



MEETING WITH CONSTITUTIONAL MORALITY

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“The Constitution only contains legal provisions, only a skeleton. The flesh of the skeleton is to be found in what we call constitutional morality.” —

Dr. Ambedkar¹

An excursion into the domain of Indian constitutional law would reveal that it has been no stranger to judge-made doctrines. Constitutional silences are often supplied with judicially crafted tests such as ‘arbitrariness’ test, basic structure doctrine and ‘manifest arbitrariness’ test in order to aid constitutional interpretation. A recent addition has been made in this list in the form of constitutional morality which has gained significant traction after Naz Foundation.² It has started to frequently occur in discussions relating to constitutional interpretation and current political issues following the spate of judgements in 2018 that solidified this tool's position in Indian constitutional law jurisprudence. These interactions between the Supreme Court and constitutional morality have been characterised by a serious lack of agreement over the definition, significance, and normative basis for the term's use in constitutional adjudication. In light of these concerns, this paper attempts to present and discuss the idea of constitutional morality, trace its development in the area of Indian constitutional law, and establish the normative basis for its application in adjudication.

¹ NARENDRA JADHAV, AMBEDKAR SPEAKS (2013) 292.

² Naz Foundation v. GNCT of Delhi, (2009) 111 DRJ 1.

THE OLD AND NEW CONSTITUTIONAL MORALITY

Constitutional morality is abstract and defies specific formulation. Constitutional morality refers to a genuine commitment on the part of office holders to institutional duties and standards required to uphold the fundamental elements of the constitutional order, such as the separation of powers and the prerogatives of each arm of government.³ According to Frohnen and Carey, “*Constitutional morality is no monkish demand for individual self-immolation. It is a form of self-interest properly understood, linking concern for self with concern for one’s institution and, ultimately, common good.*”⁴ Political and constitutional officials should adhere to certain expectations in order for the constitutional ecosystem to function coherently and in accordance with its guiding principles. To guarantee that the constitutional ecosystem operates coherently and in accordance with its guiding principles, it might be described as anticipated standards of conduct for political and constitutional actors. The common law approach to constitutional interpretation develops constitutional law case by case. This aids in updating the Constitution's text to reflect societal changes and revealing the moral implications of unresolved constitutional issues.⁵ Constitutional interpretation, as proponents⁶ of a living constitution have noted, aids in the development of a strong constitutional theory by correcting, extending, and generating new law. This opens the door for constitutional language to be used for significant social transformation. Looking at the evolution of constitutional morality across time reveals the numerous meanings that it has taken on. Grote is credited with documenting the term's common uses and with using it in connection with Athenian democracy for the first time. His description of the political upheaval that led to the passage of the Greek Constitution solidifies the requirement for constitutional morality in order for the Constitution to succeed.⁷ By his invocation of constitutional morality as some modicum of respect or reverence for Constitution,⁸ Grote appears to drive home the idea that merely introducing a Constitution would not ensure stability in democracy unless this sentiment of constitutional morality was imbibed by the government as well as citizens. This interpretation suggests that constitutional morality is the bare minimum necessary for constitutional democracy to function. He saw constitutional morality as a reverence for the "form" of the Constitution that is instilled in the participants to remove the risks associated with any future disturbance. This is still open to taking into account criticism of official action. This connotation combining freedom and self-restraint can be likened to “conduct-based” conception of constitutional morality,⁹ which is akin to the limited government ideal of present-day rule of law. Reading this account in conjunction with Kelsenian idea of ‘grundnorm’,¹⁰ constitutional morality can be equated with inviolable core of a Constitution which yields the required authoritative supremacy to it. The sentiment of constitutional morality can be called as grundnorm of the Constitution. Understood thus, it becomes both a pre-condition for the stability of constitutional democracy and the reservoir

³ Bruce Frohnen and George Carey, *Constitutional Morality and the Rule of Law*, (XXVI *Journal of Law & Politics* 2012) 497.

⁴ *Id.* at 507.

⁵ David A. Strauss, *Common Law Constitutional Interpretation*, (63 *University of Chicago Law Review* 1996) 877. See also, David A. Strauss, *Do We Have a Living Constitution?*, (59 *Drake Law Review* 2011) 973.

⁶ Aileen Kavanagh, *The Idea of a Living Constitution*, (16 *CAN. J.L. & Jurisprudence* 2003) 55, 81.

⁷ GEORGE GROTE, *A HISTORY OF GREECE* (2010) 203.

⁸ GEORGE GROTE, *A HISTORY OF GREECE* (Routledge, London, 2000).93

⁹ Abhijeet Srivastava, *Evolving Meanings and Judicial Reasonings – Filling In The Silences Of ‘Constitutional Morality’*, (10 (1) *IJLPR* 2021) 46, 58.

¹⁰ J. W. Harris, *When and Why Does the Grundnorm Change* (29 *Cambridge L.J.* 103 1971), 106.

of its legal legitimacy. There are now many different interpretations of this formal idea. The phrase is attempted to be given additional substantive meanings, which lead to a "value-based" understanding and an association with the spirit of constitutions. In Indian Constituent Assembly debates, the phrase first used in this context, where Ambedkar used it to defend the inclusion of inane administrative matters in the Constitution.

INDIAN EXPERIENCE: -

Although there is no agreement over the exact location of constitutional morality in Indian constitutional law jurisprudence, a list of its most notable sources would include text of Constitution,¹¹ Constituent Assembly debates, founding moment of Indian Constitution and earlier precedents. Both past and present play shape the contours of constitutional morality. The conceptions of constitutional morality speak in favour of purposive interpretation of constitutional text and capturing evolving meanings of constitutional silences, thus transforming Indian constitutional law not merely on its periphery but also in its core. Constituent Assembly debates bore witness to Ambedkar's views on constitutional morality. He defended the inclusion of administrative details in the Constitution on grounds of constitutional morality which was conspicuously absent from the thitherto prevailing scene.¹² His opinions were a result of his mistrust of the executive branch's and legislature's functional propriety or moral behaviour. Although he alluded to Grote's theory, Ambedkarite constitutional morality was more concerned with preserving the unwritten spirit of the Constitution than promoting a merely reverent or respectful attitude towards its forms. In one of his speeches, Ambedkar listed observance of constitutional morality as one of the conditions precedent for successful working of a democracy.¹³ He claims that the Constitution's formal provisions are only its "skeleton," with constitutional morality serving as its "flesh." He likens this constitutional morality to constitutional conventions that stipulate the norms for ethical and sound functioning of the government. The absence of these conventions on Indian scene caused reasonable apprehensions in Ambedkar's mind. He remarked that people of India are "*yet to learn constitutional morality*"¹⁴ and this necessitates the inclusion of administrative details in Constitution. Ambedkar was concerned not merely in making a constitution but in establishing constitutionalism. The counter-majoritarian construct accountable for constitutionally limited governance is the core of the Ambedkarite idea of constitutional morality. Ambedkar is so to be given credit for this idea of political propriety and restricted government through adherence to constitutional morality. This tool of constitutional morality remained dormant until 2009, only making sporadic appearances in lesser-known obiters. Prior to 2009, the echoes of constitutional morality could be located in context of political propriety,¹⁵ thus echoing Ambedkarite idea of constitutional morality. Although this phrase did not have any significant bearing on the outcome of cases, the references point towards a conduct-based understanding of the phrase. A noteworthy

¹¹ The most notable sources are the Preamble and Parts III, IV and IV-A of the Constitution of India, 1950.

¹² See, *The Constitution and the Constituent Assembly Debates*. Lok Sabha Secretariat, Delhi, 1990, pp. 107-131 and pp. 171-183. See also, *Parliament of India, Constituent Assembly Debates (Proceedings) vol.VII Part II: November 4, 1948*.

¹³ BHALCHANDRA MUNGEKAR, *THE ESSENTIAL AMBEDKAR* (Rupa Publications, 2017) 308.

¹⁴ Arvind P. Datar & Rahul Unnikrishnan, *Interpretation of Constitutions: A Doctrinal Study*, (NLS I Rev. 136-148 2017), 29.

¹⁵ Philip C. Bobbitt, *Constitutional Fate*, (58 TEXAS L. REV. 1980) 695-775.

instance is the majority opinion of Justice Khanna in *Kesavananda*¹⁶ which consisted of ruminations on parliamentary ethics and combined both Grotian and Ambedkarite notions. In another case, it was opined that violation of a constitutional convention would “be a serious breach of constitutional morality”.¹⁷ Again in 2003, Justice Sinha opined that if a measure of affirmative action violated the doctrine of equality, it would violate “constitutional morality”.¹⁸ These passing allusions couldn't have a significant impact on judicial discourse. After 2009, this idea of constitutional morality and the Court's comprehension of it experienced a significant alteration. Recent judgements, albeit in accordance with the emphasis on political propriety, have started to give constitutional morality significant weight and show a wider knowledge than that shown in Ambedkar's speeches. Constitutional morality now refers to unwritten constitutional conventions as well as the substantive content of the constitution, such as the right to equality. This “value-based” view of constitutional morality was celebrated by Delhi High Court in *Naz*, which took the phrase from discussions in the Constituent Assembly but gave it a real value-based component. The Court stated that popular morality, which is founded on ephemeral and subjective cultural concepts, should not take precedence over constitutional morality. Ambedkar introduced ‘constitutional morality’ into public and constitutional discourse to emphasize that Indian democracy could not be founded on majoritarianism. It must rather be based on constitutional ethics of respect for dispersed and powerless minorities.¹⁹ This was done to accommodate India's unique circumstances. This viewpoint still holds true today in *Naz*, where it was decided that only constitutional morality could pass the “compelling state interest” test. This way of thinking has significant ramifications for how we perceive democracy in India, which is after all a diverse, plural, and hierarchical country. Public morality and constitutional morality disagree at some points, and unless public morality is put through the constitutional morality filter, it cannot be considered a “compelling state interest.” Although the HC’s has placed public morality in direct contrast to constitutional morality, it does not delve into the question as to how far constitutional values are themselves based on or shaped by public morality. Public morality is merely a reflection of the moral and normative values of the majority of the population (as expressed by the legislature), while constitutional morality not only reflects the majority's values but also shapes and changes them as part of our Constitution's social engineering provisions.²⁰ Public morality and constitutional morality are not essentially mutually exclusive constructs and show convergence and divergence at various points. In contemporary usage, constitutional morality has come to refer to substantive content of constitution. To be governed by constitutional morality is to be governed by the substantive moral entailment any constitution carries.²¹ It recognizes plurality in its deepest form and allegiance to the Constitution is premised on the belief that the final outcome that will emerge can be supported by public reason. It is precisely this abstraction, this distance from specific persons and wishes for substantive outcomes that would allow a constitutional culture to emerge²² where citizens are a part of a common deliberative enterprise despite all differences. It essentially means two things: firstly,

¹⁶ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

¹⁷ *S.P. Gupta v. Union of India*, (1981) Supp SCC 87 (paragraph 1077, per Venkataramiah J).

¹⁸ *Islamic Academy of Education v. State of Karnataka*, (2003) 6 SCC 697 (paragraph 118)

¹⁹ Aravind Narrain, *What Would An Ambedkarite Jurisprudence Look Like?*, 29 (1) (NLSI Rev. 1 2017) , 3.

²⁰ Rohit Sharma, *The Public and Constitutional Morality Conundrum: A Case-note On The Naz Foundation Judgment*, (2 NUJS L. Rev.2009), 445, 447.

²¹ Pratap Bhanu Mehta, *What is Constitutional Morality?*, Seminar (June 05, 2022, 09:45 PM)

²² *Id.*

the opposite of popular morality, and secondly, the spirit or essence of Constitution.²³ It enables evaluation of legislation and government action by Courts on both formal and substantive grounds. This formulation of constitutional morality imposes implied constitutional limits on government, rooted in constitutional principles that judges consider to be essential to its existence.²⁴ Since *Naz*, constitutional morality has occupied a prominent place in judicial forum. In *Manoj Narula*,²⁵ Court found the appointment of some ministers to the Union Council of Ministers, against whom serious charges of moral turpitude and other offences were being tried in the courts as being against the Constitution and the law, as well as constitutional morality. It placed a strong emphasis on the value of constitutional morality as customs and traditions that are crucial to the development of institutions. The court adopted a conduct-based interpretation of the term and declared it to be synonymous with the rule of law, arguing that adherence to the Constitution is a component of constitutional morality. The “conscience of Constitution” or value-based conception of constitutional morality made its appearance in Apex Court in *NCT of Delhi v. Union of India*,²⁶ where Court was called upon to resolve the tussle concerning power-sharing between central government and provincial government of Delhi. In arriving at the decision, Court suggested that constitutional morality was akin to spirit of the Constitution²⁷ and implies strict adherence to principles enshrined in it.²⁸ It required constitutional functionaries to cultivate in themselves a spirit of constitutionalism. In the concurring judgment, the task of constitutional morality as supplying constitutional silences and the norm-specifying feature²⁹ of constitutional morality was emphasized.

In *Navtej*,³⁰ scope of constitutional morality was further fortified. This case consists of the most elaborate exposition of the concept whereby various judges attributed different interpretations to it. The idea of constitutional morality as the framework ushering in a pluralistic and more inclusive society that resists the forces of homogenization is the common thread tying all of these views together. It was pitted against social or majoritarian morality. The judgment also explored the transformative potential of the concept³¹ which the courts were expected to facilitate. The same conception of constitutional morality as a counterpoise to public or majoritarian morality was carried forward in *Shine*.³² In *Sabarimala*,³³ the source of constitutional morality was traced to the four principles of “justice, liberty, equality and fraternity” as contained in Preamble. In order to give the concept the needed longevity, these rules are to control the constitutional sense of morality. But when it came to determine the parameters of “morality” under Articles 25 and 26, different judges gave the phrase varied interpretations, exposing the incoherence in the Court's doctrinal understanding of the phrase. This conception

²³ Abhinav Chandrachud, *The Many Meanings of Constitutional Morality* (January 18, 2023).

²⁴ *Id.*

²⁵ 2014) 9 SCC 1.

²⁶ (2018) 8 SCC 501.

²⁷ *Ibid.*, at paragraph 284.1.

²⁸ *Ibid.*, at paragraph 58.

²⁹ *Ibid.*, at paragraph 302.

³⁰ *Navtej Johar v. Union of India*, (2018) 10 SCC 1

³¹ *Ibid.*, ¶405 (per Chandrachud J).

³² *Joseph Shine v. Union of India*, (2019) 3 SCC 39.

³³ *Indian Young Lawyers Association v. State of Kerala*, (2018) SCC Online SC 1690

of constitutional morality was reiterated in the dissenting opinion of Justice Nariman³⁴ in *Kantaru Rajeevaru v. Indian Young Lawyers Association*,³⁵ a case that aspires to define the broad contours of the expression in order to prevent it from becoming subjective. The above discussion establishes that the lawyerly approach to constitutional morality has hitherto remained confined to the justiciability of fundamental rights, which could have been otherwise availed. The non-lawyerly approach, on the other hand, broadens the scope of constitutional morality by merging the individualistic plane with that made up of societal interests and constitutional democracy as a whole. Constitutional morality is important for the smooth working and survival of the Constitution in the same manner as public morality is for a society.³⁶ The provision of fundamental rights can only be realised in an effective democracy with an administrative structure that is focused on society and upholds social transformational values. In order to do this, the constitutional morality in adjudication must transcend the lawyerly sense of being limited to only fundamental rights. The following subsections will address the normative rationale for employing this term in adjudication despite its abstract nature in light of this discussion.

NORMATIVE JUSTIFICATION: -

The constitution assigns responsibility, establishes boundaries for authority, states ideals, creates a sense of history for the populace, and paves the way for the future. The Constitution's text is made up of both spoken words and silent passages. One of these constitutional silences relates to morals. The Court must balance the competing needs of abiding by fixed legal standards and society's evolving expectations for justice. In complex situations, this tension between logic and values calls for resolution. Judges must identify the competing values, estimate the value consequences of preferring one set of competing values to another and must choose from among them.³⁷ The outcome of a constitutional debate shapes how our society is organised. The process used in constitutional adjudication has echoes of a sociological approach to law, in which societal needs are addressed with the least amount of friction. The ethical concept of limited government is inextricably linked to the constitutional morality construct. Mehta interprets Ambedkar in a valuable way when he suggests three distinctions: the morality of the Constitution, the conventions and protocols of discretionary power when the Constitution is silent, and the growth of constitutionalism among the ruling class and the subject population. With the assistance of competent solicitors, the Court significantly established the concept in this third sense.³⁸ Rule of law, which judges and other public officials are committed to upholding, compels them to engage directly and fully with the normative commitments a political community makes and which inform its Constitution.³⁹ Some modicum of moral analysis becomes necessary as people reasonably disagree over content and contours of these normative commitments. This analysis seeks to persuade logical political community members to reach a consensus on an understanding of these essential moral commitments. Every use of public authority must adhere to these commitments. These values are ingrained

³⁴ paragraph 19.

³⁵ (2020) 3 SCC 52.

³⁶ Mahendra Pal Singh, *Observing constitutional morality*, (SEMINAR, 2019).

³⁷ John A. Winters, *General Principles of Constitutional Adjudication: The Political Foundations of Constitutional Law*, (10 Wm. & Mary L. Rev 1968). 315, 330.

³⁸ Upendra Baxi, *A Dangerous Precedent?*, India Legal (14th June, 2021, 06:30 PM)

³⁹ Upendra Baxi, *A Dangerous Precedent?*, India Legal (14th June, 2021, 06:30 PM), <https://www.indialegallive.com/viewpoint/a-dangerous-precedent/>.

in positive legislation and are in charge of delivering the system's normative consistency and bringing order to the community. In this way, the fundamental principles of the polity are embodied in constitutional morality, which acts in contentious situations where judges can uphold the rule of law by proving that their rulings are consistent with these principles. When formal rules to resolve complex problems are absent, this interpretive technique becomes essential. Dworkin's understanding of rule of law brings in a "rights conception"⁴⁰ which sees the rule book as an attempt by the community to capture the moral rights that people bear. In hard cases, judges are bound to discover these principles in order to justify their decision. Adjudicative acts are not performed in a motivational void. In law, the adjudicator must "reason about" morality as he must reason about much else.⁴¹ While judges inevitably make new law in resolving hard cases, they should look to existing rules in statute, common law and the constitution in order to distill underlying principles of the legal system on the basis of which and in congruence with which they can resolve these disputes.⁴² According to this logic, certain deep normative ideals that society views as being of the utmost importance are protected by rights. In polities with such a normatively rich rule of law ideal, moral reasoning becomes inevitable. The complexity of such arguments simply serves to highlight the diversity of political viewpoints and the necessity of forging an effective agreement. This becomes crucial in a multicultural nation like India, which demonstrates a normatively rich vision of the rule of law and acknowledges the need for consistency not only between official behaviour and formal regulations but also between official behaviour and firmly held normative beliefs. It thereby establishes a link between the law and the moral pillars of political community.

On Indian scene, difficulty of channeling concerns of unpopular minorities through regular legislative contestation justifies the assertive interventions of Supreme Court.⁴³ While relegating such questions pertaining to rights of these unpopular minorities to legislative process seems a way out of counter-majoritarian dilemma, instances from legislative chambers reveal that quite often these questions are not addressed by legislature owing to what Dixon calls as "blind spots" and legislative inertia.⁴⁴ One instance of this can be how Shashi Tharoor's bill to decriminalize homosexuality was never tabled in the Parliament.⁴⁵ Constitutional morality provides a prod in the correct direction to overcome this inertia. The Navtej ruling makes this clear. Despite the dearth of empirical evidence that makes it difficult to assess this decision's success at the local level, the Apex Court has started the job off on the right foot. Despite criticism from majoritarian regimes, the idea of constitutional morality has solidified the Apex Court's commitment to safeguarding all minorities. The Apex Court's judicial review authority now goes beyond its traditional formulation of evaluating laws or executive orders against the fundamental rights chapter thanks to the twin notions of constitutional morality and counter-majoritarianism. The Community's Constitutional Morality ("CCM") of the Waluchow community is consistent with the current iteration of

⁴⁰ RONALD DWORKIN, *LAW'S EMPIRE* (Hart Publishing, 1986) 11

⁴¹ Bebhinn Donnelly-Lazarov, *The Figuring of Morality in Adjudication: Not so Special* (24 *RATIO Juris* 2011) 284, 291

⁴² Richard Stacey, *The Magnetism of Moral Reasoning and the Principle of Proportionality in Comparative Constitutional Adjudication* (67 *AM. J. COMP. L.* 2019) 435, 459.

⁴³ Arundhati Katju, *LGBT rights in India: The Doctrine of Constitutional Morality and Counter-Majoritarianism in the Context of Institutional Supremacy*, 25 October 2018.

⁴⁴ Rosalind Dixon, *Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited*, 5 *INTL. J. Const. L.* 391 (2007).

⁴⁵ PTI, *Shashi Tharoor's bill to decriminalise homosexuality defeated in Lok Sabha*, *INDIAN EXPRESS*.

constitutional morality in India. According to this view, a judge's primary responsibility is to keep the community accountable for its core moral values. CCM is not any one person's or organization's personal code of ethics. It also lacks any religious foundations. The underlying moral principles and convictions that the society has actually vowed to uphold and which have attained some sort of formal legal recognition make up this sort of community-based, positive morality. In reality, a community's legal customs reflect its political morality. CCM is a subset of the larger body of moral norms that receives a sizable amount of community support.⁴⁶ This is consistent with the substantive idea of democracy, according to which CCM turns into a source of ethical standards derived from society. The transforming nature of this technology is another rationale for employing it. Additionally, the Apex Court has noted this in a number of judgements.⁴⁷ It makes sure that no person subject to the Constitution is left without access to its benefits. The brief history of this tool suggests that it has been applied in cases involving issues of gender equity, institutional propriety, social uplift, and reducing majoritarianism in a progressive manner. This technology asserts that it is compatible with real democracy. Despite their limitations, courts may express constitutional moralities more effectively than legislatures because judges can use common law reasoning to ascertain a nation's actual moral commitments. In a morally heterogeneous political community with various interpretations of what constitutes the greater good of humanity, the necessity for constitutional morality becomes increasingly apparent. This method generates a semblance of overlapping consensus for the common interest of society in the shape of normative constitutional commitments that aim for social change. At its best, constitutional law is a type of transformational, deliberative politics.⁴⁸ The constitutional text signifies certain aspirations which the constitutional community is expected to achieve in course of time. The task of constitutional morality is to make the realization of these aspirations possible in the light of the community's experience and exigencies. It connotes "mediation between past and present."⁴⁹ This can be located in the Indian context with the help of the string of judgments invoking the "value-based" conception to dismantle the marginalisation, exclusion and discrimination that had hitherto plagued the existence of certain sections of society. In course of this realization, the later communities can also do away with the notions which were acceptable to the earlier communities. A constitutive aspiration of Indian constitutional tradition has been to achieve justice, liberty, equality and to promote fraternity. Due to the fact that these constitutional values are the very essence of the Constitution, neutrality or the lack of value choices are impossible in constitutional adjudication. The choices made at the founding moment itself are evidence that these values were incorporated into the Constitution. These enduring, significant, and timeless ideals transcend morality and are included in the Constitution. Every modern state's law exemplifies the nuances of both widely held moral principles and accepted social morality. Either abruptly through legislation or covertly and piecemeal through the judicial process, these influences infiltrate the law.⁵⁰ Constitutional morality provides space for giving a voice to experiences of the society to play a legitimate part in this endeavour of moral reasoning by filtering history, relevant precedents, prevailing traditions, and conventional morality in search of the

⁴⁶ Wil Waluchow, On the Neutrality of Charter Reasoning.

⁴⁷ Wil Waluchow, On the Neutrality of Charter Reasoning.

⁴⁸ MICHAEL J. PERRY, MORALITY, POLITICS AND LAW (Oxford University Press, 1988) 121.

⁴⁹ Id. at 138

⁵⁰ H.L.A. HART, THE CONCEPT OF LAW (Oxford University Press, 1961) 199.

enduring values that perpetuate a constitutional democracy.⁵¹ The permanent constitutional values are shaped by national history, aspirations and ideals in order to yield a local, concrete understanding of constitutional morality.

A COMPLETE DEFINITION IS IMPOSSIBLE:

The 'undefined spirit' of the Constitution, which is the abstract aspect of constitutional morality, has angered many people. A closer examination of the idea and the many situations in which it has been used in adjudication, however, will show that potential dangers by its usage can be minimised by its principled use. Additionally, different interpretations of the phrase have connected it to other amorphous ideas like justice, liberty, equality, dignity, non-discrimination, and fraternity. Despite being abstract, such enunciations challenge societal dogmas, prejudices, discrimination, and exclusion that are prevalent in public life and are not as deadly as they are portrayed to be. The use of constitutional morality in decision-making is consistent with the courts' constitutional obligation to decide cases that raise opposing claims respecting fundamental human rights. Dialectic between public morality and constitutional morality serves well the promotion of constitutional good governance and the production of constitutionally sincere citizens.⁵²

Convictions do not easily divide between overarching concepts and specific applications. Instead, they are piled in layers of generality to create a more intricate structure. Which description the judge choose will have a significant impact on his decisions in these circumstances.⁵³ This provides an occasion of the mediation of consensus and dissensus. According to Levine, "*ambiguous talk makes modern politics possible... by tempering the assertion of particular interests and parochial understandings with symbols whose common use, in the face of diverse interpretations, provides a mooring for social solidarity and a continuing invitation to engage in communal discourse. And that continuing invitation, finally, engages us as well in quests for meanings that transcend whatever univocal determinations we have achieved at any given moment.*"⁵⁴ The constitutional goals that serve as a foundation for judgement are undefined, therefore relying on them to make decisions cannot lead to clear-cut, obvious conclusions about what constitutes right and incorrect government behaviour. The Court must exercise its interpretative powers here. The generality and ambiguity of constitutional aspirations enable members of the plural constitutional community to adequately share these goals.⁵⁵ Sharing gives society opportunities for moral development. The decisions of the Court deal with actual, genuine issues between real people, not just theoretical debates. The use of constitutional morality as an interpretive tool by the judiciary aids in the development of a constitutional discourse and encourages other political actors to think about these moral issues. As a result, there is a "deliberative, transformative politics."⁵⁶ The basket of constitutional morality consists of a few fairly universally shared substantive values and the more formal but still critical values promoted by the rule of law. Lon Fuller referred to these formal values as collectively constituting the "inner morality" of law.⁵⁷

⁵¹ Patricia M. Wald, *The Role of Morality in Judging: A Woman Judge's Perspective*, (4(1) LAW & INEQ. 1986) 3, 9.

⁵² Upendra Baxi, *A Dangerous Precedent?*, India Legal (14th June, 2021, 06:30 PM)

⁵³ MICHAEL J. PERRY, *MORALITY, POLITICS AND LAW* (Oxford University Press, 1988) 127

⁵⁴ Cited in MICHAEL J. PERRY, *MORALITY, POLITICS AND LAW* (Oxford University Press, 1988) 156

⁵⁵ *Id.* at 149

⁵⁶ Richard Kay, *Moral Knowledge and Constitutional Adjudication*, (1989) 507.

⁵⁷ See, L. FULLER, *THE MORALITY OF LAW* 33-94, 162-70, 181-86 (Yale University Press, 1969).

There are such shared ideals as free speech, press, and religion, due process of law, and equal protection under the law. These constitute the mutually acceptable bases of accommodation necessary for consensus. To meet changing circumstances, constitutional law must be flexible; and for constitutional law to be flexible, the Constitution must, in one way or another, be indeterminate.⁵⁸ Timothy Endicott argues that legal principles and normative terms are necessarily vague and thus "a legal system with no vague laws is impossible" because law needs "to regulate a variety of human activity in a general way".⁵⁹ To uncover the underlying principles, Dworkin advocates for a moral reading of the Constitution, according to which all people are required to comprehend how to interpret and apply abstract constitutional provisions while keeping in mind that they are debating moral standards of decency and fairness.⁶⁰ This brings the considerations of political morality compatible with institutional history into constitutional law discourse. This is compatible with Dworkin's "constitutional conception of democracy" where all members of the community are treated with equal concern and respect. A step further in this direction is taken by Waluchow with his conception of community's constitutional morality which is an inter-subjective construct of legally entrenched moral principles broadly accessible to legal minds. CCM is "the set of moral norms and considered judgments properly attributable to the community as a whole as representing its true moral commitments" and this set is in "some way tied to its constitutional law and practices."⁶¹ Through the available social and legal evidence, judges achieve reflective equilibrium after thoroughly comparing and weighing cases and principles. It acknowledges both disagreement and consensus and strives to reach a Rawlsian reflective equilibrium. This CCM, although undefined, is identifiable and helps in reining in judicial subjectivity to a certain extent. The means are geared to justifying the ends of enforcing views of the people and not the judiciary. However, in conceptualizing this constitutional morality, one should be aware of the myths of homogeneity and common morality. What is required is a conception of justice upon which all reasonable people will agree despite their differing comprehensive philosophical views. The generality that envelops these clauses is the key to securing this interpretational latitude. Due to the underlying amorphousness, comprehensiveness, and indeterminacy, this also becomes a strong argument against any attempts to give this tool a specific definition and pinpoint its precise substance. Any attempt to compartmentalise this theory will hinder its development and, as a result, the evolution of the constitutional ecosystem to meet shifting social needs. This accommodation utilising a constitutional morality interpretive technique is not without challenges.

CONCLUSION: -

The above explanation indicates that constitutional morality is not a new concept and is as old as the Indian Constitution. It has come a long way, and its current incarnation includes both "conduct-based" and "value-based" concepts. These two are inextricably linked and do not function alone. It serves as both a guide to good and ethical institutional behaviour and an interpretive tool. Despite the incredible journey of constitutional morality in India from a replica of Grote's notion to its new intricacies, this doctrine still has a lot to explore. The concept's strength, rather than its weakness, is the abstraction that underpins it. Concepts such as "reasonability," "arbitrariness," and

⁵⁸ Philip A. Hamburger, *The Constitution's Accommodation of Social Change* (MICH. L. REV. 239 1989) 88

⁵⁹ Timothy Endicott, *Law is Necessarily Vague*, (Legal Theory 2001) 382 7

⁶⁰ RONALD DWORKIN, *FREEDOM'S LAW* (Harvard University Press, 1996) 2.

⁶¹ WIL WALUCHOW, *A COMMON LAW THEORY OF JUDICIAL REVIEW: THE LIVING TREE* (Cambridge University Press, 2007) 227.

"manifest arbitrariness" are essentially abstract concepts, into which the judges feed information based on their personal experiences and feeling of political responsibility in order to fulfil the obligation of coherence. The history of these ethereal ideas and their influence on the discourse surrounding constitutional law raises hopes for the effectiveness of constitutional morality as a tool for interpretation.

