
Analysing the Socio – Legal impacts of Decolonising India’s Legal System: A Case Study of Replacing Colonial – Era Criminal Laws with Indigenous Bharatiya Laws

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Abstract

The Indian government announced on August 11, the last day of the current Parliamentary session, that it will be introducing three new laws to be discussed on the House Floor. The Indian Evidence Act of 1872, the Criminal Procedure Code of 1973, and the Indian Penal Code of 1860 were the three fundamental legislation that these new regulations sought to replace.¹ The Bharatiya Nyaya Sanhita, Bhartiya Nagrik Suraksha Sanhita, and Bharatiya Sakshya Adhinyam were the names of the suggested substitutes, in that order. Although the reform was presented as a break from the colonial origins of criminal law, it seems to represent a return to the authoritarian mindset of the colonial era rather than an advancement of the relatively modest progress made in supporting civil rights and individual freedoms decades earlier. This paper explores the socio-legal implications of decolonizing India's legal framework by replacing colonial-era criminal laws with indigenous Bharatiya laws. Furthermore, it explores the challenges encountered in decolonizing the legal system, including resistance from vested interests, conflicts between modern and traditional legal norms, and the need for institutional reforms. The study also considers the role of state actors, civil society organizations, and indigenous communities in driving decolonization initiatives.

Keywords: Decolonization, Indian Legal system, Colonial-era laws, Indigenous laws, Bharatiya laws, Socio-legal impacts, Legal reform

Introduction

Recently, the Indian Parliament introduced three Bills - the Bharatiya Nyaya Sanhita, 2023 (referred to as the 'New Penal Bill'), the Bharatiya Nagarik Suraksha Sanhita, 2023 (referred to as 'New Procedure Bill'), & the Bharatiya Sakshya Bill, 2023 (referred to as 'New Evidence Bill'). These Bills aim to replace colonial-era legislation with the intention of expediting the delivery of justice and breaking away from the legacy of colonial rule.²

¹ See, Indian Penal Code of 1860 (Act No. 45 of 1860), Act No. 2 of 1974 (Code of Criminal Procedure, 1973), and The Indian Evidence Act, 1872 (ACT No. 1 of 1872).

² “Criminal Law Bills and a Hollow Decolonisation”, *Lukmaan IAS*, Oct. 03, 2023, available at: <https://blog.lukmaaniias.com/2023/10/03/criminal-law-bills-and-a-hollow-decolonisation/> (last visited on Mar. 2, 2024).

The Indian government filed a notice on August 11, the last day of the current parliamentary session, announcing that it will be introducing three new measures for discussion on the House floor. The goal of these proposed laws was to replace the Indian Evidence Act of 1872, the Criminal Procedure Code of 1973, and the Indian Penal Code of 1860, which served as the cornerstones of Indian criminal law. The *Bharatiya Nyaya Sanhita*, *Bhartiya Nagrik Suraksha Sanhita*, and *Bharatiya Sakshya Adhinyam* were to be the successors, in that order. While this reform is presented as an attempt to break the legal system's colonial heritage, it really represents a return to the authoritarian mindset of the colonial era rather than a continuation of the incremental advancements in civil rights and individual freedoms over the previous fifty years.

These proposed legislations are now being discussed by a Legislative Committee and may encounter challenges as India gets closer to its general election in 2024. However, given that this is one of the biggest legislative changes to India's criminal code in at least 50 years, it is important to give it more thought and attention.³

The introduction of the three new criminal law Bills has sparked a flurry of concerns, questions, and commentary regarding the nature and extent of the changes being proposed. There is significant scrutiny surrounding the perceived differences between these Bills and existing codes and laws. Amidst the introduction of these Bills and the establishment of the Committee for Reforms in Criminal Law in 2020, considerable emphasis was placed on the notion of decolonization that these Bills were expected to bring about. However, there is growing apprehension that these Bills fall short of achieving meaningful decolonization of Indian criminal law. Instead, they are seen as perpetuating and even intensifying colonial-style powers and structures.

Critics argue that while there may be some superficial changes, the core principles and mechanisms of colonial-era laws remain largely intact. This raises concerns about the potential continuation of oppressive practices and the consolidation of authoritarian control under the guise of legal reform. Overall, there is skepticism regarding the extent to which these Bills truly represent a departure from colonial legacies and a genuine effort towards decolonizing Indian criminal law.

Decolonization of the Legal System

The argument for the decolonization of the Indian legal system has gathered steam again, especially in light of the Chief Justice of India's statements and the support of many Supreme Court judges. The necessity of "Indianizing" the legal system is being more recognized as a means of guaranteeing access to justice, especially for underprivileged and marginalized groups of people. This facet delves into the historical context, tracing back to the deliberations that transpired during the freedom struggle era. It highlights the decisions made by various leaders to prioritize the modernization of the legal system over wholesale Westernization. The

³ *Id.*

central argument posits that to enhance access to justice, the focus should be on reforming the existing legal system to make it more user-friendly, cost-effective, and expeditious, rather than replacing it with an antiquated, elitist structure.⁴

Considering the current socio-economic realities shaped by neoliberalism, digitalization, and globalization, the article advocates for a right-based approach. Prioritizing workable solutions to problems like the backlog of cases is suggested. These solutions include making the legal system more inclusive, increasing the number of courts and judges relative to the population, filling open judicial positions, and increasing funding for legal aid and literacy initiatives. Furthermore, it emphasizes the importance of transparency and diversity within courtrooms, advocating for a system that is both litigant-centric and justice-centric, while also advocating for a shift away from technicalities towards a more modern and humane approach.⁵

Hence, the article underscores the imperative of evolving the Indian legal system to better align with the needs and realities of contemporary society. It calls for a comprehensive reform agenda that prioritizes accessibility, efficiency, and fairness, while eschewing outdated and exclusionary practices inherited from colonial legacies.

Indianisation

The Chief Justice of India emphasized the need to "Indianize" the legal system in order to better meet the pragmatic needs of society in a lecture on September 18, 2021. He maintained that a more regional strategy is required because the existing judicial processes are lengthy, expensive, and too complex. The CJI went on to explain that the impoverished and weaker members of society cannot access the legal system because of a lack of knowledge and infrastructure. However, there have been objections raised regarding the somewhat ambiguous usage of the term 'Indianization'.⁶ Critics have pointed out that the term lacks clarity and may be prone to misinterpretation. Additionally, the CJI suggested the utilization of alternative dispute resolution methods as a means to alleviate the burdensome nature of traditional legal proceedings.

While ADR methods can offer benefits such as expedited resolutions and reduced costs, there are concerns about the potential pitfalls. Specifically, there is apprehension that without proper oversight and support, such methods could inadvertently lead to a regression to the rough justice meted out by traditional khap panchayats. Therefore, it is imperative that any implementation of alternative dispute resolution is accompanied by comprehensive legal literacy initiatives and the promotion of rights-based awareness among the populace.

⁴ Aayush Malik, "How to Truly Decolonise Criminal Law, Make It 'Indian' Read More At: <https://www.deccanherald.com/Opinion/How-To-Truly-Decolonise-Criminal-Law-Make-It-Indian-2762925>", *Deccan Herald*, Nov. 09, 2023, available at: <https://www.deccanherald.com/opinion/how-to-truly-decolonise-criminal-law-make-it-indian-2762925> (last visited on Mar. 2, 2024).

⁵ *Id.*

⁶ Abhinav Sekhri, "Decolonising Criminal Law?", *Verfassungsblogs*, Sept. 04, 2023, available at: <https://verfassungsblog.de/decolonising-criminal-law/> (last visited on Mar. 2, 2024).

A further facet of the discourse pertaining to the "Indianization" or "decolonization" of the legal system pertains to the restricted scope of recommendations put forth by judges. These recommendations frequently reference works such as Manusmriti and Arthashastra, thus mirroring the pre-colonial Brahmanical system of the upper class. These proposals are perceived to cater to the interests of the Hindu elite Brahmanical class, neglecting the justice delivery system followed by the masses during that era.

According to the Law Commission's 14th report, popular courts that functioned on customary laws prior to the creation of dharmashastras or Vedas are said to have served as the foundation for the old indigenous legal system.⁷ Over time, this system developed from tribal institutions, where justice was administered by popular courts like village assemblies or caste assemblies, or by tribunals. Unlike the present tendency toward centralization, these institutions were essential components of the social structure, with villages enjoying significant autonomy and decentralization of authority. These tribunals derived their authority and power from the king, representing a decentralized form of governance that empowered local communities to administer justice according to their customs and traditions. Therefore, any attempt at decolonizing the legal system should take into account the diverse and decentralized nature of pre-colonial justice delivery mechanisms, rather than solely focusing on texts and systems that catered to the interests of the elite Brahmanical class.

Over the decades, the British legal system, although foreign in origin, underwent significant modifications and adaptations to better suit the Indian context. These changes were the result of extensive deliberations and discussions aimed at tailoring the legal framework to the specific needs and conditions of India. According to Professor Upendra Baxi (1986), there were discussions over the Western legal system's fitness for a "peasant Asian society" even during the colonial era. Some even called for the elite Hindu legal system to take the place of the British system.⁸ Baxi stressed that in order to satisfy the needs of an independent India, the institutional, normative, and cultural continuity of the British Indian legal system, including its norms, beliefs, and values, were carefully considered, acknowledged, and modified. He did point out, nevertheless, that several unique features of the British Indian legal system continued to exist in independent India, including a top-down, non-democratic, elite-focused approach that frequently disregarded the interests of the general populace. As a result, it would be incorrect to characterize the Indian legal system as either a totally foreign or colonial replica. Instead, it has undergone a process of Indianization, incorporating both advantages and limitations. This nuanced perspective recognizes the hybrid nature of the Indian legal system, which reflects a blend of colonial legacies, indigenous traditions, and contemporary realities.⁹

⁷ *Id.*

⁸ Adv Dr. Shalu Nigam, "People-Centric Legal System Not Decolonization or Indianization is the Need of the Hour" *SSRN Law Journal* 9 (2022).

⁹ *Supra* note 6.

Key Features of the Bill

The introduction of three crucial bills signals a significant shift in India's legal landscape. Let's break down the key provisions and changes proposed by each bill:

Bharatiya Nyaya Sanhita, 2023

- Replaces the Indian Penal Code, 1860, reducing the sections from 511 to 356.
- Significant changes include the removal of the offense of sedition, with new penalizations for acts inciting secession, armed rebellion, or subversive activities.
- Defines terrorism and organized crime, imposing penalties accordingly.
- Provides enhanced protection for women, including the imposition of the death penalty for gang rape of women below 18 years and penalties for sexual intercourse obtained through deceitful means.

Bharatiya Sakshya Bill, 2023

- Repeals Indian Evidence Act, 1872, and expands to 170 sections.
- Widens the scope of admissible electronic records and removes colonial references from the Act.
- Recognizes electronic or digital records with the same legal standing as paper records.
- Broadens the definition of documents to include various electronic records and communication mediums.

Bharatiya Nagrik Suraksha Sanhita Bill, 2023

- Replaces Criminal Procedure Code, 1898, with 533 sections.
- Allows for trials, inquiries, and proceedings to be conducted electronically.
- Mandates forensic investigation for offenses punishable with at least seven years of imprisonment.
- Prescribes timelines for various procedures, such as completing medical reports for rape victims within seven days and delivering judgments within 30 days of completing arguments.

These bills collectively aim to modernize and streamline India's legal system, addressing deficiencies and adapting to contemporary challenges. They introduce significant changes in criminal law, evidence admissibility, and procedural aspects, with a focus on efficiency, transparency, and enhanced protection of rights, particularly for marginalized groups like women and victims of crimes.

Socio-Legal Impacts of the Bills

The persistence of limited respect for civil liberties and the constrained scope for judicial review of executive actions, ingrained within the statutory framework, posed a fundamental

contradiction against constitutional principles. While India transitioned into a new era marked by constitutional governance, the retention of colonial-era criminal codes, characterized by a culture of command and control, clashed with the emerging culture of constitutional justification.

The expectation that the old order would seamlessly adapt to the new constitutional ethos proved unfounded. It was clear by the end of the first ten years of India's independence that the police, who had hitherto been seen as colonial rule's enforcers, were not easily changing into advocates for citizens' rights.¹⁰

This persistence of old attitudes was fueled by a prevailing belief among those in positions of power, spanning all branches of the State, that the oppressively powerful state machinery was necessary for a nation still finding its footing. Rather than encouraging scrutiny and accountability, citizens were urged to place trust in the authorities, who purportedly operated within the bounds of the law. However, this reasoning, characterized by a 'trust us' approach, failed to address the inherent flaws within legal structures that enabled oppression. Efforts to challenge this narrative and restrain executive power while enhancing independent judicial oversight gained momentum in the 1960s. This movement culminated in the enactment of the new Code of Criminal Procedure in 1974,¹¹ albeit without substantive changes to the Penal Code and Evidence Act as initially envisaged. While the revised Procedure Code did incorporate some measures to safeguard individual liberties, the overall framework of colonial-era law, particularly concerning arrest, bail, and preventive powers, remained largely unchanged.

While the colonial legacy continues to influence various aspects of India's legal system, including bureaucratic training, legal interpretation, language, and attire, simply replacing it with an outdated medieval system is neither practical nor beneficial. Wearing outdated attire in the twenty-first century, such a dhoti or bhagwa chola, is pointless and unfit for Indian society. A more realistic strategy would be to look for contemporary substitutes that appeal to both the current and next generations of attorneys and law students.¹² Developing a contemporary legal system based on individual and collective rights is crucial for India to compete in the neoliberal, globalized, and digitalized world of today. This means tackling basic problems such women's safety, education, healthcare, hunger, and malnourishment. Embracing a rights-based approach and fostering inclusivity are crucial steps towards building a legal framework that aligns with contemporary realities and aspirations.

The current Indian criminal codes are to be replaced with proposed draft laws that have been crafted through a convoluted and opaque process presided over by a commission that did not include members of the minority populations who are most affected by the application of the law. Furthermore, the committee included only one female member, a government

¹⁰ *Id.*

¹¹ *Supra* note 8.

¹² *Id.*

appointment. With the exception of the Committee's appointment, the government made no public disclosures on the arbitrary consultation procedures that the Committee employed. Moreover, no report from the drafting process has been released to the public, which has impeded any substantive discussion or debate. The new draft legislation have serious problems with their content in addition to procedural ones. The internet has drawn attention to blatant flaws and unfinished sentences, such as section 23 of the draft's exculpatory defense of involuntary drunkenness, which seems to pardon any injury produced after voluntary intoxication.¹³ Even if these issues are fixable, this collection of draft laws' clear endorsement of colonial logic, which is typified by command and control, remains unalterable.

Conclusion

The structural flaws in the legal system cannot be exclusively ascribed to the legacy of colonialism; rather, they are all the product of human or institutional inadequacies. In order to make the justice delivery mechanism more inclusive and accessible to all, courts must reflect on these issues and take concrete action to prioritize justice, increase systemic funding, and streamline processes. To address these flaws and improve the system's usability, reforms are required. Reducing procedural obstacles is an essential first step in making justice more accessible. This include expanding the number of courts, enhancing court facilities, and expediting the litigation process for parties involved. Transparency throughout legal proceedings is essential, and measures must be taken to make legal processes more participatory and inclusive.

A shift away from the top-down approach is imperative, as it has exacerbated existing problems. The legal system has historically favored an elite approach, neglecting to address social and historical inequities. The privileged elites have traditionally dominated the creation and application of laws, which has resulted in problems with the efficacy, acceptance, distribution, and quality of laws. The general public, who are most impacted by these regulations, have had little say in matters of policy, and power has remained heavily concentrated. To remedy this, there must be greater participation from various stakeholders in the law-making process. Gram sabhas, schools, universities, voluntary organizations, and vulnerable groups should all have a role in debating and shaping laws. Neglecting the input of vulnerable groups perpetuates their marginalization within the legal system. Thus, a more inclusive approach is necessary to address these systemic shortcomings and ensure fair and effective justice for all.

The draft laws of 2023 represent a significant departure from India's constitutional commitment to foster a culture of justification and protect civil liberties. They stand as perhaps the most blatant violation of this promise since the retention of permanent laws allowing executive detention without trial, known as preventive detention. To view these draft laws as part of a reform effort aimed at shedding the country's colonial past is to ignore the clear evidence before us. If implemented, these laws will undoubtedly exacerbate the existing power imbalance

¹³ *Id.*

between the state and its citizens. Furthermore, they will worsen the application and administration of criminal law, further eroding trust in the justice system. It will require collective efforts from all stakeholders to raise awareness about the numerous flaws in these draft laws and advocate for them to be sent back to the drawing board rather than being enacted into law.¹⁴

¹⁴ *Supra* note 6.