
JUDICIAL BALANCE TO CONSTITUTIONAL MORALITY AND MAJORITARIAN MORALITY

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ABSTRACT

It is about the changing role of the Indian judiciary in bridging the constitutional and majoritarian morality- pivotal issues to maintaining democratic morality in a diverse society. The morality as envisaged by the framers and discussed in the landmark judgments is constitutional morality where allegiance is taken to the principles of liberty, equality and dignity even though these may be opposed to the entrenched cultural norms or religious practices. By examination of the most significant cases one can find such as Navtej Singh Johar v. Union of India, Indian Young Lawyers Association v. Union of India, Shayara Bano v. State of Kerala. This paper focuses on the use of constitutional morality to broaden the rights of oppressed groups and to defend them by the courts, and addresses the criticism of overreaching into judicial matters.

Based on to comparative jurisprudence in United States, South Africa and Germany. The article proposes a normative paradigm of judicial balancing as a way of maintaining constitutional rights and respecting democratic pluralism. The article puts the Indian constitutionalism in global discourses of moral power and judicial legitimacy.

INTRODUCTION

Besides the judiciary being a court of law, in a constitutional democracy, the judiciary plays the role of the guardian of fundamental rights and the moral compass of the country. Its interpretative authority is limited not only to the words of the statutes but to the moral ideals of equality, justice, liberty and fraternity of the Constitution as incorporated in its structural features. The role is further complicated when the courts are called upon to reconcile the ethical opinions of the majority population, as the majoritarian morality, and the constitutional morality as expressed in the values of continuity and permanence embodied in the Constitution. Having a clash between those two moralities is a major dilemma to the modern constitutional adjudication and judicial philosophy.¹

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As articulated by the framers and subsequently in the jurisprudence, constitutional morality requires the institutions, and most importantly the court to safeguard the transformational vision of the Constitution, even if such an objective can be contrary to settled societal practices or popular will.² It ensures that the Constitution is always a living document that can protect the rights of all citizens, especially the weakest or more marginalized segments of the population, in the act of being a normative framework that is outside of fleeting political will and the status quo of cultural average. In contrast, the prevailing religious, political and cultural narratives shape what is understood by majoritarian morality. It is not a fixed process that is molded by the popular will, legislative requirements, populist discourse and so on. Moral restraints on majoritarianism, despite the fact that democracy is founded on it, are formulated through constitutionalism to guard against the extinction of the rights of the minority and the misuse of the state authority. Consequently, the court has the problem of having to act with constitutional values and at the same time uphold democratic legitimacy. Such a not hypothetical because contradiction has revealed itself in some of the important decisions. In *Navtej Singh Johar v. the Supreme Court*, the Supreme Court used constitutional morality to outgrow social prejudices on decriminalization of consensual same sex relationships. *Union of India*. So, in the case, *Joseph Shine v. The Court* considered a significant thing concerning gender equality and alleged the law on adultery unconstitutional. Both these verdicts can be seen as a prediction of the judicial body eager to restrain the pressure of majority rule and protect the constitutional principles. majoritarian spirit, which, as critics put it, is what the decision on Ayodhya land dispute- not a work in philosophic writing. These are not judicial harm and harm by judges acts, taken carelessly. These courts stand first on the need to be generally submissive to the people, and, second, to the spirit of the Constitution. It is not that it is just the venture in which a principle of law has been recourse to but it must be a decision of caution and good sense by the institution and of morals. And the ancient ones such as Justice H.R. Khanna allowed in *ADM Jabalpur v. The Shivkant Suklala* are there to remind us that there are no higher breeds of political pressures to a great extent that would compel a person to doubt the truth that there is a national cause of constitutional morality via the judicial conscience. The fact that India is socio and politically transitioning is a pointer that role of judiciary in ensuring that this balance is achieved will

¹Sujit Choudhry, *The Migration of Constitutional Ideas* 3–5 (Cambridge Univ. Press 2006).

² B.R. Ambedkar, *Debates Before the Constituent Assembly*, vol. 1, at 59 (Lok Sabha Secretariat 1949).

become even more important. The perpetuation of the Constitution and the principle of legitimacy of the judiciary depends upon a jurisprudence as such that attains a balance between democratic fact and constitutional dream. It is open to, and is advisable that courts should devise a way to balance the contentious relationship between majoritarian and constitutional morality to arrive at substantive justice. This is the relationship that is analyzed in this paper.

Introduction to Judicial Balance: Navigating Constitutional Morality and Majoritarian Morality

The judicatory system in a constitutional democratic state, such as India, is endowed with a significant role of establishing a balance in the clash between the standards of the Constitution and the changes of the moral preferences of the majority, i.e. judicial balancing, and calls upon the courts to interpret the Constitution and the laws, not solely based on the linguistic framework but through the normative reappropriation of constitutional morality. The morality of the majority, which inculcates the prevailing ideology of cultural, religious or political philosophy, can at times clash with such an interpretation. There would be a strain in the jurisprudence of India to show that the court has a dual responsibility in knowing the transformative nature of the constitution but at the same time, to retain the knowledge of the democratic space within which it is functioning.

Constitutional Morality vs. Majoritarian Morality

Constitutional morality refers to the commitment to the principles of liberty, equality, fraternity, and justice that are incorporated into the Constitution. It demands that institutions uphold those values even if they are contrary to the social mores of the time, that constitute the majority. In a contrast, Majoritarian morality, is the dominant value and belief of the majority population at a specific point in time. The aspect of constitutionalism is to protect against the dangers and abuses of majority rule, which is the basis of democracy, against the protections of minorities and fundamental freedoms.

Judicial balance in practice

The Indian judiciary has always utilized constitutional morality as a mechanism to protect individual rights when an administrative or legislative act has endorsed predominant popular views. There are several important cases that embody judicial balancing and exhibit a commitment to safeguarding constitutional ideals against popular pressure.

Navtej Singh Johar v. Union of India (2018)

In this landmark case, the Supreme Court legalized consensual homosexual acts among adults by striking down sections of Section 377 of the Indian Penal Code. The ruling underlined the point that constitutional morality has to take precedence over the morality of society, which had been stigmatizing LGBTQ+ members for ages. Justice Chandrachud pointed out that "constitutional morality cannot be martyred at the altar of social morality."³

Indian Young Lawyers Association v. State of Kerala (Sabarimala Case, 2018)

The Court permitted women of menstruating age to go to the Sabarimala temple, going against centuries-long religious practices. The majority opined that the denial of women was unconstitutional under Article 25 and Article 14 of the Constitution. Justice Nariman emphasized that "the Constitution is founded on the bedrock of the rule of law, which includes equality and non-discrimination."⁴ The judgment precipitated large-scale protests, demonstrating the tension between constitutional requirements and majority beliefs.

Manoj Narula v. Union of India (2014)

In this case, the Court considered the appointment of criminal elements as ministers. It was upheld that constitutional morality requires public functionaries to maintain integrity and transparency. The judgment gave fillip to the notion that democratic legitimacy should be balanced by constitutional values.⁵

State of Maharashtra v. Indian Hotel and Restaurants Association (2013)

The Supreme Court invalidated a prohibition of dance bars in Maharashtra on the grounds that it infringed the right to livelihood under Article 19(1)(g). The Court opposed moralistic views presented by the state on the basis that public morality cannot supersede constitutional liberties.⁶

The Rise of Majoritarian Morality

³ (2018) 10 S.C.C. 1.

⁴ (2018) 10 S.C.C. 1.

⁵ (2014) 9 S.C.C. 1.

⁶ (2013) 8 S.C.C. 519.

Majority rule is the guiding principle in democratic states. But where the moral compass of the government starts to align only with the mood of the majority, constitutional values may be sacrificed. This form of majoritarian morality has been on the rise in the past few years, especially in pluralistic democracies such as India. It describes dominance of the beliefs, habits, and tastes of the majority in defining laws, policies, and courtroom decisions, frequently at the expense of minorities' rights and constitutional protections.

Definition and Features of Majoritarian Morality

Majoritarian morality is the moral code that mirrors the majority political, religious, or cultural values. In contrast to constitutional morality, which lies in its bedrock of justice, equality, and liberty, majoritarian morality is malleable and usually driven by populist rhetoric. Its main features are:

- Homogenization of values: It represses diversity by advocating one cultural or religious identity.
- Moral absolutism: It applies the majority's moral norms universally, ignoring pluralist norms.
- Resistance to progressive change: It usually resists reforms that attack traditional beliefs, even when such reforms are required by the constitution.

Influence of Electoral Mandates and Public Opinion

Electoral mandates are often seen as moral approvals of the majority's vision. Political parties, riding on electoral victories, can implement policies that are in line with popular opinion instead of constitutional ideals. Public opinion, magnified through media and social platforms, can put pressure on institutions to yield to majoritarian demands.

For example, criminalization of beef consumption in various Indian states was more with religious sentiment of the majority rather than constitutional argument. Although Article 48 of the Constitution promotes protection of cows, enforcement of prohibitions has impacted disproportionately upon minority groups whose dietary habits are different.⁷

⁷ (1958) S.C.R. 629.

In the same vein, the Citizenship (Amendment) Act, 2019 (CAA), granting special expeditious citizenship to non-Muslim refugees from contiguous countries, was rationalized by the government as a benevolent act. The opposition claims it is an example of majoritarian morality in that it omits Muslims and also seeks to dismantle the secular character of the Constitution.⁸

Risks of Populism and Erosion of Minority Rights

Populism combined with majoritarian morality is a significant threat to constitutional democracy. It tends to involve the framing of minorities as "others" or as threats to national identity. This can lead to:

- Legal discrimination: Legislation may be drafted or judicially interpreted in terms that discriminate against minority groups.
- Social alienation: Minorities can be stigmatized, subjected to violence, or excluded from public debate.
- Institutional compromise: Autonomous institutions such as the judiciary can be under pressure to conform to dominant narratives.

A stark example is the *Shayara Bano v Union of India* (2017) case, where the Supreme Court struck down the practice of instant triple talaq among Muslims. While the judgment upheld gender justice, it also sparked debates about selective intervention in religious practices.⁹ Critics argued that similar scrutiny was not applied to regressive customs in other religions, suggesting a tilt towards majoritarian preferences.

Examples of Majoritarian Pressures on Legal Institutions

Legal institutions, especially the judiciary, are expected to act as bulwarks against majoritarian excesses. However, they are not immune to societal pressures. In some cases, judicial decisions have reflected a compromise between constitutional morality and public sentiment.

1. *Indian Young Lawyers Association v State of Kerala* (2018)

⁸ Citizenship (Amendment) Act, No. 47 of 2019, India Code (2019).

⁹ (2017) 9 S.C.C 1.

In the Sabarimala case, the Supreme Court allowed women of menstruating age to enter the temple, citing violation of Articles 14 and 25.¹⁰ While the judgment was grounded in constitutional morality, the backlash from religious groups and political actors revealed the strength of majoritarian morality. The subsequent review petitions and protests indicated how public opinion can challenge judicial independence.

2. State of Maharashtra v Indian Hotel and Restaurants Association (2013)

The Supreme Court overruled a prohibition on dance bars, holding that it infringed the right livelihood in article 19(1)(g). The state had justified the prohibition on the basis of morality, which had shown concerns of unease of the majorities regarding the specific professions. As was revealed in the Court ruling, the constitutional liberty and social morality became incompatible.

3.State of Kerala v Bijoe Emmanuel (1986).

Three Jehovah Witness students had been dismissed on the basis of failure to sing national anthem on grounds of religion. The landmark courts case where majoritarian morality was judgmentally opposed in article 25 was nevertheless, upheld.

Judicial Dilemmas and Balancing Acts

They must read the Constitution and at the same time sensitive to the moods and democratic processes. This balancing is exceptionally challenging where constitutional morality, the values that have been inscribed in the Constitution, comes against majoritarian morality or where majoritarian morality seems to be going against the soul of the Constitution. The courts are also probed with the shortcomings on their own institutional structures and strong candidates are another way out of constitutional ethos having been dissenting in their judgements.

Maintaining Constitutional Morality Against Popular Will

One of the deepest duties of the judiciary is to guard constitutional values even when these clash with prevailing societal philosophies. In the case of Navtej Singh Johar v Union of India, this notion was made very clear as the Supreme Court decriminalised homosexual sex between consenting adults through the interpretation of Section 377 of the Indian Penal Code.

¹⁰ *Id.*

¹¹ Notwithstanding prevalent social conservatism, the Court held that constitutional morality has to supersede public morality. Justice Chandrachud said, "Our Constitution is a living document. It must be interpreted in a manner that enhances the liberty and dignity of the individual."¹²

Likewise, in *Joseph Shine v Union of India*, the Court invalidated Section 497 of the IPC, criminalizing adultery. The legislation was held to be unconstitutional for undermining the dignity and agency of women. The ruling spurned patriarchal norms and reiterated the precedence of individual rights over archaic moral codes.¹³

In the case of *Sabarimala (Indian Young Lawyers Association v State of Kerala)*, the Court held that gender discrimination at the temple was against Articles 14 and 25. The judgment was based on constitutional morality, with a focus on gender equality and non-discrimination.¹⁴ Although masses of people criticized the decision, the move signified the willingness of the judiciary to ensure the constitutional values take precedence over the majoritarian religious sentiment.

Cases Where Judiciary Yielded to Majoritarian Sentiment

- Though courts have repeatedly stood up for constitutional morality, there have been instances where judicial decisions seemed to follow predominant expectations. This fine juggling of constitutional morality and majoritarian feeling is evident in some of the landmark decisions. One such landmark case is *M Siddique (D) Thr Lrs v Mahant Suresh Das*, popularly known as *Ayodhya case*, in which the Supreme Court gave the contested land to the Hindu claimants and ordered that a different parcel be given to the Muslim community.¹⁵ Although the verdict was framed as a resolution of a civil property dispute, numerous scholars and commentators have argued that it reflected dominant religious sentiments and majoritarian expectations more than strict legal reasoning.¹⁶ The case demonstrates how the judiciary can be a complicated institution in finding its way around constitutional principles in the midst of strong sentiment and political symbolism amongst the people.

¹¹ *Id.*

¹² *Id.*

¹³ *Id at 189.*

¹⁴ *Idl.*

¹⁵ (2019) 14 S.C.C 1.

¹⁶ Faizan Mustafa, *Ayodhya Verdict: A Victory of Faith over Law?*, *Indian Express* (Nov. 10, 2019), <https://indianexpress.com/article/opinion/columns/ayodhya-verdict-supreme-court-faith-over-law-6111656/>

Mohd. Hanif Quareshi v State of Bihar (1958).

The Court affirmed that multiple states had placed bans on slaughter of cows as causes of several reasons basing on Article 48 of the Constitution. Although the verdict took into consideration the economic consequences to the minority communities, it yielded to the cultures and religious orientation of the majority.

The problem of ensuring a balance between the Will of the people and the Spirit of the constitution exists.

Democracy is based on will of the people that is made through election and legislation. On the contrary, democratic governance is based on the will of the majority, the Constitution imposes principled constraints on this will to safeguard individual rights and ensure the delivery of substantive justice.¹⁷ In this context, the judiciary is tasked with interpreting statutory provisions in a manner that respects democratic legitimacy while upholding the normative commitments of constitutionalism.¹⁸ This tension is most acutely felt in cases concerning free speech, religious liberty, and minority rights.

A pertinent illustration is *Kaushal Kishor v State of Uttar Pradesh*, where the Supreme Court examined the scope of free speech exercised by public officials and its potential impact on constitutional rights.¹⁹ The Court affirmed that although Article 19(1)(a) guarantees freedom of speech, its exercise must remain within the bounds of constitutional morality.²⁰ The judgment reiterated that public discourse—even when aligned with popular sentiment—must respect the dignity and rights of others.

At the same time, the judiciary must remain vigilant against the perils of judicial overreach. Excessive intervention in domains traditionally reserved for the legislature or executive may disrupt the separation of powers and institutional equilibrium.²¹ Conversely, judicial passivity in the face of constitutional violations can erode public trust in the judiciary's role as a guardian of rights and liberties.²² The art of this now is to strike a balance between principled

¹⁷Aharon Barak, *The Judge in a Democracy* 85 (Princeton Univ. Press 2006)..

¹⁸Sujit Choudhry, *The Migration of Constitutional Ideas* 3–5 (Cambridge Univ. Press 2006).

¹⁹(2023) 4 S.C.C 1.

²⁰*id* [para 129].

²¹S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* 45 (Oxford Univ. Press 2002).

²²Upendra Baxi, *The Avatars of Indian Judicial Activism: Explorations in the Geography of (In)Justice*, in *Public Interest Litigation in South Asia* 156 (S.K. Choudhry ed., Cambridge Univ. Press 2011).

affirmation and the encroachment of democratic functions that is, to affirm constitutional values without acting like a usurper of democratic functions.

Role of Dissenting Opinions in Maintaining Constitutional Ethos

In terms of the constitutional law, dissent is required. They offer intellectual symmetry of decisions by majority and most of the time offer a foundation of later legal reform.

Dissenting opinion is an essential element in the constitutional jurisprudence. They are the intellectual equivalents of the majority judgments and are likely to be the threshold of a future change in the law. Dissents keep the Constitution alive by holding existing interpretations to question and reminding future generations of other ways to move towards justice.

The dissenting opinion expressed by justice Indu Malhotra in the *sabarimala* case was that religious practices be safeguarded under Article 25 and the courts must not intervene in issues of faith. Even though her opinion was also not spared of criticism due to the apparent glorification of the traditional norms, it pointed to the fact that the realization of religious freedom and gender equality was immensely nuanced in a constitutional manner. The strains of the type demonstrate how the judiciary has trouble with striking a balance between the conflicting rights in the context of constitutional morality.

One of the earliest examples of principled dissent can be seen in the opinion of Justice H.R. Khanna in *ADM Jabalpur v Shivkant Shukla* that was rendered in the Emergency. Although most of the bench supported the suspension of basic rights, Justice Khanna stood out and said that the right to life and personal liberty is inherent and they cannot be diluted even during the time of national crisis. His objection which was inconsequential earlier on was subsequently proven right and has come to represent the social conscience of the judiciary and its firm adherence to constitutional values.²³

Dissenting judgments are crucial in making sure that the interpretation of the constitution is pluralistic and dynamic. They offer space for minority perspectives within the judicial discourse and reinforce the principle that justice must be deliberative, not dictated by

²³ Granville Austin, *Working a Democratic Constitution: The Indian Experience* 347 (Oxford Univ. Press 1999).

unanimity.²⁴ Such voices enrich constitutional jurisprudence and safeguard its transformative potential.

Comparative Perspectives: Judicial Responses to Constitutional Values and Public Morality

In constitutional democracies, the judiciary frequently confronts the challenge of harmonizing the foundational principles of the Constitution with the shifting moral perspectives of society. This dynamic interplay between constitutional ideals and public morality is not confined to the Indian context. Jurisdictions such as the United States, South Africa, and Germany provide insightful models of how courts mediate this tension. A comparative analysis of these approaches can offer Indian jurisprudence meaningful guidance in safeguarding constitutional fidelity while adapting to evolving societal norms.

Judicial Approaches in the United States

The United States Supreme Court has been central in defining the shapes of constitutional morality, and most of its decisions oppose the common sense among the people. Its jurisprudence in its civil rights, reproductive autonomy, and LGBTQ equality demonstrate a consistent adherence to the rule of the constitution, despite such decisions facing majoritarian popular trials views.²⁵

One of the most famous examples of such a judicial stance is the case of *Brown v Board of Education* (1954) in which the Court declared racial segregation in the schools as inconsistent with the Equal Protection Clause of the Fourteenth Amendment. Although segregation was approved in many states during that time, the decision of the court was a breakthrough in the history of the American constitution, as it initiated the civil rights movement and declared the judiciary to be the protector of constitutional morality.²⁶

In *Obergefell v Hodges* (2015), the Court made same-sex marriage legal in all states of the United States and stated that the right to marry is one of the basic liberties that the must be guaranteed by the Constitution.²⁷ Despite opposition from conservative groups and several

²⁴ Abhinav Chandrachud, *Republic of Rhetoric: Free Speech and the Constitution of India* 212 (Penguin 2017).

²⁵ Laurence H. Tribe, *The Invisible Constitution* 45 (Oxford Univ. Press 2008).

²⁶ Mark Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925–1950* 189 (Univ. of N.C. Press 1987).

²⁷ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

states, the Court emphasized dignity, autonomy, and equality—core constitutional values—as guiding principles.

However, the U.S. judiciary also faces criticism for decisions that appear to reflect political or ideological leanings. The recent reversal of *Roe v Wade* in *Dobbs v Jackson Women's Health Organization* (2022) reignited debates about the role of public morality and judicial restraint.²⁸ The decision returned the issue of abortion to state legislatures, reflecting a shift toward majoritarian control over individual rights.

Judicial Approaches in South Africa

South Africa's Constitutional Court is renowned for its transformative jurisprudence, rooted in the post-apartheid Constitution that explicitly embraces dignity, equality, and freedom. The Court has defended constitutional morality with great consistency even when it goes against the cultural or religious standards.

The Court in *Minister of Home Affairs v Fourie* (2005) decided that the exclusion of same-sex couples in marriage was in breach of the equality clause of the Constitution.²⁹ The decision recognized opposition in society but made it clear that constitutional rights should not depend on popular support.

Christian Education South Africa v Minister of Education (2000) is another illustration.³⁰ It affirmed a prohibition on corporal punishment in schools against the contention that religious beliefs made the practice acceptable. The Court believed that in the current case the rights of children to protection and dignity were more valued than parental religious freedom.

South Africa's experience demonstrates how a rights-based constitutional order can enable courts to confront entrenched social norms while promoting inclusive democracy.

Judicial Responses in Germany

Germany's Federal Constitutional Court is renowned for its strict protection of constitutional values, especially human dignity enshrined in Article 1 of the Basic Law. The Court frequently undertakes proportionality analysis in balancing individual rights against public interests.

²⁸ *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ____ (2022).

²⁹ *Minister of Home Affairs v. Fourie* 2005 (1) SA 524 (CC) (S. Afr.).

³⁰ *Christian Educ. S. Afr. v. Minister of Educ.* 2000 (4) SA 757 (CC) (S. Afr.).

In Lüth Case (1958), the Court ruled that freedom of expression was to be interpreted in accordance with the constitutional order, i. e. in accordance with human dignity and with democracy. This case established the principle of the so-called indirect horizontal effect according to which constitutional rights could intervene in the relationship of the law to the law. Germany's stance on hate speech and Holocaust denial is unique in its own history.

Lessons for Indian Jurisprudence

Indian courts have demonstrated both courage and caution in navigating the tension between constitutional morality and majoritarian sentiment. Landmark decisions such as *Navtej Singh Johar v Union of India* and *Joseph Shine v Union of India* reflect a progressive commitment to individual rights.³¹ Judicial independence in India faces significant challenges, particularly in politically sensitive contexts such as *M Siddiq v Mahant Suresh Das* (Ayodhya dispute) and the judiciary's cautious stance on the Citizenship (Amendment) Act.³² These cases underscore the difficulty of maintaining institutional autonomy amidst heightened political pressures and public scrutiny.

To a comparative constitutionalist, Indian jurisprudence has a number of models to learn:

1. Moving towards a Rights-Based Interpretation: The South African constitutional jurisprudence shows how the courts may adopt a consistent approach to the interpretation of legal texts so as to facilitate social justice and safeguard the marginalized communities.³³
2. Using Proportionality Doctrine: The concept of rights balancing which Germany uses in a systematic way provides a useful template to Indian courts when handling complicated constitutional cases claims.³⁴
3. Maintaining Judiciary Independence: The experience in the United States indicates how dangerous judicial politicization can be. Indian courts must remain vigilant against ideological encroachments and safeguard their institutional integrity.³⁵

³¹ Id189.

³² *M. Siddiq (D) Thr. L.Rs. v. Mahant Suresh Das*, (2019) 14 S.C.C. 1; see also Alok Prasanna Kumar, The Supreme Court's Silence on the Citizenship (Amendment) Act, *The India Forum* (Jan. 2020), <https://www.theindiaforum.in/article/supreme-court-s-silence-citizenship-amendment-act>.

³³ Cora Hoexter, *Administrative Law in South Africa* 142 (2d ed., Juta 2012).

³⁴ Robert Alexy, *A Theory of Constitutional Rights* 66–70 (Oxford Univ. Press 2002).

³⁵ Stephen Breyer, *Making Our Democracy Work: A Judge's View* 95 (Vintage 2011).

4. Promoting Constitutional Literacy: Enhancing public understanding of constitutional values can mitigate resistance to progressive judicial decisions. This requires collaborative efforts from the judiciary, civil society, and educational institutions.³⁶
5. Valuing Dissent: Dissenting opinions, such as those in *ADM Jabalpur v Shivkant Shukla* and *Indian Young Lawyers Association v State of Kerala (Sabarimala)*, contribute to a richer constitutional dialogue and preserve alternative interpretive possibilities for future jurisprudence.³⁷

Current Controversies and Criticisms: Judicial Morality in a Constitutional Democracy

As the principal guardian of constitutional values, the judiciary occupies a distinctive role within democratic governance. Its mandate to interpret the Constitution and enforce fundamental rights frequently places it at the heart of politically and socially contentious debates. In recent years, judicial reasoning has come under increased scrutiny, particularly in cases where decisions appear to override legislative intent or diverge from popular sentiment.³⁸ This has generated critical discourse on issues such as judicial overreach, moral paternalism, the tension between restraint and activism, and the influence of external actors including media and civil society.³⁹ In deeply polarized societies, constitutional courts must navigate these pressures with care, ensuring that their legitimacy and independence remain intact.

Judicial Overreach and Moral Paternalism Criticism

Critics argue that meddling distorts democratic accountability and undermines the idea of separation of powers. An associated problem often referred to as moral paternalisms occurs when judges apply their own moral standards, masked as constitutional interpretation, often to the exclusion of cultivating readiness in society or where cultural variation exists. This is often considered in connection with the Supreme Court of India's opinion in the *Indian Young*

³⁶ Madhav Khosla, *The Indian Constitution* 112 (Oxford Univ. Press 2012).

³⁷ (2018) 10 S.C.C 1.

³⁸ Tarunabh Khaitan, *Judicial Review and the Indian Constitution: A Critical Appraisal*, 41 *Oxford J. Legal Stud.* 456 (2021).

³⁹ Upendra Baxi, *Preliminary Notes on Transformative Constitutionalism*, 2 *Indian L. Rev.* 1 (2018).

Lawyers Association v. State of Kerala (Sabarimala case)⁴⁰. The Court held that prohibiting women from entering temples was a violation of Articles 14 and 25, utilizing constitutional morality to counteract religious tradition. Although the judgment promoted gender equality, it was faulted for dismissing the devotees' faith and foisting a top-down moral scheme.

Similarly, in *Joseph Shine v Union of India*, the Court struck down Section 497 of the IPC, which criminalized adultery.⁴¹ Though the decision promoted individual autonomy, some viewed it as judicial moralism, with the Court assuming the role of a social reformer rather than a constitutional adjudicator.

These cases highlight the tension between progressive jurisprudence and democratic pluralism. While courts must uphold rights, they must also be cautious not to substitute their moral preferences for legislative deliberation.

Judicial Restraint vs. Activism debates

The tension between judicial restraint and activism is at the heart of constitutional theory. Judicial restraint theorists believe that courts must interpret statutes narrowly, defer to popularly elected institutions, and not make policy. Activists believe that courts have a duty to actively defend rights, particularly when political institutions do not.

In *Vishaka v State of Rajasthan*, the Supreme Court established guidelines against sexual harassment in the workplace in the absence of a law.⁴² This was a perfect example of judicial activism creating a legal vacuum. Conversely, in *S.R. Bommai v Union of India*, the Court was restraining by exercising federalism and limiting the unjust overthrow of state governments. The issue is when to go to the activism. The judiciary may be appropriate in cases that concern the marginalized populations or malpractice of the constitution. Too much activism may overthrow institutional restraints and is liable to political punishment. This is seen in the case of *Kaushal Kishor v State of Uttar Pradesh* which has just occurred balance. The Court believed that the speech of the public officials should be of constitutional morality, and there should be no violation of the judiciary and encroachment of its mandate. Tt

The Role of Constitutional Courts in Polarized Societies

⁴⁰ Id.

⁴¹ (2018) 2 S.C.C 189.

⁴² (1997) 6 S.C.C 241.

- Constitutional judges do the job of stabilizing well polarized societies institutes. There is the issue of conflicting identities, ideologies and interests that they must balance and the rule of law that they must enforce. This is especially necessary, at an era where political organizations are either stifled or dangerously corrupt. The good case in point is the Constitutional Court of South Africa. The same case where the society opposed and emphasized the fact of equality and dignity legitimized same-sex marriage by the Court in the Minister of Home Affairs v Fourie. The Court ruling revealed how the courts can find the means of developing constitutional values in massively partisan issues. So is the situation with Indian judiciary. Governing rich all by a constitutional adjudication has become bitter with one of the greatest surprises of majoritarian politics and polarization of faith- and identity-based mobilization. This court pressure which has been occurring puts them in manoeuvrance in it without need to inevitably lose the favour of the people and adherence to the constitution.

Towards a Harmonious Jurisprudence:

Frameworks for Balancing Constitutional and Majoritarian Morality

Consensual jurisprudence ratifies the constitutional values of equality, liberty and justice without falling into the fallacy of being entrained to the whim of democracy. This can be made in balance by:

- Proportionality examination: The consideration of personal rights and those of groups of people.
- Contextual interpretation: The instruction of the constitutional provisions against the newly changing social norms.
- Dialogic adjudication: Encouraging legislative and executive engagement post-judgment, rather than unilateral judicial mandates.

Such frameworks allow courts to respect public morality without compromising constitutional integrity.

Conclusion

The idea of judicial equilibrium between constitutional and majoritarian morality is what constitutional adjudication in a democracy is based on. It is an expression of the challenge of the judiciary, in the long run, to protect the essence of the values of the Constitution and be at the same time responsive to the democratic will of the people. This balance is not an empty formula, it demands a fine sense of law, society and the active nature of justice.

Liberty, equality, fraternity and justice constitute the morality that is founded on the constitution. It is the moral compass that defines the interpretation and implementation of the provisions of the constitution, especially the discourse of basic rights and protection of minorities. Majoritarian morality represents the dominant cultural, religious and political principles of the majority of the populace. And as an element, however, in the democratic form of government, the constitution must limit its extent that it reproduces not the rights of minority, but casts them down into majority in practised mastery over these. Courts are not present to Bask the body of people but are there to play the majoritarian role of countering the body of all the citizens who are not either vulnerable or non-representatives of the popular will. This is demonstrable in the historic cases of *Navtej Singh Johar v Union of India*, *Joseph Shine v Union of India*, and *Indian Young Lawyers Association v State of Kerala* in which the Supreme Court ratified the constitutional morality at the expense of the socially embedded objected. These rulings, prove that justice should be founded on the principles of the constitution and not the people will which is prone to change. In the meantime, it is to be realized as well that the prerogative of the judiciary also should be populated and mild. It is the risk that is taken by courts to lose a democratic legitimacy and institutions are provided by a response of working at the legislative or executive territory. How to determine when judicial action mete out is substantial, to take action according to the policies of the constitution, the necessity to hear the elected authorities poses a question. This must be light, principled and must be lightened by the text, history and normative purpose of the text of the Constitution. This is far harder to to maintain in such a multi-ethnic nation like India. The courts are compelled to operate within overlapping borders of identity, belief and power and not lose rights guaranteed by the constitutions to the populist pressures. Meanwhile, it must be open to discussion with other arms of government and even the civil society, creating a normatively oriented jurisprudence, but also socially responsive.

And last, judicial balance is not a point or predetermined position, but is a process, a constant negotiation of ideals of law and facts of life. It needs intellectual clarity, moral uprightness

and institutional uprightness. The judiciary must reaffirm itself as the keeper of constitutional morality, and respect the democratic ethos, which it is rooted in, as the democratic project in India is coming of age. Only in this delicate equilibrium the promise of justice would be achieved in a manner that can be considered lawful, legitimate and inclusive.

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