



Sexual Minorities and the Constitution: Beyond Decriminalisation to Recognition?

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ABSTRACT

This research paper examines the constitutional journey of sexual minorities in India, focusing on the transition from the removal of criminal penalties for same-sex relationships between consenting adults to the broader struggle for full legal recognition and equality. The Supreme Court's landmark judgment in *Navtej Singh Johar v. Union of India* marked a historic step in affirming the rights of LGBTQIA+ individuals by limiting the scope of Section 377 of the Indian Penal Code so that it no longer applied to consensual same-sex relationships between adults. However, decriminalisation alone does not address the myriad legal and social challenges faced by sexual minorities. This paper examines the safeguards provided by the Constitution through Articles 14, 15, 19, and 21, which uphold the principles of equality, prohibit discrimination, protect freedom of speech, and ensure the right to live with dignity. It also highlights the gaps in legislation that leave sexual minorities vulnerable in areas such as marriage, adoption, inheritance, and healthcare. This paper also looks into the flaws in how the Transgender Persons (Protection of Rights) Act, 2019, is being carried out and emphasizes the need for a legal system that is more inclusive and complete. Through comparative analysis with international jurisdictions like South Africa, Nepal, the United States, and the United Kingdom, the paper identifies best practices in recognising and protecting sexual minorities' rights. The role of the



judiciary as a protector of fundamental rights is acknowledged, but the paper argues that legislative action is crucial for long-term social change. The paper suggests introducing a specific law to prevent discrimination, officially recognising same-sex marriages, granting adoption and inheritance rights, implementing reservation policies for transgender individuals, training judges and police officers to be more sensitive, and creating legal support systems within communities. The paper emphasises that true constitutional recognition goes beyond removing criminal sanctions; it requires creating an environment of equality, dignity, and social acceptance.

In conclusion, this research underlines the importance of moving from mere decriminalisation to comprehensive legal and social recognition for sexual minorities, ensuring that the goal is to ensure that every citizen, no matter their sexual orientation or gender identity, truly enjoys the constitutional values of justice, freedom, equality, and brotherhood.

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1.Introduction

In modern constitutional democracies, the idea of equality is not limited to just treating everyone the same, but also involves acknowledging and protecting the unique identities and needs of every individual. One such group whose rights and identity have long been ignored or misunderstood in India is that of sexual minorities. These minorities include individuals who do not conform to traditional heterosexual or binary gender identities¹. Often referred to by the acronym LGBTQIA+, this community encompasses Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual people, and others whose sexual orientation, gender identity, or gender expression falls outside traditional societal norms.

For decades, sexual minorities in India have faced social stigma, legal discrimination, and institutional neglect. They faced both social exclusion and legal persecution under colonial-era laws, especially

¹ Brian A. Feinstein et al., *Sexual and Gender Minority Populations*, ASS'N FOR BEHAVIORAL & COGNITIVE THERAPIES, <https://www.abct.org/fact-sheets/sexual-and-gender-minority-populations/>



Section 377 of the Indian Penal Code, which criminalised same-sex relationships. Although the Supreme Court later invalidated this law in *Navtej Singh Johar v. Union of India* (2018)², thereby decriminalising consensual same-sex relationships between adults, the journey towards full constitutional equality remains incomplete.

Constitutional recognition goes far beyond the mere removal of criminal penalties. It refers to the acknowledgement of a group's rights, dignity, and place within the legal and social framework of the country. For sexual minorities, this goes beyond just being free from criminal charges; it means having equal rights and protections as heterosexual and cisgender people. This includes the ability to marry, adopt children, inherit property, receive non-discriminatory healthcare, and live with dignity in every aspect of life.

The distinction between decriminalisation and recognition is crucial. Decriminalisation simply means that certain actions or identities are no longer considered crimes. In the case of LGBTQIA+ individuals, it means that same-sex relationships are not punishable by law. However, recognition involves actively granting rights, protections, and legal status. For example, while two men can now live together without fear of being arrested, they still do not have the legal right to marry, adopt children as a couple, or be recognised as partners in matters like medical consent or next-of-kin status. Their relationships continue to be invisible in the eyes of Indian law.

This lack of legal and social recognition means that sexual minorities still face serious challenges in everyday life. They often experience discrimination in schools, workplaces, healthcare facilities, and public spaces. Many individuals are disowned by their families or denied opportunities because of their identity. The absence of anti-discrimination laws specifically protecting LGBTQIA+ individuals makes them vulnerable and forces them to constantly struggle for basic human dignity.

This research paper aims to examine whether India's constitutional provisions have sufficiently protected sexual minorities following the landmark 2018 Supreme Court ruling. Although the judiciary has made important advances in acknowledging LGBTQIA+ rights, particularly through cases such as *NALSA v. Union of India* (2014)³ and *Navtej Singh Johar*, the lack of legislative reform leaves many issues unaddressed. This paper seeks to study the constitutional provisions that can protect sexual

² Harry Rana, *Navtej Singh Johar v. Union of India Case Summary 2018 SC*, LAW PLANET, <https://lawplanet.in/navtej-singh-johar-v-union-of-india-case-summary/>

³ Legal Vidhiya, *NALSA v. Union of India*, (2014) 5 SCC 438, <https://legalvidhiya.com/nalsa-v-union-of-india-2014-scc-438/>



minorities, examine how far the courts have interpreted these rights progressively, and identify the gaps that still exist in law and practice.

The paper will also discuss the need for positive legal rights—such as marriage equality, adoption rights, inheritance, and protection from discrimination—as a necessary next step beyond mere decriminalisation. Furthermore, it will compare Indian constitutional developments with those in other countries, and offer suggestions for reforms that would truly ensure equality and dignity for sexual minorities in India.

In doing so, this research does not just aim to highlight what has been done, but more importantly, what remains to be done in the fight for full and meaningful constitutional recognition of sexual minorities.

2. Colonial Legacy and the Criminalisation of Homosexuality

The criminalisation of homosexuality in India is not rooted in its ancient culture or native traditions but is largely a legacy of British colonial rule⁴. Before the advent of colonialism, Indian society had a much more nuanced and, in some cases, accepting view of diverse gender identities and sexual orientations. Ancient Indian texts, temple carvings, and regional histories reflect depictions of same-sex relationships and gender fluidity. However, the arrival of Victorian-era Western values during British rule significantly changed the legal and social conditions for sexual minorities in India.

2.1 Historical Origins of Section 377 IPC

The notorious Section 377 of the Indian Penal Code, introduced in 1861, was a direct imposition of British moral codes. Drafted by Lord Macaulay, this section criminalised “carnal intercourse against the order of nature,” which came to be interpreted as any form of non-peno-vaginal sexual act, including homosexual activity⁵. The British rulers believed that Indian society was overly permissive, and they wanted to “civilise” the colonised population by imposing a rigid Christian moral framework. Section 377 was not based on any Indian custom or demand; rather, it reflected the attitudes of 19th-century Britain, which viewed homosexuality as sinful and perverse.

⁴ Deepanshi Mehrotra, *The Pre-Colonial History of Homosexuality in India: Why Love Is Not Western (Part I/III)*, LAWCTOPUS (July 19, 2021), <https://www.lawctopus.com/academike/history-of-homosexuality-in-india/>.

⁵ *The Omission of Section 377 from the Bharatiya Nyaya Sanhita*, JUS CORPUS, <https://www.juscorpus.com/the-omission-of-section-377-from-the-bharatiya-nyaya-sanhita/>



This law was copied almost verbatim from the Buggery Act of 1533 in England⁶, where sodomy had been a punishable offence for centuries. Ironically, the UK decriminalised homosexuality decades ago, but this outdated law continued to persist in India long after Independence.

2.2 British Colonial Morality and Its Long-Standing Effect

The imposition of Section 377 not only criminalised certain sexual acts but also institutionalised a system of moral policing. It created a culture where sexual minorities were viewed as criminals by default, regardless of whether any “acts” were actually committed. The law was vague, broadly worded, and open to misuse⁷. Over time, it became a tool for harassment, blackmail, and police abuse, especially against gay men, transgender persons, and gender non-conforming individuals.

The law cast a long shadow over Indian society, embedding shame, secrecy, and fear into the lives of queer people. Even though it was rarely used for actual convictions, the mere existence of the law served as a justification for social exclusion, discrimination, and violence. Families disowned LGBTQIA+ members, educational institutions refused to accept or support them, and employment opportunities were often denied or withdrawn due to their identity.

Section 377 also ensured that queer people remained invisible in the legal system. Because their existence was legally condemned, they were unable to seek protection from abuse or discrimination. Reporting crimes like sexual violence, domestic abuse, or bullying was extremely difficult, as doing so could expose the survivor to legal risk under Section 377 itself.

The colonial morality embedded in the law encouraged society to look at homosexuality and transgender identities as unnatural or imported from the West, when in fact, it was the homophobia itself that was imported⁸. The British Empire succeeded in rewriting the moral code of Indian society, and the effects lingered for over 150 years, well beyond Independence in 1947.

2.3 Legal and Social Marginalisation of Queer Identities Pre-2018

⁶ Johnson, *Buggery and Parliament*, Wiley Online Library (*Parliamentary History*) (2017), available at <https://onlinelibrary.wiley.com/doi/10.1111/1750-0206.12463>.

⁷ *Decriminalization of Section 377: A Turning Point in Indian LGBTQ+ Rights*, LAWFOYER, <https://lawfoyer.in/decriminalization-of-section-377-a-turning-point-in-indian-lgbtq-rights/>

⁸ J.M. General, *How Has Colonialism Impacted the LGBTQ+ Community?*, THE OXFORD STUDENT (Feb. 15, 2021), <https://www.oxfordstudent.com/2021/02/15/how-has-colonialism-impacted-the-lgbtq-community/>.



Prior to the Supreme Court's 2018 decision to limit the application of Section 377, sexual minorities in India lived in a constant state of vulnerability. They were denied not only legal protection but also basic human dignity and social acceptance. Homosexuality was widely misunderstood as a disease or a perversion, and queer individuals were frequently subjected to conversion therapies, forced marriages, and even corrective rape.

There were no laws recognising same-sex relationships, marriage, inheritance, adoption, or healthcare decision-making. Transgender persons were frequently arrested under vagrancy or obscenity laws, and often faced police brutality. Social attitudes were shaped by fear and ignorance, in part because the law had declared non-heterosexual lives to be criminal for generations.

Section 377 also hindered the work of public health campaigns, particularly those targeting HIV/AIDS in the gay and transgender communities⁹. Fear of being criminalised discouraged people from seeking healthcare, leading to greater vulnerability and marginalisation.

Activism was gradually building up from the 1990s onward. NGOs like the Naz Foundation, advocacy groups, and independent lawyers began challenging the constitutionality of Section 377. The Delhi High Court's 2009 decision (later overturned in 2013) briefly gave hope, but it was not until the Supreme Court's verdict in *Navtej Singh Johar v. Union of India* (2018) that this colonial relic was finally removed from the law books¹⁰.

This judgment marked the formal end of criminalisation, but the legacy of colonial-era morality remains deeply rooted in social attitudes and even in other areas of the law. Although the court acknowledged the rights to equality and dignity, the fight for complete legal and social acceptance for India's sexual minorities continues

3. The Historic Verdict in the Case of *Navtej Singh Johar v. Union of India*

The *Navtej Singh Johar v. Union of India* case, decided by the Supreme Court in 2018, it was a landmark ruling that invalidated the portion of Section 377 of the Indian Penal Code that criminalised

⁹ Supreme Court Observer, *Constitutionality of Section 377 IPC*, <https://www.scobserver.in/cases/navtej-singh-johar-v-union-of-india-constitutionality-of-section-377-ipc-background/>

¹⁰ **Monica Bathija**, *How the 2009 Section 377 Judgement Changed the LGBTQ Discourse in India*, FORBES INDIA (May 30, 2024), <https://www.forbesindia.com/article/15th-anniversary-special/how-the-2009-section-377-judgement-changed-the-lgbtq-discourse-in-india/93249/1>.



consensual same-sex relationships between adults. This decision represented a major advancement in acknowledging the rights of sexual minorities in India and was celebrated across the country as a victory for love, dignity, and individual freedom.

At the heart of this case were five petitioners, including dancers, journalists, and LGBTQIA+ activists, who challenged the constitutionality of Section 377, claiming that the law infringed upon their fundamental rights guaranteed by the Constitution. The Court, in a unanimous verdict, agreed and declared that criminalising consensual same-sex relations among adults was unconstitutional.

The Supreme Court relied on several constitutional principles to reach its conclusion. Article 14, which guarantees equality before the law, was used to show that Section 377 treated LGBTQIA+ individuals unequally. The Court found the law to be arbitrary and lacking any rational basis. Article 15, which bans discrimination based on sex, was understood more broadly to cover sexual orientation as well. The court explained that treating someone unfairly because of their sexual orientation is a type of sex discrimination, and therefore violates the Constitution.

Another crucial principle used in the judgment was Article 21, which ensures the right to life and personal freedom, was reaffirmed by the Court to also protect the right to privacy, dignity, and autonomy. Referring to its earlier decision in the *Puttaswamy* case (2017), the Court held That a person's sexual orientation is a fundamental part of who they are and their privacy, and thus should be fully safeguarded under Article 21¹¹.

One of the most powerful aspects of the judgment was its emphasis on dignity. The judges stated that the law had created a sense of guilt and fear in the minds of LGBTQIA+ persons, denying them their basic sense of self-worth. By criminalising who they are, the law violated their right to live with dignity.

Each of the judges gave separate but concurring opinions. Justice D.Y. Chandrachud's observations were particularly impactful. He highlighted how Section 377 had not only criminalised same-sex relations but had also legitimised societal stigma and state-sponsored discrimination for decades. Justice

¹¹ LawNotes, *Article 21 of the Indian Constitution*, <https://lawnotes.co/article-21-of-the-indian-constitution/#:~:text=Navtej%20Singh%20Johar%20vs.%20Union%20of%20India%20%282018%29%3A,live%20with%20dignity%20and%20equality%20under%20Article%2021>



Indu Malhotra made the memorable statement that “history owes an apology to the members of this community.”¹²

This case is also a prime example of judicial activism, where the Court took a bold and progressive step in upholding constitutional morality over societal morality. Despite the absence of legislative action, the judiciary acted to protect the rights of a marginalised group. It demonstrated that the Constitution is dynamic and must adapt over time to guarantee justice for everyone, particularly for those who have long been marginalized. The *Navtej Singh Johar* judgment is not just about decriminalisation; it is about constitutional recognition, inclusion, and dignity for all, regardless of whom they love.

4. Constitutional Rights of Sexual Minorities

Sexual minorities—such as lesbian, gay, bisexual, transgender, queer, intersex, asexual, and others who don’t fit traditional norms (LGBTQIA+)—have the same basic constitutional rights as every other citizen of India. However, these rights have historically been denied or ignored in the name of tradition, morality, or majoritarian sentiment¹³. The Indian Constitution ensures various fundamental rights that, when understood in a progressive way, form the backbone of legal protection for sexual minorities. This section explores how Articles 14, 15, 19, and 21 of the Constitution protect and empower LGBTQIA+ individuals — not just in theory, but in spirit and practice¹⁴.

4.1 Article 14 – Equality Before the Law

Article 14 of the Indian Constitution ensures that everyone is treated equally under the law and receives equal legal protection. It has traditionally been viewed as a protection against unfair or arbitrary actions by the state, Article 14 has evolved through judicial interpretation to include the idea of substantive equality, not just treating everyone the same, but ensuring equal outcomes for disadvantaged groups.

For sexual minorities, Article 14 became especially important in the *Navtej Singh Johar v. Union of India* case, in this ruling, the Supreme Court stated that penalising consensual same-sex relationships infringed upon the fundamental right to equality. The Court emphasized that the law should not single

¹² Akshat Khetan, *Justice D.Y. Chandrachud: A Legacy of Progressive Jurisprudence and Constitutional Vision*, ET LEGALWORLD (Nov. 6, 2024), <https://legal.economicstimes.indiatimes.com/news/opinions/justice-d-y-chandrachud-a-legacy-of-progressive-jurisprudence-and-constitutional-vision/115020404>.

¹³ World Health Organization, *Improving LGBTIQ+ Health and Well-being with Consideration for SOGIESC*, WHO, <https://www.who.int/activities/improving-lgbtqi-health-and-well-being-with-consideration-for-sogiesc>

¹⁴ Ronit Raj, *Articles 14, 19, and 21: The Golden Triangle of the Indian Constitution*, THE LEGAL QUORUM, <https://thelegalquorum.com/articles-14-19-and-21-the-golden-triangle-of-the-indian-constitution/>



out and discriminate against a group of people just because of who they are. By reading equality broadly, the Court acknowledged that LGBTQIA+ persons cannot be treated as second-class citizens or be denied protection just because they belong to a minority.

Equality, therefore, is not limited to what the majority enjoys, it extends to the full spectrum of human identity, this includes protection based on sexual orientation and gender identity. Article 14 provides the basis for fighting discrimination in various aspects of life such as jobs, housing, healthcare, and education.

4.2 Article 15 – Protection Against Discrimination

Article 15(1) prevents the State from discriminating against citizens based on religion, race, caste, sex, place of birth, or any of these factors. Although "sexual orientation" is not specifically listed, the Supreme Court has ruled that the term "sex" also covers sexual orientation and gender identity. This progressive interpretation ensures that Article 15 protects LGBTQIA+ persons from discrimination not only by the state but potentially in private spaces as well.

In *Navtej Singh Johar*, the Court clarified that the Constitution's framers intended to include all forms of discrimination based on sex, including that which arises from sexual orientation. Therefore, refusing to hire someone, evicting tenants, or denying services solely because they are queer amounts to unconstitutional discrimination under Article 15.

However, this right remains mostly on paper due to the lack of a comprehensive anti-discrimination law. While Article 15 offers strong moral and legal ground, real change will only happen when these rights are enforced through legislation and social reform.

4.3 Article 19 – Freedom of Expression and Identity

Article 19(1)(a) guarantees the right to freedom of speech and expression, which includes expressing one's identity, personality, and way of life. For sexual minorities, this right is crucial for affirming their gender identity and sexual orientation. It protects their freedom to dress, speak, associate, or act in ways that reflect who they truly are.

The right to expression also means being able to openly declare one's sexual identity without worrying about censorship, negative reactions, or legal consequences. In the *NALSA v. Union of India* case, the Supreme Court affirmed that transgender people have the right to define their own gender, and that this



identification is protected by Article 19. Similarly, in *Navtej*, the Court acknowledged that making same-sex relationships illegal infringed on the expressive freedom of LGBTQIA+ individuals by preventing them from living openly and without stigma.

Therefore, freedom of expression is not just about speech, it's about the freedom to be oneself, without coercion, stigma, or legal punishment.

4.4 Article 21 – Right to Life and Personal Liberty

One of the strongest protections in the Indian Constitution, Article 21, ensures the right to life and personal freedom. Courts have interpreted this to include the rights to privacy, dignity, and autonomy. For sexual minorities, these rights serve as the fundamental foundation for their existence and freedom.

In the landmark *Justice K.S. Puttaswamy v. Union of India* (Right to Privacy case), the Supreme Court declared that privacy includes the right to make intimate personal choices, including one's sexual orientation. The judgment reaffirmed that LGBTQIA+ people have the right to select their partners, live with respect, and maintain privacy regarding their sexuality and identity.

Building on this, *Navtej Singh Johar* extended Article 21 to cover the full dignity of sexual minorities. The Court stressed that living a life with dignity means more than survival — it means being free to love, express, and live authentically, without state interference or societal violence.

However, while the right exists in theory, many queer persons still face harassment, forced conversion therapies, disownment, and police abuse. Legal protection under Article 21 must be accompanied by effective enforcement and sensitisation of law enforcement, healthcare providers, and educators.

Articles 14, 15, 19, and 21 of the Indian Constitution offer a solid basis for safeguarding and uplifting sexual minorities. These rights go beyond just being written principles—they serve as powerful instruments to combat long-standing exclusion, invisibility, and discrimination. Yet, the journey from legal recognition to social acceptance and civil rights is far from over. Constitutional morality must now be translated into inclusive laws, policies, and societal change that affirm the complete dignity and personhood of every individual, no matter their sexual orientation or gender identity¹⁵.

¹⁵ Rachit Sharma, *Rights of LGBTQ in India and the Struggle for Societal Acceptance*, 4 INT'L J.L. MGMT. & HUMAN. 18 (2021), available at <https://ijlmh.com/paper/rights-of-lgbtq-in-india-and-the-struggle-for-societal-acceptance/>.



5. Life Beyond Decriminalisation: Legal and Social Recognition Gaps

The 2018 Navtej Singh Johar judgment, which decriminalised same-sex relationships in India, was a landmark decision. It represented a major change in how the Constitution protects LGBTQIA+ individuals, especially by upholding their rights to equality, dignity, and privacy. Still, simply removing Section 377 from the books doesn't guarantee complete constitutional recognition and rights for these communities¹⁶. Even after this progressive step, sexual minorities in India continue to face deep legal and social exclusion, as many civil rights and social protections still remain inaccessible to them.

5.1. No Legal Recognition of Same-Sex Marriages

A significant shortcoming in Indian law is the absence of legal acknowledgment for same-sex marriages. While heterosexual couples can marry under various personal laws (Hindu Marriage Act, Muslim Personal Law, etc.) or under the secular Special Marriage Act, these legal routes remain closed for same-sex couples¹⁷. Without the legal status of marriage, queer couples are denied a whole range of rights — such as spousal benefits, tax advantages, and protection from domestic violence — that heterosexual couples enjoy. Courts have been slow to expand the definition of "family" or "spouse" to include same-sex partners, resulting in the continued invisibility of these relationships in legal discourse.

5.2. Denial of Adoption, Surrogacy, Inheritance, and Next-of-Kin Status

The denial of marriage recognition leads to further discrimination in related areas like adoption, surrogacy, inheritance, and being treated as next-of-kin. Currently, under laws such as the Juvenile Justice Act and adoption guidelines, only married heterosexual couples or single individuals are allowed to adopt. Same-sex couples are thus effectively barred from raising children together. Likewise, access

¹⁶ Amisha Matkar, *A Critical Analysis on Decriminalization of Section 377 of Indian Penal Code, 1860*, LEGAL SERVICE INDIA, <https://www.legalserviceindia.com/legal/article-2948-a-critical-analysis-on-decriminalization-of-section-377-of-indian-penal-code-1860.html>

¹⁷ Free Law, *Same-Sex Marriage in India: A Review of Recent Supreme Court Judgments*, FREE LAW (Oct. 20, 2023), <https://www.freelaw.in/legalarticles/Same-Sex-Marriage-in-India-A-Review-of-Recent-Supreme-Court-Judgments>.



to surrogacy is restricted to married heterosexual couples under the Surrogacy (Regulation) Act, 2021, leaving queer individuals out¹⁸.

In matters of inheritance, a lack of legal kinship between queer partners means they are often denied succession rights to property, even if they have shared a life together. The absence of next-of-kin status creates further difficulties in making medical decisions, accessing hospital visitation rights, or even claiming the body of a deceased partner. These legal omissions continue to treat sexual minorities as second-class citizens and go against the equality and non-discrimination principles guaranteed by Articles 14 and 15 of the Constitution.

5.3. *Transgender Persons and the Flawed Implementation of the Transgender Persons Act*

The enactment of the Transgender Persons (Protection of Rights) Act, 2019 was anticipated to be a significant achievement for the transgender community. Unfortunately, its implementation has been fraught with problems¹⁹. Firstly, the Act mandates a certification process by a district magistrate to legally recognise someone as transgender, which has been widely criticised for being bureaucratic, intrusive, and lacking sensitivity. It weakens the person's right to define their own identity, which was affirmed in the *NALSA v. Union of India* case.

Additionally, the Act does not offer positive measures like reservations in education and jobs, which are crucial for historically marginalised communities like transgender persons. The penalties for crimes against transgender individuals under this Act are also weaker compared to the general law, thereby reflecting a diluted commitment to justice and equality. In practice, trans persons continue to face denial of housing, police harassment, poor access to healthcare, and exclusion from mainstream education and workspaces.

5.4. *Societal Exclusion in Employment, Housing, and Education*

Beyond legal gaps, social discrimination remains a daily reality for queer individuals in India. In employment, many LGBTQIA+ persons face bias in hiring, lack of inclusive HR policies, and hostile

¹⁸ Rudra Pal, *Impact of the New Surrogacy (Regulation) Act, 2021 on Surrogacy Arrangements in India*, A.K. LEGAL & ASSOCIATES (May 12, 2023), <https://aklegal.in/impact-of-the-new-surrogacy-regulation-act-2021-on-surrogacy-arrangements-in-india/>.

¹⁹ Lawful Legal, *Legislative Analysis of the Transgender Persons (Protection of Rights) Act, 2019*, <https://lawfullegal.in/legislative-analysis-of-the-transgender-persons-protection-of-rights-act-2019/>



workplace environments. Even in educational institutions, there is a lack of sensitisation, leading to bullying, marginalisation, or invisibilisation of queer students²⁰.

In terms of housing, many landlords refuse to rent homes to same-sex couples or transgender individuals. The lack of legal protection against such discrimination often leaves queer persons with little recourse. These experiences reinforce a sense of not belonging, even though they are guaranteed equal protection under the Constitution.

5.5. Intersectional Discrimination: Caste, Class, Religion and Queer Identity

Importantly, the queer experience in India cannot be understood in isolation. Many LGBTQIA+ individuals also belong to marginalised castes, minority religions, or lower socio-economic backgrounds. This results in intersectional discrimination, where individuals face multiple and layered forms of oppression²¹.

For instance, a Dalit lesbian woman may simultaneously face caste discrimination, gender oppression, and homophobia — a reality that legal reforms have yet to fully acknowledge or address. Muslim transgender persons may face both religious and gender-based exclusion. These overlapping identities often push such individuals further to the margins, away from the protection of law and policy.

Decriminalising was a crucial initial move toward acknowledging the rights of sexual minorities in India. Still, it is only the beginning and not sufficient on its own. Without comprehensive legal recognition and active societal inclusion, LGBTQIA+ individuals remain on the periphery of constitutional protection. The Indian state must now move beyond symbolic gestures and take concrete steps to integrate queer lives into the legal, economic, and social mainstream.

6. Comparative Jurisprudence: Learning from Other Countries

In the quest for full constitutional recognition of sexual minorities, India can greatly benefit by examining the experiences and legal frameworks adopted by other countries. These countries have

²⁰ PolSci Institute, *LGBTQ Rights in India: From Marginalization to Legal Recognition*, POLSCI INSTITUTE, <https://polsci.institute/state-politics-india/lgbtq-rights-india-legal-recognition/>

²¹ Ayanabha Banerjee, *From Margins to Mainstream: The Escalating Recognition of Queer Individuals and Non-Heterosexual Relations in India*, THE MOOKNAYAK (Mar. 12, 2024), <https://en.themooknayak.com/lgbtq-news/from-margins-to-mainstream-the-escalating-recognition-of-queer-individuals-and-non-heterosexual-relations-in-india>.



progressed considerably in safeguarding the rights of LGBTQIA+ people, going beyond mere decriminalisation to ensuring equality, dignity, and inclusion. A comparative analysis helps highlight both successful models and gaps that India can address in its own legal and social context.

South Africa stands out as a leader in constitutional equality and marriage rights for sexual minorities. Its Constitution clearly forbids discrimination on the basis of sexual orientation, which was a landmark inclusion globally. This strong constitutional guarantee provided the foundation for the Constitutional Court to recognise same-sex marriages legally in the case of *Minister of Home Affairs v. Fourie* (2005)²². The Court confirmed that refusing marriage rights to same-sex couples was unconstitutional because it infringed upon their rights to equality and dignity. South Africa's example shows how crucial clear constitutional protections are for LGBTQIA+ individuals and how the judiciary plays a key role in upholding these rights. For India, the lesson lies in framing explicit anti-discrimination protections within the Constitution or law, and considering marriage equality as a fundamental right that courts can uphold.

Moving eastwards, Nepal has been a regional leader in recognising gender diversity beyond the traditional male-female binary²³. Nepal was among the earliest South Asian nations to legally recognize a "third gender" option, enabling people who don't identify strictly as male or female to get official identification that matches their gender identity. This recognition came through progressive court rulings and subsequent legislation, which also granted rights related to education, employment, and social welfare for transgender and gender-nonconforming people. Nepal's example shows that acknowledging different gender identities legally can be successfully established through a mix of court decisions and supportive laws. India, with its own rich cultural history of non-binary gender identities, can strengthen protections and recognition for transgender and intersex persons by adopting similar inclusive legal frameworks.

In the United States, the landmark Supreme Court decision *Obergefell v. Hodges* (2015) represents a historic victory for marriage equality²⁴. The Court decided that the right to marry is a basic freedom safeguarded by the Fourteenth Amendment's Due Process and Equal Protection Clauses. This ruling compelled all states to legalize same-sex marriage, invalidating the bans that were in place in numerous

²² Minister of Home Affairs and Another v Fourie and Another (CCT 60/04) [2005] ZACC 19, <https://www.saflii.org/za/cases/ZACC/2005/19.html>

²³ Ibtisam Ahmed, *Third Gender Rights in South Asia: What's New?*, ISPI, <https://www.ispionline.it/en/publication/third-gender-rights-south-asia-whats-new-25354>

²⁴ Legal Information Institute, *Obergefell v. Hodges*, https://www.law.cornell.edu/wex/obergefell_v._hodes



areas. The U.S. example underscores the importance of constitutional guarantees of equality and liberty, and how judicial interpretation can secure sweeping rights for sexual minorities, even in the absence of specific legislation. For India, this underscores the judiciary's potential role in expanding rights through constitutional interpretation but also the need for clear legislative action to solidify these rights.

The United Kingdom has developed comprehensive legislation to address the rights of sexual minorities, particularly through the *Gender Recognition Act, 2004* and the legalisation of same-sex marriage in 2014²⁵. The Gender Recognition Act permits transgender individuals to officially change their gender, ensuring their rights concerning marriage, inheritance, and privacy. The UK's step-by-step legislative approach combined with social sensitisation campaigns shows how legal reforms can be integrated into wider social acceptance processes. India could look towards such inclusive legislation that not only protects sexual minorities from discrimination but also affirms their rights in family and personal matters.

6.1 What India Can Learn from These Countries

From these international examples, India can derive several valuable lessons. Firstly, it is clear that having specific constitutional or legal safeguards against discrimination based on sexual orientation and gender identity is crucial. Although the Indian Supreme Court's *Navtej Singh Johar* ruling decriminalised consensual same-sex relations, it did not address broader issues like marriage, adoption, or inheritance rights, which remain unprotected.

Second, recognition of gender diversity beyond the male-female binary is crucial. India's The Transgender Persons (Protection of Rights) Act, 2019, while a positive development, has faced criticism for its insufficient measures. Nepal's legal recognition of the third gender offers a useful template for more inclusive policies.

Third, the Indian judiciary, like the courts in the U.S., can play a powerful role in advancing LGBTQIA+ rights by interpreting fundamental rights expansively. However, without supportive legislation, these rights risk remaining fragile or inconsistent across different domains.

India can also learn from the UK's approach to comprehensive, incremental reforms that combine legal recognition with social education and awareness programs. This approach can help lessen stigma,

²⁵ Joanna Dawson & Georgina Sturge, *Gender Recognition and the Equality Act 2010*, HOUSE OF COMMONS LIBRARY, <https://commonslibrary.parliament.uk/research-briefings/cbp-10137/>



encourage acceptance, and guarantee that sexual minorities are not just legally protected but also able to fully engage in society.

The comparative jurisprudence of these countries demonstrates that legal recognition of sexual minorities must go beyond decriminalisation and address substantive equality and dignity. India's constitutional framework provides the potential for such progressive reforms, but it requires clear legislative action supported by judicial activism and societal change to fully ensure the rights of sexual minorities are upheld.

7. The Role of the Judiciary vs. Legislative Paralysis

In the journey toward securing rights for sexual minorities in India, The judiciary has taken an important and active role, frequently stepping in to address shortcomings when the legislature has not acted. The courts, especially the Supreme Court, have delivered landmark judgments that have progressively recognised the rights and dignity of LGBTQIA+ individuals²⁶. However, this judicial activism contrasts sharply with the noticeable inaction and reluctance of the Parliament to enact comprehensive laws that would protect and promote the rights of sexual minorities.

The judiciary's intervention has been vital because, historically, there was little or no legislation specifically addressing the rights of sexual minorities. For example, prior to the Supreme Court invalidating the criminalisation of consensual same-sex relationships under Section 377 of the Indian Penal Code in *Navtej Singh Johar v. Union of India* (2018), the legislature had not taken any steps to repeal or amend this colonial-era law despite widespread criticism and advocacy. The Supreme Court acknowledged the fundamental rights to equality, privacy, and dignity, and courageously decriminalised homosexuality, emphasizing the importance of safeguarding sexual minorities from discrimination and societal prejudice.

Yet, while the judiciary has been proactive, Parliament has largely remained silent or passive on the matter. Over the years, several bills aimed at safeguarding LGBTQIA+ rights have been introduced but have either been withdrawn or lapsed without discussion. The lack of detailed laws protecting queer rights has resulted in important issues remaining unresolved, including the legal acknowledgment of same-sex marriages, rights to adoption and inheritance, and safeguards against discrimination in

²⁶ Hasi Jain, *From Judgments to Handbook: India's Transformative Journey towards LGBTQIA+ Equality*, CITIZENS FOR JUSTICE AND PEACE, <https://cjp.org.in/from-judgments-to-handbook-indias-transformative-journey-towards-lgbtqia-equality/>



employment and public areas. This legislative inertia has contributed to a situation where, despite judicial protections, many sexual minorities continue to face legal uncertainties and social marginalisation.

The failure of Parliament to act can be attributed to various factors, including political hesitation, lack of consensus among lawmakers, and societal prejudices. While some private members have introduced bills to advance queer rights, these efforts have not translated into concrete laws due to insufficient political will. The result is a legal vacuum where progressive judicial pronouncements lack the backing of detailed, enforceable legislation.

This gap between judicial rulings and legislative action underscores the urgent need for Parliament to take proactive steps toward enacting laws that go beyond decriminalisation to full legal recognition and protection of sexual minorities. Comprehensive legislation would provide clarity, safeguard against discrimination in every aspect of life, and affirm the dignity and rights of LGBTQIA+ persons. Such laws should address issues like marriage equality, adoption, inheritance, employment rights, healthcare access, and protection from hate crimes.

While the judiciary has been a champion for the rights of sexual minorities, ensuring their constitutional protections through landmark judgments, the legislature has yet to rise to the occasion. Without decisive legislative action, the journey toward full recognition and equality remains incomplete. For true social change and legal certainty, Parliament must translate judicial guidance into robust laws that affirm the rights and dignity of every person, irrespective of their sexual orientation or gender identity.

8. Recommendations and the Way Forward

Despite the historic step of decriminalising homosexuality, many challenges remain for sexual minorities in India. To truly ensure equality and dignity, the law must go beyond just removing criminal penalties. It needs to actively protect and recognise the rights of LGBTQIA+ individuals. This requires a combination of new laws, better enforcement of existing laws, and social reforms.

Firstly, there is a pressing need to enact a comprehensive Equality and Anti-Discrimination Law specifically designed to safeguard sexual minorities. Such legislation should clearly prohibit unequal treatment due to sexual orientation, gender identity, or expression across all aspects of life, such as education, work, healthcare, housing, and access to public services. Currently, there is no uniform law



that explicitly protects LGBTQIA+ persons from discrimination, which leaves them vulnerable in many spheres. A dedicated law would help close this gap and affirm the State's commitment to equality.

Marriage equality is another crucial area that demands urgent attention. The Indian legal system does not yet recognise same-sex marriages, which denies LGBTQIA+ couples fundamental rights enjoyed by heterosexual couples. These rights include joint adoption, inheritance, maintenance, and the ability to make medical decisions for their partners. Legalising marriage equality would grant these couples social security and legal recognition, contributing greatly to their dignity and social acceptance.

Adoption rights for sexual minorities also need to be clearly defined and made accessible. Presently, there are no specific laws or guidelines allowing same-sex couples to adopt children in India. This creates an unfair barrier and denies many LGBTQIA+ individuals the opportunity to form families legally. Along with marriage equality, reforms in adoption and inheritance laws are essential to provide a comprehensive framework for family rights.

While the Transgender Persons (Protection of Rights) Act, 2019 marked progress, its implementation remains inadequate. As a result, many transgender individuals still experience discrimination, limited healthcare access, and social marginalization because the law is not effectively enforced. Proper government measures are needed to ensure transgender individuals receive identity documents, social benefits, and protection from violence and harassment. Strengthening the implementation will help transgender persons live with dignity and freedom.

Education and workplaces must become gender-neutral and inclusive environments. Schools should integrate LGBTQIA+ issues into their curriculum to foster awareness and reduce stigma from an early age. Similarly, workplaces must adopt policies that protect sexual minorities from harassment and discrimination, ensuring equal opportunities for recruitment, promotion, and benefits. Inclusive environments encourage participation and growth without fear of bias or prejudice.

Judicial officers and law enforcement agencies also need special training and sensitisation. Many sexual minorities face discrimination and violence not just from society but sometimes from the very institutions meant to protect them. Police personnel should be trained to handle cases involving sexual minorities sensitively and respectfully, avoiding harassment or abuse. Similarly, judges and lawyers should be educated about LGBTQIA+ rights to ensure fair and empathetic treatment in courts.



Reservation or affirmative action for transgender persons in education and employment is another important recommendation. Recognising the historical marginalisation faced by this community, affirmative policies can help improve their access to quality education and gainful employment. This would help uplift transgender persons economically and socially, promoting equality and empowerment.

Finally, community-based legal support mechanisms are essential. Many sexual minorities, especially those from economically weaker backgrounds, face difficulties in accessing legal aid or understanding their rights. NGOs and community organisations can provide legal counselling, support in filing complaints, and help navigate the justice system. Strengthening such support networks will empower sexual minorities to claim their constitutional rights more effectively.

Together, these recommendations form a roadmap for moving beyond mere decriminalisation toward full constitutional recognition, protection, and inclusion the presence and role of sexual minorities within India's social, legal, and political landscape.

9. Conclusion

The journey of sexual minorities in India, from criminalisation leading to the removal of criminal penalties for consensual same-sex relationships in *Navtej Singh Johar v. Union of India*, marks a significant constitutional milestone. However, this landmark judgment is only the beginning of a much larger struggle for equality, dignity, and full legal recognition. While the Supreme Court's ruling properly upheld the constitutional right to privacy, liberty, and equality for sexual minorities, it did not address many critical issues related to social and legal recognition. Therefore, moving beyond mere decriminalisation towards full constitutional recognition and protection remains an urgent need.

The Indian Constitution provides a robust framework for safeguarding fundamental rights, but the lived realities of sexual minorities reveal glaring gaps. Articles 14, 15, 19, and 21 provide powerful tools to challenge discrimination and uphold dignity, yet without specific laws and policies targeting sexual minorities, these constitutional rights remain theoretical for many. The absence of marriage equality, lack of adoption rights, limited inheritance protections, and insufficient recognition of transgender identities demonstrate that the constitutional promise of equality is far from fulfilled in practical terms.

Further, the failure of the legislature to enact comprehensive protections means the judiciary has borne the responsibility of upholding queer rights through progressive judgments. While judicial activism has been instrumental in advancing rights, the absence of supportive legislation limits long-term structural



reforms. It is essential for Parliament to step in and draft laws that not only protect against discrimination but also provide affirmative recognition and support to sexual minorities. This includes marriage equality, legal recognition of family rights, and strong anti-discrimination statutes covering education, employment, healthcare, and public services.

Additionally, the Transgender Persons (Protection of Rights) Act, 2019, though well-intentioned, has faced criticism for its narrow scope and poor implementation. Comprehensive reforms and effective enforcement are necessary to ensure transgender persons enjoy their constitutional rights fully. Alongside legal reforms, societal acceptance must grow, which requires education, sensitisation, and inclusive policies across institutions.

The comparison with other countries shows that constitutional guarantees alone are insufficient without accompanying legislative measures and social acceptance. India can learn from global examples where legal reforms have been coupled with societal outreach to ensure lasting change. Affirmative actions like reservations for transgender persons in education and employment, sensitisation of judiciary and law enforcement, and support for community-based legal aid are critical steps toward achieving substantive equality.

Ultimately, the constitutional vision of India is founded on justice, liberty, equality, and fraternity. For sexual minorities, this vision can only be realised when they are not just free from penal sanctions but also enjoy full recognition, protection, and respect for their identities and relationships. The path forward demands coordinated efforts by the judiciary, legislature, civil society, and the public to create an inclusive legal and social environment where all people, no matter their sexual orientation or gender identity, deserve to live with dignity and enjoy equal rights.

This research highlights that while the decriminalisation of homosexuality was a groundbreaking legal victory, it is just the foundation upon which a more inclusive constitutional framework must be built. The legal and social challenges faced by sexual minorities require urgent attention and action, ensuring that the Constitution's guarantee of equality extends to every part of society, without excluding anyone.

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