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GENDER-NEUTRAL SEXUAL OFFENCES UNDER THE BHARATIYA NYAYA SANHITA: CLOSING THE POST-SECTION 377 GAP

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ABSTRACT

The Bharatiya Nyaya Sanhita 2023 ("BNS") replaced the Indian Penal Code 1860 as India's general criminal code, yet its central sexual-offence provision, section 63, retains the male-perpetrator/female-victim formulation inherited from section 375 of the former Code. This continuity became more consequential once the BNS repealed section 377 IPC, the provision that after being read down in *Navtej Singh Johar v Union of India* had continued to supply residual coverage for certain non-consensual penetrative sexual conduct falling outside the rape provision. The repeal, without a clearly equivalent general offence, leaves adult male victims and transgender victims whose cases cannot readily be brought within the statutory term "woman" outside the rape-specific framework of legal classification, sentencing, and evidentiary treatment under sections 63–64 and section 120 of the Bharatiya Sakshya Adhinyam 2023. This article argues that the resulting gap is not merely terminological: it affects how the criminal law recognises the harm of non-consensual penetration itself. Drawing on the legislative history of India's rape law, constitutional principles of equality, dignity and sexual autonomy under Articles 14, 15 and 21, and comparative models from Canada's graded sexual-assault framework and the United Kingdom's gender-neutral victim category under the Sexual Offences Act 2003, the article contends that gender neutrality in the core penetrative offence is compatible with retaining gender-sensitive aggravated protections. It proposes a targeted, consent-based amendment to section 63, together with consequential changes to sentencing and evidentiary provisions, as a workable route to closing the post-section 377 protection gap without disturbing the constitutional gains secured in *Navtej*.

Keywords: Bharatiya Nyaya Sanhita; Section 377; Gender-Neutral Rape Law; Non-Consensual Sexual Offences; Male Victims; Transgender Rights; Sexual Autonomy; Comparative Criminal Law

I. INTRODUCTION

The Bharatiya Nyaya Sanhita 2023 ("BNS") replaced the Indian Penal Code 1860 ("IPC") as India's general criminal code, effective 1 July 2024. Its sexual-offence provisions continue to be organised within a statutory framework centred on offences against women and children, and section 63 retains the core structure of the former section 375 IPC: a man commits rape against a woman when specified penetrative acts occur in enumerated circumstances.¹ Although the 2013 reforms and the BNS both expanded the description of prohibited penetrative acts, neither altered the gendered identity of who may be recognised as a perpetrator or a victim within this framework.

This continuity became considerably more consequential once the BNS repealed the IPC in its entirety, including section 377. That provision, following the Supreme Court's judgment in *Navtej Singh Johar v Union of India*, had been read down to exclude consensual sexual acts between adults in private, while continuing to apply to non-consensual sexual conduct and conduct involving persons incapable of valid consent.² Section 377 had thus operated as an imperfect but real residual provision, addressing non-consensual penetrative conduct that fell outside the narrower, gender-specific rape provision. Its repeal required Parliament to decide whether, and how, the BNS would preserve protection for that remaining category of conduct. The available evidence suggests it did not squarely do so: section 63 cannot, on its text, classify non-consensual penetrative sexual conduct against an adult male victim as rape, and the position of transgender victims remains textually unresolved.

The constitutional defect identified in *Navtej* lay specifically in the criminalisation of consensual adult intimacy, not in any suggestion that non-consensual sexual violence should go unpunished or unrecognised as a distinct legal wrong.³ It follows that the repeal of section 377, while constitutionally necessary, has left an unaddressed structural question: whether the BNS provides an offence of equivalent legal character, sentencing consequence, and evidentiary treatment for victims who cannot be brought within section 63's woman-specific formulation.

It is argued that the BNS produces an underinclusive framework for non-consensual penetrative sexual conduct. By retaining a male-perpetrator/female-victim formulation in section 63 while repealing section 377 IPC without enacting a clearly equivalent general offence, the Code

¹ Bharatiya Nyaya Sanhita 2023, ss 63–64; Indian Penal Code 1860, s 375 (as substituted by Criminal Law (Amendment) Act 2013, s 3).

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

³ *Navtej Singh Johar* (n 2).

creates a gap in offence classification, sentencing, and evidentiary treatment for adult male victims and for transgender victims whose cases cannot clearly be brought within the statutory term "woman."⁴ The appropriate response is not the restoration of section 377, but a consent-based, gender-neutral penetrative sexual-offence framework.

II. FROM IPC SECTION 375 TO BNS SECTION 63

A. The gendered architecture of rape law

Former section 375 IPC criminalised specified acts committed by "a man" against "a woman," a formulation that survived the wide-ranging 2013 amendments to the definition of penetrative conduct.⁵ The Criminal Law (Amendment) Act 2013, enacted in the aftermath of the *Nirbhaya* case, expanded the scope of prohibited acts to include penetration of the mouth, urethra, and anus, and introduced acts involving objects and other body parts.⁶ It did not, however, alter the male-perpetrator/female-victim structure inherited from the colonial-era Code. The BNS, enacted a decade later, reproduces this same structure in section 63, changing terminology and renumbering provisions without revisiting the underlying gendered architecture.⁷

The consequence is that the threshold definition of rape continues to determine, by reference to the sex of the parties rather than the nature of the act or the presence of consent, who may invoke the rape-specific legal regime.

B. The reform proposals Parliament did not adopt

The gender-specific structure of Indian rape law has been contested for over two decades. In *Sakshi v Union of India*, the Supreme Court considered concerns about the narrow scope of the offence of rape and referred the matter to the Law Commission for review.⁸ The Law Commission's 172nd Report subsequently recommended replacing "rape" with a broader, gender-neutral offence of "sexual assault."⁹ The Criminal Law (Amendment) Ordinance 2013, promulgated shortly before the 2013 Act, initially adopted gender-neutral language reflecting this recommendation.¹⁰ Parliament, however, enacted the Criminal Law (Amendment) Act 2013 in gender-specific form, departing from the Ordinance's approach.¹¹ The BNS, in turn,

⁴ Bharatiya Nyaya Sanhita 2023, ss 63–64; Bharatiya Sakshya Adhiniyam 2023, s 120.

⁵ Indian Penal Code 1860, s 375 (as it stood prior to amendment); Criminal Law (Amendment) Act 2013, s 3.

⁶ Criminal Law (Amendment) Act 2013, s 3, substituting Indian Penal Code 1860, s 375.

⁷ Bharatiya Nyaya Sanhita 2023, s 63.

⁸ *Sakshi v Union of India* (2004) 5 SCC 518.

⁹ Law Commission of India, *172nd Report on Review of Rape Laws* (2000) paras 3.1–3.5.

¹⁰ Criminal Law (Amendment) Ordinance 2013, cl 3.

¹¹ Criminal Law (Amendment) Act 2013, s 3.

continued this final legislative choice rather than reviving the gender-neutral formulation considered at the Ordinance stage.

The present statutory design is therefore not merely inherited colonial language. It reflects a deliberate legislative choice, made and remade at three separate junctures, to retain a gender-specific gateway to the most serious penetrative sexual offence, despite an institutional recommendation for a broader formulation.

III. THE REPEAL OF SECTION 377 AND THE POST-BNS STATUTORY GAP

A. Navtej and the limited surviving operation of section 377

The constitutional significance of *Navtej Singh Johar v Union of India* lay in its recognition that consensual sexual conduct between adults, irrespective of sexual orientation, could not be criminalised consistently with the guarantees of dignity, privacy, and equality under the Constitution.¹² The Court read down section 377 IPC to that specific extent. It did not hold that section 377 was wholly unconstitutional, nor did it suggest that non-consensual sexual conduct should escape criminal sanction. Section 377 continued, after *Navtej*, to apply to non-consensual acts and to acts involving persons incapable of giving valid consent.¹³

This distinction matters because it clarifies what the repeal of section 377 did, and did not, resolve. Section 377 had, notwithstanding its considerable drafting and conceptual defects, continued to supply a residual route for prosecuting such conduct until its repeal.

B. Repeal under the BNS and the missing equivalent

The BNS repeals the IPC in its entirety, including section 377, subject to the savings provisions applicable to pending proceedings.¹⁴ The repeal itself was a necessary consequence of replacing the IPC with a new code; it was not, by itself, constitutionally objectionable.

Section 63 BNS cannot on its text serve this function. Its victim category is confined to "a woman," and its perpetrator category is confined to "a man." Non-consensual penetrative sexual conduct against an adult male victim, or against a victim who cannot clearly be brought within the statutory term "woman," therefore falls outside section 63 regardless of the presence or absence of consent.¹⁵ The BNS does not contain any other provision that performs the specific function section 377 had performed for such conduct.

This is a narrower and more precise claim than an assertion that such conduct now goes entirely

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

¹³ *Navtej Singh Johar* (n 12); Indian Penal Code 1860, s 377.

¹⁴ Bharatiya Nyaya Sanhita 2023, s 358.

¹⁵ Bharatiya Nyaya Sanhita 2023, s 63

unpunished. General offences in the BNS may apply depending on the facts of a given case. The claim is that the Code lacks a general, rape-equivalent offence built around non-consent and penetration as the core wrong, applicable irrespective of the victim's gender.

C. Why general offences do not close the gap

General offences differ from a rape-specific framework in three material respects.

First, general offences characterise the wrong differently. Provisions addressing hurt, wrongful restraint, or criminal intimidation locate the offence in physical injury, confinement, or threat, rather than in the violation of sexual autonomy through non-consensual penetration.¹⁶ The same physical act may accordingly receive a legal description that does not reflect its sexual character.

Second, general offences do not carry the sentencing structure Parliament has attached to rape. Sections 63 and 64 BNS prescribe minimum sentences and aggravated categories calibrated to the seriousness Parliament has assigned to non-consensual penetrative conduct. A prosecution under a general provision does not attract this calibrated sentencing framework, regardless of the similarity of the underlying conduct.

Third, general offences do not engage the evidentiary architecture developed specifically for rape prosecutions. Section 120 of the Bharatiya Sakshya Adhiniyam 2023 creates a presumption concerning consent in a prosecution for rape under section 64(2) BNS.¹⁷ That presumption is unavailable where the same conduct is instead prosecuted as a general offence. The cumulative effect is that the gap identified here is a gap in legal recognition, sentencing proportionality, and evidentiary support for the specific wrong of non-consensual penetration, wherever the victim falls outside section 63's textual scope.

IV. UNEQUAL LEGAL RECOGNITION OF MALE AND TRANSGENDER VICTIMS

A. Adult male victims

The consequence identified is clearest for adult cisgender male victims. Section 63 BNS excludes them from its victim category by definition, regardless of the presence of force, coercion, or complete absence of consent.¹⁸ Depending on the facts, a prosecution may proceed under general provisions addressing hurt, unnatural offences under residual provisions,

¹⁶ Bharatiya Nyaya Sanhita 2023, ss 115–117, 127, 351.

¹⁷ Bharatiya Sakshya Adhiniyam 2023, s 120; Bharatiya Nyaya Sanhita 2023, s 64(2).

¹⁸ Bharatiya Nyaya Sanhita 2023, s 63.

wrongful confinement, or criminal intimidation. None of these provisions replicates the legal characterisation, sentencing structure, or evidentiary treatment available under sections 63 and 64.

The resulting anomaly can be stated concretely: where the same non-consensual penetrative act is committed against two adult victims of different sexes, one prosecution may proceed as rape, while the other cannot be classified as rape at all. This difference follows directly, and only, from the victim's sex.

B. Transgender victims and unresolved statutory status

An adult transgender woman may have a textual basis for arguing that the term "woman" in section 63 should be interpreted consistently with the constitutional recognition of self-identified gender identity established in *National Legal Services Authority v Union of India*.¹⁹ The BNS, however, does not expressly resolve whether section 63 extends to transgender women, leaving this question to depend on judicial interpretation rather than clear statutory text.

The position is more clearly unfavourable for transgender men, non-binary persons, and other transgender victims who cannot plausibly be brought within the statutory term "woman."

C. The Transgender Persons Act as an insufficient substitute

Section 18(d) of the Transgender Persons (Protection of Rights) Act 2019 criminalises specified abuse against transgender persons, including sexual abuse, and prescribes a punishment range substantially lower than that available under sections 63 and 64 BNS.²⁰ This provision offers meaningful protection, but it cannot be treated as equivalent to a general penetrative sexual-offence framework.

The result is a hierarchy of legal protection that is difficult to justify on any principled basis and raises constitutional questions.

V. CONSTITUTIONAL BASIS AND RESPONSE TO OBJECTIONS

A. Equality, dignity, and sexual autonomy

Article 14 guarantees equal protection of the laws and prohibits arbitrary classification.²¹ Where the criminal law recognises non-consensual penetrative conduct as rape for one class of

¹⁹ *National Legal Services Authority v Union of India* (2014) 5 SCC 438, paras 66, 69–72.

²⁰ Transgender Persons (Protection of Rights) Act 2019, s 18(d).

²¹ Constitution of India, art 14.

adult victims but denies that recognition to another class solely by reference to sex, the classification calls for justification that the text of section 63 does not itself supply.

Article 15 prohibits discrimination on the ground of sex, and the Supreme Court has held that discrimination on the ground of gender identity falls within this constitutional guarantee.²² Article 21's guarantee of dignity, privacy, and personal autonomy has similarly been extended to protect bodily integrity and sexual autonomy as core constitutional values.²³ Read together, these provisions do not merely tolerate legislative attention to gender-neutral sexual violence; they supply an affirmative constitutional basis for it.

National Legal Services Authority v Union of India is particularly significant in this context. The Court there recognised self-identified gender as a matter of constitutional significance and held that discrimination on the ground of gender identity offends Articles 14, 15, 19, and 21.²⁴ A criminal-law framework that leaves the legal status of transgender victims dependent on uncertain interpretation, rather than clear statutory text, sits uneasily with the constitutional recognition *NALSA* required.

It is necessary, however, to state the limits of this constitutional argument precisely. These authorities do not themselves amend section 63, and they do not resolve the specific textual and drafting choices required to give effect to a gender-neutral offence. Courts have generally recognised that the detailed design of criminal offences, including sentencing structure and aggravated categories, is primarily a legislative function.²⁵ The constitutional materials examined here establish that the present statutory framework requires justification; they do not by themselves supply the text of the reform.

B. Objection: gender neutrality may dilute protection for women

A gender-neutral core offence may be met with the objection that Indian rape law developed specifically in response to the structural and historical vulnerability of women to sexual violence, and that gender neutrality risks diluting hard-won protections.

This objection deserves to be taken seriously, but it does not survive close examination. The argument advanced in this article does not propose the removal of any existing protection for women. It proposes that access to the basic offence of non-consensual penetrative sexual assault should not depend on the victim's sex, while aggravated categories responsive to

²² Constitution of India, art 15; *National Legal Services Authority v Union of India* (2014) 5 SCC 438, paras 66, 69–72.

²³ Constitution of India, art 21; *K S Puttaswamy v Union of India* (2017) 10 SCC 1.

²⁴ *National Legal Services Authority v Union of India* (2014) 5 SCC 438, paras 66, 69–72.

²⁵ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

gendered patterns of vulnerability, including custodial abuse, abuse of authority, and offences against pregnant women, are retained and, where necessary, strengthened. Comparative experience confirms that a gender-neutral basic offence can coexist with a graded structure of aggravated offences calibrated to context and vulnerability. Gender neutrality, on this account, concerns the threshold for legal recognition of the wrong, not the criminal law's sensitivity to the social and structural dimensions of sexual violence against women.

C. Objection: expanded liability and false complaints

A second objection anticipates that extending rape-equivalent liability to a broader class of victims will increase the risk of false or exaggerated complaints. This objection is not specific to gender-neutral reform. The criminal standard of proof beyond reasonable doubt, together with existing procedural safeguards, applies with equal force irrespective of the victim's sex. The possibility that a legal protection may occasionally be misused is not, without more, a sufficient justification for denying that protection to an entire class of victims whose experience of non-consensual penetrative conduct is materially indistinguishable from that of victims currently protected under section 63.

VI. COMPARATIVE MODELS - CANADA AND THE UNITED KINGDOM

The purpose is not to survey comparative sexual-offence law generally, but to extract specific drafting lessons relevant to the reform proposed.

A. Canada: a graded sexual-assault model

Canada abolished the common-law offence of rape and replaced it with a gender-neutral, graded structure of sexual assault. Section 271 of the Criminal Code establishes the basic offence of sexual assault in gender-neutral terms, while sections 272 and 273 create aggravated categories addressing sexual assault with a weapon, threats to a third party, causing bodily harm, and aggravated sexual assault involving wounding, maiming, disfiguring, or endangering life.²⁶

The comparative value of this model lies in its demonstration that a single, broad basic offence, defined without reference to the sex of either party, can operate alongside a differentiated structure of aggravated offences tied to the presence of weapons, injury, or danger to life.

²⁶ Criminal Code, RSC 1985, c C-46, ss 271–273.

Seriousness under this model is calibrated by the circumstances and consequences of the offence, not by the victim's or perpetrator's sex.

B. United Kingdom: gender-neutral victim, differentiated penetrative offences

The United Kingdom adopts a different drafting technique. Section 1 of the Sexual Offences Act 2003 defines rape as intentional penetration of the vagina, anus, or mouth of another person with the perpetrator's penis, without that person's consent and without a reasonable belief in consent.²⁷ The victim category under this provision is gender-neutral. The offence nonetheless remains perpetrator-specific, since only a person with a penis can commit rape as defined. Section 2 separately criminalises assault by penetration using a body part other than the penis, or an object, again with a gender-neutral victim category.²⁸

The UK model illustrates that gender neutrality with respect to the victim does not require gender neutrality with respect to the mode of penetration. India could similarly retain distinct penetrative categories, provided the overall framework does not exclude any class of adult victim from rape-equivalent recognition and sentencing on the basis of sex alone.

C. Limits of comparison

Both jurisdictions operate within procedural and institutional contexts that differ materially from India's, and neither statute should be transplanted without adaptation to the BNS's existing structure, sentencing conventions, and the evidentiary framework under the Bharatiya Sakshya Adhiniyam 2023. Their value for this article is narrower and more precise: both jurisdictions demonstrate that Parliament can design a gender-neutral or victim-neutral penetrative sexual-offence framework without abandoning graduated categories of seriousness or context-sensitive aggravating factors.

VII. A TARGETED REFORM FOR THE BNS

As established previously, the precise nature of the statutory gap: adult male victims and many transgender victims fall outside section 63's rape-specific framework of classification, sentencing, and evidentiary support. This gap raises a genuine constitutional concern under Articles 14, 15, and 21, while it has been demonstrated that other jurisdictions have closed comparable gaps without abandoning graduated protection. It is important to translate those findings into a specific, workable legislative proposal.

²⁷ Sexual Offences Act 2003, s 1.

²⁸ Sexual Offences Act 2003, s 2.

A. A gender-neutral core offence

The central reform proposed is an amendment to section 63 BNS that replaces its present sex-specific formulation with a consent-based, victim-neutral definition of the core penetrative offence:

"A person commits penetrative sexual assault if that person intentionally –

- (a) penetrates, to any extent, the vagina, mouth, urethra or anus of another person with the penis;
- (b) inserts, to any extent, any object or part of the body, other than the penis, into the vagina, urethra or anus of another person; or
- (c) applies the mouth to the vagina, penis or anus of another person, in circumstances where the other person does not consent, or where consent is vitiated in the manner specified in sub-section (2)."

Two drafting questions merit brief attention. First, whether the offence should retain the label "rape" or adopt a different term such as "penetrative sexual assault." Retaining "rape" preserves the social and legal gravity long associated with the offence; a new label, following the Canadian model. It may reduce doctrinal friction with the existing understanding of "rape" as sex-specific. Either choice is compatible with the substantive reform proposed here, provided the punishment structure in section 64 remains calibrated to the seriousness Parliament currently assigns to non-consensual penetration. Second, the definition above follows the UK's approach of distinguishing penile penetration from penetration by other means, though India need not replicate the UK's perpetrator-specific limitation on the core offence itself.

B. Retaining gender-sensitive aggravated protections

The reform proposed here is deliberately confined to the threshold definition of the offence. It does not require, and this article does not propose, the removal of any existing gender-sensitive protection. Aggravated categories under sections 64 to 66 BNS should be retained and reviewed, not discarded, and may properly continue to reflect the following considerations, several of which already inform the existing framework:

1. Offences committed against children, retaining the enhanced protections presently available.
2. Custodial, police, military, medical, educational, or other authority-based abuse of position.
3. Offences committed by more than one person acting together.
4. Offences causing grievous injury, permanent impairment, or death.

5. Offences involving weapons, threats, or coercion of a serious character.
6. Offences against persons with disabilities or persons unable to communicate consent.
7. Repeat offending and offences committed during communal or sectarian violence.

This structure answers the objection raised that gender neutrality at the threshold of the core offence is fully compatible with, and does not require abandoning, heightened protection calibrated to gendered and contextual patterns of vulnerability.

C. Consequential amendment to Section 120, Bharatiya Sakshya Adhiniyam 2023

A threshold amendment to section 63 is incomplete without a corresponding amendment to the evidentiary framework. Section 120 BSA presently creates a presumption concerning consent that refers expressly to "the woman alleged to have been raped" in a prosecution under section 64(2) BNS. If section 63 is amended along the lines proposed above, section 120 would need to be redrafted using a gender-neutral formulation, such as "the person alleged to have been subjected to penetrative sexual assault," while preserving Parliament's existing choice to confine the presumption to the specified aggravated category of prosecution rather than extending it automatically to every case.

This is not a minor drafting formality. Without this consequential amendment, a gender-neutral section 63 would create an offence available to all adult victims while leaving its principal evidentiary presumption textually confined to female complainants, reproducing at the evidentiary stage the very asymmetry the substantive reform is designed to remove.

D. Relationship with Section 377 and the Transgender Persons Act

Two clarifications are necessary to define the proper scope of this proposal. First, the reform does not entail any revival of section 377 IPC in its former or any similar form. Consensual sexual activity between adults remains, and must remain, outside the scope of criminal liability, consistent with *Navtej*. The reform responds exclusively to non-consensual conduct. Second, section 18(d) of the Transgender Persons (Protection of Rights) Act 2019 should continue to operate as a supplementary protection specific to transgender persons, addressing forms of abuse beyond penetrative sexual violence; it is not displaced by, and should not be treated as a substitute for, the general offence proposed here.

VIII. CONCLUSION

This article has argued that the Bharatiya Nyaya Sanhita 2023 retains an underinclusive framework for non-consensual penetrative sexual conduct, and that this underinclusiveness

became acute once the Code repealed section 377 IPC without enacting a clearly equivalent general offence. It was shown that the gendered structure of section 63 is not an inherited accident but the product of a deliberate legislative choice, repeatedly reaffirmed despite the Law Commission's recommendation for a gender-neutral formulation. Part III demonstrated that the repeal of section 377, while constitutionally necessary in light of *Navtej*, removed the residual provision that had continued to address non-consensual conduct falling outside section 375 IPC, and that general offences cannot replicate the legal classification, sentencing calibration, or evidentiary support that a rape-specific framework provides. It is important to trace the practical consequences of this gap for two distinct groups: adult male victims, who are excluded from section 63 by definition, and transgender victims, whose statutory position remains unresolved rather than clearly settled either way.

This gap is situated within a constitutional framework, arguing that Articles 14, 15, and 21, read together with *NALSA* and *Navtej*, require justification for a classification that the present statutory text does not supply, while also taking seriously and answering the principal objections that gender-neutral reform might weaken protection for women or increase the risk of false complaints. Through the contrasting examples of Canada's graded sexual-assault model and the United Kingdom's gender-neutral victim category, that this constitutional concern can be addressed through legislative techniques already tested elsewhere, without sacrificing proportionate, context-sensitive treatment of aggravating circumstances.

The reform proposed follows directly from this analysis rather than from any general preference for gender-neutral drafting as such. It is deliberately narrow: a consent-based, victim-neutral definition of the core penetrative offence in section 63, a preserved and reviewed structure of aggravated categories responsive to gendered and contextual vulnerability, a consequential amendment to the evidentiary presumption in section 120 BSA, and no disturbance whatsoever to the constitutional protection *Navtej* secured for consensual adult intimacy.

The way forward, on this account, does not require Parliament to choose between protecting women and recognising the sexual autonomy of other victims. It requires only that the criminal law apply its most serious and best-developed framework for non-consensual penetrative conduct according to the nature of the wrong committed, rather than according to the sex of the person against whom it was committed. Until that adjustment is made, the repeal of section 377 will remain not a completed reform, but an unfinished one.