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“Constitutional Morality Still to be Defined”: A Judicial Perspective

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Abstract

Constitutional morality refers to a strict adherence to the core values and principles of the Constitution, and it guides the conduct of both the government and the citizen. The concept was propounded by the British classicist George Grote in the nineteenth century, for whom it meant a paramount reverence for the forms of the Constitution. In India it was first invoked by Dr. B. R. Ambedkar, the architect of the Constitution. Although the term is not expressly defined in the Indian Constitution, it is inherent in the document's emphasis on justice, equality and liberty, values that run through the Preamble, the Fundamental Rights and the Directive Principles of State Policy. Constitutional morality implies the coexistence of individual freedom and self-restraint, and it embraces the morality of individuals as well as that of constitutional authorities and democratic institutions. It has a significant role in the positive transformation of the social, public and religious moralities that are deeply rooted in Indian society, and for the development of the nation it must take precedence over them. In the view of the Supreme Court of India, constitutional morality rests not only on the constitutional text but on values such as individual autonomy, liberty, equality, non-discrimination, identity, dignity and privacy, and the Court has described it as an adherence to the core values of constitutional democracy and as a yardstick of justice. Drawing on a doctrinal analysis of landmark judgments, this paper examines how the judiciary has used the concept, why it remains contested and undefined, and how it might be given firmer content.

Keywords: - Constitutional Morality, Fundamental Rights, Preamble, Religious Morality, Social morality

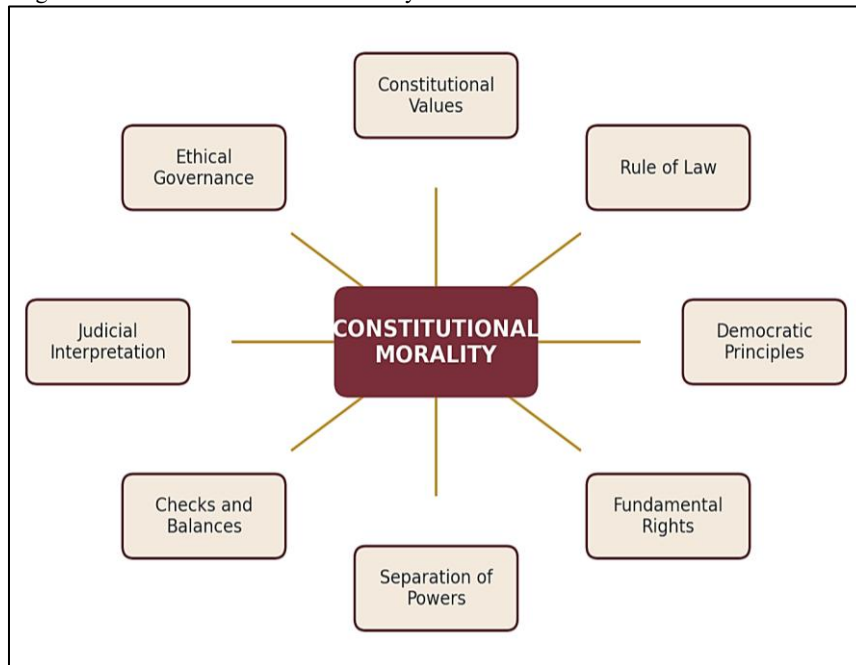
I. INTRODUCTION

Constitutional morality refers to a strict adherence to the core values and principles of the Constitution, and it guides the actions of both the government and the citizen. The British classicist George Grote propounded the concept in the nineteenth century, describing it as a paramount reverence for the forms of the Constitution of the land. In India the term was first used by Dr. B. R. Ambedkar, the architect of the Constitution. Although constitutional morality is not explicitly mentioned in the Indian Constitution, it is inherent in the document's core principles, which emphasise justice, equality and liberty, values that are found throughout the Constitution, including the Preamble, the Fundamental Rights and the Directive Principles of State Policy.

The main pillars of constitutional morality may be set out as follows. Constitutional values uphold the core ideals enshrined in the Constitution, such as justice, liberty, equality, fraternity, secularism and the dignity of the individual. The rule of law upholds the supremacy of law, under which everyone, including government officials, is accountable. Democratic principles ensure the functioning of a representative democracy in which citizens participate in decision-making and hold their representatives accountable. Fundamental Rights, such as the rights to equality, freedom and life and personal liberty, give concrete form to constitutional morality. The separation of powers maintains the balance between the legislature, the executive and the judiciary so as to prevent the arbitrary exercise of power, while checks and balances establish mechanisms to prevent its abuse. Judicial interpretation of the Constitution promotes its underlying principles while adapting them to changing social

needs, and ethical governance ensures transparency, accountability and integrity in public service. Figure 1 summarises these elements.

Fig 1. Elements of constitutional morality.



Source: adapted from Elements of Constitutional Morality (Vision IAS, 2020).

The judiciary has invoked these ideas in a series of landmark decisions. In *Kesavananda Bharati v. State of Kerala* (1973), the Supreme Court established the basic structure doctrine, which limits Parliament's power to amend the Constitution and keeps its core principles intact, an early instance of the Court upholding the spirit of the Constitution. In the *S. P. Gupta* case (1982), the Court treated a constitutional breach as a serious violation of constitutional morality. In *Manoj Narula v. Union of India* (2014), it held that constitutional morality means submitting to the norms of the Constitution and not acting arbitrarily in a manner that violates the rule of law. In the *Sabarimala and Navtej Johar* matters of 2018, discussed below, constitutional morality was held to prevail over restrictive religious custom and over the criminalisation of consensual same-sex relations. It is this body of judicial practice, and the controversy surrounding it, that the present study examines.

1.1. Statement of the Problem

The Constitution of India contains no definition of constitutional morality. In some cases the apex court gives priority to constitutional morality, while in others it gives priority to social or religious morality, and the attitudes and orientations of individual judges can influence the outcome. This indeterminacy creates difficulties within the political system and is the central problem the study addresses: how a concept of such weight can be applied consistently when its content remains unsettled.

1.2. Objectives of the Study

- To understand the concept of constitutional morality.
- To clarify the concept of constitutionalism.
- To distinguish constitutional morality from religious morality and social morality.
- To recognise the significance of the basic structure doctrine.
- To understand the legal treatment of adultery and of triple talaq in relation to constitutional morality.

1.3. Scope and Significance

The study deals with one of the least defined concepts in Indian constitutional law, a concept that goes to the core values and principles of the Constitution and to the relationship between individual rights and social and religious traditions. By addressing the legal gaps left by uneven judicial reasoning, the study touches questions that protect minorities from majoritarianism, test the legitimacy of the judiciary and reach the heart of Indian democracy.

II. LITERATURE REVIEW

The intellectual history of constitutional morality begins outside India. George Grote introduced the idea in his *History of Greece* in the nineteenth century, defining it as a paramount reverence for the forms of the Constitution of the land. On this understanding, constitutional morality implies the coexistence of freedom and individual self-restraint, and it covers the morality of individuals as well as that of constitutional authorities and democratic institutions (Shelal, 2021). At the level of the individual it is the duty of citizens to obey and respect the Constitution and its authorities, even as they remain free to appreciate and to criticise them, while constitutional authorities must operate within the limits set by the fundamental law (Nishant, 2021).

A connected strand of writing ties constitutional morality to the rule of law. Constitutional morality is said to secure public trust in the constitutional bodies and democratic institutions through which the ideals of the Constitution are realised, institutions whose independent and impartial functioning is essential to the framers' vision (Rajora, n.d.). The rule of law, in turn, requires non-discrimination on grounds of caste, creed, religion, sex, colour or place of birth, and guarantees equality before the law and the equal protection of the laws, a conception traced to A. V. Dicey's Law of the Constitution (Frohnén & George, n.d.).

A third strand examines the relationship between constitutional morality and the social, public and religious moralities that are deeply rooted in Indian society. Several writers argue that, because constitutional morality sometimes questions these inherited moralities, it must take precedence over them if the nation is to modernise and progress (Sai, 2020). The abolition of sati is offered as a paradigm case in which constitutional values displaced an oppressive social practice and restored the dignity, and the rights to remarriage and education, of Indian women (Cheyanne, 2015). On this view constitutional morality serves the building of an inclusive society founded on unity in diversity, a value of particular importance in a multi-caste, multi-religious and multi-lingual country (Aditi, 2020).

A fourth strand connects constitutional morality to constitutionalism and the basic structure of the Constitution. Constitutionalism prevents the arbitrary exercise of power and protects individual rights and liberties, describing how democratic and constitutional institutions should function to achieve the Constitution's ideals (Abhinav, 2020). The decision in *Kesavananda Bharati* (1973), which held that certain basic features of the Constitution lie beyond Parliament's amending power, is read as a judicial insistence that governmental action must not violate the spirit or soul of the Constitution (Dhawal, 2020). Finally, the literature locates constitutional morality firmly within the Indian text. Ambedkar introduced the concept in the Constituent Assembly in November 1948, presenting it as a means of coordinating the conflicting interests of different sections of society and of resolving them amicably rather than through upheaval (Ananya, 2020), and later writers find it reflected in the Preamble, the Fundamental Rights (Part III, Articles 12 to 35), the Directive Principles (Part IV, Articles 36 to 51) and the Fundamental Duties (Part IVA, Article 51A) (Laxmikanth, 2017).

2.1. Distinguishing Constitutional Morality from Social and Religious Morality

Because one of the study's objectives is to distinguish constitutional morality from the moralities with which it competes, it is useful to set the three side by side. Constitutional morality derives from the Constitution and its values and binds both the state and the citizen; social morality derives from the customs and opinion of a community and shifts with time and place; and religious morality derives from scripture and doctrine and binds the followers of a faith. Where they conflict, the Supreme Court has held that constitutional morality must prevail. Table 1 summarises the principal differences.

Table 1. Constitutional, social and religious morality compared.

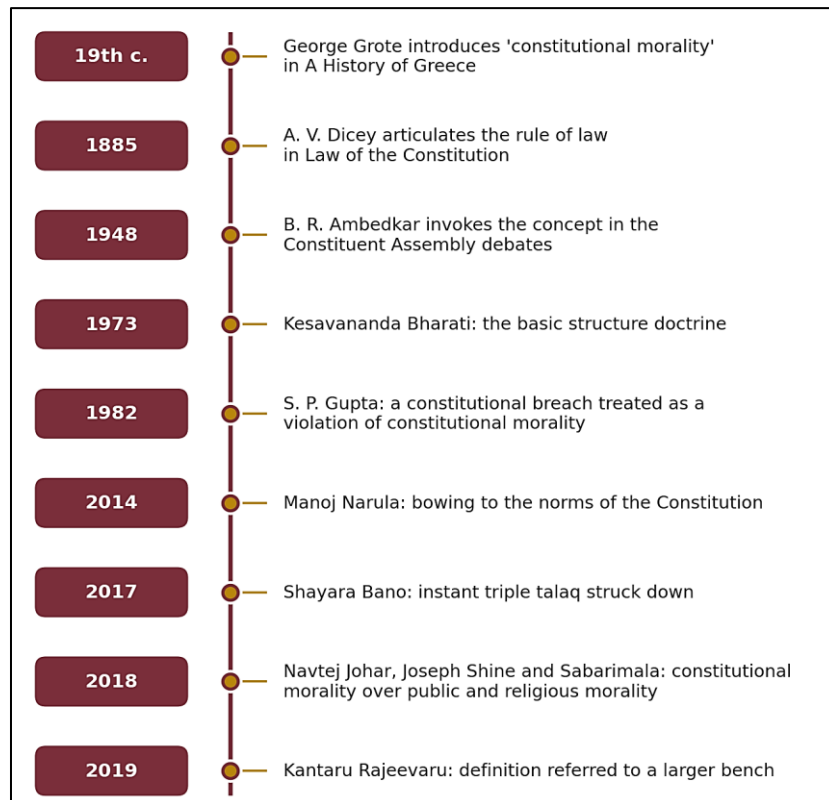
Basis of Comparison	Constitutional Morality	Social Morality	Religious Morality
Source	The Constitution and its core values	Customs, traditions and community norms	Religious texts, scriptures and doctrines
Authority	The Constitution as the supreme law	Prevailing public or majority opinion	Religious institutions and scripture
Binds	The state and all citizens	Members of a society or community	The followers of a faith
Nature	Codified and relatively stable	Fluid; varies with time and place	Rooted in tradition; resistant to change
In conflict	Prevails, as held by the Supreme Court	Yields where it offends constitutional values	Yields where it offends constitutional values
Illustration	Striking down Section 377 and triple talaq	Attitudes underlying the old adultery law	Temple-entry restrictions; instant triple talaq

Source: compiled by the author.

2.2. The Evolution of Constitutional Morality

The concept has travelled a long road from its origins in nineteenth-century political thought to its place at the centre of contemporary Indian constitutional adjudication. Figure 2 traces this evolution, from Grote's coinage and Dicey's account of the rule of law, through Ambedkar's introduction of the idea in the Constituent Assembly, to the line of judgments in which the Supreme Court has given it concrete effect.

Fig 2. The evolution of constitutional morality.



Source: compiled by the author from the cited literature and judgments.

III. RESEARCH METHODOLOGY

The study adopts a doctrinal and qualitative approach, using descriptive, analytical and historical methods. The descriptive method sets out the concept of constitutional morality and its constituent elements; the analytical method examines how the Supreme Court has reasoned with the concept across a series of landmark judgments; and the historical method traces its origins from Grote and Dicey through Ambedkar to the contemporary jurisprudence. The study relies on secondary sources, including the texts of judgments, constitutional provisions, books, journal articles and newspaper reports, and proceeds chiefly by case analysis, reading the leading decisions to identify how constitutional morality has been defined, applied and contested.

IV. FINDINGS: THE SUPREME COURT AND CONSTITUTIONAL MORALITY

In the view of the Supreme Court, constitutional morality is not confined to the constitutional provisions but rests on values such as individual autonomy, liberty, equality, non-discrimination, identity, the dignity of the individual and the right to privacy. The Court has described it as an adherence to the core values and principles of constitutional democracy and as a yardstick of justice. The way the concept has been deployed is best seen through the leading cases, which are summarised in Table 2 and discussed below.

Table 2. Landmark Supreme Court judgments invoking constitutional morality.

Case (year)	Issue	Outcome	Morality Uphold
Kesavananda Bharati v. State of Kerala (1973)	Limits on Parliament's power to amend the Constitution	Basic structure doctrine; core features cannot be amended	Spirit of the Constitution
Shayara Bano v. Union of India (2017)	Validity of instant triple talaq (talaq-e-biddat)	Struck down by a 3:2 majority as unconstitutional	Constitutional over religious morality
Navtej Singh Johar v. Union of India (2018)	Criminalisation of homosexuality under Section 377 IPC	Section 377 read down; consensual same-sex relations decriminalised	Constitutional over public morality
Joseph Shine v. Union of India (2018)	Adultery as an offence under Section 497 IPC	Section 497 struck down; adultery no longer a crime	Gender equality and constitutional morality
Indian Young Lawyers Association v. State of Kerala, Sabarimala (2018)	Exclusion of women aged 10 to 50 from the temple	Ban lifted by a 4:1 majority; later referred to a larger bench	Constitutional over religious custom

Source: compiled by the author from the cited judgments.

4.1. Shayara Bano and the Triple Talaq Case

Shayara Bano v. Union of India led to the prohibition of the practice of triple talaq in India. Triple talaq is a form of divorce under which a Muslim man could instantly divorce his wife by pronouncing the word talaq three times, in writing,

orally or electronically, without any intervention by the state. The practice, known as talaq-e-biddat, existed among Indian Muslims following the Hanafi school, and rendered women vulnerable to unilateral and arbitrary divorce. In 2016, after Rizwan Ahmed divorced Shayara Bano by oral triple talaq, she petitioned the Supreme Court arguing that talaq-e-biddat, along with polygamy and nikah-halala, violated Articles 14, 15, 21 and 25 of the Constitution (Dheniwal, 2022). A five-judge constitution bench, by a 3:2 majority, declared instant triple talaq unconstitutional in order to protect the dignity of Indian Muslim women, thereby upholding constitutional morality over religious morality (Triple Talaq Illegal, 2017).

4.2. Navtej Singh Johar and Section 377

In *Navtej Singh Johar v. Union of India* (2018), the Court partly struck down Section 377 of the Indian Penal Code, which had treated carnal intercourse against the order of nature, including homosexuality, as a crime. A five-judge bench comprising Chief Justice Dipak Misra and Justices R. F. Nariman, D. Y. Chandrachud, A. M. Khanwilkar and Indu Malhotra unanimously held that Section 377, so far as it criminalised consensual same-sex relations, was unconstitutional and contrary to the fundamental rights to intimacy and identity. In doing so the Court overruled its 2013 verdict and decriminalised homosexuality, upholding constitutional morality over social or public morality. It observed that the Court must not be guided by a majoritarian view or popular perception but by constitutional morality, which has an overriding effect on public morality (Constitutionality of Section 377 IPC, 2018).

4.3. Joseph Shine and the Adultery Law

In *Joseph Shine v. Union of India* (2018), the Court struck down Section 497 of the Indian Penal Code, which had made adultery an offence for men while treating women as exempt, on the ground that it offended gender equality and gender justice. The Court observed that the validity of criminal law should be tested not by public or social morality but by constitutional morality, and that the notion of the husband as master and the wife as his possession was contrary to constitutional ideals. With this fifty-year-old provision set aside, adultery is no longer a criminal offence in India, though it remains a civil wrong and a ground for divorce (Rajalakshmi, 2018).

4.4. The Sabarimala Case and the Reference to a Larger Bench

Indian Young Lawyers Association v. State of Kerala, popularly known as the Sabarimala case, concerned Article 14 (equality), Article 15 (prohibition of discrimination), Article 17 (abolition of untouchability) and Article 25 (freedom of conscience). In September 2018, by a 4:1 majority, the Court lifted the ban on the entry of women aged 10 to 50 and set aside Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965, in order to secure the rights to equality and to worship. Chief Justice Dipak Misra and Justices A. M. Khanwilkar, R. F. Nariman and D. Y. Chandrachud supported the entry of women, while Justice Indu Malhotra, the only woman on the bench, dissented.

On 14 November 2019, in *Kantaru Rajeevaru v. Indian Young Lawyers Association*, a five-judge bench comprising Chief Justice Ranjan Gogoi and Justices A. M. Khanwilkar, R. F. Nariman, D. Y. Chandrachud and Indu Malhotra kept the final decision in abeyance and referred to a larger bench the question of the judiciary's role in determining whether a particular practice is essential or integral to a religion, a question rooted in the *Shirur Mutt* case of 1954, in which a seven-judge bench led by Justice B. K. Mukherjea had held that the courts may not interfere in the practice of religion. Senior Advocate A. M. Singhvi argued that constitutional morality cannot be applied objectively, and the conflict between constitutional morality and public morality therefore continues (Krishnadas, 2020).

V. DISCUSSION

The cases show that constitutional morality has been a powerful engine of progressive change, yet they also expose the source of the controversy surrounding it. The principal criticisms are the lack of literature and clarity about what the concept means, and the fear that, so undefined, it may slide into judicial supremacy and judicial activism. Critics argue that it can sit uneasily with the basic tenets of democracy and with the separation of powers, that it may impede the organic development of liberalism, and that, by setting itself against public and social morality, it risks breeding public distrust of the organs of government (Muskan, 2021).

Yet these criticisms must be weighed against the considerations that tell in the concept's favour. Table 3 sets the two sides out together.

Table 3. Constitutional morality: arguments in favour and criticisms.

Arguments in Favour	Criticisms and Concerns
Protects minorities and individuals from majoritarianism	Lacks a settled definition and clear contours
Advances justice, equality, liberty and the dignity of the individual	May open the door to judicial overreach and activism
Upholds the supremacy and the spirit of the Constitution	Sits in tension with the separation of powers
Enables the progressive transformation of society	Risks subjectivity, varying from one judge to another
Serves as a yardstick of justice in hard cases	May foster public distrust by overriding social and religious morality

Source: compiled by the author.

These anxieties have been voiced by senior members of the legal establishment. The former Attorney General K. K. Venugopal warned that the use of constitutional morality is unpredictable and potentially dangerous, recalling the early fear

that the Supreme Court might become a third chamber of the legislature. The former Union Law Minister Ravi Shankar Prasad similarly urged that the nuances of the concept be set out with clarity, so that its meaning does not vary from one judge to another. Because there is at present no settled agreement on the substance of the principle, the concern is that it will be coloured by the individual values and biases of the judges who apply it.

The same worry animates the judicial reflection on the concept. In his writing, Senior Advocate A. M. Singhvi likened the judicial approach to constitutional morality to the proverbial Chancellor's foot, a measure that varies with the person applying it, and argued that a standard must be fixed to prevent legal uncertainty and arbitrary decision-making. The Court itself, in *Kantaru Rajeevaru*, acknowledged that the term is nowhere defined in the Constitution and that its boundaries must be settled if it is not to become arbitrary, referring the matter to a larger bench. There, Justice Nariman located constitutional morality in the spirit of the Constitution, identifying it with the ideals of the Preamble read together with Parts III and IV.

5.1. Suggestions

- A larger Constitution Bench of the Supreme Court should authoritatively define constitutional morality, religious morality and social morality.
- The influence of judges' personal bias on outcomes should be reduced as far as possible, including through clearer standards.
- Constitutional literacy should be encouraged among citizens.
- Legal-awareness programmes should be conducted more widely.
- A scientific temperament should be cultivated in public life.

VI. CONCLUSION

Although concerns have been raised about constitutional morality, the concept cannot be discarded, for it has underpinned several ground-breaking and forward-looking decisions. With the development of specific and objective norms, the principle might mature into a fuller theory, comparable to the basic structure doctrine, and a regular and consistent understanding of it would allow judges to interpret the Constitution more accurately. A clear definition could establish constitutional morality as a benchmark, particularly where individual freedoms and rights come into conflict with cultural or religious traditions.

Several pressing questions, including marital rape, surrogacy, abortion and sexuality, are bound up with constitutional morality, and the resolution of contested religious and cultural practices, such as female genital cutting in the Dawoodi Bohra community and the rights of Parsi women, may turn on how the concept is developed. Many critics of the basic structure doctrine once claimed that it would produce judicial anarchy and shrink the role of the executive, yet that doctrine has served the nation well. In the same way, time is needed to see how the courts will apply constitutional morality and how it will help resolve the urgent socio-cultural questions of Indian society.

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