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The journal invites contributions from law students, researchers, academicians, legal practitioners, and policy scholars. By facilitating engagement between emerging scholars and experienced legal professionals, *White Black Legal* seeks to bridge theoretical legal research with practical, institutional, and societal perspectives.

In a rapidly evolving social, economic, and technological environment, the journal endeavours to examine the changing role of law and its impact on governance, justice systems, and society. *White Black Legal* remains committed to academic integrity, ethical research practices, and the dissemination of accessible legal scholarship to a global readership.

AIM & SCOPE

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The journal publishes scholarly works examining doctrinal, theoretical, empirical, and interdisciplinary perspectives of law. Submissions are welcomed from academicians, legal professionals, researchers, scholars, and students who demonstrate intellectual rigour, analytical clarity, and relevance to current legal and policy developments.

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Through its publications, *White Black Legal – The Law Journal* seeks to foster critical legal thinking and contribute to the development of law as an instrument of justice, governance, and social progress, while expressly disclaiming responsibility for the application or misuse of published content.

CONSTITUTIONALISM: AT THE HELM OF CONSTITUTIONAL INTERPRETATION

AUTHORED BY - BABU BETHOVAN

ABSTRACT

Constitution is first and foremost a forbearance upon the government that ensures the laws and institutional structures does not hinder the social, political and economic existence of the common man. Secondly, the Constitution bridges the gap between the past of the nation that tells the tale of what the nation was, with the more futuristic panorama of what the nation ought to be. Under the Indian constitutional scheme, Fundamental Rights and Directive Principles of State Policy - together referred to as the conscience of the Constitution – lays foundation to the ideal of Constitutionalism by vesting inalienable rights to individuals and groups and establishing a legal culture to be evoked by the State while manifesting policy decisions. By incorporating independent judiciary along with a vibrant judicial review mechanism, India poses a model limited government paradigm in comparison to other world democracies. Over the years, the Apex Court in exercise of its judicial creativity has breathed life into the nuances of the constitutional text by bringing forth the basic structure theory, the essential religious practice test and a plethora of other judicial doctrines. Although these interventions have paved path for the juridical materialization of constitutionalism, still it raises the question as to in which direction the notion of constitutional morality is being navigated by the judiciary under the arm twisting influence of social morality. This paper argues that the concept of constitutionalism along with the proper attribution of constitutional morality serves as an amicable tool for interpretation of the Constitution and ensuring the perpetuation of the Constitution with the changing times.

Keywords: Constitutionalism, Constitutional morality, Social morality.

INTRODUCTION

"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 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 constitution will not be less sacred in the eyes of his opponents than his own."

- Dr. B. R. Ambedkar

Constitution in one word signifies a dogmatic change in the political atmosphere of a territory. In case of India, Constitution of India marked the transition of a colonial state into an independent nation founded on the ideological edifice of justice, liberty and equality. These ideals fused with the definition of government, its elaborate organs and various constitutional restraints paves preliminary path for the premise that the Constitution of India inherently indoctrinates the principle of constitutionalism within its operative sphere. Constitutionalism and Constitutional morality are two imperative doctrines of modern constitutional law. Though distinct in their theoretical foundations, these doctrines emerge as a safeguard against the unfettered authority of those wielding power and provides for certain permissible standards to be kept in vigil during the course of constitutional functioning. By aligning the intricacies of these doctrines, an acceptable approach of interpreting the constitutional provisions maybe appropriated.

UNDERPINNINGS OF CONSTITUTIONALISM

At its inception the Indian constitution too met with the dilemma of adopting a model of constitutional arrangement, like in the case of every other jurisdiction where a written constitution prevails. Among the existing traditional models of parliamentary sovereignty (which was the norm for the erstwhile imperial rulers) and judicial supremacy, the legal apparatus of judicial supremacy was found befitting the Indian scenario at the first juncture as it vested the constitutional courts with the power to review of legislative acts on substantial and procedural grounds. Later, with the advent of modern constitutional reforms that emerged in the commonwealth nations, a new alternative approach was adhered to which was addressed as the new commonwealth model of constitutionalism wherein the constitutional courts not only exercise the power to question the validity of laws by the adopting the mechanism of

judicial review, the courts themselves remain independent and neutral from the overarching authority of the government.¹

Constitutionalism essentially embodies the concept of legal limitation over the power wielded by government. In India, the parliamentary democratic system that regulates the affairs of the nation sources its legitimacy from the will of the people. Will of the people, which in turn constitutes popular sovereignty remains yet another cardinal principle of constitutionalism. By adopting a mode of representative democracy, the will of the people is conveyed through the elected representatives who ensures the policy decisions are made in furtherance of the welfare and benefit of the general populace. Any action not in consonance with the general consensus is met with political setbacks as in transfer of power shifting towards another entity who acquires the political legitimacy of the public during the forthcoming course of electoral process. Though in theory this might appear as an ideal setup, the practicality of this process has its shortcomings and that itself negates the application of constitutionalism.

Under the Constitution the Union and State legislatures along with Union and State Executives exercise their distinct authority over the people. The doctrine of separation of powers running comprehensively across the text of the Constitution is yet another facet of constitutionalism. As put forward by Montesquieu, separation of powers intends to avert the concentration of powers in any particular organ of the government. A written constitution clearly indicates such demarcation of powers of the three branches also ensures a system of checks and balance that advertises and promotes accountability of the branches to each other as well as maintaining transparency in the eyes of the general public. In a modern democracy such as India, instances of executive overreach by bureaucrats and extraneous judicial activism occurs repetitively which actually threatens the fabric of constitutionalism.

Fundamental rights and Directive Principles of State Policy – collectively identified as the conscience of the Constitution provides for guaranteeing individual liberties, ensuring protection of human rights and balancing the competing claims of personal and collective interests. It is founded on the principle that fundamental rights shall not be dishonored by the state and its instrumentalities and such constitutional restraints shall serve as a failsafe against the denial of any right at the cost of regulating yet another right. This principle is yet another pinnacle of constitutionalism. Of late it is this facet of constitutionalism that seems to be debated in the precedential glyphs of judiciary.²

¹ Chintan Chandrachud, *Balanced Constitutionalism Courts And Legislatures In India And The United Kingdom* 5 (Oxford University Press 2017)

² P. ISHWARA BHAT, *FUNDAMENTAL RIGHTS A STUDY OF THEIR INTERRELATIONSHIP* 17 (Eastern Law House 2004)

STRANDS OF CONSTITUTIONAL MORLAITY

The major premise upon which the concept of constitutional morality is founded is based on the notion that the foundational norms of the Constitution must always be abided by and does transgress the norm of rule of law established within the constitutional apparatus. Further, parliamentary and democratic values, due process of law, liberties and freedoms all contribute to the texture of constitutional morality. At the outset, constitutional morality intends to balance conflicting interests arising from the diversified society with the measures taken by administrative authority to resolve the conflicts by incorporating self-restraints present within the constitutional plane.

For instance, while the question of constitutional validity of Right to Information Act 2005 and criminal antecedents of ministers in Central and State governments was brought before the Apex court, the doctrine of constitutional morality was vehemently employed to highlight the aspects of good governance.³ Further protection of fundamental rights, adherence to constitutional principles, independence and impartiality of institutions, significance of judicial review and scrutiny were also identified as connected concerns with constitutional morality.

Later, in the instance of interpreting morality under Article 25 of the Constitution, the Apex court further explained that constitutional morality requires courts to interpret the Constitution in a progressive manner, evolving with the changing social norms and values and a progressive interpretation of constitutional provisions to strike down a discriminatory practice that was based on patriarchal and outdated beliefs.⁴ The concept of constitutional morality can be applied in judicial decision-making to uphold the principles of equality, non-discrimination, and individual rights. It introduced the trend of challenging discriminatory practices based on gender or any other arbitrary grounds and reinforced the supremacy of the Constitution in ensuring justice and equality for all citizens.⁵

AN INTERPLAY AND AN AFTERMATH

Constitutionalism intends to accomplish a non-arbitrary government. By establishing a non-arbitrary government, an institutional framework for good governance is advanced simultaneously. In order to ensure this protocol is properly administered a standard of guidelines such as in the case of constitutional morality. Constitutional morality and constitutionalism are integral components of democratic governance, providing the framework

³ Manoj Narula v. Union of India, (2014) 9 SCC 1

⁴ Indian Young Lawyers Association & Ors v. The State of Kerala, (2019) 11 SCC 1

⁵ ibid

for the rule of law, protection of rights, and the functioning of institutions. While constitutionalism establishes the structure and principles of governance, constitutional morality guides the interpretation and application of these principles, ensuring adherence to democratic values. The two concepts are interrelated, with constitutional morality reinforcing the foundational principles of constitutionalism and ensuring their adherence in practice. Upholding constitutional morality is vital for the sustenance and advancement of democracy, ensuring that governments serve the interests of all citizens and uphold the ideals enshrined in the constitution.

Constitutionalism in the contemporary sense is often identified through the lens of transformative constitutionalism. In traditional context, a constitution was subject to transformation by the means of amendments. Judiciary while interpreting the constitutional morality has given priority to social morality rather than constitutional morality. Most of the recent interpretations of both constitutionalism and constitutional morality are lost in the psyche of the personal morality of the judges.

Social morality, refers to the moral values and norms that prevail within a society. It encompasses cultural, religious, and ethical beliefs that guide individuals' behavior and interactions within the community. While constitutional morality and social morality are distinct concepts, they are interconnected and mutually influence each other within a society. Constitutional morality provides the framework for governance, ensuring adherence to democratic principles and the protection of fundamental rights, while social morality reflects the cultural, ethical, and community standards prevailing within a society. While both are concerned with moral principles and values, they operate within different spheres and contexts. It encompasses cultural, religious, and ethical beliefs that guide individuals' behavior and interactions within the community. In cases where social morality contradicts constitutional principles, there may be tension between the two, requiring careful consideration and resolution. Social morality can influence public opinion and political discourse, shaping policies and laws enacted by governments. Constitutional morality serves as a safeguard against the imposition of discriminatory or unjust laws that may be influenced by prevailing social norms. The judiciary plays a crucial role in reconciling conflicts between constitutional morality and social morality through judicial review and interpretation. Courts must ensure that laws and policies adhere to constitutional principles, even if they diverge from prevailing social norms.