

The New Dawn – Navigating and Unravelling the New Indian Criminal Laws

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Introduction

On 1 July 2024, India will usher in a new era in its criminal justice system with the introduction of three groundbreaking laws that will replace the existing substantive and procedural criminal laws:

- a. the *Bharatiya Nyaya Sanhita* (BNS) replaces the Indian Penal Code, 1860 (IPC);
- b. the *Bharatiya Nagarik Suraksha Sanhita* (BNSS) replaces the Criminal Procedure Code, 1973 (CrPC); and
- c. the *Bharatiya Sakshya Adhinyam* (BSA) replaces the Indian Evidence Act, 1872 (IEA).

The IPC, CrPC and IEA (collectively referred to as the “Old Criminal Laws”) will be succeeded by the BNS, BNSS and BSA, referred to as the “New Criminal Laws”. The pivotal date of 1 July 2024 is termed as the “Effective Date”.

These New Criminal Laws introduce several significant changes that are likely to transform how criminal matters are approached in India. Key changes in the BNS include:

- a. a new offence of “organised crime”, which now encompasses “economic offences”;
- b. a focus on offences pertaining to identity and authenticity, especially in light of technological developments; and
- c. devising a balanced punishment approach based on deterrence and reformation, by introducing a new punishment of community service.

The BNSS brings notable changes to the procedures for criminal investigations and prosecutions. Some of the key highlights of the BNSS, which will be on the frontline areas engaging the criminal justice system, are discussed below.

Transitioning to the New Regime

Given the critical nature and consequences of criminal cases, the transition from the Old Criminal Laws to the New Criminal Laws must be straightforward, certain and simple. The IPC will continue to apply to offences committed before the Effective Date, even if the investigation or trial concludes afterwards. This ensures constitutional protection against ex post facto law.

The transition to the procedural changes introduced by the BNSS may be more complex. For example, should the procedures under the BNSS apply to investigations or prosecutions initiated after the Effective Date if the offence occurred before the Effective Date? If an investigation begins before the Effective Date under the CrPC, will its trial follow the BNSS if the trial starts after the Effective Date?

Since there is no vested right to a specific procedure, the procedure under the BNSS may be applied to investigations and trials initiated after the Effective Date. However, this would only apply if no substantive rights of the accused are adversely affected.

Although the transition and repeal provisions in the New Criminal Laws offer some guidance, additional clarity will be required from the courts on many aspects. The doctrine of doubtful penalisation may favour an interpretation that gives the benefit of the doubt to an accused if more than one interpretation is possible. However, the mischief rule may also determine the extent to which the doctrine would apply – i.e., if the procedural amendment is geared towards preventing a particular mischief, then a purposive interpretation would be preferred. Therefore, courts should give careful thought while dealing with transitional issues, as it is not speed but direction that is important for protecting the rights of individuals.

Trial by Fire? Prima Facie Case Before Registration of First Information Report (FIR)

The registration of an FIR is the first step in setting criminal law into motion. This is the point where the police investigation is said to commence. Previously, the police were required to register an FIR and start their investigation upon receiving information that disclosed a cognisable offence. However, the BNSS introduces a new statutory requirement for the police to conduct a preliminary enquiry to determine if a prima facie case exists before registering an FIR.

This requirement to form a prima facie view before registering an FIR applies to offences punishable by imprisonment for three to seven years. Under the BNS, various offences related to commercial transactions and economic crimes fall into this category, such as criminal breach of trust, cheating, counterfeiting documents, and certain types of forgery.

A police officer conducting an investigation under the BNSS must reach a subjective determination on the merits of the complaint before initiating a formal investigation. This adds a step, making the process more burdensome, and may cause delays. Essentially, the investigator is now tasked with a quasi-judicial function, needing to establish a prima facie finding before even beginning to investigate the offence.

How does this change impact the complainant and the accused?

A complainant is likely to face increased scrutiny before an FIR is registered. In some cases, the investigator may seek a response from the accused regarding the merits of the complaint before registering the FIR. This could lead to significant delays in the investigation and the potential loss of evidence. The introduction of a preliminary enquiry stage adds an additional layer for challenging police actions, creating more opportunities for disputes and complications in the criminal justice process.

The objective of this change is to weed out frivolous FIRs and the potential to arm-twist parties with the threat of criminal action. However, whether the medicine is worse than the malady is yet to be seen.

Attachment of property under the BNSS

The BNSS has significantly expanded the powers to attach property linked to criminal activity during the investigation stage. This power of attachment is similar to the Enforcement Directorate's power under the Prevention of Money Laundering Act, 2002, but it is more extensive and the standard required to be met is less stringent.

Under the BNSS, the investigator can file an application with the competent court/magistrate, whose power to attach property extends to any property obtained as a “result of criminal activity”, effectively encompassing any offence under the BNS.

Moreover, the court/magistrate can issue an ex-parte interim order to attach property, meaning the property can be seized without giving the accused an opportunity to be heard. This attachment can remain in effect indefinitely until the magistrate determines whether the property is a proceed of crime.

In addition, the magistrate has the authority to dispose of the property alleged to be obtained from criminal activity, even before the trial concludes. This means that the property of an accused can be sold and appropriated by the government before any determination of guilt.

How magistrates and the police exercise their powers is an area of concern. One would need to scrutinise the exercise of such power, and ensure that it does not become a route of recovering money by utilising the criminal process instead of the courts.

Conclusion

The New Criminal Laws aim to enable a fast and efficient criminal justice system, promising both challenges and opportunities. The transition to a set of laws that are more contemporary and attuned to the technological changes of the present time will only be effective and efficient if the law enforcement agencies untether themselves from the erstwhile regime. This will truly be a transition from laws being made for those who were ruled to laws being made for those who are governed.

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