

## **“Constitutional Morality in India in Contemporary Times - A Critical Analysis of its Nexus and Jurisprudence”**

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### **ABSTRACT**

This paper explores the interplay between the ethos of our Constitution and morality in India, in the light of the doctrine of *constitutional morality*. The doctrine was introduced in India with a caution by Dr. Ambedkar as it was not a *natural sentiment* and was to be deliberately cultivated. In essence, constitutional morality signifies fidelity to the core values enshrined in the Preamble as guiding principles for governance and interpretation. It stands in contrast to the dynamic nature of *societal morality*, which acts as a basis for legal interpretation of the constitutional text. This ensures that fundamental rights and principles are upheld even when they conflict with majoritarian beliefs or traditional norms, thereby acting as a counter-majoritarian check and a safeguard against the “tyranny of the majority”.

The study traces the evolution of constitutional morality in Indian jurisprudence through landmark judgements over a period of time, which are a reflection of societal morality. The study critically analyses the dynamic relation of constitutional morality and popular morality. In *Navtej Singh Johar* (2018), which decriminalized same-sex relations, the Court emphatically held that constitutional morality must prevail over social morality, while the same judiciary upheld Popular morality in the landmark judgment of the *Naaz Foundation* case in 2009.

The study draws a comparative and critical analysis illustrate how the Indian Judiciary has used constitutional morality to infuse these principles even against the prevailing social norms. Thus, constitutional morality makes a path for transformative constitutionalism, which is to be interpreted as a charter of social reform and progressive values. It serves as a moral compass within the law, upholding the founding ethos of the Constitution and protecting constitutional rights and values from erosion by majoritarian or traditionalist pressures.

**Keywords:** Constitutional Morality, Societal Morality, Transformative Constitutionalism, Natural Sentiment

## BACKGROUND

Constitutional morality has emerged as one of the most discussed principles of Indian constitutional jurisprudence. The Indian Constitution claims to rest on the harmony of the “rule of law”, “individual liberties”, and the “collective aspirations” of a diverse and pluralistic democracy. Dr. B.R. Ambedkar used the term “constitutional morality” in a discourse on the Indian Constitution and warned that adopting a constitution would not be enough. It would require a “diffusion of constitutional morality” to the people and the institutions of the State for its working.<sup>1</sup>

Constitutional morality means “adhere to values and principles of the Constitution in its legal order” as opposed to the prevailing sentiment of the majority, the moral traditions, or the moral order of the society. It implies respect for constitutional processes, and the rights of dissenters, and a firm and protective stance on the rights of minorities and marginalized communities. It is fundamentally linked to the doctrine of transformative constitutionalism that seeks to change the societal order as opposed to treating the constitution as a legal order.

In recent years, court has used the doctrine to invalidate laws and practices that go against the bastions of equality, liberty, and dignity. Its use, however, has also led to the discussion of judicial activism, the limits of a judicial corollary, and the possible conflict between the morality of the Constitution and the morality of society. This research attempts a critique of the doctrine as it has developed, the philosophies relevant to it, and the judicial path it has taken, especially in the phase of post-liberalization and the expansion of rights in Indian constitutionalism.<sup>2</sup>

## THE CONCEPT OF CONSTITUTIONAL MORALITY

Normatively, essays in constitutional morality aim to anchor the behaviors and actions of citizens and the state within constitutional limits and ideals. As a guide, it offers a direction in order to serve a higher claim. The state and citizens must work within a framework of respect for constitutional order. The notion of constitutional sentiment, for instance, first appeared in the writing of George Grote, a 19th century historian of Greece, who referred to it as a sentiment to be pervaded in the spirit of the citizens that must be taken up for the maintenance of constitutional order.

Dr. Ambedkar incorporated this notion, explaining constitutional morality as “a paramount reverence for the forms of the Constitution, enforcing obedience to authority, and acting under and within these forms.” Democracy, for Ambedkar, was not only a political charter, but a way of life framed within the principles of liberty, equality, and fraternity. Thus, the jurisprudential morality,

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<sup>1</sup> Frank I. Michelman, “Morality, Identity and Constitutional Patriotism,” 14 *Ratio Juris* 253, (2001), <https://doi.org/10.1111/1467-9337.00181>.

<sup>2</sup> *Id.*

the exercise of which power was to remain within these bounds, was to prevent the descent of the democracy into a dictatorship or into a rabble.<sup>3</sup>

In the Indian context, constitutional morality operates on two levels; Institutional, the State and its organs are to act within the limits of the Constitution, and the principles of the Constitution; Societal, citizens and societies are to act on the principles of forbearance, reasonableness, and recognition of the rights of others, even when such rights are contrary to the citizen or community's personal or religious rights. In this sense, constitutional morality is beyond the written law.

## EVOLUTION AND JURISPRUDENTIAL FOUNDATIONS IN INDIA

During the Constituent Assembly Debates, Ambedkar stated that the success of the Constitution would depend on the people's adherence to constitutional morality and not on the text of the Constitution. He stated that "constitutional morality is not a natural sentiment; it has to be cultivated".<sup>4</sup> Ambedkar made this observation because he had a profound comprehension of the socio-cultural complexities of India, where the traditional morality of caste, religion, and custom, and other social mores of the country, often overshadowed universal justice, equality, and the modern principles of constitutional democracy.

Concerning the future of India and the democracy it had been bestowed with, Ambedkar was undeniably correct. He predicted that, if social and religious mores took priority above the law in the actions of the political framework, democracy would fall. In that regard, constitutional morality, in the sense described by Ambedkar, was to be the "spirit of the Constitution."

In the early years of the Republic, the Indian judiciary focused largely on the textual and structural interpretation of the provisions of the Constitution. While the phrase "constitutional morality" was not textually used, it was certainly present in the balance of the system in the other judgments.

In *Kesavananda Bharati v. State of Kerala*,<sup>5</sup> court recognized the features "rule of law", "separation of powers", and "fundamental rights" as the "basic structure" of the Constitution and therefore, indefeasible. The doctrine in this case integrated some elements of constitutional morality as it prevented temporary political majorities from overriding the fundamental tenets of the Constitution.

The explicit use of the term constitutional morality gathered steam during the 21st century particularly in instances involving moral and cultural issues. The Constitution, in the view of the higher judiciary, was to be considered as a "transformative document" to be used to remove the

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<sup>3</sup> Saloni -, "Constitutional Morality Vs. Popular Morality: Who Defines Justice in India?" 16 *Int'l J. on Sci. & Tech.*, (2025), <https://doi.org/10.71097/ijst.v16.i4.8584>.

<sup>4</sup> *Id.*

<sup>5</sup> AIR 1973 SC 1461.

hierarchies of society and achieve “substantive equality” within it. The case of *Naz Foundation v. NCT of Delhi*<sup>6</sup> was the first case in which court purported to explain the idea of constitutional morality and how it should be used to interpret laws involving personal dignity and autonomy. Although this judgement was reversed by court marked the start of a vital jurisprudential shift toward moral constitutionalism in the case law driven by public sentiment.

### **CONSTITUTIONAL MORALITY VERSUS SOCIETAL/POPULAR MORALITY**

The term ‘societal morality’ refers to a community or society’s collective moral values and norms at a particular point in time. These norms are typically informed and shaped by religion, custom, and tradition, and are, to an extent, pliable over time. Constitutional morality, however, is firmly rooted in the values of the Constitution, liberty, equality, and dignity, and claims to rationality and universality as a standard of justice for all.<sup>7</sup>

Societal morality can be characterized as majoritarian, and, more or less, temporary. Constitutional morality, however, is counter-majoritarian and, in fact, permanent. The judiciary is consequently the Constitution’s guardian, and is tasked with the protection of minority and marginalized rights, regardless of the dominant moral sentiment of society.

The conflict between constitutional and societal morality is most visible in pluralistic societies such as India, where the clash of long-held traditions with constitutional values is most profound. Caste, gender, and religious discrimination, as well as issues relating to sexual orientation, have all challenged the boundaries of constitutional morality.

The judiciary’s position has been to mediate between the different moral orders, to somehow reconcile society’s moral plurality with the universality of the rights enshrined in the constitution. The balance, however, has not been consistent. The oscillation between decisions illustrates this inconsistency and the Court’s moral reasoning, which is not unusual, shifts according to the prevailing morality.

### **JUDICIAL PRONOUNCEMENTS REFLECTING THE DOCTRINE**

*Naz Foundation v. NCT of Delhi*<sup>8</sup> was also the time that the Delhi High Court judiciary shifted the phrasing of the judgement construing Section 377 of the IPC, which blocked same sex relations, and same sex relations in the constitution and moral popularity. The Court explained that the constitution is a living document and must be interpreted with the emotional ‘transformative character’ of the constitution and constitutional morality.

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<sup>6</sup> 160 DLT 277 2009.

<sup>7</sup> Anuja Shivraj Rane & Deepashri Sidharaj Choudhari, “Constitutional Morality Vis-À-Vis Cultural Relativism in India” 11 *J.L. & Sustainable Deve.* 1279, (2023), <https://doi.org/10.55908/sdgs.v11i10.1279>.

<sup>8</sup> 160 DLT 277 (Delhi HC 2009)..

Justice A.P. Shah stated “if there is one tenet that can be said to be to the underlying theme of the Indian constitution, it is the recognition of the dignity of the individual.” This final judgement, that also crossed the 14, 15, and 21 of the Indian constitution and drew from international human rights law and placed the rights of the sexual minorities in jural, moral cosmopolitan order and placed constitutional morality, in the negative sense, at the inclusive, dignified, legal, and equitable side of the discriminatory social order.

In *Suresh Kumar Koushal Koushal v. Naz Foundation*,<sup>9</sup> the high court walked back this progressive verdict and reinstated Section 377. The court stated that “the mere fact that the majority of people find a practice immoral is not a reason to strike it down,” but also described the LGBT population as a “minuscule fraction” and justified the law on that basis.

This judgment entrenched a regression from constitutional to societal morality. It gave prominence to the supremacy of the legislature over the judiciary in the realm of moral question, thus capitulating to the moral sentiment of the majority. It provoked critique for abandoning the moral core of the constitution that centers around individual dignity and for undermining the egalitarian spirit of the constitution.

In *Navtej Singh Johar v. Union of India*,<sup>10</sup> court held constitutional and corrective measure, restored the guiding principle of constitutional morality as a prism for adjudicating rights. Sec. 377 of IPC in its totality criminalized and vilified same-sex relations in India. The views expressed by court in his concurring opinion highlight that “constitutional morality is founded on the fundamental postulate that every individual is entitled to live with dignity”. Here, the observations made by the Court indicate that the rights of every individual must be served, even if the individual in question stands socially disapproved of by the majority. Hence, social morality must not be the barometer to the enforcement of rights. Legal rights must prevail over social rights. The decision linked the features of constitutional morality to transformative constitutionalism. This demonstrates the need for the law to adapt with time to the realities of an ever-increasing social order of freedom and equality.

In *Indian Young Lawyers Association v. State of Kerala*<sup>11</sup> further solidified the commitment to constitutional morality in India. Sabarimala temple practices that secures the exclusion of women aged 10-50 access to the temple, was declared unconstitutional by court on the basis of Articles 14, 15, and 25. Justice D.Y. Chandrachud did not shy from stating that the demands of constitutional morality expects the State and the citizenry to uphold the constitutional order, even in situations where it collides with religious and cultural edicts.

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<sup>9</sup> (2014) 1 SCC 1.

<sup>10</sup> (2018) 10 SCC 1.

<sup>11</sup> (2019) 11 SCC 1.

The Court was clear that the protection of equality in the Constitution is a more fundamental right than the social order of a community, and therefore, the Constitution must reign. In this context, the Court developed constitutional morality to a point where it must prevail over the foremost patriarchal provisions linked to religion.

In *Joseph Shine v. Union of India*,<sup>12</sup> court decriminalized adultery and struck down Section 497 IPC as unconstitutional. The Court once again called upon constitutional morality to invalidate gender discriminatory provisions and morality. Chief Justice Dipak Misra stated, “Societal morality changes from age to age, but constitutional morality is eternal,” and the doctrine’s permanence is now firmly established within the Indian Constitution. These illustrate the judiciary’s willingness to adopt an interpretative paradigm that prioritizes constitutional morality over social conservatism. They combine to demonstrate that constitutional morality is, within a democracy, both an interpretative and a moral imperative.

### **CONSTITUTIONAL MORALITY AND TRANSFORMATIVE CONSTITUTIONALISM**

The idea of constitutional morality is most closely aligned with the philosophy of transformative constitutionalism, which uses the Constitution as a tool for social reform and advocacy for the rights of the underprivileged. Transformative constitutionalism, a phrase from South African jurisprudence, was described in *State v. Makwanyane*<sup>13</sup> as changing society to become a “democratic, equal and humane” one. In India, this philosophy is in line with Ambedkar’s vision of social democracy when he spoke of the need for liberty, equality and fraternity to coexist.

The meaning constitutional morality imparts to transformative constitutionalism is that it must be based on ethics. This means that the Constitution must be viewed as a charter of progressive social change rather than something that is static and must be interpreted in a textually confined way. Because of this, the judiciary has been able to expand the interpretation of legislation and constitutional rights and has been able to overturn discriminatory laws and practices.

Justice Chandrachud referred to ‘transformation’ and ‘constitutional morality’ in the same breath when he said, “constitutional morality requires that look beyond social conventions to see that rights are real and meaningful.” The Court emphasized that constitutional morality entails the dismantling of the structures of patriarchy that curb liberty. These decisions, in concert, consolidate the movement of constitutional morality from the realm of theoretical construct to the domain of judicial enforceability.

The transformative function of constitutional morality also serves to redistribute the power dynamics within the polity. It contests the structures, both formal and informal, that foster

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<sup>12</sup> (2019) 3 SCC 39.

<sup>13</sup> 1995 (3) SA 391 (CC).

exclusion, inequality, and subjugation. Thus understood, the philosophy of constitutional morality ceases to be an abstraction anchored in judicial doctrine and becomes the instrument of social liberation.<sup>14</sup>

## THE COUNTER-MAJORITARIAN ROLE OF THE JUDICIARY

The foundational principle of constitutional morality rests on the counter-majoritarian premise. It allows the courts to defend constitutional principles, even if these principles are clinched in the morality of the majority. This principle stems from the notion that democracy is more than rule by the majority: it is a guarantee that the rights of minorities and individual members of a polity are protected from the tyranny of numbers.

The spirit of Justice H.R. Khanna's dissent in *ADM Jabalpur v. Shivkant Shukla*<sup>15</sup> embodies the very early beginnings of constitutional morality's counter-majoritarian aspect. Even during the Emergency period, where fundamental rights were suspended, court vocalized that the "right to life and liberty" is fundamental and cannot be taken away by an executive order. He did not state 'constitutional morality,' but his dissent leaves no doubt that it is in the spirit of 'constitutional morality' in the sense that he defended the Constitution's moral authority from the onslaught of greater 'majoritarian' dissent.

In later cases, court defended the counter-majoritarian perspective by stating that constitutional courts must go against popular bias and defend the rights of the individual. Justice Malhotra also stated, "History owes an apology to members of the LGBT community," a strong testament to the Court's obligation to defend rights regardless of the will of the majority. The Court refused to accept the 'public morality' that is based on religion and affirmed that constitutional morality is superior to 'public sentiment'.<sup>16</sup>

The relative criticism of "constitutional morality" stems and suggests primarily the use of disproportionate instances. The doctrine is non-discriminative in the positive and negative outcomes of social and legal outcomes. In the areas of positive social outcomes, the doctrine is the "decriminalisation" of social conduct and the "adultery" legal doctrine. "Convenience" describes the arbitrary use of a laid doctrine rather than discretionary use at the outcomes enshrined. Furthermore, the absence of defined boundaries brings the democratic validity of judicial interpretations into question. When constitutional morality is not tied to text provisions or logically consistent arguments, it runs the risk of moral subjectivity concealed within judicial power.

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<sup>14</sup> Ishika B Prabhakar, "An Analysis of the Essentiality of Constitutional Morality In Contemporary India" 2023 *Int'l J.L. & Soc. Scis.* 1, <https://doi.org/10.60143/ijls.v6.i1.2020.34>.

<sup>15</sup> AIR 1976 SC 1207.

<sup>16</sup> Prakriti Uniyal, "Constitutional Morality v. Popular Morality: The Judiciary's Evolving Role" 7 *Int'l J. For Multidisciplinary Rsch.*, (2025), <https://doi.org/10.36948/ijfmr.2025.v07i04.52448>.



Another critique is in the relationship between constitutional morality and popular morality, which at times creates a disconnect between judicial logic and the popular will. When the Court strikes down practices that are religious or culturally entrenched, the grievance is that it is ignoring the moral fabric of the populace.

For example, the Sabarimala verdict resulted in such strong protests that the public is still said to be in non-compliance, with assertions that the Court had crossed boundaries of faith. The controversy indicates that the moral authority of a judicial decision relies on societal endorsement, regardless of the decision's constitutional accuracy.<sup>17</sup>

Judicial use of constitutional morality circles back to the discretion judges have to exercise. While moral reasoning does add to the depth of constitutional interpretation, the danger of it is sidelining an objective reasoning in the analysis and instead offering a personal one. The risk with constitutional morality is the potential for it to become “judicial morality,” resulting in the loss of institutional neutrality.<sup>18</sup>

As Justice Indu Malhotra noted in her dissent in Sabarimala, “Matters of deep religious faith and sentiment should not ordinarily be interfered with by courts.” This highlights the need for moral paternalism and the discretion of the courts to determine the scope of moral adjudication. Hence, the need for the courts to exercise constitutional morality with the appropriate judicial restraint and doctrinal consistency.

The internalization of constitutional morality in society is, arguably, the most profound of the challenges to be tackled. It is the reason for Ambedkar's observation that it must be “deliberately cultivated.” The society continues to be shaped by the old, traditional hierarchies and patriarchal norms, even with the more positive judicial decisions.

The decision to decriminalize same-sex relations is an example of a positive judicial decision that society is still not ready for. The Sabarimala judgment also underscores this. The strong backlash that the Sabarimala judgment received in the context of gender equality evidenced the need for more education and public discourse in order to realize constitutional morality.<sup>19</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> Abhinav Chandrachud, “The Many Meanings of Constitutional Morality” 2020 *SSRN Elec. J.*, <https://doi.org/10.2139/ssrn.3521665>.

<sup>19</sup> *Id.*



## Empirical and Comparative Overview of Constitutional Morality and Judicial Trends in India (2009 - 2024)

Parameter	Indicators or Figures	Analytical Insight / Interpretation
1. Judicial Invocation of “Constitutional Morality” (2009–2024)	Approx. 24 Supreme Court and 11 High Court judgments have cited the term “constitutional morality” directly between 2009–2024 (based on SCC Online citation frequency search).	The rise from 0–1 citation before 2009 to 35+ references by 2024 demonstrates how the doctrine has evolved from philosophical rhetoric to an established interpretive norm guiding constitutional adjudication.
2. Thematic Distribution of Cases Invoking Constitutional Morality	Derived from analysis of 25 landmark cases (2009–2024).	The highest concentration lies in gender equality and religious freedom, showing that courts deploy the doctrine mainly in identity-based disputes that challenge traditional morality.
3. Alignment of Judicial Outcomes with Constitutional Morality (as declared)	Roughly 70% of cases (2009–2024) adopting constitutional morality led to liberal, rights-affirmative outcomes.	This indicates a progressive judicial trajectory, reflecting the Court’s shift from societal morality toward a transformative vision of the Constitution.

4. Public Acceptance Index of Rights-based Judgments	Support for gender equality (83% urban India), same-sex rights (37%), temple-entry equality (45%).	A gap persists between judicial progressivism and social acceptance. The relatively low public support for LGBTQ+ and religious reforms highlights a social lag vis-à-vis constitutional morality.
5. Gender Representation in Constitutional Morality Cases	Only 11% of total constitutional bench judges (2009–2024) were women.	The limited gender diversity at the bench level may affect interpretive nuance in cases directly involving gender-based morality.
6. Comparative Invocation of Transformative Morality (Global)	South Africa: 12 major cases explicitly cite transformative morality. U.S.: 5 key cases since 1954 (rights expansion).	India’s jurisprudence parallels South Africa’s in frequency and moral intensity but exceeds Western jurisdictions in direct moral theorization — indicating a normative activism model.
7. Media and Academic Citations Growth (2009–2024)	Mentions increased from <10 per year in 2009 to >230 in 2023, per Factiva and Google Scholar data.	The sharp growth in discourse signifies the doctrine’s mainstreaming into public and academic consciousness, establishing it as a central vocabulary in constitutional interpretation.

Source - Afreen Afshar ALAM, “Constitutional morality: The new instrument of justice?” 2025 *REV. DE DREPT CONSTITUTIONAL - CONST. L. REV.* 79, (2025), <https://doi.org/10.62938/rdc-2024-2-0005>.

## COMPARATIVE PERSPECTIVE

Constitutional morality in other jurisdictions and how different constitutional systems manage the intersection of morality and constitutionalism in their systems can provide useful insights. In the United Kingdom, constitutional morality operates primarily through constitutional conventions, the rule of law, parliamentary accountability, and the protection of fundamental rights. There might not be written constitutional documents in the United Kingdom, but the courts do insist that the morality of political power operates outside moral constraints. In the case of *A v. Secretary of State for the Home Department*,<sup>20</sup> the House of Lords viewed the indefinite detention without trial of foreign nationals as incompatible with human rights and moral constitutional governance.

However, contrary to India, the United Kingdom judiciary is not accustomed to speaking of morality as a constitutional doctrine. Judiciary reasoning for the invocation of morality is found within fairness, proportionality, and reasonableness. Thus, India’s version of constitutional morality is more normative and transformative in the sense that it seeks to change values in society, rather than simply restrain the power of the State.

Transformative constitutionalism is something that the South African Constitution has and offers influence to Indian jurisprudence. In the constitutional South African court case *Makwanyane*,<sup>21</sup> the justices invoked the contemporary constitutional values of human dignity, equality and freedom to abolish the death penalty as it exceeded public opinion. Justice Chaskalson’s reasoning closely mirrors the Indian Court and the constitutional morality invoked in *Navtej John and Sabarimala* cases.

Constitutional morality binds the two jurisdictions as an evolving concept while performing the function of moral reason adjudication under social adversity. South African jurisprudence is more focused on reconciliation and restorative justice as compared to the Indian Courts, which are more prescriptive and perform the function of moral adjudication more authoritatively.

Constitutional morality in the U.S. stems from debates on the “substantive due process” and “equal protection” doctrines. The cases of *Obergefell v. Hodges*<sup>22</sup> and *Brown v. Board of Education*<sup>23</sup>

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<sup>20</sup> [2004] UKHL 56.

<sup>21</sup> 1995 (3) SA 391 (CC).

<sup>22</sup> 576 U.S. 644 (2015).

<sup>23</sup> 347 U.S. 483.

which legalized same-sex marriage and racially segregated schools respectively, highlight the same reasoning about the need for social prejudice to give way to constitutional values.

Compared to other jurisdictions, American constitutionalism is more reliant on historical and textual interpretations rather than moral reasoning. Indian constitutional morality on the other end combines Ambedkarite egalitarianism and moral universalism, which arguably places social justice more in the hands of the courts.

## CONCLUSION

Within the scope of India's constitutional evolution, the doctrine of constitutional morality remains a pivotal development. It is the foundation of the conscience of the Constitution, ensuring fidelity to the encompassing promises of justice, liberty, equality, and fraternity. The doctrine enables delivery of the 'guardians of the constitutional conscience' and the protection of rights and freedoms, even against the majoritarian will of the electorate. Despite the above, the doctrine of constitutional morality will survive the precarious condition of indeterminacy, posing the risk of unfettered judicial subjectivity and, paradoxically, alienating the majority of the citizenry. For a more resolute future, civic education and democratic deliberations, as well as constitutional accountability, are the more effective means of extending the practice of constitutional morality outside judicial confines. As Ambedkar said, constitutional morality is a principle to be lived, not one to be adjudicated alone. In today's world, characterized by identity politics, religious nationalism, and populism, which challenge constitutional democracy, constitutional morality offers guidance for India's constitutional journey. It serves as a reminder that democracy is more than simply majority rule; it is a matter of justice, reason, and human dignity.

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