

INDIAN JOURNAL OF CONSTITUTIONAL STUDIES

ARTICLE

OCTOBER 2021

Copyright © 2016-17. All rights reserved with the Editors of Indian Journal of Constitutional Studies.

ISSN 2456 - 5008
Published bimonthly

- - Disclaimer - -

No part of this publication may be reproduced or copied in any form by any means without prior written permission of Managing Editor of the Indian Journal of Constitutional Studies. The Indian Journal of Constitutional Studies (hereinafter IJCS) and its affiliates holds the copyright to all articles contributed to this publication. The views expressed in this publication are purely personal opinions of the authors and do not reflect the views of the Editorial Board or Board of Advisors for the Indian Journal of Constitutional Studies. Though all efforts are made to ensure the accuracy and correctness of the information published, the Editorial Board or the Board of Advisors for IJCS are not responsible for any errors caused due to oversight or otherwise.

- - Note - -

This compilation has continuous footnoting. Kindly read the references to previous footnotes in all the Articles in isolation upon the particular Article only.

Publisher Details -

Bishikh Mohanty

E33, AWHO Colony Chandrasekharapur, Sailashree Vihar,

Khorda, Odisha, Pin - 751021

Telephone: +91 8106743973

Email: ijconsstudies@gmail.com

- Acknowledgement-

We would like to express a deep sense of gratitude towards our editors, who thoroughly validated all articles sent to them for reviews. We would also like to thank our contributor, **Mr. Shreyam Sharma** for their contribution towards journal's blog.

RECALLING AMBEDKAR'S CONSTITUTIONAL MORALITY THROUGH THE INDIAN JURISPRUDENCE

-Shreyam Sharma, student, Nalsar University of Law

Introduction:

In his speech delivered on the [4th of November 1948](#), Dr B.R. Ambedkar emphasised the need of absorbing “Constitutional Morality” in the veins of this secular democratic, sovereign and socialist republic, to ensure the subsistence of a government that is both free and peaceful. While the purpose of Grote’s [History of Greece](#) was to rescue Athenian democracy from the condescension of its elitist critics like Plato and Thucydides, Ambedkar’s hope was to prevent the misuse of constitutionally vested discretion in the hands of the legislature. The lack of this morality, he argued, would foster a breeding ground for even a strong and tenacious minority, who shall make the operation of a free institution impossible, without being able to usurp power and dominance. But in the backdrop of a paradigm shift in the Indian political environment towards moral policing and supremacy of social mores over constitutional mores, what are the defining contours of constitutional morality?

The Origin of the Indian Idea of CM:

From the “[Basic Structure](#)” doctrine to liberal interpretations of Article 21, the Supreme Court of India through various judgements, has developed doctrines and principles unwritten in the Indian Constitution. If we were to follow the conceptions and elaborations made by Dr. Ambedkar, one may conclude that constitutional morality demands respect for the provisions of the constitutions, refraining from arbitrary actions that tend to blur the boundaries of constitutional restraints and worsen the potential of unbridled opprobrium of executive or legislative authority. He warns adamantly that only people who are saturated with constitutional morality such as the one described by [Grote](#), can take the risk of omitting the constitutional details of the administration and leaving it for the Legislature to prescribe them. However, a presumption of constitutional morality cannot be made in the favour of Indians, since it has to be cultivated in a country, [where democracy is only a top-dressing on a soil that is largely undemocratic](#).

Despite constituent assembly debates extensive deliberations on constitutional morality, there is no reference to the term or any standard of constitutional morality in the text of the constitution. Neither is any reference to constitutional morality made in statutory law, though the phrase ‘morality’ is juxtaposed with [public policy in some contexts](#). But the importance of constitutional morality has been emphasized time and again in various Supreme Court judgements and even endorsed by jurists such as [Justice Krishna Iyer, who observed that we cannot regain our past glory unless we realise the importance of morality in our present legal system](#). Hon’ble *Justice Dhananjay Y. Chandrachud* [observes that](#) Constitutional morality requires filling in constitutional silences to enhance and complete the spirit of the Constitution. He further [observes](#) that it signifies a constitutional culture that is not only in favour of the government but in every subject of the law. It became the subject matter of much scholarly discussion especially after the Attorney General of India, K.K. Venugopal, was extensively reported in the press as having criticized it as a “[dangerous weapon](#)”.

Supreme Court carries forward the tenets of Constitutional Morality:

The origin of the Indian Judiciary’s engagement with Constitutional Morality in a full-fledged manner starts with the Delhi High Court Judgement in the famous **Naz Foundation Case** [[Naz Foundation v. Government of NCT of Delhi & Ors., \(Naz\) 2009 \(111\) DRJ 1 \(DB\)](#)] where the first-ever historic constitutional challenge to the penalisation of homosexual activities was marked. The primary argument of the petitioner was the violation of privacy rights for the preservation of social or religious morality. The State countered that the anti-sodomy law reflected the “morals of the time in the Indian society”, and that criminal law depends ought to take into consideration the political and moral considerations of the contemporary society. The Delhi High Court laid down the test of “compelling state interest” for restriction of the rights to privacy and the “enforcement of public morality” cannot be construed as a compelling state interest. The fundamental rights of an individual cannot be curtailed on the pretext of popular social morality or societal disapproval of certain acts. Such morality must be judged on the parameters of a superior constitutional morality- one that is derived from constitutional values. The policies and provisions made by a government ought to be in consonance with the “Conscience of the Constitution”.

It was subsequently in [Navtej Singh Johar v. Union of India](#), that the Supreme Court of India decriminalised consensual same-sex activity after the reversal of Naz Foundation case in **Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors.** The court in Navtej Singh Johar clearly [supersedes constitutional morality over social morality](#) so as to sustain and preserve the constitutional values imbibed into the Indian democracy. Giving the example of [Section 377 of the IPC](#), the court emphasised the possibility of social morality being discriminatory and non-inclusive, as against constitutional morality which is free from such prejudices. Constitutional morality is a formal rational legal thinking that is independent of prejudices, biases and divisions existing in the society, thus upholding the right to equality and equal treatment of law. If at all the constitutionality of a legislation is justified on the backbone of moral values, such values must be based on constitutional principles. Chief Justice Dipak Mishra and Justice Chandrachud [highlight the organic nature](#) of the constitution and the inevitability of change in accordance with new and liberal interpretations of the constitution based on constitutional morality. The transformative character of the Constitution ought to be guided by the morality enshrined in its conscience instead of extraneous social mores that are often vitiated with discriminatory ideas.

The highly debated decision of the Supreme Court in [Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors. \(Sabarimala\), 2018](#) proved to take a step back in the jurisprudence of constitutional morality with a dissenting judgement from Justice Indu Malhotra. The case, where the fundamental rights of menstruating women between the age of 10 and 50 years to enter the Sabarimala temple was in question, as against the rights of religious denomination to manage its own affairs under [Article 26 of the Constitution](#). The custom was essentially held to be violative among other things, of Constitutional Morality. But whereas Justice Chandrachud's and Justice Nariman's concurring opinion carried forward the standard of CM, Justice Malhotra's dissent marked the first conflict within the Supreme Court regarding the supremacy of CM. While she agreed that freedom of religion and non-discrimination are essential for the preservation of CM, she argues that so does the right of "the followers of various sects ... to practice their faith in accordance with the tenets of their religion."

In such a scenario, where competing values with conflicting ends pull at CM in different directions, Justice Malhotra [suggests that courts](#) must engage in harmonious construction to ensure that neither value is undermined. Ultimately, what her dissenting opinion resulted in

was an internal tension within the liberal application of constitutional morality, which the courts felt comfortable to apply.

Finally, in [Joseph Shine vs Union of India](#), where Section 497 of the IPC was challenged by the petitioner for its arbitrariness and discriminatory nature, the Supreme Court cemented the triumph of constitutional morality over anachronistic customs. The petitioner claimed that the criminalisation of adultery demolishes the dignity of a woman and challenged it to be violative of article 14, 15(1) and 21 of the Indian Constitution. Justice Chandrachud found that the exemption given to married women from being punished as abettors assumed that a woman was a “victim of being seduced into a sexual relationship” and that she “has no sexual agency”. The Judgement taught us to lay emphasis on the inevitability of questioning patriarchal social mores and values that are anti-thetical to the pillars of the constitution. The preservation of a patriarchal concept of marriage cannot be the cost of eradication of constitutional morality.

Conclusion:

While senior advocate [Abhishek Manu Singhvi in his book](#), *From the Trenches*, and the Attorney General of India K.K. Venugopal have criticised the use of constitutional morality in judicial decisions owing to its undefined boundaries and subjectivity, the discourse set in motion primarily by two Justices- Justice D.Y Chandrachud and Dipak Mishra, is bound to break grounds. Allegiance to the ideals of the constitution and the tenets of equality, liberty and fraternity is a quint-essential condition for a democracy to succeed. While the Indian political diaspora witnesses the enactment of legislations such as the [UP Prohibition of Unlawful Conversion of Religion 2021](#) that have been [reported to cause major](#) violations of basic fundamental rights owing to its misuse, a principally strong and non-biased beacon such that of Constitutional Morality is crucial to contain divisive and discriminatory practices. Perhaps, as Ambedkar realized, India with its staggering inequality and class dominance can manage to address its disparities only if its people were to follow the morals of the constitution. The Supreme Court, in whatever small instances, strives to cement the place of constitutional morality in the Indian Jurisprudence.