

I. THE “MOVEMENT” FROM THE “STATUS” CONDITION TO “CONTRACT” CONDITION FOR THE INDIAN WOMEN: IN THE CONTEXT OF THE BNS 2023

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Abstract

Sir Henry Maine’s two theorizations propounded in the classic Ancient Law (1917) relating to static or “Status” condition in the earlier non progressive societies and “Contract” condition in the latter progressive societies, continues to impact every human development discourse. Here we have endeavoured to explore the “Status” to “Contract” theorization from the stand point of the Indian women, particularly the protection of the women’s interests under the Penal Code and the Bhartiya Nyaya Sanhita 2023 (BNS 2023). The four-part discussion begins with the Constitutional foundations of “gender justice” followed by the colonial penal policy and protection of the women, Protection of women under the newly introduced BNS 2023 and the Contemporary ground level realities of penal protection needs and practices. The conclusion is that though there are tall promises about “gender justice” in our political discourses and policies, but at the ground level the progress remains tardy. We are still to address and change the patriarchal and misogynist mindset that continues to impair the movement of the Indian women towards the “Contract” condition.

Keywords: *Contract, Status, Movement from Status to Contract, Gender Justice, Bhartiya Nyaya Sanhita*

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I. INTRODUCTION

Sir Henry Maine in the *Ancient Law*¹ propounds his first theorization around the idea of “family” that rested mainly on the patriarchal power of the male head/the father over all other members – wife/wives, sons, daughters, and slaves. For the members within the family unit, life remained static or in “Status” condition, subject to the wishes and whims of the pater familia. A direct fallout of such an accepted social condition was the Roman Law Rule of Agnation, that implied descent exclusively through males leading to a universal rule of perpetual tutelage of women. Equally strong and far-reaching is Henry Maine’s second theorization that has acquired the status of a famous aphorism: “The movement of the progressive societies has hitherto been a movement from Status to Contract”. Here “Contract” represents freedom from the “Status” condition and the loosening of the “family” stranglehold for the members, including the women. Thus, just as the first theorization of Maine has the tendency of limiting women, the second theorization liberated and ensured autonomy and equality for women. Perhaps in the early twentieth century when these theorizations were made, the author could not fully anticipate the varied interplay of these theorizations in different “progressive societies”, particularly from the point of view of women’s autonomy and dignified positioning within the “family” and the society. The interplay is still very skewed against women in India with respect to most of the matters which are vital for the “Contract” condition, such as upbringing, education,

¹ Sir Henry Maine, *Ancient Law* (Temple Press, Letchworth, GB, 1917).

marriage, employment, and bodily security. The latest revelations coming out of the Justice K. Hema Committee, AMMA Report relating to sexual exploitation of the Malayalam Cinema technicians and rape-cum murder of a female junior doctor on duty in the RG Kar Hospital, Kolkata, are clear evidences of the prevalent patriarchal and misogynist mindset in India. Since the movement towards autonomy and freedom for women is epitomized in modern societies by a value laden term “gender justice” it may be useful to understand here the true import of “gender justice” and its widening implications. The traditional categorization of persons based on biological sex, into males and females, appears to be coming under the influence of the idea of “choice” now a days. The Canadian Institute of Health Research provides a better rationalization of the “gender” categorization, thus: “sex refers to a set of biological attributes and gender refers to socially constructed roles, behaviours, expressions and identities... sex is usually categorized as female or male. Sex is what one is and gender is what one feels”. Thus, the “gender” categorization opens up the possibilities of expanding the horizons of liberation and freedoms for the new categories such as the LGBTQIA+ Couples.²

Our focus here is on how the laws, both the Constitutional and penal laws, are deployed in furthering the “progressive society” movement towards “Contract” for the women? In the foregoing pages the

² As a sequel to the Supreme Court ruling in Same Sex Marriages Petition in 2023, the Ministry of Social Justice and Empowerment has issued directions for issue of Ration Cards to the members of the LGBTQIA+ couples as well, THE HINDU 02.09.2024.

discussions are divided into four parts. First, is devoted to the enumeration of the Constitutional foundations of “gender justice”. Second, how the colonial penal law perceived women’s interest and extended protection to women under diverse social situations, Third, how the Bhartiya Nyaya Sanhita 2023 has tried to re-write the swadeshi brand of penal protection to women, and fourth, what are the ground realities of “gender justice”. The conclusion would underscore the unfinished task of “gender justice”.

II. THE CONSTITUTIONAL PROMISE AND THE ROAD-MAP FOR GENDER JUSTICE

A. Shared constitutional ownership of both genders

Unlike many other societies of the West, the resolve to constitute India into a **Sovereign Socialist Secular Democratic Republic**, itself comes from “**We, The People** of India”, comprising of men and women of every religion, race, caste, place of birth etc. Such a Perambulatory Constitutional vision is premised on the idea of complete gender equality in matters of the “ownership”, not only in respect to the form of governance, but also the aims and values enshrined in the governance of the society.

1. **Article 51-A (e):** “The spirit of common brotherhood amongst all the people... to renounce practices derogatory to the dignity of women.”

2. **Article 51-A (h):** “To develop scientific temper, humanism and a spirit of inquiry and reform.”

Thus, the State officials and the ordinary citizens are equally bound by a Fundamental Duty to renounce practices derogatory to the dignity of women in a spirit of common brotherhood amongst all the people. At the same time Article 51A(h) impels the officials as well as the citizens to develop scientific temper, humanism, spirit of inquiry and reform in their approach towards customs and traditions, particularly those that tend to debase women.

3. **Article 14:** Right to Equality: Every citizen, both female and male are entitled to get from the state equality, before the law as well as the equal protection of the laws within the territory of India.
4. **Article 15(1):** “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
5. **Article 15(3):** “Nothing in this article shall prevent the state from making any special provision for women and children.

Thus, like males females are entitled to claim the guarantee of equality in matters of application of the law and in matters by protection of the laws. But by the application of intelligible differentia or reasonable classification, women’s special protection under the rape law becomes

justified. Likewise, though Article 15(1) lays down the general non-discrimination rule on ground of “sex”, but because of an exception created by Article 15(3) the state is empowered to go ahead for any special provision for women. The special provision shall be for the benefit, and not for the detriment, of women.

6. **Article 19 ‘Right to Freedom’:** “(1) All citizens the right to six freedoms [(a) to (e) and (g)]. Of these for the women the freedom of speech and expression, freedom to form association, and freedom to practice any profession or carry on any occupation, trade or business are of special significance. In a traditional society like India large number of women continue to earn their livelihood and survive through age old profession like prostitution/sex work, singing and dancing, therefore, indiscriminate clamp down on traditional means of earning, without creation of meaningful alternative, often compels them to seek constitutional intervention under Article 19(1)(g).

7. **Article 21: ‘Protection of life and personal liberty’** The Constitution guarantees of the personal liberty of the citizen/non-citizen ensures and umbrella protection to every person that includes and infinitely wide range of conditions that the Court can label as undignified, unjust or violative of basic human rights. Article 21 was successfully pressed into action to further gender justice cause in several cases: Bodhisattwa

Gautam (1996)³; Navtej Singh Johar (2018)⁴; Joseph Shine (2018).⁵

III. THE COLONIAL PENAL POLICY AND PROTECTION OF THE INTERESTS OF WOMEN

The colonial penal laws were mainly interested in imposing hitherto unknown crime concepts largely by coercive criminal justice machinery, which operated more for the legitimization of the ruling class power. According to Barry Wright, the colonial rule in India posed twin challenges of reconciliation between liberties and state power, thus: “These reflected unresolved tensions between the rule of law and liberties on the one hand and the requirements of sovereignty and state power on the other”.⁶ Thus, “Government by rules became the basis for the conceptualization of British colonial rule”⁷ Under such a dispensation the interests of women received scarce or even negative attention. the Draft Penal Code, 1837 that later developed into the Indian Penal Code, 1860, had defined the offence of rape in Clause 359: “The Fifthly” clause that lays down the elements of the rape offence read, thus: “intercourse with a woman with or without her consent, when she is under nine years of age”. This amounts almost to

³ *Bodhisattwa Gautam v Subhra* (1996) 1 SCC 490.

⁴ *Navtej Singh Johar v UOI* (2018) 1 SCC 791.

⁵ *Joseph Shine v UOI* (2018) 2 SCC 189.

⁶ Barry Wright, “Macaulay’s Indian Penal code: Historical Context and Originating Principles”, in Wing Cheong Chan at al. (eds) *Codifications, Macauley and the Indian Penal Code – The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate, Pub. 2011, p. 26).

⁷ N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press, 2003).

the condonation of “child sex”. Similarly, Clause 359 “Exception” read thus: “Sexual intercourse by a man with his own wife is in no case rape”. The Draft Penal Code has perceived rape offence more as an invasion of patriarchal hegemony rather than as an offence against the bodily interest of the victimized female.⁸ Such an approach to the offence of rape was in sync with the then prevailing Indian society approach that viewed rape as an invasion of the family or community honour only by an “outsider”.⁹ Though in the final version of the Indian Penal Code, 1860 the age of consent was raised and under the “Exception”, that made intercourse by the husband punishable if the wife is below ten years of age. Even in the final version of the Penal Code there was little change of attitude towards the interest and the protection of women. They continued to be seen as weaker sections, perpetually under the protection either of the guardian or the husband. Such a patronizing attitude led to the inclusion of a few offences relating to women in the Chapter XVI ‘On Offences Affecting the Human Body’, under the sub-head such as ‘criminal force and assault’ under Section 354 and Kidnapping and Abduction under Sections 361-363. The same patronizing attitude is reflected in the six offences included in the Chapter XX ‘Of offences Relating to Marriage’. These offences were created mainly for the protection of the interest of ‘marriage’ institution, wife’s interest gets protection incidentally. Similar incidental protection of the women’s interest can be seen in

⁸ Pande, *B.B. Criminal Law and Criminal Justice: Advanced Legal Writings* (EBC, 2022 at p. 53).

⁹ Kalpana Kannabiran, “Sexual Assault and the Law”, in Kalpana. K. and Ranbir Singh (eds) *Challenging the Rule(s) of Law*, Sage Pub. 2008 at p. 81.

section 509 that falls in chapter XXII, that primarily designed to contain behaviours likely to disturb orderly life in the society.

The Indian Penal Code was subjected to several women centric amendments in the post-independence era such the addition of Section 498A 'Husband or relative of husband subjecting her to cruelty' (in 1983) and Section 304B 'Dowry Death' (in 1986). However, more comprehensive women-centric amendments in the Code were affected in the post Nirbhaya Gang Rape incident, by the Act 13 of 2013 that not only widened the ambit of 'criminal force and assault offences, the definition of rape offence and its punishment, which were thoroughly revised, but also for the first time the Code incorporated a comprehensive 'Trafficking of person' offence under Section 370. The trafficking of person offence was given additional teeth by the addition of Section 370-A 'Exploitation of a trafficked person, particularly sexual exploitation of a minor person', 'Habitual dealing in slaves' (S. 371), 'Selling or buying a minor for the purposes of prostitution' (SS. 372 and 572). All these offences aim at protecting the interest of women.

IV. PENAL LAW PROTECTION TO WOMEN UNDER THE BHARATIYA NYAYA SANHITA 2023

The Indian Penal Code perceived women only in their gross bodily form. That is the main reason for most of the offences protecting the interest of women being lumped under Chapter XVI that related to 'offences affecting the human body'. Even in Chapter XX where the

women's interest got protected incidentally, the sex offences centered around her body. The Bharatiya Nyaya Sanhita (BNS 2023) has taken the bold step by breaking away from the classificatory frame of the Penal code by creating a distinct and exclusive Chapter V 'Offences Against Woman and Child', as the first chapter in line of the specific offences under the Sanhita. By doing so the BNS 2023 has not only brought the penal law in line with the Constitutional guarantees enshrined in Articles 15(3), 53A (e) and (h), but also tried to bring the penal law in sync with the progressive feminist trends in the west. However, the western feminist trend being deeply entrenched in the social realities has been able to bring about real change, which is evident by how the Lord Hale's 1736 dictum of non-retractability of mutual matrimonial consent rule could be overruled by the House of Lords in *R v R* in 1991.¹⁰ It may be apposite to quote a few lines from Lord Keith's House of Lords ruling, thus : "Marriage is in modern times, regarded as a partnership of equals, and no longer one in which the wife must be subservient chattel of the husband". Such a deeply entrenched progressive feminist trend must have inspired Nicola Lacey and Celia Wells in *Reconstructing Criminal Law*¹¹ to bring together offences relating to women under Chapter 4, titled as: 'A Question of Integrity: Legal Construction of Sexually and Bodily Autonomy'. The Chapter is sub-divided into five parts such as: I The Social Construction of Sexuality and Bodily Autonomy, II Sexual Violence, III Regulating

¹⁰ (1991) 4 All ER 48.

¹¹ Lacey, Nicola, Wells, and Celia, *Reconstructing Criminal Law* (2nd Edition Law in Context series, Butterworths, London, 1998).

Sexuality, IV Regulating Maternity and V Euthanasia. Each of these sub-divisions are further divided into heads as under the ‘Sexual Violence’ part the divisions are 1. Sexual violence and Criminal process, 2. The Offence of Rape (a) Penile Penetration, (b) Rape and Marriage, (c) Consent, (d) Mistaken Belief, (e) Evidence and Rape Trial, and (f) Punishing Rape. Similarly Regulating Sexuality part is further divided into I, Forbidden Degrees, 2, Prostitution, and 3, Pornography.¹² Perhaps, for a traditional society like India the idea of re-grouping ‘Offences Against Woman’ under title such as “A Question of Integrity: Legal Construction of sexuality and Bodily Autonomy” sounded too radical. Therefore, the BNS 2023 merely reshuffled and rearranged the Penal Code offences, without any such philosophical pretensions.

Coming to the BNS 2023 the Chapter V that has moved away from the colonial classificatory frame by arranging the offences against women under four new groups/clusters as: ‘Sexual offences’ (SS. 63 to 73), ‘Criminal force and assault’ (SS 74 – 79), ‘Offences relating to marriage and cruelty’ (SS 80–87) ‘Causing miscarriage etc.’ (SS 88 – 92). All the above four cluster of offences have been picked up from chapter XVI or chapter XX of the Penal Code, more or less on the lines of the old offences, their explanations and even the illustrations. The ‘sexual offences’ cluster (that runs into 11 Sections) is more or less a detailed version of Sections 375 and 376 of the Penal Code. Section

¹² Pande, B.B. *Criminal Law and Criminal Justice: Advanced Legal Writings* (EBC, 2022, pp. 156-159).

376 and Section 376 A to E, have been spread over into seven Sections. Section 63 defines the offence of Rape exactly like Section 375, including repeating ‘marital Exemption’ under the Exception 2, but only with one change that such intercourse should not be with a wife below eighteen years of age. (this is perhaps in deference to the Supreme Court ruling in *Independent Thought Vs. UOI* (2017)).¹³ The ‘marital exemption’, retained in a restricted form under Section 63 Exception 2 has been done away in most of the western democracies and even in India in the *RIT Foundation Vs. UOI* the Delhi High Court in 2021, delivered a split decision in respect to it that is pending for final resolution before the Supreme Court. Perhaps the Drafters of Section 63 Exception 2 were inspired by the Union of India affidavit filed before the Delhi High Court in the *RIT Foundation* case, in August 2017.

‘The fact that other countries, mostly western, have criminalized marital rape does not necessarily mean that the India should also follow blindly. This country has its own unique problems due to various factors like literacy, lack of financial empowerment of majority of females, mind-set of the society, vast diversity, poverty etc. and these should be considered before criminalizing marital rape. It should be ensured adequately that marital

¹³ (2017) 10 SCC 800.

*rape does not become a phenomenon which may destabilize the institution of marriage apart from being a easy (sic) tool of harassing the husbands.*¹⁴ (emphasis supplied)

In effect the paramountcy of the institution of marriage and its sanctity prevailed upon the minds of the drafters at the time of retaining ‘marital exemption’ not ‘marital rape’, because every non-consensual intercourse ought to be deemed rape, whether it is by the husband or an ‘outsider’.

Yet, another change in this cluster of ‘sexual offences’ is the addition of a new sexual offence under Section 69, that arises whenever deceitful “promise to marry” is deployed to secure sexual intercourse with a woman, which is made punishable up to ten years imprisonment. The Section explains “deceitful means” to include inducement for or false promise of employment or promotion etc. It is significant that the BNS 2023 has tried to spread the protection net of the penal law from an unmarried girl-friend, on one end, a wife under 18 years of age, on the other. It is equally curious that in the third cluster of ‘offences relating to marriage’ all the eight offences of Chapters XX and XX-A of the Penal Code, have been repeated, excepting Section 497 dealing with the offence of Adultery (perhaps in deference to the Supreme

¹⁴ Pande, B.B. “The Immutability of the Marital Exemption Clause in the Indian Rape Law”, in M.P. Singh et al. (eds) The Indian Yearbook of Comparative Law 2018, Springer Nature Singapore Pvt. Ltd., 2019 at pp. 365-366.

Court ruling in *Joseph Shine v UOI*.¹⁵ The trust of Joseph Shine ruling is conveyed best by Justice DY Chandrachud's observations. "In enacting 497, the legislative made an ostensible effort to protect the institution of marriage. 'Ostensible' it is because the provision postulates a notion of marriage which subverts the equality of spouses... Section 497 is based on an understanding that marriage submerges the identity of the woman. It is based on a notion of marital subordination. In recognizing, accepting and enforcing these notions, Section 497 is inconsistent with the ethos of the Constitution".¹⁶ The move to withhold penalization of adulterous behaviour is a decisive swing towards de-criminalization on the lines of the Criminal Law realist Anthony Duff's theorization, thus:

*'Human beings live and love in a broad spectrum of relationships and desires, some of which transgress social norms. But if such a relationship is consensual and non-violent, it is not the business of the state to police it. Nor should the state invoke the paranoia of the collapse of social order to criminalize a breakdown in marital relations.'*¹⁷

Thus, in the matter of protection of the interests of women the BNS 2023 has not gone much beyond the colonial penal law, which treated

¹⁵ *Joseph Shine v UOI* (2018) 2 SCC 189.

¹⁶ *Ibid.*

¹⁷ Pande, B.B. *The Indian Yearbook of Comparative Law* (2018, at p. 381).

women as a weaker section, requiring perpetual protection. This is clearly reflected in the lack of new imaginations about crimes against women and recurring “gender justice” concerns. Expectation was that, after seventy-four years of Constitutional Law influence and thirty-one years of Human Rights influence, the BNS 2023 would carry a new ideal of ‘Womanhood’, neither over protected nor defenseless in a hostile environment. But, because in the scheme of governance it appears the gender issues could not muster up the desired priority heading the BNS 2023 to play it safe by repeating more or less the Penal Code line. However, the replacement of the old penal law by the BNS 2023 is likely to present paradoxical situations of ‘Differential Protection to Women’, thus:

Situation A: By not reenacting Section 497 that criminalized adulterous relations, the BNS 2023 has recognized the equality between marriage partners. Under the earlier law the penal law criminalized to protect the sexual exclusivity of the husband and not the wife.

Situation B: Retaining Section 63 Exception 2 extends ‘marital exemption’ to a husband to have intercourse without consent with a wife above the eighteen years age, though she has been a party to seven promises or *Saptapadi* in contrast to only one under section 69 at the time of the marriage.

Situation C: Creation of a new sexual offence under section 69 extends penal protection to a girl-friend who may be in search for a suitable matrimonial alliance. By extending penal protection to her the BNS 2023 appears to have followed an over-patronizing approach for the women by projecting her as naive, on the one hand and sexually vulnerable, on the other. Such an approach continues to feed the patriarchal and misogynist mind set further. The aforesaid changes in the BNS 2023 tends to create paradoxical situation in respect to women under the three situations: A married woman under Situation A, enjoys complete sexual freedom; A married woman above the age of eighteen appears to be worst-off, because she is compelled to suffer non-consensual sexual intercourse at the hands of her husband; A unmarried girl-friend has the best bargain under Situation C, she enjoys sexual freedom coupled with the prospects of a partner of her choice. This leads to the propagation of three shades of women's sexual autonomy: One, where, both female and male partners enjoy equal sexual freedom, Two, where the female partner's sexual freedom is subjected to the male partners whims and fancies, including non-consensual sexual intercourse, and three, where the female partner's sexual freedom prevails upon the male partner, who has freedom to sexual intercourse subject to promise to marry, under fear of punishment. There, is no clue from the side

of the Drafters of the BNS 2023 about the afore described anomalies.

V. THE CONTEMPORARY GROUND LEVEL REALITIES OF “GENDER JUSTICE”

At the ground level “gender justice” is still a distant dream for a majority of the Indian women who are struggling to come out of the “Status” condition in the family and outside. In this respect the plight of the working women is worst, because their every step towards “Contract” is paved by multiple kinds of discriminations, exploitations and even violence. This contemporary “gender justice” reality can be gleaned from the following sample news items:

- (i) *‘For 20 minutes, her body lay in the middle of the main road in a Meerut village. The neighbours stood in silence, a few made videos, and no one came to the rescue of the 17 years old girl who was strangled to death, allegedly by her 28 years old brother... The reason for the killing was that the girl was in love with a man from a different religion.’¹⁸*
- (ii) *‘As many as 17 persons were arrested for assaulting a woman and blackening her face in front of her three minor children during a village panchayat in Pratapgarh... The woman was tied to a tree, her hair was chopped off and she was garlanded with shoes over accusations of an “extra-marital affair...” the*

¹⁸ The Indian Express, Luck. edn. 08.08.2024.

*victim's family claimed that she was in a "illicit relationship" with a local resident (40) and frequently spoke with him over the phone. The victim's in-laws disapproved of this but she allegedly refused to snap ties with the man... Her husband runs a vegetable shop in another state.*¹⁹

- (iii) On the lines of Disha Bill passed by the Andhra Pradesh in November 2019 in response to a gang rape of a 26 years old veterinary doctor in Shamshadbagh in Hyderabad, the Shakti Bill passed by the Maharashtra legislature in 2020, to curb the menace of rape of working woman in the Textile Mill, the West Bengal Assembly has passed the Aprajita Bill, 2024 in response to the gruesome rape and murder of a junior doctor on duty in the K.G. Kar Medical College and Hospital in Kolkata. The Bill fixes a time period for investigation, trial and enhancement up to death penalty for the gruesome crime that threatens working women at their place of work. But like the Disha Bill and Shakti Bill that are still awaiting Presidential assent, the Aparajita Bill also will have to remain in waiting before it is accorded assent by the President. However, all these Bills are symbolic of the society's emphatic rejection of violence against working women.

To close the saga of tardy march of "gender justice" on an optimistic note, I borrow from a young Haryana, Rhodes Scholar at the University

¹⁹ The Indian EXPRESS Luck. edn. 31.07.2024.

of Oxford, Anupriya Dhonchak's recent writing on feminism in Haryana. The author observes: "Field work in rural Haryana demonstrates that gender, caste, age, and class roles, which are defined by society, determine women's mobility, making their access to masculine public space conditional on some compelling reason requiring adherence to a behavioural code of conduct. In that sense, sporting success becomes a badge of honour, discipline, and morality. It becomes a culturally sanctioned avenue for conditional, fragile and temporary freedoms".²⁰ Writing further "The trials, tribulations and triumphs of Phogat carry possibilities of a unique vernacularisations of feminism in Haryana. Vernacularisation is the process by which universalistic human rights are converted into local understandings of social justice. It has the advantage of fashioning change in communities from within"²¹

²⁰ Anupriya Dhonchak "Vinesh Phogat and Feminism in Haryana", THE HINDU Luck. Edn 03.09.2024.

²¹ *ibid.*