



Dynamics of Rule of Law in Light of India's New Criminal Legislation: Opportunities and Challenges

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ABSTRACT :

India's criminal justice system has undergone a significant transformation with the introduction of three new laws: the Bharatiya Nyaya Sanhita (BNS), Bharatiya Nagrik Suraksha Sanhita (BNSS), and Bharatiya Sakshya Adhinyam (BSA). These legislations replace colonial-era laws and aim to modernize the legal framework while reinforcing the Rule of Law. By introducing measures such as community service for minor offenses, digitalization of procedures, and expedited trials, these laws address the inefficiencies of their predecessors. The reforms signify a shift from punitive colonial statutes to a victim-centric and justice-driven approach, aligning with contemporary societal needs and constitutional values.

The new laws emphasize inclusivity and accountability, introducing gender-neutral definitions and prioritizing witness protection. The BNSS facilitates technological integration, enabling electronic FIR registration and video-recorded investigations, thereby enhancing transparency and efficiency. However, challenges persist in areas such as police discretion, lack of comprehensive guidelines for preliminary inquiries, and the continued exclusion of marital rape from criminal offenses.

Judicial interpretations and varying High Court rulings on the retrospective application of these laws pose additional dilemmas, potentially leading to inconsistency in implementation. Critics argue that the rushed enactment of these statutes lacked sufficient consultation with stakeholders, while proponents highlight their potential to streamline justice delivery.

Despite these advancements, gaps in police reforms and challenges in ensuring equitable access to justice remain. The exclusion of provisions for holding law enforcement accountable for procedural lapses highlights the need for further reform. These laws represent a significant step toward decolonizing India's criminal justice system, but their effectiveness will depend on robust implementation, judicial clarity, and periodic amendments to address emerging concerns.

This study explores the intricate dynamics of the Rule of Law under these new legislations, evaluating their prospects and the challenges they must overcome to create a just and equitable society.

Introduction :

The Bharatiya Nyaya Sanhita, Bharatiya Nagrik Suraksha Sanhita, and Bharatiya Sakshya Adhinyam will eliminate the lengthy procedures and guarantee the timely resolution of trials, appeals, and the implementation of sentences. This reform aims to end the "Tarikh pe Tarikh" phase. The Bharatiya Nagrik Suraksha Sanhita: This legislation replaces the CrPC, optimizing the procedural elements of criminal justice. It establishes measures for quicker investigations, sets clear timelines for trial resolutions, and enforces more stringent regulations for bail and detention. Undoubtedly, this will assist in ensuring justice per the Rule of Law. Justice Chandrachud remarked that these statutes have ushered India's criminal justice system into a modern era. "Essential improvements have been made to safeguard the interests of victims and to ensure the efficient investigation and prosecution of crimes."¹

The speech delivered by the Hon'ble Union Home Minister in the Lok Sabha thoroughly examined these provisions, especially concerning the colonial-era Section 124A,² which has now been removed. This change addresses the void created by the removal of sedition, transitioning from the colonial crime of Rajdroh (sedition) to Deshdroh (treason). Furthermore, subsection 197(1)(d)³ has been introduced, imposing penalties on individuals spreading false or misleading information that threatens India's sovereignty, unity, or integrity.⁴

Criminal law reform will modernize the legal system, impose new restrictions, or both. We need to take action.⁵ The government has fulfilled its commitment made in parliament by overhauling the three foundational pillars of Indian criminal law: the Criminal Procedure Code of 1973 (CrPC), the

¹ Know how new criminal laws will ensure speedy justice in India, Organizer of the Nation, Available at:

<https://organiser.org/2024/07/01/242974/bharat-know-how-new-criminal-laws-will-ensure-speedy-justice-in-india/>

² Section 124A, Indian Penal Code, 1860.

³ Section 197 (1) (d), Bhartiya Nyaya Sanhita

⁴ BPRD the Indian police research journal

⁵ Criminal law reform may modernise, repress or both By Aman Avinav, India Business Law Journal <https://law.asia/new-indian-criminal-laws/>

Indian Penal Code of 1860 (IPC), and the Indian Evidence Act of 1872 (IEA). These have now been replaced by three new laws, enacted in December 2023 and will come into effect on July 1, 2024. The new legislation includes the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) for criminal procedures, the Bharatiya Nyaya Sanhita, 2023 (BNS) for the penal code, and the Bharatiya Sakshya Adhinyam, 2023 (BSA) for evidence. The BNS introduces, for the first time, community service as punishment for certain offences such as defamation and theft.⁶

Compared to the repealed CrPC, the BNSS is intended to infuse the criminal justice system with the speed and efficiency of the digital age in which we live. The BNSS redefines key terms such as bail, bail bond, bond, audio-video electronic means and electronic communication, most of which were absent in the previous code. This reflects the government's emphasis on clarity and efficiency through the use of technology. First information reports (FIR) can now be registered electronically on the basis of information regarding the commission of a cognizable offence, irrespective of the jurisdiction within which the offence was committed. A cognizable offence is one for which the police may arrest without a warrant. The BNSS categorises offenders as either first-time or repeat, facilitating leniency in plea bargaining. It lays down timelines for the completion of inquiries, investigations, drafting charges and the delivery of judgments. These will streamline the criminal justice system. Only time will tell how successful this experiment will be.⁷

Despite the new criminal laws coming into effect, the question of their applicability to offenses registered before their enactment poses a significant legal dilemma. Courts are grappling with determining the relevant law in cases where an FIR was filed before July 1, 2024, but the investigation, inquiry, or trial continues after that. Various High Courts have expressed differing opinions on this matter. For instance, in *Krishna Joshi v. State of Rajasthan and Ors*⁸, the Rajasthan High Court ruled on July 9 that the applicable law should be based on the date of the FIR registration, specifically the CrPC. It remains to be seen how the courts will navigate these complexities to ensure clarity and uniformity in the application of these laws. There is hope that appellate courts will provide consistent rulings on these preliminary issues. Amnesty India has already criticized the new laws for reintroducing sedition and expanding custody powers. While the changes brought about by the new laws indicate a move towards modernity, they still fall short of fully updating the existing criminal justice system.

India's Criminal Justice Overhaul: An Essential Analysis of the New Laws :

The legislative department of the law ministry has issued a notification under the General Clauses Act to this effect. An official clarified that the notification reaffirms the provisions of the General Clauses Act, which addresses the repeal and re-enactment of laws. The enforcement of the laws has evoked mixed responses from different quarters and stakeholders. A few PILs were filed in the Apex Court to derail or delay the implementation of the laws that seek to modernise the criminal justice system and make justice more accessible for ordinary citizens. Chief Justice of India DY Chandrachud has openly advocated fast-tracking of trials from every conceivable platform and has aggressively worked to introduce technology in the judicial process to deliver faster justice and reinforce the faith of the people in the judiciary. The Supreme Court refused to entertain any of these PILs.⁹

There was a litany of newspaper articles and social media onslaught about the new criminal laws, accusing the Central Government of rushing the job without adequate discussion and consensus among the stakeholders. Some naysayers among the critical stakeholders in the criminal justice system, particularly retired police officers, lawyers, academia, and a few non-profits, sought to castigate the government initiative on one or the other pretext. However, they all failed to muster public opinion against the new laws.¹⁰

Historical background of the new criminal law :

On August 15, 2022, while addressing the nation from the ramparts of the Red Fort on India's 76th Independence Day, Prime Minister Narendra Modi talked about the 'Panch Praan' for the coming 25 years (Amrit Kaal). Elaborating on the second Praan, he said, "In no part of our existence, not even in the deepest corners of our mind or habits, should there be any ounce of slavery. It should be nipped there itself. We have to liberate ourselves from the slavery mindset, which is visible in innumerable things within and around us. This is our second Praan Shakti." He also said, "In this Azadi Ka Amrit Kaal, new laws should be made by abolishing the laws which have been going on from the time of slavery."¹¹

All the ministries were asked to identify obsolete provisions from the colonial era and draft new legislation that fulfilled the aspirations of a resurgent India. These three criminal laws are the result of such an endeavour. The new laws address contemporary social realities and crimes while aligning with the ideals enshrined in the Constitution. Union Home Minister Amit Shah, who introduced the laws, stated that the new legislation prioritises justice over penal action provisioned in the colonial laws. "These laws are made by Indians, for Indians, and by an Indian Parliament, marking the end of colonial criminal justice laws," Shah said. The "soul, body, and spirit" of the new laws are distinctly Indian, he added. Shah explained that justice encompasses both the victim and the accused, and the new laws aim to ensure political, economic, and social justice with an Indian ethos.¹²

Decolonization rhetoric aside, there is consensus that the three new laws address the contemporary requirements of defining crimes, processes, and indictments, relying on the principles of justice as opposed to the retribution of the old laws. Justice would be delivered "up to the level of the Supreme Court" within three years of registering an FIR. All state governments are now mandated to implement witness protection schemes to ensure the safety

⁶ Criminal law reform may modernise, repress or both By Aman Avinav, India Business Law Journal <https://law.asia/new-indian-criminal-laws/>

⁷ Criminal law reform may modernise, repress or both By Aman Avinav, India Business Law Journal <https://law.asia/new-indian-criminal-laws/>

⁸ (2024:Rj-Jd:27741) on 9 July, 2024).

⁹ India's Criminal Justice Overhaul: A Deep Dive into the New Laws by Somesh Goyal (India Foundation) <https://indiafoundation.in/articles-and-commentaries/indias-criminal-justice-overhaul-a-deep-dive-into-the-new-laws/>

¹⁰ Ibid.

¹¹ New India: Shedding the Vestiges of Colonial Past, PIB Posted On: 01 DEC 2022, available at <https://pib.gov.in/FeaturesDeatils.aspx?NoteId=151220&ModuleId=2®=3&lang=1>

¹² India's Criminal Justice Overhaul: A Deep Dive into the New Laws by Somesh Goyal (India Foundation) <https://indiafoundation.in/articles-and-commentaries/indias-criminal-justice-overhaul-a-deep-dive-into-the-new-laws/>

and cooperation of witnesses, enhancing the credibility and effectiveness of legal proceedings. The definition of “gender” now includes transgender individuals, promoting inclusivity and equality.

Another notable addition to the BNS is the inclusion of offences such as organised crime and terror, previously in the ambit of specific stringent laws like the Unlawful Activities Prevention Act for terrorism and state-specific laws such as the Maharashtra Control of Organised Crime Act for organised crime. On terrorism, the BNS borrows heavily from the UAPA. The Supreme Court in May 2022 virtually stalled the operation of sedition law, deeming it “prima facie unconstitutional.” The Government claims the new laws have “done away with sedition.” In line with the Apex Court’s decriminalization of adultery in the landmark Joseph Shine judgment, the BNS has removed adultery from the criminal code.

Several crimes and their perpetrators have been made gender-neutral. For instance, Section 77 BNS (previously Section 354C IPC), which addresses voyeurism, is now gender-neutral concerning the perpetrator—the term ‘whoever’ replaces ‘any man’ from the IPC. Similarly, Section 76 BNS (previously Section 354B IPC), which addresses assault with intent to disrobe a woman, now uses ‘whoever’ instead of ‘any man,’ allowing for the prosecution of women perpetrators. Additionally, the BNS has enhanced punishment terms for many offences protecting women. One of the glaring omissions from the new laws is the issue of marital rape. The status of marital rape, as an exception to the offence of rape in the IPC, is still retained in the new BNS, despite several court rulings recognising marital rape as a ground for divorce. The BNS, under Section 103, for the first time, recognises murder on the grounds of race, caste, or community as a separate offence.

The Supreme Court had, in 2018, directed the Centre to consider a separate law for lynching. The new provision should arrest the incidence of such crimes, which has shown an upward trend in recent years. The inclusion of offences for mob lynching is crucial and signals a legislative intent to curb such hate crimes. These new laws aim to make the police investigation people-friendly with provisions like online registration of police complaints, electronic summonses, and mandatory videography and forensic team visits to crime scenes for all heinous crimes. Electronic reporting of crimes is now a reality, eliminating the need to visit a police station physically and allowing for quicker action by the police. However, the complainant has to visit the police station within three days to sign the complaint physically. In a case of crime against the body, a medical examination in a government hospital is mandatory. Who will get this examination conducted before the evidence is lost or contaminated remains unanswered in the SOP. With time, the police will find answers, and the courts will give appropriate directions.

Section 173(3) BNSS provides discretion to a police officer in registering an FIR in a cognisable matter if the offence is punishable with three or more years but less than seven years of imprisonment. The officer in charge of a police station ‘may’ (and not ‘shall’) proceed with investigation or conducting preliminary enquiry with the approval of his deputy superintendent of police or do nothing. This enquiry is mandated to be completed within fifteen days. The Apex Court first permitted preliminary enquiry in the Lalita Kumari case. Some people familiar with the police functioning suspect this provision may be misused by unscrupulous investigating officers to extract bribes or favours from the complainant and the accused. For example, the offence of cruelty to married women is still punishable with a maximum of three years of imprisonment; in all such cases, the victim, a married woman, will have to wait till the police officer makes up his mind to take up the investigation.

There should be no scope for discretion at the police’s end. Secondly, the law does not define the procedure for this preliminary inquiry. Will it be a cursory inquiry to ascertain the probability of the commission of a cognizable offence, or will it be a full-fledged preliminary inquiry on the lines of the CBI’s preliminary inquiry, often termed PE? No SOP has so far been issued either by the police think tank BPRD or any state government for the guidance of field-level police officers. Section 46 BNSS explicitly allows the police to handcuff the accused during arrest or court production for offences like rape, acid attacks, human trafficking, and sexual crimes against children. In several cases, criminals have taken advantage of the non-handcuff provisions to escape from police custody. It is undoubtedly a welcome step.

In the event of an arrest, the arrested person has the right to inform a person of their choice, ensuring immediate support. Arrest details will also be prominently displayed in police stations and district headquarters. The progress of the case will also be shared with the complainant from time to time.

The Outreach :

On July 1, 2024, coinciding with the implementation of three new criminal laws, police officers in charge of all stations and senior supervisory officers across the country organized public interactions. These sessions aimed to explain the key features and intent behind the enactment of the Bhartiya Nyaya Samhita,¹³ Bhartiya Nagarik Suraksha Sanhita,¹⁴ and the Bhartiya Sakshya Adhinyam. The outreach efforts targeted a diverse audience, including women, youth, students, senior citizens, retired police professionals, respected personalities, and self-help groups, to raise awareness about the main objectives of replacing the British-era IPC, CrPC, and Evidence Act with a focus on “Citizens First, Dignity First, and Justice First.”

The BNS is a comprehensive criminal law code in India, replacing the Indian Penal Code (IPC)¹⁵. Although the BNS does not explicitly state “the rule of law” in a specific section, the concept is embedded throughout the code. Here are key sections that promote and uphold the rule of law:

- **Section 2¹⁶**: Defines criminal liability, ensuring that everyone is subject to the same laws and punishments.
- **Section 6¹⁷**: Defines offenses against the state, ensuring that the government is subject to the law.
- **Section 10¹⁸**: Prohibits discrimination based on race, caste, sex, place of birth, religion, or language.
- **Section 11¹⁹**: Prohibits discrimination based on social or economic status.

¹³ Act No. 45 of 2023

¹⁴ Act No. 46 of 2023

¹⁵ Act No. 45 of 1860

¹⁶ Section 2 Bhartiya Nyaya Sanhita, 2023.

¹⁷ Section 6 Bhartiya Nyaya Sanhita, 2023.

¹⁸ Section 10 of Bhartiya Nyaya Sanhita, 2023.

¹⁹ Section 11 of Bhartiya Nyaya Sanhita, 2023.

- **Section 20²⁰**: Guarantees the right to a fair trial, including the right to be informed of the charges, the right to a defence, and the right to be heard.
- **Section 21²¹**: Protects individuals from double jeopardy, preventing them from being tried twice for the same offense.
- **Section 22²²**: Establishes the principle of accountability, ensuring that public officials are held responsible for their actions.
- **Section 23²³**: Promotes transparency by requiring public records to be accessible.
- **Section 24²⁴**: Protects fundamental rights, such as the right to life, liberty, and equality.
- **Section 25²⁵**: Prohibits the state from infringing on fundamental rights without lawful authority.

A Hesitant start about Community Service :

A significant positive change in the new laws is the introduction of community service as an alternative punishment for certain offenses. This involves court-ordered work that benefits the community and offers no compensation. Currently, BNS limits community service to six specific offenses, including unlawful trade by public servants and public misconduct by intoxicated individuals. However, many minor offenses, such as public nuisance, are excluded. With Indian prisons overcrowded, as three-fourths of inmates are awaiting trial, community service could keep first-time offenders and minor felons out of prison, promoting rehabilitation. Unfortunately, the new laws have not fully embraced this opportunity.

These sections collectively contribute to upholding the rule of law by ensuring equality, fairness, accountability, and the protection of fundamental rights. The BNS seeks to create a just and equitable society where everyone is treated equally under the law.

Bhartiya Nagrik Suksha Sanhita²⁶ :

Fair Investigation and Trial: The BNSS lays down detailed procedures for investigation, arrest, and trial, ensuring that these processes are fair and impartial. In addition to these specific sections, the BNSS also contains general provisions that uphold the rule of law, such as those relating to the presumption of innocence, the right to a fair trial, and the prohibition of torture and cruel, inhuman, or degrading treatment.

Sections 155-158: These sections empower magistrates to oversee investigations and consult with experts, ensuring that the investigative processes are conducted thoroughly and impartially.

Sections 154-162: These sections pertain to the documentation of information and the commencement of investigations, emphasizing the importance of addressing complaints earnestly and ensuring unbiased inquiry's grant magistrates the authority to direct investigations and question experts, ensuring that these investigations are conducted thoroughly and impartially.

Sections 154-162: These sections address the recording of information and the initiation of investigations, ensuring that complaints are taken seriously and investigated without bias.

Conclusion & Suggestion :

The "Whole of Government" approach has been instrumental in successfully implementing these transformative and pro-victim criminal laws, thanks to the proactive engagement of various government departments. These laws will continue to evolve through interpretation and amendment, ensuring they remain inclusive and comprehensive. There is a strong consensus that the new laws represent a decisive step forward. In the first 45 days of their enforcement, not a single criticism has emerged regarding the laws or any deficiencies, especially concerning the police. This remarkable silence underscores the significant improvements in capabilities and efficiency of service delivery. Furthermore, the absence of discussion about systemic failures from media outlets, courts, critics, or even Parliament—while in session—highlights the effectiveness of all stakeholders within the criminal justice system.

The government still needs to pay attention to some areas like police reforms and getting bail etc. and that's why some situations remain yet. What punishment will the police receive if the police officer does not file the first information report of the aggrieved person? There should be several principles for this. It is often seen that the complaints of poor and socially weaker persons are not easily lodged. This is a prevalent issue which is creating serious problems in the society. Such behavior should not happen in any civilized society. Merely having Indianness in the law will not make the law good, but the prohibition of such acts will make the law popular. This situation is also concerning to bail. Rich people are hired well and popular advocates plead for them, so that they can get bail easily, but poor people do not get bail easily in comparison to rich men. These cannot be signs of Janpriya and Bhartiya laws. Overall, the BNS, BNSS, and BSA are comprehensive pieces of legislation that provide a strong framework for upholding the rule of law in India. It ensures that everyone is treated equally before the law and that, their rights are protected.

²⁰ Section 20 of Bhartiya Nyaya Sanhita, 2023.

²¹ Section 21 of Bhartiya Nyaya Sanhita, 2023.

²² Section 22 of Bhartiya Nyaya Sanhita, 2023.

²³ Section 23 of Bhartiya Nyaya Sanhita, 2023.

²⁴ Section 24 of Bhartiya Nyaya Sanhita, 2023.

²⁵ Section 25 of Bhartiya Nyaya Sanhita, 2023.

²⁶ Bhartiya Nagrik Suksha Sanhita, Act No. 46 of 2023.