
THE MISSING PROVISION: SEXUAL VIOLENCE AGAINST MEN AFTER THE DELETION OF SECTION 377 FROM THE BHARATIYA NYAYA SANHITA

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ABSTRACT

The enactment of the Bharatiya Nyaya Sanhita, 2023 (BNS), which replaced the Indian Penal Code, 1860 (IPC) with effect from 1 July 2024, has produced an acute and largely unremarked legislative lacuna: the complete disappearance of any criminal provision protecting adult male and transgender victims of sexual violence. Section 377 IPC, despite its colonial origins and its misuse to persecute consensual same-sex conduct, had after *Navtej Singh Johar v. Union of India* (2018) served a critical protective function by criminalising non-consensual carnal intercourse against persons of any gender. The BNS jettisons that provision without replacement. Its rape provision (Section 63) is explicitly gendered offender must be male, victim must be female and the chapter containing sexual offences is titled 'Offences Against Women and Children', textually foreclosing any favourable judicial interpretation. This paper traces the legislative history of Section 377, analyses the constitutional and human-rights obligations that demanded its protective aspects be preserved, examines the judicial and parliamentary response to the omission, and proposes a model gender-neutral provision for Parliamentary enactment.

Keywords: Section 377 IPC | Bharatiya Nyaya Sanhita | Male Sexual Violence | Gender-Neutral Rape Law | *Navtej Singh Johar* | Legal Lacuna | LGBTQ+ Rights | Indian Criminal Law

1. INTRODUCTION

On 1 July 2024, India's criminal justice system underwent its most sweeping overhaul since independence. The Bharatiya Nyaya Sanhita, 2023, the Bharatiya Nagarik Suraksha Sanhita, 2023, and the Bharatiya Sakshya Adhiniyam, 2023 replaced the Indian Penal Code, 1860, the Code of Criminal Procedure, 1973, and the Indian Evidence Act, 1872 respectively. The stated objectives of the BNS included modernisation, decolonisation, and crucially a movement towards gender-neutral offences. Yet, within days of the new law coming into force, legal scholars and practitioners identified a glaring contradiction: the BNS contains no provision whatsoever that criminalises sexual assault against adult men or transgender persons.

The omission is not trivial. Under the IPC, Section 377 the much-litigated and often maligned provision on 'unnatural offences' had, after the Supreme Court's landmark reading-down in *Navtej Singh Johar v. Union of India* (2018), performed an important residual function: it criminalised non-consensual penile intercourse with any man, woman, or animal. With that provision gone and no equivalent substituted, the rape of an adult male is, in formal legal terms, no longer a cognisable offence in India.

This paper argues that the deletion of Section 377 without a gender-neutral replacement represents a profound legislative failure one that violates Articles 14, 15, and 21 of the Constitution of India, contravenes India's international human-rights obligations, and betrays the very reformist mandate that the BNS was designed to fulfil. Part II maps the colonial origins and judicial evolution of Section

377. Part III analyses the precise legal gap created by the BNS. Part IV examines the constitutional dimensions of the gap. Part V surveys the parliamentary and judicial response. Part VI assesses the practical consequences for male and transgender survivors. Part VII places India in comparative perspective, examining how jurisdictions including Canada, the United Kingdom, South Africa, Australia, and the United States have approached gender-neutral sexual offence law. Part VIII proposes a legislative remedy. Part IX concludes.

2. SECTION 377 IPC: COLONIAL ORIGINS AND JUDICIAL EVOLUTION

2.1 The Buggery Act Template and the IPC

Section 377 of the IPC was introduced in 1861 under British colonial rule, modelled on the

English Buggery Act of 1533, enacted during the reign of Henry VIII. The Buggery Act had prescribed the death penalty for 'unnatural sexual acts against the will of God.' By 1861, the punishment had been reduced in England and Wales to a term of imprisonment not exceeding ten years; the IPC adopted a similar ceiling while also providing for life imprisonment in the most serious cases.

As enacted, Section 377 IPC read: *'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.'* The Explanation to the section clarified that 'penetration is sufficient to constitute the carnal intercourse necessary to the offence.' The law made no distinction between consensual and non-consensual conduct both were equally criminalised.

2.2 Naz Foundation v. Govt. of NCT of Delhi (2009)

The first major judicial challenge to Section 377 succeeded before the Delhi High Court in 2009. The Court, responding to a public interest litigation filed by the Naz Foundation, held that the section, in so far as it criminalised consensual sexual acts between adult persons in private, violated Articles 14, 15, 19, and 21 of the Constitution. Crucially, the Court severed the section, preserving its application to non-consensual acts and to sexual acts with minors or animals.

2.3 Suresh Kumar Koushal v. Naz Foundation (2013)

A two-judge bench of the Supreme Court reversed the Delhi High Court in 2013, reinstating Section 377 in full. The Court controversially held that since fewer than 200 persons had been prosecuted under the section in 150 years, it could not be said to violate constitutional provisions. The judgment attracted widespread academic and popular criticism for its reasoning and was subsequently overruled.

2.4 Navtej Singh Johar v. Union of India (2018): The Definitive Reading-Down

A five-judge Constitutional Bench of the Supreme Court, led by Chief Justice Dipak Misra, unanimously overruled Koushal in 2018. The Court held that Section 377, in so far as it criminalised consensual sexual conduct between adults, was unconstitutional as violating

Articles 14 (equality), 15 (non-discrimination), 19(1)(a) (freedom of expression), and 21 (right to life, dignity, and privacy). The judgment expressly stated that the LGBTQ+ community possesses 'the same human, fundamental, and constitutional rights as other citizens' and that these rights 'inhere in individuals as natural and human rights.'

Critically, however, the Court did NOT strike down Section 377 entirely. The Bench explicitly preserved the section's application to: (i) non-consensual sexual acts against adults of any gender;

(ii) all acts of carnal intercourse with minors; and (iii) bestiality. The operative directions of the judgment confirm: '*Section 377 of the IPC will continue to govern non-consensual sexual acts against adults, all acts of carnal intercourse against minors, and acts of bestiality.*' After Navtej Singh Johar, therefore, Section 377 occupied a clear and legitimate protective niche: a gender-neutral prohibition on non-consensual penetrative sexual acts.

"The LGBT community possess the same human, fundamental and constitutional rights as other citizens do since these rights inhere in individuals as natural and human rights." Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 (per Misra CJ)

3. THE LEGAL GAP CREATED BY THE BHARATIYA NYAYA SANHITA, 2023

3.1 The Architecture of Sexual Offences Under the BNS

Sexual offences in the BNS are housed in Chapter V, titled 'Offences Against Women and Children.' The relevant sub-chapter (Sections 63–73) encompasses rape (Section 63), sexual assault, stalking, voyeurism, and related offences. Every single provision in this sub-chapter is drafted on a woman-as-victim, man-as-perpetrator model. Section 63 BNS, which defines rape, begins: 'A man is said to commit rape if he...' There is no provision anywhere in the BNS that addresses sexual assault by any person against an adult male victim.

3.2 The Complete Absence of a Section 377 Equivalent

The BNS has 358 sections. Not one of them criminalises non-consensual penetrative sex against an adult male. The IPC's Section 377, as read down by Navtej Singh Johar, was the

only provision that performed this function. Its wholesale deletion without substitution means:

- **Male rape is no longer a distinct cognisable offence.** A man or transgender person subjected to non-consensual penile penetrative sex has no provision of the BNS under which an FIR can be registered for what would constitute rape if the victim were a woman.
- **The chapter heading forecloses interpretation.** Because Chapter V is explicitly titled 'Offences Against Women and Children,' there is no scope for courts to read Section 63 expansively to cover male victims. The title imposes a structural ceiling on judicial creativity.
- **Bestiality is also decriminalised.** Section 377 IPC was the only provision prohibiting sexual acts with animals. The BNS contains no equivalent, leaving bestiality entirely outside the criminal law.
- **Grievous hurt is an inadequate substitute.** Male victims may theoretically invoke the BNS provisions on 'grievous hurt' (Section 117) or 'assault' (Section 130), but these carry significantly lower maximum sentences and do not reflect the gravity of sexual violence or trigger the specialised procedures (medical examination protocols, victim support mechanisms) associated with rape law.
- **The Transgender Persons (Protection of Rights) Act, 2019 is inadequate.** While the TPPR Act criminalises 'sexual abuse' of transgender persons, it prescribes a maximum sentence of only two years far below even the minimum for rape under Section 64 BNS (seven years), and wholly disproportionate to the gravity of the offence.

3.3 Impact on Marital Sexual Violence

The deletion of Section 377 has compounded difficulties for married women as well. Under the IPC, women subjected to non-consensual anal or oral intercourse by their husbands could invoke Section 377 because unlike Section 375, which contained the marital rape exception Section 377 did not originally contain such an exception. The BNS retains the marital rape exception in Exception 2 to Section 63. With Section 377 gone, wives subjected to non-consensual 'unnatural sex' are left entirely without recourse.

4. CONSTITUTIONAL DIMENSIONS OF THE OMISSION

4.1 Article 14: Right to Equality

Article 14 guarantees equality before the law and equal protection of the laws to all persons. The Supreme Court has consistently held that classification must be based on an intelligible differentia that bears a rational nexus to the object of the legislation. The BNS's object as stated in its Statement of Objects and Reasons is to modernise criminal law and move towards gender-neutral offences. A law that affords comprehensive criminal protection to female victims of rape while denying any equivalent protection to male victims creates a classification with no rational nexus to that object. The distinction is not intelligible; it is arbitrary.

Furthermore, in *Navtej Singh Johar*, the Supreme Court held that Article 14 protects individuals against 'manifest arbitrariness' in legislation. Creating a legal framework in which the rape of a woman is a cognisable offence carrying a minimum seven-year sentence, while the rape of a man is not an offence at all, is, on the Court's own reasoning in *Navtej*, manifestly arbitrary.

4.2 Article 15: Prohibition of Discrimination

Article 15(1) prohibits the State from discriminating against any citizen on grounds of, inter alia, sex. The Supreme Court, since *NALSA v. Union of India* (2014) and confirmed in *Navtej*, has interpreted 'sex' in Article 15 to include 'sexual orientation' and 'gender identity.' A penal code that systematically excludes male and transgender victims from rape law protection discriminates against them on grounds of sex and gender identity, in direct contravention of Article 15.

4.3 Article 21: Right to Life, Dignity, and Personal Liberty

Article 21 guarantees the right to life and personal liberty. The Supreme Court has progressively expanded this to encompass the right to live with dignity, freedom from sexual violence, bodily integrity, and privacy. In *Navtej Singh Johar*, the Court held that 'the right to sexual autonomy' and 'the right not to be subjected to discriminatory behaviour are intrinsic to the constitutional protection of sexual orientation' under Article 21. A State that withdraws criminal protection from male and transgender victims of sexual violence deprives them of their constitutionally guaranteed right to bodily integrity and dignity and sends the message that violations of their bodies are not serious enough to merit criminal sanction.

4.4 International Human Rights Obligations

India is a State Party to the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT). The UN Human Rights Committee has consistently held that the absence of legal protection for male victims of sexual violence contravenes Articles 2, 7, and 17 of the ICCPR. The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity frequently cited by the Supreme Court affirm the right of all persons to be free from sexual violence and to effective legal remedies. India's failure to criminalise male rape puts it in breach of these international commitments.

5. PARLIAMENTARY AND JUDICIAL RESPONSE TO THE OMISSION

5.1 The Parliamentary Standing Committee's Recommendation

The Parliamentary Standing Committee on Home Affairs, which reviewed the three new criminal law bills in November 2023, specifically identified the omission of Section 377 as a problem. Its report stated:

"The Committee feels that to align with the objectives stated in the BNS's Statement of Objects and Reasons, which inter alia highlights the move towards gender-neutral offences, it is mandatory to reintroduce and retain Section 377 of the IPC. The Bharatiya Nyaya Sanhita, 2023, does not contain any provision for non-consensual sexual offence against male, female, transgender and for bestiality." Parliamentary Standing Committee on Home Affairs, Report on BNS (November 2023)

The Committee's recommendation was explicit and unanimous: retain Section 377. Despite this, the bills were re-introduced in December 2023 and passed on 21 December 2023 without any provision addressing the gap. No debate on the omission is recorded in the Parliamentary proceedings. Senior advocates and legal scholars have characterised the deletion as having been carried out 'without proper thought' and 'without any discussion in Parliament.'

5.2 Gantavya Gulati v. Union of India: The Delhi High Court PIL

In August 2024, advocate Gantavya Gulati filed a Public Interest Litigation before the Delhi

High Court challenging the exclusion of a Section 377 equivalent from the BNS. The PIL sought: (i) a declaration that the repeal of Section 377 IPC without incorporating equivalent provisions in the BNS is unconstitutional; and (ii) a direction to the Union of India to amend the BNS to incorporate explicit provisions criminalising non-consensual sexual acts against persons of all genders.

A Division Bench of the Delhi High Court, comprising Acting Chief Justice Manmohan and Justice Tushar Rao Gedela, admitted the petition and sought the Central Government's response. During the hearing, the bench made pointed oral observations. Acting Chief Justice Manmohan remarked that an ordinance could be introduced if required, while Justice Gedela pointedly asked whether the court should 'shut its eyes just because the offence is not in the statute book' if an incident were to occur.

Subsequently, the Court disposed of the petition by directing the Union Government to treat it as a representation and decide it expeditiously, preferably within six months. The Court granted the petitioner liberty to revive the petition if the government delayed. The Supreme Court, separately, declined to intervene in October 2024, ruling that defining what constitutes an offence falls within Parliamentary domain but that ruling did not preclude Parliamentary action, and effectively remitted the matter to the legislature.

5.3 The State (GNCT of Delhi) v. Khan Mohd. @ Guddu (2024)

The Delhi High Court further engaged with the gap in this case, decided in October 2024, where the court noted in its order that 'there is no equivalent provision to Section 377 under the BNS' and referenced the Gantavya Gulati proceedings and the Parliamentary Standing Committee's recommendation. The court observed that the gap was a live legal problem that required legislative attention.

6. PRACTICAL CONSEQUENCES FOR MALE AND TRANSGENDER SURVIVORS

6.1 Inability to Register FIRs

The immediate practical consequence of the gap is that police officers are unable to register a First Information Report for the rape of an adult male under the BNS. Before 1 July 2024, such cases would have been registered under Section 377 IPC, which was a cognisable, non-bailable

offence. The absence of an equivalent means that investigating officers have no specific legal peg on which to hang a sexual assault complaint by a male victim. This creates a chilling effect on reporting, as survivors and advocates are aware that no formal investigation can be initiated for the specific offence of male rape.

The gravity of this consequence was poignantly illustrated by the case of a 23-year-old man in Uttar Pradesh who died by suicide after being gang-raped by four men. His FIR had been registered under Section 377 IPC. Had the assault occurred after 1 July 2024, the police would have had no specific sexual violence provision under which to proceed.

6.2 Underreporting and Systemic Stigma

Sexual violence against men and transgender persons is already among the most underreported categories of crime, driven by pervasive social stigma, patriarchal conceptions of masculinity, and

critically the belief among survivors that they have no legal recourse. The deletion of Section 377 without replacement sends precisely the wrong signal: that the State does not regard violations of male bodies as sufficiently serious to merit dedicated criminal sanction. Legal scholars, including Senior Advocate Vrinda Grover, have noted that the deletion communicates to male and transgender survivors that 'violations of their bodies are not even considered as a crime that must be treated with severity.'

6.3 Law Enforcement Vulnerability

There is documented evidence that men of diverse sexual orientations and gender identities are disproportionately vulnerable to sexual violence at the hands of law enforcement agencies. The absence of legal protection does not merely fail to address this problem; it arguably exacerbates it by removing the legal mechanism that however imperfectly applied existed to deter and penalise such conduct.

6.4 Impact on the LGBTQ+ Community

The Transgender Persons (Protection of Rights) Act, 2019, though intended to provide protection for transgender persons, is inadequate as a substitute for Section 377. Its maximum sentence of two years for 'sexual abuse' of a transgender person is wholly disproportionate to

the gravity of rape and is far below the sentences prescribed for analogous offences against women. Moreover, as lawyers have observed, the BNS mentions members of the transgender community 'only in their definitions and nowhere else' rendering them effectively invisible as potential victims of sexual crime under the new penal code. The PoSH Act, 2013 similarly excludes all victims who are not women, further shrinking the protective net available to sexual minority communities.

7. COMPARATIVE PERSPECTIVES: HOW OTHER JURISDICTIONS TREAT MALE SEXUAL VIOLENCE

India is not alone in having historically excluded men from rape law protections but it is increasingly in the minority. A survey of comparative jurisdictions reveals a clear and accelerating global trend towards gender-neutral sexual offence legislation, making the BNS's omission not merely a domestic failing but a regression against an international legal consensus. The following survey examines how key jurisdictions have approached the question, and what lessons India may draw from their experience.

7.1 Canada: The Earliest and Most Comprehensive Reform

Canada represents the gold standard of gender-neutral sexual offence law reform, and did so as early as 1983. By passing Bill C-127, Parliament abolished the offence of 'rape' entirely and replaced it with three graded categories of sexual assault under the Criminal Code. These were: (i) basic sexual assault any non-consensual sexual touching or intercourse; (ii) sexual assault with a weapon or threatened violence; and (iii) aggravated sexual assault where the victim is wounded or disfigured. Critically, all three tiers are fully gender-neutral: the Criminal Code of Canada defines sexual assault as any unwanted sexual contact and explicitly includes males, females, and persons of other genders as both potential perpetrators and victims. Proof of penile penetration is not required to establish the most serious category of offending.

The Canadian model offers two specific lessons for India. First, replacing the term 'rape' with 'sexual assault' and grading offences by severity of harm rather than by the gender of the parties achieves gender neutrality without diminishing the gravity attributed to the most serious forms of sexual violence. Second, the Canadian reform was expressly driven by constitutional equality principles, analogous to the guarantees in Articles 14 and 15 of the Indian Constitution demonstrating that the constitutional mandate for gender-neutral law is not unique to India.

7.2 United Kingdom: Partial Reform and Persistent Gaps

The United Kingdom's approach illustrates both the progress achievable through legislative reform and the limitations that can persist even within reformed frameworks. Under the Sexual Offences Act 2003 (England and Wales), the victims of rape are gender-neutral: male rape was first recognised in law in 1994, and the 2003 Act made the victim category fully gender-neutral, so that rape may be committed against a person of any gender. However, the UK law retains a significant gender asymmetry on the perpetrator side: rape can only be committed by a person possessing a penis. Acts of non-consensual penetration by any other means or by a perpetrator without a penis are prosecuted under the separate, though equally serious, offence of 'assault by penetration' under Section 2 of the 2003 Act, which applies to any person regardless of gender.

Scotland went further with the Sexual Offences (Scotland) Act 2009, which created a comprehensive gender-neutral framework covering rape and sexual assault. Northern Ireland similarly reformed its law through the Sexual Offences (Northern Ireland) Order 2008. The UK experience demonstrates that a jurisdiction can preserve the distinct label and gravity of 'rape' while simultaneously ensuring that male and transgender victims have access to an offence of equivalent seriousness precisely what India lacks.

7.3 South Africa: A Model for Post-Colonial Reform

South Africa's approach to this problem is of particular comparative relevance to India because, like India, South Africa inherited a colonial-era criminal law framework that was deeply gendered. The Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (Act 32 of 2007) driven by the imperatives of the post-apartheid constitutional order comprehensively repealed the common law offences of rape and indecent assault and replaced them with a fully gender-neutral statutory framework. The Act defines rape as: 'Any person (A) who unlawfully and intentionally commits an act of sexual penetration with a complainant (B) without the consent of B, is guilty of the offence of rape.' The use of 'any person' in both the perpetrator and victim positions is deliberate and comprehensive.

The South African Act also criminalises 'compelled rape' (where a person is forced to commit rape on another), 'sexual assault' (any non-consensual sexual violation), and 'compelled self-sexual assault' all on a fully gender-neutral basis. Notably, the Act explicitly requires all

criminal justice officials police, prosecutors, magistrates to handle all reported sexual crimes without discrimination on any ground, including gender or sexual orientation. It also provides for post-exposure prophylaxis for HIV to all survivors, irrespective of gender. South Africa thus demonstrates that a constitutional commitment to equality can drive the complete transformation of a colonial-era gendered criminal law framework a direct parallel to the challenge India now faces.

7.4 Australia: State-Level Gender-Neutral Reform

Australia has, across its states and territories, largely moved towards gender-neutral sexual assault legislation. Most Australian jurisdictions define sexual assault or rape in terms that do not restrict either the victim or the perpetrator to a particular gender. New South Wales, Victoria, Queensland, and Western Australia have all enacted sexual assault provisions that apply regardless of the gender of the parties involved. The Australian model demonstrates the feasibility of gender-neutral reform even in federal systems with multiple legislative jurisdictions a consideration relevant to India's own constitutional structure.

7.5 United States: Federal and State-Level Approaches

The United States presents a mixed picture, with variation across state and federal law. At the federal level and in most states, rape and sexual assault laws are substantially gender-neutral, applying to victims and perpetrators of any gender. The Federal Bureau of Investigation's revised Uniform Crime Reporting definition of rape, adopted in 2012, is gender-neutral and consent-based: it defines rape as 'penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.' This definition explicitly covers male victims. Several states, including California, New York, and Illinois, have enacted comprehensive gender-neutral sexual assault statutes. Data from the Centers for Disease Control and Prevention has consistently shown that sexual violence affects persons of all genders, buttressing the case for gender-neutral legal frameworks.

7.6 The International Criminal Law Framework

It bears emphasis that international criminal law has always recognised gender neutrality in the definition of rape as a crime against humanity or a war crime. The Rome Statute of the

International Criminal Court defines rape and other forms of sexual violence in gender-neutral terms. The UN Security Council, in Resolution 2106 (2013), for the first time formally recognised that conflict-related sexual violence also affects men and boys, calling for accountability irrespective of the victim's gender. India, as a signatory to the ICCPR and a member of the UN Security Council on multiple occasions, is bound by these international norms. Its domestic law, with the BNS's omission, now sits in stark tension with the international framework it has subscribed to.

7.7 Lessons for India: What the Comparative Survey Reveals

The comparative survey yields four clear lessons for Indian law reform:

- **Gender neutrality is constitutionally mandated, not merely aspirational.** In every jurisdiction examined, the move to gender-neutral law was driven by constitutional equality principles. India's Constitution contains analogous indeed stronger guarantees under Articles 14, 15, and 21, reinforced by the Supreme Court's own jurisprudence in Navtej Singh Johar.
- **Gender-neutral reform need not weaken protections for women.** The experience of Canada, South Africa, and Australia demonstrates that expanding the victim category to include men and transgender persons does not dilute the law's response to sexual violence against women it strengthens the overall framework by closing loopholes and signalling that all bodies are equally protected.
- **Post-colonial reform is possible and necessary.** South Africa's experience is especially instructive: a jurisdiction that inherited the same colonial legal architecture as India managed, within a decade of constitutional transformation, to enact a comprehensive gender-neutral sexual offences framework. India can and must do the same.
- **India is now an outlier.** The global consensus expressed in domestic legislation across common law and civil law jurisdictions, and in international criminal law is that sexual violence against men and transgender persons is a serious crime deserving of equivalent legal protection. The BNS places India against that consensus.

8. PROPOSED LEGISLATIVE REMEDY

8.1 The Case for a New Gender-Neutral Provision

The solution is not to revive Section 377 in its pre-Navtej form. The colonial-era language of 'carnal intercourse against the order of nature' is archaic, morally freighted, and constitutionally suspect in so far as it pathologises same-sex relations. What is needed is a new, gender-neutral provision that criminalises non-consensual penetrative sexual acts against any person, irrespective of their gender or that of the perpetrator, anchored in the language of consent rather than the language of 'nature.' Such a provision would honour both the spirit of Navtej Singh Johar and the BNS's own stated commitment to gender-neutral reform.

8.2 Model Provision

The following model provision is proposed for insertion into the BNS, either as a new section within Chapter V or as a free-standing chapter on 'Sexual Offences Against All Persons':

Section [X] Non-Consensual Sexual Acts (Gender-Neutral Provision) (1)
Whoever commits penetrative sexual assault upon any person without the free and informed consent of such person shall be punished with rigorous imprisonment for a term which shall not be less than seven years but which may extend to life, and shall also be liable to fine. (2) For the purposes of this section (a) 'penetrative sexual assault' means any act of penile penetration into the vagina, anus, or mouth; or penetration of any object or body part other than the penis into the vagina or anus, of any person; (b) 'consent' means an unequivocal voluntary agreement communicated through words, gestures, or any other form of verbal or non-verbal communication, and the absence of resistance shall not constitute consent; (c) this section applies regardless of the sex, gender, gender identity, or sexual orientation of the perpetrator or the victim. (3) Whoever commits aggravated non-consensual sexual assault as described in sub-section (1) in circumstances analogous to those listed in Section 64 of this Sanhita shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life, and shall also be liable to fine.

8.3 Supporting Recommendations

In addition to the model provision, the following legislative and institutional reforms are recommended:

1	Amend Chapter V's title from 'Offences Against Women and Children' to 'Offences Affecting Sexual Integrity and the Bodies of All Persons' to open interpretive space for inclusive application.
2	Amend the Transgender Persons (Protection of Rights) Act, 2019 to increase the maximum sentence for sexual abuse of transgender persons to align with the proposed gender-neutral rape provision a minimum of seven years.
3	Issue a Presidential Ordinance under Article 123 of the Constitution as an interim measure to plug the gap pending Parliamentary amendment, as suggested by the Delhi High Court.
4	Amend the PoSH Act, 2013 to extend protection against sexual harassment to all persons regardless of gender.
5	Institute mandatory sensitisation training for law enforcement on receiving and investigating complaints of sexual violence from male and transgender complainants.
6	Create a Law Commission sub-committee to comprehensively audit all provisions of the BNS for gender-neutrality and to recommend amendments.

9. CONCLUSION

The deletion of Section 377 IPC from the Bharatiya Nyaya Sanhita without any equivalent replacement provision is a legislative failure of the first order. It is not a progressive step: it is a regression that leaves adult male and transgender survivors of sexual violence without a cognisable offence, without formal legal recognition of their trauma, and without the specialised investigative and support mechanisms that rape law triggers. It contradicts the BNS's own avowed objective of gender-neutrality. It contravenes the constitutional guarantees of equality, non-discrimination, dignity, and bodily integrity that Articles 14, 15, and 21 enshrine. And it ignores the express, unanimous recommendation of the Parliamentary Standing Committee that reviewed the very bills from which this provision was excised.

India's highest court, in Navtej Singh Johar, held that the right to live with dignity and freedom from sexual violence belongs equally to every person, regardless of their sexual orientation or gender identity. The Parliament that enacted the BNS has, in effect, refused to honour that commitment in the statute book. The gap must be filled. The remedy is available, constitutionally compelling, and doctrinally straightforward: a gender-neutral provision on non-consensual penetrative sexual acts, anchored in consent, applicable to perpetrators and victims of any gender.

Until that amendment is made, the Bharatiya Nyaya Sanhita despite its modernising aspirations will be remembered as the law that made male rape invisible. The missing provision must be found, and found urgently.

REFERENCES AND SOURCES OF LAW

Cases

1. Navtej Singh Johar & Ors. v. Union of India, AIR 2018 SC 4321 (W.P. (Crl.) No. 76 of 2018)
2. Naz Foundation v. Govt. of NCT of Delhi, (2009) 111 DRJ 1
3. Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors., (2014) 1 SCC 1
4. National Legal Services Authority v. Union of India, (2014) 5 SCC 438
5. K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1
6. Gantavya Gulati v. Union of India, 2024 SCC OnLine Del 5990
7. The State (GNCT of Delhi) v. Khan Mohd. @ Guddu, Delhi High Court (October 2024)
8. Sudesh Jhaku v. K.C. Jhaku, (1998) Cr LJ 2428 (Delhi)

Statutes

1. Bharatiya Nyaya Sanhita, 2023 (Act 45 of 2023), effective 1 July 2024
2. Indian Penal Code, 1860 (Act 45 of 1860) [repealed]
3. Transgender Persons (Protection of Rights) Act, 2019 (Act 40 of 2019)
4. Protection of Children from Sexual Offences Act, 2012 (Act 32 of 2012)
5. Criminal Law (Amendment) Act, 2013 (Act 13 of 2013)
6. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013

Parliamentary Documents

1. Parliamentary Standing Committee on Home Affairs, Report on the Bharatiya Nyaya Sanhita Bill, 2023 (November 2023)

Secondary Sources and Scholarship

1. Vrinda Grover, as quoted in The News Minute (December 2023): commentary on BNS omission of Section 377 protections for male and transgender victims

2. Arundhati Katju (Senior Advocate), as quoted in ThePrint (September 2023): 'Non-consensual acts on men and LGBTQ seems to have been left out from the BNS'
3. Muskan Tibrewala, Delhi-based lawyer, as quoted in The Quint (July 2024): on heteropatriarchal framework of BNS sexual offence provisions
4. 'The Thoughtless Section 377 IPC Oversight in the BNS', The Leaflet (June 2024)
5. 'Omission of IPC Section 377 from Bharatiya Nyaya Sanhita: Two Steps Backwards', The South First (June 2024)
6. 'New Criminal Laws Legalise Male Rape in India', International Bar Association (September 2024)
7. 'Gender-Neutral Rape Laws in India: Limitations of the BNS', LHSS Collective (May 2024)
8. 'Seven Years After Navtej Singh Johar: Time for Transformative Change', South Asian Herald (September 2025)
9. Law Commission of India, 172nd Report on Review of Rape Laws (2000)

International Instruments

1. International Covenant on Civil and Political Rights, 1966 (ICCPR)
2. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT)
3. Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (2006, updated 2017)
4. UN Human Rights Committee, General Comment No. 36 on Article 6 (Right to Life)