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Insights of Constitutional Morality

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ABSTRACT

Constitution of India cannot be seen merely as a legal document; instead it must be seen as a document having social and moral values associated with it. The morals of the Constitution are inspired by various historical factors like Freedom Struggle, Social factors like caste and class divide Indian society, economic factors like industrialization and various ideologies like Socialism, Marxism etc..

The Supreme Court has interpreted the Constitution in manner to uphold justice according to the constitutional scheme. The Indian constitutional law is full of judicially crafted doctrines like Basic structure and manifest arbitrariness'. Doctrine of Constitutional Morality is recent addition to this list. Recently, Supreme Court in almost all important cases like Sabrimala and Tripal talaq has given a new doctrine called Doctrine of Constitutional Morality.

Term Constitutional Morality is not new for the constitution. Infact in constituent assembly Dr. B.R. Ambedkar has attempted to define constitutional morality referring to English historian George Grote.

Present paper has attempted to investigate different aspects of Doctrine of Constitutional Morality its origin and its step by step development by means of literature and case laws.

Judge made tests are not new for Indian constitutional law but this doctrine is heavily criticized by some of the eminent jurists and lawyers. Mr. Venugopal has even referred it as a dangerous weapon.

This Paper tries to make systematic analysis of various meanings of the doctrine of Constitutional Morality and try to find out its traces in various legal texts

I. INTRODUCTION TO CONSTITUTIONAL MORALITY

"The survival of our democracy and the unity and integrity of the nation depend upon the realisation that constitutional morality is no less essential than constitutional legality. Dharma (righteousness; sense of public duty or virtue) lives in the hearts of public men; when it dies there, no Constitution, no law, no amendment, can save it."

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-Nani Ardeshir Plalhiwala

The Constitution of India is amongst the masterpiece in history of Constitutional democracy. Even though it is lengthiest constitution of world it has certain hidden aspects too. But having written Constitution doesn't take away the need for interpretation as its causes are kept in relation of abstractness to accommodation of new challenges thrown up in the society in period of generation². The phrase "Constitutional morality" was used by George Grote an English political historian for the first time in his book "History of Greece". Dr. Ambedkar described the meaning of constitutional morality –by referring to George Grote - as "paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control..."

In India morality is based on the culture and religion (ashrams, purushartha and varna-dharma). BR Ambedkar never supported the concept of religious morality. He was of the view that "virtue has become caste ridden and morality has become caste bound." Dr. Ambedkar always supported constitutional morality for individuals and institutions because of his strong commitment towards the ideals of the constitution which in turn reflected the universally accepted humanistic principle like equality, non-discrimination, freedoms and justifiable rights.

Supreme Court has put emphasis on the constitutional morality in its recent decisions. Section 377 of Indian Penal Code (IPC) was partially struck down in *Navtej Singh Johar Case*³ by Supreme Court. According to this section "carnal intercourse against the order of nature a crime". Court observed the supremacy of constitutional morality over social morality.

In *Sabarimala Temple Case*⁴, The decision was rendered with majority of four judges by concluding that word 'morality' said in Article 25 (1) of the Indian Constitution need to be read with constitutional morality. In the *Naz Foundation Case*⁴ Delhi High Court allude to constitutional morality and upheld that every citizen should respect the fundamental constitutional rights of each other, even at the time of opposing majority sentiment.

II. ORIGIN OF CONSTITUTIONAL MORALITY

The origin of the constitutional morality can be traced in the ancient Athens. Athenian

²Balkrishan K, Constitutional Morality In India New Kid In Block

³Navtej Singh Johar V. Union of India, W.P.(Crl.) No. 76/2016

⁴Indian Young Lawyers Association V. The State of Kerala, W.P.(C) No. 373/2006 ⁴ Naz Foundation V. Govt. of NCT of Delhi, 160 Delhi Law Times 277 ⁵ Mehta, Pratap Bhanu, What is Constitutional Morality.

democracy had, attain elements of an original constitutional morality⁵.

This was observed by the English political historian, George Grote and he was the First who used the term 'constitutional morality'. Dr. Ambedkar described the meaning of constitutional morality –by referring to George Grote - as “paramount reverence for the forms of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control...”⁵

Sukra Neeti (IV-5-14-15) enumerates five vices,

- (i) Raga (leaning in favour of a party),
- (ii) Lobha (greed),
- (iii) Bhaye (fear),
- (iv) Dvesha (ill-will against anyone) and
- (v) Vadoscha rahashruthi (the judge meeting and hearing a party to a case secretly, i.e. in the absence of the other party) in which every judge should protect against to be impartial. Judges are counselled by Socrates to listen obligingly, comment judiciously, examine solemnly and to conclude reasonably to promise judicial diligence.

Diligence is specifically associated with accomplishing of judicial tasks with utmost care, skill and attention, as well as with justified aptness. Solutions for many constitutional dilemmas are not just available the articles or research paper they need found through soul of the constitution, political morality and democratic ethics. Main reason behind keeping of parliamentary democracy, protection of the values and citizens fundamental rights is strong and liberated judiciary. Ambedkar also referred to the reference to Grote, the historian of Greece's quote: “The diffusion of constitutional morality not merely among the majority of any community but throughout the whole is the indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer ascendancy for themselves”.

III. UNDERSTANDING THE CONCEPT OF CONSTITUTIONAL MORALITY

The doctrine of constitutional morality is a relatively recent addition to this list of judge-made innovations. It came in for heavy criticism after the Supreme Court's Sabarimala judgment. Constitutional morality has many different possible interpretations.

In the Indian Constitution, the term 'Constitutional Morality' is neither seen in any of the

⁵ Constituent Assembly Debates, Vol. 7 (4th November 1948), Grote History of Greece, Volume III page 347

Articles nor the concept is explained. However, the term 'Morality' find place at four places in the Indian Constitution which are under Article 19 (2) & Article 19 (4)- "Right to Freedom" and Article 25 (1) & Article 26- "Right to Freedom of Religion". Constitutional morality has meant different things at different points in time⁶.

The court in *Keshavananda Bharati Case*⁷, found that basic structure and basic features of constitution cannot be challenged or shorten or deleted by any citizen of the country and will always protect the soul of constitution this can always be seen through the Preamble and the blue print of the Constitution.

In the *First Judge Case*⁸ the Supreme Court hold that breach of constitutional convention is in a 'serious breach of constitutional morality.

In *Islamic Academy of Education Case*⁹, it was held that even if Affermative action is valid under article 15(4) and 16(4) if it voliates constitutional morality if it voliates doctrine of equality. In the same case Justice Sinha commented that, "It would be constitutionally immoral to perpetuate inequality among majority people of the country in the guise of protecting the constitutional rights of minorities and constitutional rights of the backward and downtrodden."

Senior Advocate Gopal Subramanian goes even one step forward he concerns at an important aspect of constitutional morality that is the essence of fundamental rights in our country¹⁰. The principle of Constitutional Morality is that nature of Constitutionalism that gives establishment to the feature and satisfies the moral compass in the implementation and interpretation of the Constitution. Hence it would be safer to conclude that principles of fundamental rights like right of thought expression and liberty the right against discrimination and the freedom of speech are also the essence of constitutional morality.

We can say that the phrase 'Constitutional morality' struggles to preserve the very ideals, ambitions, and visions of the future that were treasured and unaltered by the Constituent Assembly. It is also to be concluded that though that constitutional morality and constitutional convention have close relation but it is not entirely same¹¹.

IV. DOCTRINE OF CONSTITUTIONAL MORALITY BY COURTS

"Therefore, we should encourage the fullest discussion of judicial decisions in constitutional

⁶ Chandrachud, Dr Abhinav, Many Meaning of Constitutional Morality.

⁷ Keshavananda Bharati V. State of Kerala, AIR 1973 SC 1461

⁸ SP Gupta V. Union of India, AIR 1982 SC 149

⁹ Islamic Academy of Education V. State of Karnataka, W.P.(C) 350/1993 SC

¹⁰ Subramaniam , Shri Gopal, Constitutional Morality – Is It A Dilemma For The State, Courts And Citizens

¹¹ Subramaniam , Shri Gopal, Constitutional Morality – Is It A Dilemma For The State, Courts And Citizens

cases in order that constitutional principles may be adequately explained and the necessity for the observance of constitutional morality brought home to the people....”¹²

Supreme Court used the concept of Constitutional Morality as an aid in interpretation of individual fundamental rights provided under the constitution and also used this concept for interpretation on the constitutional validity of the statutes¹³. It was perhaps Chief Justice A.P. Shah of the Delhi High Court who first used constitutional morality as a counterpoise to popular morality. In this form, constitutional morality requires courts to disregard societal morals while testing the validity of government action¹⁵.

However in 2013 Supreme Court has observed that it is a part of collective sensibility to respect those who had suffered at the hands of corrupt public officials, because this was “in consonance with the constitutional morality¹⁴. In *Government of NCT Delhi vs. Union of India*¹⁵, Justice Mishra observed “Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse. We may give an example. When one is expressing an idea of generosity, he may not be meeting the standard of justness. There may be an element of condescension. But when one shows justness in action, there is no feeling of any grant or generosity. That will come within the normative value. That is the test of constitutional justness which falls within the sweep of constitutional morality. It advocates the principle of constitutional justness without subjective exposition of generosity.”

In *Manoj Narula Case*¹⁶ Justice Mishra commented that, “The Constitution of India is said to be a living document in which changes can be easily made. The constitution is made for the future society as we can imagine the future through it. For the performance of the constitution there should be presence of suitable conditions and atmosphere.” He further observed that, “The government won’t be mandatory if humans were angels. Neither we need to govern or control the government. We have system that humans are governed by humans so it has two difficulties first to govern the citizens and second to govern the people itself in the government. It would not be incorrect to say with keeping in mind the above said concept that there would be always inclusion of regard for the structure of constitution with the appropriate respect and taking of proper precautions for the preservation of the constitutional values. At this point it is not wrong

¹²William D. Guthrie in ‘Magna Carta And Other Addresses’ (Columbia: New York)

¹³GV Mahesh Nath, Constitutional Morality - a need for consensus on the concept

¹⁴Niranjan Hemchandra Sashittal v. State of Maharashtra, (2013) 4 SCC 642

¹⁵Government of NCT Delhi V. Union of India, 2019 SCC Online SC 193

¹⁶Manoj Narula V. Union of India, (2014) 9 SCC 1

to remember the famous line of Laurence H. Tribe that a Constitution is written in blood, rather than ink¹⁷.

The Court has presented detail view upon constitutional morality in *Navtej Singh Johar Case*¹⁸: - The phrase constitutional morality not just include principles of constitutionalism to describe its vastness or is not limited just to texts written in the constitution but also within itself include the wide dimensions of the society in which we are living. Additionally it is the outcome of personified constitution morality that the constitutional values flow down through the working of the structure of government for the development of the each citizen of the country.

In *Sabarimala Case*¹⁹ Court further defined the principle of constitutional morality, J. Deepak Mishra observed: -

“The term ‘morality’ occurring in Article 25 (1) of the Constitution cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, a section or religious sect may perceive the term to mean. We must remember that when there is a violation of the fundamental rights, the term morality naturally implies constitutional morality and any view that is ultimately taken by the Constitutional Courts must be in conformity with the principles and basic tenets of the concept of this constitutional morality that gets support from the Constitution.”

Concurring with the majority opinion Justice Chandrachud has observed that between over reaching sense of religion and morality it is Constitution morality which must prevail. “Constitutional morality must have a value of permanence which is not subject to the fleeting fancies of every time and age. If the vision which the founders if the Constitution adopted has to survive, constitutional morality must have a content which is firmly rooted in the fundamental postulates of human liberty, equality, fraternity and dignity. These are the means to secure justice in all its dimensions to the individual citizen. Once these postulates are accepted, the necessary consequences is that the freedom of religion and, like wise, the freedom to manage the affairs of a religious denomination is subject to and must yield to these fundamental notions of constitutional morality. In the public law conversations between religion and morality, it is the overarching sense of constitutional morality which has to prevail.”

¹⁷ Laurance H. Tribe, THE INVISIBLE CONSTITUTION 29 (2008)

¹⁸ Navtej Singh Johar V. Union of India, W.P.(CrI.) No. 76/2016

¹⁹ Indian Young Lawyers Association V. The State of Kerala, W.P.(C) No. 373/2006 SC

Interestingly in the minority opinion Justice Indu Malhotra observed: - “Equality and Non-discrimination are certainly one facet of Constitutional Morality. However, the concept of equality and non-discrimination in matters of religion cannot be viewed in isolation. Under our Constitutional scheme, a balance is required to be struck between the principles of equality and non-discrimination on the one hand, and the protection of the cherished liberties of faith, belief, and worship guaranteed by Articles 25 and 26 to persons belonging to all religions in a secular polity, on the other hand. Constitutional Morality requires the harmonisation or balancing of all such rights, to ensure that the religious beliefs of none are obliterated or undermined.”

In *Joseph Shine Vs Union of India*²⁰ court has observed that in history there was no concept of common morality but it is constitutional morality said by law. In a democratic country, there should be assurance of basic rights that are essential for the free, impartial and proper living of the citizens of the country is the requirement for the fulfilment of constitutional morality. In the other words for ensuring the constitutional morality there should be assurance of equality to all citizens for example equality before law, non-discrimination on account of sex, and dignity, all of which were prohibited due to Section 497. Court observed that the constitutional morality is not similar to the popular opinion: - for passing the judgement in criminal cases the basic principle needs to be tested in the view of the constitution that determine the act criminal in nature and holds the guilty of the criminal. the principle that is opted should be consider the trinkets of morality not by the majority of the people thinking.

Court further observed that, in correlation with constitutional morality, it is the aim to remove the discrimination at various stages against the lower part of the society that prohibits their participation in the society and wants to establish the equity at large.

V. CONSTITUTIONAL MORALITY: - A DANGEROUS WEAPON

Constitutional morality has become subject matter of discussion when then Attorney General of India, K.K. Venugopal, was extensively reported in the press as having criticized it as a “dangerous weapon”²¹. Neither Grote nor Ambedkar intended constitutional morality to be used by courts to test the validity of government action. To them, it was an aspiration – a hope that citizens would inculcate a love for the Constitution which would make it difficult for the Constitution to be obliterated by the political powers of the day²². So it is the obvious questions on constitutional morality as a doctrine for examine the validity of legislation.

²⁰ Joseph Shine Vs Union of India, AIR 2018 SC 1676

²¹ Apoorva Mandhani, “Constitutional Morality A Dangerous Weapon, It Will Die With Its Birth: KK Venugopal”

²² Chandrachud, Dr Abhinav, Many Meaning of Constitutional Morality

Former Attorney General KK Venugopal also criticized by saying “Constitutional morality is very harmful to the country. And if we use this concept we do not know our destination where it will be. I hope constitutional morality dies. Otherwise, our first PM Pandit Nehru;s fear that SC will become the third chamber might come true.

However, Mr Gopal Subramaniam observed that: - “If the judiciary were to be completely unbound by any form of self-restraint or adherence to the letter and spirit of the Constitution and discover its true charter with reference to laws made by the legislature, it could well be held to be in breach. It is important that the substance of the faith in the different organs of the State has to be restored. That can only be done by what I believe to be acts of restorative character which must be assiduously undertaken by those who adorn offices in government, legislature and the judiciary. It is through this process of restorative rebuilding of confidence that one will be able to ensure that constitutional morality is sufficiently ingrained that constitutionalism is no longer at stake because of caprice, whims and excessive power concentrated in certain individuals.” It is said that every law, every doctrine may prove to be dangerous if it is used without thinking about righteousness and effect in society. Even Mr Nani Plalhiwala while arguing in privy perse case once said that “righteousness; sense of public duty or this image is in the heart of every citizen and once this dies then no Constitution, no law, no amendment, can save it.” There will be danger to this concept if it is continued to be used unethically and senselessly in the court without presence of visibility and oneness.

VI. CONCLUSION

It will be wrong to consider the doctrine of constitutional morality as completely new concept for Indian Democracy. Rather, the seeds of constitutional morality were sown during the drafting of the Constitution. Although it may be said that neither Ambedkar nor Grote intended constitutional morality to check the constitutionality of legislation but Decades after Ambedkar’s speech in November 1948, the concept has been equated with constitutional conventions, anti-corruption, equality, and the rule of law. We as together a nation, know the importance of the principle of Constitutional Morality. We have tried our level best to implement the principle through many judgements and trials.

It has always moment of pride for every Indian when the constitution of our own country was written and by such a man who has understanding of the knowledge of world history Dr. Ambedkar. By reading his writings every person can figure out his beliefs. To give him regard or honour him we should fulfil his dream of that every citizen living with his ideals of secularism and rational living under the constitution.