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FROM READING DOWN TO ERASING OUT: THE UNNATURAL OFFENCE QUESTION UNDER THE BHARATIYA NYAYA SANHITA, 2023

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Abstract

Section- 377 of the Indian Penal Code, 1860 (IPC) governed the criminal law on unnatural offences for over 163 years, penalising voluntary carnal intercourse against the order of nature with any man, woman, or animal.¹ The provision's constitutional validity was finally settled by the Supreme Court of India in 2018, when a five-judge Constitution Bench in *Navtej Singh Johar v. Union of India* unanimously read down Section- 377 to exclude private consensual sexual relations between adults, while expressly retaining its application to non-consensual acts, offences against minors, and bestiality.² The Bharatiya Nyaya Sanhita, 2023 (BNS), which came into force on July 1, 2024 as the successor to the IPC, went significantly further than the judicial mandate by omitting Section-377 entirely without enacting any provision in its place.³ The resulting legal landscape is one in which Section- 63 of the BNS which defining rape exclusively in terms of a male perpetrator and a female victim which leaves adult male survivors of sexual assault, transgender persons, and animals without the dedicated statutory protection that Section- 377 had, after its reading down, continued to

afford.⁴ This article examines the constitutional, moral, and practical consequences of that legislative omission, analyses the tension between the BNS framework and the jurisprudence of constitutional morality developed in *Navtej Singh Johar*, and puts forward recommendations for filling the legal void in a manner consistent with Articles 14, 15, and 21 of the Constitution of India.

Keywords - Section- 377 (IPC, 1860), Bharatiya Nyaya Sanhita 2023(BNS), Unnatural Offence, Legal Lacuna, Constitutional Morality, Gender-Neutral Rape Laws, LGBTQIA+, BNS Section- 63, Navtej Singh Johar, Sexual Orientation.

1. Introduction

Carnal intercourse, as understood in Indian judicial parlance, denotes sexual connection not intended for the purpose of procreation and is therefore characterised as being “against the order of nature.” The expression encompasses penile non-vaginal sexual intercourse between adults, whether the participants have given their consent or not, and Section- 377 of the IPC, 1860 criminalised such conduct with the stated object of protecting women and children from its non-consensual forms.⁵ Although the provision was cast in facially gender-neutral language, its practical application operated primarily against the LGBTQIA+ community, and its central defect lay in the failure to distinguish between consensual and non-consensual acts of carnal intercourse, thereby treating the exercise of a fundamental personal freedom on the same footing as a serious sexual offence.

The history of Section- 377 may be understood as unfolding across two distinct phases. The first was the

¹Indian Penal Code, No. 45 of 1860, § 377 (India) (repealed 2024).

²*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

³Bharatiya Nyaya Sanhita, No. 45 of 2023 (India) [hereinafter BNS] (containing no provision equivalent to Indian Penal Code § 377 and imposing

no replacement protection for non-consensual sexual offences against adult males, transgender persons, or animals).

⁴BNS § 63.

⁵Indian Penal Code, No. 45 of 1860, § 377 (India) (repealed 2024).



prolonged constitutional struggle to read down the provision so as to exclude from its ambit private consensual same-sex relations between adults, a struggle that culminated, after a false start and a discouraging reversal, in the landmark decision of 2018. The second and more recent phase, which constitutes the primary focus of this article, concerns the legal void that has been created not by the continuation of Section- 377 but by its complete elimination under the BNS, and the pressing question of what protections, if any, now exist for those whom Section- 377, IPC, even in its constitutionally read-down form, had continued to shield.

II. Journey of Section- 377: From Colonialism to Constitutional Reckoning

Section- 377 of the IPC was a product of colonial lawmaking, modelled on the Buggery Act of 1533 and drafted by Thomas Macaulay in 1838, coming into effect when the Code was enforced in 1860. In its original conception, buggery was defined as an unnatural sexual act against the will of God and man, criminalising anal penetration, bestiality, and homosexuality in the broadest sense.⁶

The modern judicial engagement with the provision began in 2001, when the Naz Foundation filed a petition before the Delhi High Court challenging the constitutionality of Section- 377 and praying for the decriminalisation of consensual homosexual relations between adults. The petition was initially dismissed in 2006 for want of standing,⁷ following which an appeal

was carried to the Supreme Court; and in 2009, the Delhi High Court delivered a landmark ruling in which it decriminalised homosexuality and held that Section- 377 violated Articles 14, 15, and 21 of the Constitution of India.⁸

That judgment was, however, overturned by the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation* (2014), where the Court characterised the High Court's decision as legally unsustainable and held that the matter of decriminalisation was properly one for the legislature.⁹ Attempts to achieve reform through the parliamentary route likewise proved unavailing: Sashi Tharoor's Private Member's Bill introduced in 2016 to decriminalise consensual homosexuality was voted down by the Lok Sabha,¹⁰ and that same year a group of five LGBTQ activists approached the Supreme Court directly, contending that Section- 377 infringed their constitutional rights to sexuality, sexual autonomy, dignity, privacy, and equality.¹¹

The definitive resolution came in September 2018, when a five-judge Constitution Bench of the Supreme Court in *Navtej Singh Johar v. Union of India* unanimously read down Section- 377, decriminalising private consensual same-sex relations between adults while expressly retaining the provision in respect of non-consensual sexual acts, acts against minors, and

⁶Law Commission of India, *42d Report: Indian Penal Code* ¶¶ 16.138–16.142 (1971) (tracing the colonial origins of § 377 to the Buggery Act, 1533 and Macaulay's Draft Penal Code of 1838); *see also* *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India) (recounting the legislative history of § 377 IPC).

⁷*Naz Foundation v. Gov't of NCT of Delhi*, W.P.(C) No. 7455/2001 (Delhi H.C. Feb. 3, 2006) (dismissing petition for want of locus standi); *see also* *Union of India v. Naz Foundation*, (2006) 15 SCC 536 (India) (Supreme Court remanding the petition to the Delhi High Court with direction to hear it on merits).

⁸*Naz Foundation v. Gov't of NCT of Delhi*, (2009) 160 DLT 277 (India).

⁹*Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 (India).

¹⁰Sashi Tharoor, *The Inclusion Bill*, Lok Sabha, 16th Sess. (Feb. 2016), <https://sansad.in/getFile/loksabhaquestions/annex/171/AU582.pdf?source=pqals>.

¹¹*Navtej Singh Johar & Ors. v. Union of India*, Writ Petition (Criminal) No. 76 of 2016 (India) (filed by five LGBTQ petitioners contending that § 377 IPC violated their constitutional rights to sexuality, dignity, privacy, and equality).



bestiality.¹² The Court held that Section- 377, to the extent it penalised consensual adult same-sex relations, was violative of Articles 14, 15, 19, and 21 of the Constitution of India, and constituted an affront to the dignity, privacy, and equality of members of the LGBTQIA+ community.¹³

III. Transition to the Bharatiya Nyaya Sanhita, 2023: The Legislative Omission

The Bharatiya Nyaya Sanhita, 2023 received the assent of the President of India on December 25, 2023 and came into force on July 1, 2024, replacing the Indian Penal Code, 1860 in its entirety.¹⁴ The new code, comprising 358 Section-s organised across 20 chapters as against the IPC's 511 Section-s, was presented as a comprehensive modernisation of India's criminal law framework, shedding colonial-era provisions and introducing new offences better suited to contemporary conditions.

Among the progressive features of the BNS is the formal recognition of transgender persons as a distinct gender category under Section- 2(10),¹⁵ a development that aligns the code with the constitutional direction given by the Supreme Court in *NALSA v. Union of India* (2014). Yet this inclusive definitional step is rendered largely illusory in the context of sexual offences, because Section- 63 of the BNS, which defines the offence of rape, adopts the same gendered framework as Section- 375 of the IPC, recognising only a male perpetrator and a female victim and making no provision for any other configuration of sexual violence.¹⁶

More critically, the BNS contains no provision that corresponds to Section- 377 of the IPC in any form. There is no replacement Section-, no transitional provision, and no acknowledgment of the gap. This omission cannot be characterised as an oversight, because the Parliamentary Standing Committee on Home Affairs, in its 246th Report on the Bharatiya Nyaya Sanhita Bill, explicitly recommended the retention of provisions analogous to Section- 377 in order to address the absence of legal protection for non-consensual sexual offences against adult males, transgender persons, and animals.¹⁷ The government proceeded without incorporating any such provision into the final enacted text, leaving the legislative gap unremedied.

IV. The Legal Lacuna: Who Is Left Unprotected?

The complete deletion of Section- 377 without a corresponding replacement produces three distinct and serious zones of legal unprotection, each of which demands separate examination.

A. Adult Male Victims of Sexual Assault

Senior lawyer and activist Vrinda Grover was among the first to draw public attention to the consequences of the deletion, pointing out that it creates a significant gap in the legal protection available to adult males and transgender persons against sexual violence.¹⁸ Section- 63 of the BNS, which replaces Section- 375 IPC in defining rape, presupposes a male perpetrator and a female victim and therefore provides no remedy to a man who is subjected to non-consensual penetrative sexual acts by another man or, indeed, by

¹²Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India).

¹³Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India) (holding that § 377 IPC, to the extent it penalised consensual adult same-sex relations, violated India Const. arts. 14, 15, 19, and 21).

¹⁴BNS, No. 45 of 2023.

¹⁵BNS § 2(10).

¹⁶BNS § 63; see also Indian Penal Code, No. 45 of 1860, § 375 (India) (repealed 2024) (on which § 63 BNS is modelled, both provisions defining rape

exclusively in terms of a male perpetrator and a female victim).

¹⁷Standing Committee on Home Affairs, *246th Report on the Bharatiya Nyaya Sanhita Bill, 2023* (Nov. 10, 2023) (India).

¹⁸Vrinda Grover, *quoted in New Criminal Law Bill Omits Section 377: How This Impacts Men and Trans Persons*, The News Minute (Dec. 14, 2023), <https://www.thenewsminute.com/news/new-criminal-law-bill-omits-section-377-how-this-impacts-men-and-trans-persons>.



a woman. While provisions relating to physical assault may technically be invoked in such cases, they carry neither the social recognition nor the punitive gravity of dedicated sexual offence provisions, and they fail entirely to acknowledge the distinctive dignitary harm that sexual violence inflicts.¹⁹

B. Transgender Persons

The BNS formally recognises transgender persons as a third gender category under Section- 2(10),²⁰ but this definitional inclusivity does not translate into substantive protection in the operative sexual offence provisions. The Transgender Persons (Protection of Rights) Act, 2019 provides some recognition of harm to transgender individuals, but its treatment of sexual violence against them is comparatively mild,²¹ and the Protection of Children from Sexual Offences Act, 2012, which takes a gender-neutral approach which extends only to persons below the age of eighteen.²² Adult transgender victims of sexual assault therefore fall into a legal void that the BNS has done nothing to address, a situation that LGBTQIA+ organisations have aptly described as an “invisibilisation” of the community within the new criminal code. The gap between the BNS’s inclusive definition of gender and the absence of corresponding protections in its sexual offence provisions represents a structural

inconsistency that is difficult to defend on constitutional grounds.

C. Bestiality and Animal Welfare

Section- 377 of the IPC had, among its surviving applications after the *Navtej Singh Johar* reading down, explicitly criminalised sexual acts with animals. The BNS omits this protection entirely, with the consequence that bestiality is no longer a named criminal offence under Indian law.²³ Animal welfare organisations have raised serious alarm about this gap, noting that law enforcement agencies now lack a clear statutory basis to act against perpetrators of such acts. As Delhi-based advocate Siddharth Malkania has observed, the BNS has gone beyond the judicial mandate by completely removing the Section- and creating a legal vacuum that the Supreme Court never sanctioned, because *Navtej Singh Johar* had expressly preserved Section- 377 for precisely these purposes.²⁴

V. Carnal Intercourse as “Sexual Perversity”: The Colonial Moral Framework

The colonial legislators who introduced Section- 377 were not merely concerned with regulating harmful conduct; they were engaged in the project of targeting despised identities—the homeless, indigenous

¹⁹Section 377 Out, New Bill Raises Questions Over Protection of Men Against Rape, The Quint (July 2, 2024), <https://www.thequint.com/news/law/bharatiya-nyaya-sanhita-section-377-rape-sexual-offences-ipc-act>.

²⁰BNS § 2(10).

²¹Transgender Persons (Protection of Rights) Act, No. 40 of 2019, § 18 (India) (providing that sexual abuse of a transgender person shall be punishable with imprisonment of six months to two years, a significantly lower range than that prescribed for rape under § 63 of the BNS).

²²Protection of Children from Sexual Offences Act, No. 32 of 2012, § 2(d) (India) [hereinafter POCOA] (defining “child” as any person below the age of eighteen years, thereby confining the Act’s gender-neutral protections to minors).

²³One Year of New Criminal Laws: No Law for Sexual Offences Against Men, Animals Yet, The Tribune (July 1, 2025), <https://www.tribuneindia.com/news/india/one-year-of-new-criminal-laws-no-law-for-sexual-offences-against-men-animals-yet/>.

²⁴*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India) (expressly retaining § 377 IPC for non-consensual sexual acts, acts against minors, and bestiality); *One Year of New Criminal Laws: No Law for Sexual Offences Against Men, Animals Yet*, The Tribune (July 1, 2025), <https://www.tribuneindia.com/news/india/one-year-of-new-criminal-laws-no-law-for-sexual-offences-against-men-animals-yet/> (quoting Advocate Siddharth Malkania: “The BNS has gone beyond the judgment by completely removing the section, creating a legal vacuum.”).



persons, migrant labourers, sex workers, transgender persons, and nomadic communities through the convenient instrumentality of morality-based criminal law, which rendered social and economic inequality invisible by recasting it as deviance.²⁵ The test of *sexual perversity* functioned as the operational criterion for determining whether any act fell within the scope of Section- 377, and successive courts applied this test in terms that reflected the deepest prejudices of the colonial moral order, condemning anal intercourse in language of revulsion and stigma.²⁶

The reading down of Section- 377 in *Navtej Singh Johar* constituted a decisive repudiation of this colonial moral framework, with the Court affirming that homosexuality or sexual attraction towards persons of the same sex had never constituted a crime and that the provision, in so far as it penalised consensual adult same-sex relations, was the product of moral judgment rather than of any rational legislative purpose.²⁷ The Court further affirmed that constitutional morality could not be held hostage to the majoritarian moral convictions of a given moment in history.²⁸ The irony produced by the BNS's subsequent wholesale elimination of Section- 377 lies in this: that in excising the provision without replacement, the legislature has inadvertently severed the only statutory mechanism available for prosecuting sexual violence against adult men and transgender persons—the very protective residue that *Navtej Singh Johar* had deliberately preserved.

VI. Constitutional Morality vis-à-vis the BNS Framework

Constitutional morality, as elaborated in *Navtej Singh Johar*, is a doctrine of multiple dimensions: it restrains the state from punishing private consensual conduct on the basis of majoritarian moral preferences, affirms the ethos of individualism and the dignity of personal choices, recognises intimate relations as inherent aspects of human personality, and imposes upon the state not merely a duty of restraint from criminalization but an affirmative obligation to protect vulnerable groups from harm. The BNS sits in uncomfortable tension with each of these dimensions.

The code formally acknowledges transgender identity under Section- 2(10)²⁹ while simultaneously withholding from transgender persons the substantive protection of sexual offence law that the same constitutional morality requires the state to extend to all citizens equally. This internal contradiction between a progressive definitional provision and a regressive operative silence, is precisely the kind of formal recognition without substantive protection that the constitutional morality doctrine was designed to preclude.

Section- 63 of the BNS, in defining rape exclusively in terms of a male perpetrator and a female victim, perpetuates a framework that denies adult male and transgender victims equality before the law in contravention of Articles 14 and 15 of the Constitution of India.³⁰ Legal scholars have noted that this

²⁵Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India) (discussing the manner in which § 377 IPC was historically deployed against marginalised communities, including homeless persons, sex workers, and transgender individuals, through the instrumentality of morality-based criminal law).

²⁶Fazal Rab Choudhury v. State of Bihar, AIR 1983 SC 23 (India); Mihir @ Bhikari Charan Sahu v. State of Orissa, 1991 Cri. L.J. 488 (India); Khandu v. Emperor, AIR 1934 Lahore 262 (India).

²⁷Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India) (“Homosexuality or sexual attraction towards same-sex persons was never a crime.”).

²⁸Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India) (Chandrachud, J., concurring) (articulating that constitutional morality requires the court to uphold constitutional values and cannot be made subservient to popular or majoritarian morality).

²⁹BNS § 2(10).

³⁰India Const. arts. 14, 15; see also Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India) (establishing that discrimination against persons on the basis of sexual identity and orientation violates the equal protection and non-discrimination guarantees of arts. 14 and 15).



provision is constitutionally vulnerable on the ground of discrimination,³¹ and the anomaly is made sharper by the fact that the Protection of Children from Sexual Offences Act, 2012 has always been gender-neutral, extending equal protection from sexual violence to children of all genders.³² The absence of a comparable gender-neutral framework for adult victims is a structural inconsistency within the BNS that is difficult to justify on any principled constitutional basis.

VII. Criminalisation of Identity, Symbolic Violence, and the Right to Choice

As Saptarishi Mandal has observed, the criminalisation of same-sex identity under Section- 377 constituted for many members of the LGBTQIA+ community a form of “symbolic harm” the injury of being formally labelled as unnatural by the state, while for others it was the source of intensely material harm, since the provision’s failure to distinguish between consensual and non-consensual carnal intercourse resulted in the devaluation of LGBTQIA+ persons both as individuals and as a community.³³

The stigmatising judicial language that had accumulated around Section- 377 over the decades compounded this devaluation: courts had on various occasions condemned anal intercourse as revolting, loathsome, and depraved, and this vocabulary of disgust normalised attitudes that in turn enabled and

facilitated concrete acts of violence, including harassment, illegal arrest and detention, extortion, and abuse of members of the LGBTQIA+ community by law enforcement.³⁴ The reading down of Section- 377 in *Navtej Singh Johar* served a dual constitutional purpose: it dismantled the legal architecture of criminalisation and simultaneously repudiated the moral narrative that had sustained it.

The Court in *Navtej Singh Johar* identified two distinct but related freedoms as being at the core of the constitutional challenge to Section- 377: first, the freedom of self-expression the right to be oneself and to exercise self-determination in respect of one’s identity and second, the freedom to choose one’s sexual partner and to enter into a union on that basis, both of which are dimensions of the right to life and personal liberty under Article- 21 of the COI that the unreformed Section- 377 had violated.³⁵ The BNS, in no longer criminalising the exercise of these freedoms,³⁶ has fulfilled one part of the constitutional mandate; but in failing to protect the bodily integrity of persons who exercise them from non-consensual violation by others a protection that the reading down of Section- 377 had expressly preserved, it has left the other part unrealised.

³¹*Gender-Neutral Laws for Sexual Offences: A Gap That Has Not Been Bridged*, The Leaflet (Aug. 5, 2024), <https://theleaflet.in/equality/gender-neutral-laws-for-sexual-offences-a-gap-that-has-not-been-bridged>.

³²Protection of Children from Sexual Offences Act, No. 32 of 2012 (India).

³³Saptarishi Mandal, *Section 377: Whose Concerns Does the Judgment Address?*, 53 Econ. & Pol. Wkly. (Engage) (Sept. 15, 2018). And *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India) (discussing the stigmatisation and devaluation of LGBTQIA+ identity resulting from the criminalisation of consensual same-sex conduct).

³⁴*Fazal Rab Choudhury v. State of Bihar*, AIR 1983 SC 23 (India); *Mihir @ Bhikari Charan Sahu v. State of Orissa*, 1991 Cri. L.J. 488 (India); *Khandu v. Emperor*, AIR 1934 Lahore 262 (India) (judicial opinions condemning carnal intercourse in stigmatising terms).

³⁵*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶ 155 (India) (Misra, C.J.) (identifying the freedom of self-expression and the freedom to choose one’s sexual partner as the two core constitutional freedoms violated by § 377 IPC).

³⁶*Bharatiya Nyaya Sanhita*, No. 45 of 2023 (India) (omitting any equivalent of Indian Penal Code § 377, thereby ceasing to criminalise consensual same-sex relations between adults).



VIII. The Overriding Effect of the Mental Health Care Act, 2017

Justice Fali Nariman, in his concurring judgment in *Navtej Singh Johar*, identified the Mental Health Care Act, 2017 as providing an independent statutory basis for the unconstitutionality of Section- 377 in its application to consensual adult same-sex relations, drawing particular attention to two provisions of that Act.³⁷ Section- 21 guarantees non-discrimination in the provision of mental health treatment on the ground of sexual orientation,³⁸ while Section- 120 provides that the Act shall have effect notwithstanding anything inconsistent with it contained in any other law for the time being in force.³⁹ Together, these provisions constituted a supra-legislative affirmation that sexual orientation could not be treated as a pathology or as a basis for adverse legal treatment of any kind.

The Mental Health Care Act, 2017 continues to be in force under the BNS regime and retains its full legal effect in two important respects.⁴⁰ First, it confirms as a legislative matter that consensual same-sex relations cannot be characterised as deviant, disordered, or otherwise unnatural. Second, and perhaps more importantly for present purposes, the Act lends constitutional force to the argument for gender-neutral sexual offence provisions in the BNS: if the state is prohibited from discriminating against persons on the ground of sexual orientation in the provision of mental health services, it is difficult to construct a principled argument for the state's failure to extend to those same persons equal statutory protection from non-consensual sexual violence.

IX. Analysis of the BNS Lacunae: Section- 63 and the Heteropatriarchal Framework

Section- 63 of the BNS,⁴¹ which defines the offence of rape, replicates the gendered premise of Section- 375 of the IPC almost verbatim, proceeding on the assumption that only a man can be a perpetrator and only a woman can be a victim. The consequence of this framing is that four significant categories of non-consensual sexual harm fall entirely outside the reach of rape law under the BNS: penetrative sexual violence committed by a woman against a man; male-on-male sexual assault; sexual violence committed against a transgender person by any perpetrator; and sexual violence committed by a transgender person against any victim, regardless of the victim's gender.⁴²

The Punjab and Haryana High Court had, in the course of interpreting Section- 377 under the IPC regime, clarified in *Ankit v. State of Haryana* that carnal intercourse within the meaning of Section- 377 extended to all penetrative sexual acts beyond peno-vaginal contact, confirming that Section- 377 was the operative statutory provision for prosecuting non-vaginal sexual violence across all gender configurations.⁴³ With the wholesale removal of Section- 377 by the BNS and the absence of any equivalent provision, no such statutory vehicle now remains available.

The recognition of transgender persons as a third gender under Section- 2(10) of the BNS, while constituting a welcome alignment with the Supreme

³⁷Navtej Singh Johar v. Union of India, (2018) 10 SCC 1 (India) (Nariman, J., concurring) (identifying the Mental Health Care Act, No. 10 of 2017, §§ 21, 120 (India) as providing an independent statutory basis for the unconstitutionality of § 377 IPC in its application to consensual adult same-sex relations).

³⁸Mental Health Care Act, No. 10 of 2017, § 21 (India).

³⁹Mental Health Care Act, No. 10 of 2017, § 120 (India).

⁴⁰Mental Health Care Act, No. 10 of 2017 (India) (in force and unrepealed as of the commencement of the Bharatiya Nyaya Sanhita, 2023).

⁴¹BNS § 63.

⁴²*Gender-Neutral Laws for Sexual Offences: A Gap That Has Not Been Bridged*, The Leaflet (Aug. 5, 2024), <https://theleaflet.in/equality/gender-neutral-laws-for-sexual-offences-a-gap-that-has-not-been-bridged>.

⁴³Ankit v. State of Haryana, 2022 SCC OnLine P&H 588 (India).



Court's direction in *NALSA v. Union of India* (2014),⁴⁴ remains an incomplete constitutional fulfilment so long as it is not accompanied by substantive protections in the operative provisions of the code. A legal regime that formally acknowledges transgender identity at the definitional level while declining to protect that identity from sexual violence in the operative provisions of criminal law is constitutionally incoherent, because it recognises the person without extending to that person the equal protection of the law that the Constitution demands.

X. Constitutional Morality, Social Morality, and the Mandate of Inclusivity

The doctrine of constitutional morality, as developed across the multiple opinions in *Navtej Singh Johar*, operates simultaneously as a restraint on state power and as a positive mandate for inclusive governance.⁴⁵ It prevents the state from invoking the moral convictions of the majority as a justification for criminalising the private consensual conduct of any individual or community; it affirms personal autonomy and the freedom of intimate choice as constitutional values of the highest order; and it places constitutional rights above prevailing social norms and majoritarian preferences whenever the two are in conflict.

The reading down of Section- 377 was a concrete application of this doctrine: it established that

LGBTQIA+ persons could no longer be pushed into legal obscurity or subjected to the threat of criminal sanction on the basis of a repressive colonial law that derived its legitimacy from social morality rather than from constitutional values,⁴⁶ and the judgment was widely understood as an affirmation that the Constitution accommodated diverse people and plural ways of life within a framework of equal dignity and respect.

The BNS, however, reproduces a form of social morality in a different register by assuming without question the heterosexual paradigms of victimhood and perpetration that have historically excluded non-heterosexual and non-binary persons from the protections of sexual offence law, and this assumption cannot be reconciled with the constitutional morality standard articulated in *Navtej Singh Johar*.⁴⁷ Inclusivity and the recognition of diversity are not merely aspirational values in the constitutional framework; they are operative requirements, and equal protection from sexual violence for all persons regardless of gender or sexual orientation is an obligation that the BNS has not yet discharged.

XI. Conclusion

The trajectory of Section- 377 of the Indian Penal Code illustrates, with unusual clarity, the tension that can exist between the colonial inheritance of criminal law, the transformative aspirations of a constitutional

⁴⁴*NALSA v. Union of India*, (2014) 5 SCC 438 (India).

⁴⁵*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India) (Chandrachud, J., concurring) (elaborating the doctrine of constitutional morality as restraining majoritarian overreach and affirming individual autonomy).

⁴⁶Ajita Banerjee, *Transformative Constitutionalism: Indian Supreme Court Upholds Constitutional Morality by Reading Down Section 377*, Oxford Hum. Rts. Hub (2018), <https://ohrh.law.ox.ac.uk/transformative-constitutionalism-indian-supreme-court-upholds-constitutional-morality-by-reading-down-section-377/>.

⁴⁷*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India) (Chandrachud, J., concurring) (holding that the state cannot reproduce social morality in legislative form where doing so perpetuates discrimination against sexual minorities); see also Ajita Banerjee, *Transformative Constitutionalism: Indian Supreme Court Upholds Constitutional Morality by Reading Down Section 377*, Oxford Hum. Rts. Hub (2018), <https://ohrh.law.ox.ac.uk/transformative-constitutionalism-indian-supreme-court-upholds-constitutional-morality-by-reading-down-section-377/>.



democracy, and the capacity of the legislature to respond adequately to judicial direction. The *Navtej Singh Johar* decision struck a careful and constitutionally principled balance: it excised from Section- 377 the unconstitutional application to consensual adult same-sex relations, while expressly preserving the provision in respect of non-consensual acts, acts against minors, and bestiality a balance that was both deliberate and grounded in a sophisticated reading of the Constitution's equality and dignity guarantees.⁴⁸

The BNS has not maintained that balance. By removing Section- 377 in its entirety without enacting any equivalent protection, the legislature has created a threefold legal vacuum for adult male victims of sexual assault, for transgender survivors, and for the victims of bestiality and Section- 63 of BNS and its rigidly gendered definition of rape perpetuates the very heteropatriarchal assumptions that the Constitution, read in the light of *Navtej Singh Johar*, expressly disavows.⁴⁹

Both the Mental Health Care Act, 2017 and the Protection of Children from Sexual Offences Act, 2012 point in the direction of gender-neutral protection as the normative standard that Indian law has already adopted in adjacent domain⁵⁰ and the recognition of transgender identity under the BNS's own definitional provisions, reflecting the constitutional mandate of *NALSA v. Union of India* (2014), makes the failure to extend corresponding protections in the operative sexual offence provisions all the more difficult to justify.⁵¹

Constitutional morality, as this article has sought to demonstrate, demands not merely the absence of criminalisation but the affirmative equal protection of

all persons from sexual violence, irrespective of their gender or sexual orientation. It is imperative that the Indian legislature act to address this lacuna through comprehensive, gender-neutral amendments to the BNS that extend rape law protections to victims of all genders, provide an explicit equivalent to the protective residue of Section- 377, and bring the code into full conformity with the constitutional values that *Navtej Singh Johar* so forcefully articulated.

XII. Suggestions

After making a through doctrinal analysis about the concept of Section- 377 IPC, the relevant judicial decisions, legislative history, and its journey ended with the complete deletion of in the New Criminal legislative edifice, some sustainable suggestions has been proposed hereunder.

• Gender-Neutral Amendment to Section- 63 BNS:

The definition of rape under Section- 63 of the BNS ought to be amended to extend its protection to victims of all genders and to recognise perpetrators irrespective of their gender, consistent with the gender-neutral framework already adopted under the POCSO Act and with comparable legislation in jurisdictions such as the United Kingdom, Canada, and Australia.

• Enactment of a Dedicated Non-Consensual Sexual Violence Provision:

A new provision should be introduced in the BNS to criminalise non-consensual penetrative and non-penetrative sexual acts committed against persons of any gender, directly filling the void created for adult male and transgender victims by the deletion of Section- 377.

• Explicit Bestiality Provision:

A dedicated provision criminalising bestiality should be enacted within the

⁴⁸*Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India).

⁴⁹BNS, No. 45 of 2023 (India) (omitting § 377 of the Indian Penal Code, 1860 in its entirety without enacting any equivalent provision for the protection of adult male victims, transgender persons, or animals from non-consensual sexual harm).

⁵⁰Mental Health Care Act, No. 10 of 2017 (India), and Protection of Children from Sexual Offences Act, No. 32 of 2012 (India).

⁵¹*NALSA v. Union of India*, (2014) 5 SCC 438 (India).



BNS or within appropriate allied animal welfare legislation, ensuring that the protective dimension previously afforded by Section- 377 in this respect is not permanently lost.

- **Operationalising Transgender Recognition:** The formal recognition of transgender identity under Section- 2(10) of the BNS should be extended into the substantive sexual offence provisions of the code, so that the inclusivity affirmed at the definitional level is given meaningful effect in the operative law.
- **Parliamentary Standing Committee Review:** Parliament should constitute a dedicated committee with a mandate to review the BNS's sexual offence provisions against the constitutional standard of gender neutrality and to recommend comprehensive amendments within a fixed timeframe.
- **Legal Education and Awareness:** Law enforcement agencies, judicial officers, and legal practitioners should receive targeted training on the rights of LGBTQIA+ persons and male survivors of sexual violence, so that such protections as exist under current law are fully and effectively utilised pending legislative reform.
- **Civil Society Consultation:** Non-governmental organisations working on LGBTQIA+ rights, gender justice, and animal welfare should be formally included in any legislative review of the BNS's sexual offence provisions, ensuring that the perspectives of affected communities meaningfully inform the reforms that will govern their lives.

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