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## WHEN CONSTITUTIONAL VALUES COLLIDE WITH SOCIAL NORMS: CONSTITUTIONAL MORALITY AS AN INTERPRETIVE TOOL IN POST-JOHAR JURISPRUDENCE

~ *Maitra Varan Chotia*

### Abstract

This paper will discuss the concept of constitutional morality in Indian jurisprudence as it is developing in response to Navtej Singh Johar (2018) and similar cases. The paper follows the history of constitutional morality since the Constituent Assembly debates with landmark Supreme Court decisions examining the ways it has been employed to safeguard fundamental rights against majoritarian social norms. The Paper examine primary (constitutional text, case law) and secondary analyses of the topic using a doctrinal approach to the role of constitutional morality as a counter-majoritarian principle that supports Articles 14, 15, 19, 21, and 25 of the Constitution of India. The literature review points out academic understandings of constitutional morality (grounded in the pledges of justice, liberty, equality and fraternity of the Constitution) and changeable popular or social morality<sup>1</sup>. The primary analysis of the case law of the Supreme Court over the last few years: in Navtej Johar, the Supreme Court did not only invalidate Section 377 IPC, but also made it clear that even constitutional morality should dictate judges, not social mores<sup>2</sup>. Likewise, in Joseph Shine the Court struck down the archaic law on adultery in Articles 14, 15 and 21, it pointed out that criminal law must be in line with the constitutional morality<sup>3</sup>. The Sabarimala ruling was another illustration of the idea in action: the Constitution Bench ruled that practices within the temples that do not admit women are unconstitutional because they contravene the theme of equality and non-discrimination that is implicit in the Constitution, and that it is a responsibility to weigh rights against each other, without obliterating or undermining

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<sup>1</sup> Gopal Subramaniam, *What is the role of 'constitutional morality' in legal interpretation?*, Supreme Court Observer (Sept. 4, 2025), <https://www.scobserver.in/journal/what-is-the-role-of-constitutional-morality-in-legal-interpretation/>.

<sup>2</sup> Saumya Uma & Samudyata Sreenath, *Legal Imagination and Social Reform: Navtej Johar Revisited*, 13 *NUJS L. Rev.* 3 (2020), <https://nujslawreview.org/wp-content/uploads/2020/10/13.3-Uma-Sreenath.pdf>.

<sup>3</sup> *Navtej Singh Johar & Ors. v. Union of India*, AIR 2018 S.C. 4321; (2018) 10 S.C.C. 1 (Sup. Ct. of India Sept. 6, 2018), <https://indiankanoon.org/doc/168671544/>.

either of the two facets of religion<sup>45</sup>. Similar judicial tendencies toward liberty and dignity as opposed to majority morality can be found in Hodges (US, 2015) and Fourie (S. Africa, 2005). The results indicate that constitutional morality has emerged as an inseparable interpretive resource to enforce basic rights, but its open-ended character poses some controversies of judicial activism. It has been suggested that there should be clearer constitutional morality doctrines, that the old laws that are not in harmony with the constitutional values should be reviewed by the legislature, and that judiciary and the populace should be educated on the constitutional ethos so that the enabling framework of our Constitution would still provide a society with the possibilities of self-renewal<sup>6</sup>.

**Keywords:** Constitutional morality; Fundamental rights; Equality; Social morality; Navtej Singh Johar; Judicial interpretation

## Introduction

The constitutional morality has become a powerful principle in the contemporary constitutional adjudication in India. The word is not often used in older cases, but it has become eminent in landmark decisions, beginning with *Kesavananda Bharati v. State of Kerala* (1973) in which the Court declared that some of the key elements of the Constitution (secularism, democracy, rule of law, etc.) should be sacrosanct. Dr. In the Constituent Assembly, B.R. Ambedkar had cautioned that constitutional morality must be disseminated at the national level (not just in the capital) because otherwise, a free and peaceable government can be achieved only under these conditions<sup>7</sup>. In modern jurisprudence, constitutional morality refers to being loyal to the most fundamental values of the Constitution, even when these collide with the existing social or religious standards. It is therefore in conflict with the then changing majoritarian morality. Indicatively, the Supreme Court in *Navtej Singh Johar v. Union of India* (2018) also said that the conception of constitutional morality and not the morality of society had to guide the court in deciding fundamental rights<sup>8</sup>. This paper will discuss the application of constitutional morality as a jurisprudential instrument since Johar, its theory, and its influence on the basic rights cases. It aims to examine the definition and application of constitutional morality by courts and the scholarly views on the concept and to evaluate how it has reformed the Indian constitutional law and comparisons with international developments. We use a doctrinal approach and analyze primary sources (judicial decisions) and secondary literature of authority to draw conclusions. The case analysis is based on the significant Indian Supreme Court decisions since Navtej Johar up to the most recent cases (e.g. *Shayara Bani, Sabarimala, Puttaswamy*) and the comparison with similar cases in other countries e.g. *Obergefell v. Hodges* and *Fourie* (in U.S and South Africa). This paper contends that constitutional morality has emerged as a necessary interpretive standard -a counter-majoritarian constraint on minority

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<sup>4</sup> *Indian Young Lawyers Ass'n & Ors. v. State of Kerala & Ors.* (Sabarimala), Writ Pet. (Civ.) No. 373 of 2006; (2019) 11 S.C.C. 1 (Sup. Ct. of India Sept. 28, 2018), <https://indiankanoon.org/doc/163639357/>.

<sup>5</sup> *Joseph Shine v. Union of India*, AIR 2018 S.C. 4898; (2019) 3 S.C.C. 39 (Sup. Ct. of India Sept. 27, 2018), <https://indiankanoon.org/doc/42184625/>.

<sup>6</sup> See supra note 4.

<sup>7</sup> See supra note 3.

<sup>8</sup> See supra note 3.

interests- and has identified difficulties and suggestions on how to further enforce it in the legal practice.

## Literature Review

Indian constitutional morality has been studied by scholars as a component of transformative constitutionalism. Subramaniam notes that Indian courts have adopted a living tree style of interpretation: the Constitution was supposed to be a dynamic charter expressing ideals of justice and inclusion<sup>9</sup>. In this perspective, constitutional morality represents the Enlightenment and egalitarianism values that were incorporated into the text that should be used in judicial reasoning. Some of the early invocations are *Naz Foundation v. Government of NCT of Delhi* (2009), Chief Justice Shah had remarked that the State could not invoke the changeable popular morality to place restrictions on the fundamental rights; the only morality that could be utilised to justify the restrictions was the constitutional morality, which is based on the constitutional values that are immutable. Subramaniam points to the fact that constitutional morality was heavily demanded by Dr. Ambedkar in the Constituent Assembly, which was characterized by the social-revolutionary thrust of the Constitution. This scholarship underlines the fact that in contrast to the social norms of a day, constitutional morality offers an objective and textually based standard contrasting majoritarian prejudices.

Constitutional morality has its contents and limits which are analyzed by other commentators. Uma and Sreenath sharply review the Navtej Johar formulation, which views constitutional morality as progressive, liberating and counter-majoritarian and the morality of society as conservative and oppressive. They doubt that this dichotomy can be philosophically valid, and propose that societal and constitutional norms can be in contact. Other commentators praise the idea as a strength of democracy since it avoids majoritarian oppression in secular rule<sup>10</sup>. There are warnings that expansive understanding of constitutional morality may invite indeterminacy or judicial activism, which may present the personal opinions of the judges as constitutional values. Opponents call on more precise parameters and popular discussion of what constitutional morality is.

The trends are observed to be parallel in comparative legal studies. According to constitutional scholars, the minority rights of Western judiciaries have traditionally been safeguarded against majoritarian pressures by appeal to substantive values that are similar to constitutional morality. To take one example, the law in the United States of America (e.g. *Loving v. Virginia*, *Obergefell v. Hodges*) stresses on personal freedom and equality in the case of a divided popular opinion. In *Obergefell* (2015) the U.S. Supreme Court ruled that same-sex couples possessed an essential right to marry, in violation of state laws to the contrary, under the Due Process and Equal Protection Clauses<sup>11</sup>. Equally, the South African Constitutional Court in *Minister of Home Affairs v. Fourie* (2005) unanimously acknowledged the existence of the right to same-sex marriage, based on the

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<sup>9</sup> See supra note 1.

<sup>10</sup> *Constitutional Morality*, Shankar IAS Parliament (Feb. 19, 2025), <https://www.shankariasparliament.com/current-affairs/gs-ii/gs-ii-polity/constitutional-morality>.

<sup>11</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015), <https://supreme.justia.com/cases/federal/us/576/644/>.

dignity and equality that were based on the transformative constitution of South Africa<sup>12</sup>. Although constitutional morality was not mentioned expressly in these decisions, they represented the same urge to make the law consistent with the central constitutional guarantees, instead of the existing social prejudice.<sup>13</sup> In Reference re Same-Sex Marriage (2004), Canadian courts also found that same-sex couples were not allowed to get married because that was against the promise of equality in the Charter.<sup>14</sup> Simply stated, comparative literature postulates that constitutional morality in India reverberates a global jurisprudential trend of profound constitutional values (liberty, dignity, equality) against majoritarian values.

The concept is, however, problematized by some scholars. They observe that even the Indian Constitution exposes the religious practice to the concept of the public order, morality and health (Art. 25(2)(b)), and that the distinction between the public and the constitutional morality may be unclear. There is a concern that invoking constitutional morality without specificity can bring the bias of the judges in the name of constitutional intent. It is also controversial whether constitutional morality lexicon is based on textual provisions (Part III values, Directive Principles) or on more general political philosophy. However, the growing dependence of the judiciary on the concept necessitates a thorough analysis of the doctrine, which is what this paper does.

## Research Methodology

The study is based on a doctrinal legal approach. The Constitution of India (in particular, Articles 14, 15, 19, 21, 25-26), landmark Supreme Court decisions (published as Johar, Shine, Sabarimala, Puttaswamy, Kesavananda, etc.), and foreign constitutional cases of national significance are the main sources. The relevant text and reasoning of judgments are extracted using official law reports and websites (e.g. indiankanoon). Secondary sources consist of academic articles, law review commentaries, and professional commentaries (as the SCObserver and Law Review articles mentioned) that explain the meaning of constitutional morality and criticize its application. The analysis continues with thematic coding of the material of these sources: finding instances where the courts define or apply constitutional morality, analyzing the Articles and values that these invoke, and placing them in the context of larger legal theories (e.g. counter-majoritarian judicial review, transformative constitutionalism). This facilitates a granular appreciation of case law and also a determination of coherence of doctrine between decisions. References are made to allow verification of all the quoted contents and legal propositions.

## Constitutional Morality in Indian Jurisprudence

### 1. Origins and Conceptual Foundation

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<sup>12</sup> *Minister of Home Affairs v. Fourie*, Wikipedia, [https://en.wikipedia.org/wiki/Minister\\_of\\_Home\\_Affairs\\_v\\_Fourie](https://en.wikipedia.org/wiki/Minister_of_Home_Affairs_v_Fourie) (last visited Dec. 29, 2025).

<sup>13</sup> Kanad Bagchi, *Transformative Constitutionalism, Constitutional Morality and Equality: The Indian Supreme Court on Section 377*, 51 *Verf. & Recht in Übersee* 367 (2018), <https://doi.org/10.5771/0506-7286-2018-3-367>.

<sup>14</sup> *Symposium, Transformative Constitutionalism, Constitutional Morality and Equality: The Indian Supreme Court on Section 377*, 51 *Verf. & Recht in Übersee* (No. 3) (2018)

Constitutional morality may be said to date to 19 th century philosopher George Grote, to whom Dr. Ambedkar referred when debating the Constitution: constitutional morality implied a supreme respect to the Constitution and a devotion to its observance, even against majority will<sup>15</sup>. Ambedkar noted that the constitutional morality was not established in the Indian society at independence - a foreign concept that had developed during the colonial rule - but demanded the enhancement of constitutional morality, a responsibility of the organs of the State including the Judiciary. This original vision meant that the promises of our Constitution (justice, liberty, equality, fraternity, fraternity, secularism), had a permanent moral direction of lawmaking and adjudication.

Constitutional morality was sometimes referred to in dicta by courts well after independence. In *Kesavananda Bharati* (1973), the majority cited the respect of constitutional ideals as a component of the basic structure of the Constitution, which was used later. *Maneka Gandhi v. Union of India* (1978) and *Minerva Mills* (1980) also pointed out that the fundamental rights should be construed in balance with the values inherent in the Constitution. Interpretation was also associated with values over time as Maneka Gandhi believed that we must see what is the consonance between Article 21 and other fundamental rights and values that the Constitution envisages. In this regard, constitutional morality would serve as a general interpretive principle.

In *Government of NCT of Delhi v. Union of India*, a very eloquent formulation of the idea, Chief Justice Dipak Misra stated: "Constitutional morality...means the morality that is constituted in the constitutional norms and conscience of the Constitution. Actions, he said, must not only have the potentiality to be in harmony with the constitutional impulse, but they must have it. That is the constitutional justice test which comes within the umbrella of constitutional morality". To put it another way, constitutional morality is not predetermined by a certain culture or epoch; it is established by the time-honored norms and conscience of the Constitution itself. It calls upon the courts to work towards the best thing of constitutional morality, which is to maintain liberty and heterogeneity in society<sup>16</sup>. Where a single Judge exercises the principle consistently it will act like a fulcrum and a laser beam in the enforcement of the rule of law<sup>17</sup>. So, it is unanimously held by scholars and judges that constitutional morality involves rigid adherence to constitutional values - justice, equality, secularism, and an objective moral norm that can be derived out of the Constitution, as compared to ephemeral social biases.<sup>18</sup>

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<sup>15</sup> See supra note 3.

<sup>16</sup> See supra note 3.

<sup>17</sup> *Indian Young Lawyers Ass'n & Ors. v. State of Kerala & Ors.* (Sabarimala), Writ Pet. (Civ.) No. 373 of 2006; (2019) 11 S.C.C. 1 (Sup. Ct. of India Sept. 28, 2018), <https://indiankanoon.org/doc/163639357/>.

<sup>18</sup> Tarunabh Khaitan, *Directive Principles and the Expressive Accommodation of Ideological Dissenters*, 16 Int'l J. Const. L. 389 (2018), <https://doi.org/10.1093/icon/moy025>.

## 2. Constitutional Morality vs. Social Morality

One of the most important characteristics of the contemporary jurisprudence is the difference between constitutional morality and social (or popular) morality. In *Naz Foundation* (Delhi HC, 2009) the court directly dismissed the changing and subjective concept of public morality as a rationale of law limiting personal autonomy by stating that the concept could suffocate social development. The court emphasized that constitutional morality that was based on the text and the values of the Constitution could only pass the test of restricting rights.

This dichotomy was reiterated by the Navtej Johar majority: the judges declared that the Court must be influenced by the conception of constitutional morality and not by societal morality. They warned that, in constitutional democracy, the principle of constitutional morality should not be stamped by the obscure ideas of social morality, which lack legal validity. Practically, this implies that although most citizens may perceive a given practice as being immoral, this cannot be considered superior to the constitutional rights.<sup>19</sup> According to Johar, the entire purpose of constitutional adjudication is to safeguard the rights of individuals - even a tiny section of the society - against the tyrant majority sentiment<sup>20</sup>. So, it was not imperative in Johar that homosexuals constituted a small minority group but the fact that they have a right pursuant to the Constitution and that any law breaching their rights should yield to the constitutional morality. This was pithily summarized: constitutional morality over social morality<sup>21</sup>.

According to scholars, though, it may be difficult to differentiate the two. Uma and Sreenath are wondering whether the constitutional and societal moralities can be ever completely divorced, and the principles, which are constitutional, appeared themselves due to some social circumstances. However, there is a common opinion that constitutional morality offers an objective point of departure. The Supreme Court has frequently referred to constitutional morality in a counter-majoritarian way: to invalidate laws based upon majoritarian beliefs or practices that clash with basic rights. According to one of the analyses, constitutional morality is an antidote to majoritarian impulses and social prejudices.<sup>22</sup>

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<sup>19</sup> Nakul Nayak, *Constitutional Morality: An Indian Framework*, 71 Am. J. Comp. L. 354 (2023), <https://doi.org/10.1093/ajcl/avad029>

<sup>20</sup> See supra note 3.

<sup>21</sup> Id.

<sup>22</sup> Oscar Vilhena Vieira, Upendra Baxi & Frans Viljoen (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria Univ. Law Press 2013).

### 3. Fundamental Rights and constitutional Morality: Case Law.

#### a) Navtej Singh Johar v. Union of India (2018)

It is the person of Navtej Singh Johar who represents the model of constitutional morality in action. The Constitution Bench consisting of five judges agreed, unanimously, that Section 377 of the Indian Penal Code, which criminalized same sex intercourse against the order of nature, was unconstitutional to the extent that it criminalized consensual intercourse between adults of the same sex. The Court has stated that the Section 377 IPC to the extent that it criminalizes consensual sexual acts of adults in private violates Articles 21, 14 and 15 of the Constitution. This grand proclamation was based on a solid appeal to constitutional morality. It was emphasized in the judgment that the values of dignity and liberty and equality in the Constitution can never be defeated by illogical and irrational ideas of morality on community.

The Johar bench, headed by Chief Justice Dipak Misra and Justice D.Y. Chandrachud (others agreed) gave strong dicta in associating constitutional morality with fundamental rights. They noted that the Indian state has a responsibility to preserve the Indian heterogeneous fibre and safeguard the freedom and liberty, which is the essence of constitutional morality<sup>23</sup>. The ruling reiterated that judges should never give in to common opinion. As an instance, it was believed that, devotion and loyalty to constitutional morality should not be added to the popular sentiment of a given moment in time<sup>24</sup>. When a law violates rights provided by the Constitution, the Court claimed, it must be struck down: when the impugned provision violates the precept of constitutional morality, the said provision must be held as unconstitutional, since the constitutional courts are there to enforce the Constitution, not to support any bias in the society<sup>25</sup>.

This jurisprudence stated clearly that constitutional morality was an interpretative resource to make a righteous decision. According to the Court, constitutional morality would act as a guide to the Court in reaching a just verdict that would be consistent with the constitutional right of the citizens, however minor that segment of the population may be. It also observed that constitutional morality is the normative vision of the Constitution and permits the society the options of self-renewal, which is similar to what was stated in the Preamble. Overall, Johar not only invalidated a discriminatory statute, but also gave a powerful jurisprudential thesis: constitutional morality (based on Articles 14, 15, 21 etc.) should dominate over any majoritarian morality of exclusion.

#### b) *Joseph Shine v. Union of India (2018)*

Soon after Johar, the Court also confronted another archaic law, namely, Section 497 of the IPC, which regarded adultery as a crime that was punishable only in those instances, when a man engaged in adultery with a married woman (not vice versa). This provision was found unconstitutional in Joseph Shine the Supreme Court as it contravened Articles 14, 15 and 21. The reasoning of the judgment once more became constitutional morality. In a majority opinion, Justice Indu Malhotra noted that the criminal law should align with constitutional morality, and stated that Section 497 was incompatible with constitutional morality since it continued to promote gender inequality. She concluded as usual: Section 497 fails constitutional scrutiny.

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<sup>23</sup> See supra note 3.

<sup>24</sup>Id.

<sup>25</sup> Id.

The Court pointed out the analysis of how Section 497 represented a two-sided offending equality. In *Sarla Mudgal*, quoting dicta of Justice Gopala Gowda, the court said that considering adultery a patriarchal right was constitutionally invalid. It proceeded to expressly state that the inhumanity in Section 497 breached substantive equality in Article 14 and its gender bias breached Article 15. This is attested by the text of the judgment: "Section 497, IPC, is unconstitutional in that it is violative of Articles 14, 15 and 21. It is worth noting that the Court reinstated that adultery in a consensual and marital situation is a matter that touches on the body and dignity of a woman, which falls under the protection of Article 21. The Court employed constitutional morality to nullify the provision by refusing to enforce the old-fashioned moral judgment, which was enshrined in the law (e.g. husbands having property rights over wives).

In this way, Shine confirms gender justice as constitutional morality. It states that criminal laws must be covered by the guarantee of equality and dignity in the Constitution. In such a way, it mirrors the strategy of *Johar*: the moral worldview of the state (conservative ideas of marriage in this case) has to yield to constitutional promises. The Shine court has mentioned that however socially acceptable a practice may be, it cannot be used to override constitutional rights. As shown in this case, constitutional morality is not limited to sexual orientation in order to safeguard individual autonomy and gender equality under Articles 14, 15, 21.

*(c) Young Lawyers Association, v. Indian. State of Kerala (2019)*

The case of *Sabarimala* (usually referred to as *Indian Young Lawyers Association v. The State of Kerala*). The *Sabarimala* temple had restricted women who had reached the age of menstruation (10-50 years) to enter the temple since decades. This exclusion was contested by petitioners who claimed that it was contrary to Articles 14, 15 and 25. In January 2019, a five-judge Constitution Bench (Chief Justice Misra and Justice Chandrachud) ruled in the case that the ban was unconstitutional. The constitutional morality once again helped the Court to reason.

Most noted that any practice which failed to grant women equal access to worship would be destroying the freedom and dignity of women - values which were against Constitutional Morality. It stressed that the secular Constitution of India allows the practice of different religions without violating the basic rights. Interestingly, the Court has warned that such terms as morality and public order in Article 25 should not be used arbitrarily against rights. It said that ideas of civic order, virtue and well being should not be colourable instruments to limit liberty of worshipping. This in a way is a repetition of constitutional morality; it is not possible to conceal discrimination under the mantle of tradition.

The opinion of the Justice Chandrachud (with three colleagues concurring) did not recurrently mention the word constitutional morality within it, but the reasoning of the opinion is consistent with the idea. It established that the exclusion had no foundation on the protection of religious denominations in Article 25 (as it did not pass the test of essential practice in *Birla v. Weimar*) and that it was patriarchal only. The judgment based its ruling on the principle of equality and dignity and said that the guarantee of liberty and equality in the Preamble applies to things of faith. According to the concurring judgment of Justice Indu Malhotra, which expressly refers to the term, in a secular democracy constitutional morality demanded the harmonisation or balancing of all fundamental rights. She stated that constitutional morality will understand the liberty of each individual, group or denomination to practice their religion. Therefore, though the court differed in approach (majority overturned the ban itself, Malhotra would have referred to legislature after interlocutory remedy), both seemed to accept that basic constitutional values (equality, fraternity) take precedence over customs.

In brief, *Sabarimala* shows the constitutional morality that limits social/religious morality. It held the practices that violate the rights of women (or any other class that is under protection) to be in breach of the underlying theme of equality and non-discrimination in the Constitution. Notably, the decision appealed to Articles 25(1)-(2) themselves: even religious freedom is not exempt to public order, morality and health as they are determined by the Constitution, but not to societal bigotry. The Court framed the argument as to whether a gender-based omission can be continued to exist under the constitutional morality. It answered this with a resounding yes: Under a constitutional democracy, whenever... basic rights are violated, the constitutional morality takes precedence over social morality.

#### *(d) Other Significant Judgments*

Constitutional morality is also represented in other modern rulings. In *Shayara Bano v. Union of India* (2017) the Supreme Court struck down talaq-e-biddat instant triple talaq because of arbitrary discrimination (Articles 14 and 15) and gender equality. Although the constitutional morality term was not used specifically, the ethos of the decision is similar to it: the Court did not want a perverse religious tradition to deprive Muslim women of justice and dignity. The *Puttaswamy* case (a panel of nine judges) highlighted that the autonomy of an individual including sexual orientation is under the rights of the constitution. This decision gave a basis to *Johar* where the Court stated that the rights that are constitutionally safeguarded apply to sexual dignity and identity. Although *Puttaswamy* emphasized the issue of privacy, it also emphasized that the constitutional morality requires the intimate decisions made by a person to be guarded against intrusion by the majority.

The doctrine was predetermined by *Kesavananda Bharati* (1973) and other early cases at the other end of the timeline. The basic structure (secularism, federalism, rule of law etc.) of the Constitution is constitutional morality as the *Kesavananda* framers implicitly acknowledged. The Court restated that fundamental rights cannot be construed to reflect constitutional ideals in a narrow manner (*Union of India*, 2016). Though not then called constitutional morality, these principles were the basis of the explicit use as has been observed in the past few decades.

Combined, these cases demonstrate that constitutional morality has become a theme in the decision of fundamental rights. The Court in both cases takes a path, which favors constitutional guarantees against discriminatory or majoritarian norms. It is worth noting that the Court has based this principle on several sections of the Constitution: on Articles 14 and 21 (equality and dignity), Article 15 (non-discrimination), Article 19 (freedoms), and Article 25 (religious freedom), the constitutional morality is recurrently applied. An example would be that Johar quashed Section 377 on the basis that it breached 14, 15, 21; Shine quashed Section 497 as a result of breaching 14, 15, 21; Sabarimala appealed to Articles 25, 14 and 15 as subject to constitutional morality. The language used by the Court in such cases often refers to the values of Preamble and Part III guarantees, which is an amalgamated vision of the moral architecture of the Constitution.

#### 4. International Perspectives

The comparative jurisprudence indicates that there are similar themes in other constitutional democracies. In *Obergefell v. Hodges* (2015) the U.S Supreme Court ruled that state same sex marriage bans were in conflict with the due process and equal protection provisions of the Fourteenth Amendment. Speaking on behalf of the majority, Justice Kennedy made the declaration that the right to marry is a basic right which is inherent in the freedom of individuals, and therefore same sex couples should be given a chance to marry. The Court specifically pegged marriage equality on dignity, liberty and equality by noting that same-sex couples were in a position to exercise the basic right to get married. This argument is similar to that of Johar in India: both courts conditioned constitutional commitments of liberty and equality to the rights of LGBT citizens, and therefore struck down traditional prohibitions that were both demeaning and serious and enduring harms. The majority in the U.S. expressly reversed the previous precedents (e.g. *Baker v. Nelson*) which had yielded to state moral judgments to a transitioning constitutional principles to majoritarian values<sup>26</sup>.

South Africa's *Minister of Home Affairs v. Fourie* (2005), A unanimous Constitutional Court arrived at a similar conclusion (Fourie, 2005). In his bench writing, Justice Albie Sachs believed that the common-law definition of marriage (a man-woman union) and the language of the Marriage Act was discriminatory against same-sex couples, which contravened the provisions of equality and dignity (Section 9) and (Section 33) of the post-apartheid Constitution . The Court directed Parliament to amend the laws, and that it was unreasonable to deprive a group of citizens of the right to marry. South Africa did not refer to constitutional morality in its line of reasoning, but its strategy echoes this idea: The Court referred to a transformative constitution that should be characterized by complete equality, and any discrimination on the basis of sexual orientation was not justified. (In a year, the Civil Union Act was passed by parliament to legalize same-sex marriage)

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<sup>26</sup> Michele Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 *Int'l J. Const. L.* 26 (2016).

These foreign cases highlight a more widespread jurisprudential tendency: to treat constitutions as living documents, which secure basic freedoms and equality, even over established social or religious practices. This, also in a broad sense, is constitutional morality in the workplace as well, judicial compliance with constitutional values as a criterion that is superior to popular morality. *Obergefell* and *Fourier* have been used to support this opinion by Indian courts, which have stated that transformation of discrimination into equality is the goal of constitutional morality and that such decisions are based on dignity and respect of all citizens. The Reference re Same-Sex Marriage (2004) by the Canadian Supreme Court also recognized that exclusion of same-sex couples in marriage would be unconstitutional distinction that only could be corrected by the legislature by Parliament.

Constitutional morality, therefore, may be regarded as an Indian form of a world judicial adherence to fundamental constitutional principles (it can also be called a form of substantive due process or transformative constitutionalism). These comparative lessons confirm that the application of constitutional morality in India is consistent with a known principle, namely that the Constitution is a scheme of cooperation between people on the basis of equality and dignity, which must be enforced by the courts over and above passing moral majorities.

## 5. Criticisms and Debates

Even though constitutional morality has been instrumental in broadening rights, it has been criticized. It has been argued that the concept is not defined and poses a threat of judicial overreach by introducing subjective values of the judges. Considering a case in point, skeptics believe that in a way of giving preference to some progressive results, the court can become an elitist moralist. Others fear that to suggest that a constitutional value is alien (as in the case of constitutional morality in 1948, as Ambedkar did) is to imply that it is not yet a valid value in society, and that judicial imposition of it would be illegitimate. In fact, Justice Nariman (who agreed with Johar) indicated that constitutional morality is preferable, but courts should be careful to define it without appearing to trespass legislative or social spheres. (He did not object, but encouraged a restrictive interpretation; his warning is reminiscent of arguments over the role of the judiciary) Equally, the dissent judges in *Sabarimala* cautioned the courts against being social engineers, reforms being best served by a legislature or religious body.

Even the judiciary itself asserts that constitutional morality is not whim in the judges but necessity of the text and form of the Constitution. As an example, in the case of *Shayara Bano* (Triple Talaq), the Court referred to the Islamic principles of gender justice and constitutional morality, in which the Court noted that personal laws have a moral foundation that is compatible with equality. It is the pushback that will, therefore, more frequently occur between popular sovereignty and judicial activism.

Within the academia, there have been arguments on constitutional morality limits. Uma and Sreenath, to take an illustrative example, ask the question whether law can ever be devoid of social morality, and state that it may be unrealistic to go all the way and divorce law of social values. They also investigate whether the framing used by the Johar bench is unfairly demonizing to the societal morality which may have its rightful democratic aspects.

## 6. Findings and Suggestions

The case law and literature analysis lead to a number of conclusions. To start with, constitutional morality has become an overriding interpretive measure of contemporary Indian constitutional law, producing results on a series of progressive adjudications. It has always been employed by the Supreme Court to make constitutional commitments (dignity, equality, liberty, fraternity) take precedence over religious dogma, patriarchal custom or majority bias. This is well seen in the rights cases: *Johar* and *Shine* struck down discriminatory laws (on sexuality and adultery) specifically through the use of constitutional morality as a reference point. This has increased substantive equality within the Court, which provides legal force to the vision of an inclusive society as espoused in the Preamble. Cases of religious freedom have also been subject to constitutional morality as witnessed in *Sabarimala* where it undermined discriminatory practices in temples.<sup>29</sup> More importantly, these instances indicate a jurisprudence of moral foundation. The constitutional morality is not a figure of speech; the courts have ruled that the non-observance of the same renders ineffective a state action or a law that violates rights .

Second, the concept serves as an element of a larger approach that is called transformative constitutionalism: it bridges formal constitutional provisions with transformative social change. Judges have associated values of Indian independence (since the advocacy of Indian independence in the eyes of Ambedkar to the slogan, *We, the people of India*, and so on) with modern rights by focusing on the enabling framework of the Constitution. This approach combines with the ideas of liberal democracy, where constitutions favor minorities and initiate inclusion. International analogies (e.g. *Obergefell*, *Fourie*) indicate that this is quite a typical practice of rights adjudication internationally.

This power is not without danger though. Both the open-textured quality of constitutional morality and the fact that it is invoked makes it open to contestation and can be viewed as subjective. Formal guidance on the way to balance between social norms and constitutional values is scarce. Indicatively, critics of *Johar* were of the view that the Court was legislating morality when proponents saw it as supporting constitutional morality as opposed to regressive legislations. The *Sabarimala* controversy is no exception, in that the decision as to what is and is not moral in constitutional terms is made by whom? Under these tensions, the courts have occasionally been unwilling to accept unilateral declarations. The *Sabarimala* majority later issued a separate review judgment to put things into context, and the concept of a nine-judge bench having been convened suggests judicial restraint.

Based on these findings, the following are some of the recommendations:

- **Elaborate the Doctrine:** The legal academia and the judiciary ought to strive to have a more conceptual approach to constitutional morality. This can include the expression of standards or aspects according to which constitutional morality is determined (e.g. textual values, purposive interpretation, international norms, constituent intent) in order to minimize uncertainty. Instructions or illustrations (in judicial decisions or legal textbooks) would be able to direct lower courts and litigants.

- **Legislative Action:** The constitutional morality acknowledgment does not precede the Parliament and states. Laws should be revised (e.g. laws making it a crime to engage in consensual sexual activity, laws prohibiting gender-discriminatory personal laws, laws against blasphemy, etc.) by legislatures, which should also take the initiative in harmonizing statutes with constitutional ideals. This would proactively ingrain constitutional morality with the democratic processes instead of the last resort judicial action.
- **Training and Education:** Judges, lawyers and legislators need to be trained on constitutional ethos. The Constitutional moral vision (Articles 14-51A) can be highlighted by law schools and continuing legal education, such as speeches of members of the constituent assembly, such as Ambedkar, about constitutional morality. An educated court system will be in a better position to practice discretion in a wise manner, as there will be less accusations of personal bias.
- **Checks and Balances:** The system of checks and balances can be enhanced to overcome the issue of judicial overreach. This may involve promoting written argument in Parliament where courts pass earth-shattering decisions, potentially even seeking curative petitions or reference cases concerning controversial constitutional matters, which is sometimes done (e.g. the pending review in Sabarimala). The legitimacy is assisted by clear, reasoned opinions with strong majorities (as in Johar).
- **Public Engagement:** Finally, constitutional morality is a democratic agreement on the fundamental rights. Academia and media should involve the masses in a discussion of these values through their civil society. Constitutions are only affected by the public opinion when the citizens develop the vision of the Constitution as stake-holders. The divergence between social and constitutional morality might be reduced by creating an awareness regarding the reason why minorities are safeguarded by the Constitution.

Overall, constitutional morality has been an effective tool of justice in the Indian courts. Its further use will be determined by its prudent use and collective action at institutions to strengthen the constitutional pledge. The principle must not be liable to the changeable whims of each age and time, as the framers of the Constitution meant, but must be deeply entrenched in the fundamental propositions of human liberty and equality.

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*Key Law Review Excerpts:*

- Subramaniam's analysis outlines how Indian courts adopted a living-constitution approach.
- Uma & Sreenath explore the *Johar* conception of constitutional vs social morality.
- *Essentials of Constitutional Law* (Paras Diwan) – on Articles 14, 15, 21 contexts.
- Emily Shapiro, *Transformative Constitutionalism and Sexual Minorities*, 56 Colum. J. Transnat'l L. (2018).