

## Criminal law Bills and a hollow decolonisation

In introducing the three criminal law Bills in 2023 and, earlier, while setting up the Committee for Reforms in Criminal Law in 2020, a lot was said about the decolonisation that these Bills will bring about. Unfortunately, the Bills do very little to decolonise Indian criminal law. They do, however, indicate the continuation and intensification of colonial-style powers.

Colonisation is, broadly, a process of oppression where the colonised become vehicles for the supreme colonial power to fulfil its desires. The subject unquestioningly serves the colonial state and remains at its mercy. Those in power have rights; those without must oblige. At the same time, the colonial state also considers itself to forever be at risk of being victimised by those it rules. Therefore, the interest it needs to protect is its own, not the subjects', who are not just inferior but also suspicious. This is the foundational essence of colonial laws – to secure and protect the colonial state and not the colonised. The purpose of laws such as the Indian Penal Code (1860) which the Bharatiya Nyaya Sanhita (BNS) seeks to replace, was not just to maintain law and order; it was an opportunity for the colonial state to legitimise, through the law, its status as a potential victim under threat from the people it colonised.

### Overbroad and constitutionally suspect

A 'decolonised' or a post-colonial law, then, would necessarily need to reflect the changed relationship between the citizen and the state. An independent people are not to serve but to be served through the state and government they give themselves. This fundamental shift changes the process of law-making, and the priorities and purpose of the law.

The Bills fail these essential requirements both in how they have been brought about and their content. The framework produced by them views citizens with such increased suspicion and



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mistrust that the state appears to almost be in opposition to the citizen.

Through the major changes in the Bills run twin threads which severely compromise people and simultaneously arm the state against them. That almost all proposed changes to the BNS (see provisions on organised crime, false information jeopardising sovereignty, acts endangering sovereignty, terrorist acts) are overbroad, and constitutionally suspect is not just the result of poor drafting. It is an outcome of the state casting the net of what constitutes an offence as wide as possible, which in parallel increases the avenues to use police powers. Many of the 'new' offences are already covered by existing laws (either under special laws or the Indian Penal Code). Adding an additional layer of criminalisation, therefore, does nothing except increase police powers.

### An expansion of suppression

A notable feature of colonisation is suppression in the guise of security by giving the executive unchecked police powers. This particular feature is so deeply entrenched that the Indian state has only increased its police powers post Independence. The Bharatiya Nagarik Suraksha Sanhita (BNSS) – it repeals the Code of Criminal Procedure, 1973 – expands those powers considerably. For instance, it allows police custody for periods longer than is allowed under the current Criminal Procedure Code. Some provisions of the BNS, such as terrorist acts, allow the police powers that are significantly broader than even those under harsh laws, such as the Unlawful Activities (Prevention) Act. The legislative increase in the use of police or police adjacent powers, including through other laws, is a continuation of colonial powers – not a route for undoing them.

Enough has been written about the police and prison being relics of colonisation. Yet, the decolonisation that the Bills seek to achieve

provides no scope for their reform. Without reorienting the foundational perspective of these institutions, though, calls for decolonisation will remain vacuous. The hope of decolonisation will remain unfulfilled because the state has not indicated, either now or earlier, the willingness to audit and reimagine these essential instrumentalities of colonial power. Increasing terms of punishments across the board, as the BNS does, while broadening police powers borrows heavily from the logic of colonial criminal law. What this means for India's severely overcrowded prisons and the implications on policing (how, who and on whom) are either non-considerations or over-looked considerations.

### In perspective

The narrative of decolonisation surrounding the Bills must not be seen in isolation from developments in other areas of criminal law that are contemporaneously pushing us back into colonial ways and outcomes of lawmaking. For instance, laws such as the Criminal Procedure (Identification) Act, 2022 which authorises the police to take measurements of convicts, accused and even those taken into custody for preventive detention, further the aim of colonisation – increased surveillance of the populace and increased control by the state.

Though the idea of decolonisation must be seen in opposition to colonisation, that is not all it is. It is an optimistic endeavour brimming with the promise of a people shaping their own destinies. It gives effect to reordered relationships between the state and citizen. It honours and centres the citizenry. But, hidden behind the rhetoric of decolonisation of the criminal law Bills lie exaggerated anxieties of colonial power.

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## The narrative of development and populism

On September 14, the Prime Minister laid the foundation stone of projects worth over ₹50,700 crore in the election-bound State of Madhya Pradesh. This included a petrochemical complex and 10 new industrial projects. He emphasised that this investment would boost the State's development. Just a few days later, on September 18, a major Opposition party announced "guarantees" for the people of Telangana ahead of the Assembly elections. These include ₹2,500 a month financial assistance to women, gas cylinders at ₹500, free travel for women in State transport buses, schemes promising an annual financial assistance of ₹15,000 for farmers, a housing scheme with a piece of land and ₹5 lakh for construction of house for homeless poor, 200 units of free electricity to each poor household, health insurance cover of up to ₹10 lakh and ₹5 lakh financial assistance to students from a poor background to pursue higher education. Both these announcements in conjunction show that 'development and populism' gain wide circulation before elections and that these two are pitched as poll promises with a call to evaluate the gains emanating with respect to short-term versus long-term benefits. The most common narrative is that development is the long-term ideal and populism is dubbed as myopic, with development-retarding effects.

### The development obsession

There are no two arguments on the need to achieve higher and better development outcomes. However, there exists a need to assess its trajectory and inclusivity to understand the implications for welfare and sustainability. While the need for accelerated development is sold easily as a poll promise, the need to take stock and address unevenness in welfare gains is neither mentioned nor taken up in the post-poll time period. An easy route to make development as an appealing proposition for voters is to define it narrowly in terms of visible physical infrastructure. The advantage of such a narrow definition is that it can be easily showcased and achievements can be quantified. This in turn would give an advantage to the incumbent governments if the scale of physical infrastructure creation is high. The opposing political parties would then be left with three options: promise an even higher scale of infrastructure creation if voted to power; highlight the unsuitability of the created infrastructure and dub it as failure, and/or address welfare of some section of the population that is left out through economic populism.

Equating development to visible mega-infrastructure could, over time, become a dangerous obsession for two reasons. First, the suitability of such projects for the specific geographic location or users is often overstated without realistically assessing long-term



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environmental consequences and its implications on the livelihoods of present and future generations. Second, the mechanisms of financing mega-infrastructure are often on the assumption of exaggerated revenue accruals from multiplier effects and flattened costs without any time and cost over-run. The fiscal burden of such financing modes would start surfacing in the medium term, and addressing it imposes additional costs. Two examples would clarify the above. First, during the period June 24 to July 10, 2023, over 41 landslides, 29 flash floods, and one cloud burst occurred in Himachal Pradesh amid relentless rain. One could call these as events of 'climate crises'. But Himachal Pradesh is an active participant in the race to 'development' through the construction of several highway roads connecting various tourist locations, thereby making the mountain regions fragile and unleashing unplanned urbanisation.

Uttarakhand faced a big disaster in 2013. Rather than learning from it, the government went on to 'rebuild' the State, which was a rebranding of the State with many highway projects. The 'Char Dham Yatra' is hyped as road connectivity that brings millions of people as religious tourists despite the fact that most places have infrastructure for only a few thousand people. These are two of the many recent examples of projecting mega-infrastructure as development symbols, resulting in environmental disasters. The costs of such disasters are not one-time as the easy route of development selected by the policy regimes sets off a spiral of calamities. Second, to assess the fiscal burden, the story of the National Highways Authority of India (NHAI), the apex body for the construction and management of national highways in the country, is revealing. The total debt of the NHAI stood at ₹3,42,801 crore as on March, 2023, up from ₹23,797 crore in 2014. The bulk of the debt, i.e., ₹3.27 trillion, was contracted between 2017-18 and 2021-22. The NHAI's debt servicing cost will cross ₹50,000 crore in FY28 as the money was raised through bonds in 112 tranches; the last of those will mature in 2050. Apart from debt, the NHAI also has contingent liabilities, most of which are from disputed claims that have been filed by contractors and developers. The fiscal implications of financing development lingers in the system, imposing long-term constraints. These two examples given above highlight the perils of the obsession of symbolising mega-infrastructure as icons of development.

### Space for populism

Populism has two dimensions – political and economic. According to Dani Rodrik, noted political economist of the Harvard University, "The distinctive trait of populism is that it claims to represent and speak for 'the people', which is assumed to be unified by a common interest. This common interest, the 'popular will', is in turn set

against the 'enemies of the people' – minorities and foreigners (in the case of right-wing populists) or financial elites (in the case of left-wing populists). Since they claim to represent 'the people' at large, populists abhor restraints on the political executive. They see limits on their exercise of power as necessarily undermining the popular will." This is the hallmark of political populism which allows the majority to ride over the rights of the minorities. Economic populists too disfavour restraints on the conduct of economic policy, as restraints, in general, narrow their policy options. However, the economic policy environment tends to prefer rules and restraints because short-term interests might dominate when economic policy is largely shaped by political considerations. Rules and restraints serve the purpose of checking those in power from pursuing short-sighted policies. But, unwavering commitment to rules and restraints may at times serve to advance the interests of narrower groups, enabling them to cement their temporary advantage for reaping long-term benefits. Thus, it emerges that while rules and restraints are vital in checking unbridled growth of political populism, a fine blend of rules with discretion is required to curtail the expansion of economic populism.

### On conventional models

Conventional models of economic growth did not attach much importance to distribution as it was expected to be an inbuilt consequence of growth. These models assumed that the benefits of growth would percolate through the 'trickle-down effect', that is, growth is characterised as a 'high tide that lifts all boats'. In this scheme of things, populist re-distributive policies do not find a place. However, cross-country growth experience shows that the benefits of growth do not trickle down that easily and some sections of the population become 'outliers' in the growth process. Government-led redistribution is needed to reduce the size of such outliers and spread the benefits of growth more evenly. The rationale for economic populism arises in this context.

While economic populism imposes fiscal costs, inappropriate physical infrastructure-led development imposes additional costs, especially environmental costs. These costs might work as a binding constraint on subsequent governments. Poor resilience coupled with an injection of fragility to the environment results in a situation of costs of such 'infrastructure led development' remaining in the system for long. In contrast to narrowly defined and prominently visible megaprojects-led development, not all economic populism hurts. At times it might be the only way to forestall the dangerous obsession with physical infrastructure-led development.

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