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In recent times, much has been written and spoken about the draconian provisions of the three new legislations – The Bharatiya Nyaya (Second) Sanhita (BNS) 2023 which replaces the Indian Penal Code (IPC) 1860, The Bharatiya Nagarik Suraksha (Second) Sanhita (BNSS), 2023 which replaces the Criminal Procedure Code (CrPC) 1973 and The Bharatiya Sakshya Adhiniyam (BSA), 2023 which replaces the Indian Evidence Act, 1872. The laws come into effect today.

The populist trope of 'decolonising' and 'Indianising' the laws has also been busted time and again by scholars, who have opined that the three legislations are indeed colonial in their nature as they give enhanced power to the state, and correspondingly reduce the ordinary person with rights and entitlements to a subject at the mercy of the all powerful, not-so-accountable state.

Since patriarchy is understood to be an embodiment of control, power, authority and subjugation, as stated by advocate D. Nagasaila in a recent webinar, the Indian state is touted as the biggest patriarch of the day, in the wake of wanting to bring the three legislations into force on July 1, 2024. It has also been emphatically stated that the three legislations are 'lawless laws' with an anti-feminist goal.

A chapter clubbing offences against 'woman and child' – in this day and age?

As one glances through the BNS, one of the most jarring is Chapter V, titled as 'Of Offences Against Woman and Child.'

The feminist foremothers of the past fought hard to establish an identity for women, independent of the children they bear or care for. The association of women with children denies both their independent identity; this is more so with women, whose social worth is defined exclusively by motherhood.

Scholars such as Sarah Lamb have highlighted stories of gender, exclusion, possibility and challenges for single women in India. It is ironical that while the Indian Constitution, through Article 14 (fundamental right to equality), Article 15 (fundamental right against non-discrimination on grounds including gender), Article 16 (equality of opportunity in public employment) and Article 21 recognise women to be independent entities possessing fundamental rights, the BNS, through the title of Chapter V, relegates women to their status in ancient India – glorified apparatuses for reproduction.

The chapter title also indicates that women and children are both vulnerable, weak and in need of state protection and benevolence, and have no capacity for exercising agency or autonomy. This is in direct contrast to the report of the Justice Verma Committee on amendments to criminal law (2013) which underscored the bodily integrity, autonomy, free will and agency of women. It is also pertinent to note that the offences against women and children, by the wisdom of the drafters, warranted a separate treatment and hence are not included in Chapter VI – 'Offences Affecting the Human Body.'

Perhaps women and children are not human enough?

What of violence against transgender and queer persons?

Over the last few decades, there has been concerted documentation of violence faced by transgender and queer persons, including physical and emotional abuse, forms of sexual violence and assault by family, community and public servants.

For instance, the 1991 report of the AIDS Bhedbhav Virodhi Andolan (ABVA) highlighted sexual violence, assault and extortion faced by the transgender and queer community. A 2003 report by People's Union for Civil Liberties (PUCL) – Karnataka documented harassment by the police in public places, harassment at home, abuse and harassment in police stations as well as rapes in jails. Several representations were made before the government-appointed Justice Verma Committee on amendments to criminal law in 2013, such as by Lawyers Collective and Alternative Law Forum, recommending that the victim in sexual offences must be made gender neutral, in order to bring within its fold sexual violence against transgender and queer persons.

Numerous affidavits by affected members of the trans* and queer community, and their parents were filed before the higher judiciary, when the constitutionality of Section 377 of the IPC (which criminalised homosexuality) was being heard by the Delhi High Court in Naz Foundation case (2009) and the Supreme Court in Navtej Singh Johar case (2018). Familial violence in the lives of queer and trans* persons was documented in 2023 in the context of the Marriage Equality case in the Supreme Court. This report was based on a closed door hearing organised by PUCL and National Network of LBI Women and Trans Persons. It details instances of physical and sexual violence, mental and emotional abuse, and importantly, the collusion of police, courts and care institutions with the family, as well as natal family violence against transgender and queer persons.

Yet what the BNS offers by way of a response to the varied forms of violence faced by trans* and queer people is a stoic and defeaning silence. A Control+F on the BNS document reveals the mention of transgender only in the definition – section 2(10) which refers to section 2(k) of the Transgender Persons (Protection of Rights) Act, 2019 for a definition of 'transgender.' Surely more was expected than a mere inclusion in the definition section? Since section 377 IPC was struck down as unconstitutional in relation to sexual intercourse between consenting adults in Navtej Singh Johar case of 2018,

there is no equivalent of this section that is added to the BNS. However, that provision accorded a semblance of protection to sexual violence against persons other than cisgendered women.

If one thought that the government probably did not do so due to the existence of a special legislation for transgender persons – Transgender Persons (Protection of Rights) Act, 2019, it needs to be noted that physical, sexual, verbal, emotional and economic abuse against transgender persons is punishable with six months to two years' imprisonment – far lesser than most provisions of sexual and gender-based violence against women in the BNS (discussed below).

However, none of the provisions dealing with sexual offences or assault on a woman have been made gender inclusive with regard to the victim. From this, one can conclude that in the BNS, there is no provision that addresses the various forms of violence against transgender and queer people that have been documented, including physical, sexual and emotional violence, and that the perpetrators – members of the natal family, community and state agencies – continue to enjoy complete impunity for the same.

Even after the NALSA judgment on rights of transgender persons, and decriminalisation of homosexuality in 2018, it has been reported that there are many instances of violence and deaths, including suicides among the trans* and queer community. This indicates that a cultural transformation is crucial – one where every person is respected and valued for what they are, irrespective of their gender identity or sexual orientation. Criminalising forms of violence against them through the BNS would surely contribute to the same. One does not need to look hard to find the reports documenting the violence as they are all available online. The Law Ministry's interns could have easily located these reports and summarised their contents, if there existed a will to do so!

Retention of the Colonial Treatment of Rape within Marriage

The offence of rape, as defined in the IPC, has an exception for husbands. Exception 2 to section 375 IPC states: "sexual intercourse or sexual acts by a man with his own wife …is not rape." Another provision (section 376B of the IPC) makes a husband's rape of his wife who has separated from him a criminal offence punishable with a lesser penalty than in other cases of rape. Both these regressive and patriarchal provisions, critiqued by many, have been retained in the BNS in Exception 2 to section 63 and section 67 respectively.

The colonial origins of the provisions have been more elaborately discussed elsewhere but summarised here. The marital rape exception (MRE) has been traced to the biblical notion of "one flesh" in the England of 1700s that applied to married couples (that is, the flesh of the woman merges with that of her husband); this formed the basis for the doctrine of coverture by which a married woman was legally presumed to have surrendered her rights (including over her body), identity and independent legal status in exchange for the husband's protection and authority over her.

It is obvious that these provisions reinforce and embed in law, the notion of the husband's 'ownership' over his wife's body, denying the possibility of her sexual desires, expression and autonomy, which are grossly incongruous with the constitutional guarantee of fundamental rights to women. The MRE was overturned in England through a judgment in 1991, while in India, it has been retained in the supposedly overhauled and modernised BNS.

It is well worth recalling that in 2013, Justice Verma committee had recommended repeal of the MRE, but the Parliamentary Standing Committee on Home Affairs rejected the recommendation, on the ground that "the entire family system will be under great stress." One wonders why the family system must be preserved and protected at the expense of bodily integrity and sexual autonomy of married women. Many, including policy makers perhaps, erroneously believe that removal of the MRE would make all husbands vulnerable to false complaints by their devious and vengeful wives.

In the context of a patriarchal Indian society, where many women continue to be socially, economically and emotionally dependant on their husbands, and given women's experience of re-victimisation through a rape trial, it is hard to believe that wives will make a bee line to the nearest police station to hoist a false charge of marital rape against their husbands, and that the police will willingly register the said criminal complaint! What is warranted is a removal of the MRE which treats married women as chattel of their husbands.

In May 2022, the Delhi high court delivered a split judgment, with one judge (Justice Rajiv Shakdher) striking down the MRE as unconstitutional due to its denial of bodily autonomy and agency of married women, while another judge (Justice Hari Shankar) conceding that often, consent is given for sexual intercourse though will may not exist, but it is not upto the state to interfere with privacy within a marital relationship. The constitutional validity of the MRE is currently pending before the Supreme Court through a batch of petitions. However, this was a lost opportunity for the BNS to pre-empt the judgment through a positive move that is in consonance with gender equality.

'Offences relating to marriage' a legitimate state interest?

The BNS has also retained and reproduced a slay of provisions dealing with 'offences' relating to marriage in the IPC, in sections 80-87 (which correspond mostly to sections 493-498A of the IPC). An examination of these offences is revealing. This chapter, in section 80 BNS, contains the definition and punishment for the offence of 'dowry death' – a euphemistic legal term for dowry-motivated murders. This provision was in section 304B of the IPC in the chapter on offences against the human body – which was its logical place. Chapter V of BNS further contains the definition and punishment for the offence of husband or his relatives subjecting the wife to cruelty (sections 85-86 of the BNS) which correspond to section 498A of the IPC, commonly known as the domestic violence provision in the IPC.

> In 1992, while reviewing a decade of legislation protecting women against violence, feminist legal scholar Flavia Agnes had questioned the placement of this provision under the chapter 'Offences Relating to Marriage' rather than under the chapter titled 'Offences Affecting the Human Body.' In her words, the provisions in the former chapter were "a constant reminder to women about their subordinate status within the IPC."

This had the potential to be addressed and rectified in the BNS.

Bigamy (section 82 of the BNS) is already a ground for matrimonial (civil) remedies, and the rationale of retaining it as a criminal offence is not known. The offence of adultery which was originally a part of the chapter, was struck down by the Supreme Court in 2018 in the *Joseph Shine* judgment, precisely because it treated the married woman's body as the property of her husband. One might heave a sigh of relief that it did not worm its way to the BNS.

However, its essence is present in another avatar – the offence of enticing or taking away or detaining with criminal intent a married woman (section 84 of the BNS). Other provisions featured in this chapter include cohabitation caused by man deceitfully inducing belief of lawful marriage (section 81 of the BNS) and marriage ceremony fraudulently gone through without a lawful marriage (section 83 of the BNS).

These are in the same vein as the offence of enticing a married woman – provisions of colonial origin that consider women to be passive victims and reinforce the rightful property of their husband or other patriarch in the family (such as the father or brother), which must be protected by the might of the criminal law machinery of the state. Since criminal offences are considered to be offences against the society at large (and not against an individual), and prosecution of the offence by the State is on behalf of the victim of such offences, what is the legitimate interest of the State in retaining these provisions as offences relating to marriage?

Reproductive rights of women and undue state interference

Additionally, one wonders why causing miscarriage with the woman's consent, in instances where it is not in good faith for saving the woman's life, is made a punishable offence with up to three years' imprisonment under section 88 of the BNS. The related provisions use the term 'quick with child' – an archaic term that has fallen out of use in the contemporary context. The offences of causing miscarriage, both with and without a woman's consent, and causing death of unborn child or child after birth are placed in the 'offences relating to marriage' chapter!

Surely the law and policy makers would know that pregnancies do not happen only within marriage, and that the Supreme Court has stated that a woman can become pregnant by choice irrespective of her marital status, and due to the constitutional guarantee of her fundamental right to life (Article 21), she has a right to terminate the pregnancy if her physical or mental health is at stake.

The Supreme Court, in another judgment, has opined that the right of every woman to make reproductive choices without undue interference from the state is central to the idea of human dignity. What then is the compatability of these colonial provisions in the IPC, which have been copied and pasted verbatim in the BNS, with the Medical Termination of Pregnancy Act, 1971, Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994 as well as with the Supreme Court judgments on reproductive rights of women? One would have expected any kind of 'overhauling' of the criminal law to analyse and address these issues.

Intimate partner violence and the illusion of criminal justice

The now infamous section 498A of the IPC, dealing with the offence of cruelty by husband and his relatives to a married woman, was included through a 1983 amendment to the IPC. It was the outcome of the women's movement and its research that dowry-motivated murders of women in their marital homes through 'stove burst' and other such means were recorded by the police as "accidental," so that no further action or investigation was necessary. Due to the broad wordings in the provision, it could be applied both for dowry-related violence as well as other forms of domestic violence faced by a woman at the hands of her husband and his relatives.

Despite its normative value in stating loud and clear that intimate partner violence against the woman within marriage was unacceptable and was a criminal offence, over the decades, women's groups found certain limitations with section 498A. For instance, it applied only to married women, and ignored the violence perpetrated on other women members of the family (such as mothers, daughters and sisters) which was also caused due to power differentials derived from patriarchal forces.

The term 'cruelty' was also vaguely defined, creating challenges in including instances of sexual and economic violence. These were remedied through a subsequent legislation – Protection of Women from Domestic Violence Act (PWDVA) 2005 – a hybrid statute which provides for civil remedies using criminal procedure. However, the usefulness of section 498A has remained, through the possibility of immediate relief to women facing extreme forms of intimate partner violence.

The difficulties and challenges faced by women in registering a criminal complaint under section 498A against the husband and his relatives has been well documented, and include refusal or reluctance of the police to register the complaint, and forced "counselling" and moralising sermons by the police and others. The dangerous, false myth that women routinely misuse the law has been propogated by men's rights groups, government agencies as well as the judiciary, often by interpreting poor convictions to mean false complaints, has been countered time and again. However, through a spate of judgments by the higher judiciary from 2005 to 2017, the provision was diluted on the premise of misuse of the law by women to harass poor husbands and their relatives. This culminated in the Rajesh Sharma judgment of 2017 where a two-judge bench of the Supreme Court took upon itself to prevent 'misuse of law' by the women, by establishing

‘Family Welfare Committees’ in each district which has to compulsorily examine every complaint filed under section 498A, interact with the couple and give its report within a month, and prohibited any arrests till then. In 2018, at the behest of women’s groups and others, the judgment was challenged before a larger bench of the Supreme Court, which modified the directions. While a large part of India may blame women for misusing the provision, what is sadly forgotten is the underuse of the section in instances of women being killed or severely assaulted within their homes.

This legal history is relevant to understanding the contents and import of sections 85-86 BNS. The BNS provisions have reproduced section 498A without broadening their application to women in live-in relationships, women in non-marital domestic relationships or by providing a clearer definition of ‘cruelty’ that captures a broader understanding of the varied dimensions of violence within the home including economic and sexual violence.

In 2023, four women reportedly approached the Delhi high court seeking mandatory registration of First Information Report (FIR) instead of being forcibly sent for mediation, after police refusal to register their complaints despite the women showing signs of physical violence. Such experiences of women has been completely ignored by the policy makers, while safeguards are warranted to ensure that the police performs its duties in a bona fide manner. Such acts of public servants maybe punishable under sections 198, 199 or 200 of BNS, but who will bell the cat is a big question. Do women facing violence, whose complaints are not registered by the police and who are made to run from pillar to post, have the capacity to ensure registration of a criminal complaint against the erring police official, is anybody’s guess. In short, there is no application of mind by the law and policy makers, as if the fate of women facing violence in intimate or domestic relationships is none of their concern. Criminal justice is likely to remain illusive to such women.

What one hand gives through BNS, the other takes away through BNSS

Rape, custodial rape, gang rape and aggravated forms of rape are included as offences in sections 63-71 of the BNS. Except for section 69, which is the offence of sexual intercourse through false promise of marriage, introduced in the BNS, the essence and wording of most other sexual offences which features in the IPC have been retained in the BNS, with varied punishments that extend upto life imprisonment or death (in exceptional circumstances). The offence of false promise to marriage warrants a separate discussion, and has been critiqued elsewhere.

Some offences, such as custodial rape, carry a minimum mandatory punishment of not less than ten years’ imprisonment. Sexual intercourse by a man with his wife during separation is punishable with two to seven years’ imprisonment under section 67 of the BNS.

Similarly offences related to use of criminal force and assault against women, including forced disrobing (section 76 of the BNSS), voyeurism (section 77 of BNS), stalking (section 78 of BNS) and acid violence (sections 123-124 of BNS), are punishable with a range of punishments up to 10 years imprisonment or life imprisonment.

However, this is no reason to rejoice, as the left hand of procedural law takes away what is given by the right hand of substantive law. A procedural law provision in BNSS – section 173(3) – provides discretionary power to the police to conduct a preliminary inquiry to ascertain if a prima facie (on its face) case is made out, for all offences punishable with three to seven years' imprisonment. This includes many of the offences discussed above. This procedural provision, lying innocuously in the statute, is not a provision applicable only to sexual offences or assault against women.

Many have raised a critique of this provision and its likelihood in undermining victim's access to justice, including in facilitating corruption and 'mediation' by the police. Former high ranking police officer Kiran Bedi opines that the preliminary inquiry will give the complaining parties "reflection time" and will avoid unnecessary litigation through falsehood or exaggeration. This turns the legal reasoning on its head, and overturns established case law in India which assumes that the criminal complaint that is promptly registered has great evidentiary value with regard to its truthfulness and veracity, and that a delayed FIR often results in embellishment as a product of afterthought!

> Let us pause to imagine the havoc that this procedural provision may cause in a context where most women are touted as vengeful liars who misuse the law, police jump in to "counsel" women facing violence in their intimate relationships to dissuade them from filing complaints and/or view their experience of sexual violence with suspicion.

In an instance reported a few days ago, a 16-year old girl ended her life in the state of UP due to police inaction on her complaint of sexual harassment; when her parents approached the police station afterwards, they were reportedly assaulted by the police, and blamed them for falsely implicating the two men who had harassed their daughter. This is the kind of police who will be conducting preliminary inquiries! Can women hope for even a semblance of access to justice? The fate of complaints that women facing sexual or gender-based violence would seek to register, which are delayed or denied due to a preliminary inquiry by a police officer, and the evidentiary value that the courts will derive from such delayed filing of FIRs, is a fearful phenomenon to imagine indeed.

Death penalty for sexual offences – a populist move

Death penalty has been retained for certain aggravated forms of sexual offences such as gang rape of minor and rape causing the woman's death or causing her to be in a persistent vegetative state. One may recall that in 2020, over 400 feminists appealed against death penalty to the four persons convicted of homicidal gang rape of Jyoti Pandey in 2012. Much has been written about imposition of death penalty for child sexual

offences and sexual offences against women is a dangerous, regressive step and a populist measure which fails to address effective investigation and prosecution in sexual offences, leading to a certainty rather than severity of punishment. The opposition to death penalty for rape includes the following reasons:

1. Data does not prove that death penalty is a deterrent;
2. As per the NCRB statistics, more than 90% of rape incidents involve accused who are known to the victim (including their family members, relatives and neighbours). Hence imposition of death penalty would deter the reporting of the crime by the victim, who may face pressure from her family and community to suppress the commission of the offence.
3. There are chances of increased violence on the victim, including murder, to destroy evidence and ensure that the victim is in no condition to identify the perpetrators. This is more so for children, who will find it difficult to overpower a gang of perpetrators or escape from them.
4. Accused among weaker and marginalised sections are disproportionately affected by the death penalty.
5. It reflects retributive justice by the State which is contrary to the global move towards reparative and restorative justice.
6. Death penalty for rape, including gang rape of minor, indicates a patriarchal preoccupation of equating rape with death.

People's Union for Democratic Rights, among others, demanded a review of death penalty in the BNS. The Parliamentary Standing Committee on Home Affairs, in its 246th report on the BNS, acknowledged various merits in the move towards abolition of capital punishment, yet left the issue for broad-based social discussion without making a clear recommendation. Instead, the Committee could have opposed death penalty on an expanding number of offences, and recommended transforming all instances of capital punishment in the BNS into life sentence, including for sexual offences.

Finally…

The detailed discussion of various provisions of the new criminal laws, particularly the BNS, from a gender perspective, leads us to the conclusion that this is a missed opportunity for gender justice. When the Chief Justice of India hailed and welcomed the new criminal laws as a watershed moment for India, he perhaps forgot that sexual and gender-based violence is very real and life-threatening for more than half of India's population, yet the experiences of women, trans* and queer persons have been substantially ignored.

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