CONSTITUTIONAL MORALITY: AN INDIAN FRAMEWORK

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INTRODUCTION

In October 2018, EBC Publishing – a leading publisher of legal research in India – organized a panel discussion in New Delhi.[1] This was no ordinary panel discussion. It was organized to honour the about-to-retire Chief Justice of India Dipak Misra. The discussants assembled were stellar: Misra himself, A.K. Sikri (then a sitting Supreme Court judge), K.K. Venugopal (the Attorney General), and Madhava Menon (a prominent legal academic). Perhaps most extraordinary of all was the topic of discussion: "India and Constitutional Morality". Over the last dozen years, Indian courts have formulated the idea that inherent to the Indian Constitution is a morality called "Constitutional Morality" (hereafter "CM"). CM acts as an interpretive device to help ascertain the (so called) true meaning of the Constitution's text in contested cases. Courts have applied CM in a variety of contexts: individual rights, group rights, minority rights, federalism, obligations of constitutional actors, and the appropriate constitutional processes that govern institutional relationships.

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[1] CNBC TV-18, Panel Discussion on "Constitutional Morality: Applicability and Actionability in Recent Constitutional Jurisprudence", FACEBOOK, (Oct. 10, 2018) https://m.facebook.com/story.php?story_fbid=1455255641285494&id=169218193115587&_rdr.

Back to the panel discussion. Misra and Sikri – the two judges on the panel – championed the development of CM. They argued that CM has a long history in India, that it is based on norms laid down in the Constitution, and that it is a manifestation of generally accepted constitutional doctrine such as "silences of the constitution". On the other hand, Venugopal and Menon questioned the judiciary's motives behind formulating CM, its judicial enforceability, and sought greater predictability in its application. Their critiques echo the Indian Government's fear that CM deepens the possibility of judicial adventurism. As India's Attorney General, Venugopal has said on record "I hope constitutional morality dies".[2] Law Minister Ravi Shankar Prasad has called for consistency in CM's application, that "it should not differ from judge to judge".[3]

As the panel discussion wore on, it became apparent that the panelists were talking past each other. If Misra and Sikri justified the courts' use of an ostensibly vague concept like CM and sought to establish its sources, Venugopal and Menon emphasized its potential for misuse. What the conversation missed was answers to some basic questions: what are the methodological and argumentative moves that courts have taken to employ CM in the case-law? What are the judicial premises and logics that work internal to CM? Given the manner in which courts have developed CM, what implications do they have on Indian constitutional law and theory?

These questions are ripe for the legal academy. However, despite courts' increasing embrace of CM, the academy has been slow to recognize and critique. To be sure, scholars

[2] Apoorva Mandhani, *Constitutional Morality A Dangerous Weapon, It Will Die With Its Birth: KK Venugopal*, LIVE LAW, (Dec. 9, 2018,7:14 PM) https://www.livelaw.in/constitutional-morality-a-dangerous-weapon-it-will-die-with-its-birth-kk-venugopal/.

[3] Mehal Jain, *Constitutional Morality Should Not Be Differed From Judge To Judge: Law Minister RS Prasad*, LIVE LAW, (26 Nov. 2018, 3:08 PM), https://www.livelaw.in/constitutional-morality-should-not-be-differed-from-judge-to-judge-law-minister-rs-prasad/

have noticed CM's significance. They have examined the political theory underpinning CM,[4] noticed the multiple meanings Indian courts have given it,[5] defended its doctrinal use, and even demanded its import in foreign jurisdictions.[6] The dominant nature of this discourse, however, has been exclusively celebratory. Scholars tend to emphasize the results of the cases where CM has been employed, rather than investigate the underlying logics and implications of CM. There has been little academic inquiry on what CM means – as an intellectual idea, as an interpretive tool, or as a phenomenon in the Indian legal and political system.

With this paper, I hope to address the basic questions I have listed above. To do so, I have undertaken three different analyses. First, I have explored the intellectual history of CM, particularly as B.R. Ambedkar – the chief draftsperson of India's constitution – understood it. Ambedkar was the first to speak of CM in Indian constitutional discourse, and if we are to recognize the place of CM in India, we must be able to appreciate his perspective. Second, I have developed a framework that situates the Indian judiciary's evolving understanding of CM. And third, I have critiqued the implications that the judicial creation and development of CM brings to bear on Indian constitutional theory. Accordingly, I have structured this paper in three parts: in Part I, I briefly survey CM's intellectual career. Some influential thinkers in modern Western political and constitutional thought – such as Mill, Dicey, and Grote – have devised accounts of CM. Surveying their writings will equip us with the intellectual tools to understand what Ambedkar meant by CM. In Part II, I examine the Indian judiciary's engagement with

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[4] See KALPANA KANNABIRAN, TOOLS OF JUSTICE: NON-DISCRIMINATION AND THE INDIAN CONSTITUTION 1-45 (2012); André Béteille, *Constitutional Morality*, in DEMOCRACY AND ITS INSTITUTIONS 75-98 (2012); Pratap Bhanu Mehta, *What Is Constitutional Morality?*, 615 SEMINAR (2010), http://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm.

[5] Mahendra Pal Singh, *Observing Constitutional Morality*, 721 SEMINAR (2019), http://ww.india-seminar.com/2019/721/721_mahendra_pal_singh.htm; Abhinav Chandrachud, *The Many Meanings of Constitutional Morality*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3521665.

[6] See James Greenwood-Reeves, *The Democracy Dichotomy: Framing the Hong Kong 2019 Street Protests as Legitimacy Counterclaims against an Incoherent Constitutional Morality*, 21 Asia-Pacific J. Hum. Rts. & L, 35 (2020).

CM. I argue that Indian courts have framed CM as an interpretive devise to mean two different things, and therefore to apply to two different types of cases. I develop accounts that capture both forms of CM and their respective internal logics. In Part III, I point out two broader concerns that relate to the manner in which courts have developed both judicial accounts of CM and the consequences it entails. Finally, I conclude with some thoughts about the future of CM, both as a judicial tool in constitutional cases and as a rhetorical device in contemporary Indian political discourse. Unlike most scholarly accounts of CM, this paper is not prescriptive. I do not outline my vision of what CM means, nor do I argue for or against its continued judicial application.

PART I: A BRIEF INTELLECTUAL HISTORY OF CONSTITUTIONAL MORALITY

A. As Citizen Attitude: Grote and beyond

Scholars typically trace CM's intellectual origins to George Grote. Grote was a 19th Century British classical historian, best known for his multi-volume work on ancient Greece, titled "History of Greece", published between 1846–56. "*The purpose of Grote's History of Greece*" Pratap Bhanu Mehta writes "*had been, in part, to rescue Athenian democracy from the condescension of its elitist critics like Plato and Thucydides …"*[7] In Chapter 31, Grote turns to the period after Hippias (510 BC), often considered the last tyrant ruler of Athens. What followed, as Grote recounts, was a brief succession struggle between Isagoras and Cleisthenes – two powerful aristocrats, the former having close ties to the Spartan king Cleomenes I and the latter having the popular support of ordinary Athenians. Cleisthenes emerged successful and became Athens's political leader. Once in power, Cleisthenes enacted constitutional reforms and established a democratic order in Athens. Today, historians and political theorists commonly credit Cleisthenes as the father of democracy.

[7] Mehta, *supra* note 4.

Grote's project in Chapter 31 is to capture the prevailing social, political, and economic environment at the time of Cleisthenes and the challenges he had to address to reform a political order that, while professing a veneer of democratic values, was in reality near-absolutist. The Greek city governments of that time, especially compared to modern governments of the 18th century, were "weak": by themselves, they could not exert the level of force necessary to "cope with conspirators or mutineers".[8] To complicate matters for Cleisthenes, (1) a new commitment to democracy – with its uncertain nature and its untested guarantees of "personal security" of the citizen and disavowal of "arbitrary action" – and (2) the ambitions of the Athenian nobles who "had yet to learn the lesson of respect for any constitution" and were unafraid to "break down the barriers of public as well as private morality", created an existential crisis for governments, who were consumed by the possibility of their overthrow. As a result, Cleisthenes took steps to protect the constitution from the undemocratic ambitions of the nobles in ways that are reminiscent to the practice of Militant Democracy today: "*first, by throwing impediments in their way and rendering it difficult for them to procure the requisite support; next, by eliminating them before any violent projects were ripe for execution.*"

But, as we noticed, Greek governments were hamstrung by weak state capacity and a weaker commitment to democracy. For Cleisthenes's methods to work, governments would require cooperation from the people – one that did not manifest in the battlefield, but rather in their hearts and minds. Democracy required, per Grote, the enactment of a constitution that stirred not only "*good-will … but kindle[d] the passionate attachment, of the mass of citizens*" – a "mass" that must amount to "*unanimity, or so overwhelming a majority as to be tantamount to be unanimity*" – to such an extent that no faction, not even a "considerable minority", should

[8] GEORGE GROTE, A HISTORY OF GREECE 91 (2002)

want to "alter it by force". A constitution that evoked such emotion formed the foundation for another, related "sentiment": "constitutional morality". CM, in Grote's words, is

> 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.[9]

In other words, CM manifests as an attitude that citizens possess: they consider the constitution and its functioning as sacred, reassured that their fellow citizens – some who may well be their ideological opponents – feel the same; and they respect the authority of constitutional institutions with the guarantee that those institutions are accountable to the rule of law and of public critique, and that their freedoms are respected. According to Grote, CM applies on a first pass to the citizens and through them, their leaders. A strong sentiment of CM will either persuade nobles to abide by democracy or create such an environment where the nobles abandon their ambitions for fear for reprisal from the citizens.

Thus, CM was a defensive resource that Cleisthenes could use to protect Athens's fledgling democracy. But at the time, Grote concludes, Athens and in particular "the first generation of leading men" did not exhibit CM. Accordingly, Cleisthenes had to resort to other, more concrete preventive actions, such as "ostracism". Grote gives two examples of societies where CM was prevalent: "the aristocracy of England (since about 1688)" and "the democracy of the American United States". He does not expand why. Grote's choices, and by implication

[9] GEORGE GROTE, A HISTORY OF GREECE 93 (2002)

his suggestion that no other political community in history exhibited CM, is likely reflective of his personal politics rather than the product of a reasoned inquiry.

Grote's conceptualization of CM as a sentiment that resides in the hearts and minds of citizens and is fiercely protective of the constitution has found a limited degree of purchase in contemporary American scholarship, in spirit if not letter. William D. Guthrie and James Beck have used CM as a clarion call for self-reflection and self-restraint while operating within the bounds of the constitution.[10] James D. Mooney has invoked CM as a "spirit and attitude" that citizens express towards their government that finds its roots in "fundamental principles of justice." Mooney uses CM as a rhetorical device to rail against a creeping socialism in the USA of the 1930s.[11] More indirectly, Grote's CM also brings to mind Jürgen Habermas's idea of constitutional patriotism, where citizens of a political community create a collective identity not on parochial lines like language or ethnicity or culture, but rather through democratic deliberation about the interpretation and institutionalization of constitutional principles.[12]

B. As Political Morality and Conventions: Mill, Dicey, and beyond.

Around the time that Grote framed CM within a historical-sociological lens, John Stuart Mill articulated a political ethics-centred vision of CM. Writing in his *Considerations of Representative Government* in 1861, Mill noticed the rise of modern government and was skeptical about the ability of constitutional law – as enforceable hard law – to prevent its different branches from exerting illegitimate power over one another. To counteract the inadequacy of positive law, Mill called for political actors and institutions to foreground "moral

[10] William D. Guthrie, *Constitutional Morality*,196 (681) N. Am. Rev. 154,154 (1912); James M. Beck, *The Changed Conception of the Constitution,* 69(1) PROC. AM. PHILOS. 99, 113 (1930); James M. Beck, *The Future of the Constitution*, 19 A.B.A J. 492 (1933).
[11] JAMES D. MOONEY, THE NEW CAPITALISM 197-98 (1934).
[12] See Jürgen Habermas, *Citizenship and National Identity*, *in* THE CONDITION OF CITIZENSHIP (Bart Van Steenbergen ed., 1994). See also Clarissa Rile Hayward, *Democracy's Identity Problem: Is "Constitutional Patriotism" the Answer?,* 14(2) Constellations 182, 182 (2007). I'm grateful to Gautam Bhatia pointing out the possible relevance of constitutional patriotism.

duties" when they discharged their public functions.[13] These duties are encapsulated in what he interchangeably called CM, "positive political morality", and the "ethics of representative government". For Mill, CM comprised the unwritten rules and maxims "*in the minds of the [political actors and institutions], which modify the use that might otherwise be made of their powers.*"[14]

Mill's conceptualization is markedly different from Grote's. While Grote situated CM's first subject as the citizen, and through him his leaders, Mill applied CM *only* to political actors and institutions. Mill was not concerned directly with the citizen or his rights, though arguably a political environment draped with Mill's CM would likely have beneficial second-order effects on citizens. It is curious that Mill should miss this distinction since Mill's work on representative government was greatly influenced by Grote.[15]

Mill's conceptualization of CM has profoundly shaped British constitutional thought. The basic idea that constitutional actors ought to follow some unwritten ethical rules prefaced Dicey's influential work on constitutional conventions.[16] In fact, Dicey termed constitutional conventions as "constitutional morality".[17] If we were to follow Dicey and equate CM as constitutional conventions, then we get a much thicker account of CM, one that is defined and substantial. Its coverage is restricted to the authority of and relationships between high constitutional functionaries such as the Crown or the Government or the Parliament. At its core, it is not concerned with other important constitutional matters, like say individual rights. CM determines some of the most foundational questions of constitutional power and authority,

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[13] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, 224.
[14] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT, 225.
[15] Leo Catana, *Grote's analysis of Ancient Greek political thought: its significance to J. S. Mill's idea about 'active character' in a liberal democracy*, 27 BRITISH JOURNAL FOR THE HISTORY OF PHILOSOPHY 553, 553 (2019).
[16] O. Hood Phillips, *Constitutional Conventions: Dicey's Predecessors*, 29(2) MODERN LAW REVIEW 137, 139-140 (1966).
[17] AV DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 23-4

such as the real (as opposed to formal) legal powers of the Crown, or the architectural framework of cabinet government, or the relationships between the two Houses of Parliament or the Cabinet and the Prime Minister, and so on.[18] In summary, CM plays a vital role in the British political and constitutional tradition. As Matthew Flinders puts it, CM is "the glue, conscience, or the accepted meta-constitutional orientation of a polity."[19]

C. Ambedkar inside and outside the Constituent Assembly

i. Ambedkar's remarks in the Constituent Assembly

We are now in a position to understand Ambedkar's views on CM. As the Chairperson of the Constitution Drafting Committee, Ambedkar is a pivotal figure in the Indian constitutional and political philosophy. On 4th November 1948, in a speech to the Constituent Assembly, Ambedkar introduced the draft Constitution and invoked "constitutional morality" for the first time in Indian constitutional thought. Before diving into the substance of Ambedkar's remarks, we should notice their context. Addressing objections that the draft Constitution reproduced many provisions of the Government of India Act, 1935, Ambedkar insisted that borrowing "fundamental ideas of a Constitution" did not amount to plagiarism. At the same time, Ambedkar was helplessly apologetic about one *type* of idea that the Drafting Committee did borrow – administrative detail. The draft Constitution, clocking in at 315 Articles and 8 Schedules, was voluminous. Its text comprised copious procedural and administrative detail around the composition of the State and its functioning.

Ambedkar felt compelled to include this kind of administrative detail. As India transitioned from an aggregation of colonial and princely territories to an independent

[18] GEOFFREY MARSHALL, CONSTITUTIONAL CONVENTIONS – THE RULES AND FORMS OF POLITICAL ACCOUNTABILITY 4 (1987).
[19] MATTHEW FLINDERS, DEMOCRATIC DRIFT: MAJORITARIAN MODIFICATION AND DEMOCRATIC ANOMIE IN THE UNITED KINGDOM 290 (2010).

democratic State, there was no guarantee that its citizens would act democratically. Excessive codification, including of minute administrative detail, was a conscious choice of the Constitution's framers. As Madhav Khosla puts it, "[t]hrough codification, the actions of Indians could be structured by specific forms of knowledge", that codification would enable citizens to "deliberate and exercise authority in ways that were suitable to a free society with a shared consensus over the principles of self-government."[20]

Ambedkar's fear about the lack of a culture of democracy rested in part because he considered that Indian citizens had not yet "learn[t] [constitutional morality]." He argued that if Indian democracy was to survive, then CM must be "cultivated" in its people. He quoted Grote's conceptualization of CM – as a particular attitude to the constitution that citizen must possess – at length in support of his thesis. Apart from CM, Ambedkar insisted that two further "interconnected" ideas needed satisfaction for the successful working of the new Constitution. First, the "form of administration" must be closely connected to and consonant with the "form of the Constitution". Second, Ambedkar was afraid that it was "*perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution*".

Political theorists tend to situate Ambedkar's remarks within a liberal heritage of procedural democracy. Pratap Bhanu Mehta has written one definitive account.[21] Mehta argues that, broadly speaking, Ambedkar relied on Grote to emphasise a CM rooted in historical observations about best practices in constitutionalism.[22] These practices transcended any desirable substantive outcomes or conventions that control silences in the Constitution. Instead they were supposed to be procedural in nature, laying the rules, listing the players, and

[20] MADHAV KHOSLA, INDIA'S FOUNDING MOMENT 30-43 (2020).
[21] Mehta, *supra* note 3.
[22] Mehta, *supra* note 3; Sujit Choudhry et al, *Locating Indian Constitutionalism in*, THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 4 (Choudhry, Khosla, Mehta eds., 2016).

patrolling the boundaries of acceptable behaviour by constitutional actors. Mehta maintains that Ambedkar understood CM to have three distinctive elements. First, Ambedkar placed a premium on self-restraint. Now that India was independent, Ambedkar wanted citizens to disavow notions of revolution or passive resistance while chasing reform. Second, Ambedkar believed that plurality of thought was a key element of CM. Barring certain fundamental substantive features, CM was concerned with adherence to the processes of political activity. CM was not outcome oriented, but focused on the fairness of rules that dictate how substantive questions must be resolved. Related to the second element, third, Ambedkar understood CM to be skeptical about "any claims [by persons or institutions] to singularly and uniquely represent the will of the people."[23] In sum, Mehta's account of Ambedkarite CM was concerned with the political battleground for citizens to determine their substantive legal and constitutional preferences, set the rules by which political actors resolved their disputes, and prohibited any one political actor from claiming sovereignty to the exclusion of all others.

Mehta's account, while persuasive, has two major inadequacies. First, Mehta consciously limits his analysis to Ambedkar's remarks in the Constituent Assembly only. Ambedkar, however, discussed CM in other works as well. A comprehensive reading of those works, which we will examine below, reveals that Ambedkar had a more complicated understanding of CM. This understanding is at times in tension with Mehta's liberal constitutionalist reading. Second, Mehta discounts (or altogether disregards) the place of citizens and affect in Ambedkar's CM. Grote's definition of CM makes clear that in political debates, citizens must be assured that their opponents will probably scrupulously adhere to the processes of the Constitution and have its best interest at heart. Ambedkar believed that this property of CM

[23] Mehta, *supra* note 3.

was not a "natural sentiment" among Indians and, in any case, was not present in Indian society at its independence. It needed to be "cultivated".

ii. *Ambedkar's remarks outside the Constituent Assembly*

While legal scholars have closely studied Ambedkar's speech in the Constituent Assembly, they have neglected Ambedkar's remarks on CM before and after the Constituent Assembly. [24] In this section, I will explore two references that together give a richer account of Ambedkar's view on the meaning, function, and – surprisingly – even dangers of CM.

In 1945 and 1946, Ambedkar published and updated his book *What Congress & Gandhi have done to the Untouchables*. In Chapter IX, titled 'A Plea to the Foreigner', Ambedkar observes that foreign interest in Indian political affairs inevitably held the Congress Party – the dominant face of the Indian independence movement – in positive light. This, he suggests, was problematic. As per Ambedkar, foreigners supported the Congress because they believed "that the Congress [was] fighting for the freedom of India" while other political parties stood "aloof". But, he argued, this view belied a more fundamental question: for whose freedom was the Congress fighting?

Ambedkar surmised that foreign interest in Indian politics was indifferent to this question because in their view "*all that is necessary for the realization of self-government is the existence among a people of what Grote called constitutional morality*". This view was "formal" and "very superficial"[25], and only served to obfuscate what was actually needed for a democracy to be successful: self-government by the people. He writes, "*[h]abits of*

[24] I owe a special debt to Moiz Tundawala for illuminating me about the possibilities of this position. For two scholarly works that build on these premises to create rich, sophisticated accounts of Ambedkar's understanding of constitutional morality, see Moiz Tundawala*, In the Shadow of Swaraj: Constituent Power and the Indian Political*, LSE Thesis, 72-76, http://etheses.lse.ac.uk/3903/1/Tundawala__Shadow-of-swaraj.pdf ; AISHWARY KUMAR, RADICAL EQUALITY: AMBEDKAR, GANDHI, AND THE RISK OF DEMOCRACY 259-66 (2015).
[25] *Id*. at 449.

constitutional morality may be essential for the maintenance of a constitutional form of government. But the maintenance of a constitutional form of Government is not the same thing as a self-government by the people." In other words, CM is a useful concept to signify that, from an empirical standpoint, a citizenry respects the norms that their constitution expresses. But CM says nothing, or very little, about whether that respect will actually prove tangibly beneficial for society as a whole. For self-government and democracy to be truly successful in practice, not just in paper, one must recognize "the existence of a permanently settled governing class" (Brahmins and other upper castes) and "its supremacy over the servile class" (Dalits and other lower castes). A society with "habits of CM" under a constitution that provides for universal adult franchise and free and fair elections, might still consistently return the "settled governing class" to government power. Hence, "the principal aim of a constitution must be to dislodge the governing class from its position …"[26] The radical fashion in which Ambedkar writes about CM and its inadequacies in creating a "self-government by the people" renders doubtful Mehta's liberal-constitutionalist reading of Ambedkar's remarks in the Constituent Assembly. And given that Ambedkar wrote *What Congress & Gandhi have done to the Untouchables* three years *before* the Constituent Assembly, it bears a strong connection to what he probably had in mind when he spoke about CM in the Constituent Assembly.

Ambedkar's other prominent reference to CM outside the Constituent Assembly lies in a famous speech he delivered in December 1952 to the Poona District Law Library. Titled "*Conditions Precedent for the Successful Working of Democracy*", Ambedkar set out to address the pre-conditions for a successful democracy.[27] One of those pre-conditions was the "observance of constitutional morality". While Ambedkar did not define CM, he describes it in strikingly similar terms to Mill's formulation of CM as a form of morality that political

[26] *Id.* at 448.
[27] He defines "democracy" as "*a form and a method of government whereby revolutionary changes in the economic and social life of the people are brought about without bloodshed."*

actors and institutions should exhibit. Ambedkar narrates two historical episodes to demonstrate CM in practice: i) when George Washington, the venerable first president of the United States, refused to stand elections for a second time, even when victory was all but assured, and ii) when the Labour party in the UK rallied behind the Conservative Prime Minister Stanley Baldwin to oppose King Edward VIII's plans to marry outside British royal traditions, which eventually led to the king's abdication of his throne. Both examples illustrate well Mill's idea that political actors must eschew temptations to act in ways that damage democracy and the constitution for temporary power.

What can we learn from Ambedkar's lukewarm relationship with CM? First, he was aware about the term's multiple historical meanings that I have charted above: of citizen attitude and political morality. Hence, when Ambedkar referred to CM and cited Grote in the Constituent Assembly, he consciously made a claim about the need to cultivate a particular citizen attitude in independent India. But, as we will see in Part II, Indian courts have devised their own meanings of CM quite apart from Ambedkar's (and Grote's) thesis of citizen attitude, often citing his Constituent Assembly remarks while doing so. Second, Ambedkar did not view the cultivation of "habits of CM" as the objective of successful self-governance. Rather, he saw it as a pre-condition, and an imperfect one at that. Mehta may be right to claim that Ambedkar's CM lays the base on which Indian constitutionalism should develop. But that formulation is formal and empty, and in any case is incomplete. Ambedkar did not believe that CM would benefit all classes of society. He was afraid that, rather than being a panacea, a zealous pursuit of CM could blind us to the importance of "dislodge[ing] the governing class from its position".

PART II: JUDICIAL APPROACHES TO CONSTITUTIONAL MORALITY

In Part I, I explored CM's intellectual history, starting from Grote and ending with Ambedkar. In the remainder of this paper, I will focus my analysis on CM's meaning in India, in particular how India's courts have conceived of it, and explore their underlying weaknesses.

Over the last twelve years, Indian courts have developed the idea, meaning, and content of CM in a number of judgments. In this Part, I argue that courts have developed two different, though not necessarily contradictory, accounts of CM. My objective is to introduce these accounts and critique them on their own terms. I will examine six judgments, all of which barring one are of the Supreme Court. These judgments are complex and engage with profound questions of constitutional law. For my purposes, I have only outlined their essentials and examined them from the limited lens of what they say about CM.

A. Constitutional Morality as a Fiction to "Morality"

The first judicial account casts CM in the domain of fundamental rights. The Indian Constitution's Fundamental Rights Chapter subjects multiple rights to State restrictions on grounds of "morality". Examples include the right to freedom of expression, to form associations, and to practice religion. As a matter of legal and political philosophy, disputes over the meaning and content of "morality" are timeless and most contested. If that remains the case, then how should judges interpret its meaning in constitutional adjudication? The first judicial account of CM, that I shall expand on with the help of three judgments, attempts to answer that question.

i. *Naz*: Constitutional Morality's Second Coming

The Delhi High Court's decision in *Naz*[28] marks the point of origin of the Indian judiciary's engagement with CM. Dipak Misra has suggested that CM has a longer history in Indian judicial discourse.[29] Misra is true as a matter of fact. But in those instances, courts used the term only in passing. There is nothing to indicate that the judges employing the term were aware about its legal, political, or intellectual history, its import, or that they intended to

[28] Naz Foundation v. Government of NCT of Delhi & Ors., (*Naz*) 2009 (111) DRJ 1 (DB)
[29] Dipak Misra in CNBC TV-18, Panel Discussion on "Constitutional Morality: Applicability and Actionability in Recent Constitutional Jurisprudence", FACEBOOK, Minute 8.

develop a judicial account of it. *Naz* was historic for another reason as well: the case marked the first-ever constitutional challenge to a criminal law that penalized consensual same-sex sexual activities in India (loosely called the "anti-sodomy law"). All parties to the case agreed that the anti-sodomy law had its roots in traditional Victorian morality. The petitioner argued, among other things, that the anti-sodomy law violated privacy rights. And that if the anti-sodomy law is justified on the back of "morality", then morality *per se* was not a valid ground to restrict privacy rights. The State countered that the anti-sodomy law reflected the "morals of the time in the Indian society", and that criminal law depends on "political as well as moral considerations".

In its judgment, the High Court found that the right to privacy covers the right to engage in consensual same-sex sexual activity. As such, to qualify as a valid restriction to privacy, the prevailing doctrine required the restriction amounted to a "compelling state interest." The High Court determined that the "enforcement of public morality" – which the State argued was the purpose of the anti-sodomy law – did not amount to a compelling state interest.[30] Accordingly, "popular morality or public disapproval of certain acts" was not a valid justification to restrict privacy rights of individuals.[31] Instead, the only kind of "morality" that *can* pass the muster of compelling state interest is "constitutional morality" – a morality that is "derived from constitutional values".[32]

What are these "constitutional values" and how does one determine them? The High Court gives no direct answer. Citing the Constitutional Court of South Africa, the High Court argues that when the State enforces morality, the limits to which it may go "are to be found in the text and spirit of the Constitution itself."[33] The High Court also suggests that the Fundamental

[30] *Naz*, ¶75.
[31] *Id.* at ¶79.
[32] *Id.*
[33] *Naz,* 2009 (111) DRJ 1, at ¶81.

Rights chapter and the Directive Principles of State Policy – directory provisions that nudge the State towards making policies in certain areas – form the "conscience of the Constitution".

ii. *Johar:* Constitutional Morality Confirmed

On appeal to the Supreme Court, a panel of two judges reversed *Naz*.[34] A second round of litigations soon followed – in *Johar*[35] – where a larger panel of the Supreme Court was asked to reconsider its reversal of *Naz*. The Court agreed and finally confirmed the decriminalization of consensual same-sex sexual activity. The logic of *Naz* – that if the constitutionality of a law is justified on the back of "morality", then that "morality" must be grounded on "constitutional values", not on prevailing (or otherwise) social mores – was vindicated. Chief Justice Misra's plurality judgment and each of Justice Chandrachud's and Justice Nariman's concurring judgments have given more definite shape to the content of CM. It is to them that I will now turn.

Chief Justice Misra spends considerable time identifying the nature and purpose of the Constitution. To him, the Indian Constitution is an organic, living document that must respond to changing times, and extend its coverage of rights to groups that have traditionally been excluded, whether for moral reasons or otherwise. And the purpose of the Constitution is to achieve a transformation of Indian society, "[from] a medieval, hierarchical society into a modern, egalitarian democracy …"[36] The Chief Justice threads a powerful thesis: the Constitution must evolve to enable social progress, and by implication, the judge's task of constitutional interpretation is to aid this project. With this philosophical backdrop, the Chief Justice argues that it is incumbent on the State's organs to embody CM – described as a set of "virtues of a wide magnitude". The various organs of the State must embody these "virtues"

[34] Suresh Kumar Koushal & Anr. v. Naz Foundation & Ors., (2014) 1 SCC 1.
[35] Navtej Singh Johar v. Union of India, (*Johar)* (2018) 10 SCC 1.
[36] *Id*. at ¶ 95.

for the ultimate "betterment of each and every individual citizen of the State." The anti-sodomy law, according to the Chief Justice, struck at the virtue of inclusive pluralism.

Like Chief Justice Misra, Justice Chandrachud begins by emphasizing the transformative purpose of the Indian Constitution. Constitutional interpretation must accordingly be faithful to that enterprise and CM must be its "guiding spirit".[37] However, this is where Justice Chandrachud departs from the Chief Justice. For Justice Chandrachud, the meaning of CM is closer to what Ambedkar had in mind in the Constituent Assembly: a kind of "mental attitude" of citizens to the text and spirit of the Constitution. This requires citizens to eschew a public morality that results in restricting the fundamental rights of any minority group. Three ideas that are foundational to CM, and also feature in the Preamble, are Fraternity (and by extension the Dignity of the individual), Liberty, and Equality. If citizens internalize these values in particular, and the Constitution's broad values generally, Justice Chandrachud's logic goes, then the anti-sodomy law will cease to exist. But Indian society, argues Justice Chandrachud, has failed to internalise CM completely. This may be because "*the process through which a society matures and imbibes constitutional morality is gradual, perhaps interminably so.*" Regardless, society's failure to internalize CM has affected the fundamental rights of a minority: here, the LGBTQ people. Hence, the Court must intervene and "act as external facilitators" of CM by striking down the anti-sodomy law.

In his concurring judgment, Justice Nariman avoids the grand theory building approach of the Chief Justice and Justice Chandrachud. He singularly maintains that the anti-sodomy law is a product of Victorian morality. This must give way to CM, presumably channelizing the logic of *Naz* – that as a restriction to a fundamental right, "morality" can only take on the form

[37] *Id.* at ¶139-44 (Chandrachud,J.,concurring),.

of CM. For him, the content of CM is concrete: it is found in the Preamble and the Fundamental Rights chapter.

iii. ***Sabarimala*: The First Pushback**

Finally, we examine the Court's controversial decision in *Sabarimala*.[38] The case concerned the fundamental right of women under the Constitution to enter a famous temple in Kerala. The temple's custom, developed over many years, barred the entry of women between the age of 10 and 50 years. Article 25 of the Constitution protects an individual's right to practice her religion subject to "morality" and other provisions of the Bill of Rights. Article 26, on the other hand, protects the right of every "religious denomination" to manage its own religious affairs, also subject to "morality". Unlike Article 25 however, Article 26 is not subject to other provisions in the Fundamental Rights chapter. The Court was asked to address whether Article 26 covers the temple and by extension its exclusionary custom. Conversely, the Court also had to address whether the custom's *per se* exclusion of women from entering the temple struck Article 25 i.e. the women's right to exercise religious freedom. And if it did, whether the custom could be considered a valid restriction i.e. whether the custom fell within the bounds of "morality" or any other provision of the Fundamental Rights chapter. In a 4-1 verdict, the Court ruled that the custom was unconstitutional because, among other reasons, it was against CM. For our purposes, we will examine Justices Chandrachud's and Nariman's concurring judgments and Justice Malhotra's dissent.

Like in *Johar*, Justice Chandrachud argues that "morality" under Articles 25 and 26 "must mean that which is governed by the fundamental constitutional principles", which are "founded

[38] Indian Young Lawyers Association & Ors. v. The State of Kerala & Ors. (*Sabarimala)*, 2018 SCC Online SC 1690.

on the four precepts which emerge from the Preamble", those of justice, liberty, equality, fraternity. Morality cannot be "public morality" because when fundamental questions of "individual dignity" and "human rights" are on the table, they cannot be subject to the "passing fancies or to the aberrations of a morality of popular opinion." This formulation of CM – as a construction of "morality" when "morality" is a restriction to a fundamental right – is very different from his articulation in *Johar,* where he understood CM as a "mental attitude" of the citizen and emphasized the role of inter-personal "fraternity" in informing CM. While he goes on to write about how the custom has a stigmatizing effect on menstruating women, he does not speak – like he did in *Johar* – in a Grotean manner which may have emphasized the need for citizens to abandon claims that women do not have the freedom to practice their faith in the temple.

Justice Nariman's presents an interesting concurring judgment. He refused to use CM to construct the meaning of "morality" in both Articles 25 and 26. Doing so, per him, "*would bring in through the back door, the other provisions of [the Fundamental Rights chapter], which Article 26 is not subject to, in contrast with Article 25(1).*" While he does not say so expressly, the idea that CM will import other provisions of the Fundamental Rights chapter probably arises from his earlier judgment in *Johar* where he took the view that the Preamble and the Fundamental Rights chapter together constitute CM. His refusal to read CM to "morality" within the meaning of Article 26 exhibits consistency between his opinions, a commitment to the Constitution's text, and a refusal to broaden restrictions to fundamental rights.

We turn now to Justice Malhotra's dissent. It marks the first occasion where judges have disagreed about the interpretation and application of CM. For Justice Malhotra, CM represents "*the moral values underpinning the text of the Constitution, which are instructive in ascertaining the true meaning of the Constitution, and achiev[ing] the objects contemplated*

therein."[39] While she agrees that freedom of religion and non-discrimination – the two planks on which the petitioners rest their claim – rise to those "moral values", she argues that so does the right of "*the followers of various sects ... to practice their faith in accordance with the tenets of their religion*."[40] As per her, courts have no jurisdiction to test the practice of a faith on notions of logic or rationality. In such a scenario, where competing values with conflicting ends pull at CM in different directions, Justice Malhotra suggests that courts must engage in harmonious construction to ensure that neither value is undermined. She however does not engage in any harmonious construction of her own and makes no finding on CM.

Justice Malhotra's dissent has important ramifications. Before *Sabarimala*, courts were comfortable with the application of CM because they presumed that there was an internal coherence between the values it holds. But *Sabarimala* exposed the inner tensions between these values. Justice Malhotra suggests a way to resolve these tensions – through harmonious construction – but does not do it. The plurality and concurring opinions failed to even engage with Justice Malhotra's contrarian position, much less suggest a method to resolve CM's internal tensions.

iv. The Deeming Principle

a. The Account Captured

The foregoing case summaries suggest that courts have developed a distinct idea of CM that operates on a specific logic. It goes like this: unlike constitutions that seek to preserve the extant powers of political institutions (including the system of distribution of powers and inter-relationships between institutions) as well as the rights of citizens, the Indian constitution seeks

[39] *Sabarimala*, 2018 SCC Online SC 1690 at ¶11.5 (Malhotra,J.,dissenting).
[40] *Id.* at ¶11.6.

a revolutionary discontinuity from the past.[41] Transformation must manifest in many ways, including the social, political, and economic, and will implicate all constitutional actors. Courts too must play along. In constitutional adjudication, where parties contest the meaning of applicable constitutional text or principle, courts must interpret the constitution in light of its transformative project.

Hence, when a court must determine the meaning of "morality" as a restriction to a fundamental right, it must not ask what prevailing public morality commands or which way the judge's personal political morality swings. Rather, transformative constitutional interpretation requires that the transformative nature of the Constitution secure the meaning ascribed to "morality". This is where "constitutional morality" – a morality that finds its content from the text and spirit of the constitution – comes alive. CM acts as a deeming principle that tethers an otherwise vague standard like "morality" to something that is more definite, objective, and aligned to the constitution's purpose. For this account to work, one must accept the premise, as the Court does, that the constitution inherently espouses a set of values worth securing and that they are discoverable.

Let us call this account the Deeming Principle. The basic idea behind the Deeming Principle – that the content of "morality" in the Constitution's text must be determined by the Constitution's values – is not novel. In jurisprudence, Ronald Dworkin and Will Waluchow have developed elaborate accounts of "constitutional morality" on somewhat similar lines. Due to space constraints, I cannot wholly capture them here. Broadly speaking, they advance

[41] It is inaccurate to suggest that our Constitution *exclusively* has a transformative character. A significant portion, particularly on matters of administration, espouses continuity with the colonial past. For a treatment of "argument[s] from colonial continuity", see ARUDRA BURRA, THE COBWEBS OF IMPERIAL RULE, 615 SEMINAR (2010), https://www.india-seminar.com/2010/615/615_arudra_burra.htm. On the revolutionary nature of India's constitution, see Uday S. Mehta, *Constitutionalism, in* The OXFORD COMPANION TO POLITICS IN INDIA 18-23 (Niraja G. Jayal & Pratap B. Mehta eds., 2010).

theories of adjudication that defend the judicial determination of politically and morally fraught legal questions. CM, in their accounts, is a tool that justifies the court's engagement with these questions, while its content is broadly found in the Constitution's text, the community's legal practices, and its moral traditions. Doctrinally speaking, South African and Canadian courts have also advanced similar ideas.[42] But it is the Indian Supreme Court has articulated the most extensive judicial account of this basic idea. In doing so, moreover, it has reached the most impressive and contentious results: the decriminalization of consensual same-sex sexual activity and the constitutional protection of women to practice their faith in a particular temple despite long-standing custom that prohibited them from doing so.

Legal scholars have generally welcomed, and celebrated, the development of the Deeming Principle.[43] Many have moved arguments to expand CM's application to a range of constitutional questions that implicate "morality". As Arvind Narain presciently predicted, "the power of the concept lies in its possible application to other 'unpopular minorities' [apart from the LBGT community]".[44] Variously, scholars have made the case for the Deeming Principle to guide State policy on criminalization, in particular criminalization of victim-less crimes,[45] to apply to and protect manual scavengers,[46] to act as the touchstone on which judges decide the validity of "morality" based restrictions to free speech, such as the regulation of sexually

[42] See for example, The National Coalition for Gay and Lesbian Equality v. The Minister of Justice, [1998] ZACC 15, Constitutional Court of South Africa, October 9, 1998; See also Gautam Bhatia, *Equal moral membership: Naz Foundation and the refashioning of equality under a transformative constitution*, 1(2) INDIAN LAW REVIEW 115, 129 (2017), citing R v. M (C), 41 C.R. (4th) 134 (1995).
[43] See Upendra Baxi, *Dignity In and With Naz, in* LAW LIKE LOVE (Arvind Narrain & Alok Gupta eds.) 231 (2011).
[44] Arvind Narain, *What Would an Ambedkarite Jurisprudence Look Like?*, 29(1) National Law School of India Review 1, 20 (2017).
[45] Latika Vashist, *Re-Thinking Criminalisable Harm in India: Constitutional morality as a Restraint on Criminalisation*, 55(1) JOURNAL OF THE INDIAN LAW INSTITUTE 73 (2013).
[46] Kalpana Kannabiran, The scope of constitutional morality, THE HINDU, (Oct. 4, 2018, 12:02 Am), https://www.thehindu.com/opinion/lead/the-scope-of-constitutional-morality/article25115335.ece.

explicit material.[47] However, they have rarely questioned the manner in which courts ought to and have determined the values that underlie the Deeming Principle. We must.

b. Uncertain Values and Subjects

The great jurisprudential advance of the Deeming Principle is that the meaning and content of a helplessly vague term like "morality" is now cabined to a set of values whose source – the Constitution – is readily apparent. But we cannot rest there. A full development of the Deeming Principle will require more, starting with an exposition of some of the values that underlie CM, followed by an articulation of the manner in which they were arrived at. Judges have failed to adequately address either. Most judges simply apply the Deeming Principle without articulating its rough moral values. When judges bother with explanation, they do not seem to agree on much.

For Justice Chandrachud, the content of the Deeming Principle is not finite. Perhaps wisely, he refuses to indicate an exhaustive list of moral values that constitute the Deeming Principle. Rather, he prefers to indicate "features" or values that in his opinion the facts implicate. To his credit, he outlines an approach to discover these values. Quoting Rajeev Bhargava,[48] he suggests that we ask "*'what it is that the Constitution is trying to say' and to identify 'the broadest possible range ... to fix the meaning of the text'*".[49] While the pronunciation of any approach is helpful, Justice Chandrachud's formulation is pegged at such a high degree of abstraction that it is impossible to be certain about the kind of moral values that are eligible to fall into the Deeming Principle. Be that as it may, in *Sabarimala*, Justice Chandrachud identified the preamble (with its attendant goals of securing justice, equality,

[47] GAUTAM BHATIA, OFFEND, SHOCK, OR DISTURB 126-35 (2016).
[48] Rajeev Bhargava, *Introduction* to POLITICS AND ETHICS OF THE INDIAN CONSTITUTION (Rajeev Bhargava ed.) 2008, at 6.
[49] State (NCT of Delhi) v. Union of India and Another (*GNCTD)* 2018 8 SCC 501, *(Chandrachud,J. Concurring)*, ¶ 8.

liberty, fraternity, secularism, and dignity) as the "*matters on which the Constitution has willed that its values must reign supreme.*"[50]

Until recently, Justice Nariman was concrete about the content of the Deeming Principle. To him, CM "*is to be found in the Preamble of the Constitution, which declares its ideals and aspirations, and is also to be found in [the Fundamental Rights chapter] of the Constitution, particularly with respect to those provisions which assure the dignity of the individual*."[51] He doubled down on this position in *Sabarimala*. However, more recently, in a dissent to an order that referred the constitutional questions implicated in *Sabarimala* to a larger bench, he stated that the values that form the content of the Deeming Principle "*are contained in the Preamble read with <u>various other parts, in particular, Part III [the Fundamental Rights chapter] and Part IV [the Directive Principles on State Policy] thereof</u>*."[52] By including Part IV and "various other parts", Justice Nariman has gone beyond his earlier formulation. One cannot be certain that one has heard his last words on this.

To pin down the content of Justice Misra's the Deeming Principle is acutely difficult. This is primarily because of his notoriously loose and verbose writing style.[53] In *Johar*, he cited elements such as the text of the constitution, "virtues of a wide magnitude" such as pluralism, inclusiveness, core and other principles of constitutionalism,[54] whereas in another case, he mentioned "constitutional principles as enshrined in various segments of the [constitution]"[55]

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[50] *Sabarimala*, (2018) SCC Online SC 1690 at ¶ 12.
[51] *Johar,* (2018) 10 SCC 1, ¶ 78.
[52] *Sabarimala Review*, 2020 9 SCC 121, at ¶ 19 (Nariman,J., dissenting) (emphasis supplied).
[53] See Apurva Vishwanath, *Why some brother judges write concurrent opinions when CJI Misra writes majority view,* PRINT.IN (July. 6,2018, 12:33 PM) https://theprint.in/opinion/off-court/why-some-brother-judges-write-concurrent-opinions-when-cji-misra-writes-majority-view/79760/. And for examples, Ashok Bagriya, *Justice Dipak Misra rules: Five orders that exhibit the next CJI's wordplay,* HINDUSTAN TIMES, (Aug. 28,2017, 11:09 AM) https://www.hindustantimes.com/india-news/justice-dipak-misra-s-words-five-of-the-most-verbose-orders-by-man-who-will-be-cji/story-P8lQIcVMXiqtjYSapeNqMJ.html
[54] *Johar*, (2018) 10 SCC 1 at ¶ 111 (Misra,J., concurring).
[55] *GNCTD*, 2018 8 SCC 501 at ¶ 57 (majority opinion).

and "morality that has inherent elements in the constitutional norms and the conscience of the Constitution"[56]. These highly abstract formulations are too vague to repose any predictability in a judicial system. How should a prospective litigant predict whether a morality-based restriction amounts to "inherent elements in the conscience of the Constitution"? Or how should a lower court judge, bound by *stare decisis*, decide whether a contested State action falls within the "core and other principles of constitutionalism"?

Excavating the different moral values that each judge ascribes to CM may seem pedantic. Moreover, it may be argued, as Bhatia has, that relative differences in understanding the import of any term of art is inevitable. The precise content of even ageless terms in constitutional discourse, such as Liberty, Equality, Discrimination, are constantly contested.[57] My objective behind this exercise is not to suggest that judges ought be more concrete or consistent – though they certainly should try – in their articulation of the content of the Deeming Principle. Rather, it is to tease out two prominent problematic aspects emerging from the case-law. The first is that judges are inconsistent within and between their own judgments in assigning the moral values that form part of the Deeming Principle. Justice Nariman's subtle expansion of the meaning of CM is plain to see. Justice Chandrachud, on the one hand suggests that the Preamble is foundational to CM, and on the other approaches CM as the emerging from a very wide question – "what it is that the constitution is trying to say?" – potentially setting the stage for future judges to incorporate a number of "features" that have nothing to do with the Preamble. The rise of inconsistent content given to the Deeming Principle was foreseeable. As far back as 2009, Pritam Baruah noted that for judges to adequately address the concern that CM is just a place holder, that much like "morality" CM too does not have content of its own,

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[56] Id. at 61.

[57] Gautam Bhatia, *India's attorney general is wrong. Constitutional morality is not a 'dangerous weapon'*, SCROLL.IN, (Dec. 21, 2018, 8:00 AM) https://scroll.in/article/905858/indias-attorney-general-is-wrong-constitutional-morality-is-not-a-dangerous-weapon.

judges must discharge "the burden of coherence and institutional history" when they elaborate on CM's content.[58] Twelve years on, we can safely say that courts have not discharged that burden.

Second, judges appear to be unsure about CM's subject. All judgments, barring one, situate CM as applying against the State, predominantly as a deeming principle to inform the meaning of "morality", and sometimes even as an aspiration for the State. However, Justice Chandrachud's concurring judgment in *Johar* is an important exception. He approaches CM as a "mental attitude" that citizens must imbibe, first through society, and when society fails, then through the court as an "external facilitator". In other words, CM's subject is not the State but the citizen, and in the name of deepening CM, courts may impose some form of conditions on citizens (or through them, the State). The distinction I draw out here – of CM's subject as the State or the citizen – is not mere hair-splitting. If CM's subject is the State, it is easy to see how courts can apply CM as an interpretive tool to direct State action. They must, however, stop using Ambedkar as a prop to defend their use of CM. Ambedkar never intended CM to act as a deeming principle or even as a tool of constitutional interpretation.[59] On the other hand, if CM's subject is the citizen, courts will be acting consistent with CM's intellectual sources: Ambedkar and Grote. But courts must then address how they have the constitutional authority to determine CM's content and why the political domain is not its best battleground. They have not.

B. Constitutional Morality as Political Ethics

[58] Pritam Baruah, *Logic and Coherence in Naz Foundation: the arguments of non-discrimination, privacy, and dignity*, 2 NUJS L. Rev. 505, 524 (2009).
[59] In a lecture delivered after his retirement, A.P. Shah, the author of *Naz*, confirmed that "Dr. Ambedkar had a different idea when he spoke of that concept." See fn. 24, Justice A.P. Shah, Section 377 IPC: From Hostility and Hatred to Courage and Freedom, Ninth Tarkunde Memoral Lecture, delivered on Dec. 12, 2015, available at (2016) 2 SCC (J) 1, 7.

Quite apart from CM as a Deeming Principle, I suggest that there is a second judicial vision. This vision sets CM in the backdrop of disputes about and between institutional actors. These disputes relate to the nature of their powers and duties, as a function of the text of the constitution and, more prominently, its non-textual norms. I will examine three judgments.

i. ***Narula*: CM reaches the Prime Minister**

The first is *Narula*.[60] A social action petition asked the court to read in limitations on the Prime Minister's power to appoint persons with criminal antecedents to cabinet positions in the government. The Constitution and existing statute states that if a person is *convicted* of certain categories of offences, then she is disqualified from becoming a *Member of Parliament*. The petition sought to prohibit the Prime Minister from choosing *cabinet members* – Members of Parliament who head Government departments, such as the Finance Minister or Defence Minister – with *any* "criminal antecedents" or *pending* criminal charges against them. In other words, the petition asked the Court to create a special class of members of Parliament – cabinet members – who would be subject to *additional* qualifications/disqualifications, over and above what the Constitution and statute provide for ordinary Members of Parliament.

The Court refused. Justice Misra, writing for majority, commented *obiter dictum* about the importance of observing CM. As per the Court, CM "*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.*"[61] CM was seen to be a "laser beam" that guides "institution building". If CM was to have any meaning, then it must be "legitimately expected" that the Prime Minister must not chose a cabinet member who has criminal antecedents or a pending criminal charge framed against him or her.[62]

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[60] Manoj Narula v. Union of India, (*Narula*) (2014) 9 SCC 1.
[61] *Id.* at ¶75.
[62] *Id* at ¶100.

ii. ***GNCTD***

Our second case is *GNCTD*[63]. This case is complex and cluttered with technical detail, but the main issue was simply this: how is political authority distributed between the Lieutenant Governor and the Chief Minister of Delhi? New Delhi is the capital of India. Like many other national capitals, New Delhi does not fall under its own province. Rather, New Delhi is a standalone territory that the Central Government controls. When India adopted its Constitution, it was decided that an administrator holding a constitutional post titled Lieutenant Governor (LG) will be the *de jure* head of New Delhi. The Central Government would appoint the LG, who in turn would act as the Central Government's representative to govern Delhi. However, in 1991, the Constitution was amended to create a new post called Chief Minister of Delhi, who would be elected by direct popular elections. The amendment empowered the Chief Minister to frame policy and govern Delhi, making her Delhi's *de facto* head. The LG remained the *de jure* head of Delhi.

GNCTD was a political power struggle. The Chief Minister and the LG of the time sparred over the scope and limits of their authority in relation to each other. As a result, important government projects on education, healthcare, and policing, among others, were suspended. The Court was asked to rule on two sets of questions: after the 1991 amendment, what are the domains left to the exclusive jurisdiction of the LG (and by extension the Central Government); and in those areas left to the jurisdiction of the Chief Minister, what is the role of the LG? Can she review decisions of the Chief Minster, and even veto them on certain grounds?

The Court held that the LG cannot interfere with the Chief Minister's decisions, except on limited grounds mentioned in the Constitution. These grounds may be invoked only in exceptional circumstances. CM was held to be the determinative standard: if the difference of

[63] *Government of NCT of Delhi v. Union of India,* 2018 8 SCC 501.

opinion between the LG and the Chief Minister does not rise to the standard of CM, then the LG cannot doubt the Chief Minister's decision.[64] Chief Justice Misra's majority judgment defined CM as "*the morality that has inherent elements in the constitutional norms and the conscience of the Constitution.*"[65] CM requires constitutional actors and institutions to "*cultivate and develop a spirit of constitutionalism where every action taken by them is governed by ... the basic tenets of the Constitution.*" This, the majority hoped, would act as a check on these institutions from turning "despotic and tyrannical" and negating "the very idea of democracy."[66]

In a concurring judgment, Justice Chandrachud approached CM in more concrete terms and focused on its impact on CM. Instead of ascribing any unifying definition to the term, Justice Chandrachud explained various "features" of CM. One of them is that constitutional actors must see their relationships with one another as "constitutional partnerships", such that they share the "ability and commitment to arrive at decisions on important issues consensually".[67] Another is that it establishes "the basic rules which prevent institutions from turning tyrannical."[68] Yet another is "institution building".[69] In his eyes, CM provides an "institutional basis for political behaviour", with the object of reducing "the gap between representation and legitimacy."[70] It is striking that Justice Chandrachud limits himself to only those "features" that have an apparent connection to the dispute between the parties. He does not go so far as to provide all-encompassing standards to determine CM. This is in stark contrast to the majority opinion, which speaks in more abstract and general terms.

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[64] *Id.* at ¶236.
[65] *GNCTD* (2018) 8 SCC 501 at ¶ 57 (majority opinion).
[66] Id at ¶ 59.
[67] *GNCTD* 2018 8 SCC 501, at ¶9 (Chandrachud,J., concurring).
[68] Id at ¶11.
[69] *Id at* ¶14.
[70] Id. *citing* THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 12 (Sujit Choudhry et al eds., 2016).

iii. *Aadhaar (II):* a dissent to remember

The final case in this account is *Aadhaar (II)*[71]. The *Aadhaar (II)* litigation is a long and sordid tale. Broadly put, the Court was petitioned to rule on the constitutionality of the Central Government's Aadhaar project (hereafter "Project") – a system where the Government collected biometrically verifiable data of each citizen and assigned a unique identity number, which the Government would then use in its various transactions with the citizen, like the distribution of welfare benefits. The Central Government began developing and implementing the Project through executive fiat, long before Parliament passed legislation to back it. When the petitioners challenged the constitutionality of the Project, the Court framed at least six interim orders[72] that expressly prohibited the Central Government from compelling citizens to enroll in the Project or making citizens' entitlements contingent on such enrolment. Parliament enacted legislation, popularly called the Aadhaar Act, to give legislative backing to the Project in March, 2016. The Court, however, continued to hear arguments against its constitutionality. In at least one interim order, the Court made clear that, despite the Project's new-found legislative backing, the Central Government could not compel citizens to enroll into the Project to receive a Government benefit.[73] However, the Central Government continued to disregard the Court's repeated directions.

The Court set out to address whether the Central Government could have proceeded to implement the Project after having received Parliament's authorization, even when the Court had framed interim orders that prohibited the Central Government from doing so. And if not, whether the Central Government was in contempt for breaching the Court's orders. The majority opinion took a hyper-technical approach, and argued that once Parliament enacted the

[71] *K.S. Puttaswamy v Union of India (II)*
[72] These orders are dated September 23, 2013, November 26, 2013, March 24, 2014, March 16, 2015, August 11, 2015, and October 15, 2015.
[73] Order dated 14 September, 2016.

Aadhaar Act, the Central Government's actions were backed by statute, and therefore did not infringe the Court's interim orders.[74] At the same time, the majority observed that "*it would have been better had a clarification been obtained from the Court after the passing of the Aadhaar Act before issuing such circulars and orders …*".[75] However, even though the Central Government did not take that route, for the majority, "*it would be difficult to hold the [Central Government] in contempt of the orders passed by this Court*".[76]

In dissent, Justice Chandrachud argued that "*the Aadhaar Act did not, as it could not have, merely nullified the interim orders of this court*". No section in the Aadhaar Act gave it "*overriding effect notwithstanding any judgment, decree or order of a court.*"[77] What troubled Justice Chandrachud, however, was not limited to the absence of any enabling section in the Aadhaar Act itself. From a constitutional standpoint, the Central Government's repeated disregard of judicial directions implicated the rule of law. The Central Government's actions nullified the Judiciary's authority to act as a constitutional check on the Executive. This, according to Justice Chandrachud, sent a problematic signal to citizens about the "moral and institutional authority" of the Court. CM plays a central role here. According to Justice Chandrachud, the authority of the Court to review the Central Government's actions as well as the obligation of the Central Government to respect the Court's decision must be seen together. While the Constitution provides for the former, it is respect for the rule of law – and more particularly "*constitutional morality as an essential component of the rule of law*" – that guarantees the latter. Here, quite apart from the absence of an enabling section in the Aadhaar Act, "propriety" and "constitutional duty" – two fundamental albeit unwritten constitutional norms – required the Central Government to seek permission from the Court before proceeding

[74] *Aadhar II,* at. ¶s 443-45
[75] Id at ¶ 445.
[76] Id.
[77]Id. at ¶ 334 (Chandrachud, J., dissenting).

to make enrollment mandatory.[78] Absent permission, CM obligated the Central Government to faithfully comply with the Court's orders. Justice Chandrachud concluded that CM needed "to be enforced as a valid response to these arbitrary acts."[79] Perhaps recognizing the futility of passing any reliefs, he did not order any remedy on contempt.

iv. The Political Ethics Principle

a. The Account Captured

The foregoing cases point to a second judicial vision of CM. This vision casts CM in the domain of institutional politics. While India may have the longest constitution in the world, with much attention devoted to matters of administration, the Indian constitution – or indeed *any* written law, whether statute or rule – cannot contemplate every situation that arises when political institutions perform their functions. Key questions around the nature, substance, and limits of institutional powers and responsibilities remain under-determined or all together uninformed by written law. CM acts as insurance – a "fulcrum"[80] – by imposing a duty on institutions and the agents working in them to act in ways that best promote the spirit of the constitution.[81] When institutions confront one another in extraordinary circumstances (like *GNCTD* or *Aadhaar II*), or even when they perform their quotidian constitutional tasks in ordinary ones (like *Narula*), they are expected to jettison any narrow cost-benefit analysis that takes account only of political gains. Instead, they must engage in a broader constitutional analysis that considers the impacts of their actions on democracy and governance. By asking institutions to reflect in such a manner, CM "underscores the ethics of politics" and gives

[78] Id.
[79] Id. at ¶ 337.
[80] *GNCTD*, 2018 8 SCC 501 at ¶ 77 (majority opinion): "*The constitutional culture stands on the fulcrum of these values [that constitute the constitutional morality]*"; GNCTD at ¶ 15 (Chandrachud.,J. concurring): "*A Constitution can establish a structure of government, but how these structures work rests upon the fulcrum of constitutional values*".
[81] "*Constitutional morality places responsibilities and duties on individuals who occupy constitutional institutions and offices.*"

"politics the identity to succeed."[82] The function, and perhaps the constitutive elements, of CM is oriented towards the citizen's relationship with the State. CM imposes duties and responsibilities to preserve the "trust" and "faith" of citizens in our constitutional institutions – whether in our Prime Minister[83], our courts[84], or our democratic institutions[85]. We may call this account of CM as the Political Ethics principle.

Since the Political Ethics principle comes alive when written law is not determinative of a correct (or best) answer to a legal question, its content cannot always be set *ex ante*. It must be forged contemporaneously at the time of inter or intra institutional confrontation. To be sure, the Political Ethics principle does not surface *only* when written law runs out. It must be "upheld at every stage" because "*the text of the Constitution may not be enough to protect its democratic values.*"[86] Along with written law, the argument goes, the Constitution is draped by a "constitutional culture" that comprises a set of norms, practices, and habits of thought that determine meta-constitutional issues: "*what questions we ask, what arguments we credit, how we process disputes and how we resolve those disputes.*"[87] All constitutional institutions must imbibe this "constitutional culture".

b. <u>Uncertain source of authority</u>

[82] Id. at ¶ 14.
[83] *Narula*, (2014) 9 SCC 1 at ¶ 96: "*The repose of faith in the Prime Minister by the entire nation under the Constitution has expectations of good governance which is carried on by the Ministers of his choice.*"
[84] *Aadhar II,* ¶ 337 (Chandrachud,J., dissenting): "*Constitutional morality requires that the faith of the citizens in the constitutional courts of the country be maintained.*"
[85] *GNCTD,* (2018) 8 SCC 501 at ¶ 13 (Chandrachud,J. concurring),: "*Constitutional morality highlights the need to preserve the trust of the people in institutions of democracy.*"
[86] Id at ¶ 9. As Ambedkar presciently observed, "*it is perfectly possible to pervert the Constitution, without changing its form by merely changing the form of the administration and to make it inconsistent and opposed to the spirit of the Constitution.*"
[87] Id. at ¶ 157 (majority opinion), (quoting Andrew M. Siegel, *Constitutional Theory, Constitutional Culture*, 18 U. Pa. J. Const. L. 1067, 1067 (2016)). It is unclear whether the court agrees with Siegel's conception of "constitutional culture", which he takes pains to construct. For the purposes of this paper, I am limiting myself to the court's quotation of Siegel's analysis.

Courts have given a robust account of the benefits of developing CM as a vehicle to deepen political ethics in India's political institutions. Who does not want her Government to discard petty politics in favor of principled constitutional politics? But courts have not addressed a more fundamental question. If the Political Ethics principle operates when written law is silent, where does the court derive its jurisdictional authority to set the content of and enforce the Political Ethics principle?

There are, to my mind, three possible answers. First, sometimes courts use the Political Ethics principle to interpret an existing clause in the constitution. In this scenario, the court engages in ordinary textual interpretation, an activity that falls squarely within its domain. For instance, in *GNCTD*, one issue related to the interpretation of Article 239AA(4), which states that if there is a difference of opinion between the LG and the CM on "any matter", then the LG shall refer it to the President. As per the Court, the Political Ethics principle demands that "any matter" cannot mean "every matter", and that only genuine differences of opinion that implicate constitutional concern may be referred to the President.[88]

Second, sometimes courts view the Political Ethics principle as merely making explicit what is implicit. It is a vehicle that finds its foundation in and builds upon the structure and purpose of the constitution's allocation and distribution of powers. The Political Ethics principle, then, is a necessary, even if unarticulated, premise for the Constitution's success. Courts use a number of doctrines that they have devised over the years – such as filling

[88] See *GNCTD,* 2018 8 SCC 501 at ¶ 136 (Chandrachud,J.,concurring).

constitutional silence[89], enhancing the spirit of the constitution[90], or upholding the soul of the constitution[91] - to justify the application of the Political Ethics principle.

Third, it may be admitted – perhaps correctly – that there exists no source of authority for courts to enforce the Political Ethics principle. But a pragmatist may ask "so what?". The ends justify the means. The Political Ethics principle is simply a set of ethics, norms, and moral practices that trace their roots in political theory and that are now constitutionalized. "Good governance", "cooperation", "propriety", "constitutional duty" – all themes that judgments in this account cover – find their natural homes in moral and political theory, not positivist constitutional law. Their constitutionalization deepens a culture of ethics in political decision-making and reposes public faith in political and constitutional processes.

PART III: TWO CRITIQUES

In Part II, I introduced two accounts of CM that courts have developed. My analyses took each account on its own terms and sought to critique its shortcomings. In Part III, I will explore two larger issues that arise due to the judicial development of CM and the manner in which courts have reasoned about it. The first is about the judicial monopolization of the meaning of CM and whether that is desirable. The second is about the court's failure to give an underlying legal theory that justifies its continued use of CM.

A. Judicial Monopolization

[89] Id at ¶ 15: "*Constitutional morality requires filling in constitutional silences to enhance and complete the spirit of the Constitution.*"
[90] Speaking in relation to constitutional morality, CJI Misra stated "*The constitutional functionaries owe a greater degree of responsibility towards [the Constitution] ... they must ensure that they cultivate and develop a spirit of constitutionalism ...*" id. (majority opinion)
[91] *Id.* at ¶ 16: "*[Constitutional morality] specifies norms for institutions to survive and an expectation of behaviour that will meet not just the text but the soul of the Constitution.*"

Both accounts are clear about who holds the keys to CM: the judiciary. Courts have entrusted themselves – and only themselves – the power to create, develop, enforce, and review CM. They do not contemplate any role for other constitutional organs. Effectively, they have monopolized the power to give meaning and content to CM. What this does to an already complicated separation of powers frameworks that India follows is to be seen. As for citizens, courts have identified a singular, almost Grotean role: their "responsive participation" towards "imb[ibing] the broad values of the Constitution" to achieve a "flourishing … constitutional order".[92] But what about enfranchising citizens to develop the CM that governs them? Courts do not contemplate any such enabling mechanism.

Assuming that the cultivation of a sentiment of CM in the people (in Ambedkar's terms) is a valid and desirable constitutional goal, is the Indian judiciary, in its sole capacity, its *best* engineer? My sense is no. For all the power that the court has accumulated for itself, particularly qua other public institutions, judicial supremacy has not had entirely positive outcomes. Recent critiques of the court's interventions in public matters in general[93], and in public interest litigations[94] and social rights adjudications[95] in particular, point to shared concerns: the court is not institutionally equipped to tackle many types of problems that come before it and its actions, while rich in rhetoric, are often shallow and have no appreciable impact.

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[92] *Id.*

[93] Pratap Bhanu Mehta, *The Indian Supreme Court and the Art of Democratic Positioning*, *in* UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 233-60 (Mark Tushnet & Madhav Khosla eds., 2015). See also S.P. SATHE, JUDICIAL ACTIVISM IN INDIA 249 – 311 (2002).

[94] ANUJ BHUWANIA, COURTING THE PEOPLE: PUBLIC INTEREST LITIGATION IN POST-EMERGENCY INDIA 112-30 (2017).

[95] Madhav Khosla, *Making social rights conditional: Lessons from India*, 8(4) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 739 (2010).

There also lies a familiar democratic concern. The judiciary, composed of unelected, mostly old, upper caste men, is not representative of India's population. Accordingly, their construction of the "broad values of the Constitution" that comprise CM may privilege certain voices and silence others.[96] For CM to be truly responsive and participatory and if citizens, as a collective, are to truly "imbibe" CM, the court will do well to carve space for the legislature, the executive, and citizens to have a direct and meaningful say in constructing CM, and in shaping the directions it ought to turn to in contested matters of public law.

B. Unprincipled

The unprincipled development of CM is another concern. This is a symptom of an all-together familiar diagnosis that there seems to be no underlying judicial philosophy that animates judicial decisions in India.[97] Courts have failed to propose either a coherent account of the nature, content, and boundaries of CM or any discernable theory of judicial review to inform its power as the sole determinant of those questions. As thicker judicial conceptions of CM emerge, courts may be seen to be making up CM as they go along. The use of such dissimilar doctrines and concepts like the silence of the constitution, constitutional abeyance, constitutional culture, constitutional trust, constitutionalism, constitutional conventions, and good governance, to defend CM has only served to water down any conceptual clarity. Compounding matters is the polyvocal nature of the Indian judicial system, which has allowed

[96] For a similar argument in a more general context, see Arghya Sengupta & Lavanya Rajamani, *The Supreme Court*, *in* THE OXFORD HANDBOOK COMPANION TO POLITICS IN INDIA 90 (Niraja Gopal Jayal & Pratap Bhanu Mehta eds., 2010): "*The Court, given the kinds of issues it interests itself in and takes ownership of, is perceived as consisting of middle-class intellectuals, and therefore as more receptive to others of their ilk, certain social and value preferences …*"

[97] Mehta has persuasively argued that formalist normative theories fail to capture judicial behaviour in India, and that ultimately courts use the consequentialist yardstick of "social acceptance" to gauge the legitimacy of their actions. Pratap Bhanu Mehta, *The Indian Supreme Court and the Art of Democratic Positioning*, *in* UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 233-60 (Mark Tushnet & Madhav Khosla eds., 2015)

judges to attribute different moral values to the content of CM in different cases, some in tension with and others even contradictory to one another.[98]

Like the critique to the Deeming Principle, the point here is not that the court has failed to speak in one voice, or even that the court *ought* to formulate CM in a consistent manner. Rather, because there are no judicially-developed principles commanding when and how CM may be invoked, judges have found it easy to identify their favoured elements that comprise the content of CM without necessarily giving reasons to defend their claims. The lack of an underlying legal theory to guide the use of CM has resulted in judges conveniently being silent on CM when it suits them, even when parties expressly make arguments citing CM or when a minority or dissenting opinion invokes CM in its reasoning. For instance, in *Aadhaar (II)*, while Justice Chandrachud's dissent heavily relied on CM to conclude that the Central Government was in contempt, neither the majority opinion nor the concurring opinion made any reference to CM. In *Narula* and *GNCTD*, Justices Lokur and Bhushan respectively made no attempt to engage with the majority's elaborate explanations and application of CM.

Taken together, (a) the judicial sovereignty on the determination of CM and (b) the court's failure to devise an underlying theory that supports the principled development of CM, may raise questions about the legitimacy of the manifestations that CM may take. *Sabarimala* gives us one good illustration. Scholars received the judgment in largely positive terms, celebrating its extraordinary egalitarian vision. But from an enforcement standpoint, *Sabarimala* (and its conclusion that CM requires temples do not discriminate against women and allow them to enter and exercise their freedom of religion) proved to be a non-starter. Popular opposition to

[98] On the polyvocal nature of the Court, see Nick Robinson, "*Structure Matters: The Impact of Court Structure on the Indian and U. S. Supreme Courts,*" 61 AMERICAN JOURNAL OF COMPARATIVE LAW 173. For illustrations of the absurdities that polyvocality can have on the coherence of legal doctrine, see Gautam Bhatia, *Potential for Chaos in India's Polyvocal Supreme Court*, IACL-AIDC BLOG, (May 21, 2018), https://blog-iacl-aidc.org/crisis-at-the-supreme-court-of-india/2018/5/20/potential-for-chaos-in-indias-polyvocal-supreme-court

the verdict was swift, strong, and vocal. The ruling government of the time – the Left Democratic Front comprising the political left – tried to enforce the verdict initially, but in the face of popular backlash, quickly backtracked.

CONCLUSION: THE ROAD AHEAD

As an intellectual concept, CM has a relatively long history, dating back to at least the mid-19th Century. As a legal-doctrinal concept, CM is still very much in its infancy. It began as an interpretive fiction to the term "morality", broadened to cover matters of political ethics, and in some judgments even applies to making and remaking "mental attitudes" of citizens, both to one another and to the constitution. The Court's common law style of constitutional interpretation has gradually added layers to its meaning.

Empirically speaking, the Court's recent interest in developing the concept of CM has been driven primarily by two judges: Misra and Chandrachud, the former a retired Chief Justice and the latter a future Chief Justice. Other judges have chipped in as well, prominently Nariman and Malhotra. But, at present, few judges have bought in to the project of establishing CM as a tool of constitutional interpretation. Some judges such as Ashok Bhushan and Madan Lokur (now retired) have notably refused to get drawn into discussions on CM, even when they have written concurring or dissenting opinions to judgments that have used CM as a central interpretive tool. Like them, most others have altogether avoided CM, even when a case at hand might have seemed ripe for its application.

For the judicial development of CM, this is a cause for concern. Indian Supreme Court judges, on average, have a very short tenure on the bench. One estimate pegs it at about five and a half years.[99] Unless other judges catch on, CM's career in the Court will be short lived.

[99] Rangin Pallav Tripathy & Gaurav Rai, *Judicial Tenure: An Empirical Appraisal of Incumbency of Supreme Court Judges*, DAKSH INDIA, https://dakshindia.org/Daksh_Justice_in_India/31_chapter_04.xhtml

In this backdrop, a recent reference in *Sabarimala* to a 9 judge-panel of the Court – a panel that sits but rarely – to address important questions of law arising in the case is significant. One issue up for the Court's consideration squarely relates to CM: "*The expression 'morality' or 'constitutional morality' has not been defined in the Constitution. Is it over arching morality in reference to preamble or limited to religious beliefs or faith. There is need to delineate the contours of that expression, lest it becomes subjective.*"[100] The outcome of the reference will address in one way or the other about the continued relevance of CM in constitutional interpretation.

Whatever the prospects of CM's continued influence in the Court, there is no doubt about its place in popular discourse. In its short modern history, CM has significantly influenced the language of conversations around morality, propriety, and responsibility of the State, public law, public institutions, and citizens in India. A number of important State actors have spoken in terms of CM in a variety of ways. Parliament recently enacted legislation criminalizing the Islamic practice of instant and irrevocable divorce at the instance of the Muslim husband (popularly called "talaq-e-biddat"). Perhaps taking stock of the controversial nature of the issue, Parliament strategically defended its legislation by referring to a Supreme Court judgment that "*vindicated the position taken by the Government that talaq-e-biddat is against constitutional morality*".[101] Members of Parliament too have helpfully appropriated CM to critique and defend legislation in their speeches in Parliament.[102] In his 2019 Constitution Day speech, the President of India urged: "*All the three organs of the State, persons gracing the*

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[100] *Sabarimala Review,* 2020 9 SCC 121 at ¶ 5. (majority opinion)

[101] ¶ 2, Statement of Objects and Reasons, Muslim Women (Protection of Rights on Marriage) Act, No 20 of 2019, https://www.prsindia.org/sites/default/files/bill_files/Muslim%20Women%20%28Protection%20of%20Rights%20on%20Marriage%29%20Bill%2C%202017.pdf

[102] See for example Lok Sabha, July 25, 2019, speech of Aparajita Sarangi, defending the talaq-e-biddat bill. See also speech of N.K. Premachandran rebutting Sarangi, claiming that the Court's continued use of CM will make the court another legislature.

constitutional posts, members of the civil society and common citizens of India are expected to abide by 'Constitutional Morality'."[103] The Law Commission of India has recommended the abolition of the death penalty in India on the back of "prevailing standards of constitutional morality".[104] All this suggests that, notwithstanding how the 9-judge bench decides CM's future in constitutional adjudication, CM as an organizing, rhetorical device in public discourse is here to stay.

[103] Press Release, Press Information Bureau, Address by the Hon'ble President of India Shri Ram Nath Kovind at the inaugural Function of 'Constitution Day', (Nov. 26,2019), https://pib.gov.in/PressReleasePage.aspx?PRID=1593530.

[104] *Report No. 262 on The Death Penalty,* L. Comm'n of India (2015) ¶ 9.2, https://lawcommissionofindia.nic.in/reports/Report262.pdf