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# NEW BILLS AND A PRINCIPLED COURSE FOR CRIMINAL LAW REFORMS

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‘The success or failure of criminal law reforms hinges on their inception, formulation, resilience, and far-sightedness’ | Photo Credit: Getty Images

The recent introduction of three Bills — the Bharatiya Nyaya Sanhita to replace the Indian Penal Code; the Bharatiya Nagarik Suraksha Sanhita to replace the Code of Criminal Procedure and the Bharatiya Sakshya Bill to replace the Indian Evidence Act — transforming criminal laws has ignited a spectrum of reactions, underscoring pivotal facets related to criminal law reforms. Preliminary objections aside, the nature and the extent of the changes requires months, if not years, of study, discourse and deliberations. Amidst this unfolding discourse, however, a prevailing challenge in the Indian context lies in effectively channelling these debates to generate substantive and pertinent contributions. The Bills hold the potential to shape the future landscape of criminal law. Therefore, the task of testing their sustainability; efficacy; adherence to rule of law; and, justice delivery capacity, becomes paramount.

In his seminal work titled ‘Crime, Reason and History’, Alan Norrie states: “…far from being free-standing foundations for a rational criminal law, the central principles of the law are a site of struggle and contradiction.” Capturing the collective aspirations of the public within criminal law reforms presents a formidable challenge given the disparities between polarised popular opinions which must be balanced with the state’s perspective. Revision of India’s Macaulay-era criminal law is undeniably complex, as the functionaries and stakeholders of this legal framework have been conditioned by the same for over 162 years. The Indian criminal law is undoubtedly an instrument of social control, moulding and guiding us in more ways than one.

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It is too early to say whether the Bills will usher in sweeping and substantial changes in the legal landscape. The success or failure of criminal law reforms hinges significantly on their inception, formulation, and subsequent approach to their longevity and oversight. The purported 160 alterations pale in comparison to the deep-seated challenges besieging India’s criminal justice system. Seemingly, the Bills also mark an abundance of missed opportunities.

At the same time, the assertion that these Bills are draconian compared to their previous iterations lacks merit. Instead, the Bills exhibit several moderative modifications, including

linguistic adjustments for gender inclusivity and replacement of outdated terms such as ‘insanity’ with ‘mental illness’. There is also a measured reconfiguration in the punitive degrees for minor and serious offences. Significantly, the integration of ICT applications with the criminal justice process is noteworthy. Although the scope is limited, innovations such as trial in absentia and the introduction of community service are commendable. The exclusion of attempted suicide and adultery aligns the black letter of the law with the Supreme Court of India’s decisions. Notably, the offence of sedition has been judiciously tempered to prevent misuse, facilitated by introducing a test for criminal intent. Newly created offences such as terrorism, organised crime, mob lynching, and negligent acts adds novel dimensions.

The debate on the Bills should not revolve merely around ascertaining whether the changes yield positive or negative outcomes. Instead, the pivotal concern lies in ascertaining whether the fundamental tenets of criminal jurisprudence are being upheld throughout this process. Currently, the trajectory of these reforms and their operational dynamics remain to be determined. Nonetheless, we can methodically examine if the reforms adhere to a principled foundation of criminal laws. The primary principle for such adjudication remains the extent to which reforms address the needs and the concerns of the people impacted by crime and justice, especially in terms of enforcement of fundamental and statutory rights. Considerable critique of criminal law reforms originates from concerns about the potential significant infringement upon individual liberties. Therefore, evaluating amended laws must revolve around striking a delicate equilibrium between state security imperatives and individual freedoms. Additionally, the efficiency of the revised laws hinges on their capacity to curtail any potential misuse by law enforcement agencies effectively. Criminal laws are generally detested as they fail to discharge their public function as a protective tool for its subjects. Reforms in laws typically fail on this count.

Questioning whether the established principles of criminalisation have been followed in creating new offences is equally pertinent. There is a need to study the principled basis of the harm or the moral/legal offence caused by such criminalised conduct. Additionally, criminal laws in India further a class divide as the rich and the resourceful get better access to justice than the marginalised and the vulnerable. The principle of equality and equitability, therefore, becomes an essential check on criminal law reform. Arguably, the realm of criminal laws confronts a crisis of public trust, resulting in deficient legitimacy on this count.

It is a fallacious to assume, without conclusive evidence to the contrary, that the populace opposes stringent measures against terrorists or organised criminals. At the same time, the level of leniency or severity in laws does not inherently shape public confidence in the criminal justice system. The upcoming Bills, therefore, face a pivotal challenge in bridging the gap between rhetoric of the law and its reality. The potency of reforms hinges on their alignment with the criminal justice system’s capacity to implement it effectively. Regardless of their textual merit, numerous legal provisions remain infeasible due to systemic shortcomings. Finally, the effectiveness of the reforms will also be tested on the basis of its impact upon the status of the vulnerable, the victims and the poor.

Over the years, the essence of criminal law has been transformed by the very actors and agencies responsible for its enforcement, often rendering it ineffectual. The political executive has consistently sought to wield criminal law as a pre-emptive tool. Criminal law remains a strategic power asset for the state. Concepts of risk, endangerment and dangerousness continue to contaminate the criminal law jurisprudence in great measure. The proliferation of this preventive approach to criminal law raises legitimate concerns.

As the Bills are placed before the select committee for its consideration, it is expected that this committee will allow greater engagement to improve the drafts in terms of both language and

substance. The space must be utilised to accommodate greater provisions concerning victims' rights and participation, hate crime, bail, sentencing framework and legal aid in the pending Bills. The envisioned criminal law reforms must be made in a manner that fosters the rule of law and fortifies the pursuit of justice for aeons to come.

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