

## **EMERGING FACETS OF GENDER JUSTICE IN LIGHT OF HART-DEVLIN DEBATE AND JUDICIAL DECISIONS IN INDIA**

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### ***ABSTRACT***

*In a democratic society, the freedom of expressing viewpoints on any issue is a valuable right in the hands of citizens which helps in the incorporation of diverse thought processes. The term expression is a broader concept which is inclusive of choices an individual has to make concerning different aspects of human life. The freedom isn't absolute as there exist multiple safeguards under the constitutional provisions which restrict the abuse of the right provided to the citizens. Apart from the constitution, different provisions exist under the law which makes acts harming the society punishable offense. There exist a balanced situation where people are allowed to express what they want and at the same time, social harmony is maintained by having some restrictions against freedom given. This balance is disrupted when one section of a society intends to impose their views on the others who have a contrary opinion. Through judicial decisions, the concept of what 'gender' entails is analysed which includes the analysis of right of LGBTQ community and application of constitutional morality in giving women their rights as seen in the Sabrimala judgement. The current article analyses both these concepts by taking into account the Hart vs Devlin debate. In India, there have been few instances in the past where a conflicting situation of popular viewpoint prevailing from a long time duration was challenged as violative of constitutional provisions. This article analyzes those cases and further explains where those judgments stand from the point of the Hart vs. Devlin debate.*

**Key Words:** *Morality, Constitution, Hart, Devlin, Gender justice*

## INTRODUCTION

The term morality comes from the French definition of *bonnesmurs*, which means the degree of adherence to moral values. On the same lines, adherence to the fundamental values of liberal democracy is referred to as constitutional morality in the context of a democratic country like India. Constitutional morality involves effective coordination of competing interests among different groups, as well as administrative cooperation to resolve issues without confrontation.

In conflict with constitutional morality, we see public morality which is what the society conceives moral, may not actually be moral according to constitutional principles. This is the main conflict addressed here, under which the Hart-Devlin debate is analyzed with the judicial interpretation in India about this conflict is seen.

The recent resurgence of common interest in the concept of public morality has resulted in a striking divide of opinion. Some claim that public morality should foster a good society, while others believe it should help in disaster prevention. Although this conflict appears to be little more than a temperamental divide between optimists and pessimists, it represents a profound split in the structure of political action. In our Indian culture, we take it for granted that morality and law are in some way linked. Insofar as it pertains to our public lives, morality is believed to follow legality. We assume that in normal social situations, we should consider a nation's moral principles in its laws. The question is when we consider a nation's moral principles, do we need to see the constitutional morality or the public morality? The answer to this could be found how the judiciary has decided cases when morality perspective also there in some decisions. Also the interface of morality with law in respect of content shown in OTT platforms where on one hand freedom of speech and expression is seen and on other hand moral issues related to such content is seen. Here application of public morality comes and so this becomes important in our analyses of the debate between constitutional morality v public morality.

## **[1] ANALYSING CONSTITUTIONAL MORALITY AND PUBLIC MORALITY**

### **1.1 CONSTITUTIONAL MORALITY**

#### **MEANING**

The term “Constitutional Morality” has not been precisely defined under any law or constitution. It has derived by looking into the provisions of the constitution itself. It is more like a philosophical concept. Grote presented one of the earliest descriptions of constitutional morality, which he described as the supreme obedience to the various aspects of the land's Constitution. The crux of the doctrine of constitutional morality<sup>1</sup> can be represented as a method to maintain the principles and notions propagated by the Constitution in order to uphold the soul of democracy. The constitutional morality reflected here does not represent society's morality in any way; rather, it consists of principles that strive to uphold the Constitution's spirit and fundamentals. Certain aspects of constitutional morality<sup>2</sup> include, but are not limited to, preamble principles, rule of law, legal process, democracy, equality, and so on. This definition lays the groundwork for delving deeper into the logic and principles ingrained in the application of a constitutional clause rather than applying it in its literal sense. The constitution of any nation is enacted to incorporate certain principles that are essential to shaping the overall functioning of the government and nation collectively.

In a democratic nation, there is a significant level of diversification present amongst the members of society in terms of religion, caste, sex, color, language, etc. This gives rise to chances of conflict between different groups which is why morality behind any constitutional provisions is required to be upheld so that there is no such domination of any particular group of people and social functions inclusively. The values that

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<sup>1</sup>The Daily Guardian, <https://theguardian.com/constitutional-morality-versus-public-morality/>. (last visited Apr 1, 2021).

<sup>2</sup>Diva Rai, *Constitutional morality in India: A comment*, Ipleaders, (Apr. 1, 2021), [https://blog.ipleaders.in/constitutional-morality-indiacomment/#Meaning\\_and\\_analysis\\_of\\_constitutional\\_morality](https://blog.ipleaders.in/constitutional-morality-indiacomment/#Meaning_and_analysis_of_constitutional_morality).

constitutional morality intends to maintain are equality, liberty of thoughts, expression, and beliefs of an individual, democratic principles like rule of law, Judiciary's independence, etc. These are the principles that specify the difference between a democratic and conservative nation. The values which are part of constitutional morality intend to be interpreted liberally so that as time progresses, necessary changes can be brought. The Idea behind constitutional morality is to expand cooperation amongst a different section of society. It ensures that society functions as per constitutional provisions rather than popular thought processes and morality.

Constitutional courts have played a massive role in developing the concept of constitutional morality which has eventually lead to necessary reforms. Since the country's Constitution went into effect, judicial institutions have been using this definition. The higher courts use this doctrine to refine current laws to meet the needs of a diverse society.

The Constitution, which expresses the people's will, is not an end in itself, but rather a way to achieve social, economic, and political justice, as the Preamble envisions. The Constitution protects all avenues necessary to achieve the ends of justice; therefore, if the Constitution fails in this endeavour, it would be due to the human beings charged with safeguarding and implementing it, not the Constitution. The Constitution contains a thread of liberal ideals that must be safeguarded, protected, applied, and valued at all times. To perform the duties of a welfare state, the various branches of government at various levels must act quickly and without the interference of the courts.

#### **1.4. PUBLIC MORALITY**

##### **MEANING**

The meaning of public morality is very subjective and it makes it difficult to bring out changes because such a concept merely focuses on what thought process shall be mandatorily observed by the society rather than having inclusive viewpoints of different individuals living in a society. That is public morality entails in a general sense the view of the majority.

Different societies have different ideas about morality, describing the moral universe of crime, culpability, and vice in different ways. So public morality would not have any universal application which is there for constitutional morality, in the sense that some

principles like equality, rule of law, liberty are some basic constitutional ideas that are universal.

## **2. HART-DEVLIN DEBATE AND INTERPRETING IT IN CONSTITUTIONAL AND PUBLIC MORALITY**

Hart Vs Devlin Debate is the result of the Wolfenden Report which was meant to look into the laws regulating sexual behavior of individuals against the same gender.<sup>3</sup> The report was prepared under the committee headed by Sir John Wolfenden. The committee had recommended that in case there is consensual homosexual sexual conduct and such activities are done in the private sphere then it shall amount to criminal punishment against those adults. It was argued that the law should consider only such activities as an offense that has the effect of distorting the public order.<sup>4</sup> The committee intended to have a liberal viewpoint against individual liberty of how they want to express their feelings in a private sphere. The primary goal of law should be to safeguard the public rather than looking into what people are doing in their private lives. The report had resulted in a change in terms of how law used to regulate the sexual preferences of individuals and the UK parliament went on to enact the Sexual Offences Act, 1967.<sup>5</sup> Before this Act was legislated, Society generally viewed homosexuality as against public morality and there should be legal restrictions against such acts.

### **2.1 LORD DEVLIN VIEW:**

Devlin viewed that any society is co-existing together because there are bound to observe certain morals which are essential to maintain the social order. He played down special emphasis on the importance of public morality and stated that any

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<sup>3</sup> Peter Cane, *Taking Law Seriously: Starting Points of the Hart/Devlin Debate*, Vol. 10, *The Journal of ethics*, 21-36, (2006).

<sup>4</sup>Wolfenden report, Thebritish library, Wolfenden Report, 1957, conclusion, <https://www.bl.uk/collection-items/wolfenden-report-conclusion>, (last visited April. 2, 2021).

<sup>5</sup>Sexual Offences Act, 1967, chapter 60, Acts of Parliament, 1967 (United Kingdom) available at [https://www.legislation.gov.uk/ukpga/1967/60/pdfs/ukpga\\_19670060\\_en.pdf](https://www.legislation.gov.uk/ukpga/1967/60/pdfs/ukpga_19670060_en.pdf).

criminal law provision should be enacted in such a manner that it doesn't lead to harm to the moral norms observed by the society collectively. Regarding the meaning of morality, Devlin said that it is of such nature that each & every person having the right mindset will consider it immoral. He stated that it is morality that is the prime reason behind the existence of any society. His approach towards the role of criminal law was such that it should have a restricted reach and law shouldn't become a maximum standard to be maintained by society and it should act as mere guidelines. Public morality has a larger role to regulate how society has to live together. Since such moral norms are collectively observed by society, any changes against how such norms are observed will have an impact on the existence of any society. Devlin also stated that every person living in a society is capable of realizing what be considered moral or immoral. Devlin regarded any liberal approach of law as a threat to public morality and this is why he was against decriminalization of any form of homosexual activity. Law should take into account what is the position of public morality and accordingly legal provisions should be enacted. Such provisions cannot have the contrary meaning of public morality. Law if remains in the form of morally conservative nature, then any society's integration as living together can be maintained. As per Devlin, Marriage is something that keeps society in an integrated form and homosexual acts have the ramification of destroying the structure of the society. He called for strict punishment against anyone who indulges himself in acts that go against the concept of public morality. Since society collectively observes public morality, anyone who fails to observe the same can influence other members of the society to do the same which will eventually lead to the complete disintegration of the society. Morality is a common prospect and there can't be an individualistic approach towards morality. Devlin also commented that instead of any politician or any lawmaker, it is the general public living in society are in a position to have a better understanding of what approach will work for the society and that is why such people can be influenced while regulating anything since they won't be inclined towards going against the majority views.

## **2.2 HART'S VIEWPOINT:**

Hart's thought process was primarily influenced by John Stuart Mill's "No Harm Principle" which stated that only such actions which have effects on other individuals

should be regulated by law. A person is left with the freedom of doing any act which is concerned with him only and society shouldn't interfere against such acts.<sup>6</sup> The extent of freedom was such that any individual may even end up harming himself. Mill under the essay's "On Liberty" described to what extent any society can control any individual's activities. Hart advocated having a liberal approach in determining how society shall be functioning. Society shouldn't collectively impose its viewpoint on an individual and they should have the authority to decide individually about how they want to live in society. Hart argued that change is something which cannot be avoided by any society as time progresses, therefore, it will be wrong to say that there will be a fall of society if any individual has contrary views against what the majority thinks. The nature of morality cannot be of a static form and the level of judging the morality doesn't remain evenly spread across the society.<sup>7</sup> It is better to have a humanitarian approach toward's how an individual want's to express himself rather than forcing him to adhere toward's what is the collective thought process of the society. Hart also stated that any individual cannot completely disassociate from any society and for the existence of any individual he must make himself part of the society. There are some common views and way of living which is observed by any society without any sense of compulsion and threat. However, those views are not meant to make any society's thought process conservative in nature and law can continue to have a liberal approach while considering the manner of regulating any activity.

### **2.3 ANALYSIS OF BOTH VIEWS:**

The interpretation of Devlin's views showcases that if public morality is considered of extreme importance then it will make any society very conservative-minded. The role of law will also decrease and it will lead to a situation where what the majority thinks will only be considered as right or wrong and minority opinion would not be looked

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<sup>6</sup>Melina Constantine Bell, *John Stuart Mill's Harm Principle and Free Speech: Expanding the Notion of Harm*, 33 UTILITAS 162–179 (2021).

<sup>7</sup>Sasha-Nr, *Hart vs Devlin Debate On Enforcement of Moral*, quills for the writing heart jurisprudence, (Apr. 2, 2021), <https://quillsforthewritingheartjurisprudence.blogspot.com/2014/10/hart-vs-devlin-debate-on-enforcement-of.html>.

which would be against constitutional principles. Devlin's views are subjective with a large scope for ambiguity. He stated that whatever right-minded people consider morally right or wrong forms part of public morality, without providing any clarification as to who exactly are these right-minded people, is there any qualification on basis of which one can judge that whether a certain person belongs to the right-minded category of people. There cannot be compulsion on any individual to absolutely agree with whatever thought process prevails in society. If different views are allowed to prevail amongst people in the society, then it will help in incorporating diversity which is also considered as the essence of any democratic society. Hart's approach goes along with inclusive of having different thought processes. He had argued for the liberal nature of law which is an effective mechanism to bring change in society. It is also problematic to think that any society remains in co-existing form only because of shared moral values as advocated by Devlin. There are factors like help doing some act which brings people together to live under a common society.

### **3. CONSTITUTIONAL MORALITY V. PUBLIC MORALITY IN LIGHT OF JUDICIAL DECISIONS IN INDIA AND APPLYING HART-DEVLIN DEBATE TO IT**

Dr. B.R. Ambedkar invented the phrase constitutional morality during one of the Constituent Assembly's debates. The issue that arises in this scenario is what is the meaning of this word in the context of modern India and the judiciary. The principle of constitutional morality was developed in the United States, and it requires judges to behave in a constitutionally moral manner.<sup>8</sup> Constitutional morality is founded on principles such as individual autonomy and liberty, equality without prejudice, recognition of identity with dignity. Adherence to the fundamental values of liberal democracy is referred to as constitutional morality. Keeping this as the base we would be analyzing judicial decisions. Hon'ble Supreme Court of India in past few years dealing with different cases which were directly related to the conflict between public morality and constitutional morality.

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<sup>8</sup>William D. Guthrie, Constitutional Morality, Vol. 196, The North American Review, pp. 154,157 (1912).



### 3.1 INTERPRETING CONSTITUTIONAL MORALITY AND THE QUESTION OF RELIGIOUS FAITH: IN THE LIGHT OF THE SABRIMALA DECISION

The landmark case of the Indian Young Lawyers Association Vs State of Kerala<sup>9</sup> which is popularly referred to as the “Sabrimala Case” dealt with the question of whether the popular faith of people is above the provisions mentioned in the constitution. The case involved a dispute regarding the ban on entry of women in their mensurating age inside the Sabrimala Temple situated in Kerala. The people involved in the management of the temple stated that it has been a century-old practice of restricting the entry of women inside the shrine who are in their mensurational age because it will lead to the impurity of the temple premise. On the opposite side of the temple’s management arguments, Petitioner in the case stated that such restrictive practice is a clear violation of fundamental rights like the Right against discrimination, freedom of religion, abolition of untouchability, right to equality.<sup>10</sup> In this case, religious faith and constitutional provisions clashed<sup>11</sup>, so the doctrine of constitutional morality was developed further. The Supreme Court by a majority of 4:1 held that “ the restriction of entry of women belonging to the specific age group is violative of the constitution”. The Hon'ble court opined that ‘Public morality should not be used to justify the prohibition of women from entering the temple.’The court stated unequivocally that the morality listed in Article 25 is a synonym for constitutional morality. Most notably, it was said that the idea of constitutional morality must have a long-term impact rather than ebbing and flowing with time. The dissenting opinion of Justice Indu Malhotra was that the courts should refrain themselves from interfering in those issues which have their association with widely followed religious sentiments. Concerning Constitutional morality, she said that it is a Secular polity that allows every individual to practice faith to follow their religious principles and it shouldn’t be judged as to whether it illogical or has any rationality behind practicing the particular faith.

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<sup>9</sup>2018 SCC OnLine SC 1690.

<sup>10</sup>*Id.*

<sup>11</sup>Aasheer Pandya, *Decoding Constitutional Morality in the light of Sabrimala Judgement*, legalserviceindia,(Apr. 2, 2021), <http://www.legalserviceindia.com/legal/article-1515-decoding-constitutional-morality-in-the-light-of-sabrimala-judgement.html>.

The Judgment was criticized and subsequently, a review petition<sup>12</sup> was filed. The Court by way of 3:2 majority decided that the review petition involves a larger constitutional question and hence it should be referred to a larger bench.

OPINION: Religious freedom, gender equality, and the right of women to worship were all reinstated in the Supreme Court's Sabarimala ruling. India is a country that has immense diversification in terms of faith and religious practices. These practices are deeply rooted in our society and people have been constantly following the same for centuries. The conflict arises when such practices are required to judge as per the constitutional provisions which bring out an important question i.e Can religious faith be placed above the constitution?. It is largely possible that if the faith of various communities is given priority against the fundamental rights of the constitution, then it will lead to undermining the value of Constitutional morality. It is necessary that in a democratic society, the principles on basis of which the constitution was brought in place are kept higher than what is observed by the general public as part of their religious practice. This standard has to be maintained irrespective of whatever is religion, whether it is of minority or majority community. Sabarimala issue is a classic case regarding the debate of whether public morality or constitutional morality is important where we saw that by allowing entry of women from a particular age group, the judiciary has given precedence to constitutional morality.

### **3.2 NAZ FOUNDATION JUDGMENT CASE STUDY ON THE DISTINCTION BETWEEN PUBLIC AND CONSTITUTIONAL MORALITY**

Constitutional Morality is a philosophy in which morality is seen from the perspective of the Constitution rather than by public morality. In the Naz Foundation case<sup>13</sup>, the constitutional validity of Section 377<sup>14</sup> was in question and Delhi High Court termed the following section as violative of Article 14, 15, and 21 of the constitution. This decision was reversed by the Supreme Court in 2013.<sup>15</sup> The Supreme Court did not recognize constitutional morality, but instead favored public morality and overturned the Delhi High Court's ruling. But then came the landmark decision where again Delhi

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<sup>12</sup>KantaruRajeevaru v. Indian Young Lawyer's Association, 2019 SCC OnLine SC 1461.

<sup>13</sup>Naz Foundation vs. Government (NCT of Delhi) and Others, (2016) 15 SCC 619.

<sup>14</sup> The Indian Penal Code, No. 45 of 1860, INDIA CODE, (1860).

<sup>15</sup> Suresh Kumar Koushal and Ors, v. NAZ Foundation and Ors, AIR2014SC563.

high Court decision was re-established and homosexuality was decriminalized and it was observed that 'insofar as Section 377 criminalizes consensual sexual acts of adults (i.e. persons above the age of 18 years who are competent to consent) in private, it is violative of Articles 14, 15, 19, and 21 of the Constitution.'<sup>16</sup> Here Court talked about the transformative power of the Constitution and observed that 'In addressing LGBT rights, the Constitution speaks-as well-to the rest of society. In recognizing the rights of the LGBT community, the Constitution asserts itself as a text for governance that promotes true equality. It does so by questioning prevailing notions about the dominance of sexes and genders'<sup>17</sup>. This is where Court restores Constitutional Morality which was lost in the previous judgment<sup>18</sup> of the Hon'ble Supreme Court. When they say that Constitution speaks to the rest of society, this is where the debate between constitutional morality and public morality comes into play.

The case's constitutional morality test may be held to more determinable criteria. If the morality of the majority was not enforced on the remaining population, restricting homosexuality would equate to the State regulating external desires and enforcing the majority's religious convictions.

The debate in the Naz Foundation case<sup>19</sup> starts with a mention of the Maneka Gandhi<sup>20</sup> decision's influence on the evolution of Article 21<sup>21</sup> and fundamental rights in general.<sup>22</sup> The Supreme Court recognized the interplay between different constitutional rights in the Maneka Gandhi case and refined it into the clichéd interplay between the trinity of

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<sup>16</sup>Navtej Singh Johar and Ors v. Union of India (UOI) and Ors, AIR2018SC4321.

<sup>17</sup>*Id.*

<sup>18</sup>Suresh Kumar Koushal *supra* note. 17.

<sup>19</sup>*Id.*

<sup>20</sup>Maneka Gandhi v Union of India 1978 AIR 597.

<sup>21</sup>India Const, art 21.

<sup>22</sup>Commonlii.org, <http://www.commonlii.org/in/journals/NUJSLawRw/2009/25.pdf> (last visited Apr 2, 2021).

Articles 14<sup>23</sup>, 19<sup>24</sup>, and 21<sup>25</sup>. As they say, the rest is history. This is the backdrop on which the Navtej Johar case<sup>26</sup> was decided.

In reality, the Naz Foundation case is a step toward identifying a principled basis for distinguishing between various types of morality. There can be another view though unpopular, where we can say that the distinction made by the Naz Foundation between public and constitutional morality is meaningless. The distinction between public and constitutional morality made by the Naz Foundation is simply a distinction between morality that is consistent with the Constitution's principles and morality that is not. The core of Rawls' or Dworkin's claims is also along these lines, namely, that state intervention to defend public morality must demonstrate that it falls within the State's permissible sphere of operation, which the criminalization of homosexuality does not.

### **3.3APPLICATION OF DEBATE OF CONSTITUTIONAL MORALITY V PUBLIC MORALITY CONCERNING STREAMING PLATFORMS**

With the advancement of reach of the Internet, the availability of content related to different subject matter has also emerged across various streaming platforms. One of the biggest advantages of realizing content across such platforms is the “wide scope of creative freedom available for the creators.” But this freedom has met with a fair share of controversies in recent times as a section of people have raised their objections against the type of content available on these platforms, which leads to a conflicting situation in between the moral thoughts of people vs freedom of expression.

To resolve the dispute, a reference can be made to the Hart Vs Devlin debate, where Hart had argued that it is alright to disagree with what is acceptable as public morality for the entire society. What is followed by the majority section of people is not mandatory to be observed by individuals. There cannot be an imposition of thoughts in a liberal and free democratic society. For the purpose of analysis, examples of two

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<sup>23</sup>India Const, art 14.

<sup>24</sup>India Const, art 19.

<sup>25</sup>India Const, art 21.

<sup>26</sup>Navtej Singh Johar, *supra* note. 18.

shows which were in the limelight as the issue of freedom of speech and expression came here and which could be related to public morality. The two shows are: 'Tandav' streaming on Amazon Prime and 'Bombay Begums streaming on Netflix.

### **PUBLIC MORALITY AND FREE SPEECH**

The fundamental right of freedom of speech and expression is provided in the Indian constitution<sup>27</sup> and is termed as one of the most valued rights provided to the citizens of our democratic nation. This right gives a sense of satisfaction to any citizen by allowing them to independently develop their thought process and also the opportunity to showcase the same on a public platform subject to some restrictions.

**TANNAV CONTROVERSY:** The recently released web series named Tandav received severe backlash for allegedly showcasing Hindu gods in a degrading manner. The makers of the series, actors were served with multiple FIR across different states. They were charged for an offense under multiple provisions of IPC. This incident led Aparna Purohit who is head of India originals at Amazon file for an anticipatory bail application which was denied by the Hon'ble Allahabad High Court.

**OBSERVATIONS MADE BY HON'BLE JUDGE:** After denying the anticipatory bail, The Judge, in this case<sup>28</sup>, made some observations that appear to be personal viewpoints rather than deciding the matter as per judicial application of mind. The primary reason given by the Judge for denying bail was that the current act by the applicant stands contrary to the sentiments of the majority community.

**ANALYSIS:** Learned Judge's observation that there exists the practice of demonstrating Hindu god's in a disrespectful manner which hurts followers of the community appears to be a prejudiced and influenced observation by taking into account the outrage created by few groups. This observation is not correct as per constitutional provisions, as under the constitution there is no such categorization of who is minority or majority community. Our constitution doesn't provide preferential treatment towards any particular religion and it follows an inclusive mechanism of the equality principle. The important point which needs to be considered is that if few groups of people belonging to the majority religion start objecting against creative and

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<sup>27</sup> INDIA CONST. art. 19, cl. 1, sub cl. a.

<sup>28</sup>Aparna Purohit v. State of UPMANU/0217/2021.

artistic demonstration then can the same be termed as a deliberate act of hurting religious sentiments. It is a too subjective thing to decide about what is the collective feeling of a community by merely taking a look at outrage by few people. While there have been protests in numbers by a different group of people against a movie or a particular show, at the same time people in large numbers have watched the same thing without displaying protest about the content. In a liberal society, it is a dangerous trend to allow people having certain agenda to take control of the viewpoint of the entire community. India is a country that follows the principle of equality and inclusion of diversification in terms of religion followed by people or language spoken by them. It doesn't create an obligation on people working in the field of art to make content that caters to the political or religious scenario present in the society. With the existence of exceptions, a balanced approach exists where there exists scope of putting forward varied thought processes. Any unpretentious observation or comment against any particular subject matter shouldn't come under the purview of offense. Concerning Section 295-A of IPC<sup>29</sup>, which talks about outraging religious feelings, Hon'ble Supreme Court in the case<sup>30</sup> stated that " An act is done without being aware of the fact that it might lead to disturbing the peace or any comment made with carefree approach lacking malicious intention cannot be counted as an offense under the following section. Supreme Court in a landmark case<sup>31</sup>, dealt with the question of decency and morality while it struck down Section 66-A of the Information & Technology Act stating it as unconstitutional. The court remarked that what is indecent or immoral for one person cannot be the same for others. Offensive as a term has a very wider interpretation and it is very problematic to have an explicit definition of what can be construed as offensive. A person exercising his freedom of speech and expression through online platforms by showing content that might be contrary to whatever popular thought prevailing in society and which might cause discomfort amongst certain sections of society but the same can not be viewed as a punishable act.

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<sup>29</sup> The Indian Penal Code, § 295-A, Act No. 45 of 1860.

<sup>30</sup> Mahendra Singh Dhoni v. Yerraguntla, MANU/SC/0473/2017.

<sup>31</sup> Shreya Singhal v. Union of India, MANU/SC/3029/2015.

## **BOMBAY BEGUM' CONTROVERSY:**

The National Commission for Protection of Child Rights [NCPCR]<sup>32</sup>, issued a legal notice to Bombay Begums, asking Netflix to stop airing the show for its “inappropriate portrayal” of children. The commission has also criticized the depiction of minors indulging in sexual activities and drugs.<sup>33</sup> Here the question of public morality in light of freedom of speech and expression can be questioned. The fundamental right of freedom of speech and expression is said to be inclusive of freedom of propagation of ideas.<sup>34</sup> NCPCR conduct of issuing notice to Bombay begum is an example of focussing on public morality and not constitutional morality in judging freedom of speech and expression, as what is shown in Bombay Begum is an expression of ideas that have to be adjudged under decency or morality which is given as a ground of restriction under Article 19(2).

Now by focussing on the Hart-Devlin debate and by applying the debate in the present issue, we feel that from Devlin's perspective who focuses on public morality, he might agree with the NCPCR decision. On the other hand, Hart's liberal approach for morals that Society shouldn't collectively impose its viewpoint on an individual, aligns with the constitutional morality principle, and thus applying Hart's view on Bombay Begum controversy seems a correct approach and in consonance with constitutional principles. Hart says change is inevitable in any society, so moving with contemporary times, there was nothing shown in Bombay Begum which was contrary to the morals of society, and even if it was, the constitutional principles were not violated by this show. Rather the constitutional principle of freedom of speech and expression would be violated if a liberal approach is not taken.

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<sup>32</sup>A statutory body formed under an Act of the Indian Parliament in 2007.

<sup>33</sup>Ektaa Malik, *Explained: What is the row between Bombay Begums and the child rights body?*, The Indian Express, March. 18, 2021, at 12.

<sup>34</sup>Romesh Thappar v. State of Madras, 1950 AIR 124.

## **CONCLUSION**

Even though public and constitutional morality are linked and stem from the same source, they are not the same. Constitutional morality is critical to the effectiveness of constitutional rules. The administration of a constitution without constitutional morality appears to become arbitrary, chaotic, and capricious. India's democracy has flourished because of the leaders' reverence for democratic constitutionalism and grassroots protestors' spiritual activism, as envisioned by the country's founders. People in a political society must be bound together by a commitment to mutual ideals discovered by public cause, such as political independence, solidarity, shared traditions, and cultural heritage, rather than by self-interest. Morality necessitates that we put aside our blood ties, stop pursuing only our interests, and instead commit to using power based on common values. Its democratic version demands that we deliberate and help each other arrive at neutral laws and public policies that are appropriate in principle to all in the polity, driven by principles of transparency, equal respect, and fairness.

The fact that concepts like morality, decency are way too subjective and having a narrow approach towards this kind of terms will have divisive effects in a free & diverse society. Therefore it is necessary to let evolve different opinion's coming out from various sections of people which will eventually help in keeping any vibrant society intact as one.