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Beyond Sec 377 - Analyzing the Legislative Shift from IPC to BNS & Its Jurisprudential Impact

(Nikky Singh)

Abstract

The Bharatiya Nyaya Sanhita Bill, 2023, was introduced by the Home Affairs Ministry in the Lok Sabha on August 11, 2023. It was referred to the Standing Committee, which made certain important modifications to the Bill in comparison to the current Indian Penal Code, 1860. Section 377, which addressed unnatural offenses such non-consensual same-sex relationships, necrophilia, and bestiality, was repealed by the Bharatiya Nyaya Sanhita Bill, 2023. Necrophilia is defined as a sexual offense against a dead body, while bestiality is defined as sexual contact between a human and an animal. The inclusion of Section 377 in the Indian Penal Code dates back to 1862, during the period of British governance over India. Prior to its enactment, there existed no regulatory framework governing sexual conduct within the country. Under the Indian Penal Code, 1860, Section 377 defined Unnatural Offences as: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." According to Black's Law Dictionary, "Homosexual is a person who is attracted to the person of the same sex."[1] The Unnatural Offences are inclusive, covering the exploitation of a female by a female or of a male by a male, of a deceased body by an individual, or of an animal by a human. The neglect shown towards homosexuals, animals and deceased bodies in the Bharatiya Nyaya Sanhita Bill, 2023, by not including the provisions of Section 377 dealing with unnatural offences, has created a grey area in comparison with the Indian Penal Code, 1860. Section 63 of the BNS delineates the term 'Rape' as a man inserting his body

[1]Black's Law Dictionary (definition of "homosexual").

part such as penis or any foreign object in a woman's body.[2] According to the definition provided in the Bill, only women can be victims of sexual offences such as rape, leaving men vulnerable without any legal recourse.

History of Section 377 IPC

In 1533, during the reign of Henry VIII, the Act for the Punishment of the Vice of Buggery[3] was passed, which prescribed the death penalty for "unnatural sexual acts against the will of God". While anyone could technically be convicted under the 1533 Act for "unnatural sexual acts" such as bestiality, same-sex convictions were the most commonplace. After this, the Buggery Act, which was re-enacted in 1566, laid down a template for the British colonies. Centuries later, in 1828, additional laws that expressly targeted male same-sex conduct were passed, such as the Offenses Against Persons Act, which made sodomy a capital crime. But in England and Wales, the penalty for the crime was lowered to ten years in 1861. A Draft Penal Code was previously suggested in 1837 to penalize "unnatural lust." Nevertheless, it was not addressed in the Report of the Law Commission of India at the time. After the Legislative Council passed the IPC and Section 377, the Governor General approved them on October 6, 1860.

In 1957, the UK published the Wolfenden Committee Report,[4] which recognised how the anti-sodomy laws had created an atmosphere for blackmail, harassment and violence against homosexuals. Pursuant to this report, the House of Lords initiated legislation to decriminalise homosexual acts done in private by consenting parties. The Sexual Offences Act, 1967 was passed in England, which decriminalised homosexual acts, provided the parties consented to it and were above the age of 21.[5] More than 125 countries have decriminalised same-sex relationships among consenting adults.

Decriminalization of Section 377 IPC

Section 377 IPC was read down, or given a narrow interpretation thereby limiting the law's scope, by the Delhi High Court on July 2, 2009.[6] The Indian Constitution's Articles 21, 14, and 15, which provide every person the "right to life" and "equal opportunity, regardless of religion, race, caste, sex, or birth," were found to be infringed by Section 377 IPC.

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[2]Bharatiya Nyaya Sanhita Bill, 2023, § 63, No. 121, Acts of Parliament, 2023 (India).
[3]Walter Hungerford and the Buggery Act: LGBTQ+ History, Historic Royal Palaces.
[4]The Editors of Encyclopaedia Britannica, Wolfenden Report, Encyclopaedia Britannica.
[5]Sexual Offences Act 1967, c. 60 (U.K.).
[6]Naz Found. v. Gov't of NCT of Delhi, (2009) 160 DLT 277 (India).

However, on December 11, 2013, a Supreme Court Bench of Justices G.S. Singhvi and S.J. Mukhopadhaya criminalised Section 377 again,[7] saying the High Court order was “legally unsustainable”, and that it had “overlooked that a minuscule fraction of the country’s population constitute lesbians, gays, bisexuals or transgenders and in last more than 150 years less than 200 persons have been prosecuted”.

Finally, on September 6, 2018, a five-judge Bench of the Supreme Court led by then Chief Justice of India Dipak Misra, and also comprising Justices Fali Nariman, A.M. Khanwilkar, D.Y. Chandrachud and Indu Malhotra, unanimously decriminalised consensual sex between two adults irrespective of their gender and partially struck down Section 377 of the IPC.

The Supreme Court described the parts of the provision that made consensual unnatural intercourse illegal as "irrational, indefensible, and manifestly arbitrary" in its ruling on a challenge brought by Bharatanatyam dancer Navtej Singh Johar. The court also observed that members of the LGBTQ community were discriminated against and harassed using Section 377. "Section 377 is capricious. The LGBT community has the same rights as everyone else. Constitutional rights cannot be dictated by popular morals or majoritarian ideologies, the court ruled. The court clarified in its decision that it was limiting its order to voluntary activities between two adults and that other provisions pertaining to unnatural sex with animals and children were still in effect.

No Provision for Homosexuals in BNS

The Bharatiya Nyaya Sanhita (BNS), 2023, the replacement for the Indian Penal Code (IPC), does not contain IPC Section 377 (or an equivalent section), which was read down by the Supreme Court in 2018. While Section 377 (“unnatural offences”) remained in the IPC, it could no longer be used to criminalise gay sex between consenting adults.

The neglect of unnatural offences in the Bharatiya Nyaya Sanhita Bill, 2023 creates a massive cavity in the criminal law that governs India. Section 377 dealt with offences which are against the order of nature, which are usually very rare. With the removal of the law that deals with unnatural offences, a situation arises wherein offenders get an upper hand as they would not be threatened by any legal restraint to commit such offences. This grave oversight by the Indian legislature amounts to a violation of the Right to Equality against the whole community of homosexuals, including transgender men and gay men.

[7]Suresh Kumar Koushal & Anr. v. NAZ Found. & Ors., Civil Appeal No. 10972 of 2013 (India).

A 2016 study by MINGLE (Mission for Indian Gay & Lesbian Empowerment), an LGBTQ+ advocacy think tank, found that many workplaces in India are not supportive, or even neutral, but rather toxic. According to the survey, 40% of LGBTQ+ employees were subject to harassment at the workplace, two-thirds reported hearing homophobic jokes or comments, and 20% faced discrimination from their own manager or human resources department.[8] It is necessary and expedient for employers in workplaces, as well as other responsible persons or institutions, to observe certain guidelines to ensure the prevention of sexual harassment. The definition of sexual harassment under the Vishaka Guidelines[9] describes the victim as women only and, again, excludes LGBTQ persons.

Increased violence, harassment, and other forms of discrimination against transsexual women and men who have sex with men (MSM) have been linked to "sodomy laws." Research indicates that these sodomy laws may be linked to an upsurge in violence against MSM-H in India, reflecting similar situations globally where criminalization laws enable authorities and members of the community to harass and discriminate against sexual and gender minorities.[10]

According to Section 377 of the Indian Penal Code, a harm caused by sexual exploitation by a person of the same sex would fall under the purview of this clause, and the victim would be entitled to a criminal law remedy. However, if someone is hurt during same-sex sexual activity, there is no way for them to receive compensation because the new Bill does not include the provisions of Section 377.

No Provision for Necrophilia in BNS

Recent cases of necrophilia (sexual offences against dead bodies) in India are concerning, and the absence of any law in the new Bill governing this issue leads to a situation where providing justice to a dead person is insurmountable. One of the most infamous cases of necrophilia in India is the Nithari Case,[11] wherein more than fifteen girls were kidnapped, murdered and raped (after being murdered), and the guilty offender was charged under Section 377 for committing rape of dead women.[12] In a recent instance, a fifty-year-old man was detained in Assam in 2020 after engaging in sexual activity with a fourteen-year-old girl's corpse. These kinds of incidents are clearly common in India, yet the perpetrators will go unpunished because there is no appropriate legislation pertaining to necrophilia. This is

[8]Ramkrishna Sinha, It Is Time to Talk About Sexuality at the Workplace.
[9]Vishaka & Ors. v. State of Rajasthan & Ors., (1997) 6 SCC 241 (India).
[10]Sexual Stigma, Criminalization and Access to HIV Services Among Homosexuals.
[11]Surendra Koli & Anr. v. State of Uttar Pradesh, (2011) 4 SCC 80 (India).
[12]Psychopaths: An Unrevealed Area in Indian Judicial System, 4 NULJ 1 (2014).

completely at odds with the goal of the Indian criminal justice system, which is to provide the victim justice.

Section 63 of BNS Is Not Gender Neutral

The Cambridge Dictionary describes gender neutrality as relating to people and not especially to men or to women.[13] The offence of “rape”, as defined in the BNS,[14] is gendered, which means that it is committed by a man against a woman. Although this is also the case in the IPC, non-minor males were protected from rape by Section 377, which dealt with "carnal intercourse against the order of nature with any man, woman, or animal." The Indian Penal Code's gender-biased rape clause was previously balanced by Section 377.

In the IPC, Section 375 defines rape and includes seven conceptions of consent which, if violated, would constitute the offence of rape by a man. In the proposed BNS, rape is covered under Section 63. The Protection of Children from Sexual Offences (POCSO) Act, 2012,[15]covers youngsters of both sexes, but the law is still gender-specific after puberty. Regardless matter whether the perpetrator is a man or a woman, the law does not acknowledge that men may become victims of rape.

According to a rare 2010 poll that was published in the Journal of the American Medical Association, 30% of women and 22% of males in the Eastern Congo reported experiencing sexual violence as a result of conflict.[16] The research by Lara Stemple at the University of California not only shows that male sexual violence is a component of wars all over the world, it also suggests that international aid organisations are failing male victims. Her study cites a review of 4,076 NGOs that have addressed wartime sexual violence.[17] "Ignoring male rape not only neglects men, but it also harms women by reinforcing a viewpoint that equates "female" with "victim," which hinders our ability to see women as strong and empowered," she continues. Similarly, keeping quiet about male victims perpetuates negative stereotypes of men and their purported invulnerability. In its 172nd Report on Review of Rape Laws, the Law Commission recommended changes for widening the scope of the offence in Section 375 of the Indian Penal Code and to make it gender neutral.[18]Various more adjustments were recommended in Sections 376, 376A to 376D. The Justice Verma Committee, established up

[13]Gender-neutral, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/gender-neutral.
[14]Bharatiya Nyaya Sanhita Bill, 2023, § 63, No. 121, Acts of Parliament, 2023 (India).
[15]The Protection of Children from Sexual Offences Act, 2012, No. 32 of 2012, India Code.
[16]Shabbir H.M. Tankiwala, Rape: Weapon of War and Mass Destruction, ch. 1.
[17]The Rape of Men, The Guardian.
[18]Law Commission of India, Review of Rape Laws, Report No. 172.

in the aftermath of the horrific 2012 Delhi gang rape, first proposed gender-neutral laws. However, the Committee ultimately rejected this proposal, fearing that gender-neutral laws might be misused against women, given the existing patriarchal setup of Indian society.

Studies elsewhere show a similar pattern: twenty-one per cent of Sri Lankan males seen at a London torture treatment centre reported sexual abuse while in detention; in El Salvador, 76% of male political prisoners surveyed in the 1980s described at least one incident of sexual torture; and a study of 6,000 concentration-camp inmates in Sarajevo found that 80% of men reported having been raped.[19] This is evidence that it is not only women who are or may be raped; it can be any human.

In Ankur Mittal v. State,[20] the Delhi High Court observed that male victims of sexual assault should also be afforded the same protection as female victims. It suggested that Parliament should consider amending the law to ensure that male victims of sexual offences get adequate protection. This judgment rekindled the debate around gender-neutral rape laws.

The National Legal Services Authority (NALSA) conducted a nationwide consultation on transgender people's access to justice in 2017. The consultation recognized that transgender people are especially vulnerable to sexual violence and that their marginalization is exacerbated by the lack of explicit legal recognition of this violence. It promoted greater legal protection for transgender people, which helped advance the cause of gender-neutral rape laws.

No Provision for Sexual Offences Against Animals

According to Section 377 of the Indian Penal Code, 1860, any person who raped or sexually exploited an animal would be prosecuted with an unnatural offense. However, the new Bharatiya Nyaya Sanhita makes no mention of unnatural offenses, such as the sexual exploitation of animals.[21] In India, there is no other rule or provision which protects animals from sexual exploitation or rape other than Section 377 of the Indian Penal Code.

In Karnail Singh & Ors. v. State of Haryana,[22] it was held that animals were to be considered as legal persons. In Animal Welfare Board of India v. A. Nagaraja & Ors., the Supreme Court ruled that compassion for all living things encompasses consideration for their pain and

[19]Will Storr, Rape of Men: The Darkest Secret of War, The Guardian.
[20]Ankur Mittal v. State (2018) (India).
[21]Concerns Grow over Legal Vacuum as India Moves to Repeal Section 377 in the Wake of Disturbing Cases of Sexual Assault of Animals, The Hindu.
[22]Karnail Singh & Ors. v. State of Haryana, (2009) 16 SCC 798 (India).

welfare. The Apex Court of India's interpretation in this case holds that every animal has the same right to life as every human, and that this right has been extended to animals as well.[23] Therefore, it is the duty of the State to protect animals from any sexual exploitation and rape, but since the newly introduced Bill does not cover any such provision, the Supreme Court's direction pronounced in this case is being disregarded. The proposed Bill only talks about mischief by killing or maiming animals in Section 323,[24] which is exhaustive in nature and therefore does not cover any sexual exploitation or rape of any animal. Other significant legislation in India related to animal welfare and protection, such as the Prevention of Cruelty to Animals Act, 1960 and the Wildlife Protection Act, 1972, also does not cover any such provision regarding sexual exploitation or rape of animals.

In Navtej Singh Johar v. Union of India, it was held by the Court that Section 377 is unconstitutional, and it was partially struck down for the benefit of the LGBTQ+ community, while the part dealing with sexual exploitation of animals was kept alive.[25] The importance of Section 377 in this regard can be assessed through a recent incident wherein a drunk man of 50 years raped a cow in the Betul district of Madhya Pradesh on March 19, 2017, and this man was charged under Section 377 of the Indian Penal Code rather than any other act or provision.[26] These instances depict the significance of Section 377 of the Indian Penal Code with regard to sexual exploitation and rape of animals.

In the international context, leading countries like Canada, the USA and the UK have criminalised the offence of bestiality. In Canada, bestiality is dealt with by Section 160 of the Criminal Code of Canada, which criminalises this offence.[27] In the UK, the offence of bestiality is tackled by the Sexual Offences Act 2003, which also criminalises this unnatural offence. By not inserting any provision dealing with bestiality in the new Bill, the Indian legislature has taken a step backward in the area of animal welfare.

Conclusion

The call for gender-neutral rape laws has gained considerable traction in recent years.[28] Advocates argue that men and transgender individuals can be, and are, victims of sexual violence. Moreover, they contend that the lack of legal recourse for male and transgender

[23]Animal Welfare Bd. of India v. A. Nagaraja & Ors., (2014) 7 SCC 547 (India).
[24]Bharatiya Nyaya Sanhita Bill, 2023, § 323, No. 121, Acts of Parliament, 2023 (India).
[25]Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India).
[26]P. Naveen, Madhya Pradesh: Cow Escapes from Farmer's Shed, Gets 'Raped' by Drunk Man, The Times of India.
[27]Kathleen Harris, Canada Passes a New Law Cracking Down on Animal Cruelty – Bestiality, CBC.
[28]Philip N.S. Rumney, In Defence of Gender Neutrality Within Rape.

victims exacerbates their trauma and contributes to a culture of silence. Siddharth Narrain (2013) favours a gender-inclusive law in the instance of rape victims, noting that the current legislation deprives lakhs of transgender people, intersex people, and sexual minorities who were not born as women of their rights.[29]

The only way to get a remedy against sexual torture by one or more males was through Section 377 IPC. LGBTQ individuals experience the same level of suffering and psychological damage from rape as do women. When it comes to victims, gender neutrality should be viewed as a ladder that leads to justice for those who were ignored. When it comes to denying a sexual minority in the land of democratic ideals their fundamental human rights, the law should not retreat in the face of new social difficulties. Justice does not take into account the victim's gender or sexual orientation; what counts is that the crime was committed. A number of fundamental and human rights are seriously violated by rape, and since the democratic Constitution is supreme and mandates that everyone living under its protection have access to human rights, the state must protect these rights.

[29]Siddharth Narrain, Crimes of Exclusion, The Indian Express (2013).