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Policing Intimacy: A Critical Analysis of Commissionerate Police Powers and Same Sex Relationships in Urban India

SHAMBHAVI UPADHYAY* AND RITU BHATI**

ABSTRACT

The decriminalisation of consensual same-sex conduct in Navtej Singh Johar v. Union of India (2018) removed the primary formal instrument through which police targeted sexual minorities in India. What it did not remove was the institutional architecture that had enabled that targeting for over a century and a half. This article examines how Commissionerate police structures in major Indian cities continue to exercise a range of executive powers, including preventive detention, public nuisance regulation, licensing authority, and extern orders, in ways that reproduce the practical effects of criminalisation without engaging its formal language. Drawing on constitutional doctrine, legal sociology, and ethnographic accounts from urban queer communities, the article argues that the persistence of this regulatory harassment reflects a deeper conflict between the transformative potential of constitutional privacy and dignity guarantees and the colonial-era administrative DNA of urban policing in India. The article concludes with a framework for institutional reform oriented toward accountability rather than aspiration.

Keywords: Commissionerate policing, sexual orientation, Section 377, preventive detention, right to privacy, queer rights, urban India, police powers

I. INTRODUCTION

On 6 September 2018, the Supreme Court of India overruled *Suresh Kumar Koushal v. Naz Foundation* and held that Section 377 of the Indian Penal Code, 1860, insofar as it criminalised consensual sexual acts between adults in private, violated the constitutional guarantees of dignity, privacy, equality, and freedom of expression.¹ The judgment was a constitutional

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¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1. The Constitution Bench unanimously held that Section 377 of the Indian Penal Code, 1860, to the extent it criminalised consensual same-sex conduct between adults, was unconstitutional; the opinions between them relied on Articles 14, 15, 19 and 21 of the Constitution, though the opinion of Dipak Misra CJI did not rest on Article 15. Four opinions were delivered: Dipak Misra CJI wrote for himself and A.M. Khanwilkar J., and Rohinton Fali Nariman, D.Y. Chandrachud and Indu Malhotra JJ. each wrote separately, concurring in the result.

watershed. The four opinions delivered collectively articulated a vision of identity-affirming constitutionalism that read Articles 14, 15, 19, and 21 as interlocking protections against the state's power to penalise intimacy. Dipak Misra CJI spoke of the need to "bid adieu to the perceptions, stereotypes and prejudices deeply ingrained in the societal mindset". D.Y. Chandrachud J. situated the case within the longer arc of anti-colonial constitutional transformation. Indu Malhotra J. expressed the view that history owed an apology to the LGBT community.

What followed on the streets of India's cities was considerably more ambiguous. Within a year of the judgment, civil liberties organisations working alongside sex workers and transgender persons in Bengaluru were publicly documenting continued police beatings, public humiliation, unreceipted "fines" and detention at police stations.² Similar episodes were reported in Hyderabad³ and Delhi.⁴ In none of these cases did officers rely on Section 377. They relied instead on other provisions: in Hyderabad, a 1919 statute directed specifically at "eunuchs"; elsewhere, provisions authorising action against "public nuisance", "disorderly conduct", or gatherings deemed threats to "public order". Often there was no formal arrest, no criminal charge and no judicial oversight. The machinery of harassment had simply shifted its legal register.

² *NGOs Call Out Police for Violence on Sex Workers, Transgenders*, NEW INDIAN EXPRESS (Bengaluru, 13 July 2019), <https://www.newindianexpress.com/cities/bengaluru/2019/Jul/13/ngos-call-out-police-for-violence-on-sex-workers-transgenders-2003256.html>. The report describes the release, by the People's Union for Civil Liberties (Karnataka), Sadhana Mahila Sangha, Janasahayog, the Alternative Law Forum and the Centre for Information Education Development Studies, of findings from a public hearing held on 5 March 2019 before Justice H.N. Nagamohan Das (Retd.), documenting beatings, public humiliation, unreceipted "fines" and station detention of sex workers, including transgender persons, in Bengaluru.

³ *V. Vasanta Mogli v. State of Telangana*, W.P. (PIL) Nos. 44 and 355 of 2018 and 74 of 2020 (Telangana High Court, decided 6 July 2023). In Hyderabad the mechanism was older and more explicit: the Telangana Eunuchs Act, 1329F, a 1919 law never repealed by the State, let police keep a register of "eunuchs" and arrest them without warrant for appearing in public in female dress. It was struck down, as violative of Articles 14 and 21, only in 2023. Twelve days after *Navtej Singh Johar* (n 1) was decided, the High Court of Judicature at Hyderabad had by interim order directed the State and its police not to register cases, make arrests or investigate under the Act until further orders: see S.A. Ishaqui, *Hyderabad High Court Suspends Use of Eunuchs Law*, DECCAN CHRONICLE (19 September 2018), <https://www.deccanchronicle.com/nation/current-affairs/190918/hyderabad-high-court-suspends-use-of-eunuchs-law.html>.

⁴ Within weeks of the verdict, transgender women in Delhi reported that police continued to harass them under other pretexts. One complainant told Scroll.in that on 9 September 2018, three days after the ruling, she and a friend were assaulted by a policeman near the Rajiv Chowk metro station after he stopped them from begging. See Vijayta Lalwani, *Delhi's Transgender Community Face Police Harassment Despite Supreme Court's Section 377 Verdict*, SCROLL.IN (9 October 2018), <https://scroll.in/article/894435/delhis-transgender-community-face-police-harassment-despite-supreme-courts-section-377-verdict>. A similar pattern was reported in the same weeks from Connaught Place, where trans women described being chased away and beaten by officers in incidents that had nothing to do with Section 377. See Vartika Rastogi, *Transgender Community Face Increasing Violence Since 377 Ruling*, THE CITIZEN (17 September 2018), <https://www.thecitizen.in/index.php/en/newsdetail/index/7/15000/transgender-community-face-increasing-violence-since-377-ruling>.

This article is concerned with that machinery. Commissionerate policing, a model in which a senior police officer, rather than a district magistrate, exercises executive magistracy powers in urban areas, concentrates extraordinary administrative authority in a body that answers primarily to the executive rather than the judiciary.⁵ The powers available under this structure, security proceedings for keeping the peace, extern orders, licensing of premises, regulation of assemblies, and public nuisance enforcement, are broad, loosely worded, and subject to minimal judicial oversight at the point of application. They were designed in the colonial period to manage urban unrest, and they carry within them an implicit model of the city as a space to be kept orderly by removing those who do not belong.

For LGBT individuals, the consequence, on the argument advanced here, is a form of policing that does not need a penal provision to be effective. It works through the accumulation of minor humiliations: the stop and interrogation, the threat of detention, the demand for identity proof, the implicit warning that the space is not for them. The post-*Navtej* landscape is therefore not simply one of liberation incompletely realised. It is one in which a constitutional transformation at the apex court has collided with an unreformed administrative apparatus at street level, and in which the gap between the two is disproportionately borne by those whose rights were formally vindicated.

II. THE ARCHITECTURE OF COMMISSIONERATE POWER

The commissionerate system operates in most of India's major metropolitan areas, including Delhi, Mumbai, Kolkata, Bengaluru, Hyderabad, and Chennai. It differs from the district police structure in one constitutionally significant respect: the Police Commissioner, a senior officer of the Indian Police Service, exercises the powers of an executive magistrate without being subject to the oversight of the district magistracy.⁶ This concentration of power was a deliberate feature of colonial urban governance, designed to allow rapid responses to civil unrest without the procedural delay that judicial or magistracy involvement would have required.

⁵ The Model Police Act, 2006, Sections 88 and 89, drafted by the Police Act Drafting Committee constituted by the Ministry of Home Affairs and chaired by Soli J. Sorabjee. Section 88(3) vests the Commissioner of Police with such powers, functions and duties as may be prescribed, and Section 89 empowers the Commissioner to exercise the powers and duties of a District Magistrate and officers subordinate to him, not below the rank of Assistant Commissioner, those of an Executive Magistrate. Sections 92 and 93 confer licensing authority over places of public amusement and entertainment and control over public assemblies and processions; Section 96 provides for security for keeping peace and order; and Section 97 authorises the removal of persons about to commit offences. Many State Police Acts confer analogous executive magistracy powers on Police Commissioners in urban areas.

⁶ Section 55 of the Karnataka Police Act, 1963 (removal of persons about to commit offences, exercisable in Bangalore by the Commissioner); Section 56 of the Bombay Police Act, 1951 (extern orders); Section 26 of the Hyderabad City Police Act, 1348F (dispersal of gangs or assemblies of persons), read with Section 22(3) (power to prohibit assemblies and processions) and Section 47 (Commissioner's judicial powers). These provisions predate independence in some cases and were drafted without any contemplation of sexuality as a protected ground.

The instruments that, on the authors' account, are most often turned against LGBT persons are the following. Security proceedings under the Bharatiya Nagarik Suraksha Sanhita, 2023 and comparable provisions of police legislation allow an executive magistrate, who in a commissionerate area is the Police Commissioner or an officer under him, to require a person believed likely to commit a breach of the peace to execute a bond for keeping the peace, with detention following only on a failure to furnish security.⁷ The evidentiary standard is an officer's reasonable belief rather than proof of any completed act. Extern orders allow commissioners to remove individuals from a city's limits on the footing that their movements or acts are "causing or calculated to cause alarm, danger or harm to person or property". Licensing powers give commissionerates authority over bars, clubs, and event venues, which can be revoked for hosting "indecent" events. Public nuisance and obscenity provisions in local police acts, many of which predate independence, penalise conduct that is "indecent" or "obscene" or that causes "annoyance" to others.⁸

Each of these instruments is, on its face, unrelated to sexual orientation. None of them mentions same-sex conduct. Where they are turned against LGBT persons, that is therefore a matter of enforcement discretion rather than statutory text, which has two important implications. First, it makes the discrimination harder to challenge because the legal provision being invoked is neutral on its face. Second, it insulates the officer from accountability because the decision to deploy the provision is presented as a judgment call about public order rather than an act of discrimination. The Foucauldian insight that the most effective forms of power are those that do not announce themselves as such finds a precise administrative expression here.⁹

⁷ Bharatiya Nagarik Suraksha Sanhita, 2023, Section 126 (formerly Section 107 of the Code of Criminal Procedure, 1973), which authorises an Executive Magistrate who receives information that a person is likely to commit a breach of the peace or disturb the public tranquillity to require that person to show cause why he should not be ordered to execute a bond or bail bond for keeping the peace for a period not exceeding one year; see also Section 170 (formerly Section 151 of the Code of Criminal Procedure, 1973), under which a police officer knowing of a design to commit a cognizable offence may arrest the person so designing without a warrant if the offence cannot otherwise be prevented, the detention not to exceed twenty-four hours unless further detention is required or authorised under another provision of law; and Section 96 of the Model Police Act, 2006, under which the Commissioner of Police or an officer not below the rank of Assistant Commissioner may require a person to show cause why he should not execute a bond, with or without sureties, for good behaviour in the interest of peace and order for a period not exceeding one year. Police Commissioners exercise executive magistracy in commissionerate areas, and the authors contend that these provisions are invoked against individuals perceived as threats to public order, including visibly queer persons.

⁸ Section 34 of the Police Act, 1861. The colonial-era statute, still operative in several States, penalises a list of acts committed on any road, open place or street "to the obstruction, inconvenience, annoyance, risk, danger or damage of the residents or passengers", including wilful and indecent exposure of the person, and permits any police officer to take into custody without a warrant any person who commits such an act within his view. Compare Section 70 of the Hyderabad City Police Act, 1348F, which penalises indecent behaviour and the use of "threatening, insulting or obscene words or gestures" in a street or public place. Though the text is facially neutral, the authors contend that its application has historically been directed disproportionately at same-sex couples, hijra communities, and sex workers.

III. COLONIAL ORIGINS AND THE GRAMMAR OF POLICING DEVIANCE

Section 377 was not an anomaly in the colonial legal order. It was part of a broader project of regulating urban Indian bodies that presumed certain categories of person to be inherently disorderly and therefore legitimate objects of pre-emptive intervention.¹⁰ The Police Act of 1861, enacted in the aftermath of 1857 as a tool of social control, established the institutional template that most State Police Acts and the commissionerate model have followed ever since. The broad, open-textured provisions of that Act were not the product of drafting carelessness. They were deliberate. They were designed to give officers the discretion to act against populations that colonial administrators regarded as threats to imperial order: political agitators, vagrants, sex workers, and those whose sexuality did not conform to Victorian moral codes.¹¹

The hijra community offers the sharpest example of this continuity. Long before Section 377 was routinely enforced against cisgender gay men, hijras were subjected to systematic police harassment under the Criminal Tribes Act (repealed in 1952) and subsequently under vagrancy and public nuisance provisions.¹² The formal legal basis changed after independence and again after the *NALSA* judgment, but the practical reality of police harassment did not change in proportion to these formal shifts. What changed was the language officers used to justify it. This pattern of legal form changing while enforcement culture persists is not incidental. It reflects the fact that the enforcement culture is carried not primarily by legal text but by institutional habit, training practices, and the transmission of informal norms within police organisations.

Arvind Narrain and Gautam Bhan's documentation of pre-*Naz Foundation* policing practices in Delhi and Mumbai showed that officers rarely needed to invoke Section 377 to achieve the practical effects of criminalisation.¹³ Extortion was more common than prosecution. The threat

⁹ MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (New York: Vintage Books, 1977), pp. 195–228. Foucault's account of surveillance and normalisation is foundational to understanding how police power operates not merely through arrest but through the continuous management of bodies and populations.

¹⁰ Sonia K. Katyal, *Exporting Identity*, (2002) 14 *YALE JOURNAL OF LAW AND FEMINISM* 97, 97–176. Katyal argues that the criminalisation of same-sex conduct in postcolonial states was largely a product of Victorian-era legal transplantation and that the colonial origins of Section 377 are inseparable from understanding its contemporary enforcement culture.

¹¹ Sumit Baudh, *Human Rights and the Criminalisation of Consensual Same-sex Sexual Acts in the Commonwealth, South and Southeast Asia* (SOUTH AND SOUTHEAST ASIA RESOURCE CENTRE ON SEXUALITY, Working Paper, 2008). Baudh traces the legislative history of Section 377 from Macaulay's Draft Penal Code (1837) through its adoption in 1860, noting that the provision was modelled on English sodomy statutes that had by the time of Indian independence been largely abandoned in England.

¹² *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438. The Supreme Court recognised transgender persons as a third gender and held that they were entitled to equal protection under Articles 14, 15, 16, and 21. The Court further directed the Central and State governments to frame welfare measures, though implementation has been halting.

¹³ ARVIND NARRAIN AND GAUTAM BHAN (EDS.), *BECAUSE I HAVE A VOICE: QUEER POLITICS IN INDIA* (New Delhi: Yoda Press, 2005). The volume brings together testimonies and analytical essays documenting police harassment of LGBT individuals under Section 377 and vagrancy-type provisions, preceding the *Naz Foundation* litigation.

of arrest under any available provision, not necessarily Section 377, was sufficient to extract compliance. This finding is significant because it suggests that the specific content of the penal provision was less important than the general discretionary authority it gave to officers who had already decided that certain bodies were inherently suspect. This article argues that the same logic has now migrated into the post-decriminalisation administrative law framework.

IV. CONSTITUTIONAL GUARANTEES AND THEIR LIMITS IN ADMINISTRATIVE CONTEXTS

The constitutional framework post-*Navtej* and *Puttaswamy* is, in principle, adequate to the challenge. The right to privacy under Article 21 expressly encompasses sexual orientation as an intimate personal choice beyond the state's power to regulate.¹⁴ The right to equality under Article 14 prohibits arbitrary state action, and an argument can clearly be made that the selective targeting of same-sex gatherings under provisions applicable to all public assemblies constitutes exactly that arbitrariness. Article 15's prohibition of discrimination on the ground of sex has been read to extend to discrimination on the ground of sexual orientation by the Delhi High Court in *Naz Foundation* and by D.Y. Chandrachud and Indu Malhotra JJ. in *Navtej*, though the opinion of Dipak Misra CJI, for himself and A.M. Khanwilkar J., did not rest on Article 15.¹⁵

The problem is structural rather than doctrinal. Constitutional guarantees operate most effectively against formal legislative acts and formal judicial proceedings. They operate far less effectively against the informal, iterative, and often undocumented exercise of administrative discretion at street level. An LGBT individual stopped by police outside a bar and subjected to hostile questioning has, in principle, a right to challenge that action under Article 226. In practice, the interaction will not have generated a written record, the officer will not have identified a specific statutory basis for the action, and the individual is unlikely to know either the officer's name or the precise provision being invoked.

¹⁴ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1. The nine-judge bench unanimously recognised the right to privacy as a fundamental right under Article 21, and Chandrachud J., in a particularly significant passage, identified sexual orientation as an integral dimension of personal identity protected by that right.

¹⁵ *Naz Foundation v. Government of NCT of Delhi*, 160 (2009) DLT 277 (Delhi High Court), W.P. (C) No. 7455 of 2001, decided 2 July 2009. The petitioner argued that discrimination on the basis of sexual orientation was comprehended within "sex" as a prohibited ground under Article 15(1), drawing on comparative constitutional jurisprudence from South Africa and Canada, and the Division Bench accepted the argument, holding that sexual orientation is a ground analogous to sex and that discrimination on that basis is not permitted by Article 15. In *Navtej Singh Johar* (n 1), D.Y. Chandrachud and Indu Malhotra JJ. likewise held that discrimination on the ground of sexual orientation is discrimination on the ground of sex under Article 15(1); the opinion of Dipak Misra CJI did not rest on Article 15.

Lawrence Liang's concept of "porous legality", the administrative zone in which formal norms are selectively applied or set aside by ground-level officers, is analytically useful here.¹⁶ Commissionerate policing of queer spaces operates precisely in this zone. The officer who questions a same-sex couple in a park is simultaneously invoking public order law (which is legitimate), exercising discretion about who counts as disorderly (which may be discriminatory), and doing so without generating any administrative record that would make the pattern legible to a court. The invisibility of the pattern is not a bug in the system. It is a feature.

The Transgender Persons (Protection of Rights) Act, 2019 illustrates a related problem. It provides formal protections against certain forms of abuse but does not establish a mechanism for holding police accountable for harassment short of those specific forms.¹⁷ The result is legislation that is adequate to extreme cases but offers no remedy for the daily texture of policing that makes LGBT persons feel that public space is not theirs. The judgment in *Navtej*, however magnificent its doctrinal architecture, has a similar limitation: it addresses the formal existence of Section 377 without reconfiguring the institutional structures through which policing actually operates.

V. QUEER SPACE, PUBLIC ORDER, AND THE POLITICS OF URBAN BELONGING

The policing of same-sex intimacy in Indian cities cannot be understood outside the broader politics of who belongs in urban public space. Asher Ghertner has shown how "world-class city" aspirations in Delhi during the 2000s produced a regime of aesthetic governance in which slum residents, street vendors, and others whose presence was deemed incompatible with the city's desired image were displaced through administrative action rather than explicit legal authority.¹⁸ LGBT persons in urban India inhabit a structurally analogous position. On this account, their presence in parks, on promenades, and outside bars is read by officers as

¹⁶ Lawrence Liang, *Porous Legalities and Avenues of Participation*, in SARAI READER 05: BARE ACTS (New Delhi: Sarai/CSDS, 2005), pp. 6–17. Liang's concept of "porous legality", the zone in which formal legal norms are selectively enforced or ignored by street-level agents of the state, is directly applicable to commissionerate policing of queer spaces.

¹⁷ The Transgender Persons (Protection of Rights) Act, 2019, Section 18. The provision makes it an offence, punishable with imprisonment of not less than six months and up to two years together with a fine, to compel a transgender person to engage in forced or bonded labour or to deny them access to a public place, but contains no equivalent protection against police harassment or profiling, an omission criticised extensively by transgender rights organisations.

¹⁸ D. ASHER GHERTNER, *RULE BY AESTHETICS: WORLD-CLASS CITY MAKING IN DELHI* (New York: Oxford University Press, 2015), pp. 78–112. Ghertner's analysis of how "nuisance" and "encroachment" discourses were deployed in Delhi to dispossess slum residents is, the authors argue, directly relevant to understanding how public order policing may be directed at non-normative bodies in urban space.

inherently suspicious, an index of a public order problem that has not yet materialised but is presumed to be imminent.

Shilpa Phadke, Sameera Khan, and Shilpa Ranade's account of how women's presence in Mumbai's public spaces is regulated through the implicit threat of police action, rather than formal legal prohibition, is directly relevant here.¹⁹ Both women in public and LGBT persons in public are read through a lens that conflates visibility with provocation. Both are subject to a form of regulatory attention that does not need to invoke a specific penal provision to be effective. And both are denied the equal right to inhabit the city, not because a statute says so, but because, on this analysis, the officers charged with governing urban space have internalised a model of the city in which these persons are anomalous.

Rohit Dasgupta traces India's postcolonial media history, from All India Radio's colonial propaganda role, through Doordarshan's state monopoly, to the liberalisation of television and the press after 1991, to show how mainstream cinema, television and print swung between sensationalising and slowly normalising queer lives. That unevenness, he argues, is part of the reason queer men turned to the internet. Reading sites such as PlanetRomeo and Guys4Men through Foucault's concept of heterotopia, and drawing on interviews with users, he finds that online queer space in India is less an escape from the nation than a site where identity, safety and desire are negotiated against homophobia at home, at school, and under the long shadow of Section 377. He is careful, however, not to romanticise it: this digital queer culture still runs along lines of class, gender and access, since internet penetration in India tracks the country's existing socioeconomic divides instead of dissolving them.²⁰

Gayle Rubin's concept of the "charmed circle" of tolerated sexualities, as against the "outer limits" of stigmatised ones, captures something of the spatial dimension of this problem.²¹ The commissionerate's implicit map of the city allocates certain spaces to acceptable intimacy and treats other spaces as locations where unacceptable intimacy is likely to occur and therefore requires pre-emptive surveillance. On this reading, parks, public beaches, and the approaches

¹⁹ SHILPA PHADKE, SAMEERA KHAN AND SHILPA RANADE, *WHY LOITER? WOMEN AND RISK ON MUMBAI STREETS* (New Delhi: Penguin, 2011), pp. 23–55. The authors argue that the equation of female presence in public space with sexual availability or impropriety is structurally analogous to the policing of queer presence, both resting on a presumption that certain bodies do not belong.

²⁰ Rohit K. Dasgupta, *Online Romeos and Gay-dia: Exploring Queer Spaces in Digital India*, in ELIZABETH MCNEIL, JAMES E. WERMERS AND JOSHUA O. LUNN (EDS.), *MAPPING QUEER SPACE(S) OF PRAXIS AND PEDAGOGY* (Cham: Springer International Publishing, 2018), pp. 183–200, https://doi.org/10.1007/978-3-319-64623-7_10.

²¹ Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in CAROLE S. VANCE (ED.), *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* (London: Routledge, 1984), pp. 267–319. Rubin's "charmed circle" concept, which contrasts tolerated from stigmatised sexual practices, offers analytical traction for understanding which bodies police treat as inherently suspicious.

to venues associated with LGBT communities are treated as the latter, and the policing that results is not random but organised by an implicit geography of tolerated and intolerable desire.

VI. INTERNATIONAL HUMAN RIGHTS STANDARDS AND DOMESTIC IMPLEMENTATION

The Yogyakarta Principles, which the Supreme Court relied on as persuasive authority in *Navtej*, specify that states must prevent the use of public order, public morality, or public health as pretexts for discriminatory enforcement against persons on grounds of sexual orientation and gender identity.²² Principle 6 on the right to privacy and Principle 9 on treatment in detention are directly applicable to commissionerate practices. Principle 6 requires that states refrain from applying criminal or administrative law to private consensual same-sex conduct. Principle 9 requires that persons in detention not be subjected to violence, harassment, or humiliation on account of their sexual orientation.

India has abstained in Human Rights Council votes on resolutions addressing violence and discrimination on grounds of sexual orientation and gender identity, including in 2014 and 2019,²³ which complicates the direct invocation of international standards as domestic legal obligations. Nevertheless, the domestic constitutional framework, interpreted in light of international standards, provides a sufficient basis for reform. The argument does not require international law to be directly binding. It requires only that the principles articulated in *Navtej* and *Puttaswamy* be implemented through institutional reform of the structures through which policing is actually delivered.

George Chauncey's historical analysis of police morals squads in early-twentieth-century New York is instructive in this comparative context.²⁴ The American experience showed that formal decriminalisation and the formal recognition of constitutional rights were necessary but not

²² *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2006), Principle 6 (the right to privacy) and Principle 9 (the right to treatment with humanity while in detention), supplemented by the *Yogyakarta Principles plus 10* (2017). India has not formally endorsed the Principles, but they were relied on by the Supreme Court in *Navtej Singh Johar* (n 1) as persuasive authority.

²³ Human Rights Council Res. 27/32, U.N. Doc. A/HRC/RES/27/32 (adopted 26 September 2014), passed by 25 votes to 14 with 7 abstentions, India abstaining: see *UN Human Rights Council Votes to Support LGBT Rights, India Abstains from Voting*, DNA INDIA (27 September 2014), <https://www.dnaindia.com/world/report-un-human-rights-council-votes-to-support-lgbt-rights-india-abstains-from-voting-2021923>; Human Rights Council Res. 41/18, U.N. Doc. A/HRC/RES/41/18 (adopted 12 July 2019), renewing the mandate of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity, India again abstaining: see *India Abstains from Vote on LGBT Community Rights at UN*, DECCAN CHRONICLE (13 July 2019), <https://www.deccanchronicle.com/nation/current-affairs/130719/india-abstains-from-vote-on-lgbt-community-rights-at-un.html>.

²⁴ GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940* (New York: Basic Books, 1994), pp. 131–159. Chauncey's historical account of how police morals squads operated in New York is instructive in a comparative sense, particularly his analysis of how licensing and public order powers were instrumentalised to surveil gay bars and cruising spots.

sufficient conditions for the protection of LGBT persons from police harassment. What was additionally required was the institutionalisation of accountability mechanisms, the training of officers in the legal implications of sexual orientation protections, and the creation of independent oversight bodies with the power to investigate complaints. The Indian context differs in significant ways, but the basic lesson is transferable.

VII. TOWARD INSTITUTIONAL REFORM: A FRAMEWORK

Three interlocking reforms would, in the authors' assessment, go furthest toward addressing the structural problem identified in this article. None is novel in the sense of being unprecedented elsewhere. All are, however, politically contested, which is why they have not happened despite the window of opportunity created by the *Navtej* judgment.

A. Statutory reform of open-textured policing powers

The broad, colonial-era provisions of local police acts that authorise action against “obscene” conduct, “indecent” behaviour, or activities causing “public annoyance” require redrafting. The redrafting should not merely narrow the provisions but should incorporate explicit non-discrimination requirements, specifying that the powers cannot be exercised on grounds that include sexual orientation and gender identity. The National Police Commission's model legislation provides a starting point, but its proposals have never been systematically implemented.²⁵

B. Mandatory training and accountability protocols

A template for such training already exists. In *S. Sushma v. Commissioner of Police*, the Madras High Court set out, as part of its interim directions, an indicative and non-exhaustive list of sensitisation programmes that it suggested the concerned Union and State departments conduct for eight stakeholder groups. Police and prison personnel are to receive regular training on preventing offences against LGBTQIA+ persons, on their legal rights, and on the offences and penalties under the Transgender Persons (Protection of Rights) Act, 2019. Legal services authorities and the judiciary are to run parallel awareness programmes. Health professionals are barred from attempting conversion “therapy”, on pain of action extending to the withdrawal of their licence, while health workers are to be sensitised against pathologising gender-diverse and

²⁵ The National Police Commission (1977–81) annexed a draft new Police Act incorporating its recommendations to its Eighth and final Report of 1981; that those recommendations were not implemented, and that the petition was filed to secure their implementation, is recorded in *Prakash Singh v. Union of India*, (2006) 8 SCC 1. The Model Police Act, 2006 was drafted separately, by the Police Act Drafting Committee: see MINISTRY OF HOME AFFAIRS, *The Model Police Act, 2006* (Police Act Drafting Committee proposed Bill), https://www.mha.gov.in/sites/default/files/ModelAct06_30_Oct_0.pdf (last visited 19 September 2026); see also note 5.

intersex persons. Schools and workplaces are to revise curricula, hiring and facilities, including gender-neutral restrooms and updated records, and parents are to be offered peer support through support groups.²⁶

C. Independent oversight of commissionerate discretion

The Police Complaints Authorities established under the *Prakash Singh* directions of 2006²⁷ were intended to provide external oversight of police conduct, but have been systematically under-resourced and, in several States, have been given mandates that exclude complaints relating to “routine” policing. Their remit should be extended to cover complaints relating to discriminatory enforcement of public order powers, and their composition should include persons with expertise in human rights and representatives of civil society organisations working with LGBT communities. The Nivedita Menon point that the Indian state has historically managed “deviant” sexuality through informal administrative power rather than formal law is precisely why oversight structures need to be designed with informal power in mind.²⁸

VIII. CONCLUSION

The judgment in *Navtej Singh Johar* is one of the most significant constitutional texts produced by the Supreme Court of India. The opinions collectively constitute a sustained engagement with the relationship between dignity, identity, and state power that will inform Indian constitutional jurisprudence for generations. The problem is that constitutional jurisprudence and street-level policing practice inhabit different institutional worlds, and the mechanisms for translating the one into the other are weak, contested, and politically dependent on governments whose commitment to the values the judgments articulate has, in the authors’ assessment, been inconsistent.

Commissionerate policing, with its concentrated executive powers and its colonial-era discretionary architecture, is the institutional location at which the gap between constitutional aspiration and lived reality is widest for LGBT persons in urban India. The provisions available to commissioners, read literally, are race- and orientation-neutral. Applied through an

²⁶ *S. Sushma v. Commissioner of Police, Greater Chennai Police*, 2021 SCC OnLine Mad 2096, Para 43(H) (Madras High Court, W.P. No. 7284 of 2021, decided 7 June 2021). The judgment numbers two consecutive paragraphs 43; the directions are in the first.

²⁷ *Prakash Singh* (n 25). Direction (6) of the judgment requires a Police Complaints Authority at the district level and another at the State level. The State-level Authority is to take cognizance only of allegations of serious misconduct, including death, grievous hurt or rape in police custody; the district-level Authority may in addition inquire into allegations of extortion, land or house grabbing, or serious abuse of authority.

²⁸ NIVEDITA MENON, *SEEING LIKE A FEMINIST* (New Delhi: Zubaan/Penguin, 2012), pp. 88–120. Menon’s critique of the manner in which the Indian state manages “deviant” sexuality through both formal law and informal administrative power is a useful lens through which to analyse commissionerate practices.

enforcement culture that has not fundamentally reckoned with the *Navtej* judgment, they reproduce the practical effects of the provision that judgment struck down.

Judith Butler's observation that performative acts of gender and sexuality are not merely private expressions but encounters with a social order that responds to them with varying degrees of tolerance or hostility is pertinent here.²⁹ For LGBT persons in India's cities, the encounter with that social order occurs most concretely in encounters with police. The quality of those encounters is determined less by the constitutional text than by the institutional culture, training, accountability structures, and statutory framework within which officers operate. Reforming those dimensions of policing is not a project that the Supreme Court can accomplish through adjudication. It is a project that requires legislative action, executive commitment, and sustained civil society pressure of a kind that has proved harder to sustain than the litigation that produced *Navtej*.

The question worth sitting with, given the above, is whether the current constitutional moment, which has produced the most LGBT-affirming apex court jurisprudence India has ever seen, also provides the political conditions for the institutional reforms that would make that jurisprudence effective. The honest answer is that it probably does not, at least not yet. But the analysis of what is needed, why it has not happened, and what the costs of its absence are, is itself a form of pressure. And pressure, accumulated over time, has occasionally moved institutions that appeared immovable.

²⁹ JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (New York: Routledge, 1990), pp. 1–46. Butler's account of gender as performative rather than expressive is pertinent to understanding why police officers read certain bodily presentations as inherently transgressive and therefore inviting intervention.