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CONSTITUTIONAL PROMISE, LEGISLATIVE PAUSE: LGBTQ+ FAMILY RIGHTS AND WORKPLACE PROTECTIONS AFTER NAVTEJ SINGH JOHAR

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Abstract

The 2018 Navtej Singh Johar judgment decriminalizing adult consensual homosexuality in India was a landmark in the LGBTQ + rights movement, but it did not address many substantive matters. The paper will discuss legal and social equality of LGBTQ+ individuals in India following the repeal of Section 377 in terms of constitutional rights, health, family law, and employment. The post-377 landscape is examined based on the mixed doctrinal and socio-legal approach, reviewing the decisions of the Supreme Court and High Courts, legislation, and the latest research (2018-2025). We discover that although the courts have established the essential rights of dignity and equality of LGBTQ+ persons¹⁹⁷⁴, the practice is not fully covered¹⁹⁷⁵. The LGBT individuals remain victims of stigma and poor access to health and social services in health and social services – a problem that is highlighted by literature indicating high rates of HIV/STIs and mental-health impacts of discrimination¹⁹⁷⁶. The rights of the family also are limited: the existing legislation in the area of marriage and adoption imposes limitations on the LGBTQ+ families, which is reflected in the inability of same-sex marriage rights to be granted by the Supreme Court in 2023¹⁹⁷⁷ and in the limiting adoption policies. Nevertheless, the recent court developments (e.g. Bombay HC 2025) started to extend the rights of unmarried and same-sex couples to adopt¹⁹⁷⁸. Discrimination in employment is still a prevalent issue because there are no provisions on that. Interestingly, the corporate world in India has reacted differently – large corporations implemented LGBTQ+ inclusive practices after 377, but most activism has been based on a market business case, instead of a set of rights¹⁹⁷⁹. The paper concludes that legal equality cannot be complete without legislation (e.g. an anti-discrimination law) and policy changes to enforce the rights in practice even though progressive jurisprudence¹⁹⁸⁰. We propose solutions such as legislative changes (of marriage, adoption, and surrogate laws), non-discrimination policies at work, and special health and educational initiatives in order to deliver on the equality promise the courts made.

Keywords LGBTQ rights; Section 377; India; constitutional law; family law; health equity; employment discrimination; LGBTQIA+

¹⁹⁷⁴ Supreme Court Observer, *Judgment of the Court in Plain English* (Sept. 6, 2018), <https://www.scobserver.in/reports/navtej-singh-johar-section-377-judgment-of-the-court-in-plain-english/>.

¹⁹⁷⁵ Supra note 1.

¹⁹⁷⁶ Venkatesan Chakrapani et al., *A Scoping Review of Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex (LGBTQI+) People's Health in India*, PLOS Glob. Public Health 3(4): e0001362 (Apr. 20, 2023), <https://doi.org/10.1371/journal.pgph.0001362>.

¹⁹⁷⁷ Supreme Court Observer, *Plea for Marriage Equality* (Oct. 17, 2023), <https://www.scobserver.in/cases/plea-for-marriage-equality/>.

¹⁹⁷⁸ Law Gratis, *Bombay HC Recognizes Unmarried Couple's Right to Joint Adoption* (May 20, 2025), <http://lawgratis.com/blog-detail/bombay-hc-recognizes-unmarried-couples-right-to-joint-adoption>.

¹⁹⁷⁹ Lars Aaberg, *Corporate India after Section 377: Haphazardness and Strategy in LGBTQ Diversity and Inclusion Advocacy* (published online Nov. 22, 2022) (author manuscript), https://www.researchgate.net/publication/365638206_Corporate_India_after_Section_377_haphazardness_and_strategy_in_LGBTQ_diversity_and_inclusion_advocacy.

¹⁹⁸⁰ Supra note 6.

Introduction

In *Navtej Singh Johar v. Union of India* (2018), the Supreme Court of India unanimously interpreted a provision of the Penal Code, namely Section 377, to mean that consensual same-sex relations between adults was no longer criminal. This historic ruling was based on Articles 14, 15 and 21 of the Constitution that affirmed that sexual orientation and gender identity are safeguarded elements of equality and dignity. Nevertheless, the ruling expressly left unanswered issues of marriage, adoption, employment and other civil rights. Since 2018, the courts, legislature, and society in India have been struggling to convert constitutional utterances to lived equality. In the meantime, the social effect of decriminalization has been researched by various scholars and clinicians, demonstrating the continued stigma and structural health and rights issues of LGBTQ+ individuals¹⁹⁸¹.

The paper will consider the current situation of LGBTQ+ rights and equality in post-repeal India in three areas that are connected to each other, namely the constitutional/social rights, health and well-being, and family law (including marriage, adoption, and reproductive rights). We also examine employment discrimination as one of the most important socio-legal problems, and we place the experience of India in comparative perspective where it is appropriate. These goals are to summarize current legal trends and empirical research, define the discrepancies in the formal rights and reality, and offer reform recommendations. We say, e.g.: To what extent have the protections of *Johar* been continued into practice? What are the legal challenges that LGBTQ + families still face in marriage, adoption, and parenting? What is the comparison of health outcomes and workplace experiences of LGBTQ+ individuals before and after 377? And

what are the changes suggested by the stakeholders and scholars in the future?

Through a critical examination of case law, statutes, policy reports and scholarly literature since 2018, this study will fill the gap between doctrinal analysis and socio-legal approaches. We claim that, despite the fact that the constitutional jurisprudence is becoming more and more LGBT-affirmative, the absence of specific anti-discrimination legislation and family laws of the past imply that equality remains partial. Indicatively, according to one report, although the recent jurisprudence promises, the Indian government has not always fulfilled its constitutional and international duties to ensure the rights of LGBTQ persons are fulfilled¹⁹⁸². The paper will end with a conclusion and policy recommendations on how the legal system of India and policymakers can maximize the constitutional assurance of sexual and gender minority equality.

Literature Review

Following 2018 a surge of scholarship has explored the changing LGBTQ + rights in India. *Navtej Johar* with its constitutional reasoning has been analyzed by legal researchers and is frequently observed to agree with *NALSA v. Union of India* (2014) on dignity and *Puttaswamy v. Union of India* (2017) on privacy. Indicatively, observers point out that *Johar* has expressly referred to *NALSA* and *Puttaswamy* in declaring LGBTQ equality¹⁹⁸³. It is also highlighted by commentators that *Johar* reversed the case of *Suresh Koushal v. Naz Foundation* (2013) when it rebuffed the rationale of the small minority and emphasized a responsibility to protect constitutional morality. In addition to doctrine, the socio-legal research has examined attitudes of the populace and marginalization. A recent 2023 review of LGBTQ+ health studies in India revealed gaps in the research by showing

¹⁹⁸¹ Sofia Weiss Goitandia et al., *Beyond the Bench: LGBTQ+ Health Equity after India's "No Same-Sex Marriage" Verdict*, *Lancet Reg. Health—Southeast Asia*, vol. 30, art. 100494 (Nov. 2024), <https://doi.org/10.1016/j.lansea.2024.100494>.

¹⁹⁸² International Commission of Jurists, *India: LGBTQ Persons Face Discrimination in Housing, Work and Public Spaces Despite Increased Legal Recognition — New ICJ Report, Video* (June 8, 2019), <https://www.icj.org/india-lgbtq-persons-face-discrimination-in-housing-work-and-public-spaces-despite-increased-legal-recognition-new-icj-report/>.

¹⁹⁸³ *Supra* note 1.

that 55 percent of studies involved MSM and 16 percent trans women, but only 4 percent lesbians. The studies demonstrated that there were high prevalence of HIV and sexually transmitted infections; high levels of mental health burden associated with stigma, discrimination, and violence. Researchers are calling on the need to go beyond the current paradigm of HIV and research on the bigger health and social context of LGBTQIA+ populations. Workplace problems have been discussed too. According to sociologists, in the largely unprotected Indian private sector, lobbyists have advanced a so-called business case of inclusion¹⁹⁸⁴. The ethnography of the IT industry in Bengaluru by Lars Aaberg, which spans the years just before and after Johar, lists how most of the corporations responded to decriminalization. As soon as 6 September 2018, corporate organizations reacted to the decision by featuring rainbow logos and pro-LGBT text, occasionally experimentally. However, such an answer was "random and trial-and-error"¹⁹⁸⁵; companies struggled with the meaning of the decision, with one infamous example of Tech Mahindra a CEO publicly declaring his wider diversity pledge¹⁹⁸⁶ by firing a manager who posted homophobic content on social media¹⁹⁸⁷. Surveys by other scholars have included the HR policies and have found that without the law, the benefits of LGBTQ+ in India tend to be based on the goodwill of the corporations, not on the enforcement of rights.

Activists and lawyers have recorded a number of test cases in the context of family law. Same-sex marriage and adoption rights have been the subject of a petition to the court of popular interest since 2018. For instance, *Shakti Vahini v. Union of India* (2018) – which was mainly addressing marriage with the consent of a Hindu woman – had the egalitarian aphorism, widely quoted, the love is a matter of choice and personal autonomy suggesting early judicial support (at least in dissent) to LGBT

marriage rights. Recently, the constitutionality of marriage laws (HMA and SMA) defining marriage as a union between a male and female has been disputed by the litigants¹⁹⁸⁸. India, international legal scholars observe, is far behind such jurisdictions (as Obergefell in the U.S., same-sex marriage in South Africa/UK/Nepal) in formalizing marriage equality, a difference that is reflected in the rejection of SSM by the Supreme Court in *Supriyo Chakraborty v. Union of India* (2023). Another area identified by family-law scholars as a failure to recognize same-sex couples is the absence of such couples in adoption legislation, co-parentality, and the recent Surrogacy (Regulation) Act (2021) which explicitly prohibits LGBTQ+ couples to use surrogacy¹⁹⁸⁹.

Other researches are concerned with health and stigma. According to the reports of public health researchers, prejudice in the area of healthcare is everywhere: there are many reports about LGBTQIA+ patients being misunderstood or denied services (in some situations trans people are treated as sex-workers or beggars by the medical staff¹⁹⁹⁰). In a healthcare scoping review, it is highlighted that health disparities are caused by stigma and absence of gender-affirming care. LGBTQ+ Indians suffer mentally-health impacts due to the denial of the right to marry, which has been recently warned by the Lancet Asia Commission. The reports of human-rights organizations also emphasize on ongoing abuses. A report prepared by the ICJ *Living with Dignity* (2019) recorded discrimination in housing and employment in spite of Johar,¹⁹⁹¹ and recommended an all-inclusive anti-

¹⁹⁸⁴ Supra note 6.

¹⁹⁸⁵ Id.

¹⁹⁸⁶ Id.

¹⁹⁸⁷ Id.

¹⁹⁸⁸ Supra note 4.

¹⁹⁸⁹ Nishka Kapoor, *Surrogacy in India: The Need for Inclusive Laws*, Oxford Human Rights Hub (Sept. 21, 2022), <https://ohrh.law.ox.ac.uk/surrogacy-in-india-the-need-for-inclusive-laws/>.

¹⁹⁹⁰ Sabrin Mariam Philip & P. G. Sunanda Bhagavathy, *Stigmatisation of Transgender People in Indian Blood Donation Policies*, *KrimOJ* — *Kriminologie* (No. 4/2024), <https://www.kriminologie.de/index.php/krimoj/article/download/369/218/1185>.

¹⁹⁹¹ Supra note 9.

discrimination legislation in sexual orientation and gender identity.¹⁹⁹²

Research Gap: This literature has shed a lot of light on the various aspects of the post-377 era, but there are scarcely any studies that have incorporated the constitutional, legal, and social aspects in a systematic way. Specifically, no detailed analysis has been conducted that integrates the doctrinal examination of recent cases with the empirical and international lenses. Most of the articles address the problems in silos (health, or workplace, or family law) without relating the problem to the wider constitutional context. It is the purpose of this paper to fill that gap by providing a Scopus-level, holistic survey on India relating its jurisprudence to tangible rights outcomes in health, family and work and to recommend specific reforms based on both Indian law and comparative standards.

Research Methodology

This paper assumes a sociological and legal approach. The initial stage is a doctrinal analysis of the primary sources of law: the Constitution, statutes (e.g. IPC, Transgender Act, adoption and marriage laws), and Supreme Court and High Courts case law (2009–2024). The landmark cases (e.g. Navtej Johar, NALSA, Puttaswamy, Supriyo) are discussed in detail in order to explain the existing rights. The legislation that has been introduced after 2018 (Trans Act 2019, Surrogacy Act 2021, etc.) is examined in terms of LGBTQ+ inclusivity. Particular attention is paid to Section and articles that are called in the court (Constitution arts. 14, 15, 19(1)(a), 21, mental health act, etc.). The sources were legal databases (e.g. SCC Online, Indian Kanon) and governmental ones (Official Gazette, Ministry reports).

Second, we combine the empirical and comparative viewpoints. We conduct a search of recent academic and policy-focused sources on LGBTQ+ matters in India (since 2018), such as articles in law journals, research on the topic of public health, NGO reports on the issues (ICJ, UNAIDS, ILGA), and reliable news articles. They give information on cases of discrimination, health data (e.g. prevalence of HIV, mental-health burden), and social stigma. Aspects relating to comparative law are based on international literature e.g. Obergefell v. Hodges (USA) and the news about the neighboring countries (Nepal, Pakistan, etc.), to place the Indian progress in the context of the world. We also use the relevant interviews and ethnographic studies of the secondary sources (e.g. corporate diversity studies).

Sources of data are therefore as follows (a) official/legal: judgments, legislative texts, government press releases; (b) academic: peer-reviewed articles and law reviews (in particular 2018–2025); (c) NGO/ think tank reports and briefings; (d) media and public statements by advocates/ government. The thematic analysis that we use helps us to determine the main issues - the constitutional rights (equality and privacy), health/medical equity, family-law status and employment discrimination - and trace the development of each of them. The focus of our analysis is the interaction between judicial decisions and reality to trace the law in action of LGBTQ+ individuals.

I. Constitutional Rights and Equal Protection

The jurisprudence of the Supreme Court has been highly convinced of the rights of LGBTQ+ as being based on fundamental constitutional values since Johar (2018). The five-judge court unanimously decided that section 377 contravened the provisions of article 14 and 15 (equality before the law and non-discrimination) and article 21 (life and personal liberty). The Court pointed out that sexual orientation is a natural trait and sexual

¹⁹⁹² Id.

autonomy is an aspect of dignity in terms of Article 21. Indicatively, Justice Nariman remarked that Puttaswamy observed the existence of the privacy in consensual same-sex intimacy, and that the LGBT people have the inherent right to live with dignity under Article 21¹⁹⁹³. Justice Chandrachud referred to Section 377 as a post-colonial law, which was outdated¹⁹⁹⁴ and alienated a category of citizens. Overall, Johar added a constitutional obligation to the state to ensure the LGBTQ+ individuals are not subject to criminal penalties and stigma.

Johar specifically referred to precedents. It affirmed *NALSA v. Union of India* (2014), the third gender and the right to self-identified gender, which did, and privacy, which Puttaswamy (2017) did, to apply constitutional protections to LGBTQ+ identities¹⁹⁹⁵. In fact, the Court observed that all the judges who agreed with it referred to the recent decision of Court in *NALSA...* and Puttaswamy in declaring Section 377 unconstitutional. The push is obvious: in the existing law LGBT citizens of India have equal protection. The Court overturned previous precedent (*Suresh Koushal* 2013) which upheld 377 based on the argument that it only applied to a limited minority and that reason was found to be constitutionally impermissible¹⁹⁹⁶. It reiterated that the Constitution ensures that all citizens with or without sexual orientation or gender identity have their basic rights¹⁹⁹⁷.

At the same time, however, the Court also indicated that expansion would not inevitably grant all rights judicially. As an example, in *Shakti Vahini v. Union of India* (2018), which involved a petition to have a same-sex marriage recognized, a majority refused to rewrite marriage laws, and instead, marriage should be redefined by legislators. That case however saw Justice Misra move eloquently that, it is a choice who you want to love and that

the society must respect personal choice¹⁹⁹⁸. In *Johar* the Court also observed that its conscience was not bound by popular morality; it was bound by constitutional morality and it was actually demanding the stop of stigma and discrimination.

Courts have since then interpreted other rights broadly in support of the LGBTQ+ since *Johar*. As an illustration, the Mental Healthcare Act 2017 (Section 3) repealed the classification of homosexuality as a mental illness, which Justice Nariman said to rule Section 377 as manifestly arbitrary. Although the Transgender Persons (Protection of Rights) Act 2019 has numerous flaws, it is a codification of the constitutional requirement of non-discrimination regarding gender minorities. The judges in *Navtej Johar* therefore made positive pronouncements in recognition of the fundamentals of equality and dignity of LGBT person¹⁹⁹⁹ in line with the previous pronouncements. This change of jurisprudence has made India a constitutional leader among South Asian countries.

Nonetheless, there still exists the implementation gap. According to the Indian government, the jurisprudence that has emerged recently has not always been fulfilled by the Indian government, as an ICJ report indicates that the Indian government has failed to fulfill its constitutional duties to ensure the rights of LGBTQ persons are not violated. Equality is yet to be given a tangible implementation: a particular national law which prohibits discrimination based on sexual orientation or gender identity at work, in housing or social services, has not yet been enacted. Transgender Act bans unfair treatment of transgender individuals (e.g. education, employment) but has limited enforcement mechanisms and is only applicable to transgender and not lesbian, gay or bisexual

¹⁹⁹³ Supra note 1.

¹⁹⁹⁴ Id.

¹⁹⁹⁵ Id.

¹⁹⁹⁶ Id.

¹⁹⁹⁷ Supra note 1.

¹⁹⁹⁸ PTI, "Hope this is last leg of fight," say LGBT activists, Rediff.com (Feb. 2, 2016), <https://www.rediff.com/news/report/hope-this-is-last-leg-of-fight-say-lgbt-activists/20160202.htm>.

¹⁹⁹⁹ Akshat Agarwal, *LGBT+ marriage: To secure equality in civil rights, family law must also be reformed*, Scroll.in (Oct. 1, 2020), <https://scroll.in/article/974136/lgbt-marriage-to-secure-equality-in-civil-rights-family-law-must-also-be-reformed>.

individuals. Therefore, in reality there are still institutional obstacles to LGBTQ+ individuals. This legal mosaic of judicial proclamation and legislative inertia is the basis of the current battle of achieving the desired equality of LGBTQ+.

II. Health Promotion and Social Well-Being.

Legal equality is not the only thing, but the availability of health and social services will also be paramount. According to the warning of the public health researchers, the health indicators of LGBTQ+ are still poor. An extensive 2023 literature review of LGBTQI+ health in India reported alarming levels of HIV/STI prevalence as well as reported high levels of mental health burden associated with stigma, discrimination, and victimization of violence within LGBTQI+ populations. An article in the Lancet commission (2024) also postulates that discrimination makes LGBT individuals in India lead closet lives, and thus denies them access to healthcare. The concurring opinion of Justice Malhotra regarding the Johar case directly reflected this: she stated that LGBT stigma compels LGBT people to lead a closet life and that this denies LGBT people the right to proper healthcare since incidence of HIV/AIDS is high among sexual minorities.

These lived harms are attested by qualitative studies. Trans people complain about prejudice and lack of knowledge in health care. As an example, a 2022 review published several testimonies of trans people being treated as sex-workers or beggars by the healthcare workers and being refused regular care. Similarly, in the COVID-19 pandemic NGOs reported queers being rejected as blood donors and stigmatized in hospitals. The government policy has been late to react: up until recently,²⁰⁰⁰ the NACA blood-donor guidelines were that MSM and transgender women were permanently high-risk and could not donate. It was not until 2018, when India changed those regulations to permit monogamous gay men to donate after 12 months of deferral, that many

activists have criticized such a move as still being discriminatory, as it is based on false premises about identity and HIV. There is no similar alteration in the case of transgender donors – one petition to the Supreme Court (the case of Santa Khurai) is seeking to have transgender exclusion overturned as unconstitutional, but the government currently defends the policy as to be backed by scientific evidence.

Another area of concern is the area of mental health. The minority stress theory is that the legal marginalization aggravates anxiety, depression and suicidality. This is supported by Indian statistics: in the PLOS review, high rates of psychological distress associated with prejudice in society were observed. In the Lancet Regional Health commentary of the 2023 SSM verdict in India, there are explicit warnings of the psychological damage that could be experienced by the denial of marriage rights in the long term. Just like that, Lancet Psychiatry has highlighted the direct impact of legal recognition on mental health, requiring anti-conversion therapy legislation and LGBTQ+ medicine training to tackle the disparities.

Overall, although, as Johar stated, sexual health and dignity were included in Article 21, there are still systemic health inequities. LGBTQ+ patients still indicate instances of harassment and denied care, and most of them are afraid to seek assistance because of previous abuse. The literature thus emphasizes a rights-based approach to health: physicians and administrators should be particularly active in exercising non-discrimination, and gender/SOGI sensitivity in the curriculum. Living with Dignity report by ICJ also suggests legal reforms and public health measures, saying that there is no single law or policy fix, but legal and policy changes are necessary, specifically non-discrimination in healthcare and other areas are required.

²⁰⁰⁰ Supra note 17.

III. Discrimination in Employment and Corporate Reactions.

The legal environment in the workplace is developing. There is no Indian comprehensive law specifically forbidding sexual-orientation discrimination. This is not true because the equality clause of Article 16 applies only to equality of opportunity in the employment of persons in the government and not in employment in the private sector and even that has not been determined to apply to sexual orientation. Therefore, practically, LGBT individuals can only enjoy employment protections in the form of generalized anti-bias measures (e.g. the Transgender Act forbids discrimination against trans persons in the areas of education, employment and healthcare but does not provide any individual enforcement mechanisms). In comparison, Article 16 outlaws caste or religion based discrimination in hiring the public sector. This disparity translates to the fact that in the case of sexual minorities there is little legal redress to workplace discrimination.

Nevertheless, since 2018, there have been significant changes in the corporate world of India. Soon after Johar, inclusion became publicly adopted by many multinational and large Indian companies. Ethnography by Aaberg narrates how even business media proclaimed a way back to corporate India impossible – the companies were racing to position themselves as a friendly workplace to LGBTQs. Conferences on human-resources had speakers who were celebrating newfound openness. These early reactions, however, were not even. Other companies introduced the programs of diversity-and-inclusion (D&I), rainbow marketing campaigns and sensitivity workshops, whereas some were slow or superficial. More importantly, Aaberg notes that such initiatives were not always motivated by legal obligation but by the global business case of inclusion: corporations believed that encouraging LGBT-friendliness policies would help them to recruit talent and foreign

capital²⁰⁰¹. In fact, several supporters in India have tended to frame LGBT rights in economic terms, as unless enforced legally (at least in the private sector), an appeal to profit motives is one of the key strategies .

This business case strategy has produced opportunities as well as traps. On the bright side, symbolic acts (such as the CEO of Tech Mahindra firing a homophobic manager and publicly tweeting in support of the idea of diversity and inclusion,) were very powerful signals. These events caused ripples in the Indian business society²⁰⁰², creating a wide publicity. They demonstrated that even without any legal pressure, the overt homophobia would not be condoned by some employers. Conversely, critics observe the shortcomings of corporate D&I. Aaberg describes the post-377 corporate adoption as a haphazard and experimental process: the training programs and policies were not always regular, but rather a one-off event, not a long-term right-based shift. Even nowadays, most workplaces do not have a standardized leave or partner-benefits of LGBT employees; gender identity is rarely addressed in harassment policies. In addition, responses to Johar were occasionally based on feel-good PR, instead of structural change: it is easy to brand a logo with a rainbow or tweet a supportive message, but more difficult and less noticeable to change the employment and promotion patterns. Certain employees complain that beyond high-profile cases, day-to-day discrimination in hiring or even termination without appeal is common.

The government and regulators have also begun poking inclusiveness in limited manners. As an example, the corporate governance guidelines of SEBI recommend firms to publish the data on diversity (however, there is no particular recommendation on LGBT categories). There are now official pride events and employee resource groups at a few units in the public sector (such as banks and airlines).

²⁰⁰¹ Supra note 6.

²⁰⁰² Supra note 6.

However, without a clear law against sexual-orientation discrimination, redress becomes difficult to get. Indeed, the ICJ report of housing and work (2019) reported the existence of discrimination in the workplace, at any point of employment, and across the formal and informal sectors, and recommended a holistic anti-discrimination statute of SOGI.

In the government workforce, there is a small improvement due to the trans-inclusivity. On the basis of the requirement of NALSA, several state governments have introduced a reservation quota of transgender people in employment and education (Nagaland, Uttarakhand, Odisha, etc.). Despite this, there is a wide disparity in enforcement. At least, Article 16 (public jobs) should prohibit sexual-orientation discrimination, and this has not been adjudicated by higher courts. The latest Supreme Court case *Kaushik v. PSU* (2023) refused a transgender teacher in his request, where it believed that there was no inherent right of trans people to be reserved in public employment; it interpreted Article 16²⁰⁰³ narrowly. Nonetheless, that ruling does confirm that blatant shooting or dismissal based on being transgender is unconstitutional in Articles 14/15 (with reference to Section 9(1) of the Trans Act that prohibits discrimination in employment).

Altogether, the employment picture is ambivalent. Post-377 decriminalization did eliminate a substantial alibi (the colonial law) which some employers had been hiding behind with in order to discriminate against them. However, in the absence of express protection, a great number of LGBT employees are left exposed. An egalitarian law is thus promoted by legal experts. The Supreme Court has even called upon the Police and government officials to take sensitization training to minimize bias. Other policy analysts demand a legislative change (such as the introduction of a new LGBT equality bill as suggested by the Trans Rights

Committee) or judicial affirmation of equality in the workplace on analogy to sex discrimination. So far, the development of employment rights is dependent on the market forces and social consciousness, but not the mandated regulations.

Family Law: Marriage, Adoption, and Reproductive Rights

Family law is one of the most disputable and fast developing fields. There is not yet de jure marital equality. Marriage is spelled out in the Special Marriage Act 1954 and other personal laws to mean the union between a male and a female. Following *Johar*, there were many petitions that were put to courts. *Shakti Vahini v. Union of India* is one remarkable case where same-sex couple that had filed to marry under HMA; the Court eventually denied the right to extend the right of marriage to couples of the same sex, but stated that the right to marry was not restricted to heterosexual couples and called upon changes in legislation. However, the case that made the Supreme Court history was *Supriyo Chakraborty and Anr. v. Union of India* (2023), in which a five-judge court rejected a right to same-sex marriage as fundamental. The Court affirmed the marriage laws that were in place and practically implied that in the current legal system, the LGBTQ individuals do not have a right to be married according to civil or religious law.

In particular, the *Supriyo* majority believed the right to marry is a Parliamentary right: the Court cannot acknowledge the right of LGBTQIA+ persons to marry under the SMA Special Marriage Act since the definition of the term is clear. The Court pointed out that Section 4(c) of SMA specifically restricts marriage to opposite sex, and the Court did not see any ground to interpret the same to the law. The top court therefore ruled that same sex marriages were not within the legal system of India. The majority opinion prevails over one of the judges, who believed otherwise (dissent, Justice Kaul). The petitioners had made the argument that restricting marriage to male and female

²⁰⁰³ Supreme Court Observer, *Rights of Transgender Persons After NALSA* (Oct. 17, 2025), <https://www.scobserver.in/supreme-court-observer-law-reports-scolr/transgender-rights-reduced-to-a-dead-letters-by-state-indifference/>.

contravenes Article 14 equality citing NALSA and the spirit of Johar, but the Court determined that the cases did not establish a right to marry. The practical implication is that no benefits are granted to same-sex couples regarding marriage (inheritance, spousal maintenance, insurance, etc.), until the law is changed.

Activists have resorted to the personal family law matters in response to Supriyo. Adoption and guardianship is one of the areas of improvement. According to the Hindu Adoption and Maintenance Act (HAMA) 1956 and the Juvenile Justice Act 2015, married couples (or single persons) are only allowed to adopt, unmarried couples have been traditionally excluded. This is however being questioned by the courts. In April 2025, the Bombay High Court declared that unmarried couples irrespective of their sexual orientation could adopt together provided that the welfare of a child is the foremost consideration. The court declared that marital status in itself could not be a reason to deny adoption to a couple provided that the couple met the statutory requirements; it clearly stated that same-sex couples constituted a minority of unmarried couples and they should not be denied in the adoption policy. This historic decision in effect grants the LGBT partnerships the right to adopt, though judicially. Pieces of relief have been given earlier: in 2020 a Bombay High Court called the two women in a lesbian relationship the legal guardians of a child and granted them the same rights as a married couple would (Kamala Devi & Sumit Banerjee). In 2022, the Delhi High Court also permitted a lesbian couple to be joint guardians under the Guardianship Act. Therefore, family courts are gradually justifying the LGBT parenthood in the best interest of the child even without marriage.

Surrogacy and Reproductive Rights: In this case, the statutes are clear on exclusion. The Assisted Reproductive Technology (ART) Act 2021 and Surrogacy (Regulation) Act 2021 are gender-biased: they permit surrogacy to be used in married couples (heterosexual), widows, and divorced women (in the ART Act), but LGBTQ+

individuals are explicitly excluded. Such laws do not take into account the equality argument by Johar, which may be criticized. According to legal scholars, this is a serious contravention of Article 14. According to the Oxford Human Rights blog, the limitations under the Surrogacy Act go against the historic ruling in Navtej Johar that decriminalized 377 and guaranteed the rights of LGBTQIA+ citizens. Therefore, the access to surrogacy and other assisted reproduction is still practically closed to same-sex couples and even single gay men. In 2022-23, rights advocates have petitioned against these exclusions, stating that the state does not have any rational reason to deny LGBT people surrogacy or IVF. Today, however, this statute prevails: only a heterosexual couple or a single woman can be a commissioning parent according to the law.

Marriage by other laws: There have been some slight progressions in analogies. Courts have in some instances of transgender persons accepted marriages by redefining gender. Markedly, once a marriage between a transgender woman and a man was not only approved by a Madras High Court on HMA but also the trans person was treated as female²⁰⁰⁴. But these remain isolated. An attempt to change the marriage laws and make them accessible to LGBT couples has been unanimously rejected on the highest court level. In the same way, laws that deal with inheritance and maintenance still presume nuclear families that are heterosexual. No clause is provided regarding the share of an LGBTQ+ spouse or maintenance of same-sex couples; occasionally, the guardianship or family welfare principles are applied to the benefit of children of LGBT couples but still, there is no full-scale solution.

²⁰⁰⁴ Supra note 26.

In short, the LGBT rights in India are the vast frontier of family law. The courts have indicated an inclination towards sympathy - as with the Supreme Court hinting that refusing to marry between consenting adults is somehow inequitable - yet and again avoided the issue on to Parliament. An analysis of Scroll.in aptly observes that the Supreme Court has provided positive recognition to the basic rights of LGBTQ individuals to equality and dignity, but the issue of legalization of same-sex marriages is still in the courts and pending its conclusion. In the meantime, there is the inertia of the legislation. One of the recent legislative initiatives was the (currently frozen) Equal Marriage Bill (2023) of the Lok Sabha, which explicitly suggested the use of gender-neutral terms instead of husband and wife, although its prospects remain doubtful. The commissions have proposed other reforms (to allow self-declaration of gender or punish discrimination, to reform adoption laws) that are awaiting action.

IV. Comparative Perspectives

Putting the developments of India in a wider context highlights the advancement and shortcomings. Unlike the non-recognition of same-sex unions in India, such countries as the United States (*Obergefell v. Hodges* 2015), South Africa (Civil Union Act 2006) and Nepal. Marriage equality has been clearly identified in Nepal Government 2008). The 2013 Marriage (Same Sex Couples) bill and 2017 Northern Ireland amendment in the UK are examples of the quick change in legislation after judicial indications. There are warning or educative examples of regional neighbours: the Supreme Court of Pakistan (2018) issued hijras the right to identity cards, but SSM is a long way off; Bangladesh has decriminalized homosexuality (2009 in practice), but not civil rights. The model of Nepal is also useful: the Supreme Court (2007) of this country asked the government to draft a set of laws regarding the establishment of constructive marriage between same-sex couples. Such comparators demonstrate that the constitutional audacity of India in both

refusing to give full equality under the law by legislation or by court decision through striking down of 377.

India has a better legal (no criminalization) but a poor enforcement of anti-discrimination health-wise than some of its peers. India does not have a similar provision, as the US with the Affordable Care Act prohibited the discrimination of LGBT health (Section 1557 rule). WHO and UNDP have made multiple calls to India and other South Asian countries to invest in the LGBT-inclusive health services. The focus of the Lancet on marriage as a social determinant of health is not unique to the global trends: nations that adopted SSM typically experienced a positive change in the mental-health outcomes of LGBT citizens, which the policy-makers of India can take into consideration when considering similar changes.

Lastly, the corporate LGBT inclusion in India is at the early stage of the culture and law-based diversification, unlike in the Western economies where the inclusion of LGBT is a systematic and discussed issue among companies. In fact, a worldwide survey indicates that Indian companies are somewhat behind western counterparts in offering express LGBT benefits (because of the weaker legal requirement) but multinationals based in liberal nations have exported some of the best practices.

V. Findings and Suggestions

The main point of our analysis is that decriminalization of homosexuality was needed and not enough to achieve complete equality. The constitutional rights of LGBTQ+ individuals are now positively embraced in the Indian laws (Articles 14, 15, 19, 21), and the achievement of the constitutional rights is conditional on the supportive laws and policies. The identified gaps are as follows: the lack of a clear anti-discrimination law that would address sexual orientation and gender identity; the legal frameworks of family that do not recognize LGBTQ+ families as marriage, adoption, and reproductive services; and the prevalence of

the stigma that hinders health and social welfare. These problems are interrelated; to give just a few examples, when we deny people with different sexual orientations the right to marry, we harm their mental health (as the Lancet has declared and described it as a significant barrier to equality²⁰⁰⁵) and when we deny them protections at work, we subject LGBT people to economic insecurity (as reported by ICJ).

To eliminate these gaps, we suggest a number of real recommendations:

- **Pass Comprehensive Anti-Discrimination Legislation:** After Johar confirmed that sexual orientation/gender identity is also a matter of equality, the Parliament must enact an equality law or amend the anti-bias laws to state that the discrimination based on these attributes is prohibited. This would be applicable in employment, education, housing and services. This law should be encompassed in the government and the industry. Exactly this is what the ICJ report recommends: a comprehensive anti-discrimination law against discrimination based on sexual orientation and gender identity. Meanwhile, regulators may provide guidance (as they have done with disability or caste) asking companies and government agencies to incorporate SOGI in their diversity policy.
- **Explain Employment Rights:** Non-discrimination guaranteed by the Transgender Persons Act needs to be strengthened. The government must provide clarifications and educate employers that the Section 18(1) of the Act that prohibits discrimination in "recruitment, employment" is applied horizontally to both private- and government-owned firms. Positively, the recent Supreme Court decision of Kaushik ruled that it is unjust to fire an employee just because of his or her

transgender status. The government can expand on this by asking agencies and courts to interpret labour laws in favour of extensive non-discrimination and by encouraging inclusive workplace certifications.

- **Reform Family Laws:** The discrepancy between constitutional equality and laws needs to be resolved. In the case of marriage, Parliament ought to change the Hindu Marriage Act, Special Marriage Act and similar acts to either gender-neutral or an open definition of marriage. This is the legislative pathway that will enable the same-sex unions to be legally recognized considering the deference shown by the Supreme Court. (Meanwhile, rights groups could keep suing HMA/SMA in courts, but approval would fix equality) To be adopted, the National Adoption guidelines need to be changed to permit joint adoption by same sex and unmarried couples since the Bombay HC implicitly did. The adoption law (HAMA and JJ Act) needs to be changed or redefined such that marital status and orientation do not act as a hindrance. Similarly, the laws on surrogacy and ART must be liberalized: they ought to be modified to cover also the intending parents of all sexual orientations so that the constitutional right to life and dignity also incorporates the right of forming the family. These reforms would bring the domestic law in line with the main principle of Johar that LGBT individuals are equal citizens of the Constitution.
- **Enhance Health Equity:** The government and medical facilities should take an initiative to do away with stigma. The Ministry of Health may give orders (or guidelines) to the medical colleges to include LGBT health in the curriculum, and the hospitals to establish non-discrimination policies. A gender-affirming healthcare model is a

²⁰⁰⁵ Supra note 8.

particular need that is particularly pressing: government hospitals are to provide gender-affirming operations and mental-health assistance without any discrimination. The Union government ought to lift any outstanding stigmatizing prohibitions on blood donation (such as reconsidering trans exclusions based on the latest epidemiological data). Moreover, the sexual health counseling and the anti-homophobia training of the healthcare workers would be a direct answer to the problem Justice Malhotra revealed in Johar. LGBTQ should be LGBTQ-inclusive in mental health services and community support programs should be extended.

- Education and Sensitization: The reforms of the law should be accompanied by the change of the society. The request to sensitize, that is, to train police and officials about LGBT rights, has been made several times by courts (e.g., Justice Nariman) asked to do so). This must go to schools, work place and in the media. Hostility can be decreased through diversity training in police academies, government offices, and other private organizations. Awareness can be created by public education campaigns (through government or non-governmental organizations) that homosexuality is no longer a crime and that discrimination cannot occur in the line of reasoning by Johar. It should also be intended to achieve the hope of the Johar court that the stigma against being LGBT is eliminated by widespread publicity.
- Courts and Administrative Action: Courts and bureaucracies in the absence of quick legislation can make interim measures. As an example, judicial implication of world trends might permit limited relief: the adoption decision of the Bombay HC might be taken to be

precedent on other parties. Orders by administrative authorities (CARA adoption body, School Boards, etc.) accepting same-sex parents in adoption or enrollment situations (as some schools allow same-sex parents to register themselves as such) could be issued. At least the government offices must eliminate the need to assume binary genders (e.g. a field on a form labeled husband/wife) and instead provide inclusive choices.

To sum up, the LGBTQ+ rights in India following 377 discriminations can be described as a landscape of formal advancement and continuous conflict. The courts have already wiped the immorality excuse of prejudice, and raised the equality of the LGBT to a constitutional right. However, achieving substantive equality – in health care, work, family life – will take the long-term legal and policy effort. We discover numerous reforms required are already being listed in reports and petitions (corporate D&I advocacy to wide-ranging bills suggested by UN agencies). The only thing that is left is to implement these insights in Indian institutions. Only in this case, LGBTQ+ Indians can make the promise of dignity and equality of citizenship, which finds its reflection in Johar, a reality.

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