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Expert Explains: What does the proposed legislation to overhaul criminal justice system mean?

What does the stated effort, through the proposed legislation, to overhaul the criminal justice system really achieve — or not achieve? What must be done to bring about the critical changes that are needed?

The Bills do propose some changes — but it is difficult to see how they will have a real impact on the deep crisis in India's criminal justice system. Further, some of the changes in these Bills present serious concerns

Are the three new Bills an overhaul of India's criminal laws?

There is a disjunct between the manner in which these Bills are being presented and their actual content. They are far from being an overhaul that will be the panacea for issues that plague India's criminal justice system. Large parts of these three Bills simply reproduce existing provisions of the Indian Penal Code, the Criminal Procedure Code and the Indian Evidence Act.

That is not to say that there aren't changes — but it is difficult to see how these changes will have any real impact on the deep crisis within India's criminal justice system. Further, some of the changes reflected in these Bills present serious concerns.

What process was adopted to determine the content of the Bills?

During the pandemic in May 2020, an Expert Committee was constituted to undertake public consultations and make recommendations. That process of consultation left a lot to be desired in terms of its composition, and the modes of participation that it adopted. There were also concerns about the limited perspective from which it was approaching the issue of criminal law reform.

There was no real information on the methodology that the Expert Committee adopted to process and analyse the submissions that were received. The Committee's recommendations to the Government of India are not in the public domain — it is in fact, possible that there is a divergence between the Committee's recommendations and the contents of the Bills that have been tabled in Parliament.

It is also not known whether the government undertook other consultation mechanisms towards determining the contents of these Bills.

What changes within these Bills significantly impact the framework of Indian criminal law?

A significant change is the introduction of new offences that were absent in the IPC like acts endangering sovereignty, organised crime, terrorism offences, mob lynching, sexual intercourse by deceitful means/ false promise to marry.

But the manner in which the offences are drafted continue to perpetuate the problem of vague criminal law provisions that exacerbate the risk of arbitrary arrests. Also, some of these offences borrow heavily from existing legislation on organised crime and the UAPA without clarifying the reasons for, or consequences of such borrowing.

That said, it should be noted that certain problematic IPC provisions do not find place in the Bharatiya Nyaya Sanhita (BNS) Bill, 2023. There are no provisions similar to s. 377 (unnatural offences) and s. 309 (attempt to suicide).

Sedition as an offence is not present, but the introduction of "acts endangering sovereignty" as an offence is perhaps the most draconian provision in these Bills. Not only is the provision vague, the manner in which it criminalises certain actions is bound to give the police unchecked powers of arrest.

In the Bharatiya Nagarik Suraksha Sanhita, 2023 (that seeks to replace the Criminal Procedure Code), the period during which an arrested person can be sent to police custody has been expanded.

Like in the CrPC, an arrested person can be sent to police custody for a maximum of 15 days after the date of arrest, but in the proposed law these 15 days of police custody can be spread over a 60- or 90-day period depending on the offence.

However, the Nagarik Suraksha Bill has significant improvements for the rights of victims — perhaps the most important of those is the provision allowing registration of FIR in any police station irrespective of where the offence was committed.

The provision requiring mandatory video recording of search and seizure seeks to address fairness in police investigations. The Nagarik Suraksha Bill also seeks to plug an important gap by making it the responsibility of a prison superintendent to ensure that an application is made to the court to release undertrials who have completed half or one-third of their maximum possible sentence.

There is also a clear push to expand the use of electronic evidence and to bring in forensics in a big way. However, crucial questions concerning the collection and analysis of forensic evidence along with the manner in which they are used in courts remain unaddressed in the proposed procedural or evidence law.

Have previously identified problems with the laws been addressed?

Not much attention has been paid to problems that have long plagued India's criminal justice system.

Overcrowded prisons and the large proportion of undertrials is a burgeoning crisis. Reforms in bail adjudication are a crucial component of this, and the new Bills do very little to resolve the manner in which bail is adjudicated and accessed.

These Bills also do not move towards effectively realising the commitment that bail should be the default option, and incarceration the exception.

The prevalence of torture and the backdoor entry of torture-based evidence in criminal trials is well known. While confessions to the police are not admissible per se, empirical research sufficiently documents staged recoveries which become the sole basis of conviction in many cases in the absence of direct evidence.

While clause 118 of the BNS, 2023 on causing grievous hurt to extort confession might be read as an attempt to criminalise torture, there are significant limitations with the provision. Without appropriate changes in the evidence legislation on recovery evidence based on statements to the police, the institutional reality of torture will continue.

The troubling approach to criminalisation and punishment and their relation to social problems continues in these laws. They perpetuate the thinking that criminal law is the first and only response to social problems. There is a crying need to start realising that criminalisation as the go-to response is not effective. Solving social problems is a far more complex exercise and resorting to criminal law is just a populist measure.

What role do legislative measures play in bringing about lasting change?

There has never been any disagreement about the need for reforming the criminal justice system and criminal law framework. However, legislative change by itself cannot be sufficient.

The Bills in their current form do not rectify long identified problems with the law and the process. But even if they had addressed those problems, it is doubtful whether it would have been sufficient.

An area of relative disengagement and apathy remains institutional reforms. The attraction that the immediacy of legislative change offers has overshadowed the less immediately observable change that accompanies institutional reform, even as it is the more urgent and helpful change to effect.

The barrier in bringing about reforms in the police force, the prison administration, or even courts is not just one of inertia, but also one of intention. For instance, informal and problematic incentives and disincentives that form part of institutional culture are rules that actors in those institutions play by because that is the acceptable mode of executing responsibility — those playing by the rules are often worse off. These informal incentives and disincentives find their way in because of ever widening gaps that are often caused by low pay, harsh service rules, poor working conditions, constant pressure, and ultimately an uncared-for system.

Multiple reports have highlighted problematic practices in the police and prisons, but the solution often becomes about an individual as an errant, not about the institution. The inertia that has beset the institutions in the criminal justice system is perhaps because the intention to bring about those changes has been dimmed by the effort it requires and the delay in any rewards it will reap.

So while legislative changes are important, centuries old institutional culture and realities can undo even meaningful legislative changes.

This is not the first time that changes are being made to criminal laws. The effort to truly understand the colonial legacy and undo it has remained an unsatisfactory effort through the decades. The present attempt does not take the country further along that path by merely deleting certain references.

Truly undoing the colonial legacy would mean fundamentally changing the conception of the relationship between the state and citizens.