

CONSTITUTIONAL MORALITY: CONCEPTION, THE SUPREME COURT'S ELASTIC YARDSTICK AND ITS IMPLICATIONS

Prof. Yogesh Pratap Singh*

ABSTRACT

*Over the past decade, the Supreme Court of India has invoked constitutional morality to decriminalise homosexuality, open the Sabarimala temple to women of menstruating age, strike down the criminal offence of adultery, invalidate instant triple talaq, recognise the right to die with dignity, ground the right to privacy, and police the conduct of a State Legislative Assembly during a political crisis. This paper examines constitutional morality both as a jurisprudential concept and as an emerging, freestanding ground of judicial review. It traces the concept's philosophical antecedents in the natural law and positivist debate over the relationship between law and morality, its genealogy in George Grote's account of Athenian democracy, and its adaptation by Dr B.R. Ambedkar during the Constituent Assembly debates as a civic virtue India would have to consciously cultivate rather than inherit. It then undertakes a critical appraisal of the doctrine's judicial deployment since *Manoj Narula v. Union of India*, arguing that constitutional morality, unlike the settled grounds of legislative incompetence, fundamental rights violation and basic structure infirmity, supplies no comparable interpretive discipline, and that its near-uniform deployment in one ideological direction across radically different fact patterns invites the concern that it functions less as an independent legal standard than as a rhetorical device dressing a preferred outcome in constitutional language. The paper concludes that constitutional morality, if it is to remain part of India's constitutional vocabulary, must be tethered expressly to the textual rights and structural principles the Constitution already contains, rather than treated as a sovereign, self-defining ground capable of overriding legislative competence, religious freedom, and the deliberately narrow architecture of basic structure review.*

KEYWORDS: Constitutional Morality; Judicial Review; Basic Structure; Ambedkar; Supreme Court of India.

1. LAW AND MORALITY: JURISPRUDENTIAL FOUNDATIONS

The relationship between law and morality is one of the most enduring and contested questions in jurisprudence, lying at the heart of the longstanding debate between natural law and legal positivism regarding the nature of law, the role of morality in legal validity, and the extent to which the state may legitimately enforce moral standard through law.¹ Natural law philosophy finds no firm distinction between law and morality, whereas positive law philosophy treats the two as distinct and separate concept. Lon L. Fuller, a prominent scholar of the natural law tradition, contended that legal systems are grounded in principle of justice that inherently possess a moral dimension, and offered a dualistic conception of morality, distinguishing a morality of aspiration, the pursuit of the good life and human excellence, from a morality of duty, the basic rule necessary for an orderly society.² For Fuller, aspirational morality cannot ordinarily be translated directly into legal compulsion, since law cannot

* Professor & Vice-Chancellor, National Law University, Tripura.

¹ Jerome E. Bickenbach, *Law and Morality*, 8(3) *Law & Phil.* 291 (1989).

² Lon L. Fuller, *The Morality of Law* 5-9 (rev. ed. 1969).

compel individual to attain the highest standard of human excellence of which they are capable; the morality of aspiration, to be workable, must instead flow from and remain answerable to the morality of duty. Constitutional morality, this paper argues throughout, faces a structurally comparable challenge: to be enforceable and to supply a workable standard of judgment, it must flow from the Constitution itself rather than from a free-floating aspiration.

Fuller further distinguished an internal morality of law, the procedural principle and condition necessary for the creation and functioning of a legal system, from an external morality of law, the substantive content of legal rule and the moral consideration informing their application and adjudication.³ The internal morality concerns not the substantive aim of legal rule but the manner in which a system of rule governing human conduct must be constructed and administered if it is to remain efficacious and true to its own purpose; the external morality comes into play once the internal morality proves largely aspirational and difficult to crystallise into legal duty, guiding a judge, faced with two equally plausible statutory interpretation, toward the reading that harmonises the statute's term with generally accepted principle of right and wrong, informed by legislative intent while requiring the judge to remain neutral in ascertaining that intent.

1.1 Hart's Penumbra of Uncertainty

Legal positivist such as Bentham, Austin, Hart and Kelsen generally reject the proposition that morality is an essential element of law, though positivism itself divides into an exclusive strand, Bentham, Austin and Kelsen among its proponent, maintaining a strict separation between law and morality, and an inclusive strand, most notably H.L.A. Hart, acknowledging that moral consideration may become relevant to the identification and application of law in certain circumstance. Hart did not regard conformity with any particular moral standard as a necessary condition for the existence of a legal system, but recognised that legal rule may prove indeterminate at what he termed the penumbra of uncertainty, the margin at which a rule's language fails to supply a clear answer to the case before the court.⁴

No legal rule, on Hart's account, can be framed comprehensively enough to anticipate every complex factual situation a court may confront; fact situations do not arrive pre-classified, and someone, the judge, must take responsibility for deciding whether a rule's word cover the case at hand, weighing the practical consequence that decision carries. Hart termed the resulting category of case, those falling outside the settled core of a rule's meaning, problems of the penumbra, observing that such problem recur whether the underlying rule

³ *Id.* at 96-97, 200.

⁴ H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 606-15 (1958).

concerns something as modest as park regulation or something as expansive as the multidimensional generality of a constitution.⁵ In such penumbral case, Hart maintained, the judge cannot decide by logical deduction alone; the decision must instead rest on some rational or sound, if inconclusive, argument oriented toward what the law ought to be, a standard Hart insisted need not itself constitute a moral judgment, notwithstanding how readily it can be mistaken for one.

Hart nonetheless conceded that every legal rule carries a fringe of vagueness, an inescapable open texture arising from the very act of classifying particular case under general term, and that a judge confronting this open texture exercises genuine discretion, choosing among open alternative in what amounts to a creative or law-making function.⁶ Where moral issue arise within that discretion, the judge must reach the best moral judgment available, constrained by whatever the legal system itself imposes; Hart insisted it matters little, for practical purpose, whether the judge is thereby making law in accordance with morality or is instead applying personal moral judgment to determine what existing law, tested against a moral standard, already requires. He nonetheless constrained this discretion considerably: a judge must not act arbitrarily, and the resulting decision must rest on reason general and rational enough to justify the outcome, the judge acting, in effect, as a conscientious legislator guided by reasoned judgment rather than personal preference alone.

Hart's account of judicial discretion in penumbral case, discretion to reach a moral judgment that nonetheless remains constrained by the legal system's own limit, bears a close structural relationship to the contemporary idea of constitutional morality this paper examines throughout, since constitutional morality is likewise understood, at least in principle, as a morality constrained by the Constitution's own explicit provision rather than a freestanding moral licence.

1.2 Dworkin's Moral Reading of the Constitution

Ronald Dworkin, a prominent critic of Hart's positivism, proposed that judges must interpret the Constitution's abstract language against the backdrop of moral principle. In *Freedom's Law: The Moral Reading of the American Constitution*⁷, he argued that abstract constitutional clause, due process, equal protection, freedom of speech among them, are not merely historical artefact to be construed through the narrow lens of the framers' original intent, but express broad moral principle judges must interpret in light of the best contemporary understanding of political morality, human dignity and equal concern for all

⁵ H.L.A. Hart, *The Concept of Law* 12-13 (3d ed. 2012).

⁶ H.L.A. Hart, *supra* note 6, at 124-32.

⁷ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* 2, 7-10 (1996).

citizens among them. Dworkin's moral reading rested on three elements: a distinction between abstract, morally freighted constitutional clause and clause that are neither abstract nor drafted in moral language; an insistence that the former class be understood to incorporate the abstract moral principle it invokes as a limit on governmental power; and a limiting condition, that judges may not read their own preferred moral judgment into these clause unless that judgment coheres with the Constitution's own structural design and the dominant line of prior constitutional interpretation.

Dworkin acknowledged that moral reading, though thoroughly embedded in constitutional practice, has frequently been dismissed as intellectually and politically discreditable, and he defended it as more plausible than what he considered the only principled alternative, a strict passivism confining judicial review considerably, or originalism, which he distinguished from moral reading on the ground that originalism ties constitutional meaning to the framers' own expectation about how a principle would apply, rather than to the abstract principle the constitutional text itself states.⁸ Article 14 of the Constitution of India, guaranteeing equality before the law and equal protection of the law, illustrates the distinction concretely: an originalist approach would confine the provision to the framers' own understanding at the time of enactment, while a moral reading construes it in light of the underlying value of equality, permitting reasonable classification while prohibiting class legislation.

1.3 Scope and Approach

This paper proceeds in three movement. It first situates constitutional morality within the broader jurisprudential debate over the relationship between law and morality, drawing on Fuller, Hart and Dworkin to establish the conceptual vocabulary against which the doctrine's Indian development can be assessed. It then traces the concept's specific genealogy, from Grote through Ambedkar's adaptation of it for a newly independent, socially fractured polity, before undertaking a close critical examination of its judicial deployment across the past decade. The analysis throughout is doctrinal rather than empirical, drawing on primary judicial text, Constituent Assembly debate and the relevant secondary jurisprudential literature, and its object is narrower than a general defence or condemnation of judicial activism; it asks specifically whether constitutional morality, as actually deployed, supplies the interpretive discipline a legitimate ground of judicial review requires.

2. CONSTITUTIONAL MORALITY: THE GENEALOGY

The genesis of the term constitutional morality traces to George Grote's *History of Greece*⁹, where Grote defined it as a complex sentiment requiring cultivation

⁸ Ronald Dworkin, *supra* note 9, at 10-15, 33-38.

⁹ George Grote, *History of Greece* vol. 4, 129-32 (1846).

in the mind of every citizen, majority and minority alike. Grote demanded a constitution framed so as to secure a passionate attachment even among a considerable minority, so that no minority would ever be compelled to alter the constitution by force rather than persuasion. Reduced to its essential content, Grote's conception envisages an egalitarian society combining freedom with self-imposed restraint, a constitution securing dignity for majority and minority alike while placing meaningful limitation on government to prevent it becoming autocratic, and a constitutional design sufficiently balanced to give individuals room to become the best version of themselves while imposing restraint capable of surviving the bitterness of party contest. Grote further held that diffusing this sentiment among the populace is a governmental responsibility, and that the idea of constitutional morality must be capable of taking rebirth in different form, suitably modified, whenever democracy faces renewed threat.

3. CONSTITUTIONAL MORALITY IN THE CONSTITUENT ASSEMBLY: AMBEDKAR'S CONCEPTION

Constitutional morality entered Indian constitutional discourse through the Constituent Assembly debates, where Dr B.R. Ambedkar quoted Grote's observation that the diffusion of constitutional morality throughout an entire community, not merely its majority, supplies the indispensable condition for government that is at once free and peaceable, since even a powerful minority, though too weak to seize power outright, can render free institution unworkable if that sentiment is absent.¹⁰ Ambedkar explained Grote's phrase as denoting a paramount reverence for constitutional form, obedience to authority acting within those form, combined with a habit of open speech and unrestrained censure of that same authority regarding its public act, all resting on every citizen's confidence that the constitutional form remains as sacred to a political opponent as to oneself. On Ambedkar's reading, successful democracy presupposes the observance of constitutional morality; the legal provision contained in the constitutional text supply only a skeleton, while constitutional morality supplies the flesh that gives that skeleton life.

The immediate occasion for Ambedkar's remark was a question concerning the inclusion of extensive administrative detail within the constitutional text itself, a drafting choice some considered excessive. Ambedkar responded that the form of administration and the form of the Constitution are closely interdependent, and that constitutional morality functions as a safeguard against administration going astray, self-restraint being its essential component. He cautioned that constitutional morality could not be presumed to exist naturally among the Indian people and would instead have to be consciously cultivated, since India, in his assessment, had not yet reached the constitutional and democratic maturity that would allow administration to function on the strength

¹⁰ VII Constituent Assembly Debates 38 (Nov. 4, 1948) (statement of Dr. B.R. Ambedkar).

of constitutional morality alone, a maturity he contrasted with England's centuries of organically evolved political convention; it was precisely this absence of an underlying ethos of liberty, equality and fraternity in Indian social life, riddled as it remained with caste hierarchy and entrenched inequality, that justified the Assembly's decision to embed detailed administrative provision directly within the constitutional text rather than trust convention alone. For Ambedkar, constitutional morality was accordingly not merely a legal safeguard but a transformative social and ethical project, a means of subordinating entrenched social hierarchy to the Constitution's egalitarian vision and ensuring that democratic institution functioned in substance and not merely in form.¹¹

Ambedkar's broader account identified seven condition he considered essential to democracy's successful functioning: the absence of glaring social inequality, a strong opposition, freedom from majoritarian tyranny over minority, equality in law and administration, observance of constitutional morality, a functioning moral order in society, and public conscience.¹² His remarks suggest two distinct dimensions of constitutional morality: adherence to the Constitution's substantive value on one hand, and adherence to convention and established practice in area the constitutional text itself leaves undetermined on the other, a distinction Ambedkar reinforced by treating English constitutional convention and constitutional morality as effectively synonymous, illustrating the point through George Washington's refusal to stand for a third presidential term on the ground that the fledgling American republic had rejected hereditary rule and would not now create a de facto one through his own continued incumbency.¹³

It is significant that the Constitution employs the word morality at several point in its text without ever employing the composite phrase constitutional morality, and that in 1951 the Supreme Court declined to treat the spirit of the Constitution, a formulation closely associated with constitutional morality, as an independent basis for judicial review, holding that Article 13 must instead be construed according to established principle of statutory interpretation uninfluenced by any presumed constitutional spirit, a position the Court reiterated in *State of Bihar v. Kameshwar Singh*¹⁴ notwithstanding Ambedkar's own plea that constitutional spirit should inform legislative validity.

The phrase has, in recent year, acquired renewed and considerably more consequential judicial life, becoming a powerful interpretive tool the Court has invoked across *Navtej Singh Johar v. Union of India*, *Indian Young Lawyers*

¹¹ VII Constituent Assembly Debates 38-41 (Nov. 4, 1948).

¹² B.R. Ambedkar, Conditions Precedent for the Successful Working of Democracy, in Dr. Babasaheb Ambedkar: Writings and Speeches vol. 17, pt. 3 (Gov't of Maharashtra ed., 2003).

¹³ VII Constituent Assembly Debates 39-40 (Nov. 4, 1948).

¹⁴ *State of Bihar v. Kameshwar Singh*, A.I.R. 1952 S.C. 252 (India).

Association v. State of Kerala, *Shayara Bano v. Union of India*, *Joseph Shine v. Union of India*, *Common Cause v. Union of India*, *K.S. Puttaswamy v. Union of India* and *Shrimanth Balasaheb Patil v. Speaker, Karnataka Legislative Assembly*, cases this paper's Section 5 examines individually. Its meaning has, notably, differed from judge to judge across this body of case law, and in the Sabarimala litigation specifically the Court relied on constitutional morality in both the majority and dissenting opinion, underscoring the interpretive elasticity this paper's title identifies. This pattern raises a foundational question this paper's remaining sections pursue directly: if Ambedkar himself doubted that constitutional morality was yet sufficiently cultivated within Indian society at the time of framing, on what basis does the judiciary, seven decades later, invoke it as a ground for recognising constitutional right, imposing restriction, or filling perceived silence in the constitutional text, and does that invocation represent legitimate interpretive evolution or the introduction of a normative standard lacking genuine textual foundation.

Former Attorney General K.K. Venugopal has voiced considerable apprehension on this point, observing publicly that the use of constitutional morality carries genuine danger precisely because its trajectory cannot be reliably predicted, and expressing hope that the doctrine's influence recedes, a concern he grounded partly in the observation that constitutional morality simultaneously expands the Supreme Court's own power of judicial review.¹⁵ Former Chief Justice Dipak Misra offered a considerably more sympathetic account, describing constitutional morality as an element inherent in constitutional norm and the Constitution's own conscience, reiterating the framers' original intent as expressed through the Preamble and Part III, and functioning as an essential component of the rule of law.¹⁶

4. THE SUPREME COURT'S ELASTIC YARDSTICK: FRAMING THE PROBLEM

Indian constitutional law rests on a fairly settled architecture of judicial review. Ordinary legislation and executive action can be struck down on two, and largely only two, well-recognised ground: lack of legislative competence, meaning a law enacted by a body lacking power to enact it under Article 246 read with the Seventh Schedule, and violation of fundamental right or other express constitutional limitation. A constitutional amendment enjoys an even narrower window of challenge, falling only where it offends the basic structure of the Constitution, a principle *Kesavananda Bharati v. State of Kerala*¹⁷ carved

¹⁵ K.K. Venugopal, Address at the National Law School of India University (2019), reported in Live Law, Constitutional Morality Should Die: Attorney General K.K. Venugopal (2019).

¹⁶ *State (NCT of Delhi) v. Union of India*, (2018) 8 S.C.C. 501, ¶ 92 (India) (Misra, C.J.).

¹⁷ *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461 (India).

out specifically to prevent courts from second-guessing amendment on any ground broader than the Constitution's own core architecture.

Into this carefully circumscribed framework, the Supreme Court has, over the past decade, introduced a third, freestanding yardstick, constitutional morality. It has been invoked to decriminalise homosexuality, to open the Sabarimala temple's sanctum to women of menstruating age, to strike down the criminal offence of adultery, to invalidate instant triple talaq, to recognise the right to die with dignity, to ground the right to privacy, and even to police the conduct of a State Legislative Assembly during a political crisis. In each of these case, the doctrine has done real constitutional work, work that led, in many instance, to outcome many would applaud on ground of justice and individual dignity. The question this paper probes is narrower but more institutional: is constitutional morality a legitimate, independent ground of judicial review, or is it a value-laden abstraction the Court has used to expand its own reviewing power beyond what the constitutional text authorises?

5. THE DOCTRINE'S JOURNEY THROUGH THE CASE LAW

In *Manoj Narula v. Union of India*¹⁸, a five-judge bench was asked to disqualify person with criminal antecedent from ministerial appointment. The Court declined to read any such disqualification into Article 75, holding itself bound by the text, yet devoted extensive discussion to constitutional morality as a value the Prime Minister ought voluntarily to honour, an ethic of constitutional trust existing alongside, but outside, the enforceable text. Even at this early point in the doctrine's revival, it appeared not as a rule of law but as exhortation, a signal of development to come.

In *State (NCT of Delhi) v. Union of India*¹⁹, the Court invoked constitutional morality to define the democratic power-sharing relationship between Delhi's elected government and its centrally appointed Lieutenant Governor. Chief Justice Dipak Misra, writing for himself and two colleagues, treated constitutional morality as effectively synonymous with the spirit of the Constitution, requiring constitutional functionaries to cultivate a spirit of constitutionalism in which every action strictly adheres to the Constitution's basic tenet. Justice Chandrachud, concurring separately, offered a comparably expansive account, describing constitutional morality as the means by which constitutional silence is filled and the Constitution's spirit completed, a compass allowing institution to be held to account against not merely the constitutional

¹⁸ *Manoj Narula v. Union of India*, (2014) 9 S.C.C. 1 (India).

¹⁹ *State (NCT of Delhi) v. Union of India*, (2018) 8 S.C.C. 501 (India).

text but its underlying soul, such that constitutional interpretation itself must flow from constitutional morality.²⁰

In *Navtej Singh Johar v. Union of India*²¹, decriminalising consensual same-sex relation under Section 377 of the Indian Penal Code, the Court held sexual orientation to be a natural and intrinsic part of individual identity protected under the right to life and privacy, and explicitly counterposed constitutional morality against societal or popular morality, holding the former must always prevail regardless of majoritarian sentiment or legislative inertia. In *Indian Young Lawyers Association v. State of Kerala*²², the Sabarimala case, the majority held that a religious denomination's practice of excluding women of a defined age group could not survive scrutiny under constitutional morality notwithstanding its defence as an essential religious practice under Articles 25 and 26; Justice Indu Malhotra's lone dissent cautioned that constitutional morality cannot become a device for overriding any religious practice a court personally finds objectionable, particularly where the challenger was not herself an adherent of the faith in question.

In *Shayara Bano v. Union of India*²³, invalidating instant triple talaq, the plurality relied more heavily on manifest arbitrariness under Article 14 than on constitutional morality directly, though the surrounding judicial and public discourse folded the decision into the same doctrinal family. In *Joseph Shine v. Union of India*²⁴, striking down Section 497 of the Indian Penal Code, the adultery provision, the Court held that a colonial-era provision embodying patriarchal assumption about women as property could not withstand constitutional morality's commitment to equality and autonomy, and in *Common Cause v. Union of India*²⁵, recognising passive euthanasia and the validity of living wills, the Court privileged individual autonomy and dignity, value it traced to constitutional morality, over a more traditional societal reverence for the sanctity of life. *K.S. Puttaswamy v. Union of India*²⁶, recognising the right to privacy, leaned on the phrase less directly, but its underlying logic, that individual autonomy and dignity must be protected even against majoritarian preference, is cut from the same doctrinal cloth.

²⁰ State (NCT of Delhi) v. Union of India, (2018) 8 S.C.C. 501, ¶¶ 273-76 (India) (Chandrachud, J., concurring).

²¹ Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1 (India).

²² Indian Young Lawyers Ass'n v. State of Kerala, (2018) 11 S.C.C. 1 (India).

²³ Shayara Bano v. Union of India, (2017) 9 S.C.C. 1 (India).

²⁴ Joseph Shine v. Union of India, (2019) 3 S.C.C. 39 (India).

²⁵ Common Cause v. Union of India, (2018) 5 S.C.C. 1 (India).

²⁶ K.S. Puttaswamy v. Union of India, (2017) 10 S.C.C. 1 (India).

In *Shrimanth Balasaheb Patil v. Speaker, Karnataka Legislative Assembly*²⁷, arising from the Karnataka defection crisis, the Court extended constitutional morality even into the domain of intra-legislature conduct, invoking it to describe the ethic the anti-defection framework and the Speaker's office are meant to serve. Justice N.V. Ramana's opinion opened by observing, drawing on sociologist André Béteille, that constitutional morality's obligations bind government and opposition equally in a functioning parliamentary democracy, yet that the same political actor in India frequently honours those obligation only while out of office, a pattern contributing to a popular perception of the political system as fundamentally amoral, notwithstanding the framers' expectation that the people themselves would shoulder responsibility for upholding constitutional value once independence was secured.²⁸

Nine judgment, nine markedly different factual terrain, federalism, criminal law, personal law, temple entry, end-of-life autonomy, privacy and legislative defection, unified by a single, recurring judicial vocabulary. The doctrine's revival is generally traced to Justice Dipak Misra, who deployed it prominently across *Manoj Narula*, *Sabarimala* and *Navtej Singh Johar*, with Justice Chandrachud, sitting alongside him on several of these bench, echoing and further popularising its use thereafter. Critics contend that this frequent invocation has, over time, diluted the doctrine's precision, converting it from a rigorously defined constitutional standard into something closer to rhetorical flourish.

6. THE CORE DIFFICULTY: AN ABSTRACT GROUND DOING CONCRETE WORK

Here lies the central problem this paper presses. The constitutional text does not contain the phrase constitutional morality anywhere in its provision, not in Part III, not in Article 246, not in the basic structure doctrine as originally articulated in *Kesavananda Bharati*. Its lineage traces, comparatively thinly, to a single line in Ambedkar's Constituent Assembly speech, itself borrowed from Grote's account of Athenian democracy, describing a habit of paramount reverence for constitutional form among a people otherwise free to differ. That is a rich historical reference. It is not, without more, a judicially administrable standard.

When a court tests legislative competence, the inquiry is textual and structural: does the subject matter fall within the Union, State or Concurrent List? When a court tests fundamental rights violation, the inquiry anchors to specific rights-bearing text, Articles 14, 15, 16, 19, 21, 25 and 29 among them, each carrying decades of interpretive doctrine cabining what counts as violation. When a court

²⁷ *Shrimanth Balasaheb Patil v. Speaker, Karnataka Legis. Assembly*, (2020) 2 S.C.C. 595 (India).

²⁸ *Shrimanth Balasaheb Patil*, (2020) 2 S.C.C. 595, ¶ 2 (India) (quoting André Béteille).

tests a constitutional amendment against the basic structure, the inquiry is tethered to identifiable structural feature, federalism, secularism, judicial review, equality and free and fair election among them, feature the Court has, over time, painstakingly enumerated. Constitutional morality supplies no comparable discipline. It is, by the Court's own description across the judgment examined in Section 5, a value standing above, and at times against, both majoritarian legislative will and even textually protected religious practice; but a standard defined chiefly by what it overrides, rather than by what it independently contains, risks becoming a vessel into which each bench pours its own conception of the just and the good.

This is not a criticism of the outcome reached in much-celebrated case such as *Navtej Singh Johar* or *Joseph Shine*; many would defend these outcome on independent normative ground of equality and dignity firmly rooted in Article 14, 15 and 21. The criticism is that constitutional morality, invoked as a freestanding and undefined ground, does not need to do that harder textual work; it offers a shortcut carrying at least three institutional consequence.

First, unpredictability. A ground of review whose content shifts with the composition and disposition of the bench cannot offer citizen, legislature or lower court a stable understanding of where the boundary of permissible state action lies, and the rule of law prizes, above almost everything else, the ability to know in advance what the law require; an amorphous morality standard erodes precisely that certainty. Second, the risk of judicial supremacy. Legislative competence review and fundamental rights review both leave the legislature meaningful room to act within a defined space, and basic structure review leaves the considerably larger space of ordinary constitutional amendment untouched; constitutional morality, by contrast, has been used to override not merely statute but established constitutional principle, and when a court can invalidate state action, or even privately practised religious custom, by appeal to a value it alone defines, the line between constitutional interpretation and constitutional authorship becomes uncomfortably thin.

A closely related concern is selectivity. Constitutional morality has, across the line of case examined in Section 5, consistently tracked a liberal, autonomy-maximising outcome, a pattern unsurprising given that it reflects the value of the judges who have articulated it, but a genuinely neutral principle should, in some case, be capable of cutting the other way, upholding majoritarian or traditionalist state action against a liberty claim, or counselling judicial restraint rather than intervention. Its near-uniform deployment in a single ideological direction across radically different fact pattern, from temple entry to euthanasia to legislative defection, invites the suspicion that it functions less as an independent legal standard than as a rhetorical device dressing a preferred outcome in constitutional language. Third, and most structurally significant, the erosion of the institutional restraint the basic structure doctrine was specifically

designed to protect: *Kesavananda Bharati* deliberately confined the ground for invalidating a constitutional amendment to the basic structure precisely to prevent the judiciary substituting its own policy or moral preference for that of a constitutionally empowered amending body. If constitutional morality can function as a parallel review standard even for ordinary legislation and executive action, it risks importing through the back door the very unbounded discretion the basic structure doctrine's narrow formulation was designed to foreclose at the front.

A comparative observation sharpens the selectivity concern further still. Common law jurisdictions that have developed comparably open-textured interpretive standard, proportionality review in the United Kingdom and Canada, or the doctrine of unconstitutional constitutional amendment now recognised in Colombia and Germany, have generally paired that openness with a structured, multi-stage analytical framework: a legitimate aim inquiry, a rational connection inquiry, a necessity inquiry, and a balancing inquiry, each stage requiring the court to articulate its reasoning in terms a later bench, and a losing litigant, can meaningfully evaluate and contest. Constitutional morality, as deployed across the case law examined in Section 5, has developed no comparable internal structure; a court invoking the phrase typically states its conclusion, that a given practice offends constitutional morality, without articulating the intermediate step by which that conclusion was reached, leaving future litigant with no template for predicting how the standard will apply to circumstance the existing case law does not squarely resemble. It is this absence of internal structure, as much as the doctrine's uncertain textual origin, that most sharply distinguishes constitutional morality from the comparatively disciplined open-textured standard other constitutional democracy have managed to develop.

7. THE CASE FOR THE DEFENCE, AND A DISCIPLINED PATH FORWARD

No critical account is complete without acknowledging the counter-case, and it deserves to be stated plainly. Defenders of the doctrine, serious scholar and judge among them, argue that a written constitution cannot survive on text alone; it require interpretive value allowing it to remain a living document, responsive to injustice the framers may not have anticipated. They point out that Ambedkar himself invoked constitutional morality to warn against reducing India's constitutional project to mere administrative machinery, and that its deployment in *Navtej Singh Johar* and *Joseph Shine* dismantled genuinely unjust, discriminatory colonial-era provision that majoritarian politics had shown little appetite to repeal through ordinary legislative process. On this view, constitutional morality is best understood not as a freestanding fourth ground of review, but as an interpretive lens informing how courts read Articles

14, 15 and 21, a value-based gloss on textually anchored right rather than a substitute for them; confined strictly to that interpretive role, much of the institutional anxiety Section 6 identifies would ease considerably.

This defence, properly understood, points toward the reform this paper's conclusion advances rather than away from it. The distinction between constitutional morality as an interpretive lens, informing the content already assigned to Article 14, 15 and 21, and constitutional morality as an independent, freestanding fourth ground of review, capable of operating even where no enumerated right is squarely implicated, is precisely the discipline the doctrine's judicial deployment to date has not consistently observed. *Manoj Narula* and *Shrimanth Balasaheb Patil* illustrate the freestanding use most clearly, since neither rested on a specific fundamental right violation in the conventional sense; *Navtej Singh Johar* and *Joseph Shine*, by contrast, could readily have been decided, and largely were decided, on the independent textual ground of Article 14, 15 and 21 alone, with constitutional morality supplying rhetorical reinforcement rather than the operative rule of decision. A court genuinely committed to the interpretive-lens conception the doctrine's defenders articulate would confine its invocation of constitutional morality to cases of the second kind, and would resist the temptation, evident in *Manoj Narula* and its successors, to deploy the phrase as a substitute for, rather than a gloss upon, the textual analysis Article 14, 15 and 21 already require.

8. CONCLUSION: A DOCTRINE IN NEED OF DISCIPLINE

The relationship between law and morality has remained a central concern of jurisprudential discourse, engaging thinker across both the natural law and positivist tradition. Fuller emphasised the inner morality of law, Hart acknowledged the open texture of legal rule and the role of judicial discretion in hard case, and Dworkin challenged any strict separation of law and morality by conceiving law as an interpretive practice grounded in principle. These theoretical debate have acquired a distinctly practical dimension in Indian adjudication, which oscillates between deference to prevailing social morality and assertion of constitutional morality depending on the fact and context of each case; Indian courts have generally shown greater deference to community morality, religious sentiment and legislative judgment in matter of personal law reform or issue deeply embedded in religious identity, reflecting a case-specific balancing rather than a uniform doctrinal stance. This inconsistency need not reflect doctrinal failure so much as the judiciary's continuing, and still unfinished, attempt to navigate the tension between individual right and collective social value on a case-by-case basis.

The Supreme Court has, on several occasion, moved beyond a purely textual reading of the Constitution to uncover the value and normative commitment embedded beneath its express provision, what might aptly be

termed the conscience of the Constitution, and constitutional morality has functioned, over the past decade, as one interpretive lens through which the Court has sought to give substantive meaning to those value, in significant case either expanding the scope of constitutional right or invalidating law and practice found inconsistent with the Constitution's foundational commitment. Grote himself, it bears remembering, did not envisage constitutional morality as a judicial tool for determining the legality of governmental action at all; for him it represented an aspirational ideal, a commitment to cultivate among citizen and government alike a deep respect, loyalty and attachment to constitutional value, sufficient that the constitutional order would remain resilient against the political force of any given day.

The outcome reached through constitutional morality in several of the case this paper has examined, dignity for the LGBTQ+ community, equal access to worship, autonomy at the end of life, are outcome a constitutional democracy committed to equality and liberty has good independent reason to welcome. That is precisely what makes the doctrinal critique this paper has developed important rather than beside the point: good outcome reached through an undisciplined method still leave behind an undisciplined method, available for the next bench, on the next set of fact, to deploy toward outcome far less widely shared than decriminalisation or the right to die with dignity have proven to be.

The jurisprudential debate on law and morality is accordingly no longer merely theoretical; it finds living expression in the manner Indian courts interpret, develop and at times transform constitutional law. If constitutional morality is to remain part of India's constitutional vocabulary, it must be tethered expressly and consistently to the textual right and structural principle the Constitution already contains, functioning as the interpretive lens its more careful defenders describe rather than as a sovereign, self-defining ground capable of trumping legislative competence, religious freedom and the deliberately narrow architecture of basic structure review. Until that discipline is imposed, constitutional morality will remain what this paper has argued it currently is: not a fourth pillar of judicial review standing alongside legislative competence, fundamental rights and basic structure, but a highly persuasive, highly consequential and still dangerously undefined exception to the other three.