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JUDICIAL INTERPRETATION OF DOCTRINE OF CONSTITUTIONAL MORALITY: A TOOL IN SAFEGUARDING THE FUNDAMENTAL RIGHTS

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“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.”

—**B.R. Ambedkar, Annihilation of Caste.**

Abstract

In contemporary India, the doctrine of constitutional morality plays a significant role in safeguarding the fundamental rights of the citizens. The constitutional morality traces to George Grote's 'History of Greece'. Later Dr B R Ambedkar used this term in the constituent assembly as a rhetorical device which justified the embodiment of the details in the constitution. The learned judges of the United States also interpreted the significance of constitutional morality in protecting human rights. In India, till recently, the doctrine was in a dormant state, but lately, through different landmark decisions, there was the renaissance of doctrine by the judicial minds in safeguarding the fundamental rights of its citizens. Honourable judiciary through these decisions apologises for the people whose fundamental rights were denied due to the interest of popular morality.

Introduction

The concept of morality governs by the principle of conduct or the system of values. The morality concept explicitly showcases the clear demarcation between what is right and what is wrong from the perspective of society at large. Moreover, morality cannot always be advocated as correct, as it fails to recognize the minority interest of society. According to HLA Hart, what

is required or allowed by law may be prohibited by morality, to be precise, what is legal may not be morally correct. Likewise, what is illegal may have moral acceptability or even required. This principle is also considered a separation thesis. Thereby, can consider this as the normative principle in the development of the doctrine of Constitutional morality. Part I deals with the historical inception of the doctrine from Greece. Part II deals with the concept of doctrine of constitutional morality specifying to Indian jurisdiction. Part III deals with the judicial approach of doctrine in protecting human rights in the United states. Part IV deals with the application of constitutional morality doctrine as a tool in setting precedents under India judicial system concerning protection of fundamental rights.

The Inception of Constitutional morality from ‘History of Greece’

The doctrine of Constitutional morality can be traced to George Grote's 'History of Greece' and is having philosophical importance. Grote defined constitutional morality as, "A paramount reverence for the forms of the constitution, enforcing obedience to the authorities 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 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."¹Grote said that constitutional morality existed in England since the Glorious Revolution of 1688 and in the U.S.

The Doctrine of Constitutional Morality conception

In India, the doctrine of Constitutional morality, till recently was in a dormant state. However, lately, judicial minds activated and interpreted the doctrine as a tool to safeguard the fundamental rights of the people and to protect the essence of the Constitution. Although the term constitutional morality is not defined explicitly anywhere in the written texts, it has taken different notions at different points of time. In a literal sense, Constitutional morality is a moral obligation of any individual who is obliged to be faithful towards the constitutional values of the land and also strive to uphold these values with the utmost integrity. The very principle of constitutional morality is the adherence to the principles which are considered to be noble and enshrined in the Constitution. It can also be an interpretation of the Constitution in line with

¹ 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> (last visited 4 October 2020)

the ethos of constitutional democracy. Moreover, this will extend to create a constitutionally moral based society. The scope of the doctrine is not limited solely to the provisions of the Constitution, preferably extends its sphere to include all the individual interests and collective interests. Moreover, due to the supremacy of social morality, the doctrine was found in the dormant state.

This article emphasizes judicial interpretation of constitutional morality as a useful tool to safeguard the fundamental rights of the citizens who have been denied their rights due to the age-old laws. The judicial interpretations by the honourable court reformed these laws which demanded reformation with the changing time. They were clear that society is not static, and evolution is within it and to meet the needs of the society; the interpretation of constitutional morality was essential. Furthermore, it also protects the spirit of the Constitution.

Constitutional morality doctrine is not similar to ordinary morality. Instead, it is the concept wherein the judicial minds try to interpret the provisions of the Constitution in a moral way which is subjected to the Constitution itself and not to the public morality. Here the learned judges introspect, analyze and question themselves regarding what is constitutionally moral and publicly moral. Moreover, on their understanding and analysis, the constitutionally moral context prevails.

India has witnessed the paramount importance of constitutional morality. The Honourable Supreme Court of India through its various landmark decisions, scrutinized the doctrine of constitutional morality with public morality. The judicial minds in all these cases recognized the deviation from constitutional morality due to the superior prevalence of public morality, which included values, customs and practices of the society in time immemorial. This scrutinization revealed that different sections of the society have to compromise with their fundamental rights to abide by public morality. However, the court interpreted that such compromises based on the interest of the larger section are improper as it denies the private interest of even smaller sections of the society. The constitutional design protects both the collective and private interest of the individuals of the land. Furthermore, these kinds of contradicting provisions need to have improved in the process of evolution of the changing society.

The Judicial approach of Constitutional morality in the United States

In the United States, constitutional morality plays a unique and highly critical role concerning the written Constitution as they are based on the consent of the people. The American lawyer

William D. Guthrie in the early 1900s opined through his writings that the United States must encourage the fullest discussion of judicial decisions in constitutional cases in order that thereby constitutional principles may be explained and the necessity for the observance of constitutional morality brought home to the people.² While considering some of the judicial interpretations, the Supreme court of the United States has recognized the right to privacy through a plethora of cases. Still, the court also noted that states might enact laws, including criminal statutes to advance a majoritarian view of sexual morality.³ The U.S. Supreme Court in *Bowers v. Hardwick*⁴, upheld that prohibition of consensual sodomy as an expression of the prevailing morality. The court treated both the questions related to the limits of governmental control over individual freedom and also the narrow issue of morality as a justification for penal sanctions. Thus, the decision was that forcing sexual morality is a legitimate governmental end and government may criminalize the private sexual acts between the consenting adults.

Supreme court's decision in *Roe v. Wade*⁵ was dominated and controlled any discussion of the legality of abortion in the United States. The anti-abortion side or pro-life condemns its opponents for avoiding the issue of right and wrong. Furthermore, abortion opponent argues that all that proponents of abortion rights talk about is a right of a woman to choose her pregnancy without even discussing the morality of that choice. The pro-choice supporters contended that even if having an abortion is immoral in certain circumstances, it should not be illegal. The fundamental right of privacy protected by the Constitution guarantees women the freedom to make through procreative decisions. However, in different cases⁶, it was held that the state might override a women's right to privacy, even fundamental right if such action is necessary to further a sufficiently compelling state interest.

Constitutional morality as a Judicial tool in safeguarding Fundamental rights: Indian approach

The term constitutional morality had a different meaning at a different period. According to George Grote; it was a culture of reverence for the Constitution, which shall ensure a peaceful government. Dr BR Ambedkar in the constituent assembly adopted this term as a rhetorical

² William D. Guthrie, *Constitutional Morality*, Vol. 196, No. 681, N. Am.Rev., 154, pp. 154-173, Aug., 1912.

³ Katheryn D. Katz, *Majoritarian Morality and Parental Rights*, 52 ALB. L. REV. 405, pp.405-469, (1988).

⁴ *Bowers v. Hardwick*, 478 U.S. 186 1986

⁵ *Roe v. Wade*, 410 U.S. 113 (1973). *Roe* invalidated a Texas statute prohibiting abortions before as well as after viability

⁶ *Boos v. Barry*, 485 U.S. 312, 321 (1988) (freedom of speech); *Roe*, 410 U.S. at 155 (right of privacy); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (right to travel); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (free exercise of religion)

device to justify the embodiment of banner details in the constitutions, which mainly concerns regarding the matters of administration. According to the present scenario, constitutional morality can either have a meaning which is entirely against the popular moralities and the Spirit or essence of the Constitution.

The Supreme court of India has first adopted the doctrine in the celebrated case of *Kesavananda Bharati v. Union of India*.⁷ Later in the case of *S.P. Gupta v. Union of India*⁸, famously known as the 'first judge case', Justice Venkataramiah stated that, "violation of constitutional convention would be a serious breach of constitutional morality."

The judiciary is recognized as the custodian of the Constitution. They are entrusted with an obligation to incorporate judicial values through its process, thereby guaranteeing the Spirit and essence of the Constitution. The preamble to the Indian Constitution refers to the state as a secular country. However, there is no "establishment Clause"⁹ in the Constitution akin to the first amendment to the U.S. Constitution. So, in recent times, the judicial minds used the term constitutional morality to uphold the fundamental rights of the citizens against popular morality. Moreover, this can be considered as a judge-made innovation concerning the interpretation of constitutional morality. The Constitution is silent on the term Constitutional morality and regarding which Justice Chalemeshwar confers eruditely in the *Justice K S Puttaswamy (Retd.) & Anr v. Union of India & Ors*¹⁰ where 'Right to Privacy' was elevated to the status of a fundamental right.

In *Naz Foundation v. NCT of Delhi*¹¹, the bench synonymously used the term constitutional morality with the Spirit, essence and conscience of the Constitution. The constitutional validity of section 377 of IPC was in question. So according to public morality, any carnal intercourse is against the order of nature. So, it was not an accepted norm by the public, and it was considered to be immoral by the public at large. Considering the nature of the person, involved in this sphere are from a minor community who are denied their right to express their feelings and their way of living. Since public morality alleges it to be immoral, it cannot always be considered to be the collective interest. The Constitution is designed to protect both private interest and collective interest. Moreover, Public interest cannot be protected at the par of private interest. This will be entirely against the essence of the Constitution, which is bound to

⁷ *Kesavananda Bharati v. Union of India*, (1973) 4 SCC 225: AIR 1973 SC 1461

⁸ *S.P. Gupta v. Union of India*, (1981) Supp SCC 87

⁹ The first amendment to the U.S. Constitution says: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...".

¹⁰ *Justice K S Puttaswamy (Retd.) & Anr v. Union of India & Ors*, WRIT PETITION (CIVIL) NO 494 OF 2012

¹¹ *Naz Foundation v. NCT of Delhi*, (2009) 160 Delhi Law Times 277

protect each of his citizens and safeguard and respect their fundamental rights. It can be considered as a second basic structure doctrine because it enables the judges to test the government action by looking not merely at the former provisions of the Constitution but also to its undefined Spirit or essence. The High court, in this case, introspected and asked themselves a question whether the impugned provision would be sustained because it amounted to enforcing public morality which was a compelling state interest. This case also referred to the foreign judgement that interpreted this doctrine. The European Court of Human Rights in *Norris vs the Republic of Ireland*¹² stated that members of the public who regard homosexuality as immoral might be shocked or offended or disturbed by the commission by others of the private homosexual as this cannot on its warrant the application of penal sanctions when it is consenting adults alone are involved.

The Chief justice A P Shah of the Delhi High Court held that popular morality or public disapprobation of specific acts is not a valid justification for restriction of the fundamental rights under article 21 of the Indian Constitution. As per the provision of the Constitution, Indian citizens have the right to life and personal liberty. So, any private interest between two citizens who have acquired a majority and are acting in consensus and also not harming the society can be allowed in the interest of safeguarding fundamental rights of those citizens. In this case, the court added that this aspect of constitutional morality was strongly insisted upon by Dr BR Ambedkar in the constitution assembly that constitutional morality must be taken into account and not the popular morality. Although the supreme court, in this case, reversed the judgement of High court, later in *Navtej Singh Johar vs Union of India*¹³, the larger bench favoured and deployed this framework to reaffirm the rights of LGBTQ and all gender non-conforming people to their dignity, life, liberty, and identity.

In *Joseph Shine v. Union of India*¹⁴, the constitutional morality was reiterated by the judiciary, and the constitutional validity of section 497 of the Indian Penal Code was challenged. The court noted the underlying reason exempting the women from the liability was the result of patriarchal norms predominating in the society where women are treated as "victims of being seduced into a sexual relationship" and as a property of a man. The court held that this provision delineated the public morality and in light of constitutional morality, such provisions cannot be allowed.

¹² *Norris v. Republic of Ireland* 142 Eur. Ct. H.R. (ser. A) (1988)

¹³ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1(India)

¹⁴ *Joseph Shine v. Union of India* (2019) 3 SCC 39

The Supreme Court in *Indian Young Lawyers Association v. State of Kerala*¹⁵ was concerned with the question of whether a rule that barred women between the ages of 10-50 from entering a Hindu temple was unconstitutional. As per the Indian Constitution, Articles 25 and 26 confer the fundamental rights to profess, practice and propagate religion, to establish and maintain religious institutions, etc., are subject to, among other things, "morality". The inquiry was whether the temple entry restriction could be justified because it aligned with morality. The court interpreted this question in the negative and held the restriction to be unconstitutional. The Chief Justice Deepak Mishra along with Justice Khanwilkar held that the expression "morality" contained in Articles 25 and 26 of the Constitution should indicate constitutional morality and not the popular morality.

Conclusion

The judiciary is considered as the temple of justice and judges are the priests, and they are the only independent authority who can interpret the law of the land aptly and can render justice to the citizens irrespective of any class differentiation.

However, there is an ongoing hue and cry from the section of the society that challenges the interpretation of the term Constitutional Morality as it is not defined in the Constitution. They claim that such interpretation gives enormous power to the judiciary, and can pronounce any judgment as to their whims and fancies. Thus it can be precarious to the constitutional values. The attorney general of India, K.K.Venugopal raised a concern that in recent days there is the frequent use of this doctrine by the judiciary and it is a 'Dangerous Weapon' handed over to the judiciary. The task of defining the constitutional morality has been referred to a bench of seven judges of supreme court after the Sabarimala case¹⁶.

Considering all the criticisms, one thing that needs respect is that the judiciary is promptly striving to annihilate all the public morality concepts that have the potential to stand against the fundamental rights of the citizens of the country. Even though the doctrine of constitutional morality was in a dormant state, now the judiciary has given life to it through its instrumentation. Judiciary recently interpreted the doctrine in very few cases, but it deems to open the door to justice to all the citizens of the country. As mentioned in the introduction part, mere morality is the interest of the public, but it cannot always be upheld by jeopardizing the interests of private individuals or any class or groups. Hence, the constitutional morality

¹⁵ *Indian Young Lawyers Association v. State of Kerala* (2019) 11 SCC 1; 2018 (8) SCJ 609

¹⁶ *Kantaru Rajeevaru v. Indian Young Lawyers Association*, Review Petition (Civil) No. 3358 of 2018, majority judgment dated 14 November 2019

doctrine is the best weapon the judiciary can hold to uphold the fundamental rights of the citizens.

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