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CRIMINAL LAW BILLS AND A HOLLOW DECOLONISATION

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‘The narrative of decolonisation surrounding the Bills must not be seen in isolation from developments in other areas of criminal law that are contemporaneously pushing us back into colonial ways and outcomes of lawmaking’ | Photo Credit: Getty Images/iStockphoto

In introducing the three criminal law Bills in 2023 and, earlier, while setting up the Committee for Reforms in Criminal Law in 2020, a lot was said about the decolonisation that these Bills will bring about. Unfortunately, the Bills do very little to decolonise Indian criminal law. They do, however, indicate the continuation and intensification of colonial-style powers.

Colonisation is, broadly, a process of oppression where the colonised become vehicles for the supreme colonial power to fulfil its desires. The subject unquestioningly serves the colonial state and remains at its mercy. Those in power have rights; those without must oblige. At the same time, the colonial state also considers itself to forever be at risk of being victimised by those it rules. Therefore, the interest it needs to protect is its own, not the subjects’, who are not just inferior but also suspicious. This is the foundational essence of colonial laws — to secure and protect the colonial state and not the colonised. The purpose of laws such as the Indian Penal Code (1860) which the Bharatiya Nyaya Sanhita (BNS) seeks to replace, was not just to maintain law and order; it was an opportunity for the colonial state to legitimise, through the law, its status as a potential victim under threat from the people it colonised.

A ‘decolonised’ or a post-colonial law, then, would necessarily need to reflect the changed relationship between the citizen and the state. An independent people are not to serve but to be served through the state and government they give themselves. This fundamental shift changes the process of law-making, and the priorities and purpose of the law.

The Bills fail these essential requirements both in how they have been brought about and their content. The framework produced by them views citizens with such increased suspicion and mistrust that the state appears to almost be in opposition to the citizen.

Through the major changes in the Bills run twin threads which severely compromise people and simultaneously arm the state against them. That almost all proposed changes to the BNS (see provisions on organised crime, false information jeopardising sovereignty, acts endangering sovereignty, terrorist acts) are overbroad, and constitutionally suspect is not just the result of

poor drafting. It is an outcome of the state casting the net of what constitutes an offence as wide as possible, which in parallel increases the avenues to use police powers. Many of the ‘new’ offences are already covered by existing laws (either under special laws or the Indian Penal Code). Adding an additional layer of criminalisation, therefore, does nothing except increase police powers.

A notable feature of colonisation is suppression in the guise of security by giving the executive unchecked police powers. This particular feature is so deeply entrenched that the Indian state has only increased its police powers post Independence. The Bharatiya Nagarik Suraksha Sanhita (BNSS) — it repeals the Code of Criminal Procedure, 1973 — expands those powers considerably. For instance, it allows police custody for periods longer than is allowed under the current Criminal Procedure Code. Some provisions of the BNS, such as terrorist acts, allow the police powers that are significantly broader than even those under harsh laws, such as the Unlawful Activities (Prevention) Act. The legislative increase in the use of police or police adjacent powers, including through other laws, is a continuation of colonial powers — not a route for undoing them.

Enough has been written about the police and prison being relics of colonisation. Yet, the decolonisation that the Bills seek to achieve provides no scope for their reform. Without reorienting the foundational perspective of these institutions, though, calls for decolonisation will remain vacuous. The hope of decolonisation will remain unfulfilled because the state has not indicated, either now or earlier, the willingness to audit and reimagine these essential instrumentalities of colonial power. Increasing terms of punishments across the board, as the BNS does, while broadening police powers borrows heavily from the logic of colonial criminal law. What this means for India’s severely overcrowded prisons and the implications on policing (how, who and on whom) are either non-considerations or over-looked considerations.

The narrative of decolonisation surrounding the Bills must not be seen in isolation from developments in other areas of criminal law that are contemporaneously pushing us back into colonial ways and outcomes of lawmaking. For instance, laws such as the Criminal Procedure (Identification) Act, 2022 which authorises the police to take measurements of convicts, accused and even those taken into custody for preventive detention, further the aim of colonisation — increased surveillance of the populace and increased control by the state.

Though the idea of decolonisation must be seen in opposition to colonisation, that is not all it is. It is an optimistic endeavour brimming with the promise of a people shaping their own destinies. It gives effect to reordered relationships between the state and citizen. It honours and centres the citizenry. But, hidden behind the rhetoric of decolonisation of the criminal law Bills lie exaggerated anxieties of colonial power.

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