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The Vanishing Offence: Non-Consensual Unnatural Sex and the Legislative Vacuum in the Bharatiya Nyaya Sanhita, 2023

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ABSTRACT

On 1 July 2024, the Bharatiya Nyaya Sanhita, 2023 came into force, replacing the Indian Penal Code, 1860 in its entirety. In doing so, the Sanhita repealed Section 377 of the IPC—the provision under which Indian criminal law had, for over a century and a half, criminalised "carnal intercourse against the order of nature." The Supreme Court in Navtej Singh Johar v. Union of India had read down Section 377 only insofar as it criminalised consensual same-sex relations between adults; the Court expressly preserved the provision's application to non-consensual acts, acts on minors, and bestiality. The BNS's blanket repeal, unaccompanied by any equivalent provision, has produced what the Delhi High Court has described as a "vacuum" in the criminal law: adult male victims of sexual assault, transgender victims of sexual violence, and—on one reading of the statute—wives subjected to non-vaginal sexual violence by their husbands now stand outside the protection of the principal penal code. This article maps the architecture of the vacuum, traces it through the doctrinal history of Section 377 and the Sanhita's drafting record, evaluates the constitutional consequences against Articles 14, 15, and 21, and surveys comparative responses in the United Kingdom, Canada, and South Africa. It concludes that the vacuum is constitutionally untenable and proposes a calibrated reform pathway combining legislative amendment, executive notification, and Article 142 interim safeguards. The Supreme Court's recent reluctance, in Pooja Sharma v. Union of India, to issue any direction does not, on the analysis offered here, foreclose a more carefully constructed challenge.

Keywords: *Bharatiya Nyaya Sanhita 2023; Section 377 IPC; Navtej Singh Johar; Non-Consensual Unnatural Sex; Gender-Neutral Rape Law; Transgender Rights; Marital Sexual Violence; Article 14; Article 21; Legislative Vacuum.*

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I. INTRODUCTION: A VACUUM THE LEGISLATURE DID NOT SEE

The Bharatiya Nyaya Sanhita, 2023, which came into force on 1 July 2024,¹ is the most ambitious recodification of Indian penal law since 1860.²

It is necessary, at the outset, to be precise about the doctrinal status of Section 377 at the moment of its repeal. The Supreme Court of India in *Navtej Singh Johar v. Union of India*³ The non-consensual core of Section 377 thus remained, after September 2018,⁴ the sole provision in Indian criminal law under which an adult male, a transgender person, or on one reading, a wife subjected to non-vaginal sexual violence could obtain a criminal remedy. It is precisely this surviving core that the BNS has now repealed.

The omission is not the inadvertence of an overworked draftsman. The Department-Related Parliamentary Standing Committee on Home Affairs, in its 246th Report on the Bharatiya Nyaya Sanhita, 2023, expressly flagged the absence of a Section 377-equivalent provision and recommended its retention.⁵ The Committee's recommendation went unheeded. The Sanhita as enacted simply does not address the offence of non-consensual unnatural sex.

The judiciary has been the first to articulate the consequences. In *Gantavya Gulati v. Union of India*⁶ The Bench was hearing a public interest petition that flagged precisely the doctrinal gap this article addresses. While the Court ultimately directed the Union of India to treat the petition as a representation, the observation has set the analytical frame for subsequent litigation. The Supreme Court, in *Pooja Sharma v. Union of India*⁷ The constitutional question, however, has been postponed rather than answered.

This article argues four interlocking propositions. First, that the BNS's repeal of Section 377 without any corresponding non-consent provision creates a genuine and identifiable category

¹Bharatiya Nyaya Sanhita, No. 45 of 2023, India Code (2023) [hereinafter BNS] (notified to come into force from July 1, 2024).

²Indian Penal Code, No. 45 of 1860, § 377, India Code (1860) [hereinafter IPC] (repealed by § 358 of the BNS) ("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.").

³*Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India) [hereinafter *Navtej Johar*].

⁴*Id.* ¶ 156 (Misra, C.J.) (reading down § 377 IPC "in so far as it criminalises consensual sexual conduct between adults of the same sex," while expressly preserving its application to non-consensual acts, acts on minors, and bestiality).

⁵Department-Related Parliamentary Standing Committee on Home Affairs, *246th Report on the Bharatiya Nyaya Sanhita, 2023* ¶¶ 3.16.5–3.16.7 (Rajya Sabha Secretariat, Nov. 10, 2023) [hereinafter *Standing Committee Report*] (recording stakeholder submissions and recommending retention of a § 377-equivalent provision in the BNS).

⁶*Gantavya Gulati v. Union of India*, W.P.(Crl.) 2474/2024, Order dated Aug. 27, 2024 (Del. H.C.) (Manhohan, A.C.J., and Gedela, J.) ("There cannot be a vacuum in criminal laws.").

⁷*Pooja Sharma v. Union of India*, W.P.(Crl.) No. 600/2024, Order dated Oct. 14, 2024 (S.C.) (Chandrachud, C.J., and Pardiwala & Misra, JJ.) ("This Court under Article 142 cannot direct that a particular act constitutes an offence. Such exercise falls under parliamentary domain.").

of conduct that is now outside the reach of the principal penal code. Second, that the gendered architecture of Section 63 of the BNS—which defines rape exclusively in terms of male perpetrator and female victim—compounds the vacuum by foreclosing any reading-in of male, transgender, or marital victims into the rape provision.⁸ Third, that the constitutional consequences—evaluated against Articles 14, 15, and 21—render the vacuum doctrinally untenable, particularly when read against the proportionality and dignity standards of *Puttaswamy* and *NALSA*⁹ Fourth, that the Supreme Court's reluctance in *Pooja Sharma* is not the last word: a more carefully constructed petition, and an executive amendment of the Sanhita itself, remain available.

The article proceeds in eight Parts. Part II reconstructs the doctrinal history of Section 377 IPC and its non-consensual core through *Naz Foundation*, *Suresh Kumar Koushal*, and *Navtej Johar*. Part III maps the architecture of the BNS as enacted, and demonstrates the ways in which the vacuum manifests across the statute. Part IV identifies the categories of victims left without statutory recourse. Part V examines the recent jurisprudence in *Gulati*, *Pooja Sharma*, and the marital-sodomy line of cases. Part VI develops the constitutional case under Articles 14, 15, and 21. Part VII offers a comparative survey of gender-neutral sexual offences regimes in the United Kingdom, Canada, and South Africa, and revisits the recommendations of the Justice Verma Committee. Part VIII proposes a calibrated reform pathway and concludes.

II. FROM MACAULAY TO NAVTEJ: THE DOCTRINAL CAREER OF SECTION 377

Section 377 IPC, drafted by Lord Macaulay and enacted in 1860, was modelled on the Buggery Act of 1533 and inherited that statute's preoccupation with the "order of nature."¹⁰ Until 2013, therefore, Section 377 was the sole provision under which oral, anal, or other non-vaginal sexual assault could be prosecuted, regardless of the victim's gender.¹¹

The Justice J.S. Verma Committee, constituted in the wake of the December 2012 Delhi gang-rape, recommended a wholesale rethinking of the law of sexual offences.¹² Male and transgender victims were thus left, post-2013, where they had been pre-2013: dependent on

⁸BNS § 63 (defining rape exclusively in respect of a "man" who commits the prohibited acts upon a "woman").

⁹*Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1, ¶ 297 (India) (Chandrachud, J.) (recognising bodily integrity, sexual autonomy, and informational privacy as facets of the right to life under Article 21).

¹⁰IPC, *supra* note 2, ch. XVI, sub-ch. titled "Of Unnatural Offences."

¹¹*Sakshi v. Union of India*, (2004) 5 S.C.C. 518 (India) (declining to expand the definition of rape under § 375 IPC by judicial interpretation but recommending legislative consideration).

¹²See Justice J.S. Verma, Justice Leila Seth & Gopal Subramaniam, *Report of the Committee on Amendments to Criminal Law* 75–82 (Jan. 23, 2013) [hereinafter Verma Committee Report].

Section 377 IPC.¹³

The constitutional career of Section 377 began with the Delhi High Court's decision in *Naz Foundation v. Government of NCT of Delhi* in 2009, which read down the provision insofar as it criminalised consensual same-sex relations between adults. The Supreme Court reversed that decision in *Suresh Kumar Koushal v. Naz Foundation*¹⁴ The constitutional question was reopened by the nine-judge bench in *Justice K.S. Puttaswamy v. Union of India* in 2017, which expressly disapproved the reasoning in *Koushal*¹⁵

The five-judge bench in *Navtej Singh Johar v. Union of India*¹⁶

It is essential to register what *Navtej Johar* did and did not say. The judgment did not invite, much less direct, the legislature to repeal Section 377 in its entirety. It said the opposite: the non-consensual core was to remain in force. The BNS's drafters, in choosing to repeal the entire provision, have therefore overshot the constitutional command. *Navtej Johar* constituted a constitutional reading-down of one application of Section 377; the BNS has effected a legislative repeal of all applications. The constitutional and legislative actions are not equivalent.

III. THE ARCHITECTURE OF THE BNS: WHERE THE VACUUM SITS

The Bharatiya Nyaya Sanhita, 2023 organises offences against the human body and against women in ways broadly continuous with the IPC, though with renumbered provisions and certain substantive changes.¹⁷ Section 64 specifies the penalty for rape; Sections 65 to 66 deal with aggravated forms of rape and gang rape. The Sanhita contains no chapter or sub-chapter titled "Of Unnatural Offences"; the IPC's sub-chapter heading and its operative provision (Section 377) have been deleted without replacement.¹⁸

The Standing Committee on Home Affairs, in its 246th Report on the Sanhita, was alive to the consequence. The Committee recorded the submissions of multiple stakeholders—including bar associations, women's rights organisations, and LGBTQIA+ advocacy bodies—who

¹³Criminal Law (Amendment) Act, No. 13 of 2013, India Code (2013) (substituting § 375 IPC and expanding the definition of "rape").

¹⁴See *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 S.C.C. 1 (India) (overruling the Delhi High Court's decision in *Naz Foundation v. Government of NCT of Delhi*, (2009) 160 D.L.T. 277 (Del.)).

¹⁵*Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 S.C.C. 1, ¶¶ 144–146 (India) (Chandrachud, J.) (overruling *Koushal* on the question of sexual orientation as a facet of privacy and dignity).

¹⁶*Navtej Johar*, (2018) 10 S.C.C. 1, ¶ 253 (Misra, C.J.) ("Section 377 IPC, in so far as it criminalises consensual sexual acts of adults ... in private, is violative of Articles 14, 15, 19, and 21 of the Constitution.").

¹⁷BNS § 358; see also Bharatiya Nyaya (Second) Sanhita Bill, 2023, Statement of Objects and Reasons (introduced in Lok Sabha on Dec. 12, 2023).

¹⁸BNS §§ 63–66 (rape and aggravated rape provisions, mirroring §§ 375–376AB IPC with modifications).

pointed out the absence of a Section 377-equivalent provision.¹⁹ Para 3.16.7 of the Report's Observations and Recommendations is unambiguous: the Committee recommended that "the Government may consider including a provision similar to Section 377 IPC, with suitable modifications consistent with the *Navtej Singh Johar*"²⁰ The Sanhita, as enacted, did not implement this recommendation. The vacuum is, in this sense, not the result of inadvertence but of deliberate legislative choice—made, on the available record, without explanation.

The architecture of Section 63 of the BNS is critical to understanding why the vacuum cannot be filled by reading the existing rape provisions expansively. Section 63 specifies that "a man is said to commit rape" if he engages in the prohibited acts upon "a woman."²¹ The BNS's offences against women architecture, in other words, has no statutory hook on which a male, transgender, or non-vaginally-assaulted female victim of sexual violence may be hung.²²

It might be argued that the gendered framing of Section 63 is itself merely a re-enactment of Section 375 IPC and that what was true under the IPC remains true under the BNS. The argument misses the architectural point. Under the IPC, the gendered framing of Section 375 was tolerable—constitutionally and pragmatically—because Section 377 supplied the residual protection for non-female victims of non-vaginal sexual assault. Under the BNS, Section 63's gendered framing now stands alone. The compensating provision has been deleted; the gendered restriction has been retained. The aggregate result is a regime in which the principal penal code recognises female victims and only female victims of sexual violence.

The Sanhita does, of course, contain general provisions on hurt, grievous hurt, and acts endangering life.²³ These provisions can be invoked—and the Delhi High Court in *Gulati*²⁴ The suggestion deserves the serious response that the body of the article will offer in Part VI. For the present, three observations suffice. First, hurt and grievous hurt are not, in their essential character, sexual offences; they do not capture the constitutional and dignitary harm at the heart of sexual assault. Second, the punishments under the hurt provisions are markedly lower than those that prevailed under Section 377 IPC, in a manner that produces an evidentiary and sentencing mismatch with the gravity of the offence. Third, the procedural infrastructure for

¹⁹Standing Committee Report, *supra* note 5, ¶¶ 3.16.5–3.16.7.

²⁰Standing Committee Report, *supra* note 5, ¶ 3.16.7 (recommending that "the Government may consider including a provision similar to Section 377 IPC, with suitable modifications consistent with the *Navtej Singh Johar* judgment").

²¹BNS § 63 (specifying that "a man is said to commit rape" if he engages in the prohibited acts with "a woman").

²²See BNS § 75 (sexual harassment), § 77 (voyeurism), § 78 (stalking), § 79 (insult to modesty)—each restricted to female victims.

²³See BNS §§ 117–125 (provisions on hurt, grievous hurt, and acts endangering life).

²⁴*Gantavya Gulati*, Order dated Aug. 27, 2024 (Del. H.C.) (observing, *arguendo*, that "if there is a vacuum then the offence may fall under the provision of causing bodily harm for the time being").

sexual offences-including the protocols for medical examination, victim support, and in-camera proceedings, does not attach to the hurt provisions. To say that hurt is a substitute for non-consensual unnatural sex is to invite under-reporting and under-prosecution.

IV. THE FORGOTTEN VICTIMS: WHO FALLS THROUGH THE VACUUM

A clear-eyed account of the vacuum requires identification of the categories of conduct, and the categories of victims, that the BNS no longer addresses. Three classes warrant separate treatment.

A. Adult Male Victims of Sexual Assault

The first and largest category is adult male victims of sexual assault by other men. Indian criminal law, prior to 1 July 2024, addressed this category through Section 377 IPC. After *Navtej Johar*²⁵ The BNS's repeal of Section 377 risks compounding the empirical invisibility with statutory invisibility.

B. Transgender Victims of Sexual Violence

The second category, in many respects more constitutionally fraught, is transgender victims of sexual violence. The Supreme Court in *NALSA v. Union of India*²⁶ The penal disparity between sexual abuse of a transgender person and rape of a cisgender woman is, on its face, unconstitutional under Article 14: identical conduct (penile penetration without consent) attracts radically different punishment depending solely on the gender identity of the victim.

C. Wives Subjected to Non-Vaginal Sexual Violence by Husbands

The third category is the most doctrinally complex. Exception 2 to Section 63 of the BNS preserves the marital rape exception, providing that "sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape."²⁷ The Supreme Court in *Independent Thought v. Union of India*²⁸ The constitutionality of the marital rape exception itself remains pending in the Supreme Court following the split verdict of the Delhi High Court in *RIT Foundation v. Union of India*²⁹

²⁵See Sangita Punia & Aparna Chandra, *The Boys Are Not Alright: Male Victims of Sexual Offences in Indian Criminal Law*, 5 *Indian L. Rev.* 217, 220 (2021).

²⁶*National Legal Services Authority v. Union of India*, (2014) 5 S.C.C. 438 (India) [hereinafter *NALSA*] (recognising transgender persons as a "third gender" entitled to constitutional protection under Articles 14, 15, 16, and 21).

²⁷BNS § 63, Exception 2 ("Sexual intercourse or sexual acts by a man with his own wife, the wife not being under eighteen years of age, is not rape.").

²⁸*Independent Thought v. Union of India*, (2017) 10 S.C.C. 800 (India) (reading down the marital rape exception in § 375 IPC to the extent it permitted sexual intercourse with a wife between fifteen and eighteen years of age).

²⁹See *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (split verdict on the constitutionality of the marital rape exception); see also *Hrishikesh Sahoo v. State of Karnataka*, 2022 SCC OnLine Kar 371 (Karnataka

A line of recent High Court cases, decided in the dying months of the IPC, established that Exception 2 to Section 375 IPC effectively immunised husbands from prosecution under Section 377 IPC for non-consensual sexual acts with wives. In *Dr. Kirti Bhushan Mishra v. State of Uttarakhand*³⁰ *State (NCT of Delhi) v. Khan Mohd. @ Guddu*³¹ and *X v. State (NCT of Delhi)*³² A wife subjected to non-consensual oral or anal intercourse by her husband has, on the face of the BNS, no remedy under any sexual-offence provision of the principal penal code.

It is worth being precise about what this third category does and does not include. It does not require Parliament to abolish the marital rape exception (a separate constitutional question, currently pending). It requires, more modestly, that the law recognise that even within the marital relationship, certain forms of non-consensual sexual conduct retain their criminal character. Section 377 IPC, despite its operation alongside Exception 2 to Section 375 IPC, formally retained that recognition; the BNS has eliminated it.

A fourth category warrants brief mention: bestiality. Section 377 IPC criminalised carnal intercourse with "any ... animal." The BNS contains no equivalent provision. While the offence is statistically rare, its absence has consequences for prosecution under wildlife and animal welfare statutes, none of which contemplate sexual abuse of animals as a discrete offence with the gravity warranted.

V. THE JUDICIAL RESPONSE: VACUUM, REPRESENTATION, AND THE LIMITS OF ARTICLE 142

Two cases—*Gantavya Gulati v. Union of India* before the Delhi High Court and *Pooja Sharma v. Union of India* before the Supreme Court—have, in the months since the BNS came into force, framed the constitutional debate. Each warrants careful reading.

In *Gulati* The Bench further observed, in *arguendo* The Court ultimately directed the Union to treat the petition as a representation and decide it expeditiously, preferably within six months. The matter has since been listed for further hearing before a different Division Bench (Chief Justice D.K. Upadhyaya and Justice Tejas Karia) on 20 February 2026.

Two features of *Gulati* merit attention. First, the Court did not foreclose the possibility of judicial intervention; it deferred to the executive in the first instance, but on the express premise that a "vacuum" cannot be permitted to persist. Second, the Court's observation that the conduct

High Court permitting framing of charges of rape against a husband).

³⁰*Dr. Kirti Bhushan Mishra v. State of Uttarakhand*, 2024 SCC OnLine Utt 2023.

³¹*State (NCT of Delhi) v. Khan Mohd. @ Guddu*, CRL.L.P. 201/2021, Order dated Oct. 16, 2024 (Del. H.C.).

³²*X v. State (NCT of Delhi)*, 2025 SCC OnLine Del 3493 (Sharma, J.) (holding that § 377 IPC could not be applied between husband and wife in the light of Exception 2 to § 375 IPC).

"may fall under the provision of causing bodily harm" was offered only as a stop-gap, not as a constitutionally adequate response. The Bench was visibly troubled by the gap; the order of reference to representation was a procedural concession to separation of powers, not a substantive endorsement of the vacuum.

In *Pooja Sharma v. Union of India*³³ The Court permitted the petitioner to make a representation to the government.

The Court's reasoning is constitutionally orthodox. Article 142 does not authorise the judicial creation of criminal offences; the principle *nullum crimen sine lege* is a foundational element of the rule of law and is reflected in Article 20(1) of the Constitution. The judicial reluctance in *Pooja Sharma* is not a vindication of the legislative omission; it is a recognition of the limits of judicial competence in respect of *criminalising* conduct. But this leaves at least three avenues open. First, the Court can direct the Union to ensure that the procedural and rights-protective infrastructure for victims of non-consensual sexual acts—including FIR registration, medical examination, and victim compensation—remains available even where the conduct is being prosecuted under fallback provisions. Second, the Court can entertain a constitutional challenge to the *omission* itself, framed under Articles 14 and 21, on the basis that the legislative repeal of Section 377 without replacement effects a withdrawal of equal protection. Third, the Court can read down Section 63 of the BNS in a gender-neutral manner, drawing on the techniques of constitutional interpretation deployed in *Vishaka* and *Common Cause*³⁴

In parallel, a line of post-2018 judgments on marital sodomy, *Mishra*, *Khan Mohd.*, *Mohd. Mustafa*³⁵ and *X v. State (NCT of Delhi)*—has further deepened the doctrinal complexity. These judgments, decided in the closing months of the IPC, established that Exception 2 to Section 375 IPC effectively neutralised Section 377 IPC within the marital relationship. Under the BNS, the doctrinal logic of these judgments has been overtaken by a different problem: the offence to which they were adjacent has itself disappeared.

VI. THE CONSTITUTIONAL CASE: ARTICLES 14, 15, AND 21

The constitutional infirmity of the legislative vacuum can be evaluated through three distinct doctrinal frames: equal protection under Article 14, non-discrimination under Article 15, and personal liberty and dignity under Article 21. Each frame, as the analysis below shows, points

³³See *Pooja Sharma*, Order dated Oct. 14, 2024 (S.C.).

³⁴*Common Cause v. Union of India*, (2018) 5 S.C.C. 1 (India) (laying down advance directives in the absence of statutory framework).

³⁵See *Mohd. Mustafa v. State (NCT of Delhi)*, CRL.REV.P. 990/2024 (Del. H.C.) (Sharma, J.).

in the same direction.

A. Article 14: The Failure of Equal Protection

Article 14 of the Constitution guarantees equality before the law and the equal protection of the laws.³⁶ The BNS, by repealing Section 377 without replacement, has produced a regime in which the criminal law's protection against sexual violence is calibrated to the gender of the victim. A cisgender female victim of penile rape is protected by Section 64 with imprisonment of not less than ten years. A transgender victim of identical conduct receives protection under Section 18(d) of the Transgender Persons Act with imprisonment of six months. An adult male victim of identical conduct receives no statutory protection at all under the principal penal code. The classification cannot be sustained under the *reasonable nexus* test. There is no rational basis on which to claim that non-consensual penetration is a graver constitutional harm when committed against a cisgender woman than when committed against a transgender person or a man. The harm to bodily integrity, sexual autonomy, and dignity—the load-bearing values of the constitutional right at stake—is in each case the same. The classification is therefore arbitrary; it fails the threshold equal-protection test under *E.P. Royappa* and *Maneka Gandhi*. It also fails the manifest-arbitrariness test crystallised in *Shayara Bano v. Union of India*.

B. Article 15: Discrimination on the Ground of Sex

Article 15(1) prohibits discrimination by the State on grounds only of religion, race, caste, sex, place of birth or any of them.³⁷ The Supreme Court in *NALSA*³⁸ The repeal of Section 377 IPC without replacement, on the analysis offered here, effects sex-based discrimination in the structure of criminal protection against sexual violence. The constitutional infirmity is not the gendered framing of Section 63 considered in isolation; it is the gendered framing of Section 63 in conjunction with the repeal of the residual protection that Section 377 supplied.³⁹ The deference owed to legislative omissions is not unconditional; it is calibrated to the constitutional values at stake.

C. Article 21: Bodily Integrity, Dignity, and Sexual Autonomy

Article 21 of the Constitution—the right to life and personal liberty—has been read by the

³⁶Constitution of India, art. 14 ("The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.").

³⁷Constitution of India, art. 15(1) (prohibiting discrimination on grounds "only of religion, race, caste, sex, place of birth or any of them").

³⁸*NALSA*, (2014) 5 S.C.C. 438, ¶ 66 (India) (reading "sex" in Article 15 to include "gender identity").

³⁹*Vishal Jeet v. Union of India*, (1990) 3 S.C.C. 318 (India); *Bandhua Mukti Morcha v. Union of India*, (1984) 3 S.C.C. 161 (India).

Supreme Court to include bodily integrity, sexual autonomy, and dignity.⁴⁰ The trilogy of *Suchita Srivastava*, *Puttaswamy*, and *NALSA*⁴¹ The protection of bodily integrity against sexual assault is among the core obligations of the State under Article 21, and the criminal law is the principal instrument through which that protection is delivered.

The Article 21 inquiry is, in this sense, a positive-duty inquiry. The State's obligation is not merely to refrain from infringing the right to bodily integrity; it is to ensure, through criminal and procedural law, that the right is enforceable and remediable. Where the State has, by legislative repeal, withdrawn the criminal-law protection of bodily integrity from identifiable categories of persons, the constitutional question is not only whether the repeal is reasonable; it is whether the State remains in compliance with its positive obligation to protect. On the analysis offered here, the answer is no.

The argument is reinforced by the general principle that the rule of law requires the existence of cognisable penal provisions for grave bodily harms.⁴² The Supreme Court has, in the death-penalty context, recognised that the State's failure to address grave bodily harms through the criminal law is constitutionally problematic, even where the failure is framed as legislative restraint rather than legislative omission. The principle is, *a fortiori*, applicable to sexual violence.

VII. COMPARATIVE FRAME: GENDER-NEUTRAL SEXUAL OFFENCES REGIMES

The Indian regime's gendered framing of sexual offences is, when viewed against comparable common-law jurisdictions, unusual. Three jurisdictions warrant brief consideration.

In the United Kingdom, the Sexual Offences Act, 2003 reorganised the law of sexual offences on a substantially gender-neutral footing.⁴³ The framing is gender-neutral with respect to the victim, while requiring penile penetration by the perpetrator.⁴⁴ Sections 2 to 4 of the Act extend the regime to assault by penetration, sexual assault, and causing a person to engage in sexual activity without consent—each fully gender-neutral on both sides. The Act's architecture explicitly recognises male, female, and transgender victims of sexual violence and calibrates the punishment to the conduct rather than to the gender of the victim.

⁴⁰Constitution of India, art. 21; *see also Olga Tellis v. Bombay Municipal Corporation*, (1985) 3 S.C.C. 545 (India).

⁴¹*Suchita Srivastava v. Chandigarh Administration*, (2009) 9 S.C.C. 1 (India) (recognising bodily integrity and reproductive autonomy as facets of personal liberty).

⁴²*See Bachan Singh v. State of Punjab*, (1980) 2 S.C.C. 684 (India) (the rule of law and the protection of life require, *inter alia*, the existence of cognisable penal provisions for grave bodily harms).

⁴³Sexual Offences Act 2003, c. 42, §§ 1–4 (U.K.) [hereinafter SOA 2003].

⁴⁴*Id.* § 1 (defining rape in gender-neutral terms with respect to the victim, while requiring penile penetration by the perpetrator).

Canada's Criminal Code adopts an even more thoroughly gender-neutral framing. Section 271 of the Criminal Code defines "sexual assault" in fully gender-neutral terms, covering all non-consensual sexual contact between any persons.⁴⁵

The international human-rights position aligns with the comparative jurisprudence. Article 36 of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention), while focused on violence against women, requires States Parties to criminalise non-consensual sexual acts in terms that do not exclude any victim on the basis of gender or relationship to the perpetrator.⁴⁶ The Indian regime is not a State Party to the Istanbul Convention, but the underlying normative principle—that protection against sexual violence cannot be calibrated to the victim's gender, is reflected in the United Nations Human Rights Committee's jurisprudence and in the broader corpus of international human-rights law. The Committee's recommendation was not implemented in the 2013 Amendment, and was not implemented in the BNS, 2023. The Indian regime is, in consequence, doubly anomalous: it has neither the gender-neutral architecture of comparable jurisdictions nor a residual provision (such as the former Section 377 IPC) to address the categories of conduct that the gendered architecture excludes.⁴⁷ These concerns are real and must inform any reform proposal. But they do not, on the analysis offered here, justify the present vacuum. A gender-neutral provision can be drafted in terms that retain the heightened protection accorded to female victims while extending parallel protection to male and transgender victims of sexual assault. The Sexual Offences Act, 2003 in the United Kingdom is one model; the Verma Committee's recommendations offer another.

VIII. THE PATH FORWARD: REFORM PATHWAYS AND CONCLUSION

The vacuum identified in this article admits of multiple reform pathways, none of them mutually exclusive. We sketch four, in ascending order of constitutional ambition.

The first and most modest pathway is legislative amendment. Parliament can—and, on the analysis offered here, should—amend the BNS to insert a provision corresponding to the non-consensual core of Section 377 IPC. The amendment need not reproduce the colonial language of "carnal intercourse against the order of nature"; it should, indeed, abandon that language in favour of a structurally cleaner formulation. A model provision might criminalise non-consensual penetrative sexual contact between any persons, with calibrated punishment scaled

⁴⁵Criminal Code, R.S.C. 1985, c. C-46, § 271 (Can.) (defining sexual assault in gender-neutral terms).

⁴⁶Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, May 11, 2011, C.E.T.S. No. 210, art. 36 [hereinafter Istanbul Convention].

⁴⁷See Flavia Agnes, *Controversy over Age of Consent*, 48 *Econ. & Pol. Wkly.* 10, 11 (2013).

to the gravity of the conduct. The Standing Committee on Home Affairs has effectively pre-empted this pathway in its 246th Report.

The second pathway is constitutional litigation. A petition under Article 32 of the Constitution, framed as a challenge to the omission rather than as a request for the judicial creation of an offence, can—on the analysis offered here—be sustained against the objections raised in *Pooja Sharma*. The petitioner in *Pooja Sharma* sought relief under Article 142, asking the Supreme Court to direct that specified conduct constitute an offence. The Supreme Court, correctly, declined to do so. A more carefully framed petition would not seek the creation of an offence but a declaration that the legislative omission of any provision corresponding to non-consensual unnatural sex violates Articles 14, 15, and 21, and a direction to the Union of India to remedy the omission within a reasonable time. The technique is analogous to the social-action litigation in *Vishaka v. State of Rajasthan*⁴⁸

The third pathway, more ambitious, is judicial reading-in. The Supreme Court has, in cases such as *NALSA* and *Common Cause*, Section 63 of the BNS could, on this approach, be read in a gender-neutral manner pending legislative amendment. The constitutional warrant for such a reading is supplied by Articles 14, 15, and 21; the doctrinal technique is settled. The objection from *Pooja Sharma* does not apply with full force, since reading-in does not require the Court to *create* an offence; it requires only that the Court interpret an existing offence in conformity with constitutional values.

The fourth pathway, most ambitious, is comprehensive reform of the law of sexual offences along the lines recommended by the Verma Committee. Such reform would integrate the offences of rape, sexual assault, and (formerly) unnatural offences into a unified gender-neutral architecture, calibrated to the gravity of the conduct rather than to the gender of the victim. This approach has been adopted, in different forms, by the United Kingdom, Canada, and South Africa, and is endorsed by the Justice Verma Committee's 2013 Report. It would represent the most thoroughgoing response to the constitutional and policy concerns identified in this article. The political prerequisites for such reform may not, in the immediate term, be present; but the doctrinal framework already exists, and the constitutional case has been made.

In the meantime, the practical task confronting prosecutors and victims falls to the High Courts. Where a victim of non-consensual unnatural sex seeks to register a First Information Report after 1 July 2024, the police are likely to invoke the BNS's general provisions on hurt, grievous hurt, and acts endangering life. These provisions are doctrinally and procedurally inadequate,

⁴⁸See *Vishaka*, (1997) 6 S.C.C. 241, ¶ 16 (India).

as Part III of this article has shown, but they constitute the only currently available avenue. The High Courts have a constitutional responsibility to ensure that the procedural infrastructure of sexual offences—medical examination protocols, in-camera proceedings, victim compensation schemes, and the procedural safeguards under the Bharatiya Nagarik Suraksha Sanhita—remains available to such victims, even where the substantive offence is being prosecuted under fallback provisions. The Delhi High Court's observation in *Gulati* that "there cannot be a vacuum in criminal laws" should, in this respect, be operationalised by the lower judiciary as a positive constitutional commitment, not merely as a rhetorical aspiration.

IX. CONCLUSION

The Bharatiya Nyaya Sanhita, 2023 is, in many respects, an overdue and welcome recodification of Indian criminal law. The Sanhita's reorganisation of the chapter structure, its reduction of antiquated language, and its integration of certain offences from auxiliary statutes are real achievements. But the Sanhita's repeal of Section 377 of the Indian Penal Code without any provision corresponding to the non-consensual core of that section is a legislative misstep with constitutional consequences. It produces a regime in which adult male victims of sexual assault, transgender victims of sexual violence, and—on the doctrinal analysis offered here—wives subjected to non-vaginal sexual violence by their husbands stand outside the protection of the principal penal code.

The repeal cannot be defended as a faithful implementation of *Navtej Singh Johar v. Union of India*. The Supreme Court in that case read down Section 377 only insofar as it criminalised consensual conduct between adults; the non-consensual core was expressly preserved. The BNS's drafters, by repealing the entire provision, have effectively overruled the constitutional *preservation* of Section 377 in *Navtej Johar*. The Standing Committee on Home Affairs flagged this concern in unambiguous terms in its 246th Report; the legislative response was silence.

The Delhi High Court's observation in *Gantavya Gulati v. Union of India*—"there cannot be a vacuum in criminal laws"—is the doctrinal pivot on which the constitutional debate now turns. The Supreme Court's reluctance in *Pooja Sharma v. Union of India* to issue Article 142 directions creating an offence is constitutionally orthodox but does not foreclose a more carefully framed challenge. The vacuum can be addressed through legislative amendment (the most desirable response), through constitutional litigation challenging the omission as a violation of Articles 14, 15, and 21 (the most likely judicial response), through judicial reading-in of Section 63 in gender-neutral terms (the most doctrinally innovative response), or through comprehensive reform of the law of sexual offences along the lines recommended by the Verma

Committee (the most ambitious response). The choice between these pathways is, ultimately, a matter of legislative and constitutional will. The constitutional question is not whether the vacuum must be filled, but how, and by which institution.⁴⁹

⁴⁹See *Supreme Court Bar Association v. Union of India*, (1998) 4 S.C.C. 409 (India).