



The Indian Journal for Research in Law and Management

Open Access Law Journal – Copyright © 2026

Editor-in-Chief – Dr. Muktai Deb Chavan; Publisher – Alden Vas; ISSN: 2583-9896

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CONSTITUTIONAL MORALITY AND JUDICIAL CONSISTENCY: A CRITICAL STUDY OF SUPREME COURT JURISPRUDENCE FROM NAVTEJ JOHAR TO SUPRIYO

- *Sreya Shah*

ABSTRACT

Constitutional morality has surfaced as a powerful doctrine in Indian constitutional jurisprudence. The Supreme Court had decisively used it to answer ambiguous and complex constitutional questions, like decriminalising consensual same-sex relations in Navtej Singh Johar and overriding a traditional discriminatory practice in the Sabrimala judgment. Yet when the same community returned to the court with their next constitutional claim in the Supriyo case, the doctrine that was so powerfully impeached to protect their rights was conspicuously absent. This paper examines the several meanings of constitutional morality, starting from Ambedkar's vision of it to the various interpretations given by the Supreme Court. Further, this paper analyses the inconsistency in the application of constitutional morality across different cases ruled by the Supreme Court and addresses a central question that arises about the consequences of the inconsistent application of constitutional morality.

INTRODUCTION

The term “morality” is very subjective; what may be moral in one person’s perspective may not be in another’s. The question is which morality should be preferred. In India, the debate between constitutional morality and public morality has been elevated significantly. Both constitutional morality and popular morality are concerned with the questions of right and wrong. But, while popular morality derives its standards from fleeting notions of society, constitutional morality is

derived from the principles sown thoughtfully in the Constitution. The Apex Court of our country has often preferred to prioritise the constitutional values over the fleeting notions of society.

Constitutional morality has emerged as one of the most powerful and contested doctrines in Indian jurisprudence. After being used by Dr Ambedkar as a tool to add administrative details in the Constitution, the Indian Courts have passed some of the most valuable precedents using this doctrine. From decriminalising adultery and consensual sex between two adult homosexuals to breaking the old traditional practices that were discriminatory against menstruating women, the doctrine of constitutional morality has been utilised optimistically to ensure justice. But across these landmark cases, the Court has never once discussed the rules of its application.

This paper traces the application of constitutional morality from Ambedkar's original vision through the Supreme Court's interpretation of it from *Navtej Singj* to *Supriyo*, and examines the consequences of one central question that comes up along the way: what happens when a powerful doctrine like constitutional morality is left without principled rules governing its application, subject entirely to the discretion of the Court that weilds it.

THE AMBEDKARITE VISION: CONSTITUTIONAL MORALITY AS A COUNTER-MAJORITY PRINCIPLE:

The concept of constitutional morality was not as prevalent in India until Dr Ambedkar introduced it in his speech in the Constituent Assembly on 4th November 1948. In his speech, Ambedkar drew upon George Grote's idea of constitutional morality to advocate the incorporation of administrative details in the Constitution. George Grote's formulation of constitutional morality held that all citizens would respect the Constitution and obey the authorities acting under it, while having unrestrained freedom to criticise such authorities who deviate from it, and that public officials and political contenders must act in accordance with the Constitution. However, in his speech, Dr Ambedkar limited the use of constitutional morality to the incorporation of administrative details in the Constitution. He believed that administrative details had no place in the Constitution. Still, he further proceeded to defend such incorporation,

stating that the form of administration would shape the form of the Constitution and the democracy of India. Hence, it must not be left to the parliament to decide it. However, there was no further elaboration by Dr Ambedkar on the concept of constitutional morality, except that in the same speech, he asserted that, “Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it.”

The Indian Courts have interpreted Dr Ambedkar’s notion of constitutional morality several times, in several meanings. Justice D. Y. Chandrachud in the *Navtej Singh Johar* case held that for the citizens to realise the Constitution’s vision, there needs to be a commitment to that vision; he stated, “Dr Ambedkar described this commitment to be the presence of constitutional morality among the members of the society.”¹ In the same case, Justice Dipak Misra defined that constitutional morality goes beyond the literal text of the Constitution, it embraces the virtues of “ushering a pluralistic and inclusive society.” The Supreme Court in the *Manoj Narula* case stated, “constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document.”²

Constitutional morality has not been defined in the Constitution, and the Courts have drawn various interpretations of it, making the concept of CM an inconsistent, undefined concept. Drawing from the several interpretations of the concept, constitutional morality essentially means that the citizens and the government shall act within the boundaries of the principles embedded in the Constitution. Another aspect discussed by the Supreme Courts over the years is the inevitable comparison between constitutional morality and popular morality. Constitutional morality is derived from the constitutional values. On the other hand, popular morality derives from the standards and principles set by society, consensually, based on the selective perceptions of right and wrong. The Supreme Court has often reiterated that it is constitutional morality that must prevail over popular morality. In the case where adultery was decriminalised, the Court stated, “It is not the ‘common morality’ of the State at any time in history, but rather constitutional morality, which must guide the law.”³ It was stated in the *Navtej Singh* case, “Devotion and fidelity to constitutional morality must not be equated with the popular sentiment

¹ *Navtej Singh Johar v. Union of India*, (2018) 10 S.C.C. 1 (India).

² *Manoj Narula v. Union of India*, (2014) 9 S.C.C. 1 (India).

³ *Joseph Shine v. Union of India*, (2019) 3 S.C.C. 39 (India).

prevalent at a particular point of time.” These nuances imply that the Courts shall always uphold constitutional morality over popular morality.

THE HIGH WATERMARK: CONSTITUTIONAL MORALITY AS A TOOL OF TRANSFORMATIVE ADJUDICATION

To ensure justice is duly served, the Indian courts have applied the idea of constitutional morality time and again. Essentially recognised in the infamous *Kesavananda Bharati* case⁴, the concept of constitutional morality has been traced thereafter in several cases. In the most recent times, it was in 2009 that the doctrine was first introduced in the case *Naz Foundation v. Govt. of NCT of Delhi*,⁵ by the Delhi High Court, where the Court distinguished between constitutional and popular morality, declaring Section 377 of IPC⁶ as unconstitutional. Further, it was in the case of *Manoj Narula*, where the Supreme Court significantly discussed the concept, stating that “traditions and conventions have to grow to sustain the value” of constitutional morality. Later in the *Triple Talaq* case⁷ and the *Joseph Shine* case, the concept of constitutional morality was discussed in brief to uphold constitutional principles over outdated, unequal laws.

Later, there came two cases where the Supreme Court relied heavily upon the doctrine of constitutional morality to ensure justice to the marginalised communities.

- 1. Navtej Singj Johar Case:** On 6th September 2018, the Supreme Court ruled a landmark judgement in favour of the LGBTQ+ community. The Court, by overruling its own judgment in *Suresh Koushal*⁸, narrowed the scope of Section 377 of the IPC, decriminalising consensual sexual intercourse between homosexuals. This judgment is marked as a significant step towards an inclusive society. Here, the Court essentially relied upon constitutional morality, upholding the values of the Constitution over societal norms. The Court emphasised crucially on the rights of the LGBTQ+ community; Justice Dipka Misra stated, “Any attempt to push and shove a homogeneous, uniform, consistent

⁴ *Kesavananda Bharati v. State of Kerala*, (1973) 4 S.C.C. 225 (India).

⁵ *Naz Foundation v. Gov't of NCT of Delhi*, 160 D.L.T. 277 (Del. H.C. 2009).

⁶ Indian Penal Code, No. 45 of 1860, § 377 (India) (repealed).

⁷ *Shayara Bano v. Union of India*, (2017) 9 S.C.C. 1 (India).

⁸ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 S.C.C. 1 (India).

and standardised philosophy throughout the society would violate the principle of constitutional morality.” The judges repeatedly emphasised the need to prioritise constitutional morality over popular morality. Justice Chandrachud held that, “It requires that the rights of an individual ought not to be prejudiced by popular notions of society.” The judgment optimistically invoked the doctrine of constitutional morality to ensure that the rights of a marginalised community were not overpowered by the popular norms of society, thereby bringing about a righteous change in the law.

- 2. The Sabrimala Case:** The Supreme Court, on 28th September 2018, passed a landmark judgement, upholding the constitutional rights of women aged from 10-50, who were, before this judgement, barred from entering the Sabrimala Temple. In the light of constitutional morality, the Court dismissed the custom of excluding a certain age group of women from entering the Sabrimala temple, holding it unconstitutional. The Court reiterated the need to adopt constitutional morality and discard the popular notions of society. Justice Dipak Misra said, “that public morality must yield to constitutional morality.” In this case, the judges used the doctrine of constitutional morality to ensure the rights of women to practice religion. Justice Indu Malhotra held, “Constitutional Morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith in accordance with the tenets of their religion.” This case marked a cornerstone of the application of constitutional morality to ensure the religious rights guaranteed by the Constitution of the menstruating women, in this sense, a marginalised community.

Establishing strong precedents, these two cases marked the importance of constitutional morality in ensuring the fundamental rights of the marginalised communities. In *Navtej Singh*, the Court not only decriminalised consensual sex between homosexuals, but in light of constitutional morality, it invoked dignity, equality, and a transformative constitutional vision. The Court kindled a glimmer of hope in the hearts of the LGBTQ+ community, which was disregarded by society for a long time. Similarly, with the help of constitutional morality, the Court in *Sabrimala*, by uplifting the age-old discriminatory practice against women, established a feminist change in legal history. These cases emphasise the importance of a prompt and accurate

use of the doctrine of constitutional morality to ensure that it is the constitutional values that prevail over the popular notions of society.

CRACKS IN THE DOCTRINE: THE SABRIMALA REVIEW AND KANTARU RAJEEVARU

After the phenomenal change brought by the Sabrimala judgement, many review petitions were filed to challenge the court's decision. The court heard the review petitions with several writ petitions raising similar constitutional questions under *Kantaru Rajeevaru*. In 2019, a bench of five judges reframed the constitutional questions and referred them to a larger bench of not less than seven judges.⁹ Among the seven questions that were framed, one was, "What is the scope and extent of the word 'morality' under Articles 25 and 26 of the Constitution of India, and whether it is meant to include Constitutional morality?" Further, in 2020, the nine-judge bench, through an order, confirmed the validity of the reference. The Court used constitutional morality as a decisive tool in the Sabrimala Case. When challenged on that decision, the court did not defend the principle that it used, nor did it dismiss any petitions; instead, the Court referred to a larger bench, forming clouds of confusion over the concept of constitutional morality. This referential order perhaps implied the hesitation of the judiciary in the application of constitutional morality, which was further deepened in the *Supriyo* case.

CONSTITUTIONAL MORALITY IN ABSENTIA: SUPRIYO V. UNION OF INDIA AND THE DOCTRINE'S DISSAPPEARANCE

On 17th October 2023, the Supreme Court ruled on another landmark judgement relating to the right to marriage of queer individuals¹⁰. However, this case did not result in favour of the marginalised community. The majority of the 3:2 bench ruled that the right to marry is not a right guaranteed under Part III of the Indian Constitution, but merely a statutory right that has to be provided by the legislature. The majority, while acknowledging the rights to form a union or a relationship of the LGBTQ+ community, held that this does not give them a "right to claim

⁹*Kantaru Rajeevaru v. Indian Young Lawyers Ass'n* (referential order), (2020) 11 S.C.C. 1 (India).

¹⁰*Supriyo v. Union of India*, 2023 S.C.C. OnLine SC 1348 (India).

entitlement to any legal status of the said union or relationship.” While such classification seems manifestly arbitrary, the Court’s reasoning of judicial legislation does not seem incorrect. The majority as well as the minority of the bench held that reading words into a law is not within the judicial powers. It is surely the legislature that must make laws that do not discriminate among the citizens, but the dignity and equality that the Apex Court mandated through the doctrine of constitutional morality in *Navtej Singh* do not meet the words of the judgment in *Supriyo*. Justice Chandrachud in *Navtej Singh* held, “Constitutional morality requires this Court not to turn a blind eye to their right to an equal participation of citizenship and an equal enjoyment of living.” The Court that so explicitly stated in *Navtej Singh* that, “Constitutional morality will supersede any culture or tradition”, chose inaction where the law made by the Parliament was clearly based on the popular notions of society. The Court made fleeting promises of dignity, equality, and justice to the community in light of constitutional morality and turned a complete blind eye towards the same concept when the same community came back to ask for more. While acknowledging that the Court’s reasoning in *Supriyo* was just, we cannot completely forget the statements made by the same court in *Navtej Singh*. The statements based on constitutional morality that flickered hope in the hearts of the community seem fruitless after the *Supriyo* judgment, where the Court barely acknowledged the concept of constitutional morality, let alone invoking it. The *Surpiyo* raises constitutional questions about the dignity and rights of the LGBTQ+ community, similar to those in *Navtej Singh*; however, unlike *Navtej Singh*, the Court refrained from applying constitutional morality in *Surpiyo*. This inconsistency in the application of constitutional morality, especially in cases that resemble the ones where it was applied, raises a grave concern that the Court has never addressed.

A DOCTRINE WITHOUT PRINCIPLES: THE ABSENCE OF A GOVERNING FRAMEWORK

Over the years, constitutional morality has been utilised to cast aside the laws that were inconsistent with the values embedded in the constitution. The doctrine was employed to hold the government accountable for its actions that were violating the rights of the citizens bestowed upon them by the Constitution. Essentially, the doctrine of constitutional morality was harnessed to ensure that the rights of the citizens are not overshadowed by the popular notions of society.

Such effective application of constitutional morality as a doctrine in several cases has bolstered citizens' trust in the Supreme Court. This consistent application of constitutional morality over the last few years has enshrined a hope in the hearts of individuals suppressed by majoritarian opinions, the hope assured that the Supreme Court shall always elevate constitutional morality over societal morality. But, with the recent developments observed in *Kantaru Rajeevaru* and *Surpiyo*, the hope has faltered. The slow deviation from the concept of constitutional morality is now unveiling the inconsistencies in the application of the concept. It unveils the unrestrained power of the judiciary over the doctrine of constitutional morality.

The Supreme Court in *Navtej Singh* asserted, "The Executive, the Legislature, and the Judiciary all have to stay alive to the concept of constitutional morality." In the *Sabrimala* case, the Court held, "It is the duty of the courts to ensure that what is protected is in conformity with fundamental constitutional values and guarantees and accords with constitutional morality." In the purview of such intrepid statements made by the Court, the citizens certainly will regard the doctrine of constitutional morality with esteem. However, the same court has deflected entirely from the concept in an identical situation. The Court's reasoning in *Surpiyo* is certainly righteous; reading into the law will definitely amount to judicial legislation. But the concern is regarding the inconsistent application of a doctrine that the Court once so highly valued.

Every case where the Supreme Court applied the doctrine of constitutional morality so powerfully, it failed to establish any rules governing the application of the same. The lack of rules like when and where constitutional morality applies, when and where it does not apply, to what extent it shall apply, and what the rules of invoking the principle are, indicates a serious problem of selective application. This problem did not go unidentified; several academics have pointed out the growing concern regarding the application of constitutional morality.

The *Supriyo* case is the prime witness to such an inconsistent application of constitutional morality. As stated earlier, the *Surpiyo* case resembled the *Navtej Singh* case quite closely; in both cases, it was the marginalised LGBTQ+ community demanding basic rights that are accessible to the rest of the citizens, inadvertently. The Court in *Navtej Singh* promised, "Constitutional morality is the guarantee which seeks that all inequality is eliminated from the

social structure and each individual is assured of the means for the enforcement of the rights guaranteed.” When constitutional morality is supposed to be a guarantee of equality and rights to all, then shouldn’t such a guarantee be inadvertent?

The consequences of an unexplained, unruled doctrine are several. An academic paper states, “The lack of an underlying legal theory to guide the use of CM has resulted in judges conveniently being silent on CM when it suits them, even when parties expressly make arguments citing CM or when a minority or dissenting opinion invokes CM in its reasoning.”¹¹ This occurred in *Supriyo*, where the petitioners had brought up constitutional morality in their arguments, but the Court taciturnly avoided mentioning the doctrine anywhere in the judgment. Observing these instances, we can draw that Constitutional morality has become a judicial discretion, a tool for the judiciary to use as per its convenience. There is no informed way for the litigants to predict when the Court will invoke constitutional morality to protect them. The lower courts often refer to the precedents of the Supreme Court to deliver a right judgment. In instances where answering certain questions requires the support of constitutional morality, there is no guidance for the lower courts on how to apply it. This creates an ambiguity, a hindrance in the path of justice.

The impact is not only on the application but also on the doctrine itself. When there are no principles or rules governing a doctrine, reliance upon such a doctrine becomes a quandary. The doctrine loses coherence and credibility. Constitutional morality, while being a powerful tool to acquire justice, becomes another questionable principle. The doctrine of constitutional morality, which is designed to provide solutions, becomes a question in itself.

The inconsistency in the application of constitutional morality in the *Supriyo* case cannot be termed as judicial restraint. A principled judicial restraint would acknowledge constitutional morality and explain why it cannot apply here. However, it is not an explanation that we received, but mere unexplained silence. This unexplained silence poses a serious problem which needs to be addressed. This problem, if continued to go unaddressed, can compromise not just the trust of marginalised communities that rely on constitutional morality, but can also disrupt the foundations of democracy, because the Supreme Court itself said in *Navtej Singh* that,

¹¹Nakul Nayak, *Constitutional Morality: An Indian Framework*, 71 *Am. J. Comp. L.* 354 (2023).

“Constitutional morality reflects that the ideal of justice is an overriding factor in the struggle for existence over any other notion of social acceptance. It builds and protects the foundations of a democracy, without which any nation will crack under its fissures. For this reason, constitutional morality has to be imbibed by the citizens consistently and continuously.”

CONSISTENCY, PREDICTABILITY AND TRANSPARENCY: CONSTITUTIONAL MORALITY’S RULE OF LAW DEFICIT

The principle of the Rule of Law requires that the law should be supreme and there should not be anything above it. For the law to be supreme, it has to be known. Under the principle of the Rule of Law, all the laws and rules must be consistent, predictable and transparent, and that's what ensures the supremacy of law in the eyes of the citizens. In India, the Rule of Law is a foundational bedrock of the Indian Constitution that holds government accountable and ensures the citizens inadvertent rights. If constitutional morality, a concept that derives its roots from the constitutional values, is applied without any guidelines, based on judicial discretion, it violates precisely what the Rule of Law is designed to prevent. The Supreme Court in the *Manoj Narula* case held, “The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner.”

The doctrine of constitutional morality stands to be deficient on three main aspects of the Rule of Law: Consistency, Predictability, and Transparency. The *Surpiyo* case establishes a landmark of violation of all three of these aspects. The Court, by failing to apply constitutional morality in a case which resembles *Navtej Singh*, where the court preached constitutional morality, proved the inconsistency in the doctrine. Similarly, after the *Supriyo* case, there is no clear and certain way to predict where the doctrine of constitutional morality applies and where it doesn't, leaving litigants and the lower courts baffled. Ultimately, the absence of rules and guidelines pertaining to the doctrine, coupled with the Courts' failure to provide clear reasoning on its application, signifies a troubling lack of transparency. This situation effectively centralises the authority to make determinations solely within the Supreme Court.

CONCLUSION

The doctrine of constitutional morality in India has travelled a long way, starting from Dr Ambedkar's narrow vision of it, to the judiciary's expanded, numerous interpretations upholding it over the majoritarian principles. The doctrine of constitutional morality has proven to be so powerful that its ungoverned use by the Court has unveiled serious issues. The Court used constitutional morality tenaciously in *Navtej Singh Johar* and completely abandoned it in *Surpiyo*, even though both cases raised similar constitutional questions. The concern is not over the judgment in *Surpiyo*, but it is about the silent abandonment of the principle that the Court once so powerfully impounded. Instead of silent abandonment, there should have been an explanation, stating the reason for its abandonment. When a doctrine so powerful in nature is left without any principles governing its application, the credibility of such a principle weakens.

The doctrine of constitutional morality was introduced to instil constitutional values in the hearts of the citizens. It was brought about to ensure that the actions of the government do not violate the rights of the citizens guaranteed by the Constitution. Rather, constitutional morality has become a tool for the Judiciary to use as per their convenience. The only way ahead is for the Supreme Court to determine its limits explicitly and establish principles that govern its application. When the doctrine is governed by certain rules and principles, its credibility remains intact.

Ambedkar warned that constitutional morality was not a natural sentiment, that it had to be cultivated against the popular notions engraved in the minds of the citizens. A court that invokes it when it's convenient and abandons it when it's not has not cultivated it; it has instrumentalised it. Until the Supreme Court determines the principles governing constitutional morality, it remains an ambiguous concept left for the citizens to solve.