
FROM CRIMINALIZATION TO CONSTITUTIONAL MORALITY: THE TRANSFORMATION OF LGBTQ+ RIGHTS IN INDIA

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ABSTRACT

This paper explores the profound transformation of LGBTQ+ rights in India, from the oppressive criminalization under the colonial Section 377 of the Indian Penal Code to constitutional recognition grounded in the values of dignity, equality, and liberty. For over 150 years, LGBTQ+ individuals were marginalized and criminalized, their identities deemed unlawful by Victorian-era laws that perpetuated stigma and exclusion. The turning point came with landmark judicial rulings such as the 2009 Naz Foundation case and the landmark 2018 Navtej Singh Johar judgment, where the Supreme Court decisively prioritized constitutional morality over traditional social morality, affirming the fundamental rights of LGBTQ+ persons. This progressive jurisprudence recognized sexual orientation as a core aspect of identity and privacy, while also acknowledging transgender rights in key decisions like the NALSA verdict. However, the journey remains incomplete, as courts have shown restraint in extending civil rights such as marriage equality, leaving much to be addressed by the legislature and society. The study highlights the judiciary's vital role in advancing LGBTQ+ rights through transformative constitutionalism while emphasizing that true equality requires continued legal reform and societal acceptance. This ongoing evolution reflects India's commitment to dismantling colonial legacies and embracing an inclusive vision of citizenship where all individuals can live with dignity and freedom.

Keywords: LGBTQ+ Rights, Constitutional Morality, Section 377 IPC, Decriminalization, Minority Rights.

Introduction

This paper examines the paradigm shift from a criminalizing legal framework to one rooted in constitutional morality, which has profoundly reshaped the landscape of LGBTQ+ rights in India. This transformation underscores the prioritization of human rights over entrenched societal norms, recognizing the diverse tapestry of Indian society.

The transformation of LGBTQ+ rights in India represents a significant jurisprudential shift from a regime of colonial criminalization to one governed by the principle of constitutional morality. For over 150 years, the legal landscape was defined by Section 377 of the Indian Penal Code, an 1861 colonial statute that criminalized consensual same-sex acts as "against the order of nature," reflecting Victorian-era moral standards¹. This legal framework not only penalized intimate acts but also institutionalized discrimination, reducing LGBTQ+ individuals to societal pariahs stripped of their fundamental rights to equality and dignity².

The move toward constitutional recognition gained momentum with the 2009 Naz Foundation ruling, which sought to harmonize Indian equality jurisprudence with the Constitution's transformative character. This trajectory was definitively advanced in the landmark case of *Navtej Singh Johar v. Union of India*, where the Supreme Court held that "constitutional morality" must always prevail over "social morality". By prioritizing constitutional values such as justice, liberty, and equality over majoritarian views, the judiciary reaffirmed that the rights of an individual cannot be martyred at the altar of societal prejudice³.

Despite these landmark judicial interventions, the journey toward substantive equality is ongoing. While decriminalization has affirmed the rights to privacy and identity, the recent 2023 ruling in *Supriya Chakraborty v. Union of India* demonstrated a selective judicial restraint. The Court declined to recognize a fundamental right to marry, asserting that the authority to legalize same-sex marriage falls within the legislative purview of the Parliament⁴. This decision underscores a persistent gap between legal decriminalization and the full realization of civil and social equality.

¹ Parmaar, S. S. (2024). Analysing Section 377 of the Indian Penal Code (IPC)

² Ryan, T. (2024). Dignity deferred: *Supriyo v. Union of India* and LGBTQ rights

³ Borah, P. K. (2018). Engaging with the law: Decriminalisation of homosexuality and the Johar judgement

⁴ Talawar, N. (2025). Beyond the bench: Implications of the Supreme Court's ruling on marriage equality in India

This paper explores the evolution of LGBTQ+ rights in India, analysing the transition from criminal subjects to rights-bearing citizens. It examines the critical role of transformative constitutionalism in dismantling colonial legacies and assesses the limitations of the current legal framework in securing comprehensive inclusion and justice for the LGBTQ+ community.

The criminalization of consensual same-sex acts marked a pivotal moment in this evolution, reflecting a judicial commitment to fundamental rights and individual dignity.

Conceptual Framework

The evolution of LGBTQ+ rights in India represents a compelling case study in the dynamic interplay between legal frameworks, societal norms, and constitutional principles. The concept of constitutional morality forms the core basis for analysing the transformation of LGBTQ+ rights in India. B. R. Ambedkar's idea highlights that the Constitution should take precedence over societal norms and majority morality.⁵ It requires that governance and judicial interpretation be grounded in the values of justice, liberty, equality, and dignity, especially when protecting marginalized communities.

A key theoretical difference here is between constitutional morality and social morality. Social morality, often based on tradition and cultural norms, has historically supported the criminalization and stigmatization of LGBTQ+ individuals under Section 377 of the Indian Penal Code. On the other hand, constitutional morality serves as a principle that protects individual rights regardless of public opinion. This distinction was clearly stated in *Navtej Singh Johar v. Union of India*, where the Supreme Court favoured constitutional values over societal rejection⁶. Understanding the idea of criminalization is essential for grasping the historical treatment of LGBTQ+ people in India. Section 377 IPC criminalized consensual same-sex relations, effectively branding LGBTQ+ individuals as “criminal subjects” and reinforcing their social exclusion⁷. Decriminalizing such identities signifies not just a legal change but also a shift in how personhood and citizenship are recognized.

In contrast, the notion of rights-bearing citizenship reflects the post-*Navtej* constitutional stance, wherein LGBTQ+ individuals are acknowledged as equal holders of fundamental

⁵ Nayak, N. (2023). Constitutional morality: An Indian framework

⁶ Sharma, S. (2025). *Navtej Singh Johar v. Union of India*

⁷ *Supra* 1

rights⁸. These rights include equality under Article 14, non-discrimination under Article 15, and the right to life and personal liberty under Article 21⁹. Earlier, Justice K. S. Puttaswamy v. Union of India confirmed the recognition of sexual orientation as a core part of identity, which paved the way for decriminalizing homosexuality¹⁰. Moreover, this framework includes the principle of human dignity, which is central to the Indian constitutional framework¹¹. Denying rights based on sexual orientation clearly violates dignity and autonomy. In Navtej Singh Johar, the Court explicitly stated that the right to choose one's partner and express one's identity is crucial to individual dignity¹².

This study draws on the concept of transformative constitutionalism, which sees the Constitution as a living document meant to address past injustices. Through this perspective, the judiciary has been instrumental in moving LGBTQ+ individuals from criminalization to constitutional recognition and protection¹³.

Therefore, the relationship between constitutional morality, criminalization, dignity, and transformative constitutionalism offers a basis for exploring the shift from exclusion to inclusion regarding LGBTQ+ rights in India.

Historical Background

The journey of LGBTQ+ rights in India is a profound narrative of struggle, resilience, and gradual transformation that reflects the country's evolving understanding of identity, dignity, and justice. For much of modern history, the LGBTQ+ community in India lived under the shadow of criminalization, a legacy rooted in colonial-era legislation. The colonial-era Section 377 of the Indian Penal Code, enacted in 1860, criminalized "carnal intercourse against the order of nature," thereby establishing a legal framework for the persecution of LGBTQ+ individuals for over a century and a half¹⁴. This provision, originally targeting a broad range of non-procreative sexual acts, disproportionately affected same-sex relations and fostered a climate of fear and systemic discrimination within the LGBTQ+ community¹⁵. This historical

⁸ Richard Albert, David Landau, Pietro Faraguna & Šimon Drugda, *The I-CONnect-Clough Center 2017*

⁹ Supra 6

¹⁰ Supra 3

¹¹ Baruah, P. (2022). Human dignity in Indian constitutional adjudication.

¹² Supra 6

¹³ Kaur, H. (2025). Gendering of Indian judiciary as a roadmap towards an equitable legal system and progressive gender-sensitive jurisprudence. *Frontiers in Sociology*, 10.

¹⁴ Sanders, D. (2009). 377 and the unnatural afterlife of British colonialism in Asia.

¹⁵ Bhatia, Gautam, Equal Moral Membership: Naz Foundation and the Refashioning of Equality

context underscores how legal structures can reinforce societal prejudice, marginalize an entire segment of the population and hinder their access to fundamental rights¹⁶.

The imposition of Section 377 marked the beginning of a long phase where LGBTQ+ individuals faced state-sanctioned discrimination, social ostracism, and fear¹⁷. Beyond legal prosecution, the existence of the law fostered an environment conducive to harassment, blackmail, and societal stigma, severely curtailing the ability of queer individuals to live authentically and with dignity. Despite these challenges, the dawn of the 21st century saw the emergence of a vibrant LGBTQ+ rights movement in India. Activism, legal battles, and shifting social attitudes began to challenge this colonial legacy. Landmark moments like the 2009 Delhi High Court ruling initially decriminalized consensual same-sex relations, affirming fundamental rights to equality and personal liberty¹⁸. Though this victory was temporarily reversed, the movement's persistence culminated in the historic 2018 Supreme Court judgment in *Navtej Singh Johar v. Union of India*, which unequivocally struck down the criminalization under Section 377¹⁹.

This judgment marked more than just a repeal of a punitive statute; it was a powerful affirmation of constitutional morality, a principle that embodies equality, dignity, and individual freedom as central values of India's democracy²⁰. By recognizing sexual orientation as an inherent aspect of human identity and underscoring the right to privacy and autonomy, the Supreme Court forged a new legal and ethical framework for LGBTQ+ rights in India²¹. Parallel to this was the recognition of transgender rights, most notably through the 2014 National Legal Services Authority (NALSA) verdict, which acknowledged the existence of a third gender and reinforced the rights to self-identification and affirmative state action. These legal milestones represent a significant shift from repression to recognition, rooted in constitutional values rather than social prejudice.

The transformation from criminalization to constitutional morality is an ongoing process. While the law has affirmed the rights of LGBTQ+ individuals, societal acceptance continues

¹⁶ Atrey, Ishan, *Navigating the Intersectionality of LGBT Rights: Perspectives from Gender, Race, and Socioeconomic Status in India*

¹⁷ Chakrapani, V., Newman, P. A., Shunmugam, M., Rawat, S., Mohan, B. R., Baruah, D., & Tepjan, S. (2022). A scoping review of lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) people's health in India.

¹⁸ *Supra* 3, Jain, D. (2013). Impact of the decriminalization of homosexuality in Delhi: An empirical study.

¹⁹ *Supra* 3

²⁰ *Supra* 3, Puri, J. (2016). Sexual states

²¹ García, V. M. V. (2019). *Navtej Singh Johar vs. Union of India*. *Revista Jurídicas*.

to lag, reflecting enduring cultural, religious, and patriarchal attitudes. The ongoing debates around marriage equality and protections against discrimination highlight the distance yet to be travelled toward full inclusion and equality.

Thus, the historical evolution of LGBTQ+ rights in India reflects a transition from colonial criminalization to constitutional recognition, shaped significantly by judicial intervention and changing interpretations of fundamental rights.

Role of the Judiciary in LGBTQ+ Rights in India

The history of Indian LGBTQ+ judicial action in India indicates not only a chain of court decisions, but a fundamental constitutional change in the perception of rights, identity, and state accountability. Initially, Section 377 of the Indian Penal Code was a colonial tool that strengthened Victorian moral values in Indian society, making it a criminal offence to have carnal intercourse that is against the order of nature²². Its retention after independence showed how inherited legal structures can be used to perpetuate exclusion until they are reinterpreted. The subsequent involvement of the judiciary in this provision heralded a change from passive continuity to active constitutional review, especially as public interest litigation became a means of marginalized communities to realize their rights. The decision of the Delhi High Court in *Naz Foundation v. Union of India* was not merely important but was also notable for its extensive reasoning. The Court took a broader interpretation of Article 15 by interpreting the term sex as sexual orientation, which made anti-discriminatory safeguards go beyond heterosexual individuals to LGBTQ+ people²³. It further pointed out that Article 21 on the right to life incorporates the right to a dignified living free from fear and stigma. Notably, the ruling relied on international human rights and comparative constitutional law, as there was an expansion of rights discourse towards being globally-driven²⁴. Nevertheless, the Supreme Court overturned it by *Suresh Kumar Koushal v. Naz Foundation*²⁵. Such progress was revealed as frail by this decision. The Court was largely criticized because, by allowing Parliament to have its way and limiting the impact, the Court adopted a formalistic and majoritarian stance that weakened the counter-majoritarian role of the judiciary in safeguarding fundamental rights. The era after Koushal was a critical era of constitutional rethinking. In *National Legal Services Authority v. Union of India*, the Supreme Court, as Union of India, went further to consider gender identity,

²² Supra 14

²³ Supra 3

²⁴ Supra 2

²⁵ Supra 3

which goes beyond the sexual orientation to include transgender persons as an independent category of people, who deserve basic rights²⁶. The case was a pioneer in the establishment of the principle of self-identification since gender identity is inherent to personal autonomy and dignity. It also instructed the state to introduce affirmative action such as reservations and social welfare schemes²⁷, so that recognition is connected to substantive equality²⁸. This case revealed the judiciary's willingness to address intersectional discrimination and to go beyond formal equality to actual social inclusion. Another change of doctrine took place in Justice K.S. Puttaswamy v. Union of India, in which rights privacy was unanimously established as a fundamental right by a nine-judge bench²⁹. This move was far-reaching in terms of LGBTQ+ rights since it clearly recognized that sexual orientation is a critical feature of privacy and personal identity³⁰. The Court overruled previous precedents that withheld such recognition³¹ and stressed the fact that constitutional rights did not depend on popular acceptance. The decision placed privacy in the context of dignity and liberty, which offered a strong constitutional foundation against any laws that encroached upon the intimate personal decisions. The most successful development of this jurisprudential progression was with Navtej Singh Johar v. Union of India, which not only decriminalized same-sex relations that were consensual but also fundamentally redefined the balance between law, morality, and individual rights³². The Court imperatively reversed Koushal³³, stating that even the right that might be neither popular nor socially debated will be safeguarded by the Constitution. It expounded on the meaning of constitutional morality, which differs with the societal morality and that the former is based on the principles of justice, liberty, equality, and fraternity³⁴. Psychological and sociological knowledge was also part of the evaluation since it acknowledged the detrimental consequences of criminalization on mental well-being, identity development, and social involvement³⁵. The Court went further than decriminalization by affirming that LGBTQ+ people deserve to be full citizens, deserving of equal moral worth. Meanwhile, the judiciary has realized its institutional constraints. In *Supriyo v. The Supreme Court*, the Union

²⁶ Supra 20

²⁷ Supra 13

²⁸ Kumar, P. (2021). Struggle for substantive justice and community development: Transgender subjects in contemporary India

²⁹ Guruswamy, M. (2017). Justice K.S. Puttaswamy (Ret'd) and Anr v. Union of India and Ors. *American Journal of International Law*, 111(4), 994

³⁰ Bhandari, V., & Sané, R. (2016). Towards a privacy framework for India in the age of the Internet.

³¹ Supra 29

³² Renu. (2019). Homosexuality with special reference case: Navtej Singh Johar v. Union of India.

³³ Supra 21

³⁴ Supra 3

³⁵ Supra 3

of India had to address the question of marriage equality but eventually refused to give same sex marriages legal recognition³⁶. The Court believed that although LGBTQ+ people had the right to enter into relationships and have dignity³⁷, the issues of marriage legalization were too complicated to consider, because of the policy and social norms, as well as legislative design³⁸. This is a sign of a dialogic approach with the judiciary proposing constitutional norms and calling for legislation. Another important dimension of judicial intervention is the use of transformative constitutionalism, a philosophy that considers the Constitution as a living document that can initiate social change. In this light, the judiciary has construed basic rights not as resolute guarantees but as dynamic values that need to be receptive to the requirements of marginalized groups. This has helped the courts penetrate deep-seated hierarchies and extend rights into new spheres like identity, autonomy and equality. Also, the focus on the idea of dignity as one of the key constitutional values has enabled the judiciary to relate various rights claims in such a way that the rights of LGBTQ+ can be perceived as a part of the continuum of human rights. Additionally, the judiciary has not only limited itself to adjudication but also influenced public discourse. The expressive role of landmark judgments has been an indicator of social acceptance and validity of LGBTQ+ identities. The courts have helped to change social attitudes and eliminate stigma by recognizing past injustices and their shared legacy of recognizing that all people are equal. Nevertheless, the difference between the legal acknowledgment and the societal one is still substantial, and it demonstrates the boundaries of judicial intervention when addressing deeply rooted prejudice. To sum up, the role of the Indian judiciary in the development of the rights of LGBTQ+ rights has been transformative and complicated, having gone through stages of progress, regression, and renewed progress. In historic rulings such as *Naz Foundation v. NCT of Delhi*, *National Legal Services Authority v. Union of India*, *Justice K.S. Puttaswamy v. Union of India*, and *Navtej Singh Johar v. Union of India*, the courts have increasingly broken-down legal barriers and provided a vision of an inclusive citizenry based on constitutional morality. However, the road to complete equality, including the right to marry, anti-discrimination laws, and social acceptance, is not yet over, and both the legislature and the legal system should continue their efforts.

Critical Analysis

The Supreme Court, by decriminalizing consensual same-sex relationships, highlighted the

³⁶ Supra 4

³⁷ Supra 4

³⁸ Supra 2

necessity for further legislative action to foster societal awareness and create an environment conducive to the LGBTQ+ community's growth³⁹.

The Indian decriminalization of LGBTQ+ rights into constitutional law can be viewed as one of the key developments in constitutional jurisprudence, but a closer examination would show that this process is still in progress and is primarily driven by the judicial system. The Supreme Court, especially in the case of *Navtej Singh Johar v. Union of India*, was instrumental in the abolition of the colonial heritage of Section 377 on the basis of the doctrine of constitutional morality and in establishing that the fundamental rights must not be subject to social biases. This ruling contributed to the recovery of dignity, independence, and identity for LGBTQ+ individuals, and also reinstated the counter-majoritarian role of the court, particularly following the retrogressive logic embraced in *Suresh Kumar Koushal v. Naz Foundation*. Moreover, the establishment of privacy as a fundamental right in *Justice K. S. Puttaswamy v. The Union of India* considerably broadened the protection of sexual orientation as an intrinsic part of identity and established a significant constitutional basis for this protection. In spite of these positive changes, there are significant shortcomings in the judicial approach since decriminalization of homosexuality has not been accompanied by the provision of substantive civil rights in the form of marriage, adoption, and inheritance. This loophole was manifested in *Supriyo v. Union of India*, in which the Supreme Court refused to acknowledge same-sex marriage. This highlights the importance of the legislature in the issue, thus reflecting a conservative and reserved judicial approach. Also, the high dependence on constitutional morality poses the problem of over-reliance upon judicial intervention where comprehensive legislative acts are not implemented as India continues to lack an effective anti-discriminatory framework that would safeguard LGBTQ+ individuals against systematic and institutional discrimination. The fact that legal and social statuses are not connected makes the situation even more complicated, since the members of the LGBTQ+ community still cannot evade stigmatization, exclusion, and violence even though progressive judicial rulings have been made. Besides, while the doctrine of transformative constitutionalism has allowed the judiciary to reinterpret rights inclusively, its application has not been uniform thus resulting in a rather skewed rights expansion where decriminalization has been realized but full equality has yet to be achieved. Therefore, despite the undoubted role of the judicial system in changing the paradigm from criminalization to constitutional status, legislative support, successful policy implementation,

³⁹ Supra 13

and societal transformation as a whole are needed to guarantee the full and substantive equality of LGBTQ+ people in India. The Supreme Court's jurisprudence, while progressive in certain aspects, has nonetheless demonstrated a cautious approach in extending the full spectrum of constitutional rights, as evidenced by its refusal to legalize same-sex marriage⁴⁰.

Conclusion

The Court's reluctance, as seen in *Supriya Chakraborty & Anr. v. Union of India**, indicates a judicial deference to the legislative domain on matters requiring significant societal restructuring, thereby limiting the realization of comprehensive LGBTQ+ equality. This judicial restraint, rooted in concerns about institutional competence and the separation of powers, underscores the ongoing tension between judicial activism and legislative prerogative in advancing social reforms. Consequently, while decriminalization marked a pivotal shift towards recognizing the fundamental rights of LGBTQ+ individuals, the incomplete judicial intervention necessitates parliamentary action to secure full legal recognition and protections, including marriage equality, which the Court deemed outside its purview.

The journey of LGBTQ+ rights in India from criminalization under Section 377 of the Indian Penal Code to constitutional recognition represents a profound shift in the country's legal and constitutional landscape. The judiciary, particularly through landmark decisions such as *Navtej Singh Johar v. Union of India*, has played a transformative role in dismantling colonial-era prejudices and affirming the principles of dignity, equality, and autonomy. By prioritizing constitutional morality over social morality, the Supreme Court has redefined the status of LGBTQ+ persons from "criminal subjects" to rights-bearing citizens, thereby reinforcing the inclusive and dynamic nature of the Indian Constitution. However, this transformation remains incomplete, as decriminalization has not been accompanied by the full realization of civil and socio-economic rights, including marriage equality, adoption rights, and comprehensive protection against discrimination.

Therefore, while constitutional morality has laid a strong foundation for LGBTQ+ rights, the responsibility now extends to the legislature and society at large to translate these constitutional promises into lived realities. In essence, the transformation from criminalization to constitutional recognition is not an endpoint but an ongoing process that requires continuous

⁴⁰ Supra 2

legal, social, and institutional efforts to ensure true equality and inclusion for LGBTQ+ individuals in India.

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