

On the margins with full equality still out of reach

Despite judicial verdicts, India's sexual minorities face discrimination in employment, health issues and personal rights



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This year, the world woke up to June, pride month, gazing at the Google Doodle of Dr. Frank Kameny (1925-2011), an American astronomer, veteran, and gay rights activist. Kameny, in the early 1970s, 'successfully challenged the American Psychiatric Association's classification of homosexuality as a mental disorder'. The global LGBTQ+ community marched ahead after the 1970s. But in India, the queer community is still a stigmatised and invisible minority, a fact that is alarmingly incompatible with the country's living, liberal and inclusive Constitution.

The Constitution was conceived by India's founding fathers as a beacon of fundamental rights, leading once enslaved Indians to the promised land of life and freedom. Despite such a liberating Constitution, the Indian state and the law have been abusing and given many marginalised segments of the citizenry such as the queer community of India the cold shoulder.

Launch pad for jurisprudence

The Constitutional courtroom in post-colonial India became a space where the individual and the state could converse with each other. The meagre gains that the queer community won have been

granted by the judiciary; not by legislatures. In the book, *Sex and the Supreme Court: How the Law is Upholding the Dignity of the Indian Citizen* (2020), Saurabh Kripal observes: "In the tug of war between the demands of the traditional conception of society and the rights of individuals to their identity and dignity, the Supreme Court has come down firmly in favour of individual." The Supreme Court of India's ruling in *Navtej Singh Johar & Ors. vs Union of India* (2018), that the application of Section 377 of the Indian Penal Code (IPC) to consensual homosexual behaviour between adults was "unconstitutional, irrational, indefensible and manifestly arbitrary", has been a great victory to the Indian individual in his quest for identity and dignity. This judgment has provided a launch pad for the LGBTQ+ jurisprudence and queer liberation movement in India.

The Delhi High Court's verdict in *Naz Foundation vs Government of NCT of Delhi* (2009) was a 38th parallel in the law of sexuality and equality jurisprudence in India. The court held that Section 377 offended the guarantee of equality enshrined in Article 14 of the Constitution, because it creates an unreasonable classification and targets homosexuals as a class (<https://bit.ly/3A1kHBZ>). Earlier, in a retrograde step, the Supreme Court, in *Suresh Kumar Koushal vs Naz Foundation* (2013), reinstated Section 377 to the IPC. But India witnessed the anastasis of Naz Foundation through the top court's judgment in *Navtej Singh Johar & Ors.* with an embedded firewall of the doctrine of progres-



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sive realisation of rights.

Despite the judgments of the Supreme Court, full equality is still a pie in the sky for the queer community in India. In matters of employment, health and personal relationship, there is still a lot of discrimination against sexual minorities. It is only when these problems are adequately addressed that the LGBTQ+ community will be able to enjoy full autonomy and agency.

Legal sanction opposed

The Union of India has recently opposed any move to accord legal sanction to same-sex marriages in India stating that the decriminalisation of Section 377 of the Indian Penal Code does not automatically translate into a fundamental right for same sex couples to marry.

This was stated in response to the Delhi High Court notice to a plea by LGBTQ+ activists and couples who sought recognition of same-sex marriages. Justice Anthony Kennedy of the U.S. Supreme Court, in *Obergefell vs Hodges* (2015) underscored the emotional and social value of the institution of marriage and asserted that the universal human right of marriage should not be denied to a same-sex couple. As of 2021, same-sex marriage is legally performed and recognised in 29 countries. Indian society and the state should syn-

chronise themselves with changing trends.

Amend Article 15

Article 15 secures the citizens from every sort of discrimination by the state, on the grounds of religion, race, caste, sex or place of birth or any of them. This Article is the cornerstone of the concept that equality is the antithesis of discrimination. Imbibing the zeitgeist, the grounds of non-discrimination should be expanded by including gender and sexual orientation. In May 1996, South Africa became the first country to constitutionally prohibit discrimination based on sexual orientation. Section 9(3) of its Constitution dictates that state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Let Gandhiji's nation learn from Mandela's nation!

The United Kingdom passed the "Alan Turing law" in 2017 which 'granted amnesty and pardon to the men who were cautioned or convicted under historical legislation that outlawed homosexual acts'. The law, named after Alan Turing, a World War II code-breaker and computing genius, who was convicted of gross indecency in 1952, provided a 'posthumous pardon, also an automatic formal pardon for living people who had had such offences removed from their record'. To expiate the excesses committed against the LGBTQ+

community in the past and present, the Indian state should also enact a law on these lines to do justice to the 'prisoners of sexual conscience'.

Justice Rohinton F. Nariman had directed in *Navtej Singh Johar & Ors.*, the Government to sensitise the general public and officials, including police officials, to reduce and finally eliminate the stigma associated with LGBTQ+ community through the mass media and the official channels. But the Government has simply disregarded this obligation. School and university students too should be sensitised about the diversity of sexuality to deconstruct the myth of heteronormativity. Heteronormativity is the root cause of hetero-sexism and homophobia.

Rohit De illustrated, in his *A People's Constitution: The Everyday Life of Law in the Indian Republic* (2018), how laws and policies were frequently undone or renegotiated from below by the ordinary citizenry using constitutional remedies. He unfolded the stories of individuals from socially and economically marginalised sections such as prostitutes, butchers, refugees, and vegetable vendors who turned to the court for 'rewriting' the Constitution. However, for Queeristan, the Constitution has been 'a beautiful and ineffectual angel' so far. Hence, it is time for change; but the burden should not be left to the powers that be. The onus remains with the civil society, the citizenry concerned and the LGBTQ+ community itself.

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