MATTERS OF MORALITY

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ABSTRACT

Taking the Naz Foundation case as a starting point, this article aims to understand the meaning of the phrase, "constitutional morality". Over the past decade, the term has been the focus of a considerable amount of legal scholarship and has even found its place in a few judgments. It is found that though Naz Foundation refers to Dr. Ambedkar's invocation of the phrase in the Constituent Assembly Debates, that meaning was different altogether. Tracing the history of the phrase as used by Dr. Ambedkar, the Article identifies various strands of the meaning of "constitutional morality", finding that the reading of constitutional morality as the substantive moral content of the constitution has become more relevant in the recent past, in India as well as in other jurisdictions. An attempt is made to locate the meaning of the phrase within constitutional philosophy, both in general and particularly in the Indian context. The author argues that whether or not the framers of the Indian Constitution intended for morality to mean constitutional morality, the word morality, as used in the Constitution, must be given that meaning by the Courts now. Having said that, the author argues that the use of constitutional morality in Naz Foundation was misplaced and is potentially harmful in the adjudication of cases involving fundamental rights. The author analyses the wording of Articles 19, 21, 25 and 26 to show the differences that arise while construing constitutional morality in cases involving these provisions. The author then suggests that a fit case for the use of constitutional morality as was done in Naz Foundation is the Sabarimala Temple Entry case that is currently pending before the Supreme Court. The author analyses the arguments advanced in that case and argues that the case can and must be resolved in a manner that favours the entry of women of all ages into the temple. According to the author, if these arguments are accepted by the Court, it would be another great step forward in constitutional adjudication in India.

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Introduction

Moral indignation, howsoever strong, is not a valid basis for overriding individuals' fundamental rights of dignity and privacy. In our scheme of things, constitutional morality must outweigh the argument of public morality, even if it be the majoritarian view.

A.P. Shah, Chief Justice, Delhi High Court

Naz Foundation v. Government of NCT of Delhi (2009)

Terms like morality are always shrouded in uncertainty. Quite simply, the term means different things to different people at different times. This confusion permeates into law, as it is often argued that law and morality are deeply inter-twined, each borrowing from the other.[1] Constitutions, particularly the Bill of Rights, embody the preference of certain moral values over others. According to Dworkin, most contemporary constitutions declare individual rights assailable against the government in a broad and abstract manner, and so, when judges are called upon to decide a controversial constitutional issue, they must decide how an abstract moral principle is best understood, and to do that, they must read the Constitution morally.[2]

The Indian Constitution is no exception to this. Granville Austin described it as "first and foremost a social document",[3] with Parts III and IV (the Chapters dealing with the Fundamental Rights and the Directive Principles of State Policy respectively) forming the "conscience of the Constitution".[4] A bare perusal of the Fundamental Rights chapter demonstrates the use of terms that, though abstract, embrace certain moral values like equality, non-discrimination and liberty. In the past, these broad and abstract terms have been frequently used by the higher judiciary as an invitation to expand and re-interpret the provisions to give full effect to these values, particularly since the 1970s.[5]

[1] *See generally*: H.L.A. Hart's *Concept of Law* (1961); Lon Fuller's *The Morality of Law* (1964). See: Tony Honore, *The Dependence of Morality on Law*, 13 OXFORD JOURNAL OF LEGAL STUDIES 1 (1993).

[2] Ronald Dworkin, *The Moral Reading of the Constitution*, The New York Review of Books, (March 21, 1996), http://www.nybooks.com/articles/1996/03/21/the-moral-reading-of-the-constitution/

[3] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION – CORNERSTONE OF A NATION, 63.

[4] *Id*.

[5] The most prominent example being the Supreme Court's expansion of the phrase, "life and liberty", used in Article 21, to include a distinct set of enforceable rights.

In being value-laden and abstract, these provisions have been able to evolve with the society whose goals they aim to serve, courtesy the interpretations given to them by the constitutional courts. In this regard, the observations made by the Supreme Court in *I.R. Coelho v. State of Tamil Nadu*,[6] that the "Constitution is a living document" whose "interpretation may change as the time and circumstances change to keep pace with it"[7] are particularly apt. This "living" nature is crucial. It is believed that while there is certainly an overlap between the moral values of society in general[8] and those reflected in the Constitution, the two do not run along the same line. It is argued that, where the two diverge, the Courts must give precedence to the values reflected in the Constitution while adjudicating upon the rights guaranteed under the Constitution.

The core of my argument is that the values *underlying* the Constitution, particularly the Fundamental Rights, can and must be identified as India's "constitutional morality", and that wherever the term "morality" is used in the Constitution, it must be read to mean "constitutional morality". The Article is divided into four Parts. Part I discusses the *Naz Foundation* judgment, and the concept of constitutional morality as identified therein. Part II argues that the meaning of the phrase as used in *Naz Foundation* is very different from that used by Dr. Ambedkar during the Constituent Assembly Debates, and that it is important to recognize the varying meanings of the phrase to properly understand its mechanics. Part III seeks to justify the interpretation of morality as constitutional morality and discusses what constitutional morality ought to mean.[9] Part IV argues that while *Naz Foundation*'s use of "constitutional morality" was misplaced, a fit case for its use as a limitation upon a fundamental right is the Writ Petition regarding the entry of women into the Sabarimala Temple which is currently pending before the Supreme Court.

[6] (2007) 2 S.C.C. 1 (India).

[7] *Id*.

[8] This tends to mean the morality of the majority.

[9] Part I seeks to identify the meaning given to constitutional morality in *Naz Foundation* while Part III attempts to ground constitutional morality in constitutional theory and history. While it may also have made sense to begin with the theoretical aspects and then move on to a discussion of the application of that theory to a particular case, the reason I chose to begin with *Naz Foundation* is because it is that judgment that really generated discussion on the meaning of the phrase "constitutional morality" in the Indian context, particularly in legal scholarship.

I. *Naz Foundation*

In *Naz Foundation v. Government of NCT*,[10] (hereinafter "*Naz Foundation*" or "*Naz*") the Delhi High Court declared that Section 377 of the Indian Penal Code (IPC), insofar as it criminalized consensual sexual acts of adults in private, violated Articles 21, 14 and 15[11] of the Constitution.[12] Although this judgment is significant for multiple reasons,[13] for the purpose of this Article, I have limited my focus to tracing the manner in which the Court dealt with the arguments advanced before it to come to a conclusion that "morality" must be interpreted as "constitutional morality". To this end, the relevant arguments to be noted are as follows:

1. Arguments challenging the constitutionality of Section 377

The Petitioner argued that Section 377 of the Indian Penal Code was based on traditional Judeo-Christian moral and ethical standards, which conceive sex in purely functional terms, i.e., for the purpose of procreation only.[14] They challenged Section 377 on the ground that it violated the fundamental rights guaranteed under Articles 14, 15, 19 and 21. It was argued that the privacy, human dignity, individual autonomy and the human need for an intimate personal sphere require that the privacy-dignity claim concerning private, consensual, sexual relations are also afforded protection under Article 21, and that this is unreasonably curtailed by Section 377. The Petitioner argued that the fundamental right to privacy under Article 21 can be abridged only for a compelling state interest, which was not to be found in Section 377.[15]

The Petitioner also argued that the challenged provision curtailed the basic freedoms guaranteed under Article 19(1)(a),(b),(c) & (d), in that, an individual's ability to make a personal statement about one's sexual preferences, right of association/assembly and right to

[10] 2009 (111) DRJ 1 (DB).

[11] Note that the judgment did not hold that Section 377 violated Article 19. This is important as "morality" is expressly provided as a reasonable restriction under Articles 19(2) and 19(4), however the Court assessed morality as a restriction to the right guaranteed under Article 21.

[12] Naz Foundation v. Government of NCT, 2009 (111) DRJ 1 (DB) ¶ 132.A (India).

[13] *See*, Arvind Narrain, *A New Language of Morality: From the Trial of Nowshirwan to the Judgment in Naz Foundation*, 4 INDIAN J. CONST. L, 84-104 (2010) (highlighting some of the most important features of the judgement, note 24 at 100)

[14] Naz Foundation v. Government of NCT, 2009 (111) DRJ 1 (DB) (India) ¶ 7.

[15] *Id.* ¶ 8.

move freely so as to engage in homosexual conduct are restricted and curtailed.[16] It was argued that Section 377 also creates structural impediments to the exercise of freedoms under Article 19 by homosexuals, particularly that of free speech and expression, and is not protected by any of the restrictions contained therein.

Further, a coalition of organizations representing women's and human rights, argued that Section 377 was based on archaic moral and religious notions of sex and that the criminalization of adult consensual sex does not serve any beneficial public purpose or legitimate state interest.[17]

2. Arguments by the Union of India in support of Section 377

Peculiarly, two Ministries of the Union of India filed Affidavits containing contradictory stances on the constitutionality of Section 377. While the Ministry of Health & Family Welfare argued that the continuance of Section 377 has hampered HIV/AIDS prevention efforts, the Ministry of Home Affairs sought to justify retention of the provision upon numerous grounds, including that "interference by public authorities in the interest of public safety and protection of health as well as morals is … permissible."[18] Quite clearly, the "interest of public safety and protection of health as well as morals" was perceived differently by the two wings of the Central Government. This, in my opinion, strikes at the very root of the claim of the Ministry of Home Affairs that they were representing "public interest".

The supporters of the provision referred to the 42nd Report of the Law Commission of India to argue that Indian society by and large disapproved of homosexuality, and that such disapproval was strong enough to justify it being treated as a criminal offence, even where adults indulge in it in private. They further argued that, at the time of enactment, Section 377of the IPC was responding to the "values and morals" of the time in the Indian society and that "in any parliamentary secular democracy, the legal conception of crime depends upon political as well as moral considerations notwithstanding considerable overlap existing between legal and safety conception of crime i.e. moral factors".[19] The Court records that "it

[16] *Id.* ¶ 9.

[17] *Id.* ¶ 20.

[18] *Id.* ¶ 11.

[19] *Id.* ¶ *13.*

is clear that the thrust of the resistance to the claim in the petition is founded on the argument of *public morality.*"[20] (emphasis added)

3. Findings on Morality

The Court relied on *Gobind v. State of Madhya Pradesh*[21] to find that the right to privacy under Article 21 could not be curtailed except for a "compelling state interest", and that public morality did not amount to such a "compelling state interest".[22] It further relied on *Lawrence v. Texas*[23]which held that moral disapproval is not by itself a legitimate state interest, and *Dudgeon v. United Kingdom*[24] and *Norris v. Republic of Ireland*[25]which held that there was no "pressing social need" to criminalise homosexual acts between consenting adults. The fact that public morality was not taken as a sufficient ground to restrict the rights of the individuals to act freely runs common through these judgments. Accordingly, the Delhi High Court held in broad terms that, "popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under Article 21."[26]

Describing popular morality as based on "shifting and subjecting notions of right and wrong" and constitutional morality as derived from "constitutional values", the Court held that "if there is any type of 'morality' that can pass the test of compelling state interest, it must be 'constitutional' morality and not public morality."[27] After erroneously placing reliance[28] on Dr. Ambedkar's speech in the Constituent Assembly Debates wherein he had used this phrase, the Court held as follows:

[20] *Id.*

[21] Gobind v. State of Madhya Pradesh, (1975) 2 S.C.C. 148 (India)

[22] It is worth noting that in August, 2015, the Supreme Court referred the question of whether the right to privacy is a fundamental right to a Constitution Bench. This, in my opinion, has no significant bearing on the leg of reasoning in *Naz Foundation* being analysed in this Article.

[23] 539 US 558 (2003).

[24] 45 ECHR (Ser. A) (1981).

[25] 142 ECHR (Ser. A) (1988).

[26] Naz Foundation v Govt of NCT Delhi & Ors 160 (2009) DLT 277 ¶ 79 (India).

[27] *Id.*

[28] Why this reliance was mistaken has been dealt with in a later part of this Article.

> "*The Fundamental Rights, therefore, were to foster the social revolution by creating a society egalitarian to the extent that all citizens were to be equally free from coercion or restriction by the state, or by society privately; liberty was no longer to be the privilege of the few. The Constitution recognizes, protects and celebrates diversity.*"[29] (emphasis mine)

The Court then referred to *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice*[30] wherein it was unequivocally stated that the "dictates of the morality" that the State can enforce "are to be found in the text and spirit of the Constitution itself."[31] This statement, coupled with the description of constitutional morality that is derived from constitutional values, indicates how one is to go about identifying this kind of morality. The emphasis on the "values" and the "spirit" of the Constitution suggests that the confines of this kind of morality are outlined by Parts III and IV of the Constitution. Finally, the Court held that "if there is one constitutional tenet that can be said to be (the) underlying theme of the Indian Constitution, it is that of 'inclusiveness'."[32]

II. *Leaving Dr. Ambedkar Behind*

Before going on to analyse this meaning of constitutional morality in greater detail, it is to be noted that *Naz Foundation's* reliance upon Dr. Ambedkar's speech where he refers to constitutional morality during the Constituent Assembly Debates was misconceived.[33] While speaking on the necessity of including administrative details in the Constitution,[34] Dr. Ambedkar quoted the following paragraph from Grote's *History of Greece*:[35]

> "*The diffusion of constitutional morality, not merely among the majority of any community but throughout the whole, is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may*

[29] Naz Foundation v Govt of NCT Delhi & Ors 160 (2009) DLT 277 ¶ 80.

[30] 1999 (1) SA 6 (CC).

[31] Naz Foundation v Govt of NCT Delhi & Ors 160 (2009) DLT 277 ¶ 81.

[32] *Id* at ¶ 130.

[33] *Id* at ¶ 79.

[34] Constituent Assembly Debates: Official Reports, Volume VII: November 4, 1948, page 38.

[35] GEORGE GROTE, HISTORY OF GREECE (J. Murray, London 1850) (1846).

> *render the working of a free institution impracticable, without being strong enough to conquer ascendency for themselves.*" (emphasis mine)

He explained that, by the phrase constitutional morality, Grote meant "a paramount reverence for the *forms* of the Constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure of those very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than in his own." (emphasis mine)

He went on to argue that the form of administration of a country is deeply linked with the form of the Constitution itself, and that it is constitutional morality that ensures that the form of administration is not perverted. Finally, he argued that constitutional morality is not a natural sentiment, and that it needs to be cultivated, and therefore the Constituent Assembly would be justified in incorporating the form of administration in the Constitution itself. It is worth noting that close to sixty years after the commencement of the Constitution it has been argued that, India's failure to adhere to democratic traditions, despite the many safeguards laid out in the Constitution, is indicative of its inability to embrace constitutional morality.[36]

The distinction between constitutional morality as invoked by Dr. Ambedkar and that spoken of in *Naz Foundation* is that the former focused on the *forms* of the constitution, while the latter focused on the principles underlying the content *of* the constitution. The different meanings of constitutional morality have been explained briefly by Pratap Bhanu Mehta[37] as follows:

> "*In Grote's rendition, 'constitutional morality' had a meaning different from two meanings commonly attributed to the phrase. In contemporary usage, constitutional morality has come to refer to the substantive content of a constitution. To be governed by a constitutional morality is, on this view, to be governed by the substantive moral entailment any constitution carries. For instance, the principle of non-discrimination*

[36] Andre Beteille, *Constitutional Morality*, 43(40) ECON. & POL. WKLY 35, 2008.

[37] PRATAP BHANU MEHTA, WHAT IS CONSTITUTIONAL MORALITY, (2010), http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm.

> *is often taken to be an element of our modern constitutional morality. In this sense, constitutional morality is the morality of a constitution.*
>
> *There was a second usage that Ambedkar was more familiar with from its 19th century provenance. In this view, constitutional morality refers to the conventions and protocols that govern decision-making where the constitution vests discretionary power or is silent*." (emphasis mine)

Mehta identifies three kinds of constitutional morality; the morality of the constitution, the morality that fills the gaps where the constitution is silent[38] and the morality that pertains to historical claims about constitutionalism. Ambedkar was dealing with the third kind of constitutional morality and the difference between these seems to have escaped the Delhi High Court in *Naz Foundation*. Mehta concludes his analysis by observing that Ambedkar's account of constitutional morality emphasized the "formal elements" of "self-restraint, respect for plurality, deference to processes, skepticism about authoritative claims to popular sovereignty and the concern for an open culture of criticism that remains at the core of constitutional forms." He points out that while this allegiance to constitutional morality presumes a certain formal equality among the actors involved, it does not provide an assurance that this allegiance would produce substantive equality. This is crucial because the judgment in *Naz Foundation* certainly does seem to view constitutional morality as requiring the constitutional court to produce substantive equality.[39] Quite clearly, the conceptualisation of constitutional morality in *Naz Foundation* is the morality *of* the constitution. The exact nature and scope of this conceptualisation has been dealt with in detail in the next Part of the Article.

Before moving on to the next Part, it may be noted that the constitutional morality spoken of by Dr. Ambedkar has been recognized by the Supreme Court of India as recently as in 2014, in the case of *Manoj Narula v. Union of India*,[40] where a Constitution Bench was called upon to decide upon the legality of persons with criminal antecedents being appointed as Ministers in the Central and State Governments. Justice Dipak Misra (speaking for himself, Chief

[38] Though in my opinion the constitutional morality that is read into places where the Constitution is silent would fall in either the first or the third category.

[39] *Supra* note 10, at ¶130.

[40] (2014) 9 SCC 1.

Justice Lodha and Justice Bobde) noted that the Constitution of India is a living document made for a progressive society,[41] and then went on to observe as follows:

> "*The principle of constitutional morality basically means to bow down to the norms of the Constitution and not to act in a manner which would become violative of the rule of law or reflectible of action in an arbitrary manner. It actually works at the fulcrum and guides as a laser beam in institution building. The traditions and conventions have to grow to sustain the value of such a morality. The democratic values survive and become successful where the people at large and the persons in charge of the institution are strictly guided by the constitutional parameters without paving the path of deviancy and reflecting in action the primary concern to maintain institutional integrity and the requisite constitutional restraints. Commitment to the Constitution is a facet of constitutional morality …*"[42] (emphasis mine)

This excerpt from the judgment demonstrates that the constitutional morality as constitutionalism in action spoken about by Dr. Ambedkar remains to be relevant to this day. This is particularly so in the context of determining how constitutional authorities are to make decisions where the Constitution is silent. However, the purpose of this Part of this Article is to demonstrate that this meaning of constitutional morality exists as separate and distinct from the meaning given to the term in *Naz Foundation* and then to analyse the conceptualisation of the morality *of* the Constitution. As such, this is where I leave Dr. Ambedkar.

III. *Morality as the Morality of the Constitution*

The distinction between the various meanings of constitutional morality sets the boundaries for a further examination of the meaning of constitutional morality as the morality *of* the constitution. Recall the earlier point that fundamental rights are often couched in general and abstract terms, usually conveying values rather than laying down codes. A frequent criticism of judicial review is that the Courts' interpretations of these abstract terms tend to reflect the subjective moral convictions of the particular judge/judges rather than those of society in

[41] *Supra* note 10, at ¶ 74.

[42] *Supra* note 10, at ¶ 75.

general, and are, to that extent, undemocratic.[43] Naturally, this problem is particularly acute when judges are required to interpret and apply "morality" itself.

1. The Morality of a Constitution and the "Majoritarian Difficulty"

The argument criticizing judges for importing their own subjective notions of morality into their interpretations of fundamental rights presumes that there exists a unified community/public morality that was disregarded by the judges. This presumption is problematic. In a diverse and pluralistic society, such as ours, different communities tend to have differing conceptions of justice and morality. In light of that, any approach that subjects fundamental rights to the moral approval of the majority would strike at the very foundation of having fundamental rights as a means of protecting minority interests. As per Bruce Ackerman, "ordinary politics" is not very democratic, and employing the Bill of Rights to advance the interests of minority groups (what he refers to as "constitutional politics") is an act of further democratisation.[44]

The idea that bill of rights is supposed to protect the vulnerable minorities and individuals[45] against the "errors, prejudices, and excesses of powerful majorities" has been supported by Wilfrid Waluchow in his argument in favour of the interpretation of morality as constitutional morality.[46] For this, he refers to the strongly worded argument made my Andrei Marmor which deserves to be quoted fully:

> "… *the idea that constitutional interpretation should be grounded on those values which happen to be widely shared in the community would undermine one of the basic rationales for having a constitution in the first place. Values that are widely shared do not require constitutional protection . . . It is precisely because we fear the temptation of encroachment of certain values by popular sentiment that we remove their protection from ordinary democratic processes. After all, the democratic legislature is a kind of institution which is bound to be sensitive to popular sentiment*

[43] *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986).

[44] BRUCE ACKERMAN, WE THE PEOPLE:FOUNDATIONS (Harvard Uni. Press 1993).

[45] Who are mostly under-represented in Legislative bodies.

[46] W.J. Waluchow, *Constitutional Morality and Bills of Rights, in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY65-92 (Grant Huscroft ed., 2008).

> *and widely shared views in the community. We do not need the constitutional courts to do more of the same*."[47] (emphasis mine)

This "majoritarian difficulty" succinctly sums up the danger of reading morality as public morality (or positive morality) in the process of constitutional adjudication. However, attacking the use of public morality in constitutional adjudication is not a sufficient ground for the adoption of constitutional morality. It is important to conceptualise constitutional morality so that it does not suffer from the same, or worse flaws; particularly, that it is neither susceptible to majority opinion to the extent of undermining the fundamental rights, nor so vague as to invite judges to import their widely varying and subjective notions of morality into constitutional law.

In an attempt to do this, Waluchow argues that, even in a multi-cultural society where "moral dissensus" is a fact of life,[48] one can seek out an "overlapping consensus"[49] in society on questions of political morality that arise in cases under a bill of rights.[50] He further distinguishes mere "moral opinions" from "true moral commitments", describing the latter to be issues and stances that have been properly examined by members of society in light of their own moral values. He then ties these concepts to constitutional law and practices, arguing that judges are in the best position to weigh all the relevant factors and identify a "community constitutional morality" to be regarded as the moral norms to which a bill of rights makes reference. Though his argument is not foolproof,[51] it provides a basis (and justification) for judges to go about the process of identifying the morality of a particular constitution.

2. The Morality of the Indian Constitution

At the outset, it must be mentioned that the word, "morality" is used in Articles 19(2), 19(4), 25 and 26 of the Fundamental Rights Chapter as one of the grounds upon which the rights

[47] ANDREI MARMOR, INTERPRETATION AND LEGAL THEORY, at 161-62 (rev. 2ded. 2005), *cited in* Waluchow, *Supra* note 46, at 88.

[48] *Supra* note 46, at 66.

[49] Waluchow obtains this phrase from Rawls' *Theory of Justice* (1971), and argues that the use of the phrase can be extended beyond the manner suggested by Rawls.

[50] *Supra* note 42, at 69.

[51] For example, the argument assumes that there would not be any complications while tying the "overlapping consensus" of "true moral commitments" to constitutional law and practices. I believe this may not be a safe assumption to make.

guaranteed therein may be restricted. In his book dealing with the freedom of speech and expression under the Indian Constitution, Gautam Bhatia has argued that, on an analytic understanding of constitutional text and history, there is no justification for reading morality, as used in Article 19(2), as public morality.[52] Conceptualising constitutional morality as referring "to the elements of the political and moral philosophy that our Fundamental Rights chapter, taken as a whole, is committed to", he then argues that "constitutional morality is the most justified interpretation … both in terms of constitutional law and philosophy."[53]

At this juncture, it is important to recognise the varying approaches to constitutional interpretation involved here. Phillip Bobbitt identifies six such approaches: historical (or originalist), textual, prudential, doctrinal, structural, and ethical.[54] Bhatia's argument that morality could not be read to mean public morality seems to be based on the historical[55] and textual[56] approaches, while his argument that it must mean constitutional morality seems to follow the structural approach.[57] Chintan Chandrachud observes that the reality of constitutional interpretation in India is "messy", with the courts often using a fusion of different approaches to reach its conclusions.[58] Even if the historical[59] and textual[60]

[52] GAUTAM BHATIA, OFFEND, SHOCK OR DISTURB, at 107-9, 13 (New Delhi, Oxford University Press,2016).

[53] *Id*. at 112-13.

[54] PHILLIP BOBBIT, *Constitutional Fate* (Oxford University Press,1982) and *Constitutional Interpretation*, (Blackwell, 1991),*cited in* Chintan Chandrachud, *Constitutional Interpretation in* SUJIT CHOUDHRY, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, at73-93 (MadhavKhoslaet al. ed. at73-93, 2016); *See*75-76 of Chandrachud's chapter for a brief summary of the different approaches.

[55] As summarized by Chandrachud, the focus of this approach is "on the subjective intent of the framers, and how they would have wished the constitutional provision to operate within the confines of a particular case." This approach lays claim to being the most objective, though that claim is dubious.

[56]As summarized by Chandrachud, the focus of this approach is "on the specific words of a constitutional provision, but requires interpreters to consider the 'present tense' of the text, rather than the meaning of the text at the time that it was enacted."

[57]This approach entails viewing the Constitution holistically, rather than as a collection of separate and distinct provisions. Pertinently, Chandrachud notes that the structural approach relies on inference rather than on a close reading of the text of the Constitution.

[58] Phillip, *Supra* note 54, at 76.

[59] For example, if it was argued that most of the notion of "constitutional morality" as referring to the morality of the constitution began to be widely accepted only much after the time when the Constituent Assembly completed its work on the Indian Constitution, and therefore they could not have *meant* to have morality read as constitutional morality.

[60] For example, if it was argued that the framers of the Constitution had the option of placing the word "constitutional" before "morality" in Article 19(2), but *chose* not to. Not that there is any evidence in the Constituent Assembly Debates to demonstrate this "choice".

approaches militated against the interpretation of morality as constitutional morality, those approaches ought to give way to the structural and ethical[61] approaches, as has been done by the Supreme Court repeatedly since the 1970s.[62]

If one were to hold the Supreme Court to the trends of interpretation it has followed in the recent decades, then the doctrinal approach, as per which precedent is carefully considered in assessing the meaning of constitutional text, supports the view that the historical and textual approaches can and should (at times) make way for the less text-oriented approaches. Two prominent examples of this are the Supreme Court's interpretation of "procedure established by law" in Article 21 as "due process"[63] and the interpretation of "consultation" in Articles 124 and 217 as "concurrence".[64] Thus, even if it could comprehensively be argued that the word morality as used in the Constitution could not have possibly meant constitutional morality in 1950, the Supreme Court has armed itself with enough to successfully make out a case for why that position must change.

A valuable example of the Supreme Court using dynamic methods of interpreting the Constitution to secure the fundamental rights of individuals is the case of *NALSA v. Union of India.*[65] Justice Sikri's judgment traced the development and expansion of Article 21 of the Constitution,[66] and then went on to observe that:

> "*The role of the Court is to understand the central purpose and theme of the Constitution for the welfare of the society. Our Constitution, like the law of society, is a living organism. It is based on a factual and social reality that is constantly changing. Sometimes a change in the law precedes societal change and is even*

[61]As summarized by Chandrachud, this approach too relies on inference, with a focus on the "aspects of cultural ethos that are reflected in the constitution."

[62] Phillip, *Supra* note 54, at 80-85.

[63] Maneka Gandhi v. Union of India, (1978) 1 S.C.C. 248 (India).

[64] SCAORA v. Union of India, (1993) 4 S.C.C. 441 (India).

[65] (2014) 5 SCC 438 (India). The question before the Court was as to whether non-recognition of the gender identity of members of the transgender (and hijra and eunuch) community as a third gender violated Articles 14 and 21 of the Constitution, and, if so, to what relief were they entitled under the Constitution.

[66] *Id.* ¶ 101-103.

> *intended to stimulate it. Sometimes, a change in the law is the result in the social reality.*"[67](emphasis mine)

Of particular importance for the purpose of this article, Justice Sikri further observed that "our Constitution inheres liberal and substantive democracy with the rule of law as an important and fundamental pillar" and that "it has its own internal morality based on dignity and equality of all human beings."[68] These observations, coupled with the Court's conclusion on the necessity to recognize the rights of transgenders, hijras and eunuchs, evince the Court's view that our Constitution has its own morality based on dignity and equality (among others) and that that morality can be used to bring about real and substantive equality in society so that the ends of social justice are met.

Interestingly, Bhatia points out that one possible method of identifying aspects of constitutional morality is through the lens of the basic structure doctrine.[69] Conceptually, the two are similar as both rely on the values underlying the Constitution for their substance. Till now, the basic structure doctrine has predominantly been invoked in cases where the relationship between the three organs of State has been in question. However, despite the fact that constitutional morality pervades the entire Fundamental Rights Chapter, if not the entire Constitution, the fact that "morality" is used in four specific provisions as a ground to restrict the fundamental rights would arguably mean that cases before the court seeking to identify and apply morality as constitutional morality would assume a particular form. Though the meaning of constitutional morality remains the same throughout in my conception, in the next Part it is argued that the wording of the different provisions where "morality" is included results in some crucial differences.

IV. *Exit Naz & Enter Sabarimala*

While Part III of this Article focused on the *meaning* of constitutional morality, this Part looks at its possible *use* (and misuse) in constitutional adjudication, particularly in light of the structure of Articles 19(2), 21,[70] 25 & 26.

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[67] *Id.* ¶ 125.

[68] *Id*. ¶ 129.

[69] *Supra* note 48, at 127. The "basic structure doctrine" has been interpreted by the Court to hold certain concepts like "democracy", "rule of law", "separation of powers", "secularism", etc. as inviolable.

[70] Though the word, "morality" is not used in this Article, it remains relevant due to the reasoning in *Naz Foundation*.

1. *Naz Foundation*: From Shield to Sword

The summary of arguments and findings in Part I show how exactly the Delhi High Court developed the concept of morality as necessarily meaning constitutional morality. As opposed to that approach, Arvind Narrain argues that the Delhi High Court could have simply relied on Hart's argument that law had no business regulating a zone of private morality at all,[71] to rule out the curtailment of rights of individuals guaranteed under Article 21 on any notion of morality. Instead, it chose to tread the much more ambitious path of interpreting morality as necessarily meaning constitutional morality, and then using that interpretation to buttress the argument of the Petitioners.[72]

Narrain shows how the Court "reversed" the terms of the debate to a point where constitutional morality required the Court to protect LGBT rights.[73] Pertinently, the Delhi High Court concluded its judgment by finding as follows:

> "*If there is one constitutional tenet that can be said to be underlying theme* (sic.) *of the Indian Constitution, it is that of 'inclusiveness'. This Court believes that Indian Constitution reflects this value deeply ingrained in Indian society, nurtured over several generations. The inclusiveness that Indian society traditionally displayed, literally in every aspect of life, is manifest in recognizing a role in society for everyone. Those perceived by the majority as 'deviants' or 'different' are not on that score excluded or ostracized.*"[74] (emphasis mine)

Clearly, it is "inclusiveness" that the Court ultimately takes as the constitutional value that is relevant for determining the case. Eventually, Section 377 of the IPC, insofar as it criminalized consensual sexual acts of adults in private, was held to violate Articles 21, 14 and 15 of the Constitution. Interestingly, none of those provisions of the Constitution expressly mention "morality" as a ground for restricting a Fundamental Right. Arguably, the Court could have simply rejected the morality-based argument supporting Section 377 by

[71] H.L.A. HART, CONCEPT OF LAW (1961).

[72] Arvind Narain, *A New Language of Morality: From the Trial of Nowshirwan to the Judgment in Naz Foundation*, INDIAN JOURNAL OF CONSTITUTIONAL LAW, 84, 102 (2010).

[73] *Id*, at 103.

[74] *Supra*, note 10 ¶ 130.

finding that the Constitution did not provide for the restriction of *any of those rights* on the ground of morality.

Recall that morality was brought into the debate by reference to *Gobind*'s case, where the Supreme Court raised (but decided not to answer) the question as to whether morality could constitute a "compelling state interest". It was in this context that the Court analysed the concept of morality and held that, if at all morality could *shield* the curtailment of the right to life under Article 21, it would have to be constitutional morality, and no other. Again, the Court's finding that Section 377 was not protected by the concept of constitutional morality was sufficient ground to read down Section 377. However, the Court did not stop there. In its concluding paragraphs the Court held that constitutional morality, if anything, buttressed the argument of the Petitioners who sought to attack the law enforced by the State.

This is as significant, because it implies that an individual aggrieved by State action can challenge such action on the ground that it is inconsistent with the constitutional morality underlying the Constitution (whether in addition to other specific fundamental rights violations or not). This interpretation has the potential to become extremely problematic.[75] Not least because it arises out of an interpretation of Article 21, which does not directly deal with morality at all. It would have been more appropriate for the Court to have held that constitutional morality could be used as a shield to protect State law or action, where a compelling state interest could be shown,[76] but that Section 377 could not take shelter under that shield. In sum, by reading constitutional morality into Article 21 and then not confining its use to that of a shield to protect State action, the Delhi High Court has created a concept that, though well-intended, can be used to diminish the very rights it sought to protect.

[75] For example, the use of constitutional morality as a component of the right under Article 21 as a sword to attack a State law that is enacted to ensure the protection of certain other fundamental rights or the fundamental rights of certain others could lead to a confusing balancing situation for the Court. I emphasise that this would be particularly worrying in the context of Article 21, whose language is so abstract that it grants judges a lot of room to manoeuvre in the process of interpretation. Gautam Bhatia provides a brief explanation of the mechanics of the problem on his blog, albeit in a different context, where he has argued against the use of Article 21 as a sword in general. *See* https://indconlawphil.wordpress.com/2016/05/02/judicial-censorship-a-dangerous-emerging-trend/. *See generally* https://indconlawphil.wordpress.com/2016/07/07/the-madras-high-courts-perumal-murugan-judgment-some-concerns/ where Bhatia points to the use of "fraternity" as a sword in the Criminal Defamation judgment (*Subramanian Swamy v. Union of India*, WP(Crl) 184 of 2014, available at: http://supremecourtofindia.nic.in/FileServer/2016-05-13_1463126071.pdf).

[76] Honestly, even the parameters for the use of the "compelling state interest" test have not been clearly defined by Indian courts, and so even this may not have been adequately clear. The United States Supreme Court however has a much clearer method of identifying and using the compelling state interest test.

2. Morality governing the Individual, the Community and the State

In this section I argue that, despite being grateful to *Naz Foundation* for its progressive view of morality under the Constitution, I feel that was not the correct case for the use of constitutional morality as anything but a shield for State law/action, whereas the on-going *Sabarimala* case is. Before discussing the details of the *Sabarimala* case, it would be helpful to analyse the wording of Articles 19, 25(1) and 26, where morality is used in the Fundamental Rights.

Article 19(2)[77] and 19(4)[78] restrict the freedoms guaranteed under Articles 19(1)(a)[79] and 19(1)(c)[80] respectively. Both Articles 19(2) and 19(4) are clear that "reasonable restrictions" may be placed on the corresponding freedoms only by way of law. The articles further clarify the legitimate interests that justify the imposition of such laws, with both including "morality" as one such justification. It is clear from the article itself that "morality"[81] is to be used as a *shield* for State law. This frames any dispute on the meaning of morality as necessarily being fought between the individual and the State. Arguments on the interpretation of constitutional morality therein would be focused on whether the law enacted by the State was consistent with or reflected the values underlying the Constitution. Here, assuming a law was enacted in the interest of constitutional morality, the State would still have to show that the restriction it placed upon the concerned freedom was "reasonable". The Supreme Court has dealt with the meaning of "reasonable" on multiple occasions. For all these reasons, the manner in which a constitutional court could employ constitutional morality under Articles 19(2) and 19(4) would be fairly structured and disciplined.

[77] The Article reads: "Nothing in sub-clause (*a*) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence." (emphasis mine)

[78] The Article reads: "Nothing in sub-clause (*c*) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause."

[79] This Article guarantees the freedom of speech and expression.

[80] This Article guarantees the freedom to form associations, unions or cooperative societies.

[81] Which, as per my argument, must be read to mean constitutional morality.

In the previous section I have argued why the use of constitutional morality under Article 21, especially as done in *Naz Foundation*, is problematic. Unlike Article 21, Article 25(1)[82] providing for the individual's right to freedom of religion, and Article 26[83] providing the rights of religious denominations to freely manage religious affairs actually use the word morality. Both Articles begin with the phrase, "subject to public order, morality and health", while Article 25(1) is also subject to the other provisions of Part III. The fact that Article 25(1) is subject to other provisions of Part III, including of course Article 26, makes it clear that ordinarily, where a conflict arises, the right of a religious denomination would override the right of an individual.[84] Since this kind of conflict is taken care of, the use of the phrase "subject to public order, morality and health" would be confined to cases where the State seeks to justify a restriction on the individual's right to freedom of religion on any of those grounds. As such, insofar as morality is concerned, Article 25(1) also frames the dispute as being between the individual and the State.

Theoretically, it is possible that a group of persons who do not form a religious denomination may seek to curtail the religious rights of an individual on the ground that they are opposed to constitutional morality; however, given that an individual is unlikely to *impact* the values underlying the Constitution by way of her/his practice of religion, this situation seems unlikely to arise. That, however, does not hold true of religious denominations. Religious denominations, and the authorities that are constituted to administer their affairs, do have the capability of acting in a manner that threatens the values that underlie the Constitution. The rest of this section of the Article seeks to demonstrate this point with the help of an example.

[82] The Article reads: "(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion."

[83] The Article reads: "Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(*a*) to establish and maintain institutions for religious and charitable purposes;

(*b*) to manage its own affairs in matters of religion;

(*c*) to own and acquire movable and immovable property; and

(*d*) to administer such property in accordance with law."

[84] *See*: Vankataramana Devaru v. State of Mysore A.I.R 1958 S.C. 255 (India) for a detailed explanation of the inter-relationship between Articles 25 & 26.In brief, the judgment holds that while Article 25(1) is subject to Article 26, Article 26 must give way to *the right* under Article 25(2)(b) where the two cannot be harmoniously construed.

It is argued that, unlike with Articles 19 and 25, "morality" as used in Article 26 can and ought to be used as a *sword* to attack State *and* private actions that are opposed to the morality of the Constitution.

The *Sabarimala* case, which is titled, *Indian Young Lawyers Association v. The State of Kerala,*[85] is a Writ Petition pending before the Supreme Court which has been filed on behalf of a group of women who seek the Court's intervention to dismantle a ban on the entry of women aged 10 to 55 into the Sabarimala Temple on the ground that it violates their fundamental rights, particularly Articles 14, 15, 19, 21 and 25. This ban was initially in force by way of subordinate legislation in the form of successive notifications issued in 1955 and 1956, but was eventually given judicial recognition and protection as a "usage" by the Kerala High Court in the case of *S. Mahendran v. Secretary, Travancore Devaswom Board.*[86] Interestingly, this judgment arose out of a letter-petition submitted before one judge of the Kerala High Court, which was then converted into a public interest litigation.

It is worth noting some of the observations of the Kerala High Court in its 1991 judgment. In response to the submission that the ban discriminated against women as a class, the Court, *inter alia*, observed that "the entry in Sabarimala temple is prohibited only in respect of women of a particular age group and not woman (sic.) as a class."[87] While examining the reasons for the ban, the Court observed the main reasons to be that, firstly, in the olden the trek up to the temple was very difficult,[88] and; secondly, and more importantly, that typically a pilgrim starts trekking to Sabarimala only after completing a period of penance (which entails purity of thought, word and deed) continuously for 41 days, but that women of the age group 10 to 50 would not be in a position to observe penance continuously for that period "due to physiological reasons".[89] The Court further observed that the deity of the temple was

[85] Writ Petition (C) 373 of 2006 (India).

[86] AIR 1993 Ker 42 (India).

[87] *Id*. at 26.

[88] As noted by the 1991 judgment, transport facilities have improved since then. In any case, this hardly seems like a reason to *ban* women.

[89] Paragraph 38. The term "physiological reasons" is expounded upon at paragraph 43 of the judgment where it is recorded that "woman (sic.) after menarche up to menopause are not entitled to enter the temple and offer prayers there at any time of the year."

in the form of a *Naisthik Brahmachari,*[90] and that "it is therefore believed that young women should not offer worship in the temple so that even the slightest deviation from celibacy and austerity observed by the deity is not caused by the presence of women."[91] The Court accepted these reasons when it accepted the ban on women as a "usage",[92] and directed the Travancore Devaswom Board "not to permit women above the age of 10 and below the age of 50 to trek the holy hills of Sabarimala".[93]

Briefly, the argument[94] on morality is that, assuming the Ayappa devotees of Sabarimala Temple to be a religious denomination for the purpose of Article 26, their fundamental right under Article 26 does not include the right to exclude women as such a restriction would be hit by the limit of morality which must be read to mean constitutional morality.[95] As has been noticed in the previous Part of this Article, the "internal morality" of the Constitution is based on "equality and dignity". Restricting the entry of women into a temple either on the ground that they menstruate or that their entry would inevitably cause deviation of the temple deity's celibacy violate that internal morality, for such a restriction is based on *who* they are, and has

[90] As recorded in paragraph 39 of the 1991 judgment, the Manu Smriti describes a Naisthik Brahmchari as a "perpetual student" who must "control his senses." "He has to observe certain rules of conduct which include refraining from indulging in gambling with dive, idle gossips, scandal, falsehood, embracing, and casting lustful eyes on females, and doing injury to others." Note how the emphasis is on restraint *by* the Brahmchari, rather than the removal all of forms temptation altogether. After all, if temptation did not exist, what would be the scope to "refrain"?

[91] *Supra* note 86, at ¶ 41.

[92] *Supra* note 86, at ¶ 44.

[93] *Supra* note 86, at ¶ 45.

[94] An argument in this respect has been made both by the counsel for the Petitioner and Mr. Raju Ramachandran, who is one of the two *amicus curaie* in the matter.

[95]It should be clarified that this is not the main argument in the case. There are three other prominent arguments which, if accepted by the Court, would do away with the need for the Court to deal with this issue at all. They are:

1. That the devotees do not constitute a "religious denomination", and therefore cannot claim any right to manage their own affairs under Article 26;

2. That, while the devotees have no right under Article 26, women in the ages of 10 to 55 have a right to enter the temple under Article 25(1), which provides that "all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion."

3. That, even if the Petitioners do not succeed in the first two arguments, the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, providing that every place of worship shall be open to all sections or classes of Hindus, is a "social reform legislation" covered under Article 25(2)(b) that would take precedence over the right of the denomination under Article 26 as per the case of *Vankataramana Devaru v. State of Mysore* A.I.R. 1958 S.C. 255.

nothing to do with what they do. In this context, it is immaterial whether women are restricted as a whole or not because the restriction of each and every woman on this basis is a threat to the notion of equality and dignity underscored by the Constitution. Such a restriction can only be valid in a society where women are seen as *innately* lesser beings who should not enjoy dignified lives. The Constitution lifts us away from that society and pushes toward an equality that is both formal and substantive. Thus, whether on a doctrinal, structural, ethical or even Dworkin's *moral* reading,[96] Article 26 must be read so that an individual (or a class of individuals) can invoke the concept of constitutional morality to legitimately curtail the rights of a religious denomination.[97]

Arguably, subjecting the rights of a religious denomination to constitutional morality read in this purportedly broad and powerful manner could lead to severe reduction in the freedoms of the denomination. However, it must be kept in mind that; firstly, respect for religious denominations and their views also forms a part of constitutional morality and thus the reconciliation of the two is more balanced than it may seem at first blush and; secondly, if at all the Court comes to the conclusion that the right of a religious denomination ought to be curtailed for being opposed to constitutional morality, it would do so based on the Constitution's own emphasis on certain rights.[98] Non-discrimination against women forms a relatively strong part of the Fundamental Rights chapter and this relative importance has been affirmed by the Supreme Court on numerous occasions. Therefore, limiting the denominations' freedom to restrict the entry of (a certain class of) women would be among the most legitimate interpretations of constitutional morality.[99]

[96] *Supra* note 2.

[97] It must be clarified that in challenging the freedom of a religious denomination in such a manner, the individual would have to argue that the freedom in question is contrary to public order, morality or health as *ought* to be recognized by the State. Accordingly, the State would be a necessary party even if it has no specific stance on the dispute because if the Court recognizes a limitation on the rights of a religious denomination, it would eventually fall upon the State to *enforce* that limitation in furtherance of public order, morality or health (as the case may be).

[98] This emphasis is to be obtained from a structural reading of the Constitution.

[99]Another such legitimate limitation of the rights of a religious denomination which is equally supported by a structural reading of the Constitution would be to uphold the rights of Scheduled Castes against discrimination in religious matters. This, of course, would depend on the exact facts and circumstances of the case.

Conclusion

Having traversed the literature on the differing meanings of morality and on the different strands of constitutional morality, it is the author's view that wherever the word morality is used in the Fundamental Rights chapter, it must be taken to mean the morality of the constitution. Taking into account the common criticism against judicial review as being undemocratic, it is argued that such an interpretation of morality would be both objective and in line with the aims of our Constitution. While society does not always move in tandem with the Constitution's aims, this view of constitutional morality can be used to anchor society to certain unassailable values like equality and dignity. This interpretation allows the Judiciary to step in to recognize voices that the Legislature or the Executive have failed to hear. Most importantly, this interpretation gives rise to a morality that can walk hand-in-hand with the Constitution.