

Session 1

Constitutional Morality

Definition of 'Constitutional'

Concise Oxford English Dictionary defines

Constitutional as :

constitutional. **adj.** of, relating to, or in accordance with a constitution.

Definition of 'Morality'

P.Ramanatha Aiyar's The Law Lexicon defines Morality as :

Morality is defined by Paley to be “that science which teaches men their duty, and the reason of it.”

'Morality' means the ideas about right and wrong which are accepted by the right thinking members of the Society as a whole of the country. *Brir Gopal v. State of M.P.*, AIR 1979 MP 173, 181. [M.P. Cooperative Societies Act. S.19 – C (2) and (3)]

Definition of 'Unconstitutional'

Concise Oxford English Dictionary defines

Unconstitutional as :

Unconstitutional. adj. not in accordance with the political constitution or with procedural rules.

Definition of 'Immorality'

Cambridge Dictionary defines Immorality as :

behaviour that is morally wrong, or outside society's standards of what is acceptable.

508 BC - Cleisthenes of Athens reformed the Athenian Constitution and made it democratic.

1846 to 1856 (19th Century) – George Grote, a British historian published 12 volumes titled ‘A History of Greece’. In one of these volumes, Grote while talking about Cleisthenes reforming the Athens Constitution, used the expression ‘Constitutional morality’ and said that a Constitution was necessary to kindle passionate attachment of citizenry and generate goodwill to prevent usurpation of powers of Despots and Oligarchs by force. Grote first propounded the theory that it is necessary to imbibe a rare and difficult sentiment in leading ambitious men and Grote said that this rare and difficult sentiment is constitutional morality. In very simple terms, Grote explained Constitutional Morality as co-existence of freedom and self restraint or in other words, obedience to authority with unmeasured censure of persons exercising authority.

1883 - Albert Venn Dicey and Frederic William Maitland, British Jurists propounded the principle that absent written Constitution, Constitutional morality is Rule of Law.

04.11.1948 – Dr.Ambedkar in his speech before the Constituent Assembly in support of the draft constitution, while explaining why our Constitution is lengthy and as to why administrative details {illustratively Part XIV Services under the Union and the States, Articles 308 to 323} borrowed from the Government of India Act, 1935 have been incorporated in the Constitution, quoted George Grote to explain why all this was necessary. Dr. Ambedkar explained it by saying that the form of administration and form of Constitution are dovetailed and it was possible to pervert the Constitution without changing the form by merely changing the form of administration.

24.04.1973 - Kesavananda Bharati [AIR 1973 SC 1461] - Three out of Thirteen Hon'ble Judges referred to this phrase 'basic structure doctrine itself is relatable to Constitutional morality'. Basic Structure Doctrine propounded in Kesavananda Bharati drew bipolar opposite views from scholars and Jurists. Defenders of the Doctrine like M.P.Jain, S.P.Sathe took the view that Constitutional morality is will of the people and caveat as regards Article 368 by way of limiting the amending powers is Constitutional morality. Opponents like H.M.Seervai and P.K.Tripathi took the view that it is fetters on power to legislate an stifling. Prof.Upendra Baxi later became strong defender of the doctrine. (Paragraphs : 747, 1112, 1423)

Coram : S.M.Sikri, (CJ), J.M.Shelat, K.S.Hegde, A.N.Grover, A.N.Ray, P.Jaganmohan Reddy, D.G.Palekar, H.R.Khanna, K.K.Mathew, M.H.Beg, S.N.Dwivedi, A.K.Mukherjea and Y.V. Chandrachud, JJ.

- **02.07.2009 - 2009 SCC OnLine Del 1762 – Naz Foundation** – Constitutionality of Section 377 (Unnatural offences) was tested and the issue was ***Public morality Vs. Constitutional morality***. [A.P.Shah, CJ and S.Muralidhar J] [Paragraphs 79 to 81, 86 and 87]
- 11.12.2013 – [Suresh Kumar Koushal case (2014) 1 SCC 1] Naz Foundation set aside. [Coram : G.S.Singhvi and S.J.Mukhopadhaya JJ] - Paragraph 11

27.08.2014 – Manoj Narula [(2014) 9 SCC 1] – Supreme Court while considering the scope and purpose of Articles 75 and 164 in the context of permissibility of persons with criminal background being appointed as Ministers of Government, Constitutional morality principle was invoked. [*Coram : R.M.Lodha CJ, Dipak Misra J, Madam B.Lokur J, Kurian Joseph J and S.A.Bobde J*] – Paragraphs 74-76, 96, 97, 99, 138, 139

22.08.2017 – Shayara Bano (Triple Talaq case)
[(2017) 9 SCC 1] – Petitioner did not succeed in putting forth their case against Triple Talaq on the ground of Constitutional morality. [Coram : *J.S.Khehar, CJ, Kurian Joseph J, R.F.Nariman J, U.U.Lalit, J, S.Abdul Nazeer J*] – Paragraph 384.

04.07.2018 – Government of NCT of Delhi [(2018) 8 SCC 501] – It was held that Constitutional morality requires filling in constitutional silences to enhance and complete the spirit of the Constitution. [Coram : *Dipak Misra CJ, Dr.A.K.Sikri J, A.M.Khanwilkar J, Dr.D.Y.Chandrachud J and Ashok Bhushan J*] – Paragraphs : 58 to 63, 290 to 302

06.09.2018 – Navtej Singh Johar case [(2018) 10 SCC 1] – a Larger Constitution Bench again held Section 377 to be unconstitutional.

[Coram : *Dipak Misra CJ, R.F.Nariman J, A.M.Khanwilkar J, Dr.D.Y.Chandrachud J and Indu Malhotra J*] – Paragraphs : 123, 127 to 129, 132, 133, 135, 136, 197, 349, 598, 600 and 601.

27.09.2018 - Joseph Shine case [(2019) 3 SCC 39] - Section 497 which makes adultery a criminal offence was held to be unconstitutional. [Coram : *Dipak Misra CJ, R.F.Nariman J, A.M.Khanwilkar J, Dr.D.Y.Chandrachud J and Indu Malhotra J*] – Paragraph 143

10.02.2020 – R.P.(C)No.3358 of 2018 in W.P.(C) No.373 of 2006 – Kantaru Rajeevaru Vs. Indian Young Lawyers Association – The question is the scope and extent of morality occurring in Articles 25 and 26 of the Indian Constitution is to be decided.

The following issues are framed for consideration by Hon’ble Supreme Court: -

- 1. What is the scope and ambit of right to freedom of religion under Article 25 of the Constitution of India?
- 2. What is the inter-play between the rights of persons under Article 25 of the Constitution of India and rights of religious denomination under Article 26 of the Constitution of India?
- 3. Whether the rights of a religious denomination under Article 26 of the Constitution of India are subject to other provisions of Part III of the Constitution of India apart from public order, morality and health?
- **4. What is the scope and extent of the word ‘morality’ under Articles 25 and 26 of the Constitution of India and whether it is meant to include Constitutional morality?**
- 5. What is the scope and extent of judicial review with regard to a religious practice as referred to in Article 25 of the Constitution of India?
- 6. What is the meaning of expression “Sections of Hindus” occurring in Article 25 (2) (b) of the Constitution of India?
- 7. Whether a person not belonging to a religious denomination or religious group can question a practice of that religious denomination or religious group by filing a PIL?

One Article closest to 'Public morality' is Article 261.

261. Public acts, records and judicial proceedings -

- (1) Full faith and credit shall be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State.
- (2) The manner in which and the conditions under which the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law made by Parliament.
- (3) Final judgments or orders delivered or passed by civil courts in any part of the territory of India shall be capable of execution anywhere within that territory according to law.