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A Dichotomy between Constitutional Morality and Public Morality: An Insight into Judicial Trends

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ABSTRACT

Is decriminalisation of homosexuality immoral? Are the same sex marital unions moral? Whether allowing women to enter the Sabrimala temple justified? Is the hijab ban immoral and domineering? Several such moral questions grip the Indian Judiciary every now and then. It is false to opine that the law and morality are distinct in character, especially when the idea of constitutional morality constitutes the basic structure of Indian grundnorm. A rigid demarcation of law and morality is highly improbable. However, there lies a clear diversion between the idea of constitutional morality and public morality. While the former focuses on upholding the supremacy of law, the latter is merely concerned with the societal inferences of morality. The idea of constitutional morality was instilled to strengthen the democratic nature of the Indian Soil. In contrast to this, public morality is an idea which has been in existence since time immemorial. These two contradicting concepts pose a problem in the judicial interpretation of laws. It is the obligation of the judiciary to decide in the interest of common benefit of the nation. It is not only the duty of the state to secure justice for all but the judiciary is equally responsible for that. An important question that arises is how far the judiciary is able to strike a balance between constitutional morality and public morality. It is also important to consider that how far the judiciary is able to uphold the ethos of constitutional morality and sidelining the interests of certain set of populace under the shadow of public morality. This research paper will expound upon the idea of constitutional morality and public morality. It will focus on the significant judicial trends in upholding the constitutional morality over public morality and also determine the direction in which Indian society is heading at the helms of constitutional morality.

Keywords: Constitutional Morality, Judicial Overreach, Justice & Public Morality.

I. INTRODUCTION

One of the fundamental tenets of the Indian constitution is the concept of “justice.” It has been correctly emphasised in the Directive principles of state policy contained in the Indian

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Constitution, in addition to being instilled in the preamble. It is emphasised that the state will work to ensure social order through social, economic, and political fairness in order to advance the wellbeing of all.³ As a result, DPSP's primary goal is to ensure that everyone gets justice. However, what precisely does the word "justice" mean? Is it limited to only being unbiased and equitable, or does it encompass more? Is there a single definition that applies to justice? 'Justice' holds varied connotations for different set of people. A common person may understand justice as punishing the offender; a philosopher may understand justice as entwined with morality; an advocate may understand justice as the application and enforceability of the law; nevertheless, the state interprets "justice" in the broadest sense as an active attempt to resolve the conflict between societal interests and individual interests.⁴ Justice is striking a balance between societal objectives and personal interests in order to move the country towards prosperity. A universal need to achieve a balance between the interests of each individual and the group as a whole should be mentioned. This urge is present in all types of civilizations. In spite of all the efforts made to maintain the welfare of everybody, this problem continues to rank among the most significant obstacles that different countries like India must overcome. These difficulties also obstruct the way for change in a society that is constantly expanding. It is clear that the state has a duty to uphold justice based on a straightforward reading of the DPSP, fundamental rights, or even the preamble of the Indian constitution. But to what extent the judiciary can substitute itself for the state in the service of justice is a matter of fact. It is important to remember that the legislature creates statutes based on the demands that are most pressing at any given time. Legislation is drafted using the "a-priori" method. No law is perfect on its own, and certain grey areas only become apparent after it is passed into law. The courts will make the final decision on these murky or quiet areas. It is important to recognise that the government's judicial branch has been given the exclusive authority to interpret laws, and that when it comes to rules that conflict, a purposeful interpretation must be made. The court is called upon to resolve not only factual disputes but also a number of ethical dilemmas that require clarification from the authority. The decriminalisation of homosexuality, the removal of adultery as a crime, the admission of women into the Sabrimala temple, and the recent prohibition on the headscarf are only a few instances of the judiciary's involvement in addressing morally complex issues. As a result, the judiciary's interpretation of the law plays a crucial part in the administration of justice. Given our nation's structure, it is clear that the Indian subcontinent is distinguished by linguistic, regional, and religious differences, making it nearly impossible to appease every

³ Ind. Const. A.38.

⁴ Komal Parnami, *Concept of Justice Difficulties in Defining Justice*, 2(5) International Journal of Law Management & Humanities (2019).

social group at once. Every sect follows its own set of tenets, morals, ethics, and beliefs. Maintaining the ethos of constitutional morality in a state that is suppressed by popular morality becomes even more challenging in such an environment. In the modern world, public morality is the social construct that determines what is right or wrong, whereas constitutional morality is simply the supremacy of law. Constitutional morality promotes the rule of law, whereas public morality offers a moral framework for a society's overall operations. The principle of giving justice to all segments of society while upholding the constitutional ethos is the foundation of constitutional morality. On the other hand, public morality delineates the boundaries of a society's moral fabric, which has remained constant throughout history. Thus, it is clear that constitutional morality serves as a useful instrument for keeping up with society's constant change. Constitutional morality requires respecting the fundamental framework of the Indian constitution in every scenario that could come before the courts. Constitutional morality emphasises change over constancy while upholding the fundamental tenets of the system, in addition to promoting happiness across the board for society. There are a lot of current concerns in India nowadays that periodically come up and directly affect public morals. The judiciary has the authority to determine how to preserve the spirit of constitutional morality by putting public morality aside and making decisions that advance the common good as a result. This paper aims to elaborate on the judiciary's function in maintaining constitutional morality and ensuring justice for all.

II. CONSTITUTIONAL MORALITY DEFINED

It is important to comprehend what a constitution and constitutionalism represent before delving into the idea of constitutional morality. In a nutshell, a constitution is a formal document with legal sanctity that establishes the parameters within which the various branches of government must operate.⁵ It is the foundational text of a nation, primarily consisting of the country's first legislation. The constitution is a necessary component of a democracy. This text serves as the source of authority for all other statutes that are enacted. This document is the source of authority for all other statutes, which are enacted under it.⁶ For this reason, it is sometimes referred to as the nation's Grundnorm.⁷ India's constitution serves as a guide for the nation's development rather than being a static, one-time text. India's constitution was drafted in 1950 to reflect the conditions that were in place at the time. It's crucial to note that the constitution

⁵ Narendra Kumar, *Constitutional law of India* 1 (9th ed. 2017).

⁶ *Ibid.*

⁷ *Govt. Of A. P. v. P.L. Devi*, AIR 2008 SC 1640.

itself specifies a sufficient amending procedure in order to preserve its dynamic nature.⁸ This suggests that it can be appropriately modified to meet the requirements of the modern world. For this reason, the Indian constitution is frequently referred to be a living, organic document.⁹ The Indian constitution is flexible, as Justice Kapadia has correctly observed, saying that it is not a transient legal document that contains a set of regulations for the moment. It lays out guidelines for a developing future and is meant to be modified to accommodate the different challenges that face humanity.¹⁰ Conversely, constitutionalism is the practice of having a restricted government run a nation. A written constitution has a direct impact on constitutionalism, which focuses on issues such as limited government, the rule of law, the separation of powers, fundamental rights, the principles that guide state policy, the independence of the judiciary, and other issues.¹¹

In accordance with the definitions of constitution and constitutionalism, the word “constitutional morality” needs to be further clarified. Throughout time, the definition of “constitutional morality” has changed. Although no one has given it a clear definition, it has been given many meanings on a number of occasions. At first, Dr. Ambedkar was the creator of this idea. He wished for the Indian democracy to be tightly governed by the values outlined in the country’s constitution. Dr. B.R. Ambedkar was significantly impacted by the ideas of British historian George Grote about Greece. Constitutional morality, according to Grote, is a respect for the tenets of the constitution that will help ensure peaceful national governance.¹² In a similar vein, Dr. Ambedkar defined it as a notion to settle disputes peacefully in cases when the constitution is silent, no explicit rules have been made out for them, and the court decides how to proceed.¹³ He believed it was vital to introduce the weapon of constitutional morality in order to limit the powers of the government, as he was concerned that an excessive amount of legislative authority with the parliament could undermine the idea of democracy in India. However, the Indian constitution never really incorporated this theory.¹⁴ The term “constitutional morality” has never been given a precise definition, but the Supreme Court of

⁸ Ind. Const. A.368.

⁹ Saurabh v. Union of India, AIR 2004 SC 361; Goodyear India Ltd. v. State of Haryana, AIR 1990 SC 781.

¹⁰ M. Nagaraj v. Union of India, AIR 2007 SC 71.

¹¹ Chandra Prakash Rajora, *Constitutional Morality*, Legalservicesindia <https://www.legalserviceindia.com/legal/article-4970-constitutional-morality.html>.

¹² *Constituent Assembly Debates* 7 (4th November 1948).

¹³ Dr. Abhinav Chandrachud, *The Many Meanings of Constitutional Morality*, SSRN <https://deliverypdf.ssrn.com/delivery.php?ID=592098125026006082118085105069125025031062030036027094096097122077111113023125125022002118044037105004117021031007026118126113026048010030044102005074009093071031103034086015093092072071102086024118117101000119010119098004069111022103018091096026076025&EXT=pdf&INDEX=TRUE>.

¹⁴ Nishant Mishra, *The Making of Constitutional Morality by Indian Judiciary: History, Significance and Concerns*, Lawctopus <https://www.lawctopus.com/academike/constitutional-morality-india/>.

India has attempted to do so through a number of rulings. Conclusively, two key aspects of constitutional morality can be deduced as follows: firstly, abiding by the bottom line principles of the constitution of India and secondly, change in the law must be based on the present day needs of the society. It is clear that the traditional understanding of constitutional morality is giving way to an evolutionary interpretation of the term. Constitutional morality focuses on sustaining constitutional democracy by meeting everyone's shared interests, in addition to protecting the core values contained in the Indian constitution. It aims to accomplish justice in both personal and societal objectives. It aims to preserve the spirit and soul of the constitution in addition to adhering to its written word.¹⁵ This theory aims to interpret the clauses in accordance with the spirit of the constitution rather than its exact wording.¹⁶ In the historic *Keshavnanda Bharti* case¹⁷, a 13-judge bench effectively defined the spirit of the constitution. Justice Sikri correctly identified a number of principles that are fundamental to the constitution, but the decision fell short of providing further clarification on the idea of constitutional morality. Since the word "constitutional morality" still lacks a clear definition, the judiciary is left to preserve the vague concept that serves as the cornerstone of Indian democracy. A thorough examination of the Indian constitution reveals that, despite not being directly stated in the grundnorm, the preamble, fundamental rights, DPSPs, and fundamental responsibilities all contribute to the fundamental morality of the document. In summary, constitutional morality can be characterised as actively adhering to the essential tenets of the Indian constitution while enforcing justice for the benefit of the larger public. Put another way, it means upholding the spirit of the Indian constitution while prioritising the common good over the interests of any one person.

(A) What is Public Morality?

The moral and ethical norms that are upheld in a community are referred to as public morality.¹⁸ The word "morality" basically refers to judging what is right or bad based on the consensus of members of a society, while the word "public" refers to society. Public morality is a good indicator of a society's mentality. Furthermore, there is no clear definition of public morality anywhere. Public morality has existed for as long as humans have. Individuals make up society. Each person is unique in their morality, ethics, and beliefs. Nonetheless, a particular group of people hold some moral standards and sets of views in common. These beliefs or ideas help to

¹⁵ Ibid.

¹⁶ Aviral Agrawal, *Conceptualising constitutional morality and its emergence in the recent scenario*, Legalservicesindia <https://www.legalserviceindia.com/legal/article-3479-conceptualising-constitutional-morality-and-its-emergence-in-the-recent-scenario.html>.

¹⁷ *Kesavananda Bharati v. State of Kerala* judgement, (1973) 4 SCC 225.

¹⁸ *Public morality*, Wikipedia (Nov. 4, 2005), https://en.wikipedia.org/wiki/Public_morality.

shape a society's moral foundation, which makes it a very delicate and sensitive concept. Legal jurist Devlin believes that the law should be designed to take into account the moral foundation of society. The goal of the law is to uphold society's moral foundation. He contends that morality is the only thing that can direct people's behaviour inside a society, and as a result, all laws must uphold the fundamental moral principles of that society. Morality is a personal and social construct that varies widely among individuals and communities.

III. JUDICIAL INTERPRETATION OF LAWS: A RATIONALE BETWEEN CONSTITUTIONAL AND PUBLIC MORALITY

It is clear that public morality and constitutional morality are two distinct ideas with differing relationships to the development and expansion of modern society. Compared to public morality, constitutional morality is a broader idea. The tenets of the Indian constitution serve as the foundation for constitutional morality. The phrase "having solemnly resolved"¹⁹ appears in the preamble of the Indian constitution, indicating that a thorough and deliberate process went into crafting a text that would be appropriate for the democratic nature of the country. It should be understood that the constitution is the ultimate law of the land, superseding all other laws. All this says is that when it comes to morality, constitutional morality is superior to the public morality ethos. Another obvious distinction is that public morality is only a socially accepted interpretation of what is right or bad, but constitutional morality seeks to fulfil the needs of society as a whole by respecting the principles of the constitution. It is believed that public morality is a natural attitude in society. Since the beginning of human history, it has prevailed. Because it lacks impartiality, public morality is a little problematic concept. Individual aspirations are typically satisfied by public morals, as opposed to societal aims. But constitutional morality must always come first in a country that is constantly changing, like India. Dr. B.R. Ambedkar correctly noted in his well-known speech that "Constitutional morality is not a natural sentiment" and stressed the significance of this idea.²⁰ It has to be developed. We have to acknowledge that this is a skill that our people lack. India's democracy is merely a cosmetic overlay atop an ultimately non-democratic land. However, since this theory isn't expressly stated in the constitution, it is up to the court to use constitutional morality to defend the spirit of the document. The Supreme Court has repeatedly issued rulings that have been so revolutionary that they have killed public morals in an effort to preserve constitutional morality and opened the door for social upheaval. There have been numerous attempts to define

¹⁹ Ind. Const. Preamble.

²⁰ Ambedkar, Speech Delivered on in The Constitution and Constituent Assembly Debates (25 November 1949).

what constitutional morality is. First, an attempt was made to clarify the doctrine in the *Keshavananda Bharti* case²¹, but it eventually faltered. In the *First Judge's* case²², violations of the constitution were described as grave harm to India's constitutional morality, but no fundamentals on the elements of constitutional morality were discussed. Recently, an attempt has been made to clarify the phrase in the *Kantaru Rajeevaru v. Indian Young Lawyers Association* case²³. Different judgements have used the term "constitutional morality" in different contexts. The Supreme Court, for example, stated that constitutional morality should be the guiding principle in *Manoj Narula v. Union of India*²⁴ and that nothing should be done that would be against the law. However, in *NCT of Delhi v. Union of India*²⁵, the Supreme Court equated the basic structure doctrine with the doctrine of constitutional morality itself. Therefore, it is undeniable that cases become more difficult to settle when there are no clear boundaries for constitutional morality, but it is also crucial to remember that the Indian court has always handled these difficulties effectively and efficiently. The discussion of constitutional morality in a variety of contexts has increased recently. Below is a list of some of the rulings that have given constitutional morality varying degrees of weight and discouraged public morality:

- Public morality is countered by the concept of constitutional morality. In the 1950s, the Supreme Court made the correct decision in the *State of Bombay v. R.M.D. Chamarbaugwala*²⁶ case, ruling that gambling is illegal since it breaches the moral code of the constitution and is not included in the list of fundamental rights.
- In a different case, *Nashirwar v. State of M.P.*²⁷, the court determined that both the federal and state governments have the authority to impose regulations on the sale of alcohol, and that these regulations are consistent with the ethos of constitutional morality as articulated in the directive principle stated in DPSPs.²⁸
- The Delhi High Court ruled in the historic *Naz Foundation v. Govt. of NCT of Delhi*²⁹ case that considering a consenting sexual union between people of the same sex as illegal goes against the Indian Constitution's A.21 guarantee of fundamental rights for homogeneous people. Furthermore, it was maintained that public morality and constitutional morality are

²¹ (1973) 4 SCC 225.

²² S.P. Gupta v. Union of India, (1989) Supp (1) SCC 87.

²³ Review Petition (Civil) No. 3358 of 2018, majority judgment dated 14 November 2019

²⁴ (2014) 9 SCC 1.

²⁵ (2018) 8 SCC 501.

²⁶ 1957 AIR 699.

²⁷ 1975 AIR 360.

²⁸ Ind. Const. A. 47.

²⁹ 160 Delhi Law Times 277.

not the same. The court correctly pointed out that public morality was a personal belief system that benefited a select few. Nonetheless, it contended that the court should take constitutional morality into account rather than public morality in order to establish a “compelling state interest.”³⁰ The court had appropriately employed constitutional morality as a means of displacing the erroneous beliefs of public morality.

- The court noted in *Justice K.S. Puttaswamy v. Union of India*³¹ that, in accordance with A.21 of the constitution, the right to privacy is a basic right. The underlying principle of the ruling was that an individual’s rights cannot be compromised or infringed upon in order to appease a certain group of people. So sustaining the spirit of constitutional morality and ruling the notion of public morality.
- In a quiet ruling, the Indian Supreme Court rejected the argument made in *Navtej Singh Johar v. Union of India*³² that gays were a tiny minority and therefore section 377 of the Indian Penal Code, 1860 should not be decriminalised. This ruling decriminalised homosexuality, opening the door for changes in the position of homosexuals in modern-day India. This ruling serves as an excellent illustration of the reasons constitutional morality is crucial to preserving a democratic society’s unity. This ruling serves as a crucial benchmark for gauging the extent to which Indian society has changed to fairly accept people of all religious beliefs. This decision is an important authority to see the parameters of how far the Indian society has evolved to accommodate all sects of individuals equally.
- One of the most contested rulings from the Indian Supreme Court is the *Joseph Shine*³³ Case. The ruling resulted in the abolition of adultery as a crime. “Constitutional morality, not the common morality of the State at any time in history, is what must guide the law,” the court declared. But because this ruling directly affects the moral decay of Indian society, it is heavily attacked. The balance between criminal jurisprudence and constitutional morality has not been achieved by this ruling.
- *Shayara Bano v. Union of India*³⁴, also referred to as the triple talaq case, is another significant ruling in which the Supreme Court struck down the practice of triple talaq on the grounds that it violated the constitutional ethos; however, no explicit reference to constitutional morality was made in this case.

³⁰ Naz Foundation v. Govt. of NCT of Delhi, 160 Delhi Law Times 277

³¹ (2017) 10 SCC 1.

³² AIR 2018 SC 4321.

³³ Joseph Shine v. Union of India, 2018 SC 1676.

³⁴ (2017) 9 SCC 1.

- The *Sabrimala*³⁵ ruling, which granted women between the ages of 10 and 50 equal access to the Sabrimala shrine, turned out to be the most groundbreaking ruling. As per the court's opinion, "the term 'morality' as used in Article 25 (1) of the Constitution cannot be interpreted narrowly to mean what it means to be an individual, a group, or a religious sect." The term "morality" inherently implies constitutional morality in cases involving violations of fundamental rights, and the Constitutional Court's ruling must be consistent with fundamental constitutional morality derived from the constitution itself. Certainly, one aspect of constitutional morality is equality and non-discrimination. Nonetheless, it is impossible to consider equality and non-discrimination in religious affairs in a vacuum. It is necessary to strike a balance between the protection of the deeply held liberties of faith, belief, and worship—guaranteed by Articles 25 and 26 to individuals belonging to all religions in a secular polity—and the principles of equality and non-discrimination. The idea of subjective public morality has been crushed by constitutional morality, which demands that all such rights be balanced or harmonised in order to protect the religious views of all.³⁶ This decision is the best illustration of how constitutional morality has done this. Similarly, different judges are expressing diverse perspectives at different times, and attempts have been made to preserve Ambedkar's concept of constitutional morality.

IV. CHALLENGES IN UPHOLDING CONSTITUTIONAL MORALITY

Numerous legal jurists have challenged how the Indian courts have applied and interpreted the concept of constitutional morality. Constitutional morality is a deadly weapon in the hands of the Indian judiciary, according to Attorney General K.K. Venugopal.³⁷ Many distinguished individuals hold the opinion that this approach grants the judicial branch broad authority, which could be disastrous for the government's ability to pass laws independently. The several points of criticism can be enumerated as:

- The court has a great deal of discretion since constitutional morality lacks precise bounds. Furthermore, this results in the impact of individual biases and prejudices on the decisions made.
- In the end, this approach will lead to judicial overreach. The concept of separation of powers serves as the foundation for the Indian constitution. The legislative branch has been given exclusive authority to enact laws, with the judiciary's role being limited to providing legal

³⁵ Indian Young Lawyers Association & Ors vs The State of Kerala & Ors., (2019) 11 SCC 1

³⁶ Indian Young Lawyers Association & Ors vs The State of Kerala & Ors., (2019) 11 SCC 1

³⁷ The Quint, *Constitutional Morality Very Dangerous, Hope It Dies: KK Venugopal*, (Dec. 9, 2018), <https://www.thequint.com/news/india/kk-venugopal-attorney-general-constitutional-morality>.

interpretation. However, the growing trend of utilising constitutional morality as a counterbalance to popular morality is causing judges to overreach, which is a blatant disregard for the constitution's cherished principle of the division of powers.

- There is a higher likelihood of the law being misapplied or misconstrued because there are no clear guidelines for applying this theory. Without a doubt, the Indian Constitution gives all statutes their authority, but it's important to recognise that constitutional morality is causing judicial bias and impeding the administration of justice. The recent ban on the hijab is perhaps the most obvious illustration of this. It is extremely debatable whether the court would have rendered a different decision if it had been able to fully express the requirements of the Indian constitution. There is a contention that the judiciary frequently fails to distinguish between public morality and constitutional morality.
- Some contend that the concept of public morality is arbitrary. The concept of constitutional morality is also arbitrary in the eyes of the judges. This idea is not absolute or objective; rather, it has developed over time.

V. CONCLUSION

The means by which society advances and grows in the proper direction is the balance that exists between the interests of the individual and the shared aims of the community. To address the issue of judicial overreach, a specific definition of constitutional morality is required. It is impossible to characterise the idea as untrue in and of itself, but in order to achieve its goals, implementation of the idea must be properly managed. One such idea that the modern society needs is constitutional morality. It has greatly benefited society thus far, and it will continue to do so in the years to come. It is evident that this theory has broadened the judiciary's purview in carrying out its primary duty of ensuring justice for all. From the explanation above, it is also clear that justice comes first, regardless of other variables that may be in play.
