

PEARLS AND PITFALLS OF THE DOCTRINE OF CONSTITUTIONAL MORALITY

Dr. Deepak Kumar Srivastava*

Abstract

A society is intangible, and we need new steps of intellectuals to grow society in every dimension, be it science, technology, or social sciences. As per society's demand, the Law cannot remain motionless, and it needs to be modified with time. Morality is a standard of what is right and what is wrong, and it can also be a communicative conduct specific to a person or society. The concept of morality is not uniform and differs from person to person, place to place, and civilization to civilization. The concept of morality is not defined at any place in the Constitution. Therefore, for "constitutional morality," we can say that it is an undefined behavioural conduct relating to constitutional facets.

In the modern sense, constitutional morality means to abide by the substantial moral entailment that the Constitution carries. Indian courts have formulated that inherent to the Indian Constitution lies a morality called "Constitutional Morality." Constitutional morality acts as an interpretive device to help courts to ascertain the meaning of the Constitution's text in contested cases. Constitutional morality is vital for constitutional laws to be effective. Without constitutional morality, the operation of a constitution tends to become arbitrary, inconsistent, and whimsical. Legal experts are divided in their opinion on constitutional morality. One set of these experts believes that constitutional morality is necessary to implement and interpret constitutional provisions effectively. In contrast, others believe it is a tool for the arbitrary use of power by the judiciary. In this context, the paper attempts to understand the doctrine of Constitutional Morality, its background, the approach of the Indian courts in the application of this doctrine, and the pearl and pitfall of it.

Keywords: *Constitutional Morality, Judicial approach, Pearls and Pitfalls.*

*"The constitutional functionaries are required to show constitutional behaviour, trust and morality so that we can have constitutional governance."*¹

-Justice Dipak Misra

I. Prologue

The Constitution is the supreme and fundamental law of any country. Jurisprudentially it has been considered a *grundnorm*.² Since it is written as a statute, the general principles of statutory interpretation will apply to the interpretation of the Constitution.³ There are theories regarding constitutional interpretation. The three most noteworthy theories are originalism, textualism, and living law theory. 'Originalism' states that the Constitution's most accurate perspective is its makers' original intent. 'Textualism' says that the only correct way to interpret the Constitution is to read it and interpret it in a literal sense. In its early years, the Supreme Court adopted a textualist and originalist approach,

* Associate Professor of Law, Hidayatullah National Law University, Raipur, Chhattisgarh.

¹ J Dipak Misra, *One can't be bereft of constitutional morality* (July 29, 2022, 10:20 AM), <https://www.deccanherald.com/national/individual-cannot-be-bereft-696376.html>.

² Grundnorm is a concept in the Pure Theory of Law created by Hans Kelsen, a jurist and legal philosopher. Kelsen used this word to denote the basic norm, order, or rule that forms an underlying basis for a legal system.

³ (Feb. 1, 2022, 11:00 AM), <https://thelawcommunicants.com/principles-of-constitutional-interpretation/>.

focusing on the plain meaning of the words used in the Constitution. Recently the Court has acknowledged as critical to its interpretive exercise the purpose for which the Constitution has been enacted. India's Constitution, at its very inception, was different. In enacting the Constitution, the founders of our Republic expressed a sense of unease with the status quo and raised expectations of root-and-branch social revolution and transformation. The Court is now started to interpret the Constitution following its revolutionary and transformative potential.⁴

According to the above approach, the Constitution is to be interpreted not in a literal sense but according to the value and morals enshrined in the document. The Constitution should be altered, or the way the Constitution is interpreted should change the meaning of the word.⁵ The Constitution is a unifying, unique, and fundamental document for the governance and functioning of a country. The constitutional law of India stands witness to how the Indian judiciary has tried to make the Indian Constitution living. For that, the Courts have employed new tests and doctrines over the years to interpret the constitutional provisions to their spirit. The "doctrine of severability," "doctrine of eclipse," "colourable legislation", and so forth are some examples of the concepts introduced by the judiciary. None of these concepts was referred to in the Constitution; the Court develops these by interpreting the powers granted in the Constitution.

Similarly, constitutional morality is an undefined code of conduct and is also a result of judicial interpretations and is not referred to anywhere in the Constitution. The concept was dormant for an extended period after the Constitution came into force, there were slight mentions of the concept, but no meaning or significance was attached to it then. But in recent years, the judiciary invoked constitutional morality very frequently, which has created a dilemma for scholars about its pearls and pitfalls.

II. Meaning

Constitutional morality refers to a set of moral principles and values that are considered essential for the proper functioning of a constitutional democratic system. It encompasses the idea that the Constitution of a country should not only be a legal document but also a moral one that upholds certain moral values and ideals.

Constitutional morality includes principles such as the rule of law, equality, justice, freedom, and human dignity. It also involves the protection of

⁴ Chintan Chandrachud, *The four phases of constitutional interpretation* (Feb. 1, 2022, 11:00 AM), <https://www.thehindu.com/opinion/lead/the-four-phases-of-constitutional-interpretation/article30653706.ece>, The judiciary is beginning to interpret the Constitution in line with its revolutionary and transformative potential.

⁵ (Jan. 1, 2023, 11:00 AM), <https://study.com/learn/lesson/constitutional-interpretation-approaches-originalism-textualism-living.html>.

individual rights and freedoms and the obligation of the state to uphold these rights.

The concept of constitutional morality is considered important in ensuring that the Constitution is not just a set of legal rules but also reflects the moral and ethical values of a society. It helps to create a moral and legal framework that can guide the actions of the state and its citizens, and ensures that the Constitution remains relevant and in tune with the changing values and needs of society over time.

III. Background

The term constitutional morality is an undefined code of conduct. The concept of constitutional morality was advocated by the British Classicist named *George Grote* in the 19th century in his book “A History of Greece.” The concept was given by *Grote* during the review of the state of the Athenian Democracy in the age of *Kleisthenes*, points out that it became necessary at that time to create in the multitude, and through them to force upon the leading men, the rare and difficult sentiment which he termed constitutional morality. He described Constitutional Morality as a “paramount reverence for the forms of the Constitution” of the land. It essentially implied a “co-existence of freedom and self-imposed restraint”. It means that while citizens would respect the Constitution and obey Constitutional authorities, they would also have the freedom to criticize those Constitutional authorities, and Constitutional authorities would have to act within the limits imposed by the law.⁶ In June 1912, a leading member of the New York Bar, *William Dameron Guthrie*, delivered an address at the Pennsylvania Bar Association where he also relied on *Grote*’s “constitutional morality.”⁷

In the Indian context, the word Constitutional Morality was first used by Dr. B.R. Ambedkar while introducing the Draft Constitution to the Constituent Assembly, Dr. Ambedkar quoted *Grote* who had said: “The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is an 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 the ascendancy for themselves.”

Thereafter, Dr. Ambedkar added further and stated:

“While everybody recognized the necessity of diffusion of constitutional morality for the peaceful working of the democratic constitution, there are two

⁶ Pratap Bhanu Mehta, *What is Constitutional Morality* (Feb. 01, 2023, 12:00 PM), https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.html.

⁷ William D Guthrie, *Constitutional Morality*, 196 THE NORTH AMERICAN REVIEW 154, 154–73 *JSTOR* (Feb. 01, 2023, 12:05 PM), <http://www.jstor.org/stable/25119811>.

things interconnected with it which are not, unfortunately, generally recognized. One is that the form of administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing its form of administration and making it inconsistent and opposed to the spirit of the Constitution.The question is, can we presume such a diffusion of constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on Indian soil which is essentially undemocratic.”⁸

Dr. Ambedkar also explained the meaning of constitutional morality in his and quoted Grote again “By constitutional morality, Grote meant... a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the constitution will not be less sacred in the eyes of his opponents than his own.”⁹

Today, the meaning and connotation of the phrase have acquired newer interpretations. But essentially, constitutional morality is a sentiment among the common masses necessary for establishing a peaceful and stable government. It is supposed to be a perfect balance between freedom and restrictions on those freedoms.¹⁰

After a couple of mentions in the Constitutional Assembly Debates, not much significance was given to this doctrine. Although few references to constitutional morality surfaced in certain judgments, most of them lacked substance and didn't realize the meaning of constitutional morality entirely.

Only in a few cases¹¹ the court invoked constitutional morality but did not discuss it at length. In fundamental rights case,¹² the court recognises the

⁸ Naz Foundation v. Government of NCT of Delhi, (2009) 160 DLT 277, para 79 (Cf. reversed by Supreme Court in Suresh Kumar Koushal v. Naz Foundation, (2014) 1 SCC 1, Also see, Shri. Goopal Subramaniam, “*Constitutional Morality-Is it Dilemma for the State, Courts and Citizens*”, 1st D D V Subba Rao Memorial Lecture (2016), (Dec. 01, 2023, 12:00 PM), <http://www.aprasannakumar.org/pdf%20files/Constitutional-Morality.pdf>.

⁹ Mehta, *supra* note 6.

¹⁰ N. Mishra, 2021. *Making of Constitutional Morality by Indian Judiciary – Academike* (Nov. 15, 2023, 12:00 PM), https://www.lawctopus.com/academike/constitutional-morality-india/#_ftn33.

¹¹ Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 at page 616, S P Gupta v. Union of India, A.I.R. 1982 S.C. 149 (India).

¹² *Ibid.*

importance of societal rights, sometimes over those of the individual. Considering themselves as trustees of the Constitution, the Judges of the Supreme Court could not allow State sponsored abrogation of the Constitution and devised a method to limit the Constituent power of Parliament. It was reasoned by the Supreme Court that if the Basic Structure of the Constitution was distorted to fulfil any presently prevailing need, it would leave the Constitution unrecognizable, and all the commitments made by the Drafting Committee in 1950, and constitutional morality itself, would be left as a vague memory.

IV. Pragmatic Judicial Approach to Morality

The concept of "constitutional morality" refers to the adherence to the principles of the Constitution, including the values of democracy, equality, and justice, as well as respect for individual rights and freedoms. In recent years, there has been a growing recognition of the importance of constitutional morality as a guiding principle for judicial decision-making.

“There is an asymmetry in society and the State should ignore it, every effort to achieve homogenisation or standardisation across all sections must be curbed as it violates the principle of Constitutional morality.”¹³

In recent times the doctrine of ‘constitutional morality’ has become weighty and germane for the judges while giving meaning to the words used in the Indian Constitution. The Supreme Court has adopted a pragmatic approach towards the application of the doctrine of constitutional morality.¹⁴

A pragmatic judicial approach to constitutional morality requires judges to balance the text and values of the Constitution with the practical realities of social and political life. This means that judges must be willing to adapt the principles of the Constitution to changing circumstances while remaining true to its core values.

In practice, this approach may involve interpreting the Constitution in a way that recognizes the evolving social and political context in which it operates, or giving priority to certain constitutional values to address pressing social problems. In many cases, the court has applied this doctrine by saying that constitutional morality is considered to be the silence of the constitutional text and a tool to fill the gaps of the constitutions to meet the demands of future generations.¹⁵ The court has also observed that it will also help society to move forward by upholding the individual dignity of the citizens by subjecting them to a process of self-renewal by not limiting the ambit of the constitutional

¹³ *Id.* at 8.

¹⁴ Kaushal Kishor v. State of Uttar Pradesh, Writ Petition (Criminal) No. 113 of 2016.

¹⁵ K S Puttuswamy v. Union of India and Ors. (2017) 10 SCC 1.

guarantee of justice to the forms and procedures of the constitution and by providing an enabling framework for the societies to progress.¹⁶

The concept of constitutional morality was addressed by the Supreme Court in *Manoj Narula v. Union of India*.¹⁷ Simply put, the principle of constitutional morality involves examining the norms or provisions of the constitution and acting in conformity with them, and not violating the rule of law or acting arbitrarily. According to the court, the traditions and conventions have to grow to sustain the value of such morality and people at large and persons in charge of institutions must strictly be guided by it. The working of constitution of India is made for a progressive society and its implementation and working will depend upon the prevailing atmosphere and conditions.

In *Joseph Shine v. Union of India*¹⁸ court has observed that in a democratic country, there should be an assurance of basic rights that are essential for the free, impartial and proper living of the citizens of the country as the requirement for the fulfilment of constitutional morality. In the other words for ensuring constitutional morality, there should be an assurance of equality to all citizens, for example, equality before the law, non-discrimination on account of sex, and dignity, all of which were prohibited due to Section 497.¹⁹ The court observed that constitutional morality is not similar to the popular opinion, for passing the judgement in criminal cases the basic principle needs to be tested in the view of the constitution that determines the act criminal in nature and holds the guilty of the criminal. The principle that is opted for should be considered the trinkets of morality not by the majority of the people's thinking. The court further observed that, in correlation with constitutional morality, it is the aim to remove the discrimination at various stages against the lower part of the society that prohibits their participation in the society and wants to establish equity at large.

Subsequently, in another scintillating judgment in the *Navtej Singh Johar* case, which pertained to Section 377²⁰ of IPC, 1860, the Supreme Court said that:

¹⁶ Navtej Singh Johar v. Union of India, A.I.R. 2018 S.C. 4321 (India).

¹⁷ Manoj Narula v. Union of India (2014) 9 SCC 1 (India).

¹⁸ Joseph Shine v. Union of India A.I.R. 2018 S.C. 1676(India).

¹⁹ Indian Penal Code, Section 497: Adultery: Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.

²⁰ Indian Penal Code, Section 377: Unnatural Sex: Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1 [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

“Constitutional morality cannot be martyred at the altar of social morality”. While in the Sabarimala judgement, where the age-old custom of debarring menstruating women of a certain age group from the temple was in question, the court observed, “...existing structures of social discrimination must be evaluated through the prism of constitutional morality. The effect and endeavour are to produce a society marked by compassion for every individual.”

In the case of *NCT of Delhi v. Union of India*²¹ where the concept of constitutional morality is expressly invoked by the court as a guiding light in constitutional interpretation²², this was in the context of deliberative democracy. The Chief Justice noted that the concept of constitutional morality is that fulcrum which acts as an essential check above high functionaries and citizens aligned as experience has shown that unbridled power without any checks and balances would result in a despotic situation which is antithetical to the very idea of democracy. We must not forget the concept of triangular values that are enshrined under the preamble of the constitution of India. That attracts our attention to the concept of constitutional trust; it is the trust that reposes under the functionaries of the constitution. The trust is that they will be guided by constitutional morality, objective pragmatism and balance that is required to sustain a proper administration.

On the same notion, the most important case which brought attention to the concept of constitutional morality was Sabarimala case²³, in the case at hand the issue of non-admission of women of the age of 10-50 years into the temple was adjudged and three judges referred to the constitutional morality concept but came to different conclusions about the said concepts. The majority opinion, delivered by the then Chief Justice of India, and his observation was:

“The term ‘morality’ occurring in Article 25 (1) of the Constitution cannot be narrowed down and be viewed in terms of what it means to be an individual, a section or a religious sect. In cases where there is a violation of fundamental rights the term ‘morality’ naturally implies constitutional morality and the Constitutional Courts decision must conform with basic principles of

Explanation. —Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

²¹ *NCT of Delhi v. Union of India* (2018) 8 SCC 501 (India).

²² *“Constitutional morality in its strictest sense implies a strict and complete adherence to the constitutional principles as enshrined in the various segments of the document. It is required that all 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.”*

²³ *Indian Young Lawyers Association & Ors v. The State of Kerala & Ors*, (2019) 11 SCC 1(India).

constitutional morality that emanate from the constitution itself.”²⁴, he added, “Having said so, the notions of public order, morality and health cannot be used as a colourable device to restrict the freedom to freely practise religion and discriminate against women of the age group of 10 to 50 years by denying them their legal right to enter and offer their prayers at the Sabarimala temple for the simple reason that public morality must yield to constitutional morality.”²⁵

Concurring with the majority view, Justice Chandrachud observed:

*"The Constitution is meant as much for the agnostic as it is for the worshipper. It values and protects the conscience of the atheist. The founding faith upon which the constitution is based in the belief that it is in the dignity of each individual that the pursuit of happiness is founded. Individual dignity can be achieved only in a regime which recognizes liberty as inhering in each individual as a natural right. Human dignity postulates equality between persons. Equality necessarily is equality between sexes and genders. Equality postulates a right to be free from discrimination and to have the protection of the law in the same manner as is available to every citizen. Equality above all is a protective shield against the arbitrariness of any form of authority. These founding principles must govern our constitutional notions of morality. Constitutional morality must have a value of permanence which is not subject to the fleeting fancies of every time and age. If the vision which the founders of the constitution adopted has to survive, constitutional morality must have content which is firmly rooted in the fundamental postulates of human liberty, equality, fraternity and dignity. These are the means to secure justice in all its dimensions for the individual citizen. Once these postulates are accepted, the necessary consequence is that the freedom of religion and, likewise, the freedom to manage the affairs of a religious denomination is subject to and must yield to these fundamental notions of constitutional morality. In the public law conversations between religion and morality, it is the overarching sense of constitutional morality which has to prevail. While the constitution recognizes religious beliefs and faiths, its purpose is to ensure a wider acceptance of human dignity and liberty as the ultimate founding faith of the fundamental text of our governance. Where a conflict arises, the quest for human dignity, liberty and equality must prevail. These, above everything else, are matters on which the constitution has willed that its values must reign supreme."*²⁶

He went on to add that;

"A claim for the exclusion of women from religious worship, even if it be founded in religious text, is subordinate to the constitutional values of liberty,

²⁴ Ibid.

²⁵ Ibid.

²⁶ *Id.* at 23.

dignity and equality. Exclusionary practices are contrary to constitutional morality."²⁷

However, in the same case²⁸ Justice Indu Malhotra, in her dissenting judgment, used the ideal of constitutional morality to reject the arguments of the petitioners. She even observed that permitting the entry of women into Sabarimala will violate the concept of constitutional morality. In her words: "The concept of Constitutional Morality refers to the moral values underpinning the text of the constitution, which are instructive in ascertaining the true meaning of the constitution, and achieve the objects contemplated therein. Constitutional morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practise their faith following the tenets of their religion. It is irrelevant whether the practise is rational or logical. Notions of rationality cannot be invoked in matters of religion by courts. The followers of this denomination, or sect, as the case may be, submit that the worshippers of this deity in Sabarimala Temple even individuals have the right to practise and profess their religion under Article 25(1) under the tenets of their faith, which is protected as a Fundamental Right. Equality and non-discrimination are certainly one facet of Constitutional Morality. However, the concept of equality and non-discrimination in matters of religion cannot be viewed in isolation. Under our Constitutional scheme, a balance is required to be struck between the principles of equality and non-discrimination on the one hand, and the protection of the cherished liberties of faith, belief, and worship guaranteed by Articles 25 and 26 to persons belonging to all religions in a secular polity, on the other hand. Constitutional morality requires the harmonization or balancing of all such rights, to ensure that the religious beliefs of none are obliterated or undermined."²⁹

Therefore, according to *Justice Indu Malhotra*, constitutional morality, which referred to the moral values of the constitution, guaranteed the freedom to hold and practice personal religious beliefs. The logic of such practices cannot even be a subject matter of question before the court. In her observation, when there is a conflict between the principles of equality and non-discrimination with the liberty of faith, belief, and worship, the solution should be designed so that the religious beliefs of no person are obliterated or undermined.

In *Kantaru Rajeevaru v. Indian Young Lawyers Association*³⁰, the Supreme Court referred to a larger bench to define constitutional morality. The Court observed that the expression is not defined anywhere in the Constitution. And

²⁷ *Id.* at 23.

²⁸ *Id.* at 23.

²⁹ *Id.* at 23.

³⁰ *Kantaru Rajeevaru v. Indian Young Lawyers Association* (2020) 3 SCC 52 (India).

contours of this expression need to be delineated to prevent it from becoming subjective.

Analyzing the above series of judgments, one thing becomes amply clear, “the silences of the Constitution are also to be ascertained to understand the Constitution”. Constitutional morality is this silence of the constitutional text. Therefore, from the above discussion, we can say that the concept of “constitutional morality” over time has been interpreted differently by different judges. Moreover, it can be observed that judges have been using the concept freely and without any limitation to the scope of the said concept.

At the same time, a pragmatic judicial approach to constitutional morality must also be grounded in the principles of the rule of law and judicial restraint. This means that judges must be careful not to overstep their constitutional role and must respect the boundaries of their authority. Overall, a pragmatic judicial approach to constitutional morality requires judges to be responsive to the needs of society while remaining committed to the fundamental principles of the Constitution.

V. Pearls and Pitfalls of the Doctrine

There are many pearls and pitfalls of the doctrine of constitutional morality. Pearls of the doctrine of constitutional morality can include the following:

- Provides a deeper understanding of constitutional values: The doctrine of constitutional morality recognizes that a constitution is not simply a set of legal rules, but is rooted in a broader set of moral values. This recognition can lead to a deeper understanding of the constitution's underlying principles and values, which can help to guide the interpretation and application of the law.
- Promotes a values-based approach to decision-making: By recognizing the importance of moral values in the constitution, the doctrine of constitutional morality promotes a values-based approach to decision-making, which can help to ensure that the law is applied in a way that reflects these values.
- Encouraging moral reflection: By requiring that the Constitution reflect the moral values of society, the doctrine of constitutional morality encourages citizens to engage in moral reflection and debate about the principles that should guide their society.
- Strengthening the legitimacy of the Constitution: When the Constitution reflects the moral values of society, it is seen as more legitimate and thus more likely to be followed and respected by citizens.
- Promoting constitutionalism: The doctrine of constitutional morality promotes constitutionalism, the idea that the Constitution should be the supreme law of the land and that all laws and actions of the government should be in accordance with it.

- Allows for flexibility in interpretation: The doctrine of constitutional morality allows for a certain degree of flexibility in the interpretation of constitutional provisions, as it acknowledges that the meaning and significance of these provisions may change over time in response to changing social, economic, and political circumstances.

There are many pitfalls of the doctrine of constitutional morality are as follows:

- Potential for subjectivity: The doctrine of constitutional morality can be subjective, as it relies on the interpretation and application of moral values, which can vary depending on one's personal beliefs and cultural background. This subjectivity can lead to inconsistency in the application of the law.
- Limiting diversity: If the doctrine of constitutional morality is used to promote a particular set of moral values, it may limit the diversity of views and perspectives within society.
- Can undermine the rule of law: By allowing for a certain degree of flexibility in interpretation, the doctrine of constitutional morality can also undermine the rule of law, as it may allow judges and other legal actors to depart from established legal principles in favour of subjective moral judgments.
- Conflicts with individual rights: The promotion of certain moral values through the doctrine of constitutional morality may come into conflict with individual rights and freedoms, such as the right to free speech or religion.
- Difficulty in adapting to change: As society changes, the moral values and principles that should be reflected in the Constitution may change as well. The doctrine of constitutional morality may struggle to adapt to these changes, leading to a disconnect between the Constitution and the values of society.

VI. Analysis

As discussed above the scholars are not in accord and have two different opinions as beneficial and having drawbacks of the doctrine of constitutional morality. One set of scholars believes in the ongoing trend of constitutional morality and suggests it to be a advantageous concept while keeping pace with the emerging needs of society upholds the rule of law. To apply the doctrine of constitutional morality it is required to be complemented and supplemented by judicial values and ethics. A standardized bench mark has to be developed so that there is no scope for legal contradictions. There is a need for a balance in an application, Constitutional morality may be invoked based on the provisions of the Constitution to question the conduct of the State and to identify the metes and bounds within which the State must operate. However, it cannot be used to

emasculate the discretion and prerogative constitutionally vested in the State to define public morality under it as an elected body. There shall be Commitment to the ideals and aspirations of the Constitution: The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the Constitutional parameters without paving the path of deviancy and maintaining institutional integrity and the requisite Constitutional restraints through their actions. In this direction, awareness must be created among the common public regarding their rights as well as their responsibilities or duties towards the country.

Along with these, it is asserted by the proponents of this belief that constitutional morality is nowhere defined in the constitution and the use of the said principle by various judges failed to deliver a constant definition of the same. Hence, the uncertain status of the said principal paves way for arbitrariness and judicial overreach.

Former Attorney General KK Venugopal also criticized by saying “Constitutional morality is very harmful to the country. And if we use this concept, we do not know our destination where it will be. I hope constitutional morality dies. Otherwise, our first PM Pandit Nehru’s fear that Supreme Court will become the third chamber might come true.”³¹

Moreover, the said concept is said to breed trust among the people in the democratic institutions of the country. Human liberty, equality and dignity are believed to be the founding stone of the said concept by the proponents of this doctrine.

There is no denying the fact that the doctrine of constitutional morality is transformative and had helped judges reach milestones with decisions. But the doctrine is surrounded by speculations and concerns. It can be deduced from the history of the said doctrine that neither Dr B. R. Ambedkar nor Grote deliberated on the use of this doctrine to keep a check on legislative actions by the courts. The uncertainty in the definition and scope of constitutional morality paves way for arbitrariness and makes it a tool to exercise judicial overreach. The sheer disregard for public morality under the said doctrine also raises doubts about the intention behind this doctrine. Therefore, the researcher believes that if there is a standard definition of the concerned doctrine and a roadmap to its scope the doctrine has the potential to develop into a more holistic principle to realize the rationale behind the Constitution of India.

³¹ K K Venugopal, “*Constitutional Morality Must Die or SC Could Become Parliaments Third Chamber, as Nehru Feared*”, TIMES NOW (Dec. 9, 2018, 2:00 PM), <https://www.timesnownews.com/india/article/kkvenugopal-attorney-general-sabarimala-news-address-constitutional-morality-supreme-court-jawaharlal-nehruharatiya-janata-party-chief-justice-of/328266>.

VII. Conclusion

The requirement of certain principles and limitations for the application of Constitutional Morality cannot be denied. However, the viewpoint here is not to completely dissolve the aspect of constitutional morality but rather harmoniously construct it to better the functioning of the judiciary and the judicial powers embarked upon them. The courts can thus employ Constitutional Morality as an effective tool for interpretations of the rights conferred on the individual by the Constitution.

The doctrine of constitutional morality is a useful tool for interpreting and applying constitutional provisions, but it must be used with care to avoid potential pitfalls and challenges. Recognizing the importance of both legal and moral principles can help to ensure that the law serves its intended purposes and reflects the values of the society it serves.

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