CONSTITUTIONAL MORALITY: THE NEW INSTRUMENT OF JUSTICE?

Afreen Afshar ALAM
Ph.D Scholar, Indian Law Institute, New Delhi, India

Pragyanshu GAUTAM
Final Year Law Student, Hidayatullah National Law University, Raipur, India

Abstract

Historian George Grote is credited with creating the theory of Constitutional Morality in the 1800s. According to Grote, Constitutional Morality is the peaceful coexistence of freedom and restraint in democratic administration. The theory of Constitutional Morality is a relatively new development in the body of judicially created constitutional law in India. The Supreme Court has used it in significant judgments, and it refers to the idea that constitutional governance requires not only adherence to the text of the Constitution but also a commitment to underlying constitutional values and principles. Doctrines like Basic Structure and Constitutional Morality have been used to impose implied constitutional limits on the Government, rooted in principles of the Constitution that judges consider essential to its existence. This means that judges can assess the legality of constitutional changes and Government activities by checking that they do not contradict the "spirit," "soul," or "conscience" of the Constitution.

The Supreme Court has emphasized that adherence to constitutional values and principles is critical for maintaining a just and democratic society. Judges must use their discretion responsibly in applying these principles to specific cases. The Apex Court has also clarified that the doctrine of Constitutional Morality does not give judges unlimited power to impose their values on society but requires them to interpret the Constitution in light of its underlying principles and values.

In this paper, the researchers trace the history of Constitutional Morality, its humble beginning, and eventual evolution. The paper also talks about its origin in India and its connection with the Chairman of the drafting committee of the Indian Constitution, Dr. B. R. Ambedkar. Ambedkar's views on Constitutional Morality were rooted in his belief that adherence to constitutional values and principles was essential for maintaining a just and democratic society. Subsequently, it scrutinizes the recent developments that have taken place in the Indian Judiciary concerning the doctrine and how the notion of constitutional morality has made a comeback in our nation's jurisprudence. The researchers shall trace

landmark cases like Naz Foundation, Navtej Singh Johar, and Joseph Shine, wherein the Supreme Court held that Constitutional Morality checks popular morality and ensures that laws and government actions are consistent with enduring principles of justice and fairness.

Keywords*: Constitution; Constitutional Morality; Comparative Constitutional Law; Supreme Court; Indian Jurisprudence.*

I. Introduction

Judicially crafted tests are not new to Indian constitutional law. The official constitutional language makes no explicit reference to any of these judicial inventions, including the "basic structure" theory, the "classification test," the old "arbitrariness," and the new "manifest arbitrariness" tests. The doctrine of Constitutional Morality is a recent addition to this list of innovations created by Indian judges. The definition of Constitutional Morality has changed over time. The term 'Constitutional Morality' is not explicitly mentioned in any of the Articles of the Indian Constitution, nor is the notion elaborated upon. The phrase 'Morality' is mentioned in four instances in the Indian Constitution, specifically under Article 19 (2) and Article 19 (4), which pertain to the "Right to Freedom," as well as Article 25 (1) and Article 26 which concerns the "Right to Freedom of Religion." Traditionally, in India, morality is derived from cultural and religious principles such as *ashrams*, *purushartha*, and *varna-dharma*.

George Grote, an English Historian, is credited with creating the theory of Constitutional Morality. He interpreted the remark in light of Greek history, Athenian democracy, and the threats it encountered. He defined Constitutional Morality as popular sovereignty governed by freedom and restraint. Grote defined "Constitutional Morality" as the public's right to criticize public officials. Thus, it emphasizes the Constitution's limitations on public officials' authority and their need to uphold it. He claimed that constitutional morality was invoked and realized in an ideal but fleeting state, particularly in the case of Athenian democracy. He also made observations about the United States and England following the Glorious Revolution in his writing.[1]

During a discussion in the Constituent Assembly, Dr. B. R. Ambedkar introduced the phrase in the Indian context to advocate for including administrative provisions in the Constitution. Ambedkar communicated his worry about the legislature and its authority through word and allusion.[2] According to him, constitutional morality would entail coordinating numerous organizations working to achieve their goals at any cost and administrative collaboration to resolve conflicts between competing interests. He believed that the people of independent India still lacked a deep-seated understanding of democracy.

The Supreme Court made passing mentions of Constitutional Morality in its judgments in subsequent years in various contexts. In *Kesavananda Bharati v. State of Kerala*,[3] two judges referred to Constitutional Morality but decided not to follow through. Based on Grote's construction, Justice A. N. Ray ruled that everyone needs Constitutional Morality, not just the majority. He accorded it equivalent standing to the concept of social contract (Para 747 of the Judgment.) Justice P. Jaganmohan Reddy also referenced and cited Ambedkar in his ruling but did not discuss the topic further (Para 1112.)

Another Judge in *S. P. Gupta v. President of India* [4] referred to a constitutional violation as "a significant breach of Constitutional Morality." Justice E. S. Venkataramiah observed that *"A convention is a rule of constitutional practice which is neither enacted by Parliament as a formal legislation nor enforced by courts, yet its violation is considered to be a serious breach of constitutional morality leading to grave political consequences to those who have indulged in such violations." (Para 1077)*

Justice S. B. Sinha used it in the *Islamic Academy of Education v. State of Karnataka,*[5] he observed that *"It would be constitutionally immoral to perpetuate inequality among majority people of the country in the guise of protecting the constitutional rights of minorities and constitutional rights of the backward and downtrodden." (Para 98)*

Justice Dipak Misra used it in *Niranjan Hemchandra Sashittal v. State of Maharashtra.*[6] He observed that *"It could be stated without any fear of contradiction that corruption is not to be judged by degree, for corruption mothers disorder, destroys the societal will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the institutions, paralyzes the economic health of a country, erodes the sense of civility and mars the marrows of governance. It is worth noting that the immoral acquisition of wealth destroys the energy of the people who believe in honesty, and history records how they have suffered from agony. The only redeeming fact is that collective sensibility respects such suffering as it is per the constitutional morality." (Para 20)*

These references to constitutional morality were brief and insufficient material, thereby failing to explain this concept thoroughly.

II. Research Methodology

The research on Constitutional Morality took a comprehensive "black-letter" law approach, thoroughly analyzing legal concepts, principles, and judicial interpretations. This involved employing a qualitative and exploratory research design to meticulously examine primary and secondary sources, including the Constitution of India, court judgments, and legal literature. A thorough data and textual analysis was conducted to understand and evaluate constitutional morality comprehensively. The primary

goal of the research was to encourage scholarly debates, offering insights into the historical development, current status, and potential future trends of constitutional law in India.

The study used qualitative and exploratory research design to analyze, evaluate, and synthesize legal sources. The objective was to comprehensively grasp constitutional morality's concept, evolution, and application. The study utilized various primary and secondary sources, including the Constitution of India, judgments from the Supreme Court and High Courts, debates in the Constituent Assembly of India, and relevant statutes and amendments. Secondary sources included legal treatises, textbooks, law review articles, academic journals, legal commentaries, and books on Indian constitutional law and jurisprudence, et al. The sources were obtained through thorough legal study, which utilized online databases such as SCC Online, Manupatra, HeinOnline, and LexisNexis, as well as visiting physical libraries, including law school libraries and the Supreme Court library.

Textual analysis was employed to understand the Constitution by closely examining and interpreting terms appearing in scholarly works, court rulings, and the Constitution itself. The assessment of constitutional morality was conducted by a thorough analysis of legal precedent, which involves examining significant landmark decisions and their influence on the evolution of moral principles in Indian law. Historical examination aims to determine the evolution of constitutional morality from its inception during the framing of the Constitution to the present day.

III. George Grote's Notion of Constitutional Morality

George Grote, a British Historian, authored a series of 12 volumes, "A History of Greece," written in the late 1800s. In one of these volumes, Grote discussed Cleisthenes' reform of the Athens Constitution and introduced the term 'Constitutional morality.' Grote addressed the importance of a widely held belief that he identified as a fundamental aspect of Athenian Democracy during the time of Cleisthenes. He analyzed the transmission of this societal influence from the general public to those in positions of authority and its dissemination across all sectors of society, encompassing both the majority and minority groups.

Grote argued that a Constitution was essential for fostering strong emotional attachment among citizens and promoting goodwill, thereby preventing despots and oligarchs from seizing power through force. Grote initially introduced the idea that ambitious individuals must adopt a unique and challenging mindset, which he called constitutional morality. Grote defined Constitutional Morality as the harmonious coexistence of freedom and self-restraint, which may also be seen as the allegiance to authority while subjecting those in power to unrestricted criticism.

According to Grote, Constitutional Morality is the peaceful coexistence of freedom and restraint and is an essential component of democratic governance. He 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 a 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*.”[7]

Assessing the Glorious Revolution of 1688 and the background of England concerning Constitutional Morality, he observed that it was not an “intrinsic or natural attitude” and that it is difficult to “create and distribute [it] throughout a population, judging from historical experience.” In addition to the previous remark, he added that Constitutional Morality was the indispensable requirement of a free and peaceful Government.”[8]

“Constitutional Morality” refers to citizens’ belief that the Constitution and its functioning are sacred and that the authority of constitutional institutions is accountable to the rule of law and public critique while respecting their freedoms. Even ideological opponents share this belief. Grote argues that Constitutional Morality primarily relates to the citizens and, by extension, their leaders. A strong sense of Constitutional Morality can inspire nobility to follow democracy or create an environment where they renounce their objectives for fear of repercussions from citizens.

In Grote’s Not Protecting Constitutional Morality, citizens and constitutional bodies must coexist harmoniously for their obligations to fall within the purview of Constitutional Morality.[9] The citizen must have autonomy and self-imposed restraint and be on an equal footing; the Constitution must be obeyed, and authorities must operate within its bounds. This is the essence of Grote’s argument on Constitutional Morality.

IV. Political Morality by J. S. Mill

John Stuart Mill developed a political ethics-focused understanding of Constitutional Morality, while Grote viewed it from a historical-sociological perspective. In an essay titled Considerations of Representative Government, published in 1861,[10] Mill discussed the origins of modern government and raised doubt about the capacity of constitutional law as an enforceable complex law to prevent its various agencies from abusing their power over one another. To solve the inadequacies of positive law, Mill urged political actors and institutions to put “moral duties” above their public obligations.[11] He referred to these duties as Constitutional Morality, “positive political morality,” and the “ethics of representative government.” According to Mill, Constitutional Morality consists of the unspoken laws and precepts “in the minds of the [political actors and institutions], which modify the use that might otherwise be made of their powers.”

Thus, to address the insufficiency of positive law, Mill advocated for political actors and institutions to prioritize "moral duties" when carrying out their public responsibilities. These responsibilities are encompassed in what he referred to interchangeably as Constitutional Morality, "positive political morality," and the "ethics of representative government." According to Mill, Constitutional Morality refers to the unspoken principles and guidelines that exist in the minds of political actors and institutions. These principles serve to regulate and limit the exercise of their powers.

Grote positioned the citizen as the first subject of Constitutional Morality and, through him, his leaders. Mill's Constitutional Morality was exclusively applicable to political figures and organizations. Although one would contend that a political climate dominated by Mill's Constitutional Morality would most likely have favorable second-order consequences for citizens, Mill was not primarily interested in the citizen or his rights. Mill's primary focus was not on the individual citizen or their rights.[12] However, it may be argued that a political system influenced by Mill's Constitutional Morality would likely have positive indirect impacts on citizens. Strangely, Mill ignored this distinction, given how much Grote's work on representative Government impacted Mill.[13]

Mill's formulation of Constitutional Morality significantly influenced British constitutional philosophy. Dicey's seminal work on constitutional conventions began with the fundamental notion that participants inside the framework of the Constitution should abide by some unwritten ethical principles.[14] Dicey defined constitutional conventions as "constitutional morality." According to A. V. Dicey: *"Conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power…are not laws since the courts do not enforce them. For the sake of distinction, this portion of constitutional law may be termed the 'conventions of the constitution,' or constitutional morality…"*[15] Constitutional Morality primarily focuses on essential constitutional issues such as individual rights. However, it also establishes the answers to some of the most fundamental queries regarding constitutional power and authority, including the actual legal authority of the Executive, the structure of cabinet government, the interrelationships between the Prime Minister and the Cabinet, etc.

V. Ambedkar's View on Constitutional Morality

Ambedkar joined Columbia University in New York in 1913 when "Constitutional Morality" was trendy in the United States. Ambedkar took "History 121" at Columbia University, which covered some aspects of Greek history.[16] It is possible that he encountered Grote's writing in that course. Decades later, in 1948, in a speech at the Constituent Assembly, he said that he agreed that "administrative details should not have any place in the Constitution." Then, using an excerpt from Grote's history of

Greece, he asserted that the Constitution might be changed without being legally amended by altering how it was administered. This was because "*the form of administration has a close connection with the form of the Constitution*."

"*Only where people are saturated with Constitutional Morality, such as the one described by Grote, the historian, can one take the risk of omitting from the Constitution details of administration and leaving it to the Legislature to prescribe them*,"[17] Ambedkar said. He quoted Grote as saying that Indians "have yet to learn it" and that Constitutional Morality was not a "natural sentiment." "*Democracy in India is only a top-dressing on Indian soil, which is essentially undemocratic*," he said. He concluded that it was better not to rely on the Legislature to impose administration forms in these situations.

Dr. Ambedkar justified his decision to include more administrative details in the Constitution by arguing that altering the administration methods may weaken the Constitution, leading it to go against and undermine its core values. He contended that the Constitution of India is susceptible to such violation due to the absence of constitutional morality in Indian Politics. Therefore, granting the Legislature the authority to determine the types of administration is an unwise and imprudent decision. In his view, constitutional morality was still something our people needed to learn.

Ambedkar was the most discerning member of the Constituent Assembly regarding his comprehension of the conflicts that Indian society was experiencing at the time. His Observations on constitutional morality during a crucial period in our social and political existence hold immense importance, not just for disadvantaged groups or minorities but for all citizens of India.[18] It can be argued that Ambedkar never meant Constitutional Morality to become a weapon in the hands of judges to administer justice. In his speech, he used the concept to target a mundane concept related to administration and how it should be kept away from the hands of legislators who will try to change it to suit their needs.

In his final address on November 25, 1949, delivered one day before the formal adoption of the Constitution, Ambedkar emphasized the significance of constitutional morality. He provided three warnings on preserving democracy, not only in its outward appearance but also in its essence.[19]

His foremost priority was to adhere firmly to constitutional means of attaining social and economic goals. Further, he expressed a warning about the dangers of idolizing political figures. He emphasized that people should be careful not to "lay their liberties at the feet of even a great man, or to trust him with powers which enable him to subvert their institutions," as John Stuart Mill had warned. He believes that expressing gratitude towards eminent individuals who have dedicated their entire lives to serving the nation is not morally incorrect. However, it is essential to establish certain boundaries.

Finally, Ambedkar emphasized the importance of striving for social and political democracy. It refers to a lifestyle that acknowledges liberty, equality, and fraternity as

the fundamental values of existence. It is improper to view these ideals—liberty, equality, and fraternity—as distinct parts of a trinity. They create a tripartite union in the sense that separating one from the others would undermine the fundamental goal of democracy. Liberty and equality are inseparable and cannot exist independently from one another. Fraternity is inseparable from liberty and equality; further, it is essential for the natural progression of liberty and equality.

Therefore, the critical elements in his description of constitutional morality are self-imposed restraint, loyalty to constitutional methods, skepticism towards any individual claims of representing the will of the people, and a commitment to social democracy based on principles of equality, liberty, and fraternity. However, he argued that it is equally vital to understand how these objectives will be attained in addition to accomplishing the constitutional objectives–according to him, this is the core of constitutional morality.

Ambedkar made another notable mention of "Constitutional Morality" outside the Constituent Assembly in a well-known address he gave in December 1952 at the Poona District Law Library called "Conditions Precedent for the Successful Working of Democracy," Ambedkar focused on addressing the necessary circumstances for a democracy to function effectively.[20] Ambedkar enumerated seven prerequisites essential for the effective functioning of democracy. He commenced his address by providing a concise explanation of contemporary democracy, which he believed was primarily concerned with the well-being and prosperity of the populace. He distinguished modern democracy from Athenian democracy, which permitted slavery, and English democracy, which mainly aimed to restrict the monarch's authority. Ambedkar proposed a different definition of democracy; according to him, democracy should be understood as a form of government that achieves radical transformations in economic and social aspects without resorting to violence.

According to Dr. Ambedkar, one of the prerequisites of having a healthy democracy is adherence to constitutional morals. Although Ambedkar did not provide a specific definition of Constitutional Morality, he elucidates it in a manner that closely resembles Mill's concept of Constitutional Morality. According to Ambedkar, Constitutional Morality is a type of morality that political actors and institutions should demonstrate. Ambedkar provides two historical examples to illustrate the implementation of Constitutional Morality: i) George Washington, the esteemed first president of the United States, declined to run for re-election despite having a highly probable chance of winning. ii) The UK's Labour Party united with the Conservative Prime Minister Stanley Baldwin to resist King Edward VIII's intention to marry outside of the traditions of the British monarchy, resulting in the king's subsequent abdication. Both cases effectively demonstrate Mill's concept that political actors must resist the temptation to engage in actions that harm democracy and the Constitution in exchange for short-term power.

In the Constituent Assembly, Dr. Ambedkar noted that the people of India do not have something called "Constitutional morality." The observance of Constitutional morality is the fourth condition for preserving democratic ideas. According to Dr. Ambedkar, the Constitution would not work independently and would depend on how people practiced it. He states, *'[We] have a Constitution which contains legal provisions, only a Skelton. The flesh of that Skelton is to be found in what we call Constitutional morality. However, in England, it is called the conventions of the Constitution, and people must be ready to observe the rules of the game.'*[21] Constitutional morality requires certain conduct—the following of Constitutional conventions and practice— from those in power and citizens. He gave examples from the U.S. as to how the president stayed in power only for two tenures to prevent abuse of power and the creation of a cult.

VI. The Renaissance of Constitutional Morality

The constitutionality of Section 377 of the Indian Penal Code, which classified carnal intercourse against the order of nature as a criminal offense, was challenged in the case of *Naz Foundation v. Government of NCT of Delhi*.[22] The Court referred to a judgment from the European Court of Human Rights in *Norris v. Republic of Ireland*,[23] It was ruled that *"[E]ven though members of the public who view homosexuality as immoral may be shocked, offended, or troubled by others' commission of private homosexual acts, this cannot on its warrant the application of penal sanctions when it is only consenting adults alone who are involved."*

The Delhi High Court disregarded public morality as a compelling governmental interest that could justify restrictions placed on personal liberty as granted by Article 21 of the Constitution. In contrast to Constitutional Morality, the Delhi High Court held that popular Morality is *"based on shifting and [subjective] notions of right and wrong."* Chief Justice M. R. Shah held that the Court must consider Constitutional Morality, not popular Morality, while assessing whether a law can be defended as advancing a "compelling state interest." The Court continued, *"Dr. Ambedkar insisted strongly on this aspect of Constitutional Morality in the Constituent Assembly." "Popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21,"* the Delhi High Court ruled. The Court further asserted that for a 'compelling state interest,' the Court must consider Constitutional Morality rather than public morality. The Chief Justice used Constitutional Morality to oppose the majority's transient sense of Morality.

Despite the permanence of a Constitution, the Court recognized the value of its flexibility by skillfully de-historicizing the idea of Constitutional Morality to further a more significant social goal. The Court cited Granville Austin and stated that Parts III and IV cover Fundamental Rights and Directive Principles of State Policy, including the

fundamental commitments to the social revolution. These serve as the Constitution's conscience. The "goals of social revolution" and "attempt[s] to foster this revolution by establishing the conditions necessary for this achievement" are therefore used to explain Constitutional Morality.[24]

In the formulation of Constitutional Morality by Chief Justice Shah, the Court was viewed as a counter-majoritarian institution. Its objective was to ensure that the Constitution's core principles prevailed over the fragile morality of the majority. Ambedkar used Grote's view of Constitutional Morality as a rhetorical technique to support the inclusion of trivial features in the Indian Constitution. Ambedkar may have agreed with Chief Justice Shah's argument that the Constitution must take precedence above moral standards. Still, he did not intend this to be the basis of Constitutional Morality. Ambedkar did not mean to imply that Courts should not consider popular Morality when determining whether a statute is Constitutional when he discussed Constitutional Morality.

The Supreme Court of India overturned the Delhi High Court's decision in *Suresh Kumar Koushal v. Naz Foundation*[25]; it subsequently found favor with a larger bench of the Supreme Court in *Navtej Singh Johar v. Union of India*.[26] The Court ultimately ruled in favor of decriminalizing consenting same-sex sexual activity. The reasoning of Naz's judgment, according to which "Morality" must be based on "Constitutional values" rather than on prevailing (or otherwise) social standards if the constitutionality of a law is supported by "morality," was proven correct. The content of Constitutional Morality has taken on more clarity due to the main opinion written by Chief Justice of India Dipak Misra and the concurring opinions of Justice D. Y. Chandrachud and Justice Rohinton Nariman.

The Supreme Court referenced several renowned jurists to support its arguments in this historic decision. The Court cited Bentham, who believed that the Morality of society should not overly influence legislators. The judgment also mentioned Hart, who avoided the specious generalization that the law must be strictly segregated from Morality but made it clear that laws like Section 377, which impose a majoritarian view of right and wrong upon a minority to protect societal cohesion, are jurisprudentially and democratically impermissible. According to the Court, John Stuart Mill also argued vehemently against the legalization of popular Morality, "who consider as an injury to themselves any conduct which they have a distaste for" cannot direct the behavior of others just because it goes against their own beliefs or views. The Supreme Court held that *"A person's sexual orientation is intrinsic to their being. It is connected with their individuality and identity. A classification which discriminates between persons based on their innate nature would be violative of their fundamental rights and cannot withstand the test of Constitutional Morality."*

The Court's decision in the case of *Independent Thought v. Union of India*[27] came before Navtej Singh Johar. According to the second exception to Section 375 of the

Indian Penal Code, a man does not commit rape if he engages in sexual activity with his wife if she is fifteen years of age or older. The Court interpreted the clause and decided that as long as the wife was at least 18 years old, sexual activity between a man and his wife did not constitute rape. In reaching his conclusion, the Court noted that Constitutional Morality prohibits the Court from interpreting Exception 2 of Section 375 IPC in a way that glorifies a custom or tradition that is no longer viable. However, in this case, the Apex Court did not fully apply the Constitutional Morality doctrine, which counterbalanced popular Morality. If it had, it might have decided that the second exception to Section 375 of the Indian Penal Code, which exempts married men from rape laws, is entirely incompatible with Constitutional Morality. After all, why should the fact that a woman is a man's adult wife prevent a man from being charged with rape for forcing himself upon her? However, the Court watered down the clause and eliminated the exemption insofar as it applied to married men who engaged in sexual activity with their wives under 18.

In *Joseph Shine v. Union of India*,[28] the Apex Court invalidated Section 497 of the Indian Penal Code because only men were subject to the punishment for adultery. By ignoring public Morality, this case demonstrates how the Supreme Court is leaning toward Constitutional Morality. The notion that the husband is the master of a woman, which had been portrayed in this law for a very long time, was disrupted by this judgment, which made it abundantly clear that a woman is not a commodity owned by a man. The Court held that the non-prosecution of women for adultery violates certain fundamental rights and that the right to privacy also included the right to sexual privacy. According to Justice Chandrachud, this Section was based on the societal and sexual convention from the nineteenth century, which disregarded women's sexual agency and viewed a woman's husband as her sole property. He disagreed with this idea and said, *"It is not the common morality of the State at any time in history, but rather Constitutional Morality, which must guide the law."*

In *State (NCT of Delhi) v. Union of India*,[29] the Supreme Court was asked to determine how the Constitution should divide power between the Union Government and the Provincial Government of Delhi. In reaching his conclusions, Chief Justice Dipak Misra, speaking for Justice Sikri, Justice Khanwilkar, and himself, appeared to indicate that "Constitutional Morality" referred to the spirit of the Constitution itself, something akin to the Basic Structure Doctrine. While interpreting the provisions of the Constitution, Constitutional Courts must read the words in the document in the light of the spirit of the Constitution. "Constitutional Morality in its strictest sense of the term," Chief Justice Misra held, *"implies strict and complete adherence to the constitutional principles enshrined in various document segments." It requires constitutional functionaries to "cultivate and develop a spirit of constitutionalism where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution. Constitutional Morality means the morality that has inherent elements in the Constitutional norms and the conscience of the Constitution."*

Justice Chandrachud also discussed Constitutional Morality in terms of the Constitution's spirit in his concurring opinion; he observed that *"Constitutional Morality requires filling in Constitutional silences to enhance and complete the spirit of the Constitution. It specifies norms for institutions to survive and an expectation of behavior that will meet not just the text but the soul of the Constitution."* He referred to the fundamental structure doctrine and held that secularism is part of the Constitution's Basic Structure and Constitutional Morality.

In *Central Board of Dawoodi Bohra v. The State of Maharashtra,*[30] during a preliminary hearing, the Supreme Court decided to deliberate on the 1986 writ petition, recognized as the oldest pending case before a Constitution Bench. The case centers on whether the leader of the Dawoodi Bohra community possesses the authority to excommunicate any of its members and whether this practice is protected as a religious right.

Nariman, J. contended that the proceeding is no longer valid since the 1949 Act, which was central to the 1986 writ petition, has been repealed and replaced by the 2016 Act. According to Nariman, the petition is considered 'moot' due to the prevalence of the 2016 Act.

Bhatnagar, J., in his submissions as reported in India Times, raised the argument that the moot issue would not be adjudicated if the leader declared that the religious power to excommunicate would not be utilized following the Supreme Court's 1962 judgment. He further contended that the 2016 legislation, specifically for Maharashtra, does not sufficiently protect members of the Dawoodi Bohra community facing excommunication.

Regarding the nine-judge Bench: In November 2019, a Constitution Bench chose to retain multiple review petitions challenging the 2018 judgment, which lifted the prohibition on women of menstruating age from entering the Sabarimala temple in Kerala until a larger bench addressed specific overarching constitutional questions. The bench expressed the view that other cases about the right to religion might involve the application of the 2018 Sabrimala judgment and intersect with its principles.

The majority judgment outlined a series of questions that might intersect with other religious matters:

1. The interaction of freedom of religion under Articles 25 and 26 and the right to equality under Article 14;
2. The scope of the term 'public order, morality, health' in Article 25 (1);
3. Whether the meaning of 'morality' in Article 25 (1) and Article 26 relates to constitutional morality or is confined to religious faith or belief;
4. The extent to which a court can inquire into an essential religious practice;
5. The scope of the term 'sections of Hindus' as mentioned in Article 25 (2)(b);
6. Whether essential religious practices of a religious denomination are protected;

7. The extent of "judicial recognition" of public interest litigation filed by individuals not from a religious denomination to challenge a spiritual practice.

On February 10th, 2023, Justice A. S. Oka delivered the Bench's unanimous decision to refer the matter to the 9-Judge Bench in the Sabarimala Review case.

In the *Sabarimala case*,[31] the Apex Court considered whether forbidding women between 10 and 50 from entering Hindu temples was constitutional. The Constitution's Articles 25 and 26, which grant the Fundamental Rights to profess, practice, and propagate a religion, to create and maintain religious institutions, etc., are subject to various restrictions, including morality. The issue was whether the ban on outsiders entering temples could be justified as being in line with Morality. Chief Justice Misra and Justice Khanwilkar concluded that the restriction was unconstitutional. They answered this question and reasoned that the word "Morality" used in Articles 25 and 26 of the Constitution must refer to Constitutional Morality, not popular morality. Justice Chandrachud further articulated his opinion on Constitutional Morality in his concurring opinion. He found that the "four precepts" in the Preamble of the Indian Constitution—justice, liberty, equality, and fraternity—are the foundation of Constitutional Morality. He then added the secularism tenet to this. These founding ideals "must govern our Constitutional notions of Morality," he insisted. He concluded that Constitutional Morality must have a value of permanence that is not susceptible to the passing whims of each period and generation.

In the 2014 case of *Manoj Narula v. Union of India*,[32] the Supreme Court emphasized that Constitutional Morality refers to the deference to constitutional norms and refraining from actions that could contradict the rule of law or lead to arbitrary conduct. The analysis of the judgment is as follows:-

Dipak Misra, J.

Doctrine of Implied Limitation

I. Reading implied limitation as a prohibition to the words contained in Article 75 (1) of the Constitution would be equivalent to adding a disqualification at a particular stage of the trial concerning a person. This is neither expressly stated nor is widely discernible from the provision. The doctrine of implied limitation was applied to the amending power of the Constitution by the Parliament on the fundamental foundation that the identity of the original Constitution could not be amended by taking recourse to the plenary power of amendment.

Under Article 368 of the Constitution, the doctrine's essential feature or basic structure was read into Article 368 to say that the Constitution's identity or framework cannot be destroyed.

II. When there is no disqualification for a person against whom charges have been framed in respect of severe or heinous offenses or offenses relating to corruption to contest the election, by interpretative process, it is difficult to read the prohibition

into Article 75 (1) or, for that matter, into Article 164 (1) to the powers of the Prime Minister or the Chief Minister in such a manner. That would come within the eligibility criterion and amount to prescribing an eligibility qualification and adding a disqualification not stipulated in the Constitution. With a constitutional prohibition or statutory embargo, such disqualification can be read into Article 75 (1) or 164 (1) of the Constitution.

Principle of Constitutional Silence or Abeyance

I. This progressive principle is applied as a recognized advanced constitutional practice. The court has identified it as filling in the gaps in certain areas in the interest of justice and the more significant public interest.

II. The question to be posed here is whether, taking recourse to this doctrine to advance constitutional culture, a court can read a court disqualification to the already expressed disqualifications provided under the Constitution and the 1951 Act. The answer has to be in the inevitable negative, for there are express provisions stating the disqualifications, and second, it would be equivalent to crossing the boundaries of judicial review.

The doctrine of Constitutional Implications

I. The Court has applied the doctrine of implication to expand the constitutional concepts, but the context in which the horizon has been extended has to be borne in mind.

II. It is not possible to accept that, while interpreting the words "advice of the Prime Minister," it can legitimately be inferred that it is prohibited to think of a person as a Minister if charges have been framed against him in respect of heinous and serious offenses, including corruption cases under the criminal law.

Doctrine of Good Governance

I. In a democracy, the citizens legitimately expect that the Government of the day would treat the public interest as the primary one and any other interest as secondary. The maxim *Salus Populi Suprema Lex* has to be kept in view and revered. The faith of the people is embedded in the root of the idea of good governance, which means reverence for citizenry rights, respect for Fundamental Rights and statutory rights in any governmental action, deference for unwritten constitutional values, reverence for institutional integrity, and inculcation of accountability to the collective at large. It also conveys that the decision-making authority makes the decisions solemnly, and policies are framed with the welfare of the people kept, including all in a homogeneous compartment. The concept of good governance is not a hypothetical conception or an abstraction. It has been the demand of the polity wherever democracy is nourished. The growth of democracy is dependent upon good governance in reality, and the people who are responsible for service orientation carry out the administration.

Advice by Prime Minister - Appointment of Ministers

I. The Prime Minister has been regarded as the repository of constitutional trust. The words "on the advice of the Prime Minister" cannot be allowed to operate in a vacuum to lose their significance. The Prime Minister's advice is binding on the President for appointing a person as a Minister to the Council of Ministers if the person is disqualified under the Constitution to contest the election or under the 1951 Act. That is in the realm of disqualification. But, a pregnant one, the trust reposed in a high constitutional functionary like the Prime Minister under the Constitution does not end there.

II. The Prime Minister would give the President a legitimate constitution and national expectation, a paramount constitutional concern. In a controlled Constitution like ours, the Prime Minister must act with a constitutional response—consequently, the cherished values of democracy and established norms of good governance get condignly fructified. The framers of the Constitution left many things reposing immense trust in the Prime Minister. The Constitution's scheme suggests that constitutional governance has to emerge, which would gradually grow to give rise to constitutional renaissance.

III. The Council of Ministers is responsible for sustaining the integrity and purity of the constitutional structure. That is why the Prime Minister enjoys a great magnitude of constitutional power. Therefore, the responsibility is more about instilling constitutional trust. It is also expected that the Prime Minister should act in the interest of the national polity of the nation-state. He has to bear in mind that unwarranted elements or persons facing charges in specific categories of offenses may thwart or hinder the canons of constitutional morality or principles of good governance and eventually diminish constitutional trust. It was already held that prohibition cannot be brought in within the province of 'advice.' Still, indubitably, the concepts, especially constitutional trust, can be perceived in the act of such advice.

IV. Thus, a disqualification cannot be added while interpreting Article 75 (1). However, it can always be legitimately expected, regarding being had to the role of a Minister in the Council of Ministers and keeping in view the sanctity of the oath he takes, the Prime Minister, while living up to the trust reposed in him, would consider not choosing a person with criminal antecedents against whom charges have been framed for heinous or criminal severe offenses or charges of corruption to become a Minister of the Council of Ministers. This is what the Constitution suggests, and that is the constitutional expectation of the Prime Minister. Rest has to be left to the wisdom of the Prime Minister.

Madan B. Lokur, J.

Conditions for Appointment as Member of Parliament

I. To become a Member of Parliament, a person should possess the qualifications mentioned in Article 84 of the Constitution;

II. To become a Member of Parliament, a person should not suffer any of the disqualifications mentioned in Article 102 of the Constitution;

III. The Constitution does not provide for any limitation in a Member of Parliament becoming a Minister, but certain implied limitations have been read into the Constitution by decisions rendered by this Court regarding an unelected person becoming a Minister;

IV. One implied limitation read into the Constitution is that a person not elected to Parliament can nevertheless be appointed as a Minister for six months;

V. Another implied limitation read into the Constitution is that though a person can be appointed as a Minister for six months, they cannot repeatedly be so appointed;

VI. Yet another implied limitation read into the Constitution is that a person otherwise not qualified to be elected as a Member of Parliament or disqualified from being so elected cannot be appointed as a Minister;

VII. In other words, any person not subject to disqualification can be appointed a Minister in the Central Government.

Criminal Background and Antecedents

I. The law does not hold a person guilty or deem or brand a person as a criminal only because an allegation is made against that person of having committed a criminal offense in the form of an off-the-cuff allegation or an allegation in the form of a First Information Report or a complaint or an accusation in a final report Under Section 173 of the Code of Criminal Procedure or even on charges being framed by a competent Court. The reason for this is fundamental to criminal jurisprudence, and the rule of law, and is quite simple. However, it is often forgotten or overlooked- a person is innocent until proven guilty. This would apply to a person accused of one or multiple offenses. At law, they are not criminals–that person may stand ‘condemned’ in the public eye, but even that does not entitle anyone to brand them as criminals.

II. Consequently, merely because a First Information Report is lodged against a person or a criminal complaint is filed against them or even if charges are framed against that person, there is no bar to that person being elected as a Member of Parliament or being appointed as a Minister in the Central Government.

III. Parliament has, therefore, in its wisdom, made a distinction between an accused person and a convict. For the election law, an accused person is entitled to be elected to the Legislature as a person not charged with any offense. However, Parliament has taken steps to ensure that some categories of convicted persons are disqualified from being elected to the Legislature. A statutory disqualification is to be found in Section 8 of the Representation of the People Act, 1951. The adequacy of the restrictions placed by this provision is arguable. For example, a disqualification under this Section is attracted only if the sentence awarded to a convict is less than two years imprisonment.

IV. Thus: (i) To become a legislator and to continue as a legislator, a person should not suffer any of the disqualifications mentioned in Section 8 of the Representation of the

People Act, 1951; (ii) There does seem to be a gap in Section 8 of the Representation of the People Act, 1951 since a person convicted of a heinous or a severe offense but awarded a sentence of less than two years imprisonment may still be eligible for being elected as a Member of Parliament; (iii) While a debate is necessary for bringing about a suitable legislation disqualifying a person from becoming a legislator, there are various factors that need to be taken into consideration; (iv) That there is some degree of criminalization of politics is quite evident; (v) It is not for this Court to lay down any guidelines relating to who should or should not be entitled to become a legislator or who should or should not be appointed a Minister in the Central Government.

In *K. S. Puttaswamy v. Union of India* (II),[33] the Supreme Court's nine-judge bench unanimously recognized the Right to Privacy as an integral part of the Right to Life and Personal Liberty under Article 21 of the Constitution. By doing so, the Court also overruled previous judgments that did not expressly recognize the right to privacy.

In this case, the judges' concurring opinions emphasized the broad scope of the right to privacy, encompassing autonomy over personal decisions, bodily integrity, and protecting personal information. The specific implications of this right were addressed in the concurring judgments, some of which are summarized below:-

- J. Chandrachud (on behalf of himself, C.J. Kehar, J. Agrawal, and J. Nazeer): The opinion emphasized that privacy is not entirely surrendered when an individual is in the public sphere. It also highlighted the negative right against State interference, such as in the criminalization of homosexuality, and the positive right to be protected by the State, calling for the introduction of a data protection regime in India.
- J. Chelameswar: Asserted that the right to privacy implies a right to refuse medical treatment, a right against forced feeding, the right to consume beef, and the right to display symbols of religion in one's appearance.
- J. Bobde: Noted that consent is essential for the distribution of inherently personal data such as health records.
- J. Nariman: Classified the facets of privacy into non-interference with the individual body, protection of personal information, and autonomy over personal choices.
- J. Sapre: Stressed that, beyond its existence as an independent right, the right to privacy includes an individual's rights to freedom of expression and movement, essential for fulfilling the constitutional aims of liberty and fraternity in ensuring the individual's dignity.
- J. Kaul: Discussed the right to privacy concerning the protection of informational privacy and the right to preserve personal reputation, highlighting the necessity for laws to provide data protection and regulate national security exceptions allowing for the interception of data by the State.
- The Court also acknowledged that the right to privacy is not absolute but may be restricted within the bounds of the law, corresponding to the State's legitimate aim and proportionate to its intended objective.

Over the last few years, Constitutional Morality has become an essential concept in Indian legal jurisprudence; judges use it to uphold the rights of citizens. The idea is most important to the Constitution of India and what it stands for. Liberal justices are now using it as a tool to protect people from both the popular Morality of society that discriminates against them and the arbitrary executive actions of the Government.

VII. Conclusion And Suggestions

The Indian Constitution is detailed and complex. Dr. Ambedkar stressed this in the Constituent Assembly[34], explaining that due to the lack of a democratic tradition, the Constitution had to be more elaborately drafted than in more mature democracies with a broader consensus on the functioning of institutions.

As time passes and society progresses, the Indian Constitution evolves, with new dimensions emerging. "Constitutional Morality," emphasizing respect for differences, has gained prominence in Indian jurisprudence over the past decade.[35] It now characterizes the contemporary identity of the Indian Constitution and the ancient legacy of a pluralistic society. This concept underscores the importance of upholding constitutional values and principles for maintaining a just and democratic society. It also allows judges to impose implied constitutional limits on the government based on essential constitutional principles. Without constitutional morality, the functioning of a constitution tends to become arbitrary, unpredictable, and impulsive.

Constitutional Morality has been associated with legal principles, equality, and anti-corruption conventions throughout history. It reflects that justice takes precedence over all other social acceptance norms in the struggle for existence. Democracy is essential for a nation to thrive. It ensures the removal of disparities from the social structure and guarantees everyone the right to enforce their guaranteed rights. It aims to revitalize democracy by fostering a spirit of fraternity among the diverse populace.

The Supreme Court has upheld the doctrine of Constitutional Morality as essential for constitutional governance, stressing that adherence to constitutional values and principles is necessary for maintaining a just and democratic society. However, the Court has clarified that the doctrine of constitutional morality does not grant judges unlimited power to impose their values on society but requires them to interpret the Constitution in light of its underlying principles and values.

In recent years, the judiciary has set progressive and historical precedents by applying this doctrine, particularly in cases involving gender justice, institutional propriety, social uplift, and the prevention of majoritarianism and similar evils. The courts have used the doctrine of constitutional morality to counter "popular morality," which may not be consistent with the Constitution's principles. Upholding constitutional values and principles, the courts can ensure that laws and government actions are based on enduring tenets essential for maintaining a just and democratic society. Judges, especially former Chief Justices of India Deepak Misra and Dhananjaya Y. Chandrachud, have played a primary role in developing the doctrine of Constitutional Morality.

References

1. Constitutional Morality, in Democracy and its Institutions 75-98 (2012). https://academic.oup.com/book/6152/chapter-abstract/149712591?redirectedFrom=fulltext (last visited Dec 22, 2024).

2. Pratap Bhanu Mehta, What Is Constitutional Morality? 615 SEMINAR (2010), http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.html (last visited Dec 22, 2024).

3. AIR 1973 SC 1461.

4. AIR 1982 SC 149.

5. 2002 8 SCC 481.

6. 2013 (3) ABR 802.

7. George Grote, Biography, Encyclopaedia Britannica. Available at: https://www.britannica.com/biography/George-Grote (last visited Dec 22, 2024).

8. 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 Dec 22, 2024).

9. Russell Meiggs, "Cleisthenes of Athens," Encyclopaedia Britannica, available at: https://www.britannica.com/biography/Cleisthenes-of-Athens (last visited Dec 22, 2024).

10. Considerations on Representative Government Cambridge Core (Cambridge University Press), https://www.cambridge.org/core/books/considerations-on-representative-government/F712A28330B4DD678BFBF2FC62229C2D (last visited Dec 22, 2024)

11. John Stuart Mill, (2010). Considerations on Representative Government (Cambridge Library Collection - British and Irish History, 19th Century). Cambridge: Cambridge University Press. https://www.cambridge.org/core/books/considerations-on-representative-government/F712A28330B4DD678BFBF2FC62229C2D (last visited Dec 22, 2024).

12. Leo Catana, Grote's analysis of Ancient Greek political thought: its significance to J. S. Mill's idea about 'active character' in a liberal democracy, 27 British Journals for the history of philosophy 553 2019. https://philpapers.org/rec/CATGAO-2 (last visited Dec 22, 2024).

13. Representative democracy and colonial inspirations: The case of John Stuart Mill: American Political Science Review Cambridge Core, https://www.cambridge. org/core/journals/american-political-science-review/article/representative-democracy-and-colonial-inspirations-the-case-of-john-stuart-mill/829240D4A3A6DE27A8D0055644FBF42E (last visited Dec 23, 2024).

14. Abhinav Chandrachud, The Many Meanings of Constitutional Morality. Available at SSRN: https://ssrn.com/abstract=3521665 (last visited Dec 23, 2024).

15. Constitutional conventions: Dicey's predecessors semantic scholar, https://www.semanticscholar.org/paper/Constitutional-Conventions:-Dicey's-Predecessors-Phillips/ec1d6a0e177a5f5956731ad796fd7cdcfa9aaa5d (last visited Dec 23, 2024).

16. An introduction to the study of the law of the Constitution SpringerLink - Palgrave Macmillan UK, https://link.springer.com/book/10.1007/978-1-349-17968-8 (last visited Dec 23, 2024).

17. Dr. Ambedkar on constitutional morality The Daily Guardian, https://thedaily guardian.com/dr-ambedkar-on-constitutional-morality/ (last visited Dec 23, 2024).

18. “if hereafter things go wrong, we will have nobody to blame”, dr. Ambedkar’s final speech in Constituent Assembly Bar and Bench - Indian Legal news, https://www. barandbench.com/columns/dr-ambedkar-1949-constituent-assembly-speech (last visited Dec 23, 2024).

19. Dr. Babasaheb Ambedkar: Writings and speeches, vol.17: Dr. B.R. Ambedkar and his egalitarian revolution, in parts 1-3, ed. by Hari Narake et al. | Ambedkar, BR (1892-1956) | 22681, https://www.bibliaimpex.com/index.php?p=sr&format=fullpage& Field= bookcode&String=22681 (last visited Dec 23, 2024).

20. Why did B.R. Ambedkar accept the Poona Pact? Constitution of India, https://www.constitutionofindia.net/blog/why-did-b-r-ambedkar-accept-the-poona-pact/ (last visited Dec 23, 2024).

21. Did Dr Ambedkar want to burn the Constitution? Supreme Court Observer, https://www.scobserver.in/journal/did-dr-ambedkar-want-to-burn-the-constitution/ (last visited Dec 23, 2024).

22. 160 Delhi Law Times 277.

23. 6/1987/129/180.

24. Indian constitution - A social revolution Medium, https://medium.com/ @varchaswini.444/indian-constitution-a-social-revolution-82d4a6ab8ca4 (last visited Dec 23, 2024).

25. AIR 2015 SC 563.

26. AIR 2018 SC 4321.

27. (2017) 10 SCC 800.

28. (2019) 3 SCC 39.

29. (2018) 8 SCC 501.

30. 2023 LiveLaw (SC) 97.

31. *Indian Young Lawyers Association v. State of Kerala* (2019) 11 SCC 1.

32. AIR Online 2005 SC 207.

33. (2017) 10 SCC 1.

34. Dr. Jay Kumar Bhongale, Dr. B. R. Ambedkar’s Constitutional Morality. Available at SSRN:https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4312052#:~:text=According%20to %20Dr.,India%20where%20everything%20is%20newborn%E2%80%9D (last visited Dec 23, 2024).

35. Nakul Nayak, Constitutional Morality: An Indian Framework. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885432 (last visited Dec 23, 2024).