

DOCTRINE OF CONSTITUTIONAL MORALITY

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INTRODUCTION

Constitutional morality basically means the adherence to the core principles of the constitution in a democracy. Constitutional morality is not just limited to following the constitutional provisions in their literal sense, but includes a commitment to an inclusive and democratic political process in which both individual and collective interests of the society are satisfied.

The word ‘morality’ has been used only four times in the Indian Constitution (twice in Article 19 and twice in Right to religious Freedom under Article 25 and 26), it continues to be invoked by the courts in many rights claim cases like surrogacy, speech, sexual orientation. The phrase ‘constitutional morality’ has, of late, begun to be widely used. Yet the phrase rarely crops up in discussions around the Constituent Assembly. Of the three or four scattered uses of the phrase, only one reference has any intellectual significance. This is, of course, Ambedkar’s famous invocation of the phrase in his speech ‘*The Draft Constitution*’, delivered on 4 November 1948.

In the context of defending the decision to include the structure of the administration in the Constitution, he quotes at great length the classicist, George Grote. The quotation was 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 ascendance for themselves.*”¹

What did Grote mean by ‘constitutional morality’? Ambedkar quotes Grote again: By constitutional morality, Grote meant that a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal control, and

¹ For easy access to the two Ambedkar speeches referred to in this text, see the selection, *The Constitution and the Constituent Assembly Debates*. Lok Sabha Secretariat, Delhi, 1990, pp. 107-131 and pp. 171-183. The quotation from Grote that Ambedkar uses can be found in a reissue of George Grote, *A History of Greece*. Routledge, London, 2000, p. 93.

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 constitution will not be less sacred in the eyes of his opponents than his own.

In Grote's rendition, 'constitutional morality' had a meaning different from two meanings commonly attributed to the phrase. In contemporary usage, constitutional morality has come to refer to the substantive content of a constitution. To be governed by a constitutional morality is, on this view, to be governed by the substantive moral entailment any constitution carries. For instance, the principle of non-discrimination is often taken to be an element of our modern constitutional morality. In this sense, constitutional morality is the morality of a constitution.

There was a second usage that Ambedkar was more familiar with from its 19th century provenance. In this view, constitutional morality refers to the conventions and protocols that govern decision-making where the constitution vests discretionary power or is silent.

But Grote's use of the term was different from these two uses, and more important for Ambedkar's purposes. Ambedkar was making a series of historical claims about constitutionalism. Like Grote, he had little doubt that constitutional morality was rare. It was not a 'natural sentiment'. The purpose of Grote's *History of Greece* had been, in part, to rescue Athenian democracy from the condescension of its elitist critics like Plato and Thucydides, and argue that Athenian democracy had, even if briefly, achieved elements of a genuine constitutional morality.

For Grote, there were only two other plausible instances of a constitutional morality having been remotely realized: the aristocratic combination of liberty and self-restraint experienced in 1688 in England, and American constitutionalism. All other attempts at enshrining a constitutional morality had grievously foundered. For Ambedkar, this note of historical caution simply added to his worries about India. Democracy in India was only, as he put it, 'top dressing on Indian soil, which is essentially *undemocratic*.'² Our people have 'yet to learn' constitutional morality.

² Ambedkar, 'Speech Delivered on 25 November 1949' in *The Constitution and Constituent Assembly Debates*, p. 174.

THE SCOPE OF CONSTITUTIONAL MORALITY

“The issue of the rights of sweepers and scavengers has never entered the mainstream legal consciousness in the country,” wrote by Upendra Baxi in *Law and Poverty: Critical Essays*. “Nor have the Bar and the Bench, and the mushrooming legal aid and advice programmes shown any awareness of the exploitative conditions of work imposed upon the scavengers and sweepers under the employment of municipal corporations or related local bodies. The exploitative conditions of work constitute governmental defiance of the law and the Constitution, which can be best summed up as a crucial component of overall governmental lawlessness in the country since Independence.”

We struggle against the caricaturing of this extremely stigmatising, violently exploitative and degrading form of forced labour by a government and civil society that showcases empty rhetoric and ceremony around “cleanliness”, while decimating an entire class of citizens through callous neglect with impunity.

There has been a steady rise in deaths of conservancy workers and a steadier normalisation of the risks to life they bear on a daily basis. Why don’t sewer deaths bring the country to a grinding halt, as they should? Will a general strike of all conservancy workers across the country bring the country to its knees? Because then, it will not be a question of prime-time jingles on a clean India; the focus will shift on each of us to take the moral and physical responsibility of cleaning our own sewers and keeping ourselves free of the risk of toxic death.

Article 17 of the Constitution of India states: “Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law.” This is a fundamental right and therefore justiciable and enforceable by courts, which shall call governments to account.

In the year 2009, the Delhi High Court, in *Naz Foundation v. NCT of Delhi*³, invoked Ambedkar’s delineation of constitutional morality in asserting the urgency of decriminalising consensual sexual relations proscribed by Section 377⁴ of the Indian Penal Code. The court

³ WP(C) No.7455/2001

⁴ **Section 377 IPC 1860 - Unnatural offences:** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

cited a second provision as well: Article 15(2)⁵ which prohibits any form of horizontal discrimination drawing again from the experience of untouchability that obstructed the universal use of public places, restaurants, water sources, etc. A five-judge bench of the Supreme Court of India, in *Navtej Singh Johar v. Union of India*, deployed this framework to reaffirm the rights of LGBTQ and all gender non-conforming people to their dignity, life, liberty, and identity.

The genealogy of Ambedkar's signposting of constitutional morality may be traced to the strength of anti-caste resistance and the abolition of untouchability. It is from this context that constitutional wisdom was applied to analogous situations of oppressions based on sexuality. It is time to call the government to account through a recursive method that takes us to the original constitutional proscription of untouchability, armed with the wisdom of the *Navtej Singh Johar* case.

JUDICIAL EMPATHY

The importance of judicial empathy in a violently exclusionary society, the application of the Constitution to lives as lived is an extremely emotional moment. We have people from India's most oppressed castes dying painful deaths without dignity in the sewers of the same city where the court sits. There is neither accountability nor due diligence on the part of the state. The time for the expression of judicial empathy is now. Justice Indu Malhotra's lines in *Johar* are apposite: "History owes an apology to the members of this community and their families, for the delay in providing redressal for the ignominy and ostracism that they have suffered through the centuries."

Given the urgency, with people dying daily despite constitutional and statutory protections, how do we right these historical wrongs, or at least "set the course for the future"? We are all agreed that the *de minimis* approach is bad law — rule by law rather than rule of law, as it should be, to echo Justice D.Y. Chandrachud. The fact that it is still possible for people to be sent into sewers without protection, and to be forced to perform degrading labour is enough for us to sit up and take note. Former Chief Justice of India Dipak Misra set out four cardinal corners of the Constitution: Individual autonomy and liberty; equality sans discrimination;

⁵ **Article 15(2)** - No Indian citizen can be discriminated against on basis of religion, race, caste, sex, place of birth. It states that no citizen shall be denied access to shops, public restaurants, hotels and palaces of public entertainment

recognition of identity with dignity; right to privacy. He also underscored the centrality of fraternity to the constitutional value system. These signposts require us to contemplate and act on the meanings and expressions of “intrinsic dignity” for conservancy workers and safai karamcharis.

PRINCIPLE OF NON-RETROGRESSION

Important for citizen consideration is the fact that the Supreme Court, in deciding on the unconstitutionality of Section 377, recognised that the four corners of the Constitution rest on a social reality steeped in prejudice, stereotypes, parochialism, bigotry, social exclusion, and segregation. If decriminalising “unnatural” sex is one of the “necessary steps on the road to democracy”, abolition of untouchability in all its forms remains an unrealised constitutional right.

The lesson on the importance of intersections in constitutional reasoning today is brought home to us in this case in yet another way. There is recognition by the court that majoritarian governments/sections work hard to keep oppressive structures in place, and that it is the duty of the court to place questions of liberty, equality, and dignity out of the reach of majoritarian impulses. The sanction for manual scavenging lies at the heart of majoritarian mindsets and structures. It is part of an ideological framework that permeates the institutional apparatus of government. If, as Justice Misra observes, “the sustenance of fundamental rights does not require majoritarian sanction”, can we call for some constitutional-procedural deliberation on the “progressive realisation of rights” in this instance? The principle of non-retrogression in the matter of fundamental rights has now been unequivocally stated. But on our streets, we only observe it in the breach especially in the case of manual scavengers.

CONCLUSION

Constitution embodied with the will of the people to govern them is not an end but a means to an end i.e. Justice, Social, Economic and Political, a triune phenomenon inscribed as a pledge in the Preambular glory of our Constitution and the adherence to Constitutional Morality and Judicial Values is inalienable in accomplishing it. Let heaven falls, but justice shall triumph! In the presence of a Constitution embodying every human aspect for safeguarding the

morality of individual and ensuring judicial values, if things go wrong under the Constitution the reason will not be that we had a bad Constitution. What we will have to say is that Man is vile!

The Constitution was made possible by a constitutional morality that was liberal at its core. Not liberal in the eviscerated ideological sense, but in the deeper virtues from which it sprang: an ability to combine individuality with mutual regard, intellectualism with a democratic sensibility, conviction with a sense of fallibility, deliberation with decision, ambition with a commitment to institutions, and hope for a future with due regard for the past and present.