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CRITICAL STUDY ON THE CONCEPT OF CONSTITUTIONAL MORALITY WITH SPECIAL REFERENCE TO ITS EFFECT ON ESSENTIAL PRACTICES DOCTRINE

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CERTIFICATE

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DECLARATION

I declare that this dissertation titled, "CRITICAL STUDY ON THE CONCEPT OF CONSTITUTIONAL MORALITY WITH SPECIAL REFERENCE TO ITS EFFECT ON ESSENTIAL PRACTICES DOCTRINE" is researched and submitted by me to the National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirement for the award of Degree of Master of Laws in Constitutional and Administrative Law, under the guidance and supervision of Dr. Sandeep M.N, Assistant Professor and is an original, bona fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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ABBREVIATIONS

AIR - All India Reporter

Art. – Article

Bom – Bombay

Del- Delhi

IPC – Indian Penal Code

Ker. – Kerala

SCC – Supreme Court Cases

SCR – Supreme Court Report

Sec. Section

v. – versus

WP (C) – Writ Petition (Civil)

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4. Afzal Ansari v. State of U.P on 15 May, 2020. Allahabad HC
5. Commissioner of Police v. Acharya J Avadhutha, Civ. App. No.6230 of 1990
6. Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar,1954 AIR 282.
7. Dr. M. Ismail Faruqui v. Union of India, AIR 1995 SC 605.
8. Dr. Noorjehan Safia Niaz v. Haji Ali Dargah Trust, (2016) 5 AIR Bom R 660.
9. Durgah Committee v. Hussain Ali, 1961 AIR 1402.
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12. Gram sabha of Village Battis Shirala v. Union of India, Writ Pet. No. 8645 of 2013 (Bombay HC July15, 2014).
13. Hussainara Khatoon v. Home Secretary Bihar, (1980) 1 SCC 81.
14. India Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690
15. Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697.
16. Joseph shine v. Union of India, (2019) 3 SCC 39.
17. K.S Puttaswamy v. Union of India, (2017) 10 SCC 1.
18. Kantaru Rajeevaru v. Indian Young Lawyers Association, (Civil) No. 3358 of 2018.
19. M.C Mehta v. Union of India, AIR 1988 SC 1037.
20. M.H Hoskot v. State of Maharashtra (1978) 3 SCC 544.
21. Manoj Narula v. Union of India, (2014) 9 SCC 1.
22. Mohd. Hanif Quareshi v. State, 1958 AIR 731.
23. Navtej Singh Johar v. union of India, (2018) 10 SCC 1.
24. Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC Online Del 1762
25. NCT of Delhi v. Union of India, (2018) 8 SCC 501.
26. R. C Cooper v. Union of India, 1970 AIR 564.
27. S. Mahendran v. The Secretary, Travancore, AIR 1993 Ker 42.

28. S. P Gupta V. President of India, (1982) 2 SCR 365.
29. S.R Bommai v. Union of India, 1994 AIR 1918
30. Saraswathi Ammal v.Rajagopal Ammal, AIR 1953 SC 491.
31. Sardar Saifuddin v State of Bombay, AIR 1962 SC 853.
32. Sardar Sarup Singh & Ors v. State of Punjab & Ors, 1959 AIR 860.
33. Shamim Ara v. State of U. P, (2002) 7 SCC 518.
34. Shayara Bano v. Union of India, (2017) 9 SCC 1.
35. Sri Govindlalji v. State of Rajasthan, AIR 1963 SC 1638.
36. Sri Venkatarama Devaru v. State of Mysore AIR 1958 SC 255.
37. Suresh Kumar Koushal v. Union of India, (2014) 1 SCC 1.
38. The Commissioner, Hindu religious endowments v. Lakshmindra Thirtha Swamiar of Shirur mutt, 1954 AIR 282.
39. Unnikrishnan v. State of Andhra Pradesh, (1993) 1SCC 645.
40. Vide Davie v. Benson, 133 U.S 333 at 342.

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CHAPTER I – INTRODUCTION

CONSTITUTIONAL MORALITY

Indian Judiciary is known for its judicial creativity and the Judge made tests. The concept of constitutional morality and the Essential practices doctrine has been among those judicially evolved tests and they attracted dialogue and discourse upon their meaning and effects. Constitutional morality has been understood and used distinctively over the course of time by various scholars, by the judiciary, by the state and by common people. According to the English Historian, George Grote, constitutional morality is the culture of reverence for the constitution and he referred to it as a rare and difficult sentiment.[1] Ambedkar in the constituent assembly debates quoted Grote for describing constitutional morality while explaining the inclusion of administrative details to the constitution. He also said that "constitutional morality is not a natural sentiment. It has to be cultivated. We must realize that our people have yet to learn it. Democracy in India is only a top- dressing on Indian soil, which is essentially undemocratic."[2]

A passing remark about constitutional morality was made by the Judiciary in the constitutional bench decision in *Keshavanda Bharati v. State of Kerala*[3], where in the judiciary propounded the basic structure theory. Later in 2003 Justice S B Sinha referred to the concept while dealing with the reservation of minority institution. He held that affirmative actions might be valid but it would violate constitutional morality if it is not in consonance with doctrine of equality.[4] The Supreme Court equated constitutional morality to the rule of law in *Manoj Narula v. Union of India*[5] and observed that constitutional morality is bowing down to norms of the constitution.

In many judgments, remarks were made with respect to this concept, but it was not substantial enough to be an important exposition of law until in *Naz Foundation v. Government of NCT of Delhi*[6], where Delhi High Court relied on constitutional morality while dealing with constitutionality of section 377 IPC. The court upheld constitutional morality opposed to public morality and held the section as unconstitutional. Even though the

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[1] GEORGE GROTE, A HISTORY OF GREECE, 153-155, IV, (1851).
[2] CONSTITUENT ASSEMBLY OF INDIA DEBATES: OFFICIAL REPORTS Vol.VII, pp38, Nov. 4, 1948
[3] Keshavanda Bharati v. State of Kerala, (1973) 4 SCC 225.
[4] Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697 (para 118)
[5] Manoj Narula v. Union of India, (2014) 9 SCC 1.
[6] Naz Foundation v. Govt. of NCT Delhi, (2009) 6 SCC Online Del 1767.

decision was overruled in Supreme Court[7], constitutional morality again set the ground when section 377 of IPC was challenged in *Navtej Singh Johar v. Union of India*.[8] As the Court in 2018 set aside the provision on the grounds of constitutional morality, it explained the concept as an adherence to constitutionalism along with ushering a pluralistic and inclusive society.

An observation was made by the Court in *NCT of Delhi V. Union of India*[9], which associate constitutional morality to the conscience of the constitution. While decriminalising the offence of adultery court again relied on constitutional morality over the common morality of the state at any time and opined that "commitment to constitutional morality requires the judiciary to enforce constitutional guarantees of equality and non-discrimination"[10]. We can see a shift in the judicial approach in the understanding and the usage of the concept of constitutional morality.

The need to describe the contours of the expression constitutional morality was brought before the judiciary and the Supreme Court observed that constitutional morality has now reached the level of stare decisis and has been explained in several constitutional bench judgments.[11]

ESSENTIAL PRACTICES DOCTRINE

For a country like India with diverse and pluralistic society where religion plays a prominent rule in the life of people, the religious rights have been a matter of discussion before the Indian judiciary. The court introduced the Essential Religious Practices Doctrine to deal with those matters. The doctrine was originally conceived in *Shirur mutt* case[12] which put forth that essential part of a religion is to be ascertained with reference to doctrines of that religion itself. The phrase 'essential religious' cannot be found in the Constitution of India. Ambedkar in Constituent Assembly Debates, used the phrase 'essentially religious' suggesting a separation between religious activities and the secular activities connected with religion and it was in concern with the hindrances the social legislations may face.[13]

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[7] Suresh Kumar Koushal v. Union of India, (2014) 1 SCC 1.
[8] Navtej Singh Johar v. union of India, (2018) 10 SCC 1.
[9] NCT of Delhi v. Union of India, (2018) 8 SCC 501.
[10] Joseph sine v. Union of India, (2019) 3 SCC 39.
[11] Kantaru Rajeevaru v. Indian Young Lawyers Association, (Civil) No. 3358 of 2018.
[12] The Commissioner, Hindu religious endowments v. Lakshmindra Thirtha Swamiar of Shirur mutt, 1954 AIR 282.
[13] CONSTITUENT ASSEMBLY OF INDIA DEBATES: OFFICIAL REPORTS Vol.VII.

Religion and law has been in a complex realm and the various judicial approaches Supreme Court has taken will be checked. It is relevant to consider whether using this doctrine is aligned with our constitutional vision. Based on the judicial decisions, it is pointed out that the "essentially religious" has shifted to "essential to religion", that is from whether something is essentially religious to whether it is essential to religion.[14] Critics have always raised concern as to judges assuming theological authority to determine which tenets of faith are essential.[15]

Court has taken varied approaches using the same doctrine, at times it considered the religious texts, and other times it kept a singular idea about religion and didn't accept the diverse practices, Court also followed the logic that the practice should be there from the very beginning of religion. In *Ismail Faruqui v. Union of India*[16], while considering the land acquisition by state, court went on to consider whether a mosque is essential for Islam and held that mosque is not an essential element of Islam and namaz can be read anywhere. The effect of essential practices on the secular nature of India is one to be considered to understand the impact of this doctrine.

THE EFFECT OF CONSTITUTIONAL MORALITY ON ESSENTIAL PRACTICES DOCTRINE

Constitutional morality and Essential Practices Doctrine have been used simultaneously in the decisions of *Shayara Bano v. Union of India*[17] and *Indian Young Lawyers Association v. State of Kerala.*[18] In the former one the Court held the practice of triple talaq as unconstitutional. The concurring judgment relied on Essential Religious Practices Doctrine and held that what is bad in theology is bad in law. Although constitutional morality was discussed, the minority opinion was that "Triple talaq being a constituent of personal law has a stature equal to other fundamental rights, conferred in part III of the constitution. The

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[14] Gautam Bhatia, *Essential Religious Practices" and the Rajasthan High Court's Santhara Judgment: Tracking the History of a Phrase, Indian Condtitutional Law and Philosophy*, (Aug. 19, 2015), https://indconlawphil.wordpress.com/2015/08/19/essential-religious-practices-and-the-rajasthan-high-courts-santhara-judgment-tracking-the-history-of-a-phrase/

[15] Rajeev Dhavan & Fali S. Nariman, *The Supreme Court and Group Life: Religious Freedom, Minority Groups, and Disadvantage communities*, in SUPREME BUT NOT INFALLIBLE, 259, 2000.

[16] Dr. M. Ismail Faruqui v. Union of India, AIR 1995 SC 605.

[17] Shayara Bano v. Union of India, (2017) 9 SCC 1.

[18] India Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690.

practice cannot therefore be set aside, on the ground of being violative of the concept of constitutional morality, through judicial intervention."[19]

The latter case which is commonly known as the Sabarimala judgment[20] set aside the rule 3(b) of Kerala Hindu Places of Public worship Act as unconstitutional which prohibited the entry of women of age ten to fifty to the Sabarimala temple in Kerala. The dissenting judgment identified the practice as an essential practice and suggested that the matters of deep religious faith should not be interfered by Courts. Justice Indu Malhotra opined: "Constitutional morality in a secular polity would imply the harmonisation of the Fundamental Rights, which include the right of every individual, religious denomination, or sect, to practice their faith and belief in accordance with the tenets of their religion, irrespective of whether the practice is rational or logical."[21]

Justice Chandrachud was of the opinion that the constitutional values like dignity, liberty, and equality stand above everything else as a principle which brooks no exceptions, even when confronted with a claim of religious belief.[22] The Court also put forward that the term morality in Article 25 of Indian Constitution implies constitutional morality and that views taken by the Court must be in conformity with the concept of constitutional morality.[23]

The varied approaches from Court and the issue of a subjective interpretation of the concepts and doctrines created a situation for Judiciary as well as the academicians to ask for more clarity, the clarity as in the true meaning and effects of the doctrines and not a clear cut definition. The rights of people are the primary concern of the Judiciary, so when religious rights and fundamental rights come into conflict whether Court can harmonise both by using constitutional morality is a question arises out of the Sabarimala decision. The concept of constitutional morality might have the potential to dilute the Essential Practices Doctrine which raises a further question as to whether the former is sufficient enough to substitute the latter.

SCOPE OF THE STUDY

The Indian Judiciary has been following certain doctrines, concepts and principles to deal with constitutional and other legal issues. It has been successful in formulating doctrines and

[19] Shayara Bano v. Union of India, (2017) 9 SCC 1 (India).
[20] India Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690.
[21] India Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690.
[22] India Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690.
[23] India Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC 1690.

tests for the effective interpretation of constitution and other statutes. As the Supreme Court exists as the guardian and protector of the rights of individuals, the effectiveness and impacts of the concepts, doctrines and principles adopted by it became a point of discussion. Constitutional morality has been vehemently criticised for its lack of clarity and subjective interpretation and it was called as a dangerous weapon by the attorney general of India, Mr. K.K Venugopal.[24] The then Law Minister Ravi Shankar Prasad asked for clarity on the concept. He observed that "nuances of constitutional morality need to be outlined with greater clarity; it should not differ from judge to judge but there must be a consensus".[25]

Justice Nariman observed that constitutional morality has attained the state of stare decisis.[26] As much as the conflicting discussions the conflicting judgments create a legal problem. Similar to constitutional morality, essential practices has also been criticised for the different judicial approaches and the effects of it on the secular nature of the nation and religious rights of individuals and denominations. The doctrine also faces condemnation that the judiciary while deciding the essential practices of religion act as clergy which is beyond its authority.[27] The researcher would examine the effect of constitutional morality on the Essential Religious Practices Doctrine. Constitutional morality and Essential Religious Practices have contributed to the jurisprudential growth of individual and community rights, it is crucial to study the essence and dimensions of each one as well as the effect of one on the other.

OBJECTIVES

- To understand the scope and meaning of constitutional morality as interpreted by the Indian Judiciary.
- To understand whether the varying interpretations and application of the concept of constitutional morality by the Indian Judiciary has resulted in conflicting judgments.
- To check whether the Indian Judiciary has been able to appreciate the true meaning of constitutional morality.

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[24] Apoorva Mandhani, *Constitutional Morality A Dangerous Weapon, It Will Die With Its Birth: KK Venugopal*, LIVELAW, (Dec. 9 2018), https://www.livelaw.in/constitutional-morality-a-dangerous-weapon-it-will-die-with-its-birth-kk-venugopal/

[25] Ananthakrishan G, *National Law Day, Ravi Shankar Prasad said Constitutional morality should not differ from Judge to Judge but there should be consensus*, INDIAN EXPRESS (Nov.27,2018), https://indianexpress.com/article/india/national-law-dayneed-to-clearly-define-nuances-of-constitutional-morality-says-prasad-5466090/

[26] Kantaru Rajeevaru v. Indian Young Lawyers Association, (Civil) No. 3358 of 2018.

[27] Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of Religion in India: Current Issues and Supreme Court Acting as Clergy*, 2017 BYU L. Rev. 915 (2018).

- To critically analyze the use of essential practices doctrine by the Indian Supreme Court and its effect on religious practices.
- To examine the effect of essential practices doctrine on the secular nature of the country.
- To evaluate the effect of constitutional morality on essential practices doctrine in India.

RESEARCH PROBLEM

Whether the judiciary has been consistent in interpreting the meaning of constitutional morality and whether the application of constitutional morality in matters connected to religion has affected the application of the Essential Practices Doctrine?

HYPOTHESIS

The application of the concept of constitutional morality by the Indian Judiciary has resulted in the dilution of the application of the essential practices doctrine.

RESEARCH QUESTIONS

1. What is the true meaning and scope of constitutional morality?
2. Has there been a uniform application of the concept of constitutional morality by the Indian Judiciary?
3. Has the Indian Supreme Court succeeded in rationalizing religious practices with the help of essential practices doctrine?
4. Can the Indian Supreme Court assume the position of a theological authority in a secular state with the help of application of essential practices doctrine?
5. Has the essential practices doctrine lost its relevance in the context of emphasis on constitutional morality by the Indian Judiciary?
6. Whether the essential practices doctrine holds any good in a secular state like India?
7. Whether essential religious practices need to be tested also on the basis of constitutional morality?
8. Whether constitutional morality is a sufficient tool to substitute essential practices doctrine and protect religious rights in India?

RESEARCH METHODOLOGY

The research methodology of the current study would be carried by doctrinal method and the study would be based on the collection of data from primary and secondary sources. The primary sources of data would include statutes, case laws, and secondary sources would include books, journals, newspaper articles, online sources, etc. which are available relating to the concerned study.

CHAPTERISATION

CHAPTER I: INTRODUCTION

It deals with the introduction of this paper, research problem, objectives and scope of the study and the methodology used for the study.

CHAPTER II: CONSTITUTIONAL MORALITY AND ITS IMPACT ON CONSTITUTIONAL ISSUES IN INDIA

This chapter tries to understand the meaning and scope of constitutional morality and intends to find out whether there is a uniform application of the concept by the Indian Judiciary. The chapter intends to look into the various judicial approaches and the impact of constitutional morality upon constitutional issues in India.

CHAPTER III: DOCTRINE OF ESSENTIAL PRACTICES AND INDIAN SUPREME COURT: JUSTIFICATIONS AND CRITICISMS

This chapter intends to examine the applicability of essential practices doctrine in the light of judicial decisions by the Supreme Court of India. The rationale for the doctrine as well as the criticisms will be examined in detail.

CHAPTER IV: EFFECT OF CONSTITUTIONAL MORALITY ON ESSENTIAL PRACTICES DOCTRINE

The purpose of this chapter is to examine the effect of constitutional morality on essential practices doctrine with specific reference to two important Supreme Court decisions, that is, Shayara Bano v. Union of India and Indian Young Lawyers Association v. Union of India. The conjunction of constitutional morality and essential practices doctrine can be viewed in both these case laws and this chapter would examine the impact of the former on the latter.

CHAPTER V: FINDINGS AND SUGGESTIONS

This chapter would include the findings from the research and the suggestions.

CHAPTER II: CONSTITUTIONAL MORALITY AND ITS IMPACT ON CONSTITUTIONAL ISSUES IN INDIA

INTRODUCTION

Constitution can be written and unwritten and it is the fundamental law of the land which provides for the powers and responsibilities of organs of state and regulates the relationship between each other and with the people. It is generally believed that constitutions encompass people's will and consensus.

There is always a history attached to a constitution, and the interpretation of the Constitution cannot be divorced from the values that are embodied in the Constitution.[28] A constitution may be a reflection of a dynamic and transformative social process and may thus be a framework for development in addition to being a fully functional machine for governance.[29] The oppression and inequalities due to the caste system, the communal differences and the lack of democratic tradition were issues particular to India and was hugely given importance by Ambedkar at the time of framing of constitution and those aspirations were reflected in the Constitution.

Granville Austin wrote that "Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. The core of the commitments to the social revolution lies in parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution." [30]

Professor Betteille has explored the relevance of constitutional morality in India and has opined that, "In the absence of constitutional morality, the operation of a constitution, no matter how carefully written, tends to become arbitrary, erratic and capricious. Without some infusion of constitutional morality among legislators, judges, lawyers, ministers, civil

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[28] Shri Gopal Subramaniam, Constitutional morality- Is it a dilemma for the State, Courts, and Citizens? 1st D.V Subba Rao Memorial lecture delivered on April 24, 2016.
[29] *Id.*
[30] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (1999).

servants, writers, and public intellectuals, the Constitution becomes a playing of power brokers."[31]

Constitutionalism is generally understood as the limitation on government as the government and other institutions derive their powers from the Constitution. Before adopting a constitution itself, our political choices were in tandem with constitutionalism. Constitutionalism at its core signifies a politics of restraint.[32]

Written constitution is not an essential feature for constitutionalism and it has acquired different meaning with every constitutional system. Constitutionalism cannot be limited to the constitutional text. The idea of democracy, rule of law and constitutional governance are core to constitutionalism. It also provides contested idea and practices concerning justice, rights, development and associational autonomy.[33] Constitution in India realising diverse cultures and practices tried to challenge the hierarchical notions that existed and tried to bring about social justice. So constitutionalism in India goes beyond limiting the government to assuring justice.

Limited government implies that the sovereignty does not lie with the government. In constitutional democracies people's sovereign authority is thought to be ultimate and unlimited but the government bodies, e.g. legislature, executive and courts- through whom that sovereignty is exercised on the people's behalf are constitutionally limited.[34]

Judiciary play an important role in interpreting and enforcing these limits. In Indian system such constitutional limits are interpreted and enforced by the independent Judiciary. Much more of a nuanced approach to that is in India, by extension, a vast range of political, administrative, and judicial matters have become constitutional questions that are routinely brought to the Court.[35] Constitutional morality may be understood as an essence of constitutionalism.

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[31] Andre Beteille, *Constitutional morality*, ECONOMIC AND POLITICAL WEEKLY, 35-42, 2008.

[32] SUJIT CHOUDHARY, *Et al*, Locating Indian Constitutionalism, 1-14, (2016) (constitutionalism). (Even if not expressed in formal language of law, the grammar of constitutionalism marked India's mainstream political choices. The anti-revolutionary nationalist movement was self-consciously a constitutional movement. The mass movement under Gandhi and the oppressed classes were also in forefront in owning a constitutional culture).

[33] RAY, SANGEETHA, & HENRY SCHWARTS, eds., A COMPANION TO POSTCOLONIAL STUDIES, (2005).

[34] Wil Waluchow, Constitutionalism, (2001).

[35] *Supra*, note 32 (Constitutionalism). (both citizens and judges invoke constitutional values and doctrine not just when claiming rights, determining jurisdiction, or limiting governmental power. They invoke constitutional values in a variety of claims: from protecting ecology to allocating natural resources, redressing grievances

Constitutional interpretation is not merely limited to the text of the Constitution, but the concept of silences of constitution is also given importance. Silences or abeyance of Constitution are applied for a comprehensive constitutional interpretation in tune with the spirit of the Constitution. A written Constitution takes on a life of its own especially in a country that is wedded to the concept of judicial review.[36] Judiciary has over the time readout these silences and interpreted the Constitution to protect the rights of individuals.

For example, Right to life has evolved to include within its scope right to speedy trial,[37] right to free legal aid,[38] right to clean drinking water and fresh air,[39] right to education,[40] right to privacy[41] etc. Although the word dignity is not specified under Article 21, the concept is mentioned in the Preamble and is ingrained in our Constitution and it is the judicial wisdom that gave it life. Similarly, it is suggested that basic structure theory was evolved from the great silence in our Constitution and although constitution provided that it could be amended, it did not say that it could be abrogated or that it's basic features could be thrown to the winds.[42]

Supreme Court in *Manoj Narula v. Union of India*[43] stated that constitutional silences or abeyance are progressive and are applied as an advanced constitutional practice to fill gaps in certain areas, in the interest of justice and larger public interest. The decision in *K.S Puttaswamy v. Union of India*[44] which held Right to privacy as a Fundamental Right under Article 21 contributed largely to the constitutional interpretation. Court, in this case, observed that "Constitutional adjudication facilitates answers to the silences of the Constitution. The task of interpretation is to foster the spirit of the Constitution as much as its text."[45]

Justice Sikri and Justice Dipak Misra in a panel discussion on the topic 'India and Constitutional morality' talked about silences of Constitution or abeyance of constitution

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against governments, and bringing ordinary courts for claims. Indian constitutional law is interesting because it has constitutionalised so much of Indian life).

[36] Fali S. Nariman, The silences in our constitutional law, (2006) 2 SCC (Jour) 15, http://www.ebc-india.com/lawyer/articles/2006_2_15.htm

[37] Hussainara Khatoon v. Home Secretary Bihar, (1980) 1 SCC 81.

[38] M.H Hoskot v. State of Maharashtra (1978) 3 SCC 544.

[39] M.C Mehta v. Union of India, AIR 1988 SC 1037.

[40] Unnikrishnan v. State of Andhra Pradesh, (1993) 1SCC 645.

[41] K.S Puttaswamy v. Union of India, (2017) 10 SCC 1

[42] *Supra*, note 9

[43] Manoj Narula v. Union of India, (2014) 9 SCC 1.

[44] K.S Puttaswamy v. Union of India, (2017) 10 SCC 1.

[45] *Id.*

which, is not specified in a Constitution but can be read out from it and stated that Constitutional morality is a facet of the silences of Constitution.[46]

HISTORY OF CONSTITUTIONAL MORALITY

George Grote an English historian propounded the term constitutional morality in his work 'A History of Greece'. While examining the evolution of Clesthenes and establishment of Athenian democracy Grote referred to the concept of constitutional morality as a paramount reverence to the Constitution[47]. There was continuous struggle between armed factions in Greece and the lack of respect for any Constitution was evident; particularly the Great nobles would follow their ambitions without any regard to limits imposed by law. As Clesthenes was aware of these rivals, either impediments were put to make it difficult for them to acquire support or they were eliminated.[48] To protect the democratic constitution from internal assailants it was necessary to provide a constitution that kindle good will but also this passionate attachment which Grote referred to as constitutional morality.[49]

Grote used the term constitutional morality as 'difficult and passionate attachment' towards constitution which was necessary to create in the multitude and thereby force upon the leading ambitious men. It was necessary to prevent the noble men to follow their ambitious purposes and protect Athenian democracy.[50]

According to Grote constitutional morality means "a paramount reverence for the forms of the constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure sure of these very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the constitution will not be less sacred in the eyes of his opponents that in his own."[51]

Grote mentioned freedom and self-restraint as the essential features of constitutional morality. It prevents the governing authority from turning tyrannical at the same time open to

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[46] Here is what legal experts have to say about constitutional morality, (Oct. 10, 2018 22:30:09), https://www.cnbctv18.com/videos/legal/here-is-what-legal-experts-have-to-say-about-constitutional-morality-1058251.htm

[47] GEORGE GROTE, A HISTORY OF GREECE, 153-155, IV, (1851).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

criticism. And pluralism and open criticism was identified as essential features of the concept.[52] Although for a brief time this democratic setup existed in Greece "Grecian democracy was ultimately overthrown, not by the spears of conquerors, but through the disregard of constitutional morality by her own citizens."[53]

AMBEDKAR'S PERSPECTIVE ON CONSTITUTIONAL MORALITY

The concept of constitutional morality finds a place in the Constituent Assembly Debates a few times. In the Constituent Assembly Debates, the Draft Constitution was criticised for producing a good part of Government of India Act, 1935 and for including administrative details. Dr. B. R Ambedkar defending the Draft Constitution addressed the need for diffusion of constitutional morality. "The diffusion of constitutional morality not merely among the majority of any community but throughout the whole, is an indispensable condition of government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable without being strong enough to conquer the ascendancy for themselves"[54]

Ambedkar explaining the meaning of constitutional morality quoted Grote, "By constitutional morality Grote meant, a paramount reverence for the forms of the constitution, enforcing obedience to authority acting under and within these forms yet combined with the habit of open speech, of action subject only to definite legal control, and unrestrained censure sure of these very authorities as to all their public acts combined too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the constitution will not be less sacred in the eyes of his opponents that in his own."[55]

It is suggested that Ambekar's formulation was not meant to be used as a test by Court to invalidate legislation or government action.[56] To consider that constitutional morality was merely used to defend the details of administration would be a narrow view of the concept. Ambedkar himself gives the reason for that which is more important. Even while accepting that a Constitution shouldn't contain the administrative provisions Ambedkar observes two

[52] *Id.*
[53] William D. Guthrie, *Constitutional Morality*, THE NORTH AMERICAN REVIEW 196, 681, 154-173, (1912).
[54] CONSTITUENT ASSEMBLY OF INDIA DEBATES: OFFICIAL REPORTS Vol.VII, pp38, Nov. 4, 1948
[55] CONSTITUENT ASSEMBLY OF INDIA DEBATES: OFFICIAL REPORTS Vol.VII, pp38, Nov. 4, 1948
[56] Abhinav Chandrachud, *The Many Meanings of Constitutional Morality,* Available at SSRN 3521665, 2020.

interconnected things that are not generally recognised.[57] "One is that the form of administration has a close connection with the form of the Constitution. The other is that it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution. It follows that it is only where people are saturated with Constitutional morality such as the one described by Grote the historian that one can take the risk of omitting from the Constitution details of administration and leaving it for the Legislature to prescribe them."[58]

He asks the question can we presume such a diffusion of constitutional morality and goes on to say that, "Constitutional morality is not a natural sentiment. It has to be cultivated. We must realise that our people have yet to learn it. Democracy is India is only a top-dressing on an Indian soil which is essentially undemocratic."[59]

The historical injustices and inequalities were a huge concern for Ambedkar and his counter majoritarian jurisprudence and the idea of constitution as a revolutionary form intended to change these situations. Ambedkar was against civil disobedience and bloody revolution, he believed in solving the issues through constitutional means.

He was acutely conscious that a democracy that was based upon a majority that constituted not a political majority but a communal majority was deeply dangerous to the very notion of democracy.[60] Ambedkar shows a disbelief in the legislation as he argued why the forms of administration should not be entrusted to legislature. He is reluctant to see any branch whether it is legislature, Court or Constituent Assembly to as being able to claim authoritatively that it embodies popular sovereignty.[61]

Constitutional morality pointed out to the larger issue of lack of democratic tradition, raised concern over a possible majoritarian arbitrariness and put forward a vision for future. It wouldn't be wrong to say that the institutions of State including the Court has duty to make sure that constitutional morality prevails and preserve a diverse society.

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[57] Pratap Banu Mehta, *what is constitutional morality?*, (2010), https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm.

[58] CONSTITUENT ASSEMBLY OF INDIA DEBATES: OFFICIAL REPORTS Vol.VII, pp38, Nov. 4, 1948

[59] CONSTITUENT ASSEMBLY OF INDIA DEBATES: OFFICIAL REPORTS Vol.VII, pp38, Nov. 4, 1948

[60] Aravind Narain, *What Would an Ambedkarite Jurisprudence Look like*, NAT'L L. SCH. INDIA REV. 29, 1, 2017.

[61] Pratap Banu Mehta, *what is constitutional morality?* (2010), https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm.

Ambedkar's has not conceived constitutional morality as a judicial tool for interpretation rather as a difficult sentiment to be diffused among the entire population. But even long after independence, the constitutional goals are not attained and equality and dignity are far dream to many individuals and communities. The democratic system has failed to ensure rights to all particularly minorities like queer community; it is in that situation the Court has adopted this concept to ensure constitutional rights.

JUDICIAL APPROACH ON CONSTITUTIONAL MORALITY

PRIOR TO 2009

In ***Keshavanda Bharati v. State of Kerala***,[62] Justice A.N Ray while raising important questions regarding amendment of Constitution identifies that people give the power of amendment to Parliament and observed that "Democracy proceeds on the faith and capacity of the people to elect their representative and faith in the representatives to represent the people. Throughout the history of mankind if any motive power has been more potent than another it is that of faith in themselves. The ideal of faith in ourselves is of the greatest help to us."[63] Justice Ray who was among the minority judges quoting Grote does uphold the vision that constitutional morality is for the entire population and not just the majority.

Constitutional morality also finds a position in another observation made by Justice Jagmohan Reddy rely on Ambedkar's words that constitutional morality is not a natural sentiment and we have to cultivate it.[64] He said that "in any case this aspect need not concern this Court as it deals with what has already been done, but since so much has been said about the people and the amending power in Art. 368 as representing the sovereign will of people, I have ventured to this topic."[65] Pratap Banu Mehta in his scholarly work explaining the concept of constitutional morality used a similar suggestion. Scepticism about authoritative claims to popular sovereignty is identified as an element of constitutional morality.[66] He opined that the claims to speak on behalf of popular sovereignty are attempts to take over its authority. The possibility of a singular authoritative arbiter of popular will and constitutional

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[62] Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[63] Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225 (A.N Ray, J., dissenting)
[64] Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225.
[65] Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225
[66] Pratap Banu Mehta, *what is constitutional morality?* (2010), https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm.

interpretation is critically viewed. The scholarship particularly pointed out that adherence to forms constitution is not equal to submission to popular sovereignty.[67]

In ***S.P Gupta v. President of India,***[68] which is first among the judges case, court examined conventions and held "A convention is a rule of constitutional practice which is neither enacted by Parliament as a formal legislation nor enforced by courts, yet its violation is considered to be a serious breach of constitutional morality leading to grave political consequences to those who have indulged in such violations". Justice E.S Venkataramiah examining constitutional conventions identified that although they are not enforceable the violation of it will be breach of constitutional morality.[69]

This was in the light of unwritten constitution in England, In case of India it was identified that "we have incorporated some of the British constitutional conventions in a modified form' but raises concern over enforceability of 'conventions outside the Constitution."[70] In this case the term constitutional morality was suggested to specify that the violations of conventions would be in breach of the concept but raises concern over the protection of same in written Constitution in India. This leads to the question as to whether the written constitution limits relying on conventions or invoking constitutional morality.

When the matter of affirmative action for minority education institution came before Court, Justice Sinha mentioned constitutional morality and observed that "if affirmative action is not in consonance with equality it would violate constitutional morality."[71] Here Court identified equality as an important aspect of constitutional morality but not in a counter majoritarian way, but suggesting if affirmative actions are not in consonance with equality it would violate constitutional morality.

SINCE 2009

Naz Foundation v. Govt. of NCT Delhi[72] is a pioneering judgment in the expansion of the concept of constitutional morality. It also paved way to a dignity based judicial interpretation. A Public Interest Litigation was filed by Naz Foundation, an NGO working in public health

[67] *Id.*
[68] S. P Gupta V. President of India, (1982) 2 SCR 365.
[69] S. P Gupta V. President of India, (1982) 2 SCR 365.
[70] S. P Gupta V. President of India, (1982) 2 SCR 365.
[71] Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697.
[72] Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC Online Del 1762.

field challenging the constitutionality of section 377 of Indian Penal Code.[73] Delhi High Court dismissed the petition on the ground that there is no cause of action and that such a petition cannot be entertained to examine the academic challenge to the constitutionality of the legislation. Upon civil appeal, Supreme Court set aside the dismissal and ordered the high court to hear the matter. The two judge bench comprising of Chief Justice A.P Shah and Justice S. Muralidhar held that section 377, IPC insofar it criminalises consensual sexual acts of adults in private, is violative of Articles 21, 14, and 15 of the Constitution.[74]

Constitutional morality was given predominance over public morality. "Popular morality, as distant from a constitutional morality derived from constitutional values, is based on shifting and subjecting notions of right and wrong. If there is any type of "morality" that can pass the test of compelling state interest, it must be "constitutional" morality and not public morality."[75]

The Court examined the Wolfenden committee[76] and how it rejected the argument of morality which observed "moral conviction or instinctive feeling howsoever strong, not a valid basis for overriding individual's privacy and for bringing within the ambit of criminal law private sexual behaviour of this kind."[77]

Court went on to state that "the argument of Moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy. Constitutional morality must outweigh the argument of public morality even if it be the majoritarian view".[78] This "dignity-plus" reasoning made a precious beginning for the removal of legal discrimination against sexual minorities.[79]

In light of this judgment the discussion or demand to revisit the criminalisation was put forward suggesting a constitutional theory of criminalisation. Since the decision dealt with an

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[73] Sec. 377 PEN.CODE, Unnatural offences – whoever voluntarily has carnal intercourse against the order of nature with any man, woman, or animal shall be punished with imprisonment for life or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.
[74] Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC Online Del 1762
[75] Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC Online Del 1762
[76] The report of the Departmental Committee on Homosexual Offences and Prostitution published in the United Kingdom on 4th September 1957. The after math of which lead to the exchange of views between Lord Devlin and H.L.A Hart. Lord Devlin opined that criminal law not only for protection of individual but society as a whole, institutions, ideals and morals. Hart was of the opinion that unless something is harmful to society, government has no right to interfere in life of citizens.
[77] Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC Online Del 1762
[78] Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC Online Del 1762
[79] Upendra Baxi, *The Attorney General's concerns about constitutional morality are misplaced,* THE INDIAN EXPRESS, (Dec. 17, 2018 12:15:42 am), https://indianexpress.com/article/opinion/columns/attorney-general-constitutional-morality-sc-sabarimala-verdict-5496440/

issue of substantive criminal law in the light of constitutional morality, it ignited the discussion to reconsider criminalisation theory.[80]

Although the High Court decision was overruled by Supreme Court in *Suresh koushal v. Union of India*[81] eventually the provision was partially set aside by Supreme Court in *Navtej Singh Johar v. Union of India*[82] and constitutional morality again became the guiding concept. *Suresh Kumar Koushal v. Union of India*, stated that Sec. 377 does not suffer from the vice of unconstitutionality. The judgment did not rely on constitutional morality, it has based its decision on the fact that LBTQ+ community only constituted a miniscule fraction of India's population and only 200 persons have been prosecuted in last 150 years.[83] The analysis was focused on presumption of constitutionality of legislation it did not used the concept of constitutional morality rather focused on case laws to uphold the social morality.

IDEAL GOVERNANCE

In ***Manoj Narula v. Union of India,***[84] the criminalisation of politics and corruption was the primary issue and the judgment upheld the democratic values and the constitutional concepts of abeyance of constitution, constitutional morality, good governance etc. Court observed that "Dr. Ambekar throughout the Debate felt that the Constitution can live and grow on the bedrock of constitutional morality." The concept was understood as 'bowing down to norms of Constitution and not to act in a manner which would become violative of the rule of law. Constitutional morality was identified as a 'laser beam in institutional building' and mentioned that the 'traditions and conventions have to grow to sustain the value of such morality."[85] Constitutional governance and the concept of constitutional morality were given prominence in this case and it was explained further in following case law.

Government of NCT of Delhi v. Union of India and Ors[86] is an important case where Court dealt with issues of governance. The then Chief Justice Dipak Misra quoted Ambedkar's reference that constitutional morality is not a natural sentiment. He examined constitutional

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[80] Lathika Vashist, *Rethinking criminalisable harm in India: constitutional morality as a restraint on criminalisation*, JOURNAL OF LAW INSTITUTE, 73-93, 2013. (under the scheme of constitutional theory of criminalisation, 'harm' has to be conceptualized in accordance with normative framework of constitutional morality rather than public morality. This will enable the courts to identify a law free zone which can be designated as the 'right not to be criminalised').

[81] Suresh Kumar Koushal v. Union of India, (2014) 1 SCC 1.

[82] Navtej Singh Johar v. union of India, (2018) 10 SCC.

[83] Suresh Kumar Koushal v. Union of India, (2014) 1 SCC 1.

[84] Manoj Narula v. Union of India, (2014) 9 SCC 1.

[85] Manoj Narula v. Union of India, (2014) 9 SCC 1.

[86] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501.

morality as a check on government and citizens and that it has inherent elements in constitutional norms and conscience of the constitution.

It was stated that "Constitutional morality is that fulcrum which acts as an essential check upon the high functionaries and citizens alike, as experience has shown that unbridled power without any checks and balances would result in a despotic and tyrannical situation which is antithetical to the very idea of democracy."[87]

Its meaning was understood as morality that has elements in constitutional norms and conscience of constitution. It was mentioned that "Constitutional morality, appositely understood, means the morality that has inherent elements in the constitutional norms and the conscience of the Constitution. Any act to garner justification must possess the potentiality to be in harmony with the constitutional impulse. In order to realize our constitutional vision, it is indispensable that all citizens and high functionaries in particular inculcate a spirit of constitutional morality which negates the idea of concentration of power in the hands of a few."[88]

Justice Chandrachud quoted Constituent Assembly Debates and stressed on the element of democracy. He also specifies certain important features of constitutional morality. It is pointed out that "constitutional morality provides in a constitution basic Rules which prevent institutions from turning tyrannical. It warns against fallibility of individuals, checks state power and the tyranny of the majority. Constitutional morality balances popular morality and acts as a threshold against an upsurge in mob rule."[89]

Both of the judges specified that constitutional morality act as check on institutions and individuals, Justice Chandrachud went on to explain the revolutionary character of Constitution. He states that constitutional morality provides not just the forms and procedure of the Constitution but also an 'enabling framework that allows a society the possibilities of self-renewal.'[90]

[87] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501.
[88] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501.
[89] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501.
[90] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501.

RECENT CASELAWS

In ***Shayara Bano v. Union of India***[91] the practice of talaq-e-biddat or triple talaq was challenged as ultra vires to the Constitution. The petitioners challenged that the practice of talaq-e-biddat was in breach of constitutional morality. Chief Justice Khehar speaking for the minority, held that the practice of talaq-e-biddat is a constituent of 'personal law' and gave it stature equal to other fundamental rights, conferred in part III of the Constitution. Hence it was held that the practice cannot be set aside on the ground of being violative of constitutional morality.[92]

The concurrent decision relied on essential practices and held that triple talaq is not an essential practice of Islam and "what is held to be bad in Holy Quran cannot be good in Shariat, and what is bad in theology cannot be good in law."[93] The grounds of constitutional morality or claims under equality were not dealt by Justice Joseph. The majority decided on manifest arbitrariness and recorded talaq-e-biddat is regulated by Shariat Application Act. The reasoning of Justice Nariman and Justice Lalit was based on constitutional reasoning but they only decided the matters on reasonableness and arbitrariness. Constitutional morality was not applied by majority and minority went on suggest that personal laws cannot be tested on ground of constitutional morality.

Although by a 3:2 majority, the practice was set aside. The result was a progressive one, if the concurring judgment had come to a different conclusion by examining essential practice, such an archaic and discriminatory practice would prevail. This shows the importance of judicial reasoning and need for basing decisions on concept of constitutional morality.

Navtej Singh Johar v. Union of India[94]

Justice Dipak Misra viewed the necessity for constitutional courts to inculcate in their judicial interpretation a sense of constitutional morality so as to protect the rights bestowed on citizens. Constitutional morality was given prominence over social morality and Court made it clear that constitutional morality will ensure rights of individuals even if it is a miniscule section of society.

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[91] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[92] Shayara Bano v. Union of India, (2017) 9 SCC 1 (Khehar, J., dissenting).
[93] Shayara Bano v. Union of India, (2017) 9 SCC 1 (Kurian, J., concurring).
[94] Navtej Singh Johar v. union of India, (2018) 10 SCC.

A pluralistic and inclusive society was identified as virtues of constitutional morality by the Court in this judgment. "The concept of constitutional morality urges the organs of the state, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by majority to usurp the rights and freedoms of a smaller or miniscule section of the populace. Constitutional morality cannot be martyred at the altar of social morality and it is only constitutional morality that can be allowed that can be allowed to permeate into the Rule of Law. The veil of social morality cannot be used to violate fundamental rights of even a single individual, for the foundation of constitutional morality rests upon the recognition of diversity that pervades the society."[95]

Justice Nariman identified the Victorian morality as the rationale of section 377 and relying on that hold that when the rationale of law ceases, the law itself ceases and that Victorian morality must give way to constitutional morality. He opined that constitutional morality is the soul of constitution and can be found in the Preamble and part III of the Constitution.

Courts while using constitutional morality take a counter majoritarian role in protecting the rights of individuals.[96] In the words of Justice DY Chandrachud, 'Constitutional morality requires that this Court must act as a counter-majoritarian institution which discharges the responsibility of protecting constitutionally entrenched rights, regardless of what the majority may believe'.[97]

Justice Chandrachud provides the justification of invoking constitutional morality while deciding the validity of a law. "When deciding the validity of law there are well established principles, namely, legislative competence or violations of fundamental rights or of any other constitutional provisions. At the same time the Courts are expected to uphold constitutional principles and Court has to be guided by constitutional morality rather than social morality."[98]

Justice Indu Malhotra held that sexual orientation is an innate and intrinsic feature of an individual and it was further held that classification which discriminates between persons

[95] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[96] Arundhadhi Katju, *LGBT rights in India: The Doctrine of Constitutional Morality and Counter-Majoritarianism in the Context of Institutional Supremacy*, CONSTITUTION.NET, (Oct.24, 2018), https://constitutionnet.org/news/lgbt-rights-india-doctrine-c onstitutional-morality-and-counter-majoritarianism-context.
[97] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[98] Navtej Singh Johar v. union of India, (2018) 10 SCC.

based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality."[99]

Constitutional morality exists as a guiding light to the constitutional courts. Court as an agent of State takes upon itself the duty to diffuse constitutional morality and not to be guided by majoritarian view. Again reinstating constitutional morality should prevail over social morality Court observed how the concept would aid the Court in arriving at a just decision, "The concept of constitutional morality would serve as an aid for the Court to arrive at a just decision which would be in consonance with the constitutional rights of the citizens, howsoever small that fragment of populace may be."[100]

It was held that "While testing the constitutional validity of impugned provision of law, if a constitutional court is of view that the impugned provision falls foul to the precept of constitutional morality, then the said provision has to be declared as unconstitutional for the pure and simple reason that the constitutional courts exists to uphold the Constitution."[101]

One might say that the decision has very little effect on the common people as it does not require them to change their perception. A colonial era law based on puritanical believes has over the time perpetuated stigma, prejudice, discrimination and violence against LGBTQIA community. The decision itself says 'the perception of deviance and criminality fostered through section.377 alters the prism through which LGBT persons are viewed'. The effect of such a law had devastating effect on Indian society that even judges uphold social morality over constitutional rights of individuals. So decriminalising such a law will be removal of a legal discrimination and will have changing effects in society.

According to Ambedkar law moves beyond what is legitimised by state to what society sanctions for example custom is enforced by people far more effectively than law is by state because of the compelling force of an organised people is far greater than compelling force of the state. In such situation of a majoritarian bias, Ambedkar embraces the counter majoritarian approach of law in which the coercive force of law must be mobilised on the side of right and morality.[102]

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[99] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[100] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[101] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[102] *See* Aravind Narain, *What Would an Ambedkarite Jurisprudence Look like*, 1 Nat'l L. Sch. India Rev. 29 (2017).

The constitutionality of section 497, IPC was challenged in ***Joseph shine v. Union of India***.[103] Justice Nariman specified that Constitution envisages that equality, dignity and freedom triumph over prejudices and injustice. While stating the need to question the social mores which are against constitutional morality, it was observed that this particular case demands the Court "to make an enquiry into the insidious permeation of patriarchal values into the legal order and its role in perpetuating gender injustices"[104]. Again the rationality of law was considered and the section was set aside as it was manifestly arbitrary.

Justice Chandrachud held that "It is not the common morality of the state at any time in history, but rather constitutional morality, which must guide the law. In any democracy, constitutional morality requires the assurance of certain rights that are indispensable for the free, equal, and dignified existence of all members of society. A commitment to constitutional morality requires us to enforce the constitutional guarantees of equality before law, non-discrimination on account of sex, and dignity, all of which are affected by the operation of section 497."[105] Constitutional morality in these decisions has been given prominence over popular or social morality. Constitutional morality as a counterpoise to popular morality[106] was identified as a prominent element.

Indian Young Lawyers Association and others v. State of Kerala[107]

In 2006 Indian Young Lawyers Association filed a Public Interest Litigation before the Supreme Court regarding the entry of women of 10 to 50 years to Sabarimala temple situated in Kerala. In this judgment public morality was understood synonymously with constitutional morality since Constitution was adopted and given by the people to themselves.

Justice Dipak Misra wrote: "The right guaranteed under Article 25(1) has been made subject to, by the opening words of the Article itself, public order, morality, health and other provisions of part III of the Constitution. All the three words, that is, order, morality and health are qualified by the word public. Neither public order nor public health will be at peril by allowing entry of women devotees of the age group of 10 to 50 years into the Sabarimala temple for offering their prayers. As regards public morality, we must make it absolutely clear that since the Constitution was not shoved, by any external force, upon the people of

[103] Joseph shine v. Union of India, (2019) 3 SCC 39.
[104] Joseph shine v. Union of India, (2019) 3 SCC 39.
[105] Joseph shine v. Union of India, (2019) 3 SCC 39.
[106] Abhinav Chandrachud, *The Many Meanings of Constitutional Morality*, Available at SSRN 3521665 (2020).
[107] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

this country but was rather adopted and given by the people of this country to themselves, the term public morality has to be appositely understood as being synonymous with constitutional morality".[108]

Justice Chandrachud stressed on the fundamental postulates of dignity, liberty, equality and held that "constitutional morality must have a value of permanence which is not subject to fleeting fancies of every time and age."[109] He added that "freedom of religion and freedom to manage religious affairs subject to these fundamental notions of constitutional morality. In the public law conversations between religion and morality, it is the overarching sense of constitutional morality which has to prevail. It was also specified that it is court's duty to ensure what is protected is in conformity with fundamental constitutional values and guarantees and accords with constitutional morality."[110]

The dissenting judgment of Justice Indu Malhotra also relies on constitutional morality. "India is a country comprising of diverse religious, creeds, sects each of which have their faiths, beliefs, and distinctive practices. Constitutional morality in a secular polity would comprehend the freedom of every individual, group, sect, or denomination to practice their religion in accordance with their beliefs, and practices."[111]

The concept of constitutional morality was referred to as the "moral values underpinning the text of the Constitution, which are instructive in ascertaining the true meaning of the Constitution, and achieve the objects contemplated therein."[112] Justice Indu Malhotra went on to observe that "constitutional morality in a pluralistic society and secular polity would reflect that the followers of various sects have the freedom to practice their faith in accordance with the tenets of their religion. It is irrelevant whether the practice is rational or logical. Notions of rationality cannot be invoked in matters of religion by courts."[113]

Here the interpretation of same concept lead to different results and it happens in interpretation, the scope of constitutional morality need further deliberation in issues intertwined with faith. The interconnection with essential practices and the effect of constitutional morality on essential practice will be dealt in detail in chapter four.

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[108] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[109] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[110] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[111] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC (Malhotra, J., dissenting).
[112] *Id.*
[113] *Id.*

Review petition was filed against this Judgment and Supreme Court by 3:2 majority leave the matter to larger bench for consideration. Court in ***Kantaru Rajeevaru v. State of Kerala***[114] outlines seven issues; one among them is identifying the contours of constitutional morality. The issue identified is 'The expression morality or constitutional morality has not been defined in the Constitution. Is it overarching morality in reference to preamble or limited to religious beliefs or faith.'[115] Justice Nariman dissenting on the decision stated that constitutional morality has attained the status of stare decisis.[116] The position taken by Justice Nariman in *Navtej Singh Johar*[117] case was that fundamental rights and preamble constitutes constitutional morality.[118]In this case it was stated that "constitutional morality is nothing but values inculcated by the Constitution, which are contained in the Preamble read with various other parts, in particular, parts III and IV thereof."[119] By including part IV and various other parts, Justice Nariman has gone beyond in earlier position.[120] The issues also included on going petitions concerning matters of various faiths. Justice Nariman rejected this approach and reminded Court that only thing that is before this Court is the Review petition and writ petitions on *Indian Young Lawyers Association v. State of Kerala.*

CONCLUSION

The concerns regarding constitutional morality are rooted in power of Judicial Review and Judicial interpretation. Scholars like Professor N.R Madhava Menon raised some concerns over the usage of constitutional morality as a tool by the Court while also stating the importance of concept.[121] According to the scholar the issue is not relevance of constitutional morality itself but use and abuse of it in decision making.

The question of diffusion of constitutional morality among the people might still be a concern and Court while testing a law upon constitutional morality uphold the right of individual by relying on constitutional standards, thereby checking not only the government's or the majoritarian bias but its own bias. This is evident from the position Court has taken over time

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[114] Kantaru Rajeevaru v. Indian Young Lawyers Association, (Civil) No. 3358 of 2018.
[115] Kantaru Rajeevaru v. Indian Young Lawyers Association, (Civil) No. 3358 of 2018.
[116] Kantaru Rajeevaru v. Indian Young Lawyers Association, (Civil) No. 3358 of 2018.
[117] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[118] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[119] Kantaru Rajeevaru v. Indian Young Lawyers Association, (Civil) No. 3358 of 2018.
[120] Nakul Nayak, *Constitutional Morality: An Indian Framework*, AM. J. COMP. L. (forthcoming 2021)
[121] Prof NR Madhava Menon, *Constitutional Morality: Eight Burning Questions*, INDIA LEGAL (Jan.12, 2019), https://www.indialegallive.com/viewpoint/constitutional-morality-eight-burning-questions/

in decriminalising section 377 of IPC. Rather than an extra power, constitutional morality provides for an extra caution to judiciary.

There seems to be an agreement on the issue that democratic system of governance may not serve the constitutional goal always.[122] Professor Upendra Baxi asks the relevant question that when legislature continues to overlook matters of violation of fundamental human rights, and all nudging functions are exhausted, what should be the nature and scope of judicial duty.[123]

The attacks on constitutional morality are often upon basic structure theory as well as power of judicial review as such. From the judgments discussed it can be said that Constitutional morality is not merely a tool to check constitutionality of laws but rather a guiding light in the interpretation of Constitution. There could be difference of opinion regarding judicial review but it must be noted that Court has duty to interpret the Constitution under Article 32 and it exercises the power of judicial review within constitutional limits.

Prof. Upendra Baxi responding to K.K Venugopal's contention wrote 'courts are constitutionally mandated to adjudicate matters which raise competing contentions regarding core human rights. Constitutional morality contains a set of goals and methods by which to address these conflicts. The apex court has never said that all public policy always offends constitutional morality, but only that the courts must choose the latter when the two are in visible conflict. The dialectic between public morality and constitutional morality serves well the promotion of constitutional good governance and the production of constitutionally sincere citizens."[124]

Having different meanings attributed to the concept is not a concern, our doctrines principles and the Constitutional provisions itself is abstract and there is space for interpretation.[125] Constitutional morality is also better if left within its abstractness. A defining list of aspects of the concept will not be ideal.

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[122] *Id.*

[123] Prof. Upendra Baxi, *Constitutional Morality: "No Entry" in Adjudication?*, INDIA LEGAL, (Apr.5, 2019), https://www.indialegallive.com/viewpoint/constitutional-morality-no-entry-in-adjudication/

[124] Upendra Baxi, *A Dangerous Precedent?*, INDIA LEGAL (Dec.16, 2018), https://www.indialegallive.com/viewpoint/a-dangerous-precedent/

[125] Gautam Bhatia, *India's attorney general is wrong. Constitutional morality is not a 'dangerous weapon'*, SCROLL.IN, (Dec. 21, 2018 08:00 am), https://scroll.in/article/905858/indias-attorney-general-is-wrong-constitutional-morality-is-not-a-dangerous-weapon

Another concern is about the subjective interpretation of the concept. That is whether the morality applied is the subjective notion of judges and constitutional morality is not an objective standard. By paying close attention to the text of the Constitution, its structure, the inter-relationship between its provisions and the historical context in which it was framed, we ensure that the morality we identify as belonging to the Constitution actually is constitutional morality, and not our own subjective desires that we have projected onto the document.[126] In the same case using the same concept resulted in different outcomes was a concern. "The suggestion that the Court should always speak unanimously is neither constitutionally permissible nor desirable".[127] But a caution in interpreting is expected.

It is suggested that "Justice Indu Malhotra's analysis queers the pitch for future examination of contours of constitutional morality. whilst other judges seem to believe that constitutional morality gives dominance to one set of rights…failure to recognise this dimension could lead the court into a similar error as the dilution of the fundamental right to property for supporting legislation on land reform in 1960 and 1970 ultimately led to watering down of civil liberty in ADM Jabalpur."[128]

The effect of constitutional morality on essential practices is of importance here whether the former dilutes the later or how it guide the constitutional interpretation in matters connected with religious freedom is relevant.

Along with concerns the concept of constitutional morality has acquired the hope of people. The acceptance of constitutional morality among people has been witnessed in recent times in the protests that happened against government in Citizenship Amendment Act and people were demanding the government to adhere to constitutional morality. Controversial in itself as the concept demands self-restraint, different from other situations these methods have been taken by people to protect the Constitution itself.

The concept has been used to suggest for constitutional theory of criminalisation conceptualised within the framework of constitutional morality.[129] There are suggestions to

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[126] *Id.*
[127] Upendra Baxi, *The Attorney General's concerns about constitutional morality are misplaced,* THE INDIAN EXPRESS (Dec. 17, 2018 12:15:42 am), https://indianexpress.com/article/opinion/columns/attorney-general-constitutional-morality-sc-sabarimala-verdict-5496440/
[128] SALMAN KHURSHID, ET AL., JUDICIAL REVIEW: PROCESS, POWERS, AND PROBLEMS, 401, (2020).
[129] Lathika Vashist, *Rethinking criminalisable harm in India: constitutional morality as a restraint on criminalisation*, JOURNAL OF LAW INSTITUTE, 73-93, 2013.

expand the scope of constitutional morality to various other issues. Aravind Narain in the backdrop of Naz foundation case suggests the power of the concept lies in its possible application to other unpopular minorities.[130] Justice Chandrachud in *Indian Young Lawyers Association v. State of Kerala* while identifying the exclusion of women as a form of untouchability also shed light to the discrimination that manual scavengers face and how the constitutionally intended equality and dignity are not fully acquired.[131]

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[130] Aravind Narain, *What Would an Ambedkarite Jurisprudence Look like*, Nat'l L. Sch. India Rev. 29, 1, 2017.
[131] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

CHAPTER III DOCTRINE OF ESSENTIAL PRACTICES AND INDIAN SUPREME COURT: JUSTIFICATIONS AND CRITICISMS

SECULARISM IN INDIA

India is a country where people from diverse cultural and religious backgrounds live together. The multi-cultural system has affected our political and democratic journey. Secularism is a concept accepted by most of the political system in the world and its conception in India is indigenous to its history and way of life. There are many theories and many meanings attached to the concept.

Eugene Smith, in his work 'India as a secular State', conceptualized secular state as involving three sets of relations: religion and individual (freedom of religion); the state and the individual (citizenship); and the state and religion (separation of church and state.[132] This is not exactly the position of secularism in India.

In Constituent Assembly Debates during the discussions of the wording of the Preamble, H.V Kammath moved an amendment that the preamble should begin with the phrase 'In the name of God'. The majority of members objected to this and expressed that religion was a matter of individual choice and not the signpost of a collective.[133]

There were differing opinions regarding the concept of secularism within the constituent assembly. Shefali Jha provided varying positions on the matter. The first one is the no concern theory of secularism, which demands for definite line of separation between religion and state; the argument considers religion as limited to private sphere. The second position on secularism was that no links between state and religion should be permitted, not because it would weaken state but it would demean religion. The view is that religion is absolute truth, and it could not be subjected to the whims of changing majorities. The third view is the equal respect theory, in India where religion was such an important part of most people's lives, this principle meant not that state stay away from all religion equally, but that it respects all religion alike.[134]

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[132] DONALD EUGENE SMITH, INDIA AS A SECULAR STATE, 1963.
[133] CONSTITUENT ASSEMBLY DEBATE, vol. X, pp439, 444, 446.
[134] Shefali Jha, *Secularism in the constituent assembly debates*, 1946-1950, ECONOMIC AND POLITICAL WEEKLY, 3175-3180, 2002.

Secularism has been referred sometimes as conflicting religious freedom. Correcting the notion of secularism as opposed to religion Nehru wrote: secularism "means a state that honours all faiths equally and gives them equal opportunity, that as a state it does not allow itself to be attached to one faith or religion, which then becomes the state religion. This is a modern conception. In India, we have a long history of toleration, but this not all that secularism is about."[135]

This concept of secularism as equality of all religions and the distancing of State from religious groups was specifically meant to assure the minorities that they had a legitimate place as citizens in the country, and that they would not be discriminated. Correspondingly, secularism established that the majority group would not be privileged in any manner.[136]

The American system of secularism followed disestablishment and policy of separation. Countries like Britain, Germany and Sweden followed an established Religion along with granting liberties to non-recognized faiths. India didn't follow a complete separation of Church and State and also didn't follow the model of an established religion. Non-establishment ensured all communities especially minorities that State will not endorse or represent any specific religion. However, a complete path of separation was not established. It followed the non-establishment of religion with the absence of separation.[137]

A strict form of separation would have made difficulty in Indian situation. The demands from communities, even from minorities for assistance of state in their non-religious activities could not be accommodated with separation.[138] The separation and its extension are different in various systems, "each conception of secularism may unpack the metaphor of separation differently or select different elements from the stock of values that gave separation its point."[139] There is no one specific model of secularism. The concept has evolved over time trans-nationally and non-western societies take the concepts from western counterparts and add value to them and develop them further.[140]

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[135] Jawahrlal Nehru, a secular state in JAWAHARLAL NEHRU: AN ANTHOLOGY, (S. Gopal, Oxford University Press, 2003).

[136] Neera Chandoke, *Secularism central to a Democratic Nation, in* VISION FOR A NATION: PATHS AND PERSPECTIVES, 45, (Aakash Singh Rathore ed., Ashish Nandy, 2019)

[137] Gurpreet Mahajan, *Religion and Indian Constitution- question of separation and equality, in* POLITICS AND ETHICS OF THE CONSTITUTION, (Rajeev Barghava, Oxford University Press, ed., 2008)

[138] SHIVA RAO, THE FRAMING OF INDIAN CONSTITUTION, 309-86.

[139] Rajeev Bhargava , TN Srinivasan, *The distinctiveness of Indian secularism. The Future of Secularism*, OXFORD UNIVERSITY PRESS, NEW YORK, 2007.

[140] *See Id.*

Rajeev Dhawan provides three elements of secularism in India; religious freedom, celebratory neutrality, and reformatory justice. "Religious freedom covers not just religious believes but also rituals and practices, celebratory neutrality that entails a state that assists, both financially and otherwise in the celebration of all faiths. Reformatory justice involves regulating and reforming religious institutions and practices, setting aside some core elements that are beyond regulation."[141]

The word secular was only added to Indian Constitution in 1976 by the 42nd Constitutional Amendment and the term is nowhere defined in the Constitution. Hence the task to delineate and expand the concept of secularism has fallen upon the shoulders of Supreme Court.[142] In *S.R Bommai v. Union of India*[143], the Apex Court upheld that secularism is part of basic structure of Indian Constitution. Court referred to the concept of 'Sarva dharama samabhava' and stated that that secularism has evolved from this concept of tolerance and equality for all religions.[144]

FREEDOM OF RELIGION IN INDIAN CONSTITUTION

Indian Constitution provides for freedom of religion as a fundamental right. No other fundamental rights are subjected to other provisions of part III and religious freedom is subjected to public order, morality, health and other fundamental rights.

Article 25 of Indian Constitution provides for freedom of conscience and free profession, practice and propagation religion

1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion

2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law

a) regulation or restricting any economic, financial, political, or other secular activity which may be associated with religious practice;

[141]Quoted in RONOJOY SEN, LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND SECULARISM, 2007.
[142]Chandoke, *supra*, note 135.
[143] S.R Bommai v. Union of India, 1994 AIR 1918.
[144] *Id.*

b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindu Explanation I The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion Explanation II In sub clause (b) of clause reference to Hindus shall be construed as including reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Article 26 of the Constitution provides for Freedom to manage religious affairs – Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-

(a) to establish and maintain institutions for religious and charitable purposes;
(b) to manage its own affairs in matters of religion;
(c) to own and acquire movable and immovable property; and
(d) to administer such property in accordance with law.

INDIAN JUDICIARY AND ESSENTIAL PRACTICES

CONCEIVING ESSENTIAL PRACTICE DOCTRINE

Supreme Court promulgated the doctrine of essential practices in *Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar*[145] (herein after Shirur mutt case). In this case, seven-judge Bench of the Supreme Court held that term religion will cover all rituals and practices integral to a religion.[146] Court took note of the position in America[147] and Australia and held the observation in the Australian case *Adelaide Company v. The Commonwealth*[148] which provides that freedom of religion goes beyond liberty of opinion and it protects acts done in pursuance of religious belief applies to the Indian situation.

In an effort to elucidate the word religion, Justice Mukherjea included the rituals, observances, ceremonies and modes of worship prescribed by religion as integral parts of religion. "The guarantee under our Constitution not only protects the freedom of religious

[145] Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar, 1954 AIR 282.
[146] *Id.*
[147] Vide Davie v. Benson, 133 U.S 333 at 342, (it was said that, that the term religion has reference to one's views of his relation to his Creator and to the obligations they impose of reverence for His Being and character and of obedience to His will. It is often confounded with cultus of form or worship of a particular sect, but is distinguishable from the latter. This position was not considered apt for Indian Constitution).
[148] Adelaide Company v. The Commonwealth, 67 C.L.R. 116, 127.

opinion but it protects also acts done in pursuance of a religion and this is made clear by the use of the expression practice of religion in article 25."[149]

The attorney General of India contended to distinguish the secular activities from the protection guaranteed under Article 26. It was contended that the secular activities that may be connected with religion do not form an essential part of it. In identifying the essential part of religion, Court stated that it should be ascertained by the doctrines of that religion. It was observed that, "What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself. If the tenets of any religious sect of the Hindus prescribe that offerings of food should be given to the idol at particular hours of the day, that periodical ceremonies should be performed in a certain way at certain periods of the year or that there should be daily recital of sacred texts or ablations to the sacred fire, all these would be regarded as parts of religion and the mere fact that they involve expenditure of money or employment of priests and servants or the use of marketable commodities would not make them secular activities partaking of a commercial or economic character; all of them are religious practices and should be regarded as matters of religion within the meaning of Art. 26 (b)."[150]

The Court also upheld complete autonomy to religious denominations to decide what rites and ceremonies are essential to religion according to the tenets of the religion and it was held that no outside authority has any jurisdiction to interfere with their decision in such matters. The promulgated doctrine in this case has been used by the judiciary ever since, but varied approaches have been identified. Often the approaches have been criticised to be weakening freedom of religion and rationalising religion, but there are matters affecting other fundamental rights also.

A different approach from *Shirur mutt* case was found in *Saraswathi Ammal v.Rajagopal Ammal*[151] where the primary issue was the right of a woman to set up perpetuity to have worship conducted at the burial place of her deceased husband. The Court referred to Hindu scriptures to decide whether the practice is part of Hindu religion and stated that must be "shown shastraic basis in Hindu Religion"

[149] Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar,1954 AIR 282.
[150] *Id.*
[151] Saraswathi Ammal v.Rajagopal Ammal, AIR 1953 SC 491.

In *Sri Venkatarama Devaru v. State of Mysore*[152] when Madras Temple Entry Authorisation Act was passed in 1947 with the object of removal of disability of Harijans from entering Hindu temples a representation was made by the trustees who managed the temple of Sri Venkatarama of Moolky Petta, siting that the temple was a private one and therefore outside the operation of the Act. But the Government did not accept the position and held that the Act applied to the temple. Trustees brought a suit stating that the temple was a denominational one and founded exclusively for the Gowda Saraswatha Brahmins. The issue whether rights of a religious denomination to manage its own affairs in matters of religion under Art.26 (b) can be subjected to, and controlled by, a law protected by Art. 25 (2)(b) of the Constitution. Court found the temple as a denominational temple and took the essentiality test to identify whether exclusion of person from entering into a temple for worship is a matter of religion according to the Hindu ceremonial law. For this, the Court referred scriptural texts and case law and came to the conclusion that it is matter of religion. Justice Aiyar stated that "under the ceremonial law pertaining to temples; who are entitled to enter them for worship and where they are entitled to stand and worship and how the worship is to be conducted are all matters of religion."[153] Court took an approach of harmonious construction and upheld the state intervention and also stated that on special occasions of the community others could be excluded.

"The *Devaru* ruling, in theory, followed the essential practices doctrine of *Shirur mutt* by accepting that religion encompassed rituals and practices. However, the other cardinal principle laid out in *Shirur mutt* regarding the autonomy of a religious denomination to decide what ceremonies are essential was breached."[154]

Court in *Mohd. Hanif Quareshi v. State*[155] *of Bihar* held that cow slaughtering during Bakrid was not an essential practice of Muslims. The petitioners claimed that sacrifice of a cow during Bakrid was essential to Islam but Court stated that the affidavit didn't contain that sacrifice of cow is required by religion. It also examined the various Mughal emperors who prohibited cow sacrifice. The necessity to take an essentiality test has been questioned and it

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[152] Sri Venkatarama Devaru v. State of Mysore AIR 1958 SC 255
[153] *Id.*
[154] RONOJOY SEN, LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND SECULARISM, 2007.
[155] Mohd. Hanif Quareshi v. State, 1958 AIR 731.

is pointed out that Court could have decided the matter upon the restriction of health under Article 25.[156]

In *Sardar Sarup Singh & Ors v. State of Punjab & Ors*[157] section 148-B of Sikh Gurudwaras Act, 1925 was challenged which provided for setting up of a Gurudwara Board and introduced new members. It was contended by the petitioners that, as the provision does not allow direct election of members of Board by security itself is matter of religion and violates the content of right guaranteed under Article 26(b). Court held that "no authoritative text has been placed before Court to show that direct election by entire Sikh community in the management of Gurudwaras is part of Sikh religion."[158] It was also held that the method of representation for the extended areas under s. 148B of the Act was an arrangement dictated merely by consideration of convenience and expediency, and did not involve any principle religion.[159]

REDIFINING ESSENTIAL PRACTICES DOCTRINE

Essential Practices Doctrine although promulgate in *Shirur mutt* case, over time evolved with further judicial elements. It has adopted various methods and added new standards to satisfy. In *Durgah Committee v. Hussain Ali,*[160] khadims of the tomb of Hazrat Khwaja Moin-ud-din Chishti claiming to be representing the Chishti Soofies challenged the constitutional validity of the Durgah Khwaja Saheb Act, 1955. According to the respondents the Durgah belonged to Chishti Soofies who were a religious denomination and the challenge was that the impugned Act has interfered with their fundamental right to manage the affairs of the Durgah. The act also took away their right to receive offerings from the pilgrims.

An observation made in this case is worth to reproduce in full to understand the judicial position. Justice Gajedragadkar observed, " whilst we are dealing with this point it may not be out of place incidentally to strike a note of caution and observe that in order that that the practices in question should be treated as a part of religion they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and many make a claim for being treated as religious practices within the meaning of Art. 26.

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[156]Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of religion in India: Current issues and supreme court acting as clergy*, BYU L. Rev. 915, 2017.
[157]Sardar Sarup Singh & Ors v. State of Punjab & Ors, 1959 AIR 860.
[158] *Id.*
[159] *Id.*
[160]Durgah Committee v. Hussain Ali, 1961 AIR 1402.

Similarly, even practices though religious may have sprung from merely superstitious beliefs and may in that sense be extraneous and unessential accretions to religion itself. Unless such practices are found to constitute an essential and integral part of a religion their claim for the protection under Art. 26 may have to be carefully scrutinised; in other words, the protection must be confined to such religious practices as are an essential and an integral part of it and no other."[161]

The Court not only separate secular practices from the matters of religion but also those practices which arise from superstitions were not considered as essential to religion. The importance of Court's role in deciding the matter was highlighted in this judgment. This position of separating superstition from religion has been referred to as rationalising religion by the Supreme Court. "Court seems committed to an idea of cleansing religion from superstition, to the search for a pure religion whose theology turns out to be compatible with the civil theology of the commonwealth."[162]

The validity of Bombay Excommunication Act which prohibited excommunication of members of religious communities was challenged by head of Dawoodi Bohra community.[163] Taking the essential religious practices test, Court considered the history of Dawoodi Bohra community and held that the head had the power to excommunicate members. It laid down that "a practice grounded on an obnoxious social rule or practice may be within the ambit of social reform that the State may carry out."[164]

Sri Govindlalji v. State of Rajasthan[165] where an Act for management and administration of Nathwada temple was challenged Court established once again that it is the Court that decides the essential practices. An important observation made in this case is: "In cases where conflicting evidence is produced in respect of rival contentions as to competing religious practices the Court may not be able to resolve the dispute by a blind application of the formula that the community decides which practice is an integral part of its religion, because the community may speak with more than one voice and the formula would, therefore, break down. This question will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in

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[161] *Id.*
[162] Pratap Banu Mehta, *Passion and constraint in* POLITICS AND ETHICS OF THE CONSTITUTION, (Rajeev Barghava, Oxford University Press, ed., 2008)
[163] Sardar Saifuddin v State of Bombay, AIR 1962 SC 853.
[164] *Id.*
[165] Sri Govindlalji v. State of Rajasthan, AIR 1963 SC 1638.

character and if it is, whether it can be regarded as an integral or essential part of the religion, and the finding of the Court on such an issue will always depend upon the evidence adduced before it as to the conscience of the community and the tents of its religion."[166]

Court also highlighted the difficulty in separating secular activity from religious activity. Justice Gajendragadkar with reference to Hinduism tried to explain this as "all human actions from birth to death and most of individual actions in day to day life are religious in nature"[167] and demanded to attempt to separate it nevertheless. The contention that management of property by Tilkayats amount to religious practice as Tilkayats managed the property throughout the history of the temple was rejected by the Court and it was held that "the right to manage the properties of the temple is a purely secular matter and it cannot be regarded as religious practice under Art. 25 (1) or as amounting to affairs in matters of religion under Art. 26 (b)."[168]

Tandava dance of Ananda Margi faith was put to the test of essential practices in *Acharya Jagdishwaranda Avadhutha v. Commissioner of Police, Culcutta*[169]. Continuing conflict with State and followers of Ananda margi faith existed as commissioner of Police issued Sec.144 of Criminal Procedure Code preventing the public procession of tandava dance carrying lathis, skulls, swords etc. It was noted that Ananda Margi faith came into existence in 1955 and tandava dance was adopted only in 1960 and it was held that the practice is not essential part of the religion. Since order itself is of recent origin and the practice of dance is still more recent it was not considered as an essential part. Court examined that even if it is prescribed as a religious rite there is no justification in any writings of Shri. Ananda Murti that tandava dance must be performed in public. The approach of Supreme Court seems to identify a religious practice as an integral practice only if it existed when the religion was founded.[170] The matter was brought again before Court and the High Court of Culcutta observed, "If the Courts started enquiring and deciding the rationality of a particular religious practice then it might bring confusion and the religious practice would become what the Courts wish the practice to be".

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[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] Acharya Jagdishwaranda Avadhutha v. Commissioner of Police, Culcutta , AIR 1984 SC 51.
[170] Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of religion in India: Current issues and supreme court acting as clergy*, BYU L. Rev. 915, 2017.

It came before Supreme Court again and in *Commissioner of Police v. Acharya J Avadhutha*,[171] and it was held that "the essential part of religion means the core belief upon which a religion is founded and those practices that are fundamental to follow a religious belief. It is upon the cornerstone of essential parts of practices that the superstructure of religion is built. Without which a religion will be no religion."[172] Justice Lakshmanan in his dissenting opinion referred the authoritative text of Ananda Margi faith Carya Carya which was written in 1986 and upheld the practice. He was of the opinion that "if the practices are accepted by followers of religion for their spiritual upliftment, then the fact that it was recently introduced cannot make it any the less of matter of religion."[173]

Essentiality test was again used in *Ismail Faruqui v. Union of India*,[174] Court went on to make an observation that is troublesome. The matter was regarding the acquisition of Mosque by State and the position Court took that a mosque may be acquired by the State was right but it went on to observe whether mosque was an essential part of religion. It was observed that "a mosque is not an essential part of the practice of the religion of Islam and Namaz (prayer) by Muslims can be offered anywhere, even in open." [175]

In the case of *A.S Narayana Deekshitutlu v. State of Andhra Pradesh*[176], the Apex Court has observed that non-essential religious practices do not have protection under Article 25 and 26 and the same are considered secular in nature and can be regulated by the State.

RECENT HIGH COURT DECISIONS

Diverse practices exist within a religion and in such circumstances considering the essential practices of a religion could be difficult. In *Gram Sabha of Village Battis Shirala v. Union of India*[177], the practice of capturing and worshipping of live cobra was challenged. Villagers of Battis Shirala in Sanghli district in Maharashtra followed this practice during Nagapanchami. Court referred to the scholarly work on Dharma Shasthras and held that the act could not have been essential to religion.

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[171] Commissioner of Police v. Acharya J Avadhutha, Civ. App. No.6230 of 1990

[172] *Id.*

[173] *Id.*

[174] Dr. M. Ismail Faruqui v. Union of India, AIR 1995 SC 605.

[175] *Id.*

[176] A.S Narayana Deekshitutlu v. State of Andhra Pradesh, 1996 AIR 1765.

[177] Gram Sabha of Village Battis Shirala v. Union of India, Writ Pet. No. 8645 of 2013 (Bombay HC July15, 2014).

Restriction on entry of women to sanctum sanctorum of Haji Ali Dargah was challenged in *Dr. Noorjehan Safia Niaz v. State of Maharashtra*[178]. Once again Court had to consider whether the practice is essential to religion to get protection under Art. 25. The advocate general submitted that the test should be whether, if without the practice the essential character of religion would stand destroyed or its theology rendered irrelevant. Bombay High Court stated that the Trust has not been successful to justify the ban and also examined that women were permitted to enter Dargah till about 2012.[179] The prohibition of women to sanctum sanctorum was not held to be an essential or integral part of religion. Court held that the ban imposed by Haji Ali Dargah Trust prohibiting women from entering sanctum sanctorum of Haji Ali Dargah contravenes Art. 14, 15 and 25 of the Constitution and permitted entry of women. The trust filed appeal to Supreme Court and the matter is before the consideration of Apex Court.

A ruling of Allahabad High Court in the matter of Azaan given in mosques went to check the essentiality of the practice and held that Azaan was integral to Islam but use of loudspeakers for Azaan was not essential.[180] Restrictions were imposed by administration on pronouncement of Azaan as part of Covid 19 pandemic guidelines. It has been pointed out by various scholars that there isn't a law which completely prohibit Azaan through loudspeakers, the matter is already under Noise pollution rules and necessary thing is a prior consent obtained from authorities. The recent matter was put forward as a pandemic guideline to prevent social and religious gatherings. An enquiry into the essentiality of Azaan via loudspeakers would have been necessary to check if law violated the freedom of religion under Article 25, only if there was a law or order which prohibited the use of loudspeakers.[181]

ESSENTIAL PRACTICES AND CONSTITUTIONAL VALUES

In *Shayara Bano v. Union of India*[182], the much discussed Supreme Court judgment on triple talaq dealt with the essential practices and unique ratio is formed on the matters raised. Justice Nariman, speaking for himself and Justice U.U Lalit, stated that "a practice does not acquire the sanction of religion simply because it is permitted" it was observed that triple

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[178] Dr. Noorjehan Safia Niaz v. Haji Ali Dargah Trust, (2016) 5 AIR Bom. R 660.
[179] *Id.*
[180] Afzal Ansari v. State of U.P on 15 May, 2020. Allahabad HC
[181] Muhammed Tahir Hakkim, *TheAllahabad HC Azaan Judgment: much ado about nothing?*, BAR AND BENCHB (24 May 2020), https://www.barandbench.com/columns/the-allahabad-hc-azaan-judgment-much-ado-about-nothing.
[182] Shayara Bano v. Union of India, (2017) 9 SCC 1.

talaq is permissible in law but stated to be sinful by the Hanafi law which tolerates it.[183] Court applied the test in tandava case, and opined that "fundamental nature of Islamic religion as seen through an Indian Sunni Muslim's eyes, will not change without this practice."[184]

Justice Kurian Joseph disagree with Chief Justice's view that triple talaq is an integral part of religious practice. He stated, "Merely because a practice has continued for so long, that by itself cannot make it valid if it has been expressly declared to be impermissible."[185] Justice Kurian Joseph came to this conclusion by examining case laws including *Shamim Ara v. State of U.P*[186] and referred to versus of Quran. It was stated that "What is held to be bad in the Holy Quran cannot be good in Shariat and, in that sense, what is bad in theology is bad in law as well."[187]

The minority judgment by Chief Justice Khehar considered triple talaq as an essential religious practice. The reasons he identified was the practice was in existence for roughly more than 1400 years and observed that talaq-e-biddat "is considered as irreligious within the religious denomination in which the practice is prevalent, yet the denomination considers it valid in law."[188] To determine the essentiality Justice Kurian Joseph relied on Quranic verses and Justice Nariman considered case laws and came to the conclusion that it is not permitted by Hanafi school of Law. The minority relied on its widespread practice to decide the essentiality. This applicability of the test by showing that talaq-e-biddat was in practice in India rather than showing Islam required for such practice indicates a different approach from the existing doctrine.

Indian Young Lawyers Association v. State of Kerala,[189] Whether practice of excluding women of 10 to 50 age constitute an essential religious practice was considered by the Court. The test for determining religious denomination laid down in *Shirur mutt* case was followed and it was held that the devotees of Ayyappa do not constitute a religious denomination. After examining various case laws regarding essential practices it was held that exclusion of women of any age group would not constitute as an essential practice of Hindu religion and

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[183] *Id.* (Nariman J., majority).
[184] *Id.*
[185] *Id.* (Kurian J., concurring).
[186] Shamim Ara v. State of U. P, (2002) 7 SCC 518.
[187] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[188] *Id.* (Khehar J., dissenting)
[189] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

on the contrary examined that "non-observance of it would change the nature of Hindu Religion."[190]

Justice Chandrachud observed that the text and tenets the respondents placed does not indicate that exclusion of women is an essential practice. It was stated that "merely establishing a usage will not afford it constitutional protection as an essential religious practice. It must be proved that the practice is essential to religion and inextricably connected with its fundamental character."[191]

The claims upon non-religious grounds like physiological reasons were rejected siting that protection given was on strictly religious grounds. It was only established by respondents that Lord Ayyappa is celibate, and Justice Chandrachud critically examined the idea which put the burden of a man's celibacy on women and concept of impurity and stigma attached with menstruation. "What Chandrachud J. recognises is that the justification offered to exclude women is an integral part of far broader discourse that is founded on the exclusion and subordination of women in social and community life."[192]

Often in many issues concerning religious matters, constitutional values and individual freedoms are also affected and it is important that relevance is drawn to the effect of constitutional values like dignity, equality and liberty upon essential religious practices. Justice Chandrachud made reference to the concept of constitutional morality also and it was mentioned that "Though our Constitution protects religious freedom and consequent rights and practices essential to religion, this Court will be guided by the pursuit to uphold the values of the Constitution, based in dignity, liberty and equality."[193] Justice Chandrachud's examination of essential practices with constitutional values have opened a new discussion the questions like whether constitutional morality dilutes the essential practices or is it enough to substitute the doctrine. It gives a significant contribution to the religious and constitutional jurisprudence of India.

The dissenting judgment of Justice Indu Malhotra is also equally relevant in the discussion of constitutional values and essential practices. Justice Malhotra examined Court's role in matters of religion. "Doctrines and tenets of a religion, its historical background, and the

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[190] *Id.* (Misra C.J., majority)
[191] *Id.* (Chandrachud J., concurring)
[192]Gautam Bhatia, *The Sabarimala Judgment – III: Justice Chandrachud and Radical Equality*, (Sep. 29, 2018), https://indconlawphil.wordpress.com/category/freedom-of-religion/essential-religious-practices/
[193] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

scriptural texts" were considered as required references to ascertain the essentiality of religious practices.[194] It was mentioned that "the only way to determine the essential practices test would be with reference to the practices followed since time immemorial, which may have been scripted in the religious texts of this temple.[195] If any practice in a particular can be traced to antiquity, and is integral to the temple, it must be taken to be an essential religious practice."[196] The practice of exclusion of women of 10 to 50 years of age was identified as an essential practice by the judge.

CONCLUSION

It has been opined that the distinction between essential and non-essential narrows the range of free exercise of religion. It is noted by the Court itself that "The Courts can discard as non-essentials anything which is not proved to their satisfaction – and they are not religious leaders or in any relevant fashion qualified in such matters- to be essential, with the result that it would have no constitutional protection. The Constitution does not say freely to profess and propagate the essentials of religion, but this is how it is constructed."[197]

The varied approaches from Supreme Court to find out the essential practices have created some confusion. There are no uniform standards for that. In some cases Court has referred to religious texts, in some situation in considered case laws and constructed history of a practice or followed the logic that the practice should be in practice from beginning of the religion.

The process of distinguishing a secular activity from religious activity and deciding whether a practice is essential or integral to religion is two major issues regarding freedom of religion. According to Justice Chandrachud the former one finds constitutional support whereas the latter is not defined in the Constitution.[198] The jurisprudence of Court evolved to test the essential or integral practices and only those practices will get protection under Article 25 and 26. The court has stated on multiple cases that the authority to decide is on the Court. Court in *Dargah Committee* case[199] has separated practices originated form mere superstition from religious practices. The doctrine has evolved to the position that the integral part of religion must be fundamental to the religion and without that the fundamental character of religion

[194] *Id.* (Malhotra J., dissenting).
[195] *Id.*
[196] *Id.*
[197] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC (J. Malhotra, dissenting).
[198] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC (J. Chandrachud, concurring)
[199] Durgah Committee v. Hussain Ali, 1961 AIR 1402.

would be affected. In some case like *Ismail Faruqui v. Union of India*[200] or in *Tandava* case[201] the use of essential practices itself seem unnecessary. Scholars have suggested that the doctrine actually allows Court to hold that religion, The Constitution, and the State are not in conflict, because the practice sought to be regulated isn't "integral" or "essential" to the religion at all, and so outside the scope of Constitutional protection.[202]

"By reserving itself the authority to determine practices which are essential to religion, the Court assumed a reformatory role which would allow it to cleanse religion of practices which were derogatory to individual dignity."[203] Professor Faizan Mustafa argues to remove the essentiality test from Supreme Court jurisprudence to strengthen religious freedom in India.[204] There are has been criticisms the authority of Court and the role of rationalising religion. The practice offers to give religious protection itself is a concern for religious freedom and autonomy of religion.

The discussions are divided upon freedom of religion and individual freedom. The question also goes to the issue whether essential practices affect other fundamental freedoms. The suggestion by Justice Chandrachud to check the practices upon constitutional values like dignity, liberty, equality and upon the concept of constitutional morality is relevant but it is to be seen as the critiques of essential religious practice doctrine would consider this suggestion as they are rooted in religious freedom alone. It is necessary to bring a balance essential practices and constitutionally granted freedom of religion and also other fundamental rights.

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[200] Dr. M. Ismail Faruqui v. Union of India, AIR 1995 SC 605.

[201] Commissioner of Police v. Acharya J Avadhutha, Civ. App. No.6230 of 1990

[202] Gautam Bhatia, *Individual, Community, and State: Mapping the terrain of religious freedom under the Indian Constitution*, Feb 7, 2016, https://indconlawphil.wordpress.com/category/freedom-of-religion/essential-religious-practices/

[203] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC (J. Chandrachud, concurring)

[204] Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of religion in India: Current issues and supreme court acting as clergy*, BYU L. Rev. 915, 2017

CHAPTER IV: EFFECT OF CONSTITUTIONAL MORALITY ON ESSENTIAL PRACTICES DOCTRINE

INTRODUCTION

The effect of constitutional morality on essential practices is considered with specific reference to *Shayara Bano v. Union of India*[205] and *Indian Young Lawyers Association v. State of Kerala.*[206] This chapter would consider the effects of constitutional morality on Essential Practices Doctrine. Both these have been in the discussion around academic and judicial circles especially with the particular decisions. The meaning and judicial approach of these tests have been considered in previous chapters with the help of various case laws.

The practice of triple talaq was challenged before the Court in *Shayara Bano v. Union of India* (*Shayara Bano* case) and the five judge constitutional bench held that triple talaq is unconstitutional. A public interest Litigation was filed in *Indian Young Lawyers Association v. State of Kerala* (*Sabarimala* case), challenging the practice of excluding women of 10 to 50 years of age from entering the temple of Sabarimala. In constitutional matters where challenges under equality and discrimination are raised the varying approaches from Court must be viewed with a critical approach.

TRIPLE TALAQ

Shayara Bano was married to Rizwan Ahmed and he divorced her in 2016 via triple talaq, a practice of pronouncing talaq three times in a sitting. Triple talaq does not involve the consent of the women. Shayara Bano filed a writ petition before the Supreme Court urging that the practice of triple talaq, polygamy and nikah halala as violative of Articles 14, 15, 21, 25 of the Constitution. Section 2 of the Muslim Personal Law Application Act of 1937 was challenged before the Supreme Court of India. The sections provides that when two parties are Muslims personal law shall apply to the matters provided including matters relating to the dissolution of marriage, including talaq.

Bebak Collective and Bartiya Muslim Mahila Andolan joined the cause. The All India Muslim Personal Law Board claimed that the practice constitute fundamental practice of Islam and challenged Court's authority in interfering with the uncodified personal law.

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[205] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[206] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

The core issue is equality and non-discrimination ensured under Constitution and whether Court is acting as a guardian and protector of those fundamental rights. The distinctive opinions of judges in *Shayara Bano* case show the existing confusion in the area. The opportunity in *Shayara Bano* was called out as a lost opportunity to uphold constitutional values.

Religion and personal laws remain in a complex realm and the reasoning of this judgment only added to that and instead of solving it. The position regarding personal law and Shariat Act taken by the Court to consider the validity of triple talaq is hereby mentioned. Justice R.F Nariman and U.U Lalit held that talaq-e-biddat is regulated by Shariat Application Act and it comes under Art.13 (1) law in force.[207] It was established that arbitrariness can be used as a test to determine constitutionality of not only executive action but legislative action also. Justice Khehar and Justice Abdul Nazeer were of the opinion that triple talaq is not regulated by Shariat Application Act of 1937, but is an intrinsic part of personal law, hence protected under Art.25 of Indian Constitution.[208] Justice Kurian Joseph agreed with Justice Khehar and Nazeer on the matter that triple talaq is not codified by Shariat Act.[209]

Even in cases where the decision is in favour of women, the courts usually do not ground their decision on sex equality. It has failed to test the specific personal law provisions against the doctrine of equality.[210] "In cases challenging sex inequality in personal laws, Indian Courts appear paralyzed by the fear of being tarred by the brush of cultural insensitivity."[211] The same can be found in the minority opinion in this case.

The arguments that Constitution intended to give unregulated protection to personal law was made before the Supreme Court. Senior Advocate Indira Jaising appearing for one of the petitioners aimed to negate this argument. She relied on the words of Ambedkar who said: "The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion and if personal law is to be saved, I am sure about it that in social matters, we will come to a standstill ... After all, what are we having this liberty for? We are having this liberty in order to reform our social system, which

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[207] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[208] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[209] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[210] Tanja Herklots, *Law, religion and gender equality: literature on the Indian personal law system from a women's rights perspective*, 3 IND. L. REV.1, 250-268, (2017).
[211] Catherine A Mackinnon*, Sex Equality under the Constitution of India: Problems, Prospects and "Personal Laws*, 4 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 181, 2006.

is so full of inequalities, discrimination and other things which conflict with our fundamental rights. It is, therefore, quite impossible for anybody to conceive that the personal law shall be excluded from the jurisdiction of the state."[212]

The judgment begins with the minority opinion of the then Chief Justice Khehar. Chief Justice Khehar has given the personal laws a stature similar to fundamental rights. It was stated that "The practice of talaq-e-biddat being a constituent of personal law has a stature equal to other fundamental rights, conferred in part III of the Constitution. The practice cannot therefore be set aside, on the ground of being violative of the concept of the constitutional morality, through judicial intervention."[213] Elevation of personal laws similar to fundamental rights and holding the position that it cannot be tested on constitutional morality puts personal laws in a stature which the Constitution does not envision.

In *State of Bombay v. Narasu Appa Mali*[214], Court held that personal laws do not constitute law under Article 13 and are immune from constitutional review. This position has not been overturned by the Supreme Court and Shayara Bano decision has been called out for being a lost opportunity. This position has created "islands of "personal law" free from constitutional norms of equality, non-discrimination, and liberty."[215] Justice Nariman although didn't consider to overrule the position in *State of Bombay v. Narasu Appa Mali*[216], stated the need for the same.

Justice Chandrachud in Sabarimala decision also doubted the correctness of the stance taken towards personal law. He observed: "Customs, usages and personal law have a significant impact on the civil status of individuals. Those activities that are inherently connected with the civil status of individuals cannot be granted constitutional immunity merely because they have some association and features that have a religious nature."[217] Since it is not overturned, the stance in *State of Bombay v. Narasu Appa Mali*[218] remains the same.

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[212] SALMAN KHURSHID, TRIPLE TALAQ: EXAMINING FAITH, OXFORD UNIVERSITY PRESS, 2018.
[213] Shayara Bano v. Union of India, (2017) 9 SCC 1. (Khehar C.J., dissenting).
[214] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.
[215] Gautam Bhatia, *Two Cheers for the Supreme Court*, THE HINDU, (Aug. 24, 2017), https://www.thehindu.com/opinion/lead/two-cheers-for-the-supreme-court/article19547560.ece.
[216] State of Bombay v. Narasu Appa Mali, AIR 1952 Bom 84.
[217] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[218] *Id.*

The minority opinion "severely undermines the constitutional balance between individual rights and religious precepts."[219]The freedom to practice profess or propagate religion does not include the protection of personal laws as such. The Article is also subject to public order, morality, health and other provisions of fundamental rights. The constitutional provision of Article 25 has been designed to protect an individual, in her faith, from state interference.[220] Chief Justice Khehar has extended it to protect personal law system. When the personal law systems itself dictates gender inequality how can it be legitimised by constitutional law.[221]

Chief Justice Khehar didn't have the scepticism towards Court's authority in deciding a religious practice on ground of Essential Religious Practice doctrine. But he raised concern over the same on the ground of constitutional morality. The application of essential practice doctrine by him itself has been identified as faulted.[222] The Minority suggested legislative action and not a challenge to the constitutionality of triple talaq.

The dissent recorded that "Religion is a matter of faith and not of logic. It is not open for Court to accept an egalitarian approach, over a practice which constitutes an integral part of religion."[223] This take put the Essential Practice Doctrine in a higher pedestal than constitutional morality. A constitutional Court giving primacy to this view would be a dark spot in its history and a heavy tear in the realm of gender justice.

The tenets and scriptures of religion have been arraigned with their inherent patriarchal nature. "The marked feature of religious personal laws is that women have fewer rights than men."[224] The patriarchal interpretations of personal law and the state's inaction towards it have legitimised women's continued subordination.[225] McKinnon argued that when laws are designed and implemented "based on sex, there is nothing personal about them."[226] If one examines the various judicial approaches taken by the Court itself, gender equality has never been a ground in the forefront. It has always been marginalised in the jurisprudence and

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[219] Gautam Bhatia, *The Supreme Court's Triple Talq Judgment*, (Aug.22, 2017), https://indconlawphil.wordpress.com/2017/08/22/the-supreme-courts-triple-talaq-judgment/

[220] *Id.*

[221] Vrinda Narain, *Reconciling Constitutional Law, Gender Equality and Religious Difference: Lessons from Shayara Bano, India's Triple Talaq decision*, in THE ASIAN YEARBOOK OF HUMAN RIGHTS AND HUMANITARIAN LAW, Brill Nijhoff, 345-377, 2021.

[222] The protection was granted upon establishing that the practice prevailed among Indian Sunnis for over 1400 years rather than establishing that Islam mandated the practice or that it was essential and integral part of Islam.

[223] Shayara Bano v. Union of India, (2017), 9 SCC 1.

[224] Archana Parashar, *Gender inequality and religious personal laws in India*, 2 THE BROWN JOURNAL OF WORLD AFFAIRS, 14, 103-112, (2008), http://www.jstor.org/stable/24590717.

[225] *See Supra*, note 217.

[226] Quoted in Pangri Mehta, *Religious freedom and gender equality in India*, 3 INTERNATIONAL JOURNAL OF SOCIAL WELFARE 25, 283- 289, (2016).

constitutional thought of India.[227] Essentially what the Courts have failed to accept is that women's rights are human rights.

Another area of concern is the claims of group identity with gender justice. The claims of group identity and gender justice have met with conflicts, and the former cannot keep a blind eye towards the latter. Archana Parashar suggests that religious autonomy and gender equality can coexist and criticises the issue of "women being denied equality by referring to anachronistic laws that are supported in the name of progressive pluralism."[228] The approach of multi-culturalism should also consider the feminist and gender based alignments within cultural practices so that Indian society can realize the constitutional goals of universal equality and justice.[229]

How the Hindu right-wing nationalists use this argument against minority rights must be critically viewed. Ratna Kapur criticised the Hindu Right-wing nationalist movement for adopting a formal approach which demands to treat "all Muslim women the same as Hindu women, but not all Hindu women the same as men."[230] Also they posit their conception of secularism as treating all religions equal and condemning any special protections of rights of religious minorities as violative of secularism.[231]

These feministic approaches have been noted to suggest the existing gender discriminations within the personal laws and to highlight the need for decision making to ensure gender equality. Courts must not shy away from dealing this crucial issue and to lay its decision based on the principle of equality. *Shayara Bano*[232] was a case fought by Muslim women claiming their freedom and right to equality. The petitioners have claimed that the practice of instantaneous divorce is in violation of constitutional morality, but the judicial reasoning has failed to recognise the fundamental rights of women guaranteed by the Constitution.

Justice Nariman mentioned that triple talaq is only permissible in law but at the same time stated to be sinful by the very Hanafi School which tolerates it.[233] Considering the conditions Court has laid down in various case laws it was held that the fundamental nature of Indian

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[227] *Supra*, note 217.
[228] *Supra*, note 220.
[229] Pratibha Jain, *Balancing minority rights and gender justice: The impact of protecting multiculturalism on women's rights in India*, Berkeley J. Int'l L. 23: 201, 2005.
[230] Ratna Kapur, *gender and "faith" in law: equality, secularism, and, the rise of the hindu nation*, 3 JOURNAL OF LAW AND RELIGION, 35, 407-431, (2020).
[231] *Id.*
[232] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[233] Shayara Bano v. Union of India, (2017) 9 SCC 1.

Sunni Muslim would not change without the practice of triple talaq, hence the practice is not essential to Islam.[234] Justice Nariman asks "when petitions are filed under Art.32 is it permissible for Court look into the breach of fundamental right and send the issue back to legislature."[235] Justice Nariman and J. Lalit are the only two judges who were willing to subject triple talaq to constitutional reasoning and even it was only held unconstitutional on the ground of arbitrariness.[236] Justice Nariman speaking for himself and Justice U.U Lalit relied on doctrine of arbitrariness to hold that triple talaq is unconstitutional.

Justice Kurian Joseph agreed with Chief Justice Khehar and Justice Nazeer that triple talaq is not codified by personal law but disagrees with the view that it forms an essential part of Islam. Justice Kurian Joseph in his short judgment in length dealt with the examination of Quranic verses and concluded that the practice is not essential part of Islam. The concurring opinion reinstated the position taken by Court in *Shamim Ara v. State of U.P*.[237] He examined the Quranic verses and came to the conclusion that they provided for "sanctity and permanence to matrimony."[238] Justice Joseph concluded that tenets of the Holy Quran permit talaq in unavoidable situations. Reconciliation and upon its success, the revocation was identified as essential steps before talaq attains finality. As this option is not available in triple talaq, the practice was held to be against tenets of Quran.[239]It was held that what is bad theology is bad in law. Hence by a 3:2 majority the practice of triple talaq was set aside.

In this case dealing with equality and with the claims of constitutional morality by the petitioners, such an approach solely based on essential practices by examining Quranic verses was criticised by many. Sacrificing constitutional adjudication at the altar of religious pontification dilutes the supremacy of the Constitution.[240] The claims on grounds of equality and constitutional morality were not dealt by Justice Joseph.

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[234] Shayara Bano v. Union of India, (2017) 9 SCC 1

[235] Shayara Bano v. Union of India, (2017) 9 SCC 1.

[236] Rehan Aindri, *Privileging the Powerful: Religion and Constitutional Law in India*, ASIAN JOURNAL OF COMPARATIVE LAW, 13, 307-331, (2018).

[237] Shamim Ara v. State of U. P, (2002) 7 SCC 518

[238] Shayara Bano v. Union of India, (2017) 9 SCC 1(Kurian J., concurring)

[239] *Id.*

[240] Arghya Sen Gupta, *Let's talk about discrimination: Supreme Court outlawing triple talaq was no surprise, it should have gone further*, TIMES OF INDIA (Aug.23, 2017), https://timesofindia.indiatimes.com/blogs/toi-edit-page/lets-talk-about-discrimination-supreme-court-outlawing-triple-talaq-was-no-surprise-it-should-have-gone-further/

TEMPLE ENTRY GATEKEEPING

The ban excluding women was first challenged in *S. Mahendran v. The Secretary, Travancore*[241] before the High Court of Kerala. The Court justified that ban by stating that it is a custom practiced time immemorial. Kerala High Court held that the prohibition is only to women of particular age group and did not discriminate against women as a class.[242]Indian Young Lawyers Association filed a Public Interest Litigation in 2006 challenging the practice of excluding women of 10 to 50 ages as violative of Article 14, 15 and 25 of the Constitution.

The majority did not identify the believers of Ayyappa as a religious denomination nor have they accepted that the practice of excluding women is an essential practice of Hindu religion. The claims like women were allowed in other Ayyappa temples and that women are not discriminated as a class since exclusion was only between the ages of 10 to 50 were not accepted by the majority.

Justice Deepak Misra stated that "Patriarchy in religion cannot be permitted to trump over the element of pure devotion borne out of faith and the freedom to practice and profess one's religion."[243] He goes with the view that "faith and religion do not countenance discrimination but religious practices are sometimes seen as perpetuating patriarchy" which negates equality and other rights.[244] Such a view point could be taken to show that the clash is not between culture and religion on one side against right to equality, but between those norms of culture or religion that inculcates patriarchal values which discriminate women.[245]

It was mentioned that any rule based on discrimination of women pertaining to biological characteristics cannot pass the muster of constitutionality.[246] It was further stated that exclusion of women of any age group could not be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part of Hindu religion to allow Hindu women to enter into a temple.[247] Chief Justice Misra along with Justice Khanwilkar held that morality in Article 25 and Article 26 means constitutional morality, and not popular morality.[248]

[241] S. Mahendran v. The Secretary, Travancore, AIR 1993 Ker 42.
[242] *Id.*
[243] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[244] *Id.* (Misra C.J., majority)
[245] Frances Raday, *Culture, religion, and gender*, 4 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW, 1, 663-715, (2013).
[246] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[247] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[248] *Id.*

The test for a denomination and extend of the rights guaranteed to them has been dealt by the judiciary along with the essential religious practices doctrine. Justice Nariman points out three conditions to satisfy a denomination; a common faith, a common organisation and a distinctive name.[249] Examining the particular case, in the light of decided cases it was held that the believers of Ayyappa did not constitute a religious denomination. Justice Nariman made it clear that even if excluding women is an essential part it is hit by section 3 of Kerala Hindu Places of Public Worship Act 1965.[250] The Act is a measure enacted under Art. 25(2)(b) as a social reform measure and right claimed under Art.25 (1) will be subject to such law. It was also stated that the fundamental right of thanthris to exclude women from entering the temple must be subjected to fundamental right of women to practice religion.[251] Harmonious construction of Article 25 and 26 was considered and it was observed that right under Art. 26(b) will be subject to laws made under Art. 25(2) (b). He didn't agree with position taken by the majority that the word morality mentioned under Art.25 and Art.26 means constitutional morality.[252]

EQUALITY, DIGNITY AND LIBERTY BY JUSTICE CHANDRACHUD

Justice Chandrachud laid his proposition on the corner stone of values in Preamble of Indian Constitution. He relied on the concepts of equality, dignity and liberty as the core principles of constitution. The meaning of constitutional morality was understood to abide in these values.

Justice Chandrachud considering the language of Art.25 carved out the relevant points like entitlements to all persons, recognition of equal entitlement, freedom of conscience and right to freely profess and practice religion; and the nature of right was identified as an individual right.[253] The distinctive position of Art.25 from other fundamental rights was also considered and it was observed that "individual right to freedom of religion was not intended to prevail over but was subject to the overriding constitutional postulates of equality, liberty and personal freedom recognised in the other provisions of part III."[254]

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[249] *Id.*
[250] Kerala Hindu Places of Public Worship (Authorisation of Entry) Act, 1965, No. 7, Act of Kerala State, 1965 places of public worship to be open to all sections and classes of Hindus.
[251] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[252] In footnote 2 of his judgment Justice Nariman disagreed with this proposition.
[253] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[254] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

Morality mentioned in Art.25 and Art.26 was understood as "governed by fundamental constitutional principles" and not changing "popular opinion".[255] Justice Chandrachud has followed similar view he adopted in *Navtej Sigh Johar v. Union of India*[256] where morality was understood as constitutional morality. It was based on the view that the Constitution would not subject the rights to the passing fancies or popular opinion. Thereby established the core values of dignity, equality and liberty as supreme values from which all the rights have evolved from. It was clearly stated that "in matters of religion and morality it is the overarching Constitutional morality that must prevail."[257]

Even the purpose of religious freedom was considered as "to ensure wider acceptance of human dignity and liberty."[258] Article 25 begins with the words subject to public order, morality and health and other provisions of part III. No other fundamental right is subjected to other fundamental rights. This distinctive position of Art.25 considered by him and is used as a constitutional backing for his proposition of constitutional morality.

Justice Chandrachud notes the textual position of Art.25 and 26. Even though Art.26 does not have any such subjection to other fundamental rights, he set down that "the absence of words of subjection does not really attribute the provision a status independent of a cluster of other entitlements, particularly those based on individual freedom." He refers to the settled position in that fundamental rights are not watertight compartments.[259] Although in *Shirur mutt*[260] case the denominations were given complete autonomy, the following decisions took a different approach and Court here reinstates that Art.26 is not independent of other freedoms.

The respondent's contention that celibacy is the foremost requirement hence to exclude women was identified as an "assumption which cannot stand constitutional scrutiny."[261] Putting the burden of a man's celibacy on women was condemned and identified that it is used to deny women equally entitled spaces. The contentions like women can't keep vritham and claim of impurity associated with menstruation also didn't satisfy as valid claims in the constitutional framework according to Justice Chandrachud.

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[255] *Id.*
[256] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[257] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[258] *Id.*
[259] R. C Cooper v. Union of India, 1970 AIR 564.
[260] Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar,1954 AIR 282.
[261] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

J. Chandrachud also brought the connection with untouchability under Art.17 of Indian Constitution. The ambit of Art.17 was extended to include exclusion of women based on menstruation and purity. It was stated that "Individual dignity cannot be based on notions of purity and pollution."[262] He observes the language of Art.17 which forbids untouchability in any form and examined Constitution's purpose to bring social change to the systems of "stigmatised hierarchies".[263]

Justice Chandrachud has reminded the purpose of constitutional Court and stated the concept of constitutional morality as a guiding tool to Court in its interpretation of constitutional matters. It was stated that: "Though our Constitution protects religious freedom and consequent rights and practices essential to religion, this Court will be guided by the pursuit to uphold the values of the Constitution, based in dignity, liberty and equality. In a constitutional order of priorities, these are values on which the edifice of the Constitution stands. They infuse our constitutional order with a vision for the future of a just, equal and dignified society."[264] Exclusion was identified as destructive to these values.

DISSENT BY JUSTICE INDU MALHOTRA

Justice Malhotra begins the decision by delving into the maintainability of a Public Interest Litigation. As the petitioners were not believers, It was noted that Art. 32 must be based upon whether petitioner's right to worship has been violated. According to her, allowing such petitions would lead "interlopers" to question various beliefs and raises concern over the minority rights.[265] Justice Indu Malhotra relies on the form of the deity as a Naishtik Brahmachari upon considering the issue of violation of Art.14 and 15 and does not consider it in violation of the same.

She relied on opinions of various decisions from other jurisdictions to justify limited interference of Court in matters of religion. J. Latham's opinion of what is superstition to one section of public may be a matter of fundamental religious belief to another was not accepted by the Supreme Court before, but Justice Malhotra considered it as relevant.[266] In one of the

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[262] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[263] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[264] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[265] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[266] Adelaide Company of Jehova's Witnesses Incorporated v. The Commonwealth 67 CLR 116, 123.

cases Justice Malhotra herself referred to show the no interference of state also provided that religious practices cannot contradict "both constitutional tradition and common sense."[267]

The position of religious freedom in America is different from India as it does not have the restraints as mentioned in Indian Constitution and it can be said that the Religion clause in US constitution is absolute.[268] Although that is the case, the application of the Religion clauses throughout US history has been fraught with conflict and ambiguity.[269] Even in US scholarly works there were discourses suggesting that religion can no longer be uniquely privileged among the diversity of philosophical, ethical, and moral doctrines embraced by many citizens today.[270]

"The dissenting judgment has been picky in the way that the stance of the United States has been presented. The judgments that have been used are specifically in support of non-interference of the state into religious matters in spite of the lack of uniform stance taken by the US court itself, and on the basis of that, it has drawn the conclusion that judicial review of religious practices should not be undertaken."[271]

It was stated that "It is not for the Courts to determine which of the practices to be struck down except in a case if the practice is pernicious, oppressive, or a social evil like sati."[272] Justice Malhotra doesn't completely bar court form interfering in religious matters. In issues like sati which is oppressive the interference of Court is accepted. The practice of excluding women based on their physiological reason of menstruation was not considered as an oppressive practice.

The true nature of exclusion and oppressive nature of the practice was evident from the after effects of the judgment. The incidents of violence and threats against women and the purification ceremonies conducted in temple after two women entered the temple shows the discrimination based on purity. Senior advocate Indira Jaising before a petition heard before

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[267] Employment Division, Department of Human Resources of Oregon v. Alfred L. Smith, 494 U.S. 872 (1990).
[268] *See*, Alexandrowicz C. H, *The Secular State in India and in the United States.* 3 JOURNAL OF THE INDIAN LAW INSTITUTE 2.2 , 273-296, 1960.
[269] JESSE H. CHOPPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES, QUID PRO BOOKS, 2013.
[270] Micah Schwartzman, *what if Religion is not Special?,* U. Chi. L. Rev., 1351-1427, 2012.
[271] Vijetha Ravi, *Sabarimala forces us to recognise the hitherto unacknowledged yet omnipresent socio-legal violence against women*, 2019, http://dspace.jgu.edu.in:8080/jspui/bitstream/10739/2345/1/Sabarimala%20forces%20us%20to%20recognise%20the%20hitherto%20unacknowledged%20yet%20omnipresent%20socio.pdf
[272] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

Supreme Court raised the matter that, it is beyond exclusion to temple and a total social boycott that women faced.[273]

Justice Malhotra identified moral values underpinning the Constitution as the concept of constitutional morality. It was also stated that "constitutional morality in a secular polity would include harmonisation of fundamental rights, which includes right of every individual and denomination or sect to practice their faith and belief in accordance with tenets of their religion, irrespective of whether the practice is rational or logical."[274] Here Justice Malhotra uses the term rational or logical but what if it is in conflict with other fundamental rights. "Rational" is not merely a synonym for acceptable or even constitutional.[275] The secularism argument that a pluralistic society with different faiths has to be necessarily tolerant of such oppression defeats the very purpose of our judicial system.[276] Different from this "what Chandrachud J. recognises is that the justification offered to exclude women is an integral part of far broader discourse that is founded on the exclusion and subordination of women in social and community life."[277]

Days prior to Sabarimala decision came the landmark judgment of *Navtej Singh Johar V. Union of India*[278], wherein the Court partially set aside Sec.377 of IPC. Justice Malhotra herself articulated about individual dignity and constitutional morality in this case. It was stated that "the natural or innate sexual orientation of a person cannot be ground for discrimination. Where legislation discriminates on the basis of an intrinsic and core trait of an individual, it cannot form a reasonable classification based on intelligible differentia."[279] It was further held that "a person's sexual orientation is intrinsic to their being. It is connected with their individuality, and identity. A classification which discriminates between persons based on their innate nature, would be violative of their fundamental rights, and cannot withstand the test of constitutional morality."[280]

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[273] "Nothing Will Stop Me": Woman Who Entered Sabarimala Resolve To Do It Again, NDTV (Feb. 6, 2019), https://www.ndtv.com/india-news/nothing-will-stop-me-woman-who-entered-sabarimala-resolve-to-do-it-again-1989544
[274] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[275] Deepa Das Acevedo, *Pause for Thought: Supreme Court's Verdict on Sabarimala*, ECONOMIC & POLITICAL WEEKLY 53(43), 12, 2018.
[276] *Supra*, note 267.
[277] Gautam Bhatia, *The Sabarimala Judgment – III: Justice Chandrachud and Radical Equality*, (Sep. 29, 2018), https://indconlawphil.wordpress.com/category/freedom-of-religion/essential-religious-practices/
[278] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[279] *Id.*
[280] *Id.*

Following this it is to be noted that menstruation is intrinsic to women and constitutes an innate nature of their being. Then excluding women of menstruating ages to the temple must be viewed as a classification which does not stand the test of constitutional morality. Justice Malhotra who took this view in matter of sexual orientation took a different approach when matter was interconnected with religious freedom.

The claim of untouchability was not accepted by Justice Malhotra. She was of the opinion that the practice does not come under the purview of untouchability and accepted a historic conception of Art. 17. Justice Malhotra also noted that no precedent is shown to interpret Art.17 in such a way.

WHETHER CONSTITUTIONAL MORALITY DILUTES ESSENTIAL RELIGIOUS PRACTICE DOCTRINE

In *Shayara Bano* case and *Sabarimala* judgment the issues demanded Court to take up the Essential Practices Doctrine as well as constitutional morality. These two tests could not be possibly considered independently. It has been suggested that "romancing religious practices with constitutional morality is the way out" [281] of dilemma created in matters of law and religion. In Sabarimala Judgment Court made it clear that even if a practice is essential it must be tested on the ground of constitutional morality. In the light of Sabarimala decision it can be said that with the correlation with them, constitutional morality has an effect on Essential Religious Practice Doctrine. Whereas in *Shayara Bano* although constitutional morality was raised, the reasoning shows that primacy was given to Essential Religious Practices.

Court in *Sabarimala case* examined the evolution of essential religious practices and noted the shift in deciding "what is essentially religious to what is an essential religious practice."[282] Courts attaining the central role in deciding the essential religious practices on the basis of tenets of religion were also identified.

Even after considering the essential religious practice which would have been enough to set aside the practice, as the matter included dignity of women, Justice Chandrachud went on to consider its engagement with constitutional values. It was observed that "It is the duty of the

[281] Nabeela Siddiqui, *On Crossroads with Constitutional Morality: The (Un)tamed ERP test*, Available at *SSRN*, 2020.
[282] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

courts to ensure that what is protected is in conformity with fundamental constitutional values and guarantees and accords with constitutional morality."[283] It was stated that "practices that detract from these foundational values cannot claim legitimacy."[284]

Justice Malhotra also considered the effects of Essential Religious Practices doctrine and critically examined Court's role in interfering with matters of religion. According to the opinion, Court's interference was justifiable in oppressive practice like Sati. The practice of excluding women of 10 to 50 years was not considered as one such an oppressive practice by Justice Indu Malhotra. In fact the practice was identified as an essential practice. It seems like Justice Malhotra is suggesting that the practice can be tested on Art. 21 but not under Art.14 or 15. When the minority opinion is suggesting that constitutional morality ensures freedom of religion to practice and profess, the test of a practice must be upon constitutional morality itself.

The proposition of Justice Chandrachud is seen with scepticism that it viewed values of dignity, equality and liberty above all other rights. Rather than putting certain rights on a higher pedestal the proposition is rooted in understanding the core value of constitutional morality from which all rights evolve.

As per Justice Chandrachud's proposition the issue can be tested upon constitutional morality which is rooted in equality, dignity and liberty if either upholding (liberty to conscience, practice and profess religion) or rejecting a practice is necessary for upholding the constitutional morality. While examining essential practices test Court noted that although it claims to protect freedom of religion under Art.25 it often acts against it. The constitutional backing of essential practices itself is in question here as the doctrine permit or prohibit a practice based on essential and integral practices which is not mentioned in the Constitution.

Application of constitutional morality by Supreme Court has resulted in dilution of Essential Practices Doctrine. Even when the practice was not considered as an essential practice, it was tested on ground of constitutional morality in Sabarimala decision. The priority of a Constitutional Court was clearly expressed in this case and constitutional morality was given

[283] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[284] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

importance. Scholars have suggested that even if a practice is essential or not it has to be subject to the test of constitutional morality.[285]

WHETHER CONSTITUTIONAL MORALITY IS A SUFFICINET TOOL TO SUBSTITUTE ESSENTIAL RELIGIOUS PRACTICE DOCTRINE

Court being the ecclesiastical authority in deciding the essential practices has been criticised by various scholars, the concern was over the authority of Court in doing that. The constitutional backing of essential practices doctrine has also been questioned in Sabarimala decision. In that light it would be easier to consider the role of Court that is specified in the Constitution, the guardian and protector of fundamental rights. It was reminded in Sabarimala verdict that "Court is the enforcer of fundamental rights."[286] "Court has constitutional power and duty to interpret and affirm fundamental rights under Art.32."[287]

The position in Sabarimala case clearly gave prominence to constitutional morality; and essential practices doctrine was diluted. It meant even if a practice is essential or not, the constitutional court must concern itself with testing it on constitutional morality; that leads to the suggestion that constitutional morality could be a sufficient tool to substitute essential practices doctrine. According Justice Nariman the concept of constitutional morality has achieved the position of stare decisis.[288]

In a country with constitutional governance rooted in the values of dignity, liberty and equality, Courts must be guided by these values. Justice Chandrachud provides that "the Constitution is meant as much for the agnostic as it is for the worshipper."[289] The decision suggests that Court's efforts must be to protect the right to conscience of the person which is rooted in the concept of dignity and liberty of individual.

Religious freedom and personal laws has been a matter of conflict and created confusion in our legal system but an approach which is rooted in constitutional values is more desirable. It is suggested that the clash is not between religion and right to equality, but between those

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[285] *Id.*

[286] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC

[287] Upendra Baxi, *The Attorney General's concerns about constitutional morality are misplaced,* THE INDIAN EXPRESS (Dec. 17, 2018), https://indianexpress.com/article/opinion/columns/attorney-general-constitutional-morality-sc-sabarimala-verdict-5496440/

[288] Kantaru Rajeevaru v. Indian Young Lawyers Association, (Civil) No. 3358 of 2018.

[289] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

norms of culture or religion that inculcates patriarchal values which discriminate women.[290] Some of the patriarchal norms defended on grounds of freedom of religion, are not agreed upon by different faiths or even by the various branches within each.[291] In such lack of homogeneity in religion, Court's conception of a particular religion would be difficult.

It is suggested that Court's vast effort upon interpreting religious texts is simply a veneer that gives added support to the conclusions they would have arrived at any way.[292] Also the efforts Court made have tried to suppose that many wonderful modern values like democracy can be produced out of traditional scriptures.[293] Indian Supreme Court in multiple occasions has taken the view that religion in its truest interpretation is not discriminatory.[294] Chief Justice Misra and Justice Khanwilkar in Sabarimala decision provided that religious practices that are discriminatory do not pass the test of constitutional morality. Although in the issue of gender equality in Hindu faith they based their decision on the idea that Hindu religion is non-discriminatory in essence, and with that stance faith emerges as enlightened and non-discriminatory.[295] Concurring opinion of Justice Kurian Joseph in Shayara Bano in his examination of Quranic verses also effectively tried to suggest the same. Rather than a truest interpretation of religion an interpretation of constitutional values is what is expected from the Judges.

Pratap Bhanu Mehta upon Shayara Bano decision critiqued the need for Court to "go to great lengths to show that religion, properly understood, is not in conflict with constitutional morality" and points out the rather important question that is, "will the Court redeem the constitutional promise of a society where law treats all individuals as free and equal?"[296]

A similar position was taken by Justice Deepak Misra in Sabarimala decision where he observed, "In so scenario, it can be said that exclusion of women of any age group could be regarded as an essential practice of Hindu religion and on the contrary, it is an essential part

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[290] Frances Raday, *Culture, religion, and gender*, 4 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 1, 663-715, (2013).
[291] *Id*.
[292] Pratap Banu Mehta, *Passion and constraint in* POLITICS AND ETHICS OF THE CONSTITUTION, (Rajeev Barghava, Oxford University Press, ed., 2008)
[293] *Id.*
[294] Sri Venkatarama Devaru, (1958) SCR 895 & Shastri Yagnapurushdasji, (1966) 3 SCR 242.
[295] See, Ratna Kapur, *gender and "faith" in law: equality, secularism, and, the rise of the hindu nation*, 3 JOURNAL OF LAW AND RELIGION 35, 407-431 (2020).
[296] Pratap Banu Mehta, *On triple talaq, court must say: Religious practice cannot trump modern constitutional morality,* (May 18, 2017), https://indianexpress.com/article/opinion/columns/no-dark-spaces-triple-talaq-hearing-4661236/

of the Hindu religion to allow Hindu women to enter into a temple."[297] Courts have prior to this also taken the position that true religion does not include discrimination but such a view would bring distinct outcomes from a court that does not see religion and discriminatory behaviour as mutually exclusive.[298] The assumption that "faith and religion do not countenance discrimination" precludes serious conversation about the constitutional fate of discriminatory religious practices.[299]

J. Chandrachud focuses on the adjudicatory role of Court in defining boundaries of religion in dialogue about public spaces. The debate is thus shifted from private public spheres to the relationship between man and woman within society, which is inherently an issue of public importance. [300] Justice Chandrachud shed light to what should be the central issue in a constitutional Court when met with issues interconnected with faith. "The assumption by the Court of the authority to determine whether a practice is or is not essential to religion has led to our jurisprudence bypassing what should in fact be the central issue for debate. That issue is whether the Constitution ascribes to religion and to religious denominations the authority to enforce practices which exclude a group of citizens."[301]

When there is a conflict between religious freedom and other fundamental rights, would it be fair to expect our Judiciary to go on searching for the religious scripts or construct a history on their own to come to a decision. Justice Chandrachud in Sabarimala decision while identifying the practice of excluding women as derogatory to women observed that Court cannot adopt interpretation of constitution which has such an effect. It was observed that, "We must remember that when there is a violation of fundamental rights, the term morality naturally implies constitutional morality and any view that is ultimately taken by the constitutional Courts must be in conformity with the principles and basic tenets of the concept of this constitutional morality that gets support from the Constitution."[302]

It is suggested that the validity of religious practices can be decided on the touchstone of the limitations provided in the Art. 25 and 26 of Constitution instead of dabbling with the

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[297] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC
[298] See, Deepa Das Acevedo, *Pause for Thought: Supreme Court's Verdict on Sabarimala*, 43 ECONOMIC AND POLITICAL WEEKL, 53 (2018).

[299] *Id.*
[300] Jean-Philippe Dequen, *Back to the Future? Temporality and Society in Indian Constitutional Law: A Closer Look at Section 377and Sabarimala Decisions and the Genealogy of Legal Reasoning*, 1 JOURNAL OF HUMAN VALUES, 26, 17–29, (2020).
[301] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC
[302] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC

questions of theology.[303] Essential Religious Practice is a judicially evolved doctrine. The doctrine has given the Courts wide authority to define, interpret and regulate the meaning of religion.[304] They effectively determine the content of religious beliefs and, in the process, construct tradition and religious identity, both of which become frozen and fossilized.[305] Essential Religious Practice Doctrine has been criticised for homogenisation and rationalisation of religion.[306] In my humble opinion, constitutional morality seems to be a sufficient tool to substitute Essential Practice Doctrine. As Professor Upendra Baxi has noted use of constitutional morality or to suggest that "morality" in Article 25 means constitutional morality invites the same accusation of homogenisation and rationalisation. [307]

But then constitutional morality would not test a practice by taking a theological authority or by constructing history of a practice by itself. Rather it would ensure that equality and non-discrimination is followed. This way religious freedom can be ensured and those practices which perpetuates discrimination and which are against constitutional values will be set aside.

Shayara Bano decision gave primacy to Essential Religious Practice and judges didn't examine the case on grounds of constitutional morality even though it was claimed by the petitioners. Sabarimala decision gave primacy to the concept of constitutional morality. The judges tested the practice on essential practices but went onto suggest that even if a practice is essential it is subject to constitutional morality. Both these decisions had a progressive result. This leads us to a space where the reasoning of these judgments has given primacy to different concepts but had a similar result.

The contradictory opinions in Sabarimala verdict has brought many to suggest that the concept of constitutional morality brings subjective interpretation. A constitutional law scholar would be keen to search for a middle ground between the opinion of Justice Malhotra

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[303] Pranjal Kishore, *Law and Faith: Constitution as the Touchstone for Interpretation*, THE HINDU CENTRE FOR POLITICS AND PUBLIC POLICY.
[304] Pratap Banu Mehta, *Passion and constraint in* POLITICS AND ETHICS OF THE INDIAN CONSTITUTION (Rajeev Barghava, Oxford University Press, ed., 2008)
[305] Ratna Kapur, gender and "faith" in law: equality, secularism, and, the rise of the hindu nation, Journal of Law and Religion 35 (3), 407-431, 2020.
[306] RONOJOY SEN, LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND SECULARISM, 2007.
[307] Upendra Baxi, note in RONOJOY SEN, LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND SECULARISM, 2007.

and Justice Chandrachud. It has been suggested that the difference between justices does not concern the standard of constitutional morality, but the applicability in a mere case.[308]

All the fundamental freedoms including freedom of religion derived from the principles of equality, dignity and liberty which constitute the concept of constitutional morality. So when a conflict arise it is desirable to check the issue upon constitutional morality. The challenge on the constitutional backing of Essential Practices doctrine is real and a possible change in jurisprudence is expected soon. Using essential practice test would be grade-appropriate when legal reasoning or existing legal sources are unable to provide the judge with adequate guidance.[309] The concept of constitutional morality is also be subjected to the criticism. The process here is not to choose the lesser of two evils rather to search for the approach that is constitutionally appropriate. Concept of constitutional morality is a guiding light in constitutional interpretation and it must be understood that the concept also in itself demands the limitation of Judiciary within the constitutional limits. Judiciary should also follow the ideals of constitutional morality to ensure constitutionalism as envisioned by the Constitution.

In the review petition of Sabarimala decision, the Supreme Court has formulated certain important issues including Essential Religious Practices doctrine and the concept of constitutional morality. The matter has been referred to a larger bench for consideration. It must be seen if the Court would give prominence to one test over other and would bring clarity in their effects in constitutional matters.

The Constitution of India ensures religious freedom to the individual and rights to denominations to manage their affairs and also ensure certain minority rights. It is suggested that religious autonomy and gender equality can coexists. The religious autonomy that various communities claim invokes a simplistic notion of choice.[310] It is important to consider "whether structural nature of hurdles in exercising choice makes it a futile concept for most women."[311]

Judicial decisions shouldn't be ignorant to these issues and Constitutional morality seems to be helpful in interpretation to ensure justice and equality. Indian Constitution is referred to as

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[308] Upendra Baxi, *The Attorney General's concerns about constitutional morality are misplaced,* THE INDIAN EXPRESS (Dec. 17, 2018 12:15:42 am), https://indianexpress.com/article/opinion/columns/attorney-general-constitutional-morality-sc-sabarimala-verdict-5496440/

[309] KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE, 239, 1998.

[310] Archana Parashar, *Gender inequality and religious personal laws in India*, 2 THE BROWN JOURNAL OF WORLD AFFAIRS, 14, 103-112, (2008).

[311] *Id.*

a social document[312] and it has ensured equality considering the socio economic situations particular to India and tried to attain justice through a substantive approach rather than a formal approach.

The importance of judicial reasoning is also an important aspect in this. Judicial reasoning go beyond simple mechanical decision making procedures and involve conflicts of rights and principles, interpretations of rights and principles, and decisions on priorities of rights and principles.[313] Psychological and political and theoretical approaches have made significant discourse about judicial reasoning and to examine all those aspects would be beyond the framework of my work.

Salman Khurshid attempts to base the concept of constitutional morality on Dworkin's concept of an ideal judge.[314] He quoted Dworkin's examples of judges as Dworkin himself referred to as Herbert and Hercules. Herbert fills the gap upon instruments like social welfare, original intent, and so on. Hercules goes beyond approaches like popular opinion, original intent, and mischief rule, and so on to find out the right answer.

Dworkin upon judicial interpretation has stated that "Constitutional interpretation is disciplined, under the moral reading, by the requirement of constitutional integrity. Judges may not read their own convictions into the constitution. They may not read the abstract moral clauses as expressing any particular moral judgment, no matter how much that judgment appeals to them, unless they find it consistent in principle with the structural design of the Constitution as a whole, and also with the dominant lines of past constitutional interpretation by other judges. They must regard themselves as partners with other officials, past and future, who together elaborate a coherent constitutional morality, and they must take care to see that what they contribute fits with the rest." Dworkin referred to judges as "authors jointly creating a chain novel in which each writes a chapter that makes sense as part of the story as a whole."[315]

[312] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (1999).
[313] William Blackstone, *Justice and Legal Reasoning*, WM. & MARY L. REV. 18, 321, 1976.
[314] SALMAN KHURSHID, ET AL., JUDICIAL REVIEW: PROCESS, POWERS, AND PROBLEMS, 401 (2020).
[315] RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION, CAMBRIDGE MA: HARVARD UNIVERSITY PRESS, 1997.

CHAPTER V – FINDINGS AND CONCLUSIONS

CONSTITUTIONAL MORALITY

The concept of constitutional morality has attained a prominent discourse in the academic and judicial circle in the in the last decade or so. This is primarily because of a considerable amount of case laws using the concept to decide on issues including individual dignity and equality and other constitutional values. But the concept is neither a newly found judicial doctrine nor we could find a reference to it in the constitution. The concept has been used nearly two hundred years ago by an English Historian who wrote the book 'History of Greece'.[316]

George Grote referred to the concept of constitutional morality as a paramount reverence to the Constitution[317]. His conception encompassed the concept with not only enforcing obedience to authority acting under and within forms of constitution combined with the habit of open speech, of action subject only to definite legal control.[318] Freedom and self-restraint was identified as the essential feature of constitutional morality and he has recognised that such a constitutionalism is followed in England and America.[319]

Dr. B.R Ambedkar who is called as the Father of Indian Constitution has used the concept of constitutional morality in Constituent Assembly Debates. He demanded "The diffusion of constitutional morality not merely among the majority of any community but throughout the whole."[320] He quoted Grote in explaining the concept.

Pratap Banu Mehta brings attention to the interconnection Ambedkar addresses between administrative forms and constitutional forms.[321] Ambedkar said "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."[322] Thereby, Ambedkar seeks a diffusion of constitutional morality among people to maintain the spirit of the Constitution at the same time identifies that it is "not a natural sentiment and

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[316] GEORGE GROTE, A HISTORY OF GREECE, 153-155, IV, (1851).
[317] *Id.*
[318] *Id.*
[319] *Id.*
[320] CONSTITUENT ASSEMBLY OF INDIA DEBATES: OFFICIAL REPORTS Vol.VII, pp38, Nov. 4, 1948
[321] Pratap Banu Mehta, what is constitutional morality? (2010), https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm.
[322] CONSTITUENT ASSEMBLY OF INDIA DEBATES: OFFICIAL REPORTS Vol.VII, pp38, Nov. 4, 1948

must be cultivated."[323] It is said that Ambedkar used the concept merely to defend the administrative details that are added to the Constitution and that Ambekar's formulation was not meant to be used as a test by Court to invalidate legislation or government action. [324]

The concept Judiciary referred the concept of constitutional morality for the first time in *Keshavananda Bharati V. State of Kerala*[325] Justice A.N ray and Justice Jagmohan Reddy used the term in an opposite sense. The former uses it to refer it to democratic will of people by quoting the diffusion of constitutional morality among entire population. The latter refers it against the claims of sovereignty towards people's will.

The concept is referred in other cases also[326] but didn't form the substantial reasoning until in 2009 when Delhi High Court dealt with concept in detail while setting aside Sec. 377 of IPC.[327] *Naz Foundation v. Govt. of NCT of Delhi*[328] gave prominence to the concept of constitutional morality and paved the way for a dignity-based judicial interpretation. Sec. 377 has been defended in the name of morality and Court stated that "the argument of Moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy. Constitutional morality must outweigh the argument of public morality even if it be the majoritarian view."[329] Court held that the argument of moral indignation, howsoever strong, is not a valid basis for overriding individual's fundamental rights of dignity and privacy. Constitutional morality must outweigh the argument of public morality even if it be the majoritarian view."[330]

The concept was used to uphold ideal governance in further cases. In *Manoj Narula v. Union of India,*[331] dealing with criminalisation of politics and corruption referred to constitutional morality as bowing down to the norms of Constitution. In *Govt. of NCT Delhi v Union of India*[332], Justice Deepak Misra identified the concept and equal to the conscience of Constitution. Judges considered the concept as a check on the state functionaries as well as

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[323] CONSTITUENT ASSEMBLY OF INDIA DEBATES: OFFICIAL REPORTS Vol.VII, pp38, Nov. 4, 1948
[324] Abhinav Chandrachud, *The Many Meanings of Constitutional Morality,* Available at SSRN 3521665 (2020)
[325] Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225
[326] S. P Gupta V. President of India, (1982) 2 SCR 365, Islamic Academy of Education v. State of Karnataka, (2003) 6 SCC 697.
[327] Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC Online Del 1762.
[328] Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC Online Del 1762.
[329] Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC Online Del 1762.
[330] Naz Foundation v. Govt. of NCT of Delhi, 2009 SCC Online Del 1762.
[331] Manoj Narula v. Union of India, (2014) 9 SCC 1.
[332] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501

citizens. Justice Chandrachud also identified another element to the concept: "Constitutional morality balances popular morality and acts as a threshold against an upsurge in mob rule."[333]

Later in 2017 triple talaq was challenged before Supreme Court and petitioners challenged the practice of triple talaq as violative of constitutional morality.[334] This was a case intertwined with faith and personal law. The five Judge Constitutional Bench did not rely on the concept of constitutional morality to decide the matter. The minority judgment even stated that the practice being a constituent of personal law has a stature similar to fundamental rights and it cannot be tested on the ground of constitutional morality.[335]

In *Navtej Singh Johar v. Union of India*[336], following the proposition in *Naz Foundation* case[337] Court has upheld constitutional morality over social morality and ensured to protect the rights of even a minuscule section. It was stated that "The concept of constitutional morality urges the organs of the state, including the Judiciary, to preserve the heterogeneous nature of the society and to curb any attempt by majority to usurp the rights and freedoms of a smaller or miniscule section of the populace."[338] Justice Nariman was of the opinion that preamble and fundamental rights constituted constitutional morality and the concept encompass the soul of Constitution.[339]

Justice Deepak Misra and justice Chandrachud justified the use of constitutional morality by stating that constitutional courts must inculcate a sense of constitutional morality to protect the rights of individuals[340] and that Courts are expected to uphold constitutional principles and has to be guided by constitutional morality rather than social morality."[341]

In *Joseph shine v. Union of India*[342], checking the constitutionality of section 497 of IPC also used the concept to set aside the impugned provision. Justice Chandrachud mentioned that a commitment to constitutional morality requires the Court to ensure constitutional values of equality, non-discrimination, and dignity.[343]

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[333] Government of NCT of Delhi v. Union of India, (2018) 8 SCC 501.
[334] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[335] Shayara Bano v. Union of India, (2017) 9 SCC 1.
[336] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[337] Naz Foundation v. Govt. of NCT Delhi, (2009) 6 SCC Online Del 1767.
[338] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[339] *Id.* (Nariman J.)
[340] *Id.* (Misra C.J.).
[341] *Id.* (J. Chandrachud).
[342] Joseph shine v. Union of India, (2019) 3 SCC 39.
[343] Joseph shine v. Union of India, (2019) 3 SCC 39.

In another judgment connected with faith and religious practice,[344]Justice Misra along with Justice Khanwilkar stated that the word morality in Art. 25 and 26 must mean constitutional morality.[345] Justice Chandrachud also shared the same view and justified it by stating that the Constitution would not subject the rights to the passing fancies or popular opinion. Justice Nariman did not agree with that proposition.

Justice Chandrachud identifies the core values of preamble from which all values evolve placed his proposition in values of equality, dignity and liberty which will prevail over social morality. This position he took in *Indian Young Lawyers Association v. State of Kerala*[346] is just a more clarified version of his earlier propositions. Justice Malhotra in the same decision dissenting used the concept to suggest that "constitutional morality in a secular polity would include harmonisation of fundamental rights, which includes right of every individual and denomination or sect to practice their faith and belief in accordance with tenets of their religion, irrespective of whether the practice is rational or logical."[347]

Justice Misra also has contributions to dignity based jurisprudence and has linked the concept with silences of constitution, constitutional governance and it was understood as necessary to ensure the fundamental rights of Individuals. Justice Nariman is one of the judges who have spoken about constitutional morality. Still, he has mostly based his decisions on arbitrariness and rationality to decide the matter.

The constitutional bench in *Kantaru Rajeevaru v. State of Kerala*[348], referred the matter to a larger bench to examine the contours of constitutional morality. Justice Nariman dissenting stated that constitutional morality has attained the state of stare decisis through various judicial pronouncements. The position taken by Justice Nariman in *Navtej Singh Johar*[349] case was that fundamental rights and preamble constitutes constitutional morality.[350]In this case it was stated that "constitutional morality is nothing but values inculcated by the Constitution, which are contained in the Preamble read with various other parts, in particular, parts III and IV thereof."[351] By including part IV and various other parts, Justice Nariman has

[344] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[345] Based on the view that the Constitution is adopted and given by the people of this country to themselves and not forced upon them, so public morality has to be understood as synonymous with constitutional morality.
[346] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[347] *Id*. (Malhotra J., dissenting).
[348] Kantaru Rajeevaru v. Indian Young Lawyers Association, (Civil) No. 3358 of 2018.
[349] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[350] Navtej Singh Johar v. union of India, (2018) 10 SCC.
[351] Kantaru Rajeevaru v. Indian Young Lawyers Association, (Civil) No. 3358 of 2018.

gone beyond in earlier position.[352] Indian Judiciary has taken a transformative as well as originalistic approach while deliberating the concept of constitutional morality.

These recent decisions brought debate around the concept and concerns about the subjective interpretation and the abstractness of the concept. Some called it a dangerous weapon, whereas other critics didn't entirely question the relevance of the idea but doubted the possibility of its abuse.[353] It is somewhat agreed that democratic systems of government may not always serve the constitutional goal.[354] In such situations, when legislatures overlook the fundamental rights of individuals, it will be necessary for Judiciary to protect those rights.[355]

Gautam Bhatia suggests that our doctrines and constitutional values are abstract concepts. He opined that the morality identified is constitutional morality. It focused on the text of the Constitution, its structure, the inter-relationship between its provisions and the historical context in which it was framed. Considering these elements, it can be ensured that constitutional morality is objective.[356]

The differing opinion in the Sabarimala verdict has brought more concerns regarding the subjective interpretation of the concept. In the same case using the same concept resulted in different outcomes was a concern. Upendra Baxi believes that "The suggestion that the Court should always speak unanimously is neither constitutionally permissible nor desirable and stated that the difference between the judges does not concern standard of constitutional morality, but the applicability in a given case."[357]

ESSENTIAL RELIGIOUS PRACTICE

The discourses in secularism in the world often fail to incorporate the Indian conception of secularism. The concept had met with apprehension within the Constituent assembly and the

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[352] Nakul Nayak, *Constitutional Morality: An Indian Framework*, AM. J. COMP.L. (forthcoming 20201).
[353] Prof NR Madhava Menon, *Constitutional Morality: Eight Burning Questions*, INDIA LEGAL (Jan.12, 2019), https://www.indialegallive.com/viewpoint/constitutional-morality-eight-burning-questions/
[354] *Id.*
[355] Prof. Upendra Baxi, *Constitutional Morality: "No Entry" in Adjudication?*, INDIA LEGAL (Apr.5, 2019), https://www.indialegallive.com/viewpoint/constitutional-morality-no-entry-in-adjudication/
[356] Gautam Bhatia, *India's attorney general is wrong. Constitutional morality is not a 'dangerous weapon'*, SCROLL.IN, (Dec. 21, 2018 08:00 am), https://scroll.in/article/905858/indias-attorney-general-is-wrong-constitutional-morality-is-not-a-dangerous-weapon
[357] Upendra Baxi, *The Attorney General's concerns about constitutional morality are misplaced,* THE INDIAN EXPRESS (Dec. 17, 2018 12:15:42 am), https://indianexpress.com/article/opinion/columns/attorney-general-constitutional-morality-sc-sabarimala-verdict-5496440/

political spheres.[358] Secularism in India is identified as a distinctive[359], as it didn't exactly followed the existing models from America or Europe. Equality of all religions and a certain level of distancing from religion was part of its conception in India. India did not follow a strict separation of Church and State and didn't follow the European models of established religion either. [360] The historical wounds of Partition were not healed and it was necessary to ensure the minorities that State would not endorse any religion. There is no one specific model of secularism, the concept has evolved over time trans-nationally and non-western societies take the concepts from western counterparts and add value to them and develop them further.[361]

The word secular was added to the Constitution only in 1976 and it is nowhere defined in the Constitution; hence the task to delineate and expand the concept of secularism has fallen upon shoulders of Supreme Court.[362] Supreme Court of India has held that secularism is part of the basic structure of Constitution.[363]

The Constitution of India ensures freedom of religion and the contours of religion are further developed with judicial interpretation. Article 25 of Indian Constitution provides for freedom of conscience and free profession, practice and propagation religion. The provision is subject to public order, morality, health and other provisions of Fundamental Rights. It has also given authority for state to regulate or restrict any economic, financial, political, or other secular activity which may be associated with religious practice. Art.26 provides freedom to denominations to manage their affairs subject to public order, morality and health.

The various aspects and rights related with religion have been further evolved with judicial interpretation. Supreme Court promulgated the doctrine of Essential Religious Practices in *Shirur mutt* case.[364] The right mentioned in Constitution was understood within the framework of essential practices. The rituals, observances, ceremonies and modes of worship

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[358] *See,* Shefali Jha, *Secularism in the constituent assembly debates*, 1946-1950, ECONOMIC AND POLITICAL WEEKLY, 3175-3180, 2002.
[359] Rajeev Bhargava , TN Srinivasan, *The distinctiveness of Indian secularism. The Future of Secularism*, OXFORD UNIVERSITY PRESS, NEW YORK, 2007.
[360] Gurpreet Mahajan, *Religion and Indian Constitution- question of separation and equality, in* POLITICS AND ETHICS OF INDIAN CONSTITUTION (Rajeev Barghava, Oxford University Press, ed., 2008).
[361] Rajeev Bhargava , TN Srinivasan, *The distinctiveness of Indian secularism. The Future of Secularism*, Oxford University Press, New York. 2007
[362]Neera Chandoke, *Secularism central to a Democratic Nation, in* VISION FOR A NATION: PATHS AND PERSPECTIVES, 45, (Aakash Singh Rathore ed., Ashish Nandy, 2019)
[363] S.R Bommai v. Union of India, 1994 AIR 1918
[364] Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar,1954 AIR 282

prescribed by religion were identified as integral parts of religion.[365] What constitutes the essential part of a religion is primarily to be ascertained with reference to the doctrines of that religion itself.[366] Autonomy to religious denominations was also stated in this case.

From *Shirur mutt*[367]*t* to the recent case laws, Courts have taken varied approaches. The complete autonomy to religious denominations was not followed in *Sri Venkatarama Devaru v. State of Mysore.*[368] Court has not given certain practices protection under Constitution upon lack of authoritative texts and affidavits presented before Court to establish that the practice is essential.[369] Doctrines and tenets of religion were given prominence to decide a practice as essential practice, but Court in multiple times has ensured that it is upon Court to consider a practice as essential.

Justice Gajedragadkar in along with separating secular practices from religious practice also brought a distinction from practices arising out of mere superstition and stated the protection must be confined to such religious practices that are an essential and an integral part of religion. This position redefining the Essential Practices Doctrine has met with criticism of rationalisation and homogenisation.[370] It said that Court seems committed to an idea of cleansing religion from superstition, to the search for a pure religion whose theology turns out to be compatible with the civil theology of the commonwealth.[371]

Court in another case identified that community might speak in differing opinion and the question of religion will always have to be decided by the Court and in doing so, the Court may have to enquire whether the practice in question is religious in character and if it is, whether it can be regarded as an integral or essential part of the religion.[372]

The continued struggle between police and followers of Ananda Margi faith regarding tandava dance met with judicial conflicts also.[373] In the long process of judicial conflicts Court stated that the tandava dance is not an essential practice of the faith. Court followed a

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[365] *Id.*
[366] Commissioner, Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar,1954 AIR 282.
[367] *Id.*
[368] Sri Venkatarama Devaru v. State of Mysore AIR 1958 SC 255
[369] Mohd. Hanif Quareshi v. State
[370] RONOJOY SEN, LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND SECULARISM, 2007.
[371] Pratap Banu Mehta, *Passion and constraint in* POLITICS AND ETHICS OF THE INDIAN CONSTITUTION, (Rajeev Barghava, Oxford University Press, ed., 2008)
[372] Sri Govindlalji v. State of Rajasthan, AIR 1963 SC 1638
[373] Acharya Jagdishwaranda Avadhutha v. Commissioner of Police, Culcutta , AIR 1984 SC 51, Commissioner of Police v. Acharya J Avadhutha, Civ. App. No.6230 of 1990.

logic that the practice was existent even before the adoption of tandava dance and hence it is not an essential part of religion. It is suggested that approach of Supreme Court seems to identify a religious practice as an integral practice only if it existed when the religion was founded.[374] It was further stated that the essential part of religion means the core belief upon which a religion is founded and those practices that are fundamental to follow a religious belief.[375] The essential practices were identified as those fundamentals of religion without which the existence of religion is affected.

The necessity and relevance to going on decide whether a practice is essential was noted by scholars in *Ismail Faruqui v. Union of India.*[376]In this case Court Could have decided the matter that State has power to acquire a mosque, but went on to suggest that a mosque is not an essential part of Islam and prayer can be offered anywhere.[377]

Some important High Court judgments are also reported recently which is relevant to the discussion. The practice of capturing and worshipping of cobras during Nagapanchami,[378] the Bombay High Court decision on ban of women to Haji Ali Durgah and decision on pronouncement of Azan etc. are some of them. The Bombay High Court did not find the ban as an essential part of religion as women were previously allowed to visit Durgah, the issue is currently before the consideration of Supreme Court.[379]

In *Shayara Bano v. Union of India* and *Indian Young Lawyers Association v. State of Kerala* are two important case laws dealing with essential practices as well as constitutional values. Justice Nariman and Justice Lalit applied the test in *Tandava* case.[380] They opined that "fundamental nature of Islamic religion as seen through an Indian Sunni Muslim's eyes, will not change without this practice."[381] Hence the practice was not considered as an essential practice. The concurring opinion examined the Quranic verses and concluded that it is not an essential practice.

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[374] Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of religion in India: Current issues and supreme court acting as clergy*, BYU L. Rev. 915, 2017.
[375] Commissioner of Police v. Acharya J Avadhutha, Civ. App. No.6230 of 1990
[376] Dr. M. Ismail Faruqui v. Union of India, AIR 1995 SC 605.
[377] *Id.*
[378] Gram Sabha of Village Battis Shirala v. Union of India, Writ Pet. No. 8645 of 2013 (Bombay HC July15, 2014). (Court referred to scholarly work on Dharma Shashthras and stated that he practice is not essential to religion).
[379] Dr. Noorjehan Safia Niaz v. Haji Ali Dargah Trust, (2016) 5 AIR Bom R 660.
[380] Commissioner of Police v. Acharya J Avadhutha, Civ. App. No.6230 of 1990
[381] Shayara Bano v. Union of India, (2017) 9 SCC 1

In *Indian Young Lawyers Association v. State of Kerala*[382], where ban of women of 10 to 50 ages to the temple of Sabarimala was challenged, the majority held that the practice is not essential religious practice. Justice Misra and Justice Khanwilkar observed that exclusion of women does not constitute essential part of religion and in fact non-observance of it would change nature of religion. Again the proposition of 'fundamental nature of religion' in *Tandava* case[383] is followed here. Also, the non-religious grounds like physiological reasons were rejected siting that protection given was on strictly religious grounds. The dissenting opinion identified the practice as an essential practice.

In some cases, Court has referred to religious texts, in some situations it considered case laws and constructed history of a practice or followed the logic that the practice should be in practice from the beginning of the religion. Justice Chandrachud in Sabarimala decision delineated these two aspects of the doctrine as separating secular from religious practice and to check whether practice is essential or integral to religion.[384] Justice Chandrachud suggests that Court's role in checking whether a practice is essential to religion is lacks constitutional backing.

Court taking the theological authority and rationalising religion has been critically viewed and scholars argue to remove the Essential Practices Doctrine from Supreme Court Jurisprudence to ensure religious freedom.[385] It is pointed out that the doctrine actually allows Court to hold that religion, The Constitution, and the State are not in conflict, because the practice sought to be regulated isn't "integral" or "essential" to the religion at all, and so outside the scope of Constitutional protection.[386]

EFFECT OF CONSTITUTIONAL MORALITY ON ESSENTIAL PRACTICES

ISSUE WITH ESSENTIAL PRACTICES DOCTRINE

Religion has occupied space with the power to direct people's conscience, and often, religious institution itself has attained the adjudicatory role in a person's life. India is not

[382] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[383] Commissioner of Police v. Acharya J Avadhutha, Civ. App. No.6230 of 1990
[384] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[385] Faizan Mustafa & Jagteshwar Singh Sohi, *Freedom of religion in India: Current issues and supreme court acting as clergy*, BYU L. Rev. 915, 2017.
[386] Gautam Bhatia, *Individual, Community, and State: Mapping the terrain of religious freedom under the Indian Constitution*, Feb 7, 2016, https://indconlawphil.wordpress.com/category/freedom-of-religion/essential-religious-practices/

following a model of theocracy; it is a secular polity. But it does not follow a strict form of separation of Church and State.

The lack of separation of religion and State is evident mostly in the assistance that religious institutions receive from the State. Considering the financial assistance, it is from the whole population, including people of various beliefs and ideologies. This aspect of secularism followed in India is often not addressed in the arguments condemning state interference in matters of religion. Indian Constitution has found a delicate balance between these issues and provided freedom of religion, and gave way for State's interference. It has also subjected freedom of religion to public order, morality, health and other fundamental rights.

The interference of the judiciary in matters of religion is the issue here. Scholars highlight the accusation of homogenisation and rationalisation of religion.[387] Most studies on the topic are focused on Court's role in shaping or limiting Hindu religion. These 'particular studies' limit the academic scope of the subject, and refining court ruling on a particular religion has no real purpose other than perpetuating that there is an inherent bias from Court towards a religion. Beyond the issue of rationalisation and homogenisation of religion, the authority of Court itself in deciding the matters of religion and the constitutional backing of Essential Practice Doctrine was highlighted in Sabarimala Judgment. Separating secular activities from religious activities has the constitutional backing; but finding out the essential or fundamental nature of religion seems to be distant from the provision.[388]

Religion, for many, is part of their identity and a human being navigating various identities within themselves enters into an intersectional space of gender, race, caste, sex, sexuality, ideologies and beliefs. These aspects could be mutually exclusive at times. The demand for balancing these aspects could be difficult. Merely stating that religion and gender can coexist does not offer a solution to the issue of gender injustice perpetrated by religious institutions. The solution, in a democratic polity is expected from the institutions of State.

Judiciary in deciding matters sometimes take up an originalistic approach finding out the intent of Constitution and also a transformative approach. Religious studies and the existence of religion as such is rooted in the interpretation of its tenets and doctrines. These interpretations decide the gender roles and social obligations in society.

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[387] RONOJOY SEN, LEGALIZING RELIGION: THE INDIAN SUPREME COURT AND SECULARISM, 2007.

[388] See Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC

Demands for reformation within a religion were always prominent. Religious communities adopting women priests and queer affirming spaces are examples of this. Two years ago, the Bishop of Iceland apologised to the gay and lesbian community on behalf of country's National Church for its wrongdoings.[389] This kind of reformation is necessary for survival of religion as well as for social change. But it is not constitutionally advisable that a person must wait for a religion to reform to enjoy one's constitutional rights.

Court in *Tandava* case[390] followed the logic that a practice must be in existence from the beginning of religion. This position taken by Court in a way limits the possibility of reformation within religion. Scholars have stated that using the doctrine, the Court constructs tradition and religious identity that become frozen and fossilized.[391]

Whether the judiciary, in dealing with constitutional issues intertwined with matters of religion should get into an interpretation of religion, is the relevant question. Justice Gajendragadkar has made significant contributions to judicial interpretation in matters of religion. In *Dargah Committee* case[392] he has added an extra element of separating superstitions from religion to the Essential Practices doctrine. There were similar approaches focused on the reformation of religion and efforts were also made to establish that religion in its truest interpretation does not perpetuate discrimination.[393]

Comparing this stance with the position taken in *Sabarimala* verdict[394] would be wrong. The focus in Sabarimala was not reformation of religion or religious beliefs. The focus was ensuring the constitutional rights of women. One might curiously imagine how Justice Gajendragadkar would tackle the Sabarimala issue in this era of judicial interpretation.

From a passive interpretation that the Constitution does not protect a practice because it does not form an essential element of religion to identifying a religious practice as discriminatory and not offering constitutional protection is more of an enlightened judicial position. It is my humble suggestion that Court should not take the extra burden of reforming religion, but it must never be ignorant towards the rights guaranteed by the Constitution.

[389] Jelena Ćirić, *Bishop of Iceland Apologises to Gay and Lesbian Community*, Society, x News, (Oct. 30, 2019), https://www.icelandreview.com/news/bishop-of-iceland-apologises-to-gay-and-lesbian-community/

[390] Commissioner of Police v. Acharya J Avadhutha, Civ. App. No.6230 of 1990.

[391] Ratna Kapur, gender and "faith" in law: equality, secularism, and, the rise of the hindu nation, Journal of Law and Religion 35 (3), 407-431, 2020.

[392] Durgah Committee v. Hussain Ali, 1961 AIR 1402.

[393] Sri Venkatarama Devaru, (1958) SCR 895 & Shastri Yagnapurushdasji, (1966) 3 SCR 242

[394] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.

Another related aspect would be the public use of reason suggested by John Rawls.[395] He suggested that rational and universally acceptable reasons must be used in public sphere.[396] What would that mean in a system of constitutional governance? The arguments or reasoning based on a private reason, like religious belief is not ensuring justice in a society.

CONSTITUTIONAL MORALITY AS GUIDING LIGHT

Even after considering the Essential Practice Doctrine, which didn't support the exclusion according to the majority in *Sabarimala* decision, Justice Chandrachud tested the matter on constitutional morality as it dealt with the dignity of woman. Justice Chandrachud considering the role of Court state that "The assumption by the Court of the authority to determine whether a practice is or is not essential to religion has led to our jurisprudence bypassing what should in fact be the central issue for debate. That issue is whether the Constitution ascribes to religion and to religious denominations the authority to enforce practices which exclude a group of citizens."[397]

The judicial decision-making must align with the secularism that India follows at the same time the discriminatory practise should not be protected in the name of claims of pluralism.[398] Also it is necessary to fully realise gender equality beyond the veils of selective demand for equality for women of minority religion with women belonging to other beliefs.[399] Constitutional morality is a sufficient tool to balance this. Judges in various cases has stated that constitutional morality ensures pluralism but the majority position in Sabarimala also specified that it cannot perpetuate discrimination. So in constitutional matters when both constitutional morality and Essential Practices are used the former dilutes the latter. Even if a practice is essential or not it must be subjected to constitutional morality.[400]

Constitutional morality is the right tool to balance the claims of religion and other fundamental rights. Interpretation based on the concept would not demand the Court to acquire a theological authority, nor to set aside a practice based on its essentiality. If the

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[395] JOHN RAWLS, POLITICAL LIBERALISM. COLUMBIA UNIVERSITY PRESS, 2005.
[396] See *Id.*
[397] Indian Young Lawyers Association v. State of Kerala, 2018 SCC OnLine SC.
[398] *See*, Archana Parashar, *Gender inequality and religious personal laws in India*, 2 THE BROWN JOURNAL OF WORLD AFFAIRS 14, 103-112, (2008).
[399] *See*, Ratna Kapur, *gender and "faith" in law: equality, secularism, and, the rise of the hindu nation*, JOURNAL OF LAW AND RELIGION 35 (3), 407-431, 2020
[400] Pratap Banu Mehta, *On triple talaq, court must say: Religious practice cannot trump modern constitutional morality*, (May 18, 2017), https://indianexpress.com/article/opinion/columns/no-dark-spaces-triple-talaq-hearing-4661236/

practice is not violative of constitutional morality there is no need to limit the freedom of religion.

The progressive result of these judgments has invited more discussions on gender equality and constitutional rights but the reasoning of these decisions showed the constitutional issues. The reasoning of a constitutional Court is important as its result. In a Country like India judicial reasoning sets the tone for growth of jurisprudence and constitutional morality is a promising concept to ensure constitutional governance.

Using constitutional morality Court has been successful in dissecting the issues in constitutional light and it does not bring with itself the weight of satisfying the social or popular morality, in fact constitutional morality protects the rights of even a minuscule section.[401] Examining the case laws, it is clear that constitutional morality dilutes Essential Practices Doctrine. It is my humble suggestion to give prominence to constitutional morality over Essential Practices Doctrine.

Essential Religious practice as well as the contours of constitutional morality will now be considered by a nine judge Constitutional Bench. Scholars have questioned the review that it is not a round 2 of a decision and review must follow the checks and balances of legal system.[402] In a review Court considers whether the reasoning that led to the decision was fundamentally flawed, that it is present on the face of the record that it simply cannot stand.

The constitution of a nine judge bench is also critically viewed. Sabarimala Did not deliver any findings on essential practices and even if it did the right move would be to convene a seven judge bench and to check the conflicts in Shirur mutt and Dargah Committee case and if Court find that decision in Shirur mutt is wrong, then the question can be referred to nine judge bench.[403]

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[401]Navtej Singh Johar v. union of India, (2018) 10 SCC 1.
[402] Gautam Bhatia, *The Afterlife of the Sabarimala Review: On the "Preliminary Question" before the Nine-Judge Bench*, (Feb.5, 2020) https://indconlawphil.wordpress.com/2020/02/05/the-afterlife-of-the-sabarimala-review-on-the-preliminary-question-before-the-nine-judge-bench/
[403] Gautam Bhatia, *The curious continuing After life of Sabarimala "Review"*, (Jan. 14, 2020) https://indconlawphil.wordpress.com/2020/01/14/the-curious-continuing-afterlife-of-the-sabarimala-review/

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APPENDIX

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