



**TWO SEXES, PRIVATE PLATFORMS AND INSTITUTIONAL CLARITY:
SECTION 377, THIRD-GENDER RECOGNITION AND DIGITAL REGULATION
UNDER INDIAN CONSTITUTIONAL LAW**

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ABSTRACT

This paper examines the constitutional path of Section 377 of the Indian Penal Code, the recognition of a “third gender” in National Legal Services Authority v. Union of India (2014),¹ the partial reading-down of Section 377 in Navtej Singh Johar v. Union of India (2018),² and the Transgender Persons (Protection of Rights) Act, 2019.³ Using doctrinal analysis together with the author’s direct observation of location-based applications and commercial online platforms, the paper makes three related claims. First, the male–female binary remains the most coherent foundation for institutional categories in India. Second, the post-2018 protection of adult private autonomy, including the equal privacy interests of men, should be preserved without being turned into a requirement to redefine sex. Third, the growth of digital platforms has revealed clear regulatory gaps under the Information Technology Act, especially around age verification, non-consensual content, data practices and the effect of online material on younger users. The paper is critical of approaches that treat self-identification as overriding biological sex in institutional settings, while still affirming the equal dignity of individuals and the private liberty of adults. It concludes that a clear two-sex policy, paired with stronger platform regulation, offers the better balance between private freedom and institutional coherence.

Keywords: Two-Sex Policy; Section 377; Private Autonomy, Third Gender, Digital Platforms, Age Verification, Regulatory Gaps.

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¹ National Legal Services Authority v. Union of India, (2014) 5 S.C.C. 438 (India).

² Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India).

³ The Transgender Persons (Protection of Rights) Act, No. 40 of 2019 (India).

INTRODUCTION

In recent years, Indian constitutional law has taken two important steps that are often presented as part of one continuous progressive story. The first was the decision to protect consensual adult private activity by reading down Section 377 of the Indian Penal Code. The second was the formal recognition of a “third gender” and the growing weight given to self-declared gender identity in certain legal and administrative contexts. At the same time, digital platforms that help people make contact and that host large volumes of online content have expanded quickly. These platforms operate under intermediary rules that still look underdeveloped when it comes to age verification, data handling and the effect of content on younger users.

This paper looks at these developments from a doctrinal and social-science angle that puts institutional clarity and the equal liberty of adult men and women at the centre. The author spent time examining publicly accessible location-based applications and commercial online platforms in order to understand how they are designed, how content is organised, how age gates work in practice, and where regulatory exposure appears.⁴ Those observations feed directly into the discussion of regulatory gaps. The paper argues for a two-sex policy, male and female as the coherent categories for institutional design while fully accepting the post-2018 protection of adult private autonomy, including the privacy interests of men. It remains critical of frameworks that treat self-identification as able to override biological sex in settings where physical sex continues to matter for fairness, safety and accurate data.

The core claim is straightforward. Private adult liberty and sex-based institutional categories can sit side by side. Adults remain free to form private relationships and to access online content. The State remains free and, given the observed weaknesses in platform design, has a responsibility to set clearer rules that protect minors and reduce exploitation risks. Liberty and regulation do not have to cancel each other out when the line between private adult conduct and public institutional design is kept clear. Approaches that blur that line do not strengthen the privacy interests secured in 2018; they create new sources of instability in institutions that still depend on sex as a working category.

The rest of the paper is organised as follows. Part II explains the method, including the observational component. Part III traces the constitutional path from Section 377 to third-

⁴ Author’s structured observation of publicly accessible location-based applications and commercial online platforms, 2024–2026

gender recognition. Part IV sets out the two-sex position and the case for equal private autonomy. Part V turns to digital platforms, content distribution, data practices and regulatory shortfalls. Part VI offers a critical look at self-identification doctrines in institutional settings. Part VII gathers the findings, recommendations and conclusion.

RESEARCH METHODOLOGY

The study is primarily doctrinal. It works with the text of Section 377 of the Indian Penal Code, 1860, the Transgender Persons (Protection of Rights) Act 2019, and the principal judgments of the Supreme Court, *National Legal Services Authority v Union of India* (2014), *Navtej Singh Johar v Union of India* (2018) and *K.S. Puttaswamy v Union of India* (2017). Secondary writing on both the supportive and critical sides of the gender-identity debate has also been consulted so that the argument does not rest on one school of thought alone.

Alongside the doctrinal work, the author carried out direct observation of publicly accessible location-based social applications and commercial online platforms between 2024 and 2026. Attention was paid to interface design, the placement and strength of age-verification gates, the organisation of content libraries, the kinds of data-permission prompts that appear, and the publicly visible recommendation or community features. The aim was simply to record design choices that affect regulatory exposure. The observations do not amount to a quantitative content study, nor do they make any claim about the private behaviour of individual users. Notes from the observation period are retained by the author. The overall approach is analytical rather than statistical.

The paper stays within constitutional and regulatory questions under Indian law. References to biological sex are kept limited and serve only to identify the material category against which legal claims of identity are being measured. Clinical questions about gender dysphoria fall outside the scope of this study.

CONSTITUTIONAL TRAJECTORY: FROM SECTION 377 TO THIRD-GENDER RECOGNITION

Section 377 and the Path to *Navtej Singh Johar*: Section 377 of the Indian Penal Code, 1860, made certain forms of intercourse “against the order of nature” a criminal offence.⁵ For a long period the provision was applied both to non-consensual acts and to consensual private activity

⁵ Indian Penal Code, No. 45 of 1860, § 377 (India).

between adults. The first successful challenge to its application to the latter came in *Naz Foundation v Government of NCT of Delhi* (2009), where the Delhi High Court read the section down on grounds of equality, dignity and privacy.⁶ The Supreme Court reversed that decision in *Suresh Kumar Koushal v. Naz Foundation* (2013) and restored the full reach of the provision.⁷

The position changed decisively in *Navtej Singh Johar v. Union of India* (2018). A five-judge Constitution Bench held that Section 377, to the extent it criminalised consensual acts between adults in private, violated Articles 14, 15, 19 and 21 of the Constitution.⁸ The Court built on the privacy jurisprudence developed in *K.S. Puttaswamy v Union of India* (2017), which recognised privacy as a fundamental right that includes decisional autonomy over intimate matters.⁹ Importantly, the Court limited its holding to adult private consensual conduct and left the section intact for non-consensual acts and bestiality.¹⁰ It did not create a positive right to marriage, nor did it require that the male–female binary be subordinated to gender identity across institutional contexts. The decision therefore protects private adult liberty without forcing the State to abandon sex as a binary legal category. Later commentary sometimes treats the judgment as a broad endorsement of identity-based claims; that reading goes beyond what the Court actually decided.

NALSA and the Third-Gender Framework: Two years earlier, in *National Legal Services Authority v Union of India* (2014), the Supreme Court recognised transgender persons as a third gender and affirmed a right to self-identification.¹¹ The Court directed the Centre and the States to treat transgender persons as a socially and educationally backward class for reservation purposes and to provide welfare measures. Self-perception was given significant weight. The judgment responded to real patterns of exclusion and vulnerability and has been widely welcomed as a progressive step.

Scholarship supportive of NALSA presents the decision as a landmark affirmation of dignity, autonomy and substantive equality. Writers in this tradition argue that recognising a third gender corrects older binary rigidities, advances constitutional morality, and brings Indian law

⁶ *Naz Foundation v. Gov't of NCT of Delhi*, (2009) 160 D.L.T. 277 (Del. H.C.).

⁷ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 S.C.C. 1 (India).

⁸ India Const. arts. 14, 15, 21.

⁹ *K.S. Puttaswamy v. Union of India*, (2017) 10 S.C.C. 1 (India).

¹⁰ *Navtej Singh Johar*, (2018) 10 S.C.C. 1, paras. 94–97, 253.

¹¹ *NALSA*, (2014) 5 S.C.C. 438, paras. 74–76, 129.

closer to international standards on gender identity. They maintain that self-identification is the only workable and rights-respecting criterion, and that worries about institutional disruption should not outweigh the need for inclusion.

A more critical reading points to unresolved difficulties. NALSA moved between biological, psychological and social understandings of gender without settling on a clear hierarchy.¹² The Transgender Persons (Protection of Rights) Act, 2019, then operationalised self-perceived identity through a certification process while prohibiting discrimination in certain spheres. Implementation has varied from State to State, and practical tensions have appeared in settings where physical sex is material: prisons, sports, shelters, medical records and crime statistics. When self-identification is treated as conclusive, the male–female binary can be collapsed into identity, weakening sex-based protections that rest on average physical differences and documented vulnerability patterns. Privacy and non-discrimination protect individuals from criminalisation and arbitrary exclusion. They do not, by themselves, require public institutions to treat subjective identity as equivalent to biological sex for every purpose.

Persistent Open Questions: Indian constitutional law now protects adult private autonomy. It has also created a formal third-gender category. Whether that category should displace the male–female binary in competitive sports, single-sex spaces, official statistics or medical record-keeping is still an open question. Supportive scholarship stresses dignity and inclusion; critical scholarship stresses material biology, institutional coherence and the limits of what courts can usefully mandate. The privacy right recognised in *Puttaswamy* protects adult private conduct; it does not automatically require public institutions to treat self-declared identity as decisive in every context.¹³ Keeping the binary of male and female for institutional design remains fully compatible with the protection of private adult liberty. The two goals need not be presented as alternatives.

The Two-Sex Position and Equal Private Autonomy: In developmental and evolutionary biology, sex is defined by anisogamy, the production of two distinct types of gametes and yields a binary classification of male and female. Disorders of sexual development are recognised as medical variations; they are not treated as additional sexes.¹⁴ This binary supplies a coherent foundation for legal categories that turn on physical sex. A two-sex policy, male and female as

¹² Transgender Persons (Protection of Rights) Act, §§ 4–7.

¹³ *Puttaswamy*, (2017) 10 S.C.C. 1.

¹⁴ Leonard Sax, How Common Is Intersex? A Response to Anne Fausto-Sterling, 39 J. Sex Rsch. 174 (2002).

the operative institutional categories, does not deny the dignity of individuals who experience gender dysphoria. It simply insists that self-identification should not override sex in settings where physical difference continues to matter for fairness, safety or data integrity.

Within this framework, the private autonomy of adult men deserves clear recognition. The post-2018 constitutional settlement protects the private expression of adults regardless of the sex of their partners. That protection is a liberty interest of men as much as of women. Equal private autonomy therefore has three practical implications. First, private adult consensual conduct should remain protected; there should be no return to criminalisation or any disproportionate regulatory burden that singles out male same-sex expression while leaving other adult expression untouched. Second, frameworks that treat male same-sex attraction as evidence that sex itself is fluid should be resisted. Third, institutional categories should remain sex-based rather than identity-based, so that male-bodied persons are not reclassified in ways that compromise the sex-based rights of women or the reliability of data and safety regimes.

A two-sex policy is consistent with robust protection of adult private autonomy. Approaches that collapse sex into self-declaration are not required by the privacy doctrine in *Puttaswamy* or by the limited holding in *Navtej*. Critical engagement with identity frameworks that subordinate sex to self-identification is therefore compatible with and in some respects required by a commitment to both private liberty and institutional clarity.

DIGITAL PLATFORMS, CONTENT DISTRIBUTION AND REGULATORY GAPS

Observational Findings: Location-based applications allow adult users to identify nearby individuals for interpersonal contact. Commercial online platforms host large volumes of explicit audiovisual material. Direct observation of these platforms between 2024 and 2026 brought several recurring features into view.¹⁵ Age-verification gates are often minimal, little more than a self-declaration of age or a simple click-through screen, and can be bypassed without difficulty. Content libraries are extensive. Data-permission prompts commonly ask for location, device identifiers and behavioural information. Recommendation features tend to intensify exposure to particular kinds of content. These design choices are not unique to any one category of platform, but their scale and the nature of the material raise clear regulatory questions under Indian law.

¹⁵ Publicly observable features of major location-based applications and commercial online platforms as of 2025–26.

The observational exercise does not claim to measure anyone's private behaviour. It simply records publicly visible design decisions that determine how easily younger users can reach explicit material, how much personal data is collected, and how content is organised and recommended. Those decisions are the proper subject of regulatory attention.

Regulatory Weakness under the Information Technology Framework: After Navtej, these platforms operate inside the sphere of adult private autonomy and are subject to intermediary liability under the Information Technology Act 2000 and the 2021 Intermediary Guidelines.¹⁶ The Rules impose due-diligence and grievance-redressal obligations on intermediaries.¹⁷ In practice, however, the enforcement of robust age-gating, proactive monitoring of non-consensual content, and meaningful accountability for data practices remains limited. Notice-and-takedown systems place most of the burden on complainants. Proactive obligations are narrowly drawn. The result is a regulatory gap: broad private liberty exists alongside weak capacity to prevent underage access and the unmediated influence of explicit online material on younger users.

Influence on Younger Users and Data Practices: The volume and accessibility of explicit online content create an environment in which younger users whose capacity for long-term judgment is still forming may build understandings of relationships and identity through highly stylised, commercialised material. This is not an argument for re-criminalising adult private conduct. It is an argument for recognising that platform design and thin regulatory enforcement can produce predictable harms: premature exposure, contact with non-consensual material, and the normalisation of identity narratives that treat biological sex as secondary.

Data practices add another layer of concern. Location-based applications necessarily collect precise geolocation data; many also request access to contacts and device identifiers. When age gates are weak, the same data infrastructure that serves adult users can expose minors to both content and contact risks. Stronger age-verification (preferably going beyond simple self-declaration), clearer content labelling, and stricter limits on data retention would reduce these risks without removing adult private liberty.

The existence of these platforms does not prove that sex is non-binary, nor does it require the State to expand self-identification doctrines into institutional domains. Private adult access to

¹⁶ Information Technology Act 2000; Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

¹⁷ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, rr. 3–4.

online content and the design of public institutions remain distinct policy spheres. Treating the popularity of online content as a reason to redefine sex in law confuses two different questions: one about private liberty, the other about institutional categories.

CRITICAL ASSESSMENT: IDENTITY EXPANSION VERSUS INSTITUTIONAL COHERENCE

The recognition of a third gender in NALSA and the 2019 Act responded to real patterns of exclusion and vulnerability. Supportive scholarship treats the development as constitutional progress. Critical analysis points out that when self-identification is treated as conclusive, sex-based categories become unstable. In prisons, the placement of male-bodied persons in female facilities based on identity raises documented safety concerns. In competitive sports, retained male physiological advantages after male puberty affect fairness for female athletes. In shelters and official statistics, the erosion of sex as a category weakens both protection and accurate policy design. These are practical institutional problems, not abstract cultural disputes.

A two-sex policy does not deny dignity to any individual. It simply maintains that dignity does not require the State to treat subjective identity as equivalent to biological sex for every purpose. Equal private autonomy is protected by the post-2018 settlement; that protection is not strengthened by frameworks that dissolve the sex categories on which many institutional safeguards still rest. Critical engagement with identity frameworks that subordinate sex to self-identification is therefore compatible with a commitment to both private liberty and institutional clarity.

The same distinction applies to digital platforms. Adults remain free to access online content and to form private relationships. Regulators remain free and, given the observational evidence of weak age gates and data practices, have a responsibility to set clearer rules that protect minors. Liberty and regulation need not cancel each other out when the boundary between private adult conduct and public institutional design is kept in view. Treating every defence of sex-based categories as a threat to private liberty produces neither coherent institutions nor stronger privacy protections.

FINDINGS

1. Navtej Singh Johar correctly protects consensual adult private activity, including the equal privacy interests of men, without requiring the redefinition of sex for institutional purposes.

2. NALSA and the 2019 Act introduced third-gender recognition and self-identification without settling the hierarchy between biological sex and identity, leaving institutional ambiguity in domains where physical sex remains material.
3. Direct observation of location-based applications and commercial online platforms shows weak or easily bypassed age-verification, extensive content libraries, and data practices that collect location and behavioural information, exposing regulatory gaps under the Information Technology framework.
4. A two-sex (male–female) policy remains the coherent foundation for institutional design; frameworks that subordinate sex to self-declaration are not required by constitutional privacy doctrine and introduce new sources of instability.
5. Private adult liberty and the protection of younger users from unmediated explicit content can sit together when regulation focuses on platform design rather than on adult private conduct itself.

RECOMMENDATIONS

1. Keep the post-2018 protection of adult private consensual activity in place and avoid converting it into a requirement to redefine sex for institutional purposes.
2. Adopt a clear two-sex policy for prisons, sports, shelters and official statistics, and clarify—through legislation or authoritative guidance—that self-identification under the 2019 Act does not automatically displace sex-based categories.
3. Strengthen age-verification, non-consensual-content enforcement and intermediary accountability under the Information Technology Rules, drawing on the observed weaknesses in current platform design.
4. Recognise equal private autonomy as part of the post-2018 settlement and resist approaches that treat any defence of sex-based categories as incompatible with private liberty.

CONCLUSION

Navtej Singh Johar correctly removed the criminal sanction from consensual adult private activity. That protection extends equally to the privacy interests of men. Digital platforms operate within the private sphere, yet the observed weaknesses in age-gating and data practices

show a regulatory gap that Indian law has not yet closed. The recognition of a third gender and the elevation of self-identification over the male–female binary leave unresolved institutional difficulties. A two-sex policy, combined with targeted platform regulation, offers the better balance between private adult liberty, the protection of younger users, and the coherence of Indian constitutional law. Private access to online content does not require the redefinition of sex; institutional clarity does not require the re-criminalisation of adult private conduct. Future adjudication and legislation should keep that distinction in view.

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