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LAW AND MORALITY: CONSTITUTIONAL MORALITY VS. PUBLIC MORALITY

Nidhi Ngaihoih*

ABSTRACT

All across the world, the democratization process is deepening. This has brought to the fore the rights of diverse minority groups vis-à-vis the dominant moral norms espoused by the majority community. Judiciary has to adjudicate the practice of liberty, equality, dignity, and justice among diverse communities. While legal and moral norms were undifferentiated at the early stage of civilization, increasingly the two have diverged after the secularization of law during the modern period. In recent decades, the judiciary world across has been propounding new dimensions to the idea of Constitutional morality as different from any public morality. This is applied to rescue the diverse cultural practices from discrimination and homogenization by a dominant public morality, particularly with regard to gender rights. In India, the concept was first referred to during the making of the Constitution itself by the Chairman of the Drafting Committee. After the judgment of the High Court of Delhi in the Naz Foundation case (2009) which decriminalized homosexuality between adults in private, by upholding the primacy of Constitutional morality above public morality, a fierce debate has ensued among jurists and opinion makers. Though the apex court has upheld the primacy of constitutional morality as of now, the fate of the principle depends on the final verdict of the larger nine-judge Bench of the Apex Court in the Sabarimala case.

The paper examines the debate over the relationship between legal and moral and further situates the evolution of the concept of the primacy of Constitutional morality over public morality in India.

Keywords: Derrida, Dworkin, Habermas, Jurisprudence, Kelsen, Kesavananda Bharati, majoritarianism, morality, Naz Foundation, Navtez Singh Johar, public order, Sabarimala.

INTRODUCTION

To properly describe the relation of law to morals has been a long philosophical issue. Law was humanized during the advent of the modern period i.e. law has to be based upon the foundation of human nature and not something ordained by god or revealed scripture. What should be the proper balance between justice, security and morals gained significance in

***Nidhi Ngaihoih** is third year student of B.A., L.L.B at Rajiv Gandhi National University of Law, Patiala, Punjab, India-147006.Email: nidhingaihoih21066@rgnul.ac.in

jurisprudence. Roscoe Pound, a University Professor at Harvard University, aptly summed up this dilemma in making rules of law. He writes:

> *"…in the making of rules of law and finding grounds of decision, in interpreting rules, in applying rules and grounds of decision, and in exercise of discretion in the judicial and in the administrative process, there are three things to be regarded: (1) justice, the ideal relation between men; (2) morals, the ideal development of individual character; and (3) security. These three have to be kept in balance. The answer to the proposition that there is here an irreducible antinomy is that we cannot ignore any one of them and we cannot proceed on the basis of any one of them at the expense of the others.*"[1]

Nineteenth-century German jurist Caspar Rudolph Ritter von Jhering exclaimed that the distinction between the moral and the legal norm was the *Cape Horn of the scientific study of law*.[2] Jhering commented that the "juristic navigator who would overcome its perils ran no little risk of fatal shipwreck".[3] Jhering showed in his foundational work on jurisprudence that the root of this difficulty lay in the very vocabulary of juristic and ethical terms. He showed the poverty of terms for "law" to carry many meanings. On the other side, there was in German an abundance of words of different degrees of ethical connotation with meanings not always clearly differentiated. The words indeed have polysemic nature as French philosopher Jacques Derrida has shown in his deconstruction approach. Apart from that, the social usage and variety of contexts bring the issue of hermeneutic instability. Jhering used certain terms and their treatment exposed how the linguistic examination is as untrustworthy as the philosophical examination of the two concepts of *moral* and *legal*.[4] In the English language, the terms morality, and morals are not thoroughly distinguished in general usage.

The first person to systemically approach the problem of the distinction between law and morality was Christian Thomasius (1655-1728). Thomasius was a German jurist and he is credited to have desacralized law. He explained how human reason was able to know the precepts of natural law without the aid of scripture. He differentiated between the legal and moral spheres. Thomasius uses the term *perfect obligations* for legal obligations and the term *imperfect obligations* for moral ones because they are not coercible.[5] Thus there was the marginalization of a religious basis in legal theory and its decoupling from theology.

Another stream of thinking that looked upon law as separate from morals constituting an independent normative order was also in vogue in Europe. This group looked upon law as a construction in itself. Legal only correlates with the State and has no moral underpinning. This was propounded by German Idealist philosopher George Wilhelm Hegel (1770-1831) for whom the State is the march of God on earth. Hegel saw State in absolute terms. European jurists like Hans Kelsen followed the Hegelian line and argued that the norms of law have their own existence and self-validity beyond any relationship that could be established with morality. It can be termed in Indic phrases as *"swayambhu"* - self-generated.

Kelsen (1881-1973), explicitly rejected the theory according to which law would represent a moral minimum by its own nature, because this implies the existence of absolute morality or at least a content common to all positive systems. Kelsen's "Pure Theory" demands the separation of law from morality. Therefore, Kelsen tries to offer an ideal form of legal

statements, which are distinguishable from morality.[6]

Until one discerns the subtle difference between morality and morals, one may miss a way to properly situate morality in the legal and social sphere. Roscoe Pound advises using "morality" for a body of accepted conduct and "morals" for systems of precepts to conduct organized by principles as ideal systems.[7] Thus, morality is this-worldly, while morals are ideal and utopian. One may state that conventional morality would be a body of conduct approved by the custom or habit of the group of which the individual is a member. Hindu morality would be conducted and approved by Hindus in accordance with the day the principles of *Dharma Shastras*. Confucian morality would be conduct approved by Confucius's Analects. Similarly, Islamic morality would be conduct approved by the Quran and Sharia. Thus, morality would not be an ideal but an actual system. Jurists place "morality" as "positive" while "morals" as "natural," i.e. according to an ideal not necessarily practiced nor backed by social practices. Therefore, Systems of "morals" are ideals for the morality of the time and place.

German philosopher Jurgen Habermas distinguishes morality and legality. He differentiates moral norms – norms regulating interpersonal relationships and conflicts between natural persons who are supposed to recognize one another as both members of a concrete community and irreplaceable individuals – from legal norms – norms regulating interpersonal relationships and conflicts between actors who recognize one another as consociates in an abstract community first produced by legal norms themselves.[8]

Habermas' argument in favor of reconciling these two axiological structures is simple. The contemporary states are territorially defined groups of individuals and communities organized through legitimately binding legal norms. To be legitimate, these norms should stem from discursive democratic practice and the law-making procedure, not from particular ethics. It is common knowledge that for most modern states (except for colonial states, occupied territories, and semi-sovereign territories), the principal source of legitimacy is a constitution. Hence, if we follow his argumentation, the legality and legitimacy of basic constitutional norms are those that ultimately matter, although morality often plays an unquestionable role in their formation.[9]

RESEARCH METHODOLOGY

Research Hypothesis

The research assumes that morality mentioned in the Constitution of India is not societal morality, but constitutional morality which includes inter alia, liberty, equality, and inclusiveness.

Research Questions

1. What are the brief stages in the evolution of the relationship between law & morals?
2. What are the given concepts of public morality, morality, and morals in the Indian Constitution?
3. How was the genesis of the concept of constitutional morality initiated?
4. How has the judgments of the Naz Foundation, Navtez Singh Johar, and the Sabrimala case shaped these concepts?

Research Methodology

The research will follow the qualitative, doctoral method of study and will focus on the various articles, judgments, and constitutional debates from reliable sources available over the internet. The study of various academic writings available on online databases like JSTOR will also be undertaken. The statutory provisions will be accessed through legal databases like SCC Online.

Literature Review

Ananya Chakravarti[10] deliberates upon several recent judgments on cases like the opening of Sabrimala temple for women of all ages; decriminalizing of Section 377 of the Indian Penal Code (1860) and has argued that constitutional morality is not limited only to following the constitutional provisions but a commitment to the inclusive and democratic political process in which both individual and collective interests are satisfied. It encompasses ensuring constitutional values like rule of law, social justice, individual freedom, judicial independence, sovereignty, etc. She has also analyzed the writings of legal luminaries like Upendra Baxi, Subhash Kashyap, and Pratap Bhanu Mehta and showed emerging consensus that constitutional morality cannot be trumped by social morality and it is only constitutional morality that can be allowed to permeate into the rule of law. Social morality cannot be used to violate the fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society.

The paper traces the evolution of the concept of morality in Indian Constitution since the Constituent Assembly debates and encompasses diverse aspects of the theme.

Brief Stages in Evolution of Relationship between Law & Morals

In the early stage of the western legal tradition, morality is much more advanced than law. At the beginning of Roman law, matters like good faith in transactions, keeping promises, and performing agreements, are left to *fas* (faith) or *boni mores* (good morals) rather than to *ius* (law). In the early stage of Anglo-Saxon law, there was no law of contracts. During the medieval period, the Church enforced informal contracts. Then, the law began to crystallize with definite and certain rules.[11]

Roscoe Pound has formulated four stages in the development of the law with respect to morality and morals. First, is the stage of undifferentiated ethical customs, customs of popular action, religion, and law, which jurists would call the pre-legal stage. During those times, Law was undifferentiated from morality. Second, is the stage of strict law, codified or crystallized custom, which in time is outstripped by morality and does not possess sufficient power of growth to keep abreast? Third, there is a stage of infusion of morality into the law and of reshaping it by morals; this is the stage of equity and natural law. Fourth, there is the stage of conscious law-making, the maturity of law, in which it is emphasized that morals and morality are for the lawmaker and that law alone is for the judge.[12]

Nineteenth-century analytical views of the relation of law and morals were strongly influenced by the assumption of the separation of powers as fundamental for juristic thinking, not merely a constitutional device. Accordingly, assuming an exact, logically defined separation of

powers, the analytical jurist contended that law and morals were distinct and unrelated and that he was concerned only with law.[13] John Austin (1790-1859), **"**Father of English Jurisprudence" puts *"Law is the aggregate of rules set by men as politically superior, or sovereign, to men as politically subject."* He attributes command, sanction, duty, and sovereignty as the four essential attributes of positive law. Austin distinguishes positive law from positive moralities which are devoid of any legal sanction and identifies law with command duty and sanction. Austin's positive law emphasizes the separation of law from morals. Austin attempted to establish a science of jurisprudence separated from ethics, wherein the former is concerned with positive law irrespective of goodness or badness.

Public Morality, Morality, and Morals in the Indian Constitution

Indian Constitution was framed by stalwarts who had exposure to western jurisprudence and who also struggled to establish a modern political system based on principles of equality, liberty, and justice in India. It appears interesting to find that there has not been much debate on the usage of the terms moral, morality, and public morality in the Indian Constitution. Only by a proper understanding of these terms, one can properly situate the evolving concept of constitutional morality in India.

On 13th December 1946, the Constituent Assembly of India met in the Constitution Hall, New Delhi, wherein Pandit Jawaharlal Nehru moved the Resolution on the aims and objectives of the Constituent Assembly. Nehru stated, "The Resolution defines our aims, describes an outline of the plan and points the way which we are going to tread."[14] Thereupon he begged to move:

"(1) This Constituent Assembly declares its firm and solemn resolve to proclaim India as an Independent Sovereign Republic and to draw up for her future governance a Constitution;

(5) WHEREIN shall be guaranteed and secured to all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith worship, vocation, association and action, subject to law and public morality; and…."*[15]*

Clearly, in resolution contained the term, "*public morality*" as a constraint to right to liberties. When the Constitution was finally adopted, the term, "*public morality*" did not appear in the Constitution. In the Constitution, "*Morality"* has been *a* term used four times, while the term "*moral*" has been used only once. The term "*public*" was delinked from "*public morality*" and placed with the "*public order*". Let us see the first usage of the term in the chapter on Fundamental Rights.

Under Article 19 on the Right to Freedom of speech, it is given as follows:

"*19. Protection of certain rights regarding freedom of speech, etc. — (1) All citizens shall have the right—*
Article 19 [(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of 4 [the sovereignty and integrity of India], the security of the State, friendly

*relations with foreign States, public order, decency or **morality**, or in relation to contempt of court, defamation or incitement to an offence.]"*[16]

This proviso (2) was substituted by the Constitution (First Amendment) Act, 1951, s. 3, for cl. (2) (with retrospective effect). Here, we see how "morality" has been singled out and separated from "public order" and "decency".

Again, Article 19(4) uses the term "*public order or **morality***", as reasonable restrictions on the exercise of the right conferred by the said sub-clause. Under the right to freedom of religion, freedom of conscience, and free profession, practice, and propagation of religion the restriction on the right is subject to "*public order, **morality,** and health and to the other provisions of this Part"*, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. Article 26 on the freedom to manage religious affairs is again subject to "*public order, **morality** and health*".

Clearly, Indian lawmakers separate public order from morality as well as decency from morality. There is no concept of aggregated "public morality" in the Indian constitution. Then, we use the term "moral" in the chapter on Directive Principles of State Policy. In Article 39 it was added vide the Constitution (Forty-second Amendment) Act, 1976, w.e.f. 3-1-1977:

*"(f) children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against **moral** and material abandonment.*"[17]

Thus, while the term "morality" has been used with respect to restrictions on enforceable Fundamental Rights, term "moral" has been used in the chapter on the non-enforceable Directive Principles. "Morality" is in the sense of actual, while 'moral' is in the sense of the ideal.

Genesis of Concept of Constitutional Morality

We have seen how the concept of "public morality" was part of the aims and objectives of the Constitution Assembly, only later to get truncated in the final form of the Constitution. The concept of Constitutional morality in India has its genesis in the making of the Constitution itself. On 4 November 1948, while Introducing and moving the Draft Constitution before the Constituent Assembly, Dr B.R. Ambedkar cited the British historian, George Grote [1794 – 1871, noted for his 12 volume work on history of ancient Greece (volumes composed during 1846-1856)] who stated:

"…Grote, the historian of Greece, has said that:

"*The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of a 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 ascendency for themselves*."[18]

This was the first usage of the term in the making of Indian Constitution. Ambedkar himself clarifies what he meant by constitutional morality.

"..By constitutional morality Grote meant "a paramount reverence for the forms of the Constitution, enforcing obedience to authority 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 in his own." [19]

But, Ambedkar also cautioned that the Constitution could get perverted without having the spirit of the Constitution. That spirit is to be protected by people who are saturated with constitutional morality. In fact, Ambedkar lamented that India still is essentially undemocratic and that constitutional morality is not a natural sentiment among Indians. Ambedkar spoke the following words:

"..While everybody recognizes the necessity of the diffusion of Constitutional morality for the peaceful working of a democratic Constitution, there are two things interconnected with it which are not, unfortunately, generally recognized. One is that the form of administration has a close connection with the form of the Constitution. The form 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 pervert 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."[20]

Ambedkar was trying to conduct a moral reading of the Constitution. This is the concept fully elaborated by American jurist Ronald Dworkin in the 1990s. Dworkin wrote in his essay, *The Moral Reading of Constitution* (1996)[21] that "we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. The moral reading brings political morality into the heart of constitutional law. But political morality is inherently uncertain and controversial, so any system of government that makes such principles part of its law must decide whose interpretation and understanding will be authoritative."[22] Dworkin shows that In the American system judges—ultimately the justices of the Supreme Court—now have that authority.[23]

He further developed the theme into a fully-fledged book, **"***Freedom's Law: The Moral Reading of the American Constitution"*[24] and defended how based on the moral reading of the Constitution, is in fact the best account of what democracy really is.

Jürgen Habermas's idea of constitutional patriotism, where citizens of a political community create a collective identity not on parochial lines like language or ethnicity or culture, but rather through democratic deliberation about the interpretation and institutionalization of

constitutional principles.[25]

Such concepts have lately influenced a select few judges in the Indian higher judiciary, who view themselves as someone conducting the moral reading of the Constitution. Let us see how the Constitutional Morality (CM) concept has been behind several landmark judgments in India in recent years.

Judicial Making of Constitutional Morality in India

Though, the concept of basic structure and Constitutional Morality was used by the Constitutional Bench while deciding the power of the Parliament to amend the Constitution in the Kesavananda Bharati Sripadagalvaru Case[26]. The Court referred to Greek historian Grote alone and stated in para 789 of the judgment:

> *"By Constitutional morality Grote meant a paramount reverence for the forms of the Constitution, 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 opponents than in his own."*[27]

Constitutional Morality in a sense is to uphold the basic structure of the Constitution. Though the Bench did not explicitly state the relationship, the basic structure principle has emerged as the bedrock of vigilance against the perversion of the Constitution. The concept attracted widespread debate with the judgment of the High Court of Delhi in the Naz Foundation Case decided on 2nd July 2009.[28] Let us briefly see the landmark cases pertaining to the judicial formulation of the CM doctrine in India.

Naz Foundation v. Government of NCT of Delhi and Ors., at High Court of Delhi at New Delhi, India.

Naz Foundation, an NGO working in the field of public health filed a writ petition before the High Court of Delhi In 2001 challenging the constitutionality of Section 377 of the *Indian Penal Code*. This section criminalizes as "unnatural offenses" consensual oral and anal sex between adults in private. The petitioner sought to declare Section 377 as an infringement of the fundamental rights guaranteed under the *Constitution of India.*

In 2004, the High Court dismissed the writ petition observing that it was an academic question. The petitioner filed an appeal before the Supreme Court. The apex court remanded the matter to the High Court of Delhi for rehearing. The respondent, the Union of India, was represented by different ministries. There was a split of submissions between the Ministry of Home Affairs and the Ministry of Health & Family Welfare. The Ministry of Health & Family Welfare argued in favor of the petitioners. The Ministry of Home Affairs opposed the petition on the grounds of protection of health and morals. It further argued that India was a more conservative society than other countries that had decriminalized homosexual conduct and that Indian society had yet to demonstrate "readiness or willingness to show greater tolerance".

After going through the arguments, the High Court passed judgment in favor of the petitioner and decriminalized homosexuality for adults in private. The High Court invoked the concept of constitutional morality as separate from popular morality to justify its decision.

The relevant extract from the judgment is placed under:

> *"79. Thus popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21. Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality."*[29]

Thus, the High Court viewed Constitution as having certain values which ought to be protected. Though, nowhere in the judgment, the Court specified those values as bedrock of the Constitutional morality. But, its indication is that protecting the individual's fundamental right to dignity and privacy is one of the constitutional morals. This has been lucidly summed up in para 86 of the judgment:

> *"86…Moral indignation, howsoever strong, is not a valid basis for overriding individuals fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view."*[30]

Navtez Singh Johar case: Constitutional Morality before Supreme Court

The judgment of the High Court of Delhi in the Naz Foundation case was challenged through an appeal before a two-judge bench in the apex court. The bench reversed the judgment of the Delhi High Court in *Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors*.[31] Then, Navtej Singh Johar filed a writ before a three-judge bench of the Hon'ble Supreme Court in 2016. A larger five-judge bench of the Supreme Court was later constituted to reconsider its reversal of Naz. The Court agreed and finally confirmed the decriminalization of consensual same-sex sexual activity. The Court referred to the judgment of the Constitutional Court of South Africa in National Coalition for Gay and Lesbian Equality & Anr. v. Minister of Justice & Ors. Dated 9 October 1998 and noted a part of the same in para 44 of the judgment:

> *"44…..subjective notion of public or societal morality which discriminates against LGBT persons, and subjects them to criminal sanction, simply on the basis of an innate characteristic runs counter to the concept of Constitutional morality, and cannot form the basis of a legitimate State interest."*[32]

Once again, the Supreme Court takes recourse to the principle of Constitutional morality to strike down discrimination against the LGBT community in the wake of majoritarian views on public morality. In this judgment, the Supreme Court also delineated the contours of Constitutional morality in para 111 of its judgment:

> *"I. Constitutional morality and Section 377 IPC*
>
> *111. The concept of constitutional morality is not limited to the mere observance of the core principles of constitutionalism as the magnitude and sweep of constitutional morality is not confined to the provisions and literal text which a Constitution contains, rather it embraces within itself virtues of a wide magnitude such as that of ushering a pluralistic and inclusive society, while at the same time adhering to the other principles*

of constitutionalism. It is further the result of embodying constitutional morality that the values of constitutionalism trickle down and percolate through the apparatus of the State for the betterment of each and every individual citizen of the State."[33]

Thus, Constitutional morality has a teleological goal of a pluralistic and inclusive society or pluralistic inclusion. In the Indian context, Constitutional morality is to defend the goals enshrined in the Preamble. The Court thus began to specify the concrete themes within the ambit of Constitutional morality. The Court noted:

"115. The Preambular goals of our Constitution which contain the noble objectives of Justice, Liberty, Equality and Fraternity can only be achieved through the commitment and loyalty of the organs of the State to the principle of constitutional morality."[34]

Further, Constitutional morality has been linked to protecting the basic human rights of not only individuals but also smaller groups. The Court noted:

"121. In this regard, we have to telescopically analyse social morality vis-à-vis constitutional morality. It needs no special emphasis to state that whenever the constitutional courts come across a situation of transgression or dereliction in the sphere of fundamental rights, which are also the basic human rights of a section, howsoever small part of the society, then it is for the constitutional courts to ensure, with the aid of judicial engagement and creativity, that constitutional morality prevails over social morality."[35]

Thus the principles enunciated in the High Court judgment on Naz Foundation were not only reiterated, but also expanded. The Apex court stipulated in clear terms that if the constitutionality of a law is justified on the back of "morality", then that "morality" must be grounded on "constitutional values", not on prevailing (or otherwise) social mores. The Court declared that the constitutional values of liberty and dignity can accept nothing less.[36] Further, the Court added 'autonomy' too as a constitutional value. It observed, "*In a democratic framework governed by the rule of law, the law must be consistent with the constitutional values of liberty, dignity, and autonomy. It cannot be allowed to become a yoke on the full expression of the human personality*."[37]

Thus, Constitutional morality has been characterized as safeguarding the goals of the Preamble as well as basic human rights that includes autonomy and dignity apart from liberty. The backlash from the vanguards of majoritarianism is already in the making. Sabarimala case is keenly contested which will decide the fate of the principles of constitutional morality.

Sabarimala Case:

The matter is three decades old. A petition was filed by S Mahendran in Kerala High Court in 1990 seeking a ban on entry of women inside the Sabarimala temple. The custom followed by the Sabarimala devotees barred the entry of women between the age of 10 and 50 years since they have a menstruation cycle and menstruation is seen as taboo in several societies. The Kerala High Court upheld the restriction on entry of women of certain age inside the shrine of Lord Ayyappa at Sabarimala. Aggrieved, in 2006, a writ petition under Art 32 of the Indian Constitution was filed in the Supreme Court by Indian Young Lawyers praying for entry of women between 10 to 50 years.

Here, two Articles under Fundamental rights are juxtaposed. While the fundamental right of women is covered under Article 25 of the Constitution, Article 26 provides protection for the fundamental right of every" religious denomination" to manage its own affairs. Both rights are subject to restriction over the "public order, morality and health" clause. The Court had to look into whether Article 26 covers the exclusionary custom of the religious denomination. And whether this is an impediment over operation of Article 25 i.e. the women's right to exercise religious freedom. In 2008 after two years, matter was referred to a three-judge bench. In January 2016 Supreme Court of India raised questions against such restriction and said that this is not in accordance with constitutional morality. In April 2016, the Kerala government replied that it is under obligation to protect the right to practice the religion [2] of Sabarimala devotees. In 2017, Supreme Court of India referred the case to a five-judge Constitutional bench. In a 4-1 verdict, the Apex Court ruled vide judgment dated September 28th, 2018 that the custom was unconstitutional as it was against the constitutional morality.[38] Court specified that the term morality under Art 25 means constitutional morality, not societal or individual's morality. When there is a violation of fundamental right the word morality naturally implies constitutional morality. The exact wording of the judgment is placed below:

> *"106. The term "morality" occurring in Article 25(1) of the Constitution cannot be viewed with a narrow lens so as to confine the sphere of definition of morality to what an individual, a section or religious sect may perceive the term to mean. We must remember that when there is a violation of the fundamental rights, the term "morality" naturally implies constitutional morality and any view that is ultimately taken by the Constitutional Courts must be in conformity with the principles and basic tenets of the concept of this constitutional morality that gets support from the Constitution."*[39]

Thus, the Constitutional Bench completely decoupled term "morality" from any customary or societal pretense. Morality is purely secular and carried the values of liberty, equality, justice, dignity, autonomy, and so forth. In a way, it is a complete 180º reversal of the early stage of law when legal was fully subsumed under moral. Moral is to be seen as fully subsumed under constitutionality which is a legal framework. Vide para 107, the Court while citing *Manoj Narula v. UOI* further noted that the Commitment to the Constitution is a facet of constitutional morality.[40] Thus, Constitution has been placed on the pedestal of the divine by a series of judicial pronouncements.

Critique & Concluding Remarks

It is seen that only a few judges have been pushing for applying the principle of constitutional morality. Justice Dipak Mishra and Justice D.P. Chandrachud are major votaries of the principle. Can the principle of supremacy of Preambular values to be protected as per the principle of constitutional morality be sustained under the onslaught of majoritarianism pressure? We have seen in recent months that even Supreme Court judges become targets for cyberbullying, threats, and digital trolling for their observation during the hearing. There is no longer any bar to public criticism and sustained onslaught of character assassination of the judges themselves in the mainstream media, particularly TV News channels which run targeted campaigns against select judges for their espousal of the cause of protection of minority groups' rights. We have seen how in the Sabarimala case judgment, there was a long

dissenting note by Justice Indu Malhotra, who after her retirement is also engaged with the public cause of majoritarianism. This does not forbid well for guarding the high principles of constitutional morality if the higher judiciary themselves get at loggerheads. Then there is criticism of judges themselves for their self-assumed infallible wisdom.

Cass Sunstein notes that Dworkin's "moral reading" crusade aims to turn over to judges, who are not elected, unaccountable, and virtually irremovable, and who, "tend to be relatively well-off lawyers, and are not trained, moral theorists."[41] The untested wisdom of nine 'wise men' who are old cannot become gospel truth for a fast-changing society teaming with young people.

The Supreme Court of India heard a bunch of several petitions seeking a review of its September 2018 judgment in the Sabarimala case that lifted the ban on women aged between 10-50 years from worshipping in the shrine of Ayappa at Sabarimala in Kerala. In its order dated 10 Feb 2020, the Court referred questions on the ambit and scope of religious freedom to a larger bench of nine judges.[42] One of the seven references for the larger bench is with regard to the scope and extent of the word 'morality' under Articles 25 and 26 of the Constitution of India and whether it is meant to include Constitutional morality. The outcome of this hearing will decide the fate of the principle of constitutional morality. Though, the hearing has yet not taken place.

Constitution is a framework to address societal interest. It cannot be a self-generating, self-maintaining autopoietic system, even if it is treated as a living organism in several judicial pronouncements. After total desacralization of law, desocializing law runs counter to basic human needs which always long for transcendental support for its wandering existence for wider meaning in rudderless existence.

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