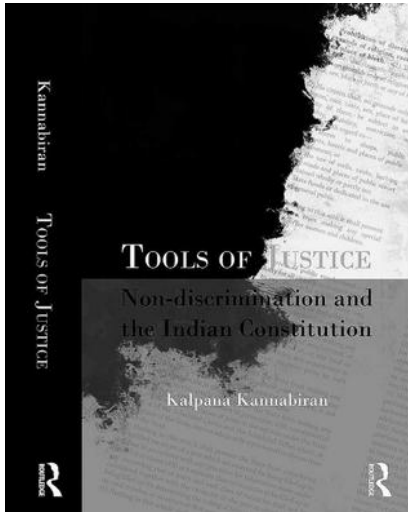


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Societal morality to constitutional morality

• [Z.M. Yacoob](#)



Kalpana Kannabiran's book, *Tools of Justice: Non Discrimination and the Indian Constitution* (Routledge, Taylor & Francis Group), a thesis of 500 pages, aims to make a contribution towards the achievement of a constitutionally acceptable order in India. It defines the change in the attitude and approach by all societal role players including, in particular, activists for social change, governmental organs as well as the judiciary. The approach it adopts includes the historical, sociological, social as well as juridical. I am not an expert on any of these disciplines nor do I know enough of the jurisprudence of India to comment on the correctness of specific facts or opinions set out in this monumental work. I have also not studied the numerous documents relied upon. My evaluation is therefore limited to examining some conceptual aspects from my perspective as a constitutional jurist in South Africa.

I must first touch upon approaches to constitutional interpretation. The writer advances an approach which may be said to be different from that adopted by the courts in India and emphasises the need to take into account the values and purpose of the Constitution. We would in South Africa too take into account the values and purpose of our Constitution. The debate about the correct interpretive approach has its basis on the distinction between arriving at the intention of the Constitution-makers, on the one hand, and the meaning of the document in its context, on the other. The latter pays little attention to the intention of Constitution-makers but, in conformity with the idea that a Constitution is a living, vibrant, flexible and dynamic instrument seeks to attain the meaning of the Constitution by extensive reference to context. I may say that I favour this approach without qualification.

It is in this sense that the methodology adopted by Ms Kannabiran is both useful and significantly powerful. She examines (in respect of disability rights; the rights of castes, tribes, religious minorities; and sex-based discrimination) the historical matrix, a conceptual delineation, the role of government, the role of activists as well as the position on the ground with ordinary people and thereafter makes proposals for change. It may well be that Ms Kannabiran has given expression to the breadth of the contextual circumstances that need to be taken into account by a court. It may not be possible for a court, in the light of the evidence available to it, to conduct as thorough an analysis as may be considered necessary. Time and resource constraints may also be a factor. But it cannot be doubted that the wider a court goes in taking into account contextual material to interpret a Constitution the greater the possibility that the final judgment of a court would reflect and represent a dynamic and living Constitution able to provide creative and transformative solutions to the problems that need to be addressed. And it must be emphasised that, unlike an ordinary commercial or delictual case, the court contest on constitutional rights often involves vulnerable communities and societies that comprise millions of people.

I did wonder whether Ms Kannabiran's reference to Dr. Ambedkar was an attempt to go back to the approach of interpretation which relies on the intention of the lawmaker or whether the views of Dr. Ambedkar are referred to in the context of an expert.

The general approach in the thesis is to emphasise the distinction between constitutional morality and societal morality. That, as I understand it, is a distinction between the nature of society, its value system, morality, well-being, inclusiveness and peacefulness, contemplated by the Constitution, on the one hand, and societal morality, on the other. The latter is postulated as a society based on horrendous and systematic discrimination and violence against, and the exclusion of, vulnerable people and communities from the "dominant" mainstream. Ms Kannabiran's work is concerned with the complex, difficult and obstacle ridden route from societal morality to the achievement of the constitutional morality.

We have the same problem in South Africa. Our Constitution proclaims a society that is equal and consonant with civil and political fundamental rights, environmental rights and socio-economic rights. We have a similar difficult route to follow. An evaluation which attempts to redesign the vehicle, build the road, chart the course and point to pitfalls is essential in a fundamental sense.

The building blocks employed in the determination and construction of the route are principally those of non-discrimination and liberty. If I understand the writer correctly, developing and putting into place a process that would systematically increase non-discrimination and liberty in a transformative sense would ultimately contribute best to the achievement of the constitutional order. There is no doubt that non-discrimination and liberty are important components of the process. But whether they are the most important or the only components is a different question. I would suggest, and the writer might agree, that all the values of the Constitution and all the rights contained in it are of fundamental and equal significance. A hierarchy of rights cannot be countenanced because rights are indivisible and inter-related. It must be said in all fairness, that Ms Kannabiran does indeed make extensive reference to many of the other rights of vulnerable people and communities. I get the sense that perhaps the concepts of non-discrimination and liberty are used to connote the circumstance that these concepts are applicable to all the rights in the Constitution and therefore all embracing.

The work postulates a distinction between non-discrimination and equality and a kind of synthesis between non-discrimination and liberty. There may be a different approach. Provided that we are speaking about substantive equality and not formal equality (I have no doubt that Ms Kannabiran is), equality and non-discrimination are, in my view, the opposite sides of the same coin. Non-discrimination may also be regarded as the vehicle towards the achievement of equality. An over-emphasis of the importance of freedom could, on the other hand, be counter-productive to the cause. This is because almost all dominant sectors rely on their right of freedom to continue with their oppressive, non-transformative, objectionable conduct. Yet, if freedom is qualified by equality in the sense of everyone being entitled to an equal freedom, the achievement of an equal society would then be modulated by appropriate management of the tension between freedom and equality.

I can only comment on one more issue. And that is Ms Kannabiran's plea, support and argument for intersecting grounds of discrimination as well as analogous grounds. Our Constitution provides for both and it is an important reason why I swear allegiance to it. It goes without saying that a poor Dalit deaf lesbian woman on a wheelchair is far more vulnerable and in greater need of constitutional protection than a female university teacher who has all her faculties and who is part of the "dominant" classes. If this is not recognised, constitutional jurisprudence could suffer. And there is no need to limit protection to the grounds expressly mentioned in the Constitution.

I would have hoped that the book would have been shorter to be more accessible so that role players who are important in the various sectors would have been able to benefit from it completely even if they were not academically inclined. Nevertheless, a careful study of this fascinating work would enhance an understanding of the position on the ground, the dire need for change and the way in which this is to be done.

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