



Critical Analysis of Exclusion of Unnatural Offences under Bharatiya Nyay Sanhita 2023. Sub Theme- Criminal Justice Reform and Human Rights

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Abstract

The Bharatiya Nyay Sanhita 2023 has been introduced by the legislature as an alternative for the hundred and sixty year old Indian Penal Code 1860 with the intention of revolutionizing the entire criminal jurisprudence in India, while upholding modern day standards and constitutional doctrines. A noteworthy change made in the enactment was elimination of the provision relating Section 377, which punished the perpetrator for the crime of 'Unnatural Offences'. This paper tries to asses and evaluates the legal & social repercussions which would be entailed by this exclusion. Traditionally the Britishers had penalized homosexual activity as an instrument of obstruding colonial mindset and as an apparatus of preserving moral; principles by illegalizing consensual as well as non-consensual same-sex relationships. In 2018, the Supreme Court of India in the landmark Judgment of Navtej Singh Johar V. Union of India 2018, had watered down the effects of Section 377 of IPC 1860 by legalizing the same-sex consensual relationships thus providing relief to the LGBTQ+ community but at the same time, it maintained the criminality of forceful and perverse o4r exploitative sexual acts committed without consent.

The complete removal of the concept of 'Unnatural Offences' from the Bharatiya Nyay Sanhita 2023, swings the legal structure of the criminal justice system in the direction of wide focal point on the topic of consent and age-appropriate relations rather than moralistic ideas of sexuality. Though this elimination is projected as liberal stride, but it creates a legal void as to the existence of legal safeguard in opposition to non-consensual act, bestiality and sodomy which were covered under section 377 of IPC 1860.

The paper with the reference to various legal systems around the world tries to make a comparative study to find out whether worldwide trend of legalizing consensual sexual activities and whether there is any certainty of a strong mechanism for safeguarding against sexual violence and abuse. It also studies the impending societal resistance to this alteration in India's sociocultural background as discussions over sexuality, morality and criminal law remain severely debatable. This paper concludes by proposing certain safeguards to stabilize inclusivity and justice, which will enable for fostering an era of equitable and rights oriented legal regime

Keywords: Unnatural Offences, Consent, Sexuality, Sodomy, Exploitative Sexual Acts

Introduction

The Indian Penal Code (IPC) of 1860 is a foundational legal document that forms the backbone of criminal law in India. The Law originated during the British Rule in India and is still utilized for the dealing with cases prior to enactment of BNS. To grasp its origin we need to examine India in the 19th century. At that time the British controlled the country, and their legal and social systems heavily influenced the law's creation. The colonial period introduced British legal practices and social changes that weren't part of traditional Indian society. These influences determined how laws were crafted and enforced in India, which is why this law holds historical importance. Prior to the British colonial rule, India had a complex and decentralized system of law based on various local customs, religious practices (such as Hindu and Muslim law), and princely states' edicts. The British colonial administration worked to increase their control by creating a consistent legal system. This system allowed them to better manage and govern the lands they ruled. Prior to the IPC, criminal laws were fragmented, with different regions or communities following different sets of laws.

The Bharatiya Nyaya Sanhita (BNS), 2023 intends to simplify and upgrade India's legal framework by integrating several existing laws into a unified structure. The goal of this cohesive strategy is to foster consistency and lessen uncertainty in court rulings. Simplifying the legal environment is one of BNS's main objectives. Redundancies and inconsistencies that frequently make interpreting the law more difficult are removed when laws are consolidated. By providing clear norms and clearing the backlog of cases, the new legislation is anticipated to speed up the legal system. This effectiveness is essential to guaranteeing the prompt administration of justice. In accordance with constitutional principles, BNS contains strong measures for the defence of liberties and rights of individuals. It places a strong emphasis on protections against discrimination and equality before the law. In order to maintain relevant in an enforceable and social environment that is

changing quickly, BNS includes mechanisms for adaptation and updating in recognition of society's dynamic character. The codification increases accountability among all parties involved, especially the judicial branch, law enforcement agencies, and legal professionals, and encourages transparency in legal processes

Under the new legislation it is pertinent to note that the complete chapter related to unnatural offences has been deleted and the reasons for such deletion are not clear at all. No comments have been made so far by the authorities as to what compelled them to take such a step. This exclusion seems to be because of the Supreme Court's Judgement in the case of Navtej Singh Johar V. Union of India, but there also the Apex Court had not criminalized the non-consensual part of the this provision. The reason why this exclusion is not to be taken lightly because it creates a void in terms of prosecution for the offences of related to non-consensual sexual act between male, sodomy and other forms of carnal intercourse such as bestiality and necrophilia. If a person is caught doing any of the above act under which law he would be punished is the major question. This situation will have dangerous repercussion as the floor would be open to all the potentials offenders intending to commit such acts. The objective of this research is to highlight the possible negative impact of this exclusion and the legal challenge that the authorities would face for the prosecution of the offenders, who indulge in commission of unnatural offences. This paper also dwells upon the social implication of such legislative action as offences such as bestiality, necrophilia also to some extent exploitative sexual assault between the people of same sex are on a rise. The methodology utilized in this paper is the doctrinal analysis of the relevant provisions of the Indian Penal Code 1860 and Bharatiya Nyay Sanhita 2023 related to exploitative sexual acts and some other legal provisions. To understand the legal area surrounding exploitative sexual acts or unnatural offences comparative analysis of different legal systems is highlighted in this paper, to enhance the legal understanding about the said offences.

Historical Context and Evolution

The history of Section 377 of the Indian Penal Code (IPC) is rooted in the colonial era, specifically the influence of British laws on the Indian legal framework. In 1860, the British introduced Section 377 in India, Criminalizing "carnal intercourse against the order of nature". This law rooted in the Buggery Act of 1533 from King Henry VIII's England, targeted same sex relationships and non procreative sexual acts. The British aimed to improve their morals and maintain control over India by enforcing this law. Section 377 was part of the Indian Penal Code (IPC) , crafted by Lord Macaulay to establish uniform laws across India. Its vague wording allowed for broad interpretations, focusing on "Unnatural" behaviors without clear definition, which led to confusion in the legal system. Even after India's Independence in 1947, this colonial era law continued to influence the country's legal landscape.

The introduction of Section 377 was not merely about adopting English laws; it was also a deliberate effort to suppress Indian customs. Before British rule, India has a more complex understanding of gender and sexuality. Ancient texts like, the *Kamasutra* and the sculptures at *Khajuraho* celebrated diverse sexual expressions, and the

Hijras, recognized as a third genders, showed a more inclusive society. Section 377 disrupted these traditions, enforcing a rigid male-female view of gender and sexuality. The law broadly criminalized any sexual act “against the order of nature”, without specifying, what “natural” sex was, leaving interpretation to judges. Historically it primarily targeted homosexual relationships but also applied to certain heterosexual acts like oral and anal sex. The maximum punishment was life imprisonment, underscoring its harshness. The provision’s vagueness led to its misuse, particularly against marginalized communities such as LGBTQ+ individuals. It instilled fear and shame, allowing police to harass and extort individuals. It intensified social biases by criminalizing homosexuality, which marginalized queer identities and rendered them nearly invisible in society.

Judicial Interpretations and Reforms

Over time, the approach of Indian Courts to section 377 changed dramatically, mirroring broad societal shifts and an increasing emphasis on human rights. At first, the Courts upheld section 377, considering it a legitimate law. However as the 2000s, progressed, they began to question its constitutionality. This shift highlighted changing perspectives on law and individual rights during that era.

Key Cases and Milestones

Naz Foundation v. Govt. of NCT of Delhi¹- The Delhi High Court took an important step in legalizing homosexuality by altering how Section 377 is interpreted. They declared that punishing consensual sexual acts between adults goes against the Indian Constitution. This Constitution has Articles 14, 15 and 21, which guarantee everyone equality, non-discrimination and the right to life and freedom. The Court’s ruling underscored the essential role dignity and privacy in a democratic society.

Suresh Kumar Koushal v. Naz Foundation²- In this case the Supreme Court decided that Section 377 was not unconstitutional and further stated that the LGBTQ+ community made up extremely small population of the country because of which it could not be given constitutional safeguard. This decision found significant criticism for being outdated and not offering protection under the Constitution.

National Legal Services Authority v. Union of India³ This case was not about Section 377 itself, but it played an essential role in advancing transgender rights. The Supreme Court decided that transgender individuals have the right to identify their own gender, granting them constitutional protection. This ruling laid the groundwork for future challenges to section 377.

¹ 160 DLT 277 (2009)

² (2014) 1 SCC 1

³ (2014) 5 SCC 438

Navtej Singh Johar v. Union of India⁴ The pivotal moment was when the Supreme Court made an important decision. Every judge agreed to legalize consensual sexual acts between adults leading to changes in Section 377. the Court stressed that the Constitution should grow with society. They acknowledged that making homosexuality illegal, violated basic rights and led to unfair treatment.

Evolution from Criminalization to Partial Decriminalization

The transition from criminalizing to partially decriminalizing Section 377 highlights the conflict between traditional values and modern ideas in Indian society. Originally this law was used to impose British colonial morals, but it eventually became a target for resistance and activism. The LGBTQ+ movement in India played a vital role in opposing this law. Activists, lawyers and organizations like the Naz Foundation and Humsafar Trust actively worked to increase awareness and shift public opinion. Their efforts resulted in the decriminalization of homosexuality, which was a significant step towards greater diversity and inclusion. However, the Supreme Court's ruling in the Navtej Singh Johar case only addressed adult relationships but did not legalize same-sex marriage, adoption rights, or provide protection against discrimination. These remain significant challenges in the ongoing struggle for complete LGBTQ+ equality.

Comparative Analysis

Decriminalization efforts have been driven by landmark judicial decisions, legislative reforms, and advocacy by civil society organizations. For instance, the South African Constitutional Court, in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*⁵, Laws that made consensual same-sex relationships illegal have been ruled unconstitutional. This highlights the focus on equality and dignity for everyone as outlined in the country's constitution after apartheid. Similarly, the Supreme Court of India decriminalized consensual same-sex relations in *Navtej Singh Johar v. Union of India*⁶, Section 377 of the IPC was determined to infringe on rights such as privacy, equality, and non-discrimination, as it deemed unfair and invasive of personal privacy. For example, the International Covenant on Civil and Political rights (ICCPR) stresses the importance of protecting privacy and ensuring equal treatment free from discrimination. In *Toonen v. Australia*⁷, the United Nations Human Rights Committee determined that Tasmania's sodomy laws were in violation of the International Covenant on Civil and Political Rights (ICCPR). This ruling was a key factor in driving legislative reforms

⁴ (2018) 10 SCC 1

⁵ 1999 (1) SA 6 (CC)

⁶ [2018] 10 SCC 1

⁷ Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992

across Australia. Regional human rights courts, such as the European Court of Human Rights, have similarly advanced decriminalization, as seen in *Dudgeon v. United Kingdom*⁸.

Decriminalization Trends in Other Jurisdictions

The global trend towards decriminalizing "unnatural offences" reflects a growing recognition of LGBTQ+ rights as fundamental human rights. Many countries have done away with colonial era laws that made same-sex relationships illegal. This change has come through Court decisions or changes in legislation. Examples include:

South Africa: The Constitutional Court in 1998 found that laws against same-sex relationships violated rights to equality and dignity. This led to decriminalization of these relationships. Furthermore in *Minister of Home Affairs v. Fourie*⁹, the Court recognized same-sex marriage, setting a significant precedent.

United States: The Supreme Court's decision in *Lawrence v. Texas*¹⁰ was pivotal. It struck down laws that criminalized same-sex conduct reinforcing the rights to liberty and privacy under the Fourteen Amendment.

Belize: In *Caleb Orozco v. Attorney General of Belize*¹¹, the Supreme Court struck down laws criminalizing same-sex intimacy, citing violations of constitutional rights to dignity and privacy.

Despite these advances, challenges remain in several regions. In parts of Africa, the Middle East, and South Asia, "unnatural offences" laws persist, often accompanied by societal stigma and state persecution. In many cases, these laws are justified on grounds of morality, religion, or "protection of public health." However, growing international advocacy and local activism continue to push for reforms.

Successful Legal Models and Their Application to Indian Law

Several jurisdictions provide successful legal models that India can adapt to strengthen protections for LGBTQ+ individuals. Examples include:

⁸ [1981] ECHR 5

⁹ [2005] ZACC 19

¹⁰ 539 U.S. 558 (2003)

¹¹ Claim No. 668 of 2010

South Africa: The integration of sexual orientation into anti-discrimination frameworks under the Equality Act (Promotion of Equality and Prevention of Unfair Discrimination Act, 2000)¹² offers a comprehensive model for combating bias and promoting inclusion.

United Kingdom: The Equality Act 2010¹³ prohibits discrimination on grounds of sexual orientation, providing a robust framework for protecting LGBTQ+ rights in various spheres, including employment and public services. India could adopt similar legislation to address systemic discrimination.

Argentina: The Gender Identity Law 2012¹⁴ guarantees the right to self-identify and access gender-affirming care, setting a benchmark for progressive legal recognition of diverse identities. This model can inform India's efforts to enhance transgender rights.

Canada: Canada's approach to hate crimes and anti-discrimination, which explicitly includes sexual orientation and gender identity, can guide India in addressing violence and bias-motivated crimes.

Amalgamation of such principles of law into Indian context needs a cautious acclimatization into local system. Informed citizenry, expert deliberations and judicial activism are the key components for making a positive change. By taking inspiration from best practices around the world, India can catalyze compendious legal framework that uplifts the human dignity and principles of equality.

Balancing Consent, Morality, and Protection Against Exploitation

Decriminalization initiatives frequently entail striking a balance between conflicting goals, such as protection against exploitation, social morality, and individual autonomy. Laws that make consenting "unnatural offences" illegal usually don't make a distinction between adult consenting activities and abusive or exploitative conduct. The concepts of justice and proportionality in criminal law are compromised by this confusion. A fundamental component of contemporary criminal justice and human rights jurisprudence is consent. Laws are beginning to acknowledge that making consenting adult activity illegal violates people's right to privacy and autonomy.

For instance, the European Court of Human Rights has repeatedly emphasized that consensual same-sex relations fall within the ambit of private life protected under Article 8 of the European Convention on Human Rights¹⁵.

¹² <https://www.gov.za/documents/promotion-equality-and-prevention-unfair-discrimination-act> - Last accessed on 10 December 2024

¹³ <https://www.legislation.gov.uk/ukpga/2010/15/contents-Last> accessed on 10 December 2024

¹⁴ <https://www.icj.org/wp-content/uploads/2013/06/Argentina-%E2%80%93-SOGI-Legislation-Country-Report-20131.pdf-Last> accessed on 10 December 2024

¹⁵ *Laskey, Jaggard and Brown v. United Kingdom* [1997] ECHR 4

At the same time, laws must address concerns about exploitation, particularly involving minors, coercion, or abuse of power. Modern legal frameworks achieve this balance by focusing on safeguarding vulnerable populations while decriminalizing consensual adult conduct. For example, Canada's approach to sexual offenses distinguishes between consensual relations and exploitative behavior through detailed age-of-consent provisions¹⁶. The morality argument, often invoked to justify "unnatural offences" laws, has been critiqued for perpetuating discrimination and ignoring evolving social norms. Courts worldwide have increasingly rejected morality as a sole basis for criminalization. In *Navtej Singh Johar*, the Indian Supreme Court held that societal morality cannot override constitutional morality, which upholds individual rights and freedoms.

Challenges and Criticisms

The Bharatiya Nyay Sanhita, 2023 (BNS 2023), which replaces the Indian Penal Code, has sparked significant debate regarding its treatment of provisions previously encapsulated under Section 377. While BNS 2023 represents a modernization of the Indian criminal justice system, its exclusion of "unnatural offences" has raised concerns about potential legal and societal implications. These challenges highlight gaps in the framework, as well as social and cultural barriers to the reform's effective implementation.

Potential Gaps in the BNS 2023

One of the key criticisms of BNS 2023 is the lack of clarity surrounding acts previously criminalized under Section 377 of the Indian Penal Code. The removal of explicit reference to "unnatural offences" has left legal practitioners and scholars questioning the status of acts that, while decriminalized for consensual adults following *Navtej Singh Johar v. Union of India*¹⁷, may still raise concerns in contexts involving non-consensual acts or abuse of minors.

Without clear guidelines, judges and police might understand them in various ways, leading to inconsistency. Critics argue that failing to clearly define these situations risks not achieving legal clarity, potentially allowing for misuse or exploitation of the law. Although some types of abuse are covered by the Protection of Children from Sexual Offences Act (POCSO) and other laws, the lack of a specific clause like Section 377 may make it difficult to prosecute crimes that do not cleanly fit inside the purview of current legislation.

Adequacy of Protections Against Exploitation and Abuse

The legal protections in BNS 2023 have faced criticism. The intention was to be progressive, but excluding "unnatural offenses" is problematic. This exclusion raises concern about how well vulnerable people are

¹⁶ Criminal Code, RSC 1985, c C-46, § 151-153

¹⁷ (2018) 10 SCC 1

protected. For instance, when sexual violence or coercion occurs between same-sex individuals, current sexual assault laws might not address it properly. These laws often assume relationships are only between a man and a woman, which means same-sex cases might not get the attention and justice they need. This creates potential loopholes, leaving victims of non-heteronormative sexual violence without recourse. Additionally, the focus on eliminating "unnatural offences" has been criticized for failing to simultaneously strengthen affirmative protections for LGBTQ+ individuals. The gaps in anti-discrimination laws make these issues worse, as pointed out by the Supreme Court in *Navtej Singh Johar*.

Social and Cultural Resistance

Altering laws is only one aspect of the challenge. It's just as crucial to tackle the deeply ingrained habits and traditions within society. Despite the decriminalization of homosexuality, prevailing cultural attitudes continue to stigmatize LGBTQ+ individuals. These attitudes show up as push-back against progressive legal changes, hindering the path from decriminalization to wider societal acceptance. Opponents of reform often invoke traditional values or religious beliefs to justify resistance. This resistance not only slows the pace of legal reforms but also perpetuates discrimination in social, professional, and familial contexts. The judiciary's progressive stance, as seen in *Navtej Singh Johar* and *NALSA v. Union of India*¹⁸, must be complemented by broader societal change to ensure that legal protections are meaningful in practice.

Recommendations

Enhancing Legal Protections: Safeguards Against Exploitative Acts

A careful examination of the Bharatiya Nyay Sanhita (BNS) 2023's absence of unnatural offenses from its purview reveals the pressing need to strengthen legal safeguards against exploitative behavior. By leaving out some crimes, especially those involving consenting same-sex relationships, it is possible to ignore situations in which abuse, compulsion, and exploitation take place. It's crucial to protect people who might be easily harmed or exploited, regardless of the rule broken. Forcing sexual acts, coercion and abuse should always be illegal. There need to be clear definitions of these actions along with strict penalties for those who commit them.

Including stricter guidelines for consent and the legal age of consent for sexual assaults would be a crucial step. Explicit protections for people in same-sex relationships and other non-heteronormative sexual relationships ought to be given top priority by the BNS. A strong framework for recognizing and handling exploitative behaviors is lacking in the existing legislative approach, particularly when the victims are members of marginalized groups like LGBTQ+ people who might experience pressure, harassment, or discrimination in their relationships. To guarantee that victims, regardless of their sexuality or gender identity, get the same degree

¹⁸ (2014) 5 SCC 438

safeguards as victims of more well-known crimes, laws tackling human trafficking, sexual assault, and forced prostitution should also be included.

Addressing Ambiguities in Existing Provisions

The BNS 2023's ambiguity in a number of clauses, especially those pertaining to the legal standing of consensual same-sex actions, is a serious worry. There are substantial legal uncertainties when unnatural offenses are not addressed and defined in a modern, comprehensive way. Because of this, the law may be applied inconsistently, with some actions that were once deemed unnatural violations under the prior penal code being misunderstood or disregarded.

The statutory framework must define precise definitions of crimes including unnatural offenses, highlighting consent and autonomy, in order to resolve these issues. It must also make sure that legal regulations do not contradict well-established human rights concepts. It is necessary to reframe ambiguous terminology like "unnatural" to reflect the contemporary understanding of sexuality in humans and relationships. For those engaged in actions that may have been illegal under out-of-date regulations but do not cause harm to others or involve intimidation or abuse, the law shouldn't obstruct justice needlessly. A more just and equitable legal system would result from the inclusion of thorough legal definitions, which would limit the possibility of misunderstandings and discriminatory actions.

Advancing Social Acceptance: Combating Stigma

The BNS 2023's absence of unnatural offenses has wider societal ramifications, especially in maintaining the stigma associated with LGBTQ+ people and non-heteronormative partnerships. The persistence of these exclusions implies a failure to see how society's conception of sexuality is changing, which feeds negative preconceptions. These antiquated legal restrictions contribute to societal exclusion by failing to safeguard underprivileged groups and further stigmatizing them.

There is a need to take up initiatives to help people understand and accept all sexual orientations and gender identities to fight stereotypes and stigma. Its essential to educate everyone about how stigma and prejudice harm mental health and social life. Schools should teach these topics early on. The government must hold public discussions about the importance of acceptance and acknowledge the rights of groups often overlooked, as this is crucial for human rights protection. These initiatives should clearly distinguish between forced behaviors and relationships that are voluntarily chosen. Encouraging acceptance of all gender identities and sexual orientations will help to create a society where everyone feels included and doesn't fear judgment or legal problems because of who they are.

Conclusion

Encouraging inclusion in the legislative and policy-setting processes is essential to guaranteeing that everyone's rights particularly those of members of marginalized communities are fairly represented and safeguarded under the law. The absence of unnatural offenses, which significantly affects the LGBTQ+ population, is one example of the BNS 2023's lack of diversity. In order to address this, a wide range of all parties involved, including human rights organizations, legal experts, and LGBTQ+ advocacy groups, should be consulted during the legislative and implementation processes.

When making laws, its crucial to consider different perspectives to ensure they address the needs of everyone in society. Lawmakers should prioritize being open and transparent, giving often unheard groups the chance to express their views. This approach helps create laws that genuinely improve their lives. Its also important to revisit and update old laws that may continue to be unfair or discriminatory. For example absence of provisions to protect people from LGBTQ+ in case of non consensual sexual act under BNS 2023. this underscores the ongoing need to review and revise laws so they align with current values of fairness, equality and respect for diversity.

