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ARTICLE

Bharatiya Nyaya Sanhita: Decolonizing Criminal Law or Colonial Continuities?

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Abstract
A change is more often than not faced with resistance from thinking minds before it is welcomed. This paper emphasizes the urgent need to scrutinize the proposed changes to the age-old Indian Penal Code to be brought about by the enactment of the new Bharatiya Nyaya Sanhita, 2023 (BNS). It critically evaluates every such new change to resolve all doubts and apprehensions, in delving particularly into the inspection of the BNS, in a theoretical study comparing with the Indian Penal Code. The paper discusses the "legislative intent and colonial continuities", "anti-democratic tendencies" and "general critiques" addressing the debates over "patriarchal biases, problems laden within a false promise to marriage in the BNS, linguistic imperialist connotations, and the ambiguities over punishments". This paper aims to evaluate the premise for an overhaul of the existing penal code and to identify and correspond substantial changes suggested in the new act in light of a promised wave of decolonization.

Keywords: anti-democratic tendencies; Bharatiya Nyaya Sanhita; colonial continuities; decolonization; Indian Penal Code

Introduction

Thomas Macaulay's Indian Penal Code, 1860 (IPC) has acclaimed critical appraisals as a legislative genius way ahead of its time. Yet, even the most scrupulously crafted legislative works can hardly envision a code of eternal and universal relevance. Despite the evolutionary inconsistencies, the probability of which had been contemplated in the drafting and therefore its allowances incorporated within the structural framework of the code, the IPC nonetheless has lived through the test of time, having proven its efficiency not just within the Indian subcontinent but having influenced several other criminal codes the world round. As James Fitzjames Stephen puts it,

> The Indian Penal Code is to the English criminal law what a manufactured article ready for use is to the materials out of which it is made. It is to the

> French Penal Code and, I may add, to the North German Code of 1871, what a finished picture is to a sketch. It is far simpler and much better expressed than Livingston's Code for Louisiana, and its practical success has been complete (Trevelyan 1923:303; Yeo and Wright 2016:5).

Nevertheless, even such a specimen of legal marvel has not been proven from the ephemeral psyche through the socio-political transitions of the world. Some of the pronounced Benthamite ideologies laden within the IPC, along with colonial trademarks, still hold good, albeit an unavoidable disregard for some others, which have succumbed to the ingenious mechanism of amendments that has befittingly adopted the constant changes in working this code.

Whilst a change is a most welcome outcome, it is also to be assessed in terms of the pertinence and coherence such changes might ascribe to the existing system. Three bills were introduced and referred to the standing committee on Home Affairs at the end of the Monsoon Session this August, namely, the Bharatiya Nyaya Sanhita Bill, 2023 (BNS),[1] Bharatiya Nagarik Suraksha Sanhita Bill, 2023[2] and Bharatiya Sakhshya Bill, 2023,[3] replacing the Indian Penal Code, 1860, Indian Evidence Act, 1872 and Code of Criminal Procedure, 1973, respectively (Madhavan 2023). The three Criminal Law Bills subsequently underwent recommendations from the Parliamentary Committee Report and were reintroduced in the Winter Session of the Parliament. Such reintroduction was followed by an enactment with unprecedented celerity and absolute abandonment of Parliamentary dialogue on 25 December 2023, and is yet to be enforced from 1 July 2024 (Live Law News Network 2024). In this paper, we confine ourselves to a detailed investigation and evaluation of the BNS Act only. The BNS has been proposed not just as an amendment but as a new Act to replace the existing IPC. The new BNS Act proposes 358 sections divided into 20 chapters. The new Act claims to make offences gender-neutral, wherein "crimes against women and children shall take precedence" (Times Now Digital 2024), in addition to having introduced new provisions addressing matters of organized crimes and terrorism, acts of secession, armed rebellion, subversive activities and activities endangering the unity and integrity of India catering towards a deterrent ideology through enhanced punishments. The Act has made claims to provide for legislation that is more comprehensible than its predecessor and liberated from its unwanted colonial legacy.

It hereby remains to be assessed by revisiting the proposed claims of the new Act in comparison to the existing provisions, ongoing legal debates upon the contentious provisions within the IPC, and the legal expectations of public interests in order to assess the purpose and need for the introduction of such a new Act as a replacement that could not have been achieved with mere amendments. This paper shall be broadly divided into three parts in the process of attempting an atomized study of the new Act, using the variables of "legislative intent and colonial continuities", "anti-democratic tendencies" and "general critiques" that can be foreseeable causes of apprehension in the public interest. Through such an

[1]Bharatiya Nyaya Sanhita Bill, 2023.
[2]Bharatiya Nagarik Suraksha Sanhita Bill, 2023.
[3]Bharatiya Sakhshya Bill, 2023.

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examination of the Act in the prescribed method, we aim to arrive at reasonable conclusions in order to supplement the dialogues with respect to such enactment in the interest of "justice, equity, and good conscience".

Legislative Intent and Colonial Continuities

Interpreting the legislative intent behind the IPC necessitates the adoption of a colonial perspective, envisioning the Indian Republic in a British Colonial milieu. Yet, the criminal laws crafted to govern this colony far exceed the scholarship of any English Criminal Law Code. Despite the academic and legal brilliance exhibited by the code, certain implicit colonial tendencies cater to the monarchical suppression of subjects. "The intersection of anticolonialism and post-colonialism with nationalism" (Mehla 2024) projects how colonial continuities have yet transpired within post-colonial laws, and even nationalist movements, that claim to implement anti-colonial laws, but often end up continuing the same old colonial legislative goals. Post-colonialist intentions of self-governance have been reduced to an idealistic critique of colonial policies whilst continuing with the structures and functions of colonial governance. Thus, replacing "*rajdroh*" with "*deshdroh*" might evoke a nationalist sentiment, but, in its functionalist essence, will make little difference to discontinuing the coercive and self-regulating mechanisms that create subjects instead of citizens (Satish, Dash, and Pandey 2024).

Suppression has a tendency to begin with restrictions upon the mind and thoughts that encourage differences, and, conventionally, it finds an expression through words uttered or scribbled. Therefore, the simple way to restrict such differences is to nip them in the bud by curbing expressions of such divergent thoughts. With respect to a critique of colonial continuities within the IPC post-independence, such legal provisions curtailing speech and expression have been one of the pioneering targets. It can be argued that whereas the logic of colonial rule emphasizes the crevice dividing the "universal rational subjects (the enlightened European as a bearer of rights) and the native subject (marked by a hypersensitive excess)", a post-colonial approach endeavours to replace the former classification with the divisions of "class, gender, and literacy" (Liang 2016:818). This depicts the dismal picture of a political sphere circumscribed by a social sphere incapable of shedding its "positivity to emerge as the properly constituted public sphere" (Dhareshwar and Srivatsan 1996).

Thus, it can be discerned that the legislative intent to silence opposing voices has been expressed through the colonial laws of sedition that have been defined under section 124A of the IPC. Approaching a historical narrative of the sedition laws, it is revealed that the second half of the nineteenth century witnessed a challenge to the colonial exploitations on the nationalistic, Islamic revivalist and economic fronts, primarily amongst others. As a response, the colonial government used the "Wahabi movement" as the red herring to invoke sedition laws as a singlehanded means to tackle the brimming oppositions from all fronts. The legislative intent and "*raison d'être*" focused on devising an "instrument to curb" and stifle the rising nationalist, political and economic dissents (Thapar, Noorani, and Menon 2016:63). The sedition law is so constructed that a certain degree of nebulous ambiguity prevails

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covertly within its open-ended definitions. In the case of *R v. Sullivan*,[4] Justice Fitzgerald held the sedition laws to be "very comprehensive and sweeping" considering the varied nature of actions, practices, words, written or uttered that fell within its ambit if it reflected the faintest allusions to disturb tranquillity or display potentials to influence ignorant people to subvert the Government (The Law Commission of London 1977). Such is the wide scope of the sedition law, and its presence remains a persistent threat to blurring the lines between legitimate or constructive criticism and seditious utterances.

Apart from the law of sedition, several other provisions exhibit the lingering traces of a colonial past. Such is apparent from the provisions purporting "moral offences" (obscenity as read in section 292[5] and adultery as read in section 497[6] of the IPC, which has been amended in recent years). While morality is a term that has been fast metamorphosing and evolving, the criminal code holds on to archaic regulations and sanctions, fostering moral policing. This hereby poses a stark incongruence between a budding democracy in a post-modern world and its quaint criminal code, which poses as shackles of conformity to a colonial mindset. Additionally, the offences as enlisted in the criminal code also depict gender bias as it seems to flout the legal precedents that have been set over years of legal and judicial toil pertaining to recognizing the broadening boundaries of gender and its nuances. This Act regresses to an archaic setting, bifurcating the concept to fit a heterosexual panorama.

The glaring anomalies that had been identified previously by several scrutiny committees, legal scholars and luminaries and the corrections suggested to the draft bills of the BNS Act have largely gone unincorporated within the Act that was passed with unimaginable celerity and inhibition to indulge in constructive debates or dialogue. Such raises alarming concerns, which have been addressed within the scope of this paper.

Anti-Democratic Tendencies

> There is the greatest difference between presuming an opinion to be true because, with every opportunity to contest it, it has not been refuted and assuming its truth for the purpose of not permitting its refutation (Mill 2016:23).

The very foundations of a democracy hail from the idea of dialogues and discourses. Though certain liberal ideas inherently find a leeway into the democratic philosophies, even non-liberal philosophies have emphasized the need for political speech within societies. Freedom of expression has been reiterated within democratic philosophy and institutions time and again. The political functions of a society remain impaired without this hallowed cannon. Stemming from a

[4]*R v. Sullivan* [1868] 11 Cox CC 44, 45.

[5]The Indian Penal Code, 1860, section 292 read as "Sale, etc., of obscene book. etc.".

[6]Ibid., section 497 read as "Adultery". The Supreme Court of India has decriminalized adultery in *Joseph Shine v. Union of India* (2018) SC 1676.

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Miltonian metaphor of the "marketplace-of-ideas" (Milton et al. 1918:36) in finding the "revealed truth" or rather unfolding the convoluted riddles of a "liberal puzzle" (Raz 1991) of free speech, the varieties have branched out divergently yet have been held together by the lubricant of democracy. The Constitution of India has shielded free speech and expression within Part III of the Indian Constitution, containing the Fundamental Rights. In this part, we shall deal with the anti-democratic tendencies that are revealed by the BNS in comparison to the IPC, considering whether such tendencies have been diminished or enhanced. We shall cover the issues primarily of laws pertaining to sedition, blasphemy, mob-lynching and terrorist activities in the discussion by way of tracing them back to the democratic ideals of "free speech and expression".

On Sedition

We begin our discussion by posing a question: "Is it possible to have sedition laws in a democracy?" If the very "essence of democracy is criticism of the government" (Yadav 2023:195), then dissent, as had also been upheld in the landmark case of *Disha A. Ravi v. State (NCT of Delhi) & Ors*.,[7] is in every sense the "safety valve of democracy". The sedition laws give overarching powers to the government to construe an act as sedition according to its whims to suppress dissent and induce tyrannical and despotic prejudices. As long as sedition laws grace the IPC, complete realization of [Article] 19(1)(a) [of the Indian Constitution] shall remain a distant dream. A possible solution to address this perhaps can be attained by resorting to some middle ground and striking a balance. The "pernicious test" tends to be a positive means to overcome such dilemmas, yet it is still not enough. Section 124A of the IPC has been criticized heavily for its indistinct wordings. The meaning of certain terms, such as "disaffection", remains broad and subjective in the hands of the executive and can be tailored according to the suit of the government. In the pre-independence case of *Queen Empress v. Bal Gangadhar Tilak*[8] in 1897, the definition of disaffection came to be equated to "disloyalty", "ill-will" and "enmity". With the colonial usage of this law against several eminent personalities of the Indian History of Independence, such as Bal Gangadhar Tilak and Mahatma Gandhi, it has also come to the fore that the sedition law blatantly overlooks the aspect of intention by replacing it with orchestration in bringing about charges. In the case of *Niharendu Dutt Majumder v. King Emperor*,[9] *it was* held that "reasonable anticipation or likelihood of public disorder" made up the gist of the offence of sedition. Therefore, considering the vagueness attributed to this section, several precedents came to aid the determination of the act of sedition. Based upon these precedents, certain tests have evolved over time, commencing with the "aggravated form and calculated tendency test"[10] based on the principles of "in the interest of" and "public disorder",

[7] *Disha A. Ravi v. State (NCT of Delhi) & Ors.* W.P. (C) 2297/2021 and CM APPLs. 6685/2021, 6686/2021, 6687/2021.

[8] *Queen Empress v. Bal Gangadhar Tilak* [1917] 19 BOMLR 211.

[9] *Niharendu Dutt Majumdar v. King Emperor* AIR [1942] FC 22.

[10] *Ram Lalji Modi v. State of UP* AIR (1957) SC 620.

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respectively, moving on to the "strict proximity test",[11] based on "public order", the "spark in a powder keg test",[12] to balance fundamental rights with restrictions laid under Article 19(2),[13] and finally to the "pernicious tendency test"[14] in the landmark case of *Kedar Nath Singh* which provided that a seditious libel should necessarily be accompanied by violence. In addition, the coveted induction of the sedition laws seems to be a direct flouting of the *S. G. Vombatkare*[15] judgment, which had put the sedition laws in abeyance against the raised constitutional challenges about the colonial roots, possible outdatedness and arbitrary usage of India's sedition statute (section 124A of the IPC) and also questioned the violation of free speech and whether it runs the danger of stifling dissent and limiting government criticism. This was also upheld in cases such as *Aman Chopra v. State of Rajasthan.*[16] Nonetheless, despite the interpretative mechanisms evolved and adapted, the ambiguities latent within the law of sedition still persist alarmingly.

With the introduction of the BNS Bill, the Honourable Home Minister Mr Amit Shah proclaimed to imbibe the "*Bharatiya Atma*" (Indian soul) within the colonial laws contained within the IPC; however, it has been argued that the mere dropping of the term "sedition", whilst carrying forward the law in word and essence disguised under seemingly un-colonial wordings such as "Acts endangering sovereignty unity and integrity of India" contained under section 152, hardly dissuades the "thinking minds" to accept such reasoning quietly. On the contrary, the open-ended ambiguity that is looming large within these sections exposes them to precarious caveats of misuse in imposing draconian fetters over free speech and thought. Hence, such tactful alteration cannot be passed down as a pliable reconsideration to removing the colonial bias to justify the replacement of the IPC, and it can only be translated as the transformation of the "imperial powers of a foreign government" into the "normal powers of an independent government" (Pathak 2016). Furthermore, as an instance of bolstering the colonial continuity, the punishments for such actions that previously made up the sedition law have been enhanced from a minimum of three years to seven years or life imprisonment. Despite a revision of the Bill, the BNS Act, which was passed in December 2023, has upheld a similar provision to the one contained in section 124A of the IPC, which has harnessed wide criticisms.

Section 152,[17] as contained within the BNS, exhibits the longstanding sedition laws through a much more draconian outlook by accommodating nomenclatures such as "acts of secession", "armed rebellion", "subversive activities", "separatist tendencies" and "endangering the sovereignty or unity" which can be ascribed broad and nebulous interpretations posing the caveat of transforming "dissent" which is a fundamental right under right to expression into a crime punishable by law. Furthermore, a severe punishment of life imprisonment or imprisonment which may extend up to seven years and a fine prescribed for this crime is largely suspected

[11] *Ram Manohar Lohia v. State of Bihar and Ors.* (1960) 2 SCR 821.
[12] *S. Rangarajan v. P. Jagjivan Ram* (1989) 2 SCC 574.
[13] The Constitution of India, 1950, art 19(2).
[14] *Kedar Nath Singh v. State of Bihar* AIR (1962) SC 955.
[15] *S. G. Vombatkare v. Union of India* (2022) 7 SCC 433.
[16] *Aman Chopra v. State of Rajasthan* (2022) SCC OnLine Raj 1056.
[17] Bharatiya Nyaya Sanhita, 2023, section 152.

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of arousing a sense of gagging public opinion and jolting the very tenets of our Constitution and in no way displaying consonance with the Honourable Home Minister's claims for having removed the sedition laws.

The BNS posits reasonable concern over the colonial continuity sheathed below an indigenous veneer of colonialism. The legal repercussions of the same are apparent from its design of latent obscurity, which emphasizes adopting a "strict liability approach" in the absence of the *mens rea* component. The soundness of such a provision resounds with an arbitrary humdrum and a powerful weapon, the reins of which lie in the hands of the state machinery. The sheer replication of a provision that ails from debatable flaws implies the legislative intent towards continuing despotic and tyrannical legacies towards a renewed source of allegiance post-independence.

Thus, it can be inferred that the colonial psyche to silence dissent has not only been continued by the vague and arbitrary import of the offences under the IPC into the BNS but has also been stimulated further to spread a culture of deterrence when it comes to critiquing the government (Ahmad and Sharma 2024:23). Such an imposition of deterrence contradicts a democratic political culture, which thereby risks the collapse of participatory democracy.

On Hate Speech and Blasphemy

The contention with respect to Blasphemy within the BNS is such that whereas the covert laws on religious hate have attracted substantial and relevant opposition considering their relevance and problems as a part of the Code governing the general laws for punishment against offences, the same sections have been manifestly repeated without any attempt at meaningful modifications under sections 196[18] and 299[19] concerning "Promoting enmity between different groups on the grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony" and "Deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs", respectively, in the proposed Act. Curiously, these sections can be traced back to sections 153A and 295A of the IPC, which had been under the gambit of revisional discourse in the pretext of cases such as *Ramji Lal Modi v. State of UP*,[20] *Baragur Ramachandrappa v. State of Karnataka*[21] or *Fatehagarh v. Ram Manohar Lohia*[22] and *Shreya Singhal v. Union of India*[23] for reasons of privileging social order over civil liberties (Bhatia 2016). In view of this contention, we, therefore, investigate the controversies surrounding the religious hate laws in the Indian context.

Blasphemy stems from an offence against a religious belief system, which is usually potent in encouraging tremendous retaliation bearing the "special reverence felt for what is deemed sacred", which is what makes the believers more susceptible to offence in comparison to any other political beliefs (Jones 1980). The aspect of

[18]Ibid., section 196.
[19]Ibid., section 299.
[20]*Ramji Lal Modi v. State of UP* AIR (1957) SC 620.
[21]*Baragur Ramachandrappa v. State of Karnataka* (2007) (5) SCC 11.
[22]*Fatehagarh v. Ram Manohar Lohia* AIR (1960) SC 633.
[23]*Shreya Singhal v. Union of India* AIR (2015) SC 1523.

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blasphemy within the purview of Indian laws must be introspected through the lenses of secularism, hate crimes and executive anomalies. These three vital factors have come to determine the fate of an offence of blasphemy in this country. Commanding a colonial heredity, the offences of blasphemy have still managed to ordain a novelty duly catering to the secular ideals of the Indian Constitutional set-up that forms a foundational pillar of the citadel of democracy. The most intriguing part of this debate is that the IPC conceals the sections on blasphemy under a secular shroud, which is the primary factor that has distinguished it from its English counterpart.

The offence of blasphemy is deeply embedded within the idea of "hate crime", the distinctive characteristic of which is attacking a person not as an individual but as a representative of a group or community (Fernandes 2003:686). This hereby garners the consequences of a feeling of insecurity within the entire targeted community through the individual victim, attacks the values, loyalties and commitments of the community that comprises their sense of identity and self-worth and also represents the offenders' views as that of their entire peer group or communities' views.[24] Therefore, the primary objectives behind punishments of hate crimes remain to obtain a "deterrent and preventive effect". The criminal laws dealing with blasphemy are primarily cited under two sections: those of section 295A[25] as mentioned and also that of section 153A of the IPC.[26] The difference between the two lies in that whilst section 295A focuses on hurting the religious beliefs of any class of citizens, section 153A focuses on class hatred, which may include religion. The laws provided under section 295A are conventionally deemed as the Indian equivalent of the English law of blasphemy, only broader by means of being inclusive of all religions.

This again presents as a complement to the Indian variant of secularism, which strays from the English connotation of the term referring to the "devaluation of religion in public and from the freeing of politics from religion". Instead, this "Anglo-Indian usage" upholds a novel idea of secularism, which "is not the opposite of the word sacred but that of ethnocentrism, xenophobia and fanaticism" as explained by Ashis Nandy (1995:45). This denotes that the Indian religious hate laws are directed towards the protection of the individual's religious sentiments instead of that of the state's.[27] The Constitution further enshrines that if any law, prima facie violates freedom of speech and expression, then the state is required to show how the legislation/state action falls within 19(2)-(6) (Jain 2019:1054) (the exceptions to freedom of speech and expression) on the grounds of "public order" which again is not defined under the Constitution but is explained within the IPC.[28] The Indian Constitution and IPC, therefore, overlook the religious hate laws in

[24]"Observations by the Commission on British Muslims and Islamophobia", Runnymede Report on the Anti-Terrorism, Crime and Security Bill, November 2001.

[25]The Indian Penal Code, 1860, section 295A.

[26]Ibid., section 153A.

[27]The English law of blasphemy began as an offence against the state considering that the English crown bears the title of the "Defender of faith and Supreme Governor of the Church of England" and is therefore inalienable from the Church despite having a working democratic Parliament.

[28]The Indian Penal Code, 1860, sections 153, 295A, 298 and 505.

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complementary and supplementary fashion from which the derivatives of blasphemy are indirectly drawn in operations (Fernandes 2003:697).

However, when it comes to India, the issue with regard to the religious hate legislation pertains not to its presence or absence from the code but with respect to its actual implementation and, more so, an appropriate implementation. Several instances over history bear silent witness to a series of adjournments, delays, promised actions and subsequent inactions that finally end in dismissals, as had been a glaring example in the prominent case against Bal Thackeray, in the pretext of the Bombay riots in 1993 (Punwani 2012:13) against a petition that contained nine instances of inflammatory publications. Despite Supreme Court precedents establishing that "only aggravated forms of insult" to religion that may disrupt public order shall be punished under section 295A,[29] the lack of "enforcement by governments" and "comprehensive judicial decisions" pose a recurring hindrance leading to religious hate propagations going unchecked, that henceforth encourages later offenders. Yet, in several instances, this section of 295A has been justified by the Supreme Court in the case of *Ramji Lal Modi v. State of Uttar Pradesh*[30] as a necessary evil for the protection of religious beliefs and, more importantly, for the "good order and peace of society, which would be disturbed by attacks on the religions of a class", otherwise. Several attempts to address the concerns over hate speech had been made by the Bezbaruah Committee in 2014, proposing amendments to section 153C of the IPC by suggesting a punishment period of five years or fine or both and an amendment to section 509A by suggesting a punishment period of three years or fine or both. Also, acts of hate speech through the virtual medium by means of computer or other devices of communications had been addressed by the T. K. Vishwanathan Committee in 2019, which recommended the insertion of sections 153C(b) and 505A proposing punishment up to two years along with a fine of Rs 5000 upon conviction. Such suggestions and recommendations that are posed in tandem with the evolving times have yet to be disregarded and unincorporated within the BNS Act of 2023.

On Mob-Lynching

Following the concept of blasphemy, another gross violation of religious rights protected under Articles 19 and 25 presents with the offences of mob-lynching, which has been a rather frequent instance in the post-independence secular history of India. Section 103(2)[31] of the BNS mentions acts that find reasonable semblances with the offences of mob-lynching that have been placed under the broader category of "Punishment for Murder", which shall be punished with death, imprisonment for life, or for a term not less than seven years alongside being liable for fine. The presence of this section yet again appeals to the secular culture against a milieu largely governed by "An Anti-secularist Manifesto" (Nandy 1995:55). In order to understand this assertion, we shall consider the instance of the much-contested case

[29]Supreme Court hearing on Indian television documentary "Tamas"; *Ramesh Birch & Ors. etc. v. Union of India* (2004) (5) BomCR 214, 2004 (3) MhLj 746.

[30]*Ramji Lal Modi v. State of Uttar Pradesh* AIR (1957) SC 620.

[31]Bharatiya Nyaya Sanhita, 2023, section 103(2).

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of *Tehseen S. Poonawalla v. Union of India*[32] to comprehend the assimilative tendencies aimed towards the creation of a cult of "Indian" (Menon and Nigam 2007:43). The authors analyse the extent of the apparently secular provision being squandered to protect the interests of a single religion, caste, race and community. We shall delve into the theoretical and conceptual intricacies of secularism in content and context in uncovering the grave realities of secular politics.

The landmark case of *Tehseen Poonawallah* provides a pioneering case study in explaining the legal nuances laden within the penal provisions for the act of mob-lynching. This case deals with the petition filed by activist Tehseen Poonawalla in view of a series of glaring instances of mob-lynching perpetrated violently in the wake of "cow vigilantism".[33] The court took cognizance of the issue concerning whether "cow protection laws" such as those mentioned under "section 12 of the Gujrat Animal Prevention Act, 1954",[34] "section 13 of Maharashtra Animal Prevention Act, 1976"[35] or "section 15 of the Karnataka Prevention of Cow Slaughter and Cattle Prevention Act, 1964"[36] can be held unconstitutional on the grounds of them protecting and encouraging mob-lynching activities under the garb of cow vigilantism enacted in "good faith". Nonetheless, in this case, the court yet left the notion of lynching undefined and left it to the police to interpret the category, thereby arming the police with excessive force that verges upon illegality under the garb of maintenance of law and order. This has further been bolstered by institutional biases, semantic vagueness of legal categories, and the lack of insulation from social and political influence in the exercise of police discretion (Bhat 2020:52).

Henceforth, in view of the case of *Tehseen Poonawalla*, it can hereby be held that as a part of "mob-lynching", it is a categorized and targeted violence that is being perpetrated upon a certain section of society in an attempt to create an "internal enemy" (Bilgrami 2014:30) with the objective of unifying the rest of the assimilated whole into a certain definition of "Indian" influenced by the ideologies of "*Hindi-Hindu-Hindustan*". This, in turn, also admonishes the salient absence of "religion" as a ground for mob-lynching amongst the other grounds that have been provided within the provision contained in section 103(2). A brief rendition of the period since the 1980s through to the 1990s and early 2000s provides a wide array of illustrations ranging from the "Uniform Civil Code debate", the "Ayodhya, Babri Masjid and Ramjanmabhoomi" issue to the state-sponsored Gujrat massacre as a response to Godhra, in order to substantiate the issue of religious mobilization, the

[32]*Tehseen S. Poonawalla v. Union of India* (2018) 9 SCC 501.

[33]Cow vigilantism is a pattern of mob-based collective vigilante violence seen in India perpetuated by Hindu nationalists against non-Hindus (mostly Muslims and Christians on the pretext of eating cows, which is sacred for the Hindu religion); see Ramachandran (2020:17).

[34]Gujrat Animal Prevention Act, 1954, section 12 read as: "No suit, prosecution or other legal proceedings shall be instituted against any person for anything which is in good faith done or intended to be done under this Act or the rules made thereunder."

[35]Maharashtra Animal Prevention Act, 1976, section 13 read as: "No suit, prosecution or other legal proceedings shall be instituted against any person for anything which is in good faith done or intended to be done under this Act or the rules made thereunder."

[36]Karnataka Prevention of Cow Slaughter and Cattle Prevention Act, 1964, section 15 read as: "Protection of persons acting in good faith.—No suit, prosecution or other legal proceedings shall be instituted against the competent authority or any person exercising powers under this Act for anything which is in good faith done or intended to be done under this Act or the rule made thereunder."

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brunt of which comes to be borne by a certain targeted community. Several other instances, such as Pehlu Khan (Alwar), Nowhatta, Jharkhand, Palgarh, Jhankar Saikia, or the Karbi Anglong lynching incidents, narrate blood-curdling tales of mass mobilized religious violence (Gupta 2019:160). This hence explains that the form of "Hindu cultural nationalism" propagated as a political philosophy by the Hindu right-wing has repeatedly furthered an idea of "secularism" that equated the "Hindu" with the "Indian" and dismissed any other so-called "pseudo-secular" ideologies alleged to "pander to minorities" (Ali, Sharma, and Ghose 2023:7). The Hindutva right-wing violence has also been attributed to caste politics, which Dilip Menon suggests has been a driving cause behind communal violence and has been utilized in the "attempt to displace its internal caste violence onto an external other" (Menon and Nigam 2007:55). Therefore, reasonable apprehensions arise upon observing the legislative intent to leave out the ground of religion as a ground for mob-lynching.

On Terrorism

The concept of terrorism, though the most debated and alarming, still lacks a concrete universal definition as a precursor to order penalties for the commitment of its offence. In light of this drawback, it has also been observed that in an "overzealous" attempt to combat terrorism, several states often engaged in defining "terrorism", which has thereby been said to have hindered the recognition of a universally accepted definition. Such actions of the states (especially the developing states) have also connoted another sincere note to be attributed towards the "institutionalizing of emergency powers during non-emergency times" to accelerate a process of "routinizing of the extraordinary" (Kalhan 2006:106). The new BNS Act is viewed in sight as such furtherance of the "overreactive" attempts of the state in including the offence of terrorism within the ambit of general punitive laws for criminal offences. In relation to the BNS, we shall attempt to bifurcate this discussion under two broad questions, the first reasoning whether the general laws can endorse special laws, and following from which the second inquiry into the dichotomy created regarding the applicability of the Criminal Procedure Code to the special laws endorsed by the general law.

According to the National Human Rights Commission (NHRC), the implementation of anti-terrorism laws has been justified based upon two apparent grounds: (i) the first being the difficulty encountered in securing convictions under the criminal justice system (operated by the general criminal laws, namely the IPC); and (ii) the second being the delayed trials under regular courts.[37] However, with the introduction of the BNS, a new variant of contradiction seems to have arisen, which appears to be challenging the very foundation upon which the current anti-terrorism laws stand. Previously, the criminal justice system, as operated by the general laws, kept the anti-terrorism laws at bay, citing the above-mentioned reasons and thereby justified the adoption of special laws against such acts over the years, which is now led by the Unlawful Activities (Prevention) Act, 1967 (UAPA). Conversely, the BNS Act under section 113 clearly attempts to define acts of

[37]See National Human Rights Commission, India (2000).

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terrorism and prescribe punishments for the same. Thereby, the question arises: if the BNS is to determine the penal provisions pertaining to terrorism, then would not the need for separate laws such as the UAPA get intrinsically nullified?

As far as this is concerned, a subsequent query surmises considering the fact that, according to the existing special laws governing terrorism within this country, the ordinary procedures of criminal law were not applicable to them. The Code of Criminal Procedure, 1973, or the Indian Evidence Act, 1872, was exempted on the grounds of procedural delay when concerned with acts of terrorism that were solely put under the procedural as well as penal ambit of the UAPA. As a result of such exemption, the charges made under such anti-terrorism legal provisions hold a draconian undertone that is extremely unforgiving and even denies the basic redressals to justice for its offenders. The 2008 Amendments to the UAPA added procedural sections 43A–F in the process of propagating a "reverse burden of proof". Under this section, certain polemical provisions that surface are displayed under section 43D(2), which extends the detention period up to 180 days, or sections 43D(4) and (5), making the procedure to receive bail cumbersome. The blatant disregard for the basic principles of criminal justice like "presumption of innocence", "strict interpretation of penal laws", *nullum crimen sine lege*, "rule of burden of proof" and "basic bail jurisprudence" pose an alarming threat to the framework of constitutional justice within this democracy. These sections have been retained after the UAPA 2019 amendment as well.

Several cases have strived to contest the capricious abuses of these laws in favour of fair trial and human rights. Such had been in the case of *Arup Bhuyan v. State of Assam*,[38] wherein it had been held that mere membership to an organization that has been banned should not serve as sufficient grounds to incriminate the person unless accompanied by violence or acts of public incitement intended towards disorder perpetrated on their behalf. However, this judgment was reversed by the Supreme Court in the *Arup Bhuyan v. State of Assam* (2023) review judgment, making "guilty by association" recognized under the UAPA. Similarly, in other cases such as *State v. Umar Khalid*,[39] it was held that possession only of "sketchy material" would not amount enough to hold someone in jail and unduly restrict their liberty while the trial is in process, or in the case of *Fakhrey Alam v. State of Uttar Pradesh*,[40] which unheeded the procurement of a supplementary chargesheet filed under the UAPA to negate the accused their statutory and fundamental right to bail.

Thus, the author challenges the grounds for continuing the UAPA. Considering the immaculate replication of the definition of terrorism in the BNS as given in the UAPA, it further raises questions of jurisdictional manipulation whereby the Parliamentary committee has provided no clear explanations as to when an individual shall be booked under the BNS and when under the UAPA (Ghose and Bajpai 2024). Sections 113(3),[41] (5),[42] (6)[43] and (7)[44] of the BNS Act, 2023 have

[38]*Arup Bhuyan v. State of Assam* (2011) 3 SCC 377, 379.
[39]*State v. Umar Khalid* (2022) DHC 004325.
[40]*Fakhrey Alam v. State of Uttar Pradesh* Cr. App. No. 319 of 2021.
[41]Bharatiya Nyaya Sanhita, 2023, section 113(3).
[42]Ibid., section 113(5).
[43]Ibid., section 113(6).
[44]Ibid., section 113(7).

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largely incorporated the text contained within sections 18,[45] 19,[46] 20[47] and 21,[48] respectively, of the UAPA, and according to the explanation to sub-section 7 of section 113 of the BNS it is required that, for the removal of doubts, "the officer not below the rank of Superintendent of Police shall decide whether to register the case under section 113 or under the Unlawful Activities (Prevention) Act, 1967". Thus, it can be inferred that the BNS goes on to endorse the jurisdiction and authority of the UAPA, which, in fact, is a matter of *sub judice* considering the glaring threats to justice reflected in its procedural aspects. Additionally, the very need for a special law on Terrorism, i.e. the UAPA, had arisen from the sheer silence of the general law, i.e. the IPC, on matters pertaining to terrorism. With the BNS providing in no equivocal terms what comprises an act of terrorism and who shall, upon being guilty of such, be labelled with the tag of a terrorist, hereby nullifies the very need for a special Act. Furthermore, recognizing the definition provided by the BNS (which is to be equated as the general law for penal provisions), it hence should also be drawn that the general procedural law for prosecution shall also be made applicable to acts of terrorism regardless of the draconian provisions under the UAPA. In this regard, an apparent dilemma surfaces, shifting focus between the applicability of general laws and special laws both in procedural and substantive applications of the same.

Whilst the existence of anti-terrorism laws has been repeatedly questioned and their draconian characteristics challenged, their continuance divulges an ostensible propensity of the government to silence political dissent, which forms the premise of democracy under the garb of anti-terrorism laws. In addition to the ongoing apprehensions over these laws, with their endorsement by the BNS, further trepidation considering their applicability and procedural inconsistencies has arisen, as has been discussed above. Further, speculating that within the BNS, the act of terrorism has been put under the chapter on the "human body" it is also contended that perhaps the government is contemplating a bifurcation in the process of ascribing punishments for acts of terrorism, whereby when such acts are directed upon the human body the process shall fall within the BNS and when not it shall within the UAPA. However, this speculative explanation too fails fundamentally in defeating the broader and exhaustive understanding of the term terrorism, which entails "acts targeted at human lives or vital installations or even both" (Ghose and Bajpai 2024). At times, when the criminal justice system strives to avoid and override confusion, such duplication of provision negates the very jurisprudence of modern criminal law. These challenges hereby posed intend to evoke tangible clarifications from the judicial minds employed in framing the BNS.

General Critiques

The glaring concerns that abound about the BNS can broadly be summarized under the mentioned headings of colonial continuities and anti-democratic biases, yet several other facets of the BNS Act still remain unaddressed, which we intend to

[45]Unlawful Activities (Prevention) Act, 1967, section 18.
[46]Ibid., section 19.
[47]Ibid., section 20.
[48]Ibid., section 21.

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cover under this paper through a general critique. However, this part shall be segmented so as to address the following themes of "patriarchal biases", "linguistic imperialist connotations" and "ambiguities on punishments" and conclude by assessing the very need for a new act as a replacement to the IPC. These issues summarized under general critiques are broader themes in themselves but have been meticulously compiled together under this heading.

Patriarchal Biases

Patriarchy is a concept that has entrenched footings deep within the human psyche that passively prevails to date, often pervading the sporadic feminist upsurges developed over centuries. Such a blatant reflection of implicit patriarchal biases is exhibited by the BNS as well. This is displayed through the blatant disregard towards victims of sexual violence apart from women in the context of sexual offences. The BNS Act has adopted a rather narrow interpretation of sexual offences through such a blind-sighted vision to several such victims of sexual stereotypes and gendered ideas. Furthermore, retaining the archaic interpretations attributed to marital rape that too when such ideas are fervently being challenged and contested upholds a rather obstinate stance to withhold the existing patriarchal conservatism.[49] Moreover, the slack indifference towards sexual assault committed by anyone other than a man, including a transgender or transman, in considering sexual offences reiterates the argument further.

False Promise to Marriage in BNS: How Problematic

The provisions on initiating sexual intercourse upon a false promise to marry being considered rape have been encoded under section 69[50] of the BNS pertaining to "Sexual intercourse by employing deceitful means, etc.". This provision has been the result of several judicial precedents, beginning with *Jayanti Rani Panda v. West Bengal*,[51] *Hari Majhi v. West Bengal*[52] and *Uday v. State of Karnataka*.[53] While these precedents outlined the consequence of the act of inducing sexual intercourse under a false promise to marriage, subsequent precedents, as in *Deelip Singh v. State of Bihar*,[54] *Deepak Gulati v. State of Haryana*,[55] *Naim Ahamed v. State (NCT of Delhi)*[56] and also *Pramod Suryabhan Pawar v. State of Maharashtra*[57] probed into the distinction between a false promise and the inability or impossibility to fulfil a genuine promise. This, hereby being incorporated within the BNS, has continued the difficulty in determining a false promise that has not been exhaustively provided and thereby leaves out openings that can unjustly favour acquittals of the accused

[49]*Independent Thought v. Union of India* (2017) 10 SCC 800.
[50]Bharatiya Nyaya Sanhita, 2023, section 69.
[51]*Jayanti Rani Panda v. West Bengal* (1983) SCC OnLine Cal 98.
[52]*Hari Majhi v. West Bengal* (1989) SCC OnLine Cal 255.
[53]*Uday v. State of Karnataka* (2003) 4 SCC 46.
[54]*Deelip Singh v. State of Bihar* (2005) 1 SCC 88.
[55]*Deepak Gulati v. State of Haryana* (2013) 7 SCC 675.
[56]*Naim Ahamed v. State (NCT of Delhi)* (2023) SCC Online SC 89.
[57]*Pramod Suryabhan Pawar v. State of Maharashtra* (2019) 9 SCC 608.

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persons. Adding to this, it can also be purported that proving a "false promise to marriage" shall become a ground difficult to prove in a court of law, especially concerning inter-religious couples and couples in a live-in relationship which thereby sprouts a dichotomy contrasting patriarchal biases, and a woman's autonomy (Ali, Vashist, and Ghose 2024). This poses the caveats of improper and arbitrary usage or widespread disposals owing to a paucity of concrete evidentiary proof. Hence, an introspection into this section reveals hindrances that might render this section redundant, which need to be corrected in accordance with the evolving notions of liberty with respect to sexual practices and relationships.

Deletion of Section 377

Further, it can be purported that section 377[58] of the IPC had been read down in the landmark case of *Navtej Singh Johar v. Union of India*[59] by the Supreme Court. The court partially read down section 377, ruling that it was unconstitutional insofar as it punished adults for having consensual intercourse. In the application of section 377, articles 14,[60] 15,[61] 19[62] and 21[63] of the Constitution were violated, and these directed the ruling in such a direction. Following this, the provision for punishment against "Unnatural Offences" has come to be entirely excluded from the new BNS Act of 2023. Thus, the provision pertaining to unnatural offences, which also includes the acts of *Bestiality and Sodomy* which also are included within the legal interpretations of "Unnatural Offences", *has* been completely removed at the same stretch, thereby negligently decriminalizing these heinous crimes as well, heeding to the legal maxim *nullum crimen sine lege* which is translated as "there can be no crime without a law". Shedding light upon this issue, it can be held that more definite and regulated incorporation of a provision pertaining to unnatural offences keeping in tandem with the partial reading down suggested in the *Navtej Singh Johar* judgment has to be reworked.

Linguistic Imperialist Connotations

The introduction of the three bills and their subsequent enactments, including the BNS, have stirred a brimming controversy concerning the imposition of "Hindi imperialism", which has historically accounted for stern opposition from the South of the country. Responses have also gone into identifying an "audacious attempt" by the Bharatiya Janata Party (BJP) government to "tamper with the essence of India's diversity" (The Wire Staff 2023). The Hindi language has also been resisted by the Eastern region to be divisive of the unity of the country; despite the purported "Indian-ness" endorsed through the Hindi language, perhaps the crudeness of reality colours a different picture wherein a foreign language despite lacking an Indian origin stands as the relic of a shared colonial past. The Acts have invited

[58]The Indian Penal Code, 1860, section 377.
[59]*Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.
[60]The Constitution of India, 1950, art 14.
[61]Ibid., art 15.
[62]Ibid., art 19.
[63]Ibid., art 21.

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criticisms for "tamper(ing) with the essence of India's diversity" (Bhalla 2023). As also identified by several senior legal experts such as Senior Advocate K. S. Chauhan, "having Hindi articles for central laws is not permissible under Article 348", and such enactment of the bills is considered "ultra vires as the Constitution does not have relaxation of this nature" (Bhalla 2023). Senior Advocate Mohan Katarki outlined that "criminal law and criminal procedure are placed in the concurrent list of the Seventh Schedule" empowering both the Parliament as well as the state legislatures to legislate upon such laws, which thereby opens multiple lingual variations of the Acts, which might pose an obstacle to unity and cause judicial as well as legal conundrums (Bhalla 2023). Furthermore, countering the arguments suggesting that Acts have only been titled in Hindi whilst retaining the contents in English, Professor G. Mohan Gopal cited that the term "text" within Article 348 of the Constitution includes "the title of an Act", and whilst Hindi versions of the bills having Hindi titles and any other regional versions of the bills having regional titles can be acceptable, "the real issue is that the bills (now Act) do not have any English title" and it is insufficient to "use a Hindi title written in the Latin script to fulfil the requirements of this provision" within Article 348 (Bhalla 2023).

Another rather alarming concern is aroused in cognizance of the uncanny revocation of the definition of "India" that is provided in the IPC under section 18,[64] in addition to a much projected and invigorated usage of the term "Bharat/Bharatiya". This, too, can be held as an additional impetus to the attempted promotion of "Hindi Chauvinism" (Express Web Desk 2019).

Ambiguities Over Punishments

The punishments provided within the BNS continue to criticize the Act in view of the enigmas overshadowing the redefined provisions of life imprisonment and the retained capital punishments. In the matter of life imprisonment, such has been given a literal interpretation preferring imprisonment for the remainder of the person's life for heinous offences such as rape, kidnapping or maiming a child for purposes of begging, or trafficking of persons, among others, as is reflected from a reading of sections 64, 139 and 143. Several queries might arise with respect to such harshening of the sentence of life imprisonment. It might be said that the legislature is envisaging a shift from a reformative penal system to a deterrent penal system by incorporating severe punishments. Moreover, considering the dialogues to abolish capital punishment in an attempt to uphold the reformative notions in contrast to a deterrent ethos perpetrated through fear, it cannot be said that a phenomenal shift from such can be observed in this regard.

Conclusion

The IPC, in its over 150 years of presence, has guided and moulded the criminal and penal laws of not only India but several other common-law countries. The IPC has been updated, reviewed and revamped over the years, glorifying its relevance and acceptance as the supreme code dedicated to penal laws governing this country. The

[64]The Indian Penal Code, 1860, section 18.

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need for an entirely new Penal Act perhaps demanded a more ardent plea of transition than simply accusing the colonial trends and complexities of interpretability. The colonial reflections may undisputedly call upon an Indian past which has been shaped and crafted gradually, adopting an incremental approach to policy making. However, in the process of making drastic changes, the caveats of overhauling the good within the previous act and bolstering the bad laden within cannot be entirely overlooked. In comparison to the BNS, it can be said that, on the whole, the IPC has largely been kept as it is within the new Act whilst only having reorganized the sections and introduced certain additions to the existing penal provisions. In contrast, some criticisms have surfaced, mentioning that several controversial provisions currently held under scrutiny and debate have been retained. Hence, the BNS must still justify its introduction and enactment as a credible replacement, which could not have been attained through amendment. Furthermore, the incredulous haste that was displayed in passing the bills whilst most of the opposition in the Parliament remained suspended, thereby denying any scope of debate or dialogue, has raised suspicion throughout the nation and compelled the populace to wonder if, after all, such acts are but mere agendas of linguistic imperialism being forwarded more than any substantive change or alterations being made to improve the penal laws of the land.

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References

Ahmad, N. M. and A. Sharma. 2024. "The Enduring Colonial Legacy: The New Criminal Laws." *Economic and Political Weekly* 59(11):21–4.

Ali, S. M. A., D. Sharma, and A. Ghose. 2023. "Covid-19 and the Demonisation of Muslims in India." *Manchester Journal of Transnational Islamic Law & Practice* 19(1):1–33.

Ali, S. M. A., A. Vashist, and A. Ghose. 2024. "Bharatiya Nyaya Sanhita and the False Promise to Marry." *Economic & Political Weekly* 59(18):18–20.

Bhalla, V. 2023. "The New IPC Has a Hindu Name. But Legal Experts Point Out That It Is Illegal." *Scroll.in*, 16 August 2023, retrieved 1 April 2024 (https://amp.scroll.in/article/1054333/the-new-ipc-has-a-hindi-name-but-legal-experts-point-out-that-it-is-illegal).

Bhat, M. M. A. 2020. "The Crime Vanishes: Mob Lynching, Hate Crime, and Police Discretion in India." *Jindal Global Law Review* 11(1):33–59.

Bhatia, G. 2016. "Blasphemy Law and the Constitution." *Live Mint*, 19 March 2016, retrieved 16 February 2024 (https://www.livemint.com/Sundayapp/TFCMsqPVQ8rK6dJj2E2kSN/Blasphemy-law-and-the-Constitution.html).

Bilgrami, A. 2014. "Secularism: Its Content and Context." *Journal of Social Philosophy* 45(1):25–48.

Dhareshwar, V. and R. Srivatsan. 1996. "Rowdy-Sheeters: An Essay on Subalternity and Politics." Pp. 201–31 in *Subaltern Studies IX*, edited by S. Amin and D. Chakrabarty. London: Oxford University Press.

Express Web Desk. 2019. "Nobody in the North Is Learning Malayalam and Tamil: Shashi Tharoor on Row over Hindi 'Imposition'." *The Indian Express*, 3 June 2019, retrieved 2 April 2024 (https://indianexpress.com/article/india/three-language-formula-needs-better-implementation-says-shashi-tharoor-5761390/).

Fernandes, D. A. 2003. "Protection of Religious Communities by Blasphemy and Religious Hatred Laws: A Comparison of English and Indian Laws." *Journal of Church and State* 45(4):669–97.

Ghose, S. and P. Bajpai. 2024. "Terrorist Acts in the UAPA and Bharatiya Nyaya Sanhita: Duplication or Duplicity?" *The Wire*, 8 February 2024, retrieved 28 March 2024 (https://m.thewire.in/article/law/duplication-or-duplicity/amp).

https://doi.org/10.1017/cri.2024.20 Published online by Cambridge University Press

Gupta, I. 2019. "Mob Violence and Vigilantism in India." *World Affairs: The Journal of International Issues* 23(4):152–72.

Jain, M. P. 2019. *Indian Constitutional Law*, 8th edn. India: LexisNexis.

Jones, P. 1980. "Blasphemy, Offensiveness and Law." *British Journal of Political Science* 10(2):129–48.

Kalhan, A., G. P. Conroy, M. Kaushal, and S. S. Miller. 2006. "Colonial Continuities: Human Rights, Terrorism and Security Laws in India." *Columbia Journal of Asian Law* 20(1):95–231.

Liang, L. 2016. "Free Speech and Expression" Pp. 814–33 in *The Oxford Handbook of the Indian Constitution*, edited by S. Choudhry, M. Khosla, and P. B. Mehta. Oxford: Oxford Academic.

Live Law News Network. 2024. "New Criminal Laws Replacing IPC, CrPC & Evidence Act to Come into Force from July 1, 2024." *Law Live*, 24 February 2024, retrieved 1 March 2024 (https://www.livelaw.in/top-stories/new-criminal-laws-replacing-ipc-crpc-evidence-act-to-come-into-force-from-july-1-2024-250395?infinitescroll=1).

Madhavan, M. R. 2023. "Revamping the Criminal Justice System to Fit the Bill." *The Hindu*, 11 November 2023, retrieved 21 January 2024 (https://www.thehindu.com/opinion/lead/revamping-the-criminal-justice-system-to-fit-the-bill/article67522334.ece).

Mehla, A. 2024. "New Criminal Laws: Postcolonial or Nationalist?" *Economic and Political Weekly* 59(6):4.

Menon, N. and A. Nigam. 2007. *Power and Contestation: India Since 1989*. London: Fernwood Publishing.

Mill, J. S. 2016. "On Liberty" Pp. 19–57 in *On Liberty & Utilitarianism*, edited by T. Griffith. Ware, Hertfordshire: Wordsworth Editions Limited.

Milton, J., R. C. Jeb, A. R. Waller, and A. W. Verity. 1918. *Areopagiticia, with a Commentary by Sir Richard Jebb and with Supplementary Material*. Cambridge: Cambridge University Press.

Nandy, A. 1995. "An Anti-Secularist Manifesto." *India International Centre Quarterly* 22(1):35–64.

National Human Rights Commission, India. 2000. "Prevention of Terrorism Bill, 2000: NHRC's Opinion." *National Human Rights Commission, India*, retrieved 15 March 2024 (https://nhrc.nic.in/press-release/prevention-terrorism-bill-2000-nhrc%E2%80%99s-opinion#:~:text=The%20National%20Human%20Rights%20Commission,issued%20on%2014%20July%202000).

Pathak, V. 2016. "Revisit Sedition Law: Romila Thapar." *The Hindu*, 18 February 2016, retrieved 11 February 2024 (https://www.thehindu.com/news/national/Revisit-sedition-law-Romila-Thapar/article14084640.ece).

Punwani, J. 2012. "Bal Thackeray: A Politics of Violence." *Economic and Political Weekly* 47(47/48):12–15.

Ramachandran, Sudha. 2020. "Hindutva Violence in India: Trends and Implications." *Counter Terrorist Trends and Analyses* 12(4):15–20.

Raz, J. 1991. "Free Expression and Personal Identification." *Oxford Journal of Legal Studies* 11(3):303–24.

Satish, M., P. P. Dash, and A. Pandey. 2024. "Bharatiya Nyay Sanhita: Decolonising or Reinforcing Colonial Ideas?" *The Wire*, 30 January 2024, retrieved 1 February 2024 (https://thewire.in/law/bharatiya-nyay-sanhita-decolonising-or-reinforcing-colonial-ideas).

Thapar, R., A. G. Noorani, and S. Menon. 2016. *On Nationalism*, 1st edn. New Delhi: Aleph Book Company.

The Law Commission of London. 1977. "Codification of the Criminal Law: Treason, Sedition and Allied Offences, Working Paper No. 72." 10 May 1977, retrieved 30 January 2024 (https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2016/08/No.072-Codification-of-the-Criminal-Law-Treason-Sedition-and-Allied-Offences.pdf).

The Wire Staff. 2023. "'Hindi Imposition': Modi Govt's Nomenclature for New Criminal Law Bills Stirs Row." *The Wire*, 13 August 2023, retrieved 1 April 2024 (https://thewire.in/politics/hindi-imposition-modi-govts-nomenclature-for-new-criminal-law-bills-stirs-row).

Times Now Digital. 2024. "Bharatiya Nyaya Sanhita Bill 2023: Key Provisions that Will Replace Indian Penal Code | Explained." *Times Now Digital*, 12 August 2023, retrieved 21 January 2024 (https://www.timesnownews.com/india/bharatiya-nyaya-sanhita-bill-2023-key-provisions-that-will-replace-indian-penal-code-explained-article-102658808).

Trevelyan, Otto G. 1923. *The Life and Letters of Lord Macaulay*, 2nd edn. London: Longmans, Green & Co.

Yadav, V. 2023. "The Sedition Conundrum in India: A Critical Examination of its Historical Evolution, Current Application and Constitutional Validity." *International Annals of Criminology* 61(2):188–222.

Yeo, Stanley and Barry Wright. 2016. "Revitalising Macaulay's Indian Penal Code." Pp. 3–17 in *Codification, Macaulay and the Indian Penal Code*, edited by W. C. Chan, B. Wright, and S. Yeo. New York: Routledge.

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Translated Abstracts

Abstracto

Los cambios suelen encontrarse con la resistencia de las mentes pensantes antes de ser bien recibidos. Este artículo destaca la urgente necesidad de examinar los cambios propuestos al antiguo Código Penal de la India que se introducirán con la promulgación de la nueva Bharatiya Nyaya Sanhita, 2023. Evalúa críticamente cada uno de esos nuevos cambios para disipar todas las dudas y aprensiones, profundizando particularmente en la inspección de la Bharatiya Nyaya Sanhita, 2023, en un estudio comparativo y teórico del Código Penal de la India. El artículo analiza la "intención legislativa y las continuidades coloniales", las "tendencias antidemocráticas" y las "críticas generales" que abordan los debates sobre los "sesgos patriarcales, los problemas que conlleva una falsa promesa de matrimonio en el BNS, las connotaciones imperialistas lingüísticas y las ambigüedades sobre los castigos". Este artículo tiene como objetivo evaluar la premisa para una revisión del código penal actual e identificar y hacer corresponder los cambios sustanciales sugeridos en la nueva ley a la luz de una ola prometida de descolonización.

Palabras clave: tendencias antidemocráticas; Bharatiya Nyaya Sanhita; continuidades coloniales; descolonización; Código Penal Indio

Abstrait

Un changement se heurte le plus souvent à la résistance des esprits réfléchis avant d'être accueilli favorablement. Cet article souligne la nécessité urgente d'examiner les modifications proposées au Code pénal indien séculaire qui seront apportées par la promulgation de la nouvelle Bharatiya Nyaya Sanhita de 2023. Il évalue de manière critique chaque nouveau changement de ce type pour dissiper tous les doutes et appréhensions, en se penchant notamment sur l'inspection de la Bharatiya Nyaya Sanhita de 2023, dans une étude comparative et théorique du Code pénal indien. L'article aborde « l'intention législative et les continuités coloniales », « les tendances antidémocratiques » et « les critiques générales » abordant les débats sur « les préjugés patriarcaux, les problèmes liés à une fausse promesse de mariage dans le BNS, les connotations impérialistes linguistiques et les ambiguïtés sur les sanctions ». Cet article vise à évaluer les prémisses d'une refonte du code pénal existant et à identifier et à faire correspondre les changements substantiels suggérés dans la nouvelle loi à la lumière d'une vague de décolonisation promise.

Mots-clés: tendances antidémocratiques; Bharatiya Nyaya Sanhita; continuites coloniales; decolonisation; Code pénal indien

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摘要

在受到欢迎之前，变革往往会遭到思想界的抵制。本文强调，迫切需要审查新《印度新法律汇编》（2023 年）颁布后对古老的《印度刑法典》提出的修改建议。它批判性地评估了每一项新的变化，以解决人们心中的所有疑虑和忧虑，特别是深入研究了《印度新法律汇编》（2023 年），对《印度刑法典》进行了比较理论研究。本文讨论了“立法意图和殖民延续性”、“反民主倾向”和“一般批评”，针对“父权偏见、BNS 中虚假婚姻承诺中的问题、语言帝国主义内涵和惩罚的模糊性”的争论。本文旨在评估对现有刑法进行全面改革的前提，并根据非殖民化浪潮的承诺确定和对应新法案中建议的重大变化。

关键词： 反民主倾向、印度新制度研究所、殖民延续性、非殖民化、印度刑法典。

الملخص

غالبا ما يواجه التغيير مقاومة من العقول المفكرة قبل الترحيب به. تؤكد هذه الورقة على الحاجة الملحة إلى التدقيق في التغييرات المقترحة على قانون العقوبات الهندي القديم والتي سيتم تحقيقها من خلال سن قانون بهارات ني ايا سانهيتا الجديد لعام 2023. كما تقوم بتقييم كل تغيير جديد بشكل نقدي لحل جميع الشكوك والمخاوف، مع الخوض بشكل خاص في فحص قانون بهارات ني ايا سانهيتا لعام 2023، في دراسة نظرية مقارنة عبر قانون العقوبات الهندي. تناقش الورقة "القصد التشريعي والاستمرارية الاستعمارية"، و"الاتجاهات المناهضة للديمقراطية"، و"الانتقادات العامة" التي تتناول المناقشات حول "التحيزات الأبوية، والمشاكل المحملة بوعد كاذب بالزواج في BNS، والدلالات الإمبريالية اللغوية، والغموض حول العقوبات". تهدف هذه الورقة إلى تقييم الفرضية لإصلاح قانون العقوبات الحالي وتحديد التغييرات الجوهرية المقترحة في القانون الجديد ومطابقتها في ضوء موجة الاستعمار الموعودة.

الكلمات المفتاحية: الاتجاهات المناهضة للديمقراطية، بهارات ني ايا سانهيتا، الاستمرارية الاستعمارية، إنهاء الاستعمار، قانون العقوبات الهندي.

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