

CONSTITUTIONAL MORALITY: A CRITICAL STUDY

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ABSTRACT

The foundation of the Indian democratic government is its Constitutional Law. The constitutional law is the groundwork on which the civil liberties, obligation and responsibilities of each individual lies, whether they are the people or representatives of the peoples. The Supreme Courts uses these constitutional provisions to safeguards the rights of the citizen, it's a sword in the hands to Supreme Court to be used against the sovereign, when it intrudes with the rights and authorizes granted to it, thereby infringing the due and legitimate rights of the individuals. Constitutional morality comes into action to ensure that all the constitutional provision are practiced, not only in its literal sense but a liberal interpretation to the foundation and fundamental philosophy of our constitutional democracy. Constitutional Morality is mighty sword used by the judiciary to maintain a system of checks and balance of individual interest, collective interest and how the government by adhering to the constitutional; provisions moderately reacts and responds to it.

KEYWORDS: *Constitutional Morality, Indian Constitution, Constitutionalism, Judicial Activism*

“No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be; to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves.”¹ –

Alexander Hamilton, Federalist

INTRODUCTION

The compass of Constitutional Morality (CM) can be implicated in the circumference of the vicious circle; of escalating demands of the contemporary India, where its citizens are moderately evolving thereby demanding changes in the cultural norms and the response of the government to maintain the check and balances in the popular will and the demands of the specific people. CM basically means the adherence to the core principles of the Constitution in a democracy. It's not just limited in following the constitutional provisions in their literal sense, but includes a committed democratic political process in which both individual and collective interests of the society are satisfied. It includes practicing to the core of constitutional values specifically incorporated in Part 3 and 4 of our constitution for the welfare of the state and protection from uncalled and unruly invasion of State.

CM fundamentally means, “Faithfulness to the foundation and fundamental philosophy of our constitutional democracy”; it's the moral obligation of every individual to uphold the constitutional values with utmost dignity without any compromise and being faithful towards it. As it's an established fact that the Supreme law of land is the constitution

¹ <https://thelibertybellenc.com/blog/a-short-analysis-of-a-key-hamilton-quote/> last visited on 31 July 2021

which is a “*living document rather than a hard bound book*”, furthermore it’s a source of moral guidance for our Supreme Court when it comes making ruling, judicial review or even judicial activism , *as our constitutional law is no stranger to judicially invented tests and doctrines.*

MEANING OF THE TERM

“Constitutional morality is a complex inter-subjective agreement where citizens have arranged to institute positive rights in law”²

The **Doctrine of CM** is a relatively recent addition which is time and again provoked by the Supreme Court in past rulings by giving some landmark judgment. This doctrine is still in its embryonic stage, in the recent times, the doctrine has often been invoked by Supreme Court in India for striking down laws which could be termed as manifestations of popular morality and in the process, has acquired new meanings and interpretations. The doctrine is for both the citizens and for the sovereign of the State , while it question the former, the parameter and modus operandi of challenging the norms and traditions , the question for the latter is, how they are reforming the inequalities and deformation to fight against arbitrary and discrimination and other non constitutional fundamentals .

The principle of CM basically means to “*bend over to the model of the Constitution and not to act in a manner which would become volatile of the rule of law or deflectable of action in an arbitrary manner.*”³ *It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons-in-charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality⁴*

The phrase ‘constitutional morality’ has, of late, begun to be widely used, hitherto the term CM has been oddly and occasionally been popped up to be contemplated in the Constituent Assembly. And one of the most significant reference is, “*Ambedkar’s famous invocation of the phrase in his speech ‘The Draft Constitution’, delivered on 4 November 1948*”. In the framework of protecting the resolution of CM and include the composition of the administration in the Constitution, he quotes excessively quotes George Grote. The quotation is worth reproducing in full:

“The diffusion of ‘constitutional morality’, not merely among the majority of any community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendancy for themselves.”⁵

What did Grote mean by ‘constitutional morality’? Ambedkar quotes Grote again:

² *The Judgment of Constitutional Morality by Scott Wisdom, pg 2* <https://macsphere.mcmaster.ca/bitstream/11375/10625/1/fulltext.pdf>, last visited on 31 July 2021

³ *Manoj nirula V UOI* , <https://indiankanoon.org/docfragment/199141576/?formInput=constitutional%20morality>

⁴ *ibid*

⁵ *For easy access to the two Ambedkar speeches referred to in this text, see the selection, The Constitution and the Constituent Assembly Debates. Lok Sabha Secretariat, Delhi, 1990, pp. 107-131 and pp. 171-183. The quotation from Grote that Ambedkar uses can be found in a reissue of George Grote, A History of Greece. Routledge, London, 2000, p. 93.*

“By constitutional morality, Grote meant... a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of constitution will not be less sacred in the eyes of his opponents than his own”.⁶

Difference between Constitutional Morality and Constitutionalism

A Constitution is a document which is comprehensive of all the basic fundamental principles, rules and procedures that comprise the legal basic of governance. It’s “an established set of principles governing a state, including constitutional amendment.”

“Constitutionalism can be defined as the, “doctrine that administrates the legality of all the government action and it entail somewhat the design of legitimacy that requires administrator behavior to be in harmony with pre-fixed permissible regulations”.⁷

In other words, constitutionalism checks whether the act of a government is legitimate and whether officials conduct their public duties in accordance with laws pre-fixed/ pre-determined in advance.”⁸ According to Barnett, constitutionalism embraces limitation of power (limited government), separation of powers (checks and balances) and responsible and accountable government⁹

It’s an recognized fact India being a democratic country is being governed by written constitution , Rule of Law being its groundwork where all the wings of democracy are projected to follow it to its center to uphold the quintessence spirit of the democracy . Therefore Constitutionalism is natural and organic corollary of the Administration.

To a certain extend we can say that what the written principles cannot redress the grievances of the people or not aligned to the popular will of the people it’s when constitutional morality comes into action.

According to Dr. Ambedkar, “Constitutional morality would mean effective coordination between conflicting interests of different people and the administrative cooperation to resolve them amicably without any confrontation amongst the various groups working for the realization of their ends at any cost”.¹⁰ Constitutional morality is not restricted or confined to chase the constitutional provisions limited to its exact literal sense but is natured on principles, ethics and values like individual autonomy and liberty; equality ,recognition of identity with dignity; the right to privacy.

CONSTITUTIONAL MORALITY IN INDIAN SCARIO

India being a democratic country is the, “one where the people are ultimately in charge for the laws by under which they are governed, as the Sovereignty lies with, WE THE people¹¹”. Thought in Indian it’s for the Supreme Court to determine what is legal and what not by the way of Judicial Review , " a practice whereby courts are sometimes called upon to review a law or some other official act of government to determine its constitutionality , or perhaps its reasonableness,

⁶ Ibid

⁷ CONSTITUTIONALISM Maru Bazezew, MIZAN LAW REVIEW Vol. 3 No.2, September 2009, pg 358 l

⁸ CONSTITUTIONALISM Maru Bazezew, MIZAN LAW REVIEW Vol. 3 No.2, September 2009, pg 358 l

⁹ Hilaire Barnett, Constitutional and Administrative Law 5 (London: Cavendish Publishing Limited, 3rd edit., 2000(1995)

¹⁰ <https://www.drishtias.com/to-the-points/Paper2/constitutional-morality-lat-visited-on-2-August-3,-2021>

¹¹ The Preamble of the Constitution,

rationality, or its compatibility with fundamental principles of justice."¹²

Judges have the right to strike down duly enacted laws by the authorities or even by the Judiciary itself, when the law is irreconcilable with the popular spirit of people and the quintessence fundamentals of the constitution. "Democracy is self-government by the people; the judiciary is neither the legislature nor the people at large, and thus it is not a directly democratic institution."¹³

The question of ethnicity, racism, same-sex marriages Uniform Civil Court, equality, religious freedom, freedom of speech and expression etc are such moral question which are altered and evolved time and again as per the need of the society. Legal challenges whilst, attached to morality; are accompanied by socio-legal examination, attached with political and cultural intervention. Such questions when manifest the spirit of democracy and popular will of the people, thereby invading the pre-established law.

When it comes to morality, the word morality is not been widely used in our constitution, it's been mentioned only four times in within Part 3 of the constitution i.e. fundamental rights in the Indian Constitution (twice in Article 19 and twice in Right to religious Freedom under Article 25 and 26), it continues to be invoked by the courts in many rights claim cases like same sex marriages, sexual orientation, marital rape, religious freedom separation of powers, surrogacy, freedom of speech.

Supreme Court on CM

It's an established fact that the term CM is not been defined or been used in the core text on the Constitution of India. Thought the Court off lately have repeated used the term in number of Cases without explaining it. Roughly estimating the term has been pounded up in around 10 reported cases.

Naz Foundation Case

The most important prime case to be notes is the Naz Foundation Case¹⁴ relating to legally recognized Homosexuality, challenged the constitutionality of Article 377 under Article 14, 15, 19 and 21 before the Delhi High Court. Where Section 377 of IPC was struck down and declared unconstitutional insofar it criminalizes consensual sexual acts of adults in private.

The Delhi High Court in the said case invoked Dr.BR Amedkars explanation of CM while emphasizing the need and necessity of decriminalizing of same sex sexual relationships which was a crime then under Section 377 of IPC.¹⁵ The Court in its ratio decendi while decriminalizing Sec 377 cited Article 15(2)¹⁶ which is prohibitory in nature It puts a bracket control on state to discriminate anyone either horizontally or vertically. In this case the age old custom of only accepting heterosexuality socially and morally was overruled and it was held that, "*Sexual orientation self-evidently comes in the ambit of set of individuality which are natural and pre determined and such are protected under Articles 14 and 15(1). Whilst, Article 14 promises to all "the equal protection of laws", it promises to homosexual people that their*

¹² THE JUDGMENT OF CONSTITUTIONAL MORALITY By SCOTT WISDOM, pg 2 <https://macsphere.mcmaster.ca/bitstream/11375/10625/1/fulltext.pdf>, last visited on 31 July 2021

¹³ *ibid*

¹⁴ Naz Foundation v. Govt. of NCT of Delhi

¹⁵ <https://www.thehindu.com/opinion/lead/the-scope-of-constitutional-morality/article25115335.ece>

¹⁶ No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to

sexual orientation cannot be made a basis to criminalize, stigmatize and maltreat them.¹⁷

Manoj Narula Case¹⁸

In this case the question was raised that, “whether personnel with criminal backgrounds/ cases and predecessor or those charged with of heinous crimes could serve as Minister or can be a part of council of ministers. Advocating the restrictions of the control of the Apex Court in subject of appointment of Ministers, it was held that the courts could not comprehend ineligibility or disqualification which is not enumerated Article 75(1). The Court left the appointment of Ministers with a criminal past to the discretion of the Prime Minister. Nevertheless it was advocated that it was justifiably and morally expected that the Prime Minister, while delivering on the Constitutional expectations, would not consider any such person to be a part of the council of minister or any cabinet .In this case it was held that, “*Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic*”¹⁹

Navtej Singh Johar Judgment,

A five judges bench of SC in the case of, gave an expansion to the judgment and lengthened this structure to defend the LGBTQ rights , that irrespective of gender or gender preferences or sexual oreintetation every individual have right to live with dignity and liberties to choose their identities and live with it. **In this** case it was held that,

*“The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism. It is further the result of embodying constitutional morality that the values of constitutionalism trickle down and percolate through the apparatus of the State for the betterment of each and every individual citizen of the State.”*²⁰

NCT of Delhi v. Union of India,

*“Constitutional moralities... can be understood as anticipated norms of behavior or even duties primarily on the part of individuals within our constitutional institutions. We use the term morality and refer to constitutional morality with regard to these norms or duties principally because of the purpose they serve; they can be viewed as imposing an obligation on individuals and institutions to ensure that the constitutional system operates in a coherent way, consistent with its basic principles and objectives. Another major feature of constitutional morality is that it provides in a Constitution the basic rules which prevent institutions from turning tyrannical. It warns against the fallibility of individuals in a democracy, checks state power and the tyranny of the majority. Constitutional morality balances popular morality and acts as a threshold against an upsurge in mob rule.”*²¹

¹⁷ <https://scroll.in/article/905858/indias-attorney-general-is-wrong-constitutional-morality-is-not-a-dangerous-weapon>

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¹⁹ <https://indiankanoon.org/docfragment/199141576/?formInput=constitutional%20morality>

²⁰ *ibid*

²¹ <https://indiankanoon.org/docfragment/144413017/?formInput=constitutional%20morality>

Indian Young Lawyers Association Case

In this case a group of five advocated challenged the, “Rule 3(b) of the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965, which authorizes restriction on women “of menstruating age” in the Sabarimala Temple, which was a discriminatory ground on basic of sex. As their fundamental right to equality was infringed they moved a petition to the Supreme Court after the Kerala HC upheld the centuries-old restriction, and ruled that only the “tantri (priest)” was empowered to decide on traditions. It was argued that the tradition is prejudiced, unfair and arbitrary and against women’s rights or equality and religion. And those women should be allowed to pray at the place of their choice.

The Supreme Court has ruled that women, of all age groups, can enter Sabarimala temple in Kerala. The apex court in a 4:1 majority said that the temple practice violates the rights of Hindu women and that banning entry of women to shrine is gender discrimination. A five-judge Constitution bench, headed by Chief Justice of India Dipak Misra, said that the provision in the Kerala Hindu Places of Public Worship (Authorization of Entry) Rules, 1965, which authorized the restriction, violated the right of Hindu women to practice religion.²²

This judgment had brought a lot of unrest in the community and infringed the religious emotions of the community, the verdict led to protest by millions of devotees. Defying such protest when two women entered the temple it was closed for purification. This case brought in lot of debate as to what has to chosen when it comes to the constitutional rights or popular will.

In this case, Attorney General K.K. Venugopal expressed concern over the Supreme Court relying on the concept of Constitutional morality after it gave a 4:1 verdict in the Sabarimala case and said it might be used now for the purpose of testing laws. “*While speaking at the Second J Dadachanji memorial debate here, Venugopal hailed as "enlightened" the dissenting judgment given by apex court judge Justice Indu Malhotra in the Sabarimala case.*”²³

"I am saying all this because of a fear that this new concept of Constitutional morality may now be used for the purpose of testing laws," he said.

*"In the Sabarimala case, the dissenting judge, Justice Indu Malhotra, relied upon Constitutional morality and said that Constitutional morality will require that every single individual would have the right to his own faith and nobody can interfere with it, the courts cannot interfere with what is the matter of faith,"*²⁴

SIGNIFICANCE

Morality has always invaded law, a rigid separation of law and morality is unworkable and unreasonable. Law pre se concentrated on the individual liberty and individual rights morality which in itself is very subjective deals with collective ideas of **what is right or wrong**.

- CM when executed by way of Judicial Activism helps in building and restores peoples trust in Judiciary and the constitution thereby keeping the fortitude of democracy alive.

²² <https://indianexpress.com/article/what-is/what-is-the-sabarimala-case-5376596/>

²³ <https://www.theweek.in/news/india/2018/12/09/sabarimala-verdict-ag-expresses-concern-over-concept-of-constitutional-morality.html>

²⁴ *ibid*

- CM is important as it plays a pivot role in implementation and establishment of “Rule of Law which “ensures equality and equity which are the ground norms of any Democracy .Furthermore its helps in harmonizing the uprightness of the constitution and shifting objective of the society.
- It facilitates people to collaborate and harmonize to practice constitutional objective that cannot be achieved single-handedly as it formulate it as an developing process devoid of rigidity subject to basic structure .
- It helps **can exercise law implement persist and shifting social morality and social norms.**
- CM helps facilitate an environment of integrity and balancing of interests , its aligns the individual and society more inclusive of each other , as it acts as a catalyst in social reformation and adapting changes .

The Way Ahead and Ambiguity

- The biggest irony is that, when it has become a well established fact that CM is the need of the hour it has yet to be specifically defined. The term and its importance has been time and again invoked by the SC but hardly even defined this leave the possibility of its prejudiced explanation on case to case basic.
- CM is not aligned with the unwritten norm of separation of powers: It advocates Judicial Supremacy over the sovereign powers and parliamentary powers which are the basic of the democracy.
- When Judicial Pronouncement departs from the pre established cultural and social norms to facilitate the need of the current society, it at times creates tiff and unease for the tradition, which tranquilities public peace temporarily.
- CM might at times influence the opportunity of unrefined emergence of the solutions to the persisting ethical problems in society.
- . To a certain extend it vitiates the supremacy of pre established law which though not a part of Basic Structure but are integral part of the constitution
- It is claimed that the application of this doctrine amounts to judicial overreach and are thereby pitting “**constitutional morality**” against “**societal/popular morality**”

NEED TO ADVOCATE CONSTITUTIONAL MORALITY

To put it in a nutshell what we can say is that CM is mighty weapons which facilitate legalize the organic growth and insertion of factors derivative from popular will. It works on the rational of induction and deduction while having core elements of freedom and self restrain. It helps in creating awareness among the citizen to bestow their trust in the constitution. It establishes the fact that the Judiciary is committed to the ideas and aspiration of the Constitution. CM vehemently protects the fundamental rights and gives room

CONCLUSION

To conclude we can say that thought constitutional morality is at its incubation stage; it must be planted in a way that, its cultivation reaches to the comprehension of each and every individual thus making them comprehend their constitutional rights and endeavoring them. The challenge which is to overcome is that the individual have to understand that it’s not only the duty of the Judiciary or specific individually to upload the essence of the constitution but every individual can use

this mechanism to uphold the rights bestowed. CM will help in establishing the India as described in its Preamble; it will help in the execution of Directive Principles i.e. the welfare state.

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