Fettering People's Rights

A Critique of Selected Offences and Punishments in The Bharatiya Nyaya Sanhita, 2023

People's Union for Democratic Rights
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Content

Introduction:

The Winter Session of the 17th Lok Sabha Winter Session concluded with the passage of, arguably, the three most significant post-Constitution legislations, namely, Bharatiya Nyaya Sanhita, 2023 (BNS), Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) and Bharatiya Sakshya Adhiniyam, 2023. These Codes replace the Indian Penal Code (IPC) of 1860, the Code of Criminal Procedure (CrPC), 1973, and the Indian Evidence Act of 1872, respectively.

The three Bills, especially the substantive law- the BNS, had been introduced with a claim that by replacing the existing laws, the goal of justice in the criminal code will be realized. However, a clause wise comparison between the IPC and the BNS, makes it amply clear that the majority of the IPC has been retained. Besides deleting the offences of homosexuality and adultery which had been already nullified by the Supreme Court, and decriminalizing the colonial category of 'thugs', the BNS has introduced only a few, less than a dozen, new offences in the name of an overhaul. The gamut of laws broadly termed as political, or in legal parlance called laws dealing with 'Offences against the State' have remained unchanged with the only exception being the redefinition of sedition. Retributive forms of punishments such as Death Penalty and Solitary Confinement which have been abolished in many liberal jurisdictions, have been retained from the IPC. Greater powers have been reserved for the Executive via the use of broad and ambiguous phrasing of offences which provide scope for law enforcing agencies to interpret at will, a scope that works in tandem with the enhanced police powers envisaged in the Criminal Procedure Code- BNSS (See Box 1).

Box 1: Executive overreach in the BNSS

- Maximum limit of police custody increased from 15 days in the CrPC to 60 or 90 days in BNSS for specific offences (S.187 (2) (3))
- Handcuffs can be used despite the existence of a developed jurisprudence in India against the use of handcuffs (S.43(3))
- Police has powers to make preventive detention without the need to present the person to a judicial magistrate (S.172(2))

For other sections of the BNSS which have an impact on citizen's liberties, see Project 39A's analysis

Given that the offences under the Bharatiya Nyaya Sanhita (BNS) both repeat provisions of the IPC while making some of them more stringent, an important question to consider is their impact on the civil liberties and democratic rights of citizens. Focusing on how the BNS coercively affects the rights of citizens, this report analyses three aspects of the law, which are procedural and substantive. First, the report addresses how an erosion of democratic norms related to legislative conduct, was carried out in the name of 'enactment' in the Parliament. Second, the report offers a study of selected provisions in the BNS that infringe on the legitimate exercise of the Fundamental freedoms. Finally, it comments on the harsher penalties in the BNS which are contrary to the spirit of a rehabilitative criminal justice system.

The Rites of Passage: A Mockery of Legislative Procedure

On 20th December, even as 95 opposition MPs remained suspended, the Lok Sabha passed the three criminal code bills. Importantly, 34 members, of which 25 belonging to the ruling party, participated in the discussion which lasted 3 hours and 10 minutes in the Lok Sabha. Only 3 opposition MPs raised criticisms of the specific provisions in the Bills and highlighted the need to debate on the Bills in the presence of the Opposition. The proposals were disregarded and the Bills were passed without any amendment. A day later, on 21st December, while 46 members remained suspended, the three Codes were passed in the Rajya Sabha with a total of 40 members, of which 30 belonging to the ruling party, participated in a discussion spanning 2 hours and 3 minutes. The three Codes, which overhaul the entire criminal justice system, were passed at a time when a record number of 146 members of Parliament remained suspended and when debates and discussion in both houses did not span any more than 5 hours and 13 minutes, with a token participation of a mere 19 non-BJP members in the entire Parliament. Notably, in the Question Hour all questions asked by the suspended members were removed from the list of questions listed for responses.

The passage of the Codes prior to being tabled a second time in the Parliament in December 2023, was just as curious. While the Home Minister, in the Rajya Sabha exalted the 'democratic' process of consultation with stakeholders since 2019, it is important to remember that the drafts of the Bills were made public only in August 2023 when they were first tabled in the Parliament and subsequently referred to a 30 member Parliamentary Standing Committee for Home Affairs. This was in violation of the Pre-Legislative Consultation Policy which was adopted by the Government of India in 2014, and which mandates the Ministry concerned to publish in the public domain the draft legislation or at least the essential elements of the proposed legislation, its broad implications, for a minimum period of thirty days before introduction in the Parliament.

According to its report submitted on 10 November, the Parliamentary Committee held 12 meetings between August and November 2023, of which a clause by clause consideration of the provisions of the BNS were held over three meetings only. A total of 19 domain experts were consulted by the Committee to review the draft Bills. The Committee claimed that these experts 'welcomed' the Bill for its focus on justice rather than punishments and for creating a citizen-centric legal structure. While submitting the report, the Committee did not append the relevant minutes of the meetings and merely added a disclaimer which said that they will be appended later. All members of the opposition in the Committee, however, spoke to the press about filing notes of dissent, with at least seven of them handing out their dissent notes appended with the Report. The dissenting notes highlight the lack of deliberation within the Committee, the absence of diversity in the domain experts invited, and a clear inclination among those present towards the ruling dispensation. The detailed clause wise recommendations of the Committee based on consultations with the experts and the internal meetings, span a meagre 27 pages, while the Notes of Dissent span close to 150 pages in the final report.

In Parliament, on 12th December the Bills were curiously withdrawn and reintroduced the same day in their second avatar, having incorporated some of the recommendations of the Committee. The reintroduction was listed in the

supplementary agenda of the Lok Sabha, giving no prior intimation to the MPs about the business of the House a day before, as per practice. The glaring absence of the views of the dissenting members in the revised bills were noticeable, as the Bills smoothly sailed through the two Houses causing the most significant legislative upheaval in the Parliament till date (See Box 2 for a historical overview of how the undemocratic law-TADA, was passed and renewed in the Parliament.)

Box 2: History Repeats

The Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA) was an anti-terror legislation with extremely vague provisions and provided for extended period of detention, parallel courts, police confessions as admissible evidence in courts, etc.

- The Law was initially enacted for a period of two years, but extended every two years with the final extension granted in 1993.
- The Conviction rate in TADA as reported in October 1993 by the Union Home Ministry, was 0.81%
- On all four occasions the Bill for extending TADA was introduced along with some other bill in the Parliament that helped deflect the debate

Year	Duration of Parliamentary Discussion on TADA	Members participated
1985	6 hours	34
1987	4 hours	18
1989	1 hour 30 mins	9
1991	3 hours 30 mins	17
1993	1 hour 10 mins	8

Source: Relevant Lok Sabha Debates, cited in PUDR's Lawless Roads, 1993

Globally, India's conviction rate (50%) is significantly lower, and, in January 2023, the Home Minister had stated that India's conviction rate would improve if the then IPC, CrPC and Evidence Act were amended such that there would be a "strengthened" "mechanism of punishment on a scientific basis, so that all the observations of forensic science can be used to punish the criminal". Several months later, the Prime Minister lauded these claims and called the passage of the Bills a historic one. And, in his speech in the Rajya Sabha, the Home Minister claimed that these Codes are 'world-class' insofar as they are advanced and scientific and also 'Bharatiya' insofar as they

recall 'past' principles and are citizen-centric. However, a close reading of some of the offences and punishments in the BNS demonstrate that they are deeply undemocratic and sinister, and that they abridge the constitutional guarantees of people.

Duplication and Redefinition of Offences:

4. **Clause 113: Terrorism**:

The inclusion of terrorism (Clause 113) within the BNS has been explained as the resolution—संकल्प—of the government to make India 'terrorist free'. How exactly is this achieved in the BNS? 'The Statement of Objects and Reasons' to the BNS states that a new offence of 'terrorist acts' has been introduced, when all that BNS does is rehearse the existing sections of the Unlawful Activities Prevention Act (UAPA). As PUDR has noted, there is an almost glaring clause wise reproduction of the most frequently used sections of UAPA, with the characteristic ambiguity of these sections.

For instance, BNS Clause 113(1)(c), which is a replica of S.15(1)(c) of UAPA, reads "whoever…..detains, kidnaps or abducts any person and threatening to kill or injure such person or *does any other act* in order to compel the Government of India, any State Government or the Government of a foreign country or an international or inter-governmental organisation or *any other person* to do or abstain from doing *any act*….commits a terrorist act". If the ambit of terrorist activity willingly includes '*any other act*', and if the list of targeted individuals/groups includes '*any other person*', who are compelled to do or abstain from doing '*any act*', then the crime of terrorism is reduced to just about anything which the executive is at liberty to decide. Such vagueness in language deliberately widens the interpretative scope as it broadens the definition of terrorist activity beyond detention, kidnap, abduction or threat to kill. In short, the use of vague clauses strengthens the executive grip over an alleged accused.

In verbatim, the Subclause 1 of the BNS reproduces S.15 of the UAPA (Terrorist Act), Subclause 2 reproduces S.16 (Punishment for Terrorist Act), Subclause 3 reproduces S.18 (Punishment for Conspiracy), Subclause 4 reproduces S.18A (Punishment for organising of terrorist camps), Subclause 5 reproduces S. 20 (Punishment for being

member of terrorist gang or organisation), Subclause 6 reproduces S.19 (Punishment for harbouring), and Subclause 7 reproduces S.21 (Punishment for holding proceeds of terrorism). The BNS Clause on "Terrorist Act' ends with an *Explanation* which states that it is up to the police, not below the rank of a superintendent of police, to decide whether a case will be registered under the purported section of the BNS or the UAPA. The duplication of the offence leaves the following questions unanswered.

- What is the purpose of having two laws which have the same ambit of criminality?
- UAPA is a special anti-terror legislation which creates its parallel regime of investigation, arrest and trial. Since its provisions have been reproduced in BNS which is an ordinary code, how can the same offence be tried under a special law in one instance and under an ordinary law, in another? Does this mean that certain acts alleged to be terrorist will be ordinary in one instance and extraordinary in another?
- What is the rationale of entrusting a police officer to decide when to use the UAPA or the BNS against acts which are similarly defined in both?

From PUCL's five year study of the NCRB data on number of people arrested and convicted under UAPA, it is evident that the conviction rate is an abysmal 2.8%. Undoubtedly, this figure would be far lower if statistics were available on the rate of acquittal in these cases which reach the higher judiciary in appeal. In 2022, according to the NCRB, 41 persons were convicted as against 172 acquittals and 15 discharges. If one looks at the NCRB figures for cases in which trials were completed, then again it shows that only in a mere 18.2% cases, conviction was ordered in 2022. However, despite the low conviction rate, the total number of cases registered under the UAPA have continued to rise. In 2022 alone, as per the NCRB figures, 1005 new cases of UAPA were registered, and 4037 cases were pending investigation by the year end, with an 80% pendency rate on police disposal of UAPA cases. In short, government statistics bear witness to the fact that the UAPA, in a majority of cases, stands as a misapplied law whose overbroad application is premised on its vaguely worded provisions.

Since the BNS's clause on terrorism closely follows some of the oft-used sections in the UAPA, such a duplication will probably lead to an amplification in the total number of registered cases under the BNS or under the UAPA, or both. But will such amplification help undertrial prisoners who remain incarcerated for long years? Because, what remains unanswered is how such a duplication in the BNS will help address the lengthy pre-trial detention period, a problem that is evident from the fact that 3558 cases were pending trial in 2022. Equally, how the BNS can help change the long-drawn struggles that prisoners via their lawyers have had to fight for securing bail, remains unclear. Since no clarity has been provided on the intent of duplication in the Parliament, there is no understanding of how the bringing in of terrorism in the general law, in addition to a special law, will change the coercive and inefficient ways in which terrorist acts continue to be investigated and judicially dealt with.

The Home Minister in the Parliament rhetorically remarked that none except the terrorists should be afraid of the new law. But given the rate at which the ambiguous, overbroad provisions of UAPA have been used against journalists, activists, human rights defenders, etc under successive governments (see here and here), and considering the fact that the BNS reproduces the same law, the offence can be a threat to anyone. The infamous Bhima-Koregaon conspiracy gives a microcosmic view of why the terrorism discourse in the country must be a concern for everyone, as human rights activists, journalists and lawyers have spent years behind the bars waiting for over five years for the trial to begin. Some have been granted bail on the glaring statement by various levels of courts that there is no evidence to support their involvement in any terrorist act. Given that the regime of UAPA has been restrictive of the exercise of our Fundamental Freedoms guaranteed under Article 19 and 21 of the Indian Constitution, the BNS clause will also deleteriously impact the constitutional guarantees, is not just a presumption (see Box 4).

Box 3: BNS and BNSS have implications for Constitutional Guarantees such as:

- **Article 19 (1)** Right to freedom:
  (a) to freedom of speech and expression
  (b) to assemble peaceably and without arms
  (c) to form associations or union

- **Article 21:** Right to Life and Personal Liberty
- **Article 22:** Protection against arrest and detention in certain cases.
  The protection includes the right to be informed of grounds of custody, right to be defended, right against arbitrary detention

5. Clause 152: Redefined Sedition

One of the much-touted achievements of the new era laws is the abolition of the offence of sedition (S 124 A IPC) for its chilling effect on the right to freedom of speech and expression, guaranteed under Article 19 of the Indian Constitution. In his speech in the Rajya Sabha, the Home Minister reiterated that the colonial era section had been deleted. However, he vociferously stated, that if anyone were to defame the nation, then that should be considered a grave crime and that such a person should be prosecuted accordingly. Hence, BNS Clause 152 re-states many of the objectives of S 124 A IPC under a new head. The redefined offence of sedition now criminalizes acts and expressions 'exciting secession or armed rebellion or subversive activities', or 'encouraging feelings of separatist activities' or 'endangering sovereignty, or unity, and integrity of India'. Much like Clause 113 defining 'Terrorist Act', this section too works with ambiguous phrases which have no definition in law like 'sovereignty of India', 'subversive activities' etc. Sedition law worked with an identified target which was the government of India and criminalized expressions of disaffection against it. While the BNS clause overtly does not criminalize expressions against the government, the wide and ambiguous wordings are broad enough to also include anti-government expressions.

The position in law on political speech has evolved in India and the judiciary has settled it that for an expression to be criminalized, it must tend to violence or incite violence. The BNS clause does not import the necessary criteria of incitement to violence in restricting acts and expressions. Going by the clause, perfectly peaceful and democratic acts critical of the ruling dispensation can be labelled as 'subversive',

and thus criminal. Since it will be up to the investigating agency to determine whether a given crime should fall under S. 152 or not, it is hardly clear whether the use section will not be politically motivated, as was obvious in the indiscriminate use of sedition section in the IPC. Much against the projection made by the government that it wants to repeal the sedition law and that it has exhibited the necessary political will to do so, the NCRB figures are suggestive of an increasing use of S 124A by the government, with 76 FIRs registered in 2021 alone, the year in which the constitutional validity of the law had been challenged in the Supreme Court. It must be recalled that the sedition law had been suspended by the Supreme Court in May 2022 pending review. Importantly, in Court, the government had opposed all efforts at invalidating the law and had urged the Court not to intervene and had asked for time for a re-examination of the law by the Executive. The Law Commission which was entrusted with the task of reviewing the law by the MHA in 279th report tabled in May 2023, had recommended for the law to be retained. The replacement of erstwhile sedition law with new clause in the BNS with an even broader scope and ambiguity, and which allows full reign to the Executive over its implementation, needs to be viewed within this timeline of events.

6. Other speech-restrictive provisions

The BNS has not only revamped sedition but also retained other colonial provisions which have been historically notorious for casting a chilling effect on the constitutional right to speech, such as outraging religious feelings and insult to religion (Clauses 296, 297), defamation (Clause 354), etc. In addition, the BNS adds another speech-restrictive dimension to an existing provision, 'Imputations, assertions prejudicial to national integration' (S 153B, IPC). This extremely wide provision of the IPC which penalized all forms of expressions that threaten national integration and promote communal disharmony, has been incorporated as Clause 197 in the BNS with an addition. It now makes punishable to 'make or publish false or misleading information, jeopardising the sovereignty, unity and integrity or security of India'. Characteristic of the revisions made in BNS, this provision too allows interpretative liberty to the Executive to decide on what is 'misleading', and whether or not it will

'jeopardise' a definition-less construct called 'sovereignty, unity, integrity and security of India'.

A Regime of Harsher Punishments:

Contrary to the Prime Minister's assertion that the new criminal justice system is directed towards a "new era" of "laws centred on public service and welfare", and the Home Minister's view that the laws are "victim centric", the specific provisions of life imprisonment and death penalty in the BNS envisages a harsher regime of punishments than what was before, besides the reproduction of the punishment of solitary confinement from the IPC.

Death Penalty: Besides continuing with the crimes that already attract death sentence in the existing IPC, the BNS has introduced four new offences which are punishable by death, namely- gang rape of a woman under 18 (Clause 70(2)), murders by a mob (Clause 103 (2)), Organized Crime (Clause 111), Offence of a Terrorist Act (Clause 113). The total number of offences punishable by death in the BNS has risen from 11 to 15. PUDR has argued that such a step is contrary to the judicial trend of declining death sentences, globally as well as from the recent jurisprudence emerging from the Supreme Court.

Focusing on mob lynching (Clause 103 (2)), a new crime under the BNS which the Home Minister drew attention to, it is worth noting that the provision of death penalty has been reserved for murders committed by a "group of five or more persons" "on grounds of race, caste, community, sex, place of birth, language, personal belief or any other similar ground". But how can premeditated intent necessary for determining the 'rarest of rare' crime be determined in a "group of five or more persons", who need not necessarily be part of an organized crime (Clause 111) or a terrorist act (Clause 113)? The case of Organized Crime (Cl 111) is equally damning as the offence has been modelled on the existing state special laws such as the Maharashtra Control of Organised Crime Act (1999), and the Gujarat Control of Terrorism and Organised Crime Act (2015), etc. Vaguely worded, the BNS' definition of

organized crime lacks clear-cut definitions for categories such as 'gang', 'mafia', 'crime ring', 'gang criminality', and where 'organized crime syndicate' is defined as a 'criminal organization' without any clarity on the meaning of the latter. Such vaguely worded and ambiguously phrased language is particularly disturbing as one of punishments under this offence is that of death penalty.

In March 2023, while reviewing the death sentence awarded to Surendra Koli in the infamous Nithari killings, a three-member bench of the Supreme Court had stated that the "rarest of rare" doctrine requires that the death sentence not be imposed only by taking into account the grave nature of crime but only if there is no possibility of reformation in a criminal'. (Para 89 of *Review Petition (Crl.) Nos 159-160 of 2013*). Importantly, in the dictionary a mob is defined as a "large crowd of people, especially one that is disorderly and intent on causing trouble and violence". In short, the higher presence of death penalty provisions in the BNS as well as the specific provision of mob lynching is contrary to the received jurisprudence which advocates strict standards for determining rarest of crimes while retaining its the belief in reformation of criminal.

Life Imprisonment: While the definition of life imprisonment remains as "imprisonment for life" in the General Chapter on punishments in the BNS, the damning clause, "till the end of natural life", has been conveniently retained for specific offences. More importantly, unlike the erstwhile IPC which had first introduced the punishment till end of life for specific sexual offences, the BNS uses the end-of-life punishment for a larger number of offences. As argued by PUDR, the contradictory purpose—of revising the general definition but retaining the end-of-life clause in specific offences—is two-fold. "For one, the punishment regime under the BNS is a harsher one as it includes a longer list of offences, as compared to the IPC, for which imprisonment for life till the end of natural life can be awarded. Second, the BNS reflects the tendency of the higher judiciary, which has, of late, interpreted life term as the end of a convict's natural life without remission as an alternative to the death penalty (*Union of India v. V Sriharan @Murugun*). However, unlike the Courts which have favoured

imprisonment till end of natural life as a replacement for Death Penalty, the BNS has reproduced and enhanced both categories of non-reformative punishments- death penalty and life term till the end of natural life."

Conclusion: Towards Prison

Offences such as terrorism and acts endangering sovereignty and unity of India with increasing scope and expansive ambiguity suggest that the attempt is to cast the net wider and unfurl a regime of incarceration by criminalizing legitimate political acts. The thrust of harsher punishments and increased offences which jail people until death make it clear that the new penal code is a pro-imprisonment one. As per the recent Prison Statistics (2022), there were a total of 573,000 prisoners across 1330 prisons in India. The figure of undertrials stood at 75.8% and the occupancy rate rose to 131.4%, a figure higher than the previous two years. The figures are stark and they suggest that despite the decrease in prison population by 5% in 2022 because of the campaign undertaken by National Legal Services Authority and which identified 25000 undertrial prisoners eligible for release, the prison population has only grown. Prison conditions particularly those related to health and medical facilities continue to remain harsh and anti-prisoner. Given this reality, it is hardly conceivable that we need a penal code that is likely to increase the already burdened and inhospitably confined prison population. And yet, that is what the BNS purportedly points to and time will tell the extent to which the BNS will tilt the balance of the criminal justice system towards greater incarceration and retributive justice.