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On the Emergence of 'Constitutional Morality' as a Double-Edged Sword in India

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In recent years, as part of its quest for judicial activism, the Indian judiciary has utilized 'Constitutional morality' as an instrumental tool, as opposed to public morality, to render several progressive judicial pronouncements. Insight into the history of 'constitutional morality, however, reveals that it was never intended to be applied in the manner that the Indian judiciary has. The paper seeks to examine the various decisions of the High Courts and the Supreme Court that have employed the concept of constitutional morality to reach multiple conclusions, some of which are even opposed in terms of values. Thus, the question arises as to which values derived from the Indian Constitution constitute the concept of constitutional morality and whether the concept can be enforced in its current form. In this paper, the author, therefore, attempts to clarify the historical significance of constitutional morality as a concept and to highlight how it can be counterproductive in modern times if its contours are not defined, at least in a doctrine-like manner.

Keywords: *constitutional morality, public morality, judicial activism.*

INTRODUCTION

Over time, the Indian judiciary has formulated and re-formulated innumerable doctrines, that today form a part of the Indian constitutional jurisprudence, even though they nowhere

expressly find a place within the Constitution itself. Now, it would be presumptuous to call the concept of constitutional morality a doctrine, for it is still in its nascent stage but it is one of doctrines-in-making by the Indian courts. Even though it has not formally been recognized as a doctrine, it has played an instrumental role in many historic and progressive judgments, affecting social change in Indian society. Until now, the concept has been employed by the courts in two broad senses – *firstly*, to counter the prevailing societal norms and *secondly*, as an equal of the 'Rule of Law.' This paper focuses on the first application of the concept because the respective decisions have had crucial ramifications on the constitutional as well as the criminal jurisprudence of the country, and thus have further emerged as an antithesis to the public or popular morality.

In the first part of the paper, the author explores the history of constitutional morality, tracing it back to the time when it was first invoked by Dr. Ambedkar in a completely different sense than it is commonly understood by courts and lawyers today. By drawing upon the historical significance of the concept, the author attempts to distinguish between its academic and legal definitions by elucidating its various aspects and elements. n a scholarly sense, constitutional morality entails the inculcation of values in the hearts and minds of citizens so that they will be loyal to the forms of the constitution and act accordingly within the constitutional framework.

Moving ahead, in the second part of the paper, the author discusses how the phrase has been resurrected by the Indian judiciary after decades of nonexistence in the post-independence era. In doing so, the Courts have radically changed their contours and created an entirely new concept. However, this new idea is not devoid of internal conflicts that are susceptible to the personal preferences of the judges, resulting in several inconsistencies. Although it has been instrumental in bringing about several progressive changes in Indian society, such as the decriminalization of conduct like homosexuality and adultery, it has left several loopholes regarding its enforcement.

In the concluding part of the paper, the author thus argues that if the content of constitutional morality is left undefined, it can become a double-edged sword in a country like India, where there is no strict formula for determining what the constitutional values are; and it will

eventually lead to the frequent pitting of one competing right against another. The solution lies not in eradicating the concept but in developing it along the lines of a doctrine – it is a potent but currently fluid concept that, if utilized correctly, can serve as an effective instrument of social transformation.

UNDERSTANDING AMBEDKAR'S CONSTITUTIONAL MORALITY

1. History of the phrase: The phrase 'constitutional morality' was invoked by Dr. Ambedkar in his famous speech 'The Draft Constitution', delivered on 4 November 1948, wherein he extensively quoted the British classicist George Grote to defend the decision of the Constituent Assembly to include the structure of the administration in the Constitution. He believed that constitutional morality is not a "natural sentiment"[1], and is rather something that must be cultivated over time and that in the immediate post-independence period, the Indian people lacked the requisite sensibilities; consequently, the minute details of how the administration was to function within the confines of the Constitution had to be included in the Constitution itself. Dr. Ambedkar then went on to quote Grote again as to what he meant by "constitutional morality":

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 perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the constitution will not be less sacred in the eyes of his opponents than his own.

In response to this Grotean account of Athenian history, an American lawyer has noted that anyone familiar with the historical nuances of the Grecian Democracy would agree with the assessment that it was ultimately overthrown not by the "spears of conquerors", but by the

[1] Dr. BR Ambedkar, Lok Sabha Secretariat, 'The Constitution and the Constituent Assembly Debates' (Speech at The Constitution and the Constituent Assembly Debates, Delhi, 25 November 1949)

flagrant disregard for constitutional morality on the part of its people.[2] When Grote emphasizes upon "paramount reverence for forms of the constitution" and at the same time subjects it to being "yet combined with a habit of open speech", he envisions a democratic legal system where a claim simpliciter that a government represented the popular sovereignty did not have any merits of its own, rather these claims were open to criticism and interrogation by the people, with whom the authority rests in reality.

Now, Pratap Bhanu Mehta, in his article[3], explains what Dr. Ambedkar means when he makes this reference – he bases his reference on two aspects of constitutional morality i.e., "historical rarity" and "self-restraint". Grote argued that Athenian Democracy had attained constitutional morality in its truest sense, the touchstone being the aristocratic combination of liberty and self-restraint experienced in England and American constitutionalism.[4] As per him, all other attempts elsewhere to incorporate it within the legal systems had tragically failed, which formed the primary force behind Ambedkar's worries about India thus he asserted that Democracy in India was only "top dressing on Indian soil, which is essentially undemocratic"[5]. In a nutshell, it was not the Indian constitution that caused his apprehensions but its practice i.e. constitutionalism. One such instance is found in the Constituent Assembly debates, wherein he emphasizes the lack of Grotean self-restraint in the Indian people, as he says that for real democracy, the people must: …hold fast to constitutional methods of achieving our social and economic objectives. It must mean that we abandon the bloody methods of revolution. It means we must abandon the method of civil disobedience, non-cooperation, and satyagraha.

2. Various aspects of the phrase: Thus, firstly, according to Ambedkar, any extra-constitutional political action, be it a violent revolution or a peaceful satyagraha, goes against the grain of constitutional morality; he calls them "the grammar of anarchy"[6] For him, an effective and efficient administration is of the utmost importance because, in a constitutional democracy, if a

[2] William D. Guthrie, 'Constitutional Morality' (1912) 196(681) The North American Review <https://www.jstor.org/stable/25119811> accessed 20 September,2022
[3] Pratap Bhanu Mehta, 'What is constitutional morality?' *(India-seminar*, 2010) <https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm > accessed 20 September 2022
[4] *Ibid*
[5] Dr. BR Ambedkar (n1)
[6] *Ibid*

dispute arises, recourse must be strictly made to the legislature or the judiciary accordingly. Thus, Ambedkar's constitutional morality envisions an allegiance to the Constitution alone. However, at the same time, he is also apprehensive about entrusting the form of administration entirely to the Legislature because he is unsure whether it can represent the will of the people, without trying to assume excessive authority. Secondly, Ambedkar never intended for the constitutional morality or allegiance to forms of the constitution to be instrumental in effecting social change per se, i.e. it was not envisioned by the constitution framers that the constitutional morality could be used to render distributive justice; rather, it was proposed as an enabling legal framework within which disagreements and disputes could be resolved. It was never outcome-based; rather, it merely outlined the conditions that both disputing parties had to meet to reach a determination. To put it shortly, constitutional morality as introduced by Ambedkar refused to take any sides, let's say, a capitalist or a socialist dispute. Thus, even though constitutional morality was never intended to be synonymous with substantive equality, the Indian judiciary has altered the contours of the term over the past decade, as will be demonstrated below.

CONTEMPORARY NEW-FOUND USAGE OF THE PHRASE

1. Revival of the phrase as an interpretive device

The concept of constitutional morality remained a dead letter in the post-independence era for more than five decades, it was mentioned in passing in a few decisions[7] but no cogent effort was ever made to attribute a definite meaning or coherence to it. However, in the *Naz Foundation* case[8], the Delhi High Court introduced a new form of morality as opposed to the so-called public morality. As we have seen, Ambedkar used the term to justify the inclusion of administrative details in the Constitution, but after the *Naz* ruling, it came to be understood as the Constitution's substantive content. It was the first time that the Victorian-era sodomy law was challenged on the basis that it violated the right to privacy, making it a landmark case. This argument was refuted by arguing that "morality" (in the sense of a widely accepted notion of public morality) could function as a reasonable restriction on this right and constitute a valid justification for a

[7] *Kesavananda Bharati v State of Kerala* [1973] AIR 1461 (SC)
[8] *Naz Foundation v Government of NCT of Delhi & Ors* [2009] 111 DRJ 1 (DB)

"compelling state interest." However, the High Court determined that "enforcement of public morality"[9] did not meet the test for compelling state interest. The Court relied on foreign jurisprudence to state that it could only be constitutional morality i.e. a "morality derived from constitutional values"[10] that could meet the test.

It should be noted, however, that the Court did not establish any specific criteria for determining what constituted "constitutional morality" and what "constitutional values" must be relied upon to form the content of constitutional morality. This opened the door for future decisions to interpret the term in their way, which proved to be the case as, following the *Naz* decision, the courts began basing their decisions on constitutional principles and pitting public morality against constitutional morality in several cases. The majority of these cases involved laws about acts such as homosexuality and adultery, whose criminalization had been justified for decades on the basis that they violated commonly held moral standards.

The courts utilised the opportunity presented by the Naz foundation judgement to issue a series of progressive decisions. In some of them, the Court did not expressly mention the phrase, but a review of the decisions reveals that they are the result of the Court's enforcement of constitutional morality. For instance, in a landmark decision[11], the Delhi High Court recognized the non-binary third gender in India, citing international human rights treaties and the Yogyakarta Principles to recognize the human rights of transgender individuals[12].

After nearly a decade, the reversal of *Naz's* judgment[13] came to be considered before the Supreme Court in the *Navtej Singh Johar*[14] case, wherein the position elucidated in *Naz's* judgment was vindicated by the Apex Court through concurring but separate judgments. Here, it is pertinent to discuss the rationale given by Misra, J and Chandrachud, J – Both focus on the transformative role of the Constitution as an organic document, but the former advocates for the role of judges in carrying out this transformative purpose in interpreting the constitution,

[9] *Ibid*
[10] *Ibid*
[11] *NALSA v Union of India* [2014] Writ Petition (Civil) No. 400/2012
[12] *Ibid*
[13] *Suresh Kumar Koushal & Anr v Naz Foundation & Ors* [2014] 1 SCC 1
[14] *Navtej Singh Johar v Union of India* [2018] 10 SCC 1

whereas the latter places the definition of constitutional morality in the same vein as Dr. Ambedkar. According to honourable justice, it is akin to a "mental attitude" that all citizens must possess and, as a result, should avoid any behaviour that violates the fundamental rights of fellow citizens or minority groups (here, LGTBQ).

However, he continues, since the populace has failed to cultivate this mindset, the judiciary must now take action. Thus, both important justifications focus, in one way or another, on how the concept of constitutional morality can affect social change as a tool for progress, even though the latter is more specific than the former. However, they fail to provide a concrete legal framework within which the concept can function on similar lines as that of a doctrine, thus making it a double-edged sword.

2. The inner conflict of constitutional morality

Gradually, constitutional morality was invoked more frequently, and in each of these cases, the Courts freely borrowed from foreign law and decisions. Consequently, courts have been accused of judicial adventurism. In addition, a debate arose in Indian criminal law regarding whether an act could remain criminal if it could not be deemed immoral by constitutional morality. In this light, the legal community and activists advocated for the decriminalization of certain behaviours, such as begging, adultery, and homosexuality, and for the criminalization of other behaviours, such as marital rape, which still exist in the statutes. The final pushback for constitutional, however, came in the *Sabrimala* judgment[15], wherein it was invoked by both the majority and the minority to render dissenting opinions. The two competing fundamental rights involved in *the Sabrimala* case were the right to practice one's religion under Article 25[16] and the right of a religious denomination to manage its affairs under Article 26[17], both articles being subject to "morality" (Article 25 is however also subject to other Fundamental Rights in Part III of the Constitution).

[15] *Indian Young Lawyers Assn. v State of Kerala* [2018] SCC 1690 (SC)
[16] Constitution of India 1950, art. 25(1)
[17] Constitution of India 1950, art. 26

The Court was thus called upon to consider whether the custom regarding the exclusion of women belonging to a certain age group, from entering the temple struck Article 25 and whether the custom could operate as a valid restriction based on "morality". It is first pertinent to consider the minority opinion given by Justice Indu Malhotra, who states that constitutional morality represents "the moral values underpinning the text of the Constitution, which are instructive in ascertaining the true meaning of the Constitution, and achieving the objects contemplated therein."[18] She thus goes on to argue that undoubtedly, freedom of religion and non-discrimination on the grounds of gender is at the core of constitutional values, but so are the rights of "the followers of various sects … to practice their faith by the tenets of their religion."[19]

Moreover, even the majority opinions reveal the inconsistency between the judges' ideas of comprehending constitutional morality – for instance, Justice Chandrachud departs from his view in *Navtej Singh Johar*, wherein, in a Grotean manner, he emphasized the importance of citizens internalizing constitutional morality, and instead asserts that "morality" under Articles 25 and 26 are "founded on the four precepts which emerge from the Preamble"[20], those of justice, liberty, equality, fraternity. When fundamental issues of "individual dignity" and "human rights" are at stake, they cannot be subject to "passing fancies or aberrations of a morality of popular opinion."[21]

In her dissenting opinion, Justice Indu Malhotra suggests that the tensions between different understandings of constitutional morality can be resolved through a harmonious construction, but it remains unclear how this can be accomplished. Thus, the judges ascribe different moral values to the concept, which exposes its formulation to the risk of becoming utterly subjective. Another important judgment that stirs debate in Indian criminal law is the *Joseph Shine* judgment[22], wherein Justice Chandrchud, speaking for the Court, concluded that Section 497 of

[18] Navtej Singh Johar (n14)
[19] *Ibid*
[20] *Ibid*
[21] *Ibid*
[22] *Joseph Shine v Union of India* [2019] 3 SCC 39

the IPC[23] striped a married woman of "her agency and identity, employing the force of law to preserve a patriarchal conception of marriage which is at odds with constitutional morality"[24]. He made a very loaded statement in this regard that criminal law "must align with constitutional morality."[25] This raises the question of whether the development of the concept of constitutional morality must be left solely to the judiciary, or whether the legislature and the executive, who are in a better position to enforce laws based on constitutional morality, should also be involved. Moreover, it also remains contentious whether criminalization must be done on the touchstone of constitutional morality.

Furthermore, it is also pertinent to discuss the case[26] wherein the exception under Section 375 IPC giving leeway to men to have sex with their minor wives, was read down by the Supreme Court. In doing so, the Court found that "constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 IPC that sanctifies a tradition or custom that is no longer sustainable."[27] However, this decision once again reveals the inner tensions between the understandings of constitutional morality as opposed to public morality, for the Court refrained from striking down the exception in its entirety; therefore, if a man has forced sexual relations with his wife over the age of eighteen, this does not constitute rape. This raises the question of to what extent the Courts are willing to interpret the Constitution's values when rendering progressive decisions, to what extent they can go against the prevailing cultural and religious morality, and whether the Court can truly emerge as agents of morality based solely on what the Constitution says. Additionally, it is a herculean task to determine what the Constitution says, particularly in a country like India with complex social realities.

CONCLUSION: THE ROAD AHEAD

As a topic of academic discussion, the concept of constitutional morality has its origins in Ambedkar's use of the term; however, its legal meaning in the modern era remains uncertain.

[23] Indian Penal Code 1860, s 497
[24] *Ibid*
[25] *Ibid*
[26] *Independent Thought v Union of India* [2017] 10 SCC 800
[27] *Ibid*

In rendering decisions based on constitutional morality, the courts have frequently relied on Ambedkar without addressing the fact that Ambedkar used Grote's conception of constitutional morality as a "rhetorical device"[28] to justify the inclusion of banal administrative details in the Indian Constitution. Ambedkar's reference to constitutional morality was not intended to imply that courts should disregard popular morality when assessing the constitutionality of statutes.[29] Historically, constitutional morality has been interpreted differently at various times. It has been associated with the foundational values of the constitution, anti-corruption measures, and equality, and even equated with the rule of law[30]. The common factor in all of these interpretations is that the concept has remained vague and susceptible to subjective understandings of the individual judges. The Attorney General of India even went to the extent to criticize it as a "dangerous weapon"[31].

That, however, seems a little far-fetched because the issue of vagueness and indecision, however, is not unique to constitutional morality, but rather to all doctrines ever developed by the judiciary. Without a proper interpretation, doctrines are nothing but empty vessels. In hindsight of the *Sabrimala* judgment, the decision of the Supreme Court to refer to a larger bench[32] regarding the question of how to define constitutional morality was a small step in the right direction. The expression "constitutional morality", the court noted, had not been defined in the Constitution, and the "contours of that expression" needed to be "delineate[d]"[33], "lest it becomes subjective"[34]. This task of delineation is intimidating and difficult, but also worthwhile. From the series of decisions based on constitutional morality, it is evident that it has the potential not only to be an antidote to popular conceptions of morality but also to shape public morality.

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[28] Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (*SSRN E-Journal*, 12 February 2020) <https://ssrn.com/abstract=3521665> accessed 24 September 2022
[29] *Ibid*
[30] *Manoj Narula v Union of India* [2014] 9 SCC 1
[31] Apoorva Mandhani, 'Constitutional Morality A Dangerous Weapon, It Will Die With Its Birth: KK Venugopal' (*Live Law*, 9 December 2018) <https://www.livelaw.in/constitutional-morality-adangerous-weapon-it-will-die-with-its-birth-kk-venugopal/> accessed 24 September 2022
[32] *Kantaru Rajeevaru v Indian Young Lawyers Association* Review [2019] SSC OnLine 1461 (SC)
[33] *Ibid*
[34] *Ibid*

One example of this is how sexual offences are now viewed as a violation of bodily integrity and sexual autonomy, as opposed to a violation of honour in the archaic sense.

It can also play a significant role in determining which conduct, according to constitutional values, should be criminalized, thereby fostering a new way of thinking in society and making it easier for legislators to incorporate constitutional morality into the legislative process. The laws and statutes affect the daily lives of the average citizen, and if we are to envision an Ambedkarian sense of constitutional morality, lawmaking is a surefire way to cultivate this morality among the populace. A legal scholar has appropriately referred to constitutional morality as a "deeming principle"[35] because it provides much more concrete and precise meaning to something as nebulous as "morality" and introduces an element of objectivity to a concept that was previously subject to the subjective standards of the various judges. The scholar argues that for this to work, the premise that the constitution espouses a "discoverable" set of inherent values must be accepted first.

Given the foregoing, it is appropriate to pose the Dworkinian question, albeit in a different context – would the Supreme Court's Herculean judges be able to effectively elevate the "silences of the constitution" to the status of the "voices of the constitution" as an interpretive tool in settling "hard cases"? Now is the time for the Judiciary to step up and take action so that it can pave the way for the other branches of government to play their part in reviving constitutional morality in its purest form.

[35] Nakul Nayak, 'Constitutional Morality: An Indian Framework' (2021) (*SSRN E-Journal*, 15 July 2021) <https://ssrn.com/abstract=3885432> accessed 24 September 2022