Himachal Pradesh National Law University, Shimla (India)

Journal Articles *ISSN:2582-1903* *Shimla Law Review*

Volume-IV (2021)

CONSTITUTIONAL MORALITY IN INDIA: A Brief Analysis & Contextualising its (De)Limitations

Vibhuti Jaswal & Aayush Raj

DOI: https://doi.org/10.70556/hpnlu-slr-v4-I1-2021-06

This article can be downloaded from: http://www.hpnlu.ac.in/journal-level-3.aspx?ref-id=18.

Recommended Citation:
Vibhuti Jaswal & Aayush Raj, *CONSTITUTIONAL MORALITY IN INDIA: A Brief Analysis & Contextualising its (De)Limitations* IV SML. L. REV. 113 (2021).

https://doi.org/10.70556/hpnlu-slr-v4-I1-2021-06

Contents

Volume IV	*ISSN: 2582-1903*	April 2020 - March 2021

CONSTITUTIONAL MORALITY IN INDIA: A Brief Analysis & Contextualising its (De)Limitations

Vibhuti Jaswal[*] *& Aayush Raj*[**]

[***Abstract***: *Constitutional morality has taken a centre-stage in decisions by the apex court of our country. But this idea has in the recent times more than being praised has been put to serious enquiry and discussion both within and outside the courts. Constitutional morality has raised some points which two decades ago was the case with the excessive use of constitutionalism as a guiding factor for decision-making by the courts. Therefore, this paper tries to answer few fundamental questions related to constitutional morality. First, it tries to identify what are moral questions and how can these be distinguished from factual questions. Second, the paper will try to identify if the Indian Constitution has moral values and how can one decipher those moral values, if there are any. Finally, the paper discusses about the interrelationship between basic structure doctrine, constitutionalism and constitutional morality and the scope of its (in)applicability to make the society better by referring to the case of Sabrimala and use of constitutional morality thereof.*]

Keywords: *Religion, morality, Constitution, law, constitutional morality, reform, administration, fundamental rights, etc.*

I

Introduction

In the latter half of the preceding decade, constitutional morality was used, by the Supreme Court, unequivocally to manifest and *confer* rights on many different groups identifying themselves as victims of multitudes of societal norms. However, this approach has seen its share of criticism owing largely to the domain in which the courts have tried to enter wearing the cloak of constitutional morality. This is a swift shift on part of the courts to, on the one hand, intended to bring radical changes in the society and on the other *filling in constitutional silences and complete the spirit of the Constitution*.[1] But this benign prelude raises some important questions. Among them are questions

[*] Dr. Vibhuti Jaswal is Assistant Professor of Law at the Army Institute of Law, Mohali. India. India. *Email:* jaswalvibhuti8@gmail.com

[**] Mr. Auyush Raj is Assistant Professor of Law at the Himachal Pradesh National Law University, Shimla. India. *Email:* aayushraviraj@gmail.com

[1] *State (NCT) of Delhi* v. *Union of India and Another*, (2018) 8 S.C.C. 501.

that has always been at the epicentre, for instance, the issues of the moral aspect of the morality. In using such terminology, one is often lost in the pursuit of understanding of morality, a term which has as many perspectives as it has enquirers. This pursuit then has a tiring effect on the executive which has the responsibility of implementing the laws interpreted in light of morality. The tiredness is a result of reconciling two polarising elements – one, where the executive has to keep in mind the *spirit* of law (enunciated not only in the black letters of law but also as interpreted by the courts of law from time to time) and two, where it has to give due weightage to the spirit of the society; in that the former being abstract while the latter being manifest and concrete. The reconciliation has, in turn, a debilitating impact on the *conferred* rights and demands more from the system. Therefore, it leads us to the same position where we stood two decades ago when Prof. Baxi opined about the justness of the Indian constitution.[2] Though this exploration was made with respect to the principle of constitutionalism (an idea that had abundantly been used and is still being used to make good the social *illness* through constitutional outreach), we, believe that it holds true for constitutional morality, as it is being used today. One is compelled to ask whether the usage of such a principle does better than raising more problems for the political and social system?

On this note, the paper tries to identify what are normative moral questions involved and how can these be distinguished from factual questions? Second, this paper will try to identify the differential point between legal and moral questions. Third, the paper will try to highlight some of the moral values the Indian Constitution inshrines and how can one decipher those moral values? Fourth, this paper tries to discuss whether the emerging concept of constitutional morality can be located precisely and in strict-terms so that the principle can be used as an all-encompassing panacea or whether such principle does more (inadvertent) damage? Finally, the paper discusses about the interrelationship between basic structure doctrine, constitutionalism and constitutional morality.

II

Legality-Morality Crossover

The extent to which legality and morality, intersect, diverse views have been presented. The Hart-Fuller debate needs no iteration.[3] In this sense, and more fully, relying largely

---

[2] Upendra Baxi, *The (Im)possibility of Constitutional Justice: Seismographic Notes on Indian Constitutionalism* in INDIA'S LIVING CONSTITUTION: IDEAS, PRACTICES, CONTROVERSIES 31 (Zoya Hasan et.al., eds.) (2002).

[3] H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1957); Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1957).

on the arguments presented by Professor Fuller, one can say, the Constitution and its overall frame has a morality of its own[4] and this must be intertwined with the inner morality of the legislators in the contemporary context.[5] The intertwining of the external morality with the internal morality and the factum of how written constitutions can be made effective, to a large extent, delineates the idea of constitutional morality as was understood by Dr. Ambedkar when he made reference to constitutional morality in the constituent assembly.[6]

The morality here is representative of, not the idea of individual morality, but the morality in the sense of establishing a nation state guided by justice, equity, and fairness. Prof. Fuller writes that *today there is a tendency to identify law, not with rules of conduct, but with a hierarchy of power or command*.[7] Bearing this in mind, in the context of morality that can be attributed to the Constitutional scheme, we find the relevance of associating constitutional morality with the administrative scheme delineated and guided by the Constitution than with the Constitution itself.[8] It is in this sense of the terms that Dr. Ambedkar refers to constitutional morality. The constitutional morality's political overture in India is, therefore, more discernible than otherwise.[9] This internal morality is further supported by the arguments presented by Fuller for the advocacy of homosexuality. He does not heed to the moral standards per se and their unanimous alignment, rather the impossibility arising because of a law which does not heed to the internal morality.[10]

---

[4] *External Morality*, Lon L. Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1957) at 645.

[5] *Id. Internal Morality*.

[6] CONSTITUENT ASSEMBLY DEBATES, Vol. VII (Nov. 4, 1948), remarks of Dr. Bhim Rao Ambedkar.

[7] Lon L. Fuller, THE MORALITY OF LAWS, 63 (1963).

[8] *Id.* Prof. Fuller further asserts, and where I draw my reverence for constitutional morality as the guiding principle for the legislators, this –

> *Being at the top of the chain of command does not exempt the legislature from its responsibility to respect the demands of internal morality of law; indeed, it intensifies that responsibility*.

[9] Nakul Nayak, *Constitutional Morality: An Indian Framework* AM. J. OF COMPARATIVE L. (forthcoming) (2021), *available at*: SSRN: https://ssrn.com/abstract=3885432. (last visited 13 Dec., 2022)

[10] *Supra* note 20 at 133 –

> *I would, however, have no difficulty in asserting that the law ought not to make it a crime for consenting adults to engage privately in homosexual acts. The reason for this conclusion would be that any such law simply cannot be enforced and its existence on the books would constitute an open invitation to blackmail, so that there would be a gaping discrepancy between the law as written and its enforcement in practice. I suggest that many related issues can be resolved in similar terms without our having to reach agreement on substantive moral issues involved.*

The Indian courts appear to have taken a position of separating law and morality in the years preceding the past decade. But the constitutional composition has been such that even in the interpretation of such demarcation, they have not completely fallen short of meeting the expectations of the society. This is because the implied constitutional morality by virtue of Professor Fuller's analysis of a written constitution and how the courts have reiterated that principle, in not the same words but in different ways, gives way to justice, equity, and fairness in India.

The first trace of an implied understanding of the concept of constitutional morality is to be found in the case of *State of Bombay* v. *R.M.D. Chamarbaugwala*[11] where the elements of public morality was at loggerheads with the underlying principles of right to the fundamental freedom of doing business[12] enshrined under article 19(1)g of the Constitution of India. Another instance of questions raised in similar lines is found in the case of *Krishna Kumar Narula* v. *State of Jammu & Kashmir*[13] relating to sale of liquor within the State.

The apex court has also dealt with the issue of public morality and its scope while interpreting the constitutional validity of Section 292 of the Indian Penal Code in *Ranjit D. Udeshi* v. *State of Maharshtra*[14] and further elaborated in the case of *Samaresh* v. *Amal Mitra.*[15]

The Supreme Court further analysed this aspect of morality in the case of *Har Shankar* v. *Deputy Excise and Taxation Commissioner*[16] where it revisited the principles laid in the above two cases and thereafter identified the overall scope of sale of liquor as a business in India.

The Supreme Court in a matter of criminal sentencing has touched upon the essence of constitutional morality that can be easily applied to such cases. Albeit, this association of the approach of the court to sentencing in criminal cases and constitutional morality might appear to be a far-fetched whimsical idea of the author but in essence this approach says exponentially about constitutional morality. Further, a unique observation is found in another celebrated decision of the apex court where the court was dealing with a law regarding restrictions on the sale of liquor:[17]

> *'The court should adopt a policy of non-alignment on the morality of drinking since though law and morals interact yet they are autonomous. However, the court should be justified in informing itself of the plural pathology implicit in untrammelled trading in alcohol'.*

---

11 A.I.R. 1957 S.C. 699.
12 Constitution of India, 1950, article 19(1)g.
13 A.I.R. 1967 S.C. 1368.
14 A.I.R. 1965 S.C. 881.
15 (1985) 4 S.C.C. 289.
16 (1975) 1 S.C.C. 737.
17 *P.N. Kaushal* v. *Union of India* (1978) 3 S.C.C. 578, para 5.

This observation is categorical and needs some analysis. The apex court while approaching the question of restriction on sale of liquor was sceptical in treading the moral conundrum involved therein or was looking at the matter *objectively*. The question that is raised, in the backdrop of this understanding is why, in more recent times, the courts have been so conscious of constitutional morality? In the judgements preceding this judgement the court has implied an element of convergence between constitutional morality and public morality and how 'the two form' the foundational basis for the development of law in society.

But this observation compartmentalises law and morality. This is not to conclude that the courts did not develop the doctrine (of constitutional morality) further or that it remained an untouched idea. Yet, this observation demonstrates a more practical approach towards identifying the high ideals of the constitution. The observation bridges the gap between public morality and constitutional morality. On the one hand it recognises the element of interaction and interoperability of morality in the domain of law, on the other hand it also recognises the practical implication of such interaction and the extent of intervention by the court. It demands of the court to remain objective and non-aligned in its analysis of such cases. It reminds the court of the limits it must impose on itself when dealing with the questions where the public morality and morality as a higher sentiment of the society interact.

This approach of dissociating law from morality guided the Apex Court in another case. In *Raghunathrao Ganpatrao* v. *Union of India,* where a challenge was raised against the Constitutional (Twenty-Sixth Amendment) Act, 1971. The court categorically observed at paras 104 and 105: [18]

> '*104.* The above passages remind us of the distinction between law and morality and the line of demarcation which separates morals from legislations. The sum and substance of it is that a moral obligation cannot be converted into legal obligation.
> *105.* In light of the above principle, the attorney general is right in saying that courts are seldom concerned with the morality which is concern of the lawmakers'.

The observation by the court, in this case, raises an important question and makes one ponder over whether constitutional morality is a construct that is guiding the court or whether, in light of these preceding observations, it is a mere oxymoron that is (*mis*)guiding the courts. The authors would like to, once again, bring to note the caveat that the use of constitutional morality leads to a tiredness in the executive and administration causing loss of the spirit of the Constitution. Thus, in the quest of *filling the gap* we are rather led into a myriad where the gap is only widened.

Moving, further, the apex court had the opportunity of discussing the question of morality in the case of *P. Rathinam* v. *Union of India* and fortunately in that case, the court

---

[18] *Raghunathrao Ganpatrao* v. *Union of India*, 1994 (Supp) S.C.C. 1 191, para 104-105.

was cautious in answering the question of interrelationship or the intersection of law and morality. *The court refrained from defining or declaring any set standards for determining the moral contours and called it a matter best left to the circumstances.*[19]

The apex court further observed that in many circumstances, the persons representing the governance mechanism must ensure that the constitution is valued and more so the *positive morality of the constitution* is also respected.[20] In an interesting observation, the court merged constitutional morality and public morality or the court conceived the idea of CM a priori to which the collective conscience only assents.[21] The standards of morality when associated with any object, leads to the deprivation of the constitutional philosophy.[22]

III

Moral Values in the Indian Constitution: Some Insights

The Indian Constitution and its interpretation reflect numerous instances where the constitutional scheme has specially protected the interests of different sections. Beginning from the enunciation of the basic structure doctrine to the broader interpretation of right to life, there is maried discussion on how constitutional values can be inferred from the text of the Constitution. The golden triangle of Articles 14, 19 and 21, and its utility in this scheme have not only been amply used but also elaborated for guiding the courts in many different cases. Further, the preambular discourse and its use in the interpretation of the Constitution has also guided the courts in various instances.

In the case of *State (NCT) of Delhi* v. *Union of India*,[23] there is a stressed and detailed analysis of the concept of Constitutional Morality and Justice Chandrachud goes at length to decipher the totality of claims related to it. Bearing this note in mind, what is reverberated in the text of the judgement is not mere bridging of the silences of the Constitution but reiterating what is contained within the liberal interpretation of the constitutional frame in India. In addition to this, referring to Fuller, one can advance that the kind of scheme of legal morality he outlines is not only safeguarded in the Indian context through its scheme but is also achieved through the understanding and interpretation of the same hitherto.[24] There is a further reflection that the courts may subject the Constitution to subjective interpretation depending on the need of the hour

---

[19] *P. Rathinam* v. *Union of India*, (1994) 3 S.C.C. 394, para 85-88.

[20] *B.R. Kapur* v. *State of Tamil Nadu*, (2001) 7 S.C.C. 231, para 72.

[21] *Niranjan Hemchandra Shashittal* v. *State of Maharashtra*, (2013) 4 S.C.C. 642, para 27.

[22] *State of Maharashtra* v. *Indian Hotels and Restaurants Association* (2013) 8 S.C.C. 519, para 112.

[23] (2018) 8 S.C.C. 501.

[24] *Supra* note 20 at 33.

and the social dynamics. However, such an interpretation is a meta-dialogue emanating from the fundamental theories developed by the constitutional courts in India. This meta-dialogue need not be supported by constitutional morality as a separate element but can finds its place in the existing framework itself.

The first fact of constitutional morality is evident on the preambular wordings. The use of the term *We the People* is reflective of the collective citizen conscience which Grote and later Dr. Ambedkar referred to with reference to constitutional morality. This understanding is also replete in how Justice Chandrachud in *Sabrimala*[25] tried to evoke and appeal to the citizen consciousness while answering the question: why the prohibition of certain age group of women was against the constitution? Constitutional morality works in two parallel consciousness: on the one hand, the citizen who have to remain conscious of the philosophy of the Constitution and on the other the consciousness of the political leaders (more so, the legislators) who formulate the laws, which must confirm with the inner morality of the laws.

Therefore, the preambular beginning in that sense amply and sufficiently resonates the requirement of constitutional morality. Further, the Fuller's scheme of internal morality is contained in the words being referred above . Further, the words also reflect a mutual coexistence and respect for the lives of the marginalised communities of the country living at the far end of the spectrum. Taking cues from the judgement of *State (NCT) of Delhi* and the ambit of political ends which it tries to encompass, it can be concluded that the words mentioned, reflect the constitutional morality elements significantly than otherwise.

In *Sabrimala* too, the elements of public consciousness were evident but it went beyond the political notions and tried to interpret the extent of use of the term morality under article 25 of the Constitution.[26] The broader reliance was placed on the constitutional scheme in totality and not in silos and the responsibility in that context. The citizenry is burdened to ensure that the constitutional ethos are met in the spirit. This interpretation of the Constitution is not novel and is a reiteration of the principles well-established as the references in the judgement amply reflect. Therefore, in that context, constitutional morality, as a principle, guiding the courts has been a trend for long time.

The second element of the Constitution that plainly reflect the underpinnings of constitutional morality is the use of the terms: *justice, liberty, equality, and fraternity in the preamble*. The reading of the preamble cannot be made disjointly but is to be considered in a conjoint manner and therefore, the terms used therein amply reflect the principles underlying constitutional morality.

---

[25] (2019) 11 S.C.C. 1.

[26] Constitution of India, 1950, article 25: Freedom of conscience and free profession, practice and propagation of religion.

Next, the expansive reading and interpretation given to article 13 is also reflect on the inner morality of the constitution. To this end the courts have referred to the inclusion of customs and usages in the expression *laws in force.* This expansive reading of the Article paves the way for wider intents, as suggested by Justice Chandrachud in *Sabrimala*. This is not a backwards analysis of how the courts can use the concept of constitutional morality. But an analysis and reading of the judgement itself shows that the apex court relied on previous decisions to come to the conclusion. In addition to this, the constituent assembly debate has already defined the ambit of the laws in force and therefore, it was not a new discovery but reiteration of the old position.

The golden triangle[27] reflects the constitutional morality element underlying constitutional analysis and interpretation. Further, the various ways in which the courts have evoked these provisions show, at length, the inner morality of the Constitution and *Navtej Johar* case is a beacon of this manifestation.[28] In this context, the widest interpretation given to article 21 and incorporation of the element of right to live with human dignity, meaning thereby a life not of mere animal existence[29] reflects constitutional morality and its essence. The conception of fundamental rights in itself finds its genesis in the backdrop of constitutional morality. The framers of the Constitution were of the opinion that constitutional morality needs to be nurtured in India and that, at the time the constitution was adopted, the citizenry was not ripe to understand the nuances of constitutional morality. It was in that context too, that the chapter on fundamental rights was elaborated and contained within it certain rights which were outrightly against the essence of such morality.[30]

Articles 32[31] and 136[32] reflect another facet of the concrete manifestation of constitutional morality. These provisions help in achieving the inner sanctity of the Constitution where a flagrant violation is either possible or an interpretation is so proposed as to foil the essence of the constitutional framework. These provisions help and allow the court to move beyond its mandate and order the government to take certain positive measures for the fulfilment of what the constitutional spirit demands. In addition to this, the

---

[27] *Maneka Gandhi* v. *Union of India* A.I.R. 1978 S.C. 597.

[28] In deciding the case, *Navtej Singh Johar* v. *Union of India* (2018) 10 S.C.C. 1, the apex court referred to the core elements of constitutionalism in India and pronounced its verdict therefrom. However, in addition to the use of this principle, the court also referred to the principle of constitutional morality. But in a nutshell much reliance was made to the core elements of the constitution than referring to the vivid or elaborate use of constitutional morality. To that extent the principles which guide the court in deciding cases otherwise and the result thereof can be obtained without distinct reference to constitutional morality.

[29] *Francis Coralie Mullin* v. *The Administrator, Union Territory of Delhi* 1981 A.I.R. 746.

[30] Articles 15 (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth), 17 (Abolition of untouchability), 18 (Abolition of titles), Constitution of India, 1950, etc.

[31] Remedies for the enforcement of fundamental rights.

[32] Special Leave to appeal by the Supreme Court.

permissibility of and the widening of the amplitude of public interest litigations, reflect the essence of constitutional morality.[33]

The chequered history of the supremacy between fundamental rights and directive principles of the State policy (DPSPs) is too well known to be reiterated. Part IV provisions reflect the element of constitutional morality in India. Though not enforceable, these principles guide the State in making statutes and other public regulatory instruments. The very essence of the principles lies in the fact of promoting the welfare of the citizens[34] thereby ensuring that individuals form the focal point of the State and its welfare scheme. This individual-centric approach of the constitution is reflected in the constitutional morality discussed in the *Sabrimala* .

Contradistinctively, one has to also look at the approach developed by the judiciary in ensuring constitutional morality. One of the most important developments in this frame is the basic structure doctrine developed by the courts for interpreting whether the actions of the legislature has been excessive or within the permissible limits of the constitution.[35] The basic structure doctrine has since been used in a number of cases to ensure that the spirit of Constitution is held high. This provisioning itself reflects that there is an inner morality associated with the Constitution of India. Further, in turn, the very premise that certain parts of Constitution cannot be changed or altered because they are intrinsically related to the spirit of the Constitution as conceived by the framers.[36]

Therefore, as a concluding remark, the basic structure doctrine, the wide interpretation of the Right to Life, the golden triangle, the preambular reading, all point towards and existing constitutional frame that safeguards the interests of various communities. There is little room for a more subjective principle/ doctrine to be developed that would guide the courts in cases in the future.[37] These provisions reflect constitutional morality and the interpretation of these provisions has fully reflected this element in the years of constitutional existence.

---

[33] M.P. Jain, CONSTITUTION OF INDIA (2020).

[34] Constitution of India, 1950, article 38 (State to secure a social order for the promotion of welfare of the people).

[35] *His Holiness Keshavananda Bharti* v. *State of Kerala*, A.I.R. 1973 S.C. 1461.

[36] *Id*.

[37] *Supra* note 3.

IV

Constitutional Morality: Current Context

A new interpretation has been given to the constitutional morality context in the aftermath of *Sabrimala* case. In this case a unique proposition was formulated and presented, one which challenged the existing notions of constitutional interpretation. This is with reference to the interpretation of article 13 and the term *laws* used therein. The decision extended the outreach of article 13 to include the customs and usages that may be subjected to judicial scrutiny or the test of constitutional excessiveness.[38] This interpretation is sweeping and it opens a pandora's box, apart from the *encroachment* by the courts into the private realms.[39] It can be looked at from two perspectives.

On the one hand we find the spirit of the constitution in the choice of the framers of the constitution who relied much on the wisdom of the political leaders and citizens to mature over time and eliminate the social ills plaguing the. On the other hand, we find the need for the courts to often read down provisions of laws and correct the *wisdom* of the legislators. The latter scheme is reflective of the fact that the political leaders have not been able to recognise or fulfil their roles in the democratic scheme of the country. The inclusion of customs and usages within the ambit of law under article 13 by overruling the previous judgements[40] is a *step* towards achieving the latter component of constitutional morality.

This interpretation/ re-reading raises important questions: *first*, whether the constitutional morality as envisioned by the framers of the Constitution and the *constitutional vision* encompassed the sweeping extent of interpretation enunciated by the Court? This question must and can only be answered by referring to the constituent assembly debates where Dr. Ambedkar referred to the concept of constitutional morality. The reference to the concept is used in the prelude to the debates that followed in the Assembly.[41] It is at the very outset while determining the politico-administrative

---

[38] *Indian Young Lawyers' Association* v. *State of Kerala* (2019) 11 S.C.C. 1, para 396-398.

[39] *Kantaru Rajeevaru* v. *Indian Young Lawyers' Association* (2020) 2 S.C.C. 1, para 4-5.

[40] *State of Bombay* v. *Narasu Appa Mali* (1951) S.C.C. Online Bom 72, *Riju Prasad Sarma* v. *State of Assam* (2015) 9 S.C.C. 461.

[41] CONSTITUENT ASSEMBLY DEBATES, Vol. VII (Nov. 4, 1948), remarks of Dr. Bhim Rao Ambedkar –

> *While everybody recognizes the necessity of the diffusion of Constitutional morality for the peaceful working of a democratic Constitution, there are two things interconnected with it which are not, unfortunately, generally recognized. One is that the form of administration has a close connection with the form of the Constitution. The form of the administration must be appropriate to and in the same sense as the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the*

Contd…

framework for the country that reference to the constitutional morality was made by Dr. Ambedkar in the constituent assembly. This reference to constitutional morality was made while answering the question of the kind of government. Dr. Ambedkar advocated for the kind of government proposed. Additionally, he further referred to the concept while delineating the need for detailing the administrative details about the government in the Constitution. Bearing this in mind, one can infer that though the overarching concept of constitutional morality cannot be read in isolation and it covers the entire constitutional scheme within its ambit. But the reference made in this particular stance cannot be stretched by stroke of imagination.

The constitutional morality in its most stern sense is one which *diffuses* in a manner to foster democratic scheme in a peaceful manner.[42] However, the aftermath of *Sabrimala* is too well-known by now. Whether raising questions in only one direction and use of constitutional morality is fostering or blocking the peaceful enforcement of a democratic constitution? An opposing view might criticise the preceding explanation for limited interpretation of the constitutional framework. But even though myopic, this analysis is strongly footed in the fact that during the rest of the tenure of the debates, the term constitutional morality was not used or made reference to explicitly. Two reasons may be given in support of the non-reference: *one*, the Constitution framers were confident of the political leadership and the type of administration chosen in the Constitution that they did not feel the need to iterate the principle; and *two*, the framers relied more naturally on the overall scheme of fundamental rights and DPSP casting out the need of reiteration of the principle.

Therefore, to extent the constitutional morality was used in the debates in the assembly, it can only be said that it was with special reference to the politico-administrative framework. Extending this interpretation in the manner that the apex Court has done in the present case can drag the court in all the social realms and and political affairs. And if such interpretations are to follow, will this not be a kind of constitutional tyranny. The extension of constitutional morality in the way suggested, is a subjective operationalisation of the concept of constitutional morality. Further, from the views of Ambedkar one may conclude that he was not referring to CM as a panacea, but a precursor to egalitarian society.[43]

> *Constitution. It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them. The question is, can we presume such a diffusion of Constitutional morality? Constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.*

[42] *Id*.

[43] *Supra* note 9.

Second, Whether this interpretation was possible without the use of the concept of constitutional morality and could have been supported by the elements already present in the interpretation of the Constitution, *viz.* articles 14, 15, 19, among others? The question is more easily answered when we look at the interpretation placed by the court on article 13(1) and inclusion of customs and usages therein. This enunciation is not new and sits at the core of the constitutional scheme since the inception of the Constitution. During the Constituent Assembly debates a question was raised with respect to the language of the article. In answering that query and to remove the difficulty therein Ambedkar clearly stated that the term customs has been used with special reference to clause (1) and not with reference to clause (2).[44] Therefore, the question of inclusion of customs and usages into the article 13(1) was an established facet of the constitution. In this light the established principles of interpretation and the doctrines for fostering equality of status among the individuals is supported by other provisions and therefore, the interpretation that the Court in reached in *Sabarimala*, could have been reached at without reference to constitutional morality distinctively. Enunciating constitutional morality as a separate principle may lead to more subjective interpretation of the Constitution.

Third, it is in light of this argument and the preceding discussions that the dissenting opinion of Justice Indu Malhotra must be read.[45] The dissenting opinion can be divided into the following seven branches (not exclusive) *viz. first*, the idea encompassed in article 26[46] of the Constitution of India, *second*, the jurisprudential and philosophical anecdote of article 25,[47] *third*, the limits that the apex Court must put on itself while dealing with the questions of intertwining conflict between religious practices on the anvil of constitutional principles and the right of freedom to profess and practice one's religion,[48] *fourth*, in relation to the preceding point, one

---

[44] CONSTITUENT ASSEMBLY DEBATES, Vol. VII (Nov. 29, 1948), remarks of Ambedkar:

> *I should have thought that construction was not possible, for the simple reason that sub-clause (3) of article 8 applies to the whole of the article 8, and does not merely apply to sub-clause (2) of article 8. That being so, the only proper construction that one can put or it is possible to put would be to read the word 'Law' distributively, so that so far as article 8, sub-clause (1)was concerned, Law would include custom, while so-far as sub-clause (2) was concerned, 'Law' would not include custom. That would be, in my judgment, the proper reading, and if it was read that way, the absurdity to which my Friend referred would not arise.*

[45] *Supra* note 38, p. 245-288.

[46] Constitution of India, 1950, article 26: *Freedom to manage religious affairs*.

[47] Constitution of India, 1950, article 25: Freedom of conscience and free profession, practice and propagation of religion.

[48] A glimpse of this argument is reflected in the dissenting opinion, wherein J. Malhotra observes:

> *453. The twin-test for determining the validity of a classification under article 14 is:*

Contd…

must be cautious about exclusionary practices and discriminatory practices (the courts cannot cater to *sensitive* sentiments in the name of constitutional morality),[49] *fifth,* is the court by way of constitutional morality trying to enter into an arena which was hitherto limited/ prohibited, *sixth*, does this expansive reading of Constitution fosters the basic structure doctrine or does it inadvertently dents the doctrine, and *seventh* the constitutional scheme envisaged under the Preambular wordings, in turn advance the basis of balancing the constitutional morality with secular polity.[50]

The classification must be founded on an intelligible differentia; and it must have a rational nexus with the object sought to be achieved by the impugned law. The difficulty lies in applying the tests under article 14 to religious practises which are also protected as Fundamental Rights under our Constitution. The right to equality claimed by the Petitioners under article 14 conflicts with the rights of the worshippers of this shrine which is also a Fundamental Right guaranteed by Articles 25, and 26 of the Constitution. It would compel the Court to undertake judicial review under article 14 to delineate the rationality of the religious beliefs or practises, which would be outside the ken of the Courts. It is not for the courts to determine which of these practises of a faith are to be struck down, except if they are pernicious, oppressive, or a social evil, like Sati.

454. The submissions made by the Counsel for the Petitioners is premised on the view that this practise constitutes gender discrimination against women. On the other hand, the Respondents submit that the present case deals with the right of the devotees of this denomination or sect, as the case may be, to practise their religion in accordance with the tenets and beliefs, which are considered to be "essential" religious practises of this shrine.

455. The Petitioners and Intervenors have contended that the age group of 10 to 50 years is arbitrary, and cannot stand the rigours of Article14. This submission cannot be accepted, since the prescription of this age-band is the only practical way of ensuring that the limited restriction on the entry of women is adhered to.

456. The right to gender equality to offer worship to Lord Ayyappa is protected by permitting women of all ages, to visit temples where he has not manifested himself in the form of a 'Naishtik Brahamachari', and there is no similar restriction in those temples. It is pertinent to mention that the Respondents, in this context, have submitted that there are over 1000 temples of Lord Ayyappa, where he has manifested in other forms, and this restriction does not apply.

457. The prayers of the Petitioners if acceded to, in its true effect, amounts to exercising powers of judicial review in determining the validity of religious beliefs and practises, which would be outside the ken of the courts. The issue of what constitutes an essential religious practise is for the religious community to decide.

[49] *Supra* note 38, para 441.20-441.21.

[50] *Supra* note 38, para 477-484.

Article 26 of the Constitution of India guarantees, as a fundamental right, the right to *every* religious denomination *to manage its own affairs in matters of religion*.[51]

In this frame of reference, and especially with respect to the third and the fourth point noted above, some questions need to be considered. The first and the foremost problem is the idea of exclusion and discrimination. In this regard, one needs to be vigilant of the fact that exclusion is a part of how (positive) law is framed.[52] Some of these exclusions find their genesis from values that regulate human life and are reflected in the social norms and practices. This exclusionary classification has been part of human live(s) for times immemorial and now *legally* regulate human lives.[53]

The emergence of non-secular State has given birth to the idea of *glocalization – the process whereby the global and the local merge to form a new, perfectly distinctive yet genuine synthesis*.[54] There is in this idea, a more indignant tone of how certain *ideologies* take the centre-stage and others are presented as subsidiary, as .[55] Hirshcl concludes:

> 'In sum, in the area of constitutional law, the world grows increasingly smaller, but the domestic and particular persist. Amalgams of constitutional law and religious law stand at the intersection of the general and the contextual, the universal and the particular. In that respect, such hybrid legal orders may very well be constitutional law's version of glocalization – the process whereby the global and the local merge to form a new, perfectly distinctive yet genuine synthesis'.

In this conclusion, there is an essence that the constitutional principles and ideologies are more universal and overarching and these must be therefore synchronised, when States adopt religious norms, legally. This ideation, thus, in turn, creates a debate about the hierarchy of fundamental rights, where some rights are considered more fundamental than others. And the *fundamentaler* rights form the touchstone of the other fundamental rights to exist.[56] Tripathi thus concludes, while assessing the history of how the courts have developed the idea of secular-State in India in the following words:

> 'It is submitted, with great respect, however, that the Court does appear to have caught that spirit of the Constitution. Starting w dicta in the Swamiar case and

---

[51] Constitution of India, 1950, article 26.

[52] Margaret Davies, *Exclusion and the Identity of Law*, 5 MACQUARIE L. J. 5 (2005), wherein the author thus argues –

> *Law can be seen to gain its identity from processes of exclusion in areas as diverse as the delineation of national legal systems, the identification of legal subjects, the formation of legal doctrines and the analysis of the underlying concept of law. The processes of law exclude a multiplicity of people and things in a multiplicity of ways and collectively these exclusions can be seen to constitute the 'real' positive law*.

[53] *Id*.

[54] Ran Hirschl, *Holy Glocalization: Constitutions and Sacred Texts in the 'Non-Secular' World*, 32(2) HARVARD INTERNATIONAL REVIEW 38 (2010).

[55] *Id*. p. 42.

[56] P. K. Tripathi, *Secularism: Constitutional Provision and Judicial Review*, 8(1) JILI 1(1966).

> further dicta built on the foundation of these in the succeeding cases, the Court seems to have worked out a novel set of principles governing church-state relations overriding and replacing the constitutional text itself. These judicial glosses, curiously, appear to figure in the Court's pronouncements more frequently and importantly than the actual provisions of the relevant articles of the Constitution. The trend of these pronouncements and judgments would indicate that, by and large, the Court has been whittling down the significance of the non-obstante clause and "establishing" autonomous and inviolable governments of the Mahants and the Dais even at the expense of the liberty of the men and women belonging to the respective denominations'.

This conclusion appears, with utmost and due respect, to us, coming from what Edward Said refers to as the *authoritative a position*.[57] The ideation of certain fundamental rights as superseding others is more a result of influence of the international instruments (such as the International Covenant on Economic Social and Cultural Rights[58] and the International Covenant on the Civil and Political Rights[59]) and the jurisprudential thematic thereof. This is precisely the influence of the *Western* ideologies and their *style for dominating*.[60]

Furthermore, articles 25 & 26 are distinct in their premise and scope. This distinction is reflected in the wordings of the provisions thereof. Article 25 uses the phrase, at the outset: *Subject to public order, morality and health and to the other provisions of this Part, all persons are… .* Whereas, article 26 uses the same phrase but omitting the phrase *and to other provisions of this Part*.

This distinction is material, in the sense that, to the extent Prof. Tripathi concludes that individual has been placed at the forefront of all the fundamental rights, freedom of religion included, he is absolutely correct. However, with respect to the fundamental right to freedom of religion, it is *layered*. The first layer is the very choice of an individual to profess, practice, and propagate a religion. In this sense there is equality for every individual to choose from myriad of religions, irrespective of the fact whether the said religion is practiced in India or not. This professing, practicing, and propagating is

---

[57] Edward W. Said, Orientalism 346 (2003) (Ebook), Said writes –

> *Moreover, so authoritative a position did Orientalism have that I believe no one writing, thinking, or acting on the Orient could do so without taking account of the limitations on thought and action imposed by Orientalism. In brief, because of Orientalism the Orient was not (and is not) a free subject of thought or action. This is not to say that Orientalism unilaterally determines what can be said about the Orient, but that it is the whole network of interests inevitably brought to bear on (and therefore always involved in) any occasion when that peculiar entity "the Orient" is in question.*

[58] International Covenant on Social, Economic and Cultural Rights, Dec. 16, 1966, U.N.G.A. Res. 2200A (XXI).

[59] International Covenant on Civil and Political Rights, Dec. 16, 1966, U.N.G.A. Res. 2200A (XXI).

[60] *Supra* note 57.

subject to the provisions of the various other provisions of the Part III of the Constitution and more so, any law which thus falls foul shall be subjected to the threshold of golden triangle or *trinity* test.[61] Ones this choice has been exercised, the person shall be governed by the tenets of that religion. This governance must not fall foul of public order, morality and health, but need not confirm with the threshold of the trinity test. This is the *interpretation simpliciter* which the courts rightly discussed during the early decades of dealing with the issues related to article 25 & 26.[62] Even the caution pointed out by Prof. Tiwari give weightage, first, as pointed by the court, to the essential practices and then intertwine the existing *dispute* accordingly.[63] It is pertinent to note that in his analysis, the vantage point appears to be appended in footnote 33 where he argues that the omission by Dr. Ambedkar of the phrase *and to other provisions of this Part* is *possibly accidental* (emphasis supplied). However, in this context, it is only trite reiterating the principle of legislative acumen that what has been omitted must not be included by way of interpretation and the judicial mind should be considered thus, accurate with respect to wording of any legislation.

V

Conclusion

Derrett has discussed the problems associated with the idea of (constitutional) morality in his book.[64] The only point of divergence that the authors presents, here is: if all the religious practices have to confirm with the constitutional threshold as fostered by the trinity test, isn't this situation similar to promoting a constitutionally driven religion, which is *legitimately state sponsored*? But, religious practices, however, illogical they might appear, are matters ordained, Godly and thereby may best be left to the followers thus. Additionally, and as pointed by Justice Malhotra, where there are elements/ reflections of practices being *pernicious, oppressive, or social evil*, the courts must intervene however, to *delineate the rationality of religious beliefs or practices, would be outside the kin of the courts*.[65] This fundamentality of how religion operates in a society and the dichotomy which secularism may assert in the religious helm of affairs have been discussed by various authors.[66] Derrett, in his classical book, makes more categorical reference to the idea, referred above and developed later chronologically (by Edward Said), the

---

[61] *Maneka Gandhi* v. *Union of India*, A.I.R. 1978 S.C. 597.

[62] *The Commissioner, Hindu Religious Endowments, Madras* v. *Lakshmindra Swami*, A.I.R. 1952 S.C. 282; *Venkataraman Devaru* v. *State*, A.I.R.1958 S.C. 255; *Saifuddin Saheb* v. *State of Bombay*, A.I.R, 1962 S.C. 253.

[63] *Supra* note 56, p. 19.

[64] P.K. Tripathi, SPOTLIGHTS ON CONSTITUTIONAL INTERPRETATION (1972).

[65] *Supra* note 38, para 453.

[66] *See generally*, D.E. Smith, INDIA AS A SECULAR STATE (1963), V. P. Luthera, THE CONCEPT OF SECULAR STATE AND INDIA (1964), J. D. M. Derrett, RELIGION LAW AND STATE IN INDIA (1967).

authoritative position. Derrett, first, highlights the issue in the *approach* of intertwining *secular* into the socio-religious frame of India in the following words:[67]

> 'Far too readily it is assumed that India, having adopted the word 'secular' for its present condition, ought to study what 'secular' means, and then put that into practice! That would indeed be a strange proceeding, though the principle that State can determine what its philosophy should be and that the citizen should accept this obediently is nowhere denied. What is often forgotten is that, whatever the citizen accepts or thinks he accepts, nothing will actually emerge in fact which is inconsistent with the ancient and traditional values, and these are consistent with 'secularism' in a wholly unique, Indian, sense'.

Further, in his analysis he refers to the overarching *nature* ingrained in the approach, influenced largely by the Europeans. He further asserts:[68]

> 'At this point the question will arise whether law and legal history is a valid path of approach to these problems. Surely law, and especially law since the European powers assumed governmental roles in India, is artificial and fictional. The free flowing of opinion, or, to take the opposite example, the half-conscious presuppositions of 'typical' villagers and villages might be better keys to the Indian mind.

He, further, while discussing and assessing the trend of cases that have been decided by the Indian judiciary (the then), and the jurisprudence related to interpretation of articles 25 & 26, concludes:[69]

> 'Thus, we have not what it might seem, namely a conflict between cosmopolitan concept of religion and a traditional Indian concept of religion, but a working out of a balance in such a way that the claims of a practice to be 'religious' naturally submit themselves to scrutiny if protection from the State is required. The freedom to believe is not touched. The freedom to act is guaranteed subject to such limitations as will make the continuance of social life in India possible. This tentative conclusion may be revised after we have seen how the courts have dealt with the special but parallel subject of religious endowments, how the Hindu public has reacted to enactment, or lack of enactment, in that highly typical context.'

In the chapter that proceeds thus, Derrett asserts, however, that the conclusion posited by him is in part evidenced by judicial anecdotes and is of indigenous origin. One reference that needs mention here is the premise related to *temple-entry laws* and jurisprudence. These laws, however, must be viewed as a conjoint culmination of article 17 and the kind of social impediment that was existent. Further, the restriction of certain group(s) from entry into temples could never be considered as *essential*. This must be differentiated from the idea and the *essential* practice associated with *Sabrimala temple* and therefore, deviation(s) from the established principle as was adjudicated by the

---

[67] J. D. M. Derrett, RELIGION LAW AND STATE IN INDIA 31 (1967).

[68] *Id*. p. 32.

[69] *Id*. p. 481.

court is an overreach. The courts might have to revisit the idea of how far the constitutional morality can be used in the name of *reforms*, in that whether the judicial religiosity can be permitted to fathom.