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**THE LEGISLATIVE OMISSION OF SECTION 377 IN THE
BHARATIYA NYAYA SANHITA: A CRITICAL ANALYSIS
OF THE LEGAL VACUUM AND A COMPARATIVE STUDY
WITH GENDER-NEUTRAL JURISDICTIONS.**

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Chapter 1

Introduction

Section 377 of the Indian Police Code of 1860, was added during colonial rule to outlaw the practice of “carnal intercourse against the order of nature.” The provision was a Victorian moralism and was originally meant to control and regulate sexual behaviour that went beyond the bounds of Victorian heterosexual norms. The consequences of Section 377 on the LGBTQ+ community and the enactment of the law with its relation to consensual same sex relationships resulted in this provision being one of the most discussed sections of Indian criminal law over time. However, the provision, despite being criticised for its misuse, was also being used as a penal protection for non-consensual sexual acts which were not defined as rape under Section 375 IPC. In reality, Section 377 has been used in cases where the victim was male, a child victim, the victim was a homosexual or when the penetrative assault was not of the penile-vaginal kind.¹

¹ D.D. Basu, *Introduction to the Constitution of India* (LexisNexis, 24th edn., 2021).

Judicial interpretation was a major catalyst to the constitutional shift in the position the law took with regards to Section 377. The Delhi High Court in *Naz Foundation v. Government of NCT of Delhi* ruled that the criminalisation of private same-sex relations infringed on the constitutional rights to dignity, equality and privacy of consenting adults. The Supreme Court, however, went in the opposite direction in *Suresh Kumar Koushal v. Naz Foundation* in which it upheld the constitutional validity of Section 377. Then, with *Navtej Singh Johar v. Union of India*, the Supreme Court again partially decriminalised Section 377, this time covering consensual same-sex intercourse between adults. Importantly, the Court also noted that the non-consensual, underage or coerced acts would continue to be punishable. As such, post the decriminalisation of Section 377, it remained relevant as a protective criminal provision, irrespective of gender, for victims of sexual violence.²

In July 2024, the Indian government repealed the Indian Penal Code (IPC), 1860, and enacted the Bharatiya Nyaya Sanhita (BNS), 2023, marking a significant transformation in India's criminal justice system. This is one of the most hotly debated clauses of the BNS, which omits Section 377 without replacing it with a gender neutral sexual assault clause. The BNS still had the offence of rape under Section 63, but the definition still only allows women to be victims, and men to be perpetrators. Adult males, transgender individuals, non-binary people and victims of some types of penetrative sexual assault, then, seem to have no specific criminal penalty. This has led to serious concerns about the presence of a “legal vacuum” in sexual offences not covered by the conventional gender-based approach.

Research Questions

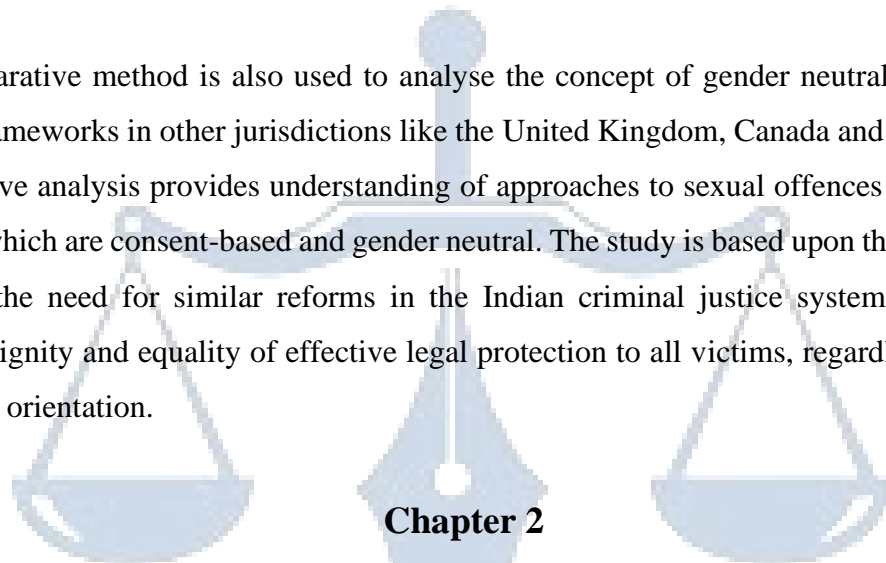
1. Whether Section 377 is absent in Bharatiya Nyaya Sanhita, which leaves a legal void in regards to sexual offenses?
2. Whether the BNS is in violation of Article 14 of the Constitution for failing to provide the same protection to a transgendered victim of sexual assault as a male victim of sexual assault?
3. Whether the current provisions in the BNS, on hurt, assault and criminal force are sufficient in lieu of the protection offered under Section 377 IPC?
4. Whether comparative gender-neutral jurisdictions offer a more inclusive basis to sexual offence laws?

² Upendra Baxi, *The Future of Human Rights* (Oxford University Press, 3rd edn., 2008).

Research Methodology

The doctrinal and comparative method of research is used in the present study. The doctrinal method has been applied to analyse statutory provisions, the constitutional principles, judicial precedents, parliamentary developments, law commission reports and scholarly writings concerning Section 377 IPC and the Bharatiya Nyaya Sanhita, 2023. The study is conducted mainly on secondary sources like books, journal articles, case laws, commentaries and online legal databases.

The comparative method is also used to analyse the concept of gender neutrality for sexual offence frameworks in other jurisdictions like the United Kingdom, Canada and South Africa. Comparative analysis provides understanding of approaches to sexual offences in other legal systems, which are consent-based and gender neutral. The study is based upon this comparison to assess the need for similar reforms in the Indian criminal justice system to guarantee equality, dignity and equality of effective legal protection to all victims, regardless of gender and sexual orientation.



Chapter 2

Evolution of Sexual Offence Laws in India

The provisions of Section 377 of Indian Penal Code, 1860 was inserted in the IPC during the British rule under Lord Macaulay's tenure. The provision made it an offence to have 'carnal intercourse against the order of nature' and set out punishments for sexual acts deemed 'unnatural' by Victorian standards of morality.³

The language was both general and vague, and could be interpreted as covering and sanctioning sexual activity that was not heterosexual. The provision was not originally rooted in the social customs of the Indian subcontinent but was largely imported from anti-sodomy legislation in England with its Christian moral values during the 19th century. The passing of Section 377 was the result of Victorian views on sexuality which held that sexuality could be contained within a heterosexual marriage and properly policeable by statute. At the time of the colony the concept of same-sex intimacy, and non-procreative sexual acts, were deemed to be immoral and against public decency.

³ Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, 2007.

Under Section 377, the colonial body would try to impose its own value system on Indian society. The law thus acquired a new moral policing function and had ceased to be simply a criminal law. It enabled the State to exercise control over private and consensual sexual behaviour. The provision was sometimes attacked because it singled out homosexual people, but it applied to more than just consensual gay and lesbian behaviour. Section 377 was often applied to situations of non-consensual sexual contact with men, minors and vulnerable people.⁴ The IPC defined rape as penetration of a woman's vagina by the penis and Section 377 was an alternative penal provision for acts that were not covered by the narrow definition of rape given in Section 375. As a result, the provision took on a dual nature; it was used as a punishment/repression tool for consensual sex deemed immoral and it served as a protective measure against some sexual violence.

Due to the general language of Section 377, there was significant ambiguity and it allowed for abuse by law enforcement agencies. Harassment, extortion, social stigma and discrimination were targeted at members of the LGBTQ+ community through the threat of criminal prosecution. The provision, even if it was not used in public, promoted and exacerbated discriminate attitudes and prejudices against people on the basis of sexual orientation. Thus, the law symbolically stood for state interference in areas of personal autonomy and identity. The colonial background of Section 377 shows how the moral dimension of the Indian criminal law is intertwined. The intention of the provision was to uphold Victorian morality, but it came to be seen as a legal measure that has broader relevance to sexual assault and protection of victims. This ambiguity about Section 377 was to become very significant during the subsequent constitutional controversies, especially whether sexual relations should continue to be illegal if same-sex acts were not made criminal and whether the absence of the provision would leave gaps in the protection offered by the criminal laws.⁵

2.1 Colonial Origins of Section 377 IPC and Victorian Morality

The first broad attack on the constitutional validity of Section 377 was in *Naz Foundation v. Government of NCT of Delhi*. The Delhi High Court in this instance concluded that the consent of adults in cases of same-sex relations was not criminalized and that was contrary to Article 14, 15 and 21 of the Indian Constitution.

⁴ V.N. Shukla, *Constitution of India* (Eastern Book Company, 14th edn., 2022).

⁵ Gautam Bhatia, *The Transformative Constitution* (HarperCollins, 2019).

The Court acknowledged that sexual orientation is a crucial component of the individual's identity and dignity. It noted that private moral values could not be upstaken by public morality and the State could not interfere in private life just because it did not approve. The ruling in the Naz Foundation was seen as a positive move towards acknowledging LGBTQ+ rights in India. The principles of inclusiveness, equality and human dignity were highlighted. It also drew attention to the negative effects of criminalisation on public health programs and the social stigma of being a homosexual. But the judgment did not strike down Section 377 as a whole. It did not cease to be in effect in relation to minors, acts that were not consensual or acts in which coercion or abuse was involved. Therefore, the Court sought to reconcile balancing individual liberty with punishment for sexual violence. However, the Supreme Court overturned the Delhi High Court ruling in Suresh Kumar Koushal v. Naz Foundation, thus reinstating the constitutional validity of Section 377 in its entirety.

The Court stated that the LGBTQ+ community was “a minuscule minority” and that it would leave it to Parliament to make the change in the law, not the Court. This choice was strongly criticized for not being sufficiently respectful to constitutional rights and for perpetuating discrimination towards sexual minorities. The most significant constitutional change was the partial abolition of Section 377 in Navtej Singh Johar v Union of India, by a Constitution Bench of the Supreme Court. The Court unanimously concluded that consensual same-sex relations between adults cannot be criminalised as they form part of the rights to equality, dignity, privacy and autonomy guaranteed by the Constitution. The judgment acknowledged that sexual orientation is part of an individual's identity and that moral standards of society do not give way to constitutional freedoms.⁶

In an important judgment, the Supreme Court also explained that while the prohibition on consensual same-sex conduct will be scrapped, Section 377 will remain in force with regard to non-consensual sexual acts, sexual acts with minors, and sexual acts involving animals. This resulted in the so-called “decriminalisation paradox”. While striking the criminality from private consensual conduct, the Court also upheld the need to punish sexual violence, which goes beyond rape. As a result, Section 377 remained as a safeguard for male victims and LGBTQ+ people who experience sexual assault.

⁶ Arvind Narrain and Alok Gupta (eds.), *Law Like Love: Queer Perspectives on Law* (Yoda Press, 2011).

2.2 Judicial Transformation and the Decriminalisation Paradox

The Bharatiya Nyaya Sanhita, 2023 was enacted with the aim of replacing the colonial era criminal laws and establishing a modernised criminal justice framework in India. The bill was introduced as a step toward updating the criminal code for a more victim-centered, efficient, and responsive criminal justice.

The BNS, however, adopted a traditional gender-specific framework for sexual offences, although it made a few changes in the structure and procedures. Section 63 of the BNS (the replacing section of IPC 375), still defines the conception of rape as a crime committed by a man upon a woman. This reflects an ongoing victim-centred as opposed to act-centred approach to sexual violence. This gendered definition is important because of the lack of Section 377 IPC. While rape laws were limited to women under the previous legislations, under the term of Section 377, alternative measures were developed to prosecute non-consensual sexual acts against men and other LGBTQ+ people.

The BNS no longer has a specific penal provision for many types of sexual assault which do not fit the narrow definition of rape as contained in the statute. Accordingly, in some respects, the criminal law system seems incomplete in respect to specific groups of victims. One of the major criticisms of the BNS is that it fails to recognise the reality that sexual violence can affect persons of all genders. There is no direct legal remedy for female victims of sexual assault, or anyone else, after a rape. Like this transgender people and non-binary people are not sufficiently recognised in the statutory framework on sexual offences.⁷

The limited punishment provided under the Transgender Persons (Protection of Rights) Act, 2019 and the absence of equivalent protection as that of the mainstream sexual offence laws renders the exclusion problematic. Another factor of importance is about types of penetrative assaults not entailing penile-vaginal relations. The definition of rape in Section 63 still only applies to people who are legally recognised as women. Therefore, rape provisions may not apply to cases of same-sex sexual assault, or nonpenile-vaginal penetration against male or transgender victims. This brings confusion in the prosecution of offences which earlier were punishable under Section 377 IPC.⁸

⁷ Ratna Kapur, "Out of the Colonial Closet, But Still Thinking 'Inside the Box' : Regulating Perversion and the Role of Tolerance in De-radicalising the Rights Claims of Sexual Subalterns," (2007) 2 NUJS L Rev 381.

⁸ Law Commission of India, 262nd Report on the Death Penalty and Human Rights (2015).

This omission of Section 377, without the addition of a gender neutral sexual assault, has thus bequeathed a “legal vacuum,” as many scholars put it. It is not because consensual same-sex relationships were decriminalised, it is because there's been no alternative mechanism put in place to criminalise non-consensual relationships outside the gender-specific one on rape. The problem isn't just symbolic, it's about the rights of victims to pursue justice via criminal law.

Chapter 3

The BNS Framework and the Legal Vacuum

In view of Section 377 IPC being omitted, another pertinent question is whether the existing provisions available under the Bharatiya Nyaya Sanhita, about hurt, assault or criminal force are sufficient to cover non-consensual sexual acts against male and LGBTQ+ victims. Some of the elements of the BNS (those in relation to willing to cause hurt or assault) could potentially be used in physical violence cases. But these provisions are of a general nature and fail to recognise the sexual nature and seriousness of the offence.

Different treatment of sexual offences as compared to hurt is based on the fact that it is a serious violation of bodily integrity, dignity, privacy and autonomy. The social and legal recognition of the offence of rape, as a result of its nature, is unique. Whereas provisions on hurt or assault are directed towards physical injury or the application of force. They do not sufficiently consider the mental trauma, disrespect, and sexual abuse of victims of nonconsensual sexual activity. As such, sexual abuse is not simply a physical injury, reducing the gravity of the crime.⁹

It is clear that substitute provisions are lacking where adult male victims are concerned. As per the existing structure, a male victim of forced penetrative sexual assault would not be able to access a specific clause to sexual offence that is like rape. Without recognizing these, individuals may be deterred from reporting, may have less access to justice, and may have increased social stigma attached to being a victim. It also causes injustice in the criminal justice system by granting sexual autonomy to some and not to others. It's even worse for transgender people and non-binary people. Transgender Persons (Protection of Rights) Act, 2019 criminalises forms of abuse against transgender persons, but the punishment is considerably less compared to punishment under the BNS for rape. This results in differential protection by

⁹ Human Rights Watch, *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism* (2008).

gender identity.¹⁰

This is a significant difference which is at odds with the constitutional values of equality and equal protection of laws. The lack of systematic protection, too, is indicative of the wider marginalisation of gender minorities in legal systems. A constitutional and criminal justice legal void that has been created because of the lack of Section 377 has a broader impact. The current knowledge and perceptions of sexual violence are shifting to an understanding of sexual offences as a matter of consent, not gender. As a result, there are a number of comparative jurisdictions that have moved towards incorporating gender-neutral and consent-based sexual offence law. By contrast, the BNS still follows the standard male-female dichotomy approach, which fails to encompass a wide range of victims in effective legal protection.

3.1 Retention of Gender-Specific Rape Laws under the BNS

Over the past few decades, a number of countries have modernized their approach to sexual offenses, replacing the gendered with a consensual framework. Over the past few decades, several countries have updated their sexual offence laws to a gender neutral approach over a consent-based model. The reforms were implemented to guarantee that all women and men who have suffered sexual violence have the same legal rights, regardless of their gender, gender orientation or gender identity. Rape statutes differ from those of the past, which spoke specifically of a man's act on a woman, to greater attention on the absence of consent and the nature of the offence itself. This transition is in response to the changing constitutional values, international human rights standards, and recognition of the rights to bodily autonomy and sexual integrity.¹¹

The UK enacted major reforms under the Sexual Offences Act, 2003. This legislation updated the laws on sexual offences, shifting the focus from consent and introducing new classifications of sexual offences beyond rape. Whilst the Act retains the term rape, which is linked to the penis, the wider context of the Act also offers a gender neutral protection to those victimised through offences including assault by penetration and sexual assault. Unlike previous laws, the law acknowledges that the victims of sexual violence can be in any gender, thereby being more inclusive. Another significant instance of gender neutral sexual offence legislation is in

¹⁰ Arvind Narrain and Alok Gupta (eds.), *Law Like Love: Queer Perspectives on Law* (Yoda Press, 2011).

¹¹ United Nations Human Rights Council, "Discrimination and Violence against Individuals based on their Sexual Orientation and Gender Identity," A/HRC/29/23 (2015).

Canada. Under the Criminal Code, traditional definitions of “rape” were replaced by the more expansive definition of “sexual assault.” The emphasis of the law is mainly on consent, coercion and bodily integrity, not the gender of the victim or perpetrator.

Throughout its history Canadian courts have applied the concept of sexual assault in a manner consistent with constitutional principles of equality, dignity and personal autonomy. This provides the equal opportunity of the law, and not discriminatory classifications based on gender. South Africa has also implemented a broad and all-encompassing policy, as outlined in the Criminal Law (Sexual Offences and Related Matters) Amendment Act.

The law does not distinguish based on gender or sexual orientation and acknowledges several types of penetrative and non-penetrative sexual crimes. The interests in dignity, equality and non-discrimination, enshrined in the Constitution, are reflected in the South African laws that were enacted after apartheid ended. The framework recognises the vulnerability of LGBTQ+ people and that all survivors of sexual violence are entitled to the same legal response.¹²

3.2 Inadequacy of Existing Remedies and the Emerging Legal Vacuum

This can be legal protection, but also social recognition of the experiences of marginalised groups. The lack of inclusion of male victims in sexual offence laws in India could deepen the stigma and deter victims from reporting sexual offences if they are male, transgender, or non-binary. Substantive equality and social justice thus have a strong link to inclusive legal frameworks. One of the key elements of comparison jurisdictions is the uniformity of the values in the constitution and the provisions of the criminal law. Some nations, like Canada and South Africa, use principles of equality, dignity and non-discrimination in interpreting the concept of sexual offence in their laws. Judgements affirming the rights of privacy, autonomy and LGBTQ+ have also shaped Indian constitutional jurisprudence. This current framework of BNS, however, seems to be incongruent with these developments, as it still uses the narrow and gender-based definitions of sexual offences.

Chapter 4

Comparative Analysis of Gender-Neutral Jurisdictions

The exclusion of Section 377 from Bharatiya Nyaya Sanhita begins to pose constitutional issues with the Constitution of India, Article 14 which states that everyone is equal before law

¹² United Nations Human Rights Council, “Discrimination and Violence against Individuals based on their Sexual Orientation and Gender Identity,” A/HRC/29/23 (2015).

and equal protection of law. Article 14 ensures that nothing is arbitrary about classification, and that the laws are applied fairly and reasonably to everyone in the same situation. The BNS will leave the definition of rape as gendered as in Section 63 but remove Section 377, which would mean that only females are explicitly protected under mainstream sexual offence laws.

This means that there is a lack of equal legal protection against sexual violence for male victims, transgender people and non-binary people. The constitutional concern is exacerbated by the fact that the exclusion is not related to the actual harm endured by the victims but to their gender identity. Sexual violence leads to a violation of a person's integrity, autonomy and dignity regardless of the victim's gender. But BNS acknowledges the harms selectively. This differential treatment can constitute discriminatory classification since similarly situated victims of sexual assault receive different treatment based on gender alone. This is an imbalance with the constitutional concept of substantive equality and the equal access to justice.¹³

The Supreme Court has consistently given a broad and a transformative interpretation to Article 14. In reference to privacy, gender identity and LGBTQ+ issues, the Court has reiterated that the constitutional rights need to apply to everyone irrespective of social or sexual identity. In *Navtej Singh Johar v Union of India*, the constitutional morality was upheld which established a rule that the State cannot refuse to accord legal recognition or protection simply because a group is a minority. The judgment acknowledged the importance of dignity, individuality and sexual orientation as being part of constitutional freedom. It is somewhat problematic that Section 377 has been omitted from the bill as it means that some kinds of victims are denied adequate legal remedies. The issue is not the decriminalisation of sex but the lack of an alternative gender-neutral act provision.

Consequently some victims are covered under specific sexual offence provisions of the law, and others have to depend on the general provisions of offences touching hurt or assault. Article 14 provides for equal protection without such treatment, which is an unbalanced approach. There is also a constitutional issue in regards to indirect discrimination. While the BNS does not explicitly Bar rights for LGBTQ+ individuals, the lack of this (which is missing from the

¹³ Ministry of Home Affairs, Government of India, The Bharatiya Nyaya Sanhita Bill, 2023 – Statement of Objects and Reasons.

text) has disproportionate effects on sexual and gender minorities. Transgender and non-binary people are especially vulnerable as they are not in the categories of rape laws. Without inclusive legal recognition, this is therefore perpetuating structural discrimination and marginalisation in the criminal justice system.

4.1 Gender-Neutral Sexual Offence Laws in Comparative Jurisdictions

Under Article 21 of the Constitution, the right to life and personal liberty has been interpreted by the Supreme Court in such a way that dignity, privacy, bodily autonomy, and sexual integrity have all been considered to be aspects of the right to dignity. The right to life under Article 21 is not limited to the simple right to exist but also encompasses the right to choose what to do with oneself and one's body.¹⁴

Sexual violence violates these constitutional guarantees since it is characterized by force, insult and invasion of physical integrity. In the absence of a strong legal framework to prevent sexual abuse, therefore, it can be said that it constitutes a violation of the constitutional guarantee of dignity and personal liberty. The Supreme Court has consistently upheld that privacy and autonomy are integral part of constitutional freedom. Justice K.S. Puttaswamy in *Justice K.S. Puttaswamy v. Union of India*,¹⁵ said that privacy entails the right to make decisions and the right to protection of intimate personal choices.

This constitutional thinking later played a part in the *Navtej Singh Johar v. Union of India*¹⁶ judgment, when sexual orientation was added to the list of intrinsic aspects of identity and dignity. Together they made this clear, that constitutional rights concerning bodily autonomy and sexual integrity apply to everyone regardless of gender or sexual orientation. The exclusion of Section 377 under the BNS raises concern as it means that some sexual violence survivors are not receiving proper recognition through the criminal justice system. Lack of a legal system that treats sexual assault of male or LGBTQ+ victims as a violation of the constitutional rights of both the victim and the accused has the potential to compromise the right to dignity and equal access to justice.

Sexual violence is more than just a physical act; it's an assault on the personal autonomy and psychological integrity of the victim. However, the lack of appropriate penalties could lead to a reduction of constitutional protection guaranteed by Article 21. Inclusive and gender neutral protections from sexual violence are also upheld by international human rights principles. The

¹⁴ Transgender Persons (Protection of Rights) Act, 2019.

¹⁵ 2017) 10 SCC 1.

¹⁶ (2018) 10 SCC 1.

Yogyakarta Principles – on the application of international human rights law to sexual orientation and gender identity – recognize that everyone has the right to equality, dignity, privacy, and freedom from discrimination, regardless of their sexual orientation and gender identity.

The principles highlight a State's duties to prevent violence and abuse of persons irrespective of their origin. The Yogyakarta Principles are not legally binding, but they provide persuasive guidance as to the interpretation of constitutional rights and human rights obligations. Indian courts have increasingly looked at the international human rights standards bearing on the interpretation of the fundamental rights in the Indian constitution.¹⁷

This more general interaction with international human rights norms is reflected in recent constitutional jurisprudence, which has recognized LGBTQ+ rights. Excluding certain categories of victims from the protection of sexual offences therefore seems to be an iteration of standards on equality and human dignity which is not in keeping with the development of international standards.

4.2 Lessons for India: Towards an Inclusive and Act-Based Framework

The lessons learnt from the study of the United Kingdom, Canada and South Africa are listed as follows: The comparative study of the United Kingdom, Canada and South Africa showcases the following lessons learnt for reform of sexual offence laws in India: An important thing to note is that these jurisdictions focus on consent and body autonomy instead of limiting the legal protection that is available by drawing on gender categories. This is done to ensure equal treatment of all victims of sexual violence before the Law. The Bharatiya Nyaya Sanhita, on the other hand, has retained a gender-biased structure that provides only for the victimisation of women, and fails to provide equivalent protection to other categories of victims. The absence of Section 377 and the lack of any holistic gender neutral section has highlighted the shortcomings of the current Indian structure. Comparative jurisdictions show that decriminalisation of consensual same-sex relations cannot happen without adequate laws to protect against non-consensual acts.

A lack of these protections could lead to situations where victims don't receive justice because their cases fall outside the scope of current statutory definitions. This is a violation of the general constitutional values of equality, dignity and access to justice. A significant takeaway from comparative jurisdictions is the primacy of consent and not morality in their

¹⁷ Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (South Africa).

understanding of sexual assault. Colonial-era laws such as Section 377 were historically based upon notions of morality and “unnatural” conduct. But in modern legal systems, “morality-based criminalisation” has become a thing of the past, with personal autonomy and freedom from coercion increasingly being the focus. These courts move away from moralist justifications towards a rights-based and victim-centred approach to sexual offences. Comparative legal instruments also show the significance of inclusiveness in the drafting of criminal laws. Gender neutral laws: To acknowledge that sexual violence can occur to persons of all genders and identities.

From the present study it is revealed that Section 377 of IPC served two-fold purpose in the Indian criminal justice system. The provision was heavily attacked for criminalizing consensual same-sex acts and for a colonial attitude to morality, but it was equally a valuable legal tool for protecting those who engaged in non-consensual sexual acts that were not considered rape.

In judicial developments, consensual sex between adults was decriminalized and at the same time the Supreme Court has stressed the need for maintaining criminal liability for non-consensual sexual acts, sexual acts with minors and sexual acts involving coercion, in the form of *Navtej Singh Johar v. Union of India*.¹⁸ However, the *Bharatiya Nyaya Sanhita, 2023*, dropped Section 377 altogether, without adding any corresponding gender neutral sexual assault provision. The BNS kept rape laws in its Section 63, but it still just acknowledges women as victims of rape. This means that the law of the main-stream criminal offence seems to have left some victims of sexual assault – adult males, transgender people, non-binary people and people who have experienced certain types of penetrative sexual assault – without proper legal protection.

This has left what could be called a “silent legal void” in the present legal framework relating to sexual offences. The study also sets out that in the absence of Section 377 IPC, general provisions relating to hurt, assault, criminal force in the BNS cannot adequately replace it. Sexual violence is an offence against dignity, autonomy, privacy and bodily integrity, and is a crime which needs to be specifically recognised. Failure to consider the offences to be regular assaults, prevents victims of the offences from recognising the harm they have suffered and as a result diminishes access to justice for vulnerable groups. Lack of specific legal recognition can also prevent individuals from reporting and can place a social stigma on the victimisation of male and LGBTQ+ victims.

¹⁸ (2018) 10 SCC 1.

A comparative examination of the jurisdictions of the United Kingdom, Canada and South Africa shows how the contemporary criminal justice system has increasingly become gender neutral and/or consensual in its approach to sexual offences. In these jurisdictions, it is the lack of consent and the nature of the act that is the focus, not gender-based restrictions of legal protection.¹⁹

These create a more extensive level of constitutional and human rights protection and inclusiveness in criminal law. The study thus suggests that the existing framework in India is quite conservative in comparison with international standards which are changing with time. This study on the constitution analysis brings out the concern over the absence of Section 377 in the constitution, as related to Articles 14 and 21 of the constitution. Failure to provide effective sexual offence protection to victims who are women and/or LGBTQ+ may constitute discriminatory treatment and a denial of equal protection of the law.

Moreover, when there is a lack of remedies it has an impact on constitutional rights of dignity, privacy, bodily autonomy and sexual integrity. International human rights principles, such as the Yogyakarta Principles, also affirm the importance of inclusive legal protection, irrespective of gender or sexual orientation.

Chapter 5

Conclusion and Suggestions

Based on the study, it is necessary to have a comprehensive gender neutral sexual assault provision in the Bharatiya Nyaya Sanhita. This should be based on the lack of consent not on gender restrictions when granting legal protection. A gender neutral approach would result in equal protection for everyone who has suffered sexual violence, including men, transgender persons, non-binary people and people from the LGTBQ+ community. It will also bring Indian criminal law in tune with constitutional equality and dignity. The definition of sexual assault in the BNS should be expanded to cover all non-consensual penetrative acts regardless of the gender of the victim and/or the perpetrator. Sexual violence must be seen as a violation of autonomy and an act of coercion and not recognised as a crime against women.

The Indian legal framework can offer more comprehensive and meaningful protection to all victims by emulating an act-based approach like that of other comparative jurisdictions like Canada and South Africa. Legislative reform must also bring fairness in penalties and

¹⁹ Human Rights Watch, *This Alien Legacy: The Origins of 'Sodomy' Laws in British Colonialism* (2008).

procedural protections that are enjoyed by all sexual offence victims. Currently, there are limited protections for transgender people in the Transgender Persons (Protection of Rights) Act, 2019, with punishments for sexual abuse significantly lower than those prescribed for rape. This imbalance can result in unequal protection and could be in breach of the constitution that guarantees equal treatment. Thus, reforms need to incorporate all victims in a single, non-discriminatory sexual offence approach. A crucial recommendation is the need for sensitization on criminal justice related issues to male and LGBTQ+ victimization.

Underreporting and limited institutional response to sexual violence stem from social stereotypes, in which sexual violence is confined to women. Police, prosecutors and judicial officers should be trained to treat all victims, regardless of gender identity or sexual orientation in an inclusive manner. Increased institutional and societal awareness is necessary in addition to legal reform if one is to be successful.

The study also suggests that there should be an increased emphasis on constitutional morality and international human rights principles in legislative policymaking. The building of constitutional jurisprudence in matters of privacy, dignity and LGBTQ+ rights is a progressive understanding of individual autonomy and equality. Likewise, internationally, the Yogyakarta Principles highlight the responsibility of States to protect everyone from violence, regardless of their sex. The advancing principles should thus be used to inform future criminal law reforms, not colonial-era understandings of gender and sexuality.

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