COMPARATIVE STUDY OF CONSTITUTIONAL MORALITY AND ITS IMPACT ON RELIGIOUS FREEDOM IN INDIA

by Farhan Zia

LLM Final Thesis
SUPERVISOR: Renáta Uitz
Central European University - Private University

16 June 2023

ACKNOWLEDGMENTS

I could not have finished this thesis without the guidance, advice and active involvement of my thesis supervisor Prof. Renáta Uitz. Not only has Prof. Uitz, with great patience provided me excellent feedback on my writings, but also given me the encouragement and support to study and explore a complex yet exciting subject matter. I must also thank Mr. Rohit Sarma, SJD Candidate at Central European University, for being very kind, willing and enthusiastic in providing me inputs and advice at each stage of the thesis.

I thank Prof. Markus Böckenförde, chair of the CCL Programme for his great efforts in ensuring ease with administrative and logistical matters. I thank Prof. Arun K. Thiruvengadam and Prof. Vlad Naumescu for insightful discussions on my subject matter. I am also grateful to my classmates, as well as the faculty and peers in the Centre for Religious Studies, comments and ideas from whom have influenced various parts of this thesis. I thank my friend TPS Harsha for being a staunch opponent of Constitutional Morality and providing me with continuous generative opportunities to debate.

Lastly, I am grateful to the district of Favoriten, Vienna for giving me unprecedented freedom and safety to reflect, experiment and present my thoughts, which have motivated this thesis.

TABLE OF CONTENTS

ABSTRACT

This thesis explores the functions of Constitutional Morality, a concept that has gained currency in Indian judicial discourse in the last decade and has most recently been used in a landmark case on freedom of religion and the rights of women. As an abstract and contested concept, its contours and contents remain unclear in academic literature. This thesis addresses the gap in knowledge on when and what impact Constitutional Morality can have on religious freedom. It situates Constitutional Morality in the context of Indian constitutionalism and the theories that have explained the shaping of its contours to show the Constitutional Morality captures a tension between stability and change that is characteristic of Indian constitutionalism. It explores the question that given CM's ambiguity, what functions might it be performing. To this effect, it creates a general framework applicable to all three jurisdictions to compare which functions might be performed. A comparison to invocation of similar grand theories in the United States and South Africa points towards the fact these theories are resorted to in judicial reasoning when faced with fundamental tensions. By comparing the functions performed in each jurisdiction, it draws useful lessons for application in India in religious freedom jurisprudence.

INTRODUCTION

In 2018, a judgment of the Indian Supreme Court led to great controversy and public unrest. The Sabarimala Temple in Kerala – a key site of pilgrimage for the devotees of Lord Ayappa – through a state-issued notification[1] prohibited the entry of women of menstruating age into the temple. The Ayappans justified this on the basis of long-lasting religious custom. A constitutional bench of the Supreme Court in struck down this notification as violative of various fundamental rights in the Constitution, *inter alia* the right to equality,[2] equal freedom of religion[3] and prohibition of untouchability[4]. An interesting and unexpected occurrence in the judgment was, however, the appearance of 'Constitutional Morality' in their reading of Art. 25 and 26 of the Constitution, which guarantee freedom of religion. 'Morality', along with 'public order' and 'health' are grounds present in the text of the Constitution as limitations to these rights.

Morality as envisioned by the framers of the Constitution, wrote D.Y. Chandrachud, J. (as he was then) in his concurring opinion, could not mean something as rapidly changing as popular or prevailing sense of what is moral in society. Unless 'morality' means something less ephemeral, it would subject a person's rights to limitations to majoritarian views. Given the centrality of the individual to the constitutional liberalism adopted by the Constitution, such a reading in his view would contradict the Constitution. Hence, for Chandrachud, 'Morality' must refer to constitutional values here. Freedom of religion in Art. 25 and 26 "must yield to these fundamental notions of Constitutional Morality."[5] Notwithstanding ambiguity and internal disagreements on the bench about these values, their sources and application, the

[1] *Indian Young Lawyers Association vs The State of Kerala* Writ Petition (Civil) No. 373 of 2006) (hereafter "*Sabarimala").*
[2] Article 14, The Constitution of India, 1950.
[3] Article 25, The Constitution of India, 1950.
[4] Article 17, The Constitution of India, 1950.
[5] ibid n(1) *Sabarimala* Para 12 (Per D.Y. Chandrachud, J.)

general claim of the court was that the Constitution embodies a certain morality and that this Constitutional Morality ("CM") limits any claims of religious freedom that contradict it.

The *Sabarimala* case and the resulting great hardship in enforcing the judgment[6] brought CM to the forefront of public debate. Proponents of CM hailed it for furthering the emancipatory potential of the Indian Constitution and distinguished this approach from the court's earlier approach in cases involving rights to religious freedom and gender equality, which had been to test whether a practice is an 'essential religious practice.' Rather than placing the religion at the centre of their investigation as had been the case earlier[7], *Sabarimala* was praised for placing the woman at the centre, and acknowledging the Constitution's aim of enforcing substantive equality.[8] Meanwhile, CM was criticised for having the potential of abuse by fusing judges' personal morals to the Constitution[9] owing to its lack of clarity[10], and upsetting the Separation of Powers by boosting the jurisdiction of the court.[11]

But even before *Sabarimala*, the CM itself was neither foreign nor unheard of. CM in Indian discourse first appeared in the speeches of B.R. Ambedkar who famously invoked it in the Constituent Assembly debates while defending the inclusion of various administrative details in the text of the Constitution.[12] Ambedkar borrowed the term from George Grote, a historian

[6] Kai Schultz, 'Her Visit to a Men-Only Temple Went Smoothly. Then the Riots Started.' (*The New York Times,* 18 January 2019) https://www.nytimes.com/2019/01/18/world/asia/temple-india-sabarimala-ammini.html last accessed 6th May 2023.
[7] *Shayara Bano v. Union of India* (Writ Petition (Civil) No. 118 of 2016).
[8] Vrinda Narain, 'Constitutionalizing Women's Equality in India: Assessing the Sabarimala Decision' (2022) 42 Colum J Gender & L 77.
[9] Richa Dwivedi and Abhinav Shrivastava, 'Constitutional Morality- A Tool for Judicial Governance' (2019) *Think India (Quarterly Journal)* 22(4).
[10] Ananthakrishnan G, 'National Law Day: Need to clearly define nuances of Constitutional morality, says RS Prasad' (*The Indian Express*, 27 November 2018) <https://indianexpress.com/article/india/national-law-dayneed-to-clearly-define-nuances-of-constitutional-morality-says-prasad-5466090/> last accessed 11 April 2023.
[11] Ananthakrishnan G, 'SC has taken more powers than any apex court… hope Constitutional morality dies with birth: A-G' (*The Indian Express,* 9 December 2018) <https://indianexpress.com/article/india/sc-has-taken-more-powers-than-any-apex-court-hope-constitutional-morality-dies-with-birth-a-g-k-k-venugopal-5484988/> last accessed 11 April 2023.
[12] B.R. Ambedkar, Constituent Assembly Debates, 4 November 1948, 38 https://eparlib.nic.in/bitstream/123456789/762996/1/cad_04-11-1948.pdf last accessed 11 April 2023.

of Greece, who used it while describing the nascent democratic State in ancient Athens. To protect the democratic constitution from those wishing to subvert it, wrote Grote, it was necessary for the statesman Cleisthenes to create such a "rare and difficult sentiment" that would kindle a passionate attachment between the constitutional forms and the citizens. Such attachment would create a bare minimum degree of unanimity, even among political opponents, of the sacredness of the forms and values espoused by the Constitution.[13] Grote named this sentiment Constitutional Morality.

For Ambedkar, much like ancient Athens, India too did not naturally possess such a Constitutional Morality and would have to be cultivated. So long as India lacked this CM, Ambedkar was deeply apprehensive of the entire constitutional project being endangered if administrative details were excluded from the Constitution and left to the discretion of the Legislature. "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 Constitution."[14] Thus, there was required a consonance between CM and the forms of the Constitution, and administrative details were to be a part of these forms. Ambedkar's focus while discussing CM was thus, on respect for forms and procedure of the Constitution.

But the appearance of CM in recent Indian case laws refers to something much narrower.[15] CM's first recent entrance was in the Delhi High Court's judgment on constitutionality of Section 377 of the Indian Penal Code which criminalised consensual homosexual intercourse: *Naz Foundation v. Govt. of NCT of Delhi* (2009).[16] Here it was used to refer to a respect for the values underlying the fundamental rights for all. Subsequently, in a series of half a dozen cases

[13] George Grote, *A History of Greece Vol.* 4 (Cambridge University Press 1847) 204-206.
[14] ibid Ambedkar n(12).
[15] Martha C. Nussbaum, 'Ambedkar's constitution Promoting inclusion, opposing majority tyranny' in Tom Ginsburg and Aziz Huq (eds) *Assessing Constitutional Performance* (Cambridge University Press 2016) 327, 330-32; Nakul Nayak, 'Constitutional Morality: An Indian Framework' in *American Journal of Comparative Law* (Forthcoming).
[16] WP(C)7455/2001.

ranging in subject matter from anti-sodomy laws[17] to criminalisation of politics[18] to rights of women[19], CM has been invoked to different ends by the Indian Supreme Court, with each judgment becoming a stepping-stone for utilisation of the concept in a subsequent judgment.

This thesis reviews the scholarly and judicial literature on Constitutional Morality to highlight how it captures a certain tension that is part of the Indian Constitutional project: between the opposing forces of a commitment to radical social transformation and a yearning for stability through precedent and a shared core of constitutional values. These core values could include values like equality, liberty, dignity and tolerance, and may be informed by a long tradition from Ambedkar to King Ashoka to Emperor Akbar. Given its ambiguity, its strategic use in judicial reasoning provides a tool to judges enforce specific readings of abstract values that they hold to be part of the Constitution, when read holistically.

This thesis compares deployment of grand theories similar to CM in South Africa and the United States to show that judges respond by reliance on such grand theories when faced with similar tensions as that captured by CM. It explores the question that given CM's ambiguity, what functions might it be performing. To this effect, it creates a general framework applicable to all three jurisdictions to compare which functions might be performed.

The selection of comparators is based on the fact that 1) they share a common-law background and 2) that Indian judgments on CM have repeatedly cited South African and American cases. It analyses *Navtej Johar v. Union of India*[20] and *Sabarimala* from India, *Dobbs v. Jackson Women's Health Organization*[21] from the United States and *Minister of Home Affairs v. Fourie*[22] from South Africa. The two cases from India are selected for the reason that they are the only

[17] *Navtej Johar v. Union of India* W. P. (Crl.) No. 76 of 2016.
[18] *Manoj Narula v. Union of India* W.P. (C) No. 289 of 2005.
[19] ibid n(1).
[20] ibid *Navtej Johar* n(17).
[21] 945 F. 3d 265.
[22] [2005] ZACC 19.

two cases including opinions by judges on CM other than its two chief proponents: Chandrachud J. and Misra J. This creates a more robust case selection. *Sabarimala* and *Navtej* share with *Dobbs* and *Fourie* not only deployment of grand theories but also factual similarity: judges operating against the background of relative constitutional silence and profound changes in the constitutional scheme of rights.

Chapter I reviews the literature on CM to show how even outside judicial discourse, CM captures a certain tension between stability and change, by situating CM in the context of grand theories on how Indian constitutionalism was shaped. Chapter II of this thesis creates a typology of the various functions that CM may perform by reviewing the case laws in India, followed by Chapter III which performs a similar analysis of *Dobbs* and *Fourie*. Chapter IV uses this analysis to connect the trends from India to useful lessons from South Africa and the United States. It concludes with showing how this analysis shows both promising and distressing trends for religious freedom in India.

CHAPTER I – Situating Constitutional Morality in Indian Constitutionalism

This chapter situates CM in the context of grand forces on Indian Constitutionalism that have shaped it. The Indian Constitution was created with a vision to break away from the past towards a radical restricting of society. It did so while not only maintaining a link with the past, but also emphasizing certain values that form a core of this drive towards transformation. Rather than reducing CM to a rhetorical device which judges use to enforce these values, or limiting it to a framework within which reasoned debate can take place when the Constitution is ambiguous, this chapter demonstrates that CM captures this tension central to Indian Constitutionalism. It emphasises the drive towards change while creating a core of values, central to the Constitution that provide both, a stability and direction to this change. For this purpose, this chapter conducts a literature review of scholarly writings on CM and uses the theories of Constitutional Identity by Gary Jacobsohn and Transformative Constitutionalism to contextualise CM. Such contextualisation helps create an abstract framework that can be applied to similar grand theories being used in other jurisdictions to compare functions performed by judges resorting to these normative concepts.

Literature Review

Following Ambedkar's invocation of CM in Constituent Assembly Debates did not result in vigorous debate around the concept. The Courts made several isolated references to CM, with no evidence that they were referring to the same concept as Ambedkar, nor did they elaborate or engage with the concept enough to sustain a relatively consistent use of the term.[23] Towards the close of the first decade of the 21st century, the concept found new life in scholarly debate and judicial discourse with the *Naz Foundation* judgment, as well as two seminal lectures by

[23] Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (2020) *SSRN* 7-8 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521665 last accessed 11 April 2023.

sociologist Andre Béteille and political scientist Pratap Bhanu Mehta respectively. While neither of these three works engage with each other, the discussion of CM in the two academic works is useful to understand the contents of CM, as well as what it is responding to.

Béteille's lecture, in showing that CM has failed to deeply take hold in India, brings forward the goals that Ambedkar's CM was geared towards. First, that CM was intended to drive forward the social transformation of India's caste-based society and second, that it was intended to instil in citizens a respect for laws and the institutions of the Constitution. He demonstrates the former by showing that in claiming that India had no democratic tradition, Ambedkar was referring to the deep pervasiveness of caste and community-based identities in Indian society, caste nearly being a defining feature of this society. Béteille argues that a successful democracy includes a State with authority and citizenship. Citizens, as opposed to subjects are viewed as individuals, and their rights are protected equally as individuals, irrespective of their caste, religious or gender identities. This view that emphasises the individual over the collective is key. When collective identities are strengthened instead, they compromise individual rights.[24] Thus, for Ambedkar, the caste hierarchy opposed democracy and its institutions. A Constitution might be a legal framework that opposes caste, but by itself it would be insufficient to transform society. Béteille reads Ambedkar to argue that what constitutional law would have to rest on is a foundation of morality for it to be effective.[25]

Béteille demonstrates the latter by distinguishing Ambedkar's desired methods from either those of Communists or that of Gandhian civil disobedience. Ambedkar regarded procedural forms as key to constitutional democracy which was often dismissed on grounds of favouring the elite by communists. Similarly, the Gandhian tradition of civil disobedience which was

[24] Andre Béteille, 'Constitutional Morality' (2008) *Economic and Political Weekly* 43(40), 35-42, 35-36, 40-41 http://www.jstor.org/stable/40278025 last accessed 11 April 2023.

[25] ibid 36.

effective during the nationalist movement was regarded as inappropriate by Ambedkar for use in post-independence India. Such methods in his view embodied a degree of coerciveness and often lead to populism, with disregard for already existing constitutional methods to achieve change.[26]

Mehta concurs on both these counts. He distinguishes Ambedkar's CM from mere normative principles embedded in the Constitution, and instead believed that Ambedkar was making observations about constitutionalism itself. Mehta identifies three features of CM: 1) a relationship between self-restraint and freedom, 2) a recognition of plurality in society and 3) suspicion of claims to popular sovereignty. The second element here recognises differences among people, based on opinions and not identity, and aims to provide a framework for resolving disputes and debates. In doing so, it would be vital to have a unanimous agreement on a constitutional process. The constitutional process would be a constitutional form, allegiance to which is key regardless of the outcome of the process. Disputes between people could only be resolved if the process is respected. Caste, however, fragments society to such an extent that it prevents such unanimity from taking hold, and thus is opposed to CM.[27] CM was then intended to drive forward the transformation of Indian society from one filled with caste and community-based collective identities to one where individual identity and the equal rights that individuals carry could come into being. A successful political transformation to a democracy becomes necessarily linked to a social transformation.

This account gives an understanding of CM that is more than just a sentiment required for the propagation of the transformation mission. CM is important for change to happen *through* the constitutional forms and institutions. The use of civil disobedience by the opposition in

[26] ibid 37-38.
[27] Pratap Bhanu Mehta, 'What Is Constitutional Morality?', 615 Seminar (2010), http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm last accessed 11 April 2023.

Béteille's account led to a populism which not only disregards the authority of state and the constitutional process, it also contributed to causing the Emergency in India, the period of independent Indian history where the Constitution was at its weakest.[28] Mehta argues similarly, that the relationship between restraint and freedom is that the latter is a condition for the former. Despite civil disobedience, the Indian nationalist movement was characterised by a politics of restraint with the habit of obeying even inconvenient laws, but not unjust ones.[29] CM opposes revolution.[30] Thus, this tension between change and stability is present in CM.

"Constitutional law is where the authority of the past and the challenges of the future meet, in the context of an ongoing democratic conversation."[31] For instance, religious liberty at the time of constitution drafting (and later) is of great value, but in the context of a changing society, to further the rights of equality, constitutional law becomes the site of this tension between the two and must handle the two. Mehta, Choudhary and Khosla have stated that a Constitution has to undertake many compromises to become successful, including the example above: between different values. Their argument is that such compromises do not dilute but advance democracy. Law and democracy shape each other in their view, and here is where CM becomes a point in the dialogue between the two.[32] It would follow then that CM becomes a link between how democracy and law shape each other. Combined with Mehta's emphasis on recognition of pluralism being a key part of Ambedkar's CM, the concept then becomes a framework through which different people, with different visions of what India's democracy ought to be, argue.

[28] ibid Béteille 39-40.
[29] ibid Mehta; ibid Béteille 42.
[30] ibid Mehta.
[31] Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, 'Locating Indian Constitutionalism' in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *Oxford Handbook of the Indian Constitution* (OUP 2016) 59.
[32] ibid 64.

Theories on shaping of Indian Constitutionalism

That CM captures these tensions can further be shown by placing it next to other grand theories which have explained the shaping of Indian Constitutionalism. For Gary Jacobsohn, central to thinking about constitutional change is questions about the identity of a Constitution. This includes both, a generic identity that helps identify Constitutions from other political or legal texts, and a particularistic identity that helps identify a given Constitution.[33] This process of identity formation is one that takes place 'dialogically.' Rather than being something that can either be discovered, or completely invented at the time of drafting, Constitutional identity is one that takes place through a process of interaction with various sources. Identity develops through experience, and hence, evolves with subsequent events. For instance, the identity that the Declaration of Independence and foundational principles of the U.S. Constitution envisioned only came to be realised after the post-Civil war amendments. It follows, that the activities of stakeholders like judges, legislators, policymakers and most importantly, the citizenry is needed for this evolution. The dialogical process develops identity in response to the environment of the Constitution such historical traditions, political debates and the specific goals of the Constitution.

A key element of Constitutional Identity is that it resists change. Heavily inspired by Edmund Burke's prescriptive constitution, Jacobsohn defines prescription as a strong presumption in favour of settled traditions. For constitutional change, this means that identity entails both discovery and innovation. Prescription is merely a presumption, and a presumption can be overcome. For the Indian Constitution, he illustrates this through the basic structure doctrine (BSD) and Indian secularism. Key to the BSD debate was the refusal of the judiciary to find space in the Constitution to allow abeyance of judicial review by the Prime Minister.[34] This,

[33] Gary Jeffery Jacobsohn, 'Constitutional Identity' (2006) *The Review of Politics* 68, 361-397.
[34] *Indira Gandhi v. Raj Narain,* AIR SC 2299 (1975).

Jacobsohn identifies as an example of the generic identity, since anything to the contrary would have compromised the basic tenets of the rule of law. But for its more particularistic elements, Secularism can be referred to, which the Supreme Court marked as a key feature of Indian Constitutional identity by declaring it its "soul"[35].

Secularism was aimed at addressing a tension between achieving communal harmony in a religiously polarised society and social reconstruction of a society in which deep injustices were justified by religion; between socioeconomic reform and tolerance of religions. This Secularism thus, had a deep confrontational characteristic towards the existing societal order that could be considered radical change. For Jacobsohn however, this is consistent with Burke's vision. Aspirations for such change could be accommodated by Constitutional Identity. This is because, it was not just societal conditions that created continuity but also invocation of alternative traditions, such as the political tolerance of King Ashoka, which made change a part of this continuity. Indian Secularism, thus, developed dialogically. The specific meaning attributed to this Secularism, which is called "contextual secularism"[36] was an innovation, which addressed the complex balance India needed. A movement to an alternative understanding of secularism, in the absence of societal changes that negate the conditions contextual secularism addresses, must be viewed with caution as significantly changing Indian Constitutional Identity.

But transformation is a key aspect of Indian Constitutional law. This Constitution did not just change the relationship between the individual and State by conferring onto erstwhile colonial subjects, the status of citizens, a large majority of whom were still illiterate at the time of independence. It also recognised that other than the State, sovereignty also rested in social

[35] *S.R. Bommai v. Union of India* 3 SC 1 (1994) 143.
[36] Rajeev Bhargava, 'What is Secularism For' in Rajeev Bhargava ed. *Secularism and its Critics* (OUP 1998) 495, 511-512.

hierarchies of caste and community.[37] Uday Mehta characterises the constitutional moment as a rupture between the past and the future, rather than a connecting tissue.[38] Indian constitutionalism clearly foreswore the past - the iniquity of the caste system - and promised a future of egalitarianism, despite carrying elements of colonial elements. The lofty goals of the Constitutions thus envisioned radical change away from servitude not just political, but also under the "settled governing classes".[39] The constitutional provisions, particularly the equality code (Art. 14-18) and the horizontal application of anti-discrimination (Art. 15(2)), untouchability (Art. 17) and forced labour prohibition (Art. 23) reflect this transformative constitutionalism.[40]

CM as a concept captures the tension between both of these: enabling such change that would carry out the vision of the egalitarian society envisioned by the framers while resistaning such change that would upset a core or soul of the Constitution. "Constitutional morality is as important for the smooth working and survival of the Constitution as public morality is for the smooth working and survival of a society"[41] Public morality maybe considered part of the continuity surrounding the Indian Constitution. But CM forays into the public morality and carves out only a part of its sphere which would be protected under the constitution. The use of CM and equality jurisprudence by courts in *Naz Foundation* and *Navtej Johar* can then, be seen as illustrating the Constitution's transformative mission. Similarly, the manner of abstraction and cooperation that CM requires for Ambedkar in Mehta's lecture is antithetical to the inherent competitiveness of caste. Such eliminations of inequality become the kind of radical change that Jacobsohn believes Constitutional Identity accommodates, since it is

[37] Gautam Bhatia, *The Transformative Constitution: A Radical Biography in Nine Acts* (HarperCollins 2019) xxv.
[38] Uday Mehta, 'Constitutionalism' in Pratap Bhanu Mehta (ed.), *The Oxford Companion to Politics in India (*Oxford University Publication 2010), 15-27, 16.
[39] B.R. Ambedkar, *What Congress & Gandhi Have done to the Untouchables,* (Gautam Book Centre 1946) 196.
[40] ibid Bhatia n(37).
[41]Mahendra Pal Singh, 'Observing Constitutional Morality' <https://www.india-seminar.com/2019/721/721_mahendra_pal_singh.htm> last accessed 11 April 2023.

difficult to call such equality anything but arbitrary, which opposes the rule of law, and hence cannot be part of the generic constitutional identity. CM is then not just a concept that provides a framework for debate, but that it captures two opposing forces that shape constitutional development.

Creating a typology of functions

It has been argued that CM, as has been used by judges, is different and narrower than what Ambedkar meant. Nakul Nayak reviewed Ambedkar's speeches outside the Constituent Assembly which reflect that he considered CM only a bare minimum.[42] The existence and persistence of a "settled working class" and a "servile class" –referring to Dalits in the Indian context - was a constant threat to democracy and the principle aim of a statesman devising democracy must be to dislodge such a class.[43] In India, this refers to Dalits and other lower castes. Cultivation of CM then is not the objective of successful self-governance but merely an imperfect condition precedent to it. Merely an adherence to CM only aids the governing class.[44] What transformation a political or moral concept takes when it enters the vocabulary of Constitutional *law* is a larger question that is beyond the scope of this study. In this thesis, I show however, that CM and similar concepts in other jurisdictions, even when used in judicial reasoning, are invoked by judges when faced with such tensions.

Following the use of CM by judges, it has become the subject of public debate, particularly after *Sabarimala*. Critics have attacked CM for a substantial increase in judicial power

[42] Nakul Nayak, 'Constitutional Morality: An Indian Framework', *American Journal of Comparative Law* (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885432> last accessed 11 April 2023.

[43] ibid Ambedkar n(39)
[44] ibid Nayak n(42).

particularly with respect to judicial review,[45] for lack of clarity in its contents[46] and the courts defining a monopoly over deciding the contents of CM.[47] Even those who defend CM do not deny its vagueness. Gautam Bhatia argues that since there are moral principles with encoded values in the Constitution separating CM from subjective moralities of judges is key.[48] For this, he suggests the onerous task of careful interpretation to develop frameworks to deploy CM in judicial reasoning by examining the text, structure, history and inter-relationship between provisions. Abhinav Chandrachud states that much like the vagueness of the BSD, CM doesn't merit rejection by this virtue only and should be left to judges to develop with time.

Based on the key hinges of these debates, and preliminary observations of CM's operation in case law, a typology of functions can be constructed to compare it with like grand frameworks that have been used by judges in the US and South Africa. The subsequent two chapters thus, test the modalities of these grand theories using this typology.

[45] Ananthakrishnan G, 'SC has taken more powers than any apex court… hope Constitutional morality dies with birth: A-G' (*The Indian Express,* 9 December 2018) <https://indianexpress.com/article/india/sc-has-taken-more-powers-than-any-apex-court-hope-constitutional-morality-dies-with-birth-a-g-k-k-venugopal-5484988/> last accessed 11 April 2023.

[46] Ananthakrishnan G, 'National Law Day: Need to clearly define nuances of Constitutional morality, says RS Prasad' (*The Indian Express*, 27 November 2018) <https://indianexpress.com/article/india/national-law-dayneed-to-clearly-define-nuances-of-constitutional-morality-says-prasad-5466090/> last accessed 11 April 2023.

[47] ibid Nayak n(42) 37.

[48] Gautam Bhatia, 'India's attorney general is wrong. Constitutional morality is not a 'dangerous weapon'' (*Scroll.in,* 21 December 2018) <https://scroll.in/article/905858/indias-attorney-general-is-wrong-constitutional-morality-is-not-a-dangerous-weapon> last accessed 11 April 2023.

CHAPTER II – Tracing Modalities in CM

This chapter creates a general framework of modalities under which these grand theories that courts have invoked can be compared. This framework, a typology of functions is useful to understand what all uses an emerging concept like CM may provide to judges, which in turn enables us to analyse its potential effects. This typology consists of four options: 1) Response to majority opinions, 2) Interpreting or filling constitutional gaps and silence, and 3) Transforming or unsettling precedent This chapter will analyse *Sabarimala* and *Navtej Johar* to trace modalities in CM. The subsequent chapter will perform a similar analysis for the Right to be Different in *Fourie* and the debate surrounding 'Liberty' in the Supreme Court of United States in *Dobbs*.

Navtej Johar v. Union of India

Navtej Johar settled a matter on which two Constitutional Courts had delivered differing verdicts. In 2010, in *Naz Foundation v. Govt. of NCT of Delhi*[49], Section 377 of the Indian Penal Code, which criminalises all homosexual intercourse as unnatural was in question in the High Court of Delhi (DHC). Finding such criminalisation unconstitutional, *inter alia*, for being against CM, the DHC read S. 377 to exclude consensual homosexual intercourse between adults. Despite s. 377 being a long-standing unamended provision, it was based on a majoritarian moral foundation that runs counter to the values embodied by the Constitution. Relying on the South African judgment of *The National Coalition for Gay and Lesbian Equality v. The Minister of Justice,*[50] the State is made the guardian of the values embodied in CM.

[49] WP(C)7455/2001 ("*Naz Foundation*")
[50] [1998] ZACC 15.

Naz Foundation was opposed by various religious groups, though not by the state[51], and was overruled by the Supreme Court in *Suresh Kumar Koushal v. Naz Foundation*.[52] The Supreme Court being the court of highest instance, most review petitions were rejected. However, following landmark judgments on the right to gender identity[53], autonomy and privacy[54], *Koushal* was revisited in *Navtej Johar*[55], where the Supreme Court affirmed *Naz Foundation* and overruled *Koushal*. The petitioners argued that the judgment in *Koushal* had been guided not by CM, but by public morality based on majoritarian values. Indeed, the judges in *Koushal* used certain arguments that deferred to majoritarianism and Parliamentary wisdom, taking inaction as proof of deliberation by the Parliament[56] and homosexuals being a "miniscule fraction"[57] as grounds for not striking down a law. The State itself did not oppose or support either stand. However, from the various other respondents, an argument forwarded was that S. 377 was a parliamentary reflection of prevailing social mores and that enforcing societal morals in public life which are not disproportionate advanced a compelling state interest.[58] Additionally, homosexuality amounts to an abuse of bodily organs, which was purported to be against dignity, and hence against CM.[59] It is in this context that *Navtej* was decided, with a unanimous bench of five judges speaking through four concurring opinions.

Firstly, the bench considered the view that homosexuality is immoral as being anachronistic. In Justice Nariman's opinion, the *raison d'être* of s. 377 was enforcement of a Victorian morality, which, by the coming into force of the Constitution can no longer be sustained by the

[51] Kanad Bagchi, 'Transformative Constitutionalism, Constitutional Morality and Equality: The Indian Supreme Court on Section 377' (2018) Verfassung und Recht in Übersee VRÜ 51, 367-380, 371 <https://www.nomos-elibrary.de/10.5771/0506-7286-2018-3-367.pdf?download_full_pdf=1> last accessed 11 April 2023.
[52] Civil Appeal No. 10972 of 2013, Supreme Court of India (*"Kosuhal"*).

[53] *National Legal Services Authority v. Union of India*, Writ Petition (civil) No. 604 of 2013.
[54] *Justice K.S. Puttaswamy (Retd) v. Union of India* AIR 2017 SC 4161.
[55] W. P. (Crl.) No. 76 of 2016 ("*Navtej Johar").*
[56] ibid *Koushal* Para 32.
[57] ibid *Koushal* Para 43.
[58] ibid *Navtej Johar* para 80 (per Nariman, J.).
[59] ibid *Navtej Johar* para 38 (per Misra, C.J.).

law. It is CM instead which applies today, putting it beyond the mandate of the law and the court to enforce religious or popular morality.[60] The Victorian morality inspiring S. 377 is a rationale that is outdated and no longer applies. It is not that CM prevails because it already exists in society, but rather because it *should* exist, and the supremacy of the Constitution pushes for that. S. 377 demeans the values through which the Constitution seeks to transform and correct past injustices, by punishing consenting homosexual intercourse. It places inclusiveness or preservation of society's heterogeneity at the centre. To further liberty (among other goals), it is the duty of state organs to counter homogenous popular sentiments, to allow for all kinds of asymmetrical attitudes to remain and grow, as long as they remain within the legal framework. Thus, rather than a societal morality, CM must guide the courts.[61]

This emphasis on the transformative mission echoes across all opinions. But it is also grounded in a gradual theory of change. Chief Justice Misra emphasized that the Constitution demands change and expansion without losing its identity, and that the SCI must "breathe life into the Constitution" [62] to move beyond just a formalistic understanding of the Constitution. CM presumably is the instrument which performs this task of breathing life into the Constitution. Misra's emphasis on the identity of the individual and the protection of this identity heightening the duty of the SCI, leads to a second development.

CM acquires an anti-majoritarian character, and the court acquiring both, a duty and over the expounding of this morality. At one level, this is important to counter claims for Parliamentary deference. Relying on Footnote 4 of *United States v. Carolene Products Co.,*[63] Nariman counters the argument that it is the legislature which should address moral shifts in society and not the courts. He argues that the Fundamental Rights in the Constitution are meant to protect

[60] ibid *Navtej Johar* para 78, 80, (per Nariman, J.).
[61] ibid *Navtej Johar* para 119 (per Misra, C.J.).
[62] ibid *Navtej Johar* para 81 (per Misra, C.J.).
[63] 304 U.S. 144 (1938).

'discrete and insular' minorities[64] and thus, need to be placed out of the reach of majoritarian governments for CM to be applied by the courts. There is first, a mistrust of the other branches of the State here in so far as CM may have been imbibed by them. Second, the court is viewed as the only institution which can identify the contents of and enforce this morality.

Justice Chandrachud adds to this expanded role of the courts: that the thrust of CM is towards individuals. Unlike public morality which gears individuals' behaviour based on existing institution and symbols, CM recalibrates this behaviour based on the text and the spirit of the Constitution.[65] Echoing Ambedkar's words that democracy is mere top-dressing in India, Chandrachud clarifies that instilling CM into each citizen requires the responsiveness of citizens to this goal, and the Supreme Court must act as the external facilitator which expounds the values of CM.[66] This cements its unique role as the facilitator of CM, and in this process, also makes it the guardian of CM's content.

Sabarimala Temple case

Indian Young Lawyers Association vs The State of Kerala, commonly known as the *Sabrimala Temple* case involves a famous temple in Kerala.[67] The patron deity of the temple is a celibate male god, Ayappa, whose followers take a pilgrimage to the temple, from which women had been traditionally excluded. State-made Rules[68] made under the Kerala Hindu Places of Public Worship Act, 1965, prohibited the entry of women of menstruating age into the temple by referring to custom as a ground for such exclusion. The legality of this exclusion was challenged before the Kerala High Court which upheld the constitutionality of the Rules and affirmed the exclusion of women. Subsequently, an appeal was filed, and a reference made to a Constitutional bench of the Supreme Court. The petitioners argued that the exclusion denies

[64] ibid *Navtej Johar* para 81, (per Nariman, J.).
[65] ibid *Navtej Johar* para 141 (per D.Y. Chandrachud, J.)
[66] ibid *Navtej Johar* Para 144 (per Chandrachud J.)
[67] ibid *Sabarimala* n(1).
[68] Rule 3(b), Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965.

women their right to religious freedom (Art. 25) as believers to enter the temple. The respondents countered that the exclusion was a practice essential to the Ayappans and that the religious autonomy granted to religious institutions under Art. 26 protected it. Article 25 and 26 of the Constitution provide for the right of religious freedom to individuals and groups respectively. These rights are subject to "public order, health and morality." It was submitted by an amicus curae that 'morality' here must be read to mean CM, lest the provision become hollow.[69]

The judgment in *Sabarimala* embodies a deep tension between judicial power and restraint. This manifests itself in the majority and dissent's treatment of both, CM and ERPT. What is agreed between the two sides is that the ERPT as it exists gives too much power to judges in allowing them to decide on theological matters.[70] The ERPT had provided a clear precedent, but as Vrinda Narain has argued, the courts' jurisprudence on religious freedom and gender equality, most recently then in *Shayara Bano v. Union of India*[71], rested on a deference to religious morality.[72] This resulted in methodologies that protected personal laws from gender scrutiny and left women's rights to how 'essential' a practice is to that religion. *Shayara Bano* had further resulted in creating greater communal disharmony despite its favourable outcome for Muslim women, and furthering boundary-making between antagonistic religious groups, amidst rising Hindu nationalism.[73] *Sabarimala* was thus, being argued on the heels of a decision failing both, equality and inclusivity, and the decision itself is handling tensions between

[69] Raju Ramachandran, Submission of Amicus Curae <https://images.assettype.com/barandbench/import/2018/08/Sabarimala-Written-submissions-Raju-Ramachandran.pdf> last accessed 11 April 2023.
[70] ibid *Sabarimala* n(1) Para 108 (per Chandrachud J.); Para 13.6 (per Malhotra J.)
[71] ibid n(7).
[72] ibid Narain n(8) 42.
[73] Jeffery A. Redding, 'A Secular Failure: Sectarianism and Communalism in Shayara Bano v. Union of India' in *Asian Journal of Law and Society* (2021) 8(1) 56-71, 58.

transformation and judicial power on one side, and restraint and religious autonomy on the other.

The majority and concurrence of Misra C.J. and Chandrachud J. respectively, addresses this by agreeing with reading CM into Art. 25. The plurality read 'public morality' in Arts. 25 and 26 as synonymous with CM. *Inter alia,* Misra provided a contractual logic: that since the Constitution was adopted by the people and not forced onto them, 'public morality' must mean CM.[74] Chandrachud argued that morality in the Constitution must be temporally universal and not transient; one that protects the rights enshrined in it. If it were ephemeral, it would become a morality of the mob or a tool of power accumulation. Since the Constitution adopted values based on constitutional liberalism, to guarantee that, its usage of 'morality' must mean values central to such liberalism.[75] Thus, the broader values of Constitutional Morality must prevail over individual rights on religious freedom. Chandrachud's argument that runs across the judgment is that what is against the values of CM cannot find protection within the Constitution. He uses CM to read the ERPT as inherently balancing conflicting rights to uphold the values of CM.[76]

Chandrachud, J.'s acknowledges the polarities described above[77] as well as the criticisms of the ERPT and calls for revisiting it[78], but not before finding that on ERPT's own terms, the Ayyappan's claim to women's exclusion fails to establish the practice as 'essential'.[79] Chandrachud demonstrated through case laws how the ERPT had evolved since its inception and has progressively given judges greater power to decide whether a practice is essential to that religion, as opposed to the views of the adherents of the religion itself.[80]

[74] ibid *Sabrimala Temple* Para 110 (per Misra, C.J.).
[75] ibid *Sabrimala Temple* Para 10-12 (per D.Y. Chandrachud, J.)
[76] ibid Para 49.
[77] ibid Para 4.
[78] ibid Para 112.
[79] ibid Para 52.
[80] ibid Para 29-48.

Given that the decision ultimately rests on the respondents failing the ERPT threshold, a CM analysis becomes *obiter dicta*. It does however, signal a move in religious freedom jurisprudence towards an alternative standard of review that emphasizes more on constitutional values over previous tests. Chandrachud's response to handling the tension of misplaced judicial powers with respect to religion in ERPT and the inability to create effective social transformation through it is to resort to CM. Whether or not ERPT is applied, CM acts as an outer limit to deciding what merits constitutional protection. Having been compared to the basic structure doctrine[81], CM in this case would rule out any law or practice that does not meet its standards – whatever that may develop to contain. Chandrachud holds that it is the court's duty that constitutionally protected practices is in consonance with CM.[82] Further, "these constitutional values stand above everything else as a principle which brooks no exceptions, even when confronted with a claim of religious belief."[83] The failure of the respondents under the ERPT was to establish a connection between Lord Ayappa's celibacy and the women's exclusion. Had they done so, the ERPT could have still allowed for women's exclusion, which for Chandrachud is against equal citizenship. CM operating to cover that lapse as a moral outer limit fits with his larger approach.

This makes a key disagreement between the judges about what values form constitute CM. Malhotra J. does not contest Art. 25 being limited by CM, but challenges the contents of CM itself. Arguing for greater judicial restraint, she finds the application of both, CM and ERPT in the form by which the majority has used it to be inappropriate for being rational inquiries into religion.[84] Her resolution to the tension is to advocate for an earlier version of the ERPT, which greater deference to the autonomy of religious institutions to determine essentiality. Showing

[81] Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (2020) *SSRN* 7-8 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521665 last accessed 11 April 2023.
[82] ibid *Sabrimala Temple* n(1) Para 49 (per D.Y. Chandrachud, J).
[83] ibid *Sabrimala Temple* n(1) Para 55 (per D.Y. Chandrachud, J).
[84] ibid *Sabarimala Temple* Para 10.13 -11.6 (per Malhotra, J.)

no clear basis for ignoring the string of precedents in between, this approach can only be regarded as incorrect. More importantly, she claims that religious liberty occupies just as key a position as other values of CM.[85] Chandrachud, while acknowledging the importance of religious liberty, maintains that it is enforceable under the Constitution only to the extent that it does not violate the values of CM.

Another key disagreement is over reading CM into Art. 26. Nariman J. in his concurrence disagreed with the plurality's interpretation of 'morality' in Art. 26, since it would subject Art. 26 to the values of CM.[86] This would include equality[87] and other values that form part of Fundamental Rights. The text of Art. 26, however, unlike Art. 25, is conspicuously silent about other Fundamental Rights limiting the rights therein. Chandrachud rationalized this distinction by stating that while Art. 26 is not subordinate to other rights, it is still impacted by other rights, just like any other right, and cannot exist in isolation.[88] His focus is on establishing a degree of coherence in the interpretation of the Constitution, and CM is the tool he uses to test this coherence. This however, makes it unclear how differently moral claims would be treated under Art. 25 versus Art. 26 when clashing with another Fundamental Right, say, Art. 15. For Chandrachud, such distinctions are practically immaterial. "If the Constitution has to have a meaning"[89] it requires that the values of CM necessary to carrying out the transformative mission, be supreme, and Art. 26 must subject to CM.

Tracing the modalities of CM

1. Countering public morality

In this very literal reading, in matters where societal moral standards form part of the law, such as the constitutionality of criminalisation of consensual homosexual intercourse, CM counter

[85] ibid Para 11.6.
[86] ibid *Sabrimala Temple* [FN2] (per Nariman, J.).
[87] ibid *Sabrimala Temple* para 30 (per D.Y. Chandrachud, J.)
[88] ibid *Sabrimala Temple* para 13 (per D.Y. Chandrachud, J.)
[89] ibid Para 15 (per Chandrachud, J.)

such morality. Both *Navtej* and *Sabarimala* demonstrate that CM reduces the scope of application of public morality in the law by substituting it with a morality inspired from the values purported to be embedded within the Constitution itself. Misra C.J. in *Navtej* and Chandrachud J. in *Sabarimala* cumulatively have the effect of considering the Indian Constitution's transformative goal as key to its identity, and CM as a vehicle to carry out this transformation. Any morality deterrent to the values vital to this transformation can find no place in the Constitution. The SCI's focus on both, inclusivity as one of the values of CM and the court's role as facilitators of CM, gives to both of these an anti-majoritarian characteristic, to the extent popular or religious moral ideas may influence the interpretation of the Constitution. The sources of this CM remain unclear,[90] but what is clear is the CM filters out any other morality, acting as the only morality the Constitution can enforce.

2. Gap filling

Martin Loughlin has argued that constitutional thought has observed a shift in viewing Constitution as a framework that regulates politics, to an order of values. In such a model, the constitutional silences refer to interpretative ambiguities, as opposed to silence on key political questions. Judges then perform the task of interpreting these ambiguities, filling the role that was earlier occupied by political judgment.[91] CM performs the function of filling gaps or interpreting constitutional silences. This is visible in the interpretation of the limitations to the right in Art. 26. By interpreting 'morality' as CM, Chandrachud reads into Art. 26, a limitation that was conspicuously absent from it. B. Shiva Rao's study of the history of Indian constitutional provisions shows that while the text in draft Article 19 (now Art. 25) was amended to add the limitation of fundamental rights, no such amendment was argued for draft Article 20 (now Art. 26), when adding the limitations of public order, health

[90] ibid Nayak n(42).
[91] Martin Loughlin, 'The Silences of Constitutions' in *ICON* (2018) 16 (3) 922–935, 930-32. https://doi.org/10.1093/icon/moy064 (last accessed 16 June 2023)

and morality.[92] Chandrachud justified this reading based on a degree of coherency key to the Constitution[93] and dismissed the apparent convergence in the limitations on Art. 25 and 26 as practically meaningless.

3. Transforming or unsettling precedent

CM does not appear to be either overruling established precedent or transforming precedent by either laying the groundwork for unsettling it or providing an alternative reading of precedent. In Chandrachud's opinion in *Sabarimala*, while he does read ERPT and CM together to point out certain inherent build-in limitations in ERPT, it does not have any impact on precedent given that he applied ERPT as it stood, finding the religious practice to fail the test.

Conclusion

This chapter has analysed *Navtej Johar* and *Sabarimala* by giving a fair summary of the arguments and tensions they were responding to, and the emergence of CM in the judicial opinions pronounced. It has subsequently traced the modalities present in CM to find that while it counters public morality and fills gaps in the text of the Constitution, it does not have a significant effect on transforming precedent, especially to suit the needs of the judge.

[92] B Shiva Rao, *The Framing of India's Constitution: A Study*, (Indian Institution of Public Administration 1968) 267-268.
[93] ibid *Sabarimala* n(1) Para 13, 15, 110 (per Chandrachud J.)

CHAPTER III – Tracing Modalities in *Dobbs* and *Fourie*

This chapter performs an analysis of *Dobbs v. Jackson Women's Health Centre* and *Minister of Home Affairs v. Fourie* to highlight the functions being performed in each judgment by the judges resorting to constitutional values and grand theories on what their respective Constitutions mean. In both of these cases, the court is responding to a similar tension as that captured by CM, whilst having a background of either invention or destruction of an unenumerated constitutional right. How the court responds to this tension, and what outcomes it reaches helps compare them to how CM is used and to draw lessons about what CM's appearance could foreshadow.

Dobbs v. Jackson Women's Health Centre

A right to abortion in the United States – a morally divisive matter - had existed since it was found by the US Supreme Court in *Roe v. Wade,*[94] and affirmed in *Planned Parenthood v. Casey*[95] with some modifications in how judges might apply it. *Roe* struck what it called a balance between those who supported a woman's right to abortion and those who supported the right of the "potential life." [96] The right to abortion is an unenumerated right, and was found by the Supreme Court through judicial interpretation. The Court in *Dobbs,* in deciding the constitutional validity of a State legislation that criminalised abortion after 15 weeks, by a five-judge majority overruled both *Roe* and *Casey.* These were overruled *inter alia* for being "egregiously wrong,"[97] and for judicial overreach in both judgments that took a deeply divisive moral issue away from the hands of the American people and their democratically elected representatives.

[94] 410 U.S. 113 (1973).
[95] 505 U.S. 833 . 1991.
[96] ibid *Roe* n(94) 150.
[97] ibid *Dobbs* n(21) 6 (Opinion of the Court)

Dobbs is characterised by a deep tension between change and stability, on both sides of the Court. The dissent is faced with a situation of trying to accomplish two objectives. First, preserving liberty – a value it views key to the Constitution, from what it views as an assault from the Court. Second, facilitating the social transformation towards greater liberty for women that it shows has been gradually ongoing over a long string of case laws in a society where a large fraction of the population believes that abortion should be banned.[98] The Court overruling *Roe* by applying an established test along with what has been termed a weak *stare decisis*[99], would drastically alter this gradual change.

The Court uses a similar vocabulary, however. The stability, that the majority is arguing for is for judges to not the power to create new rights which takes away issues of public importance away from the democratic process. The main argument of the majority opinion, written by Alito, J., is that *Roe* did not ground its founding of the right to abortion strongly in the Constitution as per the method that has been followed by the court with respect to implicit rights. That is, to test whether a right is "deeply rooted in the nation's history and tradition" and "'implicit in the concept of ordered liberty."[100] He undertakes a historical analysis of the nation's legal history with the result that a right to abortion could not be found in either common law or at any point in American legal thought, barring the few years immediately preceding *Roe.* For Alito, then, the founding of the right was the judge's own value judgment seeping into the Constitution, "short-circuiting the democratic process" by taking the right to legislate on a vital moral issue away from the hands of the people and their elected

[98] ibid *Dobbs* n(21) 21-22 (per Breyer, Sotomayor and Kagan J.)
[99] Michael Gentithes, 'Concrete Reliance on Stare Decisis in a Post-Dobbs World' ConLawNOW (2022) 14(1) 1-10.
[100] ibid n (97) 12-15.

representatives, and into those of unelected judges.[101] Faced with this impasse, the dissent relies on its alternative reading of Liberty in the Fourteenth Amendment.

Undoubtedly, the Court relied on a normative choice, but so did the dissent, by invoking what it calls the essence of liberty.[102] The Court applied a version of the test to find rights in the Due Process clause through what has been called a traditionalist interpretation, as opposed to originalism. Taylor Kordsiemon has argued that unlike originalism, which attempts to interpret the Constitution based on what it meant to the public, traditionalist interpretation highlights historical practices by the State.[103] This choice of interpretation is a normative choice, argues Kordsiemon, and the court justifies this choice by emphasizing the virtues of judicial restraint. The history and tradition test as applied by the Court is defended as guarding against the judicial overreach that puts morally divisive issues outside the democratic process. Disagreeing with the Court on both, *stare decisis* and its approach to history, the dissent regarded Alito's method for founding the right as a "pinched view" of history[104] and insist on performing an analysis that is not limited to specific points of time, but rather a longer, more holistic view of American Constitutional history. This chapter puts a greater focus on the dissent's approach owing to its greater resemblance to how Indian judges invoke the values of CM.

The dissent's argument was that a holistic view of the Court's precedent showed that what it has tried to preserve in Substantive Due Process rights is the *essence* of liberty, while the application of liberty evolved with time. This, the dissent argued, was a constitutional tradition, which could not be captured at any one specific epoch and each judge when

[101] ibid 44.
[102] ibid n(98) 22.
[103] Taylor Kordsiemon, 'A Right to Marital Rape? The Immorality of the Dobbs Approach to Unenumerated Rights' 12 *HLRe: Off Rec* (2022) 12(3) 90-106, 94-95.
[104] ibid n(98) 16.

applying this essence to varying circumstances was to look at the "doctrinal affinity"[105] of past precedents. The upholding of *stare decisis* is then key. The dissent does little, however, to explain how one tests this doctrinal affinity, or what the content of this essence is, except the following. The essence of liberty required, based on the dissent's review of precedent, that there is a degree of bodily integrity and choice in related decisions that is granted to each person. The Court's role was stated to be protected this autonomy, and that it is in carrying out this function that a Court would be acting neutrally, not instead as suggested by either Alito J. or Kavanaugh J. by leaving the issue to the Legislature. Based on this understanding, several modalities can be traced out of this approach.

Tracing the modalities of Liberty in *Dobbs*

1. Countering public morality

The debate in *Dobbs* centres around the degree of intrusion public morality should have on an individual's decisions. One of the functions that the Court tried to perform was to take the Court outside the abortion debate and allow the people and their elected representatives decide on it. It does so with the assumption that women hold significant electoral power in present times.[106] Any unenumerated liberty would be protected so far as it can establish itself within the history and tradition of the nation. But even those who defend the Court's application of the history and tradition test recognise that it makes it quite difficult to evolve a document last significantly amended in 1868.[107] Zachary Mullinax, in defending the Court's approach, nonetheless recognises this and provides other legislative solutions. Absent such

[105] ibid 21.
[106] ibid n(97) 65.
[107] Zachary Mullinax, 'Saying the Quiet Part out Loud: Unenumerated Rights after Justice Thomas's Dobbs Concurrence' 74 Mercer L Rev (2023) 74, 661-692, 688-691.

options, it is quite evident that popular moralities would restrict rights. This is the dissent's key contention.

The dissent's approach is geared towards protecting the individual from public morality being enforced by the State. While it slightly exaggerates the Court's approach as looking for reading the Fourteenth Amendment exactly as its ratifiers would have, the dissent's claim is that the Court looked for a narrow right to abortion across history, with the unsurprising outcome that it did not exist in such form. Most of the rights now available under the Due Process Clause could not be found in the history of the nation.[108] Rights being defined by who exercised them in the past would naturally result in justifying the limits to whom they are available.[109] The court's approach can also lead to outcomes which are morally reprehensible by modern standards, such as a right to marital rape or no right to defend against such marital rape.[110] The dissent's alternative approach instead looks for a broad right of bodily autonomy by enforcing values embedded in the Constitution. By searching for a "doctrinal affinity" the common thread across all the precedents it reviews is that of the choice being left with the individual and not with the State. This emphasis on liberty and its expansion throughout the constitutional history is taken as evidence of a duty of the Court to protect individual rights to an extent that all choice is not wrestled away from the hands of the woman.

2. Gap filling

Given that what is at stake is to review the existence of an unenumerated right, the task of interpreting a silence in the Constitution becomes implicated. The unenumerated nature of the right is key to the debate. The Court's claim of raw judicial power being exercised by the

[108] ibid n(98) 27.
[109] ibid 17.
[110] ibid Kordsiemon n(107).

dissent's method[111], and that they are contending on no basis other than a change in societal morality[112], is geared towards new rights being read into the Constitution. In line of the same, Kavanaugh, J. states that the Constitution's neutral stance on abortion by the text being entirely silent about the matter. The dissent's approach however, interprets this silence, not as neutrality in the background of the Court's case laws and their emphasis on a sphere of individual liberty. In line with Loughlin's account of constitutional silences becoming voids for judges to fill with orders of values, the dissent attempts to create a constitutional tradition of liberty, where to establish an unenumerated right, one looks to whether a list of case laws possessing an affinity in their holdings demonstrate an arc towards that right. Finding this essence of liberty in case laws would then establish new unenumerated rights, thus filling a constitutional silence.

3. Transforming or unsettling precedent

This function is difficult to trace in the *Dobbs* dissent. The Court's finding being that *Roe* and *casey* must be overruled for being incorrect, it is key for the dissent to preserve *stare decisis*. It has been argued that the Court's weak *stare decisis* discounts several grounds for retaining case laws that had earlier been established in *Casey,* and instead focuses on the quality of reasoning as a factor.[113] However, dissent argues that even when using the Court's weak *stare decisis*, the right to abortion could be found in the constitutional tradition of liberty over a series of case laws. It grounds its disagreement over the Court's method of finding rights in established case laws[114] While one can dispute the correctness of the dissent's method, at the least, it can be said that rather than overruling or unsettling any precedent, it is drawing on one tradition over another on how rights should be found in the Fourteenth Amendment, and

[111] ibid n(97) 36.
[112] ibid 33.
[113] ibid Gentithes n(99) 2-6.
[114] ibid n(98) 16-19.

making a reasoned argument in support of its approach. Without greater evidence or thorough review of case laws, it is difficult to trace this function in *Dobbs*.

Minister of Home Affairs v. Fourie

Fourie harbours a similar tension as *Sabarimala*, that is, a conflict between rights to religious freedom and that to equality in the context of a Constitution committed to societal transformation. *Fourie* involves applicants who were lesbians and organisations advocating against the exclusion of homosexuals from the institution of marriage in Section 30 of the Marriage Act, 1961,[115] which defined marriage exclusively in terms of man and woman. Unlike the Indian and American Constitutions, the South African Constitution is not silent on the rights of sexual minorities. Sexual orientation is listed as one of the grounds on which one shall not be discriminated against.[116] The respondents argued that even if such unfair discrimination could be established, it would impinge on their right to religious freedom if an institution like marriage which holds great religious significance to believers and is designed exclusively for heterosexuals would be expanded to include homosexuals.[117] Sachs J., writing for the Court, noted the importance of religion in public life[118] and stated in his extra-curial writings that ensuring the existence of the sacred and secular within the same public realm, as opposed to a public-private distinction was a key challenge.[119]

The Constitution is additionally silent on a right to marry. The Court explains this as the Constitution recognizing more than one arrangement for a family. This could very well then lead to creation of alternative arrangements of family, such as civil unions, which come dangerously close to a separate but equal logic (and the respondents argued towards such arrangements under Section 15(3)). The challenge before the court was thus, to uphold the

[115] Act 25 of 1961.
[116] Section 9(3), Constitution of the Republic of South Africa.
[117] ibid *Fourie* n(22) Para 83.
[118] ibid Para 89-91.
[119] Justice Albie Sachs, *The Strange Alchemy of Life and Law* (OUP 2009) 248.

dignity and equality of homosexuals in a rapidly transforming society, while maintaining the values that form a stable core, presumably including liberty, and in turn to some degree, religious liberty. It is here where tolerance as a constitutional value and the right to be different (RtBD) are deployed by the court to establish not only unfair discrimination, but also a balance of rights that furthers the transformative vision of South African Constitutionalism.

Tolerance of diversity and the RtBD were used towards two ends: first, to establish unfair discrimination under Sections 9(1) and 9(3) by linking equality to tolerance and second, to show how the State enforcing a definition of marriage that retains it exclusively for heterosexuals, despite their religious belief, would be contrary to the Constitution. The Court begins its analysis by stating that the rupture of the post-apartheid Constitution was from a society characterised by intolerance and exclusion.[120] To create a egalitarian society would require, argued Sachs, tolerance and affirmation of difference, at the very least, as a criterion on which exclusion and stigma is not perpetrated. The RtBD celebrates this difference, and in upholding tolerance of diversity, upholds equality. The Court defined tolerance as finding space for those people and practices that one finds discomforting.[121] Similar to *Dobbs* and *Sabarimala* a degree of coherency within the contents of the Constitution was sought after. The very fabric of society - one based on tolerance and mutual respect – was stated to be at stake in this case.[122]

Acknowledging this difference and tolerance of this difference would achieve the following. First, it ensures that one is not subjected to the cultural and religious norms of others. The RtBD requires finding space from departing from majoritarian norms.[123] Second, the impact

[120] ibid *Fourie* n(22) Para 59
[121] ibid Para 60.
[122] ibid.
[123] ibid Para 61.

of exclusion from marriage is taken as going against this ethos of tolerance, since it excluded people based on their difference. In making them feel as "outsiders"[124] and "biological oddities,"[125] they were denied equal citizenship, who deserve lesser affirmation and protection of laws than heterosexuals. This contributed to holding the S. 30 of the Marriage Act as violating Section 9. Third, emphasizing the significance of diversity, and its connection to equality, the court rebutted the religious freedom argument by arguing that preservation of diversity requires that one's religious belief not be imposed on another. This implicitly limits show how far the right to freedom of religion stretches, by not extending it to the respect the respondents were associating with marriage. The court summarily rejected the view as demeaning queer persons.[126] Religious belief would hence be protected passionately as far as a believer's own views about the sanctity of marriage would be concerned.[127] It would not however extend to an exclusive ownership of a public institution like marriage, exclusion from which does both tangible and symbolic harm. With this move, the Court was able to establish that there was no collision between the demand for same-sex marriage and the violation of religious liberty at all.

Much of the Court's pronouncement here on tolerance and the RtBD has been dismissed as *obiter dicta* and idealistic optimism.[128] In my view, the development of the RtBD and the constitutionalisation of tolerance serves several key functions in the judgment relevant for our purpose.

[124] ibid Para 62
[125] ibid Para 71.
[126] ibid Para 50.
[127] Ibid Para 93.
[128] PJ Visser, 'Minister of Home Affairs v Fourie and Bonthuys Case CCT 60/2004 (CC); Lesbian and Gay Equality Project v Minister of Home Affairs Case CCT 10/2005 (CC)' (2006) 39 De Jure 191, 193.

1. Countering Public morality

By invoking the RtBD, the court is able to create a sphere of protection of individual autonomy from religious or cultural norms that are important to others. By using RtBD to read equality, the court is able to establish the impact of exclusion, which it likens to slavery. On various instances[129], it establishes that simply because a majoritarian convention exists in society and law, does not lessen its discriminatory impact. A morality of the majority then, even if it has a place in law, holds no majority. In responding to the tension between the social transformation and the shared core that includes parts of religious liberty, the court by drawing on RtBD and tolerance, excise such aspects of religious liberty that threaten one's individual autonomy to be who they are. In refusing to give effect to the respondents' claim about disrespect caused to the institution of marriage, the court refuses to read Section 9(3) in the light of a prevalent religious norm. Thus, it counters public morality.

2. Gap filing

Because the Constitution is explicitly worded, ostensibly, its difficult to say that this function is being performed. Tolerance, from which the RtBD emanates, and is used to read the Bill of Rights in *Fourie*, cannot be found in the text of the Constitution, beyond the Preamble. Following Loughlin's account of the shift of Constitutions to a value order, where rather than a plain meaning, rules are interpreted in light of an overarching constitutional order, allowing judges to fill such silences that were filled earlier by politicians.[130] Felix Dube has argued that the Court's jurisprudence has led to tolerance emerging as a key constitutional value, taking a political and normative term and converting it into a social norm enforceable by courts to achieve transformation.[131] In reading equality in light of tolerance, giving a specific shape to

[129] ibid *Fourie* n(22) Para 74, 113.
[130] ibid Loughlin n(91).
[131] Felix Dube, 'The Ethos of Tolerance of Diversity in Post-Apartheid Jurisprudence' *Obiter* (2022) 43(1) 123-141.

tolerance as acceptance of what discomforts, and extending to homosexuals a right that the Constitution is silent on, the Court is using a value for interpreting the Constitution, thus, filling a gap.

3. Transforming or unsettling precedent

Fourie can however not be seen to have any impact on precedent. Neither tolerance nor the RtBD is used to interpret or even distinguish any past precedent. On the contrary, the Court draws on a range of cases concerning rights to religious liberty and gay rights to reach the conclusion in this case. Absent any evidence to the contrary, this function cannot be observed in *Fourie*.

CHAPTER IV – Conclusion by way of analysis

This chapter uses lessons learned from the previous chapter and uses them to critique the functions performed by Constitutional Morality to highlight both, the promising and distressing trends that are visible in Indian jurisprudence and the potential impact it can have on religious freedom. The survey of the literature review on CM conducted in Chapter 1 showed that a substantial increase in judicial power and vagueness in content are the chief concerns about CM post-*Sabarimala*. Tracing the modalities of CM in Chapter 2 gives a clearer picture of where and what impact CM has had so far, enabling an analysis of what it may do in the future. Findings from Chapter 3 provide helpful lessons about the potential impact CM may have, by applying it to the religious freedom jurisprudence in India.

Comparing the three jurisdictions gives the following broad picture. It becomes apparent that judges resort to grand theories as a framework for reasoned arguments when faced with a distinct tension between vital core values of the Constitution and carrying out societal transformation. That in none of the jurisdictions did the tensions and the judge's response lead to any significant unsettling of precedent shows that so far, judges have not undertaken such great judicial powers under these grand theories so as to overrule or settle precedents. Two key effects are still visible however which can impact religious freedom in India.

Strengthens individual rights from majoritarian moral/religious views

In each of the cases reviewed, the Courts used the tension as an opportunity to create a stronger zone of individual autonomy. The balance found between stability and change was to take the zone of core values and direct it towards transformation only so far as is essential to allow individuals to have the choice of their preferred expression. In *Dobbs*, the dissent does this by arguing that it would be against the essence of liberty envisioned by the longer sweep

of constitutional history in America to leave a woman with no right to bodily integrity. The SCI in *Navtej* and *Sabarimala* both, and the Constitutional Court of South Africa in *Fourie* reach a similar result by focussing on how deprivation of such choice and exclusion from rights available to other groups impinges on their equality and dignity. This thesis proposes that the use of such tensions can productively serve religious minorities by increasing the space given to freedom of religious belief and expression to minority religions in otherwise majority occupied spaces.

In *Sabarimala* as well as cases decided after it, such as the SCI's recent judgment on the prohibition on hijab in India, the discussions around ERPT consume far greater space[132] than a discussion of the women's rights and how it might be best protected with the right to religious freedom. As noted by Chandrachud J. in *Sabarimala* when critiquing ERPT that Indian jurisprudence, with its focus on essentiality of religious practices has entirely missed the vital question of whether in finding a practice essential, it would be permissible under the Constitution for undignified exclusion of specific groups be permitted.[133] It would follow that a practice which deprives a woman of choice to follow or depart from a religious practice would hypothetically be permitted under the ERPT, if found to be essential. This presents the same problem as the test adopted by the Court in *Dobbs*, which the dissent criticised for making it extremely unlikely for a right to ever be found under the Fourteenth Amendment. The ERPT and the Court's method for locating rights in the history and tradition of the nation similarly perpetuate the status quo, making societal transformation through judges difficult.

Sabarimala's approach has been praised as a map for the development of Indian constitutionalism towards a feminist constitutionalism that decides on the rights of women by

[132] Joyston D'Souza, 'SCO Daily: Supreme Court Issues Split Verdict in Hijab Ban Case' (*Supreme Court Observer,* 13 October 2022) https://www.scobserver.in/journal/sco-daily-supreme-court-issues-split-verdict-in-hijab-ban-case/ (last accessed 16 June 2023)
[133] ibid *Sabarimala* n(1) 109 (per Chandrachud J.)

giving them equal citizenship status and not as secondary variable in a largely religion-centric adjudication process. Vrinda Narain views the SCI's earlier applications of the ERPT as not only replicating harmful stereotypes about women being helpless observers with respect to their rights, but also the colonial division between the public and private sphere. Such division regards abusive, the intrusion of law into the private sphere where religion operates, and decides the rights available to women. Despite increasing power of judges to interpret scripture and decide essentiality of religious practices, it is still ultimately an analysis of the religion, and not that of women's rights enshrined in the Constitution as equals.[134]

Such analysis however, can be expanded not just towards rights of women, but that of religious minorities as well. Useful lessons can be drawn here from the right to be different as used in *Fourie*. The Court in *Fourie* used the tension between contesting claims of religious liberty and right to marry by first, establishing tolerance as a key constitutional value; second, using tolerance to shape the meaning of equality and finally, to place both contenders on an equal plain where each would tolerate the others while holding on to their own views if they so desired. Dube's claim, that South African jurisprudence has established tolerance as a key constitutional value, and has given rise to the right to be different, turns tolerance of diversity as a vital norm without which societal transformation through the Bill of Rights would not be possible.[135] I argue that the development of the right to be different fosters greater individual autonomy in *Fourie* by Sachs J. giving tolerance a specific meaning. Since the court turns tolerance into a binding norm, each person has a claim to space to practice their individual beliefs.

[134] ibid Narain n(8) 105-107, 117-125.
[135] ibid Dube n(131) 132-136.

The RtBD becomes a base on which the concept of reasonable accommodation can then foster.[136] Sajó and Uitz have stated that the parameters of how reasonable accommodation is determined remain unclear, and that it is largely a sovereign choice which depends on how far the social fabric and cohesion may be endangered by giving space to a religious practice.[137] Given that social cohesion is often based on values important to religious majorities, reasonable accommodation can become a matter of finding space from legal measures enforcing a majoritarian norm. It is common for Asian jurisdictions to invoke indigenous Asian values – often shorthand for majoritarian religious/moral values – to limit the application of human rights.[138] In writing against overemphasis by Western scholars of the exclusivity of these values in Asia, Amartya Sen uses the example of King Ashoka and Mughal Emperors Akbar to argue that liberal values like tolerance have been present throughout Indian tradition. He admits however, that even with these lionized leaders, tolerance could take various shapes, such as showing tolerance towards religious communities but not towards the claims of women.[139]

The example of South Africa shows that the use of judges to constitutionalise values through a gap filling function, using them to read provisions and reducing the influence and legitimacy of ubiquitous public morals increases the scope for creating space for religious practices of minority religions. It de-links values of majority religions from constitutional enforcement over others, making way for lesser adverse impact on social cohesion. Thus, it allows for greater reasonable accommodation.

[136] ibid.
[137] András Sajó and Renáta Uitz, 'Freedom of Religion' in Michel Rosenfeld and András Sajó (eds) 'The Oxford Handbook of Comparative Constitutional Law' (OUP 2012) 919-22.
[138] Anthony Langlois, *The Politics of Justice and Human Rights* (Cambridge University Press 2001) 12-25.
[139] Amartya Sen, 'Human Rights and Asian Values', *The New Republic* (1997) July 14-July 21, 1-13.

Prioritizes judges' personal opinions

Conversely, the use of liberty in the *Dobbs* dissent points to an alarming impact that CM may have in India. The findings of this study have shown the promising impact through a gap filing function that can be performed by using these tensions and relying on grand theories to create space for minority views free from majoritarian norms. How judges respond to the tension remains a highly context-specific question however. The approach of the *Dobbs* dissent shows how such responses can be based on preferred moral views of individual judges. In each of the cases reviewed, judges insist on certain norms having a constitutional status, and that they form an inalienable core, which if denied, would render the Constitution or parts thereof such as the Bill of Rights hollow and incoherent. The comparison in this thesis has shown that there is an insistence on coherency in grand theories on Constitution which through both reason and rhetoric provides judges creative avenues to bypass formalistic tests, such as the ERPT. But in bypassing tests, without the creation of limits, it remains entirely open for judges to mix personal moral views into the constitutionalised norm.

The *Dobbs* dissent's approach is instructive here. In using the essence of liberty to argue for a longer sweep of history to find rights, the dissent says that while rights are not frozen in one epoch of time, it also does not mean that "anything goes."[140] It provides no clear idea of what limits this approach however, beyond a mention to a vague idea of constitutional traditions informed by past precedents and history. The right to bodily integrity was argued to be part of a web of rights creating a deeply woven fabric.[141] One can observe a similar trend in Chandrachud J.'s opinion in *Sabarimala*, when reading a limitation into Art. 26 of the Indian Constitution, he insists that without such a reading, the Fundamental Rights chapter would

[140] ibid n(98) 17-18
[141] ibid 18-20.

lose synchrony. Any consequent convergence between the texts of Art. 25 and Art. 26, despite the conspicuous lack of similar limitations in the latter, would have "little practical significance."[142]

Mullinax criticises the *Dobbs* dissent's approach by likening it to the penumbras approach in *Griswold v. Connecticut*[143] which derives rights not from the constitutional text, but rather from rights having similar natures with other established rights. It results in judicial legislations since the text offers no guidance on the content, scope or limitations of that right. He argues that this would naturally lead judges to their favoured outcomes. Further, the approach is also open to producing the exact opposite results. He argues that using the dissent's approach, the majority in *Dobbs* could interpret "life" in the Fourteenth Amendment to argue for the liberty of the potential life as part of the sweep of history. It remains to the judges whose freedom they prefer.[144]

Loughlin's account of constitutional silences and the shift towards viewing constitutions as orders of values argues that it creates a new political engagement where the elite and intellectual fill silences.[145] Nayak makes a similar claim about CM. In giving judges the exclusive right to decide what values hold what priority and meaning, elite judges with a relatively homogenous backgrounds get exclusive control.[146] Judge's personal views finding place in constitutions is undesirable on its own. But when coupled with Nayak's consideration about homogenous backgrounds, religious expressions and beliefs that are diverse along caste and class backgrounds will inevitable find lesser space within the constitutional framework. Jacobsohn points to a required disharmony in Indian constitutional

[142] ibid *Sabarimala* n(1) Para 13, 15 (per Chandrachud J.)
[143] 381 U.S. 479 (1965)
[144] ibid Mullinax n(107) 683-688.
[145] ibid Loughlin n(91).
[146] ibid n(42) 36-38.

identity over competing meanings of secularism.[147] Ratna Kapur has shown that while contextualised secularism has been present in some cases, the SCI has also given repeated legitimacy to an alternative vision which aids the Hindu nationalist project.[148] CM, which houses secularism along with other values, becomes open to providing greater legitimacy to religious nationalism, depending on the judge and the doctrinal tradition they rely on.

Conclusion

This thesis has compared the application of CM in India to other grand theories employed by judges in American and South African judgments. It has demonstrated through a review of works on CM that it houses a fundamental tension between stability of a preserved core values and transformation of society along the goals of the Constitutions. The review of cases shows that when judges are faced with such tensions in cases, they invoke grand theories like CM to respond. By creating a general typology of functions these theories might perform in judicial reasoning, this thesis has compared liberty in *Dobbs* and RtBD in *Fourie* to draw useful lessons for CM's application to religious freedom in India. It has argued that there are both promising and distressing trends. While CM has the potential to safeguard minority views from majority religious and moral norms and create greater space for minority religious expression through reasonable accommodation, it simultaneously also allows for greater and dangerous subjectivity. In bypassing formalistic tests that limit judicial power but also impede social transformation, courts remove limitations on their powers, allowing for personal moral views to seep into interpretation of constitutional values.

[147] Gary Jeffery Jacobsohn, *Constitutional Identity* (Harvard University Press 2010) 129-132.
[148] Ratna Kapur, 'Secularism's others: the legal regulation of religion and hierarchy of citizenship' in Susanna Mancini (ed) *Constitutions and Religion* (Edward Elgar Publications 2020) 44-46.

BIBLIOGRAPHY

Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (2020) SSRN 7-8 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521665 last accessed 11 April 2023.

Amartya Sen, 'Human Rights and Asian Values', The New Republic (1997) July 14-July 21, 1-13.

Ananthakrishnan G, 'National Law Day: Need to clearly define nuances of Constitutional morality, says RS Prasad' (The Indian Express, 27 November 2018) <https://indianexpress.com/article/india/national-law-dayneed-to-clearly-define-nuances-of-constitutional-morality-says-prasad-5466090/> last accessed 11 April 2023.

Ananthakrishnan G, 'SC has taken more powers than any apex court… hope Constitutional morality dies with birth: A-G' (The Indian Express, 9 December 2018) <https://indianexpress.com/article/india/sc-has-taken-more-powers-than-any-apex-court-hope-constitutional-morality-dies-with-birth-a-g-k-k-venugopal-5484988/> last accessed 11 April 2023.

András Sajó and Renáta Uitz, 'Freedom of Religion' in Michel Rosenfeld and András Sajó (eds) 'The Oxford Handbook of Comparative Constitutional Law' (OUP 2012) 919-22.

Andre Béteille, 'Constitutional Morality' (2008) Economic and Political Weekly 43(40), 35-42, 35-36, 40-41 http://www.jstor.org/stable/40278025 last accessed 11 April 2023.

Anthony Langlois, The Politics of Justice and Human Rights (Cambridge University Press 2001) 12-25.

Article 14, The Constitution of India, 1950.

Article 17, The Constitution of India, 1950.

Article 25, The Constitution of India, 1950.

B Shiva Rao, The Framing of India's Constitution: A Study, (Indian Institution of Public Administration 1968) 267-268.

B.R. Ambedkar, Constituent Assembly Debates, 4 November 1948, 38 https://eparlib.nic.in/bitstream/123456789/762996/1/cad_04-11-1948.pdf last accessed 11 April 2023.

B.R. Ambedkar, What Congress & Gandhi Have done to the Untouchables, (Gautam Book Centre 1946) 196.

Felix Dube, 'The Ethos of Tolerance of Diversity in Post-Apartheid Jurisprudence' Obiter (2022) 43(1) 123-141.

Gary Jeffery Jacobsohn, 'Constitutional Identity' (2006) The Review of Politics 68, 361-397.

Gary Jeffery Jacobsohn, Constitutional Identity (Harvard University Press 2010) 129-132.

Gautam Bhatia, ‘India’s attorney general is wrong. Constitutional morality is not a ‘dangerous weapon’’ (Scroll.in, 21 December 2018) <https://scroll.in/article/905858/indias-attorney-general-is-wrong-constitutional-morality-is-not-a-dangerous-weapon> last accessed 11 April 2023.

Gautam Bhatia, The Transformative Constitution: A Radical Biography in Nine Acts (HarperCollins 2019) xxv.

George Grote, A History of Greece Vol. 4 (Cambridge University Press 1847) 204-206.

Government of NCT of Delhi v. Union of India (2018) 8 SCC 501

Griswold v. Connecticut 381 U.S. 479 (1965)

Indian Young Lawyers Association vs The State of Kerala (2019) 11 SCC 1.

Indian Young Lawyers Association vs The State of Kerala Writ Petition (Civil) No. 373 of 2006) (hereafter “Sabarimala”).

Indira Gandhi v. Raj Narain, AIR SC 2299 (1975).

Jeffery A. Redding, ‘A Secular Failure: Sectarianism and Communalism in Shayara Bano v. Union of India’ in Asian Journal of Law and Society (2021) 8(1) 56-71, 58.

Joyston D'Souza, ‘SCO Daily: Supreme Court Issues Split Verdict in Hijab Ban Case’ (Supreme Court Observer, 13 October 2022) https://www.scobserver.in/journal/sco-daily-supreme-court-issues-split-verdict-in-hijab-ban-case/ (last accessed 16 June 2023)

Justice Albie Sachs, The Strange Alchemy of Life and Law (OUP 2009) 248.

Justice K.S. Puttaswamy (Retd) v. Union of India (2019) 1 SCC 1

Justice K.S. Puttaswamy (Retd) v. Union of India AIR 2017 SC 4161.

Kai Schultz, ‘Her Visit to a Men-Only Temple Went Smoothly. Then the Riots Started.’ (The New York Times, 18 January 2019) https://www.nytimes.com/2019/01/18/world/asia/temple-india-sabarimala-ammini.html last accessed 6th May 2023.

Kanad Bagchi, ‘Transformative Constitutionalism, Constitutional Morality and Equality: The Indian Supreme Court on Section 377’ (2018) Verfassung und Recht in Übersee VRÜ 51, 367-380, 371 <https://www.nomos-elibrary.de/10.5771/0506-7286-2018-3-367.pdf?download_full_pdf=1> last accessed 11 April 2023.

Mahendra Pal Singh, ‘Observing Constitutional Morality’ <https://www.india-seminar.com/2019/721/721_mahendra_pal_singh.htm> last accessed 11 April 2023.

Manoj Narula v. Union of India (2014) 9 SCC 1

Martha C. Nussbaum, ‘Ambedkar’s constitution Promoting inclusion, opposing majority tyranny’ in Tom Ginsburg and Aziz Huq (eds) Assessing Constitutional Performance (Cambridge University Press 2016) 327, 330-32; Nakul Nayak, ‘Constitutional Morality: An Indian Framework’ in American Journal of Comparative Law (Forthcoming).

Martin Loughlin, ‘The Silences of Constitutions’ in ICON (2018) 16 (3) 922–935, 930-32. https://doi.org/10.1093/icon/moy064 (last accessed 16 June 2023)

Michael Gentithes, ‘Concrete Reliance on Stare Decisis in a Post-Dobbs World’ *ConLawNOW* (2022) 14(1) 1-10.

Minister of Home Affairs v. Fourie [2005] ZACC 19

Nakul Nayak, ‘Constitutional Morality: An Indian Framework’, American Journal of Comparative Law (forthcoming) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885432> last accessed 11 April 2023.

National Legal Services Authority v. Union of India, Writ Petition (civil) No. 604 of 2013.

Navtej Johar v. Union of India W. P. (Crl.) No. 76 of 2016.

Naz Foundation v. Government of NCT of Delhi 160 Delhi Law Times 277

PJ Visser, 'Minister of Home Affairs v Fourie and Bonthuys Case CCT 60/2004 (CC); Lesbian and Gay Equality Project v Minister of Home Affairs Case CCT 10/2005 (CC)' (2006) 39 De Jure 191, 193.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 . 1991.

Pratap Bhanu Mehta, ‘What Is Constitutional Morality?’, 615 Seminar (2010), http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm last accessed 11 April 2023.

Rajeev Bhargava, ‘What is Secularism For’ in Rajeev Bhargava ed. Secularism and its Critics (OUP 1998) 495, 511-512.

Raju Ramachandran, Submission of Amicus Curae <https://images.assettype.com/barandbench/import/2018/08/Sabarimala-Written-submissions-Raju-Ramachandran.pdf> last accessed 11 April 2023.

Ratna Kapur, ‘Secularism’s others: the legal regulation of religion and hierarchy of citizenship’ in Susanna Mancini (ed) Constitutions and Religion (Edward Elgar Publications 2020) 44-46.

Richa Dwivedi and Abhinav Shrivastava, ‘Constitutional Morality- A Tool for Judicial Governance’ (2019) Think India (Quarterly Journal) 22(4).

Roe v. Wade, 410 U.S. 113 (1973)

Rule 3(b), Kerala Hindu Places of Public Worship (Authorisation of Entry) Rules, 1965.

S.R. Bommai v. Union of India 3 SC 1 (1994) 143.

Section 9(3), Constitution of the Republic of South Africa.

Shayara Bano v. Union of India (Writ Petition (Civil) No. 118 of 2016).

Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta, ‘Locating Indian Constitutionalism’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), Oxford Handbook of the Indian Constitution (OUP 2016) 59.

Suresh Kumar Koushal v. Naz Foundation Civil Appeal No. 10972 OF 2013

Taylor Kordsiemon, 'A Right to Marital Rape? The Immorality of the Dobbs Approach to Unenumerated Rights' 12 HLRe: Off Rec (2022) 12(3) 90-106, 94-95.

The National Coalition for Gay and Lesbian Equality v. The Minister of Justice [1998] ZACC 15.

Uday Mehta, ‘Constitutionalism’ in Pratap Bhanu Mehta (ed.), The Oxford Companion to Politics in India (Oxford University Publication 2010), 15-27, 16.

Vrinda Narain, 'Constitutionalizing Women's Equality in India: Assessing the Sabarimala Decision' (2022) 42 Colum J Gender & L 77.

Zachary Mullinax, 'Saying the Quiet Part out Loud: Unenumerated Rights after Justice Thomas's Dobbs Concurrence' 74 Mercer L Rev (2023) 74, 661-692, 688-691.