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# Confluence of Religious and Constitutional Morality: An Interpretation by Supreme Court

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## ABSTRACT

*India, known for its rich tapestry of cultures, religions, and traditions, has grappled with the intricate interplay between constitutional morality and religious morality since its inception as a modern nation-state. Constitutional morality, enshrined in the Indian Constitution, reflects the secular and democratic principles upon which the nation was founded. It emphasizes individual rights, social justice, and the rule of law, serving as a guiding framework for governance and societal development. However, India's religious diversity, with its myriad belief systems and practices, has often led to tensions between constitutional and religious morals. Religious morality, deeply rooted in India's history, shapes the ethical compass of its citizens. The country is home to several major religions, including Hinduism, Islam, Christianity, Sikhism, Buddhism, and Jainism, each with its unique set of values and beliefs. These religious moralities can sometimes clash with constitutional principles, particularly in areas such as personal laws, freedom of expression, and cultural practices. This paper explores the nuanced relationship between these two moralities in the Indian context, shedding light on the challenges and opportunities they present for a diverse and pluralistic society. It also discusses how the Indian judiciary has played a crucial role in striking a balance between constitutional and religious morality, often through landmark judgments.*

**Keywords:** *Constitutional Morality, Religious Morality, Dr. Ambedkar, Supreme Court.*

## I. INTRODUCTION

The relationship between law and morality has been the subject of heated controversy debated since the resurgence of jurisprudence as a scientific discipline, but the issue has yet to be resolved, and may never be. Every variation of thought has been entertained, ranging from Austin's extreme teaching that law is entirely independent of morality for the purposes of the jurist, almost to the opposite position, held by every Oriental cad, that morality and law are one. The question is significant, and the answer has far-reaching implications that go beyond

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theoretical implications. The issue is a really practical one.

The prevalent understanding of the relationship between law and morality is that the law exists in some way to promote morality, to preserve the conditions that allow men to live moral lives, and so to enable them to live sober and productive lives. The average person sees law as a systematized version of justice, and justice as a jumble of moral ideals.

According to this approach, the positive law is viewed of as a set of rules that corresponds to the set of moral laws, derives its authority from the moral laws' obligatory nature, and is just or unjust depending on how it coincides with or departs from them. This, like all other popular notions, is unsuitable for scientific purposes, and the jurist is obligated to renounce it, at least in as much as he is also a scientist but the facts contradict it. Positive laws are not based on moral principles, and common concepts of fairness do not provide a court of appeal for state decisions. The average person conflates law and morality, and confuses legal concepts with abstract justice principles.

## II. RELIGIOUS MINORITY

“Nearly a century ago, the princely kingdom of Travancore was torn over the issue of lower castes entering the Vaikom temple. Shree Narayana Guru, the Ezhavas saint, had been barred from using the roadways surrounding the Vaikom Shiva shrine. Mahatma Gandhi had sent Congress activists, including Periyar, to aid in the Satyagraha, which demanded equitable access to the shrine, in response to a plea from certain Travancore residents.

The Maharaja of Travancore at that time was 12 years old. His parents opposed equal temple entry. Gandhiji asked that young man, “*When you attain majority and assume full authority, will you allow Harijans to enter the temple?*” The 12 years old Maharaja said without hesitation: ‘certainly’. This was not the result of anybody’s advice but arose from his own mind.” This shows that morality that got affected by societal norms where those things are right which are accepted according to their customs and traditions, but a child with unsullied mind can see what is moral with common prudence.

Socrates asks: “*Is the pious loved by the Gods because it is pious, or is it pious because it is loved by the Gods?*” This is a deep question to go into the roots of the religious morality. It thus leads to all-powerful, all-wise, totally moral notion of God to following moral problems:

- Are God’s commands and behavior themselves arbitrary?
- Whatever God or their messenger approve, will be right? It doesn’t matter what other repercussions it follows?

It then rises to questions upon goodness and upon the very nature of morality. As Leibniz said, “Why we praise him for what he has done if he would be equally praiseworthy in doing the contrary?”

The ‘religious morality’ can be defined as the accepted behavior or conduct of a particular group or society in general. It also includes the principles flow from the ancient wisdom of religion and long accepted customs and traditions. It differs to a great extent from person to person and society to society.

### III. CONSTITUTIONAL MORALITY

*“Democracy, which is best characterized as administration of, by, and for the people, expects genuine orderliness, positive propriety, committed discipline, and sanguine sanctity by persistent affirmation of constitutional morality, which is the cornerstone of good governance.”*

The notion of constitutional morality has been successfully used by the judiciary as an interpretation of the constitution to overcome age-old rules that need to be altered with the passage of time and the evolution of society. In a number of cases, the Court has applied various aspects of this progressive and transformational doctrine, some of which may be considered among the best and most significant decisions ever rendered. Nonetheless, many argue that the application of this concept amounts to judicial overreach, putting "constitutional morality" against "societal/popular morality."

The concept of constitutional morality is not defined anywhere, yet there are many distinct interpretations of it. It simply means adhering to the core principles of the constitution in a democracy, i.e. an individual's moral commitment to uphold the constitutional ideals with the utmost dignity and faithfulness. It thus goes beyond a strict interpretation of the constitution's wording and dwells in the spirit of the document, which serves both individual and communal societal interests.

In India, this concept is still in its early stages and has been evolving through time. The theory has recently been used by the Supreme Court of India to strike down laws that could be considered manifestations of popular morality, and as a result, it has taken on new meanings and interpretations.

The moral responsibility of the state and individuals to be faithful to constitutional norms and principles and uphold them with utmost honesty is known as constitutional morality.

After the Supreme Court's Sabarimala decision, the theory came under fire and became a hot topic of debate, especially after India's Attorney General referred to the Constitutional Morality

doctrine as a "dangerous weapon." Following that, the duty of defining "Constitutional Morality" was delegated to a Supreme Court bench of seven judges. In light of this, it is critical to comprehend what is meant by the term "Constitutional Morality," what the doctrine's current significance is, how the concept evolved over time and how it is interpreted by the courts, what grounds the application of this doctrine is being criticised on, and what principles should guide our approach toward it. We shall endeavour to answer these queries through this text.

Constitutional morality is based on ideals such as individual autonomy and independence, equality without discrimination, respect of identity with dignity, and the right to privacy. Adherence to the essential ideals of constitutional democracy is referred to as constitutional morality.

### **(A) Origin of Constitutional Morality**

The origins of constitutional morality can be traced back to the ancient Greek city-state of Athens. Athenian democracy was able to achieve components of a unique constitutional morality. This was noticed by George Grote, an English political historian who was the first to use the term "constitutional morality." In his work "A History of Greece," published in the 19th century, British Classicist George Grote proposed the concept of constitutional morality. He described Constitutional Morality as a "paramount reverence for the forms of the Constitution" of the land.

In Ancient times "Shukracharya", also known as Usanas, is the originator of the code, which is said to have originated during the Vedic period gave , 5 vices listed by Sukra Neeti

- i. Raga (leaning in favour of a party),
- ii. Lobha (greed),
- iii. Bhaye (fear),
- iv. Dvesha (ill-will against anyone) and
- v. Vadinoscha rahashruthi (a judge meeting and hearing a party to a case in secret, i.e. in the absence of the other side) is a practise that every judge should avoid in order to maintain impartiality. Socrates advises judges to listen kindly, comment wisely, examine earnestly, and conclude reasonably in order to guarantee judicial diligence.

Diligence is defined as performing judicial tasks with the utmost care, skill, and attention, as well as with justified adequacy. Many constitutional difficulties do not have simple solutions that may be found in publications or research papers; instead, they must be discovered through the soul of the constitution, political morality, and democratic ethics. The main basis for the

survival of parliamentary democracy, the protection of ideals, and individuals' fundamental rights is the existence of a powerful and independent court. Ambedkar also mentioned a quote by Grote, a Greek historian: *“Because even the most powerful and obstinate minority can render the working of a free institution impracticable without being strong eno, the diffusion of constitutional morality not only among the majority of any community but throughout the whole is an indispensable condition of government that is both free and peaceful.”*

### **(B) Ambedkar’s perspective on Constitutional Morality**

In the Indian context, the term Constitutional Morality was coined by Dr. B.R. Ambedkar in November 1948 during a parliamentary debate on the draught constitution's administrative provisions. In the Indian Constitution, the term "constitutional morality" does not appear. Nonetheless, the word "morality" is included in the constitution in connection with "public order" in several places.

Ambedkar defined constitutional morality as an effective coordination between opposing interests of different people and administrative collaboration to resolve those difficulties or conflicts amicably without resorting to significant confrontations or violent revolutions, based on Grote's work. According to him, constitutional morality was the solution to societal inequity, and the philosophy essentially translated to respect among republic stakeholders for constitutional democracy as the acceptable method of governance and administration. It ultimately indicated a "coexistence of self-imposed restriction and freedom."

It means that citizens would respect the Constitution and obey constitutional authorities, but they would also have the freedom to criticise those authorities, and constitutional authorities would be bound by the law's limitations

The concept of constitutional morality, according to Dr. Ambedkar, entailed a harmonious interaction between the governing and the governed, including the peaceful resolution of dissent from the latter and conflict of interests that arose between them without resorting to major confrontations or violent revolutions. He placed the responsibility for correcting the society's disparities and inequity not only on the government or the Constitution, but also on this belief system or principle of constitutional morality. He believed that by applying this idea, the country's bridge and gap between the form of government and the constitution could be bridged. Bhimrao Ambedkar believed that Indian society was primarily undemocratic in character, and that constitutional morality is important in a country where democracy is only a "top-dressing."

### **(C) Source of Constitutional Morality**

The concept 'morality,' let alone constitutional morality, is not overly defined in the

Constitution. Constitutional morality, on the other hand, might come from four different places. The following are some of them:

1. The origins of constitutional morality can be found within the Constitution itself. Articles 12 to 35 (Fundamental Rights), Articles 36 to 51 (Directive Principles of State Policy), the Preamble, and the Fundamental Duties, when read and interpreted correctly, have a pervasive essence emphasising constitutional morality.
2. The arguments and discussions that took place in the Constitutional Assembly have been one of the most important sources of constitutional morality, with Ambedkar's views serving as the foundation for modern-day understanding.
3. The events that occurred during the drafting of the Constitution, as well as the necessary constitutional history.
4. The case laws and precedents, particularly in today's times with so many harsh laws read down by the Hon'ble Supreme Court and several High Courts in defending the spirit of constitutional spirit, morality, and strengthening democratic principles.

#### **(D) The contemporary interpretation of Constitutional Morality**

In the modern era, constitutional morality can be divided into two categories: spirit or force of the Constitution, and antonym of popular morality.

Since the inception of the constitutional rule in India a number of years ago, the courts have rarely applied constitutional morality. It was hinted at gently in the highest court's landmark Keshavnanda judgement when it propounded the concept of the Constitution's basic structure. The First Judges case, a.k.a. *S.P. Gupta v. Union of India*, was another well-known case in which a "breach of constitutional morality" was mentioned. After that, it wasn't until Justice Ajit Prakash Shah used it in *Naz Foundation v. Government of NCT of Delhi* in 2010 that it was employed in a way that was contrary to popular acceptance and morality standards. In this fashion, a precedent was established for courts to overlook societal norms, stigmas, and constraints when evaluating government activities. In this case, for example, the Court considered the ideal of upholding constitutional principles rather than society's perception of the legitimacy of same-sex relationships while deliberating on the issue of decriminalisation of homosexuality, which was previously a criminal offence under Section 377 of the Indian Penal Code.

Judges began to use constitutional morality as a reason in their subsequent decisions, continuing the pattern. In the case of *Government of NCT of Delhi v. Union of India*, Justice Deepak Misra,

the former Chief Justice of India, linked constitutional morality to a "second basic structure doctrine." The fact that the principle was respected and adhered to by both citizens and officials was reaffirmed, and it was strengthened by the justices as a check on both of these classes. Almost every recent revolutionary decision, whether it was the *Navtej Singh Johar* decision on homosexuality or the *Joseph Shine* decision on adultery, had constitutional morality as one of its key tenets. In fact, the Supreme Court overruled the theory of essentiality (which protects a community's "integral" religious rituals) to defend the supremacy of constitutional morality in the *Indian Young Lawyers' Association v. Union of India*, widely known as the Sabrimala decision.

In *Manoj Narula v. Union of India*, the Supreme Court observed the 'Constitutional Morality' to a defining extent. The majority view in the constitutional bench held that:

*"Morality as defined by the Constitution is not a natural sentiment. It needs to be nurtured. We must acknowledge that our people are still learning." "The idea of Constitutional Morality fundamentally implies bowing down to the standards of the Constitution and not acting in a manner that would become violative of the rule of law or reflectible of action in an arbitrary manner," the case continued."*

### **(E) Importance of Constitutional Morality**

1. The idea of constitutional morality not only attempts to keep up with the changing times, principles, and objectives of society, but it also protects and supports the country's rule of law enforcement. As a result, it is not one-sided and tends to question both citizens and the government.
2. The notion of constitutional morality is also useful for facilitating and coordinating the cooperative efforts of all stakeholders in promoting and sustaining the nation's democratic principles. It aspires to increase people's amiability in order to pursue constitutional goals that cannot be achieved without unity and teamwork. As a result, it emphasises the importance of developing public trust in democratic institutions.
3. The notion of constitutional morality can be used to interpret laws or legislation that are out of date, as well as to affect beneficial changes in society or public morality perceptions. For example, by passing a rule forbidding Sati, Indian widows who were formerly seen to be harbingers of calamity and ill-luck were granted the right to life and dignity. However, after the passage of this law, there has been a noticeable shift in public perception of Sati and widows' rights in India. It also resulted in the granting of additional rights to them, such as the ability to remarry and continue their education after their husband's death.



4. Constitutional morality is especially important in a vibrant and diverse country like India, which has a heterogeneous population with several subclassifications such as caste, religion, colours, sexual orientation, languages, genders, and so on. Since one of the principles of constitutional morality is 'plurality,' it recognises this distinction and non-homogeneity and fosters diversity, so helping to make society more inclusive.
5. Many officers have been observed resigning or leaving their government employment in order to show solidarity with certain movements and to maintain constitutional morality. The notion of constitutional morality, on the other hand, is in opposition to this; it encourages people to be active participants in the system and to combat inequalities and non-constitutional components.

#### **(F) Significance of this doctrine**

Constitutional morality ensures that the rule of law is established in the land while also incorporating society's changing goals and ideals. Constitutional morality is a governing philosophy that emphasises the importance of maintaining public trust in democratic institutions. As such, it empowers people to work together and coordinate to attain constitutional goals that are impossible to achieve alone. Constitutional morality can influence and affect societal morality through laws and forms. For example, by legislating the abolition of Sati, widows were granted the right to dignity and life, which had an impact on how the practise was perceived in society.

Constitutional morality acknowledges society's plurality and diversity and strives to make individuals and communities more inclusive in their functioning by allowing for continuous improvement and reform. In *Navtej Singh Johar v. Union of India*, for example, the Supreme Court established a framework to reaffirm LGBTQ and other gender non-conforming people's rights to dignity, life, liberty, and identity.

#### **1. Safeguards and upholds the enforcement of rule of law in the country:**

Constitutional Morality essentially means to submit to the Constitution's norms and not to act in a way that would be a violation of the rule of law or represent an arbitrary action. Because the concept tends to question both citizens and governments, it encourages people to participate actively in the system and resist injustices and unconstitutional components.

#### **2. Promoting and reinforcing the democratic ideals of the nation:**

The idea encourages all parties, particularly citizens and the state, to work together and coordinate to achieve constitutional goals. As a result, it emphasises the importance of

developing public trust in democratic institutions

**3. Bring about a positive transformation in the perception of societal or public morality:**

The notion of constitutional morality can be used to the interpretation of laws or statutes that are out of date. For example, by passing a rule forbidding Sati, Indian widows who were formerly seen to be harbingers of calamity and ill-luck were granted the right to life and dignity. However, after the implementation of this law, there has been a noticeable shift in public opinion, leading to the extension of more rights to them, such as the ability to remarry and continue their education after their husband's death.

**4. Promoting diversity, helping to make the society more inclusive:**

Constitutional morality is especially crucial for a vibrant and diversified society like India, which has a diverse population divided by caste, religion, colours, sexual orientation, languages, genders, and other factors. Because "plurality" is one of the foundations of constitutional morality, it recognises this distinction and non-homogeneity and encourages diversity, therefore contributing to a more inclusive society.

**5. Akin to the basic structure doctrine:**

Constitutional morality' is known as one of the 'Constitutional Silences,' along with fundamental structure doctrine. It establishes implied constitutional constraints on the government, similar to the fundamental structure test, and assures that the government's activities do not contradict the Constitution's spirit, soul, or conscience.

#### **IV. COMPARISON BETWEEN RELIGIOUS MORALITY AND CONSTITUTIONAL MORALITY**

The strength or weakness of constitutional morality in modern India must be understood in the context of a cycle of growing public demands and successive governments' callous responses to those demands. Constitutional morality requirements are assumed to be equally obligatory on both the government and the opposition in a parliamentary democracy.

When a political party is in power in India, it considers these commitments substantially differently than when it is out of power. This has largely contributed to the public's image of our political system as amoral. Apart from its inherent importance, constitutional morality is a topic on which B R Ambedkar talked with insight and eloquence in the Constituent Assembly. It has been argued that Ambedkar has become a symbol for the poor. This is unquestionably correct. But he is also one of the architects of India's current constitutional structure and one of the architects of contemporary India. His constitutional morality judgments, delivered at a key

juncture in our social and political life, are crucial not only for the backward classes or minorities, but for all Indians. The Constituent Assembly convened with high expectations. After a lengthy period of colonial domination, the country had gained independence, and the possibilities for establishing a new social order based on liberty, equality, and social harmony seemed limitless. Indians had progressed from being subjects of an external authority to being citizens of their own territory. The Constituent Assembly brought together a star-studded group of individuals who stood out for their intellectual prowess, political savvy, and moral character. Among all of these individuals, however, Ambedkar stood out as the most perceptive of the conflicts that faced Indian society at the time. He noticed the inherent tensions between the hierarchical social structures inherited from the past and the strong desire for a democratic legal and political order represented in the Assembly more clearly than the others. He, like the rest of the group, had hopes for the future, but unlike the most of them, he had few illusions about the past. He didn't believe that India had a democratic heritage in any meaningful sense; if it had, he believed it had been in the distant past, long since vanished into the mists of time. The social structure of caste was diametrically opposed to democratic political institutions, and caste had long been a distinguishing aspect of Indian culture. Members of the Constituent Assembly were undoubtedly aware of the inequity, violence, and instability that existed in Indian society at the time. However, most of them had developed the habit of attributing every Indian misfortune to the crimes of colonial administration by that time. This practise is still practised by huge segments of the Indian elite today. If colonialism is not the villain, then neocolonialism is the evil. It does not reflect well on us to pass the blame for all of our inconsistencies and dilemmas on to some external agent, working either directly or indirectly through forces over which we never manage to gain control. No colonial power operates in the colonized's best interests at the expense of its own. The British rulers of India were hardly saints, but neither were they villains. They brought about changes in law and governance, some of which were mutually beneficial and have remained useful long after colonial rule ended. These advancements owe a great deal to our current Constitution. The Drafting Committee was chastised on several occasions for borrowing from the 1935 Government of India Act. The approved Constitution is considerably more closely aligned with that Act than with the Manusmriti or any other Dharmashastra. Ambedkar was well aware of this, and he did not hesitate to express his views on the subject. In his final address to the Constituent Assembly, he emphasised the weight of responsibility that the end of colonial control would impose on the leaders of independent India. "With independence, we no longer have the excuse to blame the British for everything that goes wrong." If things go wrong in the future, we will only have

ourselves to blame. The British left more than 70 years ago, but there is no lack of intellectual ammunition among patriotic Indians, of the left as well as the right, to fire at them and other western nations when things go wrong with us.

If any religion allows any immoral thing moral, will the God or the religious gurus interfere to protect the morality? On the other hand if people deny anything as moral and start opposing that guru or religion by what measures it will be ensured that the particular morality should be followed? Now, if the Supreme Court allows anything moral, but people consider it immoral, what will be its implications? In reviews, a larger bench can rule over that judgment or Parliament can nullify that judgment through its legislative power. Hence, in just a simple illustration of the religious morality and constitutional morality, it can be seen that constitutional morality is less fluid and more systematic than religious morality.

The constitutional morality implies the supremacy of the Constitution protecting the equality and liberty and securing the dignity. It prevails over the personal or group belief which is inconsistent with it. Popular morality cannot supersede the constitutional morality. It is modern in nature, applicable equally to all.

In *Government of NCT of Delhi and Others v. Union of India*, there were clear cut discussions on constitutional morality and religious morality. Article 25 of the Constitution of India provides the ‘freedom of conscience, and free profession, practice and propagation of religion’ as a fundamental right. However, like the other rights, it is also not an absolute right; it is ‘subject to public order, morality and health and to the other provisions of Part III of the Constitution’.

In this case, the majority opinion as written by the then Chief Justice of India, Justice Dipak Misra, “*Constitutional morality means that which has inherent elements in the constitutional norms and conscience of the Constitution and that which negates the idea of concentration of power in the hands of few – constitutional morality must be followed by all citizens and all high functionaries – constitutional morality acts as a check on high functionaries and citizens alike – it acts as a check on lapses by authorities and colourable activities and unbridled power – Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document.*”

Justice Chandrachud writing the concurring judgment, wrote-

“*Constitutional morality filling in constitutional silences to enhance and complete the spirit of the Constitution – a Constitution can establish a structure of government, but how these structures work rests upon the fulcrum of constitutional values – constitutional morality*

*provides a principled understanding for unfolding the work of governance – it is a compass to hold in troubled waters – it specifies norms for institutions to survive and an expectation of behaviour that will meet not just the text but the soul of the Constitution – our expectation may be well ahead of reality – but a sense of constitutional morality drawn from the values of that document enables us to hold to account our institutions and those who preside over their destinies – constitutional interpretation, therefore, must flow from constitutional morality.”*

Now, which morality will be considered under the provision of article 25? Will it be personal morality? Or will it be popular or societal morality? Will it be religious morality or will it be constitutional morality? This was also the main issue in the Sabarimala case.

As per Justice Nariman in this case:

*“The phrase ‘morality,’ as used in Article 25(1) of the Constitution, cannot be seen through a narrow lens, limiting the scope of morality definition to what an individual, a section, or a religious sect perceives the term to mean. When fundamental rights are violated, the term “morality” naturally refers to Constitutional Morality, and any decision made by the constitutional courts must be in accordance with the principles and essential doctrines of this constitutional morality, which is supported by the Constitution. Because the Constitution was not imposed on the people of this country by any external force, but rather approved and given to them by the people of this country, the term “public morality” in Article 25 must be appropriately understood as equivalent with “Constitutional Morality.”*

*“For the simple reason that public morality must yield to Constitutional morality, the notions of public order, morality, and health cannot be used as a colorable device to restrict the freedom to freely practise religion and discriminate against women in the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala Temple.”*

Hon’ble Justice D. Y. Chandrachud has opined- *“Evidently, in the constitutional order of priorities, the individual right to freedom of religion was not intended to prevail over but was subject to the overriding constitutional postulates of equality, liberty, and personal freedoms recognised in the other provisions of Part III.”* However, in the same judgment, Justice Indu Malhotra took a different position on the ‘constitutional morality’. She argued- *“...Constitutional morality in a secular polity, such as India, requires a harmonization of various competing claims to fundamental rights...the court must respect a religious denomination’s right to manage their internal affairs, regardless of whether their practices are rational or logical.”*

Hence, she is focusing more on the fundamental right to religion and any regulation of it on the

basis of equality or rationality will be interference in it according to her. It will be very harmful to make this 'morality' a tennis ball and see in which court it goes and how it will be played as Simon Weil said, "To set up as a standard of public morality a notion, which can neither be defined nor conceived, is to open the door to every kind of tyranny."

**(A) Other Aspects of Constitutional Morality:**

This 'constitutional morality' holds various different narratives. Dr. B. R. Ambedkar used it in a very different context. On November 4, 1948 while delivering George Grote as,

*"The spread of constitutional morality throughout a community, not just among the majority, is an essential condition of a government that is both free and peaceful, because even a powerful and obstinate minority can make the functioning of a free institution impossible if they are not strong enough to gain ascendancy for themselves."*

To explain Grote's view of 'constitutional morality' he quoted him again-

*"Grote defined constitutional morality as "a supreme 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 complete confidence in the bosom of the constitution."*

In Grote's interpretation, the phrase 'constitutional morality' had a different connotation than the two frequently assigned to it. Constitutional morality has come to refer to the substantive content of a constitution in modern usage. To be ruled by a constitutional morality is, in this perspective, to be regulated by any constitution's substantial moral entailment. The idea of non-discrimination, for example, is frequently regarded as a component of our modern constitutional morality. Constitutional morality is the morality of a constitution in this sense.

Ambedkar was more familiar with the second usage, which had its origins in the nineteenth century. The conventions and protocols that regulate decision-making where the constitution confers discretionary power or is silent are referred to as constitutional morality in this view. This form of constitutional morality was recently discussed in the case of 2019 Maharashtra government conflict as the allegations rose against the use of discretion by the governor. One of the allegations was that he was acting as an agent of the central government and not according to the constitutional norms.

When the case was brought before the Supreme Court, the Court while ordering the floor test in the legislative assembly to determine which party or group has a majority so as to be invited to

form government, the court has emphasised the requirement of imbibing constitutional morality by the constitutional functionaries. Undemocratic and illegal practices within the political arena should be curtailed.

In *Shrimanth Balasaheb Patil v. Karnataka Legislative Assembly* the apex court has held that-  
“*Although the Constitution may not say everything, the Supreme Court is mandated to expound the unsaid. However, such elaboration cannot be done in derogation of separation of powers and in a drastic or radical fashion...and constitutional morality should never be replaced by political morality, in deciding what the Constitution mandates. Constitutional functionaries and their activities must maintain constitutionalism and constitutional morality, according to the Constitution. A functionary is expected to be unaffected by the current political morality and pressures in this regard.*”

However, when we trace the origin and development of ‘morality’, a direct link between the religion and morality emerges glaring. It was the religion which was earlier in the position of law. It was the religion which taught people obedience, which brought morality and concept of justice. In early ages, moral principles were taught and propagated as religious principles. Religious and traditional values were used and taught as moral principles. Later, law created a distinction between religion and morality and between law and morality. It is not wise to deny role of religion in bringing the sense of justice and the morality into human society. Religious morals have formed the basis of our society for many years, however, that is not to say we can’t get to morality without religion.

In modern times, morality is also governed according to law. Can this judge made constitutional law principle ‘constitutional morality’ be seen as a danger to certainty and encroachment in religious rights? The Attorney General of India has also called it as a ‘dangerous weapon’. Justice Deepak Mishra while answering for his apprehensions said, “*Constitutional morality is not an unruly horse, people have criticized the basic feature doctrine as well but now we know what the basic features of the Constitution are. We can debate over it now, but it can be judged after a decade or so.*”

The purpose of having a constitution is to have the rule of law, a fair justice system and a just administration system with reasonable laws. In a country governed by Constitution no one can have a separate set of principles which are not in conformity with the Constitution, no one other than the Constitution and the interpretations made by the constitutional courts can put limits or restrictions on the fundamental rights of the others.

The constitutional morality based on constitutional principles and interpretations made by the

learned judges of the apex court will have far more fair operation and application. Morality standards change over time; there are plenty of examples in which something which immoral earlier now has become moral or something that was moral earlier now has become immoral.

It depends so much on the time and place. Also, it varies from person to person and group to group. That is also one of the apprehensions that what if each individual judge approaches to this 'constitutional morality' norm or tool differently. The concept of 'public morality' was relied so many times that resulted in the curtailment of many women rights and also neglecting, avoiding and denying the rights of LGBTQ community too. Many human and individual rights came to them very late just because the societal or public morality was different, the public practice was different.

It was required that those issues should have been looked through the perspective of constitutional principles as they have been looked now rather than by popular, societal or public morality which have been done in various issues recently whether it is *Navtej Johar case* or *Joseph Shine case* or various other judgments in this series or context. Many other issues are also waiting to be dealt with separating it from popular, societal or public morality and according to constitutional morality and they are mainly in the purview of religion or other cultural or societal practices.

The progressive judgments are not just good for the society and the fundamental rights of the individuals in their specific contexts or issues, they also paves the ways for various other social and legal developments bringing new and reformative perceptions. The purpose of having a constitution is to establish a morality that transcends positions and disagreements on specific issues; indeed, its strength was that it provided a framework for having a common institutional life despite disagreements on various issues and conflicts between different practices.

It is the duty of the court to uphold the better and progressive social norms or to introduce them where they are absent and also to suppress and to invalidate the regressive and repressive social and religious norms and traditions. If any custom, usage or tradition goes against the constitutional principles or fundamental rights, it must be read down as two authorities cannot govern the persons or society, collectively speaking; the one is the religion and the other is the Constitution.

The religion is granted as the fundamental right under the Constitution, hence, though all the religions should be respected, they have to be in conformity with the Constitution. Religion can neither create nor demand its own authority over the public, though unnecessary and unreasonable interference must not be made to one's fundamental right to freedom of religion.



A conscious effort must be made to uphold the just, fair and reasonable principles and balancing the conflicting interests ensuring JUSTICE, LIBERTY, EQUALITY and FRATERNITY, with the DIGNITY of each individual.

## V. CONSTITUTIONAL MORALITY: A DANGEROUS WEAPON

Attorney General of India K.K. Venugopal was widely quoted in the press as criticising it as a "dangerous weapon," constitutional morality became a topic of debate. Neither Grote nor Ambedkar meant for courts to employ constitutional morality to determine the legality of government action. It was an ideal for them — a desire that citizens would develop a love for the Constitution, making it more difficult for the political authorities of the day to obliterate it. As a result, the obvious problems about constitutional morality as a philosophy for evaluating legislation's legality arise.

Former Attorney General KK Venugopal also expressed his displeasure, saying, "*Constitutional morality is extremely destructive to the country.*" And if we utilise this approach, we have no idea where we would end up. I sincerely hope that constitutional morality perishes. Otherwise, Pandit Nehru, our first Prime Minister, may be correct in his prediction that the SC will become the third chamber.

*"If the judiciary were to be fully unbound by any sort of self-restraint or devotion to the text and spirit of the Constitution and uncover its true charter with reference to legislation established by the legislature, it could well be judged to be in breach," Mr Gopal Subramaniam said. It is critical that the substance of public trust in the various state organs be rebuilt. That can only be accomplished via what I believe are restorative acts that must be diligently carried out by those who occupy positions in government, legislation, and the court. The only way to assure that constitutional morality is sufficiently engrained that constitutionalism is no longer jeopardised by caprice, whims, and excessive power concentrated in a few individuals is to go through this process of restorative rebuilding of confidence.*" Any law, every theory, it is stated, may prove to be dangerous if it is applied without regard for justice and societal impact. Mr Nani Palhiwala, while arguing in a private prosecution case, stated that "*righteousness; sense of public responsibility or this image resides in the heart of every citizen and once this dies, no Constitution, no law, no amendment, can preserve it.*" If this concept is continues to be exploited unethically and arbitrarily in the courtroom without the presence of visibility and oneness, it will be dangerous.

### (A) Criticism of Constitutional Morality

Aside from the benefits and necessity of constitutional morality, there are several concerns that

legal experts, legislators, jurists, and the courts must face. These have been examined in more detail below:

The word "constitutional morality" is not explicitly defined in the Indian Constitution. Furthermore, despite the existence of various precedents or judgments based on the principle, constitutional morality has yet to be given a definite definition. As a result, it has an open-ended meaning that can be interpreted in a variety of ways by various people. Furthermore, it has been left to the individual judges' discretion to understand its essence and apply it in appropriate conditions.

Another argument advanced by opponents of constitutional morality is that it impedes the organic and natural evolution of liberalism or the correction of society's wrongs or ethical afflictions by putting power in the hands of the courts to adopt a "top-down approach" to the morality ideal. Some have added to this argument the premise that it indirectly indicates a lack of faith in the genuine goals of democracy, which are founded on the wisdom of the people who will be ruled.

One compelling argument against constitutional morality as a judicial basis is that it violates a fundamental foundation of democracy, namely, the separation of powers between the three wings of the State governance framework: judiciary, legislative, and executive. Dissenters continue to advocate the view that employing constitutional morality to protect and promote democracy is a fraud since it fosters judicial supremacy and excessive activity by the courts, leading to meddling in activities that are primarily sanctioned to be handled by the legislative. Some see this as a ruse to promote constitutionalism while ignoring the constitution.

Another corollary critique to the above point is that constitutional morality promotes judicial overreach by pitting it against societal morality. Mr. K.K. Venugopal, India's Attorney General, recently termed Constitutional Morality as "hazardous" to the country. He stated that the Supreme Court is gradually becoming a "third Parliament Chamber." Coming from a top legal authority like the AG, this has the potential to create an unfavorable view of this principle among the general public.

**1. A scarcity of literature and understanding of the concept of constitutional morality:**

Because there is no explicit reference of the term "constitutional morality" in the Indian Constitution, and no definite definition has been assigned to it, individual judges have been left to interpret the core of this theory and apply it in appropriate instances. As a result, subjective judgments by separate judges with differing perspectives are possible. In the Sabarimala case, for example, the majority opinion found that the restriction imposed on

women between the ages of 10 and 50 is contrary to CM, while one dissenting opinion stated that “*Constitutional morality will demand that each individual have the right to his or her own faith, which no one can interfere with; the courts cannot intervene in matters of faith.*”

2. **Encourages judicial supremacy and activism by the courts:** Using constitutional morality to uphold and promote democracy encourages judicial activism by the courts, resulting in interventions in functions that should be performed exclusively by the legislative. This approach also violates a fundamental foundation of democracy, namely, the separation of powers between the judiciary, legislative, and executive. The Supreme Court's interpretation of Article 142 of the Constitution makes this conceivable. The article discusses the Supreme Court's authority to exercise jurisdiction and issue orders in the pursuit of perfect justice.
3. **Hastens the organic and natural development of liberalism,** as well as the correction of society's wrongs or ethical afflictions, by putting power in the hands of the courts to adopt a "top-down" approach to morality. It also displays a lack of faith in democracy's genuine goals, which are founded on the knowledge of the people who will be ruled.
4. **Instills and encourages public scepticism of state organs:** The Court's top-down imposition of constitutional morality, which is an unelected and independent body, may instil and encourage popular distrust of the Legislature and the Executive.
5. **Acts as a counterweight to public morality:** The concept of public morality is mostly founded on societal notions of good and wrong, rather than the constitution's underlying values. As a result, the decision based on public morality has clashed with the decision based on constitutional morality on multiple instances.

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