# Revamping the criminal justice system to fit the bill

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The Government has introduced three Bills to replace the core laws, i.e., the Indian Penal Code (IPC), 1860, the Code of Criminal Procedure (CrPC), 1973, and the Indian Evidence Act (IEA), 1872, which form the basis of the criminal justice system. These Bills are being examined by the Parliamentary Standing Committee on Home Affairs. (The Bharatiya Nyaya Sanhita Bill will replace the IPC; the Bharatiya Nagarik Suraksha Sanhita Bill will be in place of the CrPC, and the Bharatiya Sakshya Bill will replace the IEA.)

As these Bills replace the entire Acts – and are not merely Amendment Bills to fix some gaps – they provide an opportunity for an overhaul of the laws underlying the criminal justice system. This raises the following questions – Do they update the law to reflect the concepts of modern jurisprudence? How do these Bills relate to various special laws? Do they help unclog the criminal justice system? Are various definitions and provisions drafted well without ambiguity?

**Modernising the law**

There are seven issues related to modernising jurisprudence. First, whether these Bills exclude civil law. Usually, criminal law deals with issues that are seen as an offence against the broader society or state while civil law deals with loss to a person. However, the CrPC includes provisions for maintenance of wife and children after divorce. It also allows compounding of some offences by the affected person, which means the accused person is acquitted. For example, a person who is cheated may decide to acquit the accused person. The question is whether such matters should be dealt with under the civil code. The new Bills retain these provisions.

Second, whether these Bills create a reformative system rather than a punitive system. There is a move towards this by making community service as a form of punishment. However, several minor offences (such as keeping an unauthorised lottery office, which carries a maximum penalty of six months imprisonment) are not compoundable, which means they will go through the process of trial and conviction.

Third, whether maintenance of public order and the process of criminal prosecution should be in the same law. The CrPC has provisions charting out the process of arrest and trial as well as items such as Section 144 that empower the district magistrate to impose various restrictions. The new Bill retains this structure.

Fourth, whether various directions of the Supreme Court of India have been codified in these proposed laws. The Bill codifies the procedure for mercy petitions. However, there is no codification of various directions related to arrests and bail.

Fifth, whether the Bills try to ensure consistency of implementation. Typically, penalties for offences specify a range, with the judge expected to specify the sentence within the range based on the circumstances of each case. However, for some offences, the range may be very wide; for example, the punishment is upto 10 years imprisonment if a person cohabits with a woman whom he falsely convinces that he is married to her. That is, the judge may pronounce a sentence anywhere between one day and 10 years. The new Bill retains such wide ranges.

Sixth, whether the age provisions have been updated for modern norms. The IPC specifies that a child below the age of seven years cannot be accused of an offence. It provides such exemption until 12 years of age, if the child is found not to have attained the ability to understand the nature and consequences of his conduct. The question is whether these age thresholds should be raised.

Seventh, whether gender related offences have been updated. The Bill is in line with the Supreme Court judgment which struck down the offence of adultery. Section 377 of the IPC, which was read down by the Court to decriminalise same sex intercourse between consenting adults has been dropped; consequently, the parts retained by that judgment including rape of a male adult and bestiality have also been removed. The Justice Verma Committee, in 2013, had recommended making marital rape an offence; this has not been done.

There needs to be proper parliamentary scrutiny of the new Bills replacing the IPC, the CrPC and the IEA to ensure a fair, just and efficient criminal justice system

**Overlap with special laws**

The IPC was enacted in 1860 as the principal law specifying offences and penalties. Since then, several laws have been enacted to deal with specific offences. However, the IPC and the Bill to replace it continue to specify some of these offences and the applicable penalties. This leads to duplication as well as inconsistency across these laws. In some cases, the penalties are different; also, a person may face prosecution under different laws for the same action.

In some cases, this has been addressed. For example, the Legal Metrology Act, 2009 states that provisions of the IPC related to weights and measures will not apply; the Bill removes these provisions. However, the Bill (like the IPC) overlaps with several other Acts such as those related to food adulteration, sale of adulterated drugs, bonded labour, and rash driving. Abortion continues to be an offence though it is permitted under certain conditions under the Medical Termination of Pregnancy Act, 1971. The Bill replacing CrPC retains the provision requiring maintenance of a parent though a special Act was passed in 2007 regarding this.

**Definitions and drafting**

The Bill replacing the IPC provides a person suffering from mental illness as a general exception from being an offender (this was called unsound mind earlier). The definition of mental illness is the same as in the Mental Healthcare Act, 2017. That Act aims to provide medical treatment to persons suffering from mental illness, and, therefore, excludes mental retardation or incomplete development; it also includes abuse of alcohol or drugs. Consequently, the new Bill will provide full exemption to someone who is addicted to alcohol or drugs but not to a person who is unable to understand the consequences of their actions due to mental retardation.

The three laws had a number of illustrations from daily life to clarify their provisions. Some of these illustrations have become obsolete but have still been retained. These include people riding chariots, firing cannons and being carried on palanquins. It may be useful to update these illustrations to events from modern life.

These Bills will become the basis of the criminal justice system. Parliament should examine them with great care so that they create a fair, just and efficient criminal justice system.

# The U.S.'s signal of a huge digital shift

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When Thomas L. Friedman triumphantly declared in 2005 that the world was flat, with the opportunities having been equalised globally, it was considerably premised on new digital developments. This new geopolitical and geo-economic ideology was led by the United States, home to most of the world's Big Tech. It first sought to redefine development through the field of ICT4D (Information and Communication Technologies for Development), and then herald a new dawn for democracy globally, most characterised by colour revolutions in East Europe and the so-called Arab Spring.

**Prempting digital regulation**

Behind it all of course was a new plan to employ the global reach of digital tentacles, and later data-enabled controls, for economic expansionism. Some called it digital colonisation, due to its extractive nature. The U.S. thereby sought to prempt alarmed national regimes from reconstructing boundaries to contain digital globalisation. It devised a set of digital trade proposals seeking binding commitments from countries to essentially prevent any effective future regulation of Big Tech. For some years now, such digital trade proposals have been the hottest agenda at various plurilateral trade negotiations and at the World Trade Organization (WTO). Countries such as India and South Africa, and some other developing ones, have stoutly resisted the U.S.-driven digital trade agreements juggernaut.

In the circumstances, the world was shocked to hear the U.S. withdraw, in late October, from its centerpiece digital trade positions at the WTO – those about data flows/localisation, access to source code, and location of computing facilities. The declaration represents a watershed moment about how the global digital economy and society will evolve going forward. The stated motive is the realisation that the U.S. needs domestic policy space to regulate Big Tech and AI, for which data and source code could be important leverage points. Having employed this as a major reason for opposing global digital trade agreements, developing countries can feel vindicated. However, they also had strong economic reasons; an uncontrolled remit of the Big Tech would not allow domestic digital industrialisation.

America's withdrawal from its centerpiece digital trade positions at the WTO now gives developing countries a good opportunity to shape effective digital regulation

**From flat to a split digital world**

But a major (perhaps the main, unstated) reason for the U.S. declaration is the China factor. The flat world was a happy place for the U.S. when it meant its singular digital hegemony over it. But with China fast on the heels of the U.S. towards digital superpower-hood, the situation has become more complex. The digital trade negotiations at the WTO are open to all countries, and China grasped the opportunity to participate in them. China had leveraged its accession to the WTO in 2001 to become the 'world's factory', thereby taking its economic development, and subsequently geopolitical status, to an entirely new level. A free digital trade agreement – with free data flows, without the need to share the source code of digital products, and allowing remote computing facilities – could similarly be employed globally by China to now outsmart the U.S. digitally. It could help bring China on an equal footing with the U.S. in accessing global digital markets, and in driving and controlling the world's digitalisation, in all sectors. Apart from the economic challenge, the U.S. also considers any pervasive Chinese digital presence globally as a major security threat.

Such Cold War-like economic and security-related exclusions, and blocs building, may at least be as important a reason behind the U.S. declaration as the stated one of preserving policy space. Even though having withdrawn from these all-important positions in the WTO digital trade negotiations, where China cannot be excluded, the U.S. may still push for data flow, source code, and facilities location, related provisions in regional digital trade deals, in some form or the other. Such deals will be led by the U.S., and, significantly, be limited to its allies. The Indo-Pacific Economic Framework for Prosperity (IPEF) and the Americas Partnership for Economic Prosperity (APEP) are two such initiatives by the U.S. It is pursuing similar interests through bilateral trade and technology councils, for example with the European Union (EU) and India.

The historic declaration by the U.S. can, therefore, be seen in two different lights. At one level, it signals a full global acceptance that preserving national policy space around data flows, source code, and location of computing facilities is key to all-important digital regulation. This is a most welcome development. But at another level, what indeed is rather worrying is that it could firmly herald the splitting of the global digital space, structures and value-chains into two competing blocs – one led by the U.S. and other by China. This is already happening, but could now pick up a new momentum.

**Resisting digital dependencies**

What does this mean for developing countries such as India? They should make the most of the new global consensus on the need for strong digital regulations to rein in Big Tech and manage AI, including through policies related to data, source code, and location of computing facilities. The U.S.'s statement is like abnegation by the king, with the EU already employing data and source code related laws in its domestic regulation which are beginning to look quite contrary to its positions at global digital trade forums. Developing countries should grasp this opportunity with both hands to urgently shape new paradigms for national digital regulation.

But, at the same time, developing countries must stoutly resist a new trap of a digital Cold War, whereby they get bound into digital dependencies either with the U.S. or China. A new digital regulation paradigm should combine with strong digital industrial policies to bolster domestic digital industry. Countries should aim at creating globally open standards, open protocols, and open digital public infrastructures. All these together could mean complete and genuine global-scale interoperability. This would enable open global digital value chains, allowing easy switching across global digital trade partners – suppliers or consumers – whether from the U.S., China, or elsewhere.