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**CONSTITUTIONAL MORALITY- AN IMPORTANT CONCEPT OR
JUST A NEW BUZZWORD**- Harleen Kaur¹**ABSTRACT**

The concept of *Constitutional morality* has been quite in trend these recent years. If one were to explain what constitutional morality is, it could be explained as bowing down to the core principles of the Constitution. The basis remains the same i.e. morality, which refers to the consciousness of distinction between right and wrong. Hence constitutional morality means remaining true to the distinction of right and wrong as according to the Constitution. The said concept has been used just four times since 1950 with no explanation of the word morality, let alone constitutional morality. This lack of an exact definition for the same has made it quite a vague concept. It is thus a subjective concept depending on the concerned judges to interpret it. This subjectivity has led to a lot of confusion between what stands moral as per the constitution (constitutional morality) and what the society perceives as moral (societal morality); making it quite a controversial one. It has been applied to numerous cases but the question remains the same –is it constitutional morality applied to give the judgement or is it societal morality applied to decide the said case? The role of judiciary, thus, is a crucial one in the application of the concept of constitutional morality. Hence the variability that exists upon the concept among the judiciary further leads to the emergence of scepticism among the masses.

INTRODUCTION

The Constitution is the foundation stone of a nation and the same stands true for the Constitution of our nation. The Indian Constitution was adopted on 26th November, 1949 and came into effect from 26th January, 1950. It lays down various rules, regulations, norms and

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patterns to govern not only the citizens but also the government. It is the supreme source of law in the nation and is referred to as *grundnorm*. However in the contemporary world, it has come as a challenge for the Indian judiciary to interpret the Constitution as the doctrine of ‘*constitutional morality*’ has become much more significant and relevant. Now don’t get disconcerted thinking that this concept of constitutional morality is new.

How do we define Constitutional morality? What does it imply? One of the earliest definitions of this doctrine was given by George Grote who described it as the supreme form of obedience to all aspects of the Constitution, applying not only to the citizens but the forms of authority as well. This concept then was reiterated by Dr B.R. Ambedkar who explained it as a harmonious interaction between the governing and the governed. According to Ambedkar, “*Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people are yet to learn it. Democracy in India is only a top dressing on the Indian soil which is essentially undemocratic.*”² This indicates that the concept of constitutional morality is indeed not a nascent one. It has been in existence since the times of Dr B.R. Ambedkar while compiling the Constitution but since the post-1950, it has remained in somewhat of a dormant state.

CONSTITUTIONAL MORALITY EMRGING FROM THE CONSTITUTION

Though the term ‘morality’ or ‘constitutional morality’ for that matter has not been explicitly stated in the Constitution. But it also does not imply that the Constitution has been completely quiet on the same. If read and comprehended properly, one can see that this concept emanates from the fundamental rights (Articles 12-35), Directive Principles of State Policy (Articles 36-51), fundamental duties and the Preamble. Basically, the term ‘constitutional morality’ cannot be interpreted as having one consistent definition. It depends upon the interpretation of the Supreme Court in context of Article 25 and 26 as to what the expression would imply.

ROLE OF JUDICIARY IN THE APPLICATION

The Supreme Court, though not explicitly but in passing, has indicated the concept of constitutional morality in two landmark judgements – *Kesavananda Bharti*³ and *SP*

²Dr. Babasaheb Ambedkar, Writings and Speeches 61 (1st ed., vol. 3, 1994)

³*Kesavananda Bharti v. State of Kerala*, (1973) 4 SCC 225 (India)

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*Gupta*⁴case. Two judges in the *Kesavananda Bharti* case invoked the concept of constitutional morality but did not go through with it. Later in *SP Gupta* judgement, a judge described constitutional violation as ‘*a serious breach of constitutional morality*’.

In another important judgement of *NCT of Delhi v. Union of India*⁵, constitutional morality was described as the *spirit of constitution* itself by the Apex Court, akin to the doctrine of Basic Structure laid down in the landmark case of *Kesavananda Bharti*.

The infamous *Sabrimala Temple*⁶case that dealt with the issue of whether or not the women of menstrual age i.e. between 10 to 50 years should be allowed entry into the Sabrimala temple sanctum sanctorium according to the religious practices and customs took the matter of constitutional morality as among the major issues relating to the case. CJI Deepak Mishra delivered the majority opinion which observed that the word ‘*morality*’ occurring in Article 25(1)⁷ cannot be narrowed down in its meaning and be viewed only in relation to a particular individual or religion sect. However when there is matter of violation of fundamental rights, the word automatically implies the doctrine of constitutional morality. As a result, the decision of the Court shall also be in conformity with the same. Owing to the same, the women of the age group of 10 to 50 years cannot be restricted from offering their prayers at the temple.

CONSTITUTIONAL MORALITY DIFFERS FROM PUBLIC MORALITY

Another aspect of interpretation of constitutional morality was describing it as an ‘*antidote to public morality*’. Public morality refers to the beliefs and notions of moral and immoral or rights and wrong prevailing in the society. The courts in the past have given precedence to public morality in a lot of case to curtail fundamental rights or to imply the precedence of one fundamental right over the other. The change in the said concept came with a significant judgement called the *Naz Foundation Judgement*⁸. The Court described that there is a difference between public morality and constitutional morality which should be paid heed to in matters of ‘*compelling state interest*’ because unlike constitutional morality, public morality relates to the ever changing and evolving notions and perceptions of the public/society.

⁴SP Gupta v. Union of India, AIR 1982 SC 149 (India)

⁵Government of NCT Delhi v. Union of India, (1980) 8 SCC 501(India)

⁶Indian Young Lawyers Assn. v. State of Kerala, (2018) SCCOnLine SC 1690 (India)

⁷Indian Const. art. 25, cl. 1

⁸Naz Foundation v. Govt. of NCT of Delhi, (2009) SCC OnLine Del 1762 (India)

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Further in numerous similar cases, the judges held that the Court needs to convert public morality into constitutional morality to deliver justice.

Analysing the above mentioned judgements, it is quite clear that it is pertinent to decipher the silence of the Constitution and not just the words. Constitutional morality is a matter where the Constitutional text is silent but it is still derived to understand the essence of our Constitution.

CONSTITUTIONAL MORALITY: A TRANSFORMATIVE CONCEPT

The proponents of constitutional morality clearly explain it as one of the most transformative and revolutionary concepts. It not only questions the citizens but also the government as well thus facilitating the application of the rule of law in the nation. This invokes and promotes the trust of the people in several democratic institutions which is necessary to create a sense of amiability and team spirit among the people to achieve the ambitions of the Constitution. This principle of constitutional morality also serves as an aid in interpreting the provisions of the constitution which are inconsistent with the society at the time. For instance, the prohibition of sati was a major step when it was quite clearly still prevalent in the society. However relating it to the right to life and dignity of the widows has brought about a significant change in public mindset to say the least.

It becomes even more significant in a country like India with so much diversity of caste, class, customs, genders, etc. The application of the doctrine of constitutional morality makes the country inclusive to all the differences by acknowledging these differences and promoting diversity.

CONSTITUTIONAL MORALITY IN THE PRESENT TIMES

The concept of constitutional morality thus is not just a buzzword in the present times. It has been in existence since the beginning of the presence of our Constitution. Admittedly it remained dormant until very recently before being openly enforced and applied. The cases discussed above and more are a testimony to the said fact. It has been duly acknowledged by the courts in the recent times to strike down various provisions, laws, exceptions, rules or norms to abolish discrimination, promote dignity of the people, accept the heterogeneity of the nation and promote diversity.

CRITICISM OF THE APPLICATION OF THE CONCEPT

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However we seem to be deviating from the veracity of the concept. Like any other concept, the theoretical explanation looks enticing. It seems utterly utopian to even consider the fact that the application of constitutional morality is thoroughly pellucid. What is meant by this is the fact that even though the constitutional morality principle has been applied and comes up in cases every now and then in recent times, there has been no striking discussions or deliberations upon the same. Therefore, there lies a lot of confusion related to the said concept. This is because the word '*morality*' is used with qualifiers or prefixes such as '*constitutional*' or '*societal*' when applied. Now this further implies that the conceptualisation of '*morality*' (whether constitutional or societal) depends entirely upon one's interpretation of the same.

Thus one can say that this concept is certainly not just a buzzword thrown around but is clearly taken into consideration while putting it to practice. However the lack of an explicit mention of the term in the Constitution makes this practical application very subjective i.e. depends on the interpretation of the concerned judge which defeats the entire purpose of the concept which was to bow down to the core principles of the Constitution without being deviated by the transforming notions of society. It is '*societal morality*' applied in guise of '*constitutional morality*'. This application of '*societal morality*' facilitates not rule of law but the rule of majoritarianism which is obliterating for a diverse nation like India.

Other than that, the fact that certain issues such as the rights of sweepers and scavengers have never even entered the arena of legal consciousness is quite concerning. These issues are deep-rooted in the very core of our nation. The lack of safety or the rise in the deaths of these classes of citizens is to be taken into account for. They are still to this day, considered a stigmatised class in the society and even marginalised. This is where the question of '*constitutional morality*' comes. Is it not a violation of the doctrine of constitutional morality to have such citizens be treated like this? Is it not against the basic norms and principles of the Constitution to isolate these citizens when there exists Article 17 in our Constitution?

CONCLUSION: REALISATION OF AMBEDKAR'S MOTIVE

It is to be understood that it was in the fair realisation of the objectives of the Constitution amidst the inequality in the nation that Ambedkar even used the term '*constitutional morality*'. For him, the answer to the sorry state of the society and the disparities among the people was constitutional morality. The same is strikingly transformative in nature. In the

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recent years, it has been widely applied in the cases of gender equality, social justice, upliftment of marginalised communities and such other evils.

Though the question that remains floating here is: whether or not the scope of constitutional morality would be widened by the Supreme Court? Would there be brought some sort of consistency in the same? Would there be kept a check on majoritarianism to protect the minorities in the very true and practical sense?

It is not just the interpretation but the application of constitutional and not societal morality that would make Ambedkar's vision a reality. They are not to be misinterpreted or confused with one another. Here comes the role of judiciary to widen its horizons, maintain consistency and clarity in its judgements and not succumb to the ubiquitous political ideas or public notions because for India, it is not just a concept but a necessity.

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