FROM DECRIMINALISATION TO RECOGNITION: REVISITING THE HART–DEVLIN DEBATE IN INDIA'S SAME-SEX MARRIAGE JURISPRUDENCE

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ABSTRACT

The ruling of the Supreme Court of India in the case of Navtej Singh Johar v. Union of India (2018) and Supriyo @ Supriya Chakraborty v. Union of India (2023) symbolize two philosophically mutually irreconcilable methods of the Alliance constitutional status of sexual minority rights, divided not by some modification in the text of the constitution but by a complete transformation in the juridical stance. This paper follows up the thesis that Navtej represents a Hartian constitutional philosophy, that is, one that bases its reasoning on the harm principle and emphasizes the relevance of critical morality over positive morality, whereas Supriyo takes a more neo-Devlinite stance, insisting on socially embedded conceptualizations of marriage and reliance on majoritarian consensus on the legislature as a constitutionally adequate justification to be excluded. The paper also argues that the harm principle, as developed by Hart and as applied to the Indian constitutional context, should not be regarded as sufficient to give an answer to the question of recognition; that social moralism as articulated by Devlin and applied in Navtej is insufficient analytical apparatus; and that the exclusion by Supriyo of a doctrinal method and the application of this method in his paper is a philosophically unsound step backwards. The paper identifies that there is a significant gap in the existing literature: the discussion of the Hart-Devlin debate in the context of the Navtej-Supriyo dichotomy is not conducted systematically. This paper fills that gap.

Keywords: Hart–Devlin debate, constitutional morality, Section 377 IPC, same-sex marriage, Navtej Singh Johar, Supriyo, legal moralism, harm principle, positive morality, critical morality, Ambedkar

I. Introduction

Section 377 of the Indian Penal Code, 1860 is a colonial-era provision formulated by Lord Macaulay as an instrument of Victorian moral regulation criminalised what it termed carnal intercourse against the order of nature prescribing up to ten years imprisonment with a fine and stating that only penetration was necessary to constitute the offence. The provision primarily aimed at conduct; in practice it was applied as a stigma on identity.[1] The provision remained on the statute books for 157 years. Its practical reach extended well beyond the conduct it formally prohibited: because the acts criminalised under Section 377 were constitutively associated with homosexual identity, sexual minorities lived under a structural presumption of criminality that attached to who they were rather than to any specific act they had committed.[2]

In 2018, a five-judge Constitution Bench of the Supreme Court struck down Section 377 to the extent it criminalised consensual same-sex conduct between adults. The Court held that discriminating against a person on the basis of sexual orientation is fundamentally incompatible with constitutional dignity and individual self-worth,[3] that the conduct in question is purely private and self-regarding in Mill's sense, and that constitutional morality, not mainstream social morality must be the governing standard for constitutional adjudication.[4] In 2023, the same Court, in Supriyo declined to extend that guarantee of equal citizenship to the institution of marriage. The majority held that the Indian Constitution does not guarantee a fundamental right to marry at all, leaving the legislature with substantial discretion to frame civil marriage according to its will.[3]

The juxtaposition is philosophically arresting: the same Court, interpreting the same Constitution, five years apart, reached outcomes that rest on mutually exclusive premises about the relationship between law and morality. Another notable feature of *Supriyo*, however, is its seeming retreat from recent rulings that foregrounded dignity as a constitutional value and justification for judicial intervention around LGBTQ rights.[4] A purely formalist analysis of constitutional equality guarantees neglects these relationships and fails to appreciate why even unintentional or incidental exclusion of a marginalised group can be deeply injurious to equal

[1] Indian Penal Code, 1860, Section 377
[2] Joseph Wardenski, A Minor Exception? The Impact of Lawrence v. Texas on LGBT Youth, 95(4) J. Crim. L. & Criminology 1365 (2005).
[3] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1, para 163
[4] Navtej Singh Johar v. Union of India, (2018) 10 SCC 1

dignity and the exercise of constitutional rights.[5]

The central research question this paper addresses is: why does constitutional protection of sexual orientation not entail recognition of same-sex relationships? The answer does not lie in any change of constitutional text or judicial composition. It lies in the philosophical posture that each bench adopted toward the foundational question of when, and on what grounds, the law may enforce or withhold recognition of moral choices. That question has a precise intellectual genealogy it is the Hart–Devlin debate, generated by the 1957 Wolfenden Report and shaping the jurisprudence of same-sex rights in every constitutional democracy that has confronted it.

The thesis in this paper is threefold, namely, that Navtej embodies a Hartian constitutional philosophy, which is based on the harm principle and the primacy of critical morality over positive morality, that Supriyo embodies a neo-Devlinite posture, in which the socially embedded status of the institution of marriage and the consensus of legislators serves as a constitutionally sufficient reason to deny recognition, and that the difference between the two decisions lies not in legislation but in constitutional morality, which was propagated by Navtej and renounced by Supriyo.

The available literature on the Navtej-Supriyo divide is quite substantial but incomplete. It has been argued by scholars that the non-recognition of marriage by the majority of the Supreme Court on the grounds of Article 14 and Article 15 of the constitution of India is some abuse of the Articles 14 and 15, which provide equality before the law and the prohibition of discrimination based on sex.[6]. Denying an individual the choice of a partner based on gender violates the right to equality[7]. The disadvantages encountered by sexual and gender minorities arise from deeply embedded societal assumptions about gender and sexual normativity, and these structural biases erode substantive equality across both non-traditional relationships and marriages[8]. The exclusion rests on an arbitrary classification grounded solely in sexual

[5] Ryan Thoreson, Dignity Deferred: Supriyo v. Union of India and LGBTQ Rights, University of Cincinnati College
of Law Scholarship and Publications.
[6] Aditya Sharan & Aryan Jain, Towards Inclusive Justice: Scrutinizing the Supreme Court's Verdict on Same-Sex Marriage Rights
[7] Anant Prakash Mishra, Why Same-Sex Marriages Must Be Judged at the Constitutional Altar, The Leaflet (Mar. 12, 2021), https://www.theleaflet.in/why-same-sex-marriages-must-be-judged-at-the-constitutional-altar/.
[8] Alexandra Muller, Health for All? Sexual Orientation, Gender Identity, and the Implementation of the Right to Access to Healthcare in South Africa, Health & Hum. Rts. J. 195 (2016).

orientation, lacking any rational legal basis; as an illustration of its broader consequences, a gender-based reading of the Hindu Succession Act, 1956 could deny a transgender individual the right to inherit property even as the sole surviving heir[9].From this premise of a need for recognised marital status comes the demand for that recognised marital status. The same holds for the reason that it is not legitimate to criminalise an individual for behaviours which are in accordance with their own morals or their own judgment about those behaviours. In both cases, the core concept is the democratic requirement of mutual respect among equal persons.[10].

No existing study, however, systematically maps the Hart–Devlin debate onto the specific doctrinal divide between these two decisions, identifying *Navtej* as Hartian and *Supriyo* as neo-Devlinite, and using that mapping to expose the philosophical incoherence of the latter. The critical lacuna in existing scholarship lies not in the question of whether sodomy laws should be struck down, but in the failure to trace the philosophical logic by which decriminalisation necessarily entails an obligation to recognise same-sex relationships[11]. This paper fills that gap.

The methodology is doctrinal. The paper proceeds as follows. Part II establishes the Hart–Devlin debate as the theoretical framework and examines both its internal critiques and its Indian institutional legacy. Part III analyses Section 377 and the Devlinite inheritance it embedded in Indian law. Part IV maps *Navtej* onto the Hartian framework. Part V examines *Supriyo* as a neo-Devlinite retreat. Part VI situates India within the comparative constitutional landscape. Part VII synthesises the argument and Part VIII concludes.

II. The Hart–Devlin Debate: Theoretical Framework, Internal Critiques, and Indian Legacy

A. Devlin's Legal Moralism: The Disintegration Thesis and the Reasonable Man

The Hart–Devlin debate has its intellectual origins in the 1957 Wolfenden Report, which recommended decriminalising consensual homosexual conduct between adults in private, on the basis that the criminal law's proper function was to safeguard public order and decency rather than to regulate the private lives of citizens or to enforce any specific moral system of

[9]Sanskriti Rai, From Discrimination to Recognition — Supriyo Chakraborty & Ors v. Union of India, 4 Jus Corpus L.J. 67 (June–Aug. 2024).
[10] Robert A. Burt, Moral Offences and Same-Sex Relations: Revisiting the Hart-Devlin Debate.
[11] Ibid

conduct[12]. Where Hart frames the relationship between law and morality as one of opposition and mutual limitation, Devlin conceives of it as one of necessary interdependence[13]. The Wolfenden Committee proceeded from the shared premise that private conduct or immorality that causes no offence or injury to others fell outside the proper province of the criminal law. Critics of the Report, though, saw a more troubling dynamic, in that by identifying and demarcating a separate homosexual minority, the Report in effect solidified a hetero/homo dichotomy that marginalised the fluidity of sexual and gender identity, and in framing an essential minority that is corralled, in effect negated the greater reality of the desire of same-sex[14].

The main question by Devlin is how crime and sin are related i.e. how far the criminal law can be rightfully interested in the imposition of moral norms. He argues on the basis that social cohesion is not made by physical compulsion but a system of mutual moral and political commitments and that no society can be able to sustain itself without an established morality and that an established morality is as essential to the well being of the society as good governance[15]. It has the result of the so-called disintegration thesis: because the common system of moral beliefs is the glue which makes a community, the State is justified in its defense of that system by law. In the case where there is no punishment of immoral behavior, Devlin contended, there will be a tendency by the citizens to view the law as promoting immorality which will in turn reduce the admiration of the larger legal and institutional order[16].

In the case of Devlin, morality is not a thing which stands outside of the social organisation, but rather is a constitutive element of a community: one cannot conceive of community without a shared moral order, and any attack upon that moral order is also an attack upon the community itself. Moral standards therefore are not incidentally upheld by law and are a structural requirement of the State[17]. Where Devlin finds the identity and continuity of a society in the fact that it has a common moral code, the liberal tradition finds it in the reciprocation of divergent moral visions amongst free citizens. Devlin extrapolated this argument to marriage specifically arguing that since the institution is deeply rooted in the core of the existing moral

[12] Scottish Home Department, Sir John Wolfenden, Report Of The Departmental Committee On Homosexual Offences And Prostitution, (1957) (United Kingdom).
[13]Yves Caron, The Legal Enforcement of Morals and the So-Called Hart-Devlin Controversy, 15 McGill L.J. 9 (1969).
[14] Brian Lewis, Wolfenden's Witnesses: Homosexuality in Postwar Britain 275 (Palgrave Macmillan 2016).
[15] Patrick Devlin, The Enforcement of Morals 14 (Oxford University. Press 1965).
[16] Ibid
[17] Heta Hayry, Liberalism and Legal Moralism: The Hart-Devlin Debate and Beyond, 4 Ratio Juris 202 (1991).

order, that any opposition to its conventional form is a corresponding opposition to social order itself[18].

The animating principle of Devlin's position is that law exists not merely to protect individuals from harm by others but to safeguard the institutions and shared moral understandings without which organised social life becomes impossible[19].

The benchmark Devlin proposes for measuring society's moral judgements is the reasonable man, a figure defined not by philosophical rigour or intellectual refinement, but by his capacity to represent the instinctive moral convictions of ordinary right-minded members of society[20]. On this view, questions of moral order are to be resolved not by philosophical argument but by the settled convictions of the average person, whose common-sense judgement Devlin regarded as an adequate and appropriate guide[21]. Devlin further rejected the very concept of purely private morality: all morality, he maintained, is inherently social in character and oriented toward social ends, which means that no moral conduct can be genuinely insulated from the community's legitimate concern [22].

A second dimension of the Devlinite argument is the conservative thesis: the majority are entitled to use law to protect the moral environment they inhabit, treating its preservation as a value in its own right rather than merely as an instrument of social cohesion. Proponents of laws prohibiting homosexual behaviour have mainly made use of three main arguments for this position: Firstly, they claim that homosexual behaviour, by definition, is an inherently wrong or prima facie wrong. Secondly, they argue that if laws against homosexual conduct were to be repealed, they would be effectively normalising homosexuality, thereby undermining social cohesion. Thirdly, proponents assert that the moral status quo, which represents the view of the vast majority in society, is an inherent value and should be defended from change. The orthodox thesis is supported by religious organisations and other groups with longstanding opposition to homosexual conduct. For many centuries this view has been held by religious organisations.[23].

[18] R. Wollheim, Crime, Sin, and Mr. Justice Devlin, in The Enforcement of Morals 38–39 (1959)
[19] Devlin, supra note 16
[20] Patrick Devlin, The Enforcement of Morals (Oxford University. Press 1965); J.S. Mill, On Liberty 130 (Washington Square Press ed.); E.V. Rostow, The Enforcement of Morals, (1960) Camb. L.J. 174, 185.
[21] Caron, supra note 14
[22] Ibid
[23] Russell Hittinger, The Hart-Devlin Debate Revisited 35 Am. J. Juris. 47, 49 (1990).

Two structural limitations of the Devlinite framework demand attention. First, the reasonable man standard is fundamentally sentimental rather than rational: it asks what ordinary people feel rather than what principled argument demands. A constitution, by design, imposes reasoned limits on majoritarian power; it cannot be administered through the vehicle of popular feeling. Second, Devlin himself acknowledged that no theoretical ceiling can be placed on the State's power to legislate against immorality offering only loose practical restraints rather than principled constraints. In a democratic constitutional government, this admission has fatal consequences because it will provide no basis for stopping the majority from having too much power to do what they want. In the end, Devlin's framework is incapable of providing the necessary evidence to disprove the harm principle as the standard for law reform; furthermore, legal moralism, which comprises Devlin's framework, lacks adequate constitutional support[24].

B. Hart's Liberal Positivism: The Harm Principle, Critical Morality, and Its Limits

Hart's response proceeds from two foundational analytical commitments. The first is a Mill-derived harm principle: Hart treated legal coercion as inherently requiring justification, defensible only where it serves a countervailing good of sufficient weight. This separates his position sharply from Devlin's, for whom the shared disapproval of the community is itself a constitutionally adequate reason for legal prohibition[25]. Hart further observed that laws regulating sexual conduct impose a distinctively acute form of suffering on those subject to them. Unlike the suppression of impulses toward theft or violence, the repression of sexual impulses implicates a dimension of human personality that is persistent and integral to individual identity making its legal enforcement qualitatively more harmful than the prohibition of ordinary criminal conduct.

Hart's second foundational commitment is a conceptual distinction between two kinds of morality: positive morality, meaning the moral code actually prevailing within a given social group at a given time, and critical morality, comprising the general evaluative principles by reference to which social institutions including a community's positive morality may themselves be assessed and found wanting. For Hart, the fundamental issue is what weight to assign to the historical fact that a particular form of conduct is prohibited by an existing positive morality. The utilitarian answer is that this fact carries no independent justificatory force; the

[24] Heta Hayry, Liberalism and Legal Moralism: The Hart-Devlin Debate and Beyond, 4 Ratio Juris 202 (1991).
[25] H.L.A. Hart, Law, Liberty and Morality (Oxford University. Press 1963).

opposing answer is that it does. These represent genuinely divergent critical principles, disagreeing not merely about the content of any particular morality but about a more basic question: what entitles a community to enforce its morality through law at all. Hart's answer was that this is a question to be resolved by critical morality, not one that can be settled simply by pointing to what the existing positive morality already prescribes[26]. A commitment to liberty and autonomy is, on Hart's account, the only publicly defensible moral framework that categorically rules out using law to intrude into citizens' private lives[27].

Hart directly challenged the disintegration thesis on both empirical and normative grounds. Whether any society is justified in taking coercive steps to preserve itself, he argued, cannot be answered without first asking what kind of society it is and what means of preservation are proposed: a community devoted to persecuting a racial or religious minority might be better dissolved than perpetuated. Hart further cautioned against conflating the democratic principle that political authority rests with the majority with the very different and far more dangerous claim that majorities, once empowered, face no principled limits on what they may do[28]. Hart also insisted on a sharp conceptual separation between paternalism protecting individuals from harm to themselves and legal moralism enforcing morality as such. These are distinct policies with distinct justificatory structures and must not be run together. For Hart, the existence of laws enforcing a positive morality marks the starting point of the inquiry, not its resolution: the mere fact that a moral standard is being legally enforced provides no independent reason why it should be[29].

At a significant level, the disagreement between Hart and Devlin reflects a divergence in their fundamental orientation: Devlin's framework is group-centred by prioritising the integrity of the community's shared moral life, while Hart's is individual-centred by treating the right of persons to engage in private consensual conduct as a value that outweighs the community's moral disapproval of those acts[30]. Any court that decriminalises same-sex conduct must understand that it is not merely permitting a sexual act: it is recognising the full personhood of the citizens whose identities are constitutively bound up with that act[31].

[26] Robert B. Fleming, Law, Liberty, and Morality. By H. L. A. Hart, 12 Buff. Law. Review. 640 (1963).
[27] Hayry, supra 26
[28] supra n27
[29] Ibid.
[30] Ibid.
[31] Alok Gupta, Section 377 and the Dignity of Indian Homosexuals, 41(46) Econ. & Pol. Wkly. 4815 (Nov. 18–24, 2006).

Hart's framework, however, contains a structural limitation of its own, one that is decisive for the recognition question. When pressed on what critical morality actually is, Hart identifies what it is not neither Kantian metaphysical reasoning nor Humean moral sentiment but never provides a positive specification of its content. His harm principle, detached from the broader Millian philosophy of individual self-development from which it was originally derived, cannot by itself generate a positive state obligation to recognise and facilitate a form of life. It explains why the State must not criminalise; it cannot explain why the State must actively enable. The autonomy-based framework, while powerful as a shield against state intrusion into private life, cannot serve as a sword compelling affirmative state recognition[32]. This gap between the negative liberty of decriminalisation and the positive entitlement of recognition is precisely the philosophical space that the *Navtej–Supriyo* divide inhabits.

C. The Wolfenden Legacy and Its Indian Institutional Echo

The Wolfenden Report's recommendations took a decade to translate into legislation: the Sexual Offences Act 1967 finally abolished criminal penalties for consensual same-sex conduct between adults over twenty-one in England and Wales, with the age of consent subsequently equalised at sixteen in 2001[33]. India's legislative record traces a parallel institutional trajectory. The 42nd Law Commission Report of 1971 prioritised prevailing social morality over reform, recommending that Section 377 of the IPC be retained[34]. The 172nd Law Commission Report of 2000[35] identified the irrationality of subjecting child sexual abuse and consensual sexual acts between adults to an identical penal provision, and accordingly recommended the repeal of Section 377 IPC,[44] and recommended its deletion. However the legislature chose not to act on the recommendation, a choice that precisely mirrors Devlin's institutional prescription as a deference to the legislature as the custodian of social consensus.

III. Section 377 and the Devlinite Inheritance in Indian Law

Section 377 represents the most direct institutional embodiment of Devlinite legal moralism in Indian law. While the provision was facially neutral in its drafting targeting conduct rather than identity, its practical operation was anything but. The law criminalised the only means by

[32] Hayry, supra 26
[33] Sexual Offences (Amendment) Act 2000 (UK), Gee Imaan Semmalar, Re-Casting Navtej Singh v. Union of India, 13 NUJS Law. Review. 464 (2020).
[34] Law Commission of India, Indian Penal Code, Report No. 42 (June 1971).
[35] Law Commission of India, Review of Rape Laws, Report No. 172 (March. 2000).

which homosexual men and women were able to sexualise themselves and therefore imposed on an entire class of people defined by this criminality a structural presumption of criminal culpability[36].This is an example of the Devlinite movement in its purest form; that the criminal law is used as to enact a criminally enforceable ban against a form of life which is viewed as immoral by the majority rather than harm to the person themselves or to others.

In *Queen Empress*[37], Khairati, a eunuch, was convicted by the Sessions Court of being guilty based on the results of a medical examination conducted during the trial. The Allahabad High Court overturned the conviction due to lack of evidence presented by the prosecution in support of the charge of sodomy; additionally, the Court held that merely being a habitual sodomite does not make one liable for punishment under Section 377.[38]. The criminalisation of homosexual conduct by the State functions as an official endorsement of discrimination, inviting and legitimising the marginalisation of homosexual persons across both public and private domains[39].

The Supreme Court's 2014 decision in Naz *Foundation*[40] represents the most explicit judicial endorsement of Devlinite reasoning in Indian constitutional law. The bench sustained Section 377 on the remarkable ground that the LGBT community represented only a negligible fraction of the population, a figure too small, in the Court's view, to ground a constitutional challenge under Articles 14, 15, and 21. This reasoning received strong scholarly criticism as a sort of demographic arithmetic of the constitutional principle, which was essentially inconsistent with the guarantees to equality which the Indian Constitution provided[41]. The bench refused to indulge in the refined line of argument that had upheld the ruling of the Delhi High Court, but instead withdrew to a more restricted interpretation of Article 21 and a formalistic test of equality that allowed statutory classifications provided that the classifications were not blatantly arbitrary[42]. The Court finally found that Section 377 was not an arbitrary or irrational classification and in such a manner overturned the Delhi High Court and thereby reinstated the

[36] Joseph Wardenski, A Minor Exception? The Impact of Lawrence v. Texas on LGBT Youth, 95(4) J.Criminal. L. & Criminology 1365 (2005).
[37] Queen Empress v. Khairati, 1884 SCC OnLine All 70.
[38] Pratik Dixit, Navtej Singh Johar v. Union of India: Decriminalising India's Sodomy Law, Int'l J. Hum. Rts. (2019), https://doi.org/10.1080/13642987.2019.1690465.
[39] Robert A. Burt, Moral Offences and Same-Sex Relations: Revisiting the Hart-Devlin Debate.
[40] Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1.
[41] Aditya Sharan & Aryan Jain, Towards Inclusive Justice: Scrutinizing the Supreme Court's Verdict on Same-Sex Marriage Rights.
[42]Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, ¶ 41; Upendra Baxi, Naz 2: A Critique, 49 Econ. & Pol. Wkly. 12 (2014).

criminalization of same-sex conduct that was consensual.[43].

The "minuscule minority" reasoning in effect transplants Devlin's reasonable man standard into constitutional discourse: the majority's moral reprobation, channelled through the legislature's retention of Section 377, is elevated into a sufficient constitutional justification for criminalisation. This reasoning also reflects a deeper institutional reluctance to disturb the prevailing social morality of the country, a morality that regards marriage as a sacramental institution and treats the extension of marital rights to the queer community as a threat to that institution[44].The ruling illustrates how positive morality can circumvent constitutional morality. This is the very inversion that the petitioners in Navtej used to challenge invalidation, by producing evidence of multiple wrongfully confined persons, those who have been rejected by natal families and have suffered severe psychological issues due to their non-normative gender and sexualities and thus by proving how disproportionately LGBT persons are targeted by police officers under Section 377.

IV. Navtej Singh Johar v. Union of India (2018): Constitutional Morality as Hartian Critical Morality

Navtej Singh Johar constitutes the definitive Hartian moment in Indian constitutional history. The five-judge Constitution Bench overruled *Koushal* and struck down Section 377 by deploying a philosophical architecture that tracks Hart's position in the debate with a precision that the judgment itself makes explicit.

The Court engaged directly with the Hart–Devlin debate. It held that the conduct criminalised under Section 377 consensual carnal intercourse between adults is purely private and self-regarding in Mill's sense, confined to consenting adults, incapable of causing injury to third parties, and posing no threat to the stability or security of society[45]. The Court endorsed Hart's caution that democratic legitimacy the principle that authority flows from the majority must not be confused with the far more troubling claim that the majority, once in power, is free from all principled constraint and that the majority, with power in their hands, need respect no limits. The Court endorsed Hart's rejection of the view that laws untethered from collective morality will cause social disintegration, and drew the critical distinction between acts that mainstream

[43] Ibid
[44] supra n3
[45] Supra n33

society considers immoral and acts that constitute private conduct holding that the latter fall outside the domain of legal regulation altogether[46].

The core step maps directly onto Hart's positive/critical morality distinction. The Court held that constitutional morality not the prevailing views of the majority on sexual conduct must be the governing standard against which Section 377's validity is measured.[11] Constitutional morality operates on fundamentally different premises from public or societal morality. Where public morality governs conduct by reference to prevailing popular sentiment, constitutional morality governs by reference to the text and animating spirit of the Constitution demanding that individual rights be determined by constitutional principle rather than by the shifting preferences of the majority.[11] In this way, constitutional morality functions as a structural safeguard against majoritarian overreach a principled counterweight to popular public morality that prevents the democratic will from trampling upon fundamental rights.[11]

The analytical mapping is exact: constitutional morality functions as critical morality in Hart's sense it comprises the evaluative principles derived from constitutional text by which prevailing social institutions, including the positive morality of a given moment, may be interrogated and found wanting. Popular or social morality, by contrast, is positive morality in Hart's sense the moral code that happens to be accepted within a given community at a given time. The Court endorsed the Delhi High Court's holding in *Naz Foundation* that constitutional morality must prevail over the claims of public morality, regardless of whether that morality enjoys majority support.[11] The holding that positive morality cannot validate itself in the face of constitutional adjudication is the precise Hartian commitment that *Koushal* had abandoned.

The Ambedkarian supplement is critical here and it is the element that resolves the structural limitation Hart's framework contained. The Court drew explicitly on Dr. Ambedkar's formulation before the Constituent Assembly: constitutional morality is not a natural sentiment but must be cultivated.[11] Ambedkar's constitutional morality provides precisely what Hart's critical morality could not: a substantive, positively articulated account of the governing standard one that goes beyond the negation of positive morality to affirm an anti-majoritarian, dignity-centred, and constitutionally transformative set of values. The numerical minority reasoning of *Koushal* was directly rejected, and the decision in *Koushal* stands overruled.[11]

[46] Supra n3

V. Supriyo @ Supriya Chakraborty v. Union of India (2023): The Neo-Devlinite Retreat

Supriyo confronted the logical consequence of *Navtej*: if LGBTQ+ persons are equal citizens entitled to the full range of constitutional rights, does that equality extend to the institution of marriage? The majority answered in the negative. The judgment, read through the lens of the Hart–Devlin debate, constitutes a neo-Devlinite retreat, a reversion to social morality as the governing standard for constitutional adjudication, dressed in the language of institutional restraint.

The majority's treatment of marriage reproduces Devlin's structural argument in constitutional language. The Court characterised marriage as a social institution that antedates the formal legal and political structures that have come to regulate it recognised first through custom and subsequently through law and treated it as both the foundation of social continuance and its most basic organisational unit building block[47]. The Court identified companionship, sexual intimacy and, above all, procreation as the defining features of marriage, treating the institution's reproductive function as central to its social purpose and its claim to continued legal protection.[2] This mirrors Devlin's argument precisely: marriage is built into the house in which we live and cannot be removed without bringing it down. The institution's historical embeddedness in social consensus is elevated to the status of a constitutional reason for judicial restraint.

The Devlinite logic is most clearly operative in the majority's deference-to-Parliament holding. The Court found that to create an entirely new structure for non-heterosexual marriages, would require massive legislative change to both create a new non-heterosexual social institution as well as many legal and social rights associated with such. Courts simply don't have the power or jurisdiction to create wholly new social institutions and therefore cannot create any law or decree establishing the new marriage constructs.[2] After the decriminalisation of homosexuality in *Navtej*, members of the LGBTQIA+ community possess freedom and autonomy to choose their partners, but that decriminalisation imposes no corresponding obligation on the State to confer legal recognition upon such relationships since marriage is a legally privileged status conditional upon statutory or societal criteria, and the liberty to choose a partner does not automatically entail an entitlement to marry that partner.[2] Justice Bhat argued that some classifications are permissible and do not amount to discrimination, so long as they are

[47] Supriyo @ Supriya Chakraborty v. Union of India, W.P. (Civil) No. 1011 of 2022 (2023), para 73–74

reasonable and based on intelligible differentia related to the aim of the underlying law.[2] There is no unqualified right to marriage except that recognised by statue, and the Court cannot enjoin or direct the creation of such a regulatory framework.[2]

The justices not only found that the Indian Constitution does not guarantee a right to marry to same-sex couples, but that it does not guarantee a fundamental right to marry at all, leaving the legislature with significant discretion to structure civil marriage as it sees fit[48]. Same-sex couples do not have access to many of the legal benefits that married couples have access to, including rights to inheritance, spousal maintenance, pensions (under the Employees' Provident Funds Scheme 1952), employment benefits (under the Workmen's Compensation Act 1923), health benefits (associated with spouses), as these are only available to cisgender heterosexual couples[49]. The Special Marriage Act (1954), which was created to provide legal recognition for certain marriages, does not include marriages between members of the same gender. If Parliament passed a law allowing for same-sex marriage, it would create many complex issues for those wanting to adopt children, pay child support, gain custody of their children, and gain inheritance rights.

The internal inconsistency of *Supriyo* is analytically decisive. The Court itself acknowledged that the law in the form of Section 377 imposed social morality on homosexual relationships, and that discrimination against the LGBTQIA+ community is in so many ways a product of social morality[50] yet proceeded to defer to that same social morality as a sufficient constitutional basis for denying marriage recognition. The Court accepted the submission that constitutional morality cannot and ought not to be replaced by social morality[2] yet its ultimate holding that the question of recognition is for Parliament to decide effectively privileged positive morality over constitutional morality, inverting the logic of *Navtej*. The Court itself acknowledged that the prevailing legal status quo compounds the daily experience of exclusion felt by members of the queer community, and that sustained legislative inaction risks entrenching grave injustice[2] and yet declined to remedy it.

It is precisely because of that the judgment is analytically unsatisfying on the one hand in that it recognizes the discrimination that same-sex couples experience without offering any judicial

[48] Ryan Thoreson, Dignity Deferred: Supriyo v. Union of India and LGBTQ Rights, University of Cincinnati College of Law Scholarship and Publications
[49] Shivam Garg, Legal Recognition of Same-Sex Marriage Rights in India.
[50] supra n49

solution. This inaction replicates this social morality which the Court in other places claimed to subordinate to constitutional principle. The trend of institutional self-censorship was also apparent at the hearings on the Navtej: as the counsel representing the petitioners started to develop the argument in terms of extended civil rights, Chief Justice Misra sternly told them that the issue of marriage was a matter of quite a different order. That judicial warning became in Supriyo a constitutional decision[51]. The institutional warning at that exchange took in Supriyo a constitutional decision.

Another complication in the legal recognition argument is the fact that marriage is a highly religious institution in the Indian society. The Indian culture has a broad definition of marriage as a sacrament, and most of the citizens have their marriage status as something that cannot be separated with its religious value[52]. Another argument that has been presented mostly by the opponents is that legalizing same-sex marriage would roll the law into a path of approving other non-normative marriages like polygamous and incest marriages. This is an empirically invalid argument: there is no jurisdiction that has legalised same sex marriage which has had such a downstream effect. Additionally, social science studies have continued to indicate that there is no significant psychological disparity in heterosexual and same sex marriages, and legalization has significant psychological, social, and health advantages to same-sex couples and their children.[53].

VI. Comparative Constitutional Dimension: India as the Devlinite Outlier

In reviewing the constitutional record of all the rights-based democracies, one will find a very consistent jurisprudential history: all jurisdictions that have directly addressed the question of whether to recognize same-sex marriage have ultimately shifted out of Devlinete deference to social consensus and into some form or other of the Hartian harm principle with equality-based dignity added to it. The only country that is not following this pattern is India, the philosophically anomalous country.

In *Obergefell v. Hodges*[54], the United States Supreme Court held that excluding same-sex couples from the institution of marriage denies them equal dignity and access to a fundamental

[51] Kai Schultz, India Gay-Sex Ruling: What to Expect, N.Y. Times, Sept. 5, 2018.
[52] Shodhganga, Homosexuality in India (Mar. 11, 2018).
[53] George M. Herek, Legal Recognition of Same-Sex Unions in the United States: A Social Science Perspective, 61(6) Am. Psychologist 607 (2006).
[54] *Obergefell v. Hodges*, 576 U.S. 644 (2015)

social institution, and that marriage law must develop in step with evolving constitutional values — the mere historical fact of exclusion being explicitly insufficient to justify its continuation. The South African Constitutional Court in *Minister of Home Affairs*[55] (2005) held that the constitutional guarantees of equality and dignity obliged the State to extend recognition to same-sex marriage notwithstanding public opinion was divided which is a direct application of constitutional morality over social morality, and precisely the move *Navtej* made but *Supriyo* declined to make.

The Constitutional Court in Taiwan scrutinized the prohibition on marriage between members of the same sex with particular intensity and concluded that the freedom to marry is a basic right that applies to all individuals, regardless of sexual orientation. Likewise, the UK parliament has legalized same-sex marriages by enacting the Marriage (Same-Sex Couples) Act 2013 as an expression of legislative will, after much discussion and debate on the issue, without any judicial orders. This shows that continued judicial declaration of rights followed by legislative action serves as an equally valid method of changing the Constitution. The European Court of Human Rights in *Oliari*[56], established that States bear a positive obligation under the right to family life to provide legal recognition and protection for same-sex couples thereby confirming that the refusal to recognise is not a constitutionally neutral act of omission but an active deprivation of rights. International human rights bodies have similarly affirmed that the absence of relationship recognition generates systemic inequality even where private conduct has been decriminalised, a principle established as far back[57].

Constitutional systems in the world have been moving toward more prominence of constitutional morality over existing social morality of minority cases, and the reasoning behind the judicial decision has shifted towards interpretations based on dignity, autonomy, and substantive equality the very repudiation of Devlinite deference that characterizes every jurisdiction to have recognised same-sex marriage. Same-sex behaviour remains non-recognized even in those jurisdictions where it has been decriminalised, and proves the point that non-recognition to achieve equal citizenship is not enough, and decriminalisation is not enough to make it happen, which the Supriyo majority failed to address.

While global constitutional trends point toward increasingly inclusive understandings of family

[55] Minister of Home Affairs v. Fourie, (2005)(Constitutional Court of South Africa).
[56] Oliari and Others v. Italy, Eur. Ct. H.R. (2015).
[57] Toonen v. Australia, Communication No. 488/1992, UN Human Rights Committee, (1994).

and marriage achieved through both judicial mandate and democratic legislation, India occupies a singular position: the only rights-based constitutional democracy to have affirmed the constitutional legitimacy of same-sex relationships while simultaneously refusing to remedy their exclusion from the institution of marriage. The Supriyo ruling reinstated dignity and autonomy but placed same-sex couples outside of statutory marriage structures creating a rights disparity; a legally recognized evil with no legally required solution, inconsistent internally with the constitutional morality jurisprudence of the Court herself in Navtej. The conflict between constitutional morality and social morality is something which continues to define same sex marriage litigation all over the world; what makes India unique is that its Supreme Court overturned the very reasoning it had used to support constitutional morality in Navtej and instead supported social morality in Supriyo.

VII. Synthesis: Constitutional Morality as the Bridge Hart Could Not Build

The mapping of the Hart-Devlin debate onto the Navtej-Supriyo divide sheds some light on the decisions made, as well as on the boundaries of the debate itself. Neither framework can be used in its original form with the result that it leaves a residual gap which is filled by the Indian constitutional order own resource of constitutional morality as developed by Ambedkar.

In the Indian situation, pitting Devlin against Devlin, the objection which is fundamental is epistemic: whose morality? The social morality of India is not just a one, unified, pre-political consensus, which the framework of Devlin assumes. It is caste inflected, plural, regionally varying and to a large extent colonial in its origin.

Section 377 was not the indigenous expression of an Indian moral community but was the imposition of Victorian moral order on a society whose own historical traditions contained far more complex and varied understandings of gender and sexuality. The invocation of social consensus against same-sex marriage is therefore not the expression of an authentic moral community but the perpetuation of a colonial distortion. There is no "reasonable Indian" whose felt moral convictions can serve as the constitutional standard that Devlin's framework requires.

Against Hart alone, the limitation is structural. Hart's harm principle establishes a necessary condition for the legitimacy of criminalisation that conduct causing no harm to others falls outside the legitimate reach of the criminal law but it does not establish a sufficient condition for positive state recognition of forms of life. Structural exclusion from marriage is harm,

dignitary, material, and relational. Lawmakers cannot create and extend a statutory right to marry to some and then irrationally withhold it from others in a way that stigmatises their relationships and violates their equal dignity[58].Same-sex unions can be formally acknowledged through methods such as Civil Union recognition; Personal Law Amendments; an Amendment of the Special Marriage Act; or Judicial Interpretation of the (Special Marriage) Act[59].An empirical survey within Social Research has confirmed that there are no differences in psychological characteristics (dimensions) between heterosexual and same-sex marriage; thus, granting legal status to same-sex marriages will produce measurable Psychological, Social and Medical benefits for both parties involved as well as children of same-sex couples[60].

The Indian constitutional answer to both residual gaps is Ambedkar's constitutional morality. Constitutional morality is not a natural sentiment, it has to be cultivated. As the *Navtej* Court held, it acts as a check against the tyranny of the majority and as a threshold against mob rule. It is anti-majoritarian because it is designed to protect minorities from the tyranny of the majority; rational because it is grounded in constitutional text and principle rather than social sentiment; and transformative because it is oriented towards the social transformation that the Constitution actively seeks to achieve. This is precisely the positive content that Hart's critical morality required but could not supply, a specification of what the governing standard is, not merely a negation of what it is not.

The *Navtej* Court correctly applied this doctrine. *Supriyo* abandoned it by reverting to positive morality, the morality actually accepted by the social group at precisely the constitutional moment when critical morality was most demanded. The internal contradiction is analytically inescapable: *Supriyo* itself acknowledged that Section 377 imposed social morality on homosexual relationships and that discrimination against the LGBTQIA+ community is a product of social morality[2] and then proceeded to defer to social morality as the constitutional reason for denying marriage recognition. The two positions cannot be simultaneously maintained. Constitutional morality, correctly applied, requires the state not only to refrain from criminalising but to actively enable the conditions for dignified life and it is that positive obligation that *Supriyo* refused to discharge.

[58] Laurence H. Tribe, Equal Dignity: Speaking Its Name, 129 Harv. L. Rev. F. 16 (2015).
[59] Shivam Garg, Legal Recognition of Same-Sex Marriage Rights in India.
[60] George M. Herek, Legal Recognition of Same-Sex Unions in the United States: A Social Science Perspective, 61(6) Am. Psychologist 607 (2006).

VIII. Conclusion

In this paper, a three-arc movement in the constitutional jurisprudence in India on the rights of sexual minorities was traced. Section 377 and the judicial defence to it in Koushal is the Devlinite legacy: the enforcement of common social morality by criminal law, and the warrants of collective reprobation is the working constitutional warrants. The exemplar of the Hartian moment is Navtej Singh Johar: the denial of positive morality as a constitutional ideal, the overlooking of social morality in the favor of constitutional morality, and the vindication which is based on the constitutional vision of Ambedkar that the individual dignity and autonomy cannot be sacrificed in the interests of the majority. Supriyo is the rebirth of Devlin: the process of making marriage a socially institutionalized structure, whose critical attributes are to be maintained by Parliament, and the legislative deference of the reasonable man the neo-Devlinite analogue of the reprobation of the reasonable man.

Navtej believed that constitutional morality should have an upper hand over public morality even when the morality has been popularized by the majority of the people. Supriyo considered that majoritarian opinion as an adequate cause of judicial restraint. The conclusion of the current paper is verified: Supriyo is a philosophically neo-Devlinite disposition and internally inconsistent with Navtej. Both decisions were handed down on the same Court, with five years separation, on the same constitutional text. The discrepancy is not dogmatic, it is philosophic. The two holdings are mutually exclusive except to the extent that one of them is erroneous, and the constitutional morality regime which the Court itself has set in the case of Navtej determines the erroneous one..

The forward-looking implications are twofold. Legislative action on same-sex marriage, if and when it materialises, must be grounded in constitutional obligation rather than political concession, the Constitution does not merely permit such recognition but, on the analysis advanced in this paper, demands it. A future Constitution Bench revisiting *Supriyo* will find in the constitutional morality framework that *Navtej* itself established the doctrinal foundation for a different conclusion. Constitutional morality is not static, and it is not contingent on present social consensus rather it is a commitment to gradual social transformation guided by the constitutional principles of equality, dignity, and fraternity that Dr. Ambedkar placed at the foundation of the Indian constitutional order.

The distance between decriminalisation and recognition is not legislative rather it is

philosophical. And the philosophy that bridges that distance is not to be found in Devlin's social cement, nor entirely in Hart's harm principle, but in the constitutional morality that the Indian Constitution has always contained. So long as Navtej's philosophy is not applied continuously, the commitment will remain suspended, i.e., when the state grants us our liberty without our dignity, it decriminalises us without any recognition, it frees us from punishment without ever providing us with freedom to simply live.

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