

Constitutional Morality v. Popular Morality: The Judiciary's Evolving Role

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Abstract:

India, being a democratic country that is diverse and rich in culture, and thus has a written constitution, is the lengthiest in the world. Since Dr. B.R. Ambedkar wanted to preserve the same diversity, he adopted many concepts of the constitutions around the globe, like Fundamental Rights from the Constitution of America, while the Rule of Law from the Constitution of Britain, and many more. But these two concepts have been the foundation of our Indian Constitution, contained in PART III of the same.

When we talk about the term “morality”, according to the Cambridge dictionary, the term means *a set of personal or social standards for good or bad behaviour and character*.¹ The term “morality” itself is used thrice in the COI, twice in Article 19, that is, the right to freedom of speech and expression, and once in Article 25, 26 (right to religion). The literal meaning of the term constitutional morality is adherence to constitutional democracy.²

On the other hand, Popular morality is a wider term when compared to Public Morality. Popular Morality reflects the prevailing beliefs, traditions, and ethical values of the majority population, which may or may not align with constitutional ideals. Public morality refers to the moral standards expected in public life and professional settings, often codified in laws and regulations.

There has always been a debate between constitutional morality and popular morality. However, the judiciary has increasingly invoked constitutional morality to protect individuals' fundamental rights and ensure that the rule of law prevails over aggressive popular norms.

Keywords: Morality, Constitutional, Popular, Democracy, Rights.

Introduction:

The Indian Constitution is a written and a living document, which means that it can be amended as per the changing needs of society. Sometimes, the courts in India, including the Supreme Court and High Courts, interpret the provisions of the Constitution of India in a way that allows society's requirements to be met without altering the provisions of the Constitution. According to the Basic Structure Doctrine, which was laid down in the landmark judgment of the Kesavananda Bharti Case³, says that although the Parliament has the power to amend the Constitution, it cannot change its basic structure. It acts as a constitutional safeguard against authoritarian or majoritarian amendments that threaten the essence of the Constitution.

¹ "Morality," Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/morality>

² Helan Benny & Lavina Laju, *Doctrine of Constitutional Morality in the Context of Indian Legal System: A Transformative Tool*, 3 Int'l J. Legal Sci. & Innovation, Issue II, 2021 (defining “constitutional morality” as adherence to constitutional democracy).

³ Kesavananda Bharti v. State of Kerala, (1973) 4 S.C.C. 225, SCC OnLine SC 146 (India).

The basic pillars of constitutional morality are: Rule of Law, Fundamental Rights, and Separation of Powers.

Research Methodology:

This paper is descriptive as well as analytical, and all the research on the constitutional as well as the popular morality and the judiciary's evolving role in it is done through secondary sources like journals and websites.

Review of Literature:

1. Morality and Laws :

Both laws and morals help guide how people behave in a community so everyone can live together peacefully. At their core, both are based on the idea that everyone deserves autonomy and respect.

However, legal experts see the connection between law and morality in different ways. Some believe that laws and morals are separate—that is, just because a law seems morally wrong doesn't mean it can or should be ignored. Others think that laws and morality are closely linked. According to this view, laws are meant to reflect moral standards and should always promote the well-being of individuals and the community as a whole.

For example, adultery might be seen as immoral by many, but it's legal in most places. On the other hand, driving just a little over the speed limit is against the law, but most people wouldn't consider it morally wrong.

Sometimes, people feel that breaking the law is the right thing to do. For instance, stealing food to feed someone who is starving might be illegal, but many would argue it's the moral choice if it's the only way to save a life.

2. Constitutional Morality:

2.1 Rule Of Law:

The Concept, originally taken from England, was propounded by Dicey to ensure no arbitrariness in a particular state. The Rule of Law has mainly 3 elements:

Supremacy of Law:

Supremacy of Law means that the law is supreme and everyone is equal regardless of their caste, place of birth, race, or sex. The law stands above all, and no one is above the law. In the context of the Indian scenario, many landmark judgments emphasize this principle and create a delicate balance between Constitutional Morality and Public Morality. One such case is the Kesavananda Bharati judgment.⁴

Equality Before Law:

This element highlights that everyone is equal in the eyes of the Law. Our Indian Constitution highlights this particular concept very beautifully under Article 14 of PART III. It states that *the state shall not deny to any person equality before the law or equal protection of the laws within the territory of India*.⁵ Since our constitution follows the concept of making a welfare state, Article 14 has two subparts:

- Equality before Law
- Equal Protection of Laws

⁴ Supra note 3

⁵ India Const. Art. 14

Equality before Law states that everyone is equal in the eyes of the law. India is a country that believes in the concept of the welfare state, to bring the economically backward class above the poverty line. India has the concept of equal protection of laws as well. This concept particularly says that equals should be treated equally while unequals should not be treated unequally, but differently. To provide equal opportunities to economically disadvantaged classes, special laws have been enacted to help them rise above the poverty line. In the case of *State of West Bengal v. Anwar Ali Sarkar* (1975),⁶ the SC held that equal protection of laws is corollary to Equality Before Law, which means that to maintain the concept of Equality before Law, Equal protection of laws is important as well, otherwise the structure would collapse and its purpose would not be achieved properly because absolute equality is an impossibility. After going through the provisions of Article 14 of the COI, it is observed that there is no restriction on the Right to Equality, but there should be a scope of reasonable classification. That means restrictions should be imposed on reasonable grounds. In the case of *Charanjeet Lal Chaudhary v. UOI* (1951)⁷, Justice Fazal Ali observed that after going through the book of the Constitution Law, which Professor Willis⁸ writes, there should be a distinction on reasonable grounds, which means that equality before law is necessary with equal protection of laws. Equal Protection of laws forbids class legislation, but the classification that rests upon reasonable grounds is permissible. This is also known as the doctrine of reasonable classification.

In the landmark judgment of *E.P. Royappa v. State of Tamil Nadu* (1974),⁹ Justice Bhagwati, for himself and on behalf of Justice Chandrachud and Justice Krishna Iyer, held that equality is a dynamic concept with new dimensions, not confined, crippled, and contained within traditional Doctrinaire limits. Equality is the rule of Law, and in a republic and arbitrariness is a sign of an absolute monarch. Both are sworn enemies, and equality is the antithesis of arbitrariness. After adopting the positivist view based on political logic and constitutional law, arbitrariness is violative of the law.

Predominance of Legal Spirit

The concept originally highlights that since the UK Constitution is oral and truly depends on the precedents, the Constitution is a result of the precedents. But when we compare it with the Indian scenario, our constitution is written, and it doesn't depend on the precedents; therefore, the precedents are the result of the constitution.

2.2 Fundamental Rights:

The Fundamental Rights, originally taken from the Constitution of the USA, and known as the Magna Carta, during 1912, are the foundation of the American Constitution as well as our Indian Constitution. When talking about the Indian Scenario, the fundamental rights are contained in PART III of the COI. Fundamental Rights are the basic human rights that are enforceable and cannot be changed but only amended in a positive sense, with the original intent of not violating any person's rights. In the case of *Maneka Gandhi v. UOI* (1978)¹⁰, the SC highlighted the golden triangle and the nexus between Articles 14, 19, 21, and the court also widened the scope of Art. 21 of the COI. Another case of the amendability of fundamental rights, *Shankari Prasad v. Union of India* (1952)¹¹. This case dealt with the amendability of Fundamental Rights (the First Amendment's validity was challenged). The SC Court held that the power

⁶ *State of W.B. v. Anwar Ali Sarkar*, 1952 S.C.R. 284, SCC OnLine SC 5 (India).

⁷ *Charanjit Lal Chowdhury v. Union of India*, 1950 S.C.R. 869, SCC OnLine SC 10 (India).

⁸ Hugh Evander Willis, *Constitutional Law of the United States* (1936).

⁹ *E.P. Royappa v. State of T.N.*, (1974) 4 S.C.C. 3, SCC OnLine SC 132 (India).

¹⁰ *Maneka Gandhi v. Union of India*, (1978) 1 S.C.C. 248, SCC OnLine SC 2 (India).

¹¹ *Shankari Prasad Singh Deo v. Union of India*, 1952 S.C.R. 89, SCC OnLine SC 1 (India).

conferred on Parliament by Art. 368 to amend is a very wide power and includes the power to take away the fundamental rights guaranteed by Part III, and that in the context of Art. 13 (2), "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the constitution made in the exercise of constituent power, with the result that Art. 13(2) does not affect amendments made under Art. 368.

3. Constitutional Morality or Popular Morality?

When the constitutional morality is compared with popular morality, it often clashes in society. However, in many of the cases it is seen that the judiciary has given more emphasis on the constitutional morality over popular morality..

In the case of the Indian Young Lawyers Association v. State of Kerala(2018)¹², also known as the Sabarimala Temple Case, the court ruled against the exclusion of women from the temple, stating that religious practices cannot violate the constitutional guarantees of equality and non-discrimination. These case laws particularly highlight that no person is above the law and the judiciary doesn't support the rigid, patriarchal norms set by society.

Popular morality also tends to mainstream the dominant culture at times. For instance, the prohibition on LGBTQ and the criminalization of their relations for several hundred years is a prime example. No state would legalize those courtships since they lack courage and fear losing vote banks. Courts, therefore, had to intervene to safeguard the rights of LGBTQ individuals.

In the case of Navtej Singh Johar v. UOI (2018)¹³ The SC decriminalized consensual homosexual relations between adults by reading down section 377 of the IPC because of Human Dignity, which is protected under Article 14,19,21, and involves all those rights and freedom which enable a person to live life without any encroachment upon his/her self-respect, pride, and safety.

Another case of Joseph Shine v. UOI (2018)¹⁴ in which the SC struck down Section 497 of the IPC, criminalized adultery as being patriarchal and inconsistent with the constitution's egalitarian vision. Judgment declared that individual dignity and autonomy in marital relationships cannot be overridden by outdated notions of morality that treat women as property.

The above-mentioned cases clearly show that the judiciary must create a balance between both moralities, but the judiciary also signifies that constitutional morality prevails over popular morality because any individual's rights should not be violated because of the norms set by society.

Challenges faced by the Judiciary:

Although it is observed that the judiciary emphasizes constitutional morality more than popular morality, it faces several challenges in maintaining balance within our dynamic society. To achieve this balance, the concept of checks and balances prevails in society to preserve stability. Understanding the system of checks and balances requires a clear grasp of the Doctrine of Separation of Powers. This doctrine states that the powers of the legislative, executive, and judiciary should be separated. It is a fundamental principle of democratic government that the system of checks and balances exists to uphold the structure of the separation of powers by ensuring each branch functions properly and remains in its designated role. Since the Indian Constitution does not endorse strict separation of powers, it primarily relies on the system of checks and balances.

¹² Indian Young Lawyers Ass'n v. State of Kerala, (2019) 11 S.C.C. 1, SCC OnLine SC 1280 (India).

¹³ Navtej Singh Johar v. Union of India, (2018) 10 S.C.C. 1, SCC OnLine SC 1350 (India).

¹⁴ Joseph Shine v. Union of India, (2019) 3 S.C.C. 39, SCC OnLine SC 1676 (India).

There are various instruments under the system of checks and balances under the Indian Government which are as follows:

- **Judiciary Control on Legislature:**

Several articles cover this particular area and they also play a fundamental role in the Indian Constitution as well. Starting off with Article 13 says that if any law is made before the commencement of the Constitution of India and it is inconsistent with the provisions of Part III, that is the fundamental rights, then the law would be considered void. This creates a base for the concept of judicial review which is one of the basic features of our Constitution. In the case of *Indira Nehru Gandhi v. Raj Narain*¹⁵ the observation was made in the following way- the concept of judicial review was adopted from the Constitution of the United States of America. A person whose Fundamental Rights are violated can move to the Supreme Court under Article 32 and to the High Court as well under Article 226 directly for the enforcement of his violated fundamental right and the concerned court would issue the appropriate writ for the enforcement of the particular violated fundamental right. Fundamental Rights are protection against the arbitrary action of the state against the unconstitutional law made by the central government or the state government to declare that law unconstitutional, invalid, and illegal.

- **Judiciary Control over the Executive:**

Articles 32 and 226 throw light on the judiciary's control over the executive. Article 32 gives power to a person to move to the Supreme Court if their fundamental rights are violated, while Article 226 says that a person can move to the High Court if their fundamental right or legal right is violated. The Territorial Jurisdiction of the High Court is narrower than that of the Supreme Court while the writ jurisdiction of the High Court is wider than that of the Supreme Court. Article 142(1)¹⁶ mentions that the Supreme Court in the exercise of its jurisdiction may pass such a decree or make such order as is necessary for doing complete justice in any cause or matter pending before it and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and until provision in that behalf is so made in such manner as the President may by order prescribe.

CONCLUSION:

The judiciary's sustained interplay with the intersection of constitutional morality and popular morality represents one of the most significant developments in contemporary legal interpretation. As custodian of the Constitution, the judiciary has been increasingly focusing on constitutional morality—the responsibility to uphold the intrinsic values incorporated into the Constitution, for example, justice, equality, liberty, and fraternity—when these are in conflict with current social or popular morality. This focus arises from an appreciation that the Constitution, and not fleeting social norms, needs to ground the country's moral and legal underpinnings if true justice and the rights of individuals are to be protected. Recent Indian jurisprudence is marked by the Supreme Court's aggressive invocation of constitutional morality in epochal cases against entrenched social conventions. In the decisions such as *Navtej Singh Johar* (decriminalization of homosexual relations), *Joseph Shine* (decriminalization of adultery), the Court gave importance to the principles of constitutional morality over conventional social norms, reiterating that the principle of justice is a preemptory consideration over shifting popular acceptance. These choices

¹⁵ *Indira Nehru Gandhi v. Raj Narain*, 1975 Supp. S.C.C. 1, SCC OnLine SC 521, A.I.R. 1975 S.C. 2299 (India).

¹⁶ India Const. Art. 142

reflect a clear judicial philosophy: that enduring rights and respect cannot depend on fleeting majoritarian opinions.

This judicial commitment, however, does not rest in a vacuum or without dispute. The invocation of constitutional morality has sometimes given rise to charges of judicial overreaching and raised questions about the democratic legitimacy of courts superseding pervasive social opinion or intruding into the policy sphere that the legislature has reserved for itself. Critics would contend that, in its pursuit of changing society, the judiciary should exercise restraint and refrain from evolving into a "third chamber" of parliament. There is then an inbuilt tension between the need to safeguard the Constitution's fundamentals and the imperative of upholding democratic processes and pluralism in society.

Recognizing the tension, this has been enshrined by the Indian constitutional framework as robustly giving checks and balances to keep the constitutional ideals in harmony with popular sentiment reality. Constitutional morality is interpreted and enforced by the judiciary whereas lawmaking is preserved by the legislature, and the implementation of policies rests with the executive. Judicial rulings tend to pave the way for legislative intervention, motivating or forcing Parliament to revise archaic statutes and adopt new regimes embodying both constitutional principles and changing social mores. This process serves to highlight that the judiciary's transformative function is not fixed, but collaborative and dialogic—operating in constant negotiation with other organs of the state and the wider public.

In addition, the judiciary's focus on constitutional morality occurs within institutional constraints: courts act primarily when rights are at risk or the state shirks its duty to defend marginalized communities. When courts have actively interpreted rights in order to empower the powerless, they have done so "based in constitutional text and moral commitments," thus making democratic ideals more profound, not usurping them. Thus, the judiciary maintains the Constitution as well as invites the natural development of popular morality, encouraging social self-reflection and slowly modifying public opinion towards more inclusion and equity.

Yet, the challenge is complicated. Final reconciliation between constitutional and popular morality is a constant work in progress. The role of the judiciary is not to impose a foreign vision on society, but to serve as a conscience-keeper, reminding all stakeholders—legislators, executives, and citizens themselves—of the greater obligations enshrined in the constitutional order. In situations where human dignity or fundamental rights are involved, courts are justified in insisting that constitutional morality should hold, even at the expense of short-term social tension or dissensus. But in a democracy, even the most virtuous interventions have to be careful of their wider societal impact and threat of disconnect from the people they end up serving.

Summing it up, the changing role of the judiciary in favoring constitutional morality over popular morality is necessitated by its overarching responsibility of enforcing the Constitution as the highest law and as a protector of individual and minority rights. Meanwhile, a carefully crafted interdependence among the judiciary and other branches of government—through the mechanisms of checks and balances—guarantees that judicial power is both legitimate and balanced with the broader values and needs of society. This mature balance provides for both the preservation and the progressive realization of ideals of the constitution and presents a model of constitutional government aiming for both societal stability and the ongoing pursuit of justice.