DOCTRINE OF CONSTITUTIONAL MORALITY: UNEARTHING HISTORICAL, JUDICIAL AND PHILOSOPHICAL ASPECTS

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Abstract

This study is a sincere attempt of the author to analyses the concept of "constitutional morality" in Indian Constitutional Law. The concept of constitutional morality has been developed through judicial innovation and has been subject to criticism and scholarly debate. This study explores the historical, moral, judicial, and philosophical aspects of constitutional morality and presents the author's viewpoints on the matter.

The historical aspect of constitutional morality is examined by referring to the work of George Grote, a British historian who defined constitutional morality in the context of ancient Greece. Grote's definition emphasises reverence for the constitution, obedience to constitutional authorities, freedom to criticise those authorities, and the requirement for authorities to operate within the constitutional framework. The adoption of constitutional morality in India is traced back to Dr. B.R. Ambedkar, who used the concept as a rhetorical technique in the Constituent Assembly to defend the inclusion of administrative details in the Constitution. Ambedkar's vision of constitutional morality did not suggest that courts should disregard popular morality but rather emphasised the need for a balance between constitutional ideals and popular morals.

The judicial aspect of constitutional morality is discussed in relation to court decisions, such as the *Naz Foundation* case and the *Navtej Singh Johar* case, where the Supreme Court emphasized the importance of constitutional morality over popular morality. The court's role as a counter-majoritarian institution is highlighted, with a focus on ensuring that constitutional ideals prevail over shifting societal values.

The paper concludes by presenting the author's perspectives on constitutional morality, acknowledging the ongoing debates and the need for a careful balance between constitutional principles and societal norms. The study sheds light on the multifaceted nature of constitutional morality and its significance in Indian constitutional law.

Keywords: Constitutional Morality, Constitution of India, Jurisprudence, Grote, Ambedkar

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INTRODUCTION

Judicially created tests are not uncommon in Indian Constitutional Law. Multifarious tests such as the "basic structure" concept, "intelligible differentia" test, the "classification test," the old "arbitrariness" and new "manifest arbitrariness" tests are all judicial innovations with no clear reference in formal constitutional language. Constitutional morality is a completely new evolutionary addition to this aforesaid collection of the judge-made inventions. It was heavily criticised following the *Sabarimala decision* by the Hon'ble Supreme Court of India.[1] It became the topic of intense scholarly debate, especially when the Attorney General of India, K.K. Venugopal, was widely quoted in the press as calling it a "*dangerous weapon*."[2] Recently, the Hon'ble Supreme Court appears to have grown sceptical of its application. "Constitutional morality" was conspicuously absent from the Supreme Court's succession of key judgements including issues as diverse as *Ayodhya*,[3] *Rafale*,[4] *the Right to Information Act*,[5] and *the Finance Act*.[6]

The responsibility of defining Constitutional morality was recently delegated to a Supreme Court bench of seven judges by the Hon'ble Apex Court. At various moments in history, the constitutional morality has meant different things. It implied a "*culture of veneration for the constitution among the people*," according to George Grote, a 19th century British historian of Greece. Dr. B.R. Ambedkar used it as a rhetorical technique in the Constituent Assembly so as to defend the inclusion of "prosaic elements" in the Constitution of India – specifics about administrative affairs. In succeeding years, the Hon'ble Supreme Court made incidental allusions to "constitutional morality" in various settings in its decisions. Today, as per Dr. Abhinav Chandrachud, the constitutional morality refers to two things:

"*first, the polar opposite of popular morality, and second, the spirit or substance of the Constitution*."[7]

Perhaps, it was the Hon'ble Delhi High Court's Chief Justice A.P. Shah who first utilised "constitutional morality" as a counterpoint to "popular morality." Constitutional morality in this form compels courts to reject social values when determining the legality of government action. For example, in determining the constitutionality of Section 377 of the Indian Penal Code,[8] which made "*carnal intercourse against the order of nature*" a criminal offence, the Delhi High Court looked at the values of the Constitution rather than popular morals or whether homosexuality was desirable or not in Indian society.

In his decision in the *NCT of Delhi*,[9] the Chief Justice Dipak Misra equated constitutional morality with the Constitution's spirit, soul, or conscience. Constitutional morality is a second basic structural notion in this formulation. It allows courts to examine government behaviour not just in terms of the formal provisions of the Constitution, but also in terms of its undefined spirit or essence. For example, while the preamble to the Constitution refers to India as a secular republic, the Constitution lacks a "*establishment clause*" equivalent to the first amendment to the United States Constitution. In other words, there is no clause in the Indian Constitution that specifically prohibits an official state religion, as even countries with established religions, such as the United Kingdom, can be secular.

In a concurring opinion in *the NCT of Delhi case*,[10] one judge stated that secularism is a component of "constitutional morality." Theoretically, this would allow courts to use establishment-clause-like jurisprudence in Indian Constitutional Law. The basic structure concept allows constitutional courts

[1] Indian Young Lawyers Association v. State of Kerala, (2018) SCC Online SC 1690.

[2] Apoorva Mandhani, "Constitutional Morality A Dangerous Weapon, It Will Die With Its Birth: KK Venugopal," LIVE LAW (Dec. 09, 2018, 07:14 PM), https://www.livelaw.in/constitutional-morality-a-dangerous-weapon-it-will-die-with-its-birth-kk-venugopal/.

[3] M. Siddiq v. Mahant Suresh Das, Civil Appeal Nos. 10866-10867 of 2010, judgment dated 9 November 2019.

[4] 6 Yashwant Sinha v. Central Bureau of Investigation, Review Petition (Crl.) No. 46 of 2019, judgment dated 14 November 2019.

[5] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Agarwal, Civil Appeal No. 10044 of 2010, judgment dated 13 November 2019.

[6] Rojer Mathew v. South Indian Bank, Civil Appeal No. 8588 of 2019, judgment dated 13 November 2019.

[7] Dr. Abhinav Chandrachud, "The Many Meanings of Constitutional Morality," https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521665 (last visited Jul. 04, 2023).

[8] The Indian Penal Code, 1860 § 377.

[9] (2018) 8 SCC 501.

[10] *Id.*

to determine whether constitutional changes contradict the "basic structure" of the Constitution. Similarly, constitutional morality, in its spirit-of-the-Constitution articulation, empowers "constitutional courts" to review the legitimacy of all the government activities, not only constitutional amendments, by looking at the Constitution's "spirit", "soul", or "conscience".

This study analyses the "constitutional morality" in the context of Indian constitutional law. It sheds light on the historical, moral, judicial and philosophical aspects that concern this doctrine and concludes with some author's viewpoints.

HISTORICAL ASPECT VIS-À-VIS GROTE'S UNDERSTANDING

Without ever visiting Greece, a British historian named George Grote authored an official 12-Volume history of the nation in the nineteenth century. We are mentioning of the period, when the British historians were not uncommon in doing so. For example, in the early nineteenth century, James Mill produced a three-volume history of India despite never having visited the country. Grote wrote about the "Cleisthenes of Athens," a statesman regarded as the father of Athenian democracy, in the fourth book of his dissertation on Greece. Grote claimed that "*the great Athenian nobles had yet to learn the lesson of respect for any Constitution*" during Cleisthenes' time.[11]

Contemporaries of Cleisthenes would follow their own merciless desires "*without regard to the limits imposed by law.*" Cleisthenes had to instill a "*passionate attachment*" to the Constitution among Athenians in order to maintain Athenian democracy. Grote stated that it was required to "*create in the multitude... that rare and difficult sentiment which we may call constitutional morality.*" According to Grote, "constitutional morality" is defined as follows: "*...paramount reverence for the forms of the constitution, enforcing obedience to the authorities acting under and within those 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 be not less sacred in the eyes of his opponents than in his own.*"[12]

According to Grote, "constitutional morality" has existed in England since the 1688 Revolution and in the United States of America since the Civil War.[13] He emphasised that it was not a "*natural sentiment*" and that "*establishing and disseminating [it] among a community, judging by historical experience*," was exceedingly difficult.[14] He also stated that constitutional morality was "*an unavoidable condition of a government that is both free and peaceful.*"[15] Importantly, the concept of "constitutional morality" was not intended to be exploited by institutions such to Cleisthenes' Athens' courts to nullify the will of the democratic majority. Grote said that it was a "sentiment" that had to be "established and diffused" in a society in order for a "free and peaceful" government to be created there.

According to Grote's definition, constitutional morality entailed the following:

(i) All citizens shall have paramount reverence towards the Constitution.
(ii) All citizens would submit to authorities working in accordance with the Constitution.
(iii) All people would have unrestricted freedom to criticise public authorities doing their constitutionally mandated tasks.
(iv) Public authorities would be required to behave within the framework of the Constitution.
(v) Political candidates would respect the Constitution and know that their opponents would do the same.

Grote's concept of constitutional morality, at its core, included a "*coexistence of freedom and self-imposed restraint, - of obedience to authority with unmeasured censure of those who exercise it.*"[16] While citizens would respect the Constitution and obey Constitutional authorities, they would also be allowed to criticise those authorities, and Constitutional officials would be required to operate within the legal boundaries.

HISTORICAL ASPECT VIS-À-VIS AMBEDKAR'S ADOPTION

In 1913, Dr. Bhim Rao Ambedkar enrolled at the Columbia University in New York. Only a year ago, in June 1912, a prominent member of the New

[11] George Grote Esq., Greece (New York: Peter Fenelon Collier, 1899), https://babel.hathitrust.org/cgi/pt?id=hvd.hw20pr&view=1up&seq=7 (last visited Jul. 04, 2023).
[12] *Id.* at p. 154.
[13] *Id.*
[14] *Id.* at p. 155.
[15] *Id.*
[16] *Id.*

York Bar, William D. Guthrie, testified before the Pennsylvania Bar Association on Grote's "constitutional morality." Guthrie bemoaned the "*growing tendency throughout the country to disregard constitutional morality*" at the time, as well as "*impatience with constitutional restraints*" and "*criticism of the courts for refusing to enforce unconstitutional statutes.*" He argued that the "essence" of constitutional morality was "self-imposed restraint" that legislative bodies must practise.[17]

In brief, Guthrie discussed how there was a thirst in the United States at the time for unlimited legislative authority uncontrolled by judicial review. This, he contended, was against the spirit of constitutional morality. Guthrie's statement was quickly read aloud in the United States House of Representatives. In other words, "constitutional morality" was popular in the United States before Ambedkar came. Ambedkar studied "History 121" at Columbia University during the academic year 1914-15, which contained parts of Greek history. It's also plausible that he got upon Grote's work in that course.

Decades later, on November 04, 1948, Ambedkar stood up in India's Constituent Assembly to request that the draught constitution created by the drafting committee be considered by the Constituent Assembly. In his statement in support of the motion, he highlighted why apparently insignificant administrative issues had been inserted into India's Constitution rather than being left to India's parliament to hash out. He began by agreeing that "*administrative details have no place in the Constitution.*" However, he then recalled the above-mentioned line from Grote's dissertation on the history of Greece and stated that it was conceivable to change the Constitution without legally modifying it by changing the nature of its administration. This was due to the fact that "*the form of administration has a close connection with the form of the Constitution*." "*It follows*", he added, "*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.*" He quoted Grote as saying that constitutional morality is not a "*natural sentiment*" and that Indians "*have yet to learn it.*"[18]

"*Democracy in India is only a top-dressing on an Indian soil that is essentially undemocratic*," he remarked.[19] "*It is wiser not to trust the Legislature to prescribe forms of administration in these circumstances,*" he concluded.[20] In other words, Ambedkar's concept of constitutional morality was not intended to be used as a litmus test by courts to invalidate law or government action. Grote's concept of "constitutional morality" was a rhetorical tactic utilised by Ambedkar to argue why seemingly insignificant aspects of government management were included in India's Constitution.

Those who had suffered at the hands of corrupt public authorities, since doing so was "*consistent with constitutional morality.*" These allusions to constitutional morality were too brief and insignificant to constitute a serious explication of the law.

JUDICIAL ASPECT OF CONSTITUTIONAL MORALITY

The Constitutional Morality has time and against used by the Hon'ble High Court and the Apex Court as a Rebuttal to "*Popular Morality*". In the *Naz Foundation v. Government of the National Capital Territory of Delhi*,[21] a case in which the constitutionality of Section 377 of the Indian Penal Code, which made "*carnal intercourse against the order of nature*" a criminal crime, was called into question. The court posed an intriguing question to itself: "*could the impugned provision be sustained because it amounted to enforcing "public morality" which was a "compelling state interest*"?

The court cited a decision by the European Court of Human Rights in *Norris v. Republic of Ireland*, which stated that "*…though members of the public who regard homosexuality as immoral may be shocked, offended, or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal*

[17] "Extension of Remarks of Hon. Marlin E. Olmsted, of Pennsylvania, in the House of Representatives", Jul. 16, 1912, Congressional Record ID: CR-1912-0716 (available on Lexisnexis.com); "Bulletin of the New York County Lawyers Association", Bench and Bar, vol. 2(1), at pp. 31-32 (1912).

[18] "Dr. Ambedkar's Courses at Columbia", available at: http://www.columbia.edu/itc/mealac/pritchett/00ambedkar/timeline/graphics/courses.html (last visited Jul. 07, 2023).

[19] *Id.* at p. 38.

[20] *Id.*

[21] (2009) SCC Online Del 1762.

sanctions when it is consenting adults alone who are involved."[22]

Based on this decision, the Hon'ble Chief Justice A.P. Shah of the Delhi High Court stated that "*popular morality or public disapproval of certain acts is not a valid justification for restriction of fundamental rights under Article 21.*"[23] The court went on to say that, in contrast to constitutional morality, popular morality is "*based on shifting and [subjective] notions of right and wrong.*"[24] It concluded that while considering whether a legislation might be justified for attaining a "compelling state interest," the court must examine constitutional morality rather than popular morality. "*[t]his aspect of constitutional morality was strongly insisted upon by Dr. Ambedkar in the Constituent Assembly*,"[25] the court observed. In other words, Chief Justice Shah envisioned the court as a counter-majoritarian institution in his articulation of constitutional morality. Its goal was to ensure that the Constitution's ideals won out over the majority's flimsy morality. The court could not support an otherwise unlawful statute by claiming that it pleased people's values. The Delhi High Court, however, may have erred in comparing this idea of constitutional morality with Ambedkar's vision of constitutional morality in the Constituent Assembly.

Grote's idea of "constitutional morality" was employed by Ambedkar as a "rhetorical technique" to defend the inclusion of "prosaic elements" in the Indian Constitution. Ambedkar's reference to "constitutional morality" did not suggest that courts should disregard "popular morality" while determining the constitutionality of legislation. Always acting against the popular morality is also likely to undermine the purpose of "constitutional morality" as well as the tenets of the Constitution of India. Ambedkar might have agreed with the Chief Justice Shah that the Constitution must take precedence over "popular morals," but that is not what he meant when he used the word "*constitutional morality*."

Though the Supreme Court overturned the Delhi High Court's decision in the *Naz Foundation case*, it finally won favour with a bigger Supreme Court bench in *Navtej Singh Johar v. Union of India*.[26] Wherein, the Chief Justice Misra, who had previously invoked "constitutional morality" in a different context, concluded that courts must not be "*remotely guided by majoritarian view or popular perception*," but must instead be "*guided by the conception of constitutional morality and not by societal morality.*"[27]

According to Justice Nariman, it is "*not...open for a constitutional court to substitute societal morality for constitutional morality.*"[28] He believed that "social morality" was "inherently subjective" and that morality and crime were not mutually exclusive. "Public morality" was separated from "constitutional morality" by Justice Chandrachud. The former states that "*the conduct of society is determined by popular perceptions existing in society*," whilst the latter states that "*individual rights should not be prejudiced by popular notions of society.*" He discovered that "constitutional morality" "*reflects that the ideal of justice is an overriding factor in the struggle for existence over any other notion of social acceptance.*" Three Justices agreed that the court's objective is to reform society, or to turn public morality into constitutional morality.[29]

In the landmark case of *Joseph Shine v. Union of India*,[30] this notion of constitutional morality as a counterpoint to popular morality was used again. The court was concerned in that case with "*whether Section 497 of the Indian Penal Code was constitutionally legitimate.*" The provision made it a crime for a male to have "*sexual relations with a married woman*," but the married woman was not to be prosecuted as an accomplice. The clause was overturned by the Hon'ble Court. The exemption granted to married women from being penalised as abettors assumed that a woman was a "*victim of being seduced into a sexual relationship*" and had "*no sexual agency.*"[31] He believed that a woman's "purity" and a man's "entitlement" to "her exclusive sexual possession" were "*reflective of the antiquated social and sexual mores of the nineteenth century*," but that "*…. is constitutional morality, not the 'common morality' of the State at any time in history, which must guide the law.*"[32] He went on to say that the constitutionality of criminal legislation "*must not be determined by majoritarian notions of morality that contradict*

[22] 142 Eur. Ct. H.R. (ser. A) (1988) ¶ 46.
[23] (2009) SCC Online Del 1762 ¶ 79.
[24] *Id.*
[25] *Id.*
[26] (2018) 10 SCC 1.
[27] *Id.* ¶ 131.
[28] *Id.* ¶ 351.
[29] *Id.* ¶ 598.
[30] (2019) 3 SCC 39.
[31] *Id.* ¶ 187.
[32] *Id.* ¶143.

constitutional morality." He came to the conclusion that Section 497 deprived a married woman of "*her agency and identity, using the force of law to preserve a patriarchal conception of marriage that is at odds with constitutional morality*."[33] "Criminal law," he said, "*must be consistent with constitutional morality*."[34]

The Supreme Court's judgement in *Navtej Singh Johar's* case was preceded by the verdict in *Independent Thought v. Union of India*.[35] The second exemption to Section 375 of the Indian Penal Code states that a man who has sexual relations with his wife and is at least fifteen years old does not commit rape. The court interpreted the law and determined that sexual intercourse between a man and his wife did not constitute rape if the wife was eighteen or older. The court concluded that "*constitutional morality forbids us from giving an interpretation to Exception 2 to Section 375 IPC that sanctifies a tradition or custom that is no longer sustainable.*"[36]

However, in the case of Independent Thought, the court did not fully apply the notion of constitutional morality as a counterpoise to popular morality. If it had done so, it may have determined that the immunity from rape legislation afforded to married males under the second exception to Section 375 of the Indian Penal Code was utterly opposed to constitutional morals. After example, why should a man who sexually imposes himself on a woman not be called a rapist just because she is his adult wife? However, the court simply weakened the rule and deleted the exception insofar as it related to married males who had sexual relations with their wives under the age of eighteen.

In the Sabarimala case, the Supreme Court considered whether a restriction excluding women between the ages of 10 and 50 from accessing a Hindu shrine was unconstitutional. Articles 25 and 26 of the Constitution, which give the basic rights to profess, practise, and spread religion, to create and maintain religious organisations, and so on, are subject to "morality" among other things. The question was whether the temple access limitation could be justified on the basis of "morality." Chief Justice Misra (together with Justice Khanwilkar) decided that the word "morality" in Articles 25 and 26 of the Constitution must imply constitutional morality, not popular morality.[37]

PHILOSOPHICAL ASPECT BY JUSTICE DY CHANDRACHUD

The Hon'ble Supreme Court was asked in S*tate (NCT of Delhi) v. Union of India* to determine how authority is to be divided between the national government and the provincial government of Delhi under the Constitution. In reaching his conclusions, Chief Justice Dipak Misra appeared to infer, speaking for Justice Sikri, Justice Khanwilkar, and himself, that "constitutional morality" meant the spirit of the Constitution itself – something close to the fundamental structure concept. "*In interpreting the provisions of the Constitution*," Chief Justice Misra remarked, constitutional courts must read the language in the text "*in light of the spirit of the Constitution*."[38] "*Constitutional morality in its strictest sense*," he claimed, "*implies strict and complete adherence to the constitutional principles as enshrined in various sections of the document.*"[39] It requires constitutional officials to "*cultivate and develop a spirit of constitutionalism in which every action they take is governed by and strictly adheres to the basic tenets of the Constitution.*"[40] "Constitutional morality," he said, "*means the morality that is inherent in constitutional norms and the conscience of the Constitution.*" In his concurring opinion, Justice Chandrachud also mentioned constitutional morality in terms of the Constitution's spirit. "Constitutional morality", he argued, "*requires filling in constitutional silences to enhance and complete the spirit of the Constitution.*"[41] "*It specifies norms for institutions to survive*," he continued, "*as well as an expectation of behaviour that meets not just the text but the soul of the Constitution.*"[42] He pointed to the fundamental structure concept and said that secularism was part of the Constitution's basic structure as well as constitutional morality. Justice Chandrachud emphasised this formulation of constitutional morality in his concurring judgement in the *Sabarimala temple case*.[43] He discovered that constitutional morality was anchored in the "four precepts" listed in India's Constitution's Preamble: Justice, Liberty, Equality, and Fraternity. He added the notion of secularism to this. "*These founding principles must govern our constitutional notions*

[33] *Id.* ¶ 218.
[34] *Id.* ¶ 219.
[35] (2017) 10 SCC 800.
[36] *Id.* ¶ 91.
[37] The Constitution of India, 1950, art. 25, 26.
[38] (2018) 8 SCC 501.
[39] *Id.* ¶ 58.
[40] *Id.*
[41] *Id.* ¶ 63.
[42] *Id.* ¶ 302.
[43] Indian Young Lawyers Association v. State of Kerala, (2018) SCC Online SC 1690.

of morality," he argued.[44] He concluded that constitutional morality "*must have a value of permanence which is not subject to the fleeting fancies of every time and age.*"[45]

In *Kantaru Rajeevaru v. Indian Young Lawyers Association*,[46] the Supreme Court resolved to send the subject of how to interpret constitutional morality to a bigger bench of at least seven Supreme Court justices. The term "constitutional morality" had not been defined in the Constitution, and the "*contours of that expression*" needed to be "delineated," according to the court, "*lest it becomes subjective*".[47]

In his dissenting opinion, Justice Nariman, on the other hand, restated the spirit-of-the-Constitution concept of constitutional morality. He discovered that constitutional morality was "*nothing more than the values instilled by the Constitution, which are contained in the Preamble read with various other parts, particularly Parts III and IV thereof.*"[48] He said that it had been clarified in multiple Supreme Court Constitution Bench decisions and had reached the level of stare decisis. This view of constitutional morality is analogous to the fundamental structure doctrine. Textually, there is no limit to the constituent authority of India's Parliament, which can change or repeal any article of the Constitution based on the plain language of the Constitution. However, in the fundamental Structure decision, the Supreme Court ruled that there are implied restrictions on Parliament's ability to change the Constitution, stating that Parliament cannot destroy the "basic structure" of the Constitution. Of course, what comprises the essential framework is open to court judgement throughout time. Similarly, the concept of constitutional morality articulated by the Supreme Court in the NCT of Delhi case and in Justice Chandrachud's concurring judgement in the Sabarimala case postulates that a government's actions can be tested not only by looking at the formal provisions of the Constitution but also by ensuring that they do not violate the Constitution's "spirit", "soul", or "conscience". This definition of constitutional morality, like the fundamental structural test, puts implicit constitutional constraints on the government, anchored in constitutional ideals that judges see as vital to the government's existence.

CONCLUSION

Neither Grote nor Ambedkar intended for courts to employ constitutional morality to determine the legality of government action. It was a goal to them, a desire that citizens would instill a love for the Constitution, making it impossible for the Constitution to be erased by the political powers of the day. According to this interpretation, the defeat dealt to the Indira Gandhi administration by the Janata Party at the conclusion of the Emergency heralded the growth of constitutional morality among the Indian voters. Decades after Ambedkar's November 1948 speech, constitutional morality has meant different things at different times. It has been linked to constitutional conventions, anti-corruption initiatives, equality, and the rule of law. However, two new interpretations of constitutional morality are particularly intriguing.

To begin, constitutional morality is the adversary of popular morality, and it serves as a reminder that while determining constitutional matters, courts must reject popular morals. This is an ordinary proposition in terms of constitutional doctrine. If you told a judge she had to resolve a case according to the law and the Constitution, not the talking heads on television, media commentators, and tabloids, she would answer, "but of course!" There is nothing "dangerous" about this articulation of constitutional morality, in the words of Attorney General Venugopal.

In a democratic system, it is evident that the unelected judiciary possesses institutional authority to make decisions that may contradict the will of the majority. The second aspect of constitutional morality, however, holds greater fascination. It empowers judges to consider the 'spirit,' 'essence,' or 'conscience' of the Constitution when assessing the legality of government actions. Under this perspective, constitutional morality represents another fundamental structural concept, which carries neither more nor less risk than the first aspect. Admittedly, this interpretation of constitutional morality introduces ambiguity and vulnerability to the subjective value preferences and personal inclinations of individual judges. One may wonder, what prevents a court from ruling that communism aligns with the undefined 'spirit' of the Constitution or that the Constitution's essence mandates India to be declared a Hindu state? On the

[44] *Id.* ¶ 189.
[45] *Id.*
[46] Review Petition (Civil) No. 3358 of 2018, majority judgment dated 14 November 2019.
[47] *Id.* ¶ 5(iii).
[48] *Id.* ¶ 19.

other hand, much of constitutional doctrine remains open to interpretation. Terms like 'arbitrariness,' 'manifest arbitrariness,' and 'reasonableness' serve as empty vessels into which judges pour their own notions of what is right and wrong. At a certain level, all constitutional theories lack a definitive foundation; judges' statements occupy constitutional spaces shaped by their own lived experiences. Those who argue against the problematic nature of constitutional morality in this formulation must also challenge theories such as the fundamental structure test, the tests for obvious arbitrariness and reasonableness, as well as other commonly used catchphrases in constitutional law.