



Section 377 of IPC missing in the proposed Bharatiya Nyaya Sanhita, 2023 would lead men remediless towards unnatural offences against them

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Abstract: The Union Home Minister Amit Shah has introduced three new Bills in the Lok Sabha which propose a complete overhaul of the criminal justice system in India. The proposed Bharatiya Nyaya Sanhita, 2023 would repeal and replace the colonial era Indian Penal Code, 1860. It is disheartening to see that an offence akin to Section 377 of IPC does not find place in the proposed Bharatiya Nyaya Sanhita, 2023. Meaning thereby, the protection of law towards non- consensual sexual acts/unnatural sex against adult men would no longer be available in the new Code. Further, a man or woman committing bestiality would also not be an offence in the new Code which is currently treated as intercourse against the order of nature under Section 377 of IPC.

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Introduction

The Union Home Minister Amit Shah has introduced three new Bills in the Lok Sabha which propose a complete overhaul of the criminal justice system in India. The proposed Bharatiya Nyaya Sanhita, 2023 would repeal and replace the colonial era Indian Penal Code, 1860.

It is disheartening to see that an offence akin to Section 377 of IPC does not find place in the proposed Bharatiya Nyaya Sanhita, 2023. Meaning thereby, the protection of law towards non- consensual sexual acts/unnatural sex against adult men would no longer be available in the new Code. Further, a man or woman committing bestiality would also not be an offence in the new Code which is currently treated as intercourse against the order of nature under Section 377 of IPC.

Section 377 of IPC

Under IPC, Section 377 provides punishment for unnatural offences. It states, *“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.*

Explanation.- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.”

The essential ingredient required to constitute an offence under Section 377 of IPC is ‘carnal intercourse against the order of nature’. The expression ‘carnal intercourse’ used in Section 377 of IPC is distinct from ‘sexual intercourse’ which appears in Sections 376 of IPC. The phrase ‘carnal intercourse against the order of nature’ is not defined by Section 377 of IPC, or in the Code. The term ‘carnal’ has been the subject matter of judicial interpretation in various decisions. The courts had earlier interpreted the term ‘carnal’ to refer to acts which fall outside penile-vaginal intercourse, and were not for the purposes of procreation. The test for attracting penal provisions under Section 377 of IPC changed over the years from non-procreative sexual acts to imitative sexual intercourse like oral sex to sexual perversity.

Section 377 of IPC had been a matter of debate for decades, a five- judge bench of Supreme Court of India in a landmark case titled *‘Navtej Singh Johar v. Union of India’*¹ has, unanimously, struck down Section 377 of IPC to the extent it penalizes consensual sexual

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¹ AIR 2018 SC 4321

acts of adults, be it homosexuals (man and a man), heterosexuals (man and a woman) and lesbians (woman and a woman), in private space. The apex court, however, held that Section 377 of IPC will continue to punish non-consensual sexual acts between adults, all acts of carnal intercourse against minors, and acts of bestiality.

PIL to read down Section 377 of IPC to include within its ambit victims belonging to ‘Transgender/third gender’ besides man, woman and animal

It is pertinent to note that the author has filed a PIL before Delhi High Court titled *‘Jamshed Ansari v. Union of India’*² which is still pending and the Union of India is yet to file its counter affidavit. The PIL seeks an appropriate Writ/Direction/Order in the nature thereof thereby to read down Section 377 of IPC so as to include within its ambit the ‘transgender/ third gender’ victims of non- consensual sexual acts/unnatural offences. The PIL states that the protection of Section 377 of IPC extends only to men, women and animals against unnatural offences. There is no mention of ‘transgender/ third gender’ within its ambit. Such discrimination against an individual on the basis of gender identity is deeply offensive to the dignity and self-worth of the individual which is against the mandate of Article 14, 15, 21 of the Constitution of India and the law laid down by the Supreme Court of India in *NALSA* judgment. The PIL highlighted an instance when the Delhi Police had refused to register FIR for an offence under Section 354-A of IPC against a transgender victim of sexual harassment on the ground that it applied only to women. The PIL cited another instance when Pune Court granted bail to all the four accused of raping a 19 year old transgender as Section 377 of Indian Penal Code, 1860 has no mention of a “third gender”.

Far- reaching ramifications of omission of Section 377 of IPC in the new Code

The proposed Bharatiya Nyaya Sanhita, 2023 is lacking a very important penal provision akin to Section 377 of IPC leaving adult men without recourse to any legal protection towards non- consensual sexual acts/unnatural offences against them. As far as women and children are concerned, it is noted that after the passing of Criminal Law (Amendment) Act, 2013 and POCSO Act, 2012, the punishment for any non-consensual sexual act/ unnatural offences against women are very much covered under Section 376 of IPC and any act of sexual assault/ unnatural offences against children are covered under the provisions of the POCSO Act, 2012. Though the proposed Bharatiya Nyaya Sanhita, 2023 does mention the term “unnatural lust” at

two places i.e. Section 38(d) and Section 138(4) but they are identical provisions for Section 100(4) and Section 367 of IPC, respectively. Section 38(d) of Bharatiya Nyaya Sanhita talks about right of private defence against an assault with the intention of gratifying unnatural lust, and Section 138(4) of Bharatiya Nyaya Sanhita prescribes punishment for kidnapping or abduction of any person in order that such person may be subjected to the unnatural lust of any person.

The author through his PIL is battling to make the scope of Section 377 of IPC wider by extending its protection to the victims of non- consensual sexual acts/unnatural offences belonging to ‘Transgender/Third gender’ besides man, woman and animal. On the other hand, the proposed Bill has entirely omitted it without understanding its future ramifications. The apprehension is that if the Bharatiya Nyaya Sanhita Bill is passed in its present form, the adult men will have no legal protection towards non- consensual sexual acts/unnatural offences committed against them. It would lead perpetrators getting away with the crime as under what provision of law will the adult men victims of non- consensual sexual acts file a case?

Conclusion & suggestion

It is pertinent to mention that Article 14 of the Constitution of India guarantees the equality before the law and equal protection of law. Article 15 of the Constitution of India prohibits discrimination against any citizen on certain enumerated grounds, including the ground of ‘sex’. In fact, Article 15 prohibits all forms of gender bias and gender-based discrimination. Article 21 of the Constitution of India protects the dignity of human life, one’s personal autonomy, one’s right to privacy, etc. Right to dignity has been recognized to be an essential part of the right to life and accrues to all persons on account of being humans. “Justice to all” is one of the salutary goals of our Constitution. The correlative duty in the form of obligation of State is to ensure excess to justice to all irrespective of their gender.

The current Modi Government is expected to fulfil its commitments to the ideals of *“Sabka Saath, Sabka Vikas, Sabka Vishwas”*. We hope and trust that the Union Government would positively think of legislating a penal provision akin to Section 377 of IPC in the proposed Bharatiya Nyaya Sanhita, 2023 which is, unwittingly, missing in the new Code Bill.

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