

## VIII. FEASIBILITY OF BALANCING CONSTITUTIONAL AND PUBLIC MORALITY: AN ANALYSIS OF THE INDIAN LEGAL FRAMEWORK

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### - ABSTRACT:

The society is ever-evolving and we are way behind in accommodating the socio-cultural ethos, sustainable development, digital advances, anti-competition measures and related governance challenges. This requires transformative constitutionalism being imbibed in daily judicial business, imposing a responsibility on the judiciary to ensure consistent transformation in the society through interpretation of constitution and other legal provisions, while keeping the intentions of the Constituent Assembly and morality intact. The question, herein, arises whose morality; people's or constitution's? Or, rather, can there be a balance between the two? Notably, the relationship between constitutional morality and public morality is not simply opting for one or the other; rather, it is intricate. For example, while constitutional morality seeks to ensure the democratic ethos and to protect the rights of the people; public morality imposes restrictions based on societal beliefs. The dilemma requires an inquiry as to the extent to which public morality may play a role in protecting fundamental rights and interpreting the Constitution. Against this backdrop, the authors have taken up to deepen

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their understanding of these two legal constructs and identify the possibilities for balance of these types of morality within the Indian legal system. In this regard, this paper also observes how these ideas interact with each other and affect judicial rulings, through the examples of significant cases. Further, the authors have aimed to identify the ways for reconciliation between the constitutional and public morality through judicial interpretation of the Constitution. Further, they also seek insight regarding how the judiciary has managed to deal with these concerns. In this backdrop, the paper is divided in seven parts. The first being the introduction, the second part deals with the theoretical framework of these two concepts of constitutional and public morality, third part elaborates upon constitutional morality in India, wherein fourth part engages with public morality in India, fifth part highlights the conflict between constitutional morality and public morality. Further the sixth part focuses on the role of the Indian judiciary in upholding constitutional morality and public morality. Finally, the last part deals with conclusion suggesting that when the organs of legislature and the judiciary along with civil society as third party put in efforts, the balancing of public and constitutional morality maybe a possibility.

**Keywords:** *Constitutional values, Constitutional morality, public morality, Judicial Overreach*

## I. INTRODUCTION

The constitution of any country is not a static document, rather it is a living one. It cannot stay changeless; rather, it must be attuned to changing ideas, ideologies and circumstances. Further, the legislative process is cumbersome, more so for constitutional amendment, and therefore, inappropriate to accommodate frequent changes, as it might

take a lot of time and political will to take forward the dynamic fine-tuning. Furthermore, the process might also involve the risk of affecting the basic structure of the Constitution. Consequently, the task falls upon the judicial process to adapt the law through various means of interpretation keeping the changes in consideration.<sup>1</sup>

Evidently, the Indian judiciary has done its work, as the dynamic deciphering and interpretation of the Indian Constitution has taken Indian Jurisprudence to great heights in the last half of the century. For example, the concept of basic structure, right to life, right against exploitation, right to various freedoms have seen major overhauling, while encompassing the changes. However, treading this path has never been easy, especially while ensuring that morality has not been made the scapegoat in this transformation. The intriguing questions that build up in this instance are; whose morality is being considered, on what grounds, have the higher courts delivered justice to the aggrieved parties before them while identifying between different types of morality, such as constitutional morality or public morality?

Recently, in the case of *Supriyo v Union of India*<sup>2</sup>, the Supreme Court decoded the word ‘conscience’ within the framework of right to religion, i.e., “freedom of conscience and free profession, practice and propagation of religion”. While referring to Black’s Law Dictionary it observed that conscience refers to the moral sense; the faculty of

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<sup>1</sup> *Central Inland Water Transport v Brojonath Ganguly*, (1986) 3 SCC 156.

<sup>2</sup> *Supriyo v Union of India*, 2023 INSC 920.

judging the moral qualities of actions, or of discriminating between right and wrong; particularly applied to one's perception and judgment of the moral qualities of his own conduct, in a wider sense, also denoting similar application of the standards of morality to the acts of others. This deliberation highlights the essence of morality, emphasizing personal perspectives over societal or constitutional considerations.

Notably, constitutional morality acknowledges the ideals enshrined in the Constitution and guides the government and citizens towards reinforcing the rule of law, the protection of individual rights and democracy, while limiting governance to constitutional dictates rather than the populist views.<sup>3</sup> Further, the contents of constitutional morality are founded on four principles emerging from the Preamble. Firstly, the need to ensure justice, social, economic and political. Secondly, the individual liberty in matters of thought, expression, belief, faith and worship. Thirdly, the equality of status and opportunity amongst all citizens. And, fourthly, the sense of fraternity amongst all citizens, assuring the dignity of human life.<sup>4</sup>

On the other hand, public morality is the set of moral guidelines and endorsements in society that exist among people; varying as per the

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<sup>3</sup>Mahendra Pal Singh, 'Observing Constitutional Morality' (2019) 721 *SEMINAR*, <[https://www.india-seminar.com/2019/721/721\\_mahendra\\_pal\\_singh.htm](https://www.india-seminar.com/2019/721/721_mahendra_pal_singh.htm)> accessed 16 September 2024.

<sup>4</sup>*Indian Young Lawyers Association v The State of Kerala*, (2018) 10 SCC 689.

time, place, and space. Often, public morality becomes a source for the law-making and the judicial decision-making, which must pass on the touchstone of the Constitution, as and when required. The common good of public morality is the good of a healthy moral ecology, which generates obligations in justice for all.<sup>5</sup> Further, it serves two interests, one concerning community and the other character. It also supports traditions, essentially bonding a community, and promotes certain qualities requiring thoughtful cultivation, like restraining improper behaviour, as to time and space.<sup>6</sup>

The relationship between constitutional morality and public morality is not simply opting for one or the other; rather, it is intricate. For example, while constitutional morality seeks to ensure the democratic ethos and protect the rights of the people; public morality imposes restrictions based on societal beliefs. This relationship calls into question how much public morality should play a role in protecting fundamental rights of the people and interpreting the Constitution while balancing with constitutional morality.

In this backdrop, the paper is divided in seven parts. The first being the introduction, the second part deals with the theoretical framework of these two concepts of constitutional and public morality, third part

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<sup>5</sup> Robert P. George, 'The Concept of Public Morality', (2000) 45 (1) *The American Journal of Jurisprudence*, 17–31, <<https://doi.org/10.1093/ajj/45.1.17>> accessed 16 September 2024.

<sup>6</sup> Harry M. Clor, "The Death of Public Morality?" (2000) 45 (1) *The American Journal of Jurisprudence*, <<https://scholarship.law.nd.edu/ajj/vol45/iss1/3>> accessed 16 September 2024.

elaborates upon constitutional morality in India, wherein fourth part engages with public morality in India, fifth part highlights the conflict between constitutional morality and public morality. Further the sixth part focuses on the role of the Indian judiciary in upholding constitutional morality and public morality. Finally, the last part deals with conclusion suggesting that when the organs of legislature and the judiciary along with civil society as third party put in efforts, the balancing of public and constitutional morality maybe a possibility.

## II. THEORETICAL FRAMEWORK

The perspective within which constitutional morality and public morality are understood in the context of the Indian legal order is shaped by the basic relations of law, society, social order and the individual's entitlement.

### *A. Constitutional Morality: Theoretical Underpinnings*

Constitutional morality is based on the upholding of the values and principles of the Constitution, which strengthens democracy. It is less to do with the form of constitution and constitutional authorities and more to do with the values of the constitution, i.e. the characteristics of constitutionalism. As firstly used by Grote, the concept was focussed

on the coexistence of freedom and self-restrain.<sup>7</sup> These values and principles conform to the ideals of human rights, such as liberty, individualism, and equality before the law, further promoting an inclusive and democratic political process valuing the dignity of all individuals.<sup>8</sup> Constitutional morality means adhering to the core values and principles outlined in the Constitution. It emphasizes the value of individual rights, equality, fairness, and the rule of law. They are further outlined and derived through some of the constitutional provisions, like in the Indian context, the preambulatory emphasis on justice, liberty, and equality, fairness, the rule of law and the provisions recognising the fundamental rights of the people under the Part III of the Indian Constitution.<sup>9</sup> Furthermore, the key character of constitutional morality is the establishment of a political culture that acknowledges the equality of people, promoting the growth of society through healthy democratic means.<sup>10</sup> It requires, the quality of civility, ensuring respect, restraint, patience vis-à-vis rights and concerns of other members of society.<sup>11</sup>

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<sup>7</sup> Pratap Bhanu Mehta, 'What is Constitutional Morality?' (2010) 615 SEMINAR, <[https://www.india-seminar.com/2010/615/615\\_pratap\\_bhanu\\_mehta.htm](https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm)> accessed 17 September 2024.

<sup>8</sup> Deepak K Srivastava, 'Pearls and Pitfalls of the Doctrine of Constitutional Morality: Constitutional Morality' (2022) 61(2) Punjab University Law Review <<https://pulr.puchd.ac.in/index.php/pulr/article/view/55>> accessed on 11 September 2024.

<sup>9</sup> A S Rane, 'Executive Authority on Constitutional Morality in India: A Critical Study' (2023) 34 Journal of Namibian Studies: History Politics Culture 5606.

<sup>10</sup> Md. Zeeshan Ahmad and Showkat Ahmad Wani, 'Constitutional Morality and Authoritarianism: Percolating Constitutionalism Through Judicial Interpretation' (2023) 69(3), Indian Journal of Public Administration 624.

<sup>11</sup> Andre Beteille, 'Constitutional Morality' (2008) 43 (40) Economic and Political Weekly 35 <<http://www.jstor.org/stable/40278025>> accessed on 30 September 2024.

Constituent Assembly debates throw light on the importance of the same; wherein Dr. B.R. Ambedkar, a key figure in the Indian polity, sought out constitutional morality in the context of balancing conflicts among competing interests in society. His belief was rooted in the need to reconcile the rights of the individuals and the responsibilities of society as a whole, preventing the majoritarian sentiments from eroding the absolute principles of the Constitution.<sup>12</sup> In recent times, this understanding has been fortified by certain judicial interpretations; in particular, the case of *Navtej Singh Johar v Union of India*<sup>13</sup>, clarifying the boundaries of constitutional and popular morality. The Supreme Court stressed that the higher courts must act according to constitutional morality, especially in issues concerning fundamental rights.

### *B. Public Morality: Theoretical Underpinnings*

Public morality is a broader set of rules about the ethics and behavioural expectations of people in a society; public morality is more or less the sum total of ethics. Public morality, while regulating the lives of the members of the society, becomes normative in nature and varies across communities, cultures, religions, and history, leading to a dynamic and sometimes contentious relationship with constitutional morality. Indeed, while public morality or collective morality may be

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<sup>12</sup> Nakul Nayak, 'Constitutional Morality: An Indian Framework' (JGU Research Blog, February 23 2024) <<https://research.jgu.edu.in/constitutional-morality-an-indian-framework/>> accessed on 11 September 2024.

<sup>13</sup> *Navtej Singh Johar v Union of India*, AIR 2018 SC 4321.



better placed to bring about change through legislative process, it may stand in opposition to the ideals of individual rights and freedoms contained in the Constitution and distort the very core of democratic and constitutional principles.<sup>14</sup>

The theoretical analysis of public morality is essential for assessing its impact on law and the endurance of legal norms. The variability of public morality, influenced by community changes, culture, time, and space, complicates the judiciary's task of determining public desires. This challenge is particularly pronounced in India's diverse and majoritarian society, where balancing adherence to constitutional ideals with public sentiment becomes increasingly cumbersome.<sup>15</sup>

### *C. Interplay Between Constitutional Morality and Public Morality*

In the backdrop of the theoretical understanding of the concepts of constitutional and public morality, let us have a look at their interaction, which is characterized by a clash as well as a collaboration. Acceptance of constitutional morality prioritizes the rights of individuals and the principles of democracy<sup>16</sup> while restricting the

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<sup>14</sup>Rohit Sharma, 'The Public and Constitutional Morality Conundrum: A Case-Note on The Naz Foundation Judgment' (2009) 2(2) NUJSLR <<http://www.commonlii.org/in/journals/NUJSLawRw/2009/25.pdf>> accessed on 11 September 2024.

<sup>15</sup>Supra (n 8).

<sup>16</sup>Ajay Kumar, 'Two Different But Same Perspectives On Constitutional Morality' (2022) ILI <[https://ili.ac.in/pdf/12.\\_Ajay\\_Kumar.pdf](https://ili.ac.in/pdf/12._Ajay_Kumar.pdf)> accessed on 1 September 2024.

state; whereas, in most instances, public morality aims at enforcing popular constraints on such rights.<sup>17</sup> Such interplay makes it necessary for the judiciary to make decisions with regard to and as much as possible without compromising constitutional morality while considering the society's ethical standards. Hence, the consequences of the judicial actions upon society are the determinations of figurative growth, in the form of either reinforcement of public morality or fortification of constitutional morality. A balanced approach of the two, however, has been absent from the judicial pronouncements.

In this regard, it is important to study the evolution of the constitutional and public morality in India emphasizing the importance of these approaches to constitutional interpretation, shaping societal regulation. By recognizing the distinct yet interconnected nature of these moralities, legal scholars and practitioners can better navigate the complexities of Indian constitutional law.

### III. CONSTITUTIONAL MORALITY IN INDIA

#### *A. Historical Evolution of Constitutional Morality in India*

The constitutional morality in India has transformed through judicial interpretations and practical enactments since November 26, 1949, the

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<sup>17</sup> Ranjita Chakraborty, 'Managing Public Morality: The Politics of Public Policy in India' (2009) *The Indian Journal of Political Science*, vol. 70, no. 4, pp. 1099–108 <<http://www.jstor.org/stable/42744022>> accessed 11 September 2024.

day the Constitution became effective for the first time. It was in the Constituent Assembly Debate discourse that B.R. Ambedkar first used the words “constitutional morality” because of his worries towards the legislature’s own commitment to the values of the Constitution. Within this understanding, he believed that constitutional morality served as a means of harmonious integration of all interests within the social mosaic so as to respect the individual and society as one.<sup>18</sup>

### *B. Key Constitutional Provisions Relating to Constitutional Morality*

The Preamble and some provisions of the Indian Constitution, which state the principles of justice, liberty, equality, and fraternity, are the foundation of Indian constitutional morality. Despite not having a precise definition in the Constitution, the concept of “constitutional morality” is implied from the fundamental principles that form the cornerstone of a democracy.<sup>19</sup> The Preamble and the Fundamental Rights provisions are thus important components ensuring that individual liberties are shielded from the inclinations of the majority.

### *C. Judicial Interpretation of Constitutional Morality*

The Indian judiciary has interpreted, applied, and contributed towards the evolution of the constitutional morality principles in a few

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<sup>18</sup> Supra (n 10).

<sup>19</sup> Supra (n 12).

landmark decisions, enough to initiate a dialogue on the same. In the case of *Manoj Narula v Union of India*<sup>20</sup> the Supreme Court asserted that the principle of constitutional morality basically puts the norms of the Constitution first, ensuring rule of law. It further required that the traditions and conventions of all the organs of the state must grow to sustain constitutional morality without any deviancy, leading to institutional integrity and constitutional restraint.

The case of *Josephine Shine v Union of India*<sup>21</sup>, examined constitutional morality in a matter concerning criminalisation of adultery. The Supreme Court herein abolished adultery as an offence by repealing Section 497 of the Indian Penal Code 1860. In Justice Chandrachud's opinion, the complex legal order of a nation must flow from Constitutional morality and not common morality. He further added that "in a democracy, conventionally certain rights must be available to every person for him to be able to enjoy "free, equal and dignified existence".<sup>22</sup> He further reiterated, "Commitment towards Constitutional morality means that one has to observe the constitutional provisions such as equality before law, non-discrimination on the basis of sex and dignity." At this juncture, regarding Justice R. F. Nariman's inquiry into the significance of Section 497 of the Indian Penal Code (IPC), he clarified that this ancient law has long been misaligned with its original intention and has been now at odds with contemporary

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<sup>20</sup> *Manoj Narula v Union of India*, (2014) 9 SCC 1.

<sup>21</sup> *Joseph Shine v Union of India*, AIR 2018 SC 4898.

<sup>22</sup> *ibid.*

constitutional morality. This perspective highlights a more dynamic view of constitutional morality, suggesting that it is not static but evolves with societal demands—contrary to the views expressed by other judges in the case. The Court thus considered the changing public perception while analysing the constitutionality of the given provision. The Court emphasized that when there is a conflict between the right to self-determination and social morals, the right to self-determination and privacy takes precedence. It further noted that societal morals regarding adultery have evolved over time. Furthermore, while contemplating on the constitutionality of the provision, it also tested the constitutionality of moral and societal regulation of women and their intimate lives through the law. It also observed that Section 497 perpetuated an already existing inequality; when viewed in the context of a social structure which considers the husband as the owner of the wife's sexuality, and that the law sustained "a deeply entrenched patriarchal order". It emphasised that substantive equality could be attained only through an overhaul of these social structures, when all visible and invisible forms of inequality, - social, cultural, economic, political or sexual - were recognised and eliminated so that a truly egalitarian existence could be pictured.<sup>23</sup> Thus, the judgment not only differentiated between contextual and ancient social morality but also balanced the public morality as to constitutional morality, while referring to foreign judgments.

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<sup>23</sup> *ibid.*

In the case of *Indian Hotel and Restaurant Association v The State of Maharashtra*<sup>24</sup>, the Supreme Court addressed the conflict between constitutional morality and public morality concerning the Maharashtra government's amendments to the Bombay Police Act, which prohibited dance performances in certain establishments while allowing them in hotels with three or more stars. The Court ruled that these amendments violated fundamental rights under Articles 14, 19(1)(a), 19(1)(g), and 21 of the Constitution, emphasizing that legislation must not infringe upon individual rights for the sake of public morality. The Supreme Court's decision highlighted that while the state has a role in regulating public morality, it cannot do so at the expense of constitutional protections. This ruling again underscored that morality is not static; and therefore, what may be deemed immoral at one time could evolve as moral afterwards. This perspective aligns with constitutional morality, which prioritizes individual rights over fluctuating societal norms.

Simultaneously, in the case of *Indian Young Lawyers Association v The State of Kerala*<sup>25</sup>, the issue was regarding a restriction that was imposed on the right to religion on the women of 'menstruating age', i.e. those between the ages 10 and 50. As per the prohibition, these women could be restricted from entering into the Sabarimala Temple in the State of Kerala. While deciding the matter Justice R F Nariman from the

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<sup>24</sup> *Indian Hotel and Restaurant Association & Anr. v The State of Maharashtra & Ors.*, Writ Petition Civil No.576 of 2016.

<sup>25</sup> *Indian Young Lawyers Association* (n 4).

Supreme Court of India quoted that; “It is constitutional morality which is the dominant ethic when it comes to a dialogue between religion and morality in the field of public law.” He further declared, “In cases of violation of the fundamental rights, the phrase “morality” in context means constitutional morality” and that the Judiciary should observe constitutional morality, ensuring respect for the Constitution. All judges, except Justice Indu Malhotra, held that "morality" in Articles 25 and 26 should not be interpreted in a "sectionalized" manner, as some may perceive it. However, in her dissenting judgment, Justice Malhotra while acknowledging that equality is a fundamental tenet of the Constitution, asserted that the freedom of faith, belief, and worship must also be safeguarded. She further stated, “Constitutional morality demands the harmonization or reconciliation of any and all such rights so that the religion of no one is erased or disrespected.”<sup>26</sup> This confrontation of views elaborates on the ambit of constitutional morality.

In 2009, Section 377 of the Indian Penal Code, 1860 faced constitutional scrutiny in the case of *Naz Foundation v Government of the NCT of Delhi*.<sup>27</sup> Justice Ajit Prakash Shah declared that “if there is any type of ‘morality’ that can pass the test of compelling state interest, it must be ‘constitutional’ morality and not public morality.” He further asserted that “popular morality or public disapproval of certain acts is not a valid justification for restriction of the fundamental rights under

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<sup>26</sup> *ibid.*

<sup>27</sup> *Naz Foundation v Government of the NCT of Delhi*, 2009 (6) SCC 712.

Article 21.” According to Justice Ajit Prakash Shah, popular morality is transient, and using such flimsy notions of right and wrong to deny someone their fundamental human rights is unacceptable. He emphasized the importance of “following global trends on the issue of sexual offences,” as indicated in the 172nd Law Commission Report. Justice Shah further noted that the cases filed under Section 377 should focus on issues involving consenting adults rather than being misapplied to instances of child abuse.<sup>28</sup> Numerous incidents and reports submitted by the petitioner demonstrated how, rather than serving any legitimate public purpose, this clause was being exploited to harass and violate members of the LGBT community.

Following the ruling in *Naz Foundation v Govt. of NCT of Delhi*, the Section 377 was reinstated in *Suresh Kumar Koushal v Naz Foundation*<sup>29</sup> by the Supreme Court in 2014 based on public morality. However, in *Navtej Singh Johar v Union of India*, the Supreme Court overturned its earlier ruling and categorically repealed Section 377. In his ruling, Chief Justice Dipak Misra, while speaking for himself and Justice Khanwilkar, declared that the executive, the legislature, and the judiciary, all the organs of the state, have to stay alive to the concept of constitutional morality. He continued highlighting that societal morality subjected sexual minorities to several challenges and that it was the responsibility of the courts to guarantee that constitutional

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<sup>28</sup> *ibid.*

<sup>29</sup> *Suresh Kumar Koushal v Naz Foundation*, (2014) 1 SCC 1.



morality prevailed over social morality.<sup>30</sup> In his concurring opinion, Justice R.F. Nariman said that constitutional morality serves as a “threshold against an upsurge in mob rule” and a check against the “tyranny of the majority.” According to Justice Nariman, sexual minorities had been denied fundamental rights, and it was essential for the court to ensure that these rights were upheld in accordance with the Constitution, irrespective of majority opinion. He articulated that constitutional morality is the “soul of the Constitution,” emphasizing its role in protecting individual rights against societal prejudices.<sup>31</sup> These instances show the judiciary's dedication to preserving constitutional morality and its readiness to oppose social norms that violate people's rights and fundamental values.

#### IV. PUBLIC MORALITY IN INDIA

##### *A. Historical Evolution of Public Morality in India*

In his speech made on 13th December in 1946, Jawaharlal Nehru pointed out public morality as one of the principles that ought to govern the Constitution of India.<sup>32</sup> He explained that after the independence of India, the country will have a government which will not only ensure fundamental rights but will also promote the ideals of public morality.

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<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> Constitution of India, ‘13 Dec 1946 Archives - Constitution of India’ (*Constitution of India*) <<https://www.constitutionofindia.net/debates/13-dec-1946/>> accessed on 11 September 2024.

This idea was considered essential because it guarantees people's rights and freedoms not only by law but also by individual behaviour.

Nehru aspired that the Constitution will guarantee “justice, social, economic, and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association, and action, subject to law and public morality.”

This inclusion demonstrated that while individuals were entitled to express themselves and safeguard their basic liberties and human rights, these expressions must also respect the rights of others and the moral foundations of society.<sup>33</sup> Further, Jawaharlal Nehru's acknowledgment of public morality emphasized the balance between individual liberties and the responsibilities individuals have towards their community, aiming to cultivate a harmonious and just society as India transitioned into a sovereign republic.

Thus, the intricate interaction of social, religious, and cultural standards that developed over centuries has defined public morality in India. For example, the Hindu notion of dharma has had a tremendous impact on social norms and appropriate conduct. Likewise, the propagation of public morals in India has also benefited from the teachings of Islam, Christianity, and other religions. Further, public morality in India has

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<sup>33</sup> *ibid.*

also been shaped by colonial authority and the nation-building process that followed.<sup>34</sup>

### *B. Key Legal Provisions Relating to Public Morality*

If not all, some legal concepts in India do deal with public morality, especially those concerning personal and social conduct. Articles 19, 25 and 26 refer to public order and morality in relation to a person's rights and responsibilities vis-a-vis civil liberties and religious freedom. In addition, provisions that attract obscenity legislation and those on marriage and family are also in alignment with cultural values. For instance, Section 377 of the Indian Penal Code, which prohibited homosexual acts among consenting adults, was defended on grounds of public morality until struck down by the Supreme Court in 2018.<sup>35</sup>

### *C. Judicial Interpretation of Public Morality*

The Indian judiciary has recognized the influence of public morality in the development of social norms and legal rules. Nevertheless, there has been a cross-cutting concern about the overall extent of public morality and how it must be understood as to the restriction of

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<sup>34</sup> Aditya Rawat & Divyanshu Chaudhary, 'Competing Challenges of Public Morality to Constitutional Morality: Comparative Study of Mob Justice in Sub-Continent Countries' (2021) 5(1) COMPARATIVE CONST. L. ADMINISTRATIVE L. QUARTERLY 99.

<sup>35</sup> *Supra* (n 14).

individual rights. In the *K.A. Abbas v Union of India case*<sup>36</sup>, the Supreme Court ruled that individual civil liberties may be restricted by public morality so long as there is a need and rationality for such restrictions. In a more recent decision of the Court in the case of *Joseph Shine v Union of India (2018) case*<sup>37</sup> the Court, while upholding constitutional morality, recognised contemporary public morality and dismissed the law that cautioned against adultery as a criminal offence. In the case of *S. Khushboo v Kanniammal*,<sup>38</sup> the appellant's interview in a famous magazine was termed as "against the dignity of the Tamil women" which had flagrantly affected and rather "ruined the culture and morality of the people" of Tamil Nadu. While deciding in favour of the appellant and dismissing the criminal complaints against her, the Court observed that notions of public morality are inherently subjective, and criminal law cannot be used as a means to unduly interfere with the domain of personal autonomy. It further held that morality and criminality do not coextend with each other. The Court furthermore held that if the complainants were not agreeing with the appellant, they must have published their opinion, disagreeing with her view, rather than filing these complaints in large numbers. It emphasised that non-conventional morality has to be tolerated. The Court here stated that the right to freedom of speech and expression is at a higher pedestal under the Indian Constitution.

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<sup>36</sup> *K.A. Abbas v Union of India*, 1971 AIR 481.

<sup>37</sup> *Joseph Shine* (n 21).

<sup>38</sup> *S. Khushboo v Kanniammal*, (2010) 5 S.C.R. 322.

However, the Madras High Court decision, against which this appeal was filed, was entirely based on public morality. The Court while denying the quashing of numerous FIRs against appellant, commented that even if she had made averments in the interview in general terms, her statement about pre-marital sex was a “derogatory statement and propagation of immorality and indecency in social and family life.” The Court while upholding the public morality in this case, highlighted that the entire set of women in Tamil Nadu were offended by the statements”. The Court even went further to condemn her statement that while expressing her personal opinion she was not supposed “to propagate or preach her lewd ideology to the society.”

The Court in *Supriyo’s* case<sup>39</sup> clarified that the right to religion was subject to public order, morality, health, and the other provisions of Part III. The Court emphasised that the right under Article 25 is an individual right because conscience is essentially an individual attribute.

The Court in this case further highlighted that the morality referred to in this provision is constitutional morality and not public morality. It emphasised on the decided cases like Sabarimala case, wherein the Court observed that public conception of morality, sometimes turning into mob morality, may be deeply offensive to individual dignity and human rights. In this case, wherein marriage among queer persons was being sought to be legalised, the Court denied the relief. The Court’s

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<sup>39</sup> *Supriyo* (n 2).

observations were, however, in favour of constitutional morality, its decisions were entirely as per the majoritarian public morality.

The Chief Justice Chandrachud, while giving dissenting opinion and highlighting the four components of constitutional morality, based on the Preamble of the Indian Constitution observed that neither of these principles were an impediment to queer persons entering into a union, rather they bolstered the proposition that queer persons also have the right to enter into such a relationship. Further, the other provisions in Part III to which the exercise of the right under Article 25 is subjected, did not limit the exercise of the right of marriage to the alternative sexualities, on the contrary, they gave rise to the right to enter into a union.

The Court also stated that the difference cannot be discriminated against simply because it exists. It also highlighted that Articles 19 and 21 protected the rights of every citizen and not some citizens. Though all relevant points were made, the responsibility to make changes and provide for queer marriages was put on the shoulders of the legislature, i.e., majoritarian government. It was highlighted even by the petitioners that the legislature, even when indicated to take steps in other cases of decriminalising consensual sex among adult partners of same sex, did not read down or partially repealed Section 377 of the Indian Penal Code, it was the judiciary which did so. These cases show the judicial endeavours in addressing the unduly requests of the public concerning their perceptions regarding public morality, the rights of the individual, and the lawful order of the society.

## V. CONFLICT BETWEEN CONSTITUTIONAL MORALITY AND PUBLIC MORALITY

As discussed above, the tension between constitutional morality and public morality in India often manifests in areas where individual rights clash with societal norms and values. These differences underscore a very important dimension of the judiciary, where it is entrusted with either upholding the basic rights of individuals or taking cognizance of the realities present in any social entity.

### *A. Areas of Conflict*

Key areas of contention involve the public understanding and individual concerns around the issues of religious freedom, health, sexuality, women's security, self-reverence, and the fight for sexual autonomy. These issues affect the right of individuals to access places of worship, public institutions, etc., invoking the interference of public morality even though it may infringe on the basic constitutional rights of equality, dignity, and liberty among individuals. Further, sensitive issues involving the rights of vulnerable groups, such as rights of sexual minorities, women's rights and the issue of individual freedoms always honour the constant tussle between constitutional and public morality.

### *B. Case Studies of Conflicts*

Judicial efforts to deal with tension between the constitution and public morality have changed over time. For example, in *Mr. 'X' v Hospital 'Z'*,<sup>40</sup> the Supreme Court dealt with issues surrounding patient rights and medical ethics, while adjudicating a patient's right to privacy and autonomy in medical treatment decisions. The case revolved around a patient's request for confidentiality regarding his medical condition, which was challenged by hospital authorities citing public interest.

The Court reaffirmed that constitutional morality demands respect for individual rights, including privacy and informed consent, even when public morality might suggest otherwise. It emphasized that public interest should not override personal rights guaranteed under the Constitution. This case illustrates the judiciary's role in navigating conflicts between public expectations and constitutional protections, ensuring that individual dignity.

Later in *Naz Foundation*<sup>41</sup>, the Delhi High Court held, while making the comparison of public morality and constitutional morality, that popular morality of certain acts is not a valid justification for restricting any person's fundamental rights under Article 21. It further held that public morality is temporary and based on shifting and subjecting notions of right and wrong. It emphasises that if there was any type of morality that could pass the test of compelling state interest, it must be constitutional as it is based on constitutional values and not public

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<sup>40</sup> *Mr. 'X' v Hospital 'Z'*, 1998 (8) SCC 296.

<sup>41</sup> *Naz Foundation* (n 27).



morality. Afterwards, the Supreme Court's judgment in *Navtej Singh Johar v Union to India*<sup>42</sup> further reinforced this distinction, reaffirming that constitutional morality should guide judicial decisions, particularly in matters affecting fundamental rights.<sup>43</sup>

In order to prevent legislative action from changing the fundamental principles of the Constitution, the judiciary has also underscored that “the changes made by the Parliament to the Constitution shall not alter the basic structure of the Constitution.”<sup>44</sup> This doctrine, established in *Kesavananda Bharati v State of Kerala*,<sup>45</sup> has been used to strike down laws that infringe upon individual rights, even if they are supported by public sentiment.

However, the judiciary's strategy has not been without criticism, either. There are persons, who contend that the courts' involvement in “judicial activism” and intrusion into the legislative branch has exceeded its authority. The argument put out by critics is that the judiciary ought to practice “judicial restraint” and permit the legislature to enact laws that represent community values. The best example being the *Supriyo* case.<sup>46</sup>

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<sup>42</sup> *Navtej Singh Johar* (n 13).

<sup>43</sup> **Ananya Chakravarti**, ‘Constitutional Morality in the Context of Indian Legal System’ (2020) 3(2) IJLMH<<https://ijlmh.com/constitutional-morality-in-the-context-of-indian-legal-system/>> accessed on 1 September 2024.

<sup>44</sup> Nakul Nayak, *Constitutional Morality: An Indian Framework* (2021) American Journal of Comparative Law (forthcoming).

<sup>45</sup> *Kesavananda Bharati v State of Kerala*, AIR 1973 SC 1461.

<sup>46</sup> *Supriyo* (n 2).

## VI. ROLE OF THE INDIAN JUDICIARY IN BALANCING CONSTITUTIONAL MORALITY AND PUBLIC MORALITY

It is essential to strike a balance between constitutional and public morality in order to protect individual liberties and preserve social norms. The maintenance of justice, social, economic and political, the defence of fundamental rights, assurance of fraternity and the operation of democracy all depend on this equilibrium. When it comes to striking a balance between public morality and constitutional rights, the Indian court has alternated between activism and restraint. In many instances, the judiciary till recently, adopted a proactive approach while being criticized for judicial overreach, safeguarding personal liberties and preserving fundamental constitutional values when legislative measures tend to violate them.<sup>47</sup>

### *A. Judicial Activism and Restraint*

When it comes to striking a balance between public morality and constitutional rights, the Indian court has alternated between activism and restraint. In many instances, the judiciary has adopted a proactive approach, intervening to safeguard personal liberties and preserve

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<sup>47</sup> Dr. G. V. Mahesh Nath, *Constitutional Morality-A Need for Consensus on the Concept* (2019) <<http://dx.doi.org/10.2139/ssrn.3353874>> accessed on 1 September 2024.

fundamental constitutional values when legislative measures seem to violate them.<sup>48</sup> This approach is exemplified in cases such as *Navtej Singh Johar v Union of India*,<sup>49</sup> wherein the Supreme Court upheld constitutional morality over public morality and decriminalized consensual adult same-sex relationships.

Contritely, there have also been instances where the courts have refrained from judicial review, rather has gone for restraint, such as *Supriyo's* case<sup>50</sup> where the court recognized the place of public morality in the development of law.<sup>51</sup> It went ahead with a fifty-year-old precedent, i.e. *K.A. Abbas v Union of India*,<sup>52</sup> where the Supreme Court affirmed that public morality does allow curtailment of civil liberty of expression as long as it falls within reasonable restrictions. However, the scope of public morality has changed a lot in last fifty five years.

### *B. Challenges Faced by the Judiciary*

The Indian judiciary encounters various obstacles in maintaining a balance between the public and constitutional morality. Navigating the conflict between individual rights and society values is one of the main

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<sup>48</sup> *ibid.*

<sup>49</sup> *Navtej Singh Johar* (n 13).

<sup>50</sup> *Supriyo* (n 2).

<sup>51</sup> Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (*SSRN Electronic Journal*, 2020).

<sup>52</sup> *K.A. Abbas* (n 36).

obstacles, especially when the public opinion is vehemently against the protection of particular rights. The courts must therefore carefully consider the ramifications of their decisions on both fronts, making conclusions based on the proportionality and reasonableness standards.<sup>53</sup>

The judiciary has played a proactive role in upholding constitutional morality, though this task is fraught with challenges. One significant obstacle is the potential for judicial overreach, where courts may be perceived as encroaching upon the legislative domain. Critics argue that for the government to enact laws reflective of societal values, the judiciary should exercise restraint. This raises important concerns about finding the right balance between judicial intervention and legislative authority.

Potential political pressure and public backlash against judicial rulings that defy popular opinion is another difficulty. In the case of *Khushboo v Kanniammal*,<sup>54</sup> the Court emphasised on the role played by media in reporting the judicial proceedings in a fair and equitable manner, as in this case the common people started questioning the way of inquiry made by the Apex Court. It is important that whether such demands are

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<sup>53</sup> Indu Bharti Jain and Madhu Bala, “The Role of Indian Judiciary in Justifying the Constitutional Morality over Social Morality” (2024) 4 GLS KALP: Journal of Multidisciplinary Studies. 21  
<<https://www.glskalp.in/index.php/glskalp/article/view/3>> accessed on 1 September 2024.

<sup>54</sup> *S. Khushboo* (n 38).

made or not, the judiciary must continue upholding its independence and integrity, making sure that decisions are grounded on constitutional principles rather than majoritarian forces.

It has upheld constitutional morality in landmark cases such as *Naz Foundation v Government of NCT of Delhi*,<sup>55</sup> where the Delhi High Court decriminalized same-sex relations by striking down Section 377 of the Indian Penal Code, emphasizing the need for constitutional morality to prevail over public morality. After a few year, in the case of *Manoj Narula v Union of India*,<sup>56</sup> the Supreme Court remarked that constant affirmance of constitutional morality was the pillar stone of good governance. Soon after, in 2018, while upholding women's right and dignity in religious practices and marriage, in *Indian Young Lawyers Association v State of Kerala*,<sup>57</sup> the Supreme Court ruled against the ban on women's entry into the Sabarimala temple, prioritizing constitutional values over traditional practices; and *Joseph Shine v Union of India*,<sup>58</sup> where the Supreme Court struck down the law criminalizing adultery, highlighting that it infringed upon women's dignity and autonomy.

On the other hand in *K.A. Abbas v Union of India*,<sup>59</sup> the court recognized public morals as sufficient grounds for limiting the right to

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<sup>55</sup> *Naz Foundation* (n 27).

<sup>56</sup> *Manoj Narula* (n 20).

<sup>57</sup> *Indian Young Lawyers Association* (n 4).

<sup>58</sup> *Joseph Shine* (n 271).

<sup>59</sup> *K.A. Abbas* (n 36).

freedom of expression of the individual as long as such restrictions were reasonable and justified. As an illustration, the case of *Naz Foundation v Government of NCT of Delhi*<sup>60</sup> decriminalizing same-sex relationships pointed out the conflict between the public opinion and the dilemma within judiciary in the whole decriminalization process. This took almost a decade to ensure the dignity of identity, intimacy and autonomy of sexual minority in accordance with the rights that the Constitution provides to every heterosexual. In the situation of majoritarian pressure, the Supreme Court has recently went many steps back while subtly conforming with public morality, seeking majoritarian legislative action and denying the right to marry to same-sex couples in *Supriyo*,<sup>61</sup> earlier decriminalising their sexual interactions. Thus, the courts have refrained from judicial review;<sup>62</sup> while recognizing the place of majoritarian legislative process and public morality in the development of law, going back where we started in *K.A. Abbas v Union of India*.<sup>63</sup> They have posed challenges especially in a country as diverse and as multi-cultural as India, while safeguarding constitutionalism without disregarding societal norms and values.

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<sup>60</sup> *Naz Foundation* (n 27).

<sup>61</sup> *Supriyo* (n 2).

<sup>62</sup> Abhinav Chandrachud, 'The Many Meanings of Constitutional Morality' (January 2020) SSRN Electronic Journal <<https://ssrn.com/abstract=3521665> or <http://dx.doi.org/10.2139/ssrn.3521665>> accessed on 1 September 2024.

<sup>63</sup> *K.A. Abbas* (n 36).

Irrefutably, public sentiment influences judicial proceedings, where emotional responses can complicate the consideration of constitutional rights and societal ethics.<sup>64</sup> These factors collectively create a complex environment for achieving an effective balance between constitutional and public morality.

### *C. Challenges in Balancing Morality*

As much as there is an active engagement by the judiciary, there are many factors that create challenges to effective balancing of government and general public morality:

- 1. Judicial Overreach:** The activist stance of the Indian judiciary has not been immune to criticism. Some contend that by indulging in “judicial overreach” and intruding upon the legislative branch, the courts have exceeded their authority. Critics argue that the legislature should be allowed to use legislation to represent public morality, as the legislature represents people. Ensuring separation of power, they seek judicial restraint, as shown by the Madras High Court in *Khushboo’s* case<sup>65</sup> and Supreme Court in *Supriyo v Union of India*.<sup>66</sup>

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<sup>64</sup> *Supra* (n 10).

<sup>65</sup> *S. Khushboo* (n 38).

<sup>66</sup> *Supriyo* (n 2).

Judicial activism proponents, on the other side contend that even in the face of opposing laws and societal norms, the courts must defend individual rights and preserve constitutional principles. They point to cases like *Navtej Singh Johar*<sup>67</sup> and *Indian Young Lawyers Association*<sup>68</sup> as examples of the judiciary fulfilling its role as a guardian of the Constitution.

2. **Cultural Sensitivity:** The extending range of public morality that co-exists and differs in the diverse communities that form the society poses problem for the judges to balance even the public morality itself, leave the balancing of both public and constitutional morality. In these cases, the cultural practices of the public and beliefs on one side and conditioning of the judges on other pose problems in upholding constitutional values.

However, the judges shall neither invoke their own personal morality nor the people's religious, philosophical views or political values without restrictions.<sup>69</sup>

3. **Public Sentiment:** It is understandable that having the public's emotions be taken into consideration during judicial

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<sup>67</sup> *Navtej Singh Johar* (n 13).

<sup>68</sup> *Indian Young Lawyers Association* (n 4).

<sup>69</sup> John Rawls, 'The Idea of Public Reason' in James Bohman and William Rehg (eds.), *Deliberative Democracy: Essays on Reason and Politics* (9780262268936, The MIT Press, 1997)



proceedings can ultimately bring some challenges to the legal system when it comes to the considerations of constitutional and societal ethics.<sup>70</sup>

Though, the judges can refer to reasonable understanding of public conception and political values of justice and reason. Yet again, the duty of civility gets to the core where freedom and self-restrain by the people comes to the fore.<sup>71</sup>

Thus, the judiciary has to not only save itself from judicial overreach, but also from cultural sensitivity and public sentiments. It has to negotiate the complexity of a heterogeneous society in which public morality varies greatly throughout localities. The courts in this situation will have a difficult time striking a balance between upholding individual rights and honouring cultural and religious customs. Therefore, a erudite comprehension of public morals and the constitution is necessary for this delicate balancing act, as suggested by Nehru during the Constitutional Assembly debates.

Here, the legislature also plays a crucial role in the process of mitigating conflicts between constitutional and public morality. The legislature can help create a legal framework, that balances these often-competing interests, by enacting laws that address societal needs while adhering to constitutional principles. The civil society further recognizes the importance of mediated debate among the legislature,

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<sup>70</sup> Supra (n 8).

<sup>71</sup> Supra (n 69).

civil society, lawyers, and other legal experts. Such discussions ensure that legislation not only considers public opinion but also aligns with constitutional values. This collaborative approach fosters an environment where diverse perspectives are considered, leading to more inclusive and equitable laws. However, in many instances, the majoritarian legislature, while putting political interest above all, underreads constitutional values.

The judiciary also has to negotiate the complexity of a heterogeneous society in which public morality varies greatly throughout localities. The courts in this situation will have a difficult time striking a balance between upholding individual rights and honouring cultural and religious customs. Therefore, the Indian courts must continue to interpret the Constitution in a way that upholds its fundamental ideals and principles while making adjustments for the circumstances of a changing society.<sup>72</sup> Thus, an erudite comprehension of public morals and the constitution is necessary for this delicate balancing act, as suggested by Nehru during the Constitutional Assembly debates.

*D. The necessity for a more systematic approach*

The challenges and opportunities in balancing constitutional and public morality underscore the need for a more systematic approach that recognizes their separateness, interrelation, and interdependence. A

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<sup>72</sup> Supra (n 8).

comprehensive framework should include broad-based legal principles such as proportionality, ensuring that restrictions on individual rights are necessary for achieving legitimate objectives, thereby preventing abuses of public morality; reasonableness, which requires that state actions align with constitutional values and prompts courts to evaluate public morality arguments in terms of their impact on human rights; inclusivity, which acknowledges diverse value systems and protects minority interests by involving civil society and legal professionals; and dialogue, fostering communication among the judiciary, legislature, and civil society to bridge gaps between constitutional provisions and societal norms, ultimately promoting mutual understanding and effective governance.

Accordingly, it is important to strike a balance between constitutional morality and public morality for the health of a working democracy. In this regard, the Indian judicial system has to maintain this balance as the custodian of constitutionalism and at the same time fulfil societal demands for justice and rule of law. Employing proportionality, reasonableness, inclusivity, and dialogue enables the judiciary to cope with conflicts arising from the utilization of the two sources of morality.

In this backdrop, we need to be practical to ensure the balance between the two, keeping in mind the voice of Dr. Ambedkar, who realised the core structure of India being undemocratic and therefore stated during the Constituent Assembly debates that “Constitutional morality is not

a natural sentiment. It has to be cultivated. We must realize that our people are yet to learn it. Democracy in India is only a top-dressing on an Indian soil, which is essentially undemocratic.”<sup>73</sup>

## VII. CONCLUSION

Although the Constitution of India does not define constitutional morality, it outlines the fundamental values and principles; which are justice, liberty, equality and fraternity, aiming for a fair and equitable society. Still, identifying the core of constitutional and public morality and balancing them presents several challenges despite the judiciary's active role. Further, the concern of judicial overreach turns significant, as some decisions risk encroaching on legislative functions, raising questions about the limits of judicial interference. Furthermore, cultural sensitivity complicates matters further, as diverse community values can conflict with constitutional principles, making it difficult for judges to uphold these values consistently. In this backdrop, the assessment of the tensions and a balance between constitutional and public morality in India demonstrates the importance of the courts in ensuring their place in Indian social ordering.

Notably, both the government and society have responsibilities in addressing the above issue. The legislature, by adopting laws that are coherent with the fundamental principles of the Constitution and the

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<sup>73</sup> Vasant Moon(ed), *Dr. Babasaheb Ambedkar Writings and Speeches*, Volume No. 13 (2020).

values of society, may lessen tensions arising between the constitution and public ethics. Additionally, under the obligation of civility, it is the duty of civil society as well to promote constitutional morality and increase public understanding of how public morality affects individual rights.

Conclusively, the ultimate objective in this context would be developing a legal architecture that not only fosters both individual freedoms, but also conforms to the ethics of the society. This equilibrium is essential not merely for the safeguarding of the inviolable rights, but also in upholding the norm of constitutionalism in its broadest sense which appeals to every citizen. As India progresses ahead with diversity and pluralism, this quest to balance constitutionalism and decency of the public will remain a major pursuit for the judiciary forever.