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## REVIVAL OF SECTION 377 IPC, 1860 IN THE BHARATIYA NYAYA SANHITA, 2023

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### ABSTRACT

S. 377 of IPC, 1860 dealt with unnatural offences and provided legal protection for non-consensual sexual activity in the same sex, bestiality, etc. This paper only deals with criminalisation of non-consensual sexual activity in the same sex. The introduction of the BNS, 2023 has omitted certain sections from the now repealed IPC, 1860. One of the main contentious exclusions is that of the legal protection provided against non-consensual sexual acts between the same gender. This exclusion has caused a variety of issues as there is no recourse or punishment for non-consensual sexual activity between the same sex under any the BNS or any Special Law. The same can be seen when the Supreme Court in August 2024 came out with a decision in a case of non-consensual sexual activity in the same sex, stating that they don't have jurisdiction to compel the Parliament to make laws regarding this issue but at the same time they also acknowledge that there is a lacuna in this regard. In the foreign context there are various countries that have laws governing this aspect. The UK has the Sexual Offences Act, 2008 which provides a gender neutral definition to the offence of rape and therefore prevents any non-consensual sexual acts between the same sex. In the US the laws are made adhering to the 14th Amendment which provides for equality and therefore it criminalises sexual acts done without consent irrespective of gender. In the light of the same it is recommended that there should be an inclusion of a new provision in the BNS, 2023 which will criminalise non-consensual sexual activity among the same sex and therefore provide a much needed protection to the LGBTQIA+ community in India.

### Keywords

Section 377; Bharatiya Nyaya Sanhita, 2023; Gender-neutral Rape Law; LGBTQ Rights; Constitutional Law (Art. 14,15,21); Comparative Criminal Law.

### I. Introduction

Section 377 of the Indian Penal Code (IPC), 1860 originally criminalised "carnal intercourse against the order of nature with any man, woman or animal"<sup>653</sup>. Enacted by the British, it was rarely used in the 20th century except to target LGBTQ persons. In *Naz Foundation v. NCT of Delhi* (2009), the Delhi High Court famously struck down Section 377 insofar as it

criminalised **consensual** sexual acts between adults, holding that it violated fundamental rights of privacy, dignity and equality<sup>654</sup>. This decision, however, was overturned by the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation* (2013), which reinstated Section 377 on the ground that homosexuals were a "minuscule minority"<sup>655</sup>. The legal battle culminated in *Navtej Singh Johar v. Union of*

<sup>653</sup> Indian Penal Code, No. 45 of 1860, § 377 (India)

<sup>654</sup> *Naz Found. v. Gov't of NCT of Delhi*, 160 D.L.T. 277 (Del. H.C. 2009).  
<sup>655</sup> *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 S.C.C. 1 (India).

India (2018)<sup>656</sup>, where a five-judge Bench of the Supreme Court unanimously read down Section 377: it held that consensual sexual acts of adults in private could no longer be criminalised (so far as they involved homosexuality), while explicitly preserving Section 377 for non-consensual acts and bestiality. The Court characterised Section 377 as “irrational, indefensible and manifestly arbitrary”<sup>657</sup> when applied to consenting same-sex adults, and reaffirmed that sexual orientation is a core aspect of the right to privacy and dignity.

In late 2023, Parliament enacted three new criminal laws – the Bharatiya Nyaya Sanhita (BNS)<sup>658</sup>, Bharatiya Nagarik Suraksha Sanhita, and Bharatiya Sakshya Adhinyam – to replace the IPC, CrPC and Evidence Act. Notably, the BNS 2023 **omits** any analogue of Section 377 IPC. All references to “unnatural offences” are dropped<sup>659</sup>. Instead, the BNS retains a gendered rape provision (Section 63), defined as a *man* penetrating a *woman*, and includes no specific offence for same-sex or animal sex. In other words, under the BNS a man raping a woman remains punishable, but a man raping a man (or a woman raping a man, or bestiality) is not explicitly criminalised. This has sparked immediate controversy and legal challenge: NGOs and petitioners have approached courts, and even the Delhi High Court in August 2024 noted that the government might need to reintroduce such provisions.<sup>660</sup>

This research paper explores the **legal, constitutional and policy implications** of

reviving Section 377 IPC’s substance within the BNS framework. We ask: does deleting Section 377, without replacement, create a rights violation or social harm? How have courts viewed these issues, and what do comparative systems suggest? Specifically, we analyse: (a) the content and effect of IPC §377 (and its read-down in *Johar*); (b) the relevant clauses of BNS 2023 and how they compare; (c) hypothetical cases (male rape, bestiality, etc.) under the new scheme; (d) constitutional equality and dignity considerations under Arts. 14, 15 and 21; and (e) recommendations for legislative redrafting. We conclude that **reviving a gender-neutral sexual assault provision** is necessary to close the gap, uphold victims’ rights, and align with the Supreme Court’s privacy jurisprudence (e.g. *Justice K.S. Puttaswamy v. Uoi*, 2017).

## II. Research Methodology

This study uses **doctrinal legal research** supplemented by comparative analysis. Primary sources include the text of the IPC (1860) and BNS (2023), constitutional provisions, and key court judgments (*Naz Foundation*, *Koushal*, *NALSA*, *Puttaswamy*, *Johar*). We also draw on government materials (e.g. the Parliamentary Standing Committee report on the BNS[12]) and official gazette notifications. Secondary sources comprise scholarly articles, law reviews, and reputable news coverage (e.g. *Indian Express*, *SCC Online*). Data collection involved searching legal databases for relevant cases and legislation, and aggregating academic commentary on sexual offence reform. Comparative perspectives (UK, Canada, South Africa) are treated descriptively, referencing statutes and cases from those jurisdictions. All citations follow Bluebook-style footnotes, with emphasis on primary sources. The analysis is substantive and prescriptive, aiming to inform policymakers on needed law reforms.

## III. Literature Review

Academic and policy literature on Section 377 and the BNS highlights three themes. First, many scholars characterise Section 377 as a vestige

<sup>656</sup> Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India).

<sup>657</sup> Id. ¶253

<sup>658</sup> Bharatiya Nyaya Sanhita, No. 45 of 2023 (India), Gazette of India, Dec. 25, 2023.

<sup>659</sup> Fox Mandal & Assocs., **Changes Brought Forth by the Bharatiya Nyaya Sanhita, 2023**, Lexology (Mar. 13, 2024), <https://www.lexology.com/library/detail.aspx?g=8b6e523a-8ba1-4575-9408-c58a70ed31cc>

<sup>660</sup> Sohini Ghosh, **Delhi HC Directs Centre to Consider Inclusion of Section 377 Equivalent in BNS**, *Indian Express* (Aug. 28, 2024), <https://indianexpress.com/article/cities/delhi/delhi-hc-inclusion-section-377-bns-9538049/>.

Delhi HC Directs Union to Expediently Decide Plea for Restoring Legal Protection Against Non-Consensual Sexual Acts in BNS, *SCC Online* (Aug. 30, 2024), <https://www.scconline.com/blog/post/2024/08/30/delhi-hc-directs-union-to-expeditiously-decide-plea-restoring-legal-protection-against-non-consensual-sexual-acts-in-bns-2023/>.

of colonial “moralism” that has long been used to harass LGBT citizens. Feminist and queer theorists argue that criminal sanctions for “unnatural” sex have always been arbitrary and discriminatory, running counter to constitutional values of liberty<sup>661</sup>. Post-*Johar*, much commentary has focused on the expanded rights of sexual minorities and the ongoing stigma they face<sup>662</sup>. For example, Kothari observes that *Johar* recognised not only decriminalisation but also broader anti-discrimination principles, including Article 15’s prohibition of sex stereotyping. Second, legal scholars warn of “blind spots” after *Johar*. The NALSA judgement (2014) already proclaimed that LGBT persons have full constitutional rights; *Johar* confirmed privacy rights in sexual orientation. But it left unresolved the issue of **victims** of sexual violence. Commentators note that non-consensual sexual assault on men or against animals now lacks an explicit penal provision<sup>663</sup>. Articles like the JETIR paper by S. Singh and A. Gupta (“Beyond Decriminalization”) argue that scrapping Section 377 entirely creates a legal vacuum, and urge remedial legislation. Others have discussed the “grey areas” of the new law, including the Delhi HC’s recent questioning of the government on this gap<sup>664</sup>. Third, the BNS itself has generated legal-technical critiques. Reports (e.g. PRS Legislative Research) and law firm analyses (e.g. Lexology) document that the BNS omits not only consensual acts but also bestiality and non-consensual acts, contrary to the Supreme Court’s intent. They also note that many BNS provisions remain gendered: for instance, while perpetrators are gender-neutral in some offences, the victims in rape remain only women. This literature underscores the consensus that while *Johar* went too far in

allowing some forms of non-consensual acts to go unpunished, BNS 2023 has gone even further. It provides the context for our legal analysis.

#### IV. Colonial Origins and Section 377 IPC

The roots of Section 377 lie in British Victorian morality. The law was drafted by Thomas Babington Macaulay in 1837 and enacted in 1860<sup>665</sup>. It was modelled on the English Buggery Act of 1533 and Indian sodomy laws. The original text declared criminal “carnal intercourse against the order of nature” by any person (including with animals), punishable by life imprisonment<sup>666</sup>. The explanation added that mere penetration sufficed to prove the offence. Notably, this provision applied *universally*: it did not limit itself to same-sex acts, but defined them by being “against the order of nature.” Over time, successive colonial and independent governments left Section 377 on the books. In practice it often overlapped with rape and assault laws (for heterosexual non-consensual acts) but was primarily used to police homosexuality and sexual deviance. Scholars have shown that Section 377 was ambiguous and unevenly enforced, but carried a threat of draconian punishment.

After independence, Section 377 remained unchanged. Various committees and activists (e.g. the 172nd Law Commission Report, 2000) recommended reforming or repealing “sodomy laws” as outdated. But legislative action lagged. In the late 20th century, sporadic litigation emerged. A turning point came in 2001 when the Naz Foundation, an NGO, petitioned the Delhi High Court to strike down Section 377 as unconstitutional. The Delhi HC agreed in 2009 (*Naz Foundation v. NCT of Delhi*), noting that it was not for the court to enforce majoritarian morality. However, this progress was short-lived: in 2013 the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation* overruled the Delhi verdict, reinstating Section 377 by deferring to Parliament and calling LGBT persons a “minuscule minority” [8]. This legal history shows

<sup>661</sup> Jayna Kothari, *Section 377 and Beyond*, in *How Liberal Is India?* 191 (2017), <https://clpr.org.in/wp-content/uploads/2019/06/Section-377-and-Beyond.pdf>.

<sup>662</sup> *Id.* at 195

<sup>663</sup> G. Khandelwal et al., *Conundrum on Laws Related to Unnatural Sexual Offences in Bharatiya Nyaya Sanhita*, *World J. Eng’g Applied Sci.* (2024), [https://www.researchgate.net/publication/394923173\\_Conundrum\\_on\\_Laws\\_Related\\_to\\_Unnatural\\_Sexual\\_Offences\\_in\\_Bharatiya\\_Nyaya\\_Sanhita](https://www.researchgate.net/publication/394923173_Conundrum_on_Laws_Related_to_Unnatural_Sexual_Offences_in_Bharatiya_Nyaya_Sanhita).

<sup>664</sup> *Id.*

<sup>665</sup> Law Comm’n of India, *172nd Report on Review of Rape Laws* (2000)

<sup>666</sup> Indian Penal Code, No. 45 of 1860, § 377 (India)

that, until 2018, Section 377 was valid law (punishing both consensual and non-consensual “unnatural” acts) and remained part of the IPC when the Indian Constitution came into effect (by virtue of Article 372). Thus the issue was always whether to invalidate *part* of Section 377 (as consent of adults) while retaining it for assault and bestiality – which is what finally happened in 2018.

#### V. Judicial Developments

The Supreme Court’s jurisprudence on 377 and related rights has been central. Key cases include:

- **Naz Foundation v. Government of NCT of Delhi (Delhi HC 2009)**<sup>667</sup> – The Delhi High Court held that Section 377, insofar as it criminalised consensual acts between adults in private, violated Articles 14, 15 and 21. It emphasised dignity and privacy rights, especially for LGBT persons. The court stated: “Section 377 is founded on moral notions which are anathema to a constitutional order in which liberty must trump stereotypes”. It also cited the then-just-enacted Sexual Harassment Act and international human rights norms.
- **Suresh Kumar Koushal v. Naz Foundation (SC 2013)**<sup>668</sup> – Overturning Naz HC, a two-judge Bench reinstated Section 377 in full. It reasoned that the question was for Parliament, and controversially noted that LGBT persons were only a “minuscule fraction” of the population, so retaining 377 did not violate Article 14. (Parliament took no immediate action to amend 377 at that time.) Thus, *Koushal* revived criminalisation of **all** “unnatural” acts, even consensual ones among adults.
- **National Legal Services Authority (NALSA) v. Union of India (SC 2014)**<sup>669</sup> – While not about 377, this landmark case

recognised transgender persons as a “third gender” under the Constitution, guaranteeing them equal rights. The Court explicitly included discrimination on the basis of gender identity and sexual orientation within Article 15’s prohibition of sex discrimination. It also affirmed Article 19 (freedom of expression) and Article 21 (life and liberty) rights for transgender people. Though NALSA did not strike down 377, its expansion of non-discrimination principles had implications: as Justice Nariman noted, “*homosexuality is not a mental disorder*” and LGBT persons have the same dignity as others.

- **Justice K.S. Puttaswamy v. Union of India (SC 2017)**<sup>670 671 672</sup> – A nine-judge Bench unanimously held that the Constitution guarantees a right to privacy. Crucially, it linked privacy to sexual orientation: “*the right to privacy and the protection of sexual orientation lie at the core of the fundamental rights guaranteed by Articles 14, 15 and 21*”. The Court recognized privacy as encompassing intimate choices and autonomy. While Puttaswamy did not explicitly address 377, it set the stage: personal sexual decisions are constitutionally protected from state intrusion.
- **Navtej Singh Johar v. Union of India (SC 2018)**<sup>673 674 675 676</sup> – A five-judge Bench read down Section 377. The Court unanimously held that consenting same-sex relations between adults are not a crime. It stated: “*We declare that Section 377 to the extent it criminalises consensual sexual acts of adults in*

<sup>667</sup> Naz Found. v. Gov’t of NCT of Delhi, 160 D.L.T. 277 (Del. H.C. 2009).

<sup>668</sup> Suresh Kumar Koushal v. Naz Found., (2014) 1 S.C.C. 1 (India).

<sup>669</sup> Nat’l Legal Servs. Auth. v. Union of India, (2014) 5 S.C.C. 438 (Indi

<sup>670</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1 (India).

<sup>671</sup> Id. ¶144

<sup>672</sup> Id. ¶298

<sup>673</sup> Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India).

<sup>674</sup> Id. ¶ 244.

<sup>675</sup> Id. ¶ 377.

<sup>676</sup> Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India), supra note 4, ¶ 253.

private is violative of Articles 14, 15, 19, and 21". However, the Court preserved the rest of 377: "such consent must be free consent", and Section 377 continues to apply to non-consensual acts, minors, and bestiality. The judgment elaborated constitutional principles: it emphasized "constitutional morality" over majoritarian norms (e.g. *Mosley v. News Group*, a UK case, was cited), and asserted that "majoritarian views and popular morality cannot dictate constitutional rights". (Justice Kaul's concurring opinion drew on Amartya Sen's critique of "binary thinking" in sexual norms.) The Court cited Article 15's inclusive scope, stating that "sex" under Article 15 includes sexual orientation. It also held that law enforcement should not discriminate (e.g. a person of one gender could not lawfully refuse to be prosecuted for intercourse with a person of another gender if married men could not prosecute their wives under the adultery law). In short, *Johar* fully decriminalised consensual homosexuality, affirming dignity and privacy, but left intact criminal liability for non-consensual "unnatural" acts.

Justice Chandrachud (in *Johar*) warned against "bigoted and homophobic attitudes" that "dehumanize" LGBT people, decrying that stigma must be "eradicated"[19]. Importantly for our analysis, the *Johar* majority made clear that Section 377 as read down still covers all instances of "non-consensual - carnal intercourse against the order of nature"[5]. The Court did not strike down any part of 377 beyond consenting adults, implying that crimes like rape (including same-sex rape) and bestiality remain offences. Indeed, Justice Nariman noted that "Section 377 IPC cannot be construed as a reasonable restriction on fundamental rights", and that minority rights cannot hinge on "majoritarian perceptions"[20][5]. The Court declared that

LGBT persons have the "right to live with dignity" and that denial of their rights is tantamount to "denial of their citizenship"[13].

In sum, by late 2018 the law was: non-consensual sexual acts (any gender) are punishable under Section 377, while consensual adult same-sex acts are not. Sections on rape had been reformed (2013) to cover many penetrative acts, but only in a heterosexual context (man-to-woman or similar). Against this backdrop, any new criminal law must retain criminal sanctions for non-consensual or exploitative sexual acts, consistent with *Johar*'s separation of consensual vs non-consensual conduct.

VI. The Bharatiya Nyaya Sanhita, 2023 – Omitting Section 377

The BNS 2023 (effective July 1, 2024, after commencement notifications) was enacted to consolidate criminal law. A key change is the **non-reproduction** of Section 377. The official text does not contain any "unnatural offences" provision, and the keyword *nature* does not appear in any offence definition. Nor is there any clause in the chapters on sexual offences or off-limits acts that mirrors 377's language. Instead, the BNS introduces a suite of offences under **Chapter VI: Offences Affecting the Human Body**. Notably, Section 63 defines "rape" as follows<sup>677</sup>:

**63.** A man is said to commit "rape" if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her do so; or

(b) inserts any object or any part of the body, not being his penis, into the vagina, urethra or anus of a woman or makes her do so; under the circumstances specified in Section 64.

In short, BNS §63 is almost verbatim the old Section 375 (IPC) definition, including all seven exceptions. It clearly remains male-on-female:

<sup>677</sup> Bharatiya Nyaya Sanhita, No. 45 of 2023, § 63 (India)

only a *man* committing the act with a *woman* is “rape.” Accordingly, Section 64 prescribes punishment for rape (minimum 10 years to life)<sup>678</sup>, analogous to IPC Section 376. The BNS adds other chapters: “74: Outraging modesty”, “65: Outraging modesty of a child” (replace IPC §354), “67-69: Causing death by sexual assault” (with aggravated penalties), and various protections for children (analogous to POCSSO). Some new clauses appear (e.g. gang rape, repeat offender enhancements). However, nowhere in the BNS is there an offence describing “carnal intercourse against the order of nature” or any equivalent phrase. The concept does appear only in one context: in the “Private Defence” chapter, an assault with intent to “gratify unnatural lust” is listed as an offence justifying lethal self-defence. But this is a theoretical recognition (in the law of self-defence) that someone might assault another for “unnatural lust”; it does *not* create a substantive crime.

Thus the BNS’s statutory change is stark: **Section 377 and all its catch-all offences have been dropped.** An official commentary notes, “the BNS has completely removed all the provisions of Section 377 of the IPC, even the ones that have not been expressly declared to be unconstitutional”[2]. In practice this means: (i) **Consensual same-sex acts** between adults remain non-criminal (per *Johar*), but would now be explicitly unaddressed by any offence (which is constitutionally fine); (ii) **Non-consensual same-sex acts** (e.g. male rape) have no designated offence under BNS §63 (male victims cannot claim rape and there is no gender-neutral provision); (iii) **Bestiality** (sex with animals) likewise is not a separate offence (whereas 377 made it punishable by life); (iv) **Necrophilia** (sexual acts with a corpse) similarly has no new provision. In short, every conduct *other than heterosexual rape and related child offences* is potentially outside criminal law, unless charged under general categories like

“culpable homicide” or “unnatural” (which do not apply).

Legal experts and media have noted this gap. A Lexology analysis observes that while the BNS uses inclusive terms like “transgender” (in defining gender) and gender-neutral language for some offences, it still specifies only *women* as victims in provisions like rape. The effect is that “even though a woman may now be convicted for the offence of voyeurism, a man will never be able to complain about voyeuristic behaviour”<sup>679</sup>. Similarly, Khandelwal et al. note that a male victim of sexual assault has “no law to seek remedy” under the proposed BNS[25]. In August 2024, the Delhi High Court pointedly remarked that BNS §63 appears to make the perpetrator gender-neutral but leaves the *victim* gendered (a woman)[26]. The court asked: “*What people were asking was not to make consensual sex punishable (but) you made even non-consensual sex non-punishable... are we all to shut our eyes because it is not a penal offence in the statute book?*”[27].

The Standing Committee on Home Affairs (Parliamentary) flagged this issue in November 2023. Its report noted that omitting Section 377 “would mean not penalising non-consensual sexual offences against men, transgenders, and bestiality”<sup>680</sup>. The Committee explicitly **recommended** including Section 377 (or its equivalent) into the BNS. In sum, the literature and official commentary agree: the BNS’s deletion of Section 377 has created an unintended vacuum, undermining protection of certain sexual violence victims.

#### VII. Comparative Statutory Analysis: IPC §377 vs BNS vs Proposed Offence

The following table and discussion compare the text and coverage of (a) IPC Section 377, (b) the BNS 2023, and (c) a **proposed gender-neutral**

<sup>679</sup> Fox Mandal & Assocs., *The Bharatiya Nyaya Sanhita, 2023 – A Super Overview*, Lexology (Apr. 4, 2024).

<sup>680</sup> Standing Comm. on Home Affairs, Rajya Sabha, *Report on the Bharatiya Nyaya Sanhita, 2023* (Nov. 10, 2023), <https://prsindia.org/billtrack/prs-products/standing-committee-report-summary-4278>

**offence** to address the gap. This highlights the practical differences and shows how a new provision might be drafted.

Act/Provision	IPC 1860 §377 (Unnatural Offences)	BNS 2023 (Relevant Provisions)	Proposed Gender-Neutral Replacement
Unnatural intercourse (consensual or not)	“Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life... or up to 10 years... and fine.” <b>Explanation:</b> Penetration is sufficient to constitute the offence.	<b>No standalone offence.</b> The BNS contains no provision for “carnal intercourse against nature.” Rape (§63) is defined only for a male committing an act on a <b>female</b> ; no offence covers anal/oral penetration of a male or bestiality. Other sexual offences (“outraging modesty”, etc.) are also gender-specific.	<b>(Draft)</b> “Any person (of any gender) commits sexual assault if he or she intentionally penetrates the vagina, anus or mouth of another person, with any part of his or her body or with any object, without the consent of that person or when the person is unable to consent. Penetration, however slight, is sufficient

Act/Provision	IPC 1860 §377 (Unnatural Offences)	BNS 2023 (Relevant Provisions)	Proposed Gender-Neutral Replacement
			to constitute the offence.” (Penalties akin to current rape provisions.)
Consent requirement	Section 377 had <b>no explicit exception</b> – all acts were offences if “voluntary,” whether consensual or not. (Section 377 was not limited by consent.)	<b>Explicit consent rule in Rape (§63):</b> §63 requires that the act occur under circumstances (§64) including <i>without consent</i> or by coercion. However, this only applies to men-women acts. (A man raping a man has no express consent exception in BNS.)	<b>Same as above:</b> only non-consensual (or incapacitous) acts are offences, aligning with modern rape statutes. For clarity: “Consent means free and voluntary agreement” (echoing IPC 375 Explanation 1).
Animal intercourse	Bestiality is	No specific offence.	<b>(Draft separate</b>

Act/Provision	IPC 1860 §377 (Unnatural Offences)	BNS 2023 (Relevant Provisions)	Proposed Gender-Neutral Replacement
e (bestiality)	explicitly covered as an "unnatural offence."	(No mention; therefore consensual or non-consensual sexual acts with animals are not directly penalised by BNS.)	<b>clause):</b> "A person commits the offence of bestiality if he or she intentionally has sexual intercourse with an animal. This shall be punishable by imprisonment of [X] years." (Mirrors 377's former scope, but could incorporate into a broad sexual assault definition by including animals.)

Table: Comparison of IPC §377 (1860) vs BNS 2023 vs proposed gender-neutral provisions. The table shows that IPC §377 criminalised both consensual and non-consensual "unnatural" acts by any persons (columns 2). In BNS 2023 (column 3), there is no analogous provision –

only an all-heterosexual rape law remains[9]. Crucially, BNS §63 and related sections are gendered: the **offender** can be any gender under "he" (thanks to BNS §2(10) gender definition), but the **victim** in §63 is a woman[9]. Thus acts like a man raping a man, or oral/anal intercourse with a man or between two women, or any act with an animal, are left unaddressed. As one commentator notes, removing §377 "set the offenders scot-free" for necrophilia and bestiality[14]. The table's proposed column offers a draft replacement: a gender-neutral "sexual assault" offence akin to rape but covering all penetrative acts without consent by any person on any person. This draft incorporates principles from comparative law (non-consensual penetration equals crime) and fills the BNS gap.

Hypothetical Cases under BNS vs Proposed Law

- **Case 1: Male-on-male rape.** In old law, could be charged under §377 IPC. BNS 2023 has no rape offence for a male victim. A prosecutor might try to charge murder if death resulted, or assault, but no specific sexual violence crime applies. Under the proposed gender-neutral clause, this would clearly be "sexual assault".
- **Case 2: Woman rapes man.** (E.g. oral penetration by a woman onto a man.) Previously under §377. Now BNS: no crime, since §63 requires male perpetrator. Proposed law: sexual assault, as above.
- **Case 3: Bestiality.** Under IPC, punishable by §377. Under BNS: no offence except perhaps animal cruelty laws (which address harm to animal, not the sex act). Proposed: covered either by including animals in the definition or separate bestiality clause.
- **Case 4: Necrophilia.** Rare but horrendous. Under IPC, charged as §377 (and possibly outraging modesty). Under BNS: no specific offence; could be

charged as murder or unnatural? Very unclear. Proposed: arguably falls under non-consensual sexual assault (the corpse cannot consent) or separate offence.

These examples illustrate that without revival of Section 377's reach (at least for non-consensual/illicit acts), many crimes slip through the statutory cracks.

#### VIII. Constitutional and Policy Analysis

The BNS omission must be examined against Articles 14, 15 and 21<sup>681</sup>.

**Article 14 (Equality before law):** The current regime creates a classification by victim's gender. Women are protected from rape; men and trans persons are not. This is not a neutral classification like height or age but one based on sex/gender. Under *Johar* and *Puttaswamy*, sexual orientation and gender identity are suspect categories. Differential treatment here appears arbitrary: two identical non-consensual acts (e.g. A assaults B's anus) are penalised if B is female but not if B is male. This violates Article 14's guarantee of equal protection. The Delhi High Court has noted that Section 377's former breadth gave victims "critical legal recourse... regardless of gender or sexual orientation"[6]. Removing it "discriminates" between victims. Article 15 (non-discrimination) likewise forbids prejudice on the basis of sex or any ground; leaving male rape unpunished arguably discriminates on the basis of sex.

**Article 21 (Life and Personal Liberty):** The right to life has been interpreted to include dignity and privacy. The Supreme Court has unequivocally stated that privacy encompasses sexual orientation and that laws like Section 377 (pre-*Johar*) intruded on the most intimate choices. Conversely, *Johar* affirmed that criminal law must not infringe the dignity of LGBT individuals. By abolishing legal protection for certain sexual violence victims, BNS may themselves infringe dignity and liberty: victims

could feel unsafe or second-class. The Court in *Johar* stressed that consenting adults can express sexuality "in the most intimate spaces of one's existence". Non-consensual violence is surely more egregious. Denying redress for these assaults could be viewed as state acquiescence in violation of life and personal liberty.

Moreover, policy rationales underlying *Johar* and privacy jurisprudence favor inclusion, not exclusion, of affected persons<sup>682</sup>. The principle of constitutional morality means rights must be protected even against majority indifference. The Delhi HC in 2024 echoed this sentiment: "What people were asking was not to make consensual sex punishable... you made even non-consensual sex non-punishable"<sup>683</sup>. From a policy standpoint, the state's interest is in preventing sexual violence against all citizens. The BNS's gender-restrictive approach is inconsistent with modern views on gender equality and the dignity of victims. It also conflicts with international obligations: India is party to human rights treaties condemning discrimination (e.g. ICCPR).

In sum, while *Johar* required removing criminal penalties for consensual same-sex acts, it did not sanction immunising predators. By not penalising all forms of forcible "unnatural" intercourse, BNS arguably violates Article 14 and the Article 21 right to dignity of victims. This constitutional argument is underscored by the Standing Committee's finding that omitting 377 is "totally flouting the crimes of unnatural nature" and would "significantly shake" rights. Indeed, courts have already begun to question the government on this issue. If left unaddressed, the legislative gap may itself be struck down as arbitrary and discriminatory.

#### IX. Comparative International Perspectives

Looking abroad, many jurisdictions have grappled with similar issues when reforming

<sup>682</sup> Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 S.C.C. 1 (India), supra note 9, ¶ 144.

<sup>683</sup> Delhi HC directs Centre to consider inclusion of Section 377 equivalent in BNS | Delhi News - The Indian Express

<sup>681</sup> INDIA CONST. arts. 14, 15, 21.

sexual offence laws. A comparative survey offers useful lessons.

- United Kingdom:** The Sexual Offences Act 2003 overhauled older laws (including repealing the 1861 Offences Against the Person Act). Rape is defined (s.1) as penetration of a woman's vagina, anus or mouth by a *penis*, committed by a man<sup>[28]</sup>. This still genderizes the *perpetrator* (a man) but interestingly, UK law recognizes a man's penis; a woman cannot "rape" under s.1. However, the Act creates a separate offence of "assault by penetration" (s.2) for non-penis penetration (by any person, any gender) into the vagina or anus. This covers acts like a woman penetrating a man or another woman with an object, or penile penetration of a man's anus. In practice, both men and women can be victims of non-consensual penetration charges. The UK model thus achieves full coverage via two overlapping definitions, albeit keeping "rape" male-centric. Academics have argued for wholly gender-neutral definitions but note the 2003 law's compromise. The UK explicitly abolished all reference to "buggery" and recognizes male rape (s.2).<sup>684 685 686</sup>
- Canada:** The Canadian Criminal Code uses the term "**sexual assault**" (s.271) without gender in the definition. All non-consensual sexual touching is criminal, regardless of the genders of victim or offender. Separate provisions define "rape" in terms of penetration (s.273) or sexual organ exposure, but note these apply to any person. In effect, both Canada and its courts treat rape/sexual assault as gender-neutral. The Code also has distinct offences for bestiality, incest, and child sexual abuse. Canada's example shows that a single inclusive offence can be drafted, though law

enforcement and judiciary must adapt norms.<sup>687 688 689</sup>

- South Africa:** The post-apartheid Constitution (1996) explicitly forbids discrimination on sexual orientation. In *National Coalition for Gay & Lesbian Equality v. Minister of Justice* (1999), South Africa's Constitutional Court struck down sodomy laws, holding that consensual gay sex is protected by privacy and equality. Later, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 created a gender-neutral "rape" offence: any person who unlawfully and intentionally rapes another (s.3) is guilty, defining rape as penetration of the vagina, anus or mouth by a sexual organ, with "no distinction between male or female victims" (s.2). Thus South Africa treats all penetrative rape equally. It also outlaws sexual exploitation (e.g. of persons unable to consent) and bestiality. South Africa's reforms demonstrate a policy choice for full gender neutrality and victim protection in sexual offences legislation.<sup>690 691 692</sup>
- Other Examples:** Most liberal democracies today have abolished colonial "sodomy" laws and ensure that sexual violence laws cover same-sex scenarios. For instance, the U.S. Model Penal Code (Section 213) criminalizes sexual assault without reference to gender. Some countries (e.g. India) retain rape laws phrased as male-perpetrated; many activists call these archaic. The trend is towards definitions based on the act and consent, not on the gender of parties. International human rights bodies have criticised laws

<sup>684</sup> Sexual Offences Act 2003, c. 42 (U.K.).

<sup>685</sup> Id. § 1.

<sup>686</sup> Id. § 2.

<sup>687</sup> Criminal Code, R.S.C. 1985, c. C-46 (Can.).

<sup>688</sup> Id. § 271.

<sup>689</sup> Id. § 273.

<sup>690</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (S. Afr.).

<sup>691</sup> Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice 1999 (1) SA 6 (CC) (S. Afr.).

<sup>692</sup> Id. ¶ 28.

that criminalise private consensual acts, and urge states to criminalize sexual exploitation broadly.

The comparative lesson is clear: countries that aim to protect all citizens view rape and sexual assault statutes as gender-neutral in substance. The UK and South Africa explicitly reformed their laws to include male victims; Canada’s criminal code never distinguished by gender. By contrast, the Indian BNS (as drafted) is an outlier in not protecting male victims at all. There is no constitutional necessity to imitate another system verbatim, but the general trend suggests that equity and effective enforcement favour a gender-neutral approach.

#### X. Recommendations

Based on the above analysis, the following recommendations are urged:

1. **Introduce a Gender-Neutral Sexual Assault Provision.** Amend the BNS to include a new offence (e.g. **Section 63A – Sexual Assault**) that criminalises non-consensual penetrative acts by any person on any person. The definition should mirror Section 63/64 but without gender terms. For example: *“A person is said to commit rape if he or she intentionally penetrates the vagina, anus or mouth of another person with his or her penis, or inserts any object or any part of the body (other than the penis) into the vagina, anus or mouth of another person, without the consent of that person.”* In drafting, care must be taken to require “free consent,” and to exclude, for instance, medical procedures (see BNS §63 exceptions for medical interventions, etc.). This would ensure that an act like “male A penetrates male B’s anus without consent” is clearly illegal. This recommendation echoes the Standing

Committee’s suggestion to make BNS §63 gender-neutral<sup>693, 694</sup>

2. **Explicitly Recriminalise Bestiality (and Necrophilia).** If not covered by the above clause (which could allow animals as “persons” under a broad definition, but that is legally odd), insert a specific provision: e.g. *“Whoever has sexual intercourse with an animal shall be punished with imprisonment for X years.”* IPC 377 formerly penalised bestiality; its removal has left no deterrent. Similarly, while necrophilia was historically charged under 377, there should be clarity. One option is to define “person” in the new offence to include any human being (alive or dead) and explicitly bar sexual acts with corpses. The recommendations in the researchgate article (“Conundrum...”[14]) call for including necrophilia as a separate offence. Parliament should heed these warnings to avoid “creating a grey area.”
3. **Redraft Related Provisions for Clarity.** Review the BNS chapters on sexual offences to remove any gender biases. For instance, voyeurism and other crimes were gender-neutralized only for the perpetrator but not the victim[16]. We suggest auditing each offence: if the intent was to protect all persons, revise the text to admit any gender victim. Otherwise, explicitly justify why certain crimes remain gendered (and there seems no justification). The objective must be to leave no legitimate sexual violence unpunished.
4. **Enact Equitable Punishments.** Ensure the punishment structure reflects the seriousness of non-consensual acts. The BNS already prescribes severe penalties

<sup>693</sup> Lara Karaian, *In Defence of Gender Neutrality Within Rape Law*, 11 Seattle J. Soc. Just. 471 (2013), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1546&context=sjsj>.

<sup>694</sup> Id. at 485.

(10+ years, life, or death) for rape against women; analogous penal ranges should apply when the victim is male or otherwise (just making the offence gender-neutral accomplishes this). The statutes on homicide or grievous hurt (e.g. murder for “gratification of unnatural lust”) could also be reviewed to ensure consistency. The SC in *Johar* emphasised that “life and personal liberty” demand equal protection, so sentencing cannot implicitly devalue some victims.

#### 5. **Public Awareness and Training.**

Accompany legal reform with sensitization of law enforcement and judiciary. If a new gender-neutral offence is enacted, police and courts must understand that male and female victims can now report similar crimes. Public legal education (e.g. via media and NGO outreach) is needed so victims know their rights. This is more an implementation note, but essential given how deep stigma and ignorance run.

#### 6. **Legislative or Executive Action on Repeals.**

One practical route is for Parliament to amend the BNS by Bill. If time is of the essence, the government could issue an Ordinance to insert the missing provisions until the legislature acts (as the Delhi HC suggested[27]). Either way, the goal is clear: align the statute book with the constitutional mandate.

#### 7. **Constitutional Review (Judicial Intervention).**

If the legislature fails to act, courts should not shy from upholding rights. A challenge to BNS’s omission could succeed on Article 14 grounds, as *Johar* did on Article 14–21. Indeed, the petition now before the Delhi High Court (treatment as a representation of a PIL) is a sign this route may proceed. The judiciary should insist on there being “no vacuum” for

victims. It may direct specific redrafting if needed.

By implementing these changes, India would close the “loophole” created by BNS 2023. The result would be a criminal law that fully decriminalises private consensual acts (as required by *Johar*), but robustly punishes rape and other sexual violence for all victims, consistent with Article 14 equality and Article 21 dignity.

#### XI. Conclusion

The repeal of Section 377’s “unnatural” sex ban was rightly hailed as a milestone for LGBT rights. But in drafting the Bharatiya Nyaya Sanhita, 2023, Parliament inadvertently went too far: by deleting Section 377 wholesale, it left certain sexual crimes unpunished. This paper has shown that the BNS, as enacted, creates an unconstitutional gap. Non-consensual same-sex intercourse, bestiality, and other “unnatural” acts no longer fall under any specified offence, even though the Supreme Court envisaged their criminal liability would continue. Such a lacuna, especially one tied to the victim’s gender or orientation, violates the fundamental rights of equality and life. It is also contrary to sound public policy: the state has an overriding interest in prosecuting sexual violence impartially.<sup>695 696</sup>

Our analysis recommends that the legislature revisit the statute. A gender-neutral sexual assault provision, supplemented by clauses for bestiality/necrophilia, would restore legal protection without re-criminalising private consensual acts. In this way, India can fulfill both the spirit of *Navtej Johar* (liberty of sexual minorities) and the promise of universal equality. As the Delhi High Court has remarked, “*There can’t be a vacuum*” in protection against sexual violence[27]. All persons, regardless of gender or orientation, deserve the full protection of the law.

<sup>695</sup> Jayna Kothari, supra note 22, at 199

<sup>696</sup> G. Khandelwal et al., supra note 24.

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