

Deconstructing the Concept of Otherisation in the Light of Lgbtq+ Rights in India

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Abstract

LGBTQ+ rights in India have undergone significant constitutional and legal development over the past two decades; however, the queer community continues to experience marginalisation and social exclusion through processes of otherisation. Homosexuality continues to be associated with social stigma through which the queer community has historically been constructed as the “Other”. The conventional social norms often regard identities and relationships that fall outside binary conceptions of sex and gender as abnormal or deviant. The study adopts a doctrinal approach to trace the evolution of queer rights since ancient India through an evaluation of scriptures, temple architecture, mythological references and Hijra tradition. The study critically assesses the British colonial laws inspired by Victorian morality and anti-queer notions.

This research paper critically examines the constitutional evolution of LGBTQ+ rights through landmark judgments including *Naz Foundation v. Government of NCT of Delhi* (2009), *Suresh Kumar Koushal v. Naz Foundation* (2013), followed by the transformative judgments in *National Legal Services Authority v. Union of India* (2014), *Justice K.S. Puttaswamy v. Union of India* (2017), *Navtej Singh Johar v. Union of India* (2018). It also examines the decriminalisation of consensual same-sex relations under Section 377 of the Indian Penal Code and the subsequent omission of the provision from the Bharatiya Nyaya Sanhita, 2023 (BNS), particularly the resulting concerns regarding the legal protection available against non-consensual sexual offences involving male victims. These decisions have collectively expanded the scope of Articles 14, 15, 19, and 21 of the Constitution by recognising equality, dignity, privacy, autonomy, and self-identification. However, significant gaps remain in the legal framework to give proper recognition and protection to the queer community. The issue therefore extends beyond the protection of individual rights to the recognition and protection of individual identity and dignity. The paper argues for gender-neutral laws in India to address socio-economic and political inequalities arising from discrimination based on gender and sexuality.

Keywords: LGBTQ+ rights, Otherisation, Deconstruction, Constitutional Equality, Substantive Equality, Social Exclusion, Gender Identity, Decriminalisation, Institutional Discrimination.

1. INTRODUCTION

The LGBTQ+ rights are a current evolving notion in India. Homosexuality in India is attached with social stigma because of which the queer community has been titled as “Others”. Otherisation means to treat a person or a group as intrinsically different from an alien to oneself¹. The society considers it abnormal to

¹ Cambridge Dictionary Definition of “otherize”.

be not being able to fit into the stringent definitions of man and woman. There is lack of awareness on the part of the society and it cannot distinct gender from sex. The awareness about recognising the rights of LGBTQ+ community did not happen overnight it was the combined efforts of the people all over the world to spread awareness through pride marches, sharing their struggle story on social media and supporting each other. The initial Pride Parades held in Delhi, Kolkata and Bangalore on 29th July, 2008 was an example that queer identities were acceptable to more Indian youths than ever before, but within the boundaries of family, home and school, acceptance of their sexuality and freedom to openly express their gender choices still remain constant struggle for LGBTQ+ especially in a diverse country like India².

The social pressures have contributed to a legal and institutional framework that remains insufficiently inclusive, is influenced by orthodox notions of morality, and has left many unrepresented and excluded from the mainstream. There is systematic exclusion of sexual minorities due to legal prohibition, social stigma, cultural taboos, and institutional discrimination. Therefore, there is a need to deconstruct these processes in order to make society and law more inclusive. This study highlights practical challenges in implementing existing LGBTQ+ rights and critically analyses the Transgender Persons (Protection of Rights) Act, 2019 in this context. It contributes to the existing discourse by proposing practical measures for more effective implementation of legal protections and by developing strategies to deconstruct otherisation. These proposed measures are intended to assist policymakers, legislators, and civil society organisations in advancing substantive equality for LGBTQ+ persons. This study is limited by its reliance on published literature, court rulings and secondary sources, as well as absence of extensive original empirical data.

1.1. RESEARCH QUESTIONS

1. How has the concept of 'Otherisation' evolved in India and its impact on LGBTQ+ community? Why there is need to deconstruct the concept of otherisation in order to achieve social inclusion and equality?
2. What is the current legal stance on Queer rights in India and chronology leading to decriminalisation of Section 377 of IPC?
3. What are the measures that the government needs to take to create an equitable setting in the society?

1.2. RESEARCH OBJECTIVES

1. To trace the historical evolution of attitudes towards homosexuality and gender diversity in India from ancient times to the present day.
2. To critically analyse the concept of 'Otherisation' and its manifestation in legal, social, and cultural discrimination against LGBTQ+ individuals and To evaluate the consequences of decriminalization and the shift from the Indian Penal Code to the Bharatiya Nyaya Sanhita.
3. To examine the constitutional framework governing LGBTQ+ rights and the jurisprudential evolution leading to the decriminalisation of Section 377.

1.3. RESEARCH METHODOLOGY

This study adopts doctrinal research methodology to examine the concept of otherisation in the context of LGBTQ+ rights in India. It relies on primary sources such as Constitutional provisions- Articles 14, 15, 19, and 21 of the Constitution of India, Statutory provisions including Section 377 of the Indian Penal Code and its treatment under the Bharatiya Nyaya Sanhita, 2023. The secondary sources include Judicial decisions from the Supreme Court of India, High Courts, and relevant foreign jurisdictions, Academic

² Rights of LGBTQ in India and the Struggle for Societal Acceptance by Rachit Sharma

literature including peer-reviewed journal articles and research papers, Books and monographs on LGBTQ+ rights, gender studies, and constitutional law, Reports from governmental bodies, non-governmental organisations, and international human rights mechanisms, Empirical studies and surveys on the condition of LGBTQ+ individuals in India.

2. HISTORICAL ANALYSIS OF HOMOSEXUALITY

The question about sexuality had already been a part of various early civilisations which we know through different texts, scriptures and tales. This suggest the homosexuality is not a novel or a western concept as perceived by Indians. The historical evidences reveals that the Indian Subcontinent possessed remarkably nuanced understanding of sexuality and gender prior to the colonisation³. It is can be also inferred that stigma and prejudices around sexuality arouse only after the influence of European Culture. The understanding of this history is crucial as to establish the arguments in favour the LGBTQ+ rights.

2.1. The Kama Sutra and Erotic Literature

The *Kama Sutra* written by *Vatsyayana*, was written between the 3rd and 5th centuries CE, is the most significant ancient text addressing homosexuality directly. It contains an entire chapter (Book 2, Chapter 9) devoted to *auparishtaka* (oral sex) performed by *tritiya prakriti* individuals upon men, describing such “persons and their practices in considerable detail without moral condemnation”⁴. Vatsyayana use the anthropological and clinical approach to describe these activities which implies their social visibility and approval in specific situations. Additionally, same-sex actions between women are included in the *Kama Sutra*, which describes them in relation to the *antahpura* (royal harem). These definitions accept the presence and practice of female homoeroticism, despite being succinct and rooted in patriarchal presumptions about female sexuality⁵.

2.2. Colonial Intervention and Section 377

The British ruled India for about 200 years and that colonial period marked a dramatic rupture in Indian attitudes towards sexuality. The Britishers brought with them Victorian moral codes and their restrictive more orthodox ideas of homosexuality which were far different than indigenous practices, and these ideas cum morals were imposed through law⁶. Section 377⁷ of the Indian Penal Code, drafted by Thomas Babington Macaulay and enacted in 1860, criminalised "carnal intercourse against the order of nature with any man, woman or animal."³¹ This provision, which remained in force until 2018, it was not based on any indigenous Indian legal tradition but rather was reflective of British anxieties about sexuality that had crystallised in England following the Buggery Act of 1533. Macaulay's intent while drafting the Indian Penal Code was to bring "civilized" law to the colonies. The specific mention of "unnatural" sexual acts reflects the perception of British Idea of Morality and depicts Indian sexuality as degenerate and in need of reform⁸.

³ Ruth Vanita, 'Homosexuality in India: Past and Present' (2002) 11(4) IIAS Newsletter 14.

⁴ Vatsyayana, *Kama Sutra*, Book 2, Chapter 9; Wendy Doniger and Sudhir Kakar (trans), *Kamasutra* (Oxford University Press 2002) 46-49.

⁵ *ibid*, Book 5, Chapter 6.

⁶ Alok Gupta, 'Section 377 and the Dignity of Indian Homosexuals' (2006) 41(46) Economic and Political Weekly 4815-4823.

⁷ Indian Penal Code 1860, s 377.

⁸ Suparna Bhaskaran, 'The Politics of Penetration: Section 377 of the Indian Penal Code' in Ruth Vanita (ed), *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (Routledge 2002) 15-29.

2.3. The Emergence of LGBTQ+ Activism

The contemporary LGBTQ+ rights movement in India emerged from multiple sources which include the HIV/AIDS activism of the 1990s, the global influence of Western gay rights movements, and indigenous resistance to marginalization by hijras and other gender minorities⁹. The AIDS Bhedbhav Virodhi Andolan (AIDS Anti-Discrimination Movement) filed the first legal challenge to Section 377 in 1994, though the petition was dismissed on procedural grounds¹⁰. Despite this setback, the petition marked the beginning of sustained legal advocacy against the colonial-era provision. The organisations such as the Lawyers Collective, Humsafar Trust, and Naz Foundation (India) Trust provided institutional frameworks for advocacy. These organisations made combined efforts in aligning the service provision (particularly HIV/AIDS services) with legal and political activism¹¹. The wave of LGBTQ+ rights awareness increased dramatically in the 2000s, with the emergence of pride marches in major cities, increased media coverage, and growing representation in popular culture. Even Bollywood films began to address homosexuality, though often in stereotypical or comedic ways, and public figures began coming out with greater frequency¹².

3. CONSTITUTIONALITY OF LGBTQ+ RIGHTS IN INDIA

3.1. Understanding Otherisation

The concept of 'Otherisation' was elaborated by scholars such as Edward Said, Gayatri Spivak, and Homi Bhabha in postcolonial era. It provides a theoretical framework for understanding the marginalization of LGBTQ+ individuals in India. In summation otherisation refers to the process by which the so called 'dominant groups' construct certain individuals or communities as fundamentally different from and inferior to themselves¹³. This construction is not natural or inevitable but is derived through cultural, religious, legal, and medical discourses that try define the boundaries of acceptable sexuality and gender expression¹⁴. Section 377 which came due to colonial influence can be understood as a form of legal otherisation, constructing same-sex sexual behaviour as criminal and thereby marking those who engaged in such behaviour as legal others criminals deserving of punishment rather than citizens deserving of protection¹⁵.

Family: A traditional Indian family puts immense focus on their family honour and reputation (*izzat*). LGBTQ+ individuals are treated as disgrace on family name just because they do not fall under their perfect definition of men or women and are different from "normal". They are even called as sick and frequently face rejection, violence, and ostracism from their families upon disclosure of their identity. The emphasis on family honour in Indian society is to such an extent that having an LGBTQ+ family member is often perceived as shameful, leading families to attempt concealment, forced marriage, or violence¹⁶.

⁹ Akshay Khanna, *Sexualness* (New Text Publications 2016) 12-45.

¹⁰ AIDS Bhedbhav Virodhi Andolan v. Union of India, CWP No. 1784/1994 (Delhi High Court).

¹¹ Arvind Narrain, 'The Articulation of Rights around Sexuality and Health: Subaltern Queer Cultures in India in the Era of Hindutva' (2004) 7(2) Health and Human Rights 142-164.

¹² Shohini Ghosh, 'False Appearances and Mistaken Identities: The Phobic and the Erotic in Bombay Cinema's Queer Vision' in Ruth Vanita (ed), *Queering India* (n 32) 219-234.

¹³ Edward W Said, *Orientalism* (Pantheon Books 1978); Homi K Bhabha, *The Location of Culture* (Routledge 1994).

¹⁴ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge 1990) 1-34.

¹⁵ Suparna Bhaskaran (n 31) 15-29.

¹⁶ Sibsanakar Mal and Sucheta Ghosh, 'Sexual Marginality and Mental Health: Discourse Analysis of Stigma, Discrimination, and Mental Health of Sexual Minority Groups in India' (2021) 27(1) Mental Health, Religion & Culture 58-73

Education: Education is an important aspect of an individual's life but for LGBTQ+ students they are either disowned by their family members or face bullying, harassment, and exclusion in educational institutions. There is also an absence of inclusive curricula and the perpetuation of heteronormative assumptions in educational materials which reinforces the message that LGBTQ+ identities are abnormal or unacceptable¹⁷.

Employment & Healthcare: The LGBTQ+ individuals even face discrimination at workplace such as hiring discrimination, harassment, denial of promotion, and wrongful termination. Many LGBTQ+ individuals conceal their identities at work out of fear of discrimination which ultimately impacting their mental health and job performance¹⁸. LGBTQ+ individuals face discrimination in healthcare settings ranging from insensitivity to outright refusal of care. Healthcare providers may lack training in LGBTQ+ health needs, leading to inadequate care. The pathologization of homosexuality in some medical curricula perpetuates stigma¹⁹.

Intersectional Dimensions of Discrimination

Even within the LGBTQ+ individuals are further discriminated based on caste, class, religion, disability, and geography. LGBTQ+ individuals from lower castes or marginalized communities face compounded discrimination that affects their access to education, employment, healthcare, and justice²⁰. The "pink economy" and visible LGBTQ+ culture in India tends to be dominated by urban, upper-middle-class, upper-caste individuals, while those from marginalized backgrounds remain largely invisible.²¹ It can be seen that individuals belonging to metropolitan cities or tier 1 cities in India have far better conditions than the ones in rural areas where society is still rigid. This class dimension affects access to legal remedies, safe spaces, and support services. Rural LGBTQ+ individuals face major challenges due to the absence of support networks, greater community surveillance, and limited access to information and services²². It makes their concealment of identity more difficult and coming out more dangerous because the anonymity possible in urban environments is largely unavailable in village settings.

4. DECRIMINALISATION OF SECTION 377 OF IPC

4.1. The Legal Framework Before Decriminalisation

The Section 377 of the Indian Penal Code, 1860, states that: "Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine." The explanation to the section clarified that "Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."²³ The provision criminalised sexual acts that deemed to be "against the order of nature," which judicial interpretation had understood to include

¹⁷ UNESCO, *Education Sector Responses to Homophobic Bullying* (2012) 56-67.

¹⁸ Nishul Singh and Anindita Chatterjee, 'Social and Workplace Issues of LGBT Community in India' (2021) 13(2) Prabandhan: Indian Journal of Management 45-58

¹⁹ Venkatesan Chakrapani, 'Hijras/Transgender Women in India: HIV, Human Rights and Social Exclusion' (UNDP India 2010) 12-34.

²⁰ Gee Imaan Semmalar, 'Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India' (2014) 39(2) Women's Studies Quarterly 286-291.

²¹ Ashley Tellis, 'Queer in the Time of Liberalisation' in Ritu Menon (ed), *Making a Difference: Memoirs from the Women's Movement in India* (Women Unlimited 2011) 311-335.

²² Pawan Dhall (n 56) 45-67.

²³ Indian Penal Code 1860, s 377 explanation.

anal and oral sex.²⁴ The provision was facially neutral as to the gender of participants but its implication was against homosexual conduct, and it served as the legal basis for persecution of LGBTQ+ individuals. Furthermore, Section 377 was a cognizable, non-bailable offence, giving police significant powers to arrest and detain suspected offenders without judicial oversight²⁵.

4.2. Early Judicial Interpretations

Section 377 of the IPC was not challenged up until the recent 21st century judicial interpretations of fundamental rights guaranteed under the constitution. Earlier courts regarded the provision as uncontroversially valid, reflecting natural law conceptions of sexuality that regarded heterosexual procreative sex as the only legitimate form.²⁶ Section 377 blatantly prosecuted homosexual activity even when the case involved consenting adult individuals as suggested by many earlier judicial proceedings.²⁷ One of such cases was of *Nowshirwan Irani and Ratansi* (1935).²⁸ *Nowshirwan Irani* was a young shopkeeper who was alleged to have committed an offence under Section 377 with another young boy of age 18 called *Ratansi*. The incident was reported by police officer Solomon along with his friend *Gulubuddin* who saw the incident through the keyhole. There were no proper evidences and even the medical reports did not show any signs of forcible sexual intercourse nor sodomy was proved. Finally the judge was convinced by the facts that the act took place behind locked doors which shows that *Ratansi* had gone there voluntarily plus the medical evidences also shown sign of force which ultimately imply that the act was intimate between two consenting parties in their bedroom²⁹. But due to the societal perceptions it became a public scandal making one party a predator and another victim when actually they had consented initially. Such stance was only seen after almost a century later in *Naz Foundation v. Union of India*.

4.3. The Naz Foundation Litigation (2009)

The first sustained legal challenge to Section 377 began with a public interest litigation filed by the *Naz Foundation (India) Trust* in 2001³⁰. The petitioner argued that Section 377 criminalises consensual sexual acts between adults in private which is violative of fundamental rights guaranteed by the Constitution, including the right to equality (Article 14), freedom of expression (Article 19), and the right to life and personal liberty (Article 21). The Delhi High Court After initially dismissed the petition on procedural grounds but had to reconsider it following a Supreme Court directive and delivered its landmark judgment on July 2, 2009.³¹ Chief Justice A.P. Shah, held that “Section 377, insofar as it criminalised consensual sexual acts of adults in private, violated Articles 14, 15, 19 and 21 of the Constitution”. The judgment elaborated on the aspect of how and why Section 377 violates fundamental rights. The court held that the classification created by Section 377 was unreasonable, as it criminalised a class of citizens (those who engage in same-sex sexual conduct) without any rational connection to a legitimate state objective. The court rejected the argument that prevention of HIV/AIDS transmission justified the provision, finding that criminalization actually impeded public health efforts.

²⁴ See *Lohana Vasantlal Devchand v. State of Gujarat* 1968 Cri LJ 1277.

²⁵ Code of Criminal Procedure 1973, First Schedule

²⁶ Alok Gupta (n 30) 4815-4823.

²⁷ *Minawalla and Tajmahomed*, (AIR 1935 Sind 78) *Nowshirwan Irani and Ratansi* (AIR 1934 Sind 206) and *Ratan Mia and Abdul Nur* ((1988) Cr.L.J. 980.

²⁸ Arvind Narrain A New Language Of Morality: From The Trial Of *Nowshirwan* To The Judgment In *Naz Foundation* 87-93.

²⁹ *ibid.*

³⁰ *Naz Foundation v. Government of NCT of Delhi* (2009) 160 DLT 277.

³¹ *ibid.*

4.4. The Suresh Kumar Koushal Decision (2013)

The *Naz Foundation Judgement* was challenged and on December 11, 2013, a two-judge bench of the Supreme Court, comprising Justices G.S. Singhvi and S.J. Mukhopadhaya, reversed the Delhi High Court's judgment and upheld the constitutional validity of Section 377 due to public and political pressure.³² The *Koushal* judgment was widely criticized for its reasoning and approach. The court did not consider the concerns of LGBTQ+ individuals by characterizing them as a "miniscule fraction of the country's population" whose interests could not justify reading down a colonial-era provision. The court held that Section 377 was not arbitrary in nature as it clearly defined the acts that were criminalized. This analysis was completely opposite to the Delhi High Court's more sophisticated examination of the provision and whether such classification bore a rational relationship to a legitimate state objective.

4.5. The NALSA Judgment (2014)

The *Koushal* decision was a setback for gay rights and later the Supreme Court in *National Legal Services Authority v. Union of India*³³ (2014) delivered a more progressive judgment regarding transgender rights. The NALSA judgment recognized the rights of transgender persons to self-identification of their gender, holding that:

1. Transgender persons have the right to decide their self-identified gender, and the state must give legal recognition to the gender identity claimed by transgender persons.
2. The non-recognition of transgender identity violated the fundamental rights guaranteed under Articles 14, 15, 16, 19, and 21.
3. Transgender persons should be treated as a socially and educationally backward class entitled to reservations in education and employment.
4. The government should take steps to ensure transgender persons' access to healthcare, education, and social welfare benefits.³⁴

The NALSA judgment was significant because it recognized gender identity as a fundamental right and applied progressive human rights standards. However, it also created a tension with *Koushal*, as the recognition of transgender identity implicitly undermined some of the premises of the earlier judgment.

4.6. The Navtej Singh Johar Decision (2018)

The final chapter in the legal battle against Section 377 came with *Navtej Singh Johar v. Union of India*³⁵ (2018), decided by a five-judge Constitution Bench comprising Chief Justice Dipak Misra and Justices R.F. Nariman, A.M. Khanwilkar, D.Y. Chandrachud, and Indu Malhotra. The court unanimously held that under Section 377 the criminalisation of consensual sexual conduct between adults, was unconstitutional. Each of the four separate opinions (with Justice Khanwilkar concurring with the Chief Justice) contributed to a rich jurisprudence on LGBTQ+ rights. The Chief Justice Dipak Misra emphasized the transformative nature of the Constitution and the importance of constitutional morality. He held that Section 377 violated:

- **Article 14:** The classification of persons who engage in "carnal intercourse against the order of nature" was arbitrary and irrational. The concept of "order of nature" was based on flawed Victorian morality rather than scientific understanding.³⁶

³² *Suresh Kumar Koushal v. Naz Foundation* (2014) 1 SCC 1.

³³ *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

³⁴ *ibid.*

³⁵ *Navtej Singh Johar v. Union of India* (2018) 10 SCC 1.

³⁶ *ibid* (Misra CJ).

- **Article 15:** Sexual orientation is analogous to sex and falls within the prohibited grounds of discrimination under Article 15.³⁷
- **Article 19:** The provision violated the right to expression, as sexual orientation is an essential component of identity that finds expression in intimate conduct.
- **Article 21:** The provision violated the right to life and personal liberty, including the rights to dignity, autonomy, and privacy.

Justice Chandrachud delivered the most comprehensive opinion, addressing the historical injustice suffered by the LGBTQ+ community and emphasizing the transformative potential of constitutional adjudication. The judgment acknowledged the centuries of discrimination and persecution faced by sexual minorities, stating: "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries."³⁸ Chandrachud J emphasized that constitutional morality requires recognition that individuals have a right to be who they are, and that the state cannot prescribe conformity with majoritarian views. The judgment articulated a vision of the Constitution as a transformative document that seeks to change society by eradicating existing inequalities and injustices.³⁹

5. ROLE OF SOCIAL MEDIA AND WOKE CULTURE

In the contemporary scenario there is huge waves of movements being conducted over LGBTQ+ rights and acceptance among the mainstream. Many influencers on social media come out as LGBTQ+ and share their journey and how their family reacted to it. This acts as an encouraging as well as educating content on social media. Apart from influencers there are social workers, artists, actors and the like that use these platforms to break the norms of society. The famous Indian drag artist Sushant Divgikar known by the stage name Rani KoHENur is a prominent Indian transgender singer, actor, and performer. Recently Maneka Guruswamy sworn oath as the first openly LGBTQ+ member of the Rajya Sabha in March 2026. She is a renowned advocate and has been representing for the rights of queer individuals in number of cases like Navtej Singh Johar and Supriyo Judgement. These persons while sharing their life story encourages others to also came out of their closet and live their life with dignity rather than being ashamed of afraid.

The perspective towards acceptance of LGBTQ+ community in the mainstream society was changed by the changing narratives of the movies. Bollywood initially picturised gay individuals in more comedic sense and in typical manner. But recent movies like *Shubh Mangal Zyada Saavdhan*, *Ek ladki ko Dekha to Aisa Laga*, *Badhaai Do*, and Tamil movie *Others* depict a completely original narratives with actual problems faced by the queer individuals in the society. In a YouTube podcast by Brut India interviewed Kiran Sakhi from kinnar community in episode named "The Other Side". Kiran Sakhi talked about her experience while growing up and feeling out of place, being judges and shut out of jobs. Her journey in a Sikh traditional family was tough and was only supported by her mother. The role of social media and movies is quite essential in making people think from different perspectives and even opening discussions over rights and liberties of queer individuals and also taking them out from their colonial mindsets.

³⁷ ibid.

³⁸ ibid (Chandrachud J).

³⁹ ibid.

6. AFTERMATH OF REMOVAL OF SEC. 377 IN BHARTIYA NAYAYA SAHINTA

6.1. THE TRANSITION FROM IPC TO BNS

Indian Penal Code, 1860 was replaced with the Bharatiya Nyaya Sanhita, 2023 (BNS) on July, 2024. This was one of the most significant legal reforms since independence in India and the main objective was the replacement of the colonial-era laws.⁴⁰ This comprehensive overhaul of the criminal law, along with the replacement of the Code of Criminal Procedure with the Bharatiya Nagarik Suraksha Sanhita, 2023, and the Indian Evidence Act with the Bharatiya Sakshya Adhiniyam, 2023, represented an attempt to "decolonize" Indian law.⁴¹ The BNS notably does not include any provision equivalent to Section 377 of the IPC. This deliberate omission on the part of the legislature reflects and codifies the Supreme Court's judgment in *Navtej Singh Johar*, ensuring that consensual same-sex sexual conduct between adults remains decriminalised under the new criminal code.⁴² However, the BNS has also removed provisions related to "unnatural offences" in the context of non-consensual acts. Section 377's provisions relating to non-consensual acts and acts with minors or animals have been incorporated into other sections of the BNS dealing with sexual offences.⁴³ This leads to another vacuum for non-consensual sexual offences between two adult individuals who are not protected under the other chapters of BNS such as Chapter V of the Act. The provisions under other laws like the Transgender Persons (Protection of Rights) Act, 2019, under Section 18(d) penalises sexual abuse, harm or injury to a transgender person with imprisonment of 6 months up to maximum of 2 years. This does not provide any stringent laws protection of queer community against any sexual abuse or rape as provided for women and children in BNS.

6.2. GAPS IN PROTECTION UNDER BNS

Despite the formal decriminalisation of consensual same-sex conduct, the BNS fails to provide comprehensive protection for LGBTQ+ individuals in several respects such as absence of anti-discriminatory provisions that will safeguard from hate speech and hate crimes, limited recognition of same-sex relationships and lack of protection for Transgender individuals.

Absence of Anti-Discrimination Provisions

The BNS does not include any provisions specifically protecting LGBTQ+ individuals from discrimination or hate crimes. While general provisions on assault, causing hurt, and criminal intimidation apply equally to all persons, they do not recognise the specific vulnerability of LGBTQ+ individuals or provide enhanced penalties for bias-motivated crimes.⁴⁴ It is essential to understand that the due diversity of India, it is not possible to provide for legislations for each and every individual but the main focus has always been the protection of the vulnerable. Here the queer community is not only the minority but the least represented and most vulnerable section of the society. Therefore, general laws do not give way for them to be equally protected rather due prejudices and malice of society, it forces to ignore the problems of queer community. They are often unheard and ignored which eventually calls for special laws and protection.

⁴⁰ Bharatiya Nyaya Sanhita 2023, s 1(2); Ministry of Home Affairs, Gazette of India, Extraordinary, Part II, Section 1, dated 25.12.2023.

⁴¹ Statement of Objects and Reasons, Bharatiya Nyaya Sanhita Bill, 2023.

⁴² See Abhinav Sekhri, 'Reading the Bharatiya Nyaya Sanhita' (2024) 59(3) Economic and Political Weekly 25-32.

⁴³ Bharatiya Nyaya Sanhita 2023, ss 63-72.

⁴⁴ Aswathy Nair, 'LGBTQIA+ Rights: Progress and Challenges in India' (2022) 8(4) International Journal of Law and Management 456-473.

Limited Recognition of Same-Sex Relationships

The BNS does not recognise same-sex relationships for any purpose. Provisions relating to marriage, adultery, and bigamy assume heterosexual relationships, and the concept of "husband" and "wife" used throughout the code excludes same-sex partners.⁴⁵ Since homosexual relationships are not as widely accepted in the society it makes it the responsibility of the legislation to protect them from any societal, moral scrutiny. In India there is still no freedom to choose your partner and the family holds an upper hand in taking such decisions. India as a whole society has not yet completely accepted love-marriages or live-in relationships let alone the same-sex marriages.

Lack of Protection for Transgender Individuals

Though the Transgender Persons (Protection of Rights) Act, 2019, exists as separate legislation, the BNS does not incorporate specific protections for transgender individuals. The criminal law provisions on sexual offences remain largely binary in their conception of gender, potentially leaving transgender individuals without adequate protection.⁴⁶ As mentioned before in the previous arguments that the separate legislation for Transgenders does not include any major punishments for sexual abuse as in BNS. It must be noted that often Transgenders are disowned by their families left homeless with no chances of survival and therefore, helplessly they join clans of their own, start begging or get into sex work in order to meet their basic needs. This makes these group of individuals more vulnerable and susceptible to offences.

6.3. THE SUPREME COURT'S MARRIAGE EQUALITY DECISION (2023)

Supriyo @ Supriya Chakraborty v. Union of India judgment was passed on October 2023, just months before the BNS came into force, the Supreme Court⁴⁷, addressed the question of whether same-sex couples have a right to marry under Indian law. The five-judge Constitution Bench, by a 3:2 majority, declined to extend the right to marry to same-sex couples. However, the judgment was significant in several respects. All five judges agreed that (i) Discrimination based on sexual orientation is unconstitutional, (ii) LGBTQ+ persons have a right to union and companionship, (iii) The state has an obligation to recognise same-sex relationships in some form, (iv) Queer couples are entitled to legal protection of their relationships⁴⁸. The majority (Justices Ravindra Bhat, Hima Kohli, and P.S. Narasimha) held that Marriage is a legislative rather than fundamental right. The power to create or expand the institution of marriage lies with Parliament and courts cannot read the Special Marriage Act in a gender-neutral manner. The question of marriage equality should be left to democratic deliberation⁴⁹. On the other hand the minority (Chief Justice D.Y. Chandrachud and Justice S.K. Kaul) held that Same-sex couples have a fundamental right to union and the Special Marriage Act should be read in a gender-neutral manner. Non-recognition of same-sex relationships amounts to discrimination and Queer couples should have access to civil union at minimum⁵⁰.

7. DECONSTRUCTION OF OTHERISATION

7.1. Transgender Persons (Protection of Rights) Act, 2019

The Transgender Persons (Protection of Rights) Act, 2019, is the primary legislation specifically addressing transgender rights in India.⁵¹ The Act has also been criticised by transgender rights activists on

⁴⁵ Bharatiya Nyaya Sanhita 2023, ss 85 (adultery provisions abolished), 82 (definition of marriage-related offences).

⁴⁶ Transgender Persons (Protection of Rights) Act 2019; see Gee Imaan Semmalar (n 61) 286-291.

⁴⁷ *Supriyo @ Supriya Chakraborty v. Union of India* (2023) INSC 920.

⁴⁸ *ibid* (Chandrachud CJI), (Kaul J).

⁴⁹ *ibid* (Bhat J).

⁵⁰ *ibid* (Chandrachud CJI).

⁵¹ Transgender Persons (Protection of Rights) Act 2019.

several grounds:

- **Certificate Requirement:** The requirement of obtaining a certificate of identity from a District Magistrate is seen as bureaucratic and contrary to the principle of self-identification established in the *NALSA judgment*.⁵² It is violation of constitutional rights such as right to privacy and dignity. This provisions enables authorities to abuse their power and deprive the transgender persons of their fundamental rights. This construes as an excessive surveillance on the private life of individuals and threatening their sovereignty of identification.
- **Inadequate Penalties:** The penalties for offences against transgender persons (six months to two years) are seen as inadequate compared to penalties for similar offences against other persons.⁵³ This is an inadequate punishment as it does not detriment any crime rather make the community more vulnerable. It is also against the human rights of the individuals.
- **Lack of Reservations:** Unlike the *NALSA judgment's* recommendation, the Act does not provide for reservations for transgender persons in education and employment.⁵⁴ Reservations are one of the ways for the upliftment transgender communities and giving the equal opportunity as laid under Article 15 of the Constitution.
- **Definition Issues:** The definition's reference to persons "with socio-cultural identities such as kinnar, hijra" has been criticised for conflating distinct gender identities and imposing a colonial classification.⁵⁵ New age rules need clarity and definitions that cater to the upcoming challenges.

The Transgender Persons (Protection of Rights) Rules, 2020, provide for implementation of the Act, including procedures for issuing identity certificates and establishing welfare schemes.⁵⁶

8. RECOMMENDATIONS FOR GOVERNMENT ACTION

8.1. Comprehensive Anti-Discrimination & Hate Crime Legislation

The government should enact comprehensive anti-discrimination legislation specifically covering sexual orientation and gender identity. The Act should focus on prohibiting discrimination in employment, including hiring, promotion, and termination. Prohibiting discrimination in education, including admission, treatment, and curricula, discrimination in housing, including rental and sale. The Act must establish an enforcement mechanism including complaints procedure and remedies and also, provide for both individual complaints and systemic enforcement⁵⁷. The *Bharatiya Nyaya Sanhita* should be amended to include enhanced penalties for bias-motivated crimes such as definition of hate crime to include crimes motivated by prejudice based on sexual orientation or gender identity. There are also rise in number of honour killings cases threatening the LGBTQ+ community and making them more vulnerable.⁵⁸

8.2. Amendment to Family Laws & Social Welfare and Economic Support

Family laws should be amended to provide recognition and protection for same-sex relationships. This might require amendment of the *Special Marriage Act* to allow same-sex marriages, or alternatively. There might be creation of a civil union status providing equivalent rights, or recognition of domestic

⁵² Gee Imaan Semmalar (n 61) 286-291.

⁵³ *ibid*.

⁵⁴ *National Legal Services Authority v. Union of India* (2014) 5 SCC 438.

⁵⁵ Aniruddha Dutta and Raina Roy (n 110) 320-337.

⁵⁶ Transgender Persons (Protection of Rights) Rules 2020.

⁵⁷ The Advocates for Human Rights (n 144) 56-67.

⁵⁸ Aparna Subramanian, No Honour for the Homosexuals: Exploring Honour Killing against the LGBTQ Community in India, 2024 International Journal of Law Management and Humanities.

partnerships with defined benefits and protections⁵⁹. This will also be useful when Uniform Civil Code applied and an effort can be made to make laws gender neutral and have inclusivity in the system. The Ministry of Social Justice and Empowerment is in a unique position to address the vulnerabilities that LGBTQ+ people experience on a daily basis, especially those who are socially or economically marginalized. Making sure LGBTQ+ people are specifically included in current social welfare programs would be a crucial step in ensuring that they are not excluded because of strict notions of family or identity.

8.3. Amendment of Transgender Persons Act

The Transgender Persons (Protection of Rights) Act, 2019, should be amended to address its shortcomings. There is need to simplify the identity certificate process in line with self-identification. As mentioned under Section 18 there are very less penalties for any sexual abuse of harm which must be increased so that penalties for offences against transgender persons to match penalties for similar offences against others. Amendments as to provide for reservations in education and employment must also be made in order to provide equal opportunity for employment and education. The Act must also include provisions for healthcare access including gender-affirming care.⁶⁰ The recent 2026 Amendment⁶¹ pertaining to self-identification with a mandatory medical certificate process for legal gender recognition aimed at distinguishing fake persons from the actual legitimate ones forces Transgender Persons to be physically examined by a medical officer. This is in complete contravention to the principles laid down in *NALSA Judgment 2014* where the focus was on right to self-identification and here the right has been taken away and an approval by district magistrate will decide the gender of the person. It is violative of the fundamental right to Privacy and dignity of the Transgender Persons.

8.4. Healthcare Reforms

In order to ensure that future healthcare professionals are both aware of and sensitive to the unique issues faced by LGBTQ+ people, the Ministry of Health and Family Welfare must take more proactive steps to incorporate LGBTQ+ health into medical and nursing curricula. Guidelines for LGBTQ+-affirming healthcare must be developed by the Ministry to guarantee that medical facilities offer competent, courteous, and non-discriminatory services. This is crucial for transgender people, who ought to have easily accessible, reasonably priced, gender-affirming care free from needless societal or procedural obstacles. Another crucial factor that must be taken into account is mental health services tailored to the requirements of LGBTQ+ people, as many people experience mental health issues as a result of social pressure. HIV/AIDS programs that target MSM and transgender populations must be maintained and expanded by the Ministry.⁶²

8.5. Police Training and Sensitisation

It is the duty of the Ministry of Home Affairs to guarantee that LGBTQ+ people feel secure and protected in the criminal justice system. In order to improve officers' knowledge of LGBTQ+ issues and enable them to respond with tact and professionalism, it should create and implement thorough training on LGBTQ+ issues for all police levels. Sexual orientation and gender identity should also be taken into account when gathering statistics on hate crimes, since this will aid in identifying patterns of violence and developing more effective responses. In order to ensure that complaints of police misbehaviour against LGBTQ+ people are taken seriously, the Ministry should also set up procedures for reporting and handling such

⁵⁹ Menaka Guruswamy and Arundhati Katju (n 196) 1-45

⁶⁰ Gee Imaan Semmalar (n 61) 286-291.

⁶¹ The Transgender Persons (Protection of Rights) Amendment Act, 2026.

⁶² Venkatesan Chakrapani (n 55) 78-89.

incidents. Additionally, designating LGBTQ+ community liaison officers in police stations could promote crime reporting and foster a sense of trust..⁶³

9. CONCLUSION

The aspirations of absolute equality is utopian and unachievable though efforts must be made to achieve that goal. The inclusion for LGBTQ+ individuals in India remains incomplete without any proper legislations and positive executive actions. While the decriminalisation of Section 377 in 2018 marked a historic turning point, it represents the end of one chapter rather than the conclusion of the struggle. It takes persistent work in the legal, social, cultural, and institutional spheres to dismantle otherization and end centuries of stigma, discrimination, and exclusion. With its principles of equality, non-discrimination, freedom of speech, and the right to a dignified existence, the Indian Constitution offers a solid basis for LGBTQ+ rights. LGBTQ+ people are entitled to the complete protection of fundamental rights, according to the Supreme Court's progressive interpretation of these laws. To be fully effective, however, constitutional ideas must be implemented through legislation and institutional reform.

Furthermore, the queer population is not adequately catered to or protected from discrimination, sexual abuse, or injury to one's dignity under the current legislation. India's distinct historical background presents both opportunities and challenges. Anti-LGBTQ+ legislation' colonial roots offer a decolonization narrative that is relevant in modern India. Claims that homosexuality is "Western" or "un-Indian" are refuted by the historical heritage of acceptance of gender variation, which is demonstrated in scriptures, art, and the hijra community. India has forgotten its inclusive and friendly behaviour as a result of colonization; instead, it has become fairly inflexible and adhered to the prejudices that the British imposed. This study makes recommendations for institutional change, executive action, legislative reform, and civil society involvement. A complete shift is needed to take action on several fronts at once; no single measure will be adequate. Everybody has a role to play, including the government, courts, civil society, and ordinary individuals. In the end, deconstructing otherization is an issue of human dignity rather than just law or policy. Every LGBTQ+ person in India has the right to live in dignity, free from prejudice, violence, and exclusion, regardless of whether they are from a privileged background or a marginalized group, in a rural hamlet or a metropolitan area. In order to realize this vision, society must fundamentally change how it views and appreciates variety in sexual orientation and gender identity in addition to enacting new laws. For the legislative and executive initiatives to be effective, social and legal reform must take place concurrently. The judiciary must also comprehend how society is changing and how important it is that we abandon our outdated perspectives and approach issues objectively, devoid of any prejudices or biases. The Constitution of India, in its Preamble, commits the nation to securing for all citizens justice, liberty, equality, and fraternity. These values remain aspirational for LGBTQ+ individuals who continue to face injustice, whose liberty is constrained by social prejudice even where legal prohibition has been removed, who lack equality in access to marriage and many other rights, and who too often are excluded from the fraternity of their families and communities. The task of making these constitutional promises real for all Indians, including LGBTQ+ Indians, is the work of this and coming generations. As Justice D.Y. Chandrachud observed in *Navtej Singh Johar*: "The purpose of having rights is to provide individuals with

⁶³ People's Union for Civil Liberties-Karnataka (n 46) 45-56.

a sense of security about expectations on which they can rely in planning their lives as well as their interactions with others. History owes an apology to the members of this community and their families."⁶⁴

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