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From Wolfenden to Supriyo: The Enduring Echo of the Hart–Devlin Debate in India's Fight for Marriage Equality

NIDHI UPADHYAY[1]

ABSTRACT

The Supreme Court of India's 2023 decision in Supriyo Chakraborty v. Union of India marks a pivotal moment in the constitutional discourse on marriage equality and judicial restraint. This paper situates the judgment within the enduring jurisprudential conflict between liberal individualism and legal moralism, tracing its intellectual lineage to the Hart–Devlin debate that emerged from the 1957 Wolfenden Report in the United Kingdom. By drawing parallels between H.L.A. Hart's emphasis on autonomy, privacy, and the harm principle, and Lord Devlin's defence of societal morality and institutional preservation, the paper demonstrates how these competing philosophies manifest within the majority and minority opinions of the Supriyo verdict.

The analysis argues that while the Court affirmed a Hartian conception of liberty by recognising the constitutional right of queer couples to form intimate relationships grounded in dignity and autonomy, it simultaneously adopted a Devlin-esque remedial restraint by refusing to extend legal recognition to same-sex marriages. The majority's reliance on statutory interpretation, historical understandings of marriage, and the doctrine of separation of powers reflects a commitment to preserving social institutions through legislative rather than judicial change. In contrast, the minority opinions advocate a transformative constitutionalism that views equality and liberty as requiring positive legal recognition, including the proposal for civil unions.

By examining this judicial compromise—described as a "Hartian right with a Devlin-esque remedy"—the paper highlights the unresolved tension between constitutional morality and societal morality in India's evolving democratic framework. Ultimately, the study argues that Supriyo exemplifies the limitations of judicial liberalism in the face of entrenched social institutions, raising broader questions about whether constitutional courts should merely protect individual freedoms or actively reshape the moral framework of society in pursuit of substantive equality.

[1] Author is an LL.M. Student at South Asian University, New Delhi, India.

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"Every morality is a piece of tyranny against 'nature'... a long compulsion."

- Nietzsche's Beyond Good and Evil

The Supreme Court's landmark 2023 decision in *Supriyo Chakraborty v. Union of India*[2]—the case reigniting the struggle for marriage equality—inevitably recalls an intellectual confrontation from over six decades ago. In 1957, the Wolfenden Report[3] in Britain proposed that private homosexual acts between consenting adults should no longer be criminalized. That recommendation in 1957 split the British society and led to the much celebrated Hart–Devlin debate—a clash between liberal individualism and moral conservatism. Much like that mid-century philosophical duel, the *Supriyo* case triggered a similar fierce debate in India, with echoes of both Hart's and Devlin's jurisprudential positions reverberating through the courtroom and the judgment that followed.

H.L.A. Hart's liberal philosophy finds distinct resonance in the progressive and unanimous aspects of the *Supriyo* judgment. Hart argued that the law should not enforce moral codes in private, consensual matters but should instead safeguard personal freedom.[4] The Court's recognition of the "right to a relationship" for queer couples captures this philosophy in judicial form. It affirms that adults possess the constitutional right to choose their partners, cohabit, and engage in physical intimacy without State intrusion. This reasoning closely mirrors Hart's refinement of John Stuart Mill's Harm Principle[5] which limits State interference to instances of actual harm to others. In doing so, the judgment extended the logic of *Navtej Singh Johar v. Union of India*[6], moving beyond the decriminalization of homosexuality to a broader affirmation of autonomy, dignity, and liberty.

The minority opinion of Chief Justice D.Y. Chandrachud and Justice Sanjay Kaul further reflected this liberal strain. Drawing on Articles 14, 15, and 21 of the Indian Constitution,[7] they reasoned that denying legal recognition to queer unions amounted to unconstitutional discrimination. Their reasoning echoed Hart's criticism of Lord Devlin's reliance on moral disgust and societal intolerance as foundations for criminalization.[8] For both Hart and the minority judges, the law must rest on rational and constitutional justification, not on the

[2] *Supriyo Chakraborty v. Union of India*, (2023) SCC Online SC 1503.
[3] Report of the Committee on Homosexual Offences and Prostitution, Cmd. No. 247 (1957) (U.K.) ("Wolfenden Report").
[4] H.L.A. HART, *LAW, LIBERTY AND MORALITY* 5–7 (Oxford Univ. Press 1963).
[5] JOHN STUART MILL, *ON LIBERTY* (1859).
[6] *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.
[7] INDIA CONST. arts. 14, 15, 21
[8] Patrick Devlin, *The Enforcement of Morals* (Oxford Univ. Press 1965); see also H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

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fluctuating tides of public morality or collective discomfort. As Nietzsche succinctly put it in his book "Beyond Good and Evil," "Morality is just a fiction devised for the purpose of managing human beings."

Pushing the boundaries of equality further, the minority called for the recognition of "civil unions"—marriage-like partnerships that would extend to queer couples the full "bouquet of rights" attached to marital status.[9] This vision sought to transform liberty from a merely negative concept—freedom from State punishment—into a positive one, encompassing the right to enjoy the social, legal, and economic benefits of recognised relationships. Such a conception aligns with the liberal ideal that freedom is not merely non-interference but the empowerment to participate fully and equally in civic life.

In contrast, Lord Devlin's philosophy of legal moralism finds reflection in the majority opinion and ultimate outcome of *Supriyo*. Devlin defended the State's authority to preserve social institutions and uphold moral order, even when not expressly grounded in religious or ethical absolutism.[10] The majority, in a 3:2 split, held that the right to marry is not a fundamental right under the Constitution and declined to extend the Special Marriage Act to same-sex couples.[11]Marriage, they reasoned, is a statutory institution rooted in policy, historically defined as a union between a man and a woman. This approach mirrors Devlin's conviction that safeguarding long-standing social structures lies within the State's legitimate domain—marriage being one such institution essential to social stability.

The majority's reliance on the doctrine of separation of powers further underscores this Devlin-esque restraint. Recognizing same-sex marriage, the majority reasoned, would amount to judicial legislation, a task properly belonging to Parliament.[12] This view represents the modern constitutional expression of Devlin's belief that the moral and social fabric of society must be shaped by the collective will of the people, embodied in their elected representatives. In this light, the State's role becomes not merely moral but structural—to regulate marriage as a cornerstone of social order and coherence. But the Apex Court's decision not to get involved in judicial legislation goes against their own steps taken in the much celebrated Vishakha judgement, where Honorable Justice Khanna went out of his way to bring into being the anti-sexual harassment guidelines with the help of CEDAW when he realised the legislature was lacking in that particular field. This suggests that the judiciary has, in the past, gone out of its

[9] *Supriyo Chakraborty*, supra note 2 (Chandrachud, C.J. & Kaul, J., concurring in part).
[10] DEVLIN, supra note 8, at 12–14.
[11] *Supriyo Chakraborty*, supra note 2 (Bhat, Kohli & Narasimha, JJ., majority opinion).
[12] Id.

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way to protect the dignity and sanctity of human life, which prompts the author of this report to wonder what has changed in this scenario. Did the judges let their internal bias play out in the courtroom, or were they really tied to the separation of powers principle?

The Union Government's arguments against marriage equality echoed the majority bench sentiment. Relying on societal norms, customs, and legislative competence, the government contended that recognising queer marriages would trigger a wholesale redesign of personal laws and destabilise family structures.[13] This reasoning parallels Devlin's claim that the State has a legitimate interest in maintaining traditional social order, with marriage as one of its foundational pillars. Such changes, Devlin maintained, must evolve gradually through legislative consensus rather than judicial reinterpretation.

Ultimately, the *Supriyo* judgment embodies what may be called a **Hartian right but a Devlin-esque remedy**. The Court affirmed that queer couples possess the constitutional right to form relationships grounded in privacy, dignity, and autonomy—yet it withheld the remedy of legal recognition, leaving that decision to the Legislature. In doing so, the Court struck a delicate balance: affirming liberty while deferring the authority to redefine a core social institution. This compromise reflects the enduring tension between a liberal judiciary striving to expand individual freedom and a democratic legislature cautious about reshaping the moral architecture of society.

And so, a question lingers—one that bridges 1957 and 2025: have we truly changed? Have we, as a society, moved beyond the conviction that morality serves as the cement binding our social existence, as Devlin once argued? Or do we continue to treat morality as a static code to be preserved, rather than as a dynamic and evolving conscience capable of guiding a progressive democracy? The challenge before us is not merely legal but moral: to recognize that development, justice, and equality demand a moral vision that grows with human experience. Between Hart's vision of liberty and Devlin's call for cohesion lies the real test of progress—whether our institutions, and indeed our hearts, have evolved enough to embrace freedom not as a threat to order, but as its highest expression. The path is long and filled with roadblocks, and the end, though in sight, eludes our reach. But as Albert Camus in his work *"*The Myth of Sisyphus" observed:

"The struggle itself toward the heights is enough to fill a man's heart. One must imagine Sisyphus happy."

[13] Written Submissions on Behalf of the Union of India, *Supriyo Chakraborty v. Union of India* (2023).

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