# BEATING THE COLONIAL POWERS AT THEIR GAME

## The Draconian New Criminal Laws

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ALL INDIA LAWYERS ASSOCIATION FOR JUSTICE


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# 1. Introduction:

In December of 2023, the Bharatiya Janata Party (BJP), during the winter session of the Parliament, pushed through three crucial laws – Bharatiya Sakshya Sanhita, 2023 (BSS, 2023 in short), Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS, 2023 in short) and Bharatiya Nyaya Sanhita, 2023 (BNS, 2023 in short) replacing the Indian Evidence Act, the Code of Criminal Procedure and the Indian Penal Code respectively. These new Criminal Codes were granted Presidential assent on 25th December 2023, but do not come into force until a notification[1] to this effect is issued by the Union government.

The new criminal laws effectively alter a small percentage of the existing provisions in the IPC, CrPC and Evidence Act; majority of changes are primarily an exercise in re-numbering and/or re-structuring of existing provisions.

A portion of the changes that have been incorporated into the new criminal laws are necessary, and urgently required even. This includes the statutory basis to "zero FIRs" (section 173(1) of BNSS), decriminalisation of homosexuality (as a result of the Supreme Court judgment in *Navtej Singh Johar and Ors vs. Union of India*[2]), introducing a time limit for completing investigations (Section 193(9) of BNSS) among few others. The significant changes introduced vide the BSS, 2023 is the recognition of electronic evidence as primary evidence (section 57) and the expansion of the scope of secondary evidence (section 58).

Of concern though are the changes, though small in number, which alter in substantial measure the basic character of the criminal justice system in India. These changes are pernicious, and have consequences that are far-reaching for human rights and civil liberties in the country. These include among others introducing terrorism offences similar to the UAPA, handcuffing and increasing police remand from 15 to 90 days. It is widely known that the criminal justice system in India has been weaponised against religious minorities, other vulnerable communities like Dalits and Adivasis and the poor. The new codes, by diluting the right to free and fair trial, attacking the presumption of innocence and effectively sanctioning breach of Fundamental Rights by the law enforcement agencies – only seek to further entrench a system of oppression through law which will be wielded against the vulnerable. This booklet will provide a close reading of some of the most glaring concerns.

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[1] In this regard the following provisions of the three laws need to be seen:
- Section 1(3) of BNSS, 2023 states that the law shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.
- Section 1(2) of the BNS, 2023 states that the law shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Sanhita.
- Section 1(3) of the BSA, 2023 states that the law shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

[2] AIR 2018 SC 4321

Before getting into these provisions though, it is necessary highlight the concerning manner in which these new Criminal laws have come to be passed, bypassing of the rules of procedure in Parliament. The laws – which will have an oversized impact on the everyday lives of people – were passed without much debate in a Parliament that saw the unprecedented suspension of 146 Opposition MPs (i.e. almost all members of opposition). The criminal laws were passed through what has come to be the ubiquitous way of passing bills - through a voice vote of ruling party members. History will judge the BJP for the manner in which it bulldozed these laws in Parliament, making a mockery of parliamentary democracy.

The consequences of undermining parliamentary democracy and denying any debate and discussion before passing laws is seen in the truck drivers protest that engulfed large parts of the country in the first week of January, 2024. This was the first public outburst in regard to these new criminal laws. Their anger was in response to BNS introducing section 106 to replace section 304A of the IPC (causing death by negligence), which increases the punishment for hit-and-run accidents and deaths due to rash driving from 2 years to 10 years, and criminalises fleeing the scene or failing to report the incident, which carries a maximum sentence of ten years. Truck drivers argue that they are economically weak and will be hit hard by such increased punishment. They also claim that the Union government has failed to understand that more often persons flee from accident spots to evade mob (in)justice. Incidentally, the Union home secretary Ajay Bhalla had met with the truck drivers unions and promised that the new law would only be implemented after holding discussions with them. This affirms the argument that Maansi Verma[3] makes that with the Union government rendering parliament virtually powerless to enforce procedures in law making, it is either the court of people or the court of law which can deter the government from making laws in such "illegal' ways". Leaving aside whether the courts of law would hold the Union government accountable, suffice to say that the hope truly lies in the court of the people. The truck drivers have followed the farmers who came out against the three Farm Laws, the working class whose struggle has left the Labour Codes in limbo, and the struggle of the Muslim community against the communal Citizenship Amendment Act. In the coming days, many such agitations are inevitable as the consequences of these new criminal laws becomes apparent to the people.

# 2. Attacking the premise of presumption of innocence and facilitating profiling:

Some of the provisions in the new codes detailed below are concerning in how they undermine the criminal law principle of presumption of innocence - the bedrock of the Indian Criminal Justice System - which the Courts have also upheld as available to all accused. This principle has been reduced to an empty formality by some provisions of BNSS.

### 2.1 Publicising accused details:

Section 37 of BNSS mandates the "prominent display", both physically and digitally, of the name, address and the nature of the offense of an arrested accused, in every police station and district headquarters. This provision violates the right to privacy and human dignity of a person, and

[3] "The 'Illegal' Ways of Law-Making by India's Parliament", https://thewire.in/law/the-illegal-ways-of-law-making-by-indias-parliament

facilitates the profiling and targeting of individuals prior to any formal conviction. Moreover, statutorily sanctioning the Accused through public profiling compromises an objective investigation into offences they are accused of.

**2.2 Statutorily mandating handcuffing:**

Another attack on the presumption of innocence and human dignity of accused persons is the introduction of handcuffing in the BNSS, which was not only was absent in the CrPC but was held by the Courts to be prima facie inhuman, unreasonable and akin to zoological strategies repugnant to Article 21.

Section 43(3) of BNSS, by permitting handcuffing, directly contradicts the Supreme Court's stance that public handcuffing violates the right to dignity. The BNSS also undermines the rights of accused individuals by allowing the use of handcuffs during arrests, if the person fits the criteria of a habitual repeat offender, an escapee from custody, or if they stand accused of certain offenses like organized crime or terrorist acts.

The stance of the Supreme Court on handcuffing has been unequivocal and clear. Faced with repeated instances of handcuffing, the Supreme Court has consistently disapproved of the practice, by terming it inhuman. The Supreme Court, in a host of cases, has issued a slew of directives limiting/restricting the use of handcuffs, detailing the procedure to be followed while handcuffing, including that it must be resorted to only as a last resort and only in exceptional circumstances, and on orders of the Magistrate. The Supreme Court has also repeatedly stated that the insurance against escape does not compulsorily require handcuffing.

In *D.K. Basu versus State of West Bengal*[4], the Supreme Court, while setting out the rights of accused persons while being arrested or in custody, clarified that handcuffing violates all standards of decency. Handcuffing is the last resort and should not be followed as a custom. It added that: *"The use of handcuffs or leg chains should be avoided and if [required] at all, it should be resorted to strictly in accordance with the law repeatedly explained and mandated in judgement of the Supreme Court in Prem Shanker Shukla versus Delhi Administration (1980)."* To recall, the Supreme Court in *Prem Shanker Shukla v. Delhi Administration*[5], unequivocally stated that employing handcuffs is abhorrent to human dignity and infringes upon Article 21 of the Indian Constitution.

**2.3 Further dilution of safeguards for accused persons:**

The presumption of innocence inures in favour of the accused and coupled with the guarantee of right to life, implies that the accused persons have to be treated with dignity. It is in this respect that the Supreme Court has repeatedly clamped down on arbitrary treatment of accused persons. In this regard, the dilution of rights of the accused, introduced by the court particularly in D.K.Basu v. State of West Bengal (supra) is shocking. One of the guidelines required that details of interrogating officers must be entered into a register, to enable accountability. This has been deleted. So too, the mandate that memo of arrest must detail the time and place of arrest has been deleted. The guidelines also require that an arrested person must be examined in a public hospital every 48 hours. As opposed to this, the Code mandates an initial medical examination, and grants

[4] (1997) 1 SCC 416
[5] (1980) 3 SCC 526

discretion to the medical practitioner to conduct one more examination of the arrestee if the practitioner finds it necessary.

### 2.4 Attachment/forfeiture of properties pending trials:

Sections 115 – 122 of the BNSS, Chapter VIII titled "Reciprocal arrangements for assistance in certain matters and procedure for attachment and forfeiture of property", contemplates attachment of property that is deemed to be the proceeds of a crime even before the trial has concluded.

Section 115 empowers the Court to order the attachment or forfeiture of such property, which it has *"reasonable grounds to believe"* that any property obtained by any person *"is derived or obtained, directly or indirectly, by such person from the commission of an offence"*. This section is similar to section 105-C of the CrPC. Indeed the entire Chapter VII is similar to Chapter VII-A of the CrPC (which was introduced vide amendment to the CrPC in 1993).

In regard to this section, reference has to be made to the judgment of the Supreme Court in *State of Madhya Pradesh Vs. Balram Mihani & Ors.*[6] which interpreted the provisions in Chapter VII-A of the CrPC and rejected the argument that the said chapter was meant for general offences and the properties earned out of those general offences in India. The Supreme Court conclusively held that the entire Chapter VIIA of CrPC is not applicable in relation to general offences under the Indian Penal Code and it is only applicable to situations, where an offence is committed in a contracting country. In doing so the Supreme Court also concluded as follows: *"Lastly, we cannot ignore the likely misuse of the provisions in Chapter VIIA if the whole Chapter is made applicable to the local offences generally"*.

In the first instance, this provision allows for attachment of property pending trial, which is in contradiction of the fundamental principle of "*innocent until proven guilty*". Secondly, this attachment is permitted without specifying any rights for the aggrieved to challenge orders or what happens if the trial results in an acquittal. Moreover, there is no clarification that this does not apply to local offences as held by the Apex Court in *State of Madhya Pradesh Vs. Balram Mihani & Ors*, and is likely to be misused.

# 3. Attack on the Right to Free and Fair Trial:

### 3.1 Trial by video conferencing:

The BNSS introduces the risky proposition of trial by video conferencing at the cost of the accused's right to a free and fair trial. Currently, only the physical presence of the accused in court can be substituted by video conferencing**.** However, the proposed Bill extends this to encompass the entire trial process, including cross-examination, conducted through video conferencing. This represents a direct infringement on the accused's right to mount a proper defence, as the efficacy of defending oneself would be significantly compromised in a virtual environment. [see sections 187(4) (BNSS, 251(2), 262(2), 265(3), 266(2) 308, 310 of the BNSS]

[6] [(2010) 2SCC 602]

### 3.2 Waiver of the right to trial:

Yet another assault on the right to a fair trial is contained in section 356 of the BNSS, which introduces the unconstitutional and impermissible concept of a *"waiver of the right of trial"*. The BNSS proposes that in the cases where an individual declared as a proclaimed offender has fled to evade trial, the right to a fair trial is deemed to have been waived. Consequently, the Court is empowered to carry on with the trial as though the individual were physically present, effectively undermining the fundamental principles of the right to be heard.

### 4. Undermining victims' access to justice and their fair treatment:

Victims of crimes had a marginal role in the criminal justice system that focussed on the prosecution of the accused by the State. The victim, the de facto sufferer of a crime, was a mere spectator with a limited role. However, criminal jurisprudence has evolved to now include the victim in the criminal justice process. Notable to mention is the *"Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power"*[7] adopted by the United Nations General Assembly recognises four principles of right for victims of crime – access to justice and fair treatment, restitution, compensation, and assistance. These have found their way into criminal jurisprudence through legislations and judicial interpretations.

Access to justice and fair treatment of victims are fundamentals of criminal law today, which includes the registration of FIRs and the right to be heard at various stages of the prosecution.

While section 173(1), BNSS provides statutory force to the existing principle of law, as developed through case law, on the registration of FIRs online and of *"Zero FIRs"*[8], the remainder of the provision dilutes the legal position on registering an FIR in the first place.

Under the BNSS, the police are not required to as a right register an FIR based on a complaint on a category of cases which is punishable with three years but less than seven years. Instead the police are given the option to hold "preliminary inquiries" and determine if a "prima facie" case exists before registering an FIR. This is dangerous because it provides the police arbitrary discretion, contrary to the decision of the Constitution bench of the Supreme Court in *Lalita Kumar vs. Government of Uttar Pradesh*[9].

In the *Lalita Kumari's* case the Supreme Court mandated that registration of FIR is mandatory, if the information discloses commission of a cognizable offence. No preliminary inquiry is permissible in such a situation. However, If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not and if the inquiry discloses the commission of a cognizable offence, the FIR must be registered. It was specifically held that the police officer cannot avoid his duty of registering offence if a cognizable offence is disclosed and action must be taken against erring officers who do not register an FIR if information received by him discloses a cognizable offence. The Court was conscious of the dangers of granting discretion to the police to register FIRs, and held that any discretion, option or latitude allowed to the police in the matter of

[7] http://www.un-documents.net/a40r34.htm

[8] Zero FIR refers to a FIR that is registered at a police station irrespective of whether the alleged offence has occurred within its jurisdiction. The said FIR is then to be transferred to the police station that has the actual jurisdiction.

[9] (2014) 2 SCC 1

registration of FIRs, can have serious consequences on public order and will adversely affect the rights of the victims including their right to equality.

Indeed, the Supreme Court took judicial notice of the fact that the number of FIRs not registered is approximately equivalent to the number of FIRs actually registered and held that this is a clear violation of the rights of the victims of such a large number of crimes. It further added that *"burking of crime"* (turning away turn away complainants without registering their complaints is described as "burking" in police parlance), leads to dilution of the rule of law in the short run; and also has a very negative impact on the rule of law in the long run since people stop having respect for rule of law. Thus, non-registration of such a large number of FIRs leads to a definite lawlessness in the society.

Section 173 of the BNSS has the effect of giving statutory backing to the vice of burking of crimes, much to the detriment of victims and society at large.

## 5. Sanctioning custodial violence – enhancing police custody from 15 days to 60/90 days:

Courts have repeatedly[10] expressed concern at the atrocities perpetrated by the protectors of law — namely, the police.

In *Dalbir Singh vs. State of U.P and Ors*[11], the Supreme Court declared that the *"dehumanizing torture, assault and death in custody which have assumed alarming proportions raise serious questions about the credibility of rule of law and administration of criminal justice system"*. It went to add as follows: *"If it is assuming alarming proportions, now a days, all around it is merely on account of the devilish devices adopted by those at the helm of affairs who proclaim from roof tops to be the defenders of democracy and protectors of peoples' rights and yet do not hesitate to condescend behind the screen to let loose their men in uniform to settle personal scores, feigning ignorance of what happens and pretending to be peace loving puritans and saviours of citizens' rights."* The Court further declared that *"unless stern measures are taken to check the malady of the very fence eating the crops, the foundations of the criminal justice delivery system would be shaken and the civilization itself would risk the consequence of heading towards total decay resulting in anarchy and authoritarianism reminiscent of barbarism"*.

Limiting police custody is one of the protections afforded to accused persons. It is settled law that police remand under section 167 of the CrPC, cannot be granted for the asking, and the Courts, cognizant of torture and forceful confession of crimes, have issued mandatory guidelines to protect

[10] Gauri Shanker Sharma v. State of U.P. (AIR 1990 SC 709), Bhagwan Singh and Anr. v. State of Punjab (1992 (3) SCC 249), Smt. Nilabati Behera @Lalita Behera v. State of Orissa and Ors. (AIR 1993 SC 1960), Pratul Kumar Sinha v. State of Bihar and Anr. (1994 Supp. (3) SCC 100), Kewal Pati (Smt.) v. State of U.P. and Ors. (1995 (3) SCC 600), Inder Singh v. State of Punjab and Ors. (1995(3) SCC 702), State of M.P. v. Shyamsunder Trivedi and Ors. (1995 (4) SCC 262), Shri D.K. Basu v. State of West Bengal (JT 1997 (1) SC 1)

[11] AIR 2009 SC 1674.

accused persons while in police custody. In *CBI vs. Anupam J. Kulkarni*[12], the Supreme Court clarified that the accused can be remanded to police custody only for up to fifteen days within the first fifteen days of the accused being presented before the Magistrate after their arrest.

In what can only be seen as overruling the judgments of the Supreme Court and granting sanction for custodial violence, section 187 of BNSS which deals with the duration of police custody, enhances policy custody from the present limit of 15 days of police custody under section 167 of the CrPC, to 60 or 90 days (depending on the offence). This prolonged custody period would expose the accused to intimidation, torture and danger, thus infringing upon their right to life and right to a fair trial.

It is to be noted that when the Standing Committee considered first version of the Bills, they noted that extending police custody has potential for misuse, stating that: *"There is a concern that this clause could be vulnerable to misuse by authorities, as it does not explicitly clarify that the custody was not taken in the first fifteen days either due to the conduct of the accused or due to extraneous circumstances beyond the control of the investigating officer. The committee recommends that a suitable amendment may be brought to provide greater clarity in the interpretation of this clause."*

Torture in custody flouts the basic rights of the citizens recognized by the Indian Constitution and is an affront to human dignity. Police excesses and the mistreatment of detainees/under- trial prisoners or suspects tarnishes the image of any civilised nation and encourages the men in 'Khaki' to consider themselves above the law and sometimes even to become law unto themselves.

Shockingly, the law that once the accused is remanded to judicial custody he cannot be recalled to police custody, has been changed. It may also be noted that in the United Kingdom, the period of police custody is usually 24 hours, up to 36 or 96 hours for serious crimes and up to 14 days under the Terrorism Act. In this context, the extension of police custody in the Codes really amounts to beating the colonial powers at their game.

# 6. Rendering default bail illusory:

Section 436A of CrPC was introduced via an amendment in 2005 recognising an undertrial's right to speedy trial and access to justice, both facets of Article 21 of the Constitution. Under 436A, an accused person can be released from custody if they have spent more than half of the maximum sentence prescribed for the offence.

The BNSS renders this beneficial provision illusory. Under BNSS, Section 479 deals with default bail. Section 479, BNSS adds a proviso reducing this period undergone to one-third of the maximum imprisonment but only for 'first-time offenders' and excludes persons against whom there is an *"investigation, inquiry, or trial in more than one offence or in multiple cases"*. Through this provision of the BNS, 436-A of the CrPC has been rendered practically redundant, and replaces it with a rule

[12] (1992) 3 SCC 141. The question as to whether the 15 days period of custody in favour of the police should be only within the first 15 days of remand or spanning over the entire period of investigation - 60 or 90 days, as the case may be, has been referred to a larger bench in V. Senthil Balaji vs. The State (judgment dated 07.07.2023)

that such undertrials can be released if they have already served out the maximum possible term of imprisonment.

# 7. Sanctioning arbitrary and inhuman punishments:

### 7.1 Community service:

Section 23 of the BNS has introduced "community service" as a form of punishment, for offences such as failure to comply with a proclamation (section 209), attempting suicide to compel or restrain the exercise of lawful power (section 226), theft of property less than Rs. 5,000/- (section 303(2)), drunken behaviour in public (section 355) and defamation (section 356(2)).

However, there is no definition of what community service entails, save for the explanation to Section 23, which is vague and reads as: *"Community service shall mean the 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"*.

This lack of definition and statutory framework for what constitutes community service is a matter of grave concern. This is particularly concerning in light of arbitrary and problematic orders passed by the Courts directing illegal acts of community service, as part of bail conditions or punishment for minor offences. These include orders to plant tree saplings, enlist as Covid Warriors, donate to PM Cares Fund, tie rakhi to rape survivor, etc. Essentially these orders on community service become a way of judges to further their own prejudices and biases in the name of judicial discretion.

This failure to define community service, and provide it a precise statutory mandate, goes against the specific recommendation of the Parliamentary Standing Committee on BNS, 2023 that the term be specified and suitably defined. It is evident that the omission is deliberate, not accidental, and this clause which on the face appears as progressive has the potential for serious misuse and abuse.

It is useful to recall the judgment of the Supreme Court in *Aparna Bhat vs State of Madhya Pradesh and Anr*[13], where the Court voiced its concern with judges perpetuating gender stereotypes in the name of compelling community service as part of bail conditions. The Supreme Court recognised that in a legal system where court judgments set precedents, judgments have significance beyond their resolution of a specific dispute since the judge is not only communicating to the parties their rights and liabilities in the context of the specific dispute being litigated; but the judge is also addressing the norms to be followed by the broader legal community and people of the country. In such a context it cautioned that, every solitary instance of judicial indiscretion *"reflects adversely on the entire judicial system of the country, undermining the guarantee to fair justice to all"*.

### 7.2 Solitary confinement:

Alongside handcuffing, the BNSS backs the inhuman punishment of solitary confinement, which has been recognised as psychological torture since it restricts the inmate to their cell with no contact with other inmates and little contact with jail authorities.

[13] 2021 SCC Online 230

Section 11 of the BNS offers the Court the discretion to sentence an offender to upto 3 months solitary confinement according to the following scale:
(a) a time not exceeding one month if the term of imprisonment shall not exceed six months;
(b) a time not exceeding two months if the term of imprisonment shall exceed six months and shall not exceed one year;
(c) a time not exceeding three months if the term of imprisonment shall exceed one year.

Thus, *any offender*, convicted of *any crime*, can be forced into solitary confinement at the untrammelled discretion of the judge, since the BNS offers no statutory prescription controlling the exercise of these powers. Moreover it exposes the hollow claim of the Union government of elevating justice above punitive measures.

The Union government's claim that the intention behind the criminal codes is decolonisation is sheer drivel, given the fact that the punishment for solitary confinement under the new codes is far worse than the provisions that existed before.

The provision for solitary confinement under the old laws can be traced to sections 73 and 74 of the Indian Penal Code and section 29 of Prisons Act, 1894. Under the old laws, there is a mandate that the inmate must have a means of communicating with a prison officer during solitary confinement, and, in cases where the inmate is confined in a cell for more than twenty-four hours, s/he shall be visited *at least* once a day by a medical officer. Solitary punishment in the BNS does not provide these cursory safeguards that the colonial-era Prisons Act, 1894 mandated.

The provision is in contravention of the *"Standard Minimum Rules for the Treatment of Prisoners"*[14] first adopted by the United Nations in 1955 before being expanded in 2015. Known as the "Nelson Mandela Rules", in honour of arguably the most celebrated prisoner of the twentieth century, it mandates at Rule 45 that *"solitary confinement shall be used only in exceptional cases as a last resort, for as short a time as possible and subject to independent review, and only pursuant to the authorization by a competent authority"*. It also prohibits imposition of solitary confinement in the case of prisoners with mental or physical disabilities and prisoners who are women and children. Importantly, it specifically states that this form of punishment *"shall not be imposed by virtue of a prisoner's sentence"*.

Moreover, this provision is in complete disregard of the jurisprudence that has evolved against this form of punishment as being inhuman and irrational, and which have highlighted that alternatives to "solitary" and "irons" are available.

In *Sunil Batra v. Delhi Administration*[15], the Supreme Court outlawed the practice of solitary confinement while observing that solitary confinement, absent a specific judicial order, may only be imposed when a prisoner is under an executable sentence of death, i.e. after his mercy petition has been rejected by the President, and even then under severe restrictions and modifications.

[14] https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/443/41/PDF/N1544341.pdf?OpenElement
[15] (1978) 4 SCC 494.

In *State of Uttarakhand v. Mehtab*[16], the Uttarakhand High Court, after referring to various expert studies on the impacts of solitary confinement, summarised its debilitating effect on prison inmates as follows: *"As discussed hereinabove, keeping a convict in an isolated cell has psychiatric impact on him. It causes him heart palpitations (awareness of strong and/or rapid heartbeat while at rest), diaphoresis (sudden excessive sweating), insomnia, back and other joint pains, deterioration of eyesight, poor appetite, weight loss and sometimes diarrhoea, lethargy, weakness, tremulousness (shaking), feeling cold, aggravation of pre-existing medical problems, anxiety, ranging from feelings of tension to full blown panic attacks, persistent low level of stress, irritability or anxiousness, fear of impending death, panic attacks, depression, varying from low mood to clinical depression, emotional flatness/blunting - loss of ability to have any 'feelings', emotional ability (mood swings), hopelessness, social withdrawal; loss of initiation of activity or ideas; apathy; lethargy, major depression, anger, ranging from irritability to full blown rage, irritability and hostility, poor impulse control, outbursts of physical and verbal violence against others, self and objects, unprovoked anger, sometimes manifesting as rage, cognitive disturbances, ranging from lack of concentration to confusional states, short attention span, poor concentration, poor memory, confused thought processes; disorientation, perceptual distortions, ranging from hypersensitivity to hallucinations, hypersensitivity to noises and smells, distortions of sensation (e.g. walls closing in), disorientation in time and space, de-personalisation/derealisation, hallucinations affecting all five senses, visual, auditory, tactile, olfactory and gustatory (e.g.hallucinations of objects or people appearing in the cell, or hearing voices when no-one is actually speaking), paranoia and psychosis, ranging from obsessional thoughts to full blown psychosis, recurrent and persistent thoughts (ruminations) often of a violent and vengeful character (e.g. directed against prison staff), paranoid ideas - often persecutory, psychotic episodes or states: psychotic depression, schizophrenia, self-harm and suicide etc."*

It is for these reasons that the cruel and barbaric practice of solitary confinement ought to be abolished altogether. Instead the Modi government, by drawing from colonial-era laws has codified this most inhumane, brutal, and agonising form of punishment.

# 8. Encoding draconian provisions into the new penal code:

### 8.1 Terrorist Act:

A major and concerning development is the introduction of the crime of "terrorist act" in the BNS, which did not exist in the IPC.

Section 113 of the BNS, adopts the definition of a "terrorist act" under section 15 of the draconian Unlawful Activities (Prevention) Act (UAPA), while doing away with two howsoever inadequate safeguards present in the UAPA, namely, sanction of prosecution from the government and mandatory requirement of an independent authority to peruse the evidence before sanction is granted.

[16] 2018 SCC OnLine Utt 391

The only difference between the BNS and UAPA definitions is relatively minor – UAPA includes in the definition of terrorist act the *"damage to, the monetary stability of India by way of production or smuggling or circulation of **high quality** counterfeit Indian paper currency, coin or of any other material"* whereas in the BNS a terrorist act includes *"damage to, the monetary stability of India by way of production or smuggling or circulation of counterfeit Indian paper currency, coin or of any other material"*. Basically, the BNS definition of a terrorist act is wider.

Under BNS, the offence is punishable with death, or imprisonment for life. Those who conspire or attempt to abet or incite such action, or knowingly facilitate the commission of a terrorist act, could face imprisonment of not less than five years, extendable to life sentence.

C. Mohan Gopal[17] argues that with this new BNS provision, the government will now have a double-barrelled weapon to prosecute and imprison persons under two statutes – a special law (UAPA) with some wafer-thin 'procedural safeguards' and the other a general law (BNS) without even that fig leaf. He further[18] argues that this provision gives the government arbitrary power to label virtually any nonviolent struggle for democracy or social, political or economic justice, or any opposition or public discourse contrary to the government narrative as "terrorism" and unleash the full force of anti-terrorism laws to smash and silence it.

### 8.2 Retaining sedition law under a new nomenclature:

The offense of sedition (section 124A of IPC) has been retained under section 152 of the BNS, with new nomenclature, and a more severe punishment. While sedition (124A) only carried penalties of life imprisonment or up to 3 years, the punishment has been enhanced in the BNS to punishment with life imprisonment or imprisonment for up to 7 years.

Effectively the Union government has brought sedition law in line with the 22nd Law Commission of India, which categorically recommended that section 124A be retained in the Indian Penal Code, ignoring the concern that sedition is an over broad, arbitrary offence which has no place in a constitutional republic.[19] It also recommended that punishment for sedition offences which as it stands today, carries a maximum punishment of life imprisonment or a punishment of three years, must be enhanced to life imprisonment or seven years.

By retaining sedition law, and making it more draconian, the Union Government makes a mockery of the orders and observations of the Supreme Court in a pending batch of matters[20] where the constitutional validity of section 124A was challenged. It blatantly violates the interim order on

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[17] "Second Avatar of the Criminal Law Bills: The Key Changes", https://thewire.in/government/second-avatar-criminal-law-bills-has-anything-changed

[18] "The Three Criminal Law Bills: Using Criminal Law to Establish Permanent Extra-Constitutional Emergency Powers", https://thewire.in/law/the-three-criminal-law-bills-using-criminal-law-to-establish-permanent-extra-constitutional-emergency-powers

[19] The report has been discussed in this article available at https://liberation.org.in/index.php/liberation-2023-july/quelling-dissent-roadmap-law-commission

[20] W.P. (C) No.552 of 2021 [Editors Guild of India vs UOI], W.P. (C) No. 773 of 2021 [Arun Shourie vs UOI], W.P. (C) No. 1181 of 2021 [Anil Chamadia vs UOI], W.P. (Crl.) No. 304 of 2021 [PUCL vs UOI], W.P. (C) No. 1381 of 2021 [Mahua Moitra vs UOI], W.P. (Crl.) No. 307 of 2021 [Patricia Mukhim vs UOI], W.P. (Crl.) No. 498 of 2021 [Journalist Union of Assam vs UOI] and W.P. (Crl.) No. 106 of 2021 {Kishorechandra Wagkhemcha vs UOI]

11.05.2022 by the Supreme Court keeping all pending trials, appeals and proceedings in sedition cases, in abeyance and making it impermissible for fresh cases under sedition to be initiated.

This order came against the backdrop of indiscriminate use of sedition to quell dissent, obstruct free speech and target any opposition to the dominant ruling class ideology of crony capitalism and Hindutva. Remarkable research by Article 14[21][22] provides us with unprecedented insight and hard data on the abuse of sedition law by governments, from 2010 – 2021, which Article 14 calls the Decade of Darkness, which has seen more than 800 sedition cases being filed against 13,000 people. Despite existing for the past 151 years, Article 14 found that *"Its use has risen inexorably over the last decade, most recently against public protests, dissent, social-media posts, criticism of the government and even over cricket results."*. It further found that more than 500 cases of sedition were filed since the BJP came into power in 2014 and 2019. It also found that the conviction rate was 0.1%.

Now with the Union government returning with an even more draconian sedition provision, it remains to be seen what will be left of free speech in the country.

### 8.3 Criminalising hunger strikes:

Hunger strikes are a democratic form of dissent and resistance, and form a spirited and important part of the history of Indian freedom struggle - be it Gandhi or Bhagat Singh.

While Section 309 of the IPC that penalises attempt to suicide has been taken off the books, curiously Section 226 has been introduced in the BNS that criminalises any attempt to commit suicide with the intent to compel or restrain any public servant from discharging his official duty,. This alleged crime carries punishment of simple imprisonment upto one year, fine or community service.

Clearly the sole purpose of this provision is to prohibit hunger strikes, targeting the right of people to peaceful and democratic protest. Hunger Strikes constitute an important facet of the right to protest peacefully which is acknowledged as a fundamental right guaranteed under Article 19(1)(b) of the Constitution. By criminalising hunger strikes, the Union government is effectively denying the poor, marginalised and struggling sections an important tool of political protest.

It is ironic that Modi who rode to power on the waves of the hunger strikes during the anti-corruption movement, has criminalised and denied to the people this form of protest.

### 8.4 Criminalising promise to marry:

Section 69 of the BNS states that whoever, by deceitful means or by making promise to marry to a woman without any intention of fulfilling the same, has sexual intercourse with her, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

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[21] "A Decade of Darkness: Our New Database Reveals How A Law Discarded By Most Democracies Is Misused In India", https://article-14.com/post/a-decade-of-darkness-our-new-database-reveals-how-a-law-discarded-by-most-democracies-is-misused-in-india-61fcb8768d15c

[22] "Our New Database Reveals Rise In Sedition Cases In The Modi Era", https://www.article-14.com/post/our-new-database-reveals-rise-in-sedition-cases-in-the-modi-era

The explanation to section 69 states that "deceitful means" shall include inducement for, or false promise of employment or promotion, or marrying by suppressing identity.

Right-wing groups loudly proclaim that this provision is going to be instrumental ion countering the so-called Love Jihad, since the explanation categorically includes "marrying by suppressing identity".

This pejorative and communal term for inter-religious marriages is a conspiracy theory on baseless claims that Muslim men suppress their religious identity and "lure" Hindu women into romantic relationships and then convert them to Islam. This claim has been instrumental in demonising and "otherising" the Muslim community despite the claim being a bogey. Even the Minister of State in the Ministry of Home Affairs Shri G. Kishan Reddy has recognised this, by stating on the floor of Parliament as recently as 04.02.2020 that *"no such case of 'Love Jihad' has been reported by any of the central agencies"*.

It is pertinent to note the judgment of the Division Bench of the Kerala High Court in *Anees Hameed Vs. State of Kerala*[23], where the Court cautioned as follows: *"We are appalled to notice the recent trend in the state to sensationalise every case of inter-religious marriage as either love jihad or ghar wapsi. Disturbing news is coming from several parts of the country that young men and women who undergo inter-caste marriages are threatened with violence or violence is actually committed on them. In our opinion, such acts of violence or threats or harassment are wholly illegal and those who commit them must be severely punished. This is a free and democratic country and once a person becomes a major, he or she can marry whosoever he or she likes"*.

The Supreme Court in what is popularly known as the "*Hadiya judgment*"[24] held that the right to marry a person of one's choice is integral to Article 21 of the Constitution and that matters of belief and faith, are a core constitutional liberty and that the Constitution exists for believers as well as for agnostics and that it protects the ability of each individual to pursue a way of life or faith to which she or he seeks to adhere. It is further held that, *"Matters of dress and of food, of ideas and ideologies, of love and partnership are within the central aspects of identity… Society has no role to play in determining our choice of partners."*

Yet inter-religion and inter-caste relationships and marriages have been the targets and this provision could very well be weaponised against them. It is a matter of grave concern that the BJP government, in pursuing its communal casteist agenda, has ignored the rampant murders of couples, solely because they belong to different castes and communities, also called "(dis)honour killings''. This is despite the express directions of the Supreme Court to the Union government to enact a law that would specifically cover the field of so-called 'honour' crimes.

In *Lata Singh v. State of U.P.*[25], the Supreme Court directed the administration and police authorities throughout the country to ensure that *"if any boy or girl who is a major undergoes inter-caste or inter-religious marriage with a woman or man who is a major, the couple are not harassed by any*

[23] ILR 2017(4) Kerala 389
[24] Shafin Jahan Vs. Ashokan K.M. & Ors. (2018)16 SCC 368
[25] (2006) 5 SCC 475

*one nor subjected to threats or acts of violence, and any one who gives such threats or harasses or commits acts of violence either himself or at his instigation, is taken to task by instituting criminal proceedings by the police against such persons and further stern action is taken against such persons as provided by law."* The Court further notes on dangers of `honour killings', and notes that there is nothing honourable in such killings, and in fact they are nothing but barbaric and shameful acts of murder committed by brutal, feudal minded persons who deserve harsh punishment.

In fact, in *Shakti Vahini vs. Union of India and Ors.*[26], the Supreme Court prescribed a slew of recommendations to ensure the protection of couples who enter into inter-caste or inter-religious marriages. It prescribed that a law on the lines of abolition of 'sati' and 'dowry' be implemented to fight the social menace of 'honour killings'.

However, the Union government, has failed to introduce the same in these new criminal laws and instead grants statutory blessings to notions propagating inequality, hatred and are snatching away the rights of the people of this country, and which are steeped in patriarchal, paternalistic notions, where women need to be "saved" from "predatory" men, thus denying the agency and the autonomy of the woman.

# 9. Enhancing arbitrary powers of the police:

Section 172 of BNSS, is a new provision that is introduced that did not exist in the CrPC. According to this provision all persons are bound to conform to the lawful directions of a police officer given in fulfilment of any of his duties and such police officer is empowered to detain or remove any person resisting, refusing, ignoring or disregarding to conform to any such direction given by him, and further he *"may either take such person before a Magistrate or, in petty cases, release him as soon as possible within a period of twenty-four hours"*. Thus statutory sanction has been given to the police to detain persons, without complying with the safeguards around arrest since this would not be deemed to be arrest.

# 10. Half-measures at tackling mob lynching:

While introducing the BNS, 2023 in Parliament in August, 2023, Union Home Minister Amit Shah loudly declared that in response to the widespread hue and cry about mob lynching by civil society, his government has looked at the phenomenon carefully and has accordingly introduced provisions for 7 years imprisonment or life imprisonment and death penalty for mob lynching.

The BNS does not per se mention "mob lynching" but sections 103(2) and 117(4) criminalises such actions without specifically calling it as such. Murder and causing grievous hurt by *"a group of five or more persons acting in concert commits murder on the ground of race, caste or community, sex, place of birth, language, personal belief or any other similar ground"* is made a special crime.

[26] AIR 2018 SC 1601

What is glaring is the absence of "religion" as one of the explicit grounds in these provisions, despite universal recognition that religion is one among the prime motivating factors for mob lynching.

Public executions or mob lynching of Muslims, much like caste murders, are an every-day and inescapable reality in new India. It is the direct consequence of the glaring failure of the State to take action against persons and organisations engaging in mob violence and hate crimes. These violent crimes and atrocities committed by known extra-judicial elements and extremist organizations, particularly in the name of religion have the effect of creating a condition of social apartheid, going against the most core values of the Constitution. As such, the failure to mention religion cannot be accidental or oversight.

Here we must recall that the judgment of the Supreme Court in the *Tenseen Poonawala vs, Union of India*[27]. Here the Supreme Court came down heavily on mob lynching. To quote: *"Hate crimes as a product of intolerance, ideological dominance and prejudice ought not to be tolerated; lest it results in a reign of terror. Extra judicial elements and non-State actors cannot be allowed to take the place of law or the law enforcing agency. A fabricated identity with bigoted approach sans acceptance of plurality and diversity results in provocative sentiments and display of reactionary retributive attitude transforming itself into dehumanisation of human beings. Such an atmosphere is one in which rational debate, logical discussion and sound administration of law eludes thereby manifesting clear danger to various freedoms including freedom of speech and expression."* The Court recommended to Parliament to enact a special law against mob lynching and additionally passed a slew of directions – preventive, remedial and punitive. Unsurprisingly none of these have found their way into the new criminal laws.

# 11. Unclear status of pending cases and investigations:

There is much concern about the status of the pending criminal cases and investigations.

In this regard reference ought to be made to section 4 of the BNSS, which mandates that *"all offences under the Bharatiya Nyaya Sanhita, 2023 shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained"*. This provision ought to be read with section 531, which states that notwithstanding the repeal of the CrPC, *"any appeal, application, trial, inquiry or investigation pending"* shall continue under the provisions of the Code of Criminal Procedure. Abhinav Sekhri[28] argues that this is not going to prevent serious changes to their working because the BNSS carries out serious changes to the administrative structures of courts, specifically the abolition of the cadre of metropolitan magistrates altogether.

Similarly section 170 of Bharatiya Sakshya Sanhita, 2023 mandates that notwithstanding the repeal of the Indian Evidence Act, "any application, trial, inquiry, investigation, proceeding or appeal pending" shall be dealt with under the provisions of the Indian Evidence Act, 1872.

[27] Tehseen Poonawalla vs Union of India and Ors. AIR 2018 SC 3354

[28] "The Criminal Codes are Dead; Long Live the Criminal Codes", https://theproofofguilt.blogspot.com/2023/12/the-criminal-codes-are-dead-long-live.html

Similarly there is section 358 of the Bharatiya Nyaya Sanhita, 2023. Given the constitutional prohibition of any criminal liability retrospectively allows the assumption that the new BNS offences (deceitful sexual acts; terrorism; organised crime, etc.) will not apply to acts done on a date prior to the date when the BNS is brought into force. Abhinav Sekri yet again sounds a word of caution here. He argues that, where offences are continuous, there is still the possibility where prosecutions are brought under the BNS for acts which began prior to the date of its enactment but continued subsequently to create an unbroken chain of conduct.

# 12. Insulating public servants from accountability:

Several exceptions have been carved out to benefit public servants, insulating them from accountability, even beyond the need for prior sanction. Section 218 of the BNSS retains the requirement of prior sanction under section 197 of the CrPC before any court can take cognizance of any offence alleged against the public servant.

In regard to investigations, section 175 of BNSS (which replaces section 156 of CrPC) makes the mandate of the Magistrate ordering investigation in a complaint against a public servant subject to (a) receiving a report containing facts and circumstances of the incident from the officer superior to him; and (b) after consideration of the assertions made by the public servant as to the situation that led to the incident so alleged.

In regard to private complaints filed against public servants directly in court, the section 223 of BNSS mandates that a Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless (a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and (b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received.

These additional protections to public servants defeats the very object of the criminal justice system, which is to bring offenders to book.

# 13. Forthcoming chaos in metropolitans:

The Bharatiya Nagarik Suraksha Sanhita, 2023 has introduced a big change on the administrative structure of courts by altogether omitting sections 8, 16, 17, 18, 19, 355 and 404 of Code of Criminal Procedure. That is to say that the BNSS has abolished the cadre of metropolitan magistrates. However, the BNSS is silent on how areas where this system is in place (Bengaluru, Mumbai, Kolkata, Delhi, etc.), will transition to the new system with Chief Judicial Magistrates, First Class Magistrates, and Second Class Magistrates.

# 14. Conclusion:

At its core, the substantial changes introduced through these three criminal laws, *"equip the government with adequate power to hollow out our democracy and transform India into a fascist state – should the government choose to deploy the new laws to their fullest extent"*[29] and can facilitate the clampdown on legitimate political dissent and protest against social and economic exploitation.

Enhanced police powers and curtailment of the rights of the accused, and infringement on the rights of the victims of crime, are in derogation of settled law as detailed hereinabove. It is apposite to recall the declaration of the Supreme Court in *Navtej Johar vs Union of India*[30] on the doctrine of progressive realisation of rights. As per the Court, this doctrine as a natural corollary, gives birth to the doctrine of non-retrogression, as per which there must not be any regression of rights since: *"in a progressive and an ever-improving society, there is no place for retreat. The society has to march ahead"*. The Court went on to clarify that the doctrine of non-retrogression states that the State should not take any measures or steps that deliberately lead to retrogression of rights either under the Constitution or otherwise.

In this view, the introduction of provisions relating to handcuffing, solitary confinement, sedition, etc. violate this jurisprudence that has evolved by the Supreme Court in the context of fundamental, constitutional and human rights.

A genuine and legitimate attempt to reform criminal law would have to incorporate these advances made in law[31], and on this count, the new criminal laws represent a dangerous step backwards towards the police state. Abhinav Sekhri[32] summarises what is required rather crisply: *"In that regard, I would unhesitatingly state that the 19th Century Colonial Codes (or their 20th century avatar in case of the Cr.P.C.] were deeply problematic and required a brutal re-examination. A comprehensive study of how courts had interpreted the clauses across these Codes was required to update the statutory position. The archaic language of the IPC required revisiting, its punishments needed streamlining, and the general law of crime required to be harmonised with the burgeoning field of laws defining specific crimes. Far more important was the need to tear down the Cr.P.C. and IEA and rebuild again to solve what the most pressing concerns of the criminal process, which have been rotting it from the core since independence (and even before): delays, significant pre-trial incarceration rates, and a complete surrender of personal liberty and privacy to batons and lathis wielded by the police."*

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[29] "With Parliamentary Panel's Rubber Stamp, Path Clear for New Criminal Code and 'Police Raj'", https://thewire.in/government/parliamentary-panel-rubber-stamp-new-criminal-code-police-raj

[30] AIR 2018 SC 4321

[31] In addition to the various progress in law that have been detailed in this booklet is the failure of the Union government to strike out adultery from the law books. The initial draft of the BNS bill, following the judgement of the Supreme Court in *Joseph Shine vs Union Of India* [AIR 2018 SC 4898], eliminated adultery as an offense. However, the second draft, which ultimately became law, reintroduced adultery as an offense at section 82 of the BNS.

[32] "The Criminal Codes are Dead; Long Live the Criminal Codes", https://theproofofguilt.blogspot.com/2023/12/the-criminal-codes-are-dead-long-live.html

On the contrary the new criminal laws expose the farce of alleged 'decolonisation of laws' for what it really is – entrenchment of colonial police powers for the curtailment of civil liberties and the dawn of a formal police state.

These laws weaponize the police and the criminal justice system to give the political leadership at all levels – centre, state and local – even greater opportunity to abuse the criminal justice system for political gain through selective, targeted and politically biased prosecution against ideological and political rivals.

# Appendix:

**Introducing police powers in other laws as well:**
Alongside the new criminal laws, other laws with provisions enhancing the police powers of the state were passed and have received presidential assent:

- ***Post Office Bill, 2023:***

The Post Office Bill, 2023, which will repeal the Indian Post Office Act, 1898, is concerning for several reasons, most particularly for the surveillance powers contained under it.

The new law allows for the **interception of a shipment** being transmitted through the post on the following grounds: (i) security of the state, (ii) friendly relations with foreign states, (iii) public order, emergency, or public safety, and (iv) contravention of the provisions of the Bill or any other law. An officer empowered by the central government through a notification may carry out an interception. The officer also has powers to **open, detain, or destroy shipments** carrying items prohibited under the Act or any other law.

- ***Press and Registration of Periodicals Bill, 2023:***

The Press and Registration of Periodicals Bill, 2023 is meant to replace the existing Press and Registration of Books Act, 1867, that contains certain provisions that have adverse implications on press freedom.

It denies the right to bring out a periodical, to persons convicted of *"terrorist act or unlawful activity"* or *"for having done anything against the security of the State"*. The new law offers no clarity as to which offences could be categorised as offences against the security of the state, and the Union government is empowered with unbridled discretion to notify these offenses.

Given the blatant abuse of UAPA and other criminal laws, in particular against journalists and media organisations, to suppress freedom of speech, this provides wide powers to the Modi government to prevent, at the very threshold, inimical, critical and dissenting voices from bringing out periodicals or thereafter denying them the right to continue with their periodicals.

- ***The Telecommunications Bill, 2023:***

The Bill replaces the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933, and, broadly speaking, seeks to regulate the establishment and operation of telecommunications networks and telecommunications services.

One of the concerning features of this new Law is the centralisation of executive powers and control. The Union government has the power to temporarily **possess, suspend, intercept, detain any telecommunication service, to intercept, detain, disclose, or suspend any message or class of messages**, to direct suspension of any telecommunication service or class of telecommunication, or to notify encryption and data processing standards.

# BEATING THE COLONIAL POWERS AT THEIR GAME

## The Draconian New Criminal Laws

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