RHETORIC AND SUBSTANCE: EXPLORING THE NARRATIVE OF DECOLONISATION BEHIND THE NEWLY ENACTED CRIMINAL LAWS OF INDIA

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ABSTRACT

Legal acts are literary pieces and as with any other form of art it most likely shall evolve and adapt in sync with the historical forces it withstands. The colonial experience stripped off pre-colonial identities to redefine people and nations alike with new identities as colonial subjects. Post-independence these previously colonised states grappled with the question of identity as part of their nation-building process. This meant unentangling generations of imposed identities in search of their true selves, which often were found lost or re-structured in such a way that their enmeshed nature can no longer be segregated and restored in a form that can reliably be called pre-colonial. Along with these, there were also the blessings of new wisdom that were part of the colonial experience, this led many former colonies to adopt an identity that adhered to part continuum and part reformative legislative practices. This suited peaceful and smooth transition from colonial to post-colonial legal systems which can mostly be seen in stable post-colonial democracies around the world. But even under such circumstances there always were some who were concerned with a project to restore 'originality' of the natives, if not in whole, but in taste. In post-colonial studies, such aspirations have been associated with attempts for a "decolonisation of the mind." Recently, the Indian Parliament enacted three new criminal laws to replace the pre-existing criminal laws, this endeavour was much-touted as part of a broader objective of decolonising Indian laws and by extension the legal system. Regarding this, the present article serves to understand the meaning and context in which the word 'decolonisation' has hitherto been understood in academic writings, to find whether this exercise of replacing the old colonial era origin laws has served its purpose and to know what challenges this might ensue.

Keywords: colonialism, constitutional autocracy, constitutionalism, decolonisation, post-colonial studies, re-colonisation, revisionism

Introduction

Of the many memories that I have from my childhood the most astounding ones are associated with the stories of struggle for independence that my grandmother narrated to me, as a first-hand witness and through her proximity to her mother, and my great-grandmother, Bhushan Bala Chakraborty, an Indian revolutionary and freedom fighter. My great-grandmother's heroic tales of sacrifice and unwavering courage in the face of brutalities, excesses, and torture in the Tamluk region of Bengal in British India, initiated me to the "everyday" under an oppressive regime of the British in India.[1]

One among such stories was that of the ill-fated day of martyrdom of Matangini Hazra, a septuagenarian leading a peaceful rally of mostly women volunteers of Congress, disobeying the pre-imposed Section 144 of the India Penal Code, 1860 in support of the call for *Quit India* given by Gandhi.[2] When this demonstration reached Tamluk Police Station, the Crown Police ordered the crowd be disbanded, Hazra came forward to mediate with the Police. In turn she was repeatedly shot, and witnesses remember her repeated cries of *Vande Mataram*, echoing through and between each gun shot.[3] But the last shot even robbed this old lady of her voice as the bullet pierced through her face and the crowd was left devasted, broken, and emptied from inside. India lost one of her greatest daughters, a Gandhian, who was often adorably referred by many of her comrades as *Gandhi Buri* due to her steadfast conviction to the ideals of *satyagraha* which lay waste and bloodied on the soil of Tamluk on that unfortunate day.

This and many other tales of valour and defiance by the Indian patriots during Indian independence struggle had a similar underlying connotation, the resistance even though was often physical had an over-arching symbolism which was hard to miss. The real struggle was against a system of oppression that was orchestrated through deliberate crafting of laws to administer and govern the Indian subjects by the Imperial British Government.[4] The suffering of Indians was mounted by repressive laws brought forth by the British and the agitations were justifiably against imposition of these harsh and unfair laws. The much controversial and criticised *Rowlatt Act*, imposed near the beginning of the end of British Empire in India, is just

[1] Patricia A. Adler et.al., *Everyday Life Sociology*, 13 Annual Review of Sociology 217-235 (1987).
[2] Sanjib Bera, *Parallel Government in Midnapore: A Historical Study, 1942-1944*, 6(1) International Journal of Research and Analytical Reviews 464-471 (2019).
[3] Ibid.
[4] Schmidhauser John R., *Power, Legal Imperialism, Dependency*, 23(5) Law & Society Review.

one of the many regressive and oppressive legislations passed by the British administration in India. But it had its beginning ever since the victory of the East India Company in the *Battle of Plassey* in 1757 on the subjects especially in Bengal.

Such was the apathy of these new colonial legislators towards their subjects that the land touted as the *Garden of Plenty*, witnessed tens of millions of deaths in the Great Bengal Famine of 1770, when the colonial laws were designed to maximise revenue through selective production of profitable crops like poppy and indigo over other crops which supported livelihood and sustenance of the natives.[5] Mixed with this was an aggressive and an almost impossible to meet tax regime, which was so brutal that the Bengali people, and by extension Indians under Company Rule and later Crown occupation, suffered consecutively throughout the 19th Century in manners of Bubonic plague, Cholera and Malaria epidemics.[6] The impact of all these were so severe that recent studies have found evidence of living under such stressful conditions in the form of genetic mutations in the population of the sub-continent.[7] But, even though the people suffered under Imperial occupation, it strengthened the belief of an intrinsic superiority in the West of their Imperial mission to 'civilise' the savages.[8]

In this backdrop, most of the current Indian legislations which continued from the colonial era must be revisited and studied. The British Administration was more fully dedicated to looting and robbing India of her wealth than delivering any proper governance, and whatever façade of native representation in the colonial administration was put forth from and near the end of the First World War due to negotiations by Gandhi was merely an eye-wash and no real power to influence policy making was given in the hands of Indian representatives in the colonial administration. The "othering" was so intense that the justice system, system of governance and administration that modern apologists of the British Empire so heavily cite as "good deeds," were nothing but tools through which the *unruly* subjects of the Majesty's British India could be controlled and for that a bare minimum civility among the subjects was to be maintained to not interrupt the flow of the profits to the Crown. Under such circumstances it would come as no surprise that the arrangements of law, justice system and governance were

[5] David Arnold*, Hunger in the Garden of Plenty: The Bengal Famine of 1770*, in Dreadful Visitations: Controlling Natural Catastrophe in the Age of Enlightenment, edited by Alessa Johns 1st ed. 81-111 (1999)
[6] Ibid.
[7] Wells Jonathan C. K. et. al., *The Elevated Susceptibility to Diabetes in India: An Evolutionary Perspective*, 4 Frontiers Public Health 1-17 (2016).
[8] Martin N. Nakata, Discipling the Savages, Savaging the Disciplines

designed in accordance with what the British assumed to be of value, moral and just in their taste.

The native's pre-existing system of knowledge was not only disregarded in most cases, but trampled upon or dismantled, this was reflective in the legislations enacted during the colonial period. The native being portrayed as the *uncivilized* can only draw the headlines back home for their superstitions and social malpractices. This was done deliberately to cater a feel-good message to the home audience, to rid them of the guilt and to help them turn a blind eye to the news of excesses coming out from their colonies abroad. Especially India, where ancient Indian practices were so vilified and de-contextualized that the stink of stigma of stereotypes about Indians still looms large and wide in the Western media and people in general. Further, any-and-all studies that the British Government in India undertook to understand the native knowledge system, by extension social and pre-existing legal framework, was only to further their occupation or exploit internal divisions to better administer their colony in India. Even when these laws had names bearing that of India or Indian, there hardly was any trace of indigeneity in them and most were direct imposition of or connected to the legislations passed by the British Parliament in London. Due to this, there can be hardly be any doubt that the colonial era laws which were more suited for the British to administer Indians should be revalued post-independence to serve the Indian people in the spirit of the Constitution of the independent country.

In this respect I argue that post-colonial studies of Indian legislation should seek to understand the interplay between two processes of how on one hand legislators in independent India sought to at times decouple Indian laws and by extension judiciary from the impositions of its colonial past to assert the Indianness while on the other hand continued with and at times adopted to some of those colonial practices. The recent introduction of the three new criminal laws in India, replacing their old British-era counterparts, should be looked at, to find out what is meant by decolonisation when it is used in this context, to locate where this undertaking falls within the current discourse of decolonisation, to identify why this project was initiated and how far it has met its ambition.

Decolonisation of colonial knowledge architecture

Any discussion surrounding de-colonialism should essentially start from an understanding of

what is meant by colonialism. Colonialism is a form of imperialism, in which a dominant power establishes and maintains its sovereign rule over a subordinate group of people by alienating the subordinate people from the ruling power.[9] A colonial situation can be characterised as a political and legal domination over an alien society to create a relationship of economic and political dependence and a reorientation of the colonial political economy towards the imperial economic interests and needs through institutionalised racism and cultural inequalities.[10]

As a variant of imperialism, colonialism is an unequal territorial relationship, fuelled by the need for territorial expansion, among states associated with expressions of early industrial capitalism, which triggers a search for new markets, resources, profit, and surplus value. In context to India, "colonialism" has been employed as general description of the state of subjection in the hands of European imperial ambitions since the 18th Century.[11] Decolonisation of Indian laws in this context is a process of de-hyphenation between the colonial legacy and the new laws that the independent Indian state enacted. This process however is not direct, as laws like any other aspect of culture is a product of its time and space. The modern Indian state has only existed since 1947, and even before the European Colonial occupation in the Indian subcontinent, it remained fragmented politically and culturally whose heterogeneity has only been exacerbated through several episodes of foreign conquests and occupation. This has contributed to raise the question of what this decolonisation process would be for an independent, sovereign, and united Indian state post its colonial period.

Peopling of India started as early as 65,000 years ago with Coastal Migration from Africa into India, and since then different groups of people have settled and shaped the meaning of being indigenous to the land of India.[12] There hardly is any consensus to what it means to be an Indian, as the sub-continent is home to a diverse group of ethnicities with their own culture. So, the search for an all uniform, authentic and original indigenous system of law that is or at some point in history was accepted by all Indians as their legal system can hardly be found. This is not only the case for India, but also apparent homogenous nation-states encountered similar problems when establishing an all-unique legal system devoid of any foreign cultural intrusion or influence. The reason why this debate over authenticity needed to be addressed

[9] The Dictionary of Anthropology, edited by Thomas Barfield 69-72 (Blackwell Publisher 1997)
[10] Ibid.
[11] Ibid.
[12] Gadgil Madhav, N. V. Joshi, *Peopling of India*, in The Indian Human Heritage, edited by D. Balasubramanian and N. Appaji Rao, 100-129 [University Press (India) Limited 1998)

here is because if the process of decolonisation is to establish an authentic Indian legal system, then the chequered history of peopling of the Indian subcontinent should be a reminder for us that any such attempt would never lead to a consensus on the subject across all its citizens.

Setting aside that impulse of searching for an authentic Indian legal system which would inevitably lead one to a quagmire. This paper investigates the question of decolonisation from a perspective of what is not colonial in its approach. The colonial approach can easily be identified with the hegemonic infrastructure of the colonial resgime that established colonialism in the Indian sub-continent. This is to say that all those processes that aided the colonial rule in subverting colonial subjects and robbing them of their dignity and resources should be identified as colonial, while all those processes that eliminates the residue of oppression and hegemony from the system of governance can be identified as decolonialisation.[13] With political decolonisation, an independent and sovereign state might emerge, but the impact of colonisation is embedded within the structure of the colonised society. This structure which is inherited from a colonial legacy is all pervious and it perpetuates through the system of knowledge imposed upon by the colonial powers. Which brings us to intellectual decolonisation and decolonisation of the knowledge system itself.

In Foucault's writings, a recurring theme had been the inter-relationship between power and knowledge and how they both influence and shape one another.[14] Knowledge systems under colonial occupation was built in such a way to sustain the imperial ambitions of the Empire. Law played a vital role in institutionalisation of state condoned violence, for maintenance of stability and order in the colonial society.[15] Colonial laws as consequence are part of this colonial knowledge architecture that forms an intrinsic part within the colonial structure of power. Without this aspect of the colonial knowledge infrastructure vis-à-vis colonial laws, almost all other colonial institutions would not have survived. The perpetuity of the colonial occupation relied upon the colonial laws which shaped everything from the colonial education to colonial administration, these laws enacted by the colonial regime, guided and at times justified the actions of the foreign occupiers.[16]

[13] Chitonge, Horman, *Trails of Incomplete Decolonisation in Africa: The Land Question and Economic Structural Transformation*, 57 African Study Monographs. Supplementary Issue., 21-43 (2018)
[14] Foucault Michel, Discipline and Punish: Birth of the Prison, translated by Alan Sheridan (Vintage Books 1977)
[15] Sim Joe, *Thinking about state violence*, 82 Criminal Justice Matters 6-7 (2010).
[16] Bernard S. Cohn, Colonialism and its forms of knowledge: The British in India (Princeton University Press 2021).

From the above we can imagine the centrality of colonial laws in designing the architecture of colonial knowledge systems. It is an architecture because it holds on to different aspects of the colonial occupation, facilitates the hegemonic rule and provides perpetuity to a system which is inherently biased towards the occupiers. This highlights the crucial role of the process of decolonisation of laws in independent and post-colonial States. To dismantle such an architecture, and create an infrastructure of knowledge which is pro-citizen, a good starting point should be to put the entire colonial era system of education, especially legal education under the radar of any post-colonial state. Following this, the looking glass should be pointed straight and square to the judicial process, turning it into something more approachable and less intimidating for the people at large. In order to do this, new legislations need to be passed and the thought behind these legislatures need to be post-colonial, in other words, laws of, for and by the people. Decolonisation of the colonial knowledge architecture therefore must involve the entire process from drafting of laws to its execution and finally deliverance of justice.

Post-colonial journey of the criminal laws

Since, independence India's criminal laws have undergone significant changes. These changes were driven by a desire to meet the challenges to the legal system by adapting to societal needs and ensuring the protection of fundamental rights guaranteed by the Constitution of India. Here we shall see the major changes brought forth since independence before the introduction of the three new criminal laws in 2023 by the Indian Parliament.

For most part of existence of free India, the British era colonial Indian Penal Code, 1860 remained a primary criminal law statute delineating the substantive part of criminal justice in the country. The code was hailed in its 150th year of its implementation by Nicholas Philips J. of Supreme Court of the United Kingdom for its efficacy and relevance even after passage of such a long time. But this law was had been amended 37 times after Indian independence so the question, of it being resilient to the changes in time and context are controversial at best. In the recent past, sections which were unsuitable for the times in which we live like that of 377 of the Act was decriminalised after several years of court battle in 2018 in the landmark case of Navtej Singh Johar v. Union of India.[17]

[17] Navtej Singh Johar v. Union of India (2018) AIR SC 4321.

With the introduction of section 115(1) of the Mental Healthcare Act, 2017, section 309 pertaining to the offence of attempting suicide was virtually decriminalised. As Victorian era morality faded punishment for adultery was struck down and was considered demeaning to the dignity of women in 2018 in the landmark case of Joseph Shine v. Union of India.[18] Adultery is made so redundant that in the new criminal laws passed in 2023, the provision laying down punishment for such was omitted out. Further, in several cases, since independence it has been noted that death penalty even though it is still being used for sentencing, is actually materialised into an actual sentence to be carried forward and executed only in the rarest of rare case where an exemplary punishment is required to deter the crime in the society. In the wake of the *Nirbhaya* incident, and ensuing protest following it, Criminal Law Amendment Act, 2013 was passed which introduced stricter punishment for sexual offences, including death penalty for those convicted of aggravated sexual assault.[19] This amendment expanded the definition of rape and included new forms of sexual violence, such as acid attacks, stalking, and voyeurism, making it more comprehensive in addressing gender-based violence.[20] Other notable Acts like The Protection of Children from Sexual Offences Act, 2012 and The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 were introduced to expand the domain of justice to protect children and women in workplace from sexual violence. Judicial interpretation of laws was useful in preventing misuse of sections like that of 498A of the Indian Penal Code, 1860 to prevent incarcerations based on false allegations, also stricter punishments for wrongfully alleging someone of sexual offences were also evolved out of the judicial system in independent India. [21][22]

The Code of Criminal of Procedure, 1973 which was a modern avatar of the Criminal Procedure passed by the British in 1882, which was a procedural law mostly, barring some portions of its substantive part, governed the process of law enforcement, investigation, trial, and punishment in criminal cases, underwent several amendments to make the criminal justice system more efficient, transparent, and accountable. The amendment introduced in 2005, provided for speed up trials, particularly for certain serious offences. This was a major step as it marked a break away from the colonial state of inefficiency of delivering justice as the colonial rule was mostly oblivious to the plight of common man riling for generations to get justice. The justice system

[18] Joseph Shine v. Union of India (2018) AIR SC 4898.
[19] Mukesh & Anr. v. State for NCT of Delhi (2017) AIR SC 2161.
[20] Criminal Law (Amendment) Act, 2013
[21] Preeti Gupta & Anr. v State of Jharkhand (2010) 9 SCR 1168.
[22] Arvind Kumar & Anr. v. State of UP (2020) AIR online ALL 2524.

in the colonial period and by extension for most part since independence was so notorious for its delays that people were either miserably dragged into it for years or people were afraid of its pendency that were intimated even at the slight thought of approaching it for redressal.

Under such circumstances disposal of cases in a time bound manner by establishing guidelines for bail procedures was revolutionary. Although the justice system took several years even after the amendments to fully accommodate with the provisions but it helped mostly the people undertrials languishing in prisons for extended periods, creating overcrowded jails and abuse in the hand of jail mates or prison guards. Independent India also saw a rise in civil society vocal about inmate rights and prison reforms which ultimately culminated into The Repatriation of Prisoners Act, 2003 and Model Prison Manual developed in line with international obligations to the commitments that the State of India made after its independence.

In early 2000s the government set-up Fast Track Courts to deal with the backlog of cases and expedite trials for crimes like rape and corruption. These courts aimed at speeding up the judicial process and reducing delays in deliverance of justice particularly in the most pressing cases. Speaking of most pressing issues since the late 60s India faced a barrage of non-conventional asymmetric warfare perpetuated allegedly by Pakistan and some other foreign States, both in near vicinity of its territorial borders as well as from far away complacent States. These were considered as a threat to the National Security and soon initiatives were taken to bring some very controversial and harsh legislations to curb this growing menace recognised as terrorism by the Indian legislators and law enforcement agencies. Acts like the Maharashtra Control of Organised Crime Act, 1999 was drafted in the wake of several terrorist attack that rocked this western state of India. This was quickly brought into action by other states, but the law was so harsh that no anticipatory bail application would be entertained if an accused is believed to have been arrested under this Act. Several human rights groups were against this but the national security issue prevailed over their concerns. Before this Act, another harsher law was brought into the picture in light of insurgency emanating from Punjab in the 80s. The Terrorist and Disruptive Activities (Prevention) Act, 1985 was applied to whole of India. This Act was criticised severely for a broad definition of terrorism, which allowed for the targeting of political dissidents and was deemed to be incompatible with the Indian Constitution and the principles of natural justice and the rule of law. This law has now been replaced in wake of several criticism of its misuse.

The Unlawful Activities (Prevention) Act. 1967 another legislation that came first to define the word terrorism in the wake of frequent terrorist attacks on Indian soil. This definition given in Section 15 of the Act is still in vogue as the current Bharatiya Nyaya Sanhita, 2023 adopts it word for word. This Act empowered the Indian State to deem any organisation as terrorist and ban them, seize their assets, and detain individuals suspected to be associated with it. We saw the most recent use of this on Popular Front of India, a radical Islamic political organisation, when National Investigative Agency found materials directly linking the organisation with a conspiracy to harm the State of India along with its people especially targeting the followers of different faiths. This law too has its fair share of controversy the most controversial part of it is its disregard to concerns about human rights violations, particularly during prolonged detention of suspects without trial. Another Act, The Prevention of Terrorism Act, 2002 was passed after the Indian Parliament was attacked, granted sweeping powers to detain individuals for extended periods of time without trial. It was eventually repealed in 2004, after extensive criticism for potential politically motivated misuse but even after its repeal some argued that it contributed to the strengthening of national security in India. It can be seen from this discussion that the Indian State since its inception was in a constant state of motion, sometimes being reactive, by introducing draconian laws akin to those of the colonial period, and at times then correcting its course, by pressure from within its strong democratic institutions and constitutional framework. There can be a series of other legislations that can be enlisted here to stretch on this point but this is beyond the scope of the current paper and instead it would focus on the primary three laws which were changed in 2023 to evaluate the context in which decolonisation was used as a pretext to the changes.

Replacing the colonial legacy

From the above ongoing discussion this paper has tried to establish the background for a compelling argument in support of decolonising the criminal laws in India to break away not only from its colonial heritage but also to make it more citizen centric keeping in mind the constitutional guarantees that the State has extended to its citizens post-independence. Apart from this an Economic Survey conducted by the Government of India in the financial year 2018-19 pointed out that about 3.5 crore that is almost 35 million cases were pending in the judicial system, especially in the district and sub-ordinate courts, which makes it a case for justice delayed is justice denied. Along with this a data presented by National Crime Records

Bureau on 2015 highlighted an alarming 67.2 percentage of undertrial prisoners throughout India.

To find an answer to such a condition, the Government of India constituted the Malimath Committee in 2000 to get suggestions on reforms in the Criminal Justice System of India. This committee submitted its report in 2003 suggesting 158 changes, and opined that the current system "weighed in favour of the accused and did not adequately focus on justice to the victims of crime." It recommended several changes of which significant ones involved that a schedule to the Indian Penal Code, 1860 be brough into place our of all regional languages so that the accused knows their rights, as well as how to enforce them and whom to approach when there is a denial of those rights. The committee also suggested hiving off the investigation wing from Law and Order. It pointed out that the judge to population ration in India at that time was 10.5 per million, and recommended an immediate hike in the strength of judges and courts. It suggested for separate witness protection law so that safety and security of witness can be ensured and they can be treated with dignity. Further, it recommended reducing the vacations of courts on account of long pendency of cases.

In most part these recommendations were delayed and some were not implemented as they were considered too bold for the time. The Government of India then constituted another Committee under the Chairmanship of Prof. Madhava Menon in 2006, which submitted its report in August, 2007. The four-member panel of this committee drafted a national policy paper on criminal justice system which favoured for complete revamp of the entire criminal procedure system in the country. It mooted created of a fund to compensate victims who turns hostile from the pressure of culprits and suggested setting up of separate authority at national level to deal with crimes threatening the country's security.

In this backdrop the three new criminal laws were introduced in the Indian Parliament replacing the Indian Penal Code, 1860; the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872 with Bharatiya Nyaya Sanhita, 2023; the Bharatiya Suraksha Sanhita, 2023 and the Bharatiya Sakshya Adhiniyam, 2023 respectively. In August of the same year when these Acts were introduced as Bills in the parliament, the government referred it to a 31-member Parliamentary Standing Committee, headed by Minister of Parliament Brij Lal for review. On 7th of November the committee after consulting experts and stakeholders, presented its report

on the Bills.[23]

The Committee observed that Bharatiya Nyaya Sanhita has removed offences related to adultery and same-sex sexual activities that were present in the Indian Penal Code, 1860 the Committee argued for re-criminalisation of adultery in a gender-neutral manner to safe-guard the sanctity of the institution of marriage and pointed out that if section 377 be retained again in gender neutral manner so to be invoked in case of non-consensual carnal intercourse or rape of a man by another man and to initiate proceedings against husband by a woman for unnatural sex. This recommendation was not accepted in the final draft of the Act passed in the Parliament.

The Committee pointed out that replacing the 'unsound mind' with 'mental illness' in several sections would narrow down its application as unsound mind has wider application including mood swings or voluntary intoxication. It recommended reverting to the term 'unsound mind' instead of 'mental illness.' Further the term 'intellectual disability; along with unsoundness of mind in section 367 pertaining to competence to stand trial was added.

The newly inserted section 73 dealing with unauthorised publication of court proceedings stipulates that those who print or publish 'any matter' concerning court proceedings in rape or sexual assault cases without permission would be punished with a two-year jail sentence and a fine. The Explanation provided to this section clarifies that reports on High Court or the Apex Court judgements would not amount to an offence within this provision.

In section 86 of the Bharatiya Nyaya Sanhita, 2023 defines "cruelty" as: a) wilful conduct likely to drive a woman to commit suicide or cause grave injury or danger to the life, limb, or health (whether mental or physical); or b) harassment of a woman to coerce her or any person related to her to meet any unlawful demand for property or valuable security. Although, the offence is now defined in a separate section, previously the same was in section 498A of the Indian Penal Code, only in its "explanation" clauses. There is no addition to the already and in effect definition to the word cruelty in this new Act.

The most talked about point was the definition of terrorism being now incorporated in the new Act, Section 113 of the Bharatiya Nyaya Sanhita, 2023 has incorporated the entire definition

[23] The Hindu Bureau, *Parliament panel adopts reports on criminal laws*, The Hindu November 6, 2023.

provided under Section 15 of the Unlawful Activities (Prevention) Act, 1967 but differs from the same in one respect that it includes the production or smuggling or circulation of *any* counterfeit Indian paper currency, coin or of any other material within the ambit of terrorism. Possessing property derived from or through a terrorist act, harbouring a terrorist voluntarily is punishable only if it is done knowingly under the present Act. Recruitment and training to engage in terrorist acts are provided for in the Act, which mirrors sections 18A and 18B of the Unlawful Activities (Prevention) Act, 1967. A police officer not below the rank of Superintendent of Police is bestowed with this power to decide if the prosecution of terrorist act should continue under the UAPA or section 113 of the Act. Terrorism is punishable with death or imprisonment for life and the ones who conspire, abet, incite, or facilitate the commission of a terrorist act could face imprisonment ranging from five years to life imprisonment based on the gravity of their involvement.

Mob lynching has been introduced as an offence under Section 103(2) and Section 117(4) of the Act, and its penalty is at par now with murder. The offence has been described as a murder committed by five or more people acting in concert with one another, on grounds of race, caste or community, sex, place of birth, language, personal belief, or any other ground.

Under section 106 (2) causing death by rash and negligent driving of vehicle and escaping, an imprisonment for 10 years and fine was stipulated. This created a storm of protests among especially truck drivers as it was a made duty bound for the driver to stay in the scene of the incident, where they can then face mob fury and if they escape from the crime scene, it would attract enhanced liability.[24]

After the Parliamentary Committee flagged that the definition of 'petty organised crime' was vague, poorly worded and lacked the necessary procedural safeguards. The final draft of the Act incorporated a more precise definition stating that 'whoever, being a member of a group or gang, either singly or jointly, commits any act of theft, snatching, cheating, unauthorised selling of tickets, unauthorised betting or gambling, selling of public examination question papers or any other similar criminal act, is said to commit petty organised crime.' The Explanation provided stipulates that theft would include trick theft, theft from vehicle, dwelling house, or business premises, cargo theft, pickpocketing, theft through card skimming, and theft

[24] Jagriti Chandra, *Why have truck drivers called for a strike? Explained*, The Hindu January 11, 2024.

of Automated Teller Machine.

Of the many changes incorporated in the Bharatiya Nagarik Suraksha Sanhita, 2023 which replaced the Code of Criminal Procedure, 1973 are that community service has been defined under section 23 which is 'work which the Court may order a convict to perform as a form of punishment that benefits the community, for which he shall not be entitled to any remuneration.' A Magistrate of First or Second Class has been given the power to impose this punishment to encourage a more reparative approach to minor crimes like attempt to commit suicide, public servants unlawfully engaged in trade, theft of property less that ₹5,000, public intoxication and defamation.

As provided in Section 43(3) of this Act after recommendation from the Parliamentary Committee restricted handcuffing to select heinous crimes like rape and murder instead of extending its usage to persons who have been accused of committing 'economic offences'. The power of police to use handcuffs has been expanded beyond the time of arrest to the stage of production before court.

Provisions allowing for the reading out of charge to the accused, hearing on discharge, examination of witnesses, and recording of evidence in audio-visual means have been introduced in sections 251, 262, 266 and 308 respectively in the Act.[25] This was done keeping in line with the technological progress that the society has made in recent years and to accommodate with such changes to make the most out of it.

However, the most concerning aspect of the new Bharatiya Nagarik Suraksha Sanhita, 2023 is the expanded powers of the police to keep an accused in its custody for more than the initial 15 days as it was the case in the previous Act in concern. Section 187(3) of this Act, which corresponds to Section 167(2)(a) of the Code of Criminal Procedure, 1973 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 smaller period lasting for 60 or 90 days depending on the nature of the offence. This leaves scope for misuse of this power by the police by extreme custodial violence which the panel underscored especially to people coming from vulnerable and marginalised backgrounds. The Committee recommended for its amendment to bring more clarity in the interpretation of the clause. It must be noted that this section virtually overrides

[25] Aaratrika Bhaumik, *Revised criminal law bills: Key changes explained*, The Hindu July 1, 2024.

the Supreme Court precedent in Central Bureau of Investigation v. Anupam J. Kulkarni (1992), which limited police custody to the first 15 days of arrest.

Under section 172 of the Act, preventive detention powers have been extended to the police in which the detained person must be produced before the Magistrate within 24 hours or in case of petty cases released within a day. Preventive detention being one of a very sensitive topics that persisted since the British colonial rule in many of its forms to stifle the throat of opposition in both colonial as well as independent India's Government. Its extensive usage was a major concern for Indians during the Emergency period leading up to mass scale incarceration and going missing of political dissidents.

The new Bharatiya Sakshya Adhiniyam has not been revamped extensively as far as other two acts are concerned and put to comparison. Section 61 on admissibility of electronic evidence has been allowed underscoring that an electronic record shall have the same legal effect as a paper record. There is also a requirement of a certificate by an expert which attests to the authenticity of the electronic record. This certificate must include details about the source and the method by which the electronic evidence was produced, ensuring its credibility.

From the above discussion we were about to get an overlook at the major changes that were undertaken to the erstwhile criminal laws. With this knowledge let us move to the next section where we can make a critical assessment of the process of decolonisation, which was much touted when these laws were first introduced. We will try to see how far is the project of decolonisation as understood by this paper when dealing with topics of postcoloniality been justified through this attempt of introducing new criminal laws replacing the old ones.

Post-colonial critique of the new criminal laws

Colonialism has shaped the ideas surrounding national and international criminal laws and most importantly what constitutes a crime and who is a criminal. This is most prominently reflected in the criminalisation of the Adivasis through the Criminal Tribes Act, 1924 and similar statutes enacted during the British rule.[26][27] Under such statutes, entire tribes were labelled as criminal if they were considered for instance, "addicted to the systematic

[26] Criminal Tribes Act 1871, s 2.
[27] Rishika Sahgal 2023, Decolonizing criminal law in India in C Cunneen et.al., (eds.), *The Routledge International Handbook of decolonizing Justice*. 1st ed. London 391-401.

commission of non-bailable offences."[28] They were forced to live in settlements and subjected to a system of surveillance and control.[29] The reason for such was simple, the British had to encounter the rile indigenous people more frequently and more initially as they tried to solidify their rule in India.[30] Tribal revolutions against the British were one of the very first resistance that were put up in India.[31] So, repressing the tribes through enacted laws which dehumanise them made sense to the British administration. As I have pointed out before that the colonial rule was eye-washed with the narrative of civilising the savages to justify their occupation to the morally concerned people back home in Europe.[32]

Although the Criminal Tribes Act was repealed in 1952, its impact on the administrators and law enforcement agencies was huge.[33] Vimukti communities continued to be treated as criminals, both by society and under the law long after repealing this Act. It is that a piece of law can shape a public notion to such a great deal that even when the occupation forces have left, the *othering* still persists. [34][35] Arrests without warrant, long periods of detention, recording of photographs and fingerprints for surveillance, and custodial torture of members of many of the de-notified tribes continued to be the norm in Independent India.[36]

Other criminal provisions like the habitual offenders' provisions provided the means for their continued criminalisation impacting their livelihood, cultural practices and broadening of the stereotypes surrounding them.[37] Laws to prohibit production of country liquor, which was cultural custom among many of them was deeply disregarded and stringent excise laws were imposed often to persecute them by local authorities. The Criminal Justice and Police Accountability Project has documented that one-sixth of all arrests in Madhya Pradesh were made under the state excise law and the overwhelming majority of those who are arrested are

[28] Ibid.
[29] Brown Mark, *Race, science, and the construction of native criminality in colonial India* 5(3) Theoretical Criminology 345-368 (2001).
[30] Radhakrishna Meena, Dishonoured by History: 'Criminal Tribes' and British Colonial Policy (Orient Longman 2008).
[31] Singh B. Pal, 'Criminal' Tribes of Punjab (Routledge 2010).
[32] Hall Catherine, Civilising Subjects: Colony and Metropole in the English Imagination (University of Chicago Press 2002).
[33] Arafat Safdar, "Criminalizing the natives: a study of Criminal Tribes Act, 1871," Master of Arts, The Faculty of Graduate and Postdoctoral Studies, The University of British Columbia, 2020.
[34] Charles Mary K. R.N., *Othering: Toward an Understanding of Difference* 22(4) Advances in Nursing Science 16-31 (2000).
[35] Bhukya Bhangya, Subjugated Nomads: The Lambadas under the Rule of the Nizama (Orient Blackswan 2022)
[36] Dakxin Bajrange et.al. ed., Vimukta: Freedom Stories (Navayana 2007)
[37] Satish Mrinal, *"Bad Characters, History Sheeters, Budding Goondas and Rowdies": Police Surveillance Files and Intelligence Databases in India* 23(1) National Law School of India Review 133-160 (2011).

from Vimukta and Dalit community.[38] The reason to bring this up at first to critique the decolonial project was to emphasise that unless the decolonialisation process starts with destroying the construction of criminality imposed upon us by the British and is so engrained in our justice system and a caste driven discriminatory mind, no amount of change in criminal laws can serve the people who are oppressed because of it. In order to do so institutional changes needs to be implemented and strictly adhered with zero tolerance towards any discriminatory attitude in the India social and work life.

The next round of post-colonial critique of criminal laws in India can be the idea of "due process of law" under Article 21 when it is used in case of preventive detention, In A. K. Gopalan v. State of Madras, the court rejected personal liberty on the grounds of "procedure established by law."[39] Later on, this Fazl Ali J. dissented this judgement as it took away the principles of natural justice from the equation, giving broad and over-reaching powers to the state which could then very well act like a colonial inheritor. In the constitutional history of the country, H. R. Khanna J. judgement in A. D. M. Jabalpur v. Shivkant Shukla dealing with the issue of *habeas corpus* as a right during Emergency is considered a landmark.[40] Post emergency it became a settled law that even during a national emergency Article 20 and Article 21 would not be suspended under any condition. Even recently has the country seen an almost decade long incarceration of Prof. G.N. Saibaba who was finally acquitted of all charges by the court but passed away just within few days of returning back to his home.[41] Without checks the State with virtually limitless powers can use such Acts with impunity just like the colonial administration and would get away without being held responsible for atrocities it may commit against the human body, its freedom, and rights.

In terms of offence against the state, the new criminal laws with its promise of the removal of sedition as it existed under section 124A of the Indian Penal Code, 1860 has brough in a somewhat more archaic and stringent offence in the Bharatiya Nyaya Sanhita, 2023. If the markers of colonialism are a perpetuity of the police powers that the State exerts over its subjects. The new criminal laws do little to control its proclivity towards making the state an all-powerful apparatus. Sedition has been replaced with section 152 of the Act, titled 'Act

[38] Pradhan et. al., Drunk on Power: A Study of Excise Policing in Madhya Pradesh (Criminal Justice Accountability Project 2021)
[39] A K Gopalan v State of Madras (1950) AIR 27.
[40] A D M Jabalpur v Shivkant Shukla (1976) AIR 1207.
[41] Apoorvanand, *G.N. Saibaba's death is an injustice*, Frontline, The Hindu Oct 13, 2024.

endangering sovereignty, unity and integrity of India' which differs in some ways from its previous counterpart in the Indian Penal Code, 1860.[42] The problem with this section is not that the State would take steps to maintain peace, law and order within its territory and protect the citizen as well as the State from attempts of any unlawful insurrections. But the problems lie solely in the vagueness of what constitutes exciting 'subversive activities' or encouraging 'feelings of separatist activities.' Like after independence courts had to for many years come up with interpretation of Section 124A of the Indian Penal Code, particularly being concerned with its impact on the right to freedom of speech and other constitutional rights guaranteed to the citizens, a similar long process would ensue in this case to determine a constitutionally justifiable interpretation of these grey areas of this Section.[43] Until they are settled, the scope for them to be misused by the Government and law enforcement agencies is huge which will directly bear impact on the lives of citizens.

An interesting argument has been frequently forwarded by the Government and its ministers that the new criminal laws no longer criminalise 'sedition' (*rajdroh*), but criminalises 'treason' (*deshdroh*).[44] However, the Explanation clause of Section 124A exempted its ambit from comments criticising government that do no excite feelings of hatred and disaffection as defined in the provision. There is no clarity as to how the Government's claim vis-à-vis treason and not sedition as part of the new provision is different from the already existing provision. The major concern that still continues to this day about this provision is its misuse especially by the Government and law agencies to unjustifiable incarcerate people for extended periods in most cases. Such as in the widely alleged case of Umar Khalid which is pointed out by several human rights watchers as a broad over use of power to stifle dissent, rather than the actual punishment for the crime concerned the prolonged criminal proceeding itself becomes the punishment.[45] Creating more ambiguity in this already muddied legal and political domain can only exacerbate the plight of the citizens facing the wrong end of the stick.

Another aspect of the colonial rule which ran on the basis of Victorian morality was that the State was the guardian of the bodies of its subjects. This was more so in case of its relationship

[42] Pandey Anushka, et.al., *Bharatiya Nyaya Sanhita: Decolonising or Reinforcing Colonial idea?* National Law School of India University, Bengaluru, November 18, 2024 22:28 PM nls.ac.in/blog/bharatiya-nyaya-sanhita-decolonising-or-reinforcing-colonial-ideas/
[43] Ibid.
[44] Ibid.
[45] Sharma Ishita, *Four years and counting, Umar Khalid languishes in jail without bail or trail*, The Hindu September 14, 2024.

with colonial subjects. The most consequential of this relationship was borne by women whose bodies and minds were more under the scrutiny of the colonial over-lords in addition to the societal dictums. The language found in sections 74 and 79 concerning 'modesty; stem from that patriarchal heritage that the Indian State inherited as a colonial legacy.[46] Recognising that a discussion on women's modesty revolves more around her moral character and not much on the understanding of sexual violence as a result of violation of her bodily autonomy, Justice Verma Committee recommended the redrafting and rewording of Section 354 of Indian Penal Code. It suggested replacing references to 'outraging the modesty of women' with the term 'sexual assault.' This change was not incorporated in the amendment of 2013 nor is its language changed in this new law.[47]

Questions are being raised by many as to why sections concerning women are clubbed with those concerning children and whether it is deliberate messaging done by the State to signal that woman, like children need protection of the State, which in this case is a patriarch. Another feminist critique had been towards the section 69 of the Act, where sexual intercourse with a woman through 'deceitful means have been emphasised. Here deceitful means incorporates false promise of, employment or promotion or marrying by suppressing identity. The last part marriage by 'supressing identity' has been expressed in many circles as a move against 'love jihad.'[48] In the garb of accusations of 'love jihad' many possibilities of misuse of this law can be imagined. A state which only imagines a woman as a victim, and acts with patriarchal instincts would before considering ingenuity or consent of both parties involved in a sexual relationship might start prosecuting one party in a stranded inter-religious and inter-caste relationship.[49] This tendency has become more so prevalent in the recent years and has been brought forth in many instances in a slew of judgements from both the Supreme Court and the High Courts. Apart from this, abortion rights have still not been expanded to introduce rights-based framework and marital rape is still not recognised in the current Act, which could have been a substantive step towards decolonisation.

[46] Pandey Anushka, et.al., *Bharatiya Nyaya Sanhita: Decolonising or Reinforcing Colonial idea?* National Law School of India University, Bengaluru, November 18, 2024 22:28 PM nls.ac.in/blog/bharatiya-nyaya-sanhita-decolonising-or-reinforcing-colonial-ideas/
[47] Ibid.
[48] Sen Jhuma, *Lawless Laws: The criminal law amendments and 'decolonisation' as an anti-feminist goal*, The Leaflet: Constitution First, April 23, 2024.
[49] Ibid.

It is unfortunate to find that neither in thoughts or in language in section 294 of the Bharatiya Nyaya Sanhita, has the colonial mind been shed and an attempt to developed a post-colonial legislative understanding surrounding obscenity to meet the realities of our times grown. Although the test for determination of what constitutes obscene has grown since R v. Hicklin to the 2014, Supreme Court judgement in Sarkar v. West Bengal, where the apex court held that obscene has to be judged from the point of view of an average person, by applying contemporary community standards. [50][51][52] In recent years, the Supreme Court has often stressed upon constitutional morality and not personal morality to inform what should be criminalised.

Conclusion

When posed with the question of decolonisation a society is basically left with two options, one to fall back to its indigenous knowledge system of law which many countries have already started by reinstalling the ancestral law and, the other one is the effulgent way, where in a heterogenous non-monolithic society pluralistic and discontinuous cultural, religious, and political structures are present in a widely dispersed territorial space.[53][54][55] The challenges and opportunities that come out of attempts to decolonise the criminal laws and by extension the criminal justice system are worthy of exploration as they sprout new avenues of legal enquiry strengthening the justice system and making it more democratic in nature.

Moving ahead of the colonial criminal justice system requires an awareness of the criminal question which is a direct product of the colonial governmentality. [56][57] Decolonising our understanding of what constitutes a criminal act and who can be identified as a criminal are crucial steps in moving towards decolonisation of the criminal question in India. The colonial administration was somewhat ambivalent to the regional and cultural diversity of India that pre-dated their occupation of the Indian sub-continent. But a government of post-independent

[50] Regina v. Hicklin (1868) L.R. 3 Q.B. 360.
[51] Aveek Sarkar & Anr v. State of West Bengal (2014) 4 SCC 257.
[52] *See also* Ranjit D. Udeshi v State of Maharashtra (1965) AIR 881.
[53] Lloyd Lance Lee, *'The Fundamental Laws: Codification for decolonization?'* 2 Decolonization: Indignity, Education & Society 117 (2013).
[54] Flavia Agnes, Law, and Gender Inequality: The Politics of Women's Rights in India (Oxford University Press 1999) 12.
[55] Asha Shaila Alam, *Decolonizing criminal law: a critical appraisal,* Commonwealth Law Bulletin 1-16 (2019).
[56] Aliverti Ana et.al., *Decolonizing the criminal question* 23 (2) Punishment & Society 297-316 (2021).
[57] Scott David, *Colonial Governmentality* in Anthropologies of Modernity: Foucault, Governmentality, and Life Politics, edited by Jonathan Xavier Inda, Blackwell Publishing Ltd. 21-49 (2005).

India must figure out the delicate nuances of locality in context to universality. That is central laws cannot be implemented sweepingly without taking into consideration the cultural fabric of the nation. A bottom to top approach, therefore, is necessary in this regard so as to avoid victimisation of marginalised societies in the name of enforcing law.

The currents of centralisation simultaneously are important, as envisioned by the founders of our country. This centralisation would look forward to incorporate the best practices of global institutions in matters of delivering criminal justice and implementing legislations in the same matters. The role of a democratic governance here would be to allow for the society to be able to adapt to the forces of change but simultaneously adhere the principles of preservation of the cultural fabric of the country. Also, any attempt to decolonise the criminal law or for that matter any law in India would require substantial changes to the institutional framework of the justice system. Although much progress has been achieved in eradicating social ills like caste-based discrimination, a long way is still left. Unless institutions are held responsible and made transparent in its methods of implementing laws, a top-heavy approach to decolonisation would not meet its required goals.

Further, decolonisation should be looked upon as a trend since the very first legislation after introduction of the Constitution in independent India. Laws are not just result of pieces of legislation but also are based on the painstaking interpretation of each section in respect to its constitutional validity set forth by precedents in the courts. Bringing in new legislations are a welcome step only when there is an absolute necessity for them to be introduced, as when a new law is required to address a new social challenge or met a social policy objective. Settled laws when played with has a possibility to create more confusion than solving any problems. And the path of decolonisation does not necessarily have to be to disown any association with our colonial legacy or to give *sanskritized* names in their place to sound it more Indian or indigenous. Decolonisation of the governmentality, which is rigged with colonial legacy, should be a good starting point to meet any meaningful efforts to reach the path of justice for an independent India.