



Beyond Decriminalisation: Section 377, Constitutional Transformation and the Continuing Struggle for LGBTQI+ Equality in India

¹Dr. Sarvesh Mani Tripathi and ²Dr. Mohd Shamim

¹Director School of Languages, CSJM University, Kanpur, Uttar Pradesh, India.

²Professor, Department of English, Halim Muslim PG College, Kanpur, Uttar Pradesh, India.

Abstract

For over a century and a half, Section 377 of the Indian Penal Code cast a long shadow over sexual minorities in India. Introduced under British colonial rule in 1860, the law penalized consensual adult intimacy deemed “against the order of nature.” While rarely resulting in mass trials, its presence legitimized police harassment, social exclusion, and deep personal shame. This article explores how a grassroots civil right’s struggle transformed India’s constitutional landscape—moving from early AIDS activism in the 1990s through the landmark rulings in Naz Foundation (2009), Suresh Kumar Koushal (2013), and the historic 2018 verdict in Navtej Singh Johar. We argue that the real triumph of Navtej was not just striking down a penal code; it restored the human dignity and constitutional personhood of queer citizens. But decriminalization does not mean full equality. The article underscores the persistent chasm between negative liberty (freedom from arrest) and positive citizenship (equal rights to marriage, adoption, healthcare and fair employment) through subsequent cases such as the 2023 marriage equality judgment in Supriyo.

Keywords: Section 377, LGBTQI+, human dignity, privacy, transformative constitutionalism, constitutional morality, substantive equality, India.

1. Introduction

The story of Section 377 is not just a study of a single penal law. It is the story of how the state polices intimacy, decides which bodies are “normal,” and controls who counts as a full citizen. When British colonial authorities enacted Section 377 of the Indian Penal Code in 1860, they introduced Victorian moral codes that treated non-procreative sex as an offense “against the order of nature.”

For queer Indians, the real damage of Section 377 was never just the threat of prison. But its real power was in the fear it created every day, the threat of police extortion, blackmail, and family rejection, the sense of being an outlaw in one’s own country.

The road to dismantling this law took decades of courageous work. It began with health workers and activists responding to the HIV/AIDS epidemic in the 1990s, gained legal momentum with the Naz Foundation’s public interest litigation, and reached a major breakthrough when the Delhi High Court read down the law in 2009. Although the Supreme Court dealt a devastating setback in 2013 by reinstating the ban, the legal tide turned permanently in September 2018. In *Navtej Singh Johar v. Union of India*, a unanimous five-judge bench struck down the criminalization of consensual adult intimacy.

But striking down a criminal law instantly does not create an equal society. Queer adults can’t be thrown in jail for loving

each other anymore, but they still encounter pervasive legal and institutional obstacles. Winning basic freedom from arrest is just the first step; the Supreme Court’s 2023 verdict on marriage equality (*Supriyo*) demonstrated that the real equality requires changes to the laws that govern family life, work, health care and daily civic life.

2. Research Gap

There has been much scholarly writing on Section 377 and the queer movement in India. However, there are three major issues that are often addressed in isolation:

The Colonial Past and Modern Law: Legal analysis of recent court rulings often fail to address the deep colonial roots that made criminalization possible in the first place.

The “Finish Line” Fallacy: The public conversation treats the 2018 ruling as the end of the struggle, confusing the right not to be arrested with the right to be treated equally.

The Post-2018 Reality: *Navtej* has to be tied to newer struggles such as *Supriyo*’s fight for marriage equality, transgender protections under the NALSA judgment and discrimination in housing and jobs.

This paper attempts to connect these areas by looking at the translation of legal victories into lived reality on the ground.

3. Research Questions

This article addresses six basic questions:

How colonial laws shaped India's legal and cultural attitude toward non-normative sexualities?

The Indian courts have, over time, developed an understanding of consensual same-sex intimacy.

How did the 2018 Navtej judgment redefine privacy, dignity, and constitutional morality?

How did life change—and what remained unchanged—for LGBTQI+ individuals after 2018?

What are the natural limits of using criminal law reform to achieve social equality?

The 2023 Supriyo Verdict and the Continuing Divide Between Constitutional Recognition and Civil Rights

4. Method of Procedure

The paper adopts an interdisciplinary legal approach:

Doctrinal Analysis: A detailed perusal of landmark judgments viz. Naz Foundation (2009), Koushal (2013), NALSA (2014), Puttaswamy (2017), Navtej (2018) and Supriyo (2023).

Critical & Queer Theory: Looking at how institutions and social power decide what is “natural” or “acceptable.”

Postcolonial Critique: The Effect of British Colonial Laws on the Modern Indian Government

Rather than running statistical surveys, the paper analyzes legal records, scholarly texts and historical archives, to trace the evolution of queer rights in Indian jurisprudence.

5. Theoretical Frame Work

5.1. The Queer Theory

Queer theory interrogates the idea that heterosexuality is the only natural way to live and to love. Michel Foucault showed how modern institutions (prisons, clinics, legal codes) use categories of sexuality to surveil and regulate human behavior. Judith Butler elaborated on this idea by explaining that gender roles are not hard facts of biology, but behaviors we learn and are reinforced through social expectations. In India, section 377 didn't just outlaw certain physical acts; it cast an entire group of people as deviants.

5.2. Postcolonial Theory

There is a myth that queerness is a “Western import” that corrupts traditional Indian values. Postcolonial history demonstrates the contrary, the rigidity of homophobia was largely codified and introduced by the British Empire. Ruth Vanita and Saleem Kidwai, historians, found centuries of Indian literature, poetry, and temple art celebrating same-sex desire and gender diversity long before the British arrived. Scholar Anjali Arondekar notes that colonial archives not only documented native sexuality but created rigid categories to police and sanitize Indian society.

5.3. Transformative Constitutionalism

The Indian Constitution was not intended to conserve the old social order but to redress past injustice. Transformative constitutionalism is about using fundamental rights – liberty, equality and dignity – to protect people from traditional prejudices and from majority rule. This is the principle adopted by the Supreme Court in Navtej when it held that the Constitution is actually meant to protect vulnerable minorities from the moral prejudices of the majority.

6. Section 377: The Colonial Beginnings

Lord Thomas Babington Macaulay wrote the Indian Penal Code in the 1830s, and inserted Section 377 to punish non-procreative sexual acts. It was a reflection of Victorian Christian concerns about sodomy, bodily purity and imperial

discipline.

This doesn't mean that precolonial India was a utopian paradise for queer people. Ancient and medieval Indian societies were sharply divided along caste, gender and religious lines and social attitudes varied greatly from region to region. However, indigenous traditions generally treated gender variance and homoerotic desire with relative accommodation. The colonial state introduced something brand new: a uniform, statewide penal system that treated non-normative intimacy as a crime against nature and the crown.

7. Living with Stigma: The Everyday Impact of Section 377

The true horror of Section 377 was never reflected in official conviction numbers. Because the law targeted private conduct, it gave local police an open license to abuse. For decades, officers used Section 377 to threaten, beat, detain, and extort queer and trans individuals in public parks, railway stations, and private homes.

As legal scholar Alok Gupta documented, the law's greatest weapon was psychological. In defining queer intimacy as an unnatural crime, the state sent a clear message: you are an incomplete citizen. It drove people into hiding, thousands into unwanted marriages, and caused deep isolation, depression and self-harm.

8. From the Margins to the Courts ABVA & NAZ Foundation

The legal pushback was organized in the early 90s. In 1994, prison officials refused to distribute condoms in Tihar Jail, prompting the AIDS Bhedbhav Virodhi Andolan (ABVA) to file India's first legal petition against Section 377. The law was driving gay and bisexual men underground, hampering public health efforts, ABVA's groundbreaking report, *Less than Gay*, found.

In 2001, the Naz Foundation, an NGO working on sexual health and HIV prevention, filed a Public Interest Litigation (PIL) before the Delhi High Court. Supported by the Voices Against 377 coalition, they made a critical strategic move: they stopped framing the issue solely as a public health dilemma and began arguing it as a matter of fundamental constitutional rights—under Article 14 (equality), Article 15 (non-discrimination), and Article 21 (life, privacy, and personal dignity).

9. The Break-Through, 2009: Naz Foundation

On 2nd July, 2009, a landmark verdict was delivered by a division bench of the Delhi High Court. Chief Justice A.P. Shah and Justice S. Muralidhar held that Section 377 was violative of Articles 14, 15 and 21 to the extent it criminalized consensual sexual acts between adults in private.

The court made an important distinction between constitutional morality and public morality. It said popular disapproval or religious dogma could not trump the basic rights guaranteed by the constitution. For the first time in the history of India, an Indian court upheld that queer citizens had an inalienable right to live with dignity.

10. Suresh Kumar Koushal, 2013 Reversal

On December 11, 2013, the hope of 2009 was shattered. In *Suresh Kumar Koushal v. Naz Foundation*, the two-judge bench of the Supreme Court overruled the Delhi High Court decision and re-instated Section 377.

The Court's reasoning was widely criticized. The judges

argued that the LGBTQI+ community comprised only a "miniscule fraction of the country's population" and that fewer than two hundred people had been prosecuted over 150 years. This dismissed the profound constitutional principle that fundamental rights exist precisely to protect small minorities from the indifference or hostility of the majority. The ruling pushed an entire generation of newly out citizens back into legal jeopardy.

11. Navtej Singh Johar (2018): The Turning Point

Five years later, the Supreme Court corrected its course. In *Navtej Singh Johar v. Union of India*, a five-judge Constitution Bench unanimously struck down Section 377 to the extent it criminalized consensual sexual acts between adults.

The judgment far exceeded the correction of the flawed reasoning of *Koushal*. The judges based their decision in bedrock constitutional values in four separate but concurring opinions:

Justice Dipak Misra and Justice A.M. Khanwilkar emphasize individual autonomy, asserting the constitutional compass must be set toward liberty, not social prejudice.

Justice R.F. Nariman traced the historical background of the law and found it to be an archaic Victorian relic violating the test of arbitrariness under Article 14.

Justice D.Y. Chandrachud observed that Section 377 "destroyed the civil personality of the queer citizens" and that the law must "provide a way for historical reconciliation and restorative justice".

Justice Indu Malhotra delivered one of the most memorable apologies in Indian legal history by stating that history owes an apology to the LGBTQI+ community for decades of state-sponsored stigma and ostracism.

12. From Criminal Suspects to Rights-Having Citizens

Navtej's leap of the mind was a significant one: It moved the legal gaze away from the act and onto the person.

A gay or trans person under the old colonial view was an offender waiting to be caught. Under Navtej they were seen as human beings whose sexual orientation is an intrinsic part of them. The Court reaffirmed that "sex," as used in the Article 15 prohibition on discrimination, includes sexual orientation. This is the transformation of queer subjects from objects of police surveillance into full citizens with claims on the state.

13. Independence, Privacy and Dignity

The groundwork for Navtej had been laid a year earlier by the nine-judge bench in *Justice K.S. Puttaswamy v Union of India* (2017), which had recognized privacy as a fundamental right.

In the words of Puttaswamy, privacy is not simply the ability to hide private space from the public but the ability to protect decisional autonomy – the ability to choose whom to love, how to express one's identity, and how to build one's life. The Court applied this directly to personal intimacy in Navtej: the state cannot morally police consenting adults in their private lives.

14. Constitutional Morality vs Majority Rule

One of the most important concepts that got clarified in Navtej is constitutional morality.

In practice, social morality is formed by tradition, religious orthodoxy, and the majority opinion, which tend to be conservative and exclusionary. Constitutional morality, in contrast, is rooted in the core values of the Constitution: pluralism, equality and compassion for the marginalized. The

Court emphasized that judges cannot permit constitutional rights to be dictated by popular prejudices. A democracy loses its moral legitimacy when it turns the rights of minorities into a popularity contest.

15. Decriminalization in Practice

The repeal of Section 377 brought immediate and tangible changes:

End to Direct Police Threats: Consensual adult intimacy could no longer be used as a pretext for arrest, blackmail or police violence.

Social and Cultural Visibility: queer themes, narratives and community organizing have expanded in the media, corporate spaces and universities without fear of state censorship.

Better Health Care Access: Health workers could give out condoms, offer HIV testing, and provide affirming mental health services without fear of police interference.

Judicial precedents: The lower courts' intervention to protect queer couples from family harassment and honour - based violence.

But social discrimination did not stop with the repeal of a penal law.

16. The Boundaries of Navtej and the Transgender Community

The legal journey has been different for transgender and non-binary Indians. The Supreme Court in *NALSA v. Union of India* (2014) recognized the constitutional right of self-identification of gender as male, female or third gender without surgery.

Although NALSA and Navtej reaffirmed the principles of bodily autonomy, structural challenges persist for trans persons. The Transgender Persons (Protection of Rights) Act, 2019, was heavily criticized for introducing bureaucratic certification procedures and failing to offer substantive reservations in education and public employment. Trans people, especially from working class, Dalit and Bahujan communities, face a daily struggle for survival, with systemic poverty, family violence and police profiling.

17. The Limits of Decriminalization: Negative Liberty versus Positive Liberty

The central shortcoming of the post-2018 era is the assumption that decriminalization equals equality.

In political philosophy, negative liberty means the absence of state interference: the government cannot put you in prison for who you love. Positive liberty means having the actual capacity, resources, and legal protections to participate fully in society.

A queer Indian may now sleep peacefully without fear of arrest, but they can still be:

Fired from their job because of their sexual orientation;

Denied an apartment by a landlord;

Denied hospital visitation rights when their partner is critically ill;

Excluded from health insurance benefits, pensions, and inheritance rights.

Freedom from criminal law is a shield, but true equality requires tools to build a life.

18. Supriyo and the Marriage Equality Challenge

The limits of pure judicial transformation were exposed on 17th October, 2023 when the Supreme Court delivered its verdict in *Supriyo @ Supriya Chakraborty v. Union of India*. Same-sex couples had petitioned the Court for the legalization

of same-sex marriages under the Special Marriage Act of 1954 on the grounds that denial of marital status was unconstitutional. On 17 October 2023, a five-judge bench unanimously held that there was no fundamental right to marriage under the Indian Constitution. All five judges condemned discrimination and recognized queer relationships, but a 3:2 majority found that legalizing marriage was a complex legislative policy issue that was properly the concern of Parliament, not the judiciary. Supriyo learnt the limits of reform through courts. It reaffirmed that while judges might be willing to strike down colonial criminal laws, they were uncomfortable re-writing family and personal laws without legislative intervention.

19. Section 377 and Postcolonial Reality

The persistence of Section 377 for over seventy years after India's independence reveals an uncomfortable truth about postcolonial nation-building: political independence did not automatically decolonize the legal system. The newly independent Indian state retained the colonial police powers, penal codes and regulatory framework.

True decolonization is neither idealizing an imagined, pure ancient past nor rejecting modern rights as foreign ideas. Rather it necessitates the systematic dismantling of inherited colonial structures which deny human dignity by drawing on the democratic and inclusive promise of the Indian Constitution.

20. Toward Substantive Citizenship

The battle for LGBTQI+ equality in India is shifting from a call for formal equality to a call for substantive citizenship: Formal Equality: treating everyone the same under the law, no matter what historical disadvantages they may have. Substantive Equality: Acknowledge systemic power imbalances and actively develop laws and policies to level the playing field.

For queer and trans Indians, substantive equality means horizontal anti-discrimination legislation that prohibits discrimination by private employers, landlords and healthcare providers. It demands inclusive education curricula, police sensitization, state-funded shelter homes and full-fledged legal protection for chosen families.

21. The Four Stages of Change Discussion

Looking back, the legal odyssey of LGBTQI+ rights in India has been a long journey through four distinct historical phases:

Stage 1: Criminalization (1860s-1990s)

-- Colonial penal rule; enforced secrecy; systemic police extortion.



[Phase 2: Constitution Contestation 1994-2013]

Health activism (ABVA) Naz Foundation PIL High Court victory Supreme Court setback



[Stage 3: Constitutional recognition (2014-2018)]

NALSA and Puttaswamy established dignity and privacy; Navtej struck down Section 377.



[Stage 4: Substantive citizenship (Current)]

The fight for anti-discrimination laws, social acceptance and family rights

22. Conclusion

The constitutional overhaul of Section 377 is one of the most heartening civil rights victories in post-independence India. It proved that a committed grassroots movement with the foresight of constitutional morality can challenge an entrenched colonial law and triumph.

Navtej Singh Johar brought back dignity, identity and humanity to millions of queer Indians. It flatly denied that the value of a minority is to be determined by the approval of the majority. But to strike down section 377 was to clear the rubble of a colonial past, not to build the house of full equality. As Supriyo's marriage equality verdict showed, real citizenship needs positive legal recognition, institutional protection and authentic social inclusion. The journey beyond Section 377 continues: from mere decriminalization to full civil rights, from legal tolerance to active acceptance, from formal freedom to lived human dignity.

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