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# **FROM PUBLIC DISAPPROVAL TO JUDICIAL RECOGNITION: NAVIGATING THE CONFLICT BETWEEN CONSTITUTIONAL MORALITY AND SOCIETAL MORES IN SAME-SEX UNIONS**

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## **ABSTRACT**

The tension between Constitutional Morality and Societal Mores represents one of the most significant fault lines in contemporary Indian jurisprudence, particularly regarding the legal recognition of same-sex unions. While the Indian Judiciary has increasingly adopted a "transformative constitutionalist" approach to safeguard the rights of the LGBTQ+ community, it faces persistent friction from a social fabric rooted in traditional, heteronormative values. This paper examines the evolution of this conflict, tracing the judicial trajectory from the initial decriminalization of consensual same-sex acts in *Navtej Singh Johar* to the recent, contentious verdict in *Supriyo v. Union of India*.

The study explores how the doctrine of Constitutional Morality—defined by principles of dignity, liberty, and pluralism—serves as a counter-majoritarian safeguard against "popular morality." However, the refusal of the Supreme Court to grant a fundamental right to marry suggests a judicial hesitation to override legislative domain when social institutions are at stake. By analyzing key precedents and the "counter-majoritarian difficulty," this paper argues that while the judiciary has successfully navigated the shift from public disapproval to partial judicial recognition, the final bridge to full marital equality remains blocked by the state's deference to societal mores. The research concludes that for true equality to be realized, the law must move beyond mere tolerance toward a substantive framework of civil union or marriage that reflects the "Living Constitution," independent of prevailing social prejudices.

**Keywords:** Constitutional Morality, Same-Sex Unions, Transformative Constitutionalism, Societal Mores, LGBTQ+ Rights, *Supriyo v. Union of India*.

## INTRODUCTION

The evolution of queer rights in India is a saga of a "silent revolution" being fought within the marble halls of the Supreme Court. At the heart of this struggle lies a profound ideological schism: the clash between **Constitutional Morality** and **Societal Mores**. While the former is a dynamic, rights-based framework designed to protect the individual from the "tyranny of the majority," the latter is a static collection of traditional values, religious dogmas, and historical prejudices that define the collective conscience of a society. This paper explores how this conflict has dictated the pace of legal recognition for same-sex unions in India.

The term "**Constitutional Morality**" was famously resurrected by Dr. B.R. Ambedkar, who argued that it is not a natural sentiment but one that must be cultivated. In a legal sense, it refers to the adherence to the core principles of the Constitution—justice, liberty, equality, and fraternity—even when they contradict the popular will. It is inherently "transformative," seeking to repair historical wrongs and protect the "minuscule minorities" who may never find favor in a majoritarian parliament.<sup>1</sup> Conversely, "**Societal Mores**" (or Social Morality) represent the "standard of the reasonable man" or the "collective conscience." In the context of marriage, these mores view the institution not merely as a legal contract but as a sacrosanct union between a biological man and a biological woman, intended for procreation. The conflict arises because social morality often uses the "preservation of culture" as a shield to deny equal rights, whereas constitutional morality demands that no tradition can survive if it violates the bedrock of human dignity.<sup>2</sup>

Following the landmark judgment in *Navtej Singh Johar v. Union of India* (2018), which struck down the colonial-era Section 377, there was a palpable sense of inevitability regarding marriage equality. If the state no longer viewed queer intimacy as "unnatural," it stood to reason that the state should recognize the unions resulting from that intimacy. However, the transition has stalled.

Despite the decriminalization, the Indian state continues to withhold the "bundle of rights" associated with marriage—including inheritance, adoption, insurance, and next-of-kin status. The central problem is a jurisdictional and moral deadlock: the Executive and Legislative

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<sup>1</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

<sup>2</sup> Andre Beteille, "Ideology and Social Science," (2006).

branches argue that marriage is a "social institution" that only Parliament can redefine, while the Judiciary, in its recent *Supriyo* verdict, appeared to reach its institutional limit, hesitant to mandate a new social reality from the bench.

This paper operates on the hypothesis that the Indian Judiciary utilizes the doctrine of constitutional morality as an effective sword to strike down **punitive laws** (like Section 377), but it hits a "ceiling" when asked to create **positive rights** or restructure deep-seated societal institutions.

While constitutional morality can compel the state to "stop interfering" in private lives (negative liberty), it has struggled to compel the state to "actively recognize" same-sex unions (positive liberty). This "ceiling" is not a lack of constitutional authority, but rather a manifestation of judicial restraint in the face of intense societal and political pushback. The court fears that by moving too far ahead of societal mores, it may risk its own institutional legitimacy and trigger a backlash that could destabilize the progress already made.<sup>3</sup> The scope of this research is primarily focused on the Indian legal landscape, specifically tracing the "Constitutional Odyssey" from the 2009 *Naz Foundation* judgment to the 2023 *Supriyo v. Union of India* verdict.

This paper employs a **doctrinal and analytical methodology**. It relies on:

1. **Primary Sources:** A rigorous analysis of Supreme Court and High Court judgments, focusing on the shifting definitions of "morality" and "privacy" within the text.
2. **Comparative Analysis:** Brief references to global precedents (such as *Obergefell v. Hodges* in the US) to contrast how other jurisdictions have bridged the gap between social disapproval and judicial recognition.
3. **Sociological Jurisprudence:** Examining the "State's Counter-Affidavits" in marriage equality cases to understand the specific "mores" cited by the government as barriers to legal change.

The research is limited to the legal and constitutional aspects of same-sex unions and does not delve into the theological validity of such unions within specific personal laws, except where such laws are used as arguments for state exclusion. To understand the weight of the "Societal Mores" the court is navigating, one must look at the prevailing data. While judicial recognition

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<sup>3</sup> *Supriyo v. Union of India*, (2023) SCC OnLine SC 1348.

has moved toward the left of the spectrum (progressive), public opinion in India remains deeply divided.<sup>4</sup>

Demographic Group	Support for Same-Sex Marriage (Approx. %)
General Population (2023 Survey)	28% - 32%
Gen Z / Urban Youth	45% - 53%
Rural / Tier 3 Populations	< 15%

## THEORETICAL FRAMEWORK: MORALITY IN THE EYES OF THE LAW

The jurisprudential tension between social and constitutional morality finds its most profound expression in the historic Hart-Devlin debate, which questioned whether the law should serve as a guardian of traditional ethics or a protector of individual autonomy. Lord Devlin argued that a shared "social morality" acts as the invisible bond of society, suggesting that the law has a duty to punish "vice" to prevent societal disintegration.<sup>5</sup>

Conversely, H.L.A. Hart, drawing from Mill's "harm principle," contended that legal coercion is only justified to prevent harm to others, asserting that private consensual acts—regardless of how "immoral" they seem to the majority—should remain beyond the reach of the state.<sup>6</sup> In the Indian context, this debate is resolved through the doctrine of Constitutional Morality, a term championed by Dr. B.R. Ambedkar to ensure that the "will of the majority" does not trample upon the fundamental rights of the individual.

This doctrine shifts the focus from religious or traditional "mores" to the secular values of liberty, equality, and fraternity enshrined in the Constitution. Consequently, the judiciary assumes a counter-majoritarian role, acting as a check on legislative or social impulses that would otherwise marginalize "minuscule minorities." As Justice Misra noted in *Navtej Singh Johar*, the court's duty is to uphold constitutional morality even when it is "at odds with popular sentiment," ensuring that the law evolves from a tool of social conformity into a vessel for

<sup>4</sup> Pew Research Center, "How people around the world view same-sex marriage," (June 2023).

<sup>5</sup> Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965).

<sup>6</sup> H.L.A. Hart, *Law, Liberty, and Morality* (Stanford University Press, 1963).

transformative justice.<sup>7</sup>

## THE JUDICIAL JOURNEY: FROM CRIMINALIZATION TO RECOGNITION

The trajectory of LGBTQ+ rights in India is marked by a dramatic oscillation between judicial conservatism and radical empathy. This journey can be categorized into three distinct phases: This three-phase categorization captures key milestones under Section 377 of the Indian Penal Code (IPC), which criminalized "carnal intercourse against the order of nature," disproportionately targeting consensual same-sex relations. Subsequent developments have layered additional complexities, particularly around civil rights like marriage and adoption.

**Phase 1: The Dark Ages (Suresh Koushal v. Naz Foundation):** In 2013, the Supreme Court overturned the Delhi High Court's progressive decriminalization of homosexuality, reinstating Section 377 of the IPC. The Court famously dismissed the rights of the queer community by labeling them a "minuscule minority" and asserted that a law cannot be held unconstitutional just because it offends a small section of society.<sup>8</sup> This phase represented the zenith of social morality in the courtroom, where the "collective conscience" and legislative passivity were given precedence over individual liberty.

**Phase 2: The Transformative Shift (Navtej Singh Johar v. Union of India):** This phase marked the formal enthronement of Constitutional Morality. In 2018, the Court unanimously struck down Section 377, declaring that the law's role is to protect diversity rather than enforce uniformity. The judgment emphasized that rights are not subject to the whims of the majority and that the "stigma" attached to the LGBTQ+ community was a violation of the Right to Dignity and Privacy under Article 21.<sup>9</sup>

**Phase 3: The Marriage Deadlock (Supriyo v. Union of India):** The most recent phase reflects an institutional impasse. In 2023, while the Court recognized the community's right to be free from discrimination, it stopped short of granting a "Fundamental Right to Marry." The bench was divided on whether marriage is a "statutory" creation—meaning it only exists as far as the law (like the Special Marriage Act) defines it—or a "constitutional" right rooted in the

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<sup>7</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1, ¶ 134.

<sup>8</sup> *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

<sup>9</sup> *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

freedom of choice. This deadlock suggests that while the Court is willing to protect private intimacy, it remains hesitant to redefine the public, social institution of marriage.<sup>10</sup>

Since *Supriyo*, momentum has shifted to legislative and policy arenas. Parliamentary standing committees reviewed marriage equality bills in 2024, with vocal support from opposition parties but resistance from the ruling coalition citing "social fabric." State-level initiatives, like Tamil Nadu's 2023 third gender policy expansions, signal incremental progress. Internationally, influences from Nepal's same-sex marriage recognition (2023) and Taiwan's model pressure India's judiciary. For legal scholars or moot court practitioners, this trajectory invites analysis of transformative constitutionalism versus institutional prudence—potentially culminating in a larger bench reference or fresh petitions post-2026 elections. The arc bends toward inclusion, but full equality hinges on law reform balancing personal liberty with societal evolution.

## NAVIGATING THE CONFLICT: MAJOR ARGUMENTS

The debate over same-sex unions is anchored by two opposing legal philosophies, each drawing from different interpretations of the "Right to Marriage."

**The Case for Constitutional Morality:** Proponents argue that the Right to Choice and Autonomy under Article 21 is hollow if it does not include the right to choose a life partner. Furthermore, they assert that excluding same-sex couples from the institution of marriage is a violation of Articles 14 (Equality) and 15 (Non-discrimination) on the basis of sexual orientation. Under the "Living Constitution" doctrine, the law must evolve to reflect modern understandings of family and partnership, ensuring that "marriage" is not an fossilized heteronormative relic but a dynamic site of equal citizenship.<sup>11</sup>

Proponents root their case in Article 21's expansive right to life and personal liberty, which encompasses intimate choices like selecting a life partner without state interference. This builds on *Navtej Singh Johar* (2018), where the Supreme Court elevated "constitutional morality"—pluralism and dignity—over majoritarian ethics, arguing that excluding queer couples from marriage perpetuates stigma and denies equal citizenship. Under Article 14 (equality before

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<sup>10</sup> *Supriyo @ Supriya Chakraborty v. Union of India*, (2023) SCC OnLine SC 1348.

<sup>11</sup> *Justice K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (Privacy as a fundamental right).

law) and Article 15 (prohibition of discrimination, including on grounds like sexual orientation, read via analogy), heteronormative laws like the Special Marriage Act (SMA), 1954, fail the "intelligible differentia" test, as no rational basis justifies denying same-sex unions the legal incidents of marriage (e.g., adoption, succession, spousal benefits). Advocates of a "living constitution" draw from global precedents like *Obergefell v. Hodges* (US, 2015) and Commonwealth same-sex rulings, urging courts to reinterpret "marriage" dynamically to reflect evolving societal norms, rather than fossilizing it as a relic of colonial or religious patriarchy.

The Persistence of Societal Mores: Conversely, the state and various religious bodies argue that marriage is a "Holy Union" or a pre-legal "Socio-Religious Institution" that precedes the Constitution itself. The core of their argument rests on "Legislative Competence": the belief that such a fundamental shift in the social fabric must be debated and enacted by elected representatives (the Parliament) rather than decreed by "unelected judges." There are also significant concerns regarding the entanglement of marriage with Personal Laws (Hindu, Muslim, Christian), where gender-specific terms like "husband" and "wife" form the basis of inheritance and succession, making the inclusion of same-sex unions a complex legislative challenge rather than a simple judicial fix.<sup>12</sup>

Opponents frame marriage as a socio-religious institution predating the Constitution, embedded in personal laws (Hindu Marriage Act, 1955; Indian Christian Marriage Act, 1872; Muslim personal law via Sharia), where terms like "husband," "wife," and "progeny" underpin inheritance (Hindu Succession Act), maintenance, and rituals. The state contends this invokes Article 25 (religious freedom), positioning judicial expansion as an overreach into Parliament's "legislative competence" under List III (Concurrent List) of the Seventh Schedule. In *Supriyo v. Union of India* (2023), the majority emphasized separation of powers: judges cannot "legislate" by rewriting statutes, as marriage lacks explicit fundamental status under Articles 14 or 21, unlike privacy or intimacy. Practical entanglements—recalibrating gender-specific provisions across 20+ personal laws, child custody norms, and welfare schemes—demand democratic deliberation to preserve "social fabric" and avoid unrest, echoing Suresh Koushal's deference to legislative inaction.

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<sup>12</sup> Counter-Affidavit filed by the Union of India, *Supriyo v. Union of India* (2023).

## CHALLENGES & THE ROAD AHEAD

The transition from the decriminalization of intimacy to the legal validation of unions is fraught with institutional and sociological hurdles. This section analyzes the "legal ceiling" encountered in the *Supriyo* verdict and the complexities of achieving social inclusion in a traditionalist society.

### **Institutional Barriers: The Limits of "Reading Down"**

The primary legal challenge lies in the Special Marriage Act (SMA), 1954, a secular legislation designed to facilitate inter-faith marriages. Petitioners argued that the Court should "read down" gender-specific terms in the SMA—interpreting "husband" and "wife" as "spouse"—to accommodate same-sex couples. However, the majority in *Supriyo* held that such an exercise would exceed judicial mandate.

The Court identified several "structural knots" that simple interpretation cannot untie:

**The Regulatory Maze:** Marriage under Indian law is not an isolated right but a gateway to a "bouquet of rights" including inheritance (Hindu Succession Act), maintenance, and adoption. Changing the definition in the SMA would create a cascading effect of inconsistencies across multiple gendered statutes.<sup>13</sup>

**Separation of Powers:** The Court ruled that creating a new legal regime for "Civil Unions" is a core legislative function. To judicially "rewrite" the SMA would be to infringe upon the Parliament's domain, violating the constitutional principle of the separation of powers.<sup>14</sup>

**The "Committee" Approach: Progress or Procrastination?**

In a significant but controversial move, the Supreme Court directed the Union Government to constitute a High-Powered Committee headed by the Cabinet Secretary. This committee is tasked with examining the "entitlements" of queer couples—such as joint bank accounts, pension rights, and next-of-kin status in medical emergencies—without formally recognizing them as "married."

**Criticism:** Skeptics argue this is a form of "administrative palliative" that grants peripheral benefits while denying the central right to legal status.

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<sup>13</sup> *Supriyo @ Supriya Chakraborty v. Union of India*, (2023) SCC OnLine SC 1348

<sup>14</sup> "Analysis of Legal Barriers to Same-Sex Marriage in India," *Niti Tantra* (2023).

Current Status: As of 2024–2025, the government has notified this committee, and initial consultations have focused on issues like ration cards and prison visitation rights. While it represents a step toward functional recognition, it stops short of the symbolic equality that marriage provides.<sup>15</sup>

### Social Inclusion vs. Legal Validation: The "Chicken and Egg" Dilemma

A central question in sociological jurisprudence is whether law should lead social change or reflect it.

Law as a Catalyst: Proponents of the "Living Constitution" argue that legal validation acts as a shield against social stigma. By granting same-sex unions legal parity, the State sends a normative signal that these relationships are worthy of respect, eventually "pulling" societal mores toward acceptance.

The Majoritarian Veto: Conversely, the state argues that if the law moves too far ahead of societal mores, it risks "social chaos" and public backlash. This perspective suggests that social acceptance must be the precursor to legal reform to ensure the law's durability and effectiveness.

The "Road Ahead" for same-sex unions in India likely lies in "Dialogic Constitutionalism"—a continuous conversation between the Judiciary, the Legislature, and Civil Society—where incremental administrative gains through committees eventually build the political will for a legislative overhaul of marriage laws.<sup>16</sup>

## CONCLUSION

The journey from the shadow of Section 377 to the steps of the marriage altar reveals a profound truth about Indian jurisprudence: Constitutional Morality has successfully secured the "negative liberty" of the queer community, but the "positive equality" of status remains an unfinished project. The research findings suggest that while the judiciary has dismantled the framework of criminalization, it has encountered a formidable barrier in the form of deep-seated Societal Mores that define marriage as an immutable, heteronormative monolith.

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<sup>15</sup> Gazette Notification, Government of India, April 16, 2024 (Constitution of the Cabinet Secretary Committee).

<sup>16</sup> "Discrimination, Remedies and the Same Sex Marriage Case," *CCAL Blog* (March 2025).

The core paradox identified in this paper is the gap between being and belonging. Since the Navtej Singh Johar verdict, the LGBTQ+ community in India possesses the right to exist without fear of state prosecution, yet they remain "stateless" in the realm of family law. The Supriyo judgment confirms that while the Constitution protects the right to choose a partner, the State is not yet constitutionally compelled to provide the legal infrastructure—the "bundle of rights"—that accompanies the status of marriage. This distinction creates a category of "second-class citizenship" where queer couples are allowed to love in private but are denied the public dignity and administrative security afforded to their heterosexual counterparts.<sup>17</sup>

For the conflict between constitutional principles and social mores to be resolved, India requires what may be termed a "Constitutional Renaissance." This is a process where the spirit of the Constitution—specifically the values of dignity and fraternity—percolates down from the apex courts into the daily social interactions of the citizenry. The law cannot remain an island of progress in a sea of traditionalism; rather, it must act as a pedagogical force. As societal mores are not static but are shaped by the legal environment, a "Constitutional Renaissance" demands that both the legislature and civil society engage in an honest reckoning with the prejudice inherent in current marriage laws. The evolution of social mores to align with individual dignity is not merely a legal requirement but a moral imperative for a pluralistic democracy.<sup>18</sup>

Marriage equality stands as the final frontier in the Indian LGBTQ+ civil rights movement. It is the bridge between mere tolerance and full-fledged legal and social integration. While the current judicial deadlock and the state's reliance on committees may seem like a setback, they are part of a larger, unavoidable dialogue in a diverse democracy. The history of civil rights suggests that the "arc of the moral universe" in India is indeed bending toward justice, but its trajectory is slowed by the heavy weight of tradition. Until the law recognizes that the right to marry is an extension of the right to be human, the promise of the Indian Constitution remains a "check that has been returned for insufficient funds" for its queer citizens. The struggle continues, moving from the courtroom to the conscience of the nation.

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<sup>17</sup> Gautam Bhatia, *The Transformative Constitution: A Magisterial Strategy* (HarperCollins, 2019).

<sup>18</sup> *Supriyo @ Supriya Chakraborty v. Union of India*, (2023) SCC OnLine SC 1348 (Dissenting Opinion of Justice Chandrachud regarding the right to intimate association).