
Should Section 375 be read with Section 377 of the Indian Penal Code?

ABSTRACT

Section 377 of the Indian Penal Code has been in the limelight for its controversial nature and archaic language. Despite it being read down much of the previous connotations that was anti- LGBTQIA+ in nature still exists due to lack in change of language, leading to anti LGBTQIA+ spirit of the law still being retained. Section 375 of the Indian Penal Code over the years has evolved from its narrow and restricted application to include a variety of actions to what constitutes as rape. Over the years, the restructuring of the two sections has led to the creation of certain contractions with respect to the ambit of offences that each section covers. In this article we will be examining the contractions that have arisen and how they can be resolved by reading the two sections as analogous to each other with certain modification. We will also be delving into the need for separate sections that deal with necrophilia and bestiality, in order to ensure a complete reframing of these sections. This article also aims to understand the implications of such a step and how it will impact the LGBTQIA+ community.

KEYWORDS

“Section 377 of the Indian Penal Code”, “Section 375 of the Indian Penal Code”, “consent”, “non-consensual sex”, “LQBTQIA+ community”, “bestiality”, “necrophilia”

INTRODUCTION

Section 375¹ and 377² of the Indian Penal Code ('IPC') both deal with issues that are grave and controversial and have been the subject of much debate. They have evolved over the years on account of case laws and amendments. However, it is imperative to note that there exists a contradiction between these two sections as they currently stand. It is this contradiction that we seek to address, we believe that to make the law more coherent, this contradiction must be fixed by the restructuring of section 377 through the removal of terminology such as "*unnatural*" and "*carnal intercourse against the order of nature*". Thereby making 377 *analogous* to 375. Additionally, we also propose that to punish offenses that are "*unnatural*" in the course of nature" another section should be added to the IPC that deals exclusively with offenses such as bestiality and necrophilia. However, before we delve deeper into this contradiction and how it should be fixed, we must understand the nature and evolution of these two sections of the IPC and how they are interpreted in a court of law.

A BRIEF HISTORY ON THE EVOLUTION : SECTION 375, CONCEPT OF CONSENT AND SECTION 377

A. STATUTES

1. SECTION 375 OF THE INDIAN PENAL CODE –

Since its inception Section, 375 of the Indian Penal Code³ has evolved and laid out the difference between *will* and *consent*. In its current form, the section puts consent as the focal point for determining rape. There has been a significant shift over the years in the way that the law has been structured to give the victim maximum voice and empowerment. Beginning with the *1983 amendment* that gave the woman the status of a witness and introduced the category of custodial rape after the protests following the *Mathura Case*⁴ till the *2013 amendment* after the brutal *Nirbhaya gang-rape case*⁵. The amendment expanded the definition of rape, changing the definition from penal-vaginal

¹PEN. CODE, § 375, No. 45 of 1860, INDIA CODE (1993), vol. 13.

²PEN. CODE, § 377, No. 45 of 1860, INDIA CODE (1993), vol. 13.

³ *Supra* note 2.

⁴ *Tukaram And Anr vs State Of Maharashtra*, 1979 AIR 185 (India).

⁵ *Mukesh & Anr vs State For Nct Of Delhi & Ors*, 2017 6 SCC 1 (India).

penetration to forced oral and anal sex and insertion of objects. The amendment laid down the definition of consent as positive which is revocable and has to apply to the specific sexual act giving rape a definite form of consent different from the general as expressed in *Section 90*⁶.

2. SECTION 377 OF THE INDIAN PENAL CODE-

Section 377 before the **Navtej Singh Johar**⁷ judgment sought to punish any sort of “*carnal intercourse against the order of nature*”. The acts that were set against the order of nature were not defined in the statute. The idea of what constitutes “accepted” sex is defined by moral and social standards which is the heteronormative idea of penal-vaginal sex. Other forms of sexual acts were then regarded as against the order of nature regardless of consent and were criminalized. This definition was problematic as the provision of disregarded consent as key to understanding sex and was arbitrary to non-heterosexual individuals. After the 2013 amendments, when the definition of rape was changed to include forced oral and anal sex, it created an anomaly in law since the idea of moral sex was challenged by it⁸. This position was even stated in **Sakshi vs Union of India**⁹ wherein the petitioners asked that the judicial conception of sexual intercourse in Section 375 be expanded to include other penetrative acts as well, in part because the then interpretation of Section 375 would lead to such acts only being penalized under Section 377 which penalizes consensual intercourse ‘against the order of nature’. However, the court refused to expand the definition of rape beyond penal-vaginal penetration, stating that will create confusion in the minds of people and the court. The **Navtej Singh Johar**¹⁰ case however took a different approach and read down this provision to prohibit all forms of non-consensual sex against all adults and children and bestiality, overturning the **Suresh Kumar Koushal**¹¹ Supreme court judgment.

⁶ S. 90, The Indian Penal Code, 1960.

⁷ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India).

⁸ Sebastian, J., 2017. The opposite of unnatural intercourse: understanding Section 377 through Section 375. *Indian Law Review*, 1(3), pp.232-249.

⁹ Sakshi vs Union of India, (2004) 5 SCC 546 (India).

¹⁰ *Supra* note 8.

¹¹ Suresh Kumar Koushal & Anr vs Naz Foundation & Ors, (2014) 1 SCC 1 (India).

An anomaly has been created in the law regarding the residual contents of Section 377 of IPC after **Navtej**¹² concerning Section 375 of IPC. It is not clear whether Section 377 of IPC prohibits all non-consensual acts of sex or it prohibits all other non-consensual acts of carnal intercourse. The lack of change in terminology while reading down the provision has created this confusion.

B. THE EVOLUTION OF DEFINITION OF CONSENT UNDER THE INDIAN PENAL

CODE:

The definition of consent has evolved under the IPC over the years to be affirmative and revocable as it stands today. The definition alludes to the fact that all forms of non-consensual sexual acts against a woman constitute rape under section 375 of IPC. Consent is a *sine qua non* to define rape and to ensure justice to the victim as should be the main focus. The focus on consent will ensure that the prejudices that a rape victim is subjected to do not come in the way of justice. The **Navtej Singh**¹³ judgment changed the range of acts prohibited under section 377 of IPC to all forms of non-consensual acts against all adults and minors but has retained the previous language. The very fact that is still no focus on consent but the non-consensual acts of sex are prohibited under the same category as bestiality, defined by terms like “*against the order of nature*” and “*unnatural*” leads to the continuation of the sexual violence faced by the LGBTQIA+. Since non-consensual sexual acts against heterosexual adults and minors are already covered under 375 and POCSO¹⁴, this leaves mainly non-heterosexual non-consensual sexual acts under the ambit of the section. The categorization of non-heterosexual rape with bestiality shows a form of laxness that questions their status in society. The focus on consent will highlight the sexual violence and exploitation faced by the LGBTQIA+ community which is neglected. The affirmative definition as envisaged by the Justice Verma Committee was introduced to grant some agency to the woman instead of having a rape definition that treats her like chattel.¹⁵ Such a definition if extended to non- heterosexuals will give them agency on

¹² *Supra* note 8.

¹³ *Supra* note 8.

¹⁴ Protection of Children from Sexual Offences (POCSO) act, 2012.

¹⁵ *supra* note 7.

their bodies. The next logical step to liberate and grant rights to the LGBTQIA+ community would be to restructure section 377 of IPC and make it analogous to Section 375 of the IPC to highlight the importance of consent that gives them some form of agency in deciding their sexual rights.

SECTION 377 AND 375 UNDER THE LENS OF TERMINOLOGICAL DISCRIMINATION AND A LGBTQIA+ POINT OF VIEW

The contradiction between Sections 377 and 375 of IPC now comes to be that while section 377 criminalizes non-voluntary, “*carnal intercourse against the order of nature*” most of the acts that may constitute this such as anal and oral sex now come under the expanded definition of what constitutes “sexual intercourse” under section 375.

Additionally, another terminological issue arises w.r.t the wordings “*carnal intercourse against the order of nature*” and “*unnatural*”. These are extremely problematic concerning gay rights. These words read that while homosexual sex or private acts between any persons as long as it is done with due consent is removed from the purview of section 377 of IPC it is still viewed as unnatural and against the order of nature. This goes against everything the youth, LGBTQIA+, and supporters of their rights are fighting for. It is a clear reflection of the underlying taboo associated with non-heterosexual relations in India. Nomenclatures such as these promote discrimination and stereotyping against members of this community who have relentlessly been fighting for their rights. These words also lead to further discrimination against sexual minorities and their continued harassment as in most of the Indian society Relations between them aren’t viewed as normatively and culturally correct.

So, while **Navtej** criminalized non-voluntary carnal intercourse the section still contains an *element of discrimination* within it. These words while having a perhaps positive intent to punish bestiality and such other offenses as a part of this section negate all the positivity that has come about through case laws.

RECOMMENDATIONS AND CONCLUSION: 377 AND 375 AS ANALOGOUS PROVISIONS ,
THE ISSUE OF MARITAL RAPE AND NEW SECTIONS FOR BESTIALITY AND NECROPHILIA

A. 377 AND 375 AS ANALOGOUS PROVISIONS

An *alternative* is that the SC should read down section 377 of IPC further to delete the words “*carnal intercourse against the order of nature*” from 377. This would lead to coherence between Sections 377 and 375 of the IPC and provide clarity. Section 377, unlike 375, is a non-gendered law and will prevent and punish sexual violence essentially covering all cases of *non-consensual non-heterosexual intercourse*. This reconstruction not only includes and gives importance to the idea of consent but it also normalizes consensual sex between non-heterosexual individuals.

Therefore section 377 would essentially become a provision *analogous* to section 375, wherein section 375 *deals with all heterosexual rapes* and section 377 *deals with non-heterosexual rapes*. Section 377 would then become a special provision w.r.t. section 375 in accordance with the statutory interpretation of *generalia specialibus non-derogant* i.e., a general provision yields to a special provision in case they both cover the same field.

The reason we do not want to combine them by striking down section 377 but rather make them analogous by reading section 377 down is that section 375 specifically uses the wording “*A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman...*” It is a law that protects women who are above the age of 18 against any forms of non-consensual sexual intercourse. However, IPC Section 377 due to its terminology of “*persons*” is the only law that would apply for adult men. If IPC Section 377 is struck down in its entirety, at risk will be the largest population of Indians – the heterosexual male, age 18 and upwards, and women who are subjected to non-consensual sexual acts by women. While the Verma committee report did suggest making 375 genders neutral the suggestion was not taken up and as a result, clubbing them would not be an adequate solution to deal with rapes of men or homosexual rapes.

C. ARISING AMBIGUITY OF MARITAL RAPE

Another issue that arises is the ambiguity surrounding the fate of *marital rape* as it is not criminalized under Indian law. Under 375 sex with an adult wife is an exception to the law of rape. Despite recommendations by law commissions and Justice Verma Committee has not been criminalized. The expansion of the definition of sexual intercourse under section 375 was a bane for many women and although there was some scope of punishing a wider range of acts under section 377 this became impossible due to the expansion of acts that constitute “sexual intercourse”. Pre-Navtej the courts used anal and oral sex coming under the definition of unnatural carnal intercourse to punish such offenders where consent was immaterial. This is visible in **Nimeshbhai Bharatbhai Desai vs State Of Gujarat**¹⁶ where the Gujarat High Court allowed initiation of proceedings under the 377. But the position of law has again been rendered ambiguous since oral and anal sex between consensual adults do not come under 377 and rape under 375 does not recognize marital rape against an adult woman. In India, marital rape exists *de facto* but not *de jure*. While it is a heavily prevalent reality in India it is hidden behind the sacrosanct curtains of the marital institution. The judiciary has expanded the definition of Article 21¹⁷ vastly over the years, Article 21 encapsulates the ‘right to live with human dignity’. Marital rape clearly violates a female’s right to live with human dignity, hence it can be argued that section 375 of the IPC is violative of Article 21 of The Constitution of India. Additionally Article 14¹⁸, a fundamental right, guarantees that *the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*". Hence, it protects individuals from facing any discrimination at the hands of the state. however, the exception to 375 which is the point of contention here can be said to be discriminatory towards a wife when it comes to the criminal offence of rape. Therefore again 375 of IPC is violative of Article 14 of the constitution. In 2005, the Protection of Women from Domestic Violence Act, 2005¹⁹ was passed which although did not consider marital rape as a crime, did consider it as a form of

¹⁶ Nimeshbhai Bharatbhai Desai vs State Of Gujarat, 2018 SCC Guj 732 (India).

¹⁷ INDIA CONST., art. 21.

¹⁸ INDIA CONST., art. 14.

¹⁹The Protection of Women from Domestic Violence Act, 2005.

domestic violence. Under this Act, if a woman has endured marital rape, she can approach the court and obtain a judicial separation from her husband. However, the same doesn't entirely protect the women from the crime has undergone. Women so far have had recourse only to section 498-A of the IPC²⁰, dealing with cruelty, to protect themselves against “perverse sexual conduct by the husband”. However, there is no clarity as to what constitutes this “perverse sexual conduct” . While at the present time the court has refused to take cognisance of the matter, stating that criminalizing marital rape is against the culture of India, It is imperative that this offence must be criminalized keeping in mind the social dynamic in India which are inherently unequal.

D. SEPARATE SECTIONS FOR BESTIALITY AND NECROPHILIA

However, this leaves us with another gaping hole in the law, being what section will now cover and criminalize unnatural offenses against the order of nature on the human body such as bestiality and necrophilia? For this, we suggest that another section separate from 377 and 375 must be added to the IPC.

A dead body under *article 21* as applied by the Supreme Court in **Paramanand Kataria, Advocate V. Union Of India & Another**, ²¹enjoys the right to dignity. The act of necrophilia is a clear violation of the right to dignity as enjoyed by the dead body. Although Section 297 ²²of the IPC criminalizes trespass on burial places and alludes to the dignity of the dead body it only talks about such acts as burial grounds and does not touch upon the act of necrophilia specifically. Thus, it has often been noted that there exists a gap in the law when it comes to the offense of necrophilia. This was further highlighted in the 2006 case **Surendra Koli vs State Of U.P. Ors** ²³or the “Nithari case” as was its media moniker. While the CBI registered a case against Kohli under various sections of the IPC, including rape, murder, kidnapping, and criminal

²⁰ PEN. CODE, § 498, No. 45 of 1860, INDIA CODE (1993), vol. 13.

²¹ Paramanand Kataria, Advocate V. Union Of India & Another, AIR 1989 SC 2039 (India).

²²PEN. CODE, § 297, No. 45 of 1860, INDIA CODE (1993), vol. 13..

²³ Surendra Koli vs State Of U.P. Ors , (2011) 4 SCC 80 (India).

conspiracy. They had a tough time charging Pandher and Kohli with necrophilia, as there were no well-defined laws in the country dealing with the crime and 14 years later this gap continues to exist. Hence now there should be a specific section of the IPC that deals with unnatural carnal offenses against the human body which encompasses this.

The reading down of 377 will then also require a separate section to govern the offense of *bestiality*. The **Animals Cruelty Act, 1960** does not criminalize bestiality despite there being multiple demands by the animal rights organization PETA to do so. The nature of bestiality violates basic animal rights. A study in 2002 of juvenile offenders was undertaken where the researchers established a link between animal sex offenders and human sex offenders in terms of their family background and characteristics along with the fact that 96% of animal offenders were also sex offenders of humans in some form.²⁴ This study throws light on the importance of a separate section for criminalizing bestiality since not only does it affect animal rights but also humanity. Recent cases like the gang-rape of a pregnant goat 2 years ago in Haryana have also highlighted the need for stringent measures.

Thus a specific section should exclusively deal with such crimes that are against the order of nature. It is imperative that it must also have a *defining clause* as to what constitutes unnatural offences which encompasses bestiality and necrophilia so that there is no confusion under law.

²⁴ Animalsandsociety.org. 2002. *Characteristics Of Juvenile Offenders Admitting To Sexual Activity With Nonhuman Animals*. [online] Available at: <<https://www.animalsandsociety.org/wp-content/uploads/2015/11/fleming.pdf>> [Accessed 13 December 2020].