



## Doctrine of Constitutional Morality: Ammunition in the hands of Judiciary Or Instrument of Justice?

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### ABSTRACT

*This paper deals with the concept of constitutional morality in all and all in the Indian constitutional law context, highlighting present development in the judiciary. The paper has covered all the fundamental aspects of the doctrine of constitutional morality in toto from its source, significance and much more. The doctrine of constitutional morality is explained in detail with its many meaning according to different notions of various scholars, from George Grote's History of Greece to the recent development of doctrine in the Indian context by judges in landmark judgments of Apex court. The paper deals with the true sense of the doctrine of constitutional morality as what does it exactly mean? Along with the ongoing debate as to how this doctrine is just a weapon in the hands of the Indian judiciary due to its wider scope and no reasonable restrictions on the judiciary to use it by the judiciary. The paper further deals with the bifurcation of the notion of public or majoritarianism morality and constitutional morality and how constitutional morality is a counterpoise to public morality. Further, this paper covers the major lacunae that are exiting in the present form of the doctrine of constitutional morality and some prime recommendations to overcome that issues. A bird's eye view on the recent development on the case laws dealing with constitutional morality and its analysis is also presented for a sound understating of the doctrine. In this paper author tried to cover doctrine from A to Z. Finally, this paper concluded by discussing how the doctrines proved as an aid in many issues and where it will stand in future and many more questions on the same lines.*

### INTRODUCTION

The constitution of India was drafted in the way back in 1946, but now we are living in the 21<sup>st</sup> century. Law cannot remain static. It needs to change with time. A society is intangible, and we need new levels of intellectuals for evolving society

in every dimension, beat it science, technology or social sciences. The Indian constitution is a living document, and the Indian constitutional law has evolved too much since the adoption of the constitution in various ways, through the action of legislature and not a new tradition of judicially

invented tests on the existing constitution. The constitution of a country is no doubt the supreme law or reflection of grundnorm. The constitution is a unifying, unique and fundamental document for governance and functioning of a country with peace. It is the duty of courts to safeguard the constitution and principle of constitutionalism, and it is associated with the following features:

*“...a fundamental law expressed in a written constitution drafted by a special convention or assembly, ratified by the people and amendable only by an extraordinary supra legislative process, which prescribes the rule of general standing laws produced by representative institutions operating on the basis of some form of separation of powers and limited by a charter recognizing judicially enforceable basic rights reserved by individuals.”<sup>1</sup>*

The constitution of India is reinterpreted, tested, analyzed and added certain specific doctrines by the judicial minds for achieving the end goals of the constitution. Judicial minds many times enlighten us to give us a better understanding of the spirit and text of the constitution in its true sense and what are the other derivatives that are emerging in the contemporary discourse that are held in society with changing times. There are numerous judicially

invented doctrines, concepts and crafted inventions that are not explicitly in the text of the constitution anywhere. The constitution empowers the courts to use the constitution as a source of moral guidance to the court in deciding various issues and to pronounce new verdicts and changes. The prime and fundamental function of the constitution is to limit the powers of the government. For it, we have a judiciary.

We have to take a note that the law we like to tell ourselves is reasoned, disciplined rational we tell ourselves that law is different from certio and public morality. We are bound by the rule of law and not by the rule of morals or the majority. Legal positivism argues that the boundary between laws and morality is a strict one. In other words, the question of what the law is and what it ought to be are two different contexts judges, therefore, should employ their own moral judgements to determine what the law is. And in the truth of the word that the judges and lawyers make legal interpretation although constrain by legal materials always requires some moral judgements this legal material is not always true and are not a conclusive one. The same can be verified, and this reality is doubly true as the prime object of the constitution its whole purpose is to codify morality. Therefore, a moral

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<sup>1</sup> Ward, Leed, Canadian Journal of Political Science / Revue canadienne de science politique Vol. 38, No. 3 (Sep., 2005), pp. 719-744

reading of our constitution is unavoidable. The bigger question here pops out is whose morality must guide us? The answer is simple the values of the constitution and the founders of the Indian Republic will apply.

The judiciary has crafted many inventions that find no express reference in the constitutional text. They read between the lines and come up with new inventions from time to time to safeguard the constitutionalism and spirit and soul of the constitution, the “basic structure” doctrine, the doctrine of “eclipse,” the old “arbitrariness,” new “manifest arbitrariness” the “classification test,” tests all were the examples of same. The most recent addition in the tally of the inventions by the judiciary, which is gaining prominence and pronounced time and again by the judiciary, is the past is about **Doctrine of Constitutional Morality**.<sup>2</sup>

The doctrine is not a new discovery. It was invented way back in *Greece history*, but in the Indian context now, the doctrine has attracted the attention of the judiciary and the same into taken about in the recent landmark rulings by judges of Apex court. The doctrine became the point of debate in the legal fraternity, especially after the AG of India, K.K. Venugopal said that “*I am hoping that constitutional*

*morality will die*” and has criticized the doctrine as a “*Dangerous weapon.*” And after the use of the doctrine in the case where apex court has to face heavy criticism after the Supreme court’s Sabrimala judgement.<sup>3</sup> The constitutional morality was prevalent in the judiciary before also, but it was not explicitly mentioned for as of now and not defined anywhere, but the task of defining it has recently been referred to a constitutional bench of 7 judges of Apex court in a recent case.

When we are dealing with the topic of constitutional morality, it has many different meanings as it is not defined anywhere, and it is a judge-made doctrine for safeguarding the spirit and soul of the constitution. It is as confusing as we can say the method of purposive interpretation that is applied by judges in a different case to give justice, it is subjective and changes with every case. We can deal with the concept of constitutional morality from the origin and inception of it in the way back from 19<sup>th</sup> century British historian of Greece, *George Grote*, him the constitutional morality means a culture of reverence among the individual of that nation, which would ensure a peaceful administration and functioning of government. In the Indian context, the word “*Constitutional Morality*” was the first

<sup>2</sup> Indian Young Lawyers Association v. State of Kerala, (2018) SCC Online SC 1690

<sup>3</sup> Andre Béteille, “Constitutional Morality”, Economic and Political Weekly, vol. 43, no. 40, pp. 35-42 (2008); Pratap

Bhanu Mehta, “What is Constitutional Morality?”, Seminar (2010), available at: [https://www.india-seminar.com/2010/615/615\\_pratap\\_bhanu\\_mehta.htm](https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm) (last visited 1 November 2019)

time pronounced by the father of the constitution Dr. B.R. Ambedkar. In the Constitutional Assembly debate, he stated

*'Constitutional morality is not a natural sentiment. It has to be cultivated... Our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.'*<sup>4</sup>

These were the lines said by Ambedkar on November 4, 1948, while moving the draft constitution in the assembly. He used it as a *rhetorical device or logical gadget* to legitimize the incorporation of hackneyed subtleties in the Constitution – insights about issues of the organization. In the resulting years, the Supreme Court made passing references to established ethical quality in its decisions inside various settings. Today, the sacred ethical quality basically implies two things: right off the bat, something contrary to profound mainstream quality, and besides, the soul or embodiment of the Constitution. This paper examines the topic of constitutional morality in the context of Indian law. What is constitutional Morality? Is it a dangerous tool in the hand of the judiciary? What is the salient feature of the doctrine? How does doctrine evolve? And does it in any way hinder the systems of checks and balances?

The paper is divided into different parts. The main aim of the paper is to do a comprehensive study on the topic doctrine of constitutional morality and to fill the existing gap in the knowledge on the topic. The most important aspect that the paper deals with is how the judiciary used this doctrine in various landmark cases for giving their verdict. This paper concludes by discussing A to Z of constitutional morality and is this doctrine is really a danger, as said by AG K.K. Venugopal or is it not?

### **Result & Discussion**

#### **1. The term Constitutional Morality**

What does actually mean by the term constitutional morality? Let's see this question from different perspectives as we know that constitutional morality has many meanings.

#### **Views of British historian George Grote**

The first time the concept of constitutional morality was recorded by Grote in his work *"A history of Greece"* in the 19<sup>th</sup> century. In the views of Grote, constitutional morality is the coexistence of freedom and restraint, and it is an indispensable factor for peaceful governance. He defined *"constitutional morality"* as:

*"[A] paramount reverence for the forms of the constitution, enforcing obedience to the authorities*

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<sup>4</sup> 1Constituent Assembly of India, Vol. VII.  
<http://parliamentofindia.nic.in/ls/debates/vol7p.1b.htm> last visited on 23-04-2017

*acting under and within those forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts, - combined too with a perfect confidence in the bosom of every citizen, amidst the bitterness of party contest, that the forms of the constitution will be not less sacred in the eyes of his opponents than in his own.”<sup>5</sup>*

He reminded us that it was not an “intrinsic or natural sentiment” and it is not easy to “establish and diffuse [it] among a community, judging by the experience of history”<sup>6</sup> he commented that while examining the Glorious revolution of 1688 and the context of England regarding constitutional morality. Adding to the aforementioned comment he wrote that constitutional morality was ‘the indispensable condition of a government at once free and peaceable’<sup>7</sup> The point of Grote is that constitutional morality not meant to be used the courts time and again to count down the legislative action of the government. According to Grote, constitutional morality meant as follows:

<sup>5</sup> George Grote Esq., Greece (New York: Peter Fenelon Collier, 1899), available at:

<https://babel.hathitrust.org/cgi/pt?id=hvd.hw20pr&view=1up&seq=7>; “George Grote”, Encyclopaedia Britannica, available at:

<https://www.britannica.com/biography/GeorgeGrote>

<sup>6</sup> George Grote Esq., Greece (New York: Peter Fenelon Collier, 1899), available at:

- All citizens of the country must respect the Constitution.
- All citizens of the country would obey the orders acting under the Constitutional framework.
- All citizens of the country would have the freedom to criticize public officials who are acting in the discharge of their duties.
- All public officials would have to act under the ambit of the constitution and for which they are appointed.
- All political leaders must respect the constitution.

The historian Grote 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”<sup>8</sup>*

<https://babel.hathitrust.org/cgi/pt?id=hvd.hw20pr&view=1up&seq=7>

<sup>7</sup> Ibid, at p 155

<sup>8</sup> Available at:

<https://poseidon01.ssrn.com/delivery.php?ID=905122026003117124075127124015005108102000006036012087096025105100105122023091085030018120055004119097117101027120026074123025031037030013082085108092083101007>

Grote's idea of constitutional morality impliedly states that there must be a balance between the citizens and constitutional bodies for dispersing their duties under the ambit of constitutional morality. There must be freedom and self-imposed restraint on the citizen, and on the parity, there must be the obedience of the constitution and authorities acting within the ambit of the constitution. This is the heart of Grote on constitutional morality.

#### **Views of the father of the Constitution: Dr. B.R. Ambedkar**

In 1913 Ambedkar went to Columbia University, New York. There he gets first time introduced to the concept of constitutional morality. Ambedkar pursued the course named "History 121' at university<sup>9</sup>, which comprises some elements of Greek history, might it be the time when he read about Grote's text and ideas.

The first time the word was propounded in the Indian context by Ambedkar in the constitutional assembly debate on November 4, 1948, to move a motion that the draft constitution, prepared by the drafting committee, be taken into consideration by the Constituent Assembly<sup>10</sup>. Ambedkar reiterated

Grote's word for explaining constitutional morality and explained the concept and emphasized. He quoted Greek Historian George Grote and said:

*"By constitutional morality., Grote meant... a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action s subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the constitution will not be less sacred in the eyes of his opponents than his own."*<sup>11</sup>

He said that we have to develop constitutional morality in Indians, and it is not a natural sentiment. But the Ambedkar was not in favour and never intended to say that constitutional morality is meant to be used as a test by courts to strike down the legislative actions taken by the government. He used Grote's idea as a rhetorical device to justify "established ethical quality" as an explanatory gadget utilized by Ambedkar to legitimize why apparently everyday insights concerning the

[120057043076071026083064107089024007009079109030097067019020004026127000028073068116074096&EXT=pdf](http://www.columbia.edu/itc/mealac/pritchett/00ambedkar/97067019020004026127000028073068116074096&EXT=pdf)

<sup>9</sup> "Dr. Ambedkar's Courses at Columbia", available at: <http://www.columbia.edu/itc/mealac/pritchett/00ambedkar/timeline/graphics/courses.html>

<sup>10</sup> Constituent Assembly Debates of India, vol. 7, at p. 31

<sup>11</sup> Constituent Assembly Debates, Vol. 7 (4th November 1948), Grote History of Greece, Volume III page 347

organization of the legislature had been remembered for India's Constitution.

### **Catchphrase by Judicial Minds:**

For many times stray references were made to the term “*constitutional morality*” by the Indian judiciary in different judgements. In the famous case which establishes the doctrine of basic structure, it was referred by two judges while pronouncing their verdict.<sup>12</sup> The case is popularly known as the First judge's case; Justice Venkataramiah also implicitly takes note that any type of violation of constitutional convention or any violation of the constitution would ‘be a serious breach of constitutional morality.’<sup>13</sup> The Supreme court, in the infamous case of ADM Jabalpur, was also opined the concept of constitutional morality once again, speaking through Justice Khanna’s dissenting view prevail today the reason for the endurance of his view is precise that he look to the substance of a form to the real heart of the constitution and to the purpose of its guarantees rather than satisfied with a technical and mechanical approach which was followed by other judges of Coram. We must also not forget that Justice Khanna also tips the scale basic structure case. He was truly a constitutional moralist. Justice Khanna was of the view that the

Fundamental Rights and the rule of law had life outside the literal interpretation of the constitutional texts. The resultant of his view is that Indians have Right to life of personal liberty irrespective of whether it appeared in Article 21 of the constitution and in realms into the right could not be except under the authority of law.

The court is the custodian of the constitution, in recent we have a series of cases where the concept of constitutional morality was time and again invoked by the judiciary, in the recent the flag bearer for invoking this doctrine time and again was Ex CJI, Deepak Misra, just before completion of his tenure he pronounced many important landmark verdicts. Earlier also in the NCT of Delhi judgement<sup>14</sup>, Ex CJI Misra invoked that doctrine and used it is as in consonance with the spirit, soul or conscience of the constitution. Constitutional Morality is a synonym for the rule of law in consonance with the second basic structure doctrine.

### **2. Litmus Meaning of Doctrine**

So, what do we mean actually by the doctrine of constitutional morality? As we have discussed various views on the doctrine, to understand in a wider framework basically means the adherence to

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<sup>12</sup> Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461 : (1973) 4 SCC 225 (paragraph 747, per A.N. Ray J; paragraph 1112, per P. Jaganmohan Reddy J).

<sup>13</sup> S.P. Gupta v. Union of India, (1981) Supp SCC 87 (paragraph 1077, per Venkataramiah J)

<sup>14</sup> (2018) 8 SCC 501.

the core principles of the constitution in a democratic framework. The doctrine is not still defined anywhere; there are various notions and views on the doctrine by different legal scholars. We can basically understand it as *'obeying to noble principles enshrined in the supreme law of the country, principle interpretation of the constitution in line with the ethos of the constitutional democracy'* or we can define it *'adherence to basic beliefs of standards and theory of constitutional democracy that stretch out to make libertarian moral put together society based with respect to social, financial and political equity.'*

Constitutional Morality cannot be restricted or confined under some limits. It is a wide concept. The doctrine cannot be restricted under the ambit of only constitutional provisions in their literal sense, but the doctrine is for the safeguarding of the constitution from using the purposive interpretation in any matter where the custodian of the constitution, i.e. court, finds it suitable. When we see the constitution, the word *'Morality'* has been used overall four times in the whole Indian constitution, and all the four words traced in Part III of the constitution enshrined fundamental rights. Article 19, which gives us the Right to freedom of Speech and Expression, contains the word twice, and the next two times, the word can be traced in

the Right to religious freedom under Articles 25 and 26.

The doctrine of constitutional morality fundamentally intends to bow down to the standards of the Constitution and not to act in a way that would get violative of the standard of law or reflection able of activity in a subjective way. It really works at the support and manages as a laser shaft in the establishment building. The customs and shows need to develop to support the estimation of such an ethical quality. The popularity-based qualities endure and turn into effective where the individuals everywhere and the persons-in-charge of the organization are carefully guided by the sacred parameters without clearing the way of deviancy and reflecting in real life the essential worry to keep up institutional uprightness and the imperative sacred limitations. Promise to the Constitution is an aspect of profound sacred quality. The constitutional morality is far more than the observance of the core principles of constitutionalism; the centre standards of constitutionalism as the greatness and clear of established profound quality isn't bound to the arrangements and exacting content which a Constitution contains, rather it grasps inside itself excellencies of a wide size, for example, that of guiding a pluralistic and comprehensive society, while simultaneously holding fast to different

standards of constitutionalism. It is further the consequence of typifying profound sacred quality that the estimations of constitutionalism stream down and permeate through the device of the State for the improvement of every single individual resident of the State. The individual is a focal point of the constitution because it is the realization of his individual rights that the collective wellbeing of the community is determined, according by Apex court. Therefore, constitutional morality is the spirit, soul and litmus facet of the constitution, also preamble in its ideals and aspirations found which particularly emphasized on the provisions which assure the dignity of the individual.

### 3. *From where it comes: Sources of Constitutional Morality*

Till now we are exactly able to define the term constitutional morality in an uniform way or in a way which is defined by some authority and accepted by all. The main context or meaning that it provides to us is that there must be the adherence of constitution in its true sense and not just in the verbatim, literal and text to text sense. When we trace out the doctrine and get to know what are the sources of constitutional morality especially in the context of Indian scenario some key sources are listed below:

- Constitution
- Constitutional Assembly debate
- Landmark Case laws (*ADM Jabalpur v. Shivkant Shukla*<sup>15</sup>)
- Legal developments.
- Precedents [Case Laws]
- Events that happened during the framing of constitution.

The aforementioned are the prime sources from where we can understand that constitutional morality gets continuously evolved and finally in recent it get prominence and also a much debated topic in the legal arena. The constitutional morality is now an indispensable part for safeguarding the spirit, soul and conscience of constitution as the constitution was drafted way earlier and if we apply some provisions in its literal sense or by verbatim it just gets defeated the purpose for what they are made by our forefathers who framed the constitution at that time. In Indian context when we are dealing with the doctrine of constitutional morality we must have to take a note that there is a distinction between '*constitutional democracy*' and '*populist democracy*' on the same lines there is much debate on the doctrine of constitutional morality and the concept of public morality. Can constitutional morality work in consonance with the public morality in India, it's a big question in Indian

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<sup>15</sup> 1976 (2) SCC (521)

context as in the recent judgements we get to see how the judicial minds used doctrine of constitutional morality to give justice to different sections in society and also owes an apology in the Homosexuality case<sup>16</sup> from the LGBT community. A pertinent question on the lines of constitutional morality is that how we can exactly understand it and as in the recent we get to see it differs from brains to brains of different judicial minds so doesn't it become a tool which can be misused by judiciary and also it is a judges made doctrine the sources of it can be traced in an implicit way except in some places like constitutional debates, that is the question on which we need to think upon. The concern here is about examining what can be considered as constitutional morality and what not. The sources from which it evolves out are silent on this question as no where it is mentioned that the sources of doctrine of constitutional morality is that, all the sources which we get to know is through legal studies and with the evolution of time.

#### 4. *Morality as the Constitutional Morality*

The morality as in the conscience of people differs from the morality of constitution, there are various meanings of constitutional morality which sets the new boundaries for a further examination of the true meaning and litmus context of morality of the constitution. Constitutional morality is considered

as a supreme, paramount reverence for the constitution. The constitutional morality and morality are two different ends as they are not same in any way, the morality in India mainly dominated by the society but due to this many time the morality and constitutional morality differs from each other. The constitutional morality in India is a new block in the wall, which is trying to get in the consonance of public, social morality.

#### 5. *The fling war of Public vs. Constitutional Morality*

There is a big tussle on the concept of constitutional morality and public morality. The morality that needs to be imbibe must be constitutional one as per judicial minds but sometimes there is a clash on the same by the society. In the recent landmark judgement of SC where it was held that Sec 377 of Indian constitution is partially unconstitutional brings forth this tussle as even today public morality in many parts of India specifically can't agreeing with the position of the current development by Apex court of India. The court relies on constitutional morality and not on public one as the complete rejection of "public morality" is a possible justification in the case of homosexuality on the rationale that with the changing and evolving society the purposive interpretation that is in the interest of state must be incorporated by judiciary. This is not the only one instance where court

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<sup>16</sup> Navtej Singh Johar v. Union of India (2018) 10 SCC 1.

declared constitutional morality above the public morality there are other instances also where the same was held by the court.

The concept of public morality cannot be rejected per se as the importance of public morality in shaping the fundamental rights cannot be rejected. The notion, views and concepts of public morality has a prime essence many a times in the contours of various fundamental rights. In **Mr. 'X' v. Hospital 'Z'**<sup>17</sup> court relied on the public morality as a factor to determine the precedence of one competing fundamental right over another in the case.

The prime distinction between the doctrine of constitutional and public morality is that public morality is a mere reflection of the consensus of moral and social values of the majority of populace ( sometimes expressed by legislatures), while constitutional morality reflects the morality, values that are enshrined in the constitution, it also reflects the values of majority populace but it is that prime instruments that shapes, modifies and changes this values in accordance to what is just and fair in the eyes and concept of constitution. It is a tool for the social engineering aspect of our constitution for the betterment of society with changing time. Thus, both the doctrines are not mutually exclusive but it has a major and significant distinction point.

*Constitutional morality determines the mental attitude towards individuals by the text and spirits of constitution.*

#### 6. *Judicial View of this doctrine: Analysis*

The Supreme court in three very important judgements has touched upon the constitutional morality as a fundamental basis of discovering the true spaces within the meaning of rights in Part III of constitution. The rights texts are actually a check on the governance texts, the government texts are meant to be exercised in the light of rights text that is why without the rights text the power of government is entirely arbitrary and can't be given in democratic state. When an action of government is being scrutinized, we need to check on the following points

- 1) Whether it eliminates from the government text?
- 2) Is it for the purpose of truly encapsulated in the government texts?
- 3) Does it infringe the rights texts?
- 4) If it does infringe does it do so legally?
- 5) If it does infringe even legally is it proportionate or reasonable?

In the path breaking judgement of **Justice K S Puttaswamy v Union of India**<sup>18</sup> the court held that individual is the focal point of constitution. This

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<sup>17</sup> (1975) 1 SCC 29

<sup>18</sup> (2017) 10 SCC 1

judgement is where the court is not only the custodian of constitutional rights but in fact entered the discourse of constitutional morality in a completely frontal manner. The court has accepted this approach in toto, the court said that this constitutional precept exist in unity to facilitate a humane and compassionate society. The individual is a focal point of constitution because it is a realization of his individual rights that the collective well being of community is determined.

In the ***NCT of Delhi v Union of India***<sup>19</sup> where the concept of constitutional morality is expressly invoked by the court as a guiding light in constitutional interpretation, this was in the context of deliberative democracy. The Chief Justice noted that the concept of constitutional morality is that fulcrum which acts as an essential check above high functionaries and citizens aligned as experience has shown that unbridled power without any checks and balances would result in a despotic and tyrannical situation which is antithetical to the very idea of democracy. We must not forget the concept of triangular values that are enshrined under the preamble of the constitution of India. That attracts our attention to the concept of *constitutional trust*; it is the trust that reposes under the functionaries of the constitution. The trust is that they will be guided

by constitutional morality, objective pragmatism and balance that is required to sustain a proper administration. They actually expect governance for the betterment of society, healthy relationship and mutual respect having an open mind for acceptance. Justice Chandrachud, in his concurring opinion, said one of the essential features of constitutional morality thus is the ability to commit to arriving at decisions of important issues consensually it requires despite all differences we are part of the common deliberative enterprise. The view opted by Justice Chandrachud is tactually the first ascending step in the matter of constitutional morality. Constitutional interpretation must flow from the concept of constitutional morality. In the primordial perspective of **Montesquieu**, constitutional morality not only helped to maintain the separation of powers between executive legislative and judicial bodies but also at sub-level of governance.

In ***Naz Foundation v. Govt. of NCT of Delhi***,<sup>20</sup> the popular morality could not inform the law, and it held that constitutional morality, however, did so. The court held that if there is any type of morality that can pass the test of compelling state interest, it must be constitutional morality and not public morality.

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<sup>19</sup> (2018) 8 SCC 501

<sup>20</sup> WP(C) No.7455/2001, DELHI HIGH COURT; Decision on 2 nd July, 2009 ; 160 Delhi Law Times 277

In the celebrated case of **Navtej Singh Johar V Union of India**,<sup>21</sup> the then CJI Dipak Mishra reiterated the doctrine of constitutional morality and stated that the court must not be remotely guided by popular perception or public morality that is backed by the majoritarian populace, but they must be controlled and guided by the constitutional morality. The concept of constitutional morality is not limited to mere observance of the core principles of constitutionalism as magnitude and sweep of constitutional morality is not confined to the provision and literal text that constitution contained itself. Rather it embraces within itself virtues of wide magnitudes of ushering of a pluralistic and inclusive society. The society as a whole or even a miscue part of society for like different things within the legal framework is constitutionally valid, and it does not violate any statute. The concept of constitutional morality serves as an aid for the proctor's right to a just decision. Justice D Y Chandrachud differentiated the constitutional and public morality in the present case while writing his judgment. While hearing the matter, the concept of constitutional morality is provoked by the bench for determining the result of the case and to strike down Sec 377 partially. The case implicitly presents us that the goal of the court is to convert public morality into a constitutional

one or to bring them in consonance for the development of mankind in a greater sense.

The biggest blow to public morality can be traced in the recent judgement of the Supreme court in the **Indian Young Lawyers Association v. the State of Kerala**<sup>22</sup>, popularly known as the **Sabrimala Case**. The apex court reiterated the doctrine of constitutional morality for declaring the custom of the temple as unconstitutional as it was prohibiting women from entering Lord Ayyappan Temple. The court held that this custom is unconstitutional as it is in violation of the fundamental rights of women. The supreme court bypassed the **"doctrine of essentiality"** to uphold the doctrine of constitutional morality in the present case. The supremacy of faith, popular notion or public morality holds no value in the present case, and all were superseded by the doctrine of constitutional morality as no one is above the constitution and everyone is equal before the law.

Post-2010, the doctrine and concept have gained too much prominence in the Indian judiciary as it is time and again reiterated by a different judge in many landmark decisions and in every decision doctrine of constitutional morality superseded all other principles and doctrines as it gains its powers

<sup>21</sup> AIR 2018 SC 4321; W. P. (CrI.) No. 76 of 2016 D. No. 14961/2016

<sup>22</sup> 2018 SCC OnLine SC 1690

from the constitution that is the supreme law of the land.

7. *Significance: Watershed Due to This Doctrine*

The doctrine and concept of constitutional morality ensure the establishment of the rule of law in the land with the evolution and shifting paradigm of society. The newly crafted innovation curtailed the encroachment on the judiciary and empowered judiciary to function more independently and to keep an important check on the other organs of democracy; it is a new tool added that make the judiciary stronger as a custodian of the constitution. The doctrine not only curtailed encroachment of any type on the judicial autonomy but also strengthened judicial supremacy and institutional jurisprudence in all and all. The watershed impact and significance that can be traced to this doctrine is that it protects against arbitrary practices. Constitutional morality has put a break and regulates majoritarianism; the same can be traced in all the landmark judgement given by the apex court where the court straightforwardly rejected the concept of public or majoritarian or populace morality concept and said that constitutional morality has a superseding effect on all and is supreme than all others. Also, constitutional morality played a significant role in transforming and changing the persisting social morality. E.g. by abolishing the practice of adultery and partially

struck down section 377 of the constitution in the present time, in the historical context, the concept is not expressly determined, but the guiding force comes to form this very concept, the historical example for same is the abolition of the practice of SATI by legislation.

8. *Major Concern with The Doctrine*

The doctrine of constitutional morality has somewhat gained too much prominence in India due to recent developments in the Indian Judiciary and due to some landmark rulings where this concept was time and again used by the judges. The doctrine is not just restricted to the literal text that was written in the constitution, but it is far more than that in its litmus and true sense for which the doctrine is developed and evolved. The doctrine is subjected to major criticism, and it is a big lacuna in the doctrine as it is nowhere defined by the supreme court in any of its judgement. The doctrine is used by the judges in accordance with their understanding which leaves the uncontrolled scope of its subjective interpretation by the individual judges in different cases. In the present situation, the doctrine is no more just an instrument in the hands of the judiciary through which it can load itself with more ammunition against the legislature. It simply violates the principle of separation of powers as this doctrine established the judicial supremacy as judiciary can declare any legislature

unconstitutional by applying this doctrine as it is defined nowhere so to quest the manifestation of judicial minds and to provoke supremacy it can be lethal for the constitution and nation as a whole as the constitution itself provides the power to the judiciary for interpretation of the constitution. It also violates the very principle of democratic government in its present state if it is not applied in a rational manner by the judiciary.

If we analyze it through the other spectrum, *"You can't allow individual liberties unkept, they are subject to communitarian values"* this doctrine is doing so by providing judges with an unrestrained power for interpretation the constitution according to their whims and fancies due to lack of clarity on the very concept of the doctrine of constitutional morality. The doctrine of constitutional morality cannot be accepted as a jurisprudential concept till time. There is no fundamental definition given to this doctrine, as in the present time, the ambiguous part of the doctrine is the doctrine itself as what constitutes the doctrine of constitutional morality exactly? On the same lines, Dr. K.K Venugopal (AG) also criticizes the doctrine on the judgement that was pronounced by the constitutional bench in the landmark Sabrimala case; he termed this doctrine as a *"dangerous weapon in the hands of the judiciary."* There is a need for the evolution of this doctrine as we can't ignore the fact that this doctrine carries

utmost importance as it covers the essence of the constitution in its true sense for the welfare of the state and people. The judiciary in the present state added this doctrine as a new weapon and a touchstone for the validity of executive actions and legality of laws (legislature).

### **Recommendations**

Constitutional morality reflects that idea of justice is an overriding factor in the struggle for existence over any other notion of social acceptance. It builds and protects the foundation of democracy, without which any nation would crack under its fishers. It is a guarantee that all inequalities are eliminated from the social structure, and each individual is assured of the means of enforcement of the rights guaranteed. It leans towards making Indian democracy vibrant by infusing the spirit of brotherhood among the heterogeneous populace belonging to different classes, religions, cultures, caste and section; constitutional morality cannot be nurtured unless recognized by preamble there exist fraternity which assures and maintain the dignity of each individual. The doctrine of constitutional morality is not less essential than constitutionality legality. We just need to give a definite sphere or a sort of definition that can be used for understanding the concept of constitutional morality as it then provides limited power to judges and not to act according to their whims and fancies, a times critics

just criticized the whole doctrine on only this point that *constitutional morality is not defined and it's ambiguous* in its nature as it was used by judges according to their judicial intellect and their choice that can destroy the very purpose of the doctrines. To curb this issue and to overcome this and only lacuna in the doctrine, we just need a notion that defines the doctrine in a wider ambit and then it's on the judiciary to interpret and use it according to the facts and circumstances.

### **Conclusion**

The principal reason for the evolution of the doctrine of constitutional morality is safeguarding constitutional morality. The doctrine is not a newly evolved concept, but yes, it's newly crafted under the Indian judiciary in recent times. In a practical sense, the doctrine is still in its budding stage and has not evolved completely. Even then, the doctrine paves the way for some watershed judgements that were given by the supreme court in the recent past, especially in 2018. Sometimes the doctrine is also termed as a doctrine of radical transformative character. Kurian Joseph stated that constitutional morality is not the same as the majoritarian view. The statement holds a good value in the present time as now apex court already comes up with the many decisions that proved the statement in its litmus sense. Another prime question on the doctrine of constitutional morality is that it is a

dilemma for the state, courts and citizens. There can be no doubt that power has a tendency to at least corrupt or to exsolved one's individual motive in a different light. There would be impatience with constitutional constraints, and no one can deny that no institution can claim infallibility, no institution can claim it can do wrong, and no institution can claim that its verdict is to be taken as the voice of God. This issue put forth a question, what happens legislatures are inefficient, corrupt and when people have a fundamental distrust of the representatives of people in legislative bodies. Is constitutional supremacy at stake? Is constitutional supremacy meant not to be present? Is constitutional supremacy not to be preserved? If supreme power vested in any one organ exclusively, undoubtedly, there would be chaos. The doctrine of constitutional morality brings forth a more balanced system between the legislature, executive and judiciary.

Restorative building of confidence that one will be able to ensure that constitutional morality and constitutionalism is no longer at stake because of caprices, whims and excess of power concentrated in any one institution. Justice Hugo Black once said, "Unbounded judicial creativity would make this court a day today constitutional convention." A doctrine is a great tool for the judiciary to act in a more prominent way and to provide the due rights

to the citizen along with a high level of checks on legislatures actions. The doctrine is the perfect remedy for the “*silences of the constitution,*” and as doctrine evolved under **Article 142**, the main jurisprudential discussion is the need of the hour for a more refined form of the doctrine of constitutional morality.

When the basic feature doctrine also evolved at that time, many academicians and many constitutional experts questioned what this doctrine? How to define it? And many more questions as some are coming for the doctrine of constitutional morality, but with the passage of time with the evolution of the doctrine of the basic structure, now the concept is completely cleared out, and it is one of the most fundamental and important doctrines. The Doctrine of basic structure is none less than that of basic structure as it is also a facet of the basic structure of the constitution. Majority morality or public morality and constitutional morality should be narrowed down; it is just a constitutional suggestiveness, and as a nation grows, we need to judge this doctrine futuristically. Today is not the day to judge it, we can debate, discuss and analyze the doctrine today, but we can judge in a decade or so.

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