

# CRITICAL ANALYSIS OF THE BHARATIYA NYAYA SANHITA BILL 2023 WITH SPECIAL REGARD TO LAWS CONCERNING RAPE AND UNNATURAL OFFENCES

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## ABSTRACT

*This paper discusses anomalies in the New Bhartiya Nyaya Sanhita Bill 2023. The Bill proposed in the Lok Sabha eyes to substitute the old Indian Penal Code, 1860. The authors have critically analysed the new Bill by using Doctrinal Research methodology. The Author(s) have gone through various existing literature including statutes, case laws and recent incidents in order to justify the claims and reach to the conclusion. This paper aims to point out the irregularities/ legal problems in the Bhartiya Nyaya Sanhita Bill 2023 by comparing and contrasting the old and new legislation along with international laws. The paper further discusses the consequences of removing certain old provisions in the new Bill respectively. Ultimately, the Author(s) puts forth the conclusion and winds up the paper with suggestions aiming for a better legislation in place. These suggestions by the authors were the result of a comprehensive study of various national and international instruments with keeping in view the socio-legal aspects of the Indian subcontinent.*

**KEYWORDS:** *Doctrinal, Legislation, Literature, Anomalies, Irregularities*

## 1. INTRODUCTION

On August 11, 2023, The Home Affairs Ministry launched a new Bill in the Lok Sabha, publicly known as Bhartiya Nyaya Sanhita Bill 2023, that was brought up to the Standing Committee which made certain significant changes in the Bill as compared to the existing Indian Penal Code, 1860. The Bhartiya Nyaya Sanhita Bill, 2023 repealed *Section 377* which talked about *Unnatural Offences* that included un-consensual same- sex intercourse, necrophilia and bestiality.<sup>1</sup> *Bestiality* can be defined as the process of sexual intercourse between a human and an animal. Whereas, *Necrophilia* can be delineated as sexual offence against a dead body.

The initial inclusion of *Section 377* in the Indian Penal Code dates back to 1862, during the period of British governance over India. Prior to its enactment, there existed no regulatory framework governing sexual conduct within the country. According to Indian Penal Code 1860, *Section 377* defined Unnatural Offences,

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<sup>1</sup> Indian Penal Code 1860, § 377, No. 45, Acts of Parliament, 1860 (India).

as ‘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.’<sup>2</sup> According to *Black Law Dictionary*, Homosexual is a person who is attracted to a person of the same sex.<sup>3</sup>

The Unnatural offences are inclusive which includes exploitation of a female by a female or of a male by a male or of a deceased body by an individual or of an animal by a human. The neglect shown towards homosexuals, animals and deceased bodies in the Bhartiya Nyaya Sanhita Bill, 2023 by not including the provisions of Section 377 dealing with unnatural offences has created a grey area in the Indian Penal Code, 1860. *Section 63* of this Bill delineate the term ‘Rape’ as a *Man* inserting his body part such as penis or any foreign object in a woman’s’ body.<sup>4</sup> According to the definition provided in the Bill, only a man can commit the heinous crime of rape and neglects the fact that a woman is also capable of committing rape as well.

### **1.1. OBJECTIVES OF STUDY**

The objectives of this research paper include a two- fold study which involves enlisting the anomalies in the Bhartiya Nyaya Sanhita Bill, 2023 along with providing solutions for a better legislation suitable to current Indian Socio- Legal situation.

### **1.2 RESEARCH METHODOLOGY**

The Author(s) have implied the *Doctrinal* form of Research methodology for the research work. The Author(s) have gone through the existing literature concerning the topic of research to frame arguments and arrive at the conclusion. The Autor(s) have provided suggestions on the basis of recent incidents and for the purpose of filling the cavity in the Bill.

## **2. THEORETICAL BACKGROUND**

### **2.1. HUMAN RIGHTS/ DIVINE RIGHTS**

The concept of Human Rights is often associated with Divine rights also known as Natural rights or God-given rights. A set of rights which are inherent to humans and which humans are entitled to are called human rights. This claim is based on the ground that these are the most basic and fundamental rights that a human should be entitled to due to him/her being born as a human being. The Fundamental Rights enlisted in *Part III* of the Indian Constitution have taken

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<sup>2</sup> Indian Penal Code 1860, § 377, No. 45, Acts of Parliament, 1860 (India).

<sup>3</sup> Replevin, Black’s Law Dictionary (10th ed. 2014).

<sup>4</sup> Bhartiya Nyaya Sanhita Bill 2023, § 63, No. 121, Acts of Parliament, 2023 (India).

inspiration from the concept of Human Rights only. The concept of Human Rights on the International level can be seen by taking the example of the Universal Declaration of Human Rights, 1948(UDHR), the biggest declaration on Human Rights in the modern era. Article 3 of this Declaration talks about the Right to Life which is one of the most important rights in the modern era.

## **2.2. DISCRIMINATION**

The minority community of the Homosexuals have evidently faced a lot of difficulties in the past for their rights and freedoms, and now without any provision for criminalising sexual offences against homosexuals in the new Bill introduced, it is a step forced backwards in the struggle of equality and the fight against discrimination. If this Bill becomes an Act, it simply puts homosexuals along with men, animals and dead persons in a situation where they stand without a criminal provision securing their right for sexual offences happening against them. The new Bill stomps upon the long hard-fought battles against the discrimination faced by the Homosexuals by not allowing them the right to fight against sexual offences.

## **3. ARGUMENTS ALONG WITH RESULTS/ FINDINGS**

### **3.1. CLAIM 1: No provision for Homosexuals and Necrophilia**

This paper claims that the neglect of Unnatural offences in the Bhartiya Nyaya Sanhita Bill, 2023 creates a massive cavity in the criminal law that governs India. Section 377 dealt with offences which are against the order of nature, which are usually very rare. But the gross inconsideration of this area of crime leads to these crimes going unpunished due to the absence of laws regarding these crimes. With the removal of law that deals with unnatural offences, this creates a situation wherein the offenders unfortunately get an upper hand as they would not be threatened without any legal restraint to commit such offences. This grave ignorance by the Indian legislature amounts to violation of Right to Equality against the whole community of homosexuals, men and women.

If a dead woman or a man is sexually exploited (*which earlier came under Unnatural offence*) commonly known as *Necrophilia*, the family of the sexually exploited deceased would not be having any provision from the Criminal law to file a criminal suit for penalising the offender. Whereas on the other hand, if a living female is sexually exploited or raped, the new Bill provides for proper channel and provision to go ahead with a criminal suit to punish the guilty offender. On the similar thread, an evident case of inequality can be seen in case of women and men, if any men are raped or sexually exploited, earlier a criminal suit could have been filed under the Section 377 of the Indian Penal Code but now there is no provision for males getting protection against rape or sexual

exploitation. An unnatural offence against any male, according to this new Bill is not a crime. Under Section 377 of the Indian Penal Code, if a person gets injured or receives injury by sexual exploitation of a person from the same- sex, it would fall under the ambit of this provision thus the injured person would get a remedy under Criminal law. But, since the provisions of Section 377 are not included in the new Bill, if any injury happens while same-sex intercourse, there is *no provision* for the injured person to get relief under the new Criminal Bill.

The recent cases of *Necrophilia* (sexual offences against dead bodies) in India are a concerning issue and the absence of any law in the New Bill governing this issue leads to a situation where providing justice to a dead person is insurmountable. One of the most infamous case of Necrophilia in India is the *Nithari Case* wherein more than fifteen girls were kidnapped, murdered and were raped (after being murdered), the guilty offender(s) was charged under Section 377 under Unnatural Offences for committing rape of dead women.<sup>5</sup> In a recent case, in 2020, a fifty year old male was arrested in Assam for having sexual intercourse with the corpse of a fourteen year old girl.<sup>6</sup> Cases like these are evidently present in India but due to absence of any proper provision regarding this, the offenders of these crimes will go unpunished. Therefore, provision regarding Necrophilia is a necessity and absence of this creates a vague situation for the concerned authorities to put these cases under any provision and due to situations like these, the victim is denied justice and the offender is often set free, without any restraint. This is in total contradiction of the aim of the Indian criminal law system, that is, to provide *Justice* to the victim.

### **3.2. CLAIM 2: No provision for Sexual offences against Animals**

Under Section 377 of the Indian Penal Code 1860, if any animal was sexually exploited or raped by any human being, the offender was to be charged under this section for the crime of Unnatural offence.<sup>7</sup> But in the new Bill introduced in the Lok Sabha, there is no provision for unnatural offence which includes sexual exploitation of animals. The absence of such a provision in the criminal law creates a vague area and creates ambiguity among the victims in case of such offences. In India, there is no such rule or provision which protects animals from sexual exploitation or rape other than Section 377 of the Indian Penal Code. But, with the introduction of this new Bill, the provision governing this area of crime has lost its base and this creates a cavity in the criminal law. If talked about judicial pronouncements, animals were considered as *legal persons* in the case of

<sup>5</sup> Psychopaths: An Unrevealed Area in Indian Judicial System, 4.1 NULJ 1 (2014)

<sup>6</sup> Amrtansh Arora, *Assam: Man digs up 14-year-old girl's dead body, tries to have sex with it*, India Today, May 21, 2020.

<sup>7</sup> Indian Penal Code 1860, § 377, No. 45, Acts of Parliament, 1860 (India).

*Karnail Singh and Ors vs State of Haryana*.<sup>8</sup> It was held by the Supreme Court in the case of *Animal Welfare Board of India v. A. Nagaraja & Ors* that compassion for all living creatures includes concern for their suffering and well-being. According to the interpretation of the Apex Court of India in this case, every animal has the right to life as same as any human and extended the *Right to Life* to the animals<sup>9</sup> as well and therefore it is the duty of the State to protect the animals from any sexual exploitation and rape but since the newly introduced Bill does not cover any such provision, it is simply disregarding the Supreme Court's direction pronounced in this case. The proposed Bill only talks about mischief by killing or maiming animals in Section 323<sup>10</sup> which is exhaustive in nature and therefore does not cover any sexual exploitation or rape of any animal. Other significant Legislations in India related to animal welfare and protection such as *The Prevention of Cruelty Act, 1960*, *The Wildlife Protection Act, 1972*, etc, also does not cover any such provision regarding sexual exploitation or rape of animals. In the case of *Navtej Singh Johar v. Union of India*, it was held by the Court that Section 377 is unconstitutional and it was partially struck down for the benefit of LGBTQ+ community and some part of it dealing with Sexual exploitation of Animals was kept alive.<sup>11</sup> The importance of Section 377 in this regard can be assessed through a recent incident wherein a drunk man of 50 years raped a cow in the Betul district of Madhya Pradesh on 19th March 2017, and this man was charged with Section 377 of the Indian Penal Code rather than any other act or provision.<sup>12</sup> Another case is when eight intoxicated men forcefully and brutally raped a goat in the Maroda village in Haryana, these offenders was also charged with Section 377 of the Indian Penal Code, 1860.<sup>13</sup> These instances depicts the significance of the Section 377 of the Indian Penal Code with regard to sexual exploitation and rape of Animals.

In present state, Indian legal system does not explicitly provide any law regarding *Bestiality*. India has been in this position for a long time now and it is the correct time to change it and bring amendment in this new Bill. In the International aspect, leading countries like Canada, USA and UK all have criminalised the offence of the Bestiality. In Canada, Bestiality is dealt by *Section 160* of the *Criminal Code of Canada* which criminalises this offence. In UK, the offence of

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<sup>8</sup> *Karnail Singh and Ors v. State of Haryana*, (2009) 16 SCC 798.

<sup>9</sup> *Animal Welfare Board of India v. A. Nagaraja & Ors*, (2014) 7 SCC 547.

<sup>10</sup> *Bhartiya Nyaya Sanhita Bill 2023*, § 323, No. 121, Acts of Parliament, 2023 (India).

<sup>11</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>12</sup> P Naveen, *Madhya Pradesh: Cow escapes from farmer's shed, gets 'raped' by drunk man*, *The Times of India*, Mar 27, 2016.

<sup>13</sup> Bodhisattva Ganguli, *Pregnant goat dies after being gang-raped by 8 men in Haryana*, *The Economic Times*, July 29, 2018.

Bestiality is tackled by the *Sexual Offences Act 2003* which also criminalises this unnatural offence. By not inserting any provision dealing with *Bestiality* in the new Bill, the Indian legislature has taken a step backward in the area of Animal Welfare.

### **3.3. CLAIM 3: Section 63 of the Bill not gender neutral**

According to Section 63 of the Bhartiya Nyaya Sanhita Bill, 2023, Rape is delineated as a crime wherein a *man* penetrates the body of a woman with his penis or any other body part or any other foreign object without the consent of a woman.<sup>14</sup> This definition is utterly vague and biased in favour of females, as it only mentions about an exclusive scenario wherein a man rapes a woman and totally neglects the possibility of a man getting raped. According to this whole Section, only a man is capable of committing rape and only a woman can get raped. This section as well as this new Bill as a whole is gender- biased in favour of females as it rules out the possibility of a man getting raped. By not making this Section gender neutral and by not adding any provision for unnatural offences, this Bill is entirely neglecting the likelihood of a male being raped by a woman or by another man. This Bill creates ambiguity and makes it unclear for the authorities to determine under which provision to file the chargesheet and charge the guilty offender (women raping other women or men). In the era where males getting raped is an escalating issue, with introduction of a new Bill, it was believed that this issue will be dealt with but the Bill stomps the rights and hopes of male victims getting raped. According to the recommendation of the *172nd Indian Law Commission*, in 2000, the rape laws should be framed in gender neutral manner,<sup>15</sup> wherein males are also protected from this gruesome offence of Rape, which was totally neglected. Before striking down Section 377 of the Indian Penal Code, rapes against men were reported under this provision but since 2018, India criminal law is functioning without any law for rapes against males. Cases of males getting raped shows the significance that Section 377 had in the sphere of criminal law in India. Section 377 of the Indian Penal Code earlier acted as an equaliser for the gender biased Rape provision of the Indian Penal Code, but since it has been declared unconstitutional by the Supreme Court of India, the rape laws governing India are entirely gender- biased towards females. These rape provisions in the Indian Penal Code, 1860 as well as in the Bhartiya Nyaya Sanhita Bill, 2023 are violative of *Article 14* of the Constitution of India. Article 14 guarantees Right to Equality to every Indian citizen<sup>16</sup> but the criminal laws regulating rape are gender biased towards females which is a clear

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<sup>14</sup> Bhartiya Nyaya Sanhita Bill 2023, § 63, No. 121, Acts of Parliament, 2023 (India).

<sup>15</sup> S. Rep. No. 198, (2000).

<sup>16</sup> Indian Const. Art. 14.

violation of the fundamental right of right to equality. Males are, according to the Rape laws, only capable of committing rape firsthand assuming them to be offenders and women can only be a victim in a rape case. But this is a misconception as males do get raped and women also are capable of raping a male, as is evident from recent cases, example is one such case of Jalandhar city of Punjab wherein four females after abducting a male raped him continuously before letting him go.<sup>17</sup> Cases like these depicts the importance of inclusion of two types of provisions in the Indian criminal law: firstly, gender- neutral laws for rape and secondly, laws for unnatural offences, for the protection of male community against rape and sexual exploitation. This makes the entire community of males question the Indian law- making bodies whether the gravity of Right to life and personal liberty of females is greater than the Right to life and personal liberty of males. The Bhartiya Nyaya Sanhita Bill, 2023 puts the male community in an ambiguous situation where males do not have any provision regarding rape committed against them by another male or a female. This Bill takes a backward step in regard to rights of adult males against sexual exploitation and rape.

#### **4. REASONING**

This paper contends that the introduction of the Bhartiya Nyaya Sanhita Bill, 2023 creates a grey area in respect to Unnatural offences against homosexuals, men, animals and women. The implication of not including the provisions that Section 377 of the IPC covered in the new Bill and by totally ignoring the crimes of unnatural nature, this Bill creates a vacant space in the area of Criminal law in the Indian subcontinent. The neglect of this area of crime substantially affects the Right to Life and personal liberty of the citizens of India. The question which arises is under which provision of the criminal law is where will the victim file a case if any unnatural offence takes place against him/her? What if a dead male/female is sexually exploited, where is the criminal remedy against the offender? All these questions have emerged after the introduction of the new Bill and the answers are not present in the newly introduced Bhartiya Nyaya Sanhita Bill, 2023.

#### **5. CONCLUSION & SUGGESTIONS**

After critically examining the Bhartiya Nyaya Sanhita Bill, 2023 and comparing and contrasting it with other Indian and International legislations, the Author(s) have arrived at the conclusion that the new Bill does not satisfy the needs and wants of the Indian citizens and this new Bill creates ambiguity among various

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<sup>17</sup> Nakshab Khan, *Jalandhar: Man alleges he was kidnapped, gang-raped by four girls in their 20s*, Mirror Now, Nov 24, 2022.

concerned implementing authorities. This new Bill introduced in the Lok Sabha is gender- biased in favour of females and neglects the rights of the male community as a whole. The Bhartiya Nyaya Sanhita Bill, 2023 is significantly required to undergo serious consideration and deliberations as necessary changes are required in this Bill. The Author(s) after judicial thinking suggest these amendments in the Bill along with certain policy changes; Section 63 of The Bhartiya Nyaya Sanhita Bill, 2023, which deals with Rape, should be reviewed upon again and should be made gender- neutral. The basis of this suggestion is the ecstatic increase in the number of cases involving males getting raped in India by females and other males. The Author(s) is of the view here that this is the perfect time to change the perception of the society about the males being the only rape offenders and females only being the victims of rape. The Author(s) suggests that provisions regarding same- sex rapes and for men being raped should be included in the new Bill. The Author(s) suggests that due to the growing cases of *Bestiality* in the Indian Subcontinent, there should be recognition given to this area of crime and stricter laws should be introduced in the Indian criminal justice system. The new Bill should be inclusive of the provisions dealing with the crime of Bestiality and should be properly defined in the definition clause followed by precise explanation of the crime along with punishment for the same. The Authors are of the opinion that the same pattern suggested for Bestiality should be followed in the case of Necrophilia as both these terms are not used commonly and common people are unaware of these terms and their meanings. Also, with regard to Section 377 of the Indian Penal Code, the Supreme Court in 2018 *partially struck down* provisions of this section and the non-consensual sexual acts performed on animals was upheld by the Apex Court.<sup>18</sup> Therefore, this provision should have been taken into consideration while framing the new Bill with respect to the directions of the Supreme Court.

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<sup>18</sup> Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.