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“CONSTITUTIONAL MORALITY & INDIAN CONSTITUTION- AN OVERVIEW”

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ABSTRACT

Constitutional morality is the new course for assessing any law or administrative actions of the state portraying certain degree of Dworkinian rights thesis. The words 'constitutionalism', 'dynamic interpretation' and 'transformative constitution' are associated with the same. Dr. Babasaheb Ambedkar who in his speech in the Constituent Assembly referred the term and used it to address the criticism and for defending the creation of voluminous Constitution which provides for day-to-day governance. He highlighted the importance of Constitutional morality as reverence to the values of the Constitution for good governance and inculcation of democratic sentiment amongst people. Constitutional morality is an essential element in public policy. Women and the members of LGBTQ+ have benefitted the most from the doctrine. The differentiation between public morality and constitutional morality has secured the interests of the minority as well as shifted the focus of law from community to an individual. The balancing of interests of individual and society is addressed too. The doctrine satisfies two out of three feminist legal methods as propounded by Katherine Bartlett. Constitutional morality will also aid in incorporating the difference theory and ethic of care in legal reasoning. The present paper highlights the various aspects, scope, and development of the doctrine.

Keywords: Constitution, Criticism, Governance.

Constitutional Morality and Basic Structure constitutionalism

The Basic Structure Doctrine has been successfully resorted to check the power of the Parliament to amend the Constitution since last 48 years. The application has been limited only to the amendment of the Constitution and many a times considered being a result of rules of interpretation. In this backdrop, it is necessary to point out the pivotal difference between the former with the Doctrine of Constitutional Morality. Basic Structure doctrine holds strong even when the individual or his rights are not in focus. The structure of the constitution is the focus here. Of course, that does not mean while applying the same, rights of individual will not be given even an iota of consideration. However, Constitutional morality focuses on the individual and attempts to address the rights of people.

In Indian scenario, the term was first used by Dr. Babasaheb Ambedkar in his speech in the Constituent Assembly on 4th November 1948. Addressing the criticism for incorporating the administrative provisions in the Constitution, he stated that:

"The forms of the 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 prevent the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution. It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them. 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 an Indian soil, which is essentially undemocratic."¹

The written provisions of the Constitution were thus considered as an alternative to the doctrine of constitutional morality in the above-mentioned speech. However, Constitution needs to be interpreted by applying the principle of transformative constitutionalism to address the problems faced in the present scenario. The issues, nature and scope of the rights need to be defined in the modern scenario, wherein, the interests of a pluralist society are at stake. Hence, the doctrine of Constitutional morality aids in filling the gap between the past and the present and considers the individual as the centre of the doctrine.

CONSTITUTIONAL MORALITY AND DWORKINIAN RIGHTS THESIS

Dworkin's idea of rights has been cited by the Supreme Court multiple times including, the right to privacy judgement² (9 Judge Bench) and Aadhar judgement (5 Judge Bench)³. Though Dworkin has discussed and criticised the utilitarian approach in detail, various critics have pointed out that he himself works in the shadow of utilitarianism.⁴ He has severely criticized positivism. He states that the Constitution has converted certain moral rights into legal rights.⁵ However, presently we are more interested in his seminal work, 'Taking Rights Seriously'. Constitutional morality is a principle which provides a standard that the government and judiciary needs to observe, not only because it will advance or secure an economic, political or social interest, but also as a requirement of justice, fairness or some other dimension of morality.⁶ Further, Dworkin makes a distinction between denial of right and limiting the right. He states that when government faces issues of public order then in such circumstances, it is not the denial of rights approach that needs be resorted. He states that *the institution of rights is therefore crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected.*⁷ Dworkin's words aptly apply to the notion of constitutional morality as it makes distinction between constitutional morality and public morality.

"A society committed to utilitarianism as a general background justification which does not in terms disqualify any preferences might achieve that disqualification by adopting a right to

¹ VII, Constituent Assembly Debate.

²K. S. Puttaswamy v. Union of India (2017) 10 SCC 1.

³K. S. Puttaswamy (Aadhar-5J) v. Union of India (2019) 1 SCC 1

⁴ Raymond Wacks, *Understanding Jurisprudence*, 137 (Oxford University Press, Oxford, 3rd edn., 2012).

⁵ Ronald Dworkin, *Taking Rights seriously*, 238 (Bloomsbury, E-book).

⁶*Id.* at 43.

⁷*Id.* at 255.

political independence: the right that no one suffer disadvantage in the distribution of goods or opportunities on the ground that others think he should have less because of who he is or is not, or that others care less for him than they do for other people.”⁸

Dworkin has given immense importance to the ideal of equality. Further, he states that rights have a threshold weight against community goals, thus making the ‘rights as trumps’.⁹ Further, the role of the state in securing the goal of equality is discussed at length and he anticipates state actions in securing the same.¹⁰ Though, individual is the focus of his theory, he dwells more into the interaction between the individual and government. The interests of the individual are secured through formulation of the concept of rights. Thus, Dworkin’s views on democracy can be deduced from the doctrine. Dworkin rejects the majoritarianism by stating that there is nothing inherently valuable about a process that allows a large number of people to impose its will on a smaller number.¹¹

Constitutional morality doctrine is relatively new though the traces of the same have existed for a long time. However, the starting point of the doctrine the way we understand today was discussed in *Manoj Narula v. Union of India*¹². Kurian J. stating that Court is conscience of the constitution opened the gates for analysing the legislative and executive actions from the perspective of constitutional morality.¹³ This groundwork for this doctrine can surely be attributed to Professor Dworkin. The doctrine of constitutional morality was utilised for the purpose of providing guideline to the executive in the said case. The Court held that:

“The principle of 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 or reflectible of action in an arbitrary manner. ... The traditions and conventions have to grow to sustain the value of such a morality. 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 reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality.”¹⁴

CONSTITUTIONAL MORALITY- JUDICIAL PRONOUNCEMENTS

Constitutional morality is an essential element in public policy. Women and the members of LGBTQ+ have benefitted the most from the doctrine. The differentiation between public morality and constitutional morality has secured the interests of the minority as well as shifted the focus of law from community to an individual. The balancing of interests of individual and society is

⁸ M.D.A. Freeman, *Lloyd’s Introduction to Jurisprudence*, (Sweet and Maxwell, London, 9th edn., 2014).

⁹ Raymond Wacks, *Understanding Jurisprudence*, 122 (Oxford University Press, Oxford, 3rd edn., 2012).

¹⁰ See Abhishek Sudhir, “Discovering Dworkin in the Supreme Court of India - A Comparative Excursus” 7 *NUJS Law Review* 13, (2014) (He argues that Dworkin would have defended the affirmative action through the policy of reservation as envisaged in Indian Constitution.

¹¹ *Id.*

¹² (2014) 9 SCC 1

¹³ *Ibid.*

¹⁴ *Supra* note 12.

addressed too. Three judicial pronouncements which are of immense importance and deals with gender, equality and recognition of rights is discussed here.

Government of NCT of Delhi v. Union of India, the Constitution Bench of this Court dealt with the constitutive elements of constitutional morality which govern the working of a democratic system and representative form of government. Constitutional morality was described as founded on a “constitutional culture”, which requires the “existence of sentiments and dedication for realizing a social transformation which the Indian Constitution seeks to attain.”¹⁵

In *Joseph Shine v. Union of India*, the Supreme Court while declaring S. 497 as ultra vires the Constitution, it was stated that “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. The case at hand enjoins this constitutional court to make an enquiry into the insidious permeation of patriarchal values into the legal order and its role in perpetuating gender injustices.”¹⁶ It was further highlighted that the state must be committed to constitutional morality and not common morality.

The case also made note that the provision has patriarchal overtones and that a woman is merely treated as a chattel of her husband. *Shayara Bano v. Union of India*¹⁷ dealt with constitutionality of Triple Talaq (Talaq-e-Biddat)¹⁸ practiced in Sunni Muslims belonging to the Hanafi school. The present case dealt with two conflicting rights, i.e., right to equality and dignity of women opposed to right of religious freedom. The practice of personal laws is protected by the fundamental rights. Talaq-e-Biddat being a religious practice was considered to be safeguarded by the same. However, the Court by the majority of 3:2 held that the same is not an essential practice and is manifestly arbitrary as the marital tie can be broken by the husband unilaterally.

Hence, the same is considered as violative of Article 14 and void under Article 13 (1) of the Constitution. However, Khehar CJ (in dissenting opinion) stated that Constitutional morality cannot be availed as “Talaq-e-Biddat” being a constituent of “Personal Law” has a stature equal to other fundamental rights, conferred in Part III of the Constitution.”¹⁹ Constitutional morality was not discussed at length by any other judges in the said judgement.

*Navtej Singh Johar v. Union of India*²⁰ is another case, wherein the doctrine of constitutional morality was used to recognise the rights of the people of LGBTQ+ community and declaring that consensual sexual activity between any two adults cannot be criminalised and to that extent

¹⁵ *Government of NCT of Delhi v. Union of India* (2018) 8 SCC 501.

¹⁶ *Joseph Shine v. Union of India*, AIR 2018 SC 4898

¹⁷ (2017) 9 SCC 1

¹⁸ Three Pronouncement of “talaq” at one and the same time for divorcing the wife.

¹⁹ *Supra* note at 15.

²⁰ (2018) 10 SCC 1.

Section 377 of the Indian Penal Code, 1860 was declared void. Unlike Shayara Bano case or Sabrimala case, the present case had no-contesting fundamental right against the rights of the LGBTQ+ community.²¹ The court relied upon constitutional morality by stating that

*"It is the concept of constitutional morality which strives and urges the organs of the State to maintain such a heterogeneous fibre in the society, not just in the limited sense, but also in multifarious ways. It is the responsibility of all the three organs of the State to curb any propensity or proclivity of popular sentiment or majoritarianism. Any attempt to push and shove a homogeneous, uniform, consistent and a standardised philosophy throughout the society would violate the principle of constitutional morality. Devotion and fidelity to constitutional morality must not be equated with the popular sentiment prevalent at a particular point of time."*²²

Sabrimala²³ case again dealt with the religious rights of women on one hand and religious rights of other people who propounded the denial of entry to women between the age group of 10 to 50 years (considered that generally women undergo the menstruation period in this age group). Again, conflict between two fundamental rights was dealt at length here. Unlike, Shayara Bano case, the Court applied the doctrine of Constitutional morality for arriving at the conclusion. Constitutional morality was applied in majority decision as well as dissenting decision. It was held that:

*"The content of morality is founded on the four precepts which emerge from the Preamble. The first among them is the need to ensure justice in its social, economic and political dimensions. The second is the postulate of individual liberty in matters of thought, expression, belief, faith and worship. The third is equality of status and opportunity amongst all citizens. The fourth is the sense of fraternity amongst all citizens which assures the dignity of human life. Added to these four precepts is the fundamental postulate of secularism which treats all religions on an even platform and allows to each individual the fullest liberty to believe or not to believe."*²⁴

Thus, the Court applied the principles and held that every place of public worship shall be open to all classes and sections of Hindus, women being one of them, irrespective of any custom or usage to the contrary. The court also held that the devotees of Ayyappa do not form a separate 'religious denomination'. Hence, it would be interesting to see how the rights of women or role of gender in law is considered in opposition to the rights of a religious denomination. Thus, Sabrimala case is merely a step into considering the religious rights of women and other genders.

FEMINIST CRITIQUE OF CONSTITUTIONAL MORALITY

Constitutional morality is often criticised for introduction of subjectivism in judicial process. Contrarily, feminist thinkers have objected to the idea of objectivism. The idea of Objectivism can be traced to ancient Rome, wherein in the name of justice, patriarchy was perpetuated in

²¹ See NALSA v. Union of India (2014) 5 SCC 438 provided the groundwork for recognition of rights of LGBTQ+ community. Further, the Indian scenario differs from the Western (especially the USA and UK) in terms of religious acceptance of their rights. However, the taboo, secondary treatment and the vice of social and economic backwardness is still viewed amongst them.

²²Supra note at 18.

²³Indian Young Lawyers Association and Others v. State of Kerala and Others (2019) 11 SCC 1.

²⁴Supra note at 21.

society, politics as well as laws.²⁵ *The traditional account of objectivity presupposes that we can set our interests aside and that doing so enables rationality to flourish, bringing us closer to objective truth.*²⁶ Objectivity has also been considered by feminists as perpetuating stereotypes. Further, the same has been criticised by difference theory or care ethics theory too. Robin West had argued that the hedonic lives of men and women are different. Detachment (one of the aspect of objectivism) has been glorified by the idea of justice.²⁷ Doctrine of Constitutional morality is a step to address these feminist issues. The parameters of assessing the nature of rights and its focus on individual also needs to change in the present legal scenario. Katherine Bartlett proposes a midway between lauding the concept of objectivity and rejecting it in toto. She states that *Positionality combines self-skepticism with a commitment to truth-seeking, encompassing a responsibility both for understanding our own partiality and distorted ways of thinking and for striving to overcome these multiple distortions. Acknowledging the limitations of truth, positionality insists that we nonetheless are obligated to strive toward it.*²⁸ Thus, doctrine of constitutional morality instead of achieving objectivism should aim for positionality.

Inclusion of feminist legal methods and asking the woman question while determining any law will aid in developing the doctrine of Constitutional morality in a holistic way for dealing with the issue of gender in laws. Asking the woman question entails inclusion of women experiences in the judicial process.²⁹ For example- Why are the Muslim/Jewish women in India left out from the religious right to end a marital tie? What are the reasons that might push a woman to get a divorce and whether law has given due consideration to the same? How might the omission of such right be corrected?³⁰ Katherine Bartlett introduces second feminist legal method i.e., feminist practical reasoning. She states that there are various communities to which one might look for reason.³¹ This aspect is of pivotal importance. As of now, constitutional morality, though focusing on the individual still aimed for objectivism, by limiting it to the notions of justice, liberty, equality and fraternity. It is necessary to introduce other aspects like attachment and detachment, harm and duty for assessing the actions of the state.³² The last method that Bartlett discusses is consciousness raising wherein knowledge is created by exploring common experiences and patterns.³³ This method was used in *NALSA v. Union of India*³⁴ case, wherein experiences of the Transgenders was cited in the judgement. While dealing cases wherein constitutional morality is applied, such method needs to be adopted as the individual is not only the recipient of the benefit of the doctrine but also a contributor in the system along with the state.

Doctrine of Constitutional Morality dwells into the concept of the rights of the individual. However, in case of conflict between two fundamental rights, the notion of privilege needs to be

²⁵See Carol Gilligan, David A.J. Richards, *The Deepening Darkness*, (Cambridge University Press, Cambridge, 1st edn., 2009)

²⁶Katherine Bartlett, "Objectivity: A Feminist Revisit", Vol: 66:2, *Alabama Law Review*, 388.

²⁷Ishwari Pendse, "Ethics of Care and Criminal Justice System", Tathya, available at: <https://www.tathyalaw.org/post/ethics-of-care-and-criminal-justice-system> (last visited on 20th June 2021).

²⁸*Supra* note at 25, 389.

²⁹Katherine Bartlett, "Feminist Legal Methods" Vol: 103, *Harvard Law Review*, 837.

³⁰ Though the judgements discussed in the paper cater to it up to some extent, the same has not been addressed through the doctrine of constitutional morality.

³¹*Supra* note at 27 at 855.

³²*Supra* note at 25. Also: Carol Gilligan, *In a Different Voice*, Harvard University Press, Massachusetts, 2003.

³³ *Supra* 29 at 864.

³⁴*Supra* note at 19.

taken into account. Such privilege can be a social, political or economic. For example- the idea that only a man can divorce a wife cannot be considered as a right but as a privilege. Even Dworkin has criticised such idea through his criticism of utilitarianism. Constitutional morality guarantees rights and not privileges. By making such constitutional issue only as a conflict of rights, the legal system is unable to address the real problems in the society.

CONCLUSION

As it has been rightly stated by Susan B. Anthony, "*Men, their rights and nothing more; women, their rights, and nothing less.*" Doctrine of Constitutional morality needs to take cognisance of the statement and adopt the feminist legal methods for a more inclusive judicial space. The Doctrine of Constitutional Morality will surely aid in addressing various legal issues related to gender. The adoption of positionality instead of aiming for objectivism for interpretation of the constitutional provisions, as well as ordinary laws, will provide the necessary dynamism to the doctrine.

Constitutional morality entails the concept of transformative constitutionalism. The separation of public morality and constitutional morality will aid in safeguarding the rights of the minorities. Constitutional morality must take account of the experiences of the people. While balancing the rights of the parties to litigation, the notion of privilege and how to rectify the same also needs to be catered. At the same time constitutional morality in the name of rights, must not aid in maintaining the status quo of a social or political privilege.

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