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Review Article

Conundrum on Laws Related to Unnatural Sexual Offences in Bhartiya Nyaya Sanhita

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Abstract

"Unnatural sexual offenses," as defined under Section 377 of the Indian Penal Code, originally referred to sexual acts that were deemed non-procreative or contrary to the natural order. This primarily included: Same-Sex Acts: Penetrative sexual acts between individuals of the same sex (anal and oral sex). Bestiality: Sexual acts among humans and animals. The Bharatiya Nyaya Sanhita, 2023, overlooks provisions included in Section 377, which states that "whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal commits unnatural offence." There is no mention of anything resembling what is enclosed in **Section 377 of the IPC**. With exclusion of Section 377 in the BNS, a man or a transgender person imperilled to non-consensual penile penetrative sex has no option under law for any remedy as it is no longer an offence. Similarly, there is no mention of offence for sexual intercourse of man, women or transgender with an animal. The law requires that if there is a legal wrong there must be a remedy. Not providing a remedy for acts covered under Section 377 is not only illegal but unconstitutional.

1. Introduction

Sexual assault and other sex-related crimes are indeed among the most serious and devastating offenses, both for the immediate victims and for society as a whole. The rising rates of sexual assault worldwide are alarming and highlight a number of systemic issues, including gender inequality, cultural attitudes toward consent, and inadequate support for victims. Sexual violence is not only a legal or criminal issue, but also a profound public health concern.¹

Section 377 of the Indian Penal Code, enacted in 1860, indeed criminalized "unnatural

offenses," which were primarily understood to encompass same-sex relations and certain non-procreative sexual acts. "Unnatural sexual offenses," as defined under Section 377 of the Indian Penal Code, originally referred to sexual acts that were deemed non-procreative or contrary to the natural order. This primarily included: Same-Sex Acts: Penetrative sexual acts between individuals of the same sex (anal and oral sex). Bestiality: Sexual acts among humans and animals.² The law's rationale was rooted in the belief that sexual activity should be oriented towards procreation.

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The interpretation that only penetrative acts fell under this section reinforced a narrow understanding of sexuality, deeming anything outside of heterosexual procreative sex as "unnatural."³

2. Amendments related to laws of unnatural sexual offences:

Section 377 of the Indian Penal Code (IPC) was indeed enacted in 1861 under the British colonial administration, but it was inspired by British laws, such as the **Buggery Act of 1533**, which made "buggery" (typically anal intercourse) a capital offense. However, while Thomas Macaulay is often credited with drafting the Indian Penal Code, it's important to note that Macaulay's actual drafting work was done in the early 1830s, and the code itself was enacted in 1861 under British colonial rule.⁴

The Delhi High Court's ruling in the Naz Foundation case and the Supreme Court's decision in Navtej Johar were pivotal in redefining the legal landscape surrounding consensual sexual relations in India. Both courts emphasized the importance of consent in determining the criminality of sexual acts traditionally viewed as "unnatural" under Section 377 IPC.⁵

Naz Foundation Case (2009): The Delhi High Court decriminalized consensual same-sex relations by ruling that the criminalization of consensual sexual acts between adults violated the fundamental rights to privacy and equality. The court asserted that if the acts were consensual, they should not be considered criminal.⁶

Navtej Johar Case (2018): The Supreme Court upheld the Delhi High Court's reasoning, further affirming that the essence of the law should be based on consent. The ruling clarified that only non-consensual acts—such as sexual violence or exploitation—would remain punishable under the law.⁷ As a result of these landmark decisions, Section 377 was effectively rendered inapplicable to consensual acts between adults, thereby protecting the rights of individuals engaged in such relationships. This shift marked a significant advancement for LGBTQ+ rights in India, emphasizing dignity, autonomy, and the principle that consensual adult relationships should not be criminalized. Thus, finally it resulted that only non-consensual sexual acts included in Section 377 were liable for punishment.⁸ The Supreme Court's recognition of transgender persons' rights, particularly in the landmark 2014 NALSA judgment, emphasized that individuals should be recognized based on their self-identified gender. This pivotal decision laid the groundwork for legislative reforms

aimed at protecting the rights of transgender individuals in India.⁹

The Transgender Persons (Protection of Rights) Act, 2019 further institutionalized these rights, providing a framework for the recognition and protection of transgender individuals.

Criminalization of Sexual Abuse: Section 18 of the Act specifically addresses sexual abuse against transgender persons. It prescribes penalties of up to two years of imprisonment, fine, or both for such offenses, thus recognizing the unique vulnerabilities faced by the transgender community. Overall, the Act represents a significant advancement in the legal recognition and protection of transgender rights in India, affirming their dignity and autonomy while aiming to address the discrimination and violence they often encounter.¹⁰

The **Protection of Children from Sexual Offences (POCSO) Act**, enacted in 2012, represents a crucial legal framework in India aimed at safeguarding children from sexual exploitation and abuse. Key features of the POCSO Act include: The Act is explicitly gender-neutral, meaning that it applies equally to all individuals—men, women, and transgender persons—who engage in sexual activities with minors. This inclusive approach helps to address sexual offenses without bias regarding the perpetrator's or victim's gender.¹¹

The amendments to the definition of rape under **Sections 375 and 376 of the Indian Penal Code (IPC)** in 2013 marked a significant evolution in India's legal approach to sexual violence. These amendments were primarily a response to public outcry following high-profile cases of sexual assault, and they aimed to broaden the understanding and definition of rape. Historically, the law defined rape in a gender-specific manner, stating that only a man could be charged with raping a woman. The law did not recognize the possibility of a woman raping a man, which limited the understanding of sexual violence and excluded male victims from legal protection.¹² Thus, rape tends to persist as gender-specific crime, a man raping a woman, but it is no longer limited to non-consensual peno-vaginal sex, and now comprises all other sexual acts.^{13,14} As per Section 377 of the IPC, a person, man or a transgender is liable for punishment if there is non-consensual penile penetrative sex. Chapter V of the BNS comprises of offences against women and children and a sub-chapter of that, Sections 63 to 73 deals with sexual offences. The Bharatiya Nyaya Sanhita, 2023, overlooks provisions included in

Section 377, which states that “whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal commits unnatural offence.”¹⁵ There is no mention of anything resembling what is enclosed in Section 377 of the IPC. With exclusion of Section 377 in the BNS, a man or a transgender person imperilled to non-consensual penile penetrative sex has no option under law for any remedy as it is no longer an offence. Similarly, there is no mention of offence for sexual intercourse of man, women or transgender with an animal.¹⁶

On August 28, 2024 The Delhi High Court questioned the central government representation to a petition against the elimination of penal provisions for the offences of unnatural sex and sodomy from the Bhartiya Nyaya Sanhita (BNS), which substituted the Indian Penal Code. The court instructed the Central government to quickly take decision, preferably within six months.¹⁷

3. Critical analysis & Conclusion

Considering the conditions like Necrophilia where dead woman or man is subjected to sexual exploitation which was earlier included in unnatural sexual offences, now finds no place in law where relatives can seek for justice. In comparison to this if living female is subjected to sexual violence, there is provision for her to seek for justice as per law. On the same note, earlier if the males were subjected to sexual violence, there was provision of punishment as per section 377 IPC but now there is no method of proceeding further with complaint in BNS.

There are significant number of cases of necrophilia with no remedy available for the same. The famous case of Nithari where more than 15 girls were murdered and raped and accused was charged under section 377 IPC.¹⁸ Similarly, in 2020, there was case of necrophilia with 14 years old girl in Assam.¹⁹ But absence of section related to necrophilia will set the offenders scot-free. Hence the provision of necrophilia to be included in the legal framework to ensure the justice to the victim to each and every offence and impart the punishment to the offenders. The absence of these legal provisions led to ambiguity situations for the investigating authorities to conduct the investigation. This is absolute paradox of the aim of judiciary to impart justice to each and every individual of the country.

The introduction of the Bhartiya Nyaya Sanhita led to creation of a grey area in respect to Unnatural sexual offences against homosexuals, men, animals and women. The implication of non-inclusion

of the provisions of Section 377 IPC covered in BNS is totally flouting the crimes of unnatural nature, creating a vacant space in the area of Criminal law in the Indian subcontinent. The desertion of this area of crime significantly shakes the Right to Life and personal liberty of the citizens of India.²⁰

4. Recommendations

1. With regard to Section 377 of the Indian Penal Code, the Supreme Court in 2018 partially struck down provisions of this section and the non-consensual sexual acts performed were upheld by the Apex Court. These offences to be included in the existing sections or new sections can be added.
2. Non-consensual sexual offences on males can be incorporated in section 63 of BNS by making the that law gender neutral which can resolve the issue. Currently only males can be offenders as per this section.
3. Due to the growing cases of Bestiality in the Indian Subcontinent, there should be recognition given to this area of crime and stricter laws should be introduced in the Indian criminal justice system. The new Bill should be inclusive of the provisions dealing with the crime of Bestiality and should be properly defined in the definition clause followed by precise explanation of the crime along with punishment for the same.
4. On the same lines, provisions of necrophilia to be included in the law and punishment for the same. The law requires that if there is a legal wrong there must be a remedy. Not providing a remedy for acts covered under Section 377 is not only illegal but unconstitutional.

Abbreviations: -

1. Indian Penal Code: - IPC
2. Bhartiya Nyaya Sanhita: - BNS
3. Protection of children from Sexual offences: POCSO

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