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THE DOCTRINE OF CONSTITUTIONAL MORALITY: TRUE SPIRIT OF A DEMOCRATIC NATION

INTRODUCTION

The constitution of India is the supreme law of the land and the living document of the laws rather than a simple book containing words. It is in-fact the source of moral guidance to the courts in deciding several questions of law. From time immemorial, we have seen a lot of judicial inventions that are not expressly mentioned formally in the constitution of India, One such judicial invention is the **Doctrine of Constitutional Morality**, which has been recently added and provoked several times by the Supreme Court in previous judgments to protect the fundamental rights of the citizens.

It has been observed from the ancient times that Indian culture pays a greater tribute to the providers of justice and Upanishads also demonstrate that the law is the king of kings, thus justice will triumph always, so the maintenance of constitutional morality is essential to guarantee the individuals their fundamental rights in the process of imparting justice. But in the 21st century, there has been a rapid decrease in the admiration of constitutional values and maintaining the morality of the constitution or preserving, perfecting or perpetuating it, has become the greatest challenge for the modern states. . Now, let us see how well constitutional morality has been observed in these 70 years since the constitution came into being.

DOCTRINE OF CONSTITUTIONAL MORALITY

The doctrine of constitutional morality means adherence to the noble principles enshrined in the Constitution, the interpretation of the principles of the constitution according to the spirit of

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constitutional democracy. It can also be defined as adherence to the fundamental values of principles and philosophy of constitutional democracy that have been extended to create a society based on egalitarian morality based on social, economic, and political justice.

There had been several inventions by the courts which are not expressly mentioned in the constitution but are the soul of the constitution such as the ‘basic structure’ doctrine, the ‘classification test’, the new ‘manifest arbitrariness’ test and one such judicial invention is the doctrine of Constitutional Morality which is not expressly written but can be understood from the provisions of the constitution

The word ‘morality’ has only been used four times in the Constitution of India, i.e., in the Article 19(2), 19(4) and twice in right to religious freedom under Article 25(1) and 26 and it continues to be provoked by the courts in many cases involving rights speech, sexual orientation, surrogacy, etc. The phrase ‘constitutional morality has become widely used now but it was a subject of strong criticism after the Supreme Court’s Sabrimala judgment and the Attorney General of India called it as a ‘dangerous weapon’ and since then, the supreme court seems to distrust its use, also in the series of important judgments pronounced by the courts on the eve of the retirement of the Chief Justice Gogoi on November 2019, involving questions of law, such as the Ayodhya Case, Rafael, The Right To Information Act and The Finance Act, the constitutional morality was salient by its absence.

The phrase rarely came up in the constituent assembly in the discussions, but out of some scattered uses of the phrase in the discussions, only one reference has a logical essence. This was in Dr. B.R. Ambedkar acknowledgment of the phrase in his speech,” the Draft Constitution”, delivered on 4 November 1948, referring to George Grote. So, according to Ambedkar,

“Constitutional morality is an effective co- ordination between the conflicting interests and administrative cooperation of different people, which at any cost would resolve harmoniously, without any confrontation between the various groups, to achieve their ends. The moral fabric of the society, governed and the government must be strengthened.”¹

¹ The Constitution and the Constituent Assembly Debates. Lok Sabha Secretariat, Delhi, 1990, pp. 107-131 and pp. 171-183.

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So, the principle of constitutional morality means bowing to the norms of the Constitution and not acting in a way that could violate the rule of law or reflect the action in an arbitrary way. The concept of constitutional morality is not limited to the mere observance of the fundamental principles of constitutionalism such as the magnitude and scope of constitutional morality, it is not limited to the provisions and literal text that a Constitution contains, but embodies the core virtues of a constitution.

EVOLUTION OF CONSTITUTIONAL MORALITY

The doctrine of constitutional morality was propounded by George Grote, who was an English Historian, in 19th century CE, in his book “The History of Greece”. According to Grote constitutional morality means a culture of respect for the constitution, which would guarantee a peaceful government, he quoted that-

“The diffusion of ‘constitutional morality’, not merely among the majority of any community, but throughout the whole is the indispensable condition of a 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 ascendance for themselves.”²

In Grote’s formulation, constitutional morality means the following things:

- All citizens would abide by the constitution.
- All citizens would obey authorities acting under the Constitution.
- All citizens would have the unrestrained freedom to criticize public officials acting in the exercise of their Constitutional functions.
- Public officials would have to act within the limits written in the Constitution.
- Contenders for political power would respect the Constitution and know that their opponents would respect it too

Ultimately, Grote’s formulation of constitutional morality implied a “coexistence of freedom and self-imposed moderation, of obedience to authority with excessive censorship of the persons exercising it.”³ Although citizens would respect the Constitution and obey the laws and

² Grote, History of Greece, Volume III, P.347.

³ Grote, History of Greece, Volume III.

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constitutional authorities, they would also have the freedom to criticize such Constitutional authorities, and Constitutional authorities would have to act within the limits imposed by the law.

Dr. B.R.Ambedkar also wrote about Constitutional morality in his Annihilation of Caste (1936):

*“Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil which is essentially undemocratic.”*⁴

ELEMENTS OF CONSTITUTIONAL MORALITY

There are various elements of constitutional morality, these are:

- Preamble
- Rule of law
- Social Justice
- Individual liberty
- Right to Equality
- Freedom of Choice and Expression
- Due Process of law

Constitutional morality guarantees certain rights in a democracy, and these rights are essential for the free existence of all the citizens. The preamble to the Constitution acknowledges these rights as "Freedom of thought, choice, expression, belief, faith and worship" and "Equal status and opportunities". It seeks that all inequality is eliminated from the social structure and each individual has assured the means to respect the guaranteed rights. It also tends to make Indian democracy vibrant by instilling a spirit of brotherhood among a heterogeneous population, belonging to different castes, races, religions, cultures, and sectors.

⁴ The Annihilation of Caste (1936).

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The invocation of constitutional morality should be seen as an extension of Dr. Ambedkar's formulation on social reform and constitutional transformation. Highlighting the importance of individual rights in social transformation, he observed:

"The assertion by the individual of his own opinions and beliefs, his independence and interest, above and against the group norms, group authority and group interests, is the beginning of all reforms, but whether the reform will continue depends on the scope that the group affords for such individual assertion. "

After the constitution came into being, each affirmation of rights must be governed by the principles of the Constitution, its text, and its spirit. It identifies the right to a dignified life and also prohibits discrimination in society.

JUDICIAL PRONOUNCEMENTS ON CONSTITUTIONAL MORALITY

The responsibility of the constitutional courts is to determine the validity of the law on the basis of well-accepted principles, namely, legislative competence or violations of fundamental rights or any other constitutional provisions. At the same time, the courts are expected to be the final arbiters of the Constitution to uphold the cherished principles of the Constitution.

In *S.P. Gupta v. Union of India* also called as the First Judges case⁵, the court found that a violation of a constitutional convention would “be a serious violation of constitutional morality. The court held that, although an affirmative action measure of could be valid under Articles 15(4) and 16(4) of the Constitution, it would violate “constitutional morality” if it violated the doctrine of equality.

It would be constitutionally immoral to perpetuate inequality among the majority of the country’s people, under the pretext of protecting the constitutional rights of minorities and constitutional rights of the backward and oppressed.⁶

⁵ *S.P. Gupta v. Union of India*, (1981) Supp SCC 87, ¶ 1077

⁶ *Islamic Academy of Education v. State of Karnataka*, (2003) 6 SCC 697, ¶118.

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In 2013, in *Niranjan Hemchandra Sashittal v. State of Maharashtra*⁷, the courts held that it was a part of “collective sensibility” to respect those people who have suffered at the hands of corrupt public officials because this was “in consonance with the constitutional morality.”⁸

In *Govt. of NCT of Delhi v. Union of India*,⁹ the judges used constitutional morality as a synonym for spirit, soul, or conscience of the Constitution. In this formulation, constitutional morality is the second doctrine of the basic structure. It allows the courts to test the action of government by observing not only at the formal provisions of the Constitution but also at its undefined spirit or essence. It was held that secularism was a part of constitutional morality, constitutional morality, in connection with the spirit of the Constitution, allows constitutional courts to examine the validity of all government actions, not merely constitutional amendments observing the “spirit”, “soul” or “conscience” of the Constitution.

Supreme Court in *Navtej Singh Johar v. Union of India*,¹⁰ held that courts should not be “guided remotely by majoritarian view or popular perception”, instead they should be “guided by the conception of constitutional morality and not by the societal morality.” The Apex court found that that it is “not...open for a constitutional court to replace societal morality with constitutional morality”. Thus “social morality” was “inherently subjective” and morality and criminality were not co-extensive. And distinguished “public morality” from “constitutional morality”

SIGNIFICANCE

Constitutional morality guarantees the establishment of the rule of law in the country while integrating the changing aspirations and ideals of the society. It is the governing ideal that highlights the need to preserve the confidence of the people in the institutions of democracy, it even enables people to cooperate and coordinate to pursue constitutional aspirations that cannot be achieved on their own.

⁷ (2013) 4 S.C.C. 642.

⁸ *Niranjan Hemchandra Sashittal v. State of Maharashtra*, (2013) 4 SCC 642, ¶ 26.

⁹ *Govt. of NCT of Delhi v. Union of India*, (2018) 8 SCC 501.

¹⁰ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

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Constitutional morality can also use laws and forms to influence and change persistent social morality. For example, abolishing the practice of Sati was abolished and the right to live life with dignity was passed on to widows which later on influenced the perception of the practice in the society.

Constitutional morality acknowledges the plurality and diversity of the society and seeks that the individuals and communities of society are more inclusive in their functioning, providing constant space for improvement and reform. For example, in the case of Navtej Singh Johar, the Supreme Court provided a structure to reaffirm all the rights of the LGBTQ community and all gender non confirming people to their life, liberty, dignity, and identity.

The formulation of constitutional morality as something equal to public morality appeared in *Joseph Shine v. Union of India*.¹¹ The court, in that case, was concerned about the constitutional validity of Section 497 of the Indian Penal Code, finding that Section 497 denies a married woman of “her agency and identity, using the force of law to preserve a patriarchal concept of marriage that is contrary to constitutional, morality”. So the courts held that Criminal law must be in harmony with constitutional morality.”

In the case of *Indian Young Lawyers Association v. State of Kerala*¹², popularly known as the Sabarimala case, the Supreme Court was concerned about whether there was a rule that prohibit women between the ages of 10 and 50 from entering into a Hindu temple, which was unconstitutional. Articles 25 and 26 of the Constitution, which confer the fundamental rights to profess, practice, and propagate religion, to establish and maintain religious institutions, etc., are subject to, “morality”. The main issue was whether any entry restriction into the temple could be justified because it was in harmony with “morality”. Responding negatively to this question and upholding the restriction unconstitutional, the SC, held that the word “morality” contained in Articles 25 and 26 of the Constitution should mean constitutional morality and not popular morality. CJ Misra quoted that, “Constitutional morality in its strictest sense of the term implies strict and complete adherence to the constitutional principles as enshrined in various segments of the document.”

¹¹Joseph Shine v. Union of India, (2019) 3 SCC 39.

¹² Indian Young Lawyers Association v. State of Kerala, (2018) SCC Online SC 1690.

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CONCLUSION

Constitutional morality is a separation of those actions that can be legally correct but are not morally correct and those actions that can be both legally and morally correct. However, the condition put here is that morality should be judged by our constitutional spirit rather than by the private values of the person who adorns the constitutional role in our nation. Constitutional morality is the soul of the constitution, which has its origin in four principles contained in the Preamble of the Indian Constitution, that are justice, freedom, equality, and fraternity which declares its ideals and objectives, and these principles are also found in Part III of the Constitution, in particular with respect to those provisions that guarantee the dignity of the person. These fundamental principles “should govern our constitutional opinions of morality. Constitutional morality must have a permanent value that is not subject to the short-lived imaginations of every epoch and era; it means morality which has elements deep-rooted to the constitutional norms and the values of the Constitution.

Therefore, constitutional morality is not limited only to literally following constitutional provisions but is based on values such as autonomy and individual freedom; equality without discrimination; recognition of identity with dignity; The right to privacy, etc.