

INVISIBLE CITIZENS: CONSTITUTIONAL PROMISES, STRUCTURAL BARRIERS, AND THE ONGOING MARGINALISATION OF SEXUAL MINORITIES IN INDIA

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ABSTRACT

The marginalisation of sexual minorities in India reflects a profound and structurally entrenched contradiction between the promises of a constitutional democracy and the persistent realities of inequality, exclusion, and violence. Despite the transformative constitutional jurisprudence of the Supreme Court, including the decriminalisation of consensual same-sex conduct in Navtej Singh Johar v. Union of India and the recognition of a third gender in NALSA v. Union of India, the lived experience of lesbian, gay, bisexual, transgender, queer, and intersex persons in India continues to be defined by social stigma, economic exclusion, institutional invisibility, and the absence of comprehensive legislative protection. This paper argues that the gap between formal legal progress and substantive equality is best understood not as a residual problem awaiting further judicial correction, but as the product of self-reinforcing structural barriers that operate across institutional domains simultaneously. Drawing upon constitutional jurisprudence, international human rights law, sociological research, and comparative law, the paper examines the historical roots of sexual minority oppression, the conceptual framework of structural marginalisation and transformative equality, the principal dimensions of contemporary exclusion, and the legal and policy lacunae that perpetuate disadvantage. It concludes with a normative framework for a rights-based, structurally attentive reform agenda that the legislature, executive, and judiciary must collectively advance if India is to honour its foundational constitutional commitments to equality and dignity for all its citizens.

KEYWORDS: Sexual Minorities; LGBTQ+ Rights; Structural Marginalisation; Transformative Equality; Indian Constitutional Law; Transgender Rights; Same-Sex Marriage; Non-Discrimination.

I. INTRODUCTION

Sexual minorities in India occupy a paradoxical legal and social position. On one hand, constitutional jurisprudence has moved decisively toward dignity, autonomy, and anti-stereotyping as foundational principles.¹ On the other hand, quotidian encounters with state offices, schools, clinics, police stations, and housing markets frequently reproduce the very exclusion that the Constitution condemns. This contradiction between formal rights and lived realities is not accidental; it is the predictable consequence of what this paper terms structural marginalisation, a condition in which rules, routines, resource allocations, and social norms across multiple institutional domains combine to produce and perpetuate cumulative disadvantage for sexual minorities over time.

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¹ INDIA CONST. arts. 14, 15(1), 21.

The decriminalisation of consensual same-sex conduct in *Navtej Singh Johar v. Union of India*² represented a constitutional watershed. It reversed the moral panic institutionalised by *Suresh Kumar Koushal v. Naz Foundation*³ and vindicated the dignity-affirming analysis of the Delhi High Court in *Naz Foundation v. Government of NCT of Delhi*.⁴ Yet decriminalisation, while necessary, is emphatically not sufficient. The absence of marriage equality, the lack of comprehensive anti-discrimination legislation, the inadequacy of the Transgender Persons (Protection of Rights) Act, and the persistence of violence, poverty, and institutional exclusion all testify to the considerable distance that separates current law from substantive equality.

This paper examines those gaps as structures rather than discrete incidents, tracing their origins in colonial legal history, their consolidation through institutional path dependency, and their contemporary manifestations across multiple domains of social and economic life. Part II locates the origins of sexual minority oppression in the colonial legal project. Part III analyses the constitutional framework and the arc of judicial evolution. Part IV sets out the conceptual framework of structural marginalisation and transformative equality. Part V systematically examines five dimensions of contemporary marginalisation: social stigma and family rejection; economic exclusion; healthcare disparities; violence and impunity; and administrative invisibility. Part VI addresses the marriage equality question. Part VII examines intersectionality. Part VIII proposes a normative reform agenda. Part IX concludes.

II. COLONIAL ROOTS AND THE ARCHITECTURE OF OPPRESSION

The criminalisation of same-sex conduct in India was not an expression of ancient Indian cultural or religious values. It was a legislative imposition of Victorian-era morality by colonial authorities. Section 377 of the Indian Penal Code, drafted by Thomas Babington Macaulay in 1860 and modelled on English ecclesiastical sodomy law, criminalised 'carnal intercourse against the order of nature.'⁵ The provision had no antecedent in Mughal or pre-Mughal Indian law, and its introduction represented a deliberate displacement of more diverse indigenous practices and understandings of sexuality and gender, traces of which are visible in classical texts, temple iconography, and the social institution of the hijra, which predates colonial rule by centuries.

² *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 (India) [hereinafter *Navtej Singh Johar*].

³ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1 (India).

⁴ *Naz Foundation v. Government of NCT of Delhi*, 160 DLT 277 (Delhi H.C. 2009).

⁵ Indian Penal Code, No. 45 of 1860, \u00a7 377 (India); see Arvind Narrain, *Queer: Despised Sexuality*, Law and Social Change 23-28 (2004).

Scholars such as Arvind Narrain and Gautam Bhan have documented how the colonial sodomy law served not merely as a criminal prohibition but as an instrument of social discipline, encoding heteronormativity into the architecture of state power and constructing 'deviant' sexuality as a threat to public order and moral hygiene.⁶ This encoding produced durable institutional effects that persisted long after formal decolonisation. The retention of Section 377 by the Indian legislature after independence, without amendment or repeal for over seven decades, reflects not merely legislative inertia but the active reproduction of a colonial moral framework within the postcolonial state.

The gendered dimensions of colonial legal production compound these effects. As Nivedita Menon has argued, the heteronormative assumptions embedded in Indian family law, property law, and social welfare administration were systematically consolidated during and after colonialism, creating a legal architecture that presupposes and reinforces the conjugal heterosexual family as the foundational unit of legal personhood and social entitlement.⁷ Sexual minorities who exist outside or across this architecture are rendered structurally invisible, not through overt animus but through the routine operation of ostensibly neutral rules that presuppose a subject that sexual minorities are not permitted to be.

III. CONSTITUTIONAL FRAMEWORK AND JUDICIAL EVOLUTION

The Indian Constitution provides a robust, if underenforced, normative foundation for the protection of sexual minority rights. Articles 14 and 15 guarantee equality before the law and prohibit discrimination on specified grounds; Article 21 guarantees the right to life and personal liberty, which the Supreme Court has expansively interpreted to encompass dignity, privacy, and the right to choose one's own identity.⁸

The transformation of Indian constitutional jurisprudence on sexual orientation and gender identity proceeded through four landmark decisions. Vikram Raghavan has provided an authoritative analytical account of the constitutional arguments available for protecting sexual minorities through the existing fundamental rights framework.⁹ The first, *Naz Foundation* in 2009, read the constitutional right to dignity and privacy as requiring the decriminalisation of consensual same-sex conduct between adults, drawing on

⁶ Arvind Narrain & Gautam Bhan, *Because I Have a Voice: Queer Politics in India* 12-18 (2005).

⁷ Nivedita Menon, *Seeing Like a Feminist* 77-89 (2012).

⁸ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (India).

⁹ Vikram Raghavan, 'Sexual Orientation and the Indian Constitution,' in *Legal Perspectives on Sexual and Reproductive Rights in India: Themes and Cases* 48, 57-63 (Saumya Uma ed., 2017).

the Yogyakarta Principles¹⁰ and the international human rights obligations of India under the ICCPR.¹¹ The second, *Koushal* in 2013, catastrophically reversed this progress, dismissing the rights claims of LGBT persons with a dismissiveness that was subsequently condemned by constitutional scholars and ultimately repudiated by the Supreme Court itself.

The third, *Puttaswamy* in 2017,¹² constituted the doctrinal turning point. A nine-judge bench unanimously recognised the right to privacy as a fundamental right under Article 21, with three separate concurring opinions explicitly affirming that sexual orientation is a component of individual identity falling within the protected sphere of personal autonomy. *Puttaswamy* left *Koushal* constitutionally indefensible and rendered the unanimous overruling in *Navtej Singh Johar* virtually inevitable.

The fourth landmark decision, *Navtej Singh Johar* in 2018, delivered a unanimous verdict of constitutional transformation.¹³ The five-judge bench held that Section 377 violated Articles 14, 15, and 21 insofar as it criminalised consensual same-sex conduct between adults. Justice Chandrachud's concurring opinion went furthest in articulating the structural dimensions of the constitutional violation, characterising Section 377 as a form of institutionalised prejudice that had inflicted decades of dignitary harm upon sexual minorities through the combined operation of criminal law, police harassment, and social stigmatisation.

Alongside this evolution on sexual orientation, the equally significant ruling in *NALSA v. Union of India*¹⁴ in 2014 recognised transgender persons as a 'third gender' for constitutional purposes, affirmed their right to self-identify without requiring surgical intervention, and directed the state to extend affirmative measures to them as a socially and educationally backward class. The decision drew upon international human rights instruments,¹⁵¹⁶ comparative

¹⁰ Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, princs. 1-29 (2006); Yogyakarta Principles Plus 10 (2017).

¹¹ International Covenant on Civil and Political Rights art. 17, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; *Toonen v. Australia*, Comm. No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994).

¹² Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1 (India) [hereinafter *Puttaswamy*].

¹³ *Navtej Singh Johar*, supra note 2 (Chandrachud J., concurring) at paras. 143-157.

¹⁴ *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438 (India) [hereinafter *NALSA*].

¹⁵ U.N. Human Rights Council, Res. 32/2, Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/RES/32/2 (July 15, 2016).

¹⁶ Office of the U.N. High Commissioner for Human Rights, Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity, U.N. Doc. A/HRC/29/23, paras. 14-22 (May 4, 2015) [hereinafter OHCHR SOGI Report].

jurisprudence, and the constitutional principles of dignity and equality to construct a framework for transgender rights that was, in its normative ambition, ahead of its legislative implementation.

The Supreme Court's progressive jurisprudence notwithstanding, the legislative record has been considerably less transformative. The Transgender Persons (Protection of Rights) Act of 2019¹⁷ was widely criticised by the transgender rights movement and legal scholars alike for requiring a District Magistrate's Certificate as a precondition for legal gender recognition, a requirement that contradicts the self-identification principle of *NALSA*¹⁸ and reproduces precisely the administrative burdens that the constitutional framework seeks to dismantle. The marriage equality claim, most recently decided in *Supriyo v. Union of India* in 2023,¹⁹ was rejected by a majority of three to two, with the majority holding that the extension of marriage rights to same-sex couples is a matter for the legislature rather than the judiciary. The dissenting opinions of Justices Kaul and Bhat, grounded in the constitutional right to equal dignity and the anti-discrimination mandate of Articles 14 and 15, are likely to prove the more enduring constitutional contribution.

IV. CONCEPTUAL FRAMEWORK: STRUCTURAL MARGINALISATION AND TRANSFORMATIVE EQUALITY

To understand the full extent of sexual minority exclusion, analytical frameworks that focus exclusively on intentional discrimination and overt animus are insufficient. What is required is a structural account that captures how ostensibly neutral institutions, rules, and social norms interact to produce cumulative disadvantage over time.²⁰ This paper draws upon three interlocking conceptual frameworks.

The first is structural marginalisation, understood as the systematic disadvantage produced not by the deliberate exclusionary intent of individual actors but by the routine operation of institutional rules and practices that presuppose and reproduce the dominance of particular social configurations. Documentation requirements that assume binary gender; welfare eligibility criteria premised on conjugal heterosexual families; school dress codes enforced through the discipline of a presumptively male or female body: none of these rules is expressly discriminatory, yet each imposes disproportionate

¹⁷ Transgender Persons (Protection of Rights) Act, No. 40 of 2019 (India) [hereinafter Transgender Act 2019]; National Human Rights Commission, Report on Status of Transgender Persons 14-19 (2017).

¹⁸ *NALSA*, supra note 13, at paras. 112-129.

¹⁹ *Supriyo v. Union of India*, (2023) 9 SCC 1 (India) [hereinafter *Supriyo*].

²⁰ Iris Marion Young, *Justice and the Politics of Difference* 41-48 (1990).

burdens on sexual minorities that accumulate across institutional domains into comprehensive disadvantage.²¹

The second is the concept of administrative burden as elaborated in the public administration literature. Administrative burden comprises learning costs, the cognitive effort of understanding complex eligibility rules; compliance costs, the time, money, and labour of meeting procedural requirements; and psychological costs, including the stigma, loss of autonomy, and dignitary harm experienced in navigating systems that do not recognise one's existence. For LGBTQIA+ persons, routine administrative processes, including changing name or gender markers in official documents, accessing welfare schemes, or registering a police complaint, routinely impose amplified burdens because procedures presuppose cis-heteronormativity as the default condition of the applicant.²²

The third is transformative equality, a concept that distinguishes between formal equality, which requires only that like cases be treated alike, and substantive equality, which requires the dismantling of structural arrangements that produce unequal starting positions. Mere formal equality, treating a person who has been subjected to decades of structural disadvantage identically to those who have not, is insufficient to achieve meaningful inclusion. Transformative equality, as elaborated by scholars including Becker²³ and operationalised through Nussbaum's capabilities approach,²⁴ requires enabling access to the real freedoms, or capabilities, to be and to do, including bodily autonomy, social affiliation, education, and economic participation, as articulated by Sen.²⁵ Applied to sexual minorities, this framework requires asking not merely whether formal legal prohibitions have been removed, but whether the capabilities necessary for a dignified and self-determining life are genuinely accessible.

V. DIMENSIONS OF MARGINALISATION: A SYSTEMATIC ANALYSIS

5.1 Social Stigma, Family Rejection, and Psychosocial Harm

The most immediately felt dimension of marginalisation for many sexual minorities in India is the experience of social stigma and family rejection. India's dominant social institutions, including the joint family, the caste system,

²¹ Sandra Fredman, *Discrimination Law* 9-14 (2d ed. 2011).

²² Pamela Herd & Donald Moynihan, *Administrative Burden: Policymaking by Other Means* 1-18 (2019).

²³ Mary Becker, 'Towards a Progressive Politics and a Progressive Constitution,' 69 *Fordham L. Rev.* 2007, 2024-29 (2001).

²⁴ Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* 17-45 (2011).

²⁵ Amartya Sen, *Development as Freedom* 74-86 (1999).

and religious communities, are structured around norms of conjugal heterosexuality and gender conformity that render non-conforming sexual or gender identities not merely deviant but socially threatening.²⁶ The result is a pervasive expectation of concealment that operates as a form of social coercion, compelling sexual minorities to live in what activists and scholars have described as enforced secrecy, forgoing the developmental goods of authentic self-expression, intimate relationships, and social affiliation.

Research consistently documents the severe psychosocial consequences of this enforced concealment. The Point of View report found that sixty-seven percent of LGBTQ+ respondents had faced familial coercion to undergo conversion therapy, and forty-one percent had experienced housing insecurity directly attributable to their sexual orientation or gender identity.²⁷ Clinical research on minority stress, which refers to the chronic, socially produced psychological burden experienced by members of stigmatised minority groups, demonstrates elevated rates of depression, anxiety, self-harm, and suicidal ideation among sexual minorities in India.²⁸ A 2022 study by Nazaria found that fifty-three percent of LGBTQ+ youth respondents reported clinical-level depression and thirty-seven percent reported a lifetime suicide attempt.²⁹ These outcomes are not the product of personal pathology; they are the predictable consequences of structural arrangements that deny recognition, withhold institutional support, and enforce concealment as a condition of social survival.

5.2 Economic Exclusion and Employment Discrimination

Economic marginalisation constitutes one of the most entrenched dimensions of sexual minority exclusion in India. The absence of comprehensive anti-discrimination legislation explicitly protecting against discrimination on the basis of sexual orientation and gender identity in employment leaves LGBTQ+ persons without legal recourse against dismissal, non-promotion, or hostile working environments. An ILO survey found that more than forty percent of LGBT respondents in India had experienced harassment at the workplace, with

²⁶ Patricia Uberoi, *Freedom and Destiny: Gender, Family, and Popular Culture in India* 12-19 (2006); Kalpana Kannabiran, *Tools of Justice: Non-Discrimination and the Indian Constitution* 89-96 (2012).

²⁷ Point of View & Nazaria, *It Gets Worse: Mapping the Lives of LGBTQ+ Persons in India* (2021) [hereinafter Point of View Report].

²⁸ Geetanjali Misra et al., 'Decriminalisation of Consensual Same-Sex Relations in India: Public Health and Policy Implications,' 2 *Int'l J. for Equity in Health* 14 (2009); Radhika Chandiramani, *Sexuality, Gender and Rights: Exploring Theory and Practice in South and Southeast Asia* 67-74 (2005).

²⁹ Nazaria, *Lives Worth Living: A Study on the Mental Health of LGBTQ+ Youth in India* (2022).

transgender persons reporting the highest rates of dismissal and forced resignation.³⁰

For transgender persons and members of the hijra community, economic exclusion is particularly severe and historically deep. The structural marginalisation of the hijra community from formal employment has historically confined many members to the occupational niches of badhai, the traditional practice of blessing at births and weddings, and sex work, not by cultural preference but by the systematic denial of access to education, formal employment, and civic identity.³¹ The National Crime Records Bureau does not maintain disaggregated data on economic crimes against LGBTQ+ persons,³² reflecting a broader pattern of administrative invisibility that makes the measurement, let alone the remedy, of economic discrimination structurally difficult.

The Immoral Traffic (Prevention) Act has been used by police to harass and criminalise transgender sex workers through the indiscriminate application of its solicitation and brothel-keeping provisions to any gathering of transgender persons in public spaces,³³ compounding economic exclusion with criminalisation in a self-reinforcing cycle of disadvantage. The absence of labour law protections equivalent to those applicable to workers in other protected categories leaves economic marginalisation without effective legal remedy.

5.3 Healthcare Disparities and Medical Institutionalisation

Healthcare represents a critical arena of structural marginalisation for sexual minorities. The convergence of institutional heteronormativity, provider-level stigma, and the historical pathologisation of non-heteronormative sexuality and gender identity creates multiple, compounding barriers to the attainment of the right to the highest attainable standard of health under Article 12 of the ICESCR and Article 21 of the Constitution.³⁴

Healthcare institutions in India are pervasively structured around a binary gender assumption embedded in documentation systems, ward allocation protocols, and clinical procedures. Transgender persons seeking gender-

³⁰ International Labour Organization, *Discrimination at Work on the Basis of Sexual Orientation and Gender Identity: Results of Pilot Research in South and South-East Asia* (2020) [hereinafter ILO SOGI Report].

³¹ Santosh Singh, 'Surviving on the Margins: Hijra Livelihoods and the Economy of Alms,' 19 *Gender, Place & Culture* 1, 8-14 (2012).

³² National Crime Records Bureau, *Crime in India 2022*, ch. 5 (2023); Siddharth Narrain, *Queer 'Criminality' and the Violence of Law*, 2 *Socio-Legal Rev.* 78, 84 (2006).

³³ Immoral Traffic (Prevention) Act, No. 104 of 1956 (India).

³⁴ World Health Organization, *Consolidated Guidelines on HIV, Viral Hepatitis and STI Prevention, Diagnosis, Treatment and Care for Key Populations*, at 109-113 (2022); WHO, *Gender Incongruence and Transgender Health in ICD-11* (2019).

affirming care frequently encounter providers who are untrained in, and often hostile to, their specific health needs. Admission forms requiring designation as 'male' or 'female' deny the constitutional identity of third-gender persons recognised in *NALSA*. The absence of any national clinical protocol for gender-affirming care means that access to hormone therapy or surgical procedures depends on the ad hoc goodwill of individual practitioners rather than on an institutionalised entitlement.³⁵

Mental health services present an analogous pattern of structural inadequacy. The National Mental Health Policy of 2014 identifies sexual minorities as a group requiring targeted mental health services, yet the absence of a comprehensive national protocol for affirmative therapeutic practice and the continued practice of conversion therapy by some practitioners in both the private and public health sectors,³⁶ represent a failure to operationalise the depathologisation of homosexuality and gender incongruence at the level of clinical practice, notwithstanding the World Health Organization's reclassification of gender incongruence in ICD-11 and the Indian Psychiatric Society's 2018 position statement opposing conversion therapy.

5.4 Violence, Police Impunity, and Access to Justice

The decriminalisation of consensual same-sex conduct has not produced a corresponding transformation in the practices of violence and impunity that structure the daily lives of many sexual minorities. Physical and sexual violence, including targeted assaults, conversion violence against lesbian women, and domestic violence between same-sex partners, remain prevalent. Siddharth Narrain has documented with meticulous detail how Section 377 was deployed by police not primarily as a prosecutorial instrument but as a tool of extortion, coercion, and harassment, a form of state-sanctioned predation on sexual minorities that persisted for decades.³⁷

The post-decriminalisation landscape presents a structurally familiar pattern: violence continues, but impunity deepens because police remain unwilling to register complaints from LGBTQ+ victims, same-sex partners cannot access the civil protection mechanisms of the Protection of Women from Domestic Violence Act³⁸ because its definitional architecture presupposes a heterosexual domestic relationship, and there is no hate crime legislation that would treat violence motivated by homophobia or transphobia as a separate, aggravated category of offence. Human Rights Watch has documented the

³⁵ National AIDS Control Organisation, Targeted Interventions for Most at Risk Populations: Operational Guidelines for Programme Managers 7-14 (3d ed. 2007).

³⁶ Government of India, National Mental Health Policy 2014, at 8-11 (2014); Indian Psychiatric Society, Position Statement on Homosexuality (2018).

³⁷ Siddharth Narrain, The Wages of Impunity: Power, Justice and Reconciliation 44-62 (2009).

³⁸ Protection of Women from Domestic Violence Act, No. 43 of 2005 (India).

systematic failure of Indian police to investigate violence against LGBTQ+ persons with the seriousness accorded to offences against other protected groups.³⁹ The European Court of Human Rights, in *Identoba v. Georgia*,⁴⁰ held that a state's failure to protect LGBTQ+ persons from mob violence and to investigate homophobic attacks constitutes a violation of the prohibition on inhuman treatment and the prohibition on discrimination. The doctrinal principle is directly applicable to India's constitutional and human rights obligations. The Protection of Children from Sexual Offences Act, while drafted in gender-neutral terms, has generated interpretive uncertainty in its interaction with the post-decriminalisation landscape regarding the regulation of consensual conduct involving older LGBT adolescents.⁴¹

5.5 Invisibility in Administrative Systems and Public Policy

Perhaps the most insidious form of structural marginalisation is administrative invisibility: the systematic exclusion of sexual minorities from the data architectures, enumeration systems, and policy frameworks through which the state allocates resources and distributes entitlements. India's census has historically failed to enumerate the LGBTQ+ population with any precision, recording approximately 490,000 transgender persons in 2011 in what is widely acknowledged to be a significant undercount.⁴² Gay, lesbian, and bisexual persons are not enumerated at all, rendering them formally invisible to the statistical infrastructure of welfare policy.

This administrative invisibility has direct and material consequences. Without reliable data on the size, distribution, and socio-economic conditions of sexual minority populations, it is structurally impossible to design targeted welfare schemes, assess the impact of existing programmes, or build the evidentiary basis for legislative reform. The requirement of a District Magistrate's Certificate for legal gender recognition under the Transgender Act of 2019 imposes a procedural burden that many transgender persons lack the resources, literacy, or institutional access to satisfy, effectively gatekeeping the very rights that *NALSA* affirmed as matters of self-determination rather than state certification.

³⁹ Human Rights Watch, 'Invisible Minority': Discrimination and Violence Against LGBTQ People in India (2023); Human Rights Watch, Fears and Barriers: Sexual Violence Against Women and LGBTQ People in India (2021).

⁴⁰ *Identoba & Others v. Georgia*, App. No. 73235/12, Eur. Ct. H.R. (May 12, 2015).

⁴¹ Protection of Children from Sexual Offences Act, No. 32 of 2012 (India) [hereinafter POCSO]; Law Commission of India, Report No. 283 on Sexual Offences Against Children (2023).

⁴² Office of the Registrar General & Census Commissioner, India, Census of India 2011: Data on Transgender (2014).

VI. THE MARRIAGE EQUALITY DEBATE AND REMAINING LEGAL LACUNAE

The rejection of the marriage equality claim in *Supriyo v. Union of India* in 2023⁴³ crystallised the most significant remaining legal lacuna in India's sexual minority rights framework. The majority judgment's deference to the legislature, while doctrinally intelligible in the light of the separation of powers, leaves same-sex couples without access to the 'bouquet of rights' that marriage confers, including succession, adoption, spousal social security benefits, hospital visitation rights, and joint property ownership. The impact is not merely symbolic; it is materially consequential for the legal and financial security of same-sex couples and their families.

The comparative law record suggests that constitutional recognition of marriage equality is not only legally available to a rights-respecting polity but is increasingly regarded as a constitutional imperative in jurisdictions with comparable dignity-based rights frameworks. The United States Supreme Court in *Obergefell v. Hodges*⁴⁴ grounded marriage equality in the liberty and dignity protected by the Fourteenth Amendment. The Constitutional Court of South Africa in *Minister of Home Affairs v. Fourie*⁴⁵ held that the exclusion of same-sex couples from the institution of marriage was incompatible with the constitutional rights to equality and dignity. The Inter-American Court of Human Rights in Advisory Opinion OC-24/17⁴⁶ held that states parties to the American Convention are obligated to recognise same-sex unions. In *Lawrence v. Texas*,⁴⁷ the United States Supreme Court had already established that state criminalisation of intimate consensual conduct between adults violates constitutionally protected liberty, providing further comparative support for the dignity-based analysis underpinning marriage equality claims. Scholars including Hirschl⁴⁸ have identified a convergent global trend toward dignity-based recognition of same-sex relationships in constitutional democracies, a trend that is both analytically compelling and morally weighty.

Beyond marriage, the legal lacunae in India's sexual minority rights framework include: the absence of a comprehensive anti-discrimination statute explicitly covering sexual orientation and gender identity in employment, housing, education, and public services; the failure to extend the civil

⁴³ 2023 INSC 920

⁴⁴ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

⁴⁵ *Minister of Home Affairs v. Fourie*, 2006 (1) SA 524 (CC) (South Africa).

⁴⁶ Inter-American Court of Human Rights, Advisory Opinion OC-24/17: Gender Identity, and Equality and Non-Discrimination of Same-Sex Couples, OC-24/17 (Nov. 24, 2017).

⁴⁷ *Lawrence v. Texas*, 539 U.S. 558 (2003); see also *Bowers v. Hardwick*, 478 U.S. 186 (1986) (overruled).

⁴⁸ Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* 201-218 (2014).

protections of the Protection of Women from Domestic Violence Act to same-sex partners; the inaccessibility of adoption rights for same-sex couples; and the absence of hate crime provisions that would treat violence motivated by homophobia or transphobia as aggravated offences. The Law Commission's recommendations on the reform of Section 377⁴⁹ and the ongoing consultation on the recognition of same-sex relationships⁵⁰ represent a legislative opportunity that has yet to be meaningfully acted upon.

VII. INTERSECTIONALITY: CASTE, CLASS, RELIGION, AND SEXUAL IDENTITY

The marginalisation of sexual minorities in India cannot be adequately understood without attending to its intersectional dimensions. Sexual orientation and gender identity do not operate as isolated vectors of disadvantage; they intersect with caste, class, religion, and geographic location to produce differentiated experiences of exclusion that compound and reinforce one another in ways that a single-axis analysis of 'sexual minority rights' cannot capture.⁵¹

The experience of a Dalit transgender woman in a rural setting bears little structural resemblance to that of an upper-caste gay man in an urban professional context, even though both fall within the category of 'sexual minority.' The former faces intersecting vulnerabilities of caste-based violence,⁵² economic destitution, lack of access to formal employment or education, the indiscriminate application of the Immoral Traffic Act, and the compound dignity harm of being simultaneously 'lower caste' and 'deviant' in the eyes of dominant social norms. Akshay Khanna has argued that the categories through which the global LGBTQ+ rights framework operates, including 'gay,' 'lesbian,' and 'transgender,' do not always map onto the lived identities and social practices of sexual and gender minorities in South Asian contexts,⁵³ and that the legal reforms pursued by urban, English-educated advocacy networks may not address, and may inadvertently marginalise, the concerns of those who experience sexuality-based disadvantage outside these frameworks.

⁴⁹ Law Commission of India, Report No. 172: Review of Rape Laws, at 29-34 (Mar. 2000); Law Commission of India, Report No. 198: Proposal to Amend Section 377 of the Indian Penal Code (2008).

⁵⁰ Law Commission of India, Report No. 264: The Recognition of Foreign Divorces (2022); Law Commission of India, Consultation Paper on Same-Sex Marriages (2023).

⁵¹ Kimberle W. Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241 (1991).

⁵² Scheduled Castes and Other Scheduled Tribes (Prevention of Atrocities) Act, No. 33 of 1989 (India).

⁵³ Akshay Khanna, *Sexualness* 44-59 (2016).

Class intersects with sexual minority identity to determine access to legal representation, to the institutional spaces where rights are claimed, and to the social networks that buffer the harms of stigma and rejection. UNDP research has documented the disproportionate economic deprivation of sexual minorities across South Asia,⁵⁴ while Flavia Agnes has analysed how the personal law system's structuring of rights around conjugal heterosexual families forecloses the economic entitlements of those whose intimate lives are organised differently.⁵⁵ An intersectional reform agenda must disaggregate the category of 'sexual minority' and attend to the specifically compounded vulnerabilities of those who face multiple simultaneous axes of disadvantage.

VIII. PATHWAYS TOWARD TRANSFORMATIVE INCLUSION: A REFORM AGENDA

The foregoing analysis demonstrates that the marginalisation of sexual minorities in India is structural, multi-dimensional, and self-reinforcing. Piecemeal judicial interventions, while necessary and valuable, are insufficient to dismantle arrangements that reproduce disadvantage across institutional domains simultaneously. What is required is a coordinated legislative, executive, and judicial reform agenda, grounded in the transformative equality framework, that addresses the structural roots of marginalisation rather than merely its most visible symptoms.

A. Comprehensive Anti-Discrimination Act

India requires a comprehensive Equality Act that prohibits discrimination on the grounds of sexual orientation, gender identity, and gender expression across all areas of public and private life, including employment, housing, education, healthcare, and the provision of goods and services. Such legislation must provide for effective remedies, including injunctive relief, compensation, and institutional accountability mechanisms. The experience of comparable jurisdictions, including the United Kingdom's Equality Act 2010 and South Africa's Promotion of Equality and Prevention of Unfair Discrimination Act 2000, provides useful legislative models.⁵⁶

B. Legislative Recognition of Same-Sex Relationships

The legislature must act on the invitation extended by the majority in *Supriyo* to consider the legal recognition of same-sex relationships. The arguments for

⁵⁴ United Nations Development Programme, Promoting the Inclusion of Lesbian, Gay, Bisexual, Transgender and Intersex People: A Resource Guide (2016); UNDP & APCOM, Legal Environments, Human Rights and HIV Responses Among Men Who Have Sex with Men and Transgender Women in Asia and the Pacific (2012).

⁵⁵ Flavia Agnes, Family Law and Constitutional Claims 87-104 (2011).

⁵⁶ Gautam Bhatia, Horizontal Discrimination and Article 15(2) of the Indian Constitution: A Transformative Approach, 11 Asian J. Comp. L. 87 (2016)

legislative action are compelling both from a constitutional dignity perspective⁵⁷ and from a comparative law standpoint. A civil union framework, as an initial legislative step, would extend the practical entitlements of marriage to same-sex couples without requiring the symbolic and definitional transformation that full marriage equality entails. The Law Commission's ongoing consultation should be translated into concrete legislative proposals within a defined timeframe.

C. Reform of the Transgender Persons Act

The Transgender Persons (Protection of Rights) Act 2019 must be amended to bring it into conformity with the self-identification principle affirmed in *NALSA*. The requirement of a District Magistrate's Certificate for legal gender recognition must be replaced with a statutory declaration procedure that respects the constitutional right of transgender persons to determine their own identity. Welfare provisions must be strengthened, enforcement mechanisms must be made effective, and the Act must be amended to extend its anti-discrimination protections to cover all public and private contexts.

D. Data Collection, Administrative Inclusion, and Public Policy

The structural invisibility of sexual minorities in official data systems must be urgently addressed. The census must be redesigned to enumerate LGBTQ+ populations with methodological rigour and disaggregation by caste, class, and region. State and Central government departments must conduct equality impact assessments of existing welfare schemes to identify and remedy structural exclusion. Healthcare institutions must implement affirmative protocols for LGBTQ+ patients and ban conversion therapy through binding regulatory instruments, consistent with the National Mental Health Policy and international health standards.

E. Access to Justice and Hate Crime Legislation

India requires dedicated hate crime legislation that treats violence motivated by homophobia or transphobia as an aggravated category of offence, with enhanced penalties and mandatory investigation protocols. Police accountability mechanisms must include specific provisions for complaints of discriminatory non-registration of LGBTQ+ victims' complaints. The Protection of Women from Domestic Violence Act must be amended to extend its civil protection framework to same-sex partners, consistent with the constitutional right to equal protection. The OHCHR has consistently affirmed that states' international obligations under the ICCPR require effective protection of sexual minorities

⁵⁷ Menaka Guruswamy & Arundhati Katju, 'We the People: Equality and Dignity in the Age of the Indian Constitution,' 2 Indian Const. L. & Phil. 1, 9-14 (2018).

from violence, including through criminal law mechanisms that take the motivation of homophobia seriously.

F. Intersectional and Culturally Sensitive Approaches

Reform efforts must be sensitive to the intersectional dimensions of sexual minority marginalisation and to the diversity of identities, practices, and needs that exist within and beyond the global LGBTQ+ framework. Legal reforms designed around the experiences of urban, educated, English-speaking gay men and women will fail to address the specific vulnerabilities of Dalit transgender women, rural sexual minorities, or those whose identities are articulated through indigenous cultural frameworks that do not map onto Western taxonomies. Civil society organisations, including those working at the intersection of caste, gender, and sexuality, must be systematically involved in the design and monitoring of reform initiatives. Media representation of sexual minorities, which continues to be dominated by stereotyping and caricature, must be addressed through regulatory frameworks that incentivise authentic and dignified representation.⁵⁸

IX. CONCLUSION

The marginalisation of sexual minorities in India is neither a residual legacy destined to fade with time nor a product of individual prejudice susceptible to incremental attitudinal change alone. It is a structural condition, produced and perpetuated by the interaction of laws, institutions, administrative practices, and social norms that cumulatively deprive sexual minorities of the capabilities necessary for a dignified and self-determining life. The constitutional promises of equality, dignity, and non-discrimination are not merely aspirational; they are legally binding obligations whose non-fulfilment constitutes an ongoing violation of the rights of a significant and historically excluded population.

The Supreme Court has done its constitutional duty in landmark decisions from *Naz Foundation* to *Navtej Singh Johar* and *NALSA*. The UN Human Rights Council has affirmed, in binding resolutions, that the protection of sexual minorities from violence and discrimination is a core obligation of international human rights law. Comparative constitutional experience in South Africa, the United States, and across the Inter-American system demonstrates that recognition of equal dignity for sexual minorities is not only legally achievable but constitutionally required in a polity committed to the foundational values that India's Constitution proclaims.

⁵⁸ Shohini Ghosh, 'Queer Pleasures for Queer People: Film, Television and Queer Sexuality in India,' in *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* 207, 214-19 (Ruth Vanita ed., 2002).

What remains is the political will to translate constitutional promise into legislative reality, administrative practice, and social transformation. The path toward genuine equality for sexual minorities in India is not easy, but it is legally, normatively, and constitutionally clearly marked. India's continued failure to walk it is not a reflection of cultural exceptionalism; it is a reflection of a choice, a choice that this paper argues must urgently be revisited in fidelity to the Constitution's deepest commitments.