terrorist act’ in line with the Unlawful Activities (Prevention) Act, 1965

The BNS adopts the definition of 'terrorism' from the Unlawful Activities (Prevention) Act, 1965 (UAPA). Clause 113 of the BNS consolidates large parts of sections of the existing UAPA. The UAPA has often been considered as draconian. The definition of a terrorist act under the UAPA is: *"any act with intent to threaten or likely to threaten the unity, integrity, security economic security, or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country."*

Moreover, the explanation to Clause 113(7) of the BNS transfers enormous discretionary powers to an superintendent of police level officer. He has the power to decide whether to proceed under the UAPA or Section 113 of the BNS. The logic behind creating a parallel terror code, with the existing UAPA, is hard to understand.

Community service

The BNS for the first time introduces community service as one of the punishments for petty crimes. With this change, India joins the ranks of countries like the US, UK, Sweden and many other developed nations that provide for community services as a form of punishment. This is a way of rehabilitating first time offenders and to address the problem of overcrowding in Indian prisons.

Admissibility of electronic evidence

The BSA makes the admissibility of electronic evidence, subject to the provision of a certificate under Clause 63. Clause 61 of the original Bill allowed the admissibility of electronic evidence. However, it did not include any requirement for a certificate under Clause 63. This provision has been amended and states that electronic evidence is admissible, subject to Clause 63.

Sedition law

The BNS provides for a longer duration of punishment for the offence of ‘sedition’. While the old sedition law provided for a punishment of three years, the new sedition law provides for a punishment of seven years. This is in line with the Law Commission's recommendation in 2023 to reincarnate the sedition law. However, sedition laws continue to remain vaguely worded and are likely to be misused against journalists, comedians and other voices of dissent.

Missed opportunity for reform

Although several changes have been made to the criminal law codes, there are many missed opportunities for reform. The Law Commission of India has given several recommendations for improving investigation, interrogation and trial processes under the criminal justice system. A long-standing recommendation has been to separate the investigation wing from the law and order wing of the police for better policing. This urgent measure was largely ignored.

While the revamping of the laws governing the nearly 150-year-old criminal justice system to free it from the trappings of colonialism is a desirable move, the absence of pre-legislative consultation, lack of significant reform, and chaos regarding its implementation make one question the need for such a hasty move damaging democracy and leaving an indelible mark on our constitutional values.

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Views expressed are personal.

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Mediation

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