
DEMOCRACY'S DILEMMA: THE PARADOX OF CONSTITUTIONAL MORALITY

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INTRODUCTION

In all **constitutional democracies**, there is tension between codified law and the uncoded values that determine its interpretation and application. Constitutions may give details upon the powers, rights, and structures, but it is the underlying sense of morality, rooted deep within the conscience of the society, that keeps their spirit alive. In India, this tension is particularly stark, where the Constitution is invoked not just as a legal code, but as a source of principle moral guidance in the resolution of intensely disputed social problems. In this context, 'constitutional morality' becomes relevant as not just a phrase for judicial usage, but as the core principle which shapes the democratic rule and constitutional interpretation.

Foundations of Constitutional Morality: Grote to Ambedkar

Among the makers of the Constitution, Dr. Ambedkar's idea of constitutional morality was such that in his speech before the constituent assembly, quoting George Grote explained how, despite such a lengthy draft of the Constitution, it can be subverted if those implementing it lack morality. Alongside, he also emphasized that it was possible to pervert the Constitution without changing the form of it, which would be by merely changing the form of administration. The person whom Dr. Ambedkar quoted, **George Grote**, is credited to have originally used the expression "constitutional morality" in a volume published, 'A History of Greece'. When he propounded the theory, his idea was that a constitution was necessary to hinder the passionate attachment of citizenry and generate goodwill as an attempt to prevent despots and oligarchs rise in power. While as for the constitutional morality, he contended that it was necessary for leading ambitious men to imbibe this rare and difficult sentiment, which was understood to be a consonance of freedom and self-restraint.

Basically, it was obedience to authority who had in a way unmeasured overreach of authority. Now, while it may appear so prima facie, the idea of constitutional morality does not fall in

complete contrast with A. V. Dicey's Rule of Law, 1883, which stood upon the equality before law, the opportunity of land, and predominance of legal spirit as pillars. This morality is rather **complementary to the rule of law**, except in fact taking the broader stand encompassing the spirit and ethos of the constitution, necessary for the pragmatic application of substantive principles of law.

OBJECTIVES

Let's understand various aspects with which we can study the concept:-

1. Be it with respect to the concept of public and constitutional morality.
2. the double-edged nature of constitutional morality.
3. understanding the risk of judicial moralism and its implication on the image of law.
4. democratizing morality.

CONSTITUTIONAL MORALITY AND PUBLIC MORALITY:

CROSSROADS

Constitutional morality has never had a clear definition that could be absolutely upheld by all. In fact, our understanding of constitutional morality has evolved with every new era, thought, and administrative arrangement. It with respect to our Indian Constitution and its implementation is considered to be Dr. Ambedkar's brainchild. He saw it as the way of balancing and limiting the legislative authorities with the parliament as an attempt **to safeguard democracy**. But yet, we did not observe its direct explicit usage in the judicial set-outs except for mere mentions in cases such as the Kesavananda Bharati case or S. P. Gupta case. But much later, that legitimacy was fulfilled by the judgment set out by the Supreme Court more specifically post-2014 when a number of cases referred and relied on the principle.

What constitutes constitutional morality, and how does it evolve across time and institutions? So, if we try to disintegrate the elements that form constitutional morality, we will find **two basic aspects** which are, first, stemming from the ideas and principles laid down, or which are there by way of constitution being the **grundnorm**. Second, the **change occurs based on the needs** of present-day society. Therefore, we can say that the need for invoking

such principles could occur when the constitution is silent on something, or there is a need for constitutional interpretation.

Can a pluralistic society afford a uniform public morality without endangering rights?

While as for the public or social morality, it includes shared societal values and norms. They are guides for how to behave in the culture and to establish the contrast in the beginning itself, many debates internationally - in US, around the school prayers or abortion laws while in India, reaction to judicial precedents like that of Sabarimala temple of 2019 or the marriage equality case of 2023, goes on to show how public morality often resists court-enforced values. As studied by philosophers for eternity, now it is a complex tapestry of a group's psychology, anthropology, sociology, ethics, and more. Since it is quite group-specific, be it culturally, geographically, or otherwise, there are chances for it to be invading or infringing on someone's fundamental rights, which could be by way of deterrence, devoid, obligation, etc. That does form a matter of concern, but does that mean we can go to the extent of eradicating such the whole concept of morality socially. The answer to that in general would be in negative, given it is like an institution weaved to us that tells us to care, to share and to be able to do more.

Imagine a woman denied entry to a temple, a priest defending tradition, and a judge interpreting equality. Whose morality wins and who decides? In such a scenario where one community or the public adheres to one particular social norm to the extent that it goes on to traumatize the minority group, presence of which could have been there forever or it could have been sprung up with changing times, if there is no statute to safeguard, then the judiciary must step in to strike a balance. Supporting this idea, Justice D.Y. Chandrachud said in the case of Sabarimala Temple in 2019, "The exclusion was contrary to constitutional morality and ... notions of 'purity and pollution', which stigmatise individuals, have no place in a constitutional order."¹ The direct inference of it is that the constitution must have a conscience and the constitutional morality balances popular will and center majoritarian values. It protects against tyranny of the majority.

DOUBLE-EDGED CONSTITUTIONAL MORALITY: DEMOCRATIC SHIELD OR SILENT IMPOSITION

Constitutional morality, as we perceive from various debates and what Dr. Ambedkar also

¹ "Gender & the Holy: Women at the Sabarimala Temple" (2024) *Frontline* (The Hindu Group Publications) <https://frontline.thehindu.com/social-issues/gender/article25166412.ece> [last accessed 23 June 2025].

mentioned in the speeches before the Constituent Assembly, we understand that constitutional morality is tasked with safeguarding democracy in a way and in a more specific sense, it is also a guardian of individual rights over majoritarian belief. But constitutional morality walks a steep, precarious path wherein its very strength which is, to be able to override and counter unjust social norms, also becomes its weakness, especially when exercised in isolation. This is when what is meant to be a principled check upon the social norms in question, ends up being a moral imposition. And in such cases wherein there is absolute rewriting of societal norms, beliefs or codes, without public consultation, without discussions or public readiness, it leads to resistance, resentment, or even, in a way, hollow implementation. This is where we find constitutional morality becoming double-edged since, as it affirms rights but also risks its own social legitimacy.

Sabarimala: Equality Meets Resistance

When Constitutional Morality Collides with Cultural Sentiment, in the same case of Sabarimala Temple², or as many allege that the judgement literally ignored cultural autonomy, it was met with mass resistance. But *Did the judiciary anticipate social consequences, or was it operating in a moral vacuum?* Since as a consequence, above all, there was a sense of insecurity in public, regarding the inference of judiciary with their woke morality into people's peculiar and contextual norms.

Joseph Shine: Autonomy vs. Moral Consensus

Can a liberal reading of marriage override culturally rooted moral agreements between partners?

In the case of Joseph Shine³, where infidelity was decriminalized, the institution of marriage was also viewed through a liberal lens. The interpretation of the court was valid indeed, especially with respect to the gender equality aspect of it, but it did render the idea that any kind of moral regulation in marriage, even those which have been agreed upon consensually, are in fact oppressive, thereby being inconsiderate of the possibility that some people might

² *Indian Young Lawyers Association v. State of Kerala*, (2018) 11 SCC 1

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

⁴ (4) AIR BOM R 58

value fidelity as shared moral commitment. It did not just give a decision as per the law, but also let down its attempt of changing the whole public view itself around marriage.

Naz & Navtej: Constitutional Morality at its Best

Unlike others, the case of Naz Foundation v. NCT Delhi⁴ wherein homosexuality was decriminalized, the public morality dictated that homosexuality is sinful and contended that it is unacceptable. The court went against the public sentiment and did the right thing, thus putting individuals right first over public morality. Same was led forth in the Navtej Singh Johar case⁵ of 2018 - "Social morality cannot be used to violate the fundamental rights of even a single individual." which clearly reflects that such conflict of constitutional morality with social morality is well justified, necessary and constitutionally inevitable.

This reaffirms the Rawlsian ideal that justice must be assessed from the standpoint of the least advantaged. It can be contended without conflict that constitutional morality must sometimes stand in adherence with the constitutional provisions against what is socially acceptable or simply socially moral because the constitution doesn't in its design protect just the popular or just the common believers. It protects all even those who are marginalized, even those who are the minorities. The above cases discussed reflect, show us that conflict is not always dangerous. Sometimes it does try to change the view of people completely in a way that can be termed as excessive interference, while otherwise, it's simply a mark of progress and adaptability.

JUDICIAL MORALISM AND THE RISK OF OVERREACH

It is when the judges impose moral standards through legal decisions, the same falling beyond their legal duty, such perspective is called **Judicial Moralism**. Usually the Judicial Moralism revolves around not those moral norms which have a harm attached to them.

Rather, it is concerned with reinforcing moral disapproval.

There could be **two variants** of such moralism, one being such that It criminalizes anything that is immoral and the second being fundamentally balanced, like those under the ambit of

⁵ *Navtej Singh Johar & Ors. v. Union of India*, Writ Petition (Criminal) No. 76 of 2016, AIR 2018 SC 4321

constitutional principles.

The Judge's Dilemma: Moral Lens or Legal Boundaries?

Looking at this stream of ideas wherein judges do not base their decisions entirely on just law rather they subject it to the moral worldview, this ideology implies that law is not morally neutral and that is where we find ourselves walking into a room full of debaters who would not only debate upon whether rules can be made for moral purposes or rules can be made to reinforce what is so moral in the society, but rather on a broader note specifying if it is plausible for someone to **determine morality in society with the 'correct' lens**. With such a view being accepted or followed in the judicial system, one can only wonder as to the ambiguities it may bring forth, starting with **one's personal biases** itself. Can any judge claim moral neutrality, and if not, how do we guard against subjective overreach? That is to say, if the justice was to be determined by *what judges have had for breakfast*⁶, then the whole integrity of the system of justice falls at stake.

Hart vs. Fuller: A Battle for Law's Moral Core

If we look back in time, there have been two schools of thought who have debated upon the same matter, namely the legal positivist view and the other one being moralistic or natural law view, with one of the popular debates being **the Hart-Fuller debate**⁷.

Aspect	H.L.A. Hart (Under Legal Positivism)	Lon L. Fuller (Under Natural Law Theory)
Nature of Law	Law is a system of rules created through proper procedures.	Law must conform to fundamental moral principles to be valid.
Law–Morality Relationship	Law and morality are separate ; law can be immoral yet valid.	Law and morality are interconnected ; immoral law is not truly law.

⁶ Dan Priel, 'Law Is What the Judge Had for Breakfast: A Brief History of an Unpalatable Idea', (2020) 68(3) Buffalo Law Review 899.

https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=3869&context=scholarly_works

⁷ Benjamin C. Zipursky, "Practical Positivism versus Practical Perfectionism: The Hart-Fuller Debate at Fifty" (2008) 83(4) *New York University Law Review* 1140.

Core Idea	"What the law is" is not the same as "what it ought to be."	Law must uphold inner moral values like justice and fairness.
Judicial Role	Judges should apply law as it is and declare openly when creating new law.	Judges should interpret and apply law in line with moral values.
Example Case	Supported a clear distinction in the Grudge Informer case: immoral laws still count as law.	Opposed validating immoral laws (e.g., Nazi laws); such laws lack legal legitimacy.
View on Legal Certainty	Emphasizes clarity, predictability, and procedural validity.	Emphasizes coherence, purpose, and moral integrity of law.
Critique of Opponent	Fuller's theory invites subjectivity and moral disagreement.	Hart's theory allows unjust laws and legal obedience without conscience.

Law, Morality, and the Nazi Question

Such debates have time and again underlined the unpredictable and ever-changing nature of morality. Thus, if law or rules were to be based on morality, it would **render law uncertain**. Thus, in a way, taking us back in time to Hobbes' havoc. But there is also weightage in support of moralism, the most prominent example that's given is of the **Nazi legal orders**. They were morally bad, but they were still law. Had there been moral surveillance, there would not have been such atrocities. Those who support moralism also support the contention that legal decisions should serve justice and not be mere rule-following.

“Morality as a Guiding Light, not a Commanding Force”

As Ronald Dworkin puts forth his ideas in this regard, he argues that *law is interpretive asserting to the believes that judicial moral reasoning is legitimate and necessary, but must be principled and not personal*⁸. Although at the same time, it can simply lead to **overreach** and **unjust moral pressure**, wherein an individual is pressured by moralism beyond obligation, which leads to turning of **law into moral tyranny**. Such was perceived to be the

⁸ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 225–228.

case of **Dobbs v. Jackson**⁹, which overturned the landmark case of *Roe v. Wade*¹⁰, putting forth a pro-life stance. This goes on to show that morality is a **fluid concept**. It can transform societies into better ones, but then when the common moral standards have not yet progressed as the other aspects of law, then it may cause such bizarre and **regressive outcomes**.

The Fragility of Morality Without Consensus

And at the same time, it can also be perceived that *morality without consensus can collapse under a backlash* and thereby unchecked judicial power, even for meeting moral ends can **strip people of their trust** in the judicial system itself. Therefore, it can undoubtedly be said that moral policing by authorities without democratic anchoring is inherently unstable. Above all, *Can law ever be moral if its morality alienates the very people it seeks to protect?*

NEGOTIATING MORALITY IN DEMOCRATIC ETHOS

Since we have understood by now that constitutional morality in a democracy like India, if imposed in a declaratory way, it will result in an unstable situation, Thus we can say that Constitutional Morality must be Dialogic. Authenticity should emerge from Democratic Debate, Public Participation and Reasoning instead of the Bench Proclamation.

The judiciary may spark reform, but can it own morality?

The Court upon imposing a moral standard or shifting the moral viewpoint of people can initiate the conversation. But if they contend to own it or if they pass the decision in pursuance of a moral viewpoint and seek for its imposition on a wider lot, then it will be faced with backlash and no true effect of the decision on the ground would be seen.

Legislatures Must Reclaim Moral Leadership

By way of the Constitution itself, the judiciary is not to solve these issues in isolation, the Parliament, the Legislature, must take moral ownership as well, and legislate with courage. A

Member of Parliament, a social activist, a judge, and a devotee walk into the Sabarimala debate. What does each value more, faith, law, reform, or community? It clearly reflects the

⁹ 597 U.S. 215 (2022)

¹⁰ 410 U.S. 113 (1973)

need for striking a balance in this regard and if the Parliament does not speak up, it being a democratically elected set of individuals, then the courts will. And thus leading to the consequences devoid of people's acceptance, since the courts are not bound by electoral consequences.

Interpretive Humility, Not Moral Absolutism

While discussing Judicial Moralism, we have understood how solely relying on moral principles can be difficult and in fact dangerous for a constitution-based democracy like ours. Therefore, judges, by that reasoning, must not uphold the position of moral prophets, rather, they should be positioned, poised as guardians of the constitutional process. There should be interpretive humility which demands that they facilitate such democratic development of morality instead of overriding it. The decisions, and by the way of those decisions, the moral voice of the court is stern and must be firm, but not final in a way that it creates a sense of distrust and distance in public.

The Risk of Power Without Accountability

A similar concern was raised by the Attorney General of India, KK Venugopal, when he warned courts upon their frequent moral interventions, highlighting the risk of them turning into '*the third chamber of parliament*'.¹¹ He didn't just show his concern over the boundaries of separation of power getting vague, but also upon The risk that comes with power concentration in an authority without as much accountability, the risk of moralism losing its legitimacy.

Morality Must Grow, Not Be Imposed

Another aspect of this is that when liberal ethics is imposed in a society from above via judicial dissidence, it often may lead to prematurely cutting down the society of its eventual growth. When cultural changes occur in their natural habitat in a slow manner, one doesn't have to make people welcoming of the new idea because they themselves gradually start to adapt to it. There is no external active effort needed. But in this case, when it is the judiciary that is putting forth the moral liberal thing, there is a huge need of making people welcome or making people

¹¹ K.K. Venugopal, *Second J. Dadachanji Memorial Debate*, New Delhi (9 Dec 2018) (Attorney General speaking in personal capacity), quoted in "*Use of constitutional morality may lead SC to become third chamber of Parliament*", *Mint*, 9 Dec 2018.

aware or making people sensitized about the issue. And even then, it cannot flourish from above. It must be cultivated from below.

Social Morality Needs Engagement, Not Erasure

If we discuss balancing social morality, like in the case of Sabarimala conflict, its application could have been a lot smoother had the decision been through engagement and not erasure of a certain practice. In a democracy, we are required to negotiate morality, although not accept it when it harms the other person's right, but in a way that the correctness is not imposed on their faces, rather it is settled into among the people. This could be supported by Michael Walzer's theory which suggests that *moral transformation requires "thick" community engagement and not thin legal abstraction*¹².

Thus, in this debate between populism and principles, the populist sentiment often demands quick-fix judgments, wherein they demand for bans, by-calls, punishments, but constitutional morality is in itself such a balanced regime when practiced correctly, it resists such impulses. It is promoted for courts and governments to withstand public pressure when it threatens rights, but that resistance must be extendable, reasoned, and accountable. rather than being veiled in authoritative detachment. After all, The objective in nexus with which a verdict, rule, or a law is enforced can only be achieved in its highest potential, if people have personal acceptance for it.

Therefore, constitutional morality in fairness necessitates that it be shared and not clutched.

CONCLUSION: JUDGING WITH CONSCIENCE, GOVERNING WITH CONSENSUS

The paradox of constitutional morality in a democracy lies in its simultaneous promise of justice and the risk of judicial overreach. While it serves as a safeguard against majoritarian excesses and protects the rights of the marginalized, its power becomes questionable when morality is declared from the bench rather than developed through collective democratic engagement. This dilemma cannot be termed as a flaw, it is rather an inherent tension in any democratic governance that lies between principle and process, urgency and patience, and

¹² Michael Walzer, *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, 1994).

leadership and listening.

In a functional democracy, the system cannot afford to invoke complete legal realism and nor absolute legal positivism. As discussed above, when courts step into moral arenas left vacant by a hesitant legislature, they may lead to change but in that course, if they dominate the conversation, it will be deemed to be done at the cost of legitimacy resulting in a place of isolation for the very public they seek to uplift. The doctrine of Constitutional morality, therefore, shall not be taken to be of static character under judicial monopoly. It must be dialogic, evolving not just through judgments, but through democratic consensus and cultural reflection.

We understand that democracy's strength lies not in suppressing this paradox, but in learning to negotiate the way through it. Which ought to be achieved with caution, humility, and a shared commitment to both justice and participation. The future of constitutional morality will not be shaped solely by courts or codes, but by the ability of a democracy to reflect, reason, and grow together. But at the end, the whole conversation around it boils down to one concern- *As society transforms and courts lead, can the future of constitutional morality remain both principled and plural?*