

Human Ingenuity, Emerging Technologies & IPR – Need for setting Doctrine of Constitutional Morality as Standard

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Human ingenuity erased the boundaries of innovations, and created such technologies which the past generations wouldn't have dreamed of. Intellectual Property Rights are to promote and encourage only those innovations which are contributing for the societal development and common good and complies with the social morality standard. As long as the social morality standard laid down in IPR is not influenced by the dominant cultural norms of a society; by marginalizing the minority or individual perspectives, it can represent the societal demands as a whole. But what if the social morality standard is representing only the majority in the society and is in direct conflict with the constitutional morality, the normative framework offered by our constitution which includes majority, minority and even one individual's perspective within its ambit? Constitutional morality provides a stable, principled foundation that transcends societal changes and biases and promotes the principles of inclusive development, equality, justice, dignity and fraternity. Post Navtej Singh Johar, Joseph Shine and other judgments, the question arises that whether the IP regulators can reject the grant of IP protection to an invention which though is complying with the social morality standard, but fails to comply with the constitutional morality standard? Whether the approach of the US Supreme Court in cases such as *Bedford* and *Juicy Whip I*, applying 'progressive provision' laid down in Article I, § 8, Clause 8 of the American constitution to IP cases, on and above the legislative limitations, illustrates the duty of the courts to act beyond legislative limitations to uphold the constitutional morality when necessity demands? The paper argues that applying constitutional morality as a catalyst over social morality provides a more consistent, equitable, and principled basis for navigating the complex landscape of emerging technologies and IPR. This paper explores the distinction between constitutional morality and social morality, proposing the former as a guiding principle to harmonize the intersection of human ingenuity, technological advancement and IPR.

Keywords: Human Ingenuity, Constitutional Morality, Societal Morality, Intellectual Property Rights, Inclusive Development

Ideas can exist freely without limitation, if they are within the mind of the creator, and once the ideas are converted into expressions, they had to adhere to the societal norms.¹ To put it in other words, ideas are just like unborn babies in the mother's womb, free to exist in their own way, but once born, their existence is subject to societal norms. IP is not granted to such human ingenuity which do not adhere to the moral and ethical standards of the society.

IP legislations incorporated societal morality clause as a limitation upon the recognition and grant of protection to the human ingenuity. Under Trademark Law, registration of scandalous or obscene matter and hurting religious sentiments are prohibited.² Patent law prohibits registering inventions which are contrary to public order or morality.³ Under copyright law, though there is no direct mention of moral questions in the subject matter test, still the moral

rights of the author and fair use doctrine provides the moral justification against piracy of creative ideas.⁴ In the same way, the industrial designs,⁵ and geographical indications⁶ laws provides societal morality clause as limitation on the creators. The objective of incorporating societal morality clause is to direct the human ingenuity to work for the betterment of the society and to provide solutions to the problems faced by the humankind, but not for causing destruction. The utilitarian scholars always believed that IP should be subject to societal morality clause, so that a balance can be maintained between the societal interest and the interest of the creators. This traditional view of disciplining the IP growth through societal morality clause gained momentum with the advent of technology.

The technological advancements in the fields of biotechnology, genomics, artificial intelligence, information technology, block chain technology etc., raised many questions as to the compliance of these technologies with the societal morality clause in many

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IP cases and accordingly restricted the growth of such inventions which do not fit in the moral standards of the society. This traditional view of societal moral clause no doubt is dynamic and always is invented, reinvented, and interpreted in the light of the changing societal dimensions.

Initially, it was believed that societal morality clause is sufficient to regulate the human ingenuity. But when the human ingenuity was though accepted by the societal morality clause (laid down in the IP legislations), when comes in conflict with the fundamental rights or constitutional values, the demand for looking beyond the IP legislations arose, and the solution found is the doctrine of constitutional morality.⁷

Constitutional morality defines the moral standards of a society governed under it. There is a distinction between the constitutional morality and societal morality. Constitutional morality is about the nature of society, its value system, morality, well-being, inclusiveness, and peacefulness, contemplated by the constitution, and on the other hand, societal morality is postulated as a society based on horrendous and systematic discrimination and violence against, the exclusion of, vulnerable people and communities from the dominant mainstream.⁸ In *Navtej Singh Johar v UOI*,⁹ the Supreme Court declared that Constitutional morality would supersede the societal morality.¹⁰ In the NCT of Delhi judgment,¹¹ Chief Justice Dipak Misra used constitutional morality synonymously with the spirit, soul or conscience of the Constitution.¹² According to Dr Babasaheb Ambedkar, '*ours is a battle; not for wealth, nor for power, ours is battle; for freedom; for reclamation of human personality*'. In *Subramanya Swamy v UOI*,¹³ the Apex Court held that it is the fundamental duty of every citizen of this country to uphold the constitutional morality. According to Mr. Dave, the Constitutional morality is not an emotional sentiment, it is a natural feeling which should be cultivated by nurturing the constitutional values in the minds of the citizens.¹⁴

Any technological advancement, causing damage to the human dignity by affecting the fundamental human rights can be disregarded under constitutional morality, even though it is accepted under societal morality. To put it in simple sense, an invention may pass the test of subject matter criteria and fall outside the ambit of the exclusions to the patentability, but the same cannot be granted patent, if it is considered

harmful to the society. The classic example is the Human Genome Project. The Universal Declaration on the Human Genome and Human Rights, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twenty-ninth session,¹⁵ provides that

"Recognizing that research on the human genome and the resulting applications open up vast prospects for progress in improving the health of individuals and of humankind as whole, but emphasizing that such research should fully respect human dignity, freedom and human rights, as well as the prohibition of all forms of discrimination based on genetic characteristics....."

Hon'ble (Mr.) Justice Bobde, while referring to the Supreme Court Vidhik Anuvaad Software (SUVAAS), the AI technology-based translation tool, stressed that the AI should align with the constitutional morality.¹⁶ The aim of engineering the new technology should be *eudaimonia*, a practice elucidated by Aristotle, that defines human well-being, both at the individual and collective level, as the highest virtue of a society.¹⁷

Across the jurisdictions, the courts restricted the grant of IP on the basis of the societal morality clause as well as the human or constitutional values. The following cases are the illustrations:

- (i) The *lanca v Brunetti*,¹⁸ where US Supreme Court held the Lanham Act's 'Immoral or Scandalous' bar on the registration of trademarks to be unconstitutional.¹⁹
- (ii) *Constanting Film Produktion v EUIPO* (Constantin Film),²⁰ the Court of Justice of the European Union (CJEU) permitted the registration of the '*Fack Ju Gohte*' mark, which had been rejected on grounds of morality under the EU trademark law.²¹
- (iii) The indirect application of constitutional morality in IP cases can be seen through the *Novartis case*,²² *Delhi University case*²³ etc., wherein in the court relied upon the principles access to medicines, right to health, right to information to deny the grant of exclusive IP right to the creators. The Apex Court in all cases where the issue of IP versus fundamental rights are involved, emphasized that all technological inventions shall aspire for promotion of social justice, brotherhood, and human dignity.

The paper argues that applying constitutional morality as a catalyst over social morality provides a more

consistent, equitable, and principled basis for navigating the complex landscape of emerging technologies and IPR. The article further argues that the direct application of constitutional morality is inevitable in circumstances when societal morality fails to regulate the ingenuity which goes about the constitutional values. In this regard, the article relied upon the interpretation of the US courts of 'progressive provision' laid down in Article I § 8, cl.8 of the American constitution to the IP cases.

Societal Morality v Constitutional Morality

In *Navtej Singh Johar v UOI*,⁹ the Apex Court emphatically stated that when 'constitutional morality' finds itself in opposition to 'social morality' the former must prevail.²⁴ The following is the verbatim of the Supreme Court:

'The duty of the constitutional courts is to adjudge the validity of law on well-established principles, namely, legislative competence or violations of fundamental rights or of any other constitutional provisions. At the same time, it is expected from the courts as the final arbiter of the Constitution to uphold the cherished principles of the Constitution and not to be remotely guided by majoritarian view or popular perception. The Court has to be guided by the conception of constitutional morality and not by the societal morality'. (Emphasis added)

There is a distinction between the constitutional morality and societal morality. Societal morality relates to the cultural system of a society. It is influenced by the social values and popular beliefs and stems from the conscience of the public. In 2009, the Delhi High Court in *NAZ Foundation v Government of NCT*²⁵ cautioned that popular morality/societal morality is based on "shifting and subjective notions of right and wrong". In this case, the Delhi High Court explained that the morality it enforces is that which is espoused in the constitution, and that when assessing the rights violations imposed by the criminalization of a consensual same-sex sexual acts, public disgust cannot be a reason to justify discrimination against a social group.²⁶ The judgment of the Delhi High Court in *NAZ Foundation v Government of NCT*²⁵ is set aside by the Supreme Court in *Suresh Kumar Koushal and Anr v NAZ Foundation and Ors.*²⁷

In *Navtej Singh Johar and Ors v Union of India and Ors.*,⁹ while overruling the *Suresh Kumar Koushal*²⁷ judgment, the then Chief Justice of the

Supreme Court of India, Hon'ble (Mr.) Justice Dipak Mishra held that "the *Suresh Kumar Koushal* verdict is guided by social morality leaning on majoritarian perception whereas the issue, in actuality, needed to be debated upon in the backdrop of constitutional morality". The Apex Court in *Navtej Singh Johar*,⁹ explained that what the *Koushal*²⁷ decision did not grasp, was that fundamental rights do not require majoritarian sanction and that to try to promote homogeneity in society would violate the principle of constitutional morality.²⁶

Constitutional Morality = Societal Morality (Popular Morality) + Minority Interest +
Individual dignity
combined with Justice, Equality and Fraternity

Constitutional morality stems from the constitutional values and is influenced by the democratic principles, rule of law and constitutionalism. As like societal morality, constitutional morality is also dynamic and transformative in nature, but societal morality is the majoritarian opinion of a section of people who believe in a certain culture, whereas the constitutional morality is an outcome of conscience of the court, influenced by their own sense of constitutional values derived from the principles of justice, liberty, dignity, and fraternity. Societal morality shapes the conduct of the human in each society, and constitutional morality shapes the conduct of a nation.

Societal morality is part of certain provisions of the Indian Constitution and other statutory provisions. For instance, Clause (2), (4) of Article 19 provides for the reasonable restrictions such as 'public order, decency and morality' to the fundamental right to freedom of speech and expression, freedom to form associations or unions guaranteed under Sub Clause (a) and (c) of Article 19(1). In cases such as *Ranji D Udeshi v State of Maharashtra*²⁸ and *Aveek Sarkar and Anr v State of West Bengal*,²⁹ the Apex Court held that while interpreting the expression 'morality' the court first relied upon the individual interest and then moved on to the community interest test. The careful consideration of *Udeshi*,²⁸ *Aveek Sarkar*²⁹ and *Navtej Johar*⁹ judgments reflects that there are three types of morality tests, i.e., individual morality, public morality and constitutional morality and they are applied in the same hierarchy by the courts. The societal morality test applied in *Aveek Sarkar*²⁹ relies upon the majority sentiment and do not take into account the individual. *Navtej Johar*⁹ says public morality must give way to constitutional morality

when in conflict because the former does not provide inclusive justice by considering the minority and individual opinions:³⁰

This limitation of not considering minority opinion in interpreting the moral standards is applied only in the case of societal morality standard, whereas the constitutional morality overcomes such limitation. As illustrated, morality can be understood at three levels: Individual Morality, Public/Societal Morality, and Constitutional Morality (Fig. 1). Each level represents a broader scope of ethical considerations, with constitutional morality encompassing and guiding the other two. In *Navtej Johar* case⁹, the Court concluded that regardless of what ‘societal morality’ indicates, constitutional morality would vehemently oppose outlawing or discriminating against members of the Queer community. Testing the validity of Section 377 of IPC, 1860³¹ against the normative standard of constitutional morality, the Apex Court held that the cherished principles of constitution are the guiding stars for the judiciary while interpreting the constitutional validity, not the majoritarian view or popular perception. The Apex Court through its judgment clearly indicated that the Indian society is pro to progress and transformation, by even going against the majoritarian view or popular perception, provided such progress is falling within the cherished constitutional values.

In *Joseph Shine v Union of India*,³² famously known as decriminalization of adultery, the court while interpreting Section 497 of the IPC held that just social order is the essence of doctrine of constitutional morality. According to the Apex Court, any interpretation which disregards social realities is against to the constitutional morality and the test is to see what impact the law or its interpretation is going to have on the lives of the citizens. Any legislation or interpretation which is promoting the dignity of the individual shall be promoted and rest shall be ignored as it goes against the constitutional values. The Apex

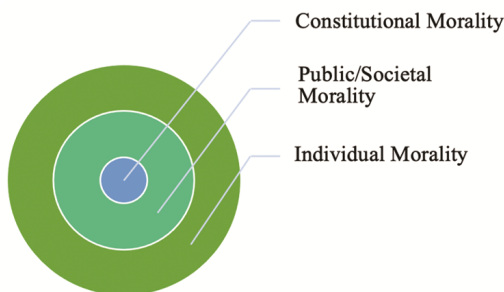


Fig. 1 — Three layers of morality

Court held that every individual shall be committed to the constitutional democracy which is characterized by the principles of equality and inclusion.

In *Indian Young Lawyers Association v State of Kerala*,³³ the Apex Court held that Constitutional morality is to be derived from the preamble, i.e., first, social, economic, and political justice; second, liberty in the matters of thought, expression, belief faith and worship; third, equality of status and opportunity amongst all citizens; and fourth, sense of fraternity which assures the dignity. The Apex Court in this case applied a caution approach to the doctrine of constitutional morality and held that the values adopted under this doctrine shall be permanent which is not subject to the fleeting fancies of every time and age.

Societal Morality in IP Cases

IP provides a recognition to the intellectual creations by granting them the exclusive right to commercially exploit their creations for a limited period. Intellectual property rights require an ethical judgment in the examination of the registrability of such right. This moral exception is based on societal morality and has gained attention globally, in the patenting of biotechnological inventions. The *Brustle* case³⁴ or transgenic animals and the *Oncomouse*³⁵ debated at length the societal morality clause in the patent field. Justice Story, the constructor of patent jurisprudence in United States of America while applying the moral utility clause held in *Bedford v Hunt*³⁶:

“A useful invention, in the statue, is such a one as may be applied to some beneficial use in society, in contradistinction to an invention, which is injurious to the morals, the health, or the good order of society. It is sufficient, that it has no obnoxious or mischievous tendency, that it may be applied to practical uses, and that so far as it is applied, it is salutary. If its practical utility is very limited, it will follow, that it will be of little or no profit to the inventor; and if it be trifling, it will sink into utter neglect. The law, simply requires, that it shall be capable of use, and that the use is such as sound morals and policy do not discountenance or prohibit”.

In other fields of IPRs such as copyrights, trademarks, designs, geographical indications and plant variety protection and farmer’s rights laws, the concept of morality and *ordre public* will be part of the formal examination on the allowability of the registration of those rights. Especially in the field of

trademarks, the ethical objection can even differ depending on the class of goods or services which needs to be registered in.

The societal morality clause is part of all international IP treaties. According to Paris Convention, 1883, the IP grant criteria shall follow a few common rules, which includes the possibility of refusal of registration for trademarks for reasons of public order or morality.³⁷ TRIPs Agreement also allows members to restrict protection for specific rights for reasons of *ordre public* or morality.³⁸

Section 3(b) of the Indian Patent Act, 1970 provides that '*the inventions whose primary or intended use or commercial exploitation of which could be contrary to public order or morality or which causes prejudice to human, animal or plant life or health or to the environment are not patentable*'.

According to Section 5(1) of the Industrial Designs Act, 2000, '*the Controller may, on the application of any person claiming to be the proprietor of any new or original design not previously published in any country and which is not contrary to public order or morality, register the design under this Act*'. According to Section 35(1), '*the Controller may refuse to register a design of which the use would, in his opinion, be contrary to public order or morality*'.

The Copyright Act, 1957 do not include any societal moral clause, but debate is always on, with respect to the copyrightability of an obscene content. The societal clause is applied to an extent in the copyright law through fair use doctrine laid down in Section 52 of the Copyright Act, 1957. But there is always a debate about registering copyright for an original obscene content.

While coming to the Indian Trademark Act, 1999, Section 9(2)(c) prohibits the registration of a trademark which consists of "scandalous or obscene matter". Comparing trademark law with copyright law, it can be said that 'scandalous subject matter' do not seek protection under the trademark law as it will offend accepted principles of morality and is protectable under copyright law as there is absence any direct clause restricting the same.³⁹ Further under Section 9(2)(c) of Trademark Law, '*if a mark is merely distasteful an objection under this section is unlikely to be justified whereas if it would cause outrage or would be likely significantly to undermine religious, family or social values then an objection must be raised*'.³⁹

In one or the other ways, the IP regime incorporated societal morality clause either through

statutory provisions or through interpretation. It is evident through this analysis that the foundations of the IP jurisprudence envisioned to lock the creations within the societal morals.

Constitutional Morality in IP Cases

Societal morality clause is concerned only about the larger section of the society and do not include the marginalized sections. It can be seen from the *Bedford* case, in which the reason for whittling away of the moral utility doctrine by the courts is due to the widespread public acceptance of gambling, which was not the case earlier.⁴⁰ *Bedford* is one of the classic examples how inclusive development is excluded from the societal morality clause. What matters is the majoritarian acceptance or rejection under the societal morality clause.

The *Juicy Whip I*⁴¹ case raised the debate of duty of the courts to interpret the IP legislations in the light of the constitutional values. According to *Juicy Whip I* Court, the Congress can at any time pass new legislation that restricts the breadth of patentable subject matter, as it did with its ban on patents of nuclear weapons and showed reluctance to apply a test of social utility in assessing the patent validity by stating that it is not the duty of the court to check the moral exception.⁴¹ Further stated that, the Congress through legislative amendments to the patent law intervene against patents that fail to keep up their end of the Constitutional bargain. The Court's verdict in *Juicy Whip I*, directs the readers to an understanding that societal morality is a duty of the legislators and constitutional morality is a duty of the courts.⁴¹ This understanding redirects the readers to the duty of the courts to apply Article I, § 8, Clause 8 of the American constitution which authorizes Congress "to promote the progress of science and useful arts...." as a limitation upon the patentability. This is the duty of the constitutional courts to limit the subject matter eligibility under IP laws, if they are falling outside the progressive provision. The courts can shrug off the responsibility of testing moral utility of IP creations but cannot shrug off the duty of applying the progressive provision as a constitutional limitation.⁴² These two cases i.e., *Bedford*⁴⁰ and *Juicy Whip I*⁴¹ provides us the limitations of the societal morality clause and drives the entire debate to look from the larger picture in regulating the techno-IP regime. If the IP is subjected to only the societal morality clause, achieving the principles of democracy and rule of law through inclusive and non-discriminatory techno-IP

development is not possible, and there the constitutional morality doctrine steps-in to provide an inclusive and sustainable techno-IP regime development.

In terms of biotechnology and genomics, the dialogue of creators is, '*patent first, ask questions later*'.⁴³ But the example of putting stop on patenting the Human Genome Project by United States of America, proves that the patent system works the other way round, '*questions first, patent later*'.⁴⁴ This case proves that unless the claimed invention do not comply with the progress limitation laid down in the American Constitution, the grant of IP is a distant dream.⁴⁵ It shows that the goal of the American Constitution is to mediate among moral visions of the society, privileging some norms and denigrating others. Constitution is the product of a people's culture and embody the moral traits of the people.¹⁷ The same is the case with regard to the issues pertaining to patenting of the Human-Animal Chimeras.

In *Alice Crop. Pty. Ltd., v CLS Bank Int'l*⁴⁶ the US Supreme Court while applying the concept of inventiveness held that monopolizing the fundamental blocks of human ingenuity is against to the progress clause laid down under Article I, § 8, Clause 8. Though in this case, the court has not expressly invoked the progress doctrine, but the court's patent eligibility jurisprudence reflects an effort to reconcile the statute's broad language with the IP clause's admonition "to promote....progress".⁴⁷

In India, the public morality clause often applied to test whether the claimed creation received popular acceptance or not. Indian courts applied till date applied the societal morality clause to the IP cases, but when there are fundamental rights challenges came across the IP, the courts indirectly applied the doctrine of constitutional morality. *Novartis case*, *Delhi University case*, Penguin publications withdrawal of Wendy Dongier's book titled *The Hindus: An Alternative History* are some classic examples of indirect application of doctrine of constitutional morality, when an IP which is affecting the positive human values, can gain protection by surpassing the subject matter test and societal morality limitation. *Novartis* judgment of the Supreme Court of India though discussed about the complexities in interpreting the inventive step clause laid down in Section 3(d) of the Patent Act, 1970, as well as compulsory licensing, generic drugs etc., still the undercurrent dialogue in the case was public health and lack of access to affordable medicines.

With regard to the copyrights, in *Delhi University case*⁴⁸ publishers lost the case as their IP is contradicting with the right to access to academic resources of the students under the fair use doctrine is violated. According to the court, copyright is not a divine right, and IP cannot create *copyright-divide* among students who can and cannot afford to access the academic resources because of the economic status. These two cases reflect the inclusive development, equality, and justice principles, which are part of the constitutional morality.

In *Star v Cricbuzz case*⁴⁹, the Delhi High Court while upholding the fundamental right to disseminate information as demanded by the public, held that "*It is imperative for this court to balance the right of the organiser of an event to monetize his own event as against the right of the public to receive information regarding such event and the right of the media to provide access to such information demanded*".⁵⁰

Constitutional morality is a concept that is distinct from both public and individual morality, and refers to the set of abstract, unstated principles or values that underlies and justifies our bill of rights or, to put it in another way, it refers to the elements of the political and moral philosophy that our fundamental rights chapter, taken as a whole, is committed to.⁵¹

Delhi High Court in *Naz Foundation v NCT*²⁵ quoted Ambedkar for the following proposition: "*Popular morality, as distinct from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong*". Though in *Penguin* case, the publisher withdrew the book from India, be it technology or literature, anything which is creating a serious barrier to their full participation in our democracy, leading to discrimination, to ostracism, segregation, deportation, violence, or in extreme genocide.⁵²

There is a requirement of caution approach on the inevitable consequences of populism and the importance of retaining the power of the courts to protect the rights of all persons at all costs. It can also be happening that judges themselves influenced by trends in public opinion, and sometimes are at pains to utilize their powers where it might result in their disfavour.⁵³

Suppose, the famous political strategist and tactician, Mr. Prashant Kishor and team comes up with a technology based on AI or computer programme which is related to formulating an innovative marketing and advertising campaign,

which has the ability of influencing the voters through data, and the same qualifies the subject matter eligibility and fell outside the ambit of the exclusions to patentability, but has the ability to *make the democracy dance according to his strategies*, can they be granted patent, because the trend of the society and politics is in the same lines? What if the scientists are interested in creating human chimeras? In *In Re: Dane K. Fisher and Raghunath v Lalgudi*,⁵⁴ which is with reference to the patenting of human chimeras, attracted the human dignity argument. It claims that it is an affront to human dignity to give an individual ‘trapped’ in the body of a non-human animal the capacities associated with human dignity.⁵⁵

The emerging new technologies and social imaginary in the today’s context is confronting the core beliefs and moral meanings that guided the nation since the founding. Though the Indian Constitution is an evolving document, which imbibed the feature of transformative constitutionalism, but when technologies while intersecting with society and constitution, if is found harmful to the dignity and well-being of the citizens, against to the principles of democracy, rule of law and constitutional morality, it cannot be permitted. Creations of the intellectuals should stand on the pillars of virtue ethics and teleological perspectives on the common good and should know the moral meaning of their work. To sum up,

*“Moral expertise thus entails a kind of knowledge extending well beyond a cognitive grasp of rules and principles to include emotional and social intelligence: keen awareness of the motivations, feelings, beliefs, and desires of others; a sensitivity to the morally salient features of particular situations; and a creative knack for devising appropriate practical responses to those situations, especially where they involve novel or dynamically unstable circumstances”.*⁵⁶

In 2018, IPO rejected the patent application no. 4668/DELNP/2007 a claim to patent sexual stimulation device on the grounds of immorality under Section 3(b) of the Patent Act, 1970. The Controller of Patents in his decision mentioned that the said claim and the device are obscene and held that the same is against to the societal morality. The critics commented that the decision is based on the conventional approach of Section 377 of the IPC, and by quoting the recent Hon’ble Supreme Court decisions in *Joseph Shine* and *Navtej Singh Johar*.

In general, when constitutional morality or societal morality is applied to non-commercial areas, which are purely social issues, the approach may be different. IP being a central point of commerce, when societal morality or constitutional morality is applied, the courts shall take into consideration, the need for developing ‘*sustainable technology driven futuristic India with constitutional culture*’. Ignoring the technological advancement and global trends, may result into competitive disadvantage at the global front, which may cause economic injustice resulting into social injustice.

The words of Justice Rader, about the *Diamond v Chakrabarty* verdict of U.S. courts shows how U.S. took advantage of the biotechnological research by granting patent to the isolated gene, compared to EU which delayed the growth of biotechnology industry, by encountering the biotechnological research on the basis of public morality.

After looking back to *Diamond v Chakrabarty* judgment after forty years, the following is the opinion of Justice Rader:

*“The key here was to look at it as an international event, because at the same time as this research was being done in the United States, there was similar kinds of research being done in Europe and Asia. But Europe encountered the European Patent Convention, which required a care to protect public morality. And that gave rise to many suits that questioned research in the biotechnological area. Things such as the potential harm to animals. These different kinds of challenges to the patent applications would delay them and make them very expensive.... With that additional expense to European biotechnological research, the U.S. having quickly transcended that problem, gained advantage in the biotech industry. They could quickly acquire patents on their inventive activities. And it tended to act as an incentive to shift resources out of Asia and Europe into the United States, where it was easier to protect them and obtain the patent rights that were applied for”.*⁵⁷

Responding to concerns about creating detrimental technologies or engaging in catastrophic research, Justice Rader said,

“The Supreme Court in Diamond v Chakrabarty very quickly pointed out that the Patent Act doesn’t stop certain development at all. It has no restrictive capacity on what researchers may wish to pursue, and it is just an incentive that gives additional

protection and indeed exclusive rights to those who apply for and receive patent protection. But the Supreme court made it clear. Even if there was no patent protection, people could continue to study new life forms".⁵⁷

Justice Rader rightly said that IP system can regulate only those creations which seek their approval *via* the societal morality clause. The creations which are operating outside the IP system can only be regulated through the doctrine of constitutional morality.

Justice Rader's statement when looked from the lens of the constitutional morality and IP debate, it gives rise to the following points:

- The objective of IP system is to recognize, reward and regulate the human ingenuity.
- Initial days of IP system formation could only foresee societal morality as a required limitation to regulate the human ingenuity, to direct the same towards the social good.
- The recent debate of *Navtej Singh Johar* and *Joseph Shine* highlighted the drawbacks of societal morality, i.e., it carries only the popular opinion.
- Democracy means the majority+minority+individual. Societal morality does not comply with the democratic values, hence constitutional morality shall be the norm if one aspires for inclusive growth with the constitutional principles such as justice, equality, fraternity and dignity of the individual.
- Hence, a human ingenuity, which is accepted by majority if is found to be against the constitutional values, though passes through the IP legislations, shall be rejected on the basis of the constitutional morality, if found to be in conflict.

NITI Ayog, in its report, Responsible AI #AI for All published in February 2021,⁵⁸ laid down the above-mentioned principles to be kept in mind to develop a responsible AI which shall be for all. The report argued that enthusiasm of corporates and industries towards the technological nuances shall always keep in mind the constitutional values and based on systems and societal considerations, identified the following broad principles for responsible management of AI.

The principles mentioned are fundamental constitutional values described by the Hon'ble Supreme Court in its judgments while referring to the

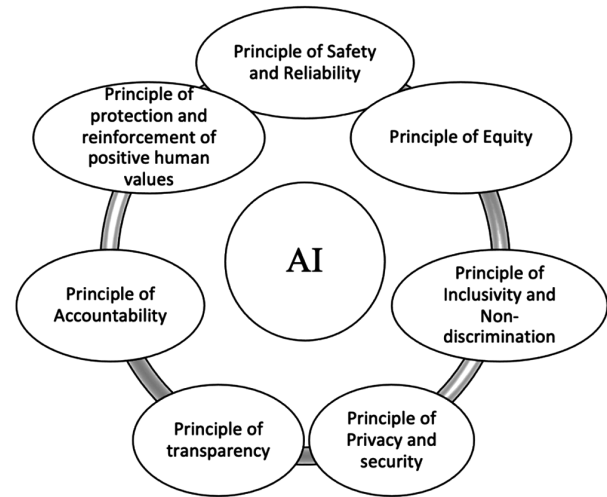


Fig. 2 — Ethical principles of artificial intelligence

doctrine of Constitutional morality (Fig. 2). This reflects that NITI Aayog is directing the growth of Artificial Intelligence (AI) towards inclusive and non-discriminatory technological advancement, i.e., towards incorporation of the doctrine of constitutional morality. Not only for Artificial Intelligence, but these principles also mentioned by NITI Aayog applies to all technologies. The phase of Techno-IP era should work for the betterment of humanity and civilization and should imbibe humanistic approach in creations.

Conclusion

Societal morality clause is a common debate in IP matters. One of such illustration is the Indian Patent Office's denial of patent grant to a creative and unique sex toy.⁵⁹ One of the patent applications that was refused relates to an electro-mechanical sexual stimulation device to be worn during intercourse. The device provides for stimulation of the G-spot and clitoris simultaneously during intercourse and otherwise and has been refused on morality grounds.⁶⁰

In *Sex Style v Abutbul*, the Israeli Magistrate court raised the question, though the porn videos comply the originality doctrine laid down under Copyright Law, can the IP be restricted on the ground of societal morality? This is answered in many cases that IP is always bound by the societal morality *via* the quid pro quo theory. But when one expands the horizon of the morality and raises the question that when a creation is crossing the subject matter threshold and the societal morality clause, and is still against the constitutional values, whether courts can apply the constitutional morality as a limitation on such IP?

The NITI Aayog report, 2021 indicates that all creations seeking protection under IPRs shall comply with the doctrine of constitutional morality. The implications of narrow IP will endanger the constitutional values by undermining the democratic principles and rule of law. Any technological advancement or human creation shall contribute for the progress of the humankind by adopting inclusive development, else do not comply quid pro quo. In situations, where subject matter eligibility and societal morality is satisfied and still creation is not providing for inclusive progress contributing for positive human values, the constitutional morality doctrine is to be applied, and the same would play a pivotal role in restricting the intellectual creations which do not adhere to the humanistic approach.

Mahatma Gandhisaid, ‘technological advancement is inevitable, hence handling it with care is essential’. In 1921, while delivering the speech to college students in Trivandurm, Gandhi said that “we cannot live without science but urged a form of accountability and for imposing humanity as limitation upon it’. The Gandhi’s seven social sins, include science without humanity, knowledge without character, commerce without morality. The morality standards which Gandhi and other great personalities are talking about is not the societal morality, but is it about the constitutional morality?

Constitutional morality is the culture of the nation and is drafted and crafted carefully, by keeping in mind the futuristic vision. Practicing, professing, and propagating the constitutional culture and values is the primary duty of each and every citizen of India, including the legislators, administrators and all other who are responsible for governing the nation. Can the Controller of Patents, recognize such inventions, which though comply with the subject matter test and societal morality clause, but is against to the constitutional values? Whether the Indian Patents Act, 1970 which is silent about such circumstances, will hold him/her back in rejecting such patent applications? When a particular invention is in direct conflict with the constitutional culture, still be recognized because of the legislative limitations?

For a constitution which is based on rule of law and constitutionalism, a single individual is as important as the citizens of the rest of the nation. Michael Sander, in his book, “*what is justice*”, raised the question, can we ignore the life of one, for the sake of the lives of others? If one to be sacrificed for three

lives, then tomorrow hundred to be sacrificed for thousands, and then thousands for the sake of lakhs and crores. At the end, the same will lead to the destruction of the humankind. Inventions and creativities of the human mind, if not channelized towards the constitutional culture, it will lead to the destruction of the nation, as well as the world. Societal morality clause in IP laws is bound by what society (larger public) want and ignores the minority and individual interest. This mob justice if allowed to ignore the minority and individual interest today, tomorrow the same may be harmful to all. Hence, constitutional morality shall operate as the ultimate limitation upon any creativity or invention seeking IP protection in India.

The application of constitutional morality in IP cases may lead to the following implications:

- (i) It can promote sustainable technologies and genuine inventions which are contributing for the constitutional values.
- (ii) It can balance the rift between the societal morality and constitutional morality and may act as a limitation upon the majoritarian dominance on the minorities in terms of technological advancement.
- (iii) It can promote ethical principles among creators and can address the concerns relating to environmental impact, privacy and societal well-being etc., with inclusive approach.
- (iv) It can promote healthy competitive by curtailing the unhealthy practices adopted and are causing damage to the public health, societal values, creating moral dilemmas and damaging culture.

Though there are many positive aspects of application of constitutional morality doctrine to IP cases, it is also required to set limitations on its application. The interpretation of constitutional morality is very subjective and can be inconsistent in its application across different cases and jurisdictions. The application of constitutional morality in IP cases, may lead to violation of international standards and may create repulsions from various stakeholders locally and globally. Further, striking the right balance between protecting IP rights and promoting public interest can be challenging and context dependent.

The actual court ruling influenced by constitutional morality can set legal precedents that shape future IP cases and also can lead to tangible changes on how IP rights are granted, enforced and challenged without affecting the IP jurisprudence, i.e., promotion of

innovation by encouraging the creators who are working for better future for mankind. It can balance the human ingenuity and emerging technologies and can emphasize the need for genuine innovation, equitable access and ethical considerations while addressing the limitations of subjectivity and implementation challenges. Establishing this framework can guide the development of IP laws and policies that align with constitutional values, promoting a just and inclusive technological future.

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