

CONSTITUTIONAL MORALITY IN INDIAN JURISPRUDENCE: FROM GROTE AND AMBEDKAR TO THE JUDICIAL REVIVAL IN NAVTEJ JOHAR AND SABARIMALA

by

Ankit Kumar

&

Khushi Nain

1. Introduction

Few ideas have reshaped Indian constitutional argument in recent years as swiftly, or as contentiously, as the concept of constitutional morality. For much of the Republic's history, the phrase lingered in the margins of legal discourse, a footnote to the Constituent Assembly Debates, occasionally recalled by scholars but largely absent from the reasoning of courts. That changed decisively in September 2018, when a Constitution Bench of the Supreme Court delivered *Navtej Singh Johar v. Union of India*,¹ reading down Section 377 of the Indian Penal Code and holding that the Constitution's own moral commitments could not be subordinated to public disapproval of same-sex intimacy. In the very same week, the Court heard arguments in *Indian Young Lawyers Association v. State of Kerala*,² within weeks, a divided bench struck down the Sabarimala temple's prohibition on women of menstruating age, declaring that even an ancient religious custom could not stand against the Constitution's promise of equal dignity. In both judgments, constitutional morality was not a rhetorical ornament; it was the foundational principle upon which the reasoning rested.

The decisions were met with acclaim in some quarters and disquiet in others.³ Significantly, the disquiet was not confined to the losing side in the courtroom. The dissenting opinion of Justice Indu Malhotra in *Sabarimala* gave voice to a concern that had been gathering beneath the surface of the doctrine: when courts invoke constitutional morality to displace both religious belief and majoritarian sentiment, upon what normative foundation are they drawing,

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

² *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1.

³ Rajeev Ramachandran, 'Women's Entry into Sabarimala Moves to Centre Stage ahead of Kerala Assembly Polls' (The Federal, 16 February 2026) <https://thefederal.com/category/states/south/kerala/womens-entry-into-sabarimala-temple-sc-to-review-petitions-230078> accessed 30 June 2026.

and what, if anything, limits that authority? That question, and the cluster of related issues it raises, constitutes the subject of this paper.

The intellectual lineage of the phrase is considerably older than its recent judicial deployment. It was George Grote, the nineteenth-century historian of Greece, who first gave systematic expression to the term “*constitutional morality*” to describe a distinctive civic temperament - a reverence for constitutional forms and offices, combined, in a paradox he regarded as essential, with an uncompromising readiness to censure the holders of those very offices.⁴ Grote was not enumerating substantive values such as liberty or equality; he was identifying the cultural precondition of durable democratic government. Several decades later, B.R. Ambedkar borrowed the term during the Constituent Assembly Debates and adapted it to Indian circumstances. India, he observed, possessed no indigenous democratic tradition. Constitutional morality would therefore have to be “cultivated” - a discipline of adherence to constitutional procedures even when those procedures frustrated the immediate will of the majority.⁵ In Ambedkar’s formulation, constitutional morality was a political virtue, not a justiciable legal standard.

What followed was a striking period of dormancy. For nearly six decades after the adoption of the Constitution, the Supreme Court constructed an elaborate fundamental rights jurisprudence - the basic structure doctrine, the expansive interpretation of Article 21, the reasonableness standards under Article 19 - without once according constitutional morality a central analytic role. This paper will argue that the dormancy was neither accidental nor inexplicable. Early constitutional adjudication was shaped by a commitment to textual fidelity. In the years that followed, the basic structure doctrine performed much of the normative work that constitutional morality might have undertaken, while the post-Emergency Court, acutely conscious of the counter-majoritarian difficulty, preferred the vocabulary of procedure, reasonableness, and non-arbitrariness to the language of moral philosophy. The revival of the concept in the second decade of the twenty-first century, culminating in the twin rulings of 2018, represents not a recovery of Ambedkar’s original meaning but a fundamental transformation of it.

It is this transformation that requires careful scrutiny. In *Navtej*, Justice D.Y. Chandrachud constructed a formidable doctrinal edifice: constitutional morality, he held, emanates from the Preamble and the fundamental rights, embodies the values of liberty, equality, dignity, and

⁴ George Grote, *A History of Greece* (John Murray 1854) vol IV, 154.

⁵ Constituent Assembly Debates, Vol VII, 4 November 1948, speech of Dr B R Ambedkar.

fraternity, and stands in a clear hierarchical relationship to social and religious morality, prevailing whenever the two conflict. The architecture possesses genuine strengths. It equips the Court with a principled language for the protection of minorities against majoritarian moralism, and it aligns coherently with the transformative ambition of the Constitution. Yet it also carries a vulnerability that neither the majority in *Navtej* nor the majority in *Sabarimala* adequately addressed. Values such as dignity and equality are not self-defining; reasonable judges, and reasonable citizens, may disagree over what they require in concrete disputes. In the absence of a disciplined method for translating abstract values into specific legal holdings, constitutional morality begins to resemble less a legal standard than a vessel for the moral intuitions of the judge. Justice Malhotra's dissent crystallized this concern when she cautioned that the doctrine "provides no determinacy or guidance" and risks substituting judicial morality for the constitutional text.⁶

The academic literature on these cases has tended, on the whole, toward celebration.⁷ That response is understandable, given the significance of the outcomes. What has not yet been attempted, however, is a sustained, three-dimensional critique that traces the genealogy of the concept, subjects its doctrinal architecture to close analysis, and then tests it against the experience of other constitutional democracies. This paper undertakes precisely that project. It examines the intellectual journey of constitutional morality from Grote's Athens to Ambedkar's Delhi, accounts for its long disappearance and its dramatic return, and identifies the fault lines that run through the modern doctrine: its indeterminacy, the absence of a clear limiting principle, its selective application across different domains, and the institutional competence problems that arise when courts override long-established religious and social practices.

The analysis then adopts a comparative perspective. The experience of South Africa's transformative constitutionalism, Canada's proportionality framework under Section 1 of the Charter, the United Kingdom's dialogic model of declarations of incompatibility, and the American doctrine of substantive due process each offer resources - and cautionary lessons - that the Indian jurisprudence has thus far largely neglected. From these comparisons, the paper derives a set of concrete proposals: a structured proportionality analysis to discipline the exercise of judicial discretion, suspended declarations of invalidity to preserve space for

⁶ *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1, [12.1] (Indu Malhotra J dissenting).

⁷ Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins 2019).

democratic dialogue, and a legislative compatibility mechanism to embed constitutional morality into the process of law-making itself.

The discussion that follows proceeds on the premise that constitutional morality can neither be accepted as an unrestricted judicial ideal nor dismissed as an illegitimate constitutional innovation. Its legitimacy depends upon whether it can be situated within a coherent constitutional framework that is historically grounded, doctrinally disciplined and institutionally restrained. By tracing the concept from its nineteenth-century origins to its contemporary judicial revival, critically examining its development in Indian constitutional jurisprudence, and evaluating it against comparative constitutional experience, this dissertation seeks to assess both the promise and the limitations of constitutional morality as an interpretative principle. The analysis accordingly begins with the genealogy of the concept, examining its intellectual foundations in the writings of George Grote and its constitutional adaptation by Dr B.R. Ambedkar during the framing of the Indian Constitution.

2. Genealogy of the Concept: From Grote to Ambedkar to the Modern Court

2.1 George Grote's on Constitutional Morality as Institutional Obedience and Open Dissent

The intellectual origins of constitutional morality are pre-Indian Constitution and can be traced to the liberal constitutional thought of the nineteenth century. The phrase was first given systematic expression by the English historian and parliamentarian, George Grote, in his celebrated *History of Greece*. Grote applied this idea to explain the success of Athenian democracy and the conditions under which constitutional government might be preserved.⁸ Unlike the present constitutional jurisprudence which often equates constitutional morality with substantive values such as dignity, equality and liberty, Grote saw it primarily as a civic virtue based on respect for the constitutional forms and procedures.⁹ Grote argued that constitutional government could only survive where the people had a “paramount reverence” for constitutional institutions and legal procedures.¹⁰

The citizens were to abide by the verdicts delivered by means provided for by the constitution, even if the verdicts were politically disadvantageous. But obedience did not equate to passivity.

⁸ Grote (n 3).

⁹ Nakul Nayak, ‘Constitutional Morality: An Indian Framework’ (2023) 71(2) *American Journal of Comparative Law* 354.

¹⁰ Grote (n 3).

At the same time Grote emphasised the importance of open criticism, public debate and democratic participation.¹¹ Constitutional morality therefore, meant balancing loyalty to institutions and freedom to dissent. Grote's conception is significant for its procedural orientation. Constitutional morality was not a source of rights but a protection against the collapse of the constitutional fabric.¹² Political differences were to be resolved through constitutional means, not through violence or extra-constitutional means. This notion of constitutional morality was supposed, in this sense, to protect constitutional stability, not to empower courts to find abstract moral principles that were not in the constitutional text.¹³

Modern scholarship has emphasised that Grote's formulation was a response to nineteenth-century anxieties about democratic instability and majoritarian excess.¹⁴ Similar concerns are expressed by John Stuart Mill and Alexis de Tocqueville, who both emphasised the importance of civic virtue and constitutional culture in preserving democratic government.¹⁵ Mill believed that representative institutions can only work if citizens develop the habits of responsible self-rule. Tocqueville emphasised the importance of democratic habits and civic associations to the maintenance of constitutional democracy.¹⁶ The idea of constitutional morality, therefore, in its original conception, was not a judicial doctrine, but a theory of democratic citizenship. It was on citizens, legislators and public officials to respect constitutional procedures while engaging in a robust political contestation.¹⁷

2.2 Ambedkar's Adoption in the Constituent Assembly Debates

This proceduralist perspective is important as it indicates the gap between Grote's conception and the contemporary judicial application of constitutional morality in India. Grote's was a concern with institutional obedience and constitutional restraint, but today's courts often invoke constitutional morality as a substantive constitutional principle that can invalidate social practices and majoritarian norms.¹⁸ One of the most important developments in contemporary constitutional jurisprudence is the shift from procedural fidelity to substantive constitutional value. Constitutional morality came into Indian constitutional thought through the

¹¹ *Ibid.*

¹² Grote (n 3); Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (2020) SSRN Working Paper.

¹³ Chandrachud (n 10).

¹⁴ Nayak (n 7).

¹⁵ John Stuart Mill, *Considerations on Representative Government* (first published 1861, CUP edn); Alexis de Tocqueville, *Democracy in America* (University of Chicago Press edn).

¹⁶ Mill (n 13); Tocqueville (n 13).

¹⁷ Grote (n 3); Nayak (n 7).

¹⁸ Chandrachud (n 10); Nayak (n 7).

interventions of Dr. B.R. Ambedkar in the Constituent Assembly. Indeed, in fact, when the Draft Constitution was introduced on 4 November 1948, Ambedkar had explicitly invoked George Grote, reproducing his understanding of constitutional morality.¹⁹

Constitutional morality, Ambedkar explained, required reverence for constitutional forms, respect for institutional procedures and faith that political opponents would equally remain committed to constitutional methods.²⁰ Ambedkar did not simply adopt Grote's terminology, however. He transformed the concept radically in the light of the social realities of post-colonial India. Unlike nineteenth-century Britain, India was struggling with entrenched systems of caste hierarchy, social exclusion and communal division. Thus constitutional morality became a bigger and more ambitious task.²¹ Constitutional morality, Ambedkar famously said, "is not a natural sentiment" and must be cultivated among citizens.²² This observation noted his concern that constitutional text alone cannot sustain democratic institutions. India's social structure, the product of centuries of caste oppression and social inequality, needed a constitutional culture that could uphold democratic governance.²³

Granville Austin's seminal account of constitution-making in India demonstrates that the Constitution was thought of not only as a legal document but as an instrument of social transformation.²⁴ The Constituent Assembly endeavoured to build up political democracy and, at the same time, pave the way for social and economic justice.²⁵ Constitutional morality was thus a part of the constitutional commitment to liberty, equality and fraternity.

This understanding is further reinforced by Ambedkar's writings outside the Constituent Assembly. In *Annihilation of Caste* he had argued that political democracy could not survive without social democracy.²⁶ Liberty, equality, fraternity were not just constitutional ideals but mutually reinforcing principles necessary for democratic life.²⁷ Constitutional morality thus acquired a transformative function of which Grote's original conception was devoid.

¹⁹ Constituent Assembly Debates (n 4).

²⁰ *Ibid.*

²¹ Constituent Assembly Debates (n 4); Christophe Jaffrelot, *Dr Ambedkar and Untouchability: Analysing and Fighting Caste* (Permanent Black 2005).

²² Constituent Assembly Debates (n 4).

²³ B R Ambedkar, *Annihilation of Caste* (Critical Quest 2014); Jaffrelot (n 19).

²⁴ Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (OUP 1966).

²⁵ *Ibid.*

²⁶ Ambedkar (n 21).

²⁷ *Ibid.*

It is essential to focus on constitutional morality and fraternity. Scholars have increasingly argued that fraternity constituted the normative foundation of Ambedkar's constitutional vision.²⁸ Fraternity required citizens to recognize each other as equal participants in a shared constitutional community despite differences of caste, religion, language or culture. Constitutional morality thus became a means of fostering constitutional citizenship and collective democratic responsibility.²⁹ Ambedkar's the Constitution did not show constitutional morality as a standalone doctrine. A study of the Constituent Assembly Debates reveals that there was no suggestion that the courts be required to use constitutional morality as an independent source for constitutional adjudication.³⁰ Indeed, constitutional morality was envisioned as a constitutional ethic to guide the citizenry as well as the legislatures and public institutions.³¹ This difference is an important one. That is because the modern judicial applications frequently ascribe to Ambedkar a conception that is broader than that which is found in the constitutional debates themselves. The present-day constitutional morality is not just the idea of Ambedkar but a judicial reconstruction of the same.³²

2.3 The Concept's Dormancy: Why Constitutional Morality Was Absent from Judicial Discourse for Six Decades

Dormant to judicial rebirth from constitutional ethics to constitutional doctrine. While Ambedkar cleverly articulated constitutional morality, it was absent from the Indian constitutional jurisprudence for several decades after the Constitution came into play. Early constitutional cases such as *A.K. Gopalan v State of Madras*, *State of Madras v Champakam Dorairajan*, and later *Kesavananda Bharati v State of Kerala*, constitutional morality was rarely relied upon as an interpretive doctrine.³³ Instead, constitutional adjudication focused on textual interpretation, federalism, the separation of powers, and the protection of fundamental rights.³⁴ Several factors explain this prolonged dormancy. Initially, the Indian constitutional jurisprudence developed an alternate repertoire of doctrinal tools, the foremost being the Basic

²⁸ Valerian Rodrigues (ed), *The Essential Writings of B R Ambedkar* (OUP 2002); Madhav Khosla, *India's Founding Moment* (Harvard University Press 2020).

²⁹ Rodrigues (n 26)

³⁰ Constituent Assembly Debates (n 4).

³¹ Constituent Assembly Debates (n 4); Granville Austin, *Working a Democratic Constitution* (OUP 1999).

³² Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (2020) SSRN Working Paper; Nakul Nayak, 'Constitutional Morality: An Indian Framework' (2023) 71(2) *American Journal of Comparative Law* 354.

³³ *A K Gopalan v State of Madras* AIR 1950 SC 27; *State of Madras v Champakam Dorairajan* AIR 1951 SC 226; *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

³⁴ M P Jain, *Indian Constitutional Law* (8th edn, LexisNexis); H M Seervai, *Constitutional Law of India* (4th edn, Universal Law Publishing 2015).

Structure Doctrine, to protect important constitutional values.³⁵ After the *Kesavananda Bharati* judgment, the courts were vested with the ability to provide protection to result-oriented fundamental constitutional principles without appealing to constitutional morality.³⁶ Subsequently, the constitutional concerns which later became the basis of the constitutional morality jurisprudence had not developed at that stage. Concerns about sexual autonomy, gender equality, privacy and identity did not play the central role in constitutional litigation in the Republic in its first few decades.³⁷ Consequently, courts relied in the main on textual and structural interpretation. The Delhi High Court decision in *Naz Foundation v Government of NCT of Delhi* revived the constitutional morality.³⁸ Faced with constitutionality of the provision, which punished ‘unnatural sex’, the Court differentiated between public morality and constitutional morality and maintain constitutional morality must prevails over the majoritarian social prejudices.³⁹ Constitutional reasoning thus took a shift here. The principle gained immense popularity following the judgments by the Supreme Court in *Government of NCT of Delhi v Union of India*, *Navtej Singh Johar v Union of India*, and *Indian Young Lawyers Association v State of Kerala*.⁴⁰ In these cases, constitutional morality emerged as an important constitutional principle based on dignity, equality, liberty and pluralism.⁴¹ Navtej Singh Johar saw the Supreme Court employ constitutional morality to strike down the criminalisation of consensual same-sex relations, asserting that constitutional rights cannot be subjected to popular morality.⁴² Similarly, in the Sabarimala case, the idea of constitutional morality was leveraged to challenge the exclusionary religious practice which was at odds with the constitutional guarantees of equality and dignity.⁴³

There has been much academic discussion about this. Supporters of constitutional morality argue that such morality enables courts to protect vulnerable minorities against relentless oppressive social norms and the domination of the majority.⁴⁴ But the critics of this doctrine

³⁵ *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

³⁶ Jain (n 27); Seervai (n 27).

³⁷ Granville Austin, *Working a Democratic Constitution* (OUP 1999).

³⁸ *Naz Foundation v Government of NCT of Delhi* (2009) 160 DLT 277.

³⁹ *Ibid.*

⁴⁰ *Government of NCT of Delhi v Union of India* (2018) 8 SCC 501; *Navtej Singh Johar v Union of India* (2018) 10 SCC 1; *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1.

⁴¹ *Government of NCT of Delhi* (n 38); *Navtej Singh Johar* (n 38).

⁴² *Navtej Singh Johar* (n 38).

⁴³ *Indian Young Lawyers Association* (n 38).

⁴⁴ Nayak (n 7); Chandrachud (n 10).

say that the doctrine does not have any clear limiting principle and thus runs the risk of allowing judges unrestrained discretion to impose their own moral preferences.⁴⁵

Consequently, the shift from Grote to Ambedkar and thence to the contemporary Supreme Court reveals an enormous conceptual shift. Constitutional morality began as a procedural ethic of constitutional fidelity, progressed into Ambedkar's democratic transformation project, and lastly became substantive constitutional doctrine in contemporary jurisprudence. The importance of understanding this genealogy is that many current constitutional morality controversies arise from tensions between these competing historical understandings.⁴⁶

3. Constitutional Morality in *Navtej Singh Johar v. Union of India* (2018) - A Doctrinal Examination

The judgment of the Supreme Court in *Navtej Singh Johar v. Union of India*⁴⁷ represents the most sustained judicial engagement with constitutional morality in the Court's history. A five-judge Constitution Bench unanimously held that Section 377 of the Indian Penal Code, insofar as it criminalised consensual same-sex conduct between adults, was unconstitutional. The unanimity of the result, however, concealed distinct judicial approaches. Chief Justice Misra, Justice Nariman, and Justice Chandrachud each placed constitutional morality at the centre of their reasoning, though with differing emphases. Justice Malhotra concurred in the outcome but grounded her analysis in privacy, dignity, and equality under Articles 14, 15, 19 and 21, without developing constitutional morality as an autonomous doctrine. Her opinion illustrates that the invalidation of Section 377 did not depend upon acceptance of constitutional morality as an independent justiciable standard.⁴⁸ This section examines the majority reasoning, the hierarchy between constitutional and social morality, and the strengths and weaknesses of the framework that emerged.

3.1 The Majority Reasoning

The challenge to Section 377 arose from its criminalisation of consensual same-sex conduct. The Court did not merely invalidate the provision; it sought to justify that result through a broader theory of constitutional morality.

⁴⁵ Chandrachud (n 10); Seervai (n 32).

⁴⁶ Grote (n 3); Constituent Assembly Debates (n 4); *Navtej Singh Johar* (n 38).

⁴⁷ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.

⁴⁸ *ibid* (Indu Malhotra J).

Chief Justice Misra located the source of constitutional morality in the Preamble and the fundamental rights. He described the Constitution as a transformative document that does not merely mirror social arrangements but seeks to reshape them according to foundational commitments.⁴⁹ Section 377, he held, offended constitutional morality by denying a class of persons the right to live with dignity and to make intimate choices. Drawing on *Justice K.S. Puttaswamy (Retd) v. Union of India*,⁵⁰ which recognised sexual orientation as an essential attribute of privacy and dignity, he held that the state could not invoke public morality to intrude upon the decisional autonomy of consenting adults.

Justice Nariman approached the matter through Article 14's doctrine of manifest arbitrariness. Section 377 was manifestly arbitrary because it targeted conduct that is a natural expression of sexual orientation, an immutable characteristic over which individuals have no choice.⁵¹ Relying on *Shayara Bano v. Union of India*,⁵² he concluded that a law targeting a class on the basis of an innate characteristic without a legitimate state purpose fails equal protection. For Justice Nariman, this arbitrariness itself demonstrated a violation of constitutional morality, which requires equal concern for all persons.

Justice Chandrachud's opinion provided the most elaborate theoretical framework. He traced the concept's origins from Grote to Ambedkar, noting that while Ambedkar had used it to describe a civic virtue of fidelity to constitutional processes, the Constitution's text and structure had transformed it into a substantive normative standard.⁵³ In his reading, constitutional morality embodies the Constitution's foundational commitments.⁵⁴

Justice Chandrachud's opinion suggests that constitutional morality operates at two levels: as an interpretive principle guiding the reading of constitutional provisions in light of the Constitution's transformative purpose, and as an independent normative standard against which legislation and state action may be assessed.⁵⁵ A law incompatible with these values is constitutionally suspect. Applying this framework, he concluded that Section 377 violated constitutional morality by denying homosexual individuals equal protection and dignity, and by enforcing a majoritarian sexual ethic the Constitution does not endorse.⁵⁶

⁴⁹ *ibid* (Misra CJ).

⁵⁰ *Justice K S Puttaswamy (Retd) v Union of India* (2017) 10 SCC 1.

⁵¹ *Navtej Singh Johar* (n 45) (Nariman J).

⁵² *Shayara Bano v Union of India* (2017) 9 SCC 1.

⁵³ *Navtej Singh Johar* (n 45) (Chandrachud J).

⁵⁴ *ibid* (Chandrachud J).

⁵⁵ *ibid* (Chandrachud J).

⁵⁶ *ibid* (Chandrachud J).

3.2 The Explicit Hierarchy: Constitutional Morality as Overriding Social Morality

A defining feature of *Navtej* was the Court's articulation of a hierarchy between constitutional morality and social morality. The Court held that constitutional morality must prevail when social morality is invoked to deny fundamental rights.

Chief Justice Misra observed that the Constitution is not a passive reflection of popular sentiment. It is a normative charter that evaluates social practices and legislative choices.⁵⁷ Social morality, fluid and often shaped by prejudice, lacks the permanence and normative weight of constitutional morality, which is anchored in the constitutional text and represents a deliberate judgment about the society India aspires to become. Where a law is defended solely by reference to majority moral sentiment, the Court must inquire whether those sentiments align with constitutional morality. If they do not, constitutional morality must govern.

Justice Chandrachud deepened this reasoning. The Constitution, he argued, adopts specific values as its normative foundation; these values are constitutive of the constitutional order, not derived from public opinion.⁵⁸ Social morality possesses no independent constitutional standing. It is relevant only insofar as it aligns with constitutional morality. When conflict arises, the Constitution must prevail, for otherwise transient majorities could override enduring constitutional commitments.⁵⁹

This hierarchical ordering directly repudiated *Suresh Kumar Koushal v. Naz Foundation*,⁶⁰ where the Court had upheld Section 377 partly on the ground that only a minuscule fraction of the population was affected. *Navtej* held that the size of the affected class is constitutionally irrelevant. Fundamental rights are a matter of constitutional entitlement, not electoral arithmetic.⁶¹ By subordinating social morality to constitutional morality, the Court rejected majoritarian logic and reaffirmed the counter-majoritarian character of fundamental rights adjudication.

3.3 Strengths of the *Navtej* Framework

⁵⁷ *ibid* (Misra CJ).

⁵⁸ *ibid* (Chandrachud J).

⁵⁹ *ibid* (Chandrachud J).

⁶⁰ *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1.

⁶¹ *Navtej Singh Johar* (n 45) (Chandrachud J).

The doctrinal framework developed in *Navtej Singh Johar* possesses several significant strengths that have contributed to its prominence in contemporary Indian constitutional jurisprudence. These strengths merit careful examination before considering the limitations of the doctrine.

First, constitutional morality is grounded in identifiable constitutional text - the Preamble and Part III - which gives it determinacy and legitimacy. A litigant invoking it draws on values the Constitution itself declares fundamental. Pratap Bhanu Mehta has argued that constitutional morality properly understood signifies a commitment to the constitutional order as a framework transcending the immediate preferences of political majorities.⁶² The Court's textual grounding aligns with that understanding. Moreover, the hierarchy between constitutional and social morality provides a principled resolution of the tension between individual liberty and majoritarian sentiment, denying the majority a veto over minority rights and protecting the counter-majoritarian function essential to constitutional democracy.

Second, the framework is dynamic and unifying. Justice Chandrachud noted that constitutional morality is not frozen at the moment of adoption; its values acquire new content as social understanding evolves, permitting the Constitution to function as a living document.⁶³ This evolutionary character coheres with the Court's established interpretive practice. Furthermore, the framework reveals the underlying unity of Articles 14, 15, 19 and 21, reducing the fragmentation of a provision-by-provision approach.

Third, the framework can be read as a fulfilment of Ambedkar's vision. Ambedkar had argued that India's undemocratic soil required the cultivation of constitutional morality as a civic discipline.⁶⁴ By insisting that the Constitution embodies a morality distinct from and superior to popular morality, *Navtej* gave institutional form to Ambedkar's insight that the Constitution is a pedagogic instrument. Mehta has observed that Indian democracy's survival owes much to the gradual internalisation of this idea.⁶⁵ The *Navtej* judgment, whatever its doctrinal vulnerabilities, represents a significant moment in that process.

3.4 Weaknesses: The Open-Endedness Problem and Absence of a Limiting Principle

⁶² Pratap Bhanu Mehta, 'What is Constitutional Morality?' (2010) 615 *Seminar* 17.

⁶³ *Navtej Singh Johar* (n 45) (Chandrachud J).

⁶⁴ Constituent Assembly Debates, vol VII, 4 November 1948 (speech of Dr B R Ambedkar).

⁶⁵ Mehta (n 60).

Despite the considerable doctrinal strengths identified above, the framework articulated in *Navtej Singh Johar* is not without significant conceptual and institutional limitations. These limitations raise important questions regarding the coherence, legitimacy, and practical application of constitutional morality as a justiciable constitutional doctrine.

The most serious is open-endedness. The values from which constitutional morality is derived are among the most contested concepts in moral and political philosophy. Reasonable judges may disagree profoundly about what justice or equality requires in a particular case. Invoking constitutional morality does not resolve such disagreements; it merely relocates them to a higher level of abstraction. A judge declaring a law incompatible with constitutional morality makes a substantive judgment about its content, yet the doctrine supplies no disciplined method for making that judgment. This generates a risk of judicial subjectivity. Chintan Chandrachud has argued that the generality of the values invoked means constitutional morality can accommodate a wide range of outcomes depending on the predispositions of the judges applying it.⁶⁶

Closely related is the absence of a clear limiting principle. If constitutional morality overrides social morality and its content is judicially determined, what restrains the Court from striking down any legislation it considers inconsistent with its understanding of dignity or equality? Justice Chandrachud acknowledged that constitutional morality cannot defeat the express provisions of the Constitution,⁶⁷ but this is a thin constraint. Most hard cases arise where the constitutional text is open to multiple reasonable constructions, and the doctrine lacks internal limits to guide judicial discretion.

Third, the *Navtej* framework does not adequately engage with the institutional limits of courts. A doctrine that empowers judges to displace social morality on the basis of constitutional morality must reckon with the fact that courts lack the capacity to calibrate the pace of social change or to build political consensus. Mehta has cautioned that courts must be attentive to their own competence and legitimacy when intervening in domains traditionally governed by legislative judgment.⁶⁸

Finally, and most critically for this paper, there is a genuine question about whether *Navtej* faithfully extends or significantly departs from Ambedkar's understanding. Ambedkar spoke

⁶⁶ Chintan Chandrachud, 'Constitutional Morality and the Judicial Function' (2019) 2 *Indian Law Review* 157.

⁶⁷ *Navtej Singh Johar* (n 45) (Chandrachud J).

⁶⁸ Mehta (n 60).

of constitutional morality as a civic disposition - a procedural habit of fidelity to constitutional processes. The Navtej Court appears to have transformed it into a set of judicially enforceable substantive values. Whether this transformation is a legitimate development or an appropriation of Ambedkar's language is a question the majority did not address. The Court treated Ambedkar's invocation as straightforward support for a judicially enforceable morality, without examining the tension between his procedural conception and the Court's substantive one. This tension goes to the legitimacy of the entire doctrinal enterprise. If constitutional morality was originally conceived as a constraint on political actors, its transformation into a source of judicial power to invalidate legislation requires a justification Navtej did not supply.

These concerns do not necessarily invalidate the doctrine, but they suggest that constitutional morality requires a more structured methodology if it is to operate as a stable principle of constitutional adjudication.⁶⁹ Without a disciplined methodology and clear limits, constitutional morality remains exposed to the criticism that it substitutes judicial morality for constitutional text.⁷⁰ These unresolved questions became more acute when the Court extended the doctrine into the religious domain in *Indian Young Lawyers Association v. State of Kerala*,⁷¹ the subject of the next Part.

4. Constitutional Morality in *Indian Young Lawyers Association v. State of Kerala (Sabarimala, 2018)* - Extending the Doctrine into Religion

The Supreme Court's decision in *Indian Young Lawyers Association v. State of Kerala*⁷² was delivered within weeks of *Navtej Singh Johar*, yet the two judgments operate in constitutionally distinct domains. Where *Navtej* concerned a colonial-era criminal statute with no specific constitutional protection, *Sabarimala* required the Court to reconcile constitutional morality with express guarantees of religious freedom under Articles 25 and 26. A five-judge Constitution Bench, by a majority of four to one, struck down Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, and the customary practice excluding women of menstruating age from the Sabarimala temple. Chief Justice Misra, Justice Nariman, Justice Khanwilkar, and Justice Chandrachud formed the majority. Justice Indu

⁶⁹ *ibid*

⁷⁰ Chandrachud (n 64)

⁷¹ *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1.

⁷² *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1.

Malhotra dissented. This section examines how the Court extended the *Navtej* framework into the domain of religion and assesses whether that extension was doctrinally sound.

4.1 Background and Constitutional Questions

The Sabarimala temple, dedicated to Lord Ayyappa, excluded women between the ages of ten and fifty. The justification was theological: Lord Ayyappa is worshipped as a celibate deity, and the presence of menstruating women was said to be inconsistent with the deity's *naishtika brahmacharya*. The practice was not grounded in any specific scriptural command but derived from long-standing custom.⁷³

The petitioners challenged the exclusion as violative of Articles 14, 15, 25, and 21. The respondents defended it on two grounds: first, that the exclusion was an essential religious practice protected by Article 25(1), and second, that the devotees constituted a religious denomination entitled to manage their own affairs under Article 26(b).⁷⁴ The case thus presented a sharper constitutional collision than *Navtej*. There, the Court had subordinated social morality to constitutional morality without needing to override any specific constitutional guarantee. Here, the Court was asked to subordinate religious practices that the Constitution itself appeared to protect. The question was whether constitutional morality could legitimately override the textually grounded rights of religious communities.

4.2 The Majority Reasoning

The majority opinions, while written separately, converged on the proposition that the exclusion could not withstand constitutional scrutiny. The reasoning proceeded in two stages: first, an application of the essential religious practices doctrine, and second, an evaluation of the practice against constitutional morality.

The essential religious practices doctrine, developed by the Court over several decades, serves a gatekeeping function. Practices that are not integral to the religion do not attract constitutional protection under Article 25; only those that constitute the core of the faith are shielded from state interference.⁷⁵ Chief Justice Misra and Justice Nariman both held that the exclusion of

⁷³ 'Indian Young Lawyers Association v State of Kerala (Sabarimala Temple Entry): Background' (Supreme Court Observer) <https://www.scobserver.in/cases/indian-young-lawyers-association-v-state-of-kerala-sabarimala-temple-entry-background/> accessed 30 June 2026.

⁷⁴ *ibid* (Nariman J).

⁷⁵ *Commissioner, Hindu Religious Endowments, Madras v Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt* AIR 1954 SC 282; see also Ronojoy Sen, *Articles of Faith: Religion, Secularism, and the Indian Supreme Court* (OUP 2010) ch 2.

women was not essential to the Ayyappa faith. Justice Nariman undertook a detailed examination of the religious texts and concluded that the practice was customary rather than doctrinally mandated.⁷⁶ Since the exclusion was not essential, it could not claim the protection of Article 25(1) and fell to be tested under Articles 14 and 15. This application of the essential religious practices doctrine allowed the majority to avoid a direct confrontation between constitutional morality and protected religious freedom. The Court was able to invalidate the practice on equality grounds without directly deciding whether constitutional morality could override a practice that was genuinely essential to a religion.⁷⁷

Yet the majority did not confine itself to this narrower ground. The opinions, particularly those of Chief Justice Misra and Justice Chandrachud, proceeded to develop a broader argument rooted in constitutional morality. Chief Justice Misra held that the notion of purity and pollution associated with menstruation was a form of social discrimination that the Constitution was designed to dismantle.⁷⁸ Religious practices, he reasoned, could not be permitted to perpetuate gender-based subordination, regardless of their antiquity. Constitutional morality, drawn from the Preamble and the fundamental rights, required the Court to evaluate religious practices against the values of dignity and equality.

Justice Chandrachud's opinion developed this argument most fully. He held that the right to religious freedom under Article 25 is not absolute; it is subject to the other provisions of Part III.⁷⁹ A religious practice that denies women equal access to worship on grounds of a biological characteristic associated with menstruation perpetuates a system of social exclusion incompatible with constitutional morality. Crucially, Justice Chandrachud linked the exclusion to Article 17, which abolishes untouchability in all its forms. He argued that the practice of excluding women based on notions of impurity arising from menstruation was analogous to the practice of untouchability, as it imposed social disabilities on a class of persons by reason of their birth.⁸⁰ Article 17 is framed as an absolute constitutional prohibition, although its application to practices of menstrual exclusion remains contested. By framing the exclusion as a form of untouchability, Justice Chandrachud elevated the constitutional objection from a violation of general equality guarantees to a violation of a specific, unqualified constitutional

⁷⁶ *Indian Young Lawyers Association* (n 70) (Nariman J).

⁷⁷ On the gatekeeping function of the essential religious practices doctrine, see Sen (n 72) 41–68.

⁷⁸ *Indian Young Lawyers Association* (n 70) (Misra CJ).

⁷⁹ *ibid* (Chandrachud J)

⁸⁰ *ibid* (Chandrachud J).

prohibition. This provided a more secure textual foundation for the result than the broader language of constitutional morality alone could supply.

This reasoning marked a significant expansion of the *Navtej* framework. Whereas *Navtej* established constitutional morality as superior to social morality, Sabarimala extended the hierarchy by positioning constitutional morality above religious practices that communities claimed were protected under Part III. The consequence was to reposition constitutional morality at the centre of religious rights adjudication.⁸¹ As Gautam Bhatia has argued, the majority's reasoning suggests that constitutional morality functions as an independent constitutional standard capable of evaluating even those practices falling within the protective ambit of religious freedom.⁸²

4.3 Justice Indu Malhotra's Dissent

Justice Malhotra's dissent is the most sustained judicial critique of the expansive use of constitutional morality to date. She did not merely disagree with the outcome; she questioned the doctrinal basis on which the majority had proceeded.

Justice Malhotra held that the devotees of Lord Ayyappa constituted a religious denomination under Article 26, and that the exclusion was an essential religious practice entitled to protection. The practice, in her assessment, was based not on any notion of female impurity or inferiority but on the specific celibate character of the deity- a theological belief that the Court was not institutionally competent to evaluate.⁸³

Her most significant contribution, however, lay in her challenge to the majority's deployment of constitutional morality. She expressed concern that the doctrine, as used by the majority, provided no determinacy or guidance and risked becoming a vehicle for judicial morality rather than constitutional interpretation.⁸⁴ The danger she identified was structural: if constitutional morality is defined by reference to abstract values like dignity and equality, and if the content of those values is determined by judges without a disciplined methodology, then the doctrine effectively transfers decision-making authority from religious communities and legislatures to the judiciary. Constitutional morality, she argued, could not, in her view, legitimately be used

⁸¹ Pratap Bhanu Mehta, 'What is Constitutional Morality?' (2010) 615 *Seminar* 17.

⁸² Gautam Bhatia, 'The Sabarimala Judgment' (Indian Constitutional Law and Philosophy Blog, 28 September 2018) <https://indconlawphil.wordpress.com/2018/09/28/the-sabarimala-judgment/> accessed 26 June 2026.

⁸³ *Indian Young Lawyers Association* (n 70) (Malhotra J, dissenting).

⁸⁴ *ibid* (Malhotra J, dissenting).

to displace religious beliefs that fall within the protective ambit of Articles 25 and 26, absent a clear and specific constitutional prohibition such as Article 17.

Justice Malhotra did not reject constitutional morality as a concept. She acknowledged that the Constitution embodies values that courts are bound to uphold.⁸⁵ Her objection was to the manner of its deployment: as a free-standing ground of review, insufficiently moored to specific constitutional text, and capable of overriding even those practices that the Constitution protects. Underlying her dissent was a deeper concern about the institutional boundaries of judicial review in matters of religion. Courts, she suggested, should distinguish between practices that violate specific constitutional prohibitions and those that merely reflect a different moral ordering, with only the former being susceptible to judicial invalidation on grounds of constitutional morality.⁸⁶

4.4 Constitutional Morality and Religious Freedom: The Expansion of the Doctrine

The *Sabarimala* judgment expanded the constitutional morality doctrine in two significant respects, each of which has implications for the coherence of the broader framework.

First, the judgment extended the doctrine into a domain where the Constitution itself grants specific, textually grounded protections. In *Navtej*, the competing interest was majoritarian social morality, which enjoys no independent constitutional standing. In *Sabarimala*, the competing interest was religious freedom, which is expressly protected by Articles 25 and 26. The expansion was thus qualitative: constitutional morality was now being deployed not merely to reject majoritarian sentiment but to override constitutionally entrenched rights. This development may be understood as marking a significant shift in the architecture of Indian rights adjudication, moving the Court closer to a model in which constitutional morality functions as a general normative standard against which all constitutional provisions, including those protecting religious freedom, are to be interpreted.⁸⁷

Second, the judgment revealed the extent to which the doctrine had become detached from specific constitutional provisions. While the majority opinions referred to Articles 14, 15, 21, and 25, much of the decisive normative work was performed by constitutional morality as a general principle rather than by the application of those articles to the specific facts. This is

⁸⁵ *ibid* (Malhotra J, dissenting).

⁸⁶ Farrah Ahmed, 'Religious Autonomy and the Indian Constitution' (2020) 18 *International Journal of Constitutional Law* 450.

⁸⁷ Mehta (n 78).

particularly evident in Justice Chandrachud's opinion, where constitutional morality operates as an overarching standard rather than as a tool for interpreting specific provisions. The scholarly response reflects these tensions. Kalpana Kannabiran has defended the judgment as a necessary application of constitutional values to a discriminatory practice, arguing that religious freedom cannot serve as a shield for gender-based exclusion.⁸⁸ Others have expressed reservations, noting that the doctrine's reliance on a free-standing standard of constitutional morality fails to articulate a clear limiting principle, leaving lower courts and future benches without adequate guidance on when and how it should be applied.⁸⁹

The result is a doctrine that is powerful but insufficiently disciplined - capable of generating outcomes that many would regard as just, but lacking the internal constraints that would distinguish it from judicial discretion. For this paper, the central significance of *Sabarimala* is that it brings to the surface the doctrinal vulnerabilities latent in *Navtej*. The open-endedness problem becomes more acute when the doctrine is applied to religious practices that communities consider central to their faith. The absence of a limiting principle becomes more troubling when the Court has not articulated any clear basis for distinguishing between religious practices that constitutional morality requires be struck down and those that may survive. And the institutional competence problem becomes more pressing when the Court substitutes its own assessment of theological justification for that of the religious community itself.

At the same time, *Sabarimala* also reveals a path toward a more disciplined application of constitutional morality. Justice Chandrachud's reliance on Article 17 suggests that the doctrine can be anchored in specific constitutional provisions rather than left to float at the level of abstract values. Where a practice can be shown to violate a specific, unqualified constitutional prohibition, the case for judicial intervention is considerably stronger than where it is challenged solely on the basis of general appeals to dignity or equality. This distinction, between constitutional morality as an interpretive aid tied to specific provisions and constitutional morality as an independent ground of review, is one that the *Navtej* majority did not adequately draw. *Sabarimala* makes the need for such a distinction apparent.

A further consideration, one that bears directly on the doctrinal anxieties traced above, is that the *Sabarimala* holding has not in fact settled into stable precedent. A batch of more than fifty

⁸⁸ Kalpana Kannabiran, 'Constitutional Morality and Religious Freedom: Reading *Sabarimala*' (2020) 55 *Economic and Political Weekly* 28.

⁸⁹ Chintan Chandrachud, 'Constitutional Morality and the Judicial Function' (2019) 2 *Indian Law Review* 157.

review petitions was filed against the 2018 judgment, and on 14 November 2019, in *Kantaru Rajeevaru v Indian Young Lawyers Association*, a five-judge bench by a narrow three-to-two majority declined to decide the review on its merits and instead kept the petitions pending, referring a set of broad constitutional questions concerning the relationship between religious freedom and equality to a larger bench.⁹⁰ The two dissenting judges, Justices Nariman and Chandrachud, considered that a review petition was not the appropriate vehicle for so wide a reference. The questions ultimately placed before a nine-judge bench include the scope of judicial review over religious practice under Article 25 and, most pertinently for the present analysis, whether the word ‘morality’ in Articles 25 and 26 of the Constitution is meant to include constitutional morality at all.⁹¹ That the very content and reach of the doctrine is now the subject of an unresolved reference before the Court’s largest available bench is itself instructive. It confirms, from within the institution that fashioned the modern doctrine, that the concerns about indeterminacy and the absence of a limiting principle examined in this Part are not merely the preoccupations of academic critics but live questions that the Court has found it necessary to revisit. Until that reference is decided, the precise authority of Sabarimala, and with it the standing of constitutional morality as a ground capable of overriding a claimed religious practice, remains provisional.

These unresolved questions - the relationship between constitutional morality and specific constitutional text, the scope of the doctrine in relation to protected rights, and the institutional limits of judicial review in matters of religion - form the subject of the doctrinal fault lines examined in the next Part.

5. The Doctrinal Fault Lines - A Critical Analysis

The preceding chapters have traced the trajectory of constitutional morality from its origins in Grote and Ambedkar to its judicial deployment in *Navtej Singh Johar* and *Indian Young Lawyers Association*. That trajectory reveals a doctrine in motion - one that has moved from the margins of constitutional discourse to its centre, and from a procedural ethic of institutional

⁹⁰ On the review and the reference to a larger bench, see ‘Kantaru Rajeevaru v Indian Young Lawyers Association (Sabarimala Review): Judgment in Plain English’ (Supreme Court Observer) <https://www.scobserver.in/reports/kantaru-rajeevaru-indian-young-lawyers-association-sabarimala-review-judgment-in-plain-english/> accessed 30 June 2026; Rajeev Ramachandran, ‘Women’s Entry into Sabarimala Moves to Centre Stage ahead of Kerala Assembly Polls’ (The Federal, 16 February 2026) <https://thefederal.com/category/states/south/kerala/womens-entry-into-sabarimala-temple-sc-to-review-petitions-230078> accessed 30 June 2026.

⁹¹ The referred questions are set out in ‘Sabarimala Reference: Background’ (Supreme Court Observer) <https://www.scobserver.in/cases/kantaru-rajeevaru-indian-young-lawyers-association-sabarimala-review-background/> accessed 30 June 2026.

restraint to a substantive standard of judicial review. This Part draws together the doctrinal fault lines that cut across the two judgments. It examines the transformation of constitutional morality from a political concept into a judicial doctrine, the resulting uncertainty in its application, the risk of judicial subjectivity, the democratic legitimacy concerns the doctrine raises, and the possibility of a more structured framework for its future use.

5.1 From Ambedkar's Constitutional Morality to Judicial Constitutional Morality

The distance between Ambedkar's understanding of constitutional morality and the Supreme Court's modern interpretation is the first fault line that requires examination. Ambedkar invoked the term in the Constituent Assembly to describe a civic disposition - a habit of fidelity to constitutional processes that had to be cultivated among citizens and political actors in a society lacking a democratic tradition.⁹² His emphasis was procedural and institutional. Constitutional morality, in his conception, was a restraint on the exercise of power: it demanded that constitutional functionaries respect the forms and limits of their offices, and that political majorities refrain from treating electoral victory as a licence for absolutism.⁹³

The Supreme Court in *Navtej* and *Sabarimala* transformed this conception. Constitutional morality has increasingly come to be treated by the Supreme Court as a judicially enforceable set of substantive constitutional values - justice, liberty, equality, dignity, and fraternity - drawn from the Preamble and the fundamental rights.⁹⁴ The shift is from a morality that primarily constrained the exercise of constitutional power to one that increasingly authorises judicial intervention in the protection of constitutional values. Where Ambedkar envisioned constitutional morality as a check on majoritarian politics, the modern Court has deployed it as a check on majoritarian morality itself, including religious morality.

Whether this transformation is justified is a question on which reasonable scholars differ. Abhinav Chandrachud has observed that the phrase now carries multiple meanings in judicial discourse, ranging from a narrow principle of institutional fidelity to a broad standard of rights protection, and that the Court has not always been careful to specify which meaning it is invoking.⁹⁵ Pratap Bhanu Mehta, writing before the 2018 judgments, had argued that constitutional morality properly understood refers to a commitment to the constitutional order

⁹² Constituent Assembly Debates, vol VII, 4 November 1948 (speech of Dr B R Ambedkar).

⁹³ Pratap Bhanu Mehta, 'What is Constitutional Morality?' (2010) 615 *Seminar* 17.

⁹⁴ *Navtej Singh Johar v Union of India* (2018) 10 SCC 1 (Chandrachud J).

⁹⁵ Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (SSRN Working Paper, 18 January 2020) <https://ssrn.com/abstract=3521665> accessed 26 June 2026.

as a framework that transcends immediate political preferences.⁹⁶ The majorities in *Navtej Singh Johar* and *Indian Young Lawyers Association* drew upon this understanding, but they extended it in a direction Mehta did not fully anticipate: from a political ethic into a ground of judicial review. The transformation is not necessarily illegitimate, but it requires a justification that the Court has not yet supplied. If a concept that was originally conceived as a restraint on power is to be converted into a source of judicial power to invalidate legislation and religious practices, the terms of that conversion must be articulated with care. The *Navtej* and *Sabarimala* majorities did not engage with this question in sustained doctrinal terms. They treated Ambedkar's invocation of the term as straightforward support for the proposition that the Constitution embodies a judicially enforceable morality, without examining the tension between Ambedkar's procedural conception and the Court's substantive one.

5.2 The Problem of Doctrinal Uncertainty

The second fault line concerns the lack of doctrinal precision in the concept of constitutional morality. The Court has not settled on a single definition, and different benches have used the term in different senses.

In *Government of NCT of Delhi v. Union of India*,⁹⁷ decided earlier in 2018, constitutional morality was invoked in a sense closer to Ambedkar's original understanding—as a principle of institutional restraint requiring constitutional functionaries to respect the distribution of powers. Chief Justice Misra, writing for the majority, held that constitutional morality requires high constitutional functionaries to cultivate a spirit of cooperation and to observe the institutional limits of their authority.⁹⁸ This is a procedural conception, concerned with the propriety of official conduct rather than with substantive rights.

In *Navtej*, by contrast, constitutional morality was transformed into a substantive standard for testing the validity of legislation. The shift was from a principle that regulates how power is exercised to one that determines what outcomes the Constitution permits.⁹⁹ In *Sabarimala*, the doctrine was extended further, into the evaluation of religious practices, and was treated by

⁹⁶ Mehta (n 88).

⁹⁷ *Government of NCT of Delhi v Union of India* (2018) 8 SCC 501.

⁹⁸ *ibid* (Misra CJ).

⁹⁹ *Navtej Singh Johar* (n 89) (Chandrachud J); Chintan Chandrachud, 'Constitutional Morality and the Judicial Function' (2019) 2 *Indian Law Review* 157.

Justice Chandrachud as an independent normative standard capable of overriding even those practices that communities claimed were protected under Part III.¹⁰⁰

The result is a doctrine that lacks consistency and predictability. A litigant, a lower court, or a future bench seeking to apply constitutional morality has no clear guidance on which conception to adopt. Chintan Chandrachud has argued that the generality of the values constitutional morality invokes means it can accommodate a wide range of outcomes, and that this very flexibility, while attractive to judges, undermines its capacity to function as a stable legal principle.¹⁰¹ The concern is not merely academic. If constitutional morality means different things in different cases, it ceases to operate as a doctrine and becomes instead a label attached to judicial conclusions reached on other grounds.

5.3 Constitutional Morality and Judicial Subjectivity

The third fault line is the risk that constitutional morality, in its current form, licenses judicial subjectivity. The values from which the doctrine is said to derive—dignity, equality, liberty, fraternity—are among the most contested concepts in moral and political philosophy. They are what legal theorists have termed essentially contested concepts: their meaning is the subject of reasonable and persistent disagreement.¹⁰²

When a judge declares that a law or practice is incompatible with constitutional morality, she is making a substantive judgment about the content of those contested values. The doctrine itself does not supply a disciplined method for making that judgment. The risk is that constitutional morality becomes a vessel into which judges pour their own moral and political commitments, presenting those commitments as though they were dictated by the constitutional text. Justice Malhotra's dissent in *Sabarimala* gave this concern its sharpest judicial expression. She warned that the doctrine, as deployed by the majority, provided no determinacy or guidance and risked substituting judicial morality for constitutional interpretation.¹⁰³

Mehta, writing before the doctrine's expansion, had cautioned that courts must be attentive to the limits of their own competence and legitimacy, particularly when they intervene in domains traditionally governed by legislative judgment or social consensus.¹⁰⁴ The *Navtej* and *Sabarimala* majorities did not adequately engage with this caution. Chintan Chandrachud has

¹⁰⁰ *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1 (Chandrachud J).

¹⁰¹ Chandrachud (n 94).

¹⁰² Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) ch 2.

¹⁰³ *Indian Young Lawyers Association* (n 95) (Malhotra J, dissenting).

¹⁰⁴ Mehta (n 88).

noted that the open-ended character of constitutional morality permits judges to reach divergent conclusions while claiming the authority of the same doctrine, a feature that sits uneasily with the rule-of-law values of predictability and constraint.¹⁰⁵

This is not to suggest that judges should never invoke broad constitutional values. It is to suggest that when they do so, they should acknowledge the interpretive choices they are making and provide a transparent account of the reasoning that leads from abstract value to specific holding. The *Navtej* and *Sabarimala* majorities, for all their rhetorical power, did not consistently provide such an account.

5.4 Constitutional Morality and Democratic Legitimacy

The fourth fault line concerns the democratic legitimacy of constitutional morality as a ground of judicial review. The doctrine empowers unelected judges to strike down legislation and religious practices on the basis of their interpretation of abstract constitutional values. This raises, in an acute form, the counter-majoritarian difficulty that has been a central preoccupation of constitutional theory.¹⁰⁶

In a constitutional democracy, the democratic principle is itself a constitutional value. The complete subordination of majoritarian preferences and long-standing social practices to judicially determined constitutional morality risks undermining the legitimacy of the judiciary and provoking the kind of backlash that ultimately weakens the constitutional order the Court seeks to protect. John Hart Ely argued that judicial review is most legitimate when it reinforces the processes of democratic decision-making rather than displacing substantive policy choices.¹⁰⁷ Alexander Bickel, in his classic formulation of the counter-majoritarian difficulty, cautioned that courts must be attentive to the political consequences of their decisions and should, where possible, avoid resolving questions that are better left to the democratic process.¹⁰⁸ Granville Austin, writing in the specific context of Indian constitutionalism, observed that the judiciary's legitimacy has depended not only on the correctness of its decisions but on the perception that it acts within the bounds of its institutional role.¹⁰⁹

¹⁰⁵ Chandrachud (n 94).

¹⁰⁶ Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press 1962) 16-23.

¹⁰⁷ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) ch 4.

¹⁰⁸ Bickel (n 101).

¹⁰⁹ Granville Austin, *Working a Democratic Constitution: The Indian Experience* (OUP 1999) ch 12.

These cautions have application to the Indian doctrine. When the Court strikes down a colonial-era criminal statute that lacks any democratic pedigree, as in *Navtej*, the democratic cost is relatively low. When it strikes down a religious practice that a significant community considers central to its faith, as in *Sabarimala*, the democratic cost is considerably higher. The doctrine of constitutional morality, as currently formulated, does not distinguish between these contexts. It provides no framework for calibrating the intensity of judicial scrutiny to the democratic stakes of the intervention.

The trajectory of the doctrine since 2018 lends weight to this concern, though from an unexpected direction. In *Supriyo v Union of India*, decided in October 2023, a Constitution Bench was invited to extend the logic of *Navtej* from decriminalisation to the legal recognition of same-sex marriage. The Court declined. While every member of the bench affirmed the dignity and equal worth of queer relationships, the majority held that there is no fundamental right to marry, that the Special Marriage Act 1954 could not be judicially rewritten to include same-sex couples, and that the creation of a new institution of marriage or civil union was a task for Parliament rather than the judiciary.¹¹⁰ The decision is striking precisely because it issued from a bench led by the author of the most expansive constitutional morality opinion in *Navtej*, yet it rested not on constitutional morality but on the separation of powers and the limits of institutional competence.¹¹¹ *Supriyo* thus supplies, in practice, the very calibration that the doctrine as articulated in *Navtej* and *Sabarimala* fails to make explicit. Where the remedy sought would have required the Court to construct a complex legislative framework, with consequences extending across the law of adoption, succession, and numerous other statutes, the same Court that had earlier invoked constitutional morality to strike down a colonial penal provision found the democratic and institutional stakes too high to warrant intervention. The contrast suggests that the missing limiting principle may lie less in any further refinement of the content of constitutional morality than in a candid assessment of when the judicial displacement of legislative or social choice is institutionally appropriate, a distinction that the structured framework proposed in this paper seeks to render express.

Mehta has observed that Indian democracy's survival has depended, in part, on the gradual internalisation of constitutional values by political actors and citizens.¹¹²¹⁹ Judicial imposition

¹¹⁰ Bhavya Pareek, 'Beyond Marriage Equality' (Vidhi Centre for Legal Policy, 5 June 2025) <https://vidhilegalpolicy.in/blog/beyond-marriage-equality-2/> accessed 30 June 2026.

¹¹¹ Swarnali Sen, 'Supriyo @ Supriya Chakraborty v Union of India (2023)' (The Legal Quorum, 7 March 2026) <https://thelegalquorum.com/supriyo-supriya-chakraborty-v-union-of-india-2023/> accessed 30 June 2026.

¹¹² Mehta (n 88).

of those values, without democratic dialogue, may accelerate the process of internalisation or may provoke resistance that sets it back. The *Navtej* and *Sabarimala* majorities did not engage with this institutional calculus.

5.5 Towards a Structured Doctrine

The fault lines identified above do not suggest that constitutional morality should be abandoned. The doctrine serves a genuine function: it gives the Court a language for articulating the Constitution's transformative purpose and for protecting minorities from majoritarian moralism. What the doctrine requires is not rejection but discipline. Drawing on the analysis in this Part and the comparative experience examined in the next, a structured approach to constitutional morality can be outlined.

First, constitutional morality should be anchored in identifiable constitutional text. The values it invokes - dignity, equality, liberty, fraternity - are drawn from the Preamble and the fundamental rights. Courts should make this textual connection explicit in each case, rather than invoking constitutional morality as a free-standing principle.¹¹³

Second, courts should, before resorting to constitutional morality as an independent ground of review, examine whether the impugned law or practice can be tested against specific constitutional provisions. In *Navtej*, Section 377 was invalidated under Articles 14, 15, 19, and 21, independently of the broader claims about constitutional morality. In *Sabarimala*, the essential religious practices doctrine provided a narrower path to the result. Reliance on constitutional morality as an independent standard should be exceptional and should be accompanied by detailed reasoning explaining why specific provisions are insufficient.

Third, constitutional morality should function primarily as an interpretive principle that guides the reading of constitutional provisions in light of the Constitution's transformative purpose, rather than as an independent ground of review. This preserves the doctrine's normative force while tethering it to the constitutional text.¹¹⁴

Fourth, courts should consider the institutional dimensions of their intervention - the democratic stakes, the capacity of the Court to assess social consequences, and the availability

¹¹³ Nakul Nayak, 'Constitutional Morality: An Indian Framework' (2023) 71(2) *American Journal of Comparative Law* 354.

¹¹⁴ Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) ch 7.

of dialogic alternatives such as suspended declarations of invalidity. Not every constitutional violation requires immediate judicial displacement of the impugned practice.¹¹⁵

These principles do not constitute a rigid test. They are guides for a more disciplined application of constitutional morality - one that preserves the doctrine's transformative potential while addressing the concerns about open-endedness, judicial subjectivity, and democratic legitimacy that the *Navtej* and *Sabarimala* judgments raised but did not resolve. The doctrinal limitations identified above suggest that constitutional morality cannot be abandoned, but neither can it remain conceptually unconstrained. A comparative examination therefore becomes necessary to determine whether other constitutional systems have developed safeguards capable of preserving the doctrine's normative force while limiting its discretionary potential. The next Part undertakes that inquiry.

6. COMPARATIVE ANALYSIS - CONSTITUTIONAL MORALITY ACROSS JURISDICTIONS

6.1 Constitutional Morality in Comparative Constitutional Theory

The emergence of constitutional morality as a constitutional doctrine in India invites a comparative examination of whether it represents a uniquely Indian innovation or reflects broader trends across constitutional democracies. Although the phrase 'constitutional morality' is rarely employed explicitly outside India, mature constitutional democracies have developed analogous doctrines requiring constitutional adjudication to be guided by foundational constitutional values rather than transient political preferences. These doctrines operate under different conceptual labels - constitutional culture, constitutional identity, constitutional patriotism, transformative constitutionalism and democratic constitutionalism - yet they collectively perform the same normative function: preserving constitutional democracy by ensuring that constitutional values prevail over majoritarian impulses.¹¹⁶

The intellectual roots of constitutional morality trace to nineteenth-century liberal constitutionalism. George Grote's articulation in *A History of Greece* remains the earliest systematic exposition, arguing that constitutional government depends not merely upon constitutional text but upon a civic disposition characterised by respect for constitutional procedures, tolerance of political disagreement and institutional self-restraint.¹¹⁷ Constitutional

¹¹⁵ Austin (n 104).

¹¹⁶ George Grote, *A History of Greece* vol VIII (John Murray 1862) 295-305.

¹¹⁷ *ibid* 299-303.

morality, in Grote's formulation, required citizens to obey constitutional institutions even when political outcomes were unfavourable while simultaneously preserving the freedom to criticise governmental action through lawful processes.¹¹⁸ The stability of democratic government therefore depended less upon coercive legal enforcement than upon a constitutional culture internalised by citizens and public officials.¹¹⁹

John Stuart Mill reached comparable conclusions, arguing that representative institutions could flourish only where citizens possessed habits of public reason, civic responsibility and constitutional participation.¹²⁰ Mill rejected the notion that constitutional government could be sustained solely through legal mechanisms, contending instead that democratic institutions required an educated citizenry capable of exercising political judgment with moderation.¹²¹ Alexis de Tocqueville similarly observed that constitutional democracies ultimately depend upon civic habits, social trust and respect for constitutional institutions rather than the formal text of the constitution alone.¹²² Together, Grote, Mill and Tocqueville established the intellectual premise that constitutional democracy is sustained by constitutional culture rather than constitutional commands alone. This theoretical foundation explains why the concept, whatever its doctrinal formulation, remains essential to the survival of constitutional governance.

Twentieth-century constitutional scholarship expanded these ideas considerably. Ronald Dworkin reconceptualised constitutional interpretation by arguing that constitutions are moral documents embodying principles of political justice rather than collections of isolated legal rules.¹²³ His theory of 'law as integrity' requires judges to interpret constitutional provisions in a manner that best fits and justifies the moral structure of the constitutional order.¹²⁴ Although Dworkin never used the expression 'constitutional morality', his moral reading of the Constitution closely resembles the normative role played by the doctrine in contemporary Indian jurisprudence.¹²⁵

¹¹⁸ *ibid* 304-307.

¹¹⁹ *ibid* 300-304.

¹²⁰ John Stuart Mill, *Considerations on Representative Government* (first published 1861, Cambridge University Press 2010) 37-52.

¹²¹ *ibid* 61-79.

¹²² Alexis de Tocqueville, *Democracy in America* (Harvey C Mansfield and Delba Winthrop tr, University of Chicago Press 2000) vol I, 235-268.

¹²³ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996) 1-38.

¹²⁴ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 176-224.

¹²⁵ *ibid* 225-275.

Aharon Barak's theory of purposive constitutional interpretation has exercised considerable influence upon constitutional courts worldwide. Barak argues that constitutional interpretation must reconcile the subjective intentions of constitutional framers with the objective constitutional values reflected in democratic society.¹²⁶ Unlike some recent Indian decisions, however, Barak insists that constitutional values must always remain anchored within constitutional text, institutional competence and principled judicial reasoning.¹²⁷ This methodological discipline prevents constitutional adjudication from degenerating into subjective judicial preference and offers an important lesson for the evolving Indian doctrine.

Jürgen Habermas' theory of constitutional patriotism offers another influential contribution. Rejecting nationalism based upon ethnicity, religion or cultural homogeneity, Habermas argues that modern constitutional democracies derive political legitimacy from shared commitment to constitutional principles.¹²⁸ Constitutional patriotism encourages citizens to identify themselves not through common ancestry but through allegiance to democratic institutions, fundamental rights and constitutional values.¹²⁹ Applied to the Indian constitutional context, this comparative perspective suggests that constitutional morality should function as a unifying constitutional ethic capable of transcending religious, linguistic and caste divisions.¹³⁰

These theoretical perspectives demonstrate that constitutional democracies pursue the preservation of constitutional values through diverse normative frameworks, even though they do not explicitly employ the language of constitutional morality. The following section examines how these theoretical commitments are reflected in constitutional practice across selected jurisdictions.

6.2 Comparative Constitutional Practice

6.2.1 South Africa

The Constitutional Court of South Africa provides perhaps the closest parallel to the Indian experience through the doctrine of transformative constitutionalism. Karl Klare famously described transformative constitutionalism as a long-term constitutional project committed to restructuring political, social and economic institutions in accordance with constitutional

¹²⁶ Aharon Barak, *Purposive Interpretation in Law* (Princeton University Press 2005) 87-129.

¹²⁷ Aharon Barak, *The Judge in a Democracy* (Princeton University Press 2006) 47-84.

¹²⁸ Jürgen Habermas, *The Inclusion of the Other* (MIT Press 1998) 105-127; Jürgen Habermas, *Between Facts and Norms* (MIT Press 1996) 491-515.

¹²⁹ Habermas (n 121) 105-127.

¹³⁰ Granville Austin, *Working a Democratic Constitution* (Oxford University Press 1999) 634-648.

values of dignity, equality and freedom.¹³¹ Unlike classical constitutionalism, which primarily limits governmental authority, transformative constitutionalism imposes affirmative constitutional obligations upon all branches of government to dismantle structural inequality inherited from historical systems of discrimination.¹³²

Despite these similarities, an important distinction separates South African constitutional jurisprudence from contemporary Indian constitutional morality. South African courts generally derive constitutional outcomes directly from textual rights - particularly dignity, equality and socio-economic guarantees - rather than invoking constitutional morality as an independent constitutional doctrine.¹³³ In *S v Makwanyane*, the Constitutional Court abolished capital punishment by placing human dignity at the centre of constitutional reasoning without relying upon an independent doctrine of constitutional morality.¹³⁴ Similarly, in *Minister of Home Affairs v Fourie*, the Court recognised same-sex marriage by emphasising equality, dignity and constitutional inclusion grounded directly within identifiable constitutional provisions.¹³⁵

The South African experience offers an important lesson for Indian constitutional jurisprudence. Constitutional transformation becomes more predictable and institutionally legitimate when constitutional values are expressly connected to constitutional provisions rather than abstract judicial formulations. While constitutional morality undoubtedly strengthens rights protection, excessive doctrinal abstraction may weaken judicial certainty and expose courts to allegations of subjectivity.¹³⁶ Accordingly, the Indian Supreme Court could strengthen its constitutional morality jurisprudence by grounding its reasoning more explicitly in express constitutional guarantees rather than treating the doctrine as an autonomous source of constitutional authority.

6.2.2 Germany

Germany provides perhaps the most structured constitutional model among the jurisdictions considered. The German Basic Law places human dignity at the apex of the constitutional order, treating it as inviolable under Article 1 and binding upon all organs of the State.¹³⁷

¹³¹ Karl E Klare, 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* 146, 150-156.

¹³² *ibid* 156-164.

¹³³ *S v Makwanyane* 1995 (3) SA 391 (CC); *Minister of Home Affairs v Fourie* 2006 (1) SA 524 (CC).

¹³⁴ *Makwanyane* (n 126).

¹³⁵ *Fourie* (n 126).

¹³⁶ Barak (n 120) 103-124.

¹³⁷ *Basic Law for the Federal Republic of Germany*, art 1.

Constitutional adjudication before the Federal Constitutional Court is dominated by proportionality analysis, which requires every restriction upon constitutional rights to satisfy the tests of legitimacy, suitability, necessity and proportionality in the strict sense.¹³⁸²³ Rather than invoking constitutional morality, German courts balance competing constitutional interests through a transparent and structured methodology.

The famous *Lüth* decision transformed constitutional rights into objective constitutional values binding upon all public authorities and significantly influenced later constitutional jurisprudence across Europe.¹³⁹ Similarly, the *Aviation Security Act Case* reaffirmed that human dignity constitutes an absolute constitutional value incapable of legislative compromise.¹⁴⁰ Constitutional adjudication therefore proceeds through doctrinal analysis rather than open-ended moral reasoning. Dieter Grimm argues that this structured constitutional methodology enhances legal certainty while simultaneously preserving robust constitutional rights protection.¹⁴¹

German constitutional jurisprudence demonstrates that strong protection for constitutional values need not depend upon an abstract doctrine of constitutional morality. Proportionality analysis provides a structured mechanism through which constitutional values are balanced against competing governmental interests, thereby enhancing judicial predictability while preserving strong protection for constitutional rights. This structured methodology also explains why German constitutional jurisprudence has largely avoided the doctrinal uncertainty that has accompanied the Indian doctrine of constitutional morality.

6.2.3 Canada

Canada provides another instructive comparative framework. The Canadian Charter of Rights and Freedoms has encouraged courts to adopt purposive constitutional interpretation while maintaining close fidelity to constitutional text. The Supreme Court of Canada consistently emphasises that constitutional rights must be interpreted generously so as to realise the underlying purposes of the Charter.¹⁴²

¹³⁸ Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press 2012) 131-177.

¹³⁹ *Lüth Case* (BVerfGE 7, 198) (Federal Constitutional Court, 15 January 1958).

¹⁴⁰ Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016) 97-118.

¹⁴¹ Dieter Grimm, *Constitutionalism: Past, Present, and Future* (Oxford University Press 2016) 97-118.

¹⁴² Peter W Hogg, *Constitutional Law of Canada* (5th edn, Carswell 2007) chs 36-38.

Decisions such as *Reference re Secession of Quebec* recognised constitutionalism, democracy, federalism and the rule of law as unwritten constitutional principles that inform constitutional interpretation without displacing constitutional text.¹⁴³ Likewise, in *R v Big M Drug Mart Ltd*, the Court interpreted freedom of religion in a manner consistent with pluralism, equality and democratic participation.¹⁴⁴

Unlike the Indian Supreme Court's explicit invocation of constitutional morality, Canadian courts generally avoid broad moral formulations. Instead, they develop constitutional principles incrementally through structured constitutional reasoning. Peter Hogg argues that unwritten constitutional principles operate as interpretive guides rather than independent constitutional commands.¹⁴⁵ This distinction preserves constitutional flexibility while limiting judicial discretion. Canadian constitutional jurisprudence demonstrates that constitutional values may effectively shape judicial reasoning without requiring a separate doctrine of constitutional morality. Consequently, this incremental and textually anchored approach offers a valuable methodological model for Indian courts seeking to define the scope of constitutional morality.

6.2.4 United Kingdom

The United Kingdom represents a distinct constitutional model because parliamentary sovereignty traditionally limited judicial constitutional review. Nevertheless, following the enactment of the Human Rights Act 1998, British courts increasingly relied upon proportionality, legality and the rule of law to scrutinise executive action.¹⁴⁶ Lord Bingham argued that constitutional democracy ultimately depends upon fidelity to the rule of law rather than unrestricted parliamentary power.¹⁴⁷ Cases such as *A v Secretary of State for the Home Department* illustrate how British courts protect constitutional rights through proportionality and legality without employing constitutional morality as a distinct constitutional doctrine.¹⁴⁸

Although the United Kingdom lacks a codified constitution comparable to India, British constitutional practice demonstrates the importance of judicial restraint and institutional dialogue. Courts generally avoid replacing legislative judgment with judicial moral preferences unless fundamental constitutional rights are clearly implicated. This institutional modesty

¹⁴³ *Reference re Secession of Quebec* [1998] 2 SCR 217, paras 49-82.

¹⁴⁴ *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 331-356.

¹⁴⁵ Hogg (n 135) ch 15.

¹⁴⁶ *Human Rights Act* 1998.

¹⁴⁷ Tom Bingham, *The Rule of Law* (Allen Lane 2010) 37-69.

¹⁴⁸ *A v Secretary of State for the Home Department* [2004] UKHL 56.

offers another lesson for Indian constitutional jurisprudence, where constitutional morality has occasionally been criticised as encouraging excessive judicial intervention into politically contested questions. The British experience further suggests that constitutional protection need not be measured by the frequency of judicial intervention but by the quality of constitutional dialogue between courts, legislatures and the executive.

6.2.5 United States

American constitutional jurisprudence relies principally upon substantive due process, equal protection and judicial review to protect constitutional rights. Landmark decisions such as *Brown v Board of Education*, *Loving v Virginia* and *Obergefell v Hodges* transformed American constitutional law through evolving understandings of equality and liberty.¹⁴⁹ However, the Supreme Court rarely invokes constitutional morality explicitly. Instead, constitutional development occurs through evolving constitutional interpretation, equal protection analysis and substantive due process analysis.

Ronald Dworkin argued that these decisions exemplify the moral reading of the Constitution, according to which judges must interpret constitutional provisions consistently with principles of political equality and individual rights.¹⁵⁰ Critics, however, have warned that expansive judicial interpretation risks undermining democratic legitimacy if insufficiently constrained by constitutional text.¹⁵¹ This debate closely parallels contemporary Indian discussions regarding constitutional morality and judicial activism. The American experience demonstrates that even without an explicit doctrine of constitutional morality, constitutional courts can protect fundamental rights through structured interpretive methodologies that remain anchored in constitutional text.

Viewed collectively, these jurisdictions demonstrate that constitutional democracies protect foundational constitutional values through structured interpretive methodologies rather than through an autonomous doctrine of constitutional morality. India's distinctive contribution therefore lies not in the protection of constitutional values, but in elevating constitutional morality itself into a separate constitutional doctrine.

6.3 Lessons for the Indian Doctrine

¹⁴⁹ *Brown v Board of Education* 347 US 483 (1954); *Loving v Virginia* 388 US 1 (1967); *Obergefell v Hodges* 576 US 644 (2015).

¹⁵⁰ Dworkin (n 116) 1-38.

¹⁵¹ Antonin Scalia, *A Matter of Interpretation* (Princeton University Press 1997) 37-47

The comparative examination undertaken above reveals a common constitutional theme. While constitutional democracies employ different doctrinal techniques to protect constitutional values, they share a commitment to ensuring that constitutional adjudication remains anchored in identifiable constitutional principles. Against this comparative background, the distinctive characteristics of the Indian doctrine become more apparent.

India is unusual not because it protects constitutional values but because it employs constitutional morality as an overarching constitutional principle capable of influencing virtually every field of constitutional law - from privacy and sexuality to religion, federalism and institutional governance.¹⁵² While this doctrinal flexibility has enabled the Supreme Court to address complex constitutional problems creatively, it has also produced conceptual uncertainty.

Mature constitutional democracies generally anchor constitutional reasoning within identifiable doctrines - proportionality in Germany, unwritten constitutional principles in Canada, transformative constitutionalism in South Africa - thereby ensuring greater doctrinal coherence and judicial accountability. The South African experience demonstrates that transformative outcomes can be achieved through express constitutional guarantees rather than abstract judicial formulations. German jurisprudence illustrates how proportionality analysis provides a structured mechanism for balancing competing constitutional interests. Canadian practice reveals that unwritten constitutional principles may effectively shape judicial reasoning without displacing constitutional text. The United Kingdom and the United States, despite their different constitutional traditions, similarly demonstrate that constitutional values can be protected through structured interpretive methodologies.

As Part V demonstrated, constitutional morality has acquired multiple meanings throughout Indian constitutional jurisprudence, creating ambiguity concerning its legitimate scope.¹⁵³ The principal criticism directed against the doctrine concerns precisely this conceptual indeterminacy. Despite its increasing prominence in decisions such as *Government of NCT of Delhi v Union of India*, *Navtej Singh Johar v Union of India*, *Indian Young Lawyers Association*

¹⁵² *Navtej Singh Johar v Union of India* (2018) 10 SCC 1; *Indian Young Lawyers Association v State of Kerala* (2019) 11 SCC 1.

¹⁵³ Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (SSRN Working Paper, 18 January 2020) 10-22 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3526789 accessed 27 June 2026.

v State of Kerala and Joseph Shine v Union of India, the Supreme Court has not articulated a consistent definition of the doctrine.¹⁵⁴

This conceptual ambiguity produces three significant constitutional concerns. First, it reduces judicial predictability. Where the doctrine lacks identifiable boundaries, judicial reasoning may appear dependent upon individual judicial philosophy rather than objective constitutional standards. Secondly, an indeterminate doctrine risks expanding judicial discretion beyond constitutionally legitimate limits. As Aharon Barak has argued, judicial creativity remains constitutionally legitimate only when constrained by constitutional text, constitutional purpose and institutional competence.¹⁵⁵ Thirdly, excessive reliance upon constitutional morality without clearly articulated standards risks encouraging what comparative scholars describe as judicial supremacy rather than constitutional supremacy.¹⁵⁶

These criticisms, however, should not be understood as arguments against the concept itself. On the contrary, constitutional morality continues to perform an indispensable constitutional function within India's deeply plural and socially stratified democracy. The constitutional commitment to liberty, equality, dignity, fraternity and secularism frequently requires judicial intervention against entrenched social practices that perpetuate exclusion and discrimination. As demonstrated in *Navtej Singh Johar* and *Indian Young Lawyers Association*, the doctrine has enabled the Supreme Court to protect vulnerable minorities, recognise sexual autonomy, strengthen constitutional governance and reaffirm constitutional equality in circumstances where majoritarian politics proved insufficiently protective of constitutional rights.¹⁵⁷ The principal challenge therefore lies not in abandoning constitutional morality but in defining its methodological limits. Comparative constitutional experience provides clear guidance: doctrinal clarity, methodological structure and institutional restraint are essential prerequisites for legitimate constitutional adjudication.

6.4 Towards a Structured Framework for Constitutional Morality in India

A structured doctrine of constitutional morality should begin with constitutional text. Every invocation of the concept must identify the specific constitutional provision or constitutional

¹⁵⁴ *Government of NCT of Delhi v Union of India* (2018) 8 SCC 501; *Navtej Singh Johar* (n 145); *Indian Young Lawyers Association* (n 145); *Joseph Shine v Union of India* (2019) 3 SCC 39.

¹⁵⁵ Barak (n 120) 103-124.

¹⁵⁶ Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press 2008) 21-49; Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1348-1362.

¹⁵⁷ Madhav Khosla, *India's Founding Moment* (Harvard University Press 2020) 183-214; *Navtej Singh Johar* (n 145); *Indian Young Lawyers Association* (n 145); Austin (n 123) 634-652.

principle from which the doctrine derives normative authority. Articles 14, 15, 19, 21, 25, 32 and the Preamble collectively provide the principal textual foundations for constitutional morality within the Indian constitutional order. The doctrine should not operate independently of these constitutional guarantees. Rather, it should illuminate their meaning in situations where competing constitutional rights require principled reconciliation.

Secondly, the doctrine should remain grounded in constitutional history. The Constituent Assembly Debates, Dr B.R. Ambedkar's speeches and the broader objectives underlying the Constitution provide essential guidance regarding the doctrine's legitimate scope. Ambedkar repeatedly emphasised that constitutional morality represented a constitutional ethic necessary for preserving democratic institutions rather than an abstract moral ideal.¹⁵⁸ Contemporary constitutional adjudication must therefore distinguish between constitutional transformation consistent with constitutional history and constitutional innovation unsupported by constitutional design.

Thirdly, the doctrine should incorporate structured proportionality analysis whenever competing constitutional rights are involved. Comparative constitutional jurisprudence demonstrates that proportionality provides transparency, rationality and judicial accountability. Instead of merely invoking the doctrine as a conclusory principle, courts should examine whether limitations upon constitutional rights satisfy the requirements of legitimate constitutional purpose, rational connection, necessity and balancing. This would align Indian practice with established comparative methodologies while preserving the doctrine's transformative potential.

Fourthly, the doctrine should recognise institutional competence. Constitutional courts possess neither democratic legitimacy nor institutional expertise to resolve every moral controversy confronting society. Judicial restraint therefore constitutes an essential component of constitutional morality itself. A doctrine designed to preserve constitutional democracy cannot disregard the constitutional distribution of institutional powers.

In light of these considerations, a five-stage analytical framework may enhance doctrinal coherence:

¹⁵⁸ *Constituent Assembly Debates*, vol VII, 4 November 1948 (speech of Dr B R Ambedkar); B R Ambedkar, *Annihilation of Caste* (Critical Quest 2014) 287-312.

1. **Identify the constitutional provision or constitutional principle directly implicated.** This ensures the doctrine operates within constitutionally prescribed boundaries rather than as an independent source of authority.
2. **Examine the constitutional history and Constituent Assembly understanding relevant to that provision.** The Constituent Assembly Debates and Ambedkar's speeches provide essential guidance regarding the doctrine's legitimate scope and prevent contemporary adjudication from departing from constitutional design.
3. **Apply proportionality where competing constitutional rights require balancing.** Structured proportionality analysis introduces transparency, rationality and judicial accountability into constitutional adjudication, ensuring that limitations upon constitutional rights satisfy the requirements of legitimate purpose, rational connection, necessity and balancing.
4. **Assess institutional competence and democratic legitimacy before extending the doctrine beyond constitutional text.** Courts should recognise their institutional limitations and defer to democratic deliberation unless constitutional guarantees are directly violated.
5. **Ensure that constitutional morality strengthens constitutional democracy rather than substituting judicial preference for constitutional reasoning.** This final stage preserves both constitutional transformation and the rule of law.

Such a framework would preserve the transformative aspirations of the Constitution while simultaneously strengthening doctrinal certainty, judicial legitimacy and constitutional accountability. Rather than functioning as an abstract moral ideal, constitutional morality would become a structured constitutional methodology anchored in constitutional text, constitutional history, constitutional values and principled constitutional reasoning.

Comparative constitutional experience reinforces the need for such methodological discipline. South African courts achieve transformative constitutional outcomes through express constitutional guarantees of dignity and equality. German constitutional jurisprudence employs proportionality as a structured balancing methodology. Canadian courts rely upon unwritten constitutional principles while remaining firmly anchored in constitutional text. The United Kingdom emphasises constitutional dialogue and institutional restraint, whereas American constitutional jurisprudence develops constitutional values through equal protection and substantive due process analysis. India need not abandon constitutional morality as a distinctive constitutional doctrine. Rather, comparative constitutional practice suggests that its continued

legitimacy depends upon a more structured methodology anchored in constitutional text, institutional competence and transparent judicial reasoning.

Ultimately, India's contribution to comparative constitutional law should not be measured by the frequency with which constitutional morality is invoked but by the clarity with which it is defined. The doctrine possesses enormous emancipatory potential when employed as an interpretive principle rooted in constitutional supremacy. Yet its legitimacy depends equally upon judicial discipline, methodological transparency and fidelity to constitutional design. A structured framework therefore represents not a limitation upon constitutional morality but the very condition necessary for its continued constitutional vitality. Comparative constitutional experience ultimately confirms the central argument of this dissertation: constitutional morality remains an indispensable interpretive principle within Indian constitutional law, but its continued legitimacy depends upon a clearer doctrinal framework grounded in constitutional text, structured judicial reasoning and institutional restraint. The concluding chapter builds upon this comparative analysis to evaluate how such a structured framework may be integrated into Indian constitutional jurisprudence without compromising the Constitution's transformative aspirations.

Conclusion

The doctrine of constitutional morality occupies a distinctive and contested position within contemporary Indian constitutional jurisprudence. Its emergence as an interpretative principle reflects a broader transformation in Indian constitutional law, wherein the Supreme Court has increasingly invoked foundational constitutional values to resolve disputes that implicate fundamental rights, secularism, and democratic governance. The intellectual lineage of the doctrine stretches from George Grote's nineteenth-century articulation of constitutional morality as a civic disposition essential for democratic stability, to Dr B.R. Ambedkar's invocation of the concept during the Constituent Assembly Debates as a constitutional ethic necessary for the survival of India's fledgling democracy. For Grote, constitutional morality represented the internalised commitment of citizens and public officials to constitutional procedures and institutional restraint. For Ambedkar, it signified the democratic culture without which constitutional provisions remain inert and susceptible to majoritarian capture. This historical foundation establishes that constitutional morality was never intended to function as a source of judicial authority but rather as a constitutional ethic capable of sustaining democratic institutions through civic virtue and institutional discipline. The transformation of

constitutional morality from a constitutional ethic into an autonomous interpretative doctrine represents one of the most significant developments in contemporary Indian constitutional law, yet it also raises fundamental questions concerning the legitimate boundaries of judicial power and the relationship between constitutional adjudication and democratic legitimacy.

The judicial revival of constitutional morality reached its most significant expression in *Navtej Singh Johar v Union of India*, where the Supreme Court struck down Section 377 of the Indian Penal Code, recognising the constitutional autonomy of LGBTQ+ individuals and affirming that constitutional morality must prevail over societal prejudice. Its subsequent application in *Indian Young Lawyers Association v State of Kerala* required the Court to reconcile religious autonomy with constitutional guarantees of equality and dignity, challenging exclusionary practices at the Sabarimala temple. Beyond questions of individual liberty, the doctrine also informed constitutional governance in *Government of NCT of Delhi v Union of India*, reinforcing the democratic accountability of executive institutions. The Court adopted a similar approach in *Joseph Shine v Union of India*, where constitutional morality underpinned the decriminalisation of adultery, reaffirming the constitutional commitment to individual autonomy and marital equality. Collectively, these decisions demonstrate that constitutional morality has enabled the Supreme Court to protect vulnerable minorities, recognise sexual autonomy, strengthen constitutional governance, and reaffirm constitutional equality in circumstances where majoritarian politics proved insufficiently protective of constitutional rights. Yet the very flexibility that has rendered the doctrine so effective in addressing complex constitutional challenges has also produced conceptual uncertainty. The Supreme Court has not articulated a consistent definition of constitutional morality, describing it variously as constitutional ethos, constitutional conscience, constitutional identity, constitutional culture, constitutional values and constitutional governance. This conceptual ambiguity has generated legitimate concerns regarding judicial predictability, doctrinal coherence, and the legitimate boundaries of judicial discretion.

The comparative analysis further demonstrates that India's constitutional experience must be understood within a broader global framework of constitutional adjudication. Germany relies upon proportionality analysis as a structured mechanism for balancing competing constitutional interests while remaining anchored in constitutional text. South Africa employs transformative constitutionalism to achieve structural reform through express constitutional guarantees of dignity, equality and socio-economic rights. Canada develops constitutional principles incrementally through unwritten constitutional principles that inform interpretation

without displacing constitutional text. The United Kingdom emphasises institutional dialogue and judicial restraint, whereas the United States develops constitutional values through equal protection and substantive due process analysis while remaining anchored in constitutional interpretation. Viewed collectively, these jurisdictions demonstrate that constitutional democracies protect foundational constitutional values through structured interpretive methodologies rather than through an autonomous doctrine of constitutional morality. India's distinctive contribution therefore lies not in the protection of constitutional values, but in elevating constitutional morality itself into a separate constitutional doctrine. While this doctrinal flexibility has enabled creative constitutional adjudication, comparative constitutional practice suggests that doctrinal clarity, methodological structure and institutional restraint are essential prerequisites for legitimate constitutional adjudication. This dissertation has therefore proposed that constitutional morality should be anchored in constitutional text, incorporating structured proportionality analysis whenever competing constitutional rights are involved, grounded in constitutional history, and attentive to institutional competence and democratic legitimacy. The proposed five-stage analytical framework would preserve the transformative aspirations of the Constitution while simultaneously strengthening doctrinal certainty, judicial legitimacy and constitutional accountability. Additionally, Parliament bears responsibility for enacting legislation consistent with constitutional values and for strengthening constitutional literacy among citizens, thereby contributing to the cultivation of the constitutional culture that Grote and Ambedkar recognised as essential for democratic survival.

Constitutional morality should neither become an unrestricted licence for judicial creativity nor remain an abstract constitutional ideal incapable of guiding constitutional adjudication. Rather, it should function as a principled interpretative doctrine that preserves constitutional supremacy while facilitating constitutional transformation in accordance with the Constitution's founding commitments to liberty, equality, dignity, fraternity and secularism. Properly understood and consistently applied, the doctrine possesses considerable emancipatory potential as an interpretative principle rooted in constitutional supremacy. Yet its legitimacy depends equally upon judicial discipline, methodological transparency and fidelity to constitutional design. India's contribution to comparative constitutional law should not be measured by the frequency with which constitutional morality is invoked but by the clarity with which it is defined. The future legitimacy of constitutional morality depends upon clarity, consistency, constitutional fidelity, and disciplined judicial reasoning. Without these qualities, the doctrine risks becoming

an indeterminate source of judicial discretion rather than a coherent principle of constitutional interpretation. With them, constitutional morality can continue to serve as an indispensable instrument for protecting constitutional values, transforming inherited inequalities, and strengthening India's constitutional democracy. The task for Indian constitutional jurisprudence is not to abandon constitutional morality but to refine its methodology, anchor its application in constitutional text and history, and ensure that it remains accountable to the constitutional principles from which it ultimately derives its authority.

