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**CONSTITUTIONAL MORALITY V. SUBJECTIVE
MORALITY: AN INSIGHT ON THE CONCEPT OF
CONSTITUTIONAL MORALITY WITH
REFERENCE TO SECULARISM AND BASIC
STRUCTURE DOCTRINE.**

Silpa V.R- CSI College for Legal Studies, Kottayam

Constitutional Morality V. Subjective Morality: An Insight on the Concept of Constitutional Morality with Reference to Secularism & Basic Structure Doctrine.

Silpa V.R

The phrase “constitutional morality” existed in the Indian Constitutional scheme since the times of Dr. Ambedkar. According to Dr. Ambedkar¹, Constitutional morality would mean an effective coordination between conflicting interests of different people in the society and the administrative cooperation to resolve them amicably without any confrontation amongst various groups i.e. when there arises a situation of conflicting or contradicting interest of two groups in a society, whose interest is to be protected has to be determined by testing it against the touchstone of constitutional morality. Constitutional morality in its spirit means nothing but adherence to the core principles of the constitution in a democracy i.e. a moral obligation of an individual to uphold the constitutional values with utmost dignity without any compromise and being faithful towards it. The doctrine dwells into the spirit of the constitution wherein both individual and collective interests of the society are satisfied. The term Constitutional morality has often been confused and misunderstood with the concept of popular or social or subjective morality. Subjective morality means that each individual has their own sense of right and wrong. In the matter of religion and faith, the words right and wrong are like two sides of a coin and every individual is bound by the moral values that are cultivated from the family and the society he lives in. What is protected under the Constitution is Constitutional morality and not Subjective morality. To understand the concept of constitutional morality, it is important to analyze

¹ Ambedkar, ‘Speech Delivered on 25 November 1949’ in The Constitution and Constituent Assembly Debates, p. 174

the core constitutional principles that are to be protected. Values like liberty, equality, fraternity recognized in preamble, rights under part III which includes the right against discrimination, right to life, right to equality etc, the tacit ideas of Human Rights which are though not specifically mentioned, however, forms the integral part of one's existence from the essence of morality. These constitutional values in a way form the basic structure of the Constitution which should not be disrupted. Though framers had intended to imbibe the spirit of constitutional morality ever since the Constitution was adopted, constitutional morality gained popularity when the Supreme Court in the *Kesavananda Bharati v. State of Kerala*² laid down the basic structure doctrine. Since then, the Supreme Court has been the interpreter of the Constitution, and the authority of all amendments made by the Parliament. The Supreme Court in a plethora of cases discussed what constitutes basic structure. On analysis of the ratios laid down by the Apex Court, it is inferred that all that has been considered the foundation of constitutional morality is recognized as the basic structure of the constitution. i.e. to uphold constitutional morality is to protect the basic structure of the Indian Constitution

The debate on what constitutes the “basic structure” of the Constitution which was lying uninterested in the archives of Indian Constitutional history gained popularity during the last decade of the 20th century. While setting up the National Commission to review the working of the Constitution, the National Democratic Alliance government stated that the basic structure of the Constitution should not be meddled with. Justice M. N. Venkatachaliah, Chairman of the Commission had focused attention on several occasions on the inquiry into the basic structure of the Constitution which is beyond the scope of the Commission's work. According to the Constitution of India,

² AIR 1973 SC

Parliament and the State legislatures in India have the power to make laws within their respective jurisdictions. This power is not absolute in nature and has to be in such a way that it does not violate the spirit of constitutional morality.

Now the question is who determines what constitutes ‘basic structure’ or what should be the constitutional morality that has to be upheld. The Constitution vests in the judiciary, the power to adjudicate upon the constitutional validity of all enacted laws which are essential³. If a law made by the Parliament or State legislatures violates any provision of the Constitution, the Supreme Court has the power to declare such law as invalid or ultra vires and thus unconstitutional. The framers of the Constitution wanted the Constitution to be an adaptable document rather than a rigid framework for governance. Thus, Parliament was endowed with the power to amend the Constitution and Article 368 of the Constitution gives the impression that Parliament’s amending powers are absolute and encompass all parts of the document. But the Supreme Court had acted as a vigilant umpire to the legislative enthusiasm of Parliament ever since independence. With the intention of preserving the original ideals envisaged by the Constitution makers, the Supreme Court pronounced that Parliament could not destroy, or alter the basic features of the Constitution under the pretext of amending it. The phrase ‘basic structure’ cannot be found in the Constitution itself and the idea is not static, so is constitutional morality. The facets of constitutional morality changes with time but the original principles upon which it is based would be the core constitutional values. It is the duty of the Judiciary to interpret the doctrine in such a way as to fit the changing concept of society. Judiciary has from time to time elaborated the concept of basic structure by adding different constitutional values to the list thereby extending the limits of constitutional morality as well. However, the

³ Surya, Rao Rega, *Lectures on Constitutional Law*: 2nd ed. Hyderabad: Asia Law House, 2016

conflict arises when such added values come in contradiction to the popular sentiments or social morality. Perhaps, when a question arises as to what has to be prioritized, the answer would obviously be the constitutional value and not the popular opinion. One such issue that arose is that of conflict between the core constitutional idea of secularism and the time immemorial custom practised by a certain religion. In *S.R.Bommai v. Union of India*,⁴ the Supreme Court has held that ‘secularism’ is a basic feature of the Constitution. The State treats equally all religions and religious denominations. Every individual has the freedom to profess and practice his own religion, and it cannot be conceded that “if a person is a devout Hindu or a devout Muslim, he ceases to be secular.” Right to profess and practice the religion of one’s choice is their fundamental right. But whether a tradition or custom that has been practised for a long time could overthrow a certain category of people’s fundamental right is a debatable issue. This is in fact a conflict between constitutional morality and subjective morality.

The conflict between constitutional morality and subjective morality mainly arises when it comes to matters of religion. Francis Bacon, in his essay titled ‘Of Unity in Religion’⁵ said that “Religion being the chief band of human society, is a happy thing when itself is well contained within the true band of unity. The quarrels and divisions about religion are evils unknown to the heathens.” Being a secular nation, the Constitution protects each and every religion as equal and without discrimination. Article 15(1)⁴ directs the State not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. The word ‘discrimination’ means to make

⁴ AIR 1994 SC 1918

⁵ Lall, Ramji, *Bacon’s Essays*: 31st ed. New Delhi: Rama Brothers India Pvt. Ltd., 2005.

an adverse distinction from others. If a law makes discrimination on any of the grounds mentioned above, it can be declared as invalid.

In *Indian Young Lawyers Association & Others v. The State of Kerala & Others*⁶, petitioners argued that the practice which has been running for a very long time in Sabarimala violates Article 14(Right to equality), Article 15 (Prohibition of discrimination), Article 17(Untouchability) and Article 25 (Freedom to practice and propagation of religion). The Court observed that religion is a way of life naturally linked to the dignity of an individual and patriarchal practices based on the exclusion of one gender in could not be allowed to infringe the fundamental freedom to practice and profess one's religion as mentioned in the Constitution of India. However, one of issues raised by the Petitioners who wanted to uphold the practice of not allowing women to enter in the temple was that the practice as such form their fundamental right under Art 25. The right guaranteed is not confined to religious belief, but extends to various rituals and ceremonies and modes of worship, which the followers of a particular religion consider necessary and instrumental for the members of their community. Hence, the Court had to interpret in detail the limits and extent of the right guaranteed under Art 25 – 28.

Articles 25 to 28 of the Constitution give a concrete shape to the concept of secularism. However, this freedom of religion is not an absolute freedom but is subject to the regulatory power of the State. Shri.R.Venkataraman, when he was the President of India had rightly remarked about Indian Secularism: “The State is neither religious nor anti- religious. But it is wholly detached from religious dogmas and activities and thus neutral in religious matters.” Jawaharlal Nehru defined the secular State as one in which the state protects all religions but does not favour one at the expense of others and does not

⁶ (2018)SCC Online SC 1690

itself adopt any religion as the state religion. To profess a religion means to declare freely and openly one's faith and belief. 'To practice religion' means to perform the prescribed religious duties, rites and to exhibit his religious belief by such acts as prescribed by the religious order in which one believes. To 'propagate' means to spread and publicize one's religious views for the instruction of others. The right to propagate one's religion does not give a right to convert any person to one's own religion. In the name of religion, no act can be done against public order, morality and health of the society. The Parliament can by law, regulate or restrict any economic, financial, political or other secular activity which is associated with religious practice. The State is entitled to make laws for social welfare and social reform. The State can make laws to eradicate social evils such as Sati, Devadasi system which are practiced in the name of religion. The State in the interest of public order can impose certain restrictions on the freedom of religion. The State is also empowered to compulsorily acquire religious property for the public purpose. The State in the interest of public health and morality has prohibited certain deleterious religious practices for the welfare of the State⁷.

However the concept of constitutional morality is not free from criticisms. As there is no mention of the term 'constitutional morality' in the Constitution and no fixed definition that has been attributed to it, it has been left to discretion of the Court to interpret the essence of this doctrine and apply in requisite situations. This makes it privy to subjective interpretations by individual judges having different perceptions. For instance, in Sabarimala case, the majority opinion held the restriction imposed upon women in age group 10-50 years is against Constitutional Morality while one dissenting opinion found that the "Constitutional morality will require that every single individual would have the right to his own faith and nobody can interfere with it, the courts cannot

⁷ Quoted by Smith D.E, *Nehru and Democracy*, Orient Longmans Pvt. Ltd, 1sted,(1958), p.150.

interfere with what is the matter of faith”. Thus even Constitutional Morality is interpreted by different judges in different way. Also, elaborating the concept in such a way as to violate the popular opinion is often criticized as ‘judicial overreach and hence violating basic tenet of democracy, that is, of separation of power between judiciary, legislature and the executive’. The fluidity of public morality is the essence of a society making moral progress through social evolution. Subsequently, stating that this natural progress should not be overpowered by transformative constitutionalism or constitutional morality acting as top-down doctrines.

Thus the requirement of limiting certain principles for the application of Constitutional Morality cannot be denied. However, the aspect of constitutional morality should not be completely dissolved but rather harmoniously constructed in order for better functioning of the society. A harmony between Constitutional morality and public morality is what is required. The importance of upholding constitutional morality has to be cultivated in the minds of citizens. With regard to protecting the constitutional doctrine of secularism and to implement the ideals and the goals enshrined in the Constitution, the society needs to cooperate with welfare activities without any religious segregation. Religious segregation will affect the entire developmental activities of the State. Thus the importance of the slogan ‘unity in diversity’ comes in vain. The State should be neutral to all religions and promote them owing to the fact that religion plays a prominent role in the cultivation of human behavior that is the backbone of subjective morality. It is understood that the Constitution does not specify which part forms the basic structure. Sabarimala verdict is an example. *Sarva Matha Prarthana*, is a light to brighten the aspect of secularism. A person should understand and give respect to another religion and in that aspect the basic structure and secularist idea will come into effect without any flaw.

Constitutional morality and subjective morality are two aspects which are to be harmoniously interpreted in the light of changing social dimensions.



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