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Constitutional Morality in the Context of Indian Legal System

ANANYA CHAKRAVARTI¹

ABSTRACT

The Constitution of India is a legal as well as a moral document. While the word 'morality' has been mentioned only four times in the Constitution, twice in Article 19, also more commonly known as right to freedom of expression and once in Article 25 and Article 26 under right to freedom of religion. The literal meaning of the term constitutional morality is adherence of the constitutional democracy

Its scope is not limited only to following the constitutional provisions but a commitment to inclusive and democratic political process in which both individual and collective interests are satisfied. It encompasses ensuring the constitutional values like rule of law, social justice, individual freedom, judicial independence, sovereignty etc. Till now many laws have been made by the Judiciary and Parliament that shows commitment to Constitutional morality. Some of them are: -

- 1. Decriminalising of Section 377 of the Indian Penal Code (1860)*
- 2. Striking down of Section 66 of the Information Technology Act (2000) (Shreya Singhal case, 2015)*
- 3. Medical Termination of Pregnancy Act*
- 4. Criminal Law Amendment Act*
- 5. Opening of Sabarimala temple to women of all age*
- 6. Ban on triple talaq*

Constitutional morality ensures that the rules do not become rigid but more value based. Constitutional morality is not static rather a dynamic interpretation which changes with time and situation but its goal remains centred on the welfare of the society. Constitutional morality entails that the decision is not only rule-based on Constitutional Law but allows wider perspective. The understanding of Constitutional morality involves reflection on the spirit of the founding fathers along with fulfilling the demands of a diverse society in all aspects with an inclusion of democratic values. It's not easy to contain the term Constitutional Morality within a definite box, its interpretation varies upon situation but the ultimate aim is to preserve

¹ Author, Advocate, Bar Council of Delhi.

democratic values with efficient judiciary.

It is truly said that law and Constitution gives direction to the society but society is the one who implements it, thereby showing Constitutional respect.

Constitutional morality emerges from following sources:

1. Text of the Constitution especially the Preamble which lays down the broad objectives of equality, liberty, justice and fraternity in the Constitution.
2. The Constitutional Assembly debates as it enables us to understand the mind of our Constitution makers
3. Events that took place during framing of the Constitution especially sectarian violence and secessionist groups enabled us to adopt a secular, federal and democratic Constitution.
4. Previous case laws which helped us in better interpretation of critical situations.

We first come across this term in Ambedkar's famous speech 'The Draft Constitution'¹, delivered on 4 November 1948. In the context of defending the decision to include the structure of the administration in the Constitution, he quotes at great length the classicist, 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 ascendance for themselves²."

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

"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."

Constitutional morality, apart from its intrinsic importance, is a subject on which B. R. Ambedkar spoke with insight and eloquence in the Constituent Assembly. It has been said that Ambedkar has become an icon for the backward classes. That is certainly true. But he is also one of the makers of modern India and the architect of its present constitutional order. His observations on constitutional morality, made at a critical juncture in our social and political

life, are of the utmost significance not only for the backward classes or minorities, but for all Indians.

The Constituent Assembly met in an atmosphere of great expectations. The country had attained freedom after a long journey of struggle to gain independence from colonial rule, and the possibilities of constructing a new social order based on liberty, equality and social harmony became tantamount nut at the time exhaustive. From being subjects of an alien power, Indians had become citizens in their own land and masters of their self. The Constituent Assembly brought together a galaxy of outstanding persons, remarkable for their intellectual ability, their political acumen and their moral standing. Yet among all of these people, Ambedkar stood out as the most clear-sighted in his understanding of the Indian society and polity.

The time and context of the Constituent Assembly debate assumed much significance at the time, as India had freshly attained independence and one nation was sought to be created out of roughly 521 princely states which had acceded to the Indian Union or were in the process of acceding. The challenge at the time was to have a predominant constitution as a binding factor for a nation. It was in this context that Ambedkar made the aforesaid remark with a view to have the constitution as the paramount document of the new nation. Therefore, it can be said that the genesis of 'constitutional morality' can be seen in the constituent assembly debates themselves.

The Supreme Court as the guardian and interpreter of the Constitution has ensured that the supremacy of the Constitution and Constitutional morality prevails over personal laws and customs. Thus, Constitutional morality ensures that the Constitution is not just a rulebook but also a tool for transformation and reforms depending upon the changing scenario in the nation. The scope of the definition of Constitutional morality is not only limited to following Constitutional provisions literally but vast enough to ensure the ultimate aim of the Constitution, a socio-juridical scenario providing an opportunity to unfold the full personhood of every citizen, for whom and by whom the Constitution exists.

Ancient Indian culture pays a similar tribute to dispensers of justice and the Upanishads also proclaim that Law is the King of Kings. It is more powerful and rigid than they (Kings). There is nothing higher than law. By its power the weak shall prevail over the strong and justice shall triumph. Upholding Constitutional morality and judicial values is indispensable to ensure an individual his inalienable fundamental rights in the process of dispensing justice. But in the modern days there has been a precipitate diminution of admiration and a sharp erosion of the

constitutional and judicial values which ought to actuate the administration of justice. Keeping the morality of the constitution or preserving, perfecting, and perpetuating it, has evolved as the greatest challenge for the contemporary States in the twenty first century

In a democratic order the concept of constitutional morality and judicial values assume myriad dimensions and implies several consequences to the dignity and freedom of the individual. Constitutional morality means adherence to the core principles of the constitutional democracy. In Dr. Ambedkar's perspective, Constitutional morality would mean an 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.

Independent and fearless judiciary is primarily responsible for retention of the parliamentary democracy, protection of constitutional values and fundamental rights of the people. The implications of Constitutional Morality without Judicial Values and judicial values without Constitutional Morality are equally absurd. Constitutional Morality is a sentiment to be cultivated in the minds of a responsible citizen but to be promoted by an independent judiciary embodied with values and ethics. Where judicial diligence is absent and judicial integrity is questioned Constitutional Morality cannot be upheld. The fruits of the morality of Constitution are enjoyed where the people can come to the courts to redress their grievances, and it is pertinent to note that it is not only important they are heard, but it is important, they believe they have been heard. Constitutional morality and judicial values are both inextricably entangled to deliver justice to the sovereign mandate. Morality envisaged in the constitution is meaningful when it's judiciously protected for the welfare of the people.

The principle of constitutional morality did not find much traction until the beginning of the last decade. To be fair, it did find mention in a few judgments of the Indian Supreme Court prior to that, however, the concept was abstract. Till date, there are roughly about 38 Supreme Court judgments that have dealt with this concept in some detail, or in passing.

For the purpose of understanding the reliance by the Supreme Court on the phrase in the recent past, five cases may be considered: Triple Talaq, sexual orientation, abortion, adultery and the entry of women into a temple in Kerala. The first and last one relates to what is claimed to be intertwined with faith.

In the case of *Navtej Singh Johar v. Union of India* (2018), the Court legalised sexual activities between two consenting adults while observing that "the overarching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind, recognition of identity

with dignity and privacy of human beings constitute the cardinal four corners of our monumental Constitution forming the concrete substratum of our fundamental rights that has eluded certain sections of our society”.² The Court even went to the extent of suggesting that “history owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries”. It violated the constitutional guarantees of equality, privacy, and dignity. By grounding LGBT rights claims in the Constitution’s equality protection, the Johar judgment has leapfrogged ahead of decriminalization, laying the foundation for future LGBT rights challenges. The judgment heralds a new dawn for LGBT ³rights and, more broadly, for individual liberties in India. Jurisprudentially, Johar puts the individual at the heart of the constitutional scheme and consolidates the Court’s ‘right to choice’ jurisprudence.

Similarly the archaic law under Section 497 which made it a punishable offence for a man to have sexual intercourse with a ‘wife’ of another man without the consent of such man was held to be unconstitutional on the ground that thinking of adultery from the point of view of criminality was a retrograde step and that it existed only “for the benefit of the husband, for him to secure ownership over the sexuality of his wife” and “aimed at preventing the woman from exercising her sexual agency”. (*Joseph Shine v. Union of India*, 2018). The idea of “a woman as a possession of her spouse⁴” was held to be completely contrary to the constitutional ideals of dignity and equality.

Again, in the case of *Shafin Jahan v. K.M. Ashokan* (2018), the Apex Court gave effect to the personal choice of an adult woman to marry a person practising a different religion. It overturned the decision of Kerala High Court, which, suspecting it to be a case of forcible conversion, had not only ordered the “young girl at a vulnerable age” to be sent to “the custody” of her parents “until she is properly married”, “as per Indian tradition”, but also ordered expeditious police investigation into the matter.

Another example of recognising personal autonomy was the case of *Common Cause v. Union of India* (2018) wherein the Supreme Court allowed passive euthanasia and gave permission for execution of a living will of persons suffering from chronic terminal diseases and likely to go into a permanent vegetative state. It also laid down detailed procedural guidelines for formation and execution of a living will. Through this case, the Court has recognised right to have a dignified death which is an extension of right to life under Article 21 and also includes

³. *Navtej Singh Johar v. Union of India* (2018)

personal liberty, and self- determination.

The biggest and the hardest blow to the societal morality was the case of *India Young Lawyers Association v. State of Kerala* (2018) which recognised the right of Hindu women to freely practise their religion irrespective of their age. It allowed women of all age groups to enter and offer worship at the temple of Lord Ayyappa at Sabrimala in Kerala, holding such a denial to not form part of the essential tenet of any religion. The Court highly deplored the ⁴societal practice of not allowing women of menstruating age to enter the temple as being “exclusionary and discriminatory⁵” and, therefore, held the provision of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965 to be unconstitutional as per Articles 14, 15, 21 and 25. It was seen as correcting a discriminatory social and religious practice that was violative of Part III of the Constitution. Constitutional morality basically rejects the transactional view of the Constitution or majority opinion which is the key to managing a vast country like India with its diversity of cultures, communities, castes, religions and customs.

In addition to this, in the case filed against the imposition of ban on the screening of the movie *Padmavat* in four states, the Supreme Court stayed the ban observing that banning a film, expression of a creative content, from being exhibited is a great shock to the constitutional conscience (*Viacom 18 India Pvt. Ltd. V Union of India*).

These verdicts, therefore, undoubtedly, acknowledge the Apex Court as the forerunner of the principles of Constitutional ideals. For most people inured to political venality and muscular majoritarianism, that objective may seem utopian but viewed in the context of recent judgments by the highest court in the land, it is extremely significant. It’s not the number that determines the right. A right permissible under the Constitution is a right that has to be respected”.

Professor Upendra Baxi, among the tallest in the firmament of legal luminaries, wrote in *India Legal*: “Courts are constitutionally mandated to adjudicate matters which raise competing contentions regarding core human rights⁶”. Constitutional morality contains a set of goals and methods by which to address these conflicts. The apex court has never said that all public policy always offends constitutional morality, but only that the courts must choose the latter when the two are in visible conflict. The dialectic between public morality and constitutional morality serves well the promotion of constitutional good governance and the production of constitutionally sincere citizens

⁴ *Joseph Shine v Union of India* (2018)

⁵ *India Young lawyers association v State of Kerala*(2018)

Pratap Bhanu Mehta's brilliant scholarship on this topic shines as he argues in what could be the defining statement on the issue—that the Indian Constitution was made possible by a constitutional morality that was “liberal at its core”. Not liberal in the “eviscerated ideological sense”, he continues, but in the deeper virtues from which it sprang: “An ability to combine individuality with mutual regard, intellectualism with a democratic sensibility,⁵ conviction with a sense of fallibility, deliberation with decision, ambition with a commitment to institutions, and hope for a future with due regard for the past and present⁷.”

“The concept of constitutional morality would serve as an aid for the Court to arrive at a just decision which would be in consonance with the constitutional rights of the citizens, however small that fragment of the populace may be. The idea of number, in this context, is meaningless; like zero on the left side of any number. In this regard, we have to telescopically analyse social morality vis-à-vis constitutional morality. It needs no special emphasis that whenever the constitutional courts come across a situation of transgression or dereliction in the sphere of fundamental rights, which are also the basic human rights of a section, howsoever small part of the society, then it is for the constitutional courts to ensure, with the aid of judicial engagement and creativity, that constitutional morality prevails over social⁶ morality. A country or a society which embraces constitutional morality has at its core the well-founded idea of inclusiveness⁸”

Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed to permeate into the rule of law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society. Our Constitution is a living and organic document capable of expansion with the changing needs and demands of the society. The Courts, therefore, owed a duty to robe themselves with the armoury of progressive and pragmatic interpretation to combat the evils of inequality and injustice

It would not be an aberration to refer to the foregoing year as the year of Constitutional Morality as the top court of the country has functioned effortlessly to move towards the ideals of constitutionalism by attempting to uproot the established principles which enjoy strong societal legitimacy. The best example of this progressive attitude donned by the judges is the Sabrimala

6 Citizenship Amendment Bill (CAB) and Constitutional Morality, Upendra Baxi, *India Legal* (2019)

7 http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm

8 http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm

9 Shreya Singhal v. Union of India (2015)

judgment which attracted widespread protests from the religious and other groups demanding precedence to the societal morality. There is an evident shift in the values of the Court from preserving group identity to the idea of individuality—individual freedom, liberty and autonomy.

There have been certain scattered discussions of what constitutes constitutional morality from sociologists' point of view as discussed by Andre Beteille in that obligations of constitutional morality bind the government of the day as well as the opposition. While this observation assumes importance in the context of the situation prevailing in the country today, the question remains: what are the institutional obligations when the country is in a state of lockdown?

A complete lockdown for a country of 1.3 billion people is certainly not an easy task. These are tough decisions. While it has been debated that only strong leadership would be able to achieve this, and that may not be disputed. The actions of the government have been decisive in mitigating the risk involved in the spread of the pandemic and citizen safety is the foremost concern inspite of a situation of immense economic slowdown,

A new balancing of priorities and human rights will emerge in the new normal post-COVID-19 world. Constitutional morality demands that governance, and institutions that govern and affect us, scrupulously follow its principles. This is non-negotiable. The Supreme Court, in *Shreya Singhal v. Union of India* (2015) judgment, had aptly described this principle in the following language: “Commitment to the Constitution is a facet of Constitutional morality⁹.”

In the past decade, the term “Constitutional Morality” has enjoyed a revival in Indian jurisprudence, being used to describe respect for difference that is claimed to be both the ancient inheritance of a pluralistic society and inherent to the modern identity of the Indian constitution.

The awareness of the Constitution and what it means to us is underlined on a daily basis. These words of the preamble, most of which was written over 70 years ago, have transcended from being mere words to an affirmation. A sacred pledge. And, as people are taking the oath, it is almost like they understand the meaning of the ‘idea of India’ – as an inclusive, diverse space where all will be accepted.

Our Constitution is a great evolving document whose meaning is so dynamic that new dimension unfolds themselves as time passes and zigzag developments overtake society. Inevitably, thoughts on the Constitution do not stand still as the dialectic of each period imparts fresh interpretation in the light of social change.

The significance of Constitutional Morality and Judicial Values to impart individual, social,

political and judicial justice is discussed in a nut shell with reference to Part III, IV and V of the Indian Constitution. Part III, considered as the soul of the Basic structure of the Constitution is described as ‘transcendental’, ‘inalienable’ and ‘primordial’, occupies a unique place in the lives of civilized societies ensuring individual justice

The Constitution embodied with the will of the people to govern them is not an end but a means to an end i.e. Justice, Social, Economic and Political, a triune phenomenon inscribed as a pledge in the Preambular glory of our Constitution and the adherence to Constitutional Morality and Judicial Values is inalienable in accomplishing the goals of a democratic setup.

A lot has, definitely, been achieved and an abundance is yet to be attained, in terms of transparency and credibility of the judiciary, for our country to become progressive, not merely legally but also socially and for every citizen equally.

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