

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS



Open Access, Refereed Journal Multi-Disciplinary
Peer Reviewed

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ISSN

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AN EVER PREVAILING LAVUNAE IN THE CRIMINAL LAWS AND INDIAN MEN WHO SUFFERS

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Abstract

Sexual violence comes under the umbrella of crimes which is frowned upon all around the world and among all the cultures equally; world show no tolerance towards it. With the advent of social media it has been proven that an allegation of any sexual offence can make you the subject to gravest punishment in the public court. May the act be as heinous as rape which causes major unrest in the public or may it be eve-teasing; an inference of unwanted sexual advance, the society frowns upon both regardless of the degree or intensity of sexual offence. No such offence against women or children goes unrecognized without the offender being crucified, but If the subject to such an act is a man the morality of society goes into a hibernation to be only woken up by another public outrage towards a molester.

Indian laws being the kryptonite for men is not an unpopular opinion nor it is a new domain of discussion, this is something which has been carried on from years. Yet, our law makers failed to recognize this major lacunae which impacts the men of our country while they refashioned the old Indian penal code to *Bharatiya Nyaya Sanhita 2023*; and Code of criminal procedure to *Bharatiya Nagarik Suraksha Sanhita 2023*. To make the new laws *less homophobic*, section 377 of the Indian penal code¹ one and only law which provides sexual protection for men was removed. This act caused nothing but wider the already existing lacunae.

This article aims to highlight this major lacunae which remains- and has remained- under the nose of the justice yet goes unnoticed, by analyzing the lack of provisions similar to section 377 in the *Bharatiya Nyaya Sanhita 2023* and by shining a light on ever present stigma about men and sexual assaulting. This stigma was pulled out of shadows by many, but we hope to give its voice hoping it to teem before it permanently gets sucked into the abyss and harm the men of our country.

¹ Indian penal code, 1860

INTRODUCTION

While repealing the Indian penal code 1860-and replacing it with the *Bharatiya Nyaya Sanhita 2023* – the section 377 of the IPC was deleted. Section 377 of the precursor act stood to punish the men and women who commits unnatural offences² such as bestiality, pedophilia, pedasty, carnal intercourse etc. The explanation of the section 377 goes as follows: “Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section”³. Which suggested that any sexual act which is not for the purpose of the procreation must be considered as unnatural and must be punished under this section. This was the perception from times memorial⁴ from stoics who believed that the act of sexual performance between a man and women must only be restricted to beget children⁵ to the modern penal laws. Such acts include- but is not limited to -penetrative penile–non-vaginal sexual acts, that is penile–oral, penile–anal sex and sexual acts between human beings and animals. The above stated act were considered as inappropriate or wrong use of human sexual organs⁶. These perceptions is an age old tale passed on by proponents of natural law, it is pertinent for the law to change with time as the concept to justice to each society is subject to time.

THE ABROGATION OF SECTION 377

In the modern age section 377 got the notorious title of being homophobic and unconstitutional. Thus, paying heed to the demands of the people of the country, our judiciary decided to scrutinize the constitutionality of the section in the case of *Navtej Singh Johar v UOI*⁷. In this case the court held that if the unnatural sex were performed with consent of adult human beings involved, they will not be criminalized. Even though the apex court decriminalized consensual sexual acts between adult human beings under this section, they did not struck down this provision. The revamp of new criminal laws removed the section completely upon it being homophobic, what they forgot is that section 377 was the one and only provision under Indian penal code which men could confide in and be protected from being sexually assaulted.

² 377 of the Indian Penal Code, 1860.

³ Ibid.

⁴ JOHN T. NOONAN, Genital Good, COMMUNIO 198, 214 (1981)

⁵ BRUNDAGE, supra note 1, at 207-09

⁶ Maynard v. Hill, 125 U.S. 190, 205, 211 (1888); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)

⁷ AIR 2018 SUPREME COURT 4321, AIR 2018 SC (CRI) 1169, (2018) 4 MAD LJ(CRI) 306, (2018) 4 BOMCR(CRI) 289, (2018) 10 SCALE 386, 2019 (1) SCC (CRI) 1, (2018) 4 CURCRIR 1, (2018) 105 ALLCRIC 258, (2018) 3 ALLCRIR 3234

MEN NO LONGER PROTECTED

Since July 1 section 377 being struck down, men no longer have any legal protection against rape. Any case which relates to sexual act against men will be invoked under sections of grievous hurt and similar sections. The sheer heedless despondency towards the issue lessens intensity and gravity of the punishment as well as the social perception towards the issue which can causes multitude of harms to the men of our country and place another feather of shame in the crown of justice. The problem with punishing someone for grievous hurt when for the act of sexual violence can be easily detected by someone with prudent mind. The punishment for grievous hurt is imprisonment upto maximum 7 years⁸. While punishment under section 377 of the precursor act was 10 years to life imprisonment.⁹ This basic penal difference shows the injustice caused to the men of the country who are the victims of sexual violence.

Furthermore, apart from the conspicuous difference in punishments the intensity and urgency with which the case is treated will be hugely affected. Supreme court advocate Yashaswi S.K. Chocksey said to The Hindu *“When section 377 is invoked the intensity with which the case is treated is much higher when compared to case where sections relating to0 grievous hurt are invoked. Its reflected in the urgency of arrests or the ease of getting bail. In the latter case, if the accused is not arrested, he can tamper with evidence and impact the course of investigation”*¹⁰ No theories of punishment suggests such disregarding attitude towards the carriage of justice for a serious offence as rape.

There are sections which protect women against rape, but the empathy of law is not extended towards men. Rape is not gender neutral, but the laws which prevents the rape skews towards women.

The whole discourse regarding section 377 remained around the borderlines of homophobia, and right to privacy. While the apex court recognized the need to redefine unnatural, they refrained to struck it down completely keeping in mind the legal protection which the section gives to men, children and animals. After 1st july men are no longer safe.

⁸ Section 117 of the Bharatiya Nyaya Sanhita 2023

⁹ Section 377 of the Indian Penal Code 1860

¹⁰ Dutta (2024) ‘Bharatiya Nyaya Sanhita has no section dealing with rape of men, transgender persons’ *The Hindu* June 22

A BARRIER OF SOCIAL STIGMA: CAUSE AND CAUSATION

While a plea has been filed in the Delhi High Court challenging the exclusion of section 377 from the Bharatiya Nyaya Sanhita 2023¹¹ and a light was shone into the shadows which brought the issue into the purview of Judiciary, there are various other issues which needs to be looked into which caused such heedless attitude towards the sexual violence towards men.

Undermining such a grave offence towards men can be traced to an ever existing preconception that men are typically thought to be less impacted by sexual abuse. However, there is proof that male victims of sexual abuse experience mental health issues on par with female victims, and that they may even have worse outcomes.¹² Such perceptions still prevails in modern India which is causing major harm to all the men of our nation not only psychologically but repercussions resonates to our legal systems as well. Such stigma can only be overcome through awareness. To spread awareness the cornerstones are studies and data on this topic but literature on male sexual assault is severely lacking¹³. As a result, the body of knowledge on female victimization dwarfs that on adult male sexual victimization.¹⁴

The change need to be brought on the societal level for so that in future a heedless and disregarding legal overhaul does not impact the men because undermining their value as a human being.

CONCLUSION

Rape is not gender neutral but the law remains so while the old criminal laws were being overhauled men suffered a collateral damage. While the provisions of sexual assault and rape were plentiful for women the only provision which gave solace to men section 377 were deleted from the new law. Such a deletion widened the ever existing lacunae and made it harder for the men in this country to carry justice. While the new ways relies upon the shade of grievous hurt

¹¹ Nupur Thapliyal (2024) 'Plea Before Delhi High Court against exclusion of section 377 IPC from Bharatiya Nyaya Sanhita 2023' *LiveLaw* Aug 12

¹² Peterson Z.D., Voller E.K., Polusny M.A., Murdoch M. Prevalence and consequences of adult sexual assault of men: Review of empirical findings and state of the literature. *Clin. Psychol. Rev.* 2011;31:1–24. doi: 10.1016/j.cpr.2010.08.006

¹³ Whitton S.W., Dyar C., Mustanski B., Newcomb M.E. Intimate Partner Violence Experiences of Sexual and Gender Minority Adolescents and Young Adults Assigned Female at Birth. *Psychol. Women Q.*; Stephenson R., Rentsch C., Salazar L.F., Sullivan P.S. Dyadic Characteristics and Intimate Partner Violence among Men Who Have Sex with Men. *West. J. Emerg. Med.* 2011;12:324–332; Hickson F.C., Davies P.M., Hunt A.J., Weatherburn P., McManus T.J., Coxon A.P. Gay men as victims of nonconsensual sex. *Arch. Sex. Behav.*

¹⁴ Pearson J., Barker D. Male rape: What we know, don't know and need to find out—A critical review. *Crime Psychol.*

to carry out justice, it cannot hide its conspicuous inadequacies.

While the issue is in the purview of judiciary and hopefully it delivers us justice. We as a society must endeavour to de-stigmatize the beliefs regarding men and sexual violence to make sure that there is no miscarriage of justice.

