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# THE INVISIBLE VICTIM: MALE AND LGBTQ+ SPOUSAL SEXUAL VIOLENCE AND INDIA'S GENDER-BLIND CRIMINAL LAW

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## ABSTRACT

India's criminal law reform through the Bharatiya Nyaya Sanhita, 2023 (BNS) was presented to the nation as a comprehensive overhaul of colonial-era legislation as modern, progressive, and attuned to contemporary realities. Yet a careful reading of the BNS reveals a troubling paradox at its core: while the statute claims to advance dignity and equality, it has simultaneously created a legal vacuum so wide that entire categories of sexual violence victims specifically, male victims and LGBTQ+ individuals subjected to spousal or intimate-partner sexual assault, now exist entirely outside the protective ambit of India's criminal law. This paper argues that the dual failure of the BNS, retaining the spousal rape exception under Section 63 while entirely deleting the equivalent of Section 377 of the Indian Penal Code, 1860 has produced a compounded injustice that is not merely a legislative oversight but a constitutional violation. Drawing on constitutional jurisprudence, key judicial decisions including *Navtej Singh Johar v. Union of India* (2018)<sup>1</sup>, *NALSA v. Union of India* (2014)<sup>2</sup>, and *K.S. Puttaswamy v. Union of India* (2017)<sup>3</sup>, as well as comparative frameworks from the United Kingdom, Canada, and South Africa, this paper critically examines the structural invisibility of male and queer victims in India's sexual offences law and proposes a framework for inclusive, gender-neutral reform.

**Keywords:** Bharatiya Nyaya Sanhita, Section 377, marital rape exception, gender-neutral rape law, LGBTQ+ rights, spousal sexual violence, Article 14, Article 21, bodily autonomy.

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

<sup>2</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

<sup>3</sup> *K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

## I. INTRODUCTION

When the Bharatiya Nyaya Sanhita, 2023 replaced the Indian Penal Code, 1860, the Government of India declared it a historic step toward decolonizing the country's criminal jurisprudence. The Home Minister described the new laws as rooted in Indian values and responsive to the needs of a modern democratic society. On paper, the ambition was admirable. In practice, the BNS has delivered one of the most significant regressions in the protection of sexual violence victims in India's legislative history, and it has done so almost entirely without public debate.

Two decisions, read together, produce a constitutional crisis for the invisible victim. First, the BNS retained Exception 2 to Section 63<sup>4</sup>, which replicates the old Exception 2 to Section 375<sup>5</sup> of the IPC, the spousal rape exemption providing that sexual intercourse by a man with his own wife, if she is above eighteen years of age, does not constitute rape. Second, and far less discussed, the BNS deleted Section 377 of the IPC entirely, without substituting any equivalent provision for non-consensual sexual acts against adult men or transgender persons. The Parliamentary Standing Committee on Home Affairs had explicitly recommended retaining Section 377<sup>6</sup> to the extent it criminalized non-consensual carnal intercourse against men and transgender persons. The government ignored this recommendation without explanation.

The result is stark. A woman raped by her husband, however violently, has no criminal remedy under the BNS as long as she is above eighteen and cohabiting with him. A man raped by another man, including by a spouse in a live-in relationship has no criminal remedy at all, because the only provision that previously addressed this situation has been wiped from the statute. A transgender person subjected to sexual violence by a partner exists in the same legal void. In a country that has constitutionally recognized transgender persons as a third gender since 2014, and that decriminalized consensual same-sex conduct in 2018, this legislative silence is not merely an omission, but an affront to constitutional morality.

This paper proceeds in five parts. Part II maps the legal framework that existed under the IPC and shows how the BNS dismantled it. Part III examines the constitutional infirmities of the dual failure in the BNS. Part IV undertakes a comparative analysis of gender-neutral legal

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<sup>4</sup> Bharatiya Nyaya Sanhita, 2023, Section 63, Exception 2.

<sup>5</sup> Indian Penal Code, 1860, Section 375, Exception 2; Section 377.

<sup>6</sup> Standing Committee on Home Affairs, Report on the Bharatiya Nyaya Sanhita Bill 2023, 18th Nov 2023

frameworks in the United Kingdom, Canada, and South Africa. Part V proposes a principled framework for reform.

## II. THE LEGAL FRAMEWORK: FROM IPC TO BNS — A REGRESSION DISGUISED AS REFORM

### 2.1 The Position Under the IPC

Under the Indian Penal Code, 1860, two provisions were primarily relevant to the sexual protection of non-female and non-heterosexual victims. Section 375<sup>7</sup> defined rape in strictly gendered terms, a man committing a penetrative sexual act against a woman, while Section 377 criminalized "carnal intercourse against the order of nature with any man, woman or animal." After the Supreme Court's landmark decision in *Navtej Singh Johar v. Union of India (2018)*<sup>8</sup>, Section 377 was read down to the extent that it decriminalized consensual same-sex relations between adults. Crucially however, the Court explicitly preserved Section 377's application to non-consensual sexual acts confirming that it remained valid as a protective instrument for adult male and transgender victims of sexual assault.

This framework, however imperfect, provided at least a partial remedy. A man who was the victim of a non-consensual penetrative act could invoke Section 377. A wife whose husband subjected her to non-penile-vaginal sexual acts that fell outside the definitional scope of rape under Section 375, could potentially use Section 377 alongside the Protection of Women from Domestic Violence Act, 2005. The framework was incomplete and heavily litigated, but it existed.

### 2.2 The BNS and the Creation of a Legal Void

The Bharatiya Nyaya Sanhita, 2023 which came into force on July 1, 2024<sup>9</sup>, fundamentally altered this position. Chapter V of the BNS, dealing with offences against women and children, provides a definition of rape under Section 63 that mirrors Section 375 of the IPC in its gender specificity: the perpetrator is a man, the victim is a woman. Exception 2 to Section 63 retains verbatim the old spousal exemption, updated only in the minimum age of the wife from fifteen

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<sup>7</sup> Indian Penal Code, 1860, s. 375

<sup>8</sup> *Navtej Singh Johar & Ors. v. Union of India*, (2018) 10 SCC 1.

<sup>9</sup> Bharatiya Nyaya Sanhita, 2023 (Act No. 45 of 2023)

to eighteen years, a change that was already mandated by the Supreme Court's ruling in *Independent Thought v. Union of India* (2017)<sup>10</sup>.

The BNS contains no equivalent to Section 377. It contains no provision criminalizing non-consensual sexual acts against adult men. It contains no provision protecting transgender persons from sexual assault by partners. The only provisions in the BNS addressing sexual violence in an even partially gender-neutral manner, such as the cruelty provisions under Section 85 provide civil or remedial frameworks, not criminal prosecution for sexual offences per se.

Senior advocate Vrinda Grover<sup>11</sup>, among the foremost voices in Indian criminal law, noted that the deletion of Section 377<sup>12</sup> creates a gap in the law that leaves adult males and transgender persons without legal protection against sexual violence. The International Bar Association has similarly documented that the new criminal laws effectively legalize male rape in India. The deletion was, as one legal commentator accurately described it, done without proper thought and without any parliamentary discussion.

### 2.3 The Double Invisibility of Queer Victims

The predicament of LGBTQ+ individuals subjected to spousal or intimate-partner sexual violence deserves particular attention because it sits at the intersection of both failures. Consider the following scenarios, all of which are legally invisible under the BNS:

A gay man in a long-term cohabiting relationship who is raped by his male partner has no remedy under Section 63, which applies only to male-on-female rape. He has no remedy under Section 377, which no longer exists. He may attempt to invoke Section 85 (cruelty) but this carries a maximum punishment of three years and does not recognize the act as sexual violence.

A transgender woman in a domestic relationship with a male partner who forces sexual intercourse upon her, faces the same gap, Section 63 applies to women being victimized by men in the biological sense, but the absence of any gender-expansive interpretation leaves transgender women in a position of legal uncertainty.

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<sup>10</sup> *Independent Thought v. Union of India*, (2017) 10 SCC 800.

<sup>11</sup> Vrinda Grover, quoted in 'New Criminal Laws Omit Section 377,' The News Minute (14 Dec 2023)

<sup>12</sup> Indian Penal Code, 1860, s. 377 (repealed)

A bisexual woman in a same-sex domestic partnership who is sexually assaulted by her female partner finds that Section 63, defining rape as an act by a man does not apply, and there is no other sexual offences provision to invoke.

According to a 2024 study published in BMC Public Health, 37.3 percent of gay and bisexual men between eighteen and twenty-four years surveyed across six Indian metropolitan cities reported having experienced sexual violence including rape.<sup>13</sup> The National AIDS Control Organisation's 2015 report found that 31.5 percent of approximately five thousand hijra and transgender women reported that their first sexual encounter was non-consensual.<sup>14</sup> These are not abstract statistics, they represent a population of survivors for whom India's criminal law has no answer.

### **III. CONSTITUTIONAL INFIRMITIES: THE CASE AGAINST THE DUAL FAILURE**

#### **3.1 Violation of Article 14: The Right to Equality**

Article 14 of the Constitution of India guarantees equality before the law and equal protection of the laws. The Supreme Court has consistently held that Article 14 prohibits not only arbitrary discrimination but also the creation of unreasonable classifications that have no rational nexus to the object of the legislation. The BNS creates precisely such an unreasonable classification.

A heterosexual woman who is raped by a stranger is entitled to the full force of criminal law. The same woman raped by her husband, if she is above eighteen and the marriage subsists, is not. A man raped by another man has no criminal remedy at all. These are victims of identical acts of sexual violation, separated only by their gender or the identity of their perpetrator. The harm is the same. The violation of bodily autonomy is the same. The criminal law's response is entirely different.

The Harvard Human Rights Journal has noted that Exception 2 to the rape provision violates Article 14 by creating two classes of women based on marital status, immunizing actions by husbands that would otherwise constitute serious criminal offences. The same logic, applied to the total exclusion of male and transgender victims from the sexual offences framework,

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<sup>13</sup> Venkatesan Chakrapani et al., 'Sexual Violence Among Gay and Bisexual Men in India,' BMC Public Health (2024)

<sup>14</sup> National AIDS Control Organisation, Size Estimation of Key Populations at HIV Risk in India (NACO, 2015)

produces an even more severe constitutional infirmity, it is not a classification within a protected group, it is the complete exclusion of entire groups from protection.

### 3.2 Violation of Article 21: Bodily Autonomy, Privacy, and Dignity

The Supreme Court's nine-judge bench decision in *K.S. Puttaswamy v. Union of India (2017)*<sup>15</sup> recognized the right to privacy as a fundamental right under Article 21, holding that this right encompasses bodily integrity, sexual autonomy, and personal intimacy. The Court held that the right to make decisions about one's body, including decisions about sexual activity, is at the heart of the constitutional guarantee of life and personal liberty. Subsequently, in *Navtej Singh Johar v. Union of India (2018)*<sup>16</sup>, the Supreme Court expressly held that sexual orientation is an essential component of identity and that any law criminalizing or denying protection to persons on the basis of sexual identity violates the constitutional rights to dignity, equality, and privacy.

A law that denies a man or a transgender person any criminal remedy when subjected to non-consensual sexual acts does not merely fail to protect them, it affirmatively communicates that their bodily autonomy is of lesser constitutional value. It tells a male rape victim that his violation is not a crime. This is precisely the kind of dignity-negating position that the Supreme Court warned against in *Puttaswamy* and *Navtej Johar*.

### 3.3 Violation of the Rights of Transgender Persons Under NALSA

In *National Legal Services Authority v. Union of India (2014)*<sup>17</sup>, the Supreme Court recognized transgender persons as a third gender entitled to the full protection of Part III of the Constitution. The Court held that discrimination against transgender individuals violates the right to equality under Article 14, and that the right to life and personal liberty under Article 21 includes the right to live with dignity and to freely express one's gender identity. The BNS, enacted a decade after NALSA and six years after *Navtej Johar*, contains no provision protecting transgender persons from sexual assault. This is not a case of the law predating constitutional development, it is a case of the legislature being fully aware of constitutional obligations and choosing to ignore them.

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<sup>15</sup> *K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

<sup>16</sup> *Navtej Singh Johar & Ors. v. Union of India*, (2018) 10 SCC 1.

<sup>17</sup> *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

### **3.4 The Parliamentary Standing Committee Recommendation: A Deliberate Disregard**

Perhaps the most damning aspect of the BNS's treatment of male and transgender sexual violence is that the legislature was explicitly warned. The Parliamentary Standing Committee on Home Affairs, tasked with reviewing the three new criminal laws, specifically recommended in November 2023 that Section 377 of the IPC should be retained to the extent it criminalizes non-consensual carnal intercourse against men and transgender persons and acts of bestiality. The government proceeded to enact the BNS without this provision, without debate, without explanation, and without any alternative mechanism. This deliberate disregard of a parliamentary committee's recommendation, one dealing with a fundamental right, raises serious questions not only about legislative competence but about constitutional accountability.

## **IV. COMPARATIVE PERSPECTIVES: HOW OTHER JURISDICTIONS HAVE RESOLVED THIS**

### **4.1 The United Kingdom: The Sexual Offences Act, 2003**

The United Kingdom fundamentally restructured its sexual offences law through the Sexual Offences Act, 2003<sup>18</sup> to achieve broad gender inclusivity. Under this Act, the offence of rape is defined as non-consensual penile penetration of the vagina, anus, or mouth of another person. The victim can be of any gender. Other forms of non-consensual sexual penetration are addressed under the offence of "assault by penetration"<sup>19</sup>, which applies regardless of the gender of either party. The Act also abolished the historical marital rape exemption entirely, recognizing that marriage cannot constitute implied, irrevocable consent to sexual activity. The UK's framework demonstrates that gender-neutral sexual offences law does not diminish protections for women, it extends the constitutional guarantee of bodily autonomy to all persons equally.

### **4.2 Canada: The Criminal Code and Gender-Neutral Sexual Assault**

Canada's Criminal Code<sup>20</sup> provides one of the most inclusive frameworks for sexual offences in the world. Sexual assault provisions in Canada do not specify the gender of the perpetrator or the victim, applying to all persons equally. The Supreme Court of Canada has consistently

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<sup>18</sup> Sexual Offences Act 2003 (UK), s. 1

<sup>19</sup> Sexual Offences Act 2003 (UK), s. 2

<sup>20</sup> Criminal Code, RSC 1985, c C-46, ss. 271–273

held that sexual integrity, the right to control what happens to one's body is a constitutionally protected value that cannot be conditioned on gender or marital status. Canada abolished its marital rape exemption in 1983<sup>21</sup>, recognizing that cohabitational or marital status is irrelevant to the question of consent.

### **4.3 South Africa: The Sexual Offences Amendment Act, 2007**

South Africa's Sexual Offences and Related Matters Amendment Act, 2007<sup>22</sup> is perhaps the most comprehensive gender-neutral sexual offences statute in the world. It defines rape as any act of sexual penetration without consent, applicable regardless of the gender of either party. It explicitly covers spousal rape, same-sex rape, and rape by women. South Africa's approach was shaped by the constitutional value of human dignity and the recognition that sexual violence violates a person's fundamental rights irrespective of who they are or who their perpetrator is.

### **4.4 Lessons for India**

The comparative picture is unambiguous. Progressive democracies have moved decisively toward gender-neutral, consent-based sexual offences frameworks that protect all persons equally. India, with one of the most rights-conscious constitutions in the world and a judiciary that has repeatedly affirmed the primacy of dignity, privacy, and equality, has moved in precisely the opposite direction with the BNS. The argument sometimes advanced, that gender-neutral rape laws may be misused against women, is not borne out by the experience of the UK, Canada, or South Africa, where women continue to be overwhelmingly recognized as the primary victims of sexual violence while men and non-binary persons have been afforded legal protection they previously lacked.

## **V. TOWARD A FRAMEWORK FOR INCLUSIVE REFORM**

The analysis above leads to a clear conclusion: the BNS must be amended to address the constitutional vacuum it has created. This paper proposes three specific reforms.

**First**, Exception 2 to Section 63 of the BNS must be deleted. The marital rape exemption has no constitutional basis. Marriage does not create permanent, irrevocable consent to sexual

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<sup>21</sup> Criminal Law Amendment Act, SC 1982, c 125 (Canada)

<sup>22</sup> Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (South Africa), s. 3

activity. This has been recognized by over 150 countries. The Supreme Court's ongoing hearing of petitions challenging the constitutional validity of this exception provides the immediate judicial opportunity to strike it down pending legislative action.

**Second**, a gender-neutral sexual assault provision must be introduced into the BNS. This provision should define sexual assault as any non-consensual act of sexual penetration, applicable regardless of the gender of the perpetrator or the victim. It should expressly apply to acts committed within marriage or intimate partnerships. The vocabulary of the provision should reflect the constitutional recognition of transgender persons as a third gender under NALSA<sup>23</sup> and should protect all persons i.e. men, women, and transgender individuals, without distinction.

**Third**, a specific provision should address intimate-partner sexual violence in the context of same-sex and non-binary relationships. The current Protection of Women from Domestic Violence Act, 2005<sup>24</sup> is limited by its gender-specific scope. A gender-neutral domestic violence law or alternatively, an amendment expanding the PWDVA<sup>25</sup> to all intimate relationships regardless of gender, would provide civil remedies to complement the criminal provisions proposed above.

## VI. CONCLUSION

The BNS was an opportunity. India had the chance to shed not only colonial-era laws but also colonial-era assumptions that the only sexual violence worth criminalizing is male-on-female rape, that marriage extinguishes the right to refuse, that men cannot be victims and women cannot be perpetrators. The legislature squandered this opportunity spectacularly. By retaining the spousal rape exception and simultaneously deleting the only provision that protected male and transgender victims, the BNS has created a criminal law framework that is simultaneously patriarchal in its treatment of women and constitutionally indifferent to the dignity of every person who falls outside the narrow victim-perpetrator binary it enshrines.

The invisible victim of the BNS is not a hypothetical. They are the gay man whose partner rapes him and who finds that no section of the statute even acknowledges that the act occurred.

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<sup>23</sup> National Legal Services Authority v. Union of India, (2014) 5 SCC 438

<sup>24</sup> Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005)

<sup>25</sup> Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005)

They are the transgender woman abandoned by a law that recognized her gender identity in 2014 but stripped her of sexual protection in 2024. They are the heterosexual man for whom, since July 2024, no criminal provision exists if he is subjected to non-consensual sexual acts. India's Constitution speaks the language of dignity, equality, and privacy for all persons. Its criminal law, as of now, does not. That contradiction cannot stand, and it is the task of the courts, the legislature, and the academic community to say so, clearly and without equivocation.