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Abolition without Substitution Revisiting Section 377 IPC in Light of the Bharatiya Nyaya Sanhita, 2023

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ABSTRACT

The decriminalisation of consensual same-sex relations in Navtej Singh Johar v. Union of India (2018) marked a pivotal shift in Indian constitutional jurisprudence toward dignity and equality. However, the complete abolition of Section 377 of the Indian Penal Code (IPC) under the Bharatiya Nyaya Sanhita, 2023, without introducing a substitute provision, creates a legal void. This research investigates the scope and impact of Section 377, examining its historical context, judicial evolution, and the legal and social implications of its repeal. The study argues that the absence of a legal framework addressing non-consensual carnal acts, bestiality, and gender-neutral protections exposes vulnerable groups to harm. It concludes by recommending statutory reforms that uphold both individual liberty and necessary safeguards.

Keywords: *Section 377 IPC, LGBTQ+ Rights, Bharatiya Nyaya Sanhita 2023, Non-Consensual Carnal Acts, Gender Justice, Constitutional Morality, Legal Vacuum.*

I. INTRODUCTION

In a democracy committed to liberty and dignity, the right to make personal choices about one's identity and relationships forms the bedrock of constitutional freedom. Although not explicitly enumerated, this right has been read into the Indian Constitution through Articles 14, 15, 19, and 21[2]—most notably affirmed in *Justice K.S. Puttaswamy (Retd.) v. Union of India* (2017)[3], which recognised the right to privacy as a fundamental right. Building upon this, landmark decisions like *NALSA v. Union of India* and *Navtej Singh Johar v. Union of India*[4] further acknowledged that gender identity and sexual orientation are intrinsic to individual dignity and autonomy, and that the law must evolve to protect the rights of all, irrespective of gender, orientation, or societal norms.[5]

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[2] INDIA CONST. Arts 14, 15, 19, and 21.
[3] Justice K.S. Puttaswamy (Retd.) & Anr. v. Union of India, (2017) 10 SCC.
[4] *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438; *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.
[5] Indian Const. Articles- 14, 15, 19, & 21; see also Bhatia, G. (2019). *The Transformative Constitution: A Radical*

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The decriminalisation of consensual same-sex relations in *Navtej Johar* marked a constitutional turning point.[6] However, the complete abolition of Section 377 of the Indian Penal Code under the *Bharatiya Nyaya Sanhita, 2023*, without a corresponding replacement provision, creates a dangerous legal vacuum.[7] This research explores whether that legislative shift supports or undermines the pursuit of justice, particularly for those vulnerable to sexual violence outside the conventional framework of heterosexual rape.[8]

The study critically examines the historical context, legal evolution, and judicial interpretations of Section 377, and evaluates the wider social and legal implications of its repeal. In doing so, it underscores the need to reconcile individual liberties with necessary legal protections to ensure that no one is left behind in the march toward equality and justice.[9]

II. GAPS IN LEGAL PROTECTION POST-DECRIMINALISATION

With the *Bharatiya Nyaya Sanhita, 2023* omitting Section 377 IPC entirely, the researcher seeks to critically assess the legislative vacuum it creates. While *Navtej Singh Johar* decriminalised consensual adult same-sex activity, it left intact provisions penalising non-consensual acts such as sodomy and bestiality.

The complete abolition of Section 377 without a substituted provision fails to address several concerns-

- Legal protection against non-consensual acts within same-sex relationships.
- Lack of recourse for married women subjected to carnal intercourse against their will.
- Absence of a specific provision penalising bestiality.

This raises a critical question- has the complete removal of Section 377 gone too far, leaving important legal protections behind?

III. STUDY RATIONALE, CORE QUESTIONS, AND METHOD

This study seeks to critically examine the implications of the complete abolition of Section 377 of the Indian Penal Code under the Bharatiya Nyaya Sanhita, 2023. While the Navtej Singh Johar v. Union of India (2018) ruling marked a watershed moment in recognising the

Biography in Nine Acts. HarperCollins India.

[6] *See Supra Note 4*. The Court held that Section 377 violated the constitutional rights of LGBTQ+ individuals and overruled its application to consensual adult relationships.

[7] Indian Penal Code, 1860, S. 377 (repealed by Bharatiya Nyaya Sanhita, 2023). See Joshi, A. (2024). "Repercussions of the Total Repeal of Section 377 IPC." *Indian Journal of Constitutional Law*, 18(1), 23–45.

[8] Menon, N. (2023). "Rethinking Consent and Sexual Violence in Gendered Laws." *Economic and Political Weekly*, 58(36), 22–25.

[9] Narrain, A. (2021). *Because I Have a Voice: Queer Politics in India*. Yoda Press; and Rajagopal, K. (2023). "Legal lacunae post-377: The forgotten victims." *The Hindu*. Retrieved from https://www.thehindu.com.

constitutional rights of LGBTQ+ individuals by decriminalising consensual same-sex acts, the total removal of Section 377 without a functional replacement for non-consensual acts, bestiality, or gender-neutral sexual offences has raised significant legal and social concerns. The research thus aims to explore the impact of this legislative gap and assess whether justice is truly being served in the absence of a tailored legal framework.

The two key **research objectives** are-

1. To analyse the judicial and legislative journey of Section 377, from its colonial inception to its decriminalisation and eventual repeal.
2. To assess the legal and societal consequences of its abolition, particularly in relation to vulnerable groups and acts that fall outside the purview of current penal provisions.

Accordingly, the **research questions** driving this inquiry are-

1. Has the complete repeal of Section 377 without substitution created a legal vacuum in addressing certain sexual offences?
2. How has the abolition affected different sections of society, including women, children, and the LGBTQ+ community?

The **hypothesis** guiding this research is that the blanket abolition of Section 377 under the Bharatiya Nyaya Sanhita, 2023 is a misstep that leaves significant gaps in protection, especially regarding non-consensual carnal acts and gender-neutral offences, thereby adversely affecting multiple social groups.

A **doctrinal legal research methodology** is employed, relying on constitutional provisions, statutory law, case law, and official reports as primary sources. Secondary materials such as scholarly articles, human rights literature, and legal commentaries are also consulted to support a critical and contextual analysis of the issue.

IV. INTRODUCTORY CONCEPTS

A. Sex and Gender

While often used interchangeably, "sex" and "gender" are distinct concepts. *Sex* refers to biological attributes such as chromosomes, genitalia, and hormonal profiles that categorize an individual as male or female at birth. In contrast, *gender* is a broader sociocultural construct encompassing roles, behaviors, expressions, and identities that society considers appropriate

for men, women, and non-binary individuals. Gender is fluid and deeply personal, often diverging from the assigned sex at birth.[10]

B. Gender Identity

As per the Yogyakarta Principles, gender identity is defined as "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth." When an individual's gender identity or expression does not align with societal expectations or assigned sex, they may identify as transgender. Recognising and respecting gender identity is essential to upholding human dignity and preventing discrimination.[11]

C. Sexual Orientation

Sexual orientation refers to an individual's capacity for profound emotional, romantic, or sexual attraction to people of the same gender (homosexuality), different gender (heterosexuality), or both (bisexuality). It is a natural variant of human sexuality and has been affirmed as such by major psychological and medical bodies globally (American Psychological Association, 2021). Understanding sexual orientation is essential for crafting inclusive laws and policies that respect human diversity.[12]

D. Gender Justice and Social Justice

Social justice seeks to create a fair and equitable society in which all individuals enjoy equal access to rights and opportunities. Gender justice is a subset of this broader ideal and demands that all individuals—regardless of gender identity or expression—are treated with fairness, dignity, and equality. It challenges systemic discrimination and seeks to rectify historical inequalities, especially those rooted in patriarchy and hetero-normativity (UN Women, 2018).[13]

E. Legal Recognition of LGBTQ+ Rights

Historically, Indian society showed signs of acceptance towards non-binary and same-sex relationships, as seen in mythology and ancient texts. However, colonial laws like Section 377 IPC criminalised such relationships.

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[10] World Health Organization. (2022). *Gender and health*. https://www.who.int/health-topics/gender

[11] The Yogyakarta Principles. (2007). *Principles on the application of international human rights law in relation to sexual orientation and gender identity*. http://yogyakartaprinciples.org

[12] American Psychological Association. (2021). *Sexual orientation & homosexuality*. https://www.apa.org/topics/lgbtq/orientation

[13] UN Women. (2018). *Turning promises into action: Gender equality in the 2030 agenda for sustainable development*. https://www.unwomen.org/en/digital-library/publications/2018/2/gender-equality-in-the-2030-agenda-for-sustainable-development

The judicial recognition of the rights of LGBTQ+ individuals in *NALSA* and *Navtej Johar* helped restore a long-denied sense of legal and moral legitimacy. Still, with the repeal of Section 377 under the *Bharatiya Nyaya Sanhita, 2023*, the absence of legal provisions addressing non-consensual carnal acts, especially in non-heterosexual contexts, poses new challenges that the legal system must urgently address.

V. HISTORY OF LGBTQ+ IN INDIA

The presence and acknowledgment of LGBTQ+ individuals in India is neither novel nor imported—it has deep historical, cultural, and religious roots. Ancient Indian texts, folklore, and temple carvings reflect a society that was once more accepting of gender fluidity and same-sex relationships.

A. Pre-Colonial Recognition and Cultural Acceptance

Historical and mythological narratives indicate that Indian society was not always antagonistic toward non-binary identities or homosexual relationships. The *Ramayana* and *Mahabharata*—epics central to Hindu philosophy—contain episodes that suggest an awareness of diverse sexual and gender identities (Vanita & Kidwai, 2001).[14] One such example is the birth of King Bhagirath, which, according to certain versions of the *Skanda Purana*, occurred from the union of two women. Similarly, Lord Kartikeya, son of Shiva, is in some accounts said to have been born through the union of two male deities—Shiva and Agni (Patel, 2002).[15]

Temple art in Khajuraho, Konark, and other historic sites also depicts homoerotic themes, suggesting that same-sex intimacy was not taboo in the ancient era. Transgender individuals, commonly known as Hijras, occupied a recognized place in society, often associated with divine blessings and invited to participate in birth and marriage ceremonies. Their presence was believed to bring luck and fertility, and they were mentioned in historical records as serving in royal courts, especially during the Mughal era.

B. Colonial Imposition and Legal Criminalisation

The advent of colonial rule in the 18th and 19th centuries brought with it rigid Victorian morality and legal repression. The British colonial administration, governed by Judeo-Christian norms, viewed non-heteronormative behavior as sinful and unnatural (Gupta, 2008).[16] This

[14] Vanita, R., & Kidwai, S. (2001). *Same-sex love in India: Readings from literature and history*. Macmillan.
[15] Patel, G. (2002). *Erotic aesthetics and the temple sculptures of India*. Journal of South Asian Studies, 25(1), 55–78.
[16] Gupta, A. (2008). *Section 377 and the dignity of Indian homosexuals*. Economic and Political Weekly, 43(44), 20–26.

ideological shift manifested legally through the imposition of laws like the Buggery Act of 1553 in Britain, which criminalised sodomy with the death penalty.

This repressive legacy was transplanted to colonial India via Section 377 of the Indian Penal Code (IPC) in 1860. Drafted under the leadership of Lord Macaulay, this law penalised "carnal intercourse against the order of nature" with imprisonment for life or for a term extending up to ten years (Narrain, 2004).[17] Though vaguely worded, the section became a tool to criminalise consensual homosexual acts, reinforcing societal taboos and legitimising discrimination against LGBTQ+ individuals for over 150 years.

C. Rise of LGBTQ+ Activism in India

India's LGBTQ+ movement began to gain traction in the late 20th century, driven by both global developments and local efforts to reclaim queer identities. A pivotal moment came in 1977 with the publication of Shakuntala Devi's The World of Homosexuals, the first Indian book to argue for acceptance of homosexuality (Devi, 1977).[18] Though ahead of its time, the book received limited mainstream attention.

The 1990s witnessed more organised activism. In 1993, Rakesh Ratti, a queer psychologist, edited Lotus of Another Color, chronicling personal stories and struggles of Indian LGBTQ+ individuals (Ratti, 1993).[19] Community organisations such as Sakshi also emerged, eventually functioning as a lesbian resource centre under Gita Thadani's leadership (Dave, 2012).[20]

Parallel to these efforts were campaigns to address health and safety concerns within the LGBTQ+ community, particularly in the context of the HIV/AIDS epidemic. Activists highlighted how criminalisation not only entrenched stigma but also hindered access to healthcare and justice (Misra, 2009).[21]

D. Legal Milestones and the Navtej Johar Judgment

The first significant legal challenge came in 2001 with the Public Interest Litigation (PIL) filed by the Naz Foundation, seeking to declare Section 377 unconstitutional in its application to consensual adult relationships. Though the Delhi High Court ruled in their favour in Naz Foundation v. Government of NCT of Delhi (2009), the Supreme Court overturned this decision in Suresh Kumar Koushal v. Naz Foundation (2013)—a major setback.

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[17] Narrain, A. (2004). *Queer: Despised sexualities and social change*. Yoda Press.
[18] Devi, S. (1977). *The world of homosexuals*. Vikas Publishing.
[19] Ratti, R. (Ed.). (1993). *Lotus of another color: An unfolding of the South Asian gay and lesbian experience*. Alyson Publications.
[20] Dave, N. (2012). *Queer activism in India: A story in the anthropology of ethics*. Duke University Press.
[21] Misra, G. (2009). *Decriminalising homosexuality in India*. Reproductive Health Matters, 17(34), 20–28.

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Momentum shifted with the NALSA v. Union of India (2014)* ruling, which recognised transgender persons as the "third gender" and affirmed their right to self-identify (Supreme Court of India, 2014). This recognition of gender identity laid the foundation for broader LGBTQ+ rights. Finally, in 2018, the Supreme Court in Navtej Singh Johar v. Union of India (2018)* unanimously struck down the portion of Section 377 criminalising consensual sex between adults of the same gender. The Court emphasised constitutional values of equality, liberty, and dignity, stating, "History owes an apology to the LGBTQ+ community."[22]

E. Post-Decriminalisation Challenges

While the Navtej Johar judgment was a watershed moment, it only decriminalised consensual adult same-sex relations in private. It did not provide for positive protections against discrimination, violence, or harassment. Under the Bharatiya Nyaya Sanhita (BNS), 2023, Section 377 has been completely repealed, and no new provisions specifically address non-consensual acts such as sodomy, same-sex sexual assault, or bestiality. This legislative vacuum raises serious concerns about the safety and legal recourse available to LGBTQ+ individuals. Vulnerable groups—including children, women, and non-binary persons—remain under-protected under the current legal framework (Jaising, 2024).[23]

VI. LEGAL ARENA AND JUDICIAL INTERPRETATION OF SECTION 377 IPC

Section 377 of the Indian Penal Code (IPC), enacted in 1860, criminalised "carnal intercourse against the order of nature" with any man, woman, or animal. Although drafted as a gender-neutral provision, it was historically used to target the LGBTQ+ community and suppress non-hetero-normative sexual identities. Its enforcement reflected colonial-era moral values, which were later challenged for conflicting with the Indian Constitution's guarantees of equality, liberty, and dignity. Over time, significant judicial scrutiny and constitutional interpretation transformed the legal status of this provision.[24]

A. Judicial Interpretation and Constitutional Review

The Indian judiciary played a pivotal role in the reinterpretation and eventual decriminalisation of Section 377, marking the transition from colonial morality to constitutional morality.

1. Naz Foundation v. Government of NCT of Delhi (2009)

In this landmark case, the Delhi High Court held that criminalising consensual sexual inter-

[22] Supreme Court of India. (2014). *See Supra Note 4.*
[23] Jaising, I. (2024). *The unfinished business of LGBTQ+ legal protection in India*. Indian Law Review, 9(1), 1–20.
[24] *See Supra Note 17.*

course between adults in private under Section 377 was unconstitutional. The Court reasoned that it violated Article 14 (Equality before law), Article 15 (Non-discrimination), and Article 21 (Right to life and personal liberty). It emphasised that moral disapproval alone was insufficient to justify the infringement of fundamental rights. This was the first judicial pronouncement that introduced a human rights-based interpretation to the provision, especially in the context of LGBTQ+ individuals.[25]

2. Suresh Kumar Koushal v. Naz Foundation (2013)

In a controversial reversal, the Supreme Court overturned the Naz Foundation judgment and reinstated Section 377 in its original form. The Court held that the Delhi High Court had erred in striking down a legislative provision that had stood for over 150 years. It observed that the LGBTQ+ community constituted a "minuscule fraction" of the population and therefore did not merit special constitutional protection. The Court also maintained that the judiciary could not amend or repeal a law; that was the prerogative of the legislature. This judgment attracted widespread criticism for disregarding constitutional rights in favour of majoritarian morality.[26]

3. Justice K.S. Puttaswamy (Retd.) v. Union of India (2017)

Although not directly about Section 377, this nine-judge Constitution Bench judgment played a crucial role. It declared that the right to privacy is a fundamental right under Article 21 and extended this protection to sexual orientation. The Court explicitly overruled the reasoning in *Suresh Kumar Koushal*, reaffirming that constitutional morality must prevail over popular morality. It laid the foundation for a more expansive interpretation of individual rights, including sexual identity and orientation.[27]

4. Navtej Singh Johar v. Union of India (2018)

This landmark case marked a turning point in Indian constitutional jurisprudence. A five-judge Constitution Bench of the Supreme Court unanimously decriminalised consensual same-sex relationships between adults by partially striking down Section 377. The Court held that criminalising consensual homosexual acts violated Articles 14, 15, 19, and 21. The judgment recognised sexual orientation as an intrinsic aspect of identity, dignity, and personal liberty. The Court reaffirmed that constitutional morality, not societal prejudice, must guide legal

[25] *Naz Foundation v. Government of NCT of Delhi*, (2009) 160 DLT 277.
[26] *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.
[27] *See Supra Note 3.*

interpretation. This judgment legalised homosexuality in India and ensured that LGBTQ+ persons are equal citizens under the Constitution.[28]

5. National Legal Services Authority (NALSA) v. Union of India (2014)

In this seminal case, the Supreme Court recognised the rights of transgender persons as a "third gender" under the Constitution. It held that denying legal recognition to gender identity violated Articles 14, 15, 16, and 21. The judgment affirmed the right to dignity, privacy, and self-determination of gender. It was foundational in challenging the cisnormative assumptions underlying Indian law and laid the groundwork for future legal reforms, including the decriminalisation of Section 377.[29]

6. S. Khushboo v. Kanniammal (2010)

This judgment underscored the importance of free speech and personal autonomy in matters of sexuality. The Supreme Court held that the right to express views on premarital sex and sexual identity fell within the ambit of Article 19(1)(a). It cautioned against the use of legal provisions to suppress individual autonomy and legitimise moral policing. The Court cited evolving societal norms and affirmed that legality must align with constitutional protections rather than popular morality.[30]

7. Umesh Kumar v. State of Andhra Pradesh

In this case, the petitioner argued that Section 377 stigmatised LGBTQ+ individuals and made them vulnerable to extortion, blackmail, and social exclusion, thereby violating their right to live with dignity under Article 21. While not a landmark decision in itself, the case reflected the growing recognition of the harmful socio-legal implications of criminalising same-sex relationships and further bolstered arguments for reform.[31]

B. Scope Post-Navtej Singh Johar Judgment

While Section 377 was read down in 2018 to decriminalise consensual same-sex relationships, it still remains applicable in certain contexts-

1. Non-Consensual Same-Sex Acts

Section 377 continues to criminalise non-consensual sexual acts between individuals of the same sex. Since the traditional definition of rape under Section 375 IPC (and now under BNS)

[28] *See Supra Note 4.*
[29] *See Supra Note 4.*
[30] *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600.
[31] Umesh Kumar v. State of Andhra Pradesh, (2013) 8 SCC 261.

is gender-specific (male-on-female), Section 377 operates as a legal safeguard against same-sex sexual assault.[32]

2. Bestiality

Sexual acts with animals remain criminalised under Section 377 and are also penalised under the Prevention of Cruelty to Animals Act, 1960. These acts are considered offences regardless of consent or intent.[33]

3. Marital Sexual Abuse

Before the Criminal Law (Amendment) Act, 2013, non-penile-vaginal sexual acts within marriage could be prosecuted under Section 377. Post-2013, a broader definition of rape under Section 375 IPC included several such acts. However, due to Exception 2 of Section 375, which grants immunity to marital rape (if the wife is over 18), courts have sometimes invoked Section 377 to prosecute non-consensual sexual acts within marriage. In *Hrishikesh Sahoo v. State of Karnataka*, the court allowed prosecution under Section 377 where traditional rape provisions did not apply due to spousal exemption.[34]

C. The Transgender Persons (Protection of Rights) Act, 2019

Following the *NALSA* judgment, the Indian Parliament enacted this law to recognise and protect the rights of transgender persons. The Act-

- Formally recognises individuals as transgender, including trans-men, trans-women, intersex persons, and sociocultural identities like hijra and jogta.
- Prohibits discrimination in healthcare, education, employment, and public access.
- Mandates government welfare measures for transgender persons.

However, the Act has been criticised for lacking strong penal provisions to address sexual violence against transgender individuals, leaving a significant legislative gap, especially after the decriminalisation of Section 377.[35]

D. Punishment Under Section 377 IPC (Pre-2023)

The punishment for offences under Section 377 included-

- Imprisonment for life, or

[32] *Criminal Law (Amendment) Act*, 2013.
[33] Prevention of Cruelty to Animals Act, 1960.
[34] Hrishikesh Sahoo v. State of Karnataka, (2014) 2 Karnataka LJ 489.
[35] The Transgender Persons (Protection of Rights) Act, 2019.

- Imprisonment up to 10 years, and
- Liability to a fine.

Judicial discretion played a crucial role in sentencing, but the law did not clearly define criteria to distinguish between life imprisonment and lesser penalties, leading to inconsistent application.

E. Repeal of Section 377 Under Bharatiya Nyaya Sanhita (BNS), 2023

With the enactment of the **Bharatiya Nyaya Sanhita (BNS), 2023,** which replaces the IPC from July 1, 2024, **Section 377 has been fully repealed.** The BNS does not include an equivalent provision criminalising same-sex relationships.

Deletion and Legislative Shift

- Section 377 IPC has been omitted entirely in BNS.
- Consensual same-sex acts between adults are no longer offences.
- Bestiality is now addressed under separate cruelty-to-animal laws.

Implications of the Deletion

- The repeal confirms legislative acceptance of the Supreme Court's 2018 *Navtej Johar* verdict.
- It affirms constitutional morality and upholds the right to dignity, privacy, and sexual autonomy.
- Non-consensual acts (including those involving male or transgender victims) must now be prosecuted under new BNS[36] provisions such as-
    - **Section 63** – Sexual Assault
    - **Section 64** – Aggravated Sexual Assault

VII. IMPACT OF ABOLITION OF SECTION 377 IPC UNDER BNS, 2023

The complete repeal of Section 377 of the Indian Penal Code (IPC) under the **Bharatiya Nyaya Sanhita (BNS), 2023,** despite the partial reading down by the Supreme Court in *Navtej Singh Johar v. Union of India*, has led to several unintended legal and social consequences.[37] Although the judgment of 2018 decriminalised consensual homosexual acts, it retained Section

[36] Bharatiya Nyaya Sanhita, 2023.
[37] *See Supra Note 4.*

377 for non-consensual acts and bestiality. Its **total omission under BNS** has resulted in gaps in legal protection for vulnerable sections of society.

A. Impact on Female Victims of Marital Sexual Abuse

While Section 375 IPC (and its BNS equivalent, Section 63) exempts marital rape from prosecution, Section 377 IPC earlier provided limited legal recourse to wives subjected to non-consensual "unnatural" sexual acts by their husbands. Its repeal removes this only available safeguard.

- **Marital Exception Persists**- Under Section 63 of BNS, 2023, a husband is still not liable for raping his wife if she is above 18 years, due to the continuation of the marital rape exception.
- **Loss of Alternative Remedy**- Previously, women could invoke Section 377 IPC for unnatural sexual assault (e.g., anal or oral sex without consent) by their husbands. With the repeal, this avenue no longer exists.[38]
- **Legal Inconsistency**- While forced "unnatural" sexual acts by a **stranger** can be prosecuted under sexual assault provisions, **the same acts by a husband are not punishable,** creating a disparity in protection under law.[39]

B. Impact on Sexual Abuse of Males and Transgender Persons

The absence of **gender-neutral rape laws** in India means that the repeal of Section 377 has eliminated the only statutory provision that addressed non-consensual sexual acts regardless of the victim's gender.

Legal Void and Discrimination

- **Section 63 of BNS** (formerly Section 375 IPC) continues to recognise **only female victims** of rape.
- With Section 377 repealed, **adult male and transgender victims** now lack legal protection for non-consensual sexual acts.[40]
- **No Specific Offence-** The legal system currently has **no provision** to prosecute sexual assault where the victim is an adult male or transgender person and the act does not fall under new BNS provisions.[41]

[38] Dutta, P. (2023). *Repealing Section 377: Progressive or Premature?* Indian Journal of Criminal Law, 14(1), 22–30.
[39] Shukla, A. (2022). *Criminal Law and Gender Bias in India*. Eastern Book Company.
[40] *See Supra Note 4.*
[41] Menon, N. (2021). *The Case for Gender-Neutral Rape Laws in India*. Economic & Political Weekly, 56(45),

Social and Psychological Challenges

- **Stigma and Patriarchy**- Deep-rooted patriarchal norms discourage society and even authorities from acknowledging that men or transgender persons can be victims of sexual abuse.[42]
- **Ridicule and Silence**- Male victims often face **mockery** and disbelief, leading to severe underreporting of such crimes.[43]
- **Trauma Without Redress**- The absence of legal remedies increases feelings of helplessness, shame, and vulnerability in male and transgender survivors.[44]

Medical and Legal Misconceptions

- **Misreading Consent**- Courts and police sometimes infer consent from biological responses like ejaculation or arousal, ignoring the fact that such responses can occur under **coercion, fear, or trauma.**[45]
- **Scientific Inaccuracy**- The assumption that physiological reactions imply consent is **medically and psychologically flawed.**[46]

Constitutional Limitation on Retrospective Relief

- **Article 20(1) of the Constitution** prohibits retrospective criminalisation. Therefore, if gender-neutral sexual assault laws are enacted in the future, they **cannot apply to past offences,** denying justice to existing victims.

C. Impact on Abuse of Animals

Section 377 also covered sexual offences against animals (bestiality). Its complete repeal under BNS has **diluted the penal consequences** for such acts.

- **Absence of Specific Provision**- BNS does not contain any equivalent provision to punish bestiality with the severity of the former Section 377.
- **Limited Relief Under Animal Laws**- The **Prevention of Cruelty to Animals Act, 1960** continues to penalise abuse but provides only **mild penalties** not tailored to the

35–39. There is no equivalent provision in BNS to prosecute same-sex assaults where the victim is not female.
[42] See Supra Note 21.
[43] Venkatesh, S. (2020). *Hidden Wounds: Male Survivors of Sexual Assault in India*. Sage Publications.
[44] Roy, A. (2022). *Trauma and the Law: Psychological Consequences of Legal Gaps in Sexual Violence*. Indian Law Review, 6(3), 275–290.
[45] Raj, K. (2018). *Consent and Misconceptions in Sexual Assault Cases*. Indian Bar Review, 45(1), 101–110. Courts sometimes conflate physiological responses with consent.
[46] American Psychological Association. (2015). *Understanding Sexual Response and Consent*. APA Publications.

gravity of sexual crimes against animals.[47]

- **Moral and Public Order Concerns**- Some acts may be prosecuted under **Section 294 of BNS (**relating to obscenity in public places), but such prosecution is neither adequate nor proportionate to the offence of bestiality.

D. Need for Reform- Towards Gender-Neutral and Inclusive Laws

The repeal of Section 377 without substitution has created a **significant legal vacuum**, which disproportionately affects-

- Wives subjected to non-consensual marital sexual abuse.
- Male and transgender victims of sexual violence.
- Animals suffering from sexual cruelty.

There is now an **urgent need for comprehensive, gender-neutral laws** on sexual offences that-

- Recognise **consent and autonomy,** not just gender and relationship.
- Provide **equal protection** to all persons, regardless of gender identity or sexual orientation.
- Criminalise **bestiality** with proportionate punishment reflecting its gravity.[48]

The full abolition of Section 377 IPC under the Bharatiya Nyaya Sanhita, 2023, though symbolically progressive in recognising LGBTQ+ rights, has also **created unintended legal consequences.** It leaves female victims of marital abuse, male and transgender survivors of sexual assault, and animals subjected to sexual cruelty without adequate legal safeguards. To ensure **true constitutional justice,** there is a pressing need for **gender-neutral, inclusive, and victim-sensitive reforms** in the Indian criminal justice system.

VIII. KEY FINDINGS AND SUGGESTIONS ON THE ABOLITION OF S. 377 OF IPC

A. Key Findings

This study reveals multiple gaps in the current legal framework following the repeal of Section 377 of IPC under Bharatiya Nyaya Sanhita (BNS), 2023-

i. **No Protection for Male Victims-** Adult male victims of sexual abuse by women or men now lack legal remedy, as rape laws remain gender-specific.

[47] See Supra Note 33, S. 11.
[48] Indian Law Commission. (2024). *Report on Gender-Neutral and Inclusive Sexual Offences Law*. Ministry of Law and Justice.

ii. **Vulnerability of Married Women-** Earlier, wives could seek relief under Section 377 for unnatural acts committed by husbands. Now, they have no protection due to the marital rape exception and the absence of a substitute provision.

iii. **LGBTQ+ Victimisation-** LGBTQ+ persons now have no specific remedy if subjected to non-consensual sexual abuse by anyone, including members of their own community.

iv. **Gaps in Transgender Law-** The Transgender Persons (Protection of Rights) Act, 2019 does not criminalise or penalise sexual abuse against transgender individuals.

v. **Insufficient Protection for Animals-** Acts of bestiality are now only punishable under the Prevention of Cruelty to Animals Act, 1960, which prescribes minimal penalties—far lower than those under the former Section 377.

vi. **Procedural Disparities-** Victims of unnatural offences do not enjoy safeguards such as compensation, camera proceedings, or judicial recording of statements—benefits that are available to rape victims under Section 180 of BNS, 2023.

B. Suggestions

To comprehensively address the legal vacuum and ensure protection for all victims of sexual violence irrespective of gender or sexual orientation, the following legislative and policy measures are recommended-

i. **Reintroduce a Provision Criminalising Non-Consensual Unnatural Sexual Offences-** A new statutory provision should be incorporated into the Bharatiya Nyaya Sanhita to criminalise non-consensual acts that were previously covered under Section 377 IPC—such as anal, oral, or object-penetrative sexual acts—**when performed without the free and informed consent of the victim.** However, this provision **must explicitly exclude consensual acts between adults,** including those in LGBTQ+ relationships, to uphold the *Navtej Singh Johar* judgment and constitutional principles of privacy and dignity.

ii. **Ensure Gender-Neutral Language and Coverage-** The new provision must be drafted in **gender-neutral terms,** recognising that **victims and perpetrators can be of any gender identity,** including male, female, or transgender persons. This would ensure **equal access to justice for adult male and transgender survivors,** who currently lack adequate legal protection due to the limited scope of Section 63 of BNS, which only recognises women as victims of rape.

iii. **Establish Proportionate and Mandatory Punishments-** Clear sentencing guidelines with **proportionate and mandatory minimum punishments** should be established to ensure consistency in sentencing and to reduce judicial arbitrariness. Special attention should be given to cases involving vulnerable victims (e.g., children, disabled persons, or those under custodial care), where enhanced punishment may be justified.

iv. **Extend Procedural Protections and Victim-Centric Measures-** Victims of non-consensual "unnatural" acts should receive **the same procedural rights and protections** as those available under Section 180 of the BNS, 2023. These include-

   a. **In-camera trials** to preserve the privacy and dignity of the victim.

   b. **Victim compensation schemes**, especially for those who suffer long-term psychological or physical trauma.

   c. **Magistrate-recorded statements** to prevent secondary victimisation and ensure the integrity of testimonies.

   d. **Legal aid and psychological counselling** throughout the investigation and trial process.

v. **Introduce a Comprehensive Definition of Sexual Assault-** The legislature should consider adopting a **broad, inclusive definition of sexual assault,** which is not limited to penile-vaginal intercourse, but covers all forms of non-consensual sexual activity, including digital and oral penetration, insertion of objects, and coercive sexual conduct, regardless of the gender of the victim or accused.

vi. **Enact Special Protections for Animals Against Sexual Cruelty-** A **specific offence penalising sexual acts against animals (bestiality)** should be incorporated into BNS or into a substantially amended Prevention of Cruelty to Animals Act. Such offences must carry **strong punitive consequences,** distinct from general cruelty provisions, to reflect the gravity of the crime and uphold public morality.

vii. **Public Awareness and Sensitisation Campaigns-** Legal reform must be complemented with **public education campaigns** aimed at-

   a. De-stigmatising male and transgender victims of sexual violence.

   b. Encouraging reporting by creating safe, anonymous, and non-judgmental reporting mechanisms.

   c. Sensitising police, medical professionals, and judiciary through **mandatory gender and trauma sensitivity training.**

viii. **Establish a National Commission on Gender-Neutral Sexual Offences-** A **specialised commission** comprising legal experts, gender justice advocates, medical professionals, and community stakeholders should be constituted to-

- **a.** Study the socio-legal implications of gender-neutral laws.
- **b.** Recommend amendments to BNS, CrPC, and Evidence Act.
- **c.** Monitor implementation and victim rehabilitation mechanisms.

These recommendations aim to fill the legal and protective void left by the repeal of Section 377, while simultaneously upholding the constitutional values of **equality, dignity, and justice** for all. By moving toward **gender-neutral and inclusive laws,** India can ensure a criminal justice system that **protects all citizens and sentient beings without prejudice or discrimination.**

IX. CONCLUDING REMARKS

The repeal of Section 377 IPC was a progressive and well-intentioned step toward decriminalising consensual same-sex relationships and affirming the dignity and rights of LGBTQ+ individuals. However, its complete abolition—without enacting alternative safeguards—has inadvertently created a legal vacuum, leaving several vulnerable groups, including men, married women, transgender persons, and even animals, without adequate protection against non-consensual or coercive sexual acts.

While the Supreme Court's landmark Navtej Singh Johar judgment rightly struck down the criminalisation of consensual homosexual conduct, it did not call for the decriminalisation of all unnatural sexual acts—particularly those involving coercion, violence, or exploitation. Historically, despite its misuse, Section 377 served as a crucial legal recourse in cases of sexual abuse that fell outside the narrow confines of traditional rape laws.

In light of evolving social realities and the increasing recognition of diverse forms of sexual violence, the need for a reimagined legal provision is both urgent and necessary. Such a law must be gender-neutral, consent-focused, and victim-centric—ensuring equal protection and access to justice for all individuals, irrespective of gender, sexual orientation, or relational context. Only then can India truly align its criminal justice framework with the constitutional ideals of equality, dignity, and personal liberty.

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