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LEGAL ASPECTS OF LGBTQ+ RIGHTS IN INDIA

- ANKITA MISHRA

1. INTRODUCTION

LGBTQ+ rights in India have undergone a dramatic transformation over the past three decades, evolving from near complete social invisibility and criminal stigma to a growing, albeit contested, recognition within constitutional and statutory frameworks. Historically, homosexuality was pathologized under colonial era laws, most notably *Section 377 of the Indian Penal Code, 1860*¹, which criminalised “carnal intercourse against the order of nature” and was routinely used to harass and prosecute same-sex relationships. This provision, rooted in Victorian morality, created a legal architecture that denied queer persons basic dignity, privacy, and autonomy in intimate life.

The modern struggle for LGBTQ+ rights in India began to crystallise in the early 2000s, when public interest litigations, urban queer activism, and emerging global human rights discourse converged to challenge the constitutionality of Section 377. Landmark interventions such as *Naz Foundation v. NCT of Delhi (2009)*², *Suresh Kumar Koushal v. Naz Foundation (2013)*³, and finally *Navtej Singh Johar v. Union of India (2018)*⁴ traced a judicial trajectory from partial decriminalisation to full recognition of consensual same-sex relations as a constitutional right. Parallely, the 2014 recognition of transgender persons as a “third gender” in *NALSA v. Union of India*⁵ and the subsequent *Transgender Persons (Protection of Rights) Act, 2019*⁶, established a distinct legal rights framework for gender-minority communities.

¹ Section 377, Indian Penal Code, 1860, Act 45 of 1860.

² *Naz Foundation v. Govt. of NCT of Delhi*, 160 DLT 277 (Del. 2009)

³ *Suresh Kumar Koushal v. Naz Found.*, (2014) 1 SCC 1 (Sup. Ct. India).

⁴ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (Sup. Ct. India).

⁵ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

⁶ *Transgender Persons (Protection of Rights) Act, 2019*, No. 40 of 2019.

Despite these advances, Indian law remains deeply conflicted on core questions of equality and inclusion. Same-sex marriage is not recognised; joint adoption by LGBTQ+ couples is largely unavailable; and no comprehensive anti-discrimination law protects LGBTQ+ persons in employment, education, housing, or healthcare. Judicial decisions have repeatedly affirmed the constitutional values of dignity, privacy, and non-discrimination, yet they have often stopped short of mandating legislative reform, leaving policy space to an ambivalent Parliament and State legislatures. In this context, the “legal aspects” of LGBTQ+ rights in India are best understood as a partial, patchwork regime constitutional victories at the top superimposed on a largely resistant statutory and social reality below.

1.1 Statement of the Problem

The central problem addressed in this research is the mismatch between constitutional principles and legislative statutory practice in the domain of LGBTQ+ rights in India. While the judiciary has decisively affirmed the rights to privacy, autonomy, and equal dignity for LGBTQ+ individuals, the State has not corresponding entrenched these rights into a uniform, rights based legal structure. *Decriminalisation of same-sex relationships via Navtej Singh Johar did not translate into recognition of same-sex marriage; the transgender recognition framework under NALSA and the 2019 Act has not been matched with robust implementation*; and anti-discrimination norms remain largely aspirational rather than enforceable.

This disjunction creates a legal grey zone in which LGBTQ+ persons are formally free from overt criminalisation yet remain vulnerable to everyday discrimination, social exclusion, and bureaucratic barriers. Questions of family formation, inheritance, adoption, workplace protection, and access to welfare schemes remain legally uncertain for same sex couples and transgender individuals. Moreover, the absence of a dedicated anti-discrimination law means that redress is often dependent on ad-hoc judicial interpretation rather than clear statutory standards, leading to inconsistent outcomes and forum shopping. The research thus interrogates how Indian law, as it presently stands, constructs, protects, and limits the rights of LGBTQ+ persons, and why doctrinal progress has not fully translated into structural equality.

1.2 Research Objectives and Questions

The broad objective of this research is to examine the legal architecture of LGBTQ+ rights in India, with a focus on constitutional doctrine, statutory regimes, and judicial interpretation, and

to evaluate the extent to which this framework ensures substantive equality for LGBTQ+ persons. More specifically, the study seeks to:

1. *Trace the historical and doctrinal evolution of LGBTQ+ rights in India, with emphasis on key constitutional and penal law cases such as Naz Foundation, Koushal, Navtej Singh Johar, and NALSA.*
2. *Analyse the Transgender Persons (Protection of Rights) Act, 2019 in relation to the constitutional framework laid down in NALSA, highlighting gaps between recognition and implementation.*
3. *Examine the status of same sex relationships and marriage related jurisprudence, particularly the Supreme Court's reasoning in **Supriyo @ Supriya Chakraborty v. Union of India (2023)**.*⁷
4. *Assess the current legal position on adoption, parenting, and family formation rights for LGBTQ+ individuals and couples.*

To achieve these objectives, the paper will be guided by the following research questions:

1. *How has the Indian judiciary reshaped the understanding of sexual orientation and gender identity through constitutional interpretation?*
2. *To what extent have the decriminalisation of same sex conduct and the recognition of transgender identity translated into enforceable positive rights?*
3. *Why has the Supreme Court refrained from recognising a fundamental right to same-sex marriage, and what are the implications for family law and constitutional jurisprudence?*
4. *What reforms legislative, executive, and judicial would be necessary to transform the present "partial equality" regime into one of substantive and inclusive legal protection?*

1.3 Methodology and Scope of the Study

This research employs a doctrinal cum analytical methodology rooted in qualitative legal analysis. The study relies primarily on primary legal materials, including the Constitution of India, relevant statutes (such as the *Indian Penal Code*, the *Transgender Persons (Protection of Rights) Act, 2019*⁸, personal and marriage laws, and adoption-related provisions), and

⁷ *Supriyo @ Supriya Chakraborty v. Union of India*, 2023 INSC 920.

⁸ *supra note*, 6

authoritative case-law of the Supreme Court and various High Courts. These materials are subjected to close statutory and constitutional interpretation, with particular attention to the evolution of rights-based reasoning, the interaction between fundamental rights provisions, and the relationship between judicial interpretation and legislative policy.

In addition, the research draws upon secondary sources such as peer reviewed journal articles, monographs, policy reports issued by national and international human rights bodies, and submissions before the Supreme Court and Law Commission, in order to contextualise doctrinal developments within broader theoretical, sociological, and comparative frameworks. While the methodology is predominantly normative and interpretive, it also incorporates elements of critical legal analysis, interrogating the coherence, consistency, and practical efficacy of the existing legal rights regime for LGBTQ+ persons.

The scope of the study is confined to domestic Indian law, with limited reference to international and regional human rights instruments (including the *ICCPR and the Yogyakarta Principles*) only to the extent that they assist in benchmarking Indian jurisprudence and identifying normative gaps. The chronological focus is on the post-2000 period, coinciding with the emergence of LGBTQ+ rights as a distinct constitutional law subject, though earlier colonial era provisions and judgments are examined where they structurally shape contemporary outcomes. The research consciously foregrounds intersectional perspectives, acknowledging how caste, class, religion, and regional disparities mediate the enjoyment of LGBTQ+ rights, without treating these as the central analytical axis.

By combining rigorous doctrinal scrutiny with normative critique, this paper seeks to produce a coherent, professionally oriented legal framework analysis of LGBTQ+ rights in India.

2. CONCEPTUAL FRAMEWORK

2.1 Understanding Sexual Orientation and Gender Identity

In legal discourse, sexual orientation and gender identity are distinct but interrelated concepts that form the core of LGBTQ+ rights analysis.

Sexual orientation refers to an individual's enduring physical, romantic, or emotional attraction to others, irrespective of their own sex assigned at birth. It encompasses categories such as heterosexual, homosexual, bisexual, and asexual orientations. In the Indian constitutional context, sexual orientation has been recognised as an intrinsic aspect of personal

autonomy, dignity, and privacy. The Supreme Court in *Navtej Singh Johar v. Union of India (2018)*⁹ explicitly affirmed that sexual orientation is a fundamental attribute of personality and that discrimination based on sexual orientation violates the constitutional guarantees of equality and non discrimination¹⁰.

Gender identity, on the other hand, denotes a person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. This concept encompasses transgender, non-binary, gender-queer, and cisgender identities. In *NALSA v. Union of India (2014)*¹¹, the Supreme Court recognised gender identity as part of the right to self-determination and dignity under *Article 21*¹², affirming the legal recognition of a "third gender" category for persons whose gender identity does not align with the binary male female classification¹³.

The distinction is analytically significant: sexual orientation addresses whom one is attracted to, while gender identity addresses who one is. In Indian jurisprudence, both concepts are now understood as essential dimensions of personality protected under fundamental rights, although statutory protections remain stronger for gender identity (via the *Transgender Persons Act, 2019*)¹⁴ than for sexual orientation (which lacks a dedicated anti-discrimination statute).

2.2 Interplay Between Law, Culture, and Morality

The legal regulation of LGBTQ+ lives in India is situated at the intersection of law, culture, and morality. Colonial-era statutes reflected Victorian moral norms that criminalised non-heteronormative sexual conduct. Post-independence Indian society has retained strong cultural and religious traditions that often reinforce binary gender roles and heteronormative family models, while also containing historical and contemporary expressions of gender and sexual diversity.

Two distinct moral frameworks compete in constitutional adjudication:

Constitutional morality derived from the normative commitments of the Constitution, including equality, dignity, autonomy, non-discrimination, and freedom. Constitutional

⁹ *supra note, 4*

¹⁰ <https://www.sconline.com/blog/post/2025/06/11/mapping-the-progression-of-lgbtq-rights-in-india-important-laws-and-judicial-pronouncements/>

¹¹ *supra note, 5*

¹² Constitution of India, art. 21.

¹³ <https://news.un.org/en/story/2024/05/1149956>

¹⁴ *supra note, 6*

morality functions as a check on majoritarian or traditional moral views when they conflict with fundamental rights.

Social morality reflective of prevailing cultural, religious, and community attitudes, which may be exclusionary or punitive toward LGBTQ+ persons. Social morality often informs legislative policy and public opinion, but it is not itself a source of constitutional rights.

The doctrinal question is how courts should mediate between these two moral frameworks. One approach is to treat social morality as relevant but not decisive, it may inform legislative choices in areas where the Constitution leaves room for policy, but it cannot justify the curtailment of fundamental rights. Another approach is to accord primacy to constitutional morality, treating it as the supreme normative standard against which laws and policies must be measured.

For LGBTQ+ rights in India, this interplay produces a regime of partial equality: constitutional recognition of dignity and autonomy coexists with statutory gaps and social resistance. The conceptual task for legal scholarship is to clarify how constitutional morality can progressively reshape law and policy without ignoring the cultural and institutional constraints within which the judiciary and legislature operate.

3. CONSTITUTIONAL FOUNDATIONS OF LGBTQ+ RIGHTS

3.1 Article 14: Equality and Non-Arbitrary Treatment

*Article 14 of the Constitution of India*¹⁵ guarantees that “*the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*” This provision establishes two interrelated principles: equality before law (a negative obligation preventing arbitrary state action) and equal protection of laws (a positive obligation to ensure that laws operate equally upon all persons in similar circumstances).

In the context of LGBTQ+ rights, Article 14 functions as a threshold guarantee against arbitrary and discriminatory legal treatment. A law that criminalises consensual same-sex conduct while permitting identical conduct in opposite sex relationships inherently creates a classification based on sexual orientation. The doctrinal question is whether such classification satisfies the reasonable classification test:

¹⁵ Constitution of India, art. 14.

(i) whether there is an intelligible differentia distinguishing the classified group, and

(ii) whether that differentia has a rational nexus with a legitimate state purpose.

Article 14 thus provides a foundational basis for challenging laws and policies that impose disproportionate burdens on LGBTQ+ persons, whether through criminal sanctions, denial of welfare benefits, or exclusion from institutional protections. The provision also supports the argument that neutrality in form does not satisfy constitutional equality if the effect of the law is to perpetuate systemic disadvantage or stigma against a particular group.

3.2 Article 15: Discrimination and the “Sex”/“Sexual Orientation” Debate

*Article 15(1)*¹⁶ prohibits the State from discriminating against any citizen on grounds only of religion, race, caste, sex, place of birth, or any of them. The explicit mention of “sex” has become the focal point of doctrinal debate regarding whether discrimination based on sexual orientation and gender identity falls within the constitutional prohibition.

However, a purposive and transformative reading, aligned with the Constitution’s commitment to substantive equality, treats “sex” as an expansive category that encompasses discrimination rooted in gender stereotypes, non conformity to binary norms, and attraction to persons of the same sex. This approach recognises that discrimination based on sexual orientation is often inextricably linked to discrimination based on sex: *a man attracted to men is treated differently from a man attracted to women precisely because of the sex of the object of his attraction.*

The interpretive expansion of “sex” to include sexual orientation and gender identity allows Article 15 to function as a direct anti-discrimination guarantee in the LGBTQ+ context, even in the absence of explicit statutory language. This reading is consistent with the transformative constitutionalism approach, which views the Constitution as a living instrument designed to overcome historical hierarchies and protect vulnerable minorities.

*Article 15(2)*¹⁷ further prohibits discrimination in access to public spaces, shops, restaurants, hotels, and places of public entertainment, while *Article 15(3)*¹⁸ and *15(4)*¹⁹ permit affirmative action for women and socially and educationally backward classes. The tension here lies in

¹⁶ Constitution of India, art. 15(1).

¹⁷ Constitution of India, art. 15(2)

¹⁸ Constitution of India, art. 15(3).

¹⁹ Constitution of India, art. 15(4)

whether LGBTQ+ persons can be brought within the ambit of “backward classes” for affirmative action purposes, or whether new clauses are needed to authorise such measures.

The doctrinal significance of Article 15 is that it shifts the analytical focus from formal equality (treating everyone the same) to substantive equality (addressing systemic disadvantage and structural exclusion). This is particularly relevant for LGBTQ+ persons, who face not only overt discrimination but also institutional erasure and symbolic exclusion from legal and social recognition.

3.3 Article 16: Non-Discrimination in Public Employment

*Article 16(1)*²⁰ guarantees equality of opportunity in matters of public employment, while *Article 16(2)*²¹ prohibits discrimination on grounds of religion, race, caste, sex, descent, place of birth, or place of residence. Like Article 15, Article 16 does not explicitly mention sexual orientation or gender identity, raising the same interpretive question regarding the scope of “sex”.

In the context of LGBTQ+ rights, Article 16 is critical for addressing employment discrimination in the public sector. LGBTQ+ persons often face barriers to entry, harassment, promotion denial, and forced concealment of identity in government employment. The absence of explicit protection creates a legal vacuum where recruitment, service conditions, and disciplinary actions may be influenced by bias without clear constitutional recourse.

The doctrinal promise of Article 16 lies in its potential to establish a baseline of non-discrimination in public employment, complementing emerging corporate diversity policies and private sector initiatives. However, the lack of explicit statutory backing and enforcement mechanisms limits its practical impact.

3.4 Article 19(1)(a) and 21: Privacy, Autonomy, and Dignity

*Article 19(1)(a)*²² guarantees the fundamental right to freedom of speech and expression. In the LGBTQ+ context, this right encompasses:

- The right to express one’s sexual orientation and gender identity through speech, writing, art, and public advocacy.

²⁰ Constitution of India, art. 16(1).

²¹ Constitution of India, art. 16(2).

²² Constitution of India, art. 19(1)(a).

- The right to assemble and associate with others who share similar identities, including forming LGBTQ+ organisations and support groups.
- The right to access information about sexual health, legal rights, and community resources.

Restrictions on LGBTQ+ expression, such as censorship of queer literature, blocking of Pride events, or penal action against advocacy, must satisfy the reasonable restrictions under Article 19(2), which are narrowly construed. The State must demonstrate that such restrictions are necessary for sovereignty, security, public order, decency, or morality, and that they are proportionate to the legitimate aim pursued.

*Article 21*²³ guarantees the right to life and personal liberty, which the Supreme Court has interpreted expansively to include privacy, autonomy, dignity, and the right to intimate association. In the context of sexual orientation and gender identity, Article 21 protects:

- The right to privacy in intimate relationships and sexual conduct.
- The right to autonomy in making decisions about one's body, gender expression, and identity.
- The right to dignity in living without stigma, harassment, or forced concealment of identity.
- The right to form intimate associations, including same-sex relationships, even if they are not legally recognised as marriage.

The interplay between Article 19(1)(a) and Article 21 is critical: Article 19 protects the public dimension of LGBTQ+ identity (expression, association, advocacy), while Article 21 protects the private dimension (intimacy, autonomy, dignity). Together, they create a comprehensive rights framework that shields LGBTQ+ persons from both public and private interference.

4. FROM CRIMINALISATION TO DECRIMINALISATION

4.1 Historical Trajectory: Colonial Penal Thinking and Section 377 IPC

Section 377 of the Indian Penal Code (IPC), 1860,²⁴ was drafted by Thomas Babington Macaulay during British colonial rule and came into force in 1862. The provision criminalised “*carnal intercourse against the order of nature*” with any man, woman, or animal, prescribing

²³ supra note, 12

²⁴ supra note, 1

punishment of imprisonment for life or up to ten years, along with fine. Though the language was ostensibly neutral, the practical effect was to criminalise consensual same-sex relations between adults, particularly homosexual acts between men.

The colonial mindset behind Section 377 was rooted in Victorian moralism, which viewed non procreative sexual conduct as “unnatural”, “sinful”, and morally corrosive to society. This moral framework was not merely repressive but also disciplinary, it sought to regulate intimate life, enforce binary gender norms, and maintain a public order that excluded queer identities. The provision did not explicitly mention “homosexuality” or “same-sex”, but its vague phrasing allowed for broad and discretionary enforcement, often targeting LGBTQ+ persons through police harassment, blackmail, and arbitrary arrests.

Post independence, Section 377 remained on the statute book as a colonial relic, largely unchallenged until the late 20th century. The continued existence of the provision created a legal architecture of stigma, where LGBTQ+ persons were not only socially marginalised but also legally vulnerable. The criminalisation underpinned discrimination in employment, healthcare, housing, and education, as the fear of exposure and prosecution forced many into concealment and isolation.

The historical trajectory of Section 377 thus reflects a continuity of colonial moral logic within the postcolonial legal order. Challenging the provision required not only a legal argument but also a normative re-imagining of the relationship between law, morality, and individual autonomy in a democratic constitutional order.

4.2 Naz Foundation v. NCT of Delhi (2009): First Judicial Opening

The first major judicial challenge to Section 377 came in *Naz Foundation v. NCT of Delhi (2009)*²⁵, where the Delhi High Court, in a landmark judgment, declared that criminalising consensual sexual conduct between adults in private violated *Articles 14, 15, 19, and 21* of the Constitution. The Court held that Section 377, insofar as it applied to consensual adult same-sex relations, was unconstitutional.

The Delhi High Court’s reasoning was grounded in constitutional morality and substantive equality. The Court observed that:

²⁵ *supra note*, 2

- Sexual orientation is a personal attribute deserving equal protection, and discrimination based on sexual orientation is analogous to discrimination on grounds of sex.
- Section 377 created an arbitrary classification between consensual and non-consensual conduct, and between same-sex and opposite-sex conduct, without a rational nexus to a legitimate state purpose.
- The provision violated the right to privacy and personal autonomy under Article 21, as it intruded into the most intimate sphere of individual life.
- The stigma created by criminalisation undermined the dignity of LGBTQ+ persons, perpetuating social exclusion and vulnerability to abuse.

The judgment was significant not only for its doctrinal innovation but also for its normative vision, it framed LGBTQ+ rights as integral to the constitutional project of equality, liberty, and dignity. The Court emphasised that constitutional morality must prevail over social morality, and that the Constitution is a living instrument capable of evolving to protect marginalised minorities.

However, the judgment was narrowly confined to consensual adult conduct in private; it did not strike down Section 377 in its entirety, leaving room for continued enforcement against non-consensual acts, bestiality, and conduct involving minors. This partial invalidation was both a strategic compromise and a doctrinal limitation, as it left the broader provision intact and vulnerable to appellate reversal.

4.3 Suresh Kumar Koushal v. Naz Foundation (2013): Rollback and Critique

In *Suresh Kumar Koushal v. Naz Foundation (2013)*²⁶, the Supreme Court set aside the Delhi High Court's judgment in Naz Foundation, reinstating Section 377 in its entirety. The Court held that the Delhi High Court had erred in reading down the provision and that amendment or repeal of Section 377 was a matter for the legislature, not the judiciary.

The Supreme Court's reasoning rested on several key premises:

4.3.1 Minimal impact argument:

The Court observed that the LGBTQ+ community constituted a "minuscule fraction" of the population, and that Section 377 was rarely enforced against consenting adults. This

²⁶ *supra note*, 3

assumption ignored the chilling effect and symbolic harm of criminalisation, even where enforcement was sporadic.

4.3.2 Legislative competence:

The Court emphasised that the separation of powers required judicial restraint in matters of criminal law reform, and that the legislature was better positioned to balance moral, social, and policy considerations.

4.3.3 Social morality:

The Court gave greater weight to prevailing social morality than to constitutional morality, suggesting that public opinion and traditional norms should inform the interpretation of criminal law.

4.3.4 Vagueness and enforceability:

The Court rejected the argument that Section 377 was unconstitutionally vague, holding that the phrase “against the order of nature” was sufficiently clear for enforcement purposes.

The Koushal judgment has been widely criticised for its doctrinal narrowness and normative conservatism. Critics argue that:

- The “minuscule fraction” reasoning devalues minority rights, treating the size of a group as relevant to the scope of constitutional protection, which contradicts the counter-majoritarian function of fundamental rights.
- The deference to the legislature ignored the historical failure of the legislature to reform Section 377 despite decades of advocacy and public debate.
- The elevation of social morality over constitutional morality undermined the transformative purpose of the Constitution, which is designed to protect minorities from majoritarian oppression.

The judgment failed to engage with the real-world consequences of criminalisation, including police harassment, blackmail, and denial of access to healthcare and other services.

Koushal thus marked a regressive turn in LGBTQ+ rights jurisprudence, restoring the colonial-era criminal provision and creating a doctrinal impasse that would only be resolved five years later.

4.4 Navtej Singh Johar v. Union of India (2018): Final Decriminalisation

In *Navtej Singh Johar v. Union of India (2018)*²⁷, a five-judge Constitution Bench of the Supreme Court unanimously read down Section 377, declaring that consensual sexual conduct between adults in private is not criminal under the provision. The Court held that Section 377, insofar as it criminalised consensual adult same-sex relations, violated *Articles 14, 15, 19, and 21 of the Constitution*.

The judgment was grounded in a comprehensive doctrinal and normative analysis:

4.4.1 Equality and non-discrimination:

The Court held that Section 377 created an arbitrary classification based on sexual orientation, which is a suspect ground analogous to sex. The provision failed the reasonable classification test, as it lacked a rational nexus with any legitimate state purpose.

4.4.2 Privacy and autonomy:

Drawing on the earlier *Justice K.S. Puttaswamy (Privacy) v. Union of India (2017)*²⁸ judgment, the Court affirmed that sexual orientation is an essential attribute of privacy and personal autonomy. The State cannot invade the intimate sphere of adult consensual conduct without compelling justification.

4.4.3 Dignity and stigma:

The Court emphasised that criminalisation creates social stigma, psychological harm, and systemic exclusion, which violate the constitutional guarantee of dignity. The provision demeaned LGBTQ+ persons by treating their intimate conduct as criminal.

4.4.4 Constitutional morality:

The Court reaffirmed that constitutional morality must prevail over social morality, and that the Constitution is designed to protect minority rights even in the face of majoritarian disapproval.

4.4.5 Transformative constitutionalism:

The judgment framed LGBTQ+ rights as integral to the transformative project of the Constitution, which seeks to overcome historical hierarchies and recognise the equal moral worth of all citizens.

²⁷ *supra note, 4*

²⁸ Justice K.S. Puttaswamy (Privacy) v. Union of India, (2017) 10 SCC 1.

The Court's reading down of Section 377 was precise and limited: it did not strike down the provision in its entirety but excluded consensual adult conduct from its scope. Non-consensual acts, bestiality, and conduct involving minors remain criminal under the provision. This approach preserved the legislative text while neutralising its discriminatory effect.

Navtej Singh Johar thus marked the culmination of the decriminalisation journey, transforming Section 377 from a tool of repression into a symbol of colonial injustice that had been constitutionally neutralised.

5. TRANSGENDER RIGHTS AND THE LEGAL REGIME

5.1 NALSA v. Union of India (2014): Recognition of Third Gender

*National Legal Services Authority v. Union of India (NALSA, 2014)*²⁹ is the foundational judgment establishing the constitutional status of transgender persons in India. A two-judge bench of the Supreme Court recognised transgender persons as a "third gender" and affirmed that they are entitled to the same fundamental rights as other citizens under Part III of the Constitution.

The Court held that:

- Gender identity is an integral part of personal autonomy and self-determination under *Article 21*. Individuals have the right to self-identify their gender as male, female, or third gender, without requiring medical or surgical intervention.
- The terms "sex" in *Articles 15 and 16* include gender identity and sexual orientation, thereby extending the anti-discrimination guarantee to transgender persons.
- Transgender persons are socially and educationally backward and may be treated as a "backward class" for the purpose of reservation in education and public employment under *Articles 15(4) and 16(4)*.
- The State must recognise the third gender category in official documents (*such as passports, voter ID, and school certificates*) and ensure that transgender persons are not forced to misrepresent their gender identity.

The judgment was groundbreaking for its affirmative recognition of transgender identity as a distinct legal category, breaking from the binary male female framework that had dominated

²⁹ *supra note, 5*

Indian law. It established the principle of self perceived gender identity as the basis for legal recognition, a standard that later legislation would partially retain but also dilute.

NALSA also laid the groundwork for positive obligations on the State, including the creation of welfare schemes, educational support, and healthcare access for transgender persons. The Court treated transgender identity not merely as a matter of identity documentation but as a rights-bearing status requiring comprehensive state action.³⁰

5.2 Judicial Directions on Welfare, Education, and Healthcare

In addition to recognising third gender status, the NALSA judgment issued specific directions to the Central and State governments to implement concrete measures for the welfare and inclusion of transgender persons. These directions covered multiple domains:

5.2.1 Welfare and Social Security

The Court directed the establishment of separate *HIV sero-surveillance centres* and the inclusion of transgender persons in the social security scheme under *National Rural Health Mission*.³¹

States were required to provide public facilities such as separate toilets, waiting areas, and other infrastructure to ensure dignity and privacy for transgender persons in public spaces.

The Court called for the creation of welfare boards at the State level to monitor and implement schemes for transgender persons, including pension, housing, and livelihood support.

5.2.2 Education

Transgender persons were to be treated as *Socially and Educationally Backward Classes (SEBC/OBC)* for the purpose of admission to educational institutions, with reservation where applicable.

The Court directed educational institutions to provide access to education without discrimination, including scholarships, hostels, and counselling support.

³⁰ <https://www.alec.co.in/show-blog-page/laws-related-to-lgbtq-community-in-india>

³¹ National Rural Health Mission Framework for Implementation (Ministry of Health & Family Welfare, Government of India, 2005).

Institutions were required to adopt sensitisation programmes to prevent harassment and bullying of transgender students.

5.2.3 Healthcare

The Court mandated that the government provide medical facilities to transgender persons, including access to gender affirmation surgery and hormone therapy in government hospitals.

States were directed to address mental health needs and provide counselling services to transgender persons, recognising the psychological harm caused by stigma and discrimination.

The judgment emphasised the need for affirmative healthcare that respects gender identity rather than treating transgender persons as pathological or deviant.

These directions were immediately binding on the State, creating a judicially enforceable framework for welfare and inclusion. However, the implementation was uneven across States, with some jurisdictions adopting comprehensive measures while others made little progress over the following years.

5.3 Transgender Persons (Protection of Rights) Act, 2019

The *Transgender Persons (Protection of Rights) Act, 2019*³² and the accompanying *Transgender Persons (Protection of Rights) Rules, 2020*³³ operationalised the NALSA judgment in statutory form. The Act was enacted to provide for the protection of rights, welfare, and social inclusion of transgender persons.

5.3.1 Key Provisions and Recognition Mechanism

The Act defines a “*transgender person*” as a person whose gender does not conform to the binary male–female classification and includes persons who:

- *Undergo sex reassignment surgery,*
- *Have a combination of male and female biological features, or*
- *Have a self-perceived gender identity that is different from the gender assigned at birth.*

The Act establishes a recognition mechanism through the following steps:

³² *supra note, 6*

³³ Transgender Persons (Protection of Rights) Rules, 2020, S.O. 2024(E) (India).

- ***Application for Certificate of Identity:*** A transgender person may apply to the District Magistrate for a Certificate of Identity, which certifies their status as a transgender person.
- ***Content of Certificate:*** The certificate includes the person's name, photograph, and gender identity as "transgender".
- ***Right to Change Gender:*** After undergoing surgery or medical intervention, a person may apply for a revised Certificate of Identity to reflect their desired gender (male or female).
- ***National Council for Transgender Persons:*** The Act establishes a National Council to monitor the implementation of the Act, advise the government on policy, and address grievances.
- ***The recognition mechanism is a mixed model:*** it retains the self-perceived identity principle from NALSA but introduces a bureaucratic certification process that requires official approval. This has been a point of contention, as it introduces a layer of state oversight that NALSA had explicitly rejected.

5.3.2 Anti-Discrimination and Penal Provisions

The Act contains several anti-discrimination provisions:

Section 3 prohibits discrimination against transgender persons in:

- Employment and occupation,
- Education,
- Healthcare,
- Access to public or private places and services,
- Voting, and
- Right to movement and residence.

Section 4 guarantees the right to self-perceived gender identity and the right to be recognised as transgender.

Section 5 provides for the right to residence, prohibiting the eviction of transgender persons from their homes without due process.

Section 6 mandates the government to provide welfare schemes for education, social security, and healthcare.

The Act also includes penal provisions for offences against transgender persons:

Section 18 prescribes punishment for:

- Forced or bonded labour,
- Denial of access to public places,
- Physical, sexual, or verbal abuse,
- Invasion of privacy, and
- Discrimination in employment or education.

The prescribed punishment is imprisonment for 6 months to 2 years, along with fine.

The Act does not create a separate offence for hate speech or hate crimes, leaving such cases to be addressed under general provisions of the *IPC (such as Sections 295A, 509, or 354)*.

The penal provisions are narrow in scope and prescribe relatively light penalties compared to similar offences against other protected groups. The absence of a hate crime framework and the limited range of punishable conduct have been widely criticised.

6. SAME-SEX RELATIONSHIPS AND MARRIAGE DEBATES

6.1 Legal Status of Same-Sex Relationships Post-Navtej Johar

Following *Navtej Singh Johar v. Union of India (2018)*, consensual sexual conduct between adults in private is no longer criminal under *Section 377 of the Indian Penal Code*. The judgment read down the provision to exclude adult consensual same-sex relationships, thereby decriminalising homosexuality in the narrow but crucial sense of removing criminal sanctions.

However, decriminalisation does not equate to positive legal recognition. Post-Navtej Johar:

- Same-sex relationships are not unlawful, but they are also not legally recognised as marriage, civil union, or domestic partnership under any central statute.
- There is no statutory framework governing property, inheritance, maintenance, or succession for same-sex couples as a distinct category.
- LGBTQ+ persons remain subject to the general criminal law (e.g., offences of assault, sexual violence, fraud) but cannot invoke marriage based protections such as those under the Protection of Women from *Domestic Violence Act, 2005*, which is expressly gendered.

The legal status is thus one of negative liberty: the State refrains from criminalising same-sex conduct but does not affirmatively recognise or regulate such relationships. This creates a legal vacuum in areas where personal status triggers rights and obligations, particularly in family law.

6.2 Recognition of Live-In Relationships Involving Same-Sex Couples

Indian law has gradually recognised live-in relationships (cohabitation without marriage) as capable of attracting certain legal protections, primarily through judicial interpretation rather than explicit statutory provision.

The Supreme Court and various High Courts have held that:

- A long term, stable cohabitational relationship may be presumed to be a “relationship in the nature of marriage” for certain purposes, particularly under the Protection of Women from Domestic Violence Act, 2005.
- Such relationships may attract rights to maintenance, protection from eviction, and access to welfare schemes in specific contexts.

For same-sex couples, the position is partial and context specific:

- Several High Courts have acknowledged that same-sex live-in relationships fall within the broader notion of “family” for purposes of welfare benefits, such as maternity leave, pension, and social security.
- In some cases, courts have extended employment related benefits (e.g., leave for caregivers, health insurance for dependents) to same-sex partners where the employer’s policy or statute is interpreted in a rights consistent manner.
- However, there is no uniform statutory recognition of same-sex live-in relationships as a distinct legal category. Protections are granted on a case by case basis, often through creative interpretation of existing laws rather than explicit entitlement.

The protective scope remains limited:

- Same-sex couples cannot register a domestic partnership under a central law.
- They lack automatic rights to inheritance, adoption, or maintenance under personal laws or the *Code of Criminal Procedure, 1973 (Section 125)*.
- The absence of a registration mechanism makes it difficult to prove the existence of a relationship for legal purposes.

Judicial recognition of same-sex live-in relationships reflects a functional approach to family, focusing on the reality of the relationship rather than its formal status. However, this approach is incomplete and leaves significant gaps in legal certainty and protection.

6.3 Supriyo @ Supriya Chakraborty v. Union of India (2023)

The most significant recent judicial development on same-sex marriage is the Supreme Court's decision in *Supriyo @ Supriya Chakraborty v. Union of India (2023)*, where a five-judge Constitution Bench examined whether same-sex couples have a fundamental right to marry under the Constitution and whether the *Special Marriage Act, 1954 (SMA)* should be read in a gender-neutral manner.

6.3.1 Judicial Denial of Fundamental Right to Marry

The Court unanimously held that:

- There is no fundamental right to marry under the Constitution that the Court can recognise or enforce for same-sex couples.
- The right to marry is not explicitly listed in Part III (Fundamental Rights), and the Court declined to read it into Articles 14, 15, 19, or 21 as an independent, enforceable right that would mandate recognition of same-sex marriage.
- The Court rejected the argument that the SMA should be read down or reinterpreted to include same-sex couples, holding that such a change would require legislative amendment, not judicial interpretation.

6.3.2 Role of Parliament and State Legislatures

The Court explicitly left the question of same-sex marriage or civil union to Parliament and State legislatures:

- The Court observed that Parliament may enact a gender-neutral marriage law or a separate civil union/domestic partnership statute that confers rights and obligations on same-sex couples.
- State legislatures may also enact state-level laws recognising same-sex unions, provided they do not conflict with central legislation on marriage or adoption.
- The Court encouraged the legislature to consider compromise models, such as civil unions that confer most of the rights of marriage without using the term “marriage”.

This leave to legislature approach reflects a separation of powers rationale; the judiciary protects fundamental rights and strikes down unconstitutional laws, but it does not create new legal institutions where none exist. The Court's role is to set a constitutional floor (minimum rights), while the legislature may build a higher ceiling (expanded rights).

The practical effect is that the burden of reform now lies with the political branches. Given the current political climate and the absence of a strong legislative consensus, the prospect of immediate statutory reform remains uncertain.

CONCLUSION

The legal trajectory of LGBTQ+ rights in India demonstrates a profound constitutional transformation coupled with statutory incompleteness. Through landmark judgments *Navtej Singh Johar (decriminalisation)*, *NALSA (transgender recognition)*, and *Supriyo (marriage debate)* the Supreme Court has affirmed that sexual orientation and gender identity are integral to dignity, privacy, autonomy, and equality under *Articles 14, 15, 19, and 21*. The judiciary has established that constitutional morality must prevail over social morality, striking down colonial-era criminalisation and recognising LGBTQ+ persons as rights-bearing citizens. However, this constitutional progress has not been matched by comprehensive legislative reform, leaving same-sex marriage unrecognised, joint adoption unavailable, and anti-discrimination protections absent from statute.

The result is a regime of partial equality, LGBTQ+ persons are no longer criminalised, yet they remain excluded from marriage, family law, surrogacy, inheritance, and maintenance frameworks that are structured around heteronormative models. *The Transgender Persons Act, 2019*, while codifying some NALSA principles, introduced bureaucratic certification and weak enforcement, creating a gap between judicial vision and statutory reality. The burden of reform now rests with Parliament and State legislatures, which must enact gender neutral marriage or civil union laws, allow joint adoption and second parent recognition, introduce comprehensive anti discrimination legislation, and align transgender rights more closely with the self identification principle. Until such reforms are enacted, LGBTQ+ persons will continue to occupy a liminal legal space—freed from criminalisation but not yet granted full equality in family, work, and public life.