COMPARATIVE CONSTITUTIONAL AND ADMINISTRATIVE LAW QUARTERLY

CONTENTS

FOREWORD

It is with immense gratitude and pleasure that we bring to you the first edition of Volume 3 of the Comparative Constitutional Law and Administrative Law Quarterly (CALQ). Our endeavour to strive to be a platform for discussing issues of importance in the field of Constitutional Law and Administrative Law continues with this edition, which is a compilation of pieces critiquing decisions by courts in India.

The first piece titled *Matters of Morality* is a take on the application of the doctrine of 'constitutional morality', particularly in the Naz Foundation case, while discussing its contours in constitutional philosophy at large. The article discusses the proposed application of this theory in the Sabrimala case pending before the Supreme Court of India, which could prove to an overhaul of women's access rights to temples hitherto defined by religious tenets.

The second case note titled *Sowing the Seeds of Doubt in the Fundamental Right to Privacy* is an analysis of the decision emanating from the application filed by Justice Puttaswamy challenging the constitutional validity of the AADHAR scheme of the government. The matter was referred to a larger bench for want of clarity on the right to privacy under the Constitution. The author however argues that the reference to a larger bench was erroneous on the premise that there already exists a clearly defined right to privacy in the country, as discussed in the piece, and the reference has only muddled a settled position.

The third piece is an analysis of the case of Devidas Ramachandra Tuljapurkar v. State of Maharashtra, a judgment that materially altered the law of obscenity in India. The note delves into the contours of the ground of “decency and morality” as a restriction on free speech. It traces the development of the law on obscenity in the United States from the rigid Hicklin test to the much more holistic Miller test and speculates as to how the judgment in Tuljapurkar would be affected had it been filed in the United States. The note attempts to bring out the ambiguities in the restriction on free speech on the ground of obscenity and explores the extent to which the law on obscenity in India has been or is capable of being liberalized as much as it has been in the United States.

At this juncture, it is crucial to thank the Board for their efforts in shaping this issue. We also express our gratitude to the support and guidance extended by our Chief Patron Prof. Poonam Saxena and our Director, Prof. I. P. Massey. We hope to continue the process of engaging and publishing ideas and opinion on the various facets of Constitutional and Administrative Law.

Editors-in-Chief

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MATTERS OF MORALITY

- VIKRAM ADITYA NARAYAN*

ABSTRACT

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

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Introduction

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

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

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

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

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

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

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

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

[4] *Id.*

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

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

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

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

[7] *Id*.

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

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

I. *Naz Foundation*

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

1. Arguments challenging the constitutionality of Section 377

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

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

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

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

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

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

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

[15] *Id.* ¶ 8.

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

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

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

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

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

[16] *Id.* ¶ 9.

[17] *Id.* ¶ 20.

[18] *Id.* ¶ 11.

[19] *Id.* ¶ *13.*

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

3. Findings on Morality

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

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

[20] *Id.*

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

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

[23] 539 US 558 (2003).

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

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

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

[27] *Id.*

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

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

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

II. *Leaving Dr. Ambedkar Behind*

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

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

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

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

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

[32] *Id* at ¶ 130.

[33] *Id* at ¶ 79.

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

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

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

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

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

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

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

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

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

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

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

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

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

[39] *Supra* note 10, at ¶130.

[40] (2014) 9 SCC 1.

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

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

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

III. *Morality as the Morality of the Constitution*

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

[41] *Supra* note 10, at ¶ 74.

[42] *Supra* note 10, at ¶ 75.

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

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

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

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

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

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

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

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

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

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

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

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

2. The Morality of the Indian Constitution

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[66] *Id.* ¶ 101-103.

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

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

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

IV. *Exit Naz & Enter Sabarimala*

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

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[67] *Id.* ¶ 125.

[68] *Id.* ¶ 129.

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

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

1. *Naz Foundation*: From Shield to Sword

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

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

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

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

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

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

[73] *Id*, at 103.

[74] *Supra*, note 10 ¶ 130.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[86] AIR 1993 Ker 42 (India).

[87] *Id.* at 26.

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

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

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

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

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

[91] *Supra* note 86, at ¶ 41.

[92] *Supra* note 86, at ¶ 44.

[93] *Supra* note 86, at ¶ 45.

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

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

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

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

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

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

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

[96] *Supra* note 2.

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

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

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

Conclusion

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

SOWING THE SEEDS OF DOUBT IN THE FUNDAMENTAL RIGHT TO PRIVACY

-ANUSHA RAMESH*

In 2012, a Writ Petition was filed on behalf of (Retd.) Justice K. S. Puttaswamy challenging the constitutional validity of the "*AADHAAR"* scheme of the Government, which provided for the creation of the 'Unique Identification Authority of India' ("**UIDAI**") through an Executive Order under the aegis of the Planning Commission.[1] Pursuant to the said Order, UIDAI, which was not even a statutory body, proceeded to collect personal data of residents of India including biometric information in order to generate a "Unique Identification Number". This Unique Identification Number came to be made a condition-precedent by governmental bodies for availment of essential services as well as withdrawal of salary. In the Petition, besides challenging the lack of any statutory authority backing the scheme, the heart of the Petitioner's contention rested in that the Scheme strikes at the root of various fundamental rights guaranteed under our Constitution including the right to privacy.[2]

A day into the commencement of the final arguments (in July, 2015) before a three-judge Bench, i.e. after more than three years since the filing of the Writ Petition, over fifteen hearings, and various interim Orders passed by different Benches, the Respondents, including the learned Attorney General appearing on behalf of the Union of India, interjected to submit that in view of the judgements rendered in ***M.P. Sharma v. Satish Chandra***[3] ("**M. P. Sharma**") and ***Kharak Singh v. State of U.P***.[4] ("**Kharak Singh**") (decided by eight and six judges respectively), the Petitioner could not claim the Right of Privacy to be a Fundamental Right guaranteed under the Constitution. It was further submitted that a catena of judgements

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[1] Gazette Notification (bearing No. A-43011/02/2009- Admn I) dated 28-01-2009 issued by Planning Commission, Government of India.

[2] K.S. Puttaswamy (Rtd.) v. Union of India & Ors., Writ Petition (C) 494 of 2012 (India). [hereinafter Puttaswamy 2012]

[3] A.I.R. 1954 S.C. 300 (India).

[4] A.I.R. 1963 S.C. 1295 (India).

that followed ***M. P. Sharma*** and ***Kharak Singh***, rendered by smaller benches of the Supreme Court referred to a fundamental right to privacy, which was jurisprudentially impermissible. In this light, the Respondents vehemently contended that important questions had arisen (such as whether the right to privacy exists under the Constitution, and if such a right existed, what would be the source and contours of such a right) which were required to be decided by a larger Bench of at least five judges in accordance with the mandate of Article 145(3) of the Constitution.

Thereafter, lengthy arguments were heard from both sides on whether a reference to a larger Bench was necessitated in view of the argument raised by the Respondents relating to the fundamental right of privacy. The three-judge Bench in ***K. S. Puttaswamy (Rtd.) v. Union of India & Ors*** ("***Puttaswamy***")[5] ultimately referred the matter to the Chief Justice of India to constitute a Bench of appropriate strength to examine the jurisprudential correctness of judgements upholding the fundamental right to privacy for the reason that there appeared to be an apparent unresolved conflict in the law as declared by the Supreme Court.

The basis of the reference to a larger Bench was erroneous for the reason that neither ***M. P. Sharma*** nor ***Kharak Singh*** are authorities that explicitly recognised/failed to recognise a fundamental right to privacy under our Constitution. The result of the reference therefore has been a jolt to the law that has been well settled for over thirty years. For the sake of argument, even if merit were to be found in the submission that substantial questions relating to the right to privacy had arisen on account of the conflict in law laid down by the Supreme Court, reference to a larger Bench under Article 145(3) was equally merited even if no such conflict existed since the determination of whether the AADHAAR scheme violates various fundamental rights itself involves the determination of "substantial of questions of law". However, the rational for the reference in ***Puttaswamy*** rested solely on the conflict that was found to be apparent on a literal reading of ***M. P. Sharma*** and ***Kharak Singh*** and subsequent cases recognising the right to privacy; consequent to which the Supreme Court has gratuitously allowed for uncertainty in the constitutional recognition of the right to privacy.

[5] K.S. Puttaswamy (Rtd.) v. Union of India & Ors., (2015) 8 S.C.C. 735 (India). [hereinafter Puttaswamy 2015]

Resolving the alleged inconsistency

The contention with regard to the doubtfulness of the existence of the Fundamental Right to Privacy, which weighted favourably with the three-judge Bench, is as follows - In ***M. P. Sharma***, a bench of eight judges had held that:

> *"17. ... A power of search and seizure is in any system of jurisprudence an overriding power of the State for the protection of social security and that power is necessarily regulated by law.* ***When the Constitution-makers have thought fit not to subject such regulation to constitutional limitations by recognition of a fundamental right to privacy, analogous to the American Fourth Amendment, we have no justification to import it, into a totally different fundamental right, by some process of strained construction****."*

Thereafter, in ***Kharak Singh***, a bench of six judges had held that:

> "*20. ... Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by the learned counsel for the petitioner.* ***As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III***."

Based on the above paragraphs the contention was that it was settled law that no Fundamental Right to Privacy was guaranteed under our Constitution. However decisions of the Supreme Court, commencing with the judgment in ***Gobind v. State of M.P.***[6] ("***Gobind***") (three-judge bench) which formed the basis of subsequent judgments such as ***R. Rajagopal v. State of T.N.***[7] (three-judge bench) and ***People's Union for Civil Liberties v. Union of India***[8] (two-

[6] (1975) 2 S.C.C. 148 (India).

[7] (1994) 6 S.C.C. 632 (India).

judge bench) upheld the Fundamental Right of Privacy and were therefore in conflict with the law settled in ***M.P. Sharma*** and ***Kharak Singh*** (by Benches of larger strength).

There are two flagrant reasons why the above contention does not hold water, which have been overlooked in ***Puttaswamy***. *First*, ***M. P. Sharma*** and ***Kharak Singh*** are not authorities in support of an assertion that no Fundamental Right to Privacy emanates from our Constitution. In ***M. P. Sharma***, the question that was sought to be resolved was whether search and seizure ordered and carried out during criminal investigation amounted to a violation of fundamental rights of the Petitioners under Article 20(3) of the Constitution. The Court drew a comparison to ***Boyd v. United States***,[9] where the United States Supreme Court was confronted with a similar challenge. However, as noticed in ***M. P. Sharma***, the Fourth Amendment in the United States Constitution expressly provided a right against searches and seizures, which did not find place in the words employed in Article 20(3) of our Constitution.[10] It was *only* in this context that the decision of ***M. P. Sharma*** held that the right to privacy as guaranteed by the Fourth Amendment could not be imported into Article 20(3) of our Constitution.[11] Therefore, the judgment in ***M. P. Sharma***, was confined to a specific aspect of 'privacy', in relation to Article 20(3) alone.

In ***Kharak Singh***, the question before the Court was whether "surveillance" under the U.P. Police Regulations involving domiciliary visits at night and periodical enquiries and reporting of movements constituted an infringement of Article 21 or Article 19(1)(d) of the Constitution. Interestingly in ***Kharak Singh***, surveillance through domiciliary visits at night was held to be plainly violative of Article 21 of the Constitution. The Court held that even though our Constitution did not confer any guarantees in terms of the Fourth Amendment of the US Constitution, "*an unauthorized intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man, an ultimate essential of ordered liberty if not of the very concept of civilization*."[12] Further, it was held

[8] (1997) 1 S.C.C. 301 (India).

[9] (1886) 6 S.Ct. 524.

[10] M.P. Sharma v. Satish Chandra**,** A.I.R 1954 S.C 300 (India).

[11] *Id*. ¶ 17.

[12] Kharak Singh v. State of U.P, A.I.R. 1963 S.C. 1295 (India).

that though our Constitution did not recognise the right to privacy expressly, it constituted an essential ingredient of personal liberty.[13] It was *only* in the context of regulations relating to the ascertainment of the movement of an individual, and *only* in such manner of invasion of privacy that it was held that there was no infringement of any rights guaranteed under Part III of the Constitution.[14] ***Kharak Singh***, in fact, impliedly recognised the Fundamental Right to Privacy under Article 21 in the context of domiciliary visits in the conduct of surveillance.

Even the later decisions of ***PUCL*** and ***Rajagopal*** that relied on ***Kharak Singh*** only highlighted the implied recognition of the right to privacy under Article 21 in cases of surveillance activities relating to domiciliary visits as evidenced from a bare reading of the judgment in ***Kharak Singh***.[15] For instance in ***PUCL***, Kuldip Singh J. opined that the majority in ***Kharak Singh*** read "right to privacy" as part of the right to life under Article 21 of the Constitution based upon the following reasoning:

> "…***It is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal****? **It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to 'assure the dignity of the individual' and therefore of those cherished human values as the means of ensuring his full development and evolution.*** *We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as 'personal liberty' having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories.*
>
> …

[13] *Id.* ¶ 29 (as per SubbaRao J.).

[14] *Id.* ¶ 17.

[15] People's Union for Civil Liberties v. Union of India, (1997) 1 S.C.C. 301 (India)*;* R. Rajagopal v. State of T.N, (1994) 6 S.C.C. 632 (India).

> ***It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of 'personal liberty' which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.*** *In our view clause (b) of Regulation 236 is plainly violative of Article 21 and as there is no 'law' on which the same could be justified it must be struck down as unconstitutional.*"

Even a plain reading of the rational for striking down Clause (b) of Regulation 236 which permitted domiciliary visits at night by the police authorities in ***Kharak Singh*** indubitably evidences that the right that was being protected was one's right to lead a private life.

The *second* reason hinges on the fact that both ***M. P. Sharma*** and ***Kharak Singh*** were decided prior to the decisions rendered in ***R. C. Cooper v. Union of India***[16] ("***R. C. Cooper***") and ***Maneka Gandhi v. Union of India***[17] ***("Maneka Gandhi")***. Both ***M. P. Sharma*** and ***Kharak Singh*** followed the law laid down in ***A.K. Gopalan v. The State of Madras***,[18] ("***Gopalan***") wherein it was held that the expression "*procedure established by law*" under Article 21 of the Constitution meant only procedure as laid down in *an enacted law*. More pertinently, ***Gopalan***, which held the field authoritatively till 1970 held that that Article 19, Article 21 and Article 22 were exclusive freedoms and one could not overlap the other's ambit. It was in this light that ***Kharak Singh*** proceeded on the footing that "*while Article 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Article 21 takes in and comprises the* ***residue***."[19] Therefore, once it was ascertained that the "right to move freely" fell within the realm of Article 19(1)(d) of the Constitution, no aspect of any such right under Article 21 could fall for consideration.

However, the law laid down in ***Gopalan*** was overruled in 1978 in ***Maneka Gandhi*** by relying on ***R.C. Cooper***, following which the scope of interpretation of Article 21 of the Constitution was broadened. It was held that the expression 'personal liberty' in Article 21

[16] R. C. Cooper v. Union of India, (1970) 1 S.C.C. 248 (India).

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

[18] A.K. Gopalan v. The State of Madras, A.I.R. 1950 S.C. 27 (India).

[19] Kharak Singh, *Supra* note 4, ¶ 11, 13.

was of the widest amplitude covering a variety of rights which constitute the personal liberty of man including those rights which distinctly find a place under Article 19 of the Constitution.[20] Therefore, the interpretation of Fundamental Rights as laid down in ***Gopalan***, which was followed in ***M. P. Sharma*** and ***Kharak Singh***, was no longer good law, when the judgment in ***Gobind*** and other decisions that followed subsequently were delivered.

There was a sea change in the very foundation upon which the interpretation of various Articles of the Constitution rested in decisions rendered post ***R.C. Cooper*** and ***Maneka Gandhi***.[21] It was in this light that in ***Gobind***, a bench of three judges placing reliance on ***Griswold v. Conneticut***,[22] gave recognition to the right of privacy, as being inherent in the totality of the very scheme of the Constitution. While a specific Article of the Constitution from which the Right to Privacy emanated was not pin pointed, it was held that:

> "*The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute*."[23]

Hence the judgment rendered in ***Gobind*** and subsequent cases that recognised the right to privacy under Part III of the Constitution were not conflicting with decisions rendered in ***M. P. Sharma*** or ***Kharak Singh*** in any manner. Hence, the rational of the three-judge in ***Puttaswamy***, finding that ***M. P. Sharma*** and ***Kharak Singh*** are in conflict with the decisions rendered in Gobind and other subsequent decisions which have contributed to the development of jurisprudence relating to the right to privacy is incorrect.[24]

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[20] 2 H.M.SEERVAI, CONSTITUTIONAL LAW OF INDIA (N.M.Tripathi Pvt Ltd, 4th ed.1967).

[21] *Id.*

[22] (1965) 381 U.S. 479.

[23] Gobind, *Supra* note 6, ¶ 28.

[24] Puttaswamy 2012, *Supra* note 2, ¶ 12.

Doctrine of Precedent

Upon reaching a finding that there appeared to be a "*certain amount of apparent unresolved contradiction of the law declared"* with respect to the Right to Privacy, the three-judge Bench in ***Puttaswamy*** held that:

> "*Therefore, in our opinion to give a quietus to the kind of controversy raised in this batch of cases once for all,* ***it is better that the ratio decidendi of M.P. Sharma [AIR 1954 SC 300 : 1954 Cri LJ 865] and Kharak Singh [AIR 1963 SC 1295 : (1963) 2 Cri LJ 329] is scrutinised and the jurisprudential correctness of the subsequent decisions of this Court where the right to privacy is either asserted or referred be examined and authoritatively decided by a Bench of appropriate strength.***"[25]

A reading of the judgment exposes uncertainty with regard to whether the reference to a larger Bench was made on the basis of the doctrine of *stare decisis* or under the mandate of Article 145(3) of the Constitution or both. In practice, the policy of the Courts, and the principle upon which rests the authority of judicial decisions as ***precedents*** in subsequent litigations, finds genesis in the latin maxim, ***stare decisis et non quieta movere*** - to abide by the precedents and not to 'disturb settled points'.[26]

The underlying trajectories that mainstay adopting this doctrine by Courts are principally two fold - *coherence* and *consistency.*[27] Allowing citizens to arrange their lives in accordance with the principles of law laid down by Courts necessitates maintenance of stability, predictability and certainty in the administration of justice.[28] On the horizontal level where the Supreme Court or High Courts sit over decisions in unequal bench strength, an additional dimension is added to the applicability of the doctrine of precedent by which Benches of

[25] Puttaswamy 2012, *Supra* note 2, ¶ 13.

[26] H.C.Black BLACK'S LAW DICTIONARY(MN: West Publishing Company rev. 1968).

[27] P.HAMBURGER, LAW AND JUDICIAL DUTY (2009).

[28] Chintan Chandrachud, *Precedential Value of Solitary High Court Rulings in India: Carving an Exception to the Principle of Vertical Stare Decisis*, LAWASIA J 25 (2011).

lower bench strength are bound by the decisions of the same Court rendered by a Bench of higher strength.

India is governed by a judicial system identified by a hierarchy of Courts where the doctrine of binding precedent is a cardinal feature of its jurisprudence, for it is in the declaration of law operating as a binding principle in future cases that lays their particular value in developing the jurisprudence of the law.[29] However, in identifying the limits to this doctrine, Pathak CJ. heading a Constitutional Bench of the Supreme Court in ***Union of India v. Raghubir Singh***[30] elucidated as under–

> *"**Legal compulsions cannot be limited by existing legal propositions, because there will always be, beyond the frontiers of the existing law, new areas inviting judicial scrutiny and judicial choice-making which could well affect the validity of existing legal dogma**. The search for solutions responsive to a changed social era involves a search not only among competing propositions of law, or competing versions of a legal proposition, or the modalities of an indeterminacy such as "fairness" or "reasonableness", but also among propositions from outside the ruling law, corresponding to the empirical knowledge or accepted values of present time and place, relevant to the dispensing of justice within the new parameters."*

In applying this doctrine, it is also required that judges be weary of the possible effects of their decisions in light of public policy considerations and in order to maintain stability and harmony of the law. [31] In ***Gujarat v. Mirzapur Moti Kureshi Kassab Jamat***, [32] a Constitutional Bench of the Supreme Court examined the doctrine in the light of Sir John Salmond's *Jurisprudence*[33]and held that broader underlying issues of policy deserve weighty consideration in judicial lawmaking, as follows:

[29] Union of India v. Raghubir Singh, (1989) 2 S.C.C. 754 (India).

[30] *Id.*

[31] Button v. Director of Public Prosecution, (1965) 3 All E.R. 587;

[32] Gujarat v. Mirzapur Moti Kureshi Kassab Jamat, (2005) 8 S.C.C. 534 (India).

[33]P J FITZGERALD, SALMOND ON JURISPRUDENCE, 187, (Universal Law Publishing Company, New Delhi 12th ed. 2012).

> *"…**a priori approach confines the law in a straitjacket instead of permitting it to expand to meet the new needs and requirements of changing society** (Salmond on Jurisprudence, 12th Edn., at p. 187). In such cases the courts should examine not only the existing laws and legal concepts, but also the broader underlying issues of policy. In fact, presently, judges are seen to be paying increasing attention to the possible effects of their decisions one way or the other. Such an approach is to be welcomed, but it also warrants two comments. First, judicial inquiry into the general effects of a proposed decision tends itself to be of a fairly speculative nature. Secondly, too much regard for policy and too little for legal consistency may result in a confusing and illogical complex of contrary decisions. In such a situation it would be difficult to identify and respond to generalized and determinable social needs. While it is true that "the life of the law has not been logic, it has been experience" and that we should not wish it otherwise, nevertheless we should remember that "no system of law can be workable if it has not got logic at the root of it". (Salmond, ibid., pp. 187-88)."*

Unequivocally, the doctrine of *stare decisis* envisages that a decision that has been followed for a long period of time, and has been acted upon by persons in the general conduct of their affairs or in legal procedure, will be generally followed by courts.[34] While it cannot be gainsaid that the rule of stare *decisis* is not so imperative or inflexible to preclude a departure therefrom in a situation where following a previous decision would result in grievous wrong to be caused,[35] that by itself does not denude the time tested doctrine of its efficacy.[36] The burden on Courts to follow the principle of *stare decisis* is strengthened further when a principle of law has been settled by a *series* of decisions leading to the evolution of a specific area of jurisprudence responsive to social change. The need for preserving the institutional legitimacy and 'adjudicative integrity'[37] of courts is bolstered by maintaining the perception

[34] A. L. Goodhart, *Precedent in English and Continental Law*, 50 L. Q. REV., 40, 57-58 (1934).

[35] Bengal Immunity Co. v. State of Bihar, A.I.R. 1955 S.C. 161 (India).

[36] Mishri Lal v. Dhirendra Nath, (1999) 4 S.C.C. 11 (India).

[37] D.E. EDLIN, *JUDGES AND UNJUST LAWS*: COMMON LAW CONSTITUTIONALISM AND THE FOUNDATIONS OF JUDICIAL REVIEW (University of Michigan Press 2008)

that decisions are made based on settled rules of law rather than the discretion of individual judges. The fundamental right to privacy has been recognised by the Supreme Court over thirty years since ***Gobind*** and by various High Courts in innumerable cases under its writ jurisdiction. Further, the Right to Privacy as an integral part of the right to life and liberty has been recognised internationally under various conventions and charters to which India is a signatory[38] and it is no longer *res integra* that Courts ought to interpret the Constitution harmoniously with international law or treaty obligations.[39] Moreover, the very preamble to our Constitution which has been recognised to be a part of its basic structure[40] has been held to impliedly recognize this most basic human right to privacy which is inherent in a sovereign democratic polity.[41]

That "*... institutional integrity and judicial discipline require that pronouncement made by larger Benches of this Court cannot be ignored by the smaller Benches without appropriately explaining the reasons for not following the pronouncements made by such larger Benches",* as held in ***Puttaswamy***, cannot be disagreed with. But by finding conflict in law laid down by the eight judge and six judge benches in ***M.P. Sharma*** and ***Kharak Singh***, and decisions rendered by the smaller Benches in ***Gobind*** and subsequent decisions such as ***PUCL*** and ***Rajagopal***, the result has manifested in unsettling law that has been settled and evolved over a long period of time. Bringing to doubt over thirty years of privacy jurisprudence which shielded against various attempts of curtail civil liberties is only antagonistic to the doctrine of *stare decisis*.

Reference to a Larger Bench

Though the reference in ***Puttaswamy*** has not expressly been made under Article 145(3) of the Constitution, it was observed that a reference to a larger Bench was necessitated for it to be "*authoritatively decided*" in the light of the "*far-reaching questions of importance involving*

[38] International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171; Universal Declaration of Human Rights, UNDoc A/810.

[39] Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 225 (India).

[40] S. R. Bommai v. Union of India, (1994) 3 S.C.C 1 (India).

[41] Kharak Singh, *Supra* Note 4, at ¶ 13.

interpretation of the Constitution" that the case raised.[42] The practice and procedure of reference to a larger Bench draws its roots from Articles 145(2) and 145(3) of the Constitution. While the former devolves power to the Supreme Court to make Rules for fixing the minimum number of judges who are to sit for any purpose, the latter mandates that the minimum number of judges who are to sit for the purpose of deciding any case involving a substantial question as to the interpretation of the Constitution or for hearing any reference under Article 143 is to be five. The legal position with regard to reference to larger Benches was settled by a constitutional Bench of the Supreme Court in ***Central Board of Dawoodi Bohra Community v. State of Maharashtra***[43] wherein it was held that-

> *"(1) The law laid down by this Court in a decision delivered by a Bench of larger strength is binding on any subsequent Bench of lesser or coequal strength.*
>
> *(2) A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is doubted."*

The exemption to the Rule and the only situation in which a Bench of lesser quorum may directly refer a matter to a Constitutional Bench is when Article 145(3) is attracted i.e. when the matter involves a 'substantial' question as to the interpretation of the Constitution.[44] The reference made in ***Puttaswamy*** was seemingly with the intention of following the mandate

[42] Puttaswamy 2015, *Supra* Note 5, at ¶ 12, 13.

[43] (2005) 2 S.C.C. 673 (India).

[44] Pradeep Chandra Parija v. Pramod Chandra Patnaik, (2002) 1 S.C.C. 1 (India).

under Article 145 (3). But the matter was not referred directly to a constitutional Bench and sent to the Chief Justice to constitute a Bench of "appropriate strength", adding to the uncertainty whether the reference was made under Article 145(3).

For the sake of argument, even if it were assumed that the reference was made under Article 145(3), it is pertinent to note that Article 145(3) binds a Court to make a reference to a Constitutional Bench *unless* the question ceases to be 'substantial'[45] and the law on the subject has already been finally and effectively decided by the Supreme Court.[46]

Conclusion

The subject matter in the Writ Petition in ***Puttaswamy*** challenging the validity of the *AADHAAR* Scheme most certainly warrants a reference to a Constitutional bench under Article 145(3), having involved substantial questions relating to the contours of various Rights guaranteed under Part III of our Constitution. But, for more than three years that the matter was pending before the Supreme Court, a reference to a larger Bench under Article 145(3) was eschewed; and the reference in ***Puttaswamy*** was made with regard to the very recognition of the fundamental right to privacy that has been long settled, and effectively protected by various judgments of the Supreme Court over more than thirty years. Therefore, it is a question which ceases to be 'substantial' and the law on the subject has been rightly and effectively followed over many years.

A preliminary issue relating to the right to privacy is now left to be determined before the merits behind the constitutional challenge to the AADHAAR Scheme can be examined. Until such determination is reached, the law of the land as of day is that there exists a certain degree of unresolved conflict in the law declared by the Supreme Court upholding the right to privacy as a fundamental right guaranteed under our Constitution. Though the matter has been left to the fate of a "*Bench of appropriate strength*" to be constituted by the Chief Justice, the seeds of doubt in the judicial recognition of a right that is intrinsic in the totality of the scheme of our Constitution has been sown by the three Learned Judges in ***Puttaswamy***.

[45] State of Jammu & Kashmir v. Thakur Ganga Singh, A.I.R. 1960 S.C. 356 (India).

[46] BhagwanSwarupLalMishan v. State of Maharashtra, A.I.R. 1965 S.C. 682 (India).

THE CASE OF DEVIDAS RAMACHANDRA TULJAPURKAR V. STATE OF MAHARASHTRA: A NEW CHAPTER IN LAW ON OBSCENITY IN INDIA

-ADITYA SOOD*

"The relation between reality and relativity must haunt the Court's evaluation of obscenity, expressed in society's pervasive humanity, not law's penal prescriptions"

- Krishna Iyer, J.[1]

Freedom of speech and expression is a quintessential right in any democratic system to ensure free flow of thoughts and ideas. The "reasonable restrictions" allowed on this right by the Constitution have been put under the gavel myriad time over the past few decades. One of these reasonable restrictions is "decency or morality" which prohibits publication of obscene speech. It is a cardinal principle of Constitutional law that speech should not be restricted due to the reason of it being offensive. However, offensive speech or expression that trespass the reasonable restrictions under Article 19, has no constitutional protection. This gives rise to obscenity as an exception to freedom of speech, as obscene material is considered extremely offensive to the community standards of the society and hence enters the domain of the "decency or morality" exception mentioned in Article 19(1). There is a fine line differentiating offensive and obscene material. The decision of the Supreme Court in Devidas Ramachandra case, further blurs this line by including speech mocking "historically respected personalities" as obscene. This case note discusses the flaws in the reasoning of the Apex Court in this case.

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[1]Raj Kapoor and Ors. v. State and Ors, (1980) 1 SCC 43.

Introduction

In India, freedom of speech and expression is guaranteed under Article 19(1)(a) of the Constitution.[2] This right is subject to the riders provided under Article 19(2) which states that, the State can restrict the right provided under sub-clause (a) of clause (1) by imposing any reasonable restriction on the speech in light of *"the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence"* [3]

For the purpose of this case note, the ground of "decency or morality" is relevant. The basis for this exception is to control proliferation of indecent or morally degrading material, as the right to freedom of speech was not intended to protect such material.[4] However, the question that arises is, who sets the standard for indecency or immorality in the society? Is it the average man who may be exposed to the work or a child who may accidently stumble upon it? As highlighted by the opening lines of this note which quote J. Krishna Iyer, the problem of ascertaining the standard for decency and morality has been troubling courts for a long time.[5]

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[2]INDIAN CONSTITUTION, Art. 19(1)(a), "(1) All citizens shall have the right to: (a) freedom of speech and expression" *See* Bennett Coleman v. Union of India, AIR 1973 SC 106;.H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA, 711 (Universal Law Publishing Company, 4th ed. 1991).

[3]INDIAN CONSTITUTION, Art. 19(2), "(2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence" *See* V.N. SHUKLA, CONSTITUTION OF INDIA, 124 (M. P. Singh ed., 11th ed. 2008); *See also* Ajmer State through Police, Ajmer v. Ratanlal Udailal, AIR 1956 Ajmer 52, 'words decency or morality are not well understood. There may be wide difference of opinion as to the precise meaning of these definitions and if the Legislature intended to impose any restrictions on the freedom of speech and expression in the interest of decency and morality those prohibited acts and restrictions should be clearly specified so that it could be decided whether these restrictions are reasonable or not".

[4]*See* M. Hidayatullah, *Thoughts on Obscenity,* 2 S. ILL. U. L. J. 283, 283(1977); Analisa Ciracusa, *Obscenity*, 6 GEO. J. GENDER & L. 347, 348 (2005).

[5]*See* William B Lockhart & Rober C McClure, *Obscenity in Courts*, 20 L. & CONTEMP. PROBS, 587, 587 (1955) ("The statutory law of obscene literature is peculiar. Though obscenity is one of the most elusive and difficult concepts known to the law, legislative bodies have seldom made any effort to provide a workable definition of the term… In consequence, courts confronted with the concrete cases for decision are left to work out for themselves their own meaning for obscenity, with little or no guidance from the legislature. They have no choice but to do the best they can with an extremely difficult and complex subject").

In India, the law of obscenity is governed by Section 292 of the Indian Penal Code, 1860 ('IPC') which imposes criminal sanctions for the distribution, sale etc. of obscene materials.[6] This section was added by the Obscene Publications Act, 1925 to give effect to Article 1 of the International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, 1923, to which India is also a signatory. However, even the IPC does not define "decency" or "morality" and hence the burden comes to the courts to determine the standards for obscenity.[7] The extent of success of the courts while doing so is a matter of study and will be discussed in later parts of this note.

Recently, in the case of *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*[8] ('Devidas'), the Supreme Court held that any speech that is offensive to "historically respected personalities" is obscene. In other words, any kind of satire or parody that mocks these personalities has been declared as obscene by the Apex Court. There are

[6]INDIAN PENAL CODE, 1860 § 292, "(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.
(2) Whoever—
(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or
(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or
(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or
(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or
(e) offers or attempts to do any act which is an offence under this section, shall be punished [on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees].
(Exception) —This section does not extend to—
(a) any book, pamphlet, paper, writing, drawing, painting, representation or figure— (i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting, representation or figure is in the interest of science, literature, art or learning or other objects of general concern, or (ii) which is kept or used bona fide for religious purposes;
(b) any representation sculptured, engraved, painted or otherwise represented on or in— (i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or (ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose".

[7]P.S.A. PILLAI, CRIMINAL LAW, 701, 703 (K.I. Vibhute ed., 2009).

[8](2015) 6 SCC 1.

serious ramifications of this holding on the freedom of speech in India. This case note is divided into the following parts - Part I puts forward the facts of this case and the issues that arose before the Apex Court. Part II discusses the manner in which political satire has been treated in the United States and how *Devidas* would have been treated in the U.S. Supreme Court.[9] Part III analyses the law on obscenity in the United States. Part IV lays down the development of law on obscenity in India and analyses the flaws in the decision of the Supreme Court in *Devidas*. The note ends with the concluding remarks in Part V.

I. Facts and Issues

The case arose pursuant to a complaint filed by V.V. Anaskar, a resident of Pune and a member of 'Patit Pawan Sangthan' (a Pune based right wing Hindu organization),[10] with the Commissioner of Police, regarding the publication of the poem titled "Gandhi Mala Bhetala" ('I Met Gandhi') written by Vasant Dattatraya Gujar. In the poem, Gujar talks about his imaginary encounters with Gandhi at various places including the Kremlin, churches, mosques and even a red-light area in Mumbai.[11] The poem at various points portrays Gandhi as hurling abuses and performing untoward activities.[12] According to the author, the point of such expression was to present a satirical critique of the people who claim to follow Gandhi's principles.[13]

It was published in 1994 and was meant for private circulation[14] amongst the members of the All India Bank Association Union. An FIR was registered against him, for writing the poem

[9]**Express Newspapers (Private) Ltd. v. Union of India**, A.I.R. 1958 S.C. 578, Justice Bhagwati stated, "[that] the fundamental right to the freedom of speech and expression enshrined in our constitution is based on (the provisions in) Amendment I of the Constitution of the United States and it would be therefore legitimate and proper to refer to those decisions of the Supreme Court of the United States of America in order to appreciate the true nature, scope and extent of this right in spite of the warning administered by this court against use of American and other cases."

[10]Devidas, ¶ 7; *See* Nitin Sethi, *Of Gandhi and the limits of Poetic license,* BUSINESS STANDARD, May 8, 2015, available at http://www.business-standard.com/article/beyond-business/of-gandhi-and-the-limits-of-poetic-licence-115050800008_1.html (last visited on June 11, 2016).

[11]Alka Dhupkar, *My poem talks about how we have destroyed Gandhi's values,* MUMBAI MIRROR, May 16, 2015, available at, http://www.mumbaimirror.com/mumbai/cover-story/My-poem-talks-about-how-we-have-destroyed-Gandhis-values/articleshow/47304204.cms (last accessed on April 15, 2016).

[12]Rushikesh Aravkar, *Translation of Vasant Dattatreya Gurjar's poem Gandhi Mala Bhetla (Gandhi Met Me)*, KRACTIVISM, available at http://www.kractivist.org/translation-of-vasant-dattatreya-gurjars-poem-gandhi-mala-bhetla-gandhi-met-me/ (last visited on June 11, 2016)..

[13]*Supra* note 12..

[14]Devidas, ¶ 7.

and a charge sheet was filed for offences under Sections 153-A, 153-B and 292 read with Section 34 of the IPC.[15] The Chief Judicial Magistrate, Latur, held that no case was maintainable under Sections 153-A and 153-B and discharged the accused of the said offences. However, the learned Magistrate did not do so for the charges under Section 292 of the IPC. A revision petition was filed, but the Additional Sessions Judge did not interfere with the aforesaid order. The accused sought to invoke the jurisdiction of the Bombay High Court under Section 482 of the Criminal Procedure Code ('CrPC'),[16] but the Aurangabad bench of the Bombay High Court, dismissed the application. The said decision became the subject matter of a special leave at the instance of the publisher.

The main issue before the Apex Court was, "*whether in a write-up or a poem, keeping in view the concept and conception of poetic license and the liberty of perception and expression, use of the name of a historically respected personality by way of allusion or symbol is permissible*".[17] In its final holding the Supreme Court refused to interfere with the original charge and sent the case back to trial. However, the Court subjected the poetic license to a vague test that any speech should not mock any "historically respected personality". This test indirectly bans political satire, which is one of the most effective tools to critique public officials in the mass media.

The next section discusses how political satire has been treated in the U.S. and whether political satire constitutes obscenity in the American context.

II. Political Satire and the Law on Obscenity in the USA

A. Political Satire

The First Amendment in the U.S. gives the right to freedom of speech[18] and the right to criticize public officials and popular personalities.[19] In 1964, in the *New York Times v.*

[15] INDIAN PENAL CODE, 1860§ 153-A,, "Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony"; and § 153-B, "Imputations, assertions prejudicial to national-integration".

[16] CRIMINAL PROCEDURE CODE, 1973 § 482, "Saving of inherent power of High Court: Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice".

[17] *Supra* note 9.

[18] U.S. CONST., Amendment I, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances".

Sullivan[20] case, the U.S. Supreme Court raised the standard for defamation suits filed by public officers by stating that the plaintiff must prove "actual malice" against the defendant.[21] Similarly in the case of *Gertz v. Robert Welch,*[22] the Court held that the protection granted by the First Amendment to defamatory statements should be the strongest when the plaintiff is a public figure.[23] Hence, the U.S. gives full freedom of speech to voice one's thoughts against "public figures".

One of the most common tools used to criticize such public personalities is satire, which makes use of several devices like parodies, mockery, hyperbole, irony, wit or sarcasm to achieve its purpose.[24] Political satire is a device used to expose popular personalities and their misdeeds through exploitation of physical or mental traits or politically embarrassing events.[25] As put by Rosenheim, "satire is not only an attack; it is an attack upon discernable, historically authentic particulars".[26] Rosenheim further states that all satire involves certain departure from literal truth and dependence on satirical truth which is entitled to protection under the First Amendment.[27]

The U.S. has had a history where satire and parody has been protected under the right to freedom of speech under the First Amendment. In the decision of *Hustler Magazine, Inc v. Falwell*[28]('Hustler'), the U.S. Supreme Court held that satire is a form of an opinion rather

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[19]New York Times v. Sullivan, 376 U.S. 254 (1964).

[20]*Id.*

[21]*See* Jonathan Deem, *Freedom of the Press box: Classifying high school athletes under the Gertz public figure doctrine,* 108 W. VA. L. REV. 799, 803 (2005-2006); Alan Kaminsky, *Defamation Law: Once a public figure always a public figure?,* 10 HOFSTRA L. REV., 803, 804 (1981-1982).

[22]418 U.S. 323 (1974).

[23]Gertz v. Robert Welch, 418 U.S. 323 (1974).

[24]COMPLETE AND UNABRIDGED WEBSTER DICTIONARY, 3762 (1963).

[25]M.H. ABRAMS, A GLOSSARY OF LITERARY TERMS 166 (5th ed. 1988). *See* Lauren Gilbert, *Mocking George: Political Satire as "True Threat" in the Age of Global* Terrorism, 58 U. MIAMI L. REV. 843,860 (2003-2004).

[26]EDWARD ROSENHEIM, SWIFT AND THE SATIRIST'S ART 25 (1963).

[27]*Id.*.

[28]485 U.S. 46 (1988).

than a statement of fact and hence cannot constitute defamation.[29] The Court held that right to criticize public men is one of the cornerstones of American citizenship.[30]

Hustler involved an advertisement was published in form of a parody where Rev. Jerry Falwell was describing his "first time" to his mother in a drunken state.[31] An action for libel, infliction of emotional distress and invasion of privacy was brought against the maker of the advertisement. The U.S. Supreme Court dismissed the action by stating that the First Amendment protected such speech against public officials and political cartoons are often meant to injure the feelings of the subject of the cartoon.[32]

In the case of *Watts v. United States*[33] the U.S. Supreme Court dropped the criminal charges against Watts, a young man who had been charged with threatening to kill the President. Watts did not want to join the army in the wake of the Vietnam War and apparently made a statement that, "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.".[34] The U.S. Supreme Court held that this was not a "true threat" but rather a political hyperbole made in the context of his opposition against the Vietnam War.[35]Thus, political satire has been safeguarded by the U.S. courts as an important aspect in shaping public opinion by ridiculing those who are in public limelight.

B. Law on Obscenity in the U.S.

In the latter half of the nineteenth century, courts in the United States started embracing the *Hicklin* definition of obscenity[36] while interpreting state laws on obscenity,[37] due to the

[29]*Id.*

[30]*Id.*

[31]*Id.*

[32]*Id.*

[33]394 U.S. 705 (1969).

[34]*Id.*

[35]Gilbert, *Supra* note 25.

[36]R v. Hicklin, (1868) 3 L.R.Q.B. 360.(This case laid down the infamous Hicklin test of obscenity as, "whether the tendency of the matter charged is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall"); *See* Tejus RK Motwani, *Obscenity as a restriction in India,* 2 INT'L JOUR. OF LEGAL STUDIES AND RESEARCH 160, 164 (Hicklin test has been criticized for being vague and too restrictive on the freedom of speech. This 1868 test had been the governing law on obscenity for decades but during the past few years, it has been substituted by more liberal tests all over the world).

absence of any definition in the Comstock Act enacted in 1873.[38] In the year 1913, in the case of *United States v. Kennerly,*[39] Justice Hand while applying the *Hicklin* test, criticized it as being a severely rigid test and suggested that instead of using the *Hicklin* test which aims at assessing the effect of obscene material on the most impressionable minds, it would be apt to shift the focus on the "average conscience of the time".[40]

The major shift from the *Hicklin* test occurred in the case of *United States v. One Book Called "Ulysses"*[41] where James Joyce's *Ulysses* was held on trial for being obscene. The trial judge observed that Joyce's *Ulysses* has what are "generally considered as dirty words" but these words are "known to almost all men".[42] The judge noted that the "dirty words" formed an essential part of the literary work and it was not "dirt for dirt's sake". The court, in a major departure from the *Hicklin* test, stated that obscenity should be ascertained according to "its effect on a person with average sex instincts" and subsequently held that the book in question was not obscene.

In 1957, in the case of *Roth v. United States,*[43] the United States Supreme Court endorsed the rejection of the *Hicklin* test by the lower courts. The Court stated that the new test to ascertain obscenity was:

> "*whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest*"[44]

Interestingly, no lower court had taken precisely the same view as taken in *Roth.* However, the Supreme Court holding built upon the earlier holdings of Justice Hand in *Kennerly* where

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[37]United States v. Smith, 45 F. 476, 477 (E.D. Wis, 1891), United States v. Clarke, 38 F. 732, 733 (E.D. Mo. 1889), Commonwealth v. Allison, 116 N.E. 265, 266 (Mass. 1917).

[38] Act of March 3, 1873, ch. 258, 17 Stat 598, amended by Act of July 12, 1876, ch. 186, 19 Stat. 90 (codified as amended in 18 U.S.C. § 1461 (2000)).

[39]209 F. 119 (S.D.N.Y. 1913).

[40]*Id.*

[41]5 F. Supp. 182 (S.D.N.Y. 1933).

[42]*Id.*

[43]354 U.S. 476 (1957).

[44]*Id.* at 489.

the learned judge had made reference to the "average conscience of the time" and the ruling in *Ulysses* which referred to the "person with average sex instincts". Even the "dominant theme of the material taken as a whole" requirement in *Roth* can be traced to Augustus Hand's opinion in *Ulysses* that the material must be "taken as a whole" in order to ascertain its "dominant effect". Hence, the "contemporary community standards" test laid down in *Roth* was a synthesis of various standards laid down by lower courts prior to 1957 as an alternative to the *Hicklin* test. *Roth* proved to be a watershed event in the liberalization of the test for obscenity. It marked a shift from the *Hicklin* test, which focused on the impact of select portions of a literary work on a sensitive reader, to the effect of the work as a whole on the average reader.

About ten years after the landmark ruling in *Roth,* the doctrine for testing obscenity was crystallized into three components in the case of *Memoirs of a Woman of Pleasure v. Massachussets.*[45] Justice Brennan writing for the majority laid down three elements of the test for obscenity as:

> *"(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value".*[46]

After the ruling in *Memoirs* the courts in the United States "reviewed and reversed summarily" the tests on obscenity without any further opinion.[47] Then finally in the case of *Miller v. California*[48] in 1973, Chief Justice Warren Burger laid down a new constitutional test for obscenity, which is the governing law in the United States even today, as:

> "*(a) whether the average person, applying contemporary community standards would find the work, taken as a whole, appeals to the prurient*

[45]383 U.S. 413 (1966).

[46]*Id.*

[47]EDWARD DE GRAZIA, GIRLS LEAN BACK EVERYWHERE: THE LAW OF OBSCENITY AND THE ASSAULT ON GENIUS, 515 (1992)

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[48]413 U.S. 15 (1973).

> *interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value*"[49]

The tests laid down in *Miller* evolved the tests laid down in *Memoirs* with a major difference being the substitution of "utterly without redeeming value" standard in *Memoirs* by the less liberal requirement of "lacking serious literary, artistic, political or scientific value" in *Miller*. This was done to make the *Memoirs* test stricter, as the court believed that every work has certain social value that can be ascribed to it.[50] *Memoirs* had held that a work can be obscene only if it is "utterly without redeeming social value"; *Miller* replaced it with not having a "serious" social value attached to it, hereby making the test stricter. On a closer scrutiny, the *Miller* tests also seemed to have shifted the emphasis of the "community standards test". In prong (b) of the *Memoirs* test, community standards are used to see whether the material is "patently offensive" in the description of sexual matters; however, in prong (a) of the *Miller* test, community standards are used to check whether the material if "taken as a whole" would appeal to the prurient interest. Substantively speaking there is no difference between the two, and this has been made clear by later decisions which have stated that both "appeal to prurient interests" and "patent offensiveness" are to be ascertained as per the community standards.[51]

The above cases show that the courts in the United States have gradually shifted from the rigid *Hicklin* test to the much more liberal *Miller* test, which uses contemporary community standards to ascertain obscenity.

C. What if Devidas was filed in the U.S.?

The main takeaway from the above discussion is that the courts in the United States treat political satire as part of the freedom of speech as is evident from the *Watts* case and the *Hustler* case. Hence, if a *Devidas* arises in the U.S., it is most likely that the charges against the author would have been dismissed. The question of the poem being declared obscene

[49] *Ibid.*

[50] Motwani, *Supra* note 35 at 166; *See* D.D. BASU, COMMENTARY ON THE CONSTITUTION OF INDIA, 2469 (Wadhwa and Company Law Publisher, 8th ed. Vol 2).

[51] Ashcroft v. ACLU, 535 U.S. 563, 576 n.7 (2002); Pope v. Illinois, 481 U.S. 497, 500 (1987).

does not even arise in the U.S. context since it would have clearly failed the second and the third elements of the *Miller* test even if it is assumed that it satisfies the first element of being against the "community standards" of the society.

The next Part discusses the way in which the Indian Supreme Court has developed its own tests of obscenity by misinterpreting the law in the U.S.

III. Development of Obscenity Jurisprudence in India

As stated earlier, there is no specific statute governing obscenity in India. The IPC under Section 292 criminalizes obscenity and provides for punishment for possession, sale, transfer or like of obscene material.[52] One of the earliest cases in India regarding this subject matter was the case of *Ranjit D. Udeshi v. State of Maharashtra*[53] where the accused was found in possession of uncensored copies of the book 'Lady Chatterley's Lover' by D.H. Lawrence. The Supreme Court was faced with the issue of constitutional validity of Section 292 of the IPC. While upholding the validity of the provision, the constitutional bench held that the *Hicklin* test holds good in the Indian context and the test for determining obscenity is to see whether the material would deprave the minds of the readers in whose hands it will fall.[54]

Gradually the test to judge allegedly obscene works was liberalized in India. In *K.A. Abbas v. Union of India*,[55] the Supreme Court stated that:

> *"Our standard must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. Therefore, it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors but how the theme is handled by the producer"*[56]

Hence, it is observed that the Supreme Court liberalized the test laid down in *Ranjit D. Udeshi* by stating that it is not the deprave mind that will determine the standard of obscenity; rather it would be the average reader who will ascertain it. The Court also

[52] *Supra* note 6, § 292 IPC.

[53] (1965) 1 SCR 65.

[54] *Id.*

[55] (1970) 2 SCC 780.

[56] *Id.*

emphasized on the intention of the producer of the work by stating that importance should be given on "how the theme is handled by the producer".

In 2006, the case of *DG Directorate General v. Anand Patwardhan*[57] came up before the Supreme Court. The case arose when the Censor Board had given an adult certificate to an award winning film and the national television channel Doordarshan issued a circular refusing to telecast any film with an adult certificate on the national television.[58] The matter was brought up before the Bombay High Court and a select committee of Doordarshan opined that the film had a secular message but at certain instances it had dialogues and speeches that might influence "negative passions".[59] The Bombay High Court held that the film should be telecast on the national television, and on appeal to the Supreme Court this decision was upheld. The Supreme Court was faced with two main questions – *first*, is obscene speech constitutionally protected in India and *second*, with regards to the exact scope of the definition of obscene speech. While answering the *first* question, the Apex Court stated that freedom of speech and expression in India is subject to reasonable restrictions. According to the Court, these reasonable restrictions apply to obscene speech as it is in the "societal interest" in preventing harm from the free flow of obscene material. The Supreme Court laid down the "societal interest test" that aimed to protect the interests of the society from the free flow of obscene material.[60]

With respect to the *second* question, the Court accepted the limitations of the *Hicklin* test for determining obscenity and analyzed the *Miller* tests laid down in the United States.[61] However, the Indian Supreme Court did not fully adopt the *Miller* test in the Indian jurisprudence. The Court borrowed the "taken as a whole" criteria and incorporated the "contemporary community standards" requirement into the "societal norms of decency" test.[62] According to the Court, this test had Constitutional backing in India as decency is one of the "reasonable restrictions" mentioned in Article 19(2). The Court applied this test to the

[57]AIR 2006 SC 3346.

[58]*Id.* at 3348.

[59]*Id.* at 3349.

[60]*Id* (This test can be said to be an Indian version of the community standard test).

[61]*Id.* at 3352.

[62]*Id.*

facts of the case and held that the film in question was dealing with gender issues and religious violence, hence there was no case for obscenity.[63]

The ruling laid down in *Anand Patwardhan*, was expanded in the 2006 case of *Ajay Goswami v. Union of India.*[64] In this case, the issue before the Supreme Court was protection of minors against materials of sexual nature in newspapers.[65] The Court reiterated the need to balance the harm arising out of free availability of obscene material and the right to freedom of speech and expression.[66] While affirming the ruling in *Anand Patwardhan,* the Court held that obscenity in the legal sense implies the expressions that offend the "prevalent sexual morality".[67] The Constitution, under Article 19, also provides for morality as a reasonable restriction to freedom of speech and expression. Hence, while *Anand Patwardhan* only talked about decency as the basis for restricting obscenity, *Ajay Goswami* further expanded the test for obscenity by including morality as a criterion for determining it.

In the 2014 case of *Aveek Sarkar v. State of West Bengal*[68]the Supreme Court was called upon to decide on the obscenity of a semi-nude image, of Boris Becker with Barbara Feltus, that featured in a magazine in 1993 with a caption that "love champions over hatred". The Court stated that the "contemporary moment of history" asked for a change in the interpretation of obscenity in the country and henceforth rejected the age old *Hicklin* test and replaced it with the "community standard test" as laid down in *Roth*.[69] While interpreting the image, the Court said that the determination of obscenity of the image has to be done in light of the accompanying caption and in this case, since the sportsmen posed nude for "battling racism",[70] it cannot be termed obscene. The Court therefore interpreted the image along with the text accompanying it.

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[63]*Id.* at 3348.

[64]AIR 2007 SC 493 (India).

[65]*Id.* at 494.

[66]*Id.* at 509.

[67]*Supra* note 69.

[68](2014) 4 SCC 257.

[69]Latika Vashist, *Law and the Obscene Image: Reading Aveek Sarkar v. State of West Bengal*, 5 J. INDIAN L. & SOC'Y, 248, 249 (2014).

[70]*Supra* note 73, ¶ 2.

It becomes evident from the above analysis that there are some similarities and differences between the law in the United States and in India with respect to the law on obscenity.

Indian law and United States law are similar in various aspects. Both the jurisdictions have now done away with the restrictive *Hicklin* test of obscenity and have adopted much more liberal tests. In both the countries, the speech in question has to be judged as a whole. This test was articulated in the United States and was acceded to by the Indian Supreme Court as well. The courts in both countries use community standards prevalent in the society to ascertain obscenity, however Indian courts have done a selective reading of the *Miller* test laid down in the United States by only incorporating the first prong (that is contemporary community standards) out of the three tests. The problems with this selective reading of the *Miller* test will be discussed in the next section.

IV. The Case of *Devidas*: A Critique

Robinson and Nicol state that, the material may "offend or entertain" and "corrupt or enlighten" depending on the tastes and preferences of the audience.[71] As Lockhart and McClure note, the social importance of the freedom for authors to write with "blunt realism" and portray their characters in "vulgar and shocking" language, when that is the most appropriate way to express the author's point, is far more than the petty harm that a "sensitive soul" might suffer from reading that work.[72] Feinberg aptly points out that catering to the needs of people, who have arbitrary prejudices and get offended by anything, is detrimental to the interests of the society.[73] Unfortunately, the Supreme Court in *Devidas* severely restricted freedom of speech by adopting community standards of an ultra-sensitive group in the society to analyze the offensiveness of the poem.

The Supreme Court begins with analyzing authorities, dealing with the law on obscenity, from the UK, the USA, and the European Court of Human Rights, in the beginning of the judgment.[74] Then, the Court starts discussing Indian cases which have shaped the law on obscenity in the country. The discussion starts with *Ranjit D. Udeshi* and carries on till *Aveek*

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[71]GEOFFREY ROBINSON & ANDREW NICOL, MEDIA LAW, 192 (5th ed. Sweet & Maxwell, 2007).

[72]*Supra* note 5, Lockhart & McClure, at 599.

[73]As cited in Aoife O'Reilly, *In defence of offence: Freedom of expression, offensive speech, and the approach of the European Court of Human Rights*, 19 TRINITY C. L. REV. 234, 240 (2016).

[74]*Supra* note 8.

Sarkar; however the learned judges just state facts and rulings of various cases, one after the other, without highlighting the common thread running through them and how the tests of obscenity have evolved in India.

The Court uses the "community standards test" as laid down in the *Aveek Sarkar* case to ascertain whether the poem in the present case was obscene or not. *Aveek Sarkar* had borrowed the "community standards test" from *Roth* in the United States; however, by applying the standard laid down in *Roth,* the Indian Supreme Court has adopted an ignorant reading of the law on obscenity in the United States, as the rule laid down in *Roth* has been expanded by later United States' Supreme Court decisions like *Memoirs* and *Miller*. These cases have added new elements to the test for obscenity.[75] The "community standards" test was one of the three elements of the *Miller* test. The Court in *Devidas* and *Aveek Sarkar* omits the two other elements namely, the work should depict sexual conduct in a patently offensive way and the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[76] Had the Court in *Devidas* applied the *Miller* test in its entirety, the poem would have certainly failed the second and the third elements, as it did not cater to sexual interests and had significant literary value.[77]

The poem in this case was a classic example of a satire on interpretation of Gandhi's principles. The satire used mockery[78] as a device to depict Gandhi hurling abuses and performing other untoward activities. The satire was on the hypocrisy of the people who claim to follow Gandhi's principles. The United States Supreme Court realized the limitations of an isolated application of the *Roth* test and thereby evolved the *Miller* test. Considering these shortcomings, the Courts in India should apply the *Miller* tests in their entirety.

[75]*Supra* note 48 and 52.

[76]*Supra* note 44.

[77]Anuradha Raman, *Sahitya Akademi to publish satirical poem on* Gandhi, THE HINDU, May 16, 2015 available at http://www.thehindu.com/news/national/sahitya-akademi-to-publish-satirical-poem-on-gandhi-jnanpith-winner/article7211162.ece (last accessed on April 16, 2016) (This poem was sought to be included in SahityaAcademi's collection on Gandhi collection of poems, which shows that the poem had immense literary value).

[78] MERRIAM-WEBSTER ONLINE DICTIONARY, (2004) available at http://www.merriam-webster.com/dictionary/mockery ("Mockery" means insulting or contemptuous action or speech).

The "community standards" test in isolation, as used by the Supreme Court, is a vague and a restrictive test.[79] As Boyce points out,

> "*Community standards cannot yield an intelligible rule that would predict and explain which materials are unacceptable. The most we can expect is an ad hoc determination in each case as to whether a majority of members of the community would consider a given item obscene. And because empirical evidence on this question is typically not introduced, it is almost inevitable that the fact finding judge or jurors will substitute their own views for those of the community*."[80]

Determination of community standards requires subjective analysis and it ultimately rests on what the judiciary perceives as the prevailing community standards.[81] The legitimacy of the judge in deciding this can be questionable and hence there is a need to adopt certain objective elements for the test. These objective elements can be incorporated from the second and the third elements in the *Miller* test which stipulate that the work should describe sexual conduct in a patently offensive way and should lack in serious artistic or literary value in order to be classified as obscene.

Ironically, the Supreme Court, in its decision in *Devidas*, gives the best example to highlight the problem of subjectivity and vagueness of the "community standards" test by including the speech that mocks "historically respected personalities" as obscene speech. The Supreme Court created a higher degree test by stating that,

> *"The judicially evolved test, that is, "contemporary community standards test" is a parameter for adjudging obscenity, and in that context, the words used or spoken by a historically respected personality is a medium of communication through a poem or write-up or other form of artistic work gets signification. That makes the test applicable in a greater degree"*[82]

[79]Bret Boyce, *Obscenity and Community Standards*, 33 YALE J. INT'L L., 299, 345 (2008).

[80]*Id.* at 351.

[81]*Id.*

[82]*Supra* note 9.

This test practically means that if a poet uses abusive language through an "ordinary" person then it would not be obscene. However, if the same expression is voiced using a "historically respected personality" as a medium, then it will be construed as obscene. What does the Court mean by making the "community standards test" applicable in a "greater degree" is not at all clear. The Court cites numerous judgments from its past where Gandhi's ideas have shaped judicial thought in India.[83] This discussion by the Apex Court however is extremely superficial. The Supreme Court's interpretation of Gandhi's ideas, can hardly be a ground to restrict the freedom of a poet to present a satire on Gandhi. In a way, instead of using the "community standards" test, the Supreme Court is relying on the "judicial standards" of the perception of Gandhi's principles. The foundation stone of freedom of speech is the right to express dissent.[84] If an author or a poet wants to convey his perception of Gandhi's ideas by mocking him, then he has the freedom to do so under the Constitution. As discussed earlier, satire and mockery are examples of expressions protected by freedom of speech.[85]

The problem with a separate test for obscene speech is accentuated by the fact that it is impossible to define who a "historically respected personality" is. In *Rosanova v. Playboy Enterprises*,[86] it was stated that "defining public figures is much like trying to nail a jellyfish to the wall." There can be no criteria to categorize people as "historically respectable". For a tribal community, their ancestors may be historically respectable, for monks the Dalai Lama may be historically respectable and for the bench in *Devidas*, Mahatma Gandhi was historically respectable. There can never be a uniform test to solve this issue, due to the varying perceptions of what "historically respectable" means.

During the course of the development of Indian law on obscenity, it was observed that the Courts gradually liberalized the tests for obscenity with the *Ranjit Udeshi* standard being substituted with the "community standard test" in *Aveek Sarkar* in 2014. However, the decision in *Devidas* has been a step backwards in the liberalization of the obscenity standard. The Court in *Devidas* ignorantly places a satire by a poet under the head of obscene speech. As was evident from the U.S. experience, such speech is necessary for the formation of

[83]*Supra* note 9 (Supreme Court referred to several cases including K. Karunakaran v. T.V. Eachara Warrier, (1978) 1 SCC 18; Bangalore Water Supply & Sewerage Board v. A. Rajappa, (1978) 2 SCC 213 etc).

[84]SEERVAI, *Supra* note 2.

[85] Gilbert, *Supra* note 26.

[86]411 F. Supp. 440, 443 (S.D. Ga. 1976).

public opinion on important national issues. This judgment certainly curtails the evolution of freedom of speech in India.

V. Conclusion

It was observed that the United States Supreme Court has evolved from the *Roth* test of contemporary community standards to judge obscenity to a more comprehensive and less subjective *Miller* test. The Supreme Court in India has however, still followed the *Roth* doctrine of community standards, which is a very subjective and vague test. In Indian context this was highlighted in the recent outrage against Tanmay Bhat's video mocking Lata Mangeshkar and Sachin Tendulkar. Applying "community standards test" is not an accurate standard of assessing whether the video offended the community as a whole. With most of the speech flowing online on the internet, it becomes even more difficult to ascertain which community's standards should be applied while judging the obscene nature of the work. For some people in the country, the video might have tickled the funny bone, while on the other hand the outrage of others over the video was quite apparent. The best alternative in this case for the Indian Supreme Court is to adopt the *Miller* tests in their entirety, by balancing the subjectivity of the "community standards test" with the objective standards of the *Miller* test. This is backed by the progressive interpretation of law on obscenity by the Indian Supreme Court starting with *K.A. Abbas* to *Aveek Sarkar*.

Unfortunately, the decision of the Apex Court in *Devidas* does the opposite of what was needed. There is a serious need to review the decision given by the Supreme Court in *Devidas* as it may open a Pandora's Box for restrictions on free speech. The vagueness of the "historically respected personality" exception will allow the courts to trample down speech against any popular personality by bringing them under the umbrella of a "historically respected person". The application of the *Roth* test was one of the primary reasons that lead to this problem. The decision in *Devidas* gives the license to courts to carve out similar exceptions for other demographic groups in the society. Just like "historically respected personalities" have been put on a higher pedestal, it may be possible that similar exceptions may be created for "highly accomplished politicians" or "respected actors" and the floodgates for such arbitrary exceptions might open. The individuals who are in public light must be open to public criticisms as these individuals have the power to shape public opinion on many important policy issues. The earlier this case is reviewed by the Apex Court, the easier it is for fundamental right to free speech to exist in its true form.