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Left in the Shadows: The Fallout of India's New Penal Code for Men and the Transgender Community

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ABSTRACT

The recent changes to the Indian criminal justice framework mark a considerable shift from its colonial past. The three new Acts that have replaced the Indian Penal Code, Indian Evidence Act, and the Criminal Procedure Code are an attempt to modernise the legal system, which, prima facie, appear progressive, such as the criminalising of sexual intercourse with a minor wife as rape. However, the Bharatiya Nyaya Sanhita (BNS), which has replaced the IPC, raises major concerns for men and the transgender community in India. The entirety of Section 377 of the IPC has been omitted in the new Act, which leaves these communities with no legal recourse in case of sexual assault or rape. The transgender community is one of the most vulnerable communities in society as it is, and without the protection of the law, they may be prone to acts of deplorable violence.

This paper will shed some light on social hierarchies and patriarchal norms that influence the way both individuals and the law view sexual offenses. Further, it discusses the impact of such a move on the aforementioned communities, and calls for gender-neutral rape laws and analyses the legal gap that exists herein violates the fundamental right to equality guaranteed by the Indian Constitution under Article 14, which is explored in detail.

Keywords: Section 377, BNS, transgender community, gender justice.

I. INTRODUCTION

In a move that promises to rid the country of its colonial hangover, the Indian Government has recently brought about huge changes² to the Indian criminal justice framework. Three new Acts have been introduced, replacing the old Indian Penal Code (the substantive aspect of criminal law), the Criminal Procedure Code (the procedural aspect of criminal law), and the Indian Evidence Act, which are all products of the British Raj that haven't seen many significant amendments.

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² Ashish Kumar Bhargava, Anindita Sanyal, Colonial-Era IPC Out, New Criminal Laws Take Effect from Today: 10 Points, NDTV (July 01, 2024, 10:07 AM IST), <https://www.ndtv.com/india-news/colonial-era-ipc-out-new-criminal-laws-take-effect-today-10-points-6005426>.

Prima facie, this seems to be a stellar move, but there have been growing concerns in the country not only with respect to the undemocratic and hasty manner in which these Acts were passed but also with regard to the new loopholes that they present.

The Bharatiya Nyaya Sanhita (BNS) has replaced the Indian Penal Code and has been in effect from the 1st of July, 2024. While bringing about significant progressive changes, such as the criminalisation of sexual intercourse with a minor wife as rape, there are certain grey areas in the Act that are highly concerning.

The most glaring issue is the complete repealing of the then Section 377 of the Indian Penal Code. This section titled “unnatural offences” criminalised “carnal intercourse against the order of nature” but was read down by a five-judge bench of the apex court of India in 2018³, and portions of it were struck down, thereby decriminalizing consensual sexual intercourse between two consenting adults, including same-sex relations.

Prior to this judgment, LGBTQ+ individuals were persecuted under this section, which called for imprisonment of up to ten years, or life, and a fine. Thus, this case marked a major milestone for Indian LGBTQ+ rights, paving the road for bringing issues such as same-sex marriage, adoption, and inheritance to the limelight, as well as putting an end to a discriminatory colonial law.

II. LACK OF PROTECTION FOR TRANS INDIVIDUALS AND MEN

For a better understanding, here is what Section 377⁴ of the now-defunct 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.”

Decriminalized to the extent of same-sex relations between consenting adults, as previously discussed, this section was often the only legal recourse for male and transgender victims of rape. Despite a Parliamentary Committee’s suggestion⁵ to retain the contents of Section 377 of the IPC in the new Code, the Act has effectively omitted them.

Other rape laws in the country are gender-specific, casting a cis-gendered woman as the victim and a cis-gendered man as the perpetrator. The complete repeal of Section 377 from the new Act, therefore, makes the rape of men and transgender individuals a non-offence. It is also worth noting that the lack of a “new Section 377” in the new Code implies the treating of anal rape of

³ Supreme Court of India: *See Navtej Singh Johar and Ors v. Union of India*, AIR 2018 SC 4321.

⁴ The Indian Penal Code, 1860, §377.

⁵ Standing Committee Report Summary, The Bharatiya Nyaya Sanhita, 2023, <https://prsindia.org>.

his wife by a man as a non-offence, as well as bestiality.

Section 18 of the Transgender Persons (Protection of Rights) Act, 2019 deals with sexual abuse and states that the jail term for such offence is from six months to two years. However, this provision treats the offense of sexual abuse against transgender individuals much milder than Section 377 of the Indian Penal Code did.

Transgender individuals are a vulnerable minority and are often subject to social marginalisation and police brutality in India. A study⁶ by the National Institute of Epidemiology, India among 60,000 transgender people found that a large number of these individuals receive no support from their families, with over 60% of transgender individuals experiencing some form of harassment or violence, especially by the police authorities— a highly ironic statistic, given how it is the duty of the police to prevent violence of any sort against any individual.

Men will meanwhile be able to seek legal recourse only through sections 114 to 117 of the BNS, which deal with grievous hurt. This trivialises the magnitude of the crime, its impact and provides only a maximum sentence of seven years. At this juncture, it is also worth noting that this would be a bailable offence. Further, by not recognising sexual assault and rape against men, the harmful stereotype that men cannot be victims of such crimes is reinforced. It also seems to imply that sexual offences against these individuals are somehow less of a crime than if it was committed against a woman.

This change that has been incorporated into the new Code is a blatant disregard for the fundamental right to equality that is enshrined in Article 14 of the Constitution of India⁷. In *State of Bengal v. Anwar Ali Sarkar*⁸, the Supreme Court of India held that to establish “classes” of people through an Act or Order, the following conditions must be met:

1. The classification must be based on an intelligible differentia.
2. The differentia must have a reasonable connection with the purpose sought by the law.

The difference that this law draws between victims of rape on the basis of sex and gender does not fulfil the aforementioned criteria and, therefore, ideally, must be considered discriminatory and violative of the doctrine of equality. Its arbitrariness and unreasonableness must be questioned.

⁶ Police harass transgenders most, says study, Times Of India (April 18, 2016, 02:50 AM IST), <https://timesofindia.indiatimes.com/city/chennai/police-harass-transgenders-most-says-study/articleshow/51869919.cms>.

⁷ India Const. art. 14.

⁸ Supreme Court of India, *See The State of West Bengal v. Anwar Ali Sarkar*, AIR 1952 SC 75.

III. WHY DOES SUCH A LEGAL GAP EXIST?

The social perspective on sexual violence plays a large role in the exclusion of protection for trans and male victims of sexual assault and rape. While the rape of a woman is seen as an affront to her family and its honour, the rape of any other individual is reduced to a crime against their body and therefore treated with much less severity.

Even though in the description of such offences the law uses fairly gender-neutral terms, a patriarchal and heteronormative view of sexual violence still remains a flagrant issue. Instead of viewing sexual violence as a slight against a family's honour, there needs to be a shift in social perspective that does not project patriarchal morals and instead views this offence as the violation of an individual's bodily integrity, regardless of their gender identity or sexual orientation.

These changes in the new rape laws are regressive and an act of denying justice to victims of sexual violence, who form a significant chunk of the Indian population. To address these issues, it is imperative that the Government recognises the aforementioned shortcomings and accordingly come up with laws that provide equal protection to all victims of sexual violence. Instead of reinforcing harmful stereotypes, the law must strive to change existing social stigmas and be a champion for the cause of minority rights.
