



SOCIAL MORALITY VERSUS CONSTITUTIONAL MORALITY

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ABSTRACT

Morality can be considered as a test upon an individual or society's behaviour to interpret that behaviour or the actions as right or wrong. In a sense morality promotes cooperation amongst the people living in the society and the things they do wrong or right. Morality is a set of rules or values that helps the people living in the society to know as to what is wrong or right/ good or bad/ moral or immoral. Morals can also be considered as customs that are followed since a long time and these morals are usually passed from generation to generation and these values are made for maintaining the peace of the society. When the morality is linked with constitutionality and society it gives birth to terms "social morality" and "constitutional morality". There are many cases and judgements in which both of these types of morality are used, so it cannot be said that Indian judiciary while delivering judgments sticks to only one type or morality, it considers both types of morality considering the facts of each case.

Two of the landmark judgments about the abovementioned types of morality are as follows:

- ❖ Naz Foundation vs. Government of NCT of Delhi & Ors.
- ❖ Navtej Singh Johar vs. Union of India

THE CONCEPT OF SOCIAL MORALITY:

Morality can be considered as a medium through which behaviour of an individual can be termed as right or wrong/ good or bad. Social morality is concerned with social values or the moral values that are followed by the society in their day to day life and as such social morality works as a check upon the individual behaviour and to observe as to how it affects the society at large. By social morality we can keep a check upon the behaviour of people and their action which causes a threat to the wellbeing of the society.

Kalpana Kannabiran's has rightly defined societal morality or social morality in her book, **Tools of Justice: Non Discrimination and the Indian Constitution** defines the concept of social morality as a system of discrimination and exclusion of the vulnerable class of people by the dominant classes in the society, as such the author of this book tries to define the concept of social morality as a rigid route towards the constitutional morality.¹

In simple words social morality can be considered as the set of rules and values that prevails in a society and work towards the well-being and progress of the society. Social morality helps individuals living in the

¹ Tools of Justice; by Kalpana Kannabiran

society to live together peacefully and cooperate with each other. Social morality lays down rules that are to be followed in a society; these rules can also be called ethical or customary rules.

Hierarchical values, customs and traditions are the pillars of social morality, best example of social morality is values like always speak truth, never indulge in a fight with anyone, and respect your elders. Social morality also acts as a guide as to the mode of conduct for individuals living in a society and how people living in a society should act in various circumstances. Social morality teaches people the art of living together in a peaceful environment.

With time the social mortality has travelled from being a pre modern concept to postmodern concept and as such the Indian judiciary also tries to be sensitive towards the feelings of the people like vulnerable groups, minorities, LGBTQ people etc.

The Indian judiciary has time and again proved that being rigid in touching new concepts will make the judiciary obsolete, to prevent these Indian judiciary is flexible enough to travel between constitutional and social morality.

Considering the facts of each and every case constitutional morality is also adopted to tackle with different circumstances. Sometimes social morality takes the upper hand and sometimes constitutional morality takes the upper hand.

THE CONCEPT OF CONSTITUTIONAL MORALITY:

Indian constitution is the lengthiest constitution and is the supreme law of land; it works as a guiding force for the smooth governance of functioning of the whole country. Constitution is flexible in nature so that it can evolve with time otherwise if the constitution is rigid than it will not have the scope for amendment and it will become obsolete.

Constitutional morality is a set of constitutional rules or values that acts as a guiding force to state machineries, functioning of local bodies, judiciary and legislature. It's not possible that in each and every situation constitution will have answers to all the questions, so to tackle this type of problem judiciary and legislature has to come up with new ideas to develop constitution with the changing time.

All the articles and provisions in the Constitution of India altogether form the foundation for constitutional morality. The term constitutional morality is not a new term it was used by the historian *George Grote*; Dr Bhimrao Ramji Ambedkar used the phrase “constitutional morality” coined by George Grote in his speech ‘The Draft Constitution’, delivered on 4 November 1948. By constitutional morality, Grote meant paramount respect for the forms of the constitution, enforcing obedience to authority and acting under and within these forms².

The Delhi High Court in 2009, in *Naz Foundation v. Government of NCT of Delhi* invoked constitutional morality in asserting the urgency of decriminalising consensual sexual relations proscribed by Section 377.³ He described it as popular sovereignty based on freedom and self-restraint.⁴

In India, the term was first used by the father of the Indian Constitution, i.e., Dr. B.R. Ambedkar. He used this term in the debate of Constituent Assembly to justify the importance and need of including the administrative powers and functions of the legislature.⁵

² <https://timesofindia.indiatimes.com/readersblog/pracin-jain-academy/constitutional-morality-28110/>

³ <https://timesofindia.indiatimes.com/readersblog/pracin-jain-academy/constitutional-morality-28110/>

⁴ George Grote, History of Greece, (Nabu Press, United States of America, 2011).

⁵ Constituent Assembly Debates of India, Vol. 7, p.31.

The judgments of Hon'ble High Court and Hon'ble Supreme Court clearly reflects or shows its support towards concept of constitutional morality, but at times there are some cases which needs support from social values that comes within the concept of social morality.

Navtej Singh V. Union of India:⁶ The SC struck down the 158 years old law on homosexuality that made carnal intercourse against order of nature a criminal offence. The court overruled its previous judgement given in Suresh Kaushal case and declared Sec 377 as unconstitutional as it violated Art 14, 15, 19 and 21 of the Constitution.

SOCIAL MORALITY AND CONSTITUTIONAL MORALITY: DO THEY COMPLEMENT EACH OTHER?

Law is taken from morality itself without morality the law will sound or seem to be harsh on the people living in the society. Constitutional and social morality are the two sides of the same coin which do not meet but at the same time complement each other because social morality alone cannot the complex legal issues because by its very nature it will have boundaries that will keep it within the society and will not allow the same to go beyond the ambit of society, in this case issues of national level will have no guiding force so in these type of situations constitutional morality is important as it will be a guiding force to the judiciary and the legislature.

But constitutional morality needs social morality in order to know the needs of the society, so that the constitutional values can change with the changing needs of the society. Constitutional morality and social morality are not same they are different in their ideologies but it can be said that these both concepts exist to complement each other which will result in the betterment of India as a country.

DIFFERENCES IN IDEOLOGIES OF SOCIAL AND CONSTITUTIONAL MORALITY

Constitutional morality is a modern concept because it changes with the changing needs of society, but at the other hand social morality are the values that are passed from generation to generation they are somehow customs of the society that are followed since a very long time. Social morality is considered to have a conservative approach towards some things like social morality opposes the concepts of "live in relationship" and "same sex marriages" whereas constitutional values or morality legalizes both of the abovementioned concepts and give rights to individuals.

Constitutional morality means a sense of faithfulness of individual or the society towards the constitution. The society at large is supposed to give respect to the constitution as it is the supreme law of land. Social morality governs the social behaviour of an individual, but the Hon'ble Supreme Court of India said that constitutional morality will always have a upper hand than social morality. In many countries a bond between constitutional morality and social morality is established where both the concepts not only complement each other but also works together. But in India constitutional morality also prevails and is given more preference upon social morality because it is not always possible that social or moral values are always possible, some morals or values are illogical and as such these morals cannot be applied in the day to day work of judiciary. Most important factor of distinction between constitutional and social morality is that constitutional morality or constitutional values is enforced by the law whereas social morality is based upon popular belief of people living in the society.

⁶ AIR 2018 SC 4321; W.P. (Crl.) No. 76 of 2018 D. No. 14961/2016

Social morality can be considered as the values that are the result of human conscience or that is made by the humans for the humans so these values somehow are not capable of keeping a restraint upon the bad actions of the people. Social morality or values are not enforceable by law so it is not strict towards the crimes of people. Human beings by their very nature are animals with law being the boundary that prevents them from committing any type of wrong.

We need a logical and codified law that falls within the ambit of constitutional morality so that various provisions are defined clearly and when the need arises, those provisions can be used to run the machinery of the country in a smooth way.

So constitutional and social morality can be two faces of a coin but they will not be same in their ideologies at any point of time, but both these concepts will always complement each other with a touch of distinctions.

CONSTITUTIONAL MORALITY: VIEW OF DR. B R AMBEDKAR

According to Dr. B R Ambedkar constitutional morality is the perfect coordination of people's interests living in a democracy and constitutional morality will also have the solutions to end those conflicts for greater good, so that there are no unnecessary conflicts between people. He is also of the view that constitutional morality or values is of utmost significance towards the constitution because without it constitution will be harsh towards the people living in the society. Constitutional morality also makes governance easy; it makes the people running the governance machinery accountable towards the people. Fundamental rights, fundamental duties, preamble, social justice, directive principles of state policy, rule of law, procedure established by law and liberty altogether forms what is known as constitutional morality.

IMPORTANCE OF CONSTITUTIONAL MORALITY

- Constitutional morality or values by its various provisions and laws can transform or upgrade the social morality existing at the present time and in the coming future social values may become more logical so that social morality will work with constitutional morality equally in every aspect.
- Constitutional morality works in the direction of improving the society and introducing reforms that will make the way for new and better provisions for the betterment of individuals living in the society.
- The concept of constitutional morality makes sure that the individuals in the society trusts democracy and respects it and at times gives out suggestions to improve the same.
- Constitutional morality is based on the notion that law is supreme and that constitution of India is the supreme law of land and that no is above law (Rule of Law).

Manoj Narula v. Union of India, Justice Dipak Misra, while referring to Ambedkar's speech on the Constitutional Morality, said, "Constitutional Morality means to bow down to the norms of the Constitution and not act in a manner which would become violative of the rule of law of action in an arbitrary manner⁷.

Dr. B R Ambedkar apprehended that the people of India are new to the concept of constitution and democracy and it will be difficult for them to accept both these ideologies with open hands, because from time immemorial people of India were habitual of social values or morality and it will be a big enough step to move such people to constitutional morality expecting that they would follow the rules laid down by the constitution, to tackle this situation the drafting committee of the constitution of India decide to draft the

⁷ MANU/SC/0736/2014

constitution while keeping in mind the social values of the people, the aspects of social justice, free expression, right to freedom of religion and many such provisions gives out the notion of social morality also.

BEGINNING OF THE NEW ERA OF CONSTITUTIONAL MORALITY

*Manoj narula versus Union of India*⁸, in this case it was held that if a person has a criminal background then he will not be considered eligible to become a minister in the Indian democracy considering the constitutional morality.

Justice Dipak Misra said that; “(constitutional morality) 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 (sic) of action in an arbitrary manner. It along with commitment to the Constitution is a facet of constitutional morality”.

However still constitutional morality was not considered a defined concept and as such judges were of the opinion that written constitution will serve better the needs of the society, but the basic structure of the constitution cannot be amended so in cases where a solution is to be taken without touching the basic structure of the constitution, the concept of constitutional morality can be used because it will be a flexible approach towards resolving the case.

But still the concept of constitutional morality is not codified and it can be said that with time this concept will lose its credibility and will become same as the concept of social morality, with time it will become obsolete, it can also be said that if the concept of constitutional morality is used without any restrictions that it will result in disobedience of the constitution of India, the judiciary will use it as a weapon of biasness, with time a confusion as to concepts will result in inconsistencies in the machinery of judiciary.

Naz Foundation Case, in this case the Hon’ble Supreme Court clearly held that in case here the ideologies of constitutional and social morality contradicts then in such case the former would prevail over the later.

The fact that constitution is continuously evolving with the changing needs of the society and as such it is not the promoter of conservative ideology like social morality.

In simple words constitutional morality spreads the notion of respect and regard towards constitutional values.

CRITICISM ON CONSTITUTIONAL MORALITY

- By Attorney General of India, *K K Venugopal*, “Use 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 PM Pandit Nehru’s fear that SC will become the third chamber might come true”.⁹
- By then law minister *Ravi Shankar Prasad*, “We hear about Constitutional Morality, we appreciate innovations but nuances of Constitutional morality should be outlined with clarity and should not differ from judge to judge and there must be a consensus.”¹⁰
- As per the view of Hon’ble Justice Nariman constitutional morality is nothing but a extension of constitutional values that are enshrined in the constitution of India and as such obedience to the constitution is must.

⁸ (2014) 9 SCC 1.

⁹ Staff Reporter, ‘Use of Constitutional Morality Very Dangerous, hope it dies’ (The Quint, 9th December 2018).

¹⁰ Staff Reporter, ‘Apply yardstick of Constitutional morality evenly: Ravi Shankar’ (The New Indian Express, 27 Nov 2018)

CONCLUSION AND VIEWS OF THE AUTHOR

As we discussed in the above article that constitutional morality and social morality are the two faces to the same coin that complement each other to form the coin but never meet each other because of their different ideologies, social morality by its very nature is a result of human conscience that has its limits whereas constitutional morality is based on the lengthiest written constitution which is drafted by eminent members of the drafting committee, constitution keeps evolving with time so that it can cover a wider range of matters in the society.

It is human nature to have different thinking, everyone will have his or her different opinion, the Judges of Hon'ble High Court and Supreme Court will have different opinions, but with different time these different opinions will disintegrate the true soul of the constitution of India.

According to the authors of the present article the need of the hour is to formulate the concept of the constitutional morality on same standards as that of the "basic structure doctrine" so that the judges can have a more clear interpretation of the constitutional values. The author is of the opinion that the concept of constitutional morality should be defined in the proper manner for future references of the judiciary and the legislature, while codifying the concept of constitutional morality the legislature must keep in mind the social values that are logical and are responsible for maintaining the balance of the society so that the moral or religious sentiments of the individuals living in the society are not affected badly. Some social values can also be inserted in the concept of constitutional morality to solve the complex issues related to religion, culture and other constitutional problems.

The time is to set a research committee to submit their suggestions on codifying the concept of "constitutional morality" so that there is no vagueness in relation to this concept. It's time to understand that nothing is perfect in its initial stage it takes time to shape something for the betterment of the society. All the doctrines, concepts, policies were criticized at some stage of their development, but they proved to be the factors that were necessary for the development of the nation.

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