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BREAKING CHAINS: FEMINIST REFORMATION IN DECOLONISING INDIAN SOCIETY THROUGH NEW CRIMINAL LAWS

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1. INTRODUCTION

In India's complex legal world, it is clear that we need to change by embracing feminist perspectives to decolonise our country. As we go deeper into the 21st century, laws like the Indian Penal Code 1860, Code of Criminal Procedure Code 1898, and Indian Evidence Code 1872 have become more stringent. These laws are outdated in today's world, thus undermining our quest for justice. However, amid this gloom, a glimmer of hope is emerging with the passage of three important laws, the Indian Justice Act (BNS), the Indian National Security Act (BNSS) and the Indian Evidence Act (BSA).

Titled "Breaking Chains: Feminist Reformation in Decolonizing Indian Society through New Criminal Laws," the paper is a call to action that goes beyond mere words on the page. It asserts that these new criminal laws must be introduced to serve as the building blocks towards a just, compassionate legal system and deeply rooted in feminism.

As we set out on this journey for justice, it is crucial to recognize and confront the lingering biases of our legal system's past. We must work to eliminate historical prejudices in the Indian Penal Code and fill the gaps in the Criminal Code. These longstanding issues have hindered the pursuit of justice for everyone. These are systemic problems that have long prevented the fulfilment of justice for all.

However, there is hope in these trials. It is through this new law that we can make a real difference. We have a goal of what it could mean for ordinary people, how to protect our rights and strike a balance between security and freedom.

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Additionally, gender justice is another issue that we have addressed in our analysis as we anticipate how these laws will affect issues such as marital rape and the backlash against modesty.

Specifically, we seek to contribute to the dialogue on legal reform in India with a special focus on feminist perspectives. We aim to use our findings to advocate for a fair system of justice that promotes gender equality and protects human dignity.

2. NEED FOR A NEW LEGISLATION

The government's recent presentation of three penal bills to the Lok Sabha, targeting the decolonization of India's judicial framework, marks a pivotal move towards legal modernization. This endeavour, noteworthy for its ambition to overhaul the remnants of colonial legacies in the legal system, underscores the importance of deliberate and evidence-based approaches in the legislative process. As an introduction to this topic, it's essential to highlight that the journey of legal reform is intricate, demanding meticulous scrutiny and validation through empirical evidence to ensure the newly proposed laws serve the contemporary needs of the society effectively.

The Indian Penal Code (IPC), a remnant of the colonial era imposed by the British before India gained independence, persists as an antiquated framework. Its provisions, forged in a bygone era, lag behind the progressive evolution of contemporary discourse on rights and inclusivity. Originally crafted to serve the colonial administration's needs, the IPC's structure and content have struggled to adapt to the dynamic landscape of modern India's legal and social demands. As society moves forward, embracing more nuanced understandings of justice, equality, and human rights, the IPC's dated statutes increasingly appear out of step with current values and the imperative for legal systems to reflect contemporary ethical standards. This dissonance highlights the need for comprehensive legal reform, ensuring that India's penal code aligns with the principles of fairness, inclusivity, and the protection of rights for all its citizens.

After nearly a century and a half since its inception, the Indian Penal Code (IPC) has undergone significant reformation. This legislative overhaul was initiated with the explicit aim of discarding laws of colonial provenance that have lingered in the Indian legal system. This initiative marks a pivotal moment in the country's legal history, as it seeks to eradicate the vestiges of colonial rule that have been embedded within its judicial framework.

The revision of the IPC represents a deliberate move towards modernizing the legal code to better reflect the values and realities of contemporary India. By repealing outdated colonial statutes, the re-enactment endeavours to establish a legal system that is more equitable, progressive, and attuned to the current socio-political context. This reform is not merely a procedural update but a profound realignment of the legal foundations, aiming to enhance the relevance and responsiveness of the law to the needs of India's diverse population.

In doing so, the updated IPC is expected to address longstanding issues of injustice and discrimination that were perpetuated under the old legal provisions. By aligning the legal framework with international human rights standards and principles of social justice, the re-enactment signifies India's commitment to fostering a more just and inclusive society. This monumental shift underscores the nation's dedication to shedding colonial legacies and forging a legal identity that resonates with its democratic ethos and aspirations.

3. OBJECTIVES

The reformation of the IPC was undertaken with the explicit purpose of eliminating laws inherited from the colonial era and "refining the regulations concerning crimes and their corresponding punishments." This comprehensive overhaul aimed to discard outdated statutes and modernize the legal framework, ensuring that it is both relevant and effective in addressing contemporary challenges. By streamlining offences and penalties², the initiative sought to create a more coherent and efficient legal system that better serves the needs of India's diverse and evolving society.

For the first time, a comprehensive national strategy has been deployed to combat organized crime, as evidenced by its specific incorporation into a section of the recently enacted Bharatiya Nyaya (Second) Sanhita (BNS), 2023. This legislative move signifies a profound advancement in the fight against organized crime networks by embedding targeted measures within the nation's statutes aimed at these criminal enterprises. The inclusion of organized crime within the framework of the BNS, 2023, reflects the government's dedicated initiative to break down the networks that facilitate and thrive on such unlawful activities. This deliberate and meticulous attention to organized crime within a legal framework highlights the government's acknowledgement of its significant risk to societal safety and the integrity of national security,

² [Bharatiya Nyaya \(Second\) Sanhita \(BNS\), 2023.](#)

leading to a deliberate and calculated policy response.

4. CONCERNS

Terms like “land grabbing” are left imprecisely defined, leading to ambiguity. This lack of clarity is compounded when considering the term “cyber-crimes,” which remains undefined and is ambiguously described as having “severe consequences” without any criteria for what constitutes such severity. Similarly, the term “economic offences” is not specifically defined, despite a broad explanation being offered. This category ambiguously includes terms like “financial scams,” “Ponzi schemes,” and “mass-marketing fraud” without clear definitions, creating potential for misuse of these loosely interpreted provisions.

Regarding “petty organized crime,” Clause 110 aims to address crimes that purportedly cause widespread feelings of insecurity among the public, yet the legislation fails to define what constitutes a “crime” as opposed to an “offence,” which is the term consistently used throughout the document. The rationale behind this deviation from standard terminology remains unclear. Furthermore, the approach of imposing harsher penalties for offences that generate a “general feeling of insecurity” among the populace is contentious, suggesting issues with how crime and its societal impact are conceptualized within the legislation.

4.1. ABORTION

The direct incorporation of the Indian Penal Code's abortion provisions into the Bharatiya Nyaya Sanhita (BNS) Bill is perplexing and seems out of touch with the evolving needs of society within the realm of criminal justice. This decision raises questions about the relevance and suitability of such provisions in addressing contemporary issues surrounding abortion and underscores the importance of aligning legal frameworks with societal norms and advancements in understanding reproductive rights and healthcare. As an introduction to this topic, it's crucial to explore how this inclusion may present challenges and highlight the necessity for thoughtful reconsideration and adaptation to better serve the needs of modern society.

The court in the case *Justice K.S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors.*³ affirmed the fundamental rights of all individuals to privacy, autonomy, and intimacy, regardless of their socio-economic standing. It declared that akin to the rights to life and personal liberty, the

³ (2017) 10 SCC 1, AIR 2017 SC 4161

right to privacy could be subject to limitations established by lawful procedures. Any infringement upon privacy must adhere to principles of fairness, reasonableness, and justice. It should satisfy three essential conditions: legality, the presence of a valid state objective, and proportionality. Legitimate state objectives may encompass matters such as national security, crime prevention and investigation, and safeguarding social welfare benefits from abuse or misuse.

The court further emphasized that although the right to privacy is essential for individuals to exercise bodily autonomy, it is not an unrestricted right. Similar to the limitations imposed on the right to free speech and expression, constraints are placed on the right to privacy as well.

In the case of *XYZ vs State of Gujarat, the Supreme Court*⁴, presided over by Justices Nagarathna and Ujjal Bhuyan on August 21, ruled that the sole authority over her body lies with a woman, granting her the ultimate autonomy to decide whether to undergo an abortion. This landmark decision reinforces the principle that a woman possesses the inherent right to make decisions regarding her reproductive health without external interference. The judgment underscores the significance of individual agency and empowerment in matters concerning one's own body and personal choices.

By affirming a woman's prerogative in determining her reproductive rights, the court reaffirms the importance of respecting her autonomy and dignity in matters of healthcare and bodily integrity.

4.2. OBSCENITY

The current obscenity laws in India, as defined by Sections 292 and 294 of the Indian Penal Code (IPC), have been subject to criticism for their reliance on subjective concepts such as "lasciviousness," "prurient interests," and "depraving and corrupting" influences. This approach to obscenity has been perpetuated by the British legal precedent known as the Hicklin Test, which judges obscenity based on its potential to corrupt easily influenced minds.

The Supreme Court of India adopted this approach in the landmark 1965 case of *Udeshi v.*

⁴ CRIMINAL APPEAL NO. /2023 (@ SLP (CrI.) Dy. No. 33790/2023)

*Maharashtra*⁵. In 2014, the "average person" test was introduced in the case of *Sarkar v. West Bengal*⁶, which sought to evaluate obscenity through the lens of contemporary society's moral standards. However, both the Hicklin and the "average person" tests rely heavily on personal and societal morals, lacking objective criteria for defining obscenity. Critics argue that the current obscenity laws in India perpetuate colonial influences, which have failed to modernize and align with constitutional principles. The recent shift towards "constitutional morality" highlights the inadequacy of personal viewpoints in criminalizing content. The proposed Bharatiya Nyaya Sanhita (BNS) obscenity laws have been scrutinised for retaining the same wording as the IPC and failing to address the concerns regarding vague definitions and potential misuse.

4.3. MARITAL RAPE

India's journey towards an independent legal framework remains incomplete. Embedded within the Indian Penal Code (IPC) lie vestiges of a bygone era –the Victorian morality imposed during British rule. This essay argues that the continued presence of colonial-era legal concepts hinders the protection of women's rights and perpetuates a system rooted in outdated notions.

A glaring example is the marital rape exception. This archaic provision, enshrined in Section 375 of the IPC, stems from the presumption of irrevocable consent upon marriage. Judge Matthew Hale, a prominent figure in English common law, laid the foundation for this principle, essentially stripping married women of their right to refuse sexual intercourse. This notion, struck down in the UK in 1991, continues to taint the Indian legal landscape. The Justice Verma Committee, formed in the wake of the horrific 2012 Delhi gang rape, recommended the removal of this exception. However, the subsequent amendment to the IPC failed to address this crucial aspect. The recent split verdict by the Delhi High Court challenging the constitutionality of the exception highlights the ongoing struggle for reform.

4.4. MODESTY

Another concerning aspect is the prevalence of language centered around "modesty" in sections like 354 and 509 of the IPC. These provisions reflect a deeply patriarchal understanding of sexual violence. Focusing on "outraging modesty" inadvertently shifts the discourse towards the subjective interpretation of a woman's character and behavior. This not only trivializes the gravity

⁵ 1965 AIR 881.

⁶ AIR 2014 SUPREME COURT 1495

of the crime but also allows the victim's moral standing to influence the legal proceedings. This focus deviates from the core issue – the violation of a woman's bodily autonomy. Recognizing this, the Verma Committee suggested replacing "outraging modesty" with the term "sexual assault." However, the 2013 amendments and the recently enacted Criminal Law Amendment Act (BNS) retain this problematic language.

The persistence of such colonial-era legal provisions has severe consequences. Firstly, it fails to acknowledge the fundamental right of married women to bodily integrity and sexual autonomy. The marital rape exception effectively grants husbands immunity, creating a legal loophole that perpetuates the power imbalance within marital relationships.

Secondly, the focus on "modesty" distracts from the core issue of sexual assault. By emphasizing subjective interpretations of a woman's character, the legal system inadvertently condones the act itself. This not only adds an unnecessary layer of complexity to legal proceedings but also discourages women from seeking justice, fearing societal judgment based on outdated moral constructs.

Moving forward, a comprehensive legal reform is imperative. The complete removal of the marital rape exception is essential to ensure that all women, irrespective of marital status, have the right to refuse sexual intercourse. Furthermore, replacing language based on "modesty" with terms that accurately reflect the nature of the crime (sexual assault) is crucial. This shift would ensure that the legal framework focuses on the violation of bodily autonomy, holding perpetrators accountable for their actions.

Addressing these issues requires a paradigm shift in legal thinking. Moving away from the vestiges of a colonial past necessitates a commitment to gender equality and the recognition of women's fundamental rights.

India's legal system needs to evolve to reflect the contemporary understanding of sexual violence. By enacting these crucial reforms, the nation can strive towards a legal framework that upholds the dignity and bodily autonomy of all individuals, ensuring a just and equitable society.

4.5.FURTHER FEMINIST CONCERNS

While the government's endeavour to reform the Indian justice system is commendable, its success hinges on several critical factors. First and foremost, there must be robust public engagement throughout the reform process, ensuring that the diverse voices and perspectives of citizens are considered. Additionally, a comprehensive evaluation of problematic practices within the existing system is imperative, addressing issues that undermine fairness and equality. Moreover, a balanced approach to navigating the complexities of legal reforms is essential, considering both the need for clarity and the nuances of legal intricacies. An illustrative instance of this is the proposed amendments concerning crimes targeting women and children. The Bharatiya Nyaya Sanhita (BNS) aims to introduce stricter regulations regarding offenses committed against women and children. Ultimately, the effectiveness of the Bharatiya Nyaya Sanhita Bill in decolonizing and revitalizing the Indian justice system depends on meticulous attention to detail and an unwavering commitment to upholding principles of justice and equity.

Sections 354 and 509 of the Indian Penal Code (IPC) reflect a colonial-era perspective on sexual violence, particularly concerning the notion of 'modesty' as it pertains to women. The recommendation by the Justice Verma Committee to revise Section 354 by replacing references to 'outraging the modesty of women' with the term 'sexual assault' aimed at modernizing the legal language and departing from colonial notions of honour, chastity, and modesty. Unfortunately, the Bharatiya Nyaya Sanhita (BNS) retains this language, perpetuating outdated moral ideals in the legal system.

Moreover, the criminalization of abortion under Section 312 of the IPC reflects lingering moralism in Indian laws. While the Medical Termination of Pregnancy Act, 1971, provides exceptions for abortion under specific conditions, the overall framework remains punitive. A rights-based approach to abortion, which was not addressed in the BNS, could have been a significant step towards decolonization by recognizing and protecting women's reproductive autonomy. However, this opportunity for reform was missed, perpetuating outdated attitudes towards abortion in the legal system.

In the Bharatiya Nyaya Sanhita, Chapter 5 focuses on crimes committed against women and children. Despite notable progress in legal reforms, the offense of rape continues to be defined with gender specificity. This situation persists despite significant milestones, such as the enactment of the Protection of Children from Sexual Offences (POCSO) Act over a decade ago. The POCSO

Act marked a significant shift by recognizing gender neutrality in cases of sexual assault against minors. Similarly, it has been ten years since the landmark Nirbhaya case and the subsequent introduction of the Criminal Laws Amendment Ordinance in February 2013. This ordinance aimed to make sexual assault laws gender-neutral, yet the specific designation of rape by gender remains unchanged.

A positive development is the alignment of the age of marriage and the age of consent, as mandated by the court in *Independent Thought v UOI*. The elimination of the 15-18 age window signifies progress, as the statutory provision has been amended to criminalize rape of a girl below 18 years of age, regardless of her marital status or relationship with the perpetrator. This change ensures legal protection for all girls under the age of 18, irrespective of their marital status or any other factors related to their relationship with the offender.

5. OVERARCHING CONCERNS

The Indian legal system, while striving towards independence, remains entangled with the vestiges of its colonial past. The Indian Penal Code (IPC) bears the imprint of British rule, particularly in shaping legal perspectives on gender and sexuality. This essay argues that the persistence of colonial-era concepts hinders the protection of fundamental rights, specifically concerning women's bodily autonomy and the rights of the LGBTQ+ community.

5.1. COLONIAL HANGOVER

Section 152 of the Bharatiya Nyaya Sanhita (BNS) has been proposed as a replacement for the current sedition law (Section 124A of IPC), which has been controversial in India. The new law aims to tackle actions that endanger India's sovereignty, unity, and integrity, a significant concern for the nation's security. However, there are concerns about this new provision's impact on citizens' fundamental rights.

The proposed law continues the colonial legacy of criminalizing vaguely defined acts and expanding police powers, possibly leading to its misuse. The broad definitions of terms like "subversive activities" and "feelings of separatist activities" create ambiguity, making it difficult to distinguish between legitimate dissent and seditious activities. Furthermore, the lack of legal precedents for this new provision adds to its interpretation's uncertainty.

It is important to ensure that any new law upholds national security while safeguarding the right to free speech and expression, a cornerstone of democracy. Therefore, further legal scrutiny must ensure that Section 152 balances these two important values. The discussions around this new provision have highlighted the need for a nuanced approach towards addressing issues of national security and fundamental rights, and all stakeholders must engage in constructive dialogue to find a way forward.

5.2. CONTRADICTIONARIES

Several other aspects of the legal framework raise further concerns. Section 84 of the IPC solely empowers husbands to prosecute cases of enticing a married woman for illicit intercourse, reinforcing the patriarchal notion of women being the property of their husbands.

Furthermore, Section 88 restricts a woman's agency over her own body. While the Medical Termination of Pregnancy (MTP) Act grants abortion rights, Section 88's continued existence creates confusion and potentially hinders women's access to safe abortion services.

The deletion of Section 377, which criminalized homosexuality, marked a positive step. However, the BNS fails to provide explicit safeguards for consensual same-sex relationships.

The expanded definition of "sexual act" in the BNS encompasses various forms of penetration. However, the marital rape exemption shields husbands from prosecution for these acts against their wives, creating a legal blind spot that leaves them vulnerable.

Finally, the lack of clear definitions for terms like "defamation," "obscenity," and "outraging modesty" allows for subjective interpretations and potential misuse, hindering the fair application of the law.

Moving forward, a comprehensive approach to legal reform is essential. This necessitates eliminating discriminatory provisions that reinforce patriarchal structures and restrict women's bodily autonomy. The removal of the marital rape exception and provisions that solely empower husbands in cases of infidelity are crucial steps in this direction.

Ensuring bodily autonomy and reproductive rights is paramount. Women must have complete control over their bodies, including reproductive rights and the ability to refuse any form of non-

consensual sexual contact.

Furthermore, the legal framework must explicitly recognize and protect the rights of the LGBTQ+ community. This includes providing safeguards for consensual same-sex relationships and ensuring equal protection against sexual assault.

Addressing these issues requires a shift in legal thinking. Moving away from the vestiges of a colonial past necessitates a commitment to gender equality and the recognition of the fundamental rights of all individuals. The Indian legal system needs to evolve to reflect the contemporary understanding of sexual violence and recognize the various forms it can take. By enacting these crucial reforms, the nation can strive towards a legal framework that upholds the dignity and bodily autonomy of all individuals, ensuring a just and equitable society.

6. CONCLUSION

As we conclude this paper, we should not just imagine that merely changing the laws on paper is what legal reform in India is all about. It is a journey rooted in our society's values and our commitment to human rights. Ultimately, our goal is to create safe and empowering spaces for all people, regardless of who they are or where they come from.

As we move forward with this journey, let us bear in mind that these laws will be directly felt by real people. We are fighting for women to have control over their own bodies, LGBTQ+ individuals to love without fear, and a legal system based on fairness and equality.

Despite progress being seen through new legislation like Bharatiya Nyaya Sanhita (Indian Justice Code), there are challenges ahead. There are also outdated and colonial-era exceptions like marital rape, which ought to be addressed. Moreover, old laws exist that make use of terms such as "modesty", which are no longer relevant today.

For us to go forward, it calls for listening, having meaningful conversations as well as dedication towards justice and empathy. A legal framework that truly encompasses our shared values of fairness, mercy and respect for human dignity can be made possible through focusing on human experiences and perspectives.

In the future, it is important for those in authority to recognise the real significance of legal reform

and put individual needs and rights first. If India takes on board feminist principles and ensures that all people contribute to legal conversations, it can make great strides towards a society based on equality and justice.

As we journey through the maze of legal reform, let us do so with a profound sense of empathy, understanding, and an unwavering dedication to forging a future where every individual is afforded equal treatment and protection under the law.

