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THE ARCHITECTURE OF AMBIVALENCE: LAW, THE QUEER COMMUNITY, AND THE STRUCTURAL CONTRADICTIONS OF RIGHTS RECOGNITION IN INDIA

Anupriya Kumari*

Abstract

India's legal framework for queer persons is defined by a paradox that this article terms "architected ambivalence": the state has progressively extended constitutional recognition to queer identity through landmark decisions from *NALSA v. Union of India* (2014) to *Navtej Singh Johar v. Union of India* (2018) and *Supriyo v. Union of India* (2023), while simultaneously constructing a legislative architecture that contradicts, erodes, or simply refuses to implement what those decisions require. The article argues that this pattern is not a failure of implementation but a structurally coherent arrangement constituted by three features: doctrinal abundance alongside legislative poverty, a systematic asymmetry by which the state has been willing to decriminalise queer identity but unwilling to extend the civil infrastructure that makes that identity liveable, and epistemic erasure at the implementation stage by which transformative judicial directions are hollowed out through administrative and legislative processes. Drawing on the critical scholarship of Narrain, Gupta, Jain, and Agarwal, and examining the replacement of the Indian Penal Code by the Bharatiya Nyaya Sanhita in 2024 and the Transgender Persons Amendment Bill of 2026, the article demonstrates that the most consequential recent developments for queer persons in India have been legislative retreats, not constitutional advances. The article concludes with a critical legislative programme aimed at bridging the gap between constitutional doctrine and lived reality.

Keywords – Constitutional morality; Queer rights jurisprudence; Transgender Persons Act; Bharatiya Nyaya Sanhita; Architected ambivalence.

I. Introduction: The Problem of Recognition without Architecture

The literature on LGBTQIA+ rights in India has, in recent years, produced a substantial body of scholarship that can be loosely organised around two poles. One strand, broadly associated with the work of Narrain, Gupta, and the Alternative Law Forum, traces the litigation trajectory of queer rights as a movement from criminality to citizenship, emphasising the constitutionalising of sexual orientation as a matter of dignity and liberty.¹ A second, more critical strand, associated with Jain's work on epistemic injustice, Dutta and Roy on decolonising transgender, and Agarwal on the

* ICSSR Doctoral Fellow, Department of Law & Governance, Central University of South Bihar, Gaya, anupriya@cusb.ac.in.

¹ See generally Arvind Narrain, *Queer: Despised Sexuality, Law and Social Change* (Books for Change 2004); Arvind Narrain and Alok Gupta (eds), *Law Like Love: Queer Perspectives on Law* (Yoda Press 2011).

possibilities and limits of family law reform, has pressed the question of whether legal recognition, on the terms the Indian state has offered it, translates into substantive equality or merely organises exclusion within a more sophisticated vocabulary.²

This article joins the second strand, but with a specific analytical contribution: it argues that the gap between the constitutional doctrine on queer rights and the legislative and executive architecture that is supposed to implement it is not accidental. It is structurally produced. Three specific mechanisms generate this gap, and each is examined in turn: (i) the judicial-legislative disjunction, in which transformative constitutional judgments are followed by statutes that contradict rather than implement them; (ii) the BNS vacuum, in which the 2024 replacement of the IPC created a deliberate legal void in the protection of queer persons from sexual violence; and (iii) the limits of constitutional morality as a rights-producing concept, which has been available to protect queer persons from the state but withheld when applied to the family as a site of violence.

Together, these three mechanisms constitute what the article calls “*architected ambivalence*”: not an incomplete project of inclusion, but a structurally coherent arrangement that places certain forms of queer dignity beyond contestation while maintaining the material conditions of queer precarity.

II. The Colonial Prologue and the litigation turn

Any critical account of the current legal landscape must begin with the question that Gupta posed in the *Economic and Political Weekly* in 2006: is Section 377 of the Indian Penal Code merely a prohibition on certain sexual acts, or does it constitute a wholesale criminalisation of homosexual identity?³ Gupta’s answer, developed through careful analysis of how Indian courts applied Section 377 in *Lohana Vasantlal* and subsequent decisions, was unambiguous: the provision had become, through its judicial interpretation, synonymous with the identity of the homosexual person, such that decriminalisation was not merely about a right to private conduct but about restoring the dignity of the homosexual as a full human being, capable of public legal existence.⁴

Section 377 was not merely a law about anal sex alone but applied to homosexuality in general. The lack of a consent-based distinction in the offence had made homosexual sex synonymous with rape and equated homosexuality with sexual perversity.⁵ Gupta’s analysis is significant not only for its doctrinal precision but for its political prescience: it argued that decriminalisation would open the “Pandora’s Box” of associated rights for equal recognition, an argument that proved accurate, and whose accuracy subsequently became itself a reason for political resistance to marriage equality.

The litigation history that followed is well-documented. The Naz Foundation’s challenge before the Delhi High Court in 2009, framed strategically as a public health issue before expanding into

² See Dipika Jain and Kimberly M Rhoten, ‘Epistemic Injustice and Judicial Discourse on Transgender Rights in India’ 26(1) *Journal of Human Values* (2020); Aniruddha Dutta and Raina Roy, ‘Decolonizing Transgender in India: Some Reflections’ 1(3) *TSQ: Transgender Studies Quarterly* 320 (2014); Akshat Agarwal, ‘LGBT+ Rights Claims for Marriage Equality and the Possibilities of Transforming Indian Family Law’ 21(4) *International Journal of Constitutional Law* 1116 (2023).

³ Alok Gupta, ‘Section 377 and the Dignity of Indian Homosexuals’ 41(46) *Economic and Political Weekly* 4815 (2006).

⁴ *Id* 4822.

⁵ *Id* 4815.

constitutional rights claims, a framing that Narrain has described as constitutively important to the court's receptivity,⁶ produced the first reading down of Section 377 against the twin axes of constitutional morality and the right to privacy.⁷ The Supreme Court's reversal in *Suresh Kumar Koushal v Naz Foundation* (2014), dismissing the rights claims of queer persons on the grounds that they constituted a "miniscule minority," drew criticism that went to the analytical foundations of constitutional adjudication.⁸ Rights are not distributed by demography, and the court's numerical reasoning represented a category error about what fundamental rights protection requires.

The Puttaswamy judgment (2017) reopened the constitutional terrain decisively.⁹ Justice Chandrachud's concurring opinion identified Koushal as unsustainable in light of the right to privacy, and several judges explicitly noted that sexual orientation falls within the protected sphere of intimate autonomy. This set the conditions for *Navtej Singh Johar v Union of India* (2018), in which a five-judge Constitution Bench unanimously read down Section 377, producing four concurring opinions.¹⁰ The court deployed constitutional morality as a trump over social morality, recognised sexual orientation as an attribute of identity protected under Articles 14, 15, 19, and 21, and applied the doctrine of substantive equality rather than merely formal non-discrimination. Justice Indu Malhotra's apology to the community "on behalf of history" marked a doctrinal acknowledgement that the constitutional violation had been ongoing, not merely historic.

III. The NALSA Judgment and its legislative betrayal

NALSA's significance in the jurisprudence of gender identity is difficult to overstate. The two-judge bench's recognition of transgender persons as a third gender entitled to constitutional protections under Articles 14, 15, 16, 19, and 21, and, critically, the direction that self-identification of gender is both a fundamental right and an attribute of personal autonomy under Article 21, placed India among the most progressive jurisdictions globally on transgender legal recognition, pre-dating analogous developments in many Western countries.¹¹

Yet as Jain and Pillai demonstrated empirically in their 2018 study published in the Socio-Legal Review, the implementation of NALSA's directives across Indian states was characterised by what they called "bureaucratisation": a process by which the transformative content of the judgment was progressively hollowed out through administrative procedures that substituted state gatekeeping for the self-determination the judgment mandated.¹² States responded to RTI queries about NALSA implementation with contradictory, incomplete, and frequently deceptive information. The gap between the court's vision and the state's administrative reality was not a failure of good faith implementation but a structural feature of how the Indian state responds to constitutional directions it finds politically inconvenient.

⁶ Arvind Narrain, 'A New Language of Morality' 2 *E.B.C. Law Journal* 1 (2009).

⁷ *Naz Foundation v Govt of NCT of Delhi* MANU/DE/0869/2009

⁸ *Suresh Kumar Koushal v Naz Foundation* 2013 INSC 1096

⁹ *Justice K.S. Puttaswamy (Retd) v Union of India* 2017 INSC 801

¹⁰ *Navtej Singh Johar v Union of India* 2018 INSC 790

¹¹ *National Legal Services Authority v Union of India* 2014 INSC 275

¹² Dipika Jain and Gauri Pillai, 'Bureaucratization of Transgender Rights: Perspective from the Ground' 14(1) *Socio-Legal Review* 98 (2018).

The Transgender Persons (Protection of Rights) Act, 2019 institutionalised this betrayal at the legislative level.¹³ Section 5 of the Act, requiring a Certificate of Identity from a District Magistrate for legal gender recognition, directly contradicted NALSA's direction on self-identification. For recognition as male or female, as distinct from "transgender", the Act required proof of surgery or medical intervention, reimposing the medical gatekeeping that NALSA's reference to self-determination was designed to eliminate. The penalties for violations under Section 18, a maximum of two years' imprisonment, classified as bailable and non-cognisable, contrasted sharply with protections available to other categories of victims under criminal law. As Jain observed in her analysis of the Act's health provisions, the legal framework for gender recognition stripped transgender persons of their right to self-determination by establishing complex bureaucratic processes in place of the autonomy the court had declared fundamental.¹⁴

IV. *Supriyo v Union Of India* (2023): Constitutional Morality and its Operational Limits

The marriage equality litigation produced, in *Supriyo @ Supriya Chakraborty v Union of India* (2023), the most ambitious constitutional engagement with queer rights in Indian judicial history, and the most revealing illustration of the operational limits of constitutional morality as a rights-producing concept.¹⁵

Agarwal's analysis in the International Journal of Constitutional Law provides the most sophisticated pre-*Supriyo* account of the transformative potential and limitations of marriage equality litigation.¹⁶ His argument, that focusing on marriage need not be assimilationist but may create greater space for the recognition of non-normative family configurations, challenged the dominant binary of assimilation versus transformation in queer legal scholarship. The more significant insight was structural: Indian family law is built on a patriarchal conception of the family in which the man is assumed to be the breadwinner and the woman confined to household labour. Recognition of same-sex marriages would necessarily disrupt this architecture, not merely add a new category within it. This is why, as Agarwal argued in his commentary on *Verfassungsblog*, the *Supriyo* litigation was always more than a question about who can marry: it was a question about the state's relationship to the family as a site of social organisation.¹⁷

The *Supriyo* judgment produced four separate opinions. Chief Justice Chandrachud's minority opinion, the most progressive, held that queer couples possess a fundamental right to intimate association under Article 21, that the state has a constitutional obligation to recognise such relationships, and that restrictions on joint adoption by queer couples violate Article 15.¹⁸ Justice Bhat's majority opinion held that creating new legal institutions falls within the legislature's

¹³ Transgender Persons (Protection of Rights) Act 2019, No 40 of 2019.

¹⁴ Dipika Jain, 'Right to Health and Gender Affirmative Procedure in the Transgender Persons Act, 2019 in India' 55(2) Indian Journal of Plastic Surgery 205 (2022).

¹⁵ *Supriyo @ Supriya Chakraborty v Union of India* (2023) SCC OnLine SC 1348, 2023 INSC 920 [hereinafter *Supriyo*].

¹⁶ Agarwal (n 2) 1116.

¹⁷ Akshat Agarwal, 'Marriage Equality at the Doors of the Indian Supreme Court' *Verfassungsblog* (24 May 2023) <<https://verfassungsblog.de/marriage-equality-at-the-doors-of-the-indian-supreme-court/>>.

¹⁸ *Supriyo* (n 15) Chandrachud CJI (minority op).

authority and that courts cannot direct Parliament to establish recognition frameworks.¹⁹ The unanimous outcome, rejection of marriage equality, concealed a profound disagreement about what constitutional morality requires at this threshold.

The majority's reasoning deserves critical attention that it has not always received. The holding that there is no fundamental right to marry, applicable to all persons, created a doctrinal tension with the court's own precedent in *Shafin Jahan v Asokan K.M.* (2018) and *Shakti Vahini v Union of India* (2018), where the court held that the right to choose a life partner is integral to Article 21 and cannot be curtailed except through just and reasonable law.²⁰ The majority in *Supriyo* distinguished these precedents by drawing a line between the right to choose a partner (constitutionally protected) and the right to formalise that partnership (not constitutionally protected). As the Centre for Law and Policy Research observed, this distinction is analytically incoherent: if choosing a partner is an aspect of personal liberty that cannot be curtailed, the denial of the legal framework through which that choice achieves civic recognition amounts to a state-imposed incapacity difficult to reconcile with the liberty jurisprudence the court itself built.²¹

The more fundamental problem is what *Supriyo* does to constitutional morality as a concept. In *Navtej*, constitutional morality operated as a transformative principle that allowed the court to override social morality in the protection of a minority's fundamental rights. In *Supriyo*, the majority invoked the separation of powers and legislative supremacy to decline the same operation at the threshold of relationship recognition. The question this raises, which Indian constitutional scholarship has not yet adequately addressed, is whether constitutional morality is a principle of general application or a concept selectively deployed by the majority. The answer that emerges from the majority opinion is troubling: constitutional morality appears to be available to protect queer persons from criminal law but unavailable to require the state to extend the civil legal infrastructure within which equal citizenship becomes materially possible.

Agarwal's subsequent analysis of *Supriyo* in the *Indian Law Review* locates this outcome within the *longue duree* of Indian family law as a site of tension between the state and religious communities over the authority to define the family.²² The majority's deference to the legislature in *Supriyo* is, on this reading, not primarily about the institutional limits of judicial power but about the political history of family law in India, in which personal religious laws have been insulated from constitutional challenge in ways the court has historically been unwilling to disturb.

V. The BNS and the deliberate void

The replacement of the Indian Penal Code by the *Bharatiya Nyaya Sanhita*, effective July 1, 2024, produced what is arguably the most analytically significant and least analysed development in the legal landscape for queer persons in the post-*Navtej* period. Its significance lies not in what it does

¹⁹ *Id* (Bhat J, majority op).

²⁰ *Shafin Jahan v Asokan KM* 2018 INSC 222

2018 INSC 266

²¹ Centre for Law and Policy Research, 'Supriyo and the Fundamental Right to Marry' (November 2023)

<<https://clpr.org.in/blog/supriyo-and-the-fundamental-right-to-marry/>>.

²² Akshat Agarwal, 'Supriyo and the Politics of Indian Family Law' 9(2) *Indian Law Review* (advance access 2025).

but in what it chooses not to do, and that choice is more damning than any legislative omission that preceded it.

Section 377 of the IPC, decriminalised by Navtej in its application to consensual adult conduct, had, in its residual post-Navtej form, served an important protective function: it provided the only available statutory basis for prosecution of sexual assault against adult male and transgender victims. Section 375 IPC (rape) was defined in strictly gendered terms, requiring a male perpetrator and female victim. Section 377, even in its reading-down, captured non-consensual carnal intercourse against persons other than cisgender women. The Parliamentary Standing Committee on Home Affairs, in its November 2023 report, had specifically recommended retaining Section 377 for non-consensual acts precisely because the gendered definition of rape left this protection vacuum.²³ That recommendation was rejected.

The BNS contains no equivalent to Section 377. Section 63 BNS defines rape as an offence committed by a man against a woman. Section 2(9) BNS defines “gender” to include transgender persons, but the sexual offence provisions remain organised exclusively around the female victim.²⁴ The result is that an adult gay man or transgender man subjected to sexual assault is left with Section 115(2) BNS (causing hurt, maximum one year, bailable and non-cognisable) or Section 18 of the Transgender Persons Act (sexual abuse, maximum two years, also bailable and non-cognisable). The contrast with Section 64 BNS (punishment for rape, minimum ten years, cognisable and non-bailable) is not simply one of quantum: the procedural difference determines whether a perpetrator can be arrested without warrant and detained pending trial. For queer victims of sexual assault, the current framework means that the perpetrator’s liberty is structurally more protected than the victim’s physical security.²⁵

This is not a colonial inheritance. The IPC was indeed a colonial instrument, and the BNS was presented as its decolonised replacement. But the gendered definition of rape was present in the IPC long before the BNS, and the Justice Verma Committee in 2013 explicitly recommended gender-neutral rape provisions.²⁶ The BNS, drafted entirely afresh in 2023, had every opportunity to implement this recommendation. It chose not to. The gendered definition of rape in the BNS is therefore not an inherited limitation but a deliberate contemporary legislative decision to exclude certain victims from the full protection of sexual violence law, a decision made with full knowledge of the protection vacuum it would create. Senior Advocate Vrinda Grover observed: “By the deletion of Section 377, there will be a gap in the law in so far as legal protection for adult males and trans persons against sexual violence is concerned.”²⁷ The government was warned. It proceeded regardless.

²³ Parliamentary Standing Committee on Home Affairs, Report on the Bharatiya Nyaya Sanhita (November 2023).

²⁴ Bharatiya Nyaya Sanhita 2023, ss 2(9), 63, 64 [hereinafter BNS].

²⁵ The Leaflet, ‘What Do the New Criminal Codes Mean for Queer People?’ (6 November 2024) <<https://theleaflet.in/what-do-the-new-criminal-codes-mean-for-queer-people>>.

²⁶ Report of the Committee on Amendments to Criminal Law (Justice JS Verma, Chair) 414-418 (23 January 2013).

²⁷ Outlook India, ‘Castaway: New Criminal Code Fails to Address Same-Sex and Transgender Sexual Violence’ (1 July 2024) (quoting Vrinda Grover, Senior Advocate).

VI. The Transgender Persons Amendment Bill, 2026: Regression Institutionalised

The trajectory from NALSA (2014) through the Transgender Persons Act (2019) to the Amendment Bill (2026) is instructive as a case study in legislative regression. NALSA mandated self-identification; the 2019 Act substituted bureaucratic certification. NALSA directed reservations; the 2019 Act provided none. The 2026 Bill, introduced in the Lok Sabha on March 13, 2026, proposes to complete this regression by eliminating the definitional basis that makes the 2019 Act applicable to the population it is supposed to protect.²⁸

The Bill's key move is structural: it removes the 2019 Act's definition of a transgender person as "a person whose gender does not match with the gender assigned at birth" and substitutes a closed list of enumerated categories, kinner, hijra, aravani, jogta, eunuch, and persons born with medically recognised intersex variations. This substitution has three analytically significant consequences. First, it eliminates self-identification as a legal principle: the Bill's proposed Section 4 makes certification through a medical board headed by a Chief Medical Officer the gateway to legal recognition, replacing self-declaration with medical gatekeeping in direct violation of NALSA.²⁹ Second, the closed categorical list erases transgender men, non-binary persons, genderqueer individuals, and the regional and transregional communities whose identities, *mangalmukhi*, *nupi maanbi*, *thirunangai*, *dhurani*, *khwaja sira*, *kothi*, are not captured in the Bill's restricted taxonomy.³⁰ Third, the new Section 18 creates an offence of "alluring or forcing" a person to become transgender, carrying five years' imprisonment, a provision that, as community organisations have documented, could be deployed against *deras* and *gharanas* (traditional transgender community support structures), organisations providing welfare services to transgender youth, and parents supporting their child's gender-affirming care.³¹

The Supreme Court advisory committee convened under former Delhi High Court Justice Asha Menon described the Bill as a "great shock" and "tremendous setback," conveying to the Social Justice Minister that the proposal to deny self-identification was inconsistent with the NALSA ruling.³² This institutional response reveals the extent of the judicial-legislative conflict: the committee, created by the Supreme Court to monitor NALSA's implementation, found itself opposing legislation introduced by the executive branch in the same constitutional system that produced NALSA.

If enacted, the Amendment Bill would impose a legal definition of transgender identity more restrictive than that used in the Criminal Tribes Act, 1871, the colonial statute that first criminalised the hijra community as a class.³³ Where the 1871 Act at least captured in its coercive gaze a broad

²⁸ Transgender Persons (Protection of Rights) Amendment Bill 2026 (Lok Sabha, introduced 13 March 2026), cl 3.

²⁹ NALSA (n 11) paras 120-129.

³⁰ The Leaflet, 'Architecture of Erasure: How the Trans Amendment Bill 2026 Erases Those It Claims to Protect' (2026) <<https://theleaflet.in>>.

³¹ *Id.*

³² Washington Blade, 'Amendments to India's Transgender Rights Law Criticized' (7 April 2026) <<https://www.washingtonblade.com>>.

³³ Criminal Tribes Act 1871, ss 1-27 (repealed); Jessica Hinchy, *Governing Gender and Sexuality in Colonial India: The Hijra, c.1850-1900* (Cambridge University Press 2019).

and diverse set of gender-variant persons, the 2026 Bill's enumerated list would exclude many of those same persons from the legal protection of a statute nominally designed for their benefit. This is not an unintended consequence. It is the point.

VII. Family Violence and the State's Strategic Silence

Supriyo's most important, and most overlooked, finding is the court's explicit identification of the natal family as a primary site of violence against queer persons. The judgment acknowledged documented patterns of physical and sexual violence, emotional and psychological abuse, and the use of natal family authority to prevent queer adults from maintaining relationships, all occurring with, in many cases, the active connivance of the police.³⁴

This finding should have produced legislative consequence. It has not. No statutory mechanism was created to enforce the court's direction that police cannot compel queer persons to return to their natal families. No specific shelter legislation has been enacted for LGBTQ+ persons made homeless by family rejection. Conversion therapy, banned for licensed medical professionals by the National Medical Commission in 2022 following the Madras High Court's direction in *S Sushma v Commissioner of Police*,³⁵ remains entirely unaddressed by legislation, such that religious practitioners, family members, and informal networks can conduct conversion practices against queer persons, including minors, without any criminal exposure. As Jain and Rhoten have observed in their work on the heteronormative state and the right to health, the Indian state's treatment of queer persons' healthcare needs has been characterised by a persistent refusal to acknowledge the family as a site of medical harm.³⁶

The legal position of a queer adult made homeless by family rejection, subjected to conversion practices, and denied property rights on the intestate death of their partner is remarkable in its comprehensiveness. Such a person cannot invoke any statute that addresses their homelessness as a function of sexual orientation; has no statutory remedy for conversion therapy conducted by non-medical actors; possesses no inheritance claim on their partner's estate; cannot make medical decisions on behalf of an incapacitated partner; and cannot jointly adopt a child. Each of these incapacities is distinct from decriminalisation, which said only that the state will not prosecute. The civil legal framework responds: but it will not protect either.

VIII. The Doctrinal Architecture of Ambivalence: A Synthesis

Drawing the preceding analysis together, "architected ambivalence" can be defined with analytical precision as a condition in which three structural features co-exist.

The first is doctrinal abundance with legislative poverty. The Supreme Court's jurisprudence on queer rights is, by any comparative standard, sophisticated and progressive: it has deployed

³⁴ Supriyo (n 15) Chandrachud CJI (minority op) (noting natal family and police as primary actors in violence against queer persons).

³⁵ *S Sushma v Commissioner of Police* W.P. No. 7284 of 2021

h J).

³⁶ Dipika Jain and Kimberly M Rhoten, 'The Heteronormative State and the Right to Health in India' 7(1) *NUJS Law Review* (2015).

constitutional morality, transformative constitutionalism, the right to dignity, substantive equality, and the right to privacy in the service of queer rights recognition. The legislative architecture that should implement this jurisprudence is comparatively sparse, contradictory, and in several respects regressive. The gap between doctrine and legislation is structural, produced by a political economy in which judicial rulings on queer rights generate insufficient legislative cost for parliamentarians to bear.

The second is protection asymmetry by domain. The legal framework protects queer persons most robustly from criminal law, the state acting as prosecutor, and least robustly in the domains of family violence, sexual violence, civil status, and economic rights. This asymmetry is not random: decriminalisation is the cheapest form of rights recognition (it requires only that the state withdraw), while civil rights recognition requires affirmative legal architecture that reallocates resources and disturbs existing social arrangements. The state has been willing to bear the cost of the former; it has systematically declined to bear the cost of the latter.

The third is epistemic erasure at the implementation stage. Jain and Rhoten's concept of epistemic injustice, the process by which gender diverse litigants must mould their claims into normative legal categories that erase their lived experience, operates not only in courts but in the bureaucratic structures that implement judicial directions.³⁷ NALSA's direction on self-identification was epistemically transformed, through the implementation process, into a certification procedure that reimposed precisely the medical authority over gender that the judgment was designed to displace. The 2026 Amendment Bill proposes to institutionalise this epistemic erasure at the statutory level, replacing the lived diversity of gender-variant experience with a closed administrative taxonomy.

IX. Towards a Critical Legislative Programme

The foregoing analysis produces not a counsel of despair but a clarification of the appropriate sites and forms of legal intervention. Recognising that architected ambivalence is structurally produced rather than accidentally assembled suggests that piecemeal remedies addressing individual gaps are insufficient. What is required is a legislative programme that addresses the structural asymmetry, extending the state's affirmative legal architecture into the domains of family, sexual violence, civil status, and economic rights.

The most immediate priority, with the strongest doctrinal foundation, is gender-neutral sexual violence law. The gendered structure of Section 64 BNS, deliberately excluding male and transgender victims from the full protection of rape law, has no constitutional justification: the equal protection guarantee of Article 14 and the right to bodily integrity under Article 21 apply regardless of gender. A petition challenging this provision on these grounds is constitutionally well-founded and would be unlikely to survive scrutiny before a Constitution Bench.

Withdrawal of the Transgender Persons Amendment Bill, 2026 is a matter of constitutional compulsion. The Bill's elimination of self-identification and imposition of medical gatekeeping cannot be reconciled with NALSA's holding that self-identification is a fundamental right under

³⁷ Jain and Rhoten (n 2).

Article 21; any enacted version of it would face immediate constitutional challenge with strong prospects of success.

Beyond these immediate priorities, this article endorses the framework proposed by Agarwal, which suggests that the focus of queer legal advocacy must shift from rights-claiming within existing legal institutions to the transformation of those institutions.³⁸ Agarwal's central insight, that marriage equality, if framed correctly, has the potential to transform Indian family law's patriarchal structure rather than merely assimilate queer persons within it, suggests a legislative programme that addresses the civil legal disabilities of queer persons not as a supplement to marriage equality but as an alternative path to family recognition, including civil unions, chosen-family recognition, relationship registration schemes, and the extension of succession, medical decision-making, and adoption rights to non-marital relationships.

Such a programme would require political mobilisation that extends beyond litigation. As Agarwal has observed, judicial decisions not followed by legislative and political consensus remain constitutionally fragile.³⁹ The work is to build the political and social conditions in which legislative actors have reason to act.

X. Conclusion

India's constitutional jurisprudence on queer rights has generated a body of doctrine that is, in its analytical range and moral ambition, among the most impressive in comparative constitutional law. The problem is not the doctrine. The problem is its relationship to the institutional environment in which it operates.

Gupta's observation in 2006, that decriminalisation would open the Pandora's Box of associated rights, was correct. The question was always what would emerge from that box, and in what sequence. What has emerged is a precise calibration: constitutional recognition at the level of identity (the state will not prosecute you for your existence), denial at the level of relationship (your relationship has no legal status), void at the level of bodily security (if you are assaulted, the law does not have adequate words for what was done to you), and regression at the level of transgender legal status (you may soon be defined out of existence by the very statute designed to protect you).

Narrain observed that Navtej established a new language of morality for thinking about queer rights in India.⁴⁰ What this article has tried to demonstrate is that the new language of morality inhabits a state apparatus that continues to speak, in its legislative and administrative registers, the old language of exclusion. The task for scholars, advocates, and constitutional actors is to translate the new language into legislative architecture, to build, from the doctrine that has been won, the institutions that make it real. Architected ambivalence is not inevitable. It is a political choice. And political choices can be changed.

³⁸ Agarwal (n 2) 1133-1138.

³⁹ Agarwal (n 17).

⁴⁰ Narrain (n 6).