

Let constitutional morality guide judicial independence

BR Ambedkar held that constitutional morality is inherent in the form of the Constitution. Then again, the constitutional form can be perverted

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The jurisprudence developed by the Supreme Court and high courts in the last 50 years has gradually turned the judiciary into a protector of constitutional values. Today, the courts are imbued with, and embedded in, the philosophical foundations of constitutional morality. (HT Archive)

On the occasion of the 77th Constitution Day, Chief Justice of India (CJI) Surya Kant articulated an idea of constitutional morality that is deeply embedded in the Constitution. The view that cultural and civic sentiments support freedom, prompt self-restraint, and secure adherence to constitutional norms and engender respect for institutions beyond legal rules and regulations underpin the original idea of constitutional morality. British historian George Grote first spoke of “constitutional morality”, in his work, *A History of Greece*, describing it as a sentiment underlying written rules, producing the civic consciousness essential for democratic governance.

In 1948, BR Ambedkar, the chief architect of India’s Constitution, held that constitutional morality is inherent in the form of the Constitution. Then again,

the constitutional form can be perverted through maladministration and make it antithetical to the constitutional spirit. Therefore, strict adherence to constitutional morality alone will safeguard democracy from manipulations. In the Constituent Assembly, Ambedkar expressed that even within a constitutional democracy based on the principles of rule of law, power-holders tend to become unaccountable and undermine the values of the Constitution. He held that a pure legalistic approach to constitutional interpretation might be inadequate to protect, preserve, and promote constitutional values. He was aware that constitutional morality engenders a jurisprudential faith in the Constitution. The said faith gives meaning and shape to the promises of liberty, dignity, equality, fraternity, and reasonableness. The judges give the content and context to these promises. Ambedkar's faith in constitutional morality, and his call to transcend ordinary interpretations to protect, preserve, and promote these constitutional values stems from these jurisprudential credos and imaginations in the Constituent Assembly.

Ambedkar was prescient about the challenges ahead. He, therefore, chose to address his fears about the arbitrary exercise of constitutional powers within the idea of constitutional morality. Nearly 25 years after Ambedkar introduced the idea of constitutional morality, the Emergency era (1975–77) witnessed a betrayal of all institutions, including the judiciary. The Supreme Court retreated from its role as a guardian of the Constitution — ruling that the right to life could be suspended during an Emergency (*ADM Jabalpur*). But the silver lining was Justice HR Khanna's lone dissent, in which he asserted that the rule of law exists independent of and beyond the constitutional text — an idea integral to constitutional morality. The Emergency era is a powerful reminder that legality and constitutionality through laws and regulations without moral commitment have the risk of legitimising injustice.

The jurisprudence developed by the Supreme Court and high courts in the last 50 years has gradually turned the judiciary into a protector of constitutional values. Today, the courts are imbued with, and embedded in, the philosophical foundations of constitutional morality. While many injustices remain unaddressed, the judiciary is among the most influential, impactful, and trusted public institutions in the country. The Supreme Court has spearheaded the evolution of many pathbreaking constitutional doctrines and practices — the doctrine of basic structure, invocation of epistolary jurisdiction, liberal interpretation of the rules of standing and the development of public interest litigation as a tool for promoting access to justice. Undoubtedly, constitutional morality is at the heart of this jurisprudential, deontological, and institutional evolution.

The salient feature of constitutional morality is not only constitutional outcomes but also institutional functioning. The CJI, as an individual as much as an institution, has a significant role in developing constitutional morality. Being the “master of roster”, the CJI exercises enormous administrative powers in constituting the benches. Constitutional morality warrants the exercise of these powers in a transparent manner so that the institutional morality of the office

of the CJI is preserved. The current CJI has appealed that constitutional morality should lead to fairness and restraint in judicial administration. The responsibility to sustain constitutional morality is of the Indian judiciary. This can be done through judicial hermeneutics inside the court and juridical governance outside them. The role of the CJI in this essential judicial function is pivotal.

The responsible exercise of the doctrine of constitutional morality will guarantee that courts remain as constitutional interpreters; not moral arbiters. A judiciary committed to constitutional morality is a *sine qua non* of Indian democracy. However, there should be a clear and conscious recognition that not every legal and constitutional issue involves a moral failure of democracy, let alone a betrayal of the Constitution. Constitutional morality helps and guides when there are exceptional circumstances like manifest violations of constitutional rights, procedures, and processes; and when power holders have acted in an irresponsible manner that violates the constitutional promise, despite its legal recognition. Constitutional morality, therefore, is a shield against constitutional injustice, and certainly not a sword for promoting judicial supremacy.

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