

# The Fabulous and the Fascist

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The last ten years have witnessed the gradual collapse of democracy and constitutionalism in India. In its first term (2014–19), the Narendra Modi government went about incrementally dismantling each institution meant for establishing executive accountability, thereby killing the Constitution [with a thousand cuts](#). Indeed, given the spate of censorship, preventive detentions, internet bans, invocation of sedition and terrorism charges against all forms of dissent and the general climate of curtailed liberty that India has witnessed in the last decade, it is not an exaggeration to say that it is going through an “[undeclared emergency](#)”. And while it is true that Modi’s authoritarianism has [deep roots](#) in India’s constitutional order that favors the concentration of power and facilitates its use by the executive, it is equally true that under Modi, the targeted exclusion of Muslims from all spheres of public life has confirmed India’s status as a [majoritarian ethnic democracy](#).

Where do LGBT rights figure in all this? There is some basis for asking this question. Illiberal and autocratic governments in different parts of the world have been making attacks on LGBT rights “[a central pillar of their political agendas](#)”. The Williams Institute, a US-based LGBT think tank, points at [correlations](#) between the erosion of democratic norms and institutions and anti-LGBT sentiments. Similarly, Human Rights Watch, the eminent human rights organization, notes how targeting LGBT rights can be seen everywhere as part of the “[authoritarian playbook](#)”. So, if India exemplifies the “[global democratic recession](#)”, and if the undermining of LGBT rights by authoritarian governments is also a global trend, then does India belong to the latter as well? What gives further reason to pursue this question is that in October 2023, the Supreme Court of India turned down a plea for legal recognition of same-sex marriage — something that the union government had opposed. The Supreme Court has aided the Modi government’s [consolidation](#) of [autocratic](#) power by evading crucial constitutional questions and allowing itself to be used by the government to sanctify its majoritarian agenda. Was the marriage equality verdict yet another example of the Court’s deference to the Modi government?

## Rainbow Decade

The last decade is marked by key milestones in the history of LGBT rights mobilization in India: the Supreme Court’s 2014 judgment in *National Legal Services Authority v Union of India (NALSA)*, which declared transgender people’s right to legal identity; the Court’s 2018 judgment in *Navtej Johar and Others v Union of India (Navtej)*, where it decriminalized sodomy; the enactment of the Transgender Persons Protection of Rights Act, 2019 (TG Act) which provided mechanisms for state recognition of trans identities and non-discrimination in various spheres; and the above-mentioned marriage equality judgment in *Supriyo Chakraborty and Others v Union of India (Supriyo)* in 2023. But in between these “milestones”, there have also been other legal developments: the [exclusion](#) of LGBT people from new laws

regulating surrogacy and assisted reproductive technologies (2021); the Telangana High Court striking down the colonial era [Telangana Eunuchs Act](#) (2023); and numerous instances of different High Courts upholding adult LGBT couples' right to [live together](#), free from interference from their families or the police.

As this cursory survey shows, there have been both legal wins and losses. But as I hope to show below, whether positive or negative, LGBT experiences with the state in the last decade are peripheral to the crisis of constitutionalism sketched above. Below, I contextualize the wins and the losses and discuss why LGBT rights in India are not “under attack” as they have been under authoritarian governments elsewhere.

## Low-Hanging Fruits

Exactly a month before Modi came to power, in April 2014, a two-judge bench of the Supreme Court delivered an unexpectedly positive judgment in *NALSA*. The Court [held](#) that *hijras* (a traditional male-to-female transgender category) had the right to identify as the “third gender” for all official purposes and that all transgender persons had the right to choose how they wanted to be identified. The judges directed the government to make provisions for the legal recognition of trans persons in official documents and recognize the group as a “socially and economically backward class” for purposes of reservation to government education and employment for their social advancement. This was a surprising verdict since just four months earlier, in *Koushal v Naz Foundation*, a different bench of the Court had [reinstated](#) the criminalization of sodomy by overturning a 2009 Delhi High Court judgment.

*NALSA*, *in contrast*, showed the judges' willingness to use their constitutional authority to name and remedy the marginalization of transgender persons. And yet, beyond the façade of progressiveness, the judgement revealed the judges' lack of understanding of who the “transgender” was and confusion over how to remedy their marginalization. It contradicted its own much-hyped preference for “self-identification” by shoving hijras into the third gender category (many of them identify as women) and introducing a psychological test for the state to confirm their identification. The judgment has been rightly criticized for its implicit pathologization of [trans-ness](#). But equally, *NALSA* exemplifies all that is [wrong](#) with the Indian Supreme Court's style of adjudication: issuing orders that are so general that it is impossible to establish accountability for their implementation; flouting separation of powers by issuing orders that are legislative in character; endorsing the executive's proposals even without knowing what they were. These, as many have noted, are signs of a [populist court](#) that is eager to be seen as doing justice to the downtrodden rather than guarding against executive excesses, arguably the main role of a constitutional court.

Populism mars the Court's celebrated *Navtej* judgment of September 2018 as well. In a wordy judgment of 500 pages, a five-judge bench of the Court found the blanket criminalization of sodomy by section 377 of the Indian Penal Code to be unconstitutional and read it down to exclude adult consensual sex in private from its scope. While the verdict was sound and much overdue, once again, it was not the

best example of a constitutional court doing its job. For one, the government had not opposed the petition for decriminalization, just as the United Progressive Alliance government before it had not appealed the Delhi High Court's 2009 decriminalization verdict. As lawyer Nizam Pasha astutely noted: "section 377 was just a [low-hanging fruit](#) waiting to be plucked by a court increasingly conscious of its public image and the media reportage of its proceedings". Pasha goes on to list other cases decided by the Court during this period, which involved more contentious legal and constitutional questions, and where the Court repeatedly failed to hold the executive accountable.

## The Subtle Charms of Symbolic Harms

But instead of getting sidetracked into the structural problems ailing the Indian Supreme Court, let us stay with the main concern of this piece: LGBT rights. What is it about this issue that made it a "low-hanging fruit" for a populist court? Relatedly, why are LGBT rights not under attack in India as they are elsewhere, despite there being an authoritarian government in power that professes a socially conservative ideology? Part of the answer lies in the nature of demands made on the state. Since its inception in the early 1990s, LGBT activism pursued the singular goal of decriminalization of sodomy. Towards that goal, it drew attention to how the criminalization of sexual acts that were "against the order of nature" demeaned homosexual personhood. To be sure, "being" gay or lesbian had never been a crime, the way membership to certain [ethnic groups](#) had been under the now-repealed Criminal Tribes Act, 1871. Nor was the anti-sodomy provision actively and systematically enforced, the way similar laws had been used against the "vice of homosexuality" in [other parts](#) of the world. Nonetheless, by foregrounding the symbolic harms suffered by the homosexual subject by the very existence of this legal provision, the activists succeeded in making a case against it.

Symbolic harms can be easier to remedy when compared to structural ones. Often, just some affirming words or even a lapel pin can do the job. Consider what Ritu Dalmia, a famous chef and co-petitioner in *Navtej*, [wrote](#) about her case: "We are not asking to be treated as a minority; we're not asking for quotas and reservations; only dignity and privacy to be who we are." Here, Dalmia distinguishes her cause from that of the other marginalised groups in India: the Dalits (former "untouchables"), the Adivasis (indigenous people), the disabled, and so on—the ones that demand "quotas and reservations". Although she disclaims the tag of an activist, her personal reflections bear all the activist tropes and capture very accurately the thrust of the long campaign for decriminalization. Legal cases are characteristically of narrow scope. But in this case, the wider activism that supported the court case also had a narrow focus. Thus, in public perception, the cause of LGBT rights was not identified with protest against police excesses or for democratising access to public spaces or even for sexual freedom! It was simply a plea for recognition. The fact that the issue allowed the elites to be "victims" who, in turn, could loftily abjure "special treatment", was why it garnered massive support from the mainstream media and the intelligentsia. The fact that it did not involve demands for any structural change was why the state did not have any problem with it.

Incidentally, the section of the LGBT population that did seek “quotas and reservations”, those outside the elite milieu—the transgender people—has not been successful. Despite the *NALSA* judges directing the government to provide the transgender category with reservation in education and employment, the law that the Modi government enacted in 2019, in the face of opposition from the trans community, did not provide for the same. The Rules to operationalize the law were released during the pandemic, amidst a nationwide lockdown, when the prospects of consultation with the community were restricted. And while a [petition](#) challenging several provisions of the TG Act is currently pending before the Supreme Court, in another case, the union government has informed the Court that it has [no plans](#) to introduce separate reservations for the transgender category. Undoubtedly, the Act is an important, though limited, achievement for the trans community. Modi recently took credit for giving trans people an [identity](#) by enacting the law, demonstrating, once again, that the government has no problem with LGBT recognition claims.

## Saffron Rainbow

A second reason why LGBT rights are not under attack in India the way they are in other backsliding democracies is because of the considerable [uptake](#) of the nationalist politics of the Hindu Right among a significant section of the LGBT population. From [dreaming](#) about a uniform civil code, an idea which the Bharatiya Janata Party (BJP) uses periodically to delegitimise Muslim family law, to [celebrating](#) the Modi government’s unilateral ending of [Jammu & Kashmir’s](#) autonomous status within the Indian union to [supporting](#) the construction of the Ram temple in Ayodhya where a Hindu mob had demolished the Babri Mosque in 1992 to pride march organisers [collaborating](#) with the police to identify attendees raising slogans against the anti-Muslim Citizenship Amendment Act, the LGBT population has proved itself to be a useful ally of the Hindu Right. The government’s decision not to oppose decriminalization in court, a decision [backed](#) by the Rashtriya Swayamsevak Sangh (the BJP’s ideological parent organization), and the latter’s public [support](#) for LGBT people have further [cemented](#) that bond. This support, however, is best dubbed as tolerance, for it does not translate into support for substantive legal rights as became evident during the marriage equality litigation in 2023.

The union government (and the [BJP](#) and the [RSS](#)) opposed the plea for marriage equality before the Supreme Court, though the primary disappointment of the LGBT community seems to be with the judges, who turned it down. The judges held in this case that it was not open to them to creatively interpret the Special Marriage Act, 1954—a civil marriage legislation—to extend legal recognition to same-sex marriage. As I had [shown](#) at the beginning of the hearing, there were genuine challenges to a favourable statutory interpretation in this case that the petitioners did not seem to have paid attention to. The judges also [dismissed](#) the petitioners’ argument that the statute itself was discriminatory and, hence, unconstitutional. But more importantly, they held that Indians did not have the fundamental right to marry and, therefore, any marriage statute was not subject to a fundamental rights analysis. Troubling as they may seem, these conclusions are consistent with the Court’s previous holdings and its general approach to family law. In its seventy-year history, the Court has never intervened in substantive family law by striking down discriminatory laws. The High

Courts, in fact, have a better record in this respect, but that is a story for another day. In other words, marriage equality did not succeed at the Supreme Court because (a) the government opposed the idea, (b) the petitioners did not have a realistic strategy, and most importantly, (c) the issue was not a low-hanging fruit.

I believe that there is hope for marriage equality in the “New India”. Paola Bachhetta, who has tracked the Hindu Right’s shifting responses to LGBT visibility in India since the 1990s, [urges](#) us “to complicate the current binary in which queer acceptance is imagined as always already a good thing and is systematically associated with the left, while queer repression is assigned to the right.” Bachhetta continues, now zooming out beyond India: “In fact, in many places across the globe queer acceptance to date has been conditional upon the violence of queer-normativisation, in which queer-normativity is upheld to construct ever more unacceptable others.” Which means, that we should not be surprised if in the coming years, the RSS and the BJP turn around and support the cause of marriage equality just to portray Muslims as obscurantist and intolerant. After all, the Hindu Right’s popular refrain through which it justifies its politics is *Hindu khatre mein hai* (the Hindu is in danger) and not *hetero khatre mein hai*.

