

## **Re-Writing Criminal Law in India**

Kamran Adil

### **Intrdouction**

The Government of India Act, 1833 (often known as the Charter Act, 1833) authorized the East India Company to enact laws for the British India and to govern it as a government. Under the law, a Law Commission was established that was headed by Lord Macaulay. The Law Commission started working in 1833 and by 1837, it had done its basic work. One of the founding principles of the Law Commission was codification of laws. The codification of laws was primarily influenced by the works of Jeremy Bentham who insisted on the necessity of codification of laws for the sake of clarity and uniformity. Accordingly, codes of penal and procedure laws were prepared. The Indian Penal Code, 1860, the Code of Criminal Procedure, 1898 and the Indian Evidence Act, 1872 were drafted under the same auspices and the approach of codification was symbolized through these legislations.

After the Independence in 1947, Pakistan and India tried to reform their criminal laws as an expression of decolonization and in order to meet the expectations of their citizenry. Pakistan's experience of re-writing and reforming the criminal laws was initially eclipsed by the religious considerations resulting in Hudood laws in 1979, the Qanoon-e-Shahadat Order in 1984 and Qisas and Diyat laws in 1992. This, however, changed in the following years and the law reforms was shaped by the global trends and necessities. The criminal laws, therefore, related to juvenile protection (under the obligations of the UN Convention on the Rights of Children), women protection (the anti-rape law) and terrorism (under the international obligations emanating out of the Financial Action Task Force and the international soft law of the United Nations Security Council Resolutions) were enacted. On the other hand, India undertook major hauls of its criminal law reforms. It was able to revise its Code of Criminal Procedure in 1973. In another major effort, at the end of 2023, it was able to re-write its three major criminal laws. The instant write up will briefly explore the new laws by highlighting salient features of these laws:

### **1. Vernacular Titles**

Semantics is perhaps the main feature of the latest re-writing of the three criminal laws in India. Living up to its reputation, the ruling party of the India Bharatia Janta Party (BJP) has changed the titles of the three laws with vernacular titles with Hindutva fervor. By repealing the colonial names, new vernacular names of the laws have been provided; these are:

- i. The India Penal Code, 1860 (IPC) repealed and re-enacted as ‘Bharatiya Nyaya Sanhita’(BNS)-literally translated as Indian Justice Code;
- ii. The Code of Criminal Procedure, 1973 (Cr. P. C) repealed and re-enacted as ‘the Bharatiya Nagarik Suraksha Sanhita’ (BNSS)-literally translated as Indian Citizen Protection Code;
- iii. The Indian Evidence Act, 1872 repealed and re-enacted as ‘the Bharatiya Sakshya Adhinyam’ (BSA)-literally translated as Indian Evidence Law.

## 2. Salient Features of the Bns

Broadly, the BNS retains the features of the repealed IPC. Its salient features are:

- i. Community service has been added as a punishment under the law allowing it to be slated as alternate punishment (section 4);
- ii. There is now a dedicated chapter on the offences against ‘woman and child’ in the penal code (Chapter V);
- iii. The definition of rape included in the law is not gender neutral and still only covers rape with a woman (section 63). In 2021, through the Criminal Law (Amendment) Act, 2021, Pakistan introduced a gender neutral definition of rape in its law;
- iv. Disclosing identity of victim of rape has been criminalized (section 72);
- v. Sexual harassment has been criminalized as part of the main penal code (section 75);
- vi. Voyeurism against women is a new offence (section 77);
- vii. Stalking has been criminalized and the old law of criminal intimidation has been modified to include use of technology (section 78);
- viii. Procurement of a child has been added as a new offence (section 96);
- ix. Buying and selling children for prostitution/illicit intercourse criminalized (sections 98 and 99);
- x. New offence of organized crime has been added to the statute. The definition of organized crime is quite expansive and includes kidnapping, robbery, vehicle theft, extortion, land-grabbing, contract killing, economic offence, cybercrimes, trafficking of persons, drugs, weapons, illicit goods (section 111);

- x. Petty organized crime has been provided as a separate category of offences. It includes selling tickets, unauthorized betting and selling examination papers (section 112);
- xi. The law of terrorism was earlier stated in the Unlawful Activities (Prevention) Act, 1967. The BNS has defined terrorist act and there is confusion as to the special law or the general penal code will apply in terrorism cases. (section 113);
- xii. Offences of trafficking in persons and forced labour have been made part of the general criminal law (sections 143, 144, 145 and 146). In Pakistan, these laws are covered under special laws and dedicated agencies deal with these offences;
- xiii. The offence of sedition has been removed from the statute book and is not part of the offences against the state;
- xiv. The new penal code has only about 358 provisions as against over 500 provisions in the IPC;
- xv. The date of coming into force of the law is not provided in the law. It is expected to come into force in mid of 2024.

### **3. Salient Features of the Bns**

The second major law is the BNSS, which deals with the criminal procedures; its noteworthy points are:

- i. Definitions of 'audio-video electronic' and 'electronic communication' added to the criminal procedure code. The process serving and proclamation of court orders are later linked through these means (section 2(1) (a) and (i));
- ii. The state governments/provincial governments have been authorized to confer power of executive magistrate to a Commissioner of Police or Superintendent of Police (sections 14 and 15). The commissioner system of police is prevalent in some cities in India and this law supplements the police laws on the subject;
- iii. Unlike Pakistan's laws, where dedicated criminal prosecution services have been established in the provinces by special provincial laws, the BNSS provides for a directorate of prosecution for every state government (section 20);
- iv. The powers of police to arrest without a warrant is a very important area of law enforcement. The BNSS expands the powers to police for arresting without a warrant. Now these powers include cases when a police officer is obstructed from execution of his duty. Likewise, the arrest without warrant is permissible if the accused is

- requisitioned to be arrested on the request of another police officer (section 35);
- v. The law of notices has been added in the code to authorize police officer to issue notice before arrest (section 35);
  - vi. The accused has been provided right to meet a lawyer of his choice (section 38);
  - vii. The forms of process serving of summons has been allowed through an encrypted, or electronic communication, or through digital signatures (section 63);
  - viii. The search of a place shall be carried out preferably through audio-video electronic means (section 105);
  - ix. Police has been given power to seize property for the purpose of investigation (section 106);
  - x. The processes for international and national cooperation in criminal matters has been clarified (section 112);
  - xi. Forfeiture law regarding property and crime proceeds has been strengthened (sections 118, 119, 120 and 121);
  - xii. Empowering police to take preventive actions is an important coercive legal power. In Pakistan, under Section 21 of the Anti-Rape (Investigation & Trial) Act, 2021, police are required to prevent offences against women even if the offence is not in their area of jurisdiction. Predicated on the same concept, the law provides detailed preventive powers for police (sections 168 to 172);
  - xiii. The period of detention with police for remand can be extended up to ninety days if the offence is of heinous nature (section 187);
  - xiv. The final report on the completion of investigation may be submitted within a period of two months from the date of receipt of information in cases related to women and children (section 193);
  - xv. Plea-bargaining has been added as a permanent feature of criminal justice processes (section 289);
  - xvi. All medical officers have been obliged to treat the victims (section 397);
  - xvii. The state/provincial governments can notify witness protection schemes (section 398);
  - xviii. There is a specific provision for making mercy petitions in death sentences cases (section 472).

#### **4. Salient Features of the Bsa**

- i. The legal definitions of the terms ‘document’ and ‘evidence’ to now include digital documents and electronically generated statements (section 2);
- ii. While reproducing the Indian Evidence Act largely, the law covers the electronic evidence/records and statements;
- iii. The person dealing with retrieving, storing and processing of digital evidence has been included in the definition of an expert (section 39) to protect technical persons from attending courts for testimonies;
- iv. Admissibility of electronic evidence has been legalized. For this, detailed processes with elaborate caveats have been laid out. The persons submitting electronic evidence has to certify about the chain of custody (owned, or maintained, or managed, or operated) and the type of algorithm through which data/information obtained (SHA1, or SHA256, or MD5, or any other) have to be declared (section 63);

#### **Concluding Remarks**

Though the laws have been passed from the parliament, these have yet to come into force on a date to be notified. It may be noted that the re-writing of these new laws have yet to be integrated into the larger legal system. The ruling BJP in India is busy with weaponizing the criminal prosecutions as it is using criminal, administrative and regulatory laws for disqualifying and excluding political opponents; the abuse of criminal laws can take away the merit of the new amendments, if any.