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Doctrine of Constitutional Morality in the Context of Indian Legal System: A Transformative Tool

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ABSTRACT

The constitution of India is a living document rather than a book of words. It provides moral guidelines while deciding matters of utmost importance. The constitutional morality means adherence to the core values of principles and philosophy enshrined in the constitution. Law should be based on acceptability of the constitutional parameters. Constitutional morality is not limited only to following the constitutional provisions literally but is based on values like individual autonomy and liberty; equality without discrimination; recognition of identity with dignity; the right to privacy. Recently, the “constitutional morality”; has become much more relevant while interpreting the laws. The Supreme Court has applied different facets of this transformative doctrine in various judgements. Naz Foundation’s case determined that the distinction between popular morality and constitutional morality is the distinction between moralities enshrined in the constitution. Navtej Singh Johar v. Union of India reaffirmed this distinction and decriminalized section 377 of I.P.C. The genealogy of Ambedkar’s signposting of constitutional morality may be traced to the strength of anti-caste resistance and the abolition of untouchability. The central elements of constitutional morality are freedom and self-restraint. In this paper we would like to highlight “doctrine of essentiality” need to uphold constitutional morality and recent Supreme Court landmark judgements. The paper also examines two contemporary uses of constitution morality: first, as an equilibrium to popular morality (in judgments concerning homosexuality, adultery, rape, and the Sabarimala temple), and second, as a reincarnated basic structure doctrine, involving an analysis of the “spirit”, “soul” or “conscience” of the Constitution.

Keywords: *Constitutional morality, Public morality, Constitutional parameters, Individual autonomy and liberty.*

I. INTRODUCTION

India is a democratic country governed by written constitution and rule of law. The constitution of India is a legal as well as a moral document. While the word “morality” has been mentioned only 4 times in the constitution, twice in Article 19, also more commonly

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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 term constitutional morality is adherence of constitutional democracy. The Supreme law of land Constitution of India is a living document rather than a book containing words. The doctrine of Constitutional Morality means adherence to core values of principles and philosophy of constitutional democracy that extended to create egalitarian moral based society based on social, economic and political justice. Constitutional Morality has been regarded as a paramount reverence of the constitution. It specifies norms for the constitution to survive and expectation of behavior that will meet not just the text but the soul of the constitution. The strength or weakness of constitutional morality in contemporary India has to be understood in the light of a cycle of escalating demands from the people and the callous responsive of the successive government to those demands.

The Constitution is important because it provides the values, liberty and individual freedom and maintains the check and balances amongst the different organs, and none usurp the duties and powers of others. Our Constitution has been perceived to the transformative in the sense that the interpretation of the provision should not be limited to the mere literal meaning of the words. Transformative constitutionalism not only include within its wide periphery the recognition of the rights and dignity of individuals but also to foster the adequate opportunities to develop socially, economically and politically. Though the Constitution of India secures justice social economic and political to all its citizens and confers the right to life, liberty, equality, and dignity to all, however women in general and Hindu and Muslim women in particular, children LGBT groups and SC/ST groups etc. are some of the examples who are deprived from the justice and equality.

II. SCOPE OF CONSTITUTION MORALITY

It is the moral responsibilities of an individual together with the society to be lawful towards the values enshrined in the constitution and uphold them with utmost integrity. The morality under Article 19(1)(a), 19(1)(c), 19(2), 19(4), 25(1) and 26 is the morality the constitution conceive of not what public perceives and is vested with the State. Imposing restrictions on the fundamental rights under these articles claiming it as the public morality or public decency or public order is not justified. But equilibrium between constitutional morality and public morality should be maintained. The use of public morality to curb the fundamental rights should be avoided and hence constitutional morality plays the role when public morality crosses the limit. Constitutional morality gives assurance of establishment of rule of

law in the land while integrating the dynamic needs of the society. This doctrine forms to impact and change the persisting societal morality. The abolition of sati by enactment is an example in this regard, as it leads to a better society. Constitutional morality is a progressive tool since it recognizes plurality and diversity prevailing in a society and provides scope for improvements and reforms. For instance, decriminalization of criminal offence against homosexuals in *Naz Foundation' case*³ and again reiterated in *Navtej Singh Johar's case*⁴ helped to realize the trauma faced by LGBTQI community and helped to reaffirm their rights to live with dignity, identity and liberty.

Flouting Laws

Abolition of untouchability in all its forms, including scavenging remains an unrealized constitutional right. Article 17 of the Indian Constitution says that “Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law”. Justice D.Y. Chandrachud puts it aptly in his judgement in *Justice KS Puttaswamy v Union of India*⁵ (2017) that the vision of founding father was enriched by the histories of suffering of those who suffered oppression and violation of dignity both here and elsewhere. This is one of the fundamental rights and which should be enforceable by courts. Clear violation of fundamental rights will strike the root of existence. In the year 2009, the Delhi High Court, in *Naz Foundation v. NCT of Delhi*⁶, invoked Ambedkar’s delineation of constitutional morality in asserting the urgency of decriminalising consensual sexual relations proscribed by Section 377⁷ of the Indian Penal Code.

Article 15(2)⁸ which prohibits any form of horizontal discrimination drawing again from the experience of untouchability that obstructed the universal use of public places, restaurants, water sources, etc. A five-judge bench of the Supreme Court of India, in *Navtej Singh Johar v. Union of India*⁹, deployed this framework to reaffirm the rights of LGBTQ and all gender non-conforming people to their dignity, life, liberty, and identity.

The doctrine of constitutional morality has been observed as a dangerous weapon because the

³ *Supra* note 1.

⁴ *Supra* note 2.

⁵ (2017) 10 SCC 1).

⁶ *Supra* note 1.

⁷ Section 377 IPC: Unnatural Offence: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to 10 years, and shall also be liable for fine.

⁸ Article 15(2): No Indian citizen can be discriminated against on basis of religion, caste, sex, place of birth. It states that no citizen shall be denied access to shop, public restaurants, hotel and places of public entertainment.

⁹ *Supra* note 2.

courts have applied it subjectively depending upon the understanding of the judge. Legally there is no test to determine the constitutional morality and hence a standardized yardstick has to be evolved so as to avoid the scope of legal inconsistencies. The term 'morality' is often confused with popular majoritarian morality. The four key constitutional values depend on Justice, Liberty, Equality and Fraternity. The interpretation of morality should be based on the values enshrined in the constitution. A jurisprudential analysis is needed not only to use this doctrine as a tool to nullify a particular provision but also to establish it in the vocabulary of constitutional law as a philosophical concept having a specific definition and scope.

III. ELEMENTS OF CONSTITUTIONAL MORALITY

- Rule of law: Indian constitution is based upon the concept of rule of law. In *Keshavananda Bharti v. State of Kerala*¹⁰, the Supreme Court held that parliament has held that "Our Constitution postulates Rule of Law in the sense of supremacy of constitution and the laws as opposed to the arbitrariness".
- Individual liberty: Individual liberty means each of us is having the freedom to make our own choices and to do things that we want. As long as we respect others rights of others and their values, then we are free to pursue ambitions.
- Right to Equality: The Constitution of India codifies the fundamental rights, the basic human right of the citizens which are defined in Part III of the Constitution. Article 14 states that "The state shall not deny to any person equal protection of law in the territory of India. This means every person living in the territory of India has equal right before the law.
- Freedom of Choice Expression: Article 19(1)(a) of the Constitution of India guarantees to all its citizen right to freedom of speech and expression. Free expression cannot be equated or confused with a license to make unfounded and irresponsible allegation against judiciary¹¹.
- Preamble: The preamble of Indian Constitution serves as brief introductory statement of the constitution that set out the guiding purpose, principle and philosophy of Indian Constitution¹². Preamble declares India to be sovereign, socialist, secular and democratic republic.

¹⁰ AIR 1973 SC 1461.

¹¹ Radha Mohan Lal v. Rajasthan High Court, (2003) 3 SCC 427.

¹² <https://www.clearias.com/preamble-of-indian-constitution/>

- **Social Justice:** Social justice denotes the equal treatment of all citizens without any social distinction based on colour, caste, race, religion, sex, and so on. Social Justice is the foundation stone of Indian Constitution. Indian Constitution makers were well known to the use and minimality of various principles of justice..
- **Due Process of Law:** The due process has derived its meaning from the word ‘the law of the land’ used in the Section 39 of Magna Carta of 1215. Due process holds the government subservient to the law of the land and protects individuals from the excesses of state. Procedural due process determines whether government entity has taken an individual’s life and liberty without the fair procedure required by the statute¹³.

IV. AMBEDKAR SIGNPOSTING CONSTITUTION MORALITY

India gained the status of free and sovereign in August 15, 1947 after a long struggle and countless sacrifices. It adopted Constitution on November 26, 1949 which came in enforcement on January 26, 1950. It was assumed that the new constitution would be effective enough to terminate the unending patterns of expectation based on gender, caste and religion, and bring increasingly sought changes in the deeply hierarchical and unequal social structure so one would live with dignity and possess equal civil right¹⁴. The Constitution of independent India was meant more than a mere legal manuscript, that likely to structure the norms of governing, define the functions of various key institution as well as political actors for the society as a whole and particularly for the underprivileged sections who is exploited in multiple ways over the centuries especially due to the prevailing dominant social order of Hindu society. The fact that the Constitution of Independent India has borrowed several provisions from the varied Government of India Act prepared by the Britishers during the colonial period, the Constitution reflects ‘Indianess’¹⁵.

Dr. Bhimrao Ramji Ambedkar (1891-1956) has been considered as the Chief Architect of the Indian Constitution. The text prepared by Ambedkar offered a wide range of Constitutional safeguards to all citizens, for instance, socio-economic rights, civil liberties, freedom of religion, the abolition of untouchability and the prohibition of all forms of discrimination among others. In addition to the constitutional rights, he eventually won the Assembly’s support for introducing a system of reservations of jobs in the civil services, schools and

¹³ JOHAN E. NOWAK, *CONSTITUTIONAL LAW*, 387 (West publishing co. 1978).

¹⁴ Ambedkar B. R, *Prospects of Democracy in India*, 49 (New Delhi: Critical Quest).

¹⁵ The word ‘Indianess’ here denotes the distinctiveness of the Indian context which forced the constitution-makers to evolve some provision in the constitution to address the particularities of Indian Constitution.

colleges particularly for the members of Scheduled Caste and Scheduled Tribes. Dr. B. R. Ambedkar, who chaired the Drafting Committee, is notably considered as the Father of the Indian Constitution and played a very pivotal role in the constitution-making. B. R. Ambedkar, undoubtedly and noticeably, was the man who borne the responsibility to fight against the untouchability and exploitation based on Hindu caste system, and struggled for the untouchables right and carved for them a place in the Republican Constitution of India¹⁶. He presented various provision in the constituent assembly for protecting the interest of the marginalised section. Article 15(4), 16(4), 19(1) (d) and (e), 29(2), 275, 330, 335 and 340 incorporated in the constitution are clearly reflection of his conceptual understanding of social and economic justice. The circumstances necessitating the incorporation of certain articles in the Constitution for backward classes have been further explained by the Dr. B. R. Ambedkar, “the Indian Constitution must provide safeguards to prevent castes ‘with their own interest’ from doing mischief to other helpless castes” (1971).

Rightly pointed out that the Constitution has prohibited all the practise based on discrimination, untouchability and forced labour through different types of horizontal and vertical applications of which the Indian Constituted. The vision of B. R. Ambedkar is that it can be the process of constitution-making in India was greatly shaped by the beliefs of B. R. Ambedkar. In fact, several provisions can be traced from the Indian Constitution which seeks to realize the vision of B. R. Ambedkar¹⁷.

As mentioned in earlier, B. R. Ambedkar gave much priority to the principles of equality, liberty, fraternity. For him, it is necessary to ensure equality in our social and economic life at the earliest possible to solve the problem of Hindu society and fraternity meant a sense of common brotherhood of all Indians. Part IV also reflects the conceptualization of B. R. Ambedkar on democracy that is to say; a political democracy should accompany with the social and police democracy. India comprises the vision of B. R. Ambedkar, which is particularly devoted to the principle of social and economic justice, non-discrimination, liberty, equality and fraternity.

V. EQUIPOISE TO POPULAR MORALITY WITH RECENT LANDMARK JUDGEMENTS

The term ‘constitutional morality’ is playing an important role in the recent Supreme Court landmark judgements. Earlier, it was held that the Parliament was restricted to amend the

¹⁶ SUBHASH C KASHYAP, *INDIAN CONSTITUTION AND CONTROVERSIES*, 76 (Vitasta Publication 2010).

¹⁷ CHRISTOPHE JAFFRELOT, *DR AMBEDKAR AND UNTOUCHABILITY: ANALYSING AND FIGHTING CASTE*, 67 (Permanent Black, Jan. 1, 2006).

basic structure of the constitution referring the term constitutional morality in 1973¹⁸. The doctrine of constitutional morality has become much more significant while interpreting the Constitution. It was again reiterated in *S.P. Gupta v. Union of India*¹⁹, that violation of constitutional provision amounts to breach of constitutional morality.

Naz Foundation v. Govt. of NCT of Delhi is another landmark judgement decided by a two-judge bench of the Delhi High Court, which challenged that constitutional validity of Section 377 of Indian Penal Code²⁰ and held that an impugned provision should not be sustained solely on the ground that it amount to enforcing 'public morality', since enforcement of public morality does not amount to a 'compelling state interest'; to justify invasion of the zone of privacy of adult homosexuals engaged in consensual sex in private without intending to cause harm to each other or others²¹. The court referred to a judgment of the European Court of Human Rights in *Norris v. Republic of Ireland*²² in which it was held that "[a] though members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."²³. "Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional'; morality and not public morality²⁴. Therefore to stigmatize or to criminalize homosexuals only on the bases of their sexual orientation would be violative of fundamental rights and against the constitutional morality. The Constitution certainly does not prohibit the state from enforcing morality but the said morality should be constitutional morality. Constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view²⁵.

Though this judgement of the Delhi High Court was overruled by another judgement of the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*²⁶, it eventually found favour

¹⁸ Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461.

¹⁹ (1981) Supp SCC 87.

²⁰ *Supra* note 7.

²¹ *Ibid* para 75.

²² 142 Eur. Ct. H.R. (ser. A) (1988).

²³ *Ibid* para 46.

²⁴ *Supra* note 1, para 79.

²⁵ *Ibid* para 86.

²⁶ (2014) 1 SCC 1.

again with a larger bench of the Supreme Court in *Navtej Singh Johar v. Union of India*²⁷. The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles of constitutionalism²⁸. Values enshrined in the constitution must not be allowed to be crushed by obscure apprehension of popular morality which has no legal tenability. 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 citizens²⁹. The court propagates the idea that the constitutionality of a law will have to be judged keeping in mind the dynamic and interpretative changes of the statute affected by the passage of time³⁰.

Again in *Independent Thought v. Union of India*³¹ where the court diluted the second exception to Section 375 of the Indian Penal Code which says that a man who has sexual intercourse with his wife who is fifteen years of age or over does not commit rape. Here the court said that “constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 IPC that sanctifies a tradition or custom that is no longer sustainable”³² and hence ruled to criminalize rape in child marriages.

The importance of constitutional morality was again reiterated in *Joseph Shine v. Union of India*,³³ and decriminalized the offence of adultery under Section 497³⁴ of the IPC read with Section 198(2) of the CrPC. Section 497 was made unconstitutional on the very basis for criminalising adultery which was based on the assumption that a woman is considered as a property of her husband while the same restrictions, however, did not apply in case of the husband. The provision is violative of right to privacy which is an important facet Article 21 as held in *Puttaswamy's case*³⁵. Constitutional morality ensures the assurance of constitutionally guaranteed rights that are indispensable in a democratic country. A

²⁷ *Supra* note 2.

²⁸ *Ibid* para 111.

²⁹ *Ibid* para 120.

³⁰ *John Vallamatom v. Union of India*, AIR 2003 SC 2902.

³¹ (2017) 10 SCC 800.

³² *Ibid* para 89.

³³ (2019) 3 SCC 39.

³⁴ Section 497 of IPC. Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

³⁵ *Supra* note 5.

commitment to constitutional morality requires enforcement of certain rights like equality before the law, non-discrimination, dignity and hence Sections 497 IPC and 198(2) CrPC violates the Articles 14, 15(1) and 21 of the Constitution. And law need to cater the changing needs of the society by keeping the values enshrined in constitution. These laws are out dated and outlived their purpose. The maxim *cessante ratione legis, cessat ipsa lex*, means when the reason of the law ceases, the law itself ceases, applies to these laws.

The Sabarimala³⁶ judgement, which attracted both euphoria and discontent, is an important landmark judgment where it was held the word “morality” contained in Articles 25 and 26 of the Constitution must mean constitutional morality and not popular morality. The term public morality has to be appositely understood as being synonymous with constitutional morality³⁷. The case held the exclusionary rule of debarring the women of a specific age group, more specifically menstruating age group from entering the temple of Lord Ayyapan as unconstitutional. The concept of constitutional morality empowers the law keepers to interpret the constitution in a moral way that constitution conceive of, not the morality that public perceives.

VI. CONCLUSION

There are many judicially crafted tests and doctrine that are initially not explicitly mentioned in the constitutional text but later widening the scope of interpretation. The doctrine of constitutional morality means adherence to the noble principles of the constitution. It is the duty of the judiciary, as the guardian of law, to effectively use this doctrine to overcome the out-dated laws and bring reforms with the changing time. Constitutional morality has meant different things at different points in time. And law need to cater the changing needs of the society according the rights guaranteed under the constitution. This concept empowers the law keepers to interpret the constitution in a moral way that constitution conceive of not the morality that public perceives. Legally there is no test to determine the constitutional morality and hence a standardized yardstick has to be evolved so as to avoid the scope of legal inconsistencies. The term ‘morality’ is often confused with popular majoritarian morality. The four key constitutional values depend on Justice, Liberty, Equality and Fraternity. The interpretation of morality should be based on the values enshrined in the constitution. A jurisprudential analysis is needed not only to use this doctrine as a tool to nullify a particular provision but also to establish it in the vocabulary of constitutional law as a philosophical concept having a specific definition and scope. Hence it is understood that the doctrine of

³⁶ Indian Young Lawyers Association v The State of Kerala, (2018) SCC Online SC 1690.

³⁷ *Ibid* para 110.

constitutional morality is a progressive and transformative tool to evaluate and analyse the various perplexing circumstances keeping the values of the constitution in mind.
