

CONSTITUTIONAL MORALITY VERSUS SOCIAL MORALITY: A CRITICAL EXAMINATION IN LIGHT OF NAVTEJ SINGH JOHAR V. UNION OF INDIA

by

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ABSTRACT

The Supreme Court of India's landmark judgment in *Navtej Singh Johar v. Union of India* (2018) has decriminalised consensual homosexual sex under Section 377 of the Indian Penal Code, 1860 and, in the process, defined one of the most important doctrinal divisions in Indian constitutional law jurisprudence – namely, the tension between constitutional morality and social morality. In this essay, an analysis is undertaken of the two competing normative theories chronologically and critically. First, the historical background which includes the colonial and post-colonial era which has led to the establishment of the legally conservative framework is explored, followed by an analysis of how social morality developed as a judicially acknowledged standard and its flaws as an oppressive mechanism for the majoritarian majority. Finally, an analysis of constitutional morality is undertaken through the judgment delivered in *Navtej Singh Johar* along with other precedent decisions and the Court's reasoning. Subsequently, the argument seeks to highlight the need for legal change by analyzing how practices accepted in Indian society in the past have to give way to changing notions of dignity, equality, and individual liberty. Finally, the paper points out some problems that might be created by legalisation and provides a synthesis of the entire discussion. The paper is based on Indian Constitution and other sources of law and jurisprudence.

I. INTRODUCTION

Hardly any constitutional issue has had such an impact on Indian legal discourse as the conflict between the morality of a society and justice according to the Indian Constitution. The problem of the gap between the prevailing sensibilities of the majority and the intentions of a constitutional document has been at the very core of Indian modern jurisprudence. Its dramatic illustration is found in the case of the five judge bench of the Supreme Court in *Navtej Singh Johar v. Union of India*¹ (referred to below as "*Navtej Singh Johar*"), where the Supreme Court unanimously struck down Section 377 of the Indian Penal Code, 1860² (referred to below as 'IPC').

Indeed, the case involved far more than simply answering a problem of criminal law. Rather, the decision served to recalibrate the fundamental balance of power between the judiciary, society, and the Constitution. According to Chief Justice Dipak Misra and Justice A.M. Khanwilkar, speaking on behalf of themselves, the Constitution trumps the moral preferences of the majority, and the purpose of constitutional courts is to safeguard minorities against the tyranny of the mood of the masses. As such, through this judgement, the meaning of the term 'constitutional morality', used by Dr. B.R. Ambedkar for the first time in Indian constitutional history in the Constituent Assembly Debates, received renewed doctrinal life and became opposed to 'social morality'.

Three main points of view will be stated in this paper. First, social morality as a legal standard is an unstable and dangerous concept that has been used to oppress marginalized communities throughout history. Second, constitutional morality, though essential and theoretically preferable, can also become a target of criticism due to its undemocratic character. Third, despite these problems, the need for legal reform in 2018 was evident, although decriminalization posed new issues.

This paper takes an organized chronology-based approach to its argument: starting from the historical bases of moral regulation, moving on to the discussions that have occurred around both concepts, discussing the *Navtej Singh Johar* decision in great detail, and finally coming to the aspects which remain unresolved.

II. HISTORICAL BACKGROUND: COLONIALISM, LAW AND THE MACHINERY OF MORAL GOVERNMENT

¹*Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

²Indian Penal Code 1860 (Act 45 of 1860), s 377.

II.A The Colonial Legacy: Section 377 and Victorian Morality

To comprehend the problem of constitutional versus social morality, one needs to trace not the Constitution of 1950 but the Penal Code of 1860. Section 377 of the IPC enacted through Indian Penal Code of 1860,³ criminalized 'carnal intercourse against the order of nature.' The law stated:

*Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*⁴

The above clause did not originate from any local Indian tradition of law or ethics. The pre-colonial Indian culture, as seen from the erotic sculptures at Khajuraho and also from the Kamasutra literature, had been much more diverse when it came to the subject of human sexuality.⁵ Criminalizing same-sex relations, in fact, was a Victorian import, stemming from a certain school of Christian thought where sex without reproduction was regarded as sinful.

Law in the colonial state was an instrument of governance as well as cultural change. Criminal law was aimed at changing the moral universe of the colonised – creating a kind of 'civilised' subject who adhered to the sexuality rules of the metropole. Social morality, in this sense, is neither a uniform nor an organic Indian system; it is something created, transplanted and imposed, and eventually internalised as 'natural'.

Authors like Suparna Bhaskaran and Alok Gupta have traced how Section 377 was not a law aimed at punishing consensual same-sex activities but rather at regulating gender expression and giving the police power to harass gender non-conforming people and sex workers.⁶ The law was an instrument of social control far beyond its letter, being used as an instrument of state violence against people with deviant identities.

II.B Legislative Silence: The Post-Independence Continuity

Indian independence in 1947 and the Constitution of India in 1950 did not change Section 377. While many changes were made to other laws, the lack of a change has been attributed not to

³Indian Penal Code 1860 (Act 45 of 1860).

⁴Indian Penal Code 1860 (Act 45 of 1860), s 377.

⁵Ruth Vanita and Saleem Kidwai (eds), *Same-Sex Love in India: Readings from Literature and History* (Palgrave Macmillan 2000); see also Alok Gupta, 'Section 377 and the Dignity of Indian Homosexuals' (2006) 41(46) *Economic and Political Weekly* 4430, discussing pre-colonial traditions of sexual diversity in Indian culture and the colonial origins of the criminal prohibition.

⁶Suparna Bhaskaran, 'The Politics of Penetration: Section 377 of the Indian Penal Code' in Ruth Vanita (ed), *Queering India: Same-Sex Love and Eroticism in Indian Culture and Society* (Routledge 2002); Alok Gupta, 'Section 377 and the Dignity of Indian Homosexuals' (2006) 41(46) *Economic and Political Weekly* 4430.

continuation of the legislative support to colonial morality, but rather to the political timidity and preoccupation with other matters in the early years of the newly independent Republic.

The issue of penal reform was referred to the Law Commission of India several times, but it was only after its 172nd Report in 2000 that the section was recommended to be repealed, although Parliament disregarded the recommendation⁷. The result was, in effect, a tacit endorsement of the status quo or a ratification in an indirect way of the Victorian social morality.

When the Constitution came into force, the right to equality under Article 14,⁸ the right to life and personal liberty under Article 21,⁹ and the right to freedom of expression under Article 19(1)(a)¹⁰ all prima facie seemed to be in conflict with Section 377. The courts also were reluctant to take on the case. The Supreme Court later overturned the Delhi High Court's progressive decriminalization ruling in *Suresh Kumar Koushal v. Naz Foundation*¹¹ (2013) on the grounds that since only a 'minuscule fraction' of the population was affected by the provision, its constitutionality could not be impugned on that basis alone, and that it was for Parliament to amend the law if it saw fit. The Court further deferred to social morality in reaching that decision. It was this respect for majoritarian sentiment over constitutional guarantees that Navtej Singh Johar firmly rejected five years later.

III. SOCIAL MORALITY: MEANING, CONSIDERATION BY COURT, AND CRITICISM

III.A Meaning of Social Morality as a Legal Standard

Social morality can be described as the sum total of all those moral beliefs, principles, and values which are collectively held by the dominant or majority group of people within any given society at any given time. It is a descriptive principle, not a prescriptive one, as it reflects what a society believes to be right and not what any external law requires as justice. As a legal standard, social morality has been used in relation to the exceptions to the Fundamental Rights of the Indian Constitution provided in Articles 19(2) and 25(1).

Under Article 19(2) of the Constitution, the right of freedom of speech and expression can be restricted in the name of, among other things, 'public order, decency or morality.'¹² In Article

⁷Law Commission of India, 172nd Report on Review of Rape Laws (March 2000) paras 3.6–3.7. The Report recommended deletion of s 377 on the basis that the proposed expansion of s 375 (rape) to cover gender-neutral sexual assault would render s 377 redundant in respect of non-consensual acts, and that consensual same-sex activity between adults should not be a criminal offence.

⁸Constitution of India 1950, Art 14.

⁹*ibid*, Art 21.

¹⁰*ibid*, Art 19(1)(a).

¹¹*Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1.

¹²Constitution of India 1950, Art 19(2).

25(1), which secures the freedom of conscience and religion, it says that this is 'subject to public order, morality and health.'¹³ 'Morality,' as used in these provisions, in different judgments has been understood to mean social or popular morality.

In the case of *Ranjit D. Udeshi v. State of Maharashtra*¹⁴ (1965), the Court sustained the conviction of the bookseller under the Obscene Publications Act using a test of morality which was basically that of the 'reasonable man', the incarnation of social consensus. In this case, the Court applied the Hicklin test from the English case *Queen v Hicklin* (1868), which deems material obscene if it has the tendency to deprave and corrupt those whose minds are open to immoral influences. The community standards test was only adopted in India much later, in *Aveek Sarkar v State of West Bengal* (2014). Similarly, in the case of *Samaresh Bose v. Amal Mitra*¹⁵ (1985), the Court held that the test of obscenity has to be based on moral standards of the community.

The logic implied by this method is the logic of majority: when most of society feels that something is unacceptable, the law may prohibit it. On this assumption, social morality gives the democratic justification for such prohibitions by law because it represents the will of people.

III.B Criticism of Social Morality

Social morality as a constitutional standard, however, presents itself as highly problematic and requires criticism from a number of perspectives.

III.B.i The Majority Fallacy

One of the core arguments against social morality as a constitutional standard can be stated in simple terms of the fallacy of identifying the majority with moral righteousness. Liberal constitutional democracy, in essence, is not majority rule unlimited; it is majority rule limited by certain rights. In one of the seminal debates on the topic with Lord Patrick Devlin, H.L.A. Hart has convincingly demonstrated that society has no such right to impose its common morality, and that merely because the majority believes a certain practice to be immoral does not make it a candidate for criminalization.¹⁶

By calling the LGBT community 'a minuscule fraction' in *Suresh Kumar Koushal*, the Supreme Court employed a majoritarian logic that because they are few in numbers, the claim for their rights is secondary to the ethical desires of the majority. That is exactly what a constitution rights protection aims to preclude.

¹³ibid, Art 25(1).

¹⁴*Ranjit D Udeshi v State of Maharashtra* AIR 1965 SC 881.

¹⁵*Samaresh Bose v Amal Mitra* (1985) 4 SCC 289.

¹⁶H.L.A. Hart, *Law, Liberty and Morality* (Stanford University Press 1963) 17-24.

III.B.ii Social Morality as a Construct and an Act of Contingency

The second criticism is that social morality is dynamic and artificial in nature. As the history provided in Part II makes clear, the moral opprobrium associated with same-sex activity in India was predominantly a construct of colonial times and was not an inherent value system in Indian society. Social morality is constructed through the exercise of power through institutions such as religion, the media, the family, and even the state. The assumption of neutrality of social morality is to deny its very process of construction.

Furthermore, social morality is contingent; what may have been immoral at one point in history may very well be completely normal in another generation. The reliance on social morality as a yardstick for the constitution, therefore, can lead to the codification of prejudice in a historical context.

III.B.iii The Threat of Social Morality Justifying Oppression

One of the dangers here, possibly the greatest, is that the principle of social morality may simply act as a cover for prejudice and discrimination. The outlawing of homosexuality, the denial of access to public places for women, the caste system that created a class of untouchables – all of these were, at some point in history, justified by social morality. Indeed, should social morality become a constitutional standard independent of other considerations, it would be in direct contradiction to Article 17¹⁷ and Article 15¹⁸ of the Indian Constitution itself, both of which explicitly prohibit untouchability and guarantee equality irrespective of gender. In short, the argument is not that social morality is a flawed concept, but rather that it is a highly dangerous one, as it could justify violations of the fundamental rights of marginalised communities. Such a framework of law that makes social morality superior to the constitution is, therefore, the reverse of the constitutional order.

¹⁷Constitution of India 1950, Art 17.

¹⁸ibid, Art 15.

IV. CONSTITUTIONAL MORALITY: DOCTRINE, PRECEDENT, AND THE NAVTEJ SINGH JOHAR JUDGEMENT

IV.A The Doctrine of Constitutional Morality

The doctrine of constitutional morality derives from the ideas of Dr. B.R. Ambedkar, who used the term during the debate in the Constituent Assembly Debates, while quoting George Grote, an English historian, from his book *A History of Greece*. Ambedkar made it clear that the constitutional morality, which he described as supreme veneration for the form of the Constitution, enforcing obedience to authority and acting within the forms, is still to become natural to India and will have to be inculcated.

From the legal point of view, constitutional morality means values, principles, and norms enshrined in the Constitution or necessarily arising from it: equality, dignity, liberty, fraternity, and the rule of law. Constitutional morality is not the morality of any community or religion; it is the morality that the Constitution, being the supreme law of the country under Article 13,¹⁹ imposes as the foundation of governance and regulation.

The most precise interpretation of this principle has been made by the Supreme Court in *Manoj Narula v. Union of India*²⁰ (2014) wherein the court stated that “constitutional morality will percolate through the Preamble as well as Constitutional Provisions, and the concept of constitutional morality ‘is not merely about the letter of the Constitution but it is about the soul of the Constitution.’”²¹

IV.B Constitutional Morality in Navtej Singh Johar

The case of *Navtej Singh Johar v. Union of India* has been described as the most comprehensive judicial engagement with the concept of constitutional morality in Indian legal history. The four separate opinions by the court – Chief Justice Dipak Misra for himself and Justice A.M. Khanwilkar; Justice R.F. Nariman; Justice D.Y. Chandrachud; and Justice Indu Malhotra – all engage with the conflict between constitutional and social morality.

IV.B.i Opinion of Chief Justice Misra

Chief Justice Misra provided the broadest doctrinal basis for this case. He argued that the constitution is a living instrument and therefore, its morality must be considered progressively. In his opinion, he held that:

¹⁹ibid, Art 13.

²⁰*Manoj Narula v Union of India* (2014) 9 SCC 1.

²¹ibid [68].

*'Social morality cannot be used as a ruse to trump constitutional morality. Constitutional morality must prevail over social morality... The moral values of the majority cannot be used as a tool of discrimination against individuals whose sexual orientation differs from the majority.'*²²

This section sums up the fundamental doctrine of the judgment: The Constitution and not public opinion is the final authority as to what is permissible morality from a legal perspective. The Chief Justice has based this on the protection of dignity inherent in the Fundamental Rights chapter, especially the transformative interpretation of Article 21 in view of several decades of judicial interpretation following *Maneka Gandhi v. Union of India*²³ (1978).

IV.B.ii Opinion by Justice Chandrachud: The Most Profound Engagement

The most philosophically astute opinion came from Justice D.Y. Chandrachud's concurrence. This judgment of his was an attempt at addressing the majority reasoning in *Suresh Kumar Koushal* and calling it "a matter of grave constitutional concern." His Lordship opined:

*'Constitutional morality is not about what the majority believes or what the numbers say. It is about the fidelity of the Constitution to the values it has set for itself: equality, liberty, dignity and fraternity... Majoritarian governments may find it difficult to protect the liberty of individuals whose choices are unacceptable to the majority. That is precisely why the Constitution vests the power of judicial review in the courts.'*²⁴

He even took it a step further by placing the plight of the LGBTQ+ community in the larger context of the constitutional anti-discrimination project. In his opinion, Section 377, as applicable to consensual same-sex intercourse, breached Articles 14 (equality before law), 15 (non-discrimination based on sex, where 'sex' would include sexual orientation and gender identity), 19(1)(a) (right to freedom of expression which includes right to express one's sexual identity), and 21 (right to life and personal liberty, which also includes the right to dignity, privacy and identity).

IV.B.iii Opinion of Justice Nariman

Taking a textual and structural approach, Justice Nariman placed the issue in the context of the manifest arbitrariness of Section 377. Citing the ratio in *Shayara Bano v. Union of India*²⁵ (2017), he opined that a statute which is manifestly arbitrary — i.e., does not have any rational

²²*Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [262] (Misra CJ).

²³*Maneka Gandhi v Union of India* (1978) 1 SCC 248.

²⁴*Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [639] (Chandrachud J).

²⁵*Shayara Bano v Union of India* (2017) 9 SCC 1.

nexus to a valid state purpose — should be declared void under Article 14. He pointed out that Section 377, as applicable to criminalisation of the entire group of persons merely on the basis of their identity, was ‘the clearest example of state-sanctioned discrimination’²⁶ and hence, in total disregard of constitutional morality.

IV.B.iv Justice Malhotra's Opinion: The Apology of History

Justice Indu Malhotra's concurring opinion added a dimension of historical moral reckoning. She observed:

*'History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries. The members of this community were compelled to live a life full of fear of reprisal and persecution.'*²⁷

This is significant due to its judicial honesty: The Court was doing more than just interpreting the Constitution; it was recognizing the role that the law had played in creating the damage and, by implication, providing institutional redress through doctrinal revision.

IV.C Critique of Constitutional Morality as a Doctrine

The theory of constitutional morality, although intellectually satisfying and better than the doctrine of social morality as a constitutional principle, is not devoid of criticism and contradictions within itself.

IV.C.i The Problem of Judicial Activism

The foremost argument against constitutional morality comes from the supporters of judicial restraint. According to them, constitutional morality is nothing but the imposition of normative values on the democratically elected legislature by the unelected judges. This is precisely the counter-majoritarian dilemma of constitutional theory which is discussed by scholars including Alexander Bickel both in American and Indian contexts.²⁸

But who is to judge that the version of constitutional morality provided by the Supreme Court is the right one? It must be remembered that Constitution is a written document. Interpretation of a text is always an essential feature of any written text. Thus the meaning or content of constitutional morality, that is the value it requires in a particular case, is bound to depend upon the philosophical-political persuasion of the judges who interpret it.

IV.C.ii Indeterminacy and Selective Enforcement

²⁶*Navtej Singh Johar v Union of India* (2018) 10 SCC 1 [497] (Nariman J).

²⁷*ibid* [639] (Malhotra J).

²⁸Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd edn, Yale University Press 1986) ch 1.

Another concern pertains to indeterminacy. As a guiding standard, constitutional morality has sufficient flexibility to permit nearly any possible outcome. Indeed, the idea that constitutional principles should take precedence over social consensus can equally serve as a basis for expanding or curtailing rights depending on how the court defines its constitutional principles. The doctrine itself, while providing some flexibility, may eventually erode the rule of law by serving as an all-purpose justification for judicial intervention when judges are at odds with legislative and/or social decision-making.

Additionally, religious conservatives have pointed out that the application of constitutional morality in *Navtej Singh Johar* does not adequately recognize the extensive history of protective rights within religion in India and considers religious morality suspect where such is inconsistent with individual autonomy.²⁹ Although this argument does not ultimately hold water, as the Constitution clearly places individual rights above collective religious traditions in several articles, it nonetheless poses a valid difficulty for constitutional interpretation.

IV.C.iii The One-Way Nature of the Constitutional Morality Doctrine

The next issue in this context is the tendency of the doctrine of constitutional morality in the case law to work in only one direction, which is the direction of the enlargement of rights and the reduction of the community-based moral claims. Although this process is generally in harmony with the liberal democratic aspirations enshrined in the Constitution of India, the problem remains whether constitutional morality can be used by the courts to control themselves in case they deviate from constitutional ideals.

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V. WHY THE LAW HAD TO BE REVOKED: THE JUSTIFICATION FOR LEGAL REFORM

Despite all that has been said above in respect of the flaws of constitutional morality, the justification for reform of the law and decriminalization of consensual same-sex sexual acts between adults is, in the opinion of this author, overwhelming. There are several separate but cumulative reasons for it.

V.A. Constitutional Obligation

As can be seen from the preceding analysis, Section 377 was incompatible with a number of articles of the Constitution of India. In particular, Article 14 of the Constitution provides for

²⁹See generally the dissents discussed in the context of *Suresh Kumar Koushal* and subsequent petitions for review.

equality before the law and equal protection under the law – which would be violated by any law singling out some persons for criminal prosecution merely because of who they are or what they do in their consensual private lives. Similarly, Article 15(1) of the Indian Constitution bans discrimination against anybody on the grounds of sex – and taking into account the progressive interpretation of 'sex' to include sexual orientation and gender identity³⁰, the same section is directly at odds with it.

As per Article 21, as understood post *Maneka Gandhi*,³¹ the person is the entire sum of his existence. In other words, his body, identity, dignity, autonomy, self-realization, all fall within the purview of Article 21. The right to privacy, unanimously agreed to by a bench of nine judges in the case of *Justice K.S. Puttaswamy v. Union of India*³² (2017), included the right to sexual autonomy and right to intimate association. As per the Court in *Puttaswamy*, the earlier decision in *Suresh Kumar Koushal* was wrongly decided, in the sense that the latter failed to recognize that Section 377 violated fundamental rights.

V.B Changing Social Reality

Aside from the strictly legal justifications, the need for reform can be understood through changing social realities. In urban India, there was a drastic change in the attitude towards sexual minorities during the two decades prior to the *Navtej Singh Johar* verdict. There were pride marches held in prominent Indian cities; people from the LGBTQ+ community assumed visible positions within the realm of their profession and culture; the portrayal of same-sex relationships within mainstream Bollywood films became sympathetic as opposed to being discriminatory. The idea that 'social morality' unanimously condemns same-sex relations is empirical evidence that could be challenged by 2018 – all that social morality has done is to mirror the perspective of a majority of a changing society.

The costs of retaining Section 377 were thoroughly explained. Research conducted by UNAIDS and the Naz Foundation highlighted the way in which the criminalization of same-sex relations led to HIV-positive people hiding themselves, making it exceptionally difficult to provide medical help to such people.³³

V.C India's International Human Rights Obligations

³⁰*National Legal Services Authority v Union of India* (2014) 5 SCC 438; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 (Chandrachud J).

³¹*Maneka Gandhi v Union of India* (1978) 1 SCC 248.

³²*Justice K S Puttaswamy v Union of India* (2017) 10 SCC 1.

³³UNAIDS, 'Criminalisation of Same-Sex Conduct: A Tool for Exclusion' (UNAIDS 2009); Naz Foundation (India) Trust, 'Breaking the Silence: The Public Health Impact of Section 377' (Naz Foundation 2001). These reports documented how criminalisation drove the most at-risk populations underground, preventing access to HIV-prevention and treatment services.

India is signatory to the International Covenant on Civil and Political Rights (ICCPR)³⁴ and International Covenant on Economic, Social and Cultural Rights (ICESCR).³⁵ The Human Rights Committee, which oversees the ICCPR, has determined in the case of *Toonen v. Australia*³⁶ that the criminalisation of consensual sexual activity between members of the same sex breaches Article 17 (the right to privacy) and Article 26 (non-discrimination) of the ICCPR. Although international human rights instruments lack domestic application in India, they are applicable in relation to the interpretation of constitutional provisions according to Article 51(c)³⁷ and the reasoning in the case of *Vishaka v. State of Rajasthan*³⁸ (1997).

The retention of Section 377 in India was not only an aberration from domestic constitutional principles but also constituted a violation of international human rights obligations and put India among a shrinking number of countries who had failed to decriminalise homosexual acts.

VI. NEW CHALLENGES ARISING IN THE ERA OF DECRIMINALISATION

Decriminalisation of consensual sexual acts between same-sex couples in the *Navtej Singh Johar* case is indeed a defining moment in our constitutional history. However, it is certainly not the be-all and end-all of the fight for equality.

VI. A. Legislative Indifference and Absence of Positive Rights

While decriminalisation brought about an end to the penal consequences attached to same-sex conduct, it did not create positive rights. The Court deliberately confined itself to the issue of criminalisation. It made no pronouncement whatsoever with respect to same-sex marriage, right to adoption, and other such rights. There have been no legislative changes in the Parliament of India at the time of writing this thesis to fill up this gap. Subsequently, in *Supriyo @ Supriya Chakraborty v Union of India* (2023), a five-judge Constitution Bench of the Supreme Court, by a majority of 3:2, declined to recognise same-sex marriages or civil unions under existing statutes, holding that there is no fundamental right to marry under the Constitution and that the matter is one for Parliament, not the courts, to address.³⁹

³⁴International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, ratified by India 10 April 1979.

³⁵International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3, ratified by India 10 April 1979.

³⁶*Toonen v Australia* CCPR/C/50/D/488/1992 (Human Rights Committee, 1994).

³⁷Constitution of India 1950, Art 51(c).

³⁸*Vishaka v State of Rajasthan* (1997) 6 SCC 241.

³⁹*Supriyo @ Supriya Chakraborty v Union of India* 2023 INSC 920 (Supreme Court of India, 17 October 2023). The majority (Bhat, Kohli and Narasimha JJ) held that there is no unqualified right to marriage except as

The Special Marriage Act, 1954⁴⁰, the main statute which applies to civil marriages not falling within the scope of personal laws, does not apply to same-sex marriages. The Hindu Adoption and Maintenance Act, 1956⁴¹ and the Juvenile Justice (Care and Protection of Children) Act, 2015⁴² include provisions which render it impossible for same-sex couples to adopt children. The Transgender Persons (Protection of Rights) Act, 2019⁴³, while being an example of recognition of the rights of transgender people in India, has been widely criticized by the transgender community for not going far enough, especially with regard to its certification provisions.

What emerges from all of the above is that although the Constitution protects the dignity and identity of the LGBTQ+ community from criminal sanctions, statutory laws deny them the same set of civil rights which are readily available to heterosexual couples. Constitutional morality has triumphed in the criminal law sphere; statutory law must catch up with it.

VI.B Societal/Religious Backlash and Institutional Resilience

The Navtej Singh Johar ruling faced considerable socio-religious backlash. Several religious groups (from Hinduism, Islam, and Christianity) condemned this judgment and appealed for its overturning via legislative means. The political importance of such appeals limits the scope of parliamentary intervention on LGBTQ issues given the nature of identity politics that marks modern Indian electoral democracy.

The problem here lies in the risk of “constitutional morality without constitutional implementation” – while the judiciary can lay down the moral ground, without any legislative follow-up on enforcing the new framework, the gulf between what has been legally declared and the reality of LGBTQ people’s lives will be substantial. There are ongoing instances of police harassment against transgenders, conversion therapies conducted by religious and medical establishments, and violence against LGBTQ people in their families.

VI.C Judicial Expansionism and Constraints to Court-Led Change

The Navtej Singh Johar ruling brings to light, in an institutional way, a foundational issue of how much the judicial intervention ought to have been in social transformation through

conferred by statute, and that the creation of new legal categories equivalent to marriage would amount to judicial legislation beyond the court’s proper role. The minority (Chandrachud CJI and Kaul J) dissented, supporting recognition of civil unions with attendant rights and benefits.

⁴⁰Special Marriage Act 1954 (Act 43 of 1954).

⁴¹Hindu Adoption and Maintenance Act 1956 (Act 78 of 1956).

⁴²Juvenile Justice (Care and Protection of Children) Act 2015 (Act 2 of 2016), s 57.

⁴³Transgender Persons (Protection of Rights) Act 2019 (Act 40 of 2019).

constitutional courts. There is well established literature in the area of comparative constitutional law – by writers like Gerald Rosenberg⁴⁴ and, from the opposite point of view, by Robert Post and Reva Siegel⁴⁵ – debating whether social transformation through court-led constitutional change is possible without democratic legitimation.

Indian case history is revealing in this regard. The 2009 judgement of Delhi High Court in *Naz Foundation v. Government of NCT of Delhi*⁴⁶ was overturned in 2013 in *Suresh Kumar Koushal* in a political environment that was unsupportive of progressive transformation. The latest 2018 judgement in *Navtej Singh Johar* has so far stood the test of time, but the sustainability of the court-led change is dependent on the factors of social acceptability, legislative entrenchment, and internalization of change within institutions – none of which can be forced by the judiciary.

VI.D Moral Regulation and Constitutional Morality

A more abstract issue is whether the change from social morality to constitutional morality as the guiding principle reduces the possibility of moral regulation. If constitutional morality actually translates into the Supreme Court's own form of morality, then in the future it will be possible for differently composed benches with varying philosophical outlooks to use the same doctrine to arrive at different, perhaps more restrictive conclusions.

The Indian Supreme Court has had an inconsistent record when it comes to dealing with issues of religion, nationalism, and cultural identity. There have been instances where the Supreme Court was more sympathetic to community-based morality than to individual rights. For example, there is the criminalization of cow slaughter, the regulation of religious conversion, and deference to the "essential religious practices" doctrine.

⁴⁴Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (2nd edn, University of Chicago Press 2008).

⁴⁵Robert Post and Reva Siegel, 'Roe Rage: Democratic Constitutionalism and Backlash' (2007) 42 *Harvard Civil Rights-Civil Liberties Law Review* 373.

⁴⁶*Naz Foundation v Government of NCT of Delhi* WP(C) No 7455/2001 (Delhi High Court, 2 July 2009).

VII. CONCLUSION

The conflict of constitutional morality and social morality in *Navtej Singh Johar v. Union of India* is more than a legal dispute over the ambit of fundamental rights or the meaning of an outdated criminal statute; it is a question of what kind of republic India wants to be—a constitutional democracy where every individual, irrespective of his accidental identity, is afforded equal concern and respect or a majoritarian state where the tastes of the majority dictate how minorities will live.

It is my contention that the circumstances under which Section 377 was enacted point to the fact that the statute is an imposition of morality by a colonizing power rather than an expression of native Indian social values. Social morality, as a constitutional value, has shown its inherent nature of being contingent and majoritarian in the process and capable of providing cover for oppressive behavior against minorities. However, the constitutional morality laid down in *Navtej Singh Johar*, while principled and theoretically superior, has its own vulnerabilities that must be recognized.

The need for law reform was constitutionally mandated and extremely pressing because the retention of Section 377 was untenable on the grounds of Articles 14, 15, 19, and 21, was incompatible with India's international human rights responsibilities and had direct adverse effects on public health. The apology for history proffered by Justice Malhotra was no mere expression of rhetoric; rather, it represented an institutional admission that the law had betrayed the interests of the very people it was intended to serve.

However, the process of constitutional reform is by no means over yet. The lack of affirmative legislative rights in relation to marriage, adoption, succession, job security and access to medical care signifies that the promise of equality under the constitution is largely theoretical for LGBTQ+ citizens of India. The socio-religious reaction to the decision creates circumstances of vulnerability and discrimination that cannot be easily remedied through a judicial mandate. And the possibility of subversion or erosion of constitutional morality in and of itself is another potential hazard of the changing compositions of courts.

The real moral of the story of *Navtej Singh Johar* is that constitutional morality cannot be a programme that automatically takes effect but has to be something towards which a society dedicated to democracy should always strive for. The courts may show the way. The legislature has to create the pathway. And a society which cherishes the Constitution will have to undertake the journey.