
THE PEOPLE'S COURT OR THE CONSTITUTION'S GUARDIAN? JUDICIAL POPULISM AND ITS DISCONTENTS

Kanishka Rajeev Singh, B.A.LL.B., Babu Banarasi Das University, Lucknow, Uttar Pradesh¹

ABSTRACT

This conspectus examines the emergence of judicial populism in India, where courts increasingly align themselves with dominant public sentiments and political narratives, frequently at the expense of constitutional allegiance. Through doctrinal analysis and comparative reflection, it explores how landmark judgments—such as the Ayodhya verdict and the same-sex marriage verdict—reveal a shift in judicial reasoning marked by performative adjudication, populist mimicry, and strategic silence. These decisions raise critical questions about the counter-majoritarian role of the judiciary and its allegiance to constitutional morality. Comparative references to Brazil, Poland, and the United Kingdom show divergent judicial responses to populist pressures, offering lessons in institutional resilience and rhetorical restraint. The study introduces a conceptual lexicon to frame the normative tensions between legality and legitimacy, sentiment and structure. It argues that judicial populism, whether expressed through affirmation or abstention, risks transforming courts into instruments of majoritarian validation rather than guardians of constitutional principles.

Keywords: judicial populism, constitutional morality, performative adjudication, public sentiment, counter-majoritarianism, judicial tempo

¹ B.A.LL.B., Babu Banarasi Das University, Lucknow, Uttar Pradesh

1. INTRODUCTION

“The Constitution demands interpretation– not validation by the people.”

In a constitutional democracy, the judiciary is that organ of the government that is expected to act as a counter-majoritarian institution– one that upholds the rule of law in situations where it is being disturbed by popular sentiments. However, recently, a new phenomenon has emerged, called judicial populism, wherein the courts appear to align their decisions and judgments with the dominant public opinion and political narratives instead of with established legal principles, constitutional norms, and morality.² This phenomenon raises critical questions about the role of the judiciary in protecting and preserving the democratic values of the country, especially when the executive power is widening and expanding, and institutional checks are becoming narrower and weaker.

Judicial populism not only means public approval; it reflects a deeper shift in the reasoning of the judiciary and its institutional behaviour. Courts, at times, may invoke abstract notions such as “will of the people” or “national interest” to rationalize their decisions and judgments that actually lack thoroughness or deviate from precedents.³ While such a justification may even sometimes resonate with the popular expectations, it risks the credibility of the judiciary as a neutral arbiter and protector of the constitutional rights of the people.

In India, the issue is specifically complex. Historically, the Hon’ble Supreme Court of India has played a significant role in transforming the country by advancing social justice and expanding the fundamental rights of its people.⁴ Yet, in recent developments, scholars have noted a pattern of judicial deference in politically sensitive issues and selected activism that resonates populist themes.^{5 6} These developments point fingers at the judiciary’s constitutional allegiance. Concerns are whether the judiciary is responding to the mood of the public at the expense of constitutional promises.

This conspectus adopts a doctrinal and comparative methodology to explore how judicial populism

² Tom Daly, *Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro*, LEHR (Nov. 1, 2019)

https://scholar.google.com/citations?view_op=view_citation&hl=en&user=ygXtGPAAAAAJ&citation_for_view=ygXtGPAAAAAJ:u-x6o8ySG0sC.

³ Wojciech Sadurski, *Poland’s Constitutional Breakdown*, Oxford University Press (2019)

https://api.pageplace.de/preview/DT0400.9780192576965_A37450829/preview-9780192576965_A37450829.pdf.

⁴ Sathe, *Judicial Activism in India*, Oxford University Press (2002)

<https://archive.org/details/judicialactivism0000sath/page/56/mode/2up>.

⁵ Gautam Bhatia, *A little brief authority: Chief Justice Ranjan Gogoi and the Rise of the Executive Court*, Constitutional Law and Philosophy (Nov. 17, 2019) <https://indconlawphil.wordpress.com/2019/11/17/a-little-brief-authority-chief-justice-ranjan-gogoi-and-the-rise-of-the-executive-court/>.

⁶ Anuj Bhuwania, *Webinar 7: Spotlight on India and Sri Lanka: The Indian Supreme Court in the Modi Era*, International Association of Constitutional Law (Nov. 23, 2020) <https://www.iacl-democracy-2020.org/blog/2016/3/23/blog-post-sample-9wntn-6ye75-hwawc-xx9lz-p6k2z-85m67-nkxz1-m76y3-gmmc6>.

manifests in constitutional adjudication. The analysis is grounded in a close reading of selected Supreme Court judgments, with attention to reasoning style, relief design, and timing. These cases have been chosen for their constitutional importance and their impact on executive power, rights discourse, or institutional legitimacy.

Comparative references to Brazil, Poland, and the United Kingdom have been made illustratively and not exhaustively to highlight structural contrasts and judicial responses to populist pressures. These jurisdictions are selected for their relevance to the Indian context: Brazil and Poland offer examples of direct confrontation and institutional capture, while the UK showcases a more restrained judicial posture in politically infused cases.

The conceptual indicators are defined in the section that follows and are applied in this conspectus. The aim is not to offer a comprehensive theory, but to clarify how courts may mirror, resist, or defer to populist narratives through their style, structure, and silence.

The objective of this conspectus is to explore and delve into how the Indian courts navigate the tension between legal reasoning and public emotions, and whether this navigated path strengthens or weakens the constitutional order in the country.

2. CONCEPTUAL LEXICON

This conspectus engages with a cluster of interrelated concepts to interrogate the various dimensions of contemporary adjudication. Each term is defined below.

2.1. Judicial Populism

Judicial populism is a concept in constitutional theory that has recently emerged from broader discussions on populism and democratic erosion. It has gained attention in constitutional scholarship. Traditionally, populism is understood as a political approach that represents the united “will of the people” against the corrupt elite.⁷ When this concept seeps inside the judiciary, it can lead to decisions and judgments that reflect popular (dominant public) sentiments or political convenience rather than well-established legal principles or allegiance to the constitution.

Scholars such as Sadurski and Daly have argued that judicial populism is displayed through appeals to national identity, moral urgency, or cultural values, especially in cases that involve religion, security of the nation, or majoritarian interests.⁸ Courts may use such language that echoes with public emotions,

⁷ JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (Penguin Books 2007).

⁸ Tom Daly, *Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro*, LEHR (Nov. 1, 2019)

while diminishing the procedural safeguards or doctrinal consistency. In doing this, they risk becoming tools of popular validation rather than guardians of constitutional norms.

In India, due to the country's comprehensively written Constitution, its history of judicial activism, and the relationship between law and politics, judicial populism takes on a definite character. Though the Supreme Court has long been known for its transformative role in expanding the scope of rights of the people and promoting social justice, recent scholarly views suggest that the Court has also shown signs of populist reasoning.

For example, in the *Ram Janmabhoomi*⁹ judgment, the Court acknowledged the religious faith of millions of people in the country, awarded the disputed land to a deity, despite acknowledging the illegality of the demolition of the Babri Masjid. Similarly, while in one case the court legally recognized the 'third gender' and held that they should not be denied the right to life and liberty with dignity¹⁰ (which also includes the freedom of choice in marriage).¹¹ In another case, that is the same-sex marriage case, the Court, in its verdict, ultimately deferred the matter to the legislature, citing institutional limitations.¹² These decisions showcase a tension that exists between the constitutional morality and public sentiments and mood— a hallmark of judicial populism.

While dealing with this concept, it is important to distinguish between judicial populism and judicial activism. Judicial activism seeks to expand the scope of rights of the people and correct any institutional failures that arise; on the other hand, judicial populism often seeks to uphold dominant narratives, even at the cost of legal clarity.¹³ The difference lies in the quality of the decision and the purpose of its reasoning, and not in the visibility of the court.

2.2. Performative Adjudication

The phrase performative adjudication is made of two distinct ideas. 'Performative' refers to acts done more for appearance than for effect— gestures that look meaningful but may lack substance. 'Adjudication' refers to the formal process by which courts resolve disputes through legal reasoning and judgment. When read together, the term describes a style of judicial decision-making, the core of

[https://scholar.google.com/citations?view_op=view_citation&hl=en&user=ygXtGPAAAAAJ&citation_for_view=ygXtGPAAAAAJ:u-x6o8ySG0sC; Wojciech Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press \(2019\) https://api.pageplace.de/preview/DT0400.9780192576965_A37450829/preview-9780192576965_A37450829.pdf](https://scholar.google.com/citations?view_op=view_citation&hl=en&user=ygXtGPAAAAAJ&citation_for_view=ygXtGPAAAAAJ:u-x6o8ySG0sC; Wojciech Sadurski, <i>Poland's Constitutional Breakdown</i>, Oxford University Press (2019) https://api.pageplace.de/preview/DT0400.9780192576965_A37450829/preview-9780192576965_A37450829.pdf).

⁹ M Siddiq (D) through LR's v. Mahant Suresh Das and Ors., (2020) 1 SCC 1 (India).

¹⁰ National Legal Service Authority v. Union of India and Ors., (2014) 5 SCC 438.

¹¹ *In Re: Indian women says gang raped on orders of Village Court* published in Business & Financial News, AIR 2014 SC 2816 [14] (India).

¹² Supriyo @ Supriya Chakraborty v. Union of India AIR 2023 SC 5283.

¹³ Aparna Chandra, *Courting the People: Public Interest Litigation in Post-Emergency India*, 16 International Journal of Constitutional Law (Apr. 2018) <https://doi.org/10.1093/icon/moy045>.

which is on how the judgment appears— whether to the public, media, or political actors— than on what it actually achieves in law.

In simple terms, performative adjudication refers to court decisions that appear principled but are shaped by strategic concerns, such as protecting the court's image or avoiding political backlash. The decisions may use legal language or affirm rights symbolically, yet fall short of granting real legal relief.

2.3. Populist Mimicry

A more subtle mechanism through which this occurs is what may be termed populist mimicry.¹⁴ Unlike overt judicial populism, which may involve direct defiance of constitutional constraints, populist mimicry operates through symbolic gestures that simulate responsiveness to 'the people' while quietly deferring substantive justice. It is a form of judicial performance that trades constitutional allegiance for political resonance.

The concept shares analytical closeness with what Harel and Kolt describe as false mirroring— a strategy through which courts simulate alignment with populist sentiment.¹⁵ While false mirroring focuses on the critique of rhetorical simulation of populist sentiment, populist mimicry as introduced here extends further, capturing deeper behavioral alignment— where judicial reasoning and outcomes begin to show populist logic as a strategic response to political pressure. Such mimicry risks transforming courts into manipulative agents of populist politics, rather than independent arbiters of justice.

2.4. Constitutional Impatience

Referring to Girard's¹⁶ formulation, constitutional impatience describes a populist tendency to bypass deliberative institutions and accelerate executive action under the guise of fulfilling the "will of the people." Courts are expected to act as stabilizers who slow down haste and reinforce constitutional principles and norms. When they fail to do so, they risk becoming complicit in the erosion of constitutional fidelity.

2.5. Judicial Tempo

Judicial tempo refers to the speed, timing, and rhythm of judicial intervention in politically charged or

¹⁴ Populist mimicry is a concept that has been introduced here to describe instances where courts copy the rhetorical style, emotional tone, or ideological posture of populist actors.

¹⁵ Alon Harel & Noam Kolt, *Populist Rhetoric, False Mirroring, and the Courts*, 18 International Journal of Constitutional Law (2020) <https://academic.oup.com/icon/article/18/3/746/5900494#227700620>.

¹⁶ Raphaël Girard, *Populism, Executive Power, and "Constitutional Impatience": Courts as Institutional Stabilisers in the United Kingdom*, 8 Constitutional Studies (2022) https://www.researchgate.net/publication/357477526_Populism_Executive_Power_and_'Constitutional_Impatience'_Courts_as_Institutional_Stabilisers_in_the_United_Kingdom.

constitutionally urgent cases. A slow tempo may signal institutional caution, strategic avoidance, or deference to political actors. A fast tempo may reflect clarity, urgency, or desire to assert constitutional boundaries.

3. INDIAN CASE STUDIES: Populism in Practice

Let's examine some selected and renowned judgments of the Supreme Court of India where judicial reasoning appears to be influenced— explicitly or implicitly— by dominant public emotions and sentiments, political narratives, or cultural symbolism. These cases shed light on how judicial populism operates in practical scenarios, wherein the Court's allegiance to Constitutional principles is frequently muddled by gestures of majoritarian affirmation.

3.1. *The Ayodhya Verdict*

At the heart of this conspectus lies one of the most celebrated judgments in Indian history to date, the Ram Janmabhoomi Judgment. The purpose and choice of this case study is to break the silence and bring forth the bigger hidden picture. Let's delve into this case and explore how judicial populism is often seeping into contemporary India.

3.1.1. *Introduction*

The Hon'ble Supreme Court's decision in *M Siddiq (D) through LR's v Mahant Suresh Das and Ors*,¹⁷ popularly known as the Ayodhya Verdict or Ram Janmabhoomi (birth-place of Lord Ram) Verdict, is at the peak of India's one of the most controversial legal disputes. The case concerned the ownership of the land on which the Babri Masjid was built before its demolition in 1992, and whether the land on which the Masjid was built was actually the birthplace of Lord Ram. The Court's unanimous verdict awarded the disputed land to the Hindu parties, while directing the allotment of an alternative five-acre land to the Sunni Waqf Board.

3.1.2. *Historical and Legal Background*

This dispute dates back to the nineteenth century, accompanied by recorded instances of communal tensions and litigations over access and control of the disputed land. The Babri Masjid was constructed in the sixteenth century, and was claimed by Hindu litigants to have been built upon the birthplace of Lord Ram. The legal battle gained momentum after the demolition of the mosque in 1992, leading to multiple suits that were consolidated and heard by the Supreme Court.

¹⁷ M Siddiq (D) through LR's v. Mahant Suresh Das and Ors., (2020) 1 SCC 1 (India).

The Court was then burdened with the task of adjudicating competing claims of ownership, possession, and religious significance, based on both historical records and archaeological evidence.

3.1.3. *Judicial Reasoning and Faith*

The Supreme Court engaged extensively with the archaeological evidence that was put forth by the Archaeological Survey of India (ASI). It indicated the presence of a large, non-Islamic, pre-existing structure beneath the Babri Masjid, possibly of Hindu religious origin. The findings of the ASI were treated as supporting material, suggesting that the mosque was built over the remains of an earlier structure. However, the Court also acknowledged several limitations: the ASI report did not establish whether the earlier structure was demolished in order to build the mosque, nor did it explain the four-century gap between the two constructions. Most significantly, the Court itself pointed out that the finding of title cannot be decided (under law) on the basis of archaeological findings alone.¹⁸

3.1.4. *Possession and the Balance of Probabilities*

Although the ASI report did not conclusively prove the presence of a temple, nor did it establish exclusive Hindu possession, the Court relied on the principle of civil law, known as the “balance of probabilities,” to assess the claims of possession. It observed: “On the balance of probabilities, there is clear evidence to indicate that the worship by the Hindus in the outer courtyard continued unimpeded... their possession of the outer courtyard stands established...”¹⁹ Only based on mere possession, the Court delivered its judgment. Due to this approach, the Court was able to favour the Hindu parties without requiring definite proof. The judgment affirmed that the Muslim parties had not demonstrated exclusive possession, weakening their claim.

However, this reasoning arguably overlooks a critical historical fact: the desecration of the mosque in December 1949 that led to the ouster of Muslim worshipers. The Court has, on record, acknowledged the following turn of events:

Sl. No.	Event	Date	Day	Legal Significance
1.	Last Friday Namaz	16/12/1949	Friday	Demonstrates active religious possession
2.	Desecration of the mosque (leading to the ouster of the Muslims)	22/12/1949	Thursday	Marks unlawful interruption of possession

¹⁸ *Id.* at 788.

¹⁹ *Id.* at 797.

The chronology reveals that the last Friday Namaz was offered on 16 December 1949, and the desecration occurred on 22 December 1949— just one day before the next scheduled prayer. The proximity of these dates is significant. Had the desecration not taken place, the Muslim community would likely have continued to assert possession through uninterrupted religious observance. The cessation of worship was not voluntary but compelled by the unlawful disruption of the site. Thus, the ouster was not a result of abandonment but of forcible exclusion, interrupting a pattern of possession that was both active and demonstrable.

3.1.5. Judicial Recognition of Unlawful Demolition

The Court acknowledged the illegality of the mosque's demolition, stating, "The destruction of the mosque and the obliteration of the Islamic structure was an egregious violation of the Rule of Law."²⁰

Though it did admit that demolition was against the Rule of Law, the final judgment did not offer much direct redress for the demolition. Instead, the Court awarded compensatory relief by invoking Article 142²¹ of the Constitution and allotted an alternative plot in Ayodhya for the construction of a mosque. While this gesture provides some form of restitution, it does not completely address the historical wrong that occurred due to the demolition.

The decision, therefore, raises a serious constitutional concern: can unlawful acts be retrospectively legitimized through judicial compromise? And was the principle of secular equality meaningfully upheld in the final relief?

3.1.6. Faith and Belief in Judicial Reasoning

The Court placed a significant amount of weight on the continuity of Hindu worship and the strength of religious belief. One of the facets that the Court, after analyzing the disposition of the witnesses obtained, was: "The faith and belief of the Hindus that Lord Ram was born in Ayodhya is undisputed."²² Although the Court explicitly stated that ...title cannot be established on the basis of faith and belief...[they] are only indicators towards patterns of worship at the site on the basis of which claims of possession are asserted²³— it still gave a lot of significance to these indicators. By highlighting the long-standing Hindu worship and recognizing the strong belief that Lord Ram was born there, the Court made faith seem like more than just historical background. The judgment did not directly use faith to settle the legal question of title, but it built a narrative around the religious continuity and strong public sentiment. By often pointing out that belief in Lord Ram's birthplace is "undisputed" and that worship

²⁰ *Id.* at 788.

²¹ INDIA CONST. art. 142.

²² M Siddiq (D) through LRs v. Mahant Suresh Das and Ors., (2020) 1 SCC 1 [531] (India).

²³ *Id.* at 788.

at the site has continued for centuries, the Court subtly shifted the focus from strict legal ownership to a broader cultural and historical connection.

3.1.7. Political Context and Populist Alignment

The Ram Janmabhoomi dispute was not adjudicated in a political vacuum. The issue of constructing a Ram Mandir at the disputed site in Ayodhya has been a central electoral promise of the current leading government in India since at least 1996.²⁴ The party has been reiterating its commitment to facilitating the construction of a “magnificent Ram temple” at the Janmasthan, often invoking cultural and civilizational language in every Lok Sabha election manifesto from 1996 to 2019.

The BJP is committed to facilitate the construction of a magnificent Shri Ram Mandir at Ram Janmasthan in Ayodhya where a makeshift temple already exists. Shri Ram lies at the core of Indian consciousness. The BJP will explore all consensual, legal and constitutional means to facilitate the construction of Shri Ram Mandir at Ayodhya.²⁵

This consistent political messaging shaped public expectations and arguably created a normative background against which the Supreme Court delivered its verdict. While the judgment was framed in legal terms, its outcome cannot be overlooked as having mirrored a promise that had been repeatedly made to the electorate, raising concerns about judicial endorsement of majoritarian aspirations.

Such alignment between judicial outcomes and political manifestos can easily be interpreted to be a hallmark of judicial populism, where courts appear to validate dominant narratives.

3.1.8. Closing

In this way, the Court’s reasoning, though wrapped in evidentiary language, reflects a form of judicial populism. While the Court maintained a formal adherence to evidentiary standards, its rationale can be perceived to lean heavily on cultural symbolism, public sentiment and emotions, and political narratives. The case reveals how courts, sometimes, even under the garb of neutrality, may validate dominant ideologies— blurring the line between constitutional adjudication and populist affirmation.

²⁴ *From '96 to '19, Ayodhya's Ram Mandir was the Only Constant in BJP's Manifesto*, NEWS 18, Apr. 8 2019, <https://www.news18.com/news/politics/from-96-to-19-ayodhyas-ram-mandir-in-was-the-only-constant-in-bjps-manifesto-2093613.html>.

²⁵ BJP Election Manifesto (1998) [147]

<https://library.bjp.org/jspui/bitstream/123456789/241/1/BJP%20ELECTION%20MANIFESTO%201998.pdf>.

3.2. *The Same-Sex Marriage Verdict*

While the Ayodhya verdict reflects judicial populism through cultural affirmation, this landmark judgment, *Supriya Chakraborty & Anr v Union of India*.²⁶ Reveals its subtler strain– populism by abstention. The case reflects the theme of judicial populism– not through affirmation, but through strategic avoidance and institutional deference. Cloaked in constitutional restraint, the judgment reveals a subtler form of populism, expressed through abstention in the face of political resistance rather than alignment with majoritarian sentiment.

3.2.1. *Introduction*

In this case, the Hon'ble Supreme Court was presented with a historic opportunity to extend marriage equality under the Special Marriage Act, 1954 (SMA) to same-sex couples. The contention of the petitioner was not for the creation of a new institution but to ask for a gender-neutral reading of an existing secular statute. The case presented a test of constitutional allegiance– whether the Court would uphold the rights to dignity, autonomy, and non-discrimination for queer community.

Instead, the Court delivered a split verdict with a 3:2 majority. Though all the judges affirmed the right of queer persons to form relationships, the majority of the bench declined to recognize a fundamental right to marry and to reinterpret the SMA.

3.2.2. *The Majority's Stance: A Deference Disguised as Restraint*

The majority held that marriage is not a fundamental right guaranteed under the Constitution and that the SMA's exclusion of same-sex couples is constitutionally valid. It was reasoned: "Marriage as an institution is prior to the state... This implies that the marriage structure exists, regardless of the state, which the latter can utilize or accommodate, but cannot be abolished as a concept."²⁷

It was added that marriage is governed by religious and customary norms, making it inherently restrictive. "The institutional space of marriage is conditioned and occupied synchronously by legislative interventions, customary practices, and religious belief."²⁸

These arguments, while doctrinally framed, showcase a reluctance to challenge long-established social norms. The Court's non-interference was not merely about judicial discipline– it was a calculated move to avoid political friction, especially given the government's explicit opposition to marriage equality.

²⁶ Supriyo @ Supriya Chakraborty & Anr. v. Union of India, AIR 2023 SC 5283.

²⁷ *Id.* at 45 [Bhat J].

²⁸ *Id.* at 12 [Narasimha J].

3.2.3. *Recognition of right without remedy: A Constitutional Contradiction*

The court acknowledged that queer couples suffer indirect discrimination due to exclusion from marital benefits, “The denial of these benefits and inability of the earning partner in a queer relationship, therefore has an adverse discriminatory impact.”²⁹

The landmark case of *R.C. Cooper v Union of India*³⁰ to affirm that constitutional scrutiny must focus on the impact of a law, not its intent: “...the objects (of the legislation or the policy involved) are irrelevant. It is their impact, or the effect, on the individual, which is the focus of the court’s inquiry.”³¹

Yet, despite recognizing this harm faced by them, the Court declined to offer a remedy. Instead, it referred the issue to the Union Government for a committee to explore entitlements for queer couples. This move has been argued by a scholar as amounting to delegating justice to the very institution accused of exclusion³²— a gesture that transforms constitutional rights into administrative goodwill.

3.2.4. *Populism Through Abstention: Reading Between the Lines*

Unlike the Ram Janmabhoomi decision of the Court, where judicial populism was expressed through cultural alignment and symbolic restitution and a backdrop of sustained political mobilization around temple construction, same-sex marriage shows a populism of silence— manifested not through affirmation, but through strategic abstention and respect for institution. The court steered clear of affirming majoritarian sentiment, but also refrained from confronting it. This is a form of populism that is marked by not what the Court said, but what it chose not to do.

Despite recognizing discrimination, the refusal to reinterpret the SMA reflects a judicial calculation— a desire to preserve institutional legitimacy by avoiding politically sensitive adjudication. It can be said that the Court “delegitimized the petitioners’ claims by denying the existence of a right to marry.”³³ Thereby shifting the burden to Parliament for reformation.

By doing this, the Court not only preserved its image as a neutral constitutional arbiter but also very subtly reinforced the status quo by refraining from expanding the fundamental rights protection to the

²⁹ *Id.* at 114 [Bhat J].

³⁰ *R.C. Cooper v. Union of India*, AIR 1970 SC 564.

³¹ Supriyo @ Supriya Chakraborty & Anr. v. Union of India, AIR 2023 SC 5283 [110] [Bhat J].

³² Masoom Sanyal, *The Supreme Court’s Marriage Equality Judgment – III: Judicial Creativity and Justice Kaul’s Dissenting Opinion*, Constitutional Law and Philosophy (Oct. 29, 2023) <https://indconlawphil.wordpress.com/2023/10/>.

³³ Kartik Kalra, *The Supreme Court’s Marriage Equality Judgment – I: On the Right to Marry and a Case of Abstention through Delegitimation*, Constitutional Law and Philosophy (Oct. 29, 2023) <https://indconlawphil.wordpress.com/2023/10/>.

queer community, despite having done so on multiple occasions, such as the *NALSA*³⁴ and the *Navtej Singh Johar*³⁵ case. This marks a subtler strain of judicial populism: one that cloaks itself in constitutional restraint to evade scrutiny and backlash. Much like donning an invisible cloak, the Court rendered its retreat from substantive justice unnoticeable—shielding itself from political consequences by withholding the very recognition it once championed.

3.2.5. Closing

This case can be said to mark “a moment when silence rewrote the Constitution.”³⁶ Though in dissenting, Hon’ble Justice Kaul proposed a creative interpretive approach to remedy the unconstitutionality that exists in the SMA that creates two different classes of people: first, the heterosexual couples who are eligible to marry under the Act, and second, the non-heterosexual couples who are ineligible to do so, thus violating Article 14³⁷ of the Constitution, yet the judgment is a classic reflection of judicial populism by absence (not of judicial populism in the conventional sense). The Court in this case chose restraint over remedy. The decision exposes how judicial minimalism can serve populist ends, particularly in cases when courts avoid adjudication to safeguard institutional harmony.

4. POPULISM VS CONSTITUTIONAL MORALITY: Normative Tensions

The tension that exists between judicial populism and constitutional morality lies at the core of contemporary constitutional adjudication. While populism seeks legality through alignment with dominant public emotions and sentiments, constitutional morality requires allegiance to foundational principles such as liberty, equality, and justice— even when such allegiance runs counter to majoritarian will. Let’s explore the theoretical basis of constitutional morality, the counter-majoritarian role of courts, and the risks posed by performative adjudication in a populist climate.

4.1. Theoretical Framework

The jurisprudence of Ronald Dworkin offers a foundational lens to understand constitutional morality. He propounds that judges must interpret legal principles not merely as rules but as moral commitments embedded in the constitutional structure.³⁸ Dworkin in *Law’s Empire*³⁹ asserts that rights are trumps over collective goals, and that courts must protect individual rights and dignity even when doing so

³⁴ National Legal Service Authority v. Union of India, (2014) 5 SCC 438.

³⁵ Navtej Singh Johar v. Union of India, (2018) 10 SCC 1.

³⁶ This phrase is used to highlight the normative weight of judicial silence or inaction in moments of constitutional urgency.

³⁷ INDIA CONST. art. 14.

³⁸ *Understanding Dworkin’s Theory of Law: Principles and Implications*, Law Pulse (Aug. 5, 2024) <https://lawspulse.com/dworkins-theory-of-law/>.

³⁹ RONALD DWORKIN, *LAW’S EMPIRE* (Harvard University Press) (1986).

conflicts with popular opinion.⁴⁰ This view places constitutional adjudication as inherently counter-majoritarian.

Tarunabh Khaitan's work can be viewed as offering a more contemporary critique of judicial populism. His work can be interpreted to explain judicial populism as a phenomenon where courts act in accordance with dominant political narratives, often at the expense of constitutional principles.⁴¹ In his analysis of the Sabarimala case,⁴² Though Khaitan provides that the Court's invocation of constitutional morality was genuine,⁴³ it is the acceptance of review petitions⁴⁴ that reflects a populist recalibration. Such oscillations risk undermining the Court's institutional credibility and its role as a guardian and protector of rights.

4.2. The Counter-Majoritarian Role of Courts

The Indian Constitution conjures up the image of the judiciary as a counter-majoritarian institution, tasked with the duty of upholding the rights and principles that may not always enjoy popular support. The role is especially sensitive in cases involving vulnerable or politically marginalized groups. As Justice Chandrachud observed in the *Navtej Singh Johar* case,⁴⁵ while referring to the Delhi High Court's observation in the *Naz Foundation* case,⁴⁶ "...Constitutional morality must outweigh the argument of public morality even if it be the majoritarian view."⁴⁷

However, the counter-majoritarian function is not absolute. Courts operate within a political ecosystem and are frequently sensitive to the risks of overreach. In *Ram Janmabhoomi*⁴⁸ case exemplifies affirmative judicial populism. While the judgment invoked constitutional values of secularism and rule of law, it simultaneously validated a majoritarian cultural narrative long mobilized by political actors. Scholars have even critiqued the decision for favoring the strong and have voiced that the gesture echoes

⁴⁰ *Exploring Dworkin's Law's Empire*, UOLLB (Jul. 4, 2024) <https://uollb.com/blogs/uol/exploring-dworkins-laws-empire>.

⁴¹ Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14 Law & Ethics of Human Rights (2020) https://www.researchgate.net/publication/343956381_Killing_a_Constitution_with_a_Thousand_Cuts_Executive_Aggrandizement_and_Party-state_Fusion_in_India.

⁴² *Indian Young Lawyers Association v. State of Kerala*, (2019) 11 SCC 1 (India).

⁴³ Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14 Law & Ethics of Human Rights (2020) https://www.researchgate.net/publication/343956381_Killing_a_Constitution_with_a_Thousand_Cuts_Executive_Aggrandizement_and_Party-state_Fusion_in_India.

⁴⁴ *Sabarimala Review* (Supreme Court Observer) <https://www.scobserver.in/cases/kantaru-rajeevaru-indian-young-lawyers-association-sabarimala-review-background/>.

⁴⁵ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

⁴⁶ *Naz Foundation v. Government of NCT and Ors.*, MANU/DE/0869/2009 (India).

⁴⁷ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1 [497].

⁴⁸ *M Siddiq (D) through LR's v. Mahant Suresh Das and Ors.*, (2020) 1 SCC 1 (India).

the logic of “separate but equal,”⁴⁹ suggesting that while formal equality is preserved, spatial and cultural segregation is tacitly endorsed. This framing underlines the Court’s uneasy negotiation with dominant political ideologies, raising concerns about its allegiance to constitutional principles of secularism, reparative justice, and counter-majoritarian role.

In contrast, the Same-sex marriage verdict,⁵⁰ the Court’s refusal to legalize and recognize marriage between two non-heterosexual persons is framed as judicial restraint, but at the same time, it reflects a reluctance to confront the executive’s ideological stance. By deferring the issue to Parliament, the Court avoided direct squabble, thereby reinforcing a populism of silence.

4.3. Risks of Performative Adjudication

The risk of performative adjudication is evident in the landmark decisions discussed above. The Ayodhya verdict highlights performative adjudication through affirmation. The Court delivered a decision that satisfied majoritarian sentiment while maintaining a cover of secular reasoning. The judgment, while formally unanimous and legally structured, mirrored dominant political narratives and avoided confronting the deeper constitutional question of reparative justice and historical wrong.⁵¹

In contrast, in the same-sex marriage verdict, the Court affirmed the dignity of queer persons and recognized the discriminatory impact of excluding them from marriage-related benefits, yet it withheld legal recognition and delegated the matter to a government committee. The move, while procedurally cautious, exemplifies performative adjudication: the Court appeared to act by listing the matter before it, but ultimately chose not to intervene. This case is rich in constitutional language, devoid of an enforceable relief— an instance of symbolic affirmation without structural change.

Both these cases illustrate how performative adjudication— whether through celebration or silence— can erode the normative force of constitutional principles. When courts engage in such mimicry, they risk hollowing out constitutional morality. As Khaitan warns, when institutions enable executive aggrandizement and party-state fusion, they compromise the normative force of constitutional principles.⁵²

⁴⁹ Suhrit Parthasarathy & Gautam Bhatia, *Peace bought by an unequal compromise*, THE HINDU, Nov. 15, 2019) <https://www.thehindu.com/opinion/lead/peace-bought-by-an-unequal-compromise/article62106425.ece>.

⁵⁰ Supriyo @ Supriya Chakraborty & Anr. v. Union of India, AIR 2023 SC 5283.

⁵¹ See, Saurav Das, *Performative Justice: The equivocations of DY Chandrachud*, THE CARAVAN, Nov. 1, 2024 <https://caravanmagazine.in/law/equivocations-of-chandrachud>.

⁵² Tarunabh Khaitan, *Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India*, 14 Law & Ethics of Human Rights (2020) https://www.researchgate.net/publication/343956381_Killing_a_Constitution_with_a_Thousand_Cuts_Executive_Aggrandizement_and_Party-state_Fusion_in_India.

The tension between judicial populism and constitutional morality plays out in landmark decisions that shape India's constitutional identity. Both these cases challenge the judiciary's counter-majoritarian mandate and raise urgent questions about the future of constitutional allegiance in a politically charged environment.

5. COMPARATIVE PERSPECTIVES: Judicial Populism as Evident in Global Democracies

Judicial populism is not unique to Indian territory. Across democracies, courts have responded to populist pressures in varied ways— sometimes resisting, accommodating, and occasionally mirroring dominant political narratives. This section examines judicial populism in Brazil and Poland, drawing lessons for India's constitutional future.

5.1. BRAZIL: Between Resistance and Complicity

Brazil's judiciary, especially the Supremo Tribunal Federal (STF), has navigated an unsafe path between institutional resilience and strategic accommodation in the face of populist governance. Under President Jair Bolsonaro, populist rhetoric weaponized constitutional discourse, portraying the STF as an elite obstacle to the 'will of the people' and accusing it of undermining national sovereignty and executive authority.⁵³

5.1.1. Populist Confrontation and Judicial Defiance

Bolsonaro's administration repeatedly challenged the STF's counter-majoritarian role, especially in areas of public health, electoral integrity, and anti-corruption enforcement. His public statements reflected a broader strategy of delegitimizing judicial oversight (including threats to defy court orders and call for the STF's closure).⁵⁴ In spite of all this, the STF responded with remarkable constitutional assertiveness. In *ADI 6341*⁵⁵ and *ADPF 672*,⁵⁶ the Court upheld federalism, empowered subnational governments to implement pandemic measures, and reaffirmed the separation of powers.

This judicial defiance was not only procedural— it was symbolic. By fighting against executive trespass, the STF positioned itself as a guardian of constitutionalism. As Tatiana Paula notes, trust in the judiciary

⁵³ Eleonora Mesquita Ceia, *Populist Government and Judicial Power in Brazil in Times of the Covid-19 Pandemic: A Conflicting Relationship* 17 Springer (2024) https://link.springer.com/chapter/10.1007/978-3-031-71889-2_8#citeas.

⁵⁴ Tatiana Paula da Cruz, *Trusting the Courts: Exploring the Link Between Populism, Trust in Courts, and Democracy in Brazil*, Journal of Politics in Latin America (2024) <https://journals.sagepub.com/doi/pdf/10.1177/1866802X241295784>.

⁵⁵ ADI 6341 MC-REF <https://www.covid19litigation.org/case-index/brazil-federal-supreme-court-adi-6341-mc-ref-2020-04-15>.

⁵⁶ ADPF 672 MC <https://www.covid19litigation.org/case-index/brazil-federal-supreme-court-adpf-672-mc-2020-05-08>.

rose significantly in 2020, particularly after the STF's rulings constrained presidential overreach and defended the rights of the people.⁵⁷ The Court's actions helped decouple public dissatisfaction with democracy from mistrust in the judicial institution.

5.1.2. *Performative Legitimacy and Populist Mimicry*

However, this resilience was not without compromise. Scholars have highlighted a judicial stand that simulates populist responsiveness through media engagement, rhetorical alignment, and selective restraint⁵⁸ – which can be interpreted to show the emergence of populist mimicry. STF justices increasingly participated in issuing public statements to maintain institutional legitimacy amid political turbulence.⁵⁹ This performative turn risks normalizing a judicial culture that prioritizes public approval over constitutional allegiance. When courts adopt populist styles to safeguard their authority, they may inadvertently erode their counter-majoritarian function and contribute to democratic decay.⁶⁰ The STF is wavering between assertiveness and accommodation, which exemplifies this tension.

5.1.3. *Structural Vulnerabilities and Elite Capture*

Brazil's judiciary also faces structural vulnerabilities that complicate its role as a protector against judicial populism within the government. The politicization of judicial appointments has raised serious concerns about elite capture and institutional independence, as exemplified by the nomination of Justice Alexandre de Moraes, a former justice minister under Temer.⁶¹

Moreover, the judiciary's involvement with Brazil's anti-corruption crusade, *Lava Jato*⁶² (Operation Car Wash), exposed it to accusations of selective enforcement and political partiality.⁶³ While the STF

⁵⁷ Tatiana Paula da Cruz, *Trusting the Courts: Exploring the Link Between Populism, Trust in Courts, and Democracy in Brazil*, Journal of Politics in Latin America (2024) <https://journals.sagepub.com/doi/pdf/10.1177/1866802X241295784>.

⁵⁸ Conrado Hübner Mendes & Juliano Zaiden Benvindo, *The Brazilian Supreme Court and the Protection of Democracy in the Age of Populism*, I-CONnect (Jun. 26, 2019) <https://www.iconnectblog.com/symposium-introduction-the-brazilian-supreme-court-and-the-protection-of-democracy-in-the-age-of-populism/>.

⁵⁹ Eneida Desiree Salgado & Emerson Gabardo, *The Role of the Judicial Branch in Brazilian Rule of Law Erosion*, 8 Revista de Investigações Constitucionais (2021) <https://www.scielo.br/rinc/a/DjrnzM9pSSFBFLr6vNRBZrM/?format=html&lang=en>.

⁶⁰ Tom Daly, *Populism, Public Law, and Democratic Decay in Brazil: Understanding the Rise of Jair Bolsonaro*, LEHR (Nov. 1, 2019) https://scholar.google.com/citations?view_op=view_citation&hl=en&user=ygXtGPAAAAAJ&citation_for_view=ygXtGPAAAAAJ:u-x6o8ySG0sC.

⁶¹ *Temer makes Alexandre de Moraes official as new STF minister*, VEJA BRASIL, Feb. 22, 2017 <https://veja.abril.com.br/politica/temer-efetiva-alexandre-de-moraes-como-novo-ministro-do-stf>.

⁶² Brazil's largest-ever corruption probe, known as the Lava Jato (Car Wash) investigation, exposed a web of graft across Latin America and beyond, rocking the political and economic establishment in more than a dozen countries. See Amelia Cheatham, *Lava Jato: See How Far Brazil's Corruption Probe Reached*, Council on Foreign Relations (Apr. 19, 2021) <https://www.cfr.org/in-brief/lava-jato-see-how-far-brazils-corruption-probe-reached>.

⁶³ George Mészáros, *Caught in an Authoritarian Trap of Its Own Making? Brazil's 'Lava Jato' Anti-Corruption Investigation and the Politics of Prosecutorial Overreach*, 47 Journal of Law and Society (2020)

eventually curtailed some of the operation's excesses, its initial siding with punitive populism blurred the line between legal accountability and political conflicts.

5.1.4. Lessons for India

Brazil's experience offers sobering lessons for the Indian Judiciary.

- ❖ Judicial independence must be defended not only from external threats but also from internal threats toward performative legitimacy. Courts must resist the allure of public approval and maintain principled adjudication rooted in constitutional justifications.
- ❖ Populist mimicry is a subtle but coercive force. Even when courts do not overtly back populist ideology, their strategic alignment with dominant narratives can undermine their role as neutral arbiters of the constitution. As India grapples with its own populist pressures, the judiciary must remain vigilant against rhetorical co-option and institutional self-preservation at the cost of constitutional integrity.
- ❖ Public trust must be earned through allegiance to constitutional values, not through media performance or symbolic gestures. Brazil's STF demonstrated that courts can reclaim their legitimacy by defending democratic principles in moments of predicament. But since this legitimacy is fragile and rests on trust, the Courts must anchor it by transparency and consistency.

5.2. POLAND: Judicial Populism and the Architecture of Constitutional Breakdown

Poland's fall into judicial populism is one of the most studied and alarming examples of democratic regression in Europe. When the Law and Justice Party (*Prawo i Sprawiedliwość*, PiS) came to power in 2015, the country started to witness a systematic depletion of judicial independence, institutional capture, and the strategic deployment of legal reforms as a populist tool. Poland's judiciary has been reconstructed to serve majoritarian interests, with constitutional checks hollowed out from within.

5.2.1. Court-Packing and Institutional Capture

The PiS started its judicial overhaul by targeting Poland's apex constitutional court– the Constitutional Tribunal (CT). Central to the strategy was court-packing, a process whereby the ruling party expands

<https://onlinelibrary.wiley.com/doi/pdf/10.1111/jols.12245>; Mariana Mota Prado & Marta R De Assis Machado, *Using Criminal Law to Fight Corruption: The Potential, Risks, and Limitations of Operation Car Wash (Lava Jato)*, 69 The American Journal of Comparative Law (2021)
<https://academic.oup.com/ajcl/article/69/4/834/6590248?login=false>.

or manipulates judicial appointments to install such judges who are ideologically aligned or politically loyal, thereby altering the court's composition and jurisprudential direction. Unlike routine judicial renewal, court-packing is politically stimulated and frequently enforced through legislative amendments, procedural irregularities, or executive pressure. Its aim is not only to fill vacancies, but also to recalibrate the court's institutional character in favour of the governing majority.

Through legislative amendments and procedural manipulation, the PiS packed the CT⁶⁴ with pro-PiS political viewers.⁶⁵ Wojciech Sadurski documents, this process involved invalidating legitimate appointments, refusing to publish unfavourable judgments, and installing judges who lacked constitutional legitimacy.⁶⁶

The PiS also extended its capture to the National Council of the Judiciary (*Krajowa Rada Sądownictwa*, KRS), the body responsible for judicial appointments.⁶⁷ By making changes in its composition and subordinating it to parliamentary control, PiS effectively dismantled the separation of powers in the country.⁶⁸ ⁶⁹ The European Commission and the Court of Justice of the European Union have many times criticized these reforms for violating European Union standards on judicial independence.⁷⁰

This institutional reform was labeled by PiS as a “revival of the judicial system,” with President Andrzej Duda declaring that judges “are not an extraordinary caste” but “servants of the Polish people.”⁷¹ Such statements exemplify judicial populism, where courts are reimagined and reconstructed not as constitutional referees but as instruments of popular will.

⁶⁴ Sydney Young, *Upholding the Rule of Law: Will Poland Survive the Siege on its Judiciary?*, Harvard International Review (2020) <https://hir.harvard.edu/upholding-the-rule-of-law-will-polish-democracy-survive-the-siege-on-its-judiciary/>; See also Joanna Berendt, *Polish Government Pushes Legislation to Tighten Control Over Judges*, N.Y. TIMES, Dec. 21, 2019 <https://www.nytimes.com/2019/12/21/world/europe/poland-judges-independent.html?ref=hir.harvard.edu>.

⁶⁵ Wojciech Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press (2019) [8] https://api.pageplace.de/preview/DT0400.9780192576965_A37450829/preview-9780192576965_A37450829.pdf.

⁶⁶ Wojciech Sadurski, *supra* note 65.

⁶⁷ John Macy & Allyson K Duncan, *The Collapse of Judicial Independence in Poland: A Cautionary Tale*, 104 *Judicature* (2020-21) <https://judicature.duke.edu/articles/the-collapse-of-judicial-independence-in-poland-a-cautionary-tale/>.

⁶⁸ Alistair Walsh, *What are the Polish judicial reforms?*, DEUTSCHE WELLE, May 11, 2019 <https://www.dw.com/en/what-are-polands-controversial-judicial-reforms/a-51121696>.

⁶⁹ Patryk Regalski, *Poland: Judicial Reform & Independence*, ECLJ (Jul. 16, 2020) <https://eclj.org/geopolitics/eu/la-reforme-du-conseil-de-la-magistrature-polonais-et-lindependance-de-la-justice?lng=en>.

⁷⁰ Alistair Walsh, *What are the Polish judicial reforms?*, DEUTSCHE WELLE, May 11, 2019 <https://www.dw.com/en/what-are-polands-controversial-judicial-reforms/a-51121696>.

⁷¹ Sydney Young, *Upholding the Rule of Law: Will Poland Survive the Siege on its Judiciary?*, Harvard International Review (2020) <https://hir.harvard.edu/upholding-the-rule-of-law-will-polish-democracy-survive-the-siege-on-its-judiciary/>.

5.2.2. *Legal Mobilization from Within*

What distinguishes Poland's case is the emergence of internal legal mobilization— a phenomenon where judges appointed through politicized processes actively construct legal narratives to legitimize their own status. Krzyżanowska's study of Supreme Court judges appointed post-2017 shows how, despite widespread criticism, these actors get involved in public discourse, public legal commentaries, and frame their appointments as constitutionally valid.⁷²

This mobilization is not only rhetorical but also includes the strategic use of populist dichotomies, such as legitimacy vs. illegitimacy and autonomy vs. corporatism, to delegitimize dissenting judges and secure ideological control. While not all freshly appointed judges exhibit overt partisan alignment, their discursive practices reinforce the governing party's narrative and complicate the separation between legal reasoning and political allegiance.

5.2.3. *Judicial Populism in Practice*

Poland's judicial populism is not compartmentalized to appointments— it permeates adjudication. The CT has issued rulings that align closely with PiS's ideological agenda, including decisions restricting abortion rights,⁷³ challenging EU supremacy,⁷⁴ and curtailing judicial review.⁷⁵ These judgments are frequently framed in nationalist and moralist terms, reflecting populist rhetoric about sovereignty, tradition, and cultural identity.

Sadurski warns that such jurisprudence reflects a deeper constitutional breakdown, and his warning can be interpreted as the rule of law being replaced by rule-through-law— a system in which legal principles are used to anchor executive power rather than limit it. The CT's transformation from a counter-majoritarian body into a political ally illustrates how judicial populism can empty constitutional democracy from within.

⁷² Katarzyna Krzyżanowska, *Legal Mobilisation Within the Populist Supreme Court in Poland*, 20 International Journal of Law in Context (2024) <https://www.cambridge.org/core/journals/international-journal-of-law-in-context/article/legal-mobilisation-within-the-populist-supreme-court-in-poland/750A41E104EE308D5F94DC28110AB153>.

⁷³ *Poland: A Year On, Abortion Ruling Harms Women*, Human Rights Watch (Oct. 19, 2021) <https://www.hrw.org/news/2021/10/19/poland-year-abortion-ruling-harms-women>; *Poland enforces controversial near-total abortion ban*, BBC NEWS, Jan. 28, 2021 <https://www.bbc.com/news/world-europe-55838210>.

⁷⁴ Marta Lasek-Markey, *Poland's Constitutional Tribunal on the status of EU law: The Polish government got all the answers it needed from a court it controls*, European Law Blog (Oct. 21, 2021) <https://www.europeanlawblog.eu/pub/polands-constitutional-tribunal-on-the-status-of-eu-law-the-polish-government-got-all-the-answers-it-needed-from-a-court-it-controls/release/1>.

⁷⁵ Piotr Radzewicz, *Judicial Change to the Law-in-Action of Constitutional Review of Statutes in Poland*, 18 Utrecht Law Review (2022) <https://utrechtlawreview.org/articles/10.36633/ulr.689>.

5.2.4. *Lessons for India*

Poland's study offers urgent lessons for India's constitutional democracy, namely,

- ❖ Judicial independence is vulnerable to structural manipulation. Institutional safeguards are necessary and must be protected not only theoretically but also practically. Appointment processes, tenure security, and procedural transparency are essential to prevent politicization.
- ❖ Framing judicial reform as a democratic revival may conceal the intent to dismantle checks and balances. Courts must remain vigilant and sharp against narratives that equate popular will with constitutional legitimacy.
- ❖ Internal mobilization can establish populism. when judges themselves adopt populist logic to justify their positions, the judiciary risks transforming into a vehicle for executive consolidation rather than a bulwark against it.

The path on which Poland was should be a stern lesson for the Indian Judiciary. The threat is not only external— it lies in the subtle transformation of judicial culture, where constitutional fidelity is replaced by strategic alignment. Judicial populism, if left unchecked, can turn courts into weapons of power rather than guardians of principles.

6. UNITED KINGDOM: An Outshining Example of Judicial Restraint And Constitutional Allegiance in Populist Times

In recent years, both the United Kingdom (UK) and India have witnessed populist actions of executives that challenge the pace and procedures of constitutional democracy. These actions are often justified in the name of fulfilling the “will of the people,” but instead, they tend to bypass deliberative institutions such as Parliament. Girard's concept of “Constitutional Impatience” appropriately engulfs this phenomenon, describing how populist leaders seek to accelerate governance by sidelining institutional checks and legal limitations on their powers.⁷⁶ In this context, the Courts are expected to act as institutional stabilisers— slowing down the executive haste, reinforcing constitutional principles and norms, and educating the public about democratic values.

Unlike the Courts of some other States, the UK provides a compelling example of a jurisdiction where the Court did not succumb to populist styles and did not hesitate in the face of executive pressure.

⁷⁶ Raphaël Girard, *Populism, Executive Power, and “Constitutional Impatience”: Courts as Institutional Stabilisers in the United Kingdom*, 8 Constitutional Studies (2022) https://www.researchgate.net/publication/357477526_Populism_Executive_Power_and_'Constitutional_Impatience'_Courts_as_Institutional_Stabilisers_in_the_United_Kingdom.

During the Brexit process, the UK Supreme Court was troubled by populist executive actions that sought to bypass constitutional conventions and parliamentary scrutiny. However, unlike Brazil and Poland, the judiciary in the UK responded with clarity, restraint, and constitutional fidelity—interfering decisively without adopting populist rhetoric or performative adjudication.

6.1. *Miller I*:⁷⁷ Reaffirming Parliamentary Sovereignty

In *R (Miller) v Secretary of State for Exiting the European Union*,⁷⁸ the Supreme Court held that the Government could not trigger Article 50⁷⁹ of the Treaty on the European Union (the Lisbon Treaty) without parliamentary authorization.⁸⁰ The Court reasoned that ministers could not use prerogative powers to alter domestic law or remove statutory rights without an Act of Parliament. This judgment reaffirmed the principle of parliamentary sovereignty and insisted that constitutional change must follow constitutional format, even in politically tense circumstances.

The Court's reasoning was well established and institutionally cautious. It steered clear of moral grandstanding and instead relied on accepted constitutional principles, reinforcing the idea that legal process must prevail over political expediency.

6.2. *Miller II*:⁸¹ Scrutinizing Executive Power

In *R (Miller) v The Prime Minister*, also known as *Miller/ Cherry*, the Supreme Court unanimously held that the Prime Minister's advice to the monarch to prorogue Parliament for five weeks was unlawful.⁸² The Court found that the prorogation⁸³ had the effect of frustrating Parliament's constitutional functions without reasonable explanation, and was therefore justifiable and void.

This decision was significant not only for its outcome but for its tone. The Court spoke in restrained, constitutional language—laying emphasis on parliamentary accountability and the rule of law. It escaped

⁷⁷ *R (Miller) v. Secretary of State for Exiting the European Union*, [2017] UKSC 5 (United Kingdom).

⁷⁸ *Id.*

⁷⁹ Treaty on the European Union art. 50.

⁸⁰ Press Summary, *R (on the application of Miller and another) (Respondents) v. Secretary of State for Exiting the European Union (Appellant)* (Jan. 24, 2017) https://supremecourt.uk/uploads/uksc_2016_0196_press_summary_b66f583310.pdf.

⁸¹ *R (Miller) v The Prime Minister/ Cherry v Advocate General for Scotland*, [2019] UKSC 41 (United Kingdom).

⁸² Press Summary, '*R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) Cherry and others (Respondents) v Advocate General for Scotland (Appellant) (Scotland)*' (Sept. 24, 2019) https://supremecourt.uk/uploads/R_on_the_application_of_Miller_App_v_The_Prime_Minister_Resp_PS_5bceabae20.pdf.

⁸³ Prorogation refers to the formal termination of a parliamentary session, initiated by the monarch upon the Prime Minister's advice. As a prerogative power, it occurs outside legislative control and is not subject to parliamentary oversight. See also, *Why was Miller vs Prime Minister so significant?*, Politics Teaching <https://politicsteaching.com/2024/01/19/why-was-miller-vs-prime-minister-so-significant-2/>.

populist idioms and did not frame its interference as a defense of “the people” against the executive. Instead, it restored institutional balance through principled, reasoned, and procedural clarity.

6.3. *Judicial Tempo and Transparent Communication*

The manner in which the UK Supreme Court has handled both *Miller cases*⁸⁴ exemplifies a disciplined judicial tempo. Hearings were conducted swiftly, judgments were delivered timely, and press summaries were published in accessible language. The Court also live-streamed proceedings and made full case materials available to the public at large,⁸⁵ reinforcing procedural legitimacy, transparency, and public trust.

This communicative posture—transparent but restrained—stands in contrast to performative adjudication. The Court did not look for public approval through rhetorical flourishes or symbolic gestures. Even while deciding cases with extreme political consequences, the Court maintained a neutral institutional voice.

6.4. *Lessons for India*

The Constitution of India empowers the judiciary to act as a stabilizer, but it has recently responded unevenly to populist executive pressures. Landmark judgments like *Shayara Bano*⁸⁶ and *Navtej Singh Johar*⁸⁷ highlights judicial courage and confidence in upholding constitutional morality and individual rights, even against majoritarian sentiments. However, the Supreme Court has been criticized in politically sensitive cases such as the *Ram Janmabhoomi-Babri Masjid* verdict⁸⁸ for aligning with dominant narratives and also for its failure to act with urgency in the long-delayed judgment on the *Electoral Bonds Scheme*.⁸⁹

The concept of judicial tempo is especially relevant here. While the UK Courts responded quickly and clearly when faced with a constitutional crisis, Indian Courts have sometimes delayed intervention, particularly when executive actions are politically charged. This delay weakens the judiciary’s stabilizing function and undermines its role as a, what Girard calls, democratic educator.⁹⁰ Though in

⁸⁴ R (Miller) v. Secretary of State for Exiting the European Union [2017] UKSC 5; R (Miller) v. The Prime Minister/ Cherry v Advocate General for Scotland [2019] UKSC 41 (United Kingdom).

⁸⁵ The videos of the hearings and other relevant materials related to the cases can be accessed through the official website, The Supreme Court of the United Kingdom <https://supremecourt.uk/>.

⁸⁶ Sharaya Bano and Ors. v. Union of India and Ors., AIR 2017 SC 4609.

⁸⁷ Navtej Singh Johar and Ors. v. Union of India and Ors., AIR 2018 SC 4321.

⁸⁸ M Siddiq (D) through LRs v. Mahant Suresh Das and Ors., (2020) 1 SCC 1 (India).

⁸⁹ Association for Democratic Reforms & Ors. v. Union of India and Ors., AIR 2024 SC 1441, (2024) 5 SCC 1.

⁹⁰ Raphaël Girard, *Populism, Executive Power, and “Constitutional Impatience”: Courts as Institutional Stabilisers in the United Kingdom*, 8 Constitutional Studies (2022) https://www.researchgate.net/publication/357477526_Populism_Executive_Power_and_'Constitutional_Impatience'_Courts_as_Institutional_Stabilisers_in_the_United_Kingdom.

cases like *KS Puttaswamy*,⁹¹ the Court is celebrated for articulating constitutional principles and upholding and expanding rights of the people with clarity and precision; such instances are occasional.

The study of the UK offers three key lessons, namely:

- ❖ *Clarity and timing matter*: judicial restraint does not delay the case. Courts must interfere decisively when constitutional principles and norms are at stake.
- ❖ *Neutral voice strengthens legitimacy*: public trust is preserved not through populist mimicry but through principled reasoning and transparent communication.
- ❖ *Institutional allegiance is a stabilizing force*: Courts must pass judgments with a constitutional framework, resisting the temptation to mirror political sentiments.

In situations of constitutional impatience, the judiciary's role is not to anchor the executive or appease public sentiments, but to uphold the architecture of democratic accountability and transparency. The UK Supreme Court's Brexit-era jurisprudence demonstrates that this can be done through clarity, speed, and constitutional conviction.

7. CONCLUSION

In moments of constitutional strain, the role of the judiciary goes beyond adjudication; it becomes a test of institutional character. This conspectus has traced how judicial populism, whether expressed through performative affirmation or strategic silence, risks eroding the court's normative anchor: fidelity to constitutional principle over public sentiment. The comparative lens reveals that while the United Kingdom has embraced its stabilizing function with clarity, transparency, and constitutional certainty, Indian courts have oscillated between courage and caution, often modulating their tempo in response to political sensitivity.

Such judicial behaviour is not only procedural, it is educational. Courts educate democracy not only through verdicts but through the pace, transparency, and reasoning of their interference. When judicial tempo slows in the face of populist executive power, it signals not deliberation but democratic fatigue. Conversely, when courts carry out majoritarian will, they risk becoming instruments of constitutional impatience rather than its correctives.

Future scholarship must interrogate the structural and rhetorical conditions that enable or inhibit judicial resistance to populism. Reform efforts should focus on enhancing institutional transparency, curbing

⁹¹ *KS Puttaswamy and Ors. v. Union of India and Ors.*, (2018) 4 SCC 651.

procedural opacity, and cultivating a jurisprudence that privileges constitutional clarity over political calibration. In doing so, courts may reclaim their role not as passive observers of democratic erosion but as active stewards of constitutional integrity.