

TWO DIFFERENT BUT SAME PERSPECTIVES ON CONSTITUTIONAL MORALITY

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ABSTRACT

In the Constitution of India, the phrase ‘constitutional morality’ has no specific reference, instead, the word ‘morality’ is found therein. Though, it was introduced by Dr. B. R. Ambedkar at the Constituent Assembly, the apex court has highlighted the term in many of its recent judgments. Interestingly, the court’s recurrent use of constitutional morality has led to its criticism as ‘very dangerous’. Therefore, it is the necessity of time to trace the principle of constitutional morality. This study explains the different meanings associated with the phrase constitutional morality. It attempts to understand the court’s perspective on the phrase. Additionally, it provides a comprehensive insight into Dr. Ambedkar’s concept of constitutional morality. The study lastly compares the concept of constitutional morality given by Ambedkar with the view of the Supreme Court of India and concludes that both perspectives are almost identical and advocate the same idea.

Keywords: Constitutional morality, liberty, article 19, social morality, justice

- I. Introduction**
- II. Constitution morality and Indian judiciary**
- III. Recent concerns regarding constitutional morality**
- IV. Dr. Ambedkar’s view on constitutional morality**
- V. Conclusion**

“[I] feel that if all of us put our shoulders together and pledge ourselves to ‘constitutional morality’ we should be able to build up a system in which there could be liberty, equality and fraternity.”

~ *Dr. B. R. Ambedkar**

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* Hari Narake, M. L. Kasare, *et.al.*, (ed.), XVII (II) *Dr. Babasaheb Ambedkar Writings and Speeches* 378 (Dr. Ambedkar Foundation, Government of India, New Delhi, 2014) available at https://www.mea.gov.in/Images/attach/amb/Volume_17_02.pdf (last visited on August 07, 2020).

I. Introduction

FOR THE effective working of constitutional laws, the diffusion of constitutional morality is the *sine qua non*. The constitution may become arbitrary, inconsistent and capricious, if the habit of constitutional morality lacks.¹ Generally, the term constitutional morality can be understood as some expected standards of behaviour from the people of a country working within the constitutional institutes of that country. Such standards, by imposing some responsibilities upon authorities and individuals, have ensured that the operation of constitutional laws should be consistent with the fundamental ideals and values of the constitution.² However, in the Constitution of India, the phrase ‘constitutional morality’ has no specific reference instead the word ‘morality’ has been written in Part III of the Constitution only four times (two times in article 19 and one time each in article 25 and 26).³ The phrase ‘morality’ has been invoked by the Supreme Court of India in many cases dealing with issues like surrogacy, religious freedom, sexual orientation, etc.⁴ Of late, the term ‘constitutional morality’ has now come to be widely used. Apart from only three or four uses, the phrase did not become a matter of much discussion in the Constituent Assembly.⁵ But there is one reference that has scholarly significance. Of course, this is the famous mention of the phrase by Dr. Ambedkar in a speech delivered by him on November 04, 1948 in the Constitution Hall at the Constituent Assembly.⁶ He was a man under whose leadership the Constitution of India was written. His work shows that he had a good knowledge of world history that shaped his thoughts.⁷ While architecting India’s present constitutional order, he made some observations about constitutional morality that are of the utmost importance to all

¹ André Béteille, *Democracy and Its Institutions* 76 (Oxford University Press, New Delhi, 2012)

² Bruce P. Frohnen and George W. Carey, “Constitutional Morality and the Rule of Law” 26 *Journal of Law & Politics* 498 (2011).

³ G. V. Mahesh Nath, “Constitutional Morality - A Need for Consensus on the Concept”, *SSRN* (2019) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353874 (last visited on August 04, 2020).

⁴ Archit Shukla, “Doctrine of Constitutional Morality”, *Probono India* (2020) available at: http://probono-india.in/Indian-Society/Paper/136_ARCHIT%20Doctrine%20of%20Constitutional%20Morality.pdf (last visited on August 10, 2020).

⁵ Pratap Bhanu Mehta, ‘What is Constitutional Morality?’ 615 *Seminar* (Nov. 2010), available at: https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm (last visited on July 30, 2020).

⁶ *Ibid.*

⁷ Gopal Subramaniam, *Constitutional Morality: Is it a Dilemma for the State, Courts And Citizens?* 79 (1st D.V. Subba Rao Memorial Lecture delivered on April 24, 2016, Centre for Policy Studies & Visakhapatnam Public Library, Visakhapatnam, May 2016), available at: <http://www.aprasannakumar.org/pdf%20files/Constitutional-Morality.pdf> (last visited on August 04, 2020).

Indians.⁸ He cited the British 19th century historian, George Grote⁹ while justifying his decision to add the detailed forms of administration in the Constitution. According to Grote:¹⁰

[The] diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of government at once, free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendancy for themselves.

The meaning of constitutional morality has varied from time to time. For Grote, constitutional morality meant the co-existence of choices, self-imposed limitations and obedience to authority with unmeasured censure of the persons exercising it. Where citizens will respect the Constitution and abide by the constitutional authorities, they will also have the freedom to criticize them, and the constitutional authorities will have to act within the limits imposed by law.¹¹ The meaning given by Grote was generally different from the other meanings accompanying the term constitutional morality. In modern practice, it represents the substantive content of a constitution. In this manner, constitutional morality means “the morality of the constitution”. There is another use, according to which constitutional morality refers to conventions and protocols that lead to decision-making in a situation where the constitution gives discretionary power or is completely silent.¹² But Grote’s usage of the word was different from these two meanings and was more important for Ambedkar's purposes.¹³

As Upendra Baxi noted, Ambedkar's constitutional morality implies an attitude towards constitutional governance, or to put it another way, a conscious approach to the objectives of the Constitution for the betterment of society.¹⁴ The Supreme Court of India has also referred to various aspects of constitutional morality in its judgments. Recently, the court is being

⁸ *Supra* note 1.

⁹ The quotation from Grote that Ambedkar uses can be found in a reissue of George Grote, *A History of Greece: From the Time of Solon to 403 B.C.* 93 (Routledge, New York, 2001).

¹⁰ Vasant Moon (ed.), *XIII Dr. Babasaheb Ambedkar Writings and Speeches* 60 (Dr. Ambedkar Foundation, Govt. of India, New Delhi, 2014) available at: https://www.mea.gov.in/Images/attach/amb/Volume_13.pdf (last visited on August 02, 2020).

¹¹ Abhinav Chandrachud, “The Many Meanings of Constitutional Morality”, *SSRN* 05 (2020) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521665 (last visited on August 04, 2020).

¹² *Supra* note 5.

¹³ *Ibid.*

¹⁴ S. Khurshid, “Constitutional Morality and Judges of the Supreme Court”, in S. Khurshid, S. Luthra, *et.al.* (eds.), *Judicial Review: Process, Powers, and Problems* 394 (Cambridge University Press, 2020).

welcomed for its progressive stance on various issues such as homosexuality, gender justice, rights related to religious practice, etc. An analysis of these judicial reactions to all such issues indicates that the Supreme Court is defending its case on the grounds of constitutional morality. But it became an important subject of discussion amongst legal experts, especially when K.K. Venugopal, the Attorney General of India, expressed his concerns and criticized constitutional morality. He said, “[U]se of constitutional morality can be very, very dangerous and we can't be sure where it'll lead us to. I hope constitutional morality dies. Otherwise, our first Prime Minister's fear that SC will become the third chamber might come true.”¹⁵

This paper examines various meanings of constitutional morality. It studies some insubstantial references and important decisions made by the Supreme Court of India on constitutional morality and reflects how the court in its various recent decisions used the different contexts of the phrase. It discusses the relationship and contrasts between public morality and constitutional morality. Further, it provides an understanding of the meaning of constitutional morality and social morality in Dr. Ambedkar's sense. Lastly, the paper compares both perspectives of Ambedkar and the Supreme Court of India on constitutional morality and finally answers whether they are different from each other or the same.

II. Constitution morality and Indian judiciary

India has a vibrant judiciary and its high officials, in addition to their traditional role of adjudication, have been constantly propagating progressive ideas and philosophy in line with the contemporary demands of the society.¹⁶ Indian constitutional law is no stranger to the principles laid down by judges. Under the umbrella of judicial activism, the top court developed many new doctrines by expanding the boundaries of written law.¹⁷ The “basic structure rule”, “classification test” and “manifest arbitrariness” are some judicially fashioned principles that have not any written reference in the Constitution of India. Constitutional morality is a new addition to the list of principles developed by judges.¹⁸ This concept has

¹⁵ Apoorva Mandhani, “Constitutional Morality a dangerous weapon, it will die with its birth: KK Venugopal”, *LiveLaw.in*, Dec 9, 2018, available at: <https://www.livelaw.in/constitutional-morality-a-dangerous-weapon-it-will-die-with-its-birth-kk-venugopal/> (last visited on July 30, 2020).

¹⁶ Ashutosh Hajela, “Legal Realism via Constitutional Morality in India: A Critical Analysis” 9:1 *Nirma University Law Journal* 39 (2019), available at: <https://nulj.in/index.php/nulj/issue/view/14> (last visited on August 07, 2020).

¹⁷ *Supra* note 11 at 1.

¹⁸ *Ibid.*

been used extensively in several recent judgments passed by Indian courts. So, it becomes important to find out what the judiciary means by constitutional morality.¹⁹

Some important contexts

In *Naz Foundation v. Government of NCT of Delhi*²⁰ (known as *Naz Foundation* case), the Delhi High Court held that the fundamental rights of dignity and privacy of an individual cannot be denied just on the ground of a strong moral dissatisfaction. Public morality, even though accepted by the majority, must not outweigh the principle of constitutional morality.²¹ This is the scheme of things in our constitution. The idea of constitutional morality is derived from constitutional values, while the concept of popular morality is totally based on the “shifting and subjecting notions of right and wrong”.²² Therefore, the touchstone to uphold laws should only be constitutional morality and not public morality.²³ The court further observed that Part III of the Constitution of India dreamed of a society which is egalitarian to such an extent that every citizen of India is free from restriction and coercion by the state as well as society, and the right to liberty should not be the privilege of the few people. Thus, our constitution acknowledges and guards diversity. This is not less than a social revolution. It was held that while examining a law on the ground of “compelling state interest”, it must be the duty of court to be guided by the principle of constitutional morality instead of popular morality.²⁴ So, according to the court in the above-mentioned case, it is constitutional morality only that can form the basis of compelling state interest. The court also cleared that these are ‘constitutional values’ from where constitutional morality is derived. But the judgment does not give any clear-cut idea about which constitutional values are forming part of the constitutional morality. The apex court has answered this question in its following decisions.

In the Indian legal system, *Naz Foundation* case plays a very important role. It was because of this decision that the LGBT community was seen within the outline of equality and

¹⁹ Urvika Aggarwal, “Situating Dworkin in Indian Jurisprudence: An Analysis with Respect to Constitutional Morality” *SSRN* 2020, available at: <https://ssrn.com/abstract=3590126> (last visited on August 04, 2020).

²⁰ (2009) 111 DRJ 1.

²¹ *Id.*, at para. 86.

²² *Id.*, at para. 79.

²³ *Ibid.*

²⁴ *Supra* note 21.

dignity.²⁵ Even though, the aforesaid judgment of the High Court decriminalized homosexuality, the decision was reversed by the Supreme Court in *SK. Koushal case*,²⁶ while admitting that the popular morality could not be a good basis for rejecting the right of the individuals. The same is observed by Wolfenden Committee Report²⁷ in the United Kingdom on the matter of homosexuality between adults capable of giving consent.²⁸ Consequently, the *Naz Foundation* view, found favour from a five-judge bench in *Navtej Singh Johar v. Union of India*.²⁹ In this case, Chief Justice Deepak Misra, also speaking for Justice Khanwilkar, said that it is the doctrine of constitutional morality from which the courts must take guidance and not the popular morality. He stressed that the view of majority or public perceptions should not outweigh constitutional morality. The foremost purpose of constitutional morality is the adoption of a multicultural and inclusive society, though there are several other virtues encircled in the sphere of constitutional morality. He observed that the only thing that can be allowed to enter the rule of law is constitutional morality, which cannot be “sacrificed for the sake of social morality”.³⁰ The fundamental rights of an individual cannot be violated by using the veil of social morals.³¹ Justice RF. Nariman held that the concept of constitutional morality is essence and soul of the Constitution of India that can be found in the ‘Preamble’ itself. It is the preamble that declares ‘ideals and aspirations’ of the constitution. He further held that constitutional morality can also be found generally in Fundamental Rights and particularly in the provisions which granted dignity of individual in the Constitution of India.³² Justice DY. Chandrachud noted that to achieve the objectives of ‘Justice, Liberty, Equality and Fraternity’ setup by the Preamble, it is important that the organs of the state

²⁵ Arvind Narrain, “A New Language of Morality: From the Trial of Nowshirwan to the Judgment in Naz Foundation”, in Oscar Vilhena, Upendra Baxi, *et. al.* (eds.), *Transformative constitutionalism: Comparing the apex courts of Brazil, India and South Africa* 290 (Pretoria University Law Press, South Africa, 2013).

²⁶ *Suresh Kumar Koushal v. Naz Foundation*, (2014) 1 SCC 1.

²⁷ The Wolfenden Committee Report (WCR) was also discussed by Delhi High Court in *Naz Foundation* case. It is also important to note that the UK government followed WCR’s recommendations and amend the Sexual Offences Act in 1967. The Report also influenced the American Law. Which, in result, led many US States to null the laws that forbidden consensual sex between adults. In *Dudgeon v. United Kingdom* (1981), the European Court of Human Rights referred various excerpts of the WCR and struck down the laws that restricts sexual activity between male. The *Dudgeon case* made it mandatory for all countries in Council of Europe to repeal such types of laws. See. *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook* 7 (International commission of Jurists, Switzerland, 2011), available at: <https://www.refworld.org/pdfid/4f9eae7c2.pdf> (last visited on Dec. 02, 2020).

²⁸ Mahendra Pal Singh, ‘Observing Constitutional Morality’ 721 *Seminar* (Sep. 2019), available at: http://www.india-seminar.com/2019/721/721_mahendra_pal_singh.htm (last visited on Nov. 30, 2020).

²⁹ (2018) 10 SCC 1.

³⁰ *Id.*, at para. 268.

³¹ *Ibid.*

³² *Id.*, at para. 349.

should be loyal and devoted to the principle of constitutional morality. Such commitment and fidelity towards constitutional morality should not get affected by social morality.³³

In *Joseph Shine v. Union of India*,³⁴ the court was concerned with an important question that whether section 497 of the Indian Penal Code (IPC) was constitutionally valid. Under this section, a male (not a husband) was to be punished for having sexual intercourse with a married female, even though it was with her consent. Justice RF. Nariman while striking down section 497, spoke of the primacy of contemporary constitutional morality over parochial social mores. He found that:³⁵

Our Constitution is a repository of rights, a celebration of myriad freedoms and liberties. It envisages the creation of a society where the ‘ideals of equality, dignity and freedom’ triumph over entrenched prejudices and injustices. The creation of a just, egalitarian society is a process. It often involves the questioning and obliteration of parochial social mores which are antithetical to constitutional morality.

Justice DY Chandrachud examined common morality as being distinct from constitutional morality. He observed that it is the constitutional morality that needs guarantee from the state to assure certain rights which are essential and vital for living a dignified life equally and freely as a member of the society. The law must always be guided by the constitutional morality rather than any popular or common morality. So, our fidelity and devotion towards constitutional morality require us to enforce articles 14 and 15 (equality and non-discrimination respectively) of the Constitution, which is disturbed by the operation of section 497 of IPC.³⁶ In this case, the court also held that these are the principles of equality, liberty and dignity which form the essential part of constitutional morality.

The balance between religious rights and equality was directly in consideration in the *Indian Young Lawyers Association v. State of Kerala*,³⁷ (*Sabrimala Temple* case). The main issue, in this case, was the prohibition of women’s entry into a temple on the ground that it was against popular or public morality. Chief Justice Misra, holding this restriction unconstitutional, held that it must be the constitutional morality and not the social morality

³³ *Id.*, at para. 352.

³⁴ (2019) 3 SCC 39.

³⁵ *Id.*, at para. 87.

³⁶ *Id.*, at para. 143.

³⁷ 2018 SCC OnLine SC 1690.

that could serve the purpose of term “morality” given in articles 25 and 26 of the Constitution of India.³⁸ While speaking on the same subject, Justice DY Chandrachud held that the four principles enshrined in Preamble of the Constitution of India are the core content of constitutional morality. According to him, these four precepts are: guaranteed justice; the liberty of an individual; equality among all; and a sense of fraternity among everyone. He further added that the dignity of a person can be achieved only in a system that recognises liberty. It is the principle of dignity that requires equality between citizens. Equality provides protection by law in the same way as it exists for others. It also postulates the fundamental right of non-discrimination. These are the guiding stars by which the concept of constitutional morality can be governed.³⁹

Therefore, the duty of the court is to protect what is granted by and is consistent with the essential values of the constitution and in line with constitutional morality. It is the trinity of dignity, liberty and equality which outlines the trust of the Constitution of India. The priorities described by this trinity are supreme in nature and any custom, view, or practice that conflicts with these ideals is invalid.⁴⁰ He said that if the vital postulates of ‘liberty, equality and fraternity’ are there as a core content of constitutional morality then we can achieve the dreams of the founding fathers of our constitution. Only by adopting these means, we can secure proper justice for our citizens. Therefore, the essence of dignity, liberty and equality must prevail.⁴¹ In this case, once again the court held that constitutional morality must have rooted in the noble objectives of liberty, equality and fraternity. In a nutshell, it may be concluded from the above decisions of the Supreme Court that constitutional morality—in contrast with public morality—is a morality guided by the fundamental postulates of human liberty, equality and fraternity.

Some trivial references

The earliest mention of the expression constitutional morality by the Supreme Court of India was in the case of *Kesavananda Bharati v. State of Kerala*⁴². The doctrine evolved herein is commonly known for the ‘basic structure doctrine’ of the Constitution of India. In this case, Justice AN. Ray relying on Grote's construction decided that constitutional morality is in fact

³⁸ *Id.*, at para. 110-111.

³⁹ *Id.*, at para. 189.

⁴⁰ *Id.*, at para. 226.

⁴¹ *Supra* note 39.

⁴² (1973) 4 SCC 225.

necessary not only for the majority but for the entire population. He gave it equal status with the term of social contract.⁴³ Justice P. Jaganmohan Reddy also used the term and quoted Ambedkar in his judgment, but he did not talk much about it.⁴⁴ In *S. P. Gupta v. Union of India*,⁴⁵ Justice ES. Venkataramiah said: “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.”⁴⁶ In *Islamic Academy of Education v. State of Karnataka*,⁴⁷ Justice SB. Sinha held that:⁴⁸

[An] affirmative action may, therefore, be constitutionally valid by reason of articles 15(4) and 16(4) and various directive principles of state policy, but the court cannot ignore the constitutional morality which embraces in itself the doctrine of equality. 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 backward and downtrodden.

The *Supreme Court Advocates on Record Association v. Union of India*⁴⁹ (also known as *NJAC* case) was concerned with the validity of 99th constitutional amendment setting up National Judicial Appointment Commission as an alternative to the established procedure of judges’ collegium. Justice J. Chelameswar, who dissented with the majority that struck down the amendment, had an interesting observation on the need for constitutional morality for judiciary in India. He said that “we the members of the judiciary exult and frolic in our emancipation from the other two organs of the state. But have we developed an alternate constitutional morality to emancipate us from the theory of checks and balances, robust enough to keep us in control from abusing such independence?”⁵⁰ In *Shayara Bano v. Union of India*,⁵¹ Chief Justice of India JS. Khehar, speaking for the minority of two judges on the bench of five, held that the custom of ‘talaq-e-biddat’ as a component of personal law has a

⁴³ *Id.*, at para 747.

⁴⁴ *Id.*, at para. 1112.

⁴⁵ 1981 Supp (1) SCC 87.

⁴⁶ *Id.*, at para. 1077.

⁴⁷ (2003) 6 SCC 697.

⁴⁸ *Id.*, at para. 98.

⁴⁹ (2016) 5 SCC 1.

⁵⁰ *Id.*, at para. 1113.

⁵¹ (2017) 9 SCC 1.

status equal to that of other fundamental rights provided in the Constitution of India. Thus, the practice of such personal law cannot be set aside by the judiciary just on the ground that it violates the principle of constitutional morality.⁵² These references to constitutional morality were too fleeting and insubstantial to have amounted to any serious exposition of the law.

III. Recent concerns regarding constitutional morality

Liberals and progressives have praised the Supreme Court for its reformist approach on various issues by adopting constitutional morality in contrast with popular morality. However, at the same time, the other side claims that the application of this doctrine amounts to judicial overreach⁵³ and has raised concerns regarding the Apex Court's understanding and application of the term constitutional morality. The Attorney General of India (AGI) has also expressed his concern in this regard.⁵⁴ Referring to the *Sabarimala Temple* case,⁵⁵ the AGI said:⁵⁶

What is this Constitutional morality? If a bench of the Supreme Court speaks in two different voices, one saying Constitutional morality will permit the entry of women and the other one which says no, it's prohibited because of constitutional morality, that is a very dangerous weapon. You cannot use it. It can result in grave injury without anyone knowing where it's going to end. Therefore I'm hoping Constitutional morality will die with its birth.

Notably, just a few days before AGI's account, the Law Minister Ravi Shankar Prasad, on Constitution Day, took a critical view of the same issue and urged the judges to define constitutional morality if it had to be used as "touchstone" to test the validity of laws.⁵⁷ The

⁵² *Id.*, at para. 383.7.

⁵³ Md Zeeshan Ahmad, "The challenge of Constitutional Morality before the Supreme Court" *The Leaflet*, March 26, 2020, available at: <https://www.theleaflet.in/the-challenge-of-constitutional-morality-before-the-supreme-court/> (last visited on March 04, 2021).

⁵⁴ "Constitutional morality must die or SC could become Parliament's third chamber, as Nehru feared: A-G Venugopal" *Times Now News*, December 09, 2018, available at: <https://www.timesnownews.com/india/article/kk-venugopal-attorney-general-sabarimala-news-address-constitutional-morality-supreme-court-jawaharlal-nehru-bharatiya-janata-party-chief-justice-of/328266> (last visited on March 04, 2021).

⁵⁵ *Supra* note 37.

⁵⁶ Ananthakrishnan G, "SC has taken more powers than any apex court... hope Constitutional morality dies with birth: A-G" *Corporate Citizen*, January, 2019, available at: <https://corporatetcitizen.in/v4-issue19/editor-in-chief-s-choice-ananthakrishnan.html> (last visited on December 25, 2021).

⁵⁷ *Supra* note 53.

Minister said that “nuances of Constitutional morality should be outlined with clarity and should not differ from judge to judge and there must be a consensus.”⁵⁸ In his latest book, Senior Advocate Abhishek Manu Singhvi also commented on the usage of constitutional morality. He said that the phrase is full of subjectivity and its judicial approach could vary from judge to judge.⁵⁹

The first and foremost criticism of constitutional morality is its vagueness. As of now, the judiciary has no clear consensus regarding the content and contour of this principle⁶⁰ and judges have failed to adequately address the same. Most judges simply apply the term without outlining its agreed content.⁶¹ For Justice Chandrachud, the content of constitutional morality is not finite. Perhaps wisely, he refuses to indicate an exhaustive list of moral values that constitute this principle.⁶² In *Sabarimala Temple*⁶³ case, Justice Chandrachud identified the preamble as the “matters on which the Constitution has willed that its values must reign supreme.”⁶⁴ In *State (NCT of Delhi) v. Union of India*,⁶⁵ Justice Chandrachud, (speaking for himself and his brother judges) referred to constitutional morality in terms of the spirit of the Constitution.⁶⁶ He wrote that constitutional morality requires filling in constitutional silences “to enhance and complete the spirit of the Constitution.”⁶⁷ He added that constitutional morality specifies values for the survival of institutions and an “expectation of behaviour that will meet not just the text but the soul of the Constitution.”⁶⁸

While considering constitutional morality as “the soul of the Constitution”, Justice Nariman, in *Navtej Singh Johar*,⁶⁹ held that it is “to be found in the Preamble of the Constitution, which declares its ideals and aspirations”, he added that it “is also to be found in Part III of the

⁵⁸ “Apply yardstick of Constitutional morality evenly: Ravi Shankar Prasad” *The New Indian Express*, November 27, 2018, available at: <https://www.newindianexpress.com/nation/2018/nov/27/apply-yardstick-of-constitutional-morality-evenly-1903665.html> (last visited on December 25, 2021).

⁵⁹ Nishant Mishra, “The Making of Constitutional Morality by Indian Judiciary: History, Significance and Concerns” *Lawctopus*, June 10, 2021, available at: <https://www.lawctopus.com/academike/constitutional-morality-india/> (last visited on December 25, 2021).

⁶⁰ *Ibid.*

⁶¹ Nakul Nayak, “Constitutional Morality: An Indian Framework” *SSRN* 24 (2021), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885432 (last visited on December 25, 2021).

⁶² *Ibid.*

⁶³ *Supra* note 37.

⁶⁴ *Id.*, at para. 12.

⁶⁵ (2018) 8 SCC 501.

⁶⁶ *Supra* note 11 at 12.

⁶⁷ *Supra* note 65 at para. 301.

⁶⁸ *Id.*, at para. 302.

⁶⁹ *Supra* note 29.

Constitution, particularly with respect to those provisions which assure the dignity of the individual.”⁷⁰ However, more recently, in *Sabarimala Review*⁷¹ to a larger bench, he stated that the values that form the content of constitutional morality “are contained in the Preamble read with various other parts, in particular, Part III and Part IV thereof.”⁷² By including Part IV and “various other parts” of the constitution, Justice Nariman has gone beyond his earlier formulation.⁷³

Justice Dipak Misra, in *Manoj Narula v. Union of India*,⁷⁴ has essentially used constitutional morality as a synonym for the rule of law.⁷⁵ He said that constitutional morality “basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law”.⁷⁶ In *Navtej Singh Johar*,⁷⁷ Justice Misra quoted elements such as the text of the constitution, pluralism, inclusiveness, and other principles of constitutionalism,⁷⁸ whereas, in *State (NCT of Delhi) case*,⁷⁹ he mentioned that constitutional morality “implies strict and complete adherence to the constitutional principles as enshrined in various segments”⁸⁰ of the constitution and “means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution”.⁸¹

These highly abstract formulations of constitutional morality are too vague to calm any predictability in a judicial system. How should a lower court judge, bound by *stare decisis*, decide whether a contested State action falls within the meaning of constitutional morality? The major problem emerging from this uncertainty is that judges are inconsistent (even contradictory) within and between their own judgments in assigning the standards that form part of the constitutional morality.⁸² Due to this vagueness, the fear is that it would get subjected to the personal values and biases of the judges.⁸³

⁷⁰ *Id.*, at para. 79.

⁷¹ *Kantaru Rajeevaru v. Indian Young Lawyers Association*, 2020 SCC OnLine SC 158.

⁷² *Id.*, at para. 121.

⁷³ *Supra* note 61 at 25.

⁷⁴ (2014) 9 SCC 1.

⁷⁵ *Supra* note 11 at 12.

⁷⁶ *Supra* note 74 at para. 75.

⁷⁷ *Supra* note 29.

⁷⁸ *Id.*, at para. 111.

⁷⁹ *Supra* note 65.

⁸⁰ *Id.*, at para. 79.

⁸¹ *Id.*, at para. 63.

⁸² *Supra* note 61 at 26.

⁸³ *Supra* note 59.

Another criticism against constitutional morality is that the courts have entrusted only themselves the power to formulate, develop, implement and review the meaning and content of constitutional morality.⁸⁴ Which raised a fundamental question of authority that who has the power to invoke “public morality” to limit the scope of fundamental rights? The Articles⁸⁵ containing provisions regarding “public morality” make it either expressly or otherwise clear that such power is vested in “the State”. Interestingly, answering the question, whether the judiciary is part of “the State” or not, the Supreme Court has held that courts are not “State” while exercising their judicial functions, however, fall within the definition, when working in its administrative capacity. Consequently, for the purpose of limiting the scope of fundamental rights citing “public morality”, the judiciary does not fall within the definition of “State”. The same power is exclusively vested in the Executive and the Legislature.⁸⁶

Nevertheless, the concept of constitutionalism as a fundamental aspect of democracy enables the judiciary to check any State action which arbitrarily or abruptly invokes public morality to curb the fundamental rights.⁸⁷ This is the point where the role of the judiciary becomes much relevant. Here the court may apply the test of “constitutional morality” to assess the reasonableness of State action which is ostensibly based on public morality.⁸⁸ However, in doing so, the role of the judiciary is limited to identify the bright red lines within which the State must act and in applying constitutional morality to test State action, the judiciary must be able to identify those provisions which are violated by the State action. Judiciary cannot use a vague doctrine that may effectively take away the State’s constitutionally recognized powers to limit fundamental rights by invoking the public morality.⁸⁹

Additionally, the major criticism that why the judiciary should not be entrusted with the job of cultivating constitutional morality is the lack of diversity in it.⁹⁰ It is composed of unelected, mostly old, upper-caste men,⁹¹ which self-appoint their members through the

⁸⁴ *Supra* note 61 at 37.

⁸⁵ Art. 19(2), 19(4), 25(1) and 26.

⁸⁶ J. Sai Deepak, “Constitutional morality, public morality and moral diversity” *The Daily Guardian*, August 28, 2020, available at: <https://thedailyguardian.com/constitutional-morality-public-morality-and-moral-diversity/> (last visited on December 25, 2021).

⁸⁷ “Constitutional Morality: Not Only Domain of Judiciary” *CPRG India Blog*, December 13, 2018, available at: <http://www.cprgindia.org/blog/opinion/constitutional-morality-not-the-domain-of-judiciary/> (last visited on December 25, 2021).

⁸⁸ *Supra* note 86.

⁸⁹ *Ibid.*

⁹⁰ *Supra* note 87.

⁹¹ *Supra* note 61 at 38.

collegium system.⁹² According to Professor Oliver Wendell Holmes, judges cannot avoid the personal element, and it is unwise and dangerous to deny it. Judges are not absolved of having a human element by simply being in their position. Every human being has their biases and prejudices. But when people of a certain type and class begin to assemble in government offices, it becomes a dangerous mixture. As a result, these biases and prejudices are incorporated into the whole system and reflected in the work that they do.⁹³ In such a situation, formulation of the content of constitutional morality by the judiciary may benefit certain voices and silence others.⁹⁴

IV. Dr. Ambedkar's view on constitutional morality

The Constitution of India is a very long and detailed constitution.⁹⁵ Special attention was also paid to this in the Constituent Assembly. But Ambedkar justified the length by saying that in countries where the democratic tradition does not exist, the provisions of the Constitution should be written in more detail than in those countries where there is a more mature democracy and greater consensus on how democratic institutions should function. He believed that if the existence of constitutional morality is stronger in the people, then there is no need to write every detail on the white paper.⁹⁶ Therefore, he defended his decision to incorporate more detail of administration in the Constitution on the ground that by changing the forms of administration, one can distort the constitution, which can make it opposite and against the essence of the constitution.⁹⁷ He argued that the Constitution of India can be a victim of such breach as there was a lack of constitutional morality in Indian politics. Hence, giving the power to Legislature to specify the forms of administration is not a good and wise step.⁹⁸ He believed that our people had yet to learn constitutional morality.⁹⁹

He was more concerned with the elements of constitutional morality. Therefore, in his speech (famously known as “Three warnings”) of November 25, 1949, Ambedkar returns to the elements of constitutional morality. He asks a fundamental question – “If we wish to

⁹² *Supra* note 87.

⁹³ *Ibid.*

⁹⁴ *Supra* note 61 at 38.

⁹⁵ Brij Kishore Sharma, *Introduction to the Constitution of India* 37 (PHI Learning Private Limited, Delhi, 9th edn., 2020)

⁹⁶ Andre Béteille, “Constitutional Morality” 43:40 *Economic and Political Weekly* 36 (2008).

⁹⁷ *Supra* note 10.

⁹⁸ Vikram Aditya Narayan & Jahnavi Sindhu, “A historical argument for proportionality under the Indian Constitution” 2:1 *Indian Law Review* 18 (2018).

⁹⁹ *Supra* note 10.

maintain democracy not merely in form, but also in fact, what must we do?” Answering the question, he said that there are three things which must be done.¹⁰⁰

The first and primary thing for him was the need to “hold fast to constitutional methods of achieving social and economic objectives”.¹⁰¹ By “holding on to constitutional means”, he inferred that:¹⁰²

We must abandon the bloody methods of revolution. It means that we must abandon the method of civil disobedience, non-cooperation and satyagraha. When there was no way left for constitutional methods for achieving economic and social objectives, there was a great deal of justification for unconstitutional methods. But where constitutional methods are open, there can be no justification for these unconstitutional methods. These methods are nothing but the Grammar of Anarchy and the sooner they are abandoned, the better for us.

The second thing was his “caution” against hero-worship in politics.¹⁰³ He underlined the importance of observing caution which John Stuart Mill had uttered, namely, 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”.¹⁰⁴ According to him, it is not wrong in being grateful to great personalities who have served the country all their lives. But there should be some limits. For him:¹⁰⁵

This caution is far more necessary in the case of India than in the case of any other country, for in India, Bhakti or what may be called the path of devotion or hero-worship, plays a part in its politics unequalled in magnitude by the part it plays in the politics of any other country in the world. Bhakti in religion may be a road to the salvation of the soul. But in politics, Bhakti or hero-worship is a sure road to degradation and to eventual dictatorship.

¹⁰⁰ *Id.*, at 1215.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.*

The last important thing for Ambedkar was not to be content with a mere political democracy, but rather strive for social democracy as well. He pointed out that:¹⁰⁶

Political democracy cannot last unless there lies at the base of it social democracy. What does social democracy mean? It means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things.

Consequently, it is the self-imposed restraint, loyalty towards the constitutional methods, doubt about any singular claims to represent the will of the people, and an endeavour for social democracy with underlying principles of equality, liberty and fraternity, which seem important in his account of constitutional morality. But he also believed that in addition to achieving the constitutional objectives, it is also important to know in which ways these objectives will be achieved. According to him, this is the essence of constitutional morality.¹⁰⁷

Mechanisms must uphold values

Although Ambedkar recognized the “observance of constitutional morality” as a condition precedent for the “successful working of democracy”,¹⁰⁸ however, he pointed out that it is not “the be-all and end-all of democracy”.¹⁰⁹ For him, democracy means more than the successful adoption of constitutional machinery. The means of democracy need to be separated from its

¹⁰⁶ *Id.*, at 1216.

¹⁰⁷ *Supra* note 5.

¹⁰⁸ Hari Narake, M. L. Kasare, *et.al.*, (ed.), XVII (III) *Dr. Babasaheb Ambedkar Writings and Speeches* 480 (Dr. Ambedkar Foundation, Government of India, New Delhi, 2014), available at: https://www.mea.gov.in/Images/CPV/Volume17_Part_III.pdf (last visited on August 07, 2020).

¹⁰⁹ Vasant Moon (ed.), IX *Dr. Babasaheb Ambedkar Writings and Speeches* 449 (Dr. Ambedkar Foundation, Govt. of India, New Delhi, 2014), available at: https://www.mea.gov.in/Images/attach/amb/Volume_09.pdf (last visited on August 02, 2020).

ends.¹¹⁰ Therefore, while distinguishing between constitutional government and self-government, he warned against limiting democracy to its legal instruments.¹¹¹ For him, the sense of constitutional morality may be important to maintain a constitutional form of government but upholding a constitutional form of government is not like a self-rule by the citizens.¹¹²

In Ambedkar's theorizations of democracy, removing the governing class from power must be the fundamental object of a constitution and such class should also be prevented from being in power forever. Those who advocate that democracy does not need more than constitutional morality, adult suffrage and regular elections are "probably unaware of the fact that they are doing nothing more than and nothing different from expressing the point of view of the governing classes."¹¹³ The important part of democracy—that is its social and economic dimensions—is ignored if we celebrate democracy as a procedure. The rejoice of procedure only strengthens the governing class to maintain their hegemony in political power of the country.¹¹⁴ While criticising democracy just as a procedure, he held that these mechanisms should be controlled by the principles of economic and social equality. Lacking this would result in what Prof. Dewey¹¹⁵ observed as ritualism of procedure and hegemony of the powerful.¹¹⁶ He argued that formal democracy should be further categorized internally through mechanisms and values. It includes mechanisms such as constitutional morality, adult suffrage, periodic elections, etc. But all these mechanisms must uphold fundamental

¹¹⁰ Arun K. Patnaik, "Ambedkar on Indian democracy" in Narendar Pani and Anshuman Behera (ed.), *Reasoning Indian Politics: Philosopher Politicians to Politicians Seeking Philosophy* 21 (Routledge, 2018), available at: https://www.academia.edu/23064777/Ambedkar_on_Indian_Democracy (last visited on August 04, 2020).

¹¹¹ *Supra* note 109.

¹¹² *Ibid.*

¹¹³ *Id.*, at 444.

¹¹⁴ *Id.*, at 448.

¹¹⁵ Babasaheb Ambedkar completed his post-graduation from Columbia University, USA. Where he became a student of American philosopher and educator *John Dewey* and also met famous American jurist *Felix Frankfurter*. See Martha C. Nussbaum, "Ambedkar's constitution: Promoting inclusion, opposing majority tyranny", in T. Ginsburg and A. Huq (eds.), *Assessing Constitutional Performance* 297 (Cambridge University Press, 2016).

¹¹⁶ See the "Abstract" of Kanchana Mahadevan, "Pragmatism, Spirituality, and the Calling of a New Democracy: The Populist Challenge and Ambedkar's Integration of Buddhism and Dewey" *Researchgate* (2021), available at: https://www.researchgate.net/publication/347452210_Pragmatism_Spirituality_and_the_Calling_of_a_New_Democracy_The_Populist_Challenge_and_Ambedkar's_Integration_of_Buddhism_and_Dewey (last visited on August 04, 2020).

values like liberty, equality and fraternity. He said that if Indians celebrate mechanisms instead of values, there will be a crisis of democracy.¹¹⁷

V. Conclusion

Having traversed the different strands of constitutional morality, the study concludes that according to Dr. Ambedkar, the core of constitutional morality is to have a sense of respect for procedures and constitutional forms. He believed that constitutional morality—a condition precedent for the successful democracy—must uphold the basic tenets of democracy i.e., liberty, equality and fraternity.¹¹⁸ Notably, the version of Supreme Court that constitutional morality is derived from constitutional values which are the supreme ideals of liberty, equality and fraternity,¹¹⁹ is almost identical to the perspective of Dr. Ambedkar and advocate the same idea. However, it is also significant to note that, in some instances,¹²⁰ the Supreme Court has used constitutional morality in a very vague and wider sense. In this formulation, constitutional morality paves a way for the personal preferences/choices of the judge(s) while testing the validity of state action.¹²¹ To overcome this scenario, the Supreme Court referred the task of defining constitutional morality to a bench of seven judges, which is still *sub judice* in the court.¹²² Therefore, the study holds a prospect that the judiciary should outline constitutional morality as morality which must have Dr. Ambedkar's social philosophy i.e., liberty, equality and fraternity. Otherwise, the judiciary should step aside and let the other constitutional organs (the Executive and the Legislature) decide the fate of constitutional morality. instances

¹¹⁷ *Supra* note 110.

¹¹⁸ See. Part IV of this study.

¹¹⁹ See. Part II of this study.

¹²⁰ See. Part III of this study.

¹²¹ *Supra* note 11 at 15.

¹²² *Supra* note 71.