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Section 377 is gone, but some fear the proposed Bharatiya Nyaya Sanhita does not protect men against rape. This is why.

In the IPC, Section 377 — which mentioned “carnal intercourse against the order of nature with any man, woman or animal” — did offer protection to non-minor males from rape. Now, in the proposed BNS, this section is gone.

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The Bharatiya Nyaya Sanhita (BNS) 2023, the proposed 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 can no longer be used to criminalise gay sex between consenting adults. But the absence of this section in the BNS can leave adult male victims of sexual assault without much recourse in the law, some experts have pointed out.

But first, what is Section 377 of the IPC?

Section 377 of the IPC 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.”

The explanation to the provision states that “penetration is sufficient to constitute the carnal intercourse necessary to the offence.”

For decades, the LGBTQ community and others argued that this section was discriminatory, and provided legal protection to the harassment and intimidation of

How did this section become part of the IPC?

This archaic law criminalises sexual activities that were seen to be against “the order of nature”. Its roots lie in the offence of sodomy or buggery, which was first recorded as a crime in the medieval Common Law treatises of Fleta (1290) and Britton (1300).

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In 1533, during the reign of Henry VIII, the Act For the Punishment of the Vice of Buggerie was passed, which prescribed the death penalty for “unnatural sexual acts against the will of God”. While anyone could technically be convicted under the 1553 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, new laws such as the Offences Against Persons Act were enacted with a focus specifically on male same-sex activity, making sodomy punishable by death. However, in 1861, the punishment for the offence was reduced to a 10-year term in England and Wales.

Earlier in 1837, a Draft Penal Code was proposed to punish “unnatural lust”. However, the Report of the then Law Commission of India refused to discuss it.

On October 6, 1860, the IPC, along with Section 377, was assented to by the Governor General after its passage by the Legislative Council.

And how did Section 377 ultimately go?

A plea filed against Section 377 in Delhi High Court was dismissed in 2004, but it was remitted back to the HC by the Supreme Court in 2006. On July 2, 2009, a High Court Bench of Chief Justice A P Shah & Justice S Muralidhar ruled that “Section 377 IPC, insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14 and 15 of the Constitution”.

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 SC led by then Chief Justice of India Dipak Misra and also comprising Justices Fali Nariman, A M Khanwilkar, D Y Chandrachud (now Chief Justice of India), and Indu Malhotra, unanimously decriminalised consensual sex between two adults irrespective of their gender and partially struck down Section 377 of the IPC.

Delivering its verdict on a petition filed by Bharatnatyam dancer Navtej Singh Johar, the apex court referred to those areas of the section that criminalised consensual unnatural sex as “irrational, indefensible and manifestly arbitrary”. The court also noted that Section 377 was used as a weapon to harass members of the LGBTQ community, resulting in their discrimination. “Section 377 is arbitrary. LGBT community possesses rights like others. Majoritarian views and popular morality cannot dictate constitutional rights,” the court said.

However, in its ruling, the court also made it clear that other aspects dealing with unnatural sex with animals and children still remained in force, and that it was confining its order to consenting acts between two adults.

So how is this position changed by the proposed BNS?

It has been pointed out that if the Bill is passed in its present form, groups including male victims of sexual assault, could lose the legal protection accorded to them.

This, it is argued, is because the offence of “rape”, as defined in the proposed BNS, is gendered — which means that it is committed by a man against a woman. While this is the position in the IPC as well, in the IPC, Section 377 — which mentioned “carnal intercourse against the order of nature with any man, woman or animal” — did offer protection to non-minor males from rape. Now, in the proposed BNS, this section is gone.

In the IPC, Section 375 defines rape and lists seven notions of consent which, if violated, would constitute the offence of rape by a man. In the proposed BNS, rape

While in the IPC, Section 375 (and Section 376, which prescribes the punishment for rape) are placed under the subhead “Sexual offences” under Chapter XVI of the Code, “Of Offences Affecting the Human Body”, in the proposed BNS, the subhead “Of sexual offences” is under Chapter V of the Sanhita, which is specifically about “Offences Against Women and Children”.

Back in 2018, when the SC passed its verdict in ‘Navtej Johar’, several police officers had said that the judgment opened up grey areas and that guidelines were required to deal with cases where, say, a gay man withdrew “consent” and lodged a complaint against their partner.

As on date, India’s laws on sexual assault do not recognise men as victims of rape.

However, the proposed BNS does mention “unnatural lust” in at least two places.

Section 38 says the right of private defence of one’s body will extend to the voluntary causing of death or any other harm to the assailant if the offence that “occasions the exercise of the right” is an “assault with the intention of gratifying unnatural lust”.

And Section 138(4) punishes kidnapping or abducting a person to subject them to or put them “in danger of being subjected to grievous hurt, or slavery, or to the unnatural lust of any person”.

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But again, the proposed BNS does not define the term “unnatural lust”.