BEYOND NAVTEJ SINGH JOHAR JUDGEMENT: ANALYSING THE PERSISTING AMBIGUITY IN SECTION 377

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INTRODUCTION

In 2018, the Supreme Court of India delivered its landmark judgement in *Navtej Singh Johar v Union of India*[1] reading down section 377 of the Indian Penal Code, 1860, insofar as it decriminalised consensual homosexual sexual acts, on grounds of violation of the Constitution. This paper seeks to critically examine the ramifications of the verdict on the scope and interpretation of Section 377. Furthermore, I shall also discuss the ramifications of the deletion of section 377 in the newly passed Bharatiya Nyaya Sanhita, 2023 which shall soon replace the Indian Penal Code.

This analysis shall be divided into three parts. In the first part, I shall trace the historical evolution of the section, especially surrounding the differing judicial interpretations of the vague term '*against the order of nature*' that is present in its bare text. Subsequently, I shall analyse how this interpretation has changed post the Criminal Law (Amendment) Act, 2013, and how this transformation formed a major plank of the judges' reasoning in the *Navtej* judgement. Proceeding forward, in the second part, I shall show that in reading down the section, the court failed to clear up the ambiguity surrounding the term 'against the order of nature' and discuss the deleterious implications this could have. Finally, I shall try to put forth potential solutions that may exist in this regard and discuss how to the removal of the section was an inadequate and detrimental measure.

SECTION 377: TRACING THE ORIGINS

Section 377 of the Indian Penal Code, 1860, criminalises carnal intercourse against the order of nature and provides for a punishment of ten years or imprisonment for life. The bare text of the section reads:

[1] Navtej, AIR 2018 SC 4321

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 be liable to fine.[2]

A plain reading of the section reveals that there are three requirements herein: (1) that there be 'carnal intercourse', (2) that such intercourse be 'against the order of nature' and lastly, (3) the act must be done voluntarily by the perpetrator, notwithstanding the consent of the victim.

It must be noted that the section uses the term 'carnal' and not 'sexual'. For the English drafters of the section, the usage of this term was a conscious act, intending to refer to a form of 'degraded' intercourse that was done for crude bodily pleasures.[3] Perhaps this is the reason the section disregards the victim's consent, signifying that it was the act itself that attracted culpability and not its non-consensual nature as is the case in a rape law.

In the Indian context, many differing judicial interpretations of this section have stemmed over the years, arising mostly from the ambiguity surrounding the term 'against the order of nature'. Perhaps the first judicial attempt at defining it took place in the case of *Khanu V Emperor*.[4] In its judgement, the court defined 'unnatural' sexual acts as those that involved "the temporary visitation of one organism by a member of the other organism" meant solely for "non-procreative purposes".[5] In essence, any form of sexual penetration, or even gratification, could be called 'unnatural' if it were not in the 'regular' fashion of peno-vaginal sex meant solely for the desire to procreate.[6] This test has been widely regarded as regressive and could, in theory, be used to justify calling the use of a simple contraceptive as 'unnatural'.[7] Many similar interpretations were adopted over the years, culminating in the 'imitative test' laid down in the *Lohana Vasantlal* case.[8] In this case, the issue before the court was whether an act of oral sex between a man and a woman could fall under the ambit of Section 377. The court, while expressing its opinion, decided to lay down the following test:

[2] Indian Penal Code, 1860.
[3] Alexander Bubb, "*Blustering Sahibs and Section 377*", Economic and Political weekly, (2009).
[4] AIR 1925 Sind 286.
[5] AIR 1925.
[6] Saptarshi Mandal, "*The Wife as an Accomplice: Section 377 and the Regulation of Sodomy in Marriage in India*," Hong Kong Law Journal, (2016).
[7] Shamnad Basheer; Sroyon Mukherjee, "*Section 377 and the 'Order of Nature': Nurturing 'Indeterminacy' in the Law?*," NUJS Law Review, (2009).
[8] [1968] CriLJ 1277

"*If it was an imitative act of sexual intercourse to appease his sex urge or the sexual appetite it would be an unnatural offence punishable under Section 377 of the Indian Penal Code.*"[9]

An important underlying theme in these tests is that the courts have created a binary between 'sexual intercourse' and 'unnatural' intercourse, where the former has been used to define the latter. 'Unnatural' intercourse is what 'regular' sexual intercourse is not. Hence, the standard created by the courts is that 'unnatural' intercourse is something that does not fit into their, or rather the society's conception of natural sexual intercourse. This raises the question: how do the courts determine what 'regular' intercourse is? It is often the case that the societal idea of 'regular' or even 'good' sex is often reflected in the content of its rape laws.[10] A rape law often first defines what the society considers to be a 'sexual act' and then seeks to punish not its commission, rather its non-consensual nature.[11] Hence, in the Indian scenario as well, the courts have used the content Section 375 of the penal code[12] to determine what constitutes 'sexual intercourse' as per the prevailing societal norms and have then contrasted it with Section 377. In this regard, it can be said that the courts have a created a *definitional feedback loop* between Section 375 and 377, where the content of the former is used to determine the ambiguity of the latter. In conclusion, unnatural sex included anal, oral, or other non-traditional forms of penetration, done between both homosexual and heterosexual couples that did not fall strictly within the ambit of 'sexual intercourse' in Section 375.

This legal scenario underwent a change after the Criminal Law (Amendment) Act, 2013, which brought all such non-traditional forms of penetration within the ambit of Section 375 itself. Hereafter, if a man committed a non-traditional act of penetration on a woman *non-consensually*, he would be liable under Section 375 and not under Section 377 as he would have been earlier. More importantly, under this section, the consent of the victim would be a deciding factor unlike Section 377 which criminalised the act in itself for it was 'unnatural' and deplorable, notwithstanding the victim's consent.

[9] Basheer and Mukherjee, *Nurturing Indeterminacy*, 2009.
[10] John Sebastian, *"The Opposite of Unnatural Intercourse: Understanding Section 377 through Section 375*," Indian Law Review, (2017).
[11] Sebastian, *Understanding 377*, 2017. There are other reasons as well behind the moral and legal culpability of rape. However, they are not relevant to the scope of the discussion.
[12] Section 375 of the Indian Penal Code, 1860 is the provision criminalising rape in India.

Referring to the previous discussions, this expanded definition of rape in Section 375 can be said to reflect a change in the society's understanding of heterosexual sex itself.[13] The society no longer considered such non-traditional penetrative acts to be 'unnatural'. Such acts were not criminalised for their commission, but for their non-consensual nature. Hence, by not classifying such acts as 'against the order of nature', the scope of Section 377 was significantly reduced to criminalise only homosexuality, bestiality and paedophilia.

This change in the content of Section 375 formed one of the major planks of reasoning of the judges in the Navtej Singh Johar case.[14] Justice Chandrachud's ratio is particularly relevant here. He, too, reasoned that by this expanded definition of rape in section 375, the Parliament ruled against such acts as being 'against the order of nature'. In applying the equality test of Article 14 of the Indian Constitution, the court held that if such acts were decriminalised for a heterosexual couple, calling them 'unnatural' for a consenting homosexual couple is patently discriminatory. Furthermore, the court also expressed its concerns over the ambiguity of the term 'against the order of nature':

"*the phrase "carnal intercourse against the order of nature" in Section 377 as a determining principle in a penal provision, is too open-ended" [Malhotra J.]"*

"*[i]f it is difficult to locate any intelligible differentia between indeterminate terms such as 'natural' and 'unnatural', then it is even more problematic to say that a classification between individuals who supposedly engage in 'natural' intercourse and those who engage in 'carnal intercourse against the order of nature' can be legally valid. [Chandrachud J.]*

Subsequently, the court opined that consensual homosexual sex cannot be termed as 'against the order of nature' since such a classification is discriminatory and violates the constitutional rights of the LGBTQ community.[15] Therefore, the court decided to read down Section 377 insofar as it criminalised consensual homosexual sexual acts, while still retaining the section to criminalise non-consensual acts falling under its ambit (including bestiality and paedophilia).

[13]Sebastian, *Understanding 377*, 2017.
[14] Navtej, AIR 2018.
[15] Navtej, AIR 2018.

This verdict had two important consequences: *first,* it introduced a previously absent requirement of consent into the section. This was a laudable measure and reflected the idea that it was not the act in itself that attracted moral and legal culpability, rather it was its non-consensual nature, similar to how a rape law operates. *Second*, despite reading down the section and expressing concerns over its ambiguous terms, the court nonetheless opined that its vague terminology be retained in the statute books. This retention can have some deleterious consequences, which I shall proceed to discuss in the next section of the project.

THE POST-NAVTEJ LANDSCAPE

In order to understand the detrimental consequences such retention can have, I shall first attempt to formulate the content of Section 377 post the Supreme Court's judgement:

Whoever voluntarily commits carnal intercourse against the order of nature without the consent of any adult man or woman, or commits such act with an animal, or a child, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.

Dissecting the section, we can see that it has three elements: (1) that there be 'carnal intercourse', (2) that such carnal intercourse be 'against the order of nature' and (3) lastly, that such act be done non-consensually.

While there may be no ambiguity surrounding requirements (1) and (3), the problem once again arises with the second requirement. The court, on the one hand, had clearly stated that homosexual acts are not 'against the order of nature' per se and that term itself is unintelligible and discriminatory. If such was the case, the court could have either given directions to amend the language to make it more satisfactory or even still, clearly delineated what this term contained post its dicta. Concerningly, the court does neither. It merely stated that non-consensual acts under the description of Section 377 are still penalised.[16]

In doing so, as I argue, the court fell short of doing complete justice to the LGBTQ+ community. This is because earlier this section could, at least in theory, serve as a recourse in case of gender-neutral (male-on-male) rape. Since consent was immaterial and it was the act that was punished, a man could have taken recourse to this section if he was a victim of such a

[16] Navtej, AIR 2018.

crime even before 2013. However, post Navtej this situation has become a lot more ambiguous. If a man today is a victim of such a crime, the question that arises, as I argue, is that would he be able to fulfil all the requirements of Section 377 as it exists post Navtej? Strictly speaking, he may not be able to. Since homosexual sexual acts are not 'against the order of nature' as per the Supreme Court's dicta, requirement (2) of the section may not be fulfilled, leaving the victim with no recourse. This is indeed quite a bizarre outcome. It may be contended that the judgement is one that recognises and seeks to protect LGBTQ+ rights and such an outcome would be far-fetched. This may very well be true. The aim of this argument is not to contend that this outcome WILL happen, rather to point out the possibility that this MIGHT happen, which is enough of a reason to cast a duty upon the court to clear the residual content of the section. India, as a society, is still a long way from accepting such non-traditional sexual identities as natural. Even the courts have still not fully recognised the rights of the community as was seen in their refusal to recognise same-sex marriages and grant them legal recognition.[17] Leaving such ambiguity in the section may just result in great discrimination and harassment of LGBTQ people, especially at the grassroots level. Furthermore, leaving terms such as 'unnatural' on the statute books is also greatly detrimental from a dignitarian standpoint.[18]

Hence, as I have shown, in leaving the residual content of Section 377 uncertain, the courts may have inadvertently left men with no recourse in case they are victims of sexual assault. This poses a grave problem requiring urgent rectification. In the next section, I shall try and discuss some of the potential solutions that may exist to remedy such ambiguity.

BEYOND NAVTEJ: IS A GENDER-NEUTRAL RAPE LAW THE SOLUTION?

Several scholars and activists over the years have argued that Section 377 should be completely removed, and that Section 375 should be amended to contain gender-neutral language, not only in regard to the victim, but also the perpetrator.[19] However, there are several arguments against making rape laws gender-neutral, especially those emanating from a feminist vantage point. As Flavia Agnes argues, given the deeply rooted patriarchy in the Indian society, a gender-neutral rape law may just be against the interests of women and even the sexual minorities.[20] It

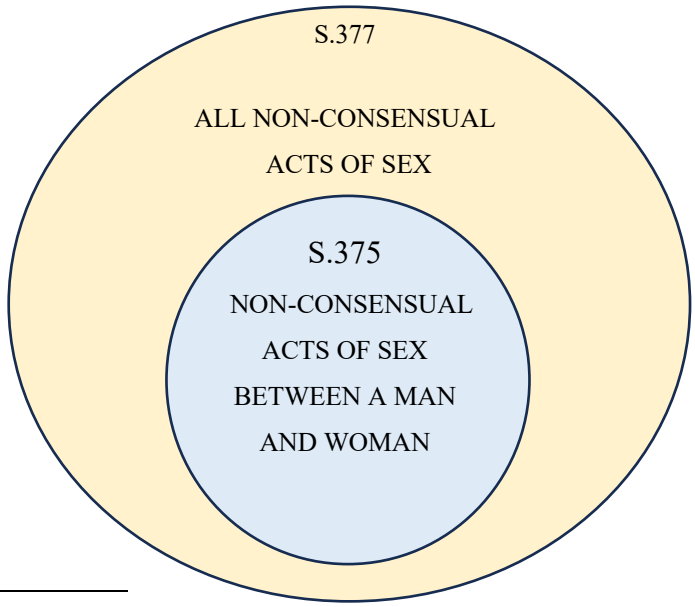
[17] Supriyo v. Union of India (2023) INSC 920.
[18] Sebastian, *Understanding 377*, 2017.
[19] Harshad Pathak, "*Beyond the Binary: Rethinking Gender Neutrality in Indian Rape Law*" Asian Journal of Comparative Law, (2016).
[20] Flavia Agnes. "*Law, Ideology and Female Sexuality: Gender Neutrality in Rape Law*." Economic and Political Weekly, (2002).

may "open up avenues for inflicting even greater trauma and humiliation to an already marginalised section and hence defeat the very purpose of reform."[21]

However, the recently passed criminal code, the Bharatiya Nyaya Sanhita, also completely removed section 377.[22] The Parliament neither amended section 375 to make its terminology gender neutral nor did it create a new section to cover acts formerly covered by section 377. This was a myopic stance adopted by the Parliament which disregards the decades of evolution of the sexual offences in India. While there may have been some ambiguities persisting after the Navtej judgement, completely removing the section was not the way to proceed. Not only relevant to people of different sexual orientations, Section 377 was also important in regard to bestiality and paedophilia. In the absence of any law covering sexual offences on male victims or victims of different sexual orientations, they may find themselves at the receiving ends of grave injustices.

Proceeding forward, I shall attempt to put forth certain solutions that would truly reflect the evolution of these sections and also reconcile the feminist arguments against a gender-neutral rape law.

A potential solution to the aforementioned problems could be to reformulate section 377 in such a way as to make it a provision covering all non-consensual acts of penetrative sexual assault, leaving Section 375 as it exists to apply in cases of male-on-female rape. [23] This can be illustrated through the following diagram-



[21] Agnes, Law, *Ideology and Female Sexuality*, 2002.
[22] Bharatiya Nyaya Sanhita, 2023.
[23] Sebastian, *Understanding 377*, 2017.

In such a case, the principle of statutory interpretation, *generalia specialibus non derogant* i.e. a general provision yields to a special provision in case they both cover the same field, would apply. The effect of this would be that in case of male-on-female rape, Section 375 would apply, since it is the special provision in accordance with the maxim, while in all other cases of sexual assault, regardless of the victim's gender, Section 377 would apply. However, in reformulating this section it must reflect the following elements:

(1) First, the requirement of the absence of the victim's consent, as introduced by Navtej, would have to be introduced into the section. This would also reflect the idea that, akin to the rape laws, it is the act's non-consensual nature that attracts culpability and not the sexual act in itself.

(2) Second, unintelligible and discriminatory terms such as 'unnatural' or 'against the order of nature' would have to be jettisoned.

(3) Third, the section should adopt gender-neutral terminology with respect to both the victim and the perpetrator. However, while recognising this need for gender neutrality, Agnes' reservations must also be taken to account. It may, as she has pointed out, lead to harassment of gay men and even women since men may file frivolous complaints to target these minorities. Hence, one approach that may be adopted to combat this gender-based power differentia is that a male victim may have a slightly higher evidentiary standard than a transgender man or a woman. The legislature may also enact certain penal consequences in cases of genuinely frivolous or *mala fide* complaints. After all, the aim of such reform would not be to completely eliminate gender from rape law jurisprudence, rather to limit its importance in identifying victims and perpetrators.[24]

(3) Fourth, the section should explicitly state that it would apply 'subject to Section 375'. This is to reflect that in case of male-on-female sexual assault, Section 375 would continue to apply and there is no ambiguity regarding which section would take precedence while convicting the offender. This section has been designed to reflect the special vulnerabilities and experiences of women, and retaining it would, once again, serve as a means of reconciling the feminist arguments against a gender-neutral rape provision.

[24] Pathak, *Beyond the Binary*, 2016.

(4) Fifth, in order to truly reflect the severity of the offence if committed on a male victim, a minimum punishment should also be prescribed. Currently, there is no base-level punishment in Section 377 as it exists in Section 375. This means that a court is free to award a relatively minor punishment in case of an offence falling under the section's ambit. This would indeed be quite discriminatory. A base level punishment in rape allows for its severity to be reflected and the moral, legal, and societal condemnation associated with it. In prescribing at least a minimum punishment, the courts would do well in recognising the severity of such an offence on the bodily and mental integrity of male victims and would go a long way in recognising their rights. Furthermore, as to the gradation of punishment in the section, an approach similar to section 375 can be adopted wherein a higher punishment is awarded as the severity of the sexual act increases.

In essence, should the legislature undertake a re-evaluation of the section, incorporating the aforementioned elements would go a long way in recognising the rights of the male victims of sexual assault and even, women. A simple deletion, as in the case of the new criminal code, was a missed opportunity to create a law that could truly reflect years of development and recognition of LGTBQ rights in India.

CONCLUDING REMARKS

In conclusion, in this project I have shown the evolution of Section 377, particularly in the aftermath of the Navtej judgement. In failing to clear the ambiguity around the term 'against the order of nature', the Supreme Court's laudatory judgement may have inadvertently left male victims of sexual assault without a clear recourse. This consequence requires an urgent response and as this analysis has shown, simply opting for a gender-neutral law or the deletion of Section 377 may not be the way to go. It requires a more nuanced approach that needs to acknowledge as well as balance, both LGBTQ rights and feminist perspectives against gender-neutrality. Addressing these complexities is crucial for crafting a legal framework that ensures justice and protection for all.

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