

Nyaya Sanhita and Swaraj in legal ideas

'Swaraj' in legal ideas can be realised incrementally if basic legal concepts can generate intelligibility and sensitivity. This can be actualised only if the paradigm of official and bureaucratic law is in sync with the sociological dimensions of law.

Written by [Guest](#)

Updated: January 9, 2024 10:52 IST



The Bharatiya Nyaya Sanhita (BNS), 2023 received the President's assent recently.
(Representative Image: IE)

By – Prof (Dr) Chanchal Kr. Singh, Dr. Mritunjay Kumar and Aastha Naresh Kohli

The President of India recently gave her assent to the much-anticipated Bharatiya Nyaya Sanhita (BNS), 2023. There were many legal provisions in the Indian Penal Code, 1862, which became obsolete due to structural transformations of the society, and many provisions were declared unconstitutional by the Supreme Court of India through its judgments. These changes have proved to be the catalyst for the introduction of a new criminal code. The BNS is an endeavour, as suggested by the Union Minister for Home Affairs in the Parliament, to decolonise the substantive code of criminal law and to bring changes as per the necessities of India.

The BNS has codified many new offences, such as terrorism, mob lynching, and organised crime, and has deleted many offences such as sedition, adultery, and unnatural offences. In fact, the BNS has rephrased the offence of sedition as an “offence endangering sovereignty, unity and integrity of India” under Clause 152. It has prescribed the death penalty as one of the alternative punishments for offences of terrorism, mob lynching, and organised crime. The Sanhita has brought life imprisonment as one of the punishments along with capital punishment in case of murder or attempt to murder committed by a life convict. It has also introduced “community service” as one of the alternative punishments to rehabilitate criminals in petty offences.

ALSO READ



Delhi weather: Capital colder than Nainital as...



India Weather Update: Delhi colder than Nainital; cold...



Tamil Nadu rain: 'Orange' alert across districts,...



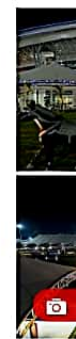
Breaking News on January 8: Nepal...

Also Read: Explained: Bharatiya Nyaya Sanhita, the new IPC, and the concerns around it

Criminalisation and Defects in Legislative Drafting

The BNS has introduced many new offences. However, the words defining these offences are so vague that they may be misused by the investigative authorities to implicate any innocent person or harass to the extent that the process will be a punishment. For example, Clause 111 (3) of the Sanhita prescribes, “Whoever abets, attempts, conspires or knowingly facilitates the commission of an organised crime, or otherwise engages in any act preparatory to an organised crime, shall be punished”. Here, words such as “assists”, “facilitates”, and “preparatory”, without qualification by Mens rea, signify the strict liability offence. The operationalisation of these words to facilitate justice will require the pious intention of authorities. Usually, the legal institutions are administered by rational techniques instead of love and compassion.

Likewise, Clause 152 of the Sanhita criminalises the expression or activity which endangers the sovereignty, unity and integrity of India. As per the Clause, anyone “excites or attempts to excite”



Tiruc
Airp
Tem
mor
thro



Top
mos
expe
cost
300
com
Cars
plan



STC



Top



Narr



Nifty



Nifty



Nifty



50

“subversive activities, or encourages feelings of separatist activities” shall be punished. These undefined words would prove to be unruly horses.

Also Read: [What is the new hit-and-run law that led to pan-India protests by truckers?](#)

Similarly, Clause 113 of the Sanhita has introduced “Terrorist Act” as an offence. The Clause provides the Mens rea of “intent to strike terror or likely to strike terror in the people”. It, however, does not define the term “terror” in any specific sense. Clause 113 (3) provides that anyone who commits “any act preparatory to the commission of a terrorist act” shall be punished. In this clause “preparatory” has neither been defined nor any Mens rea has been added as a qualifier.

Jeremy Bentham, one of the greatest reformers of the modern era, prescribed to avoid ambiguity, obscurity, over-bulkiness, unsteadiness, entanglement, longwindedness, and disorderliness in drafting legislation. In drafting the BNS, these principles have been ignored. Moreover, the conspicuous absence in the BNS of the legal provision, such as Unnatural Offence punishable under Section 377 of the Indian Penal Code, 1862, signifies an acute tendency in the drafters to avoid complex moral issues in drafting the criminal law legislation.

The hasty practices of law-making in post-colonial India have already burdened the courts with the explosion of dockets. The lack of brevity in legal propositions will further raise serious challenges against the operationalisation of rules of the BNS.

Also Read: [Bills replacing British-era criminal laws get President's assent](#)

Swaraj in Legal Ideas

The basic telos of BNS is premised on the decolonisation of Indian criminal law. But a critical reflection of its provisions suggests that it is not only a continuation of the disciplinary powers but also the enlargement of juridical powers of state apparatuses. The basic concepts in the Sanhita are the extension of the colonial era codifications and legislations. Its meanings and values cannot be understood in the context of Indian experiences.

In the words of K.C. Bhattacharya, the “shadow mind” functions behind the unmindful usage of words, concepts, or categories.

These words weave a cultural system whose powers are too subtle but efficacious in changing social behaviour. 'Swaraj' in legal ideas can be realised incrementally if the basic legal concepts can generate intelligibility and sensitivity. This may be actualised only if the paradigm of official and bureaucratic law is in sync with the sociological dimensions of law.

Especially since most Indians are alienated from the "language of law" and "legal language". The technicality of legal language and its imageries do not match with the social practices of law rooted in shared praxes of the communities. In this sense, the purpose of carving out the Indian soul beneath the layers of the "colonial nature of Indian law" (Upendra Baxi, 1982) is a daunting task to achieve, especially with the magic wand of Sanhita!

The BNS has replicated the concepts and techniques crafted by the British Colony to meet the necessities of the British Raj. Mahatma Gandhi in Hind Swaraj proposed to attain Swaraj by learning from the civilisational values of India, which were based on decentralisation of political power, righteousness in conduct and services, and non-violence in governance.

The BNS, on the contrary, continues with the colonial reified culture of imagining the criminal law.

Punishments and Human Rights

The BNS has enhanced the punishments in many offences without giving due weightage to the principle of proportionality, which is the cardinal principle of penology in determining the relationship between crime and punishment. The contemporary world has adopted the logic of human rights in the language of Constitutions to eliminate inhuman and degrading punishments.

Article 7 of the International Covenant on Civil and Political Rights (ICCPR) mandates, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". Article 1 of the Second Optional Protocol to the ICCPR prescribes to abolish the death penalty. However, the BNS prescribes the death penalty as one of the alternative punishments in newly introduced offences. In this sense, the BNS has regressed one step backward vis-à-vis penal jurisprudence.

(About the authors: Prof (Dr) Chanchal Kr. Singh is Professor of Law and Dr. Mritunjay Kumar is Associate Professor at HPNLU Shimla; Aastha Naresh Kohli is a practicing Advocate at High



Am
Airl

Easi

LA1

Oil pi
mark
East
supp

apna
#Apr
camp

L&T C
signi
Builc
busir

Vista
Airlin
recei
by A
70 ai

Bajaj
appr
buyb
4,000
per s

