
Seven to six: Questioning the assumptions underlying judicial majoritarianism in the Indian Supreme Court

Ankit Kaushik*, Malak Sheth**, and Manas Saxena***

The Supreme Court of India adjudicates cases on the basis of majority rule: under Article 145(5) of the Constitution, judgments and opinions must be delivered with the concurrence of a majority of the judges hearing the case. Jeremy Waldron has termed this practice “judicial majoritarianism” in his essay “Five to Four: Why Do Bare Majorities Rule on Courts?” This article extends Waldron’s analysis to the Indian context and examines a practice that has received little sustained scrutiny. It argues that the acceptance of judicial majoritarianism in India rests largely on assumptions of obviousness rather than on articulated philosophical foundations. Engaging with defenses of judicial majoritarianism, the article critiques their application in light of the Supreme Court’s decision in the case of Trimurthi Fragrances v. NCT of Delhi. It contends that the Court’s reasoning exposes structural tensions in the doctrine’s epistemic, procedural, and normative justifications. The article concludes by calling for a more rigorous theoretical defense of judicial majoritarianism and seeks to initiate a broader discourse on the legitimacy of majority-based adjudication in India.

1. Understanding judicial majoritarianism: An introduction

In India, as in any electoral democracy, votes are understood as a manifestation of the people’s will. The possibility that this collective will may be

* Assistant Professor of Law, National Law University Delhi, India. Email: ankit.kaushik@nludelhi.ac.in.

** Rajiv Gandhi National University of Law, Punjab, India. Email: malaksheth21127@rgnul.ac.in

*** Rajiv Gandhi National University of Law, Punjab, India. Email: manassaxena21182@rgnul.ac.in. The authors are grateful to Prof. (Dr.) G.S. Bajpai, Vice-Chancellor, National Law University Delhi, whose input helped develop and refine the presented arguments in significant measure.

majoritarian and prejudicial to minority interests¹ led the constitutional framers to establish constitutional checks—including judicial review—over legislative and executive action. Even as debates about the scope of judicial review continue in India,² as elsewhere,³ the Indian judiciary has assumed expanding roles and responsibilities.⁴ In this context—where the judiciary is tasked with functioning as a constitutional court, arbiter of inter-state disputes, and appellate court—it becomes necessary to examine the procedures and methodologies it adopts in performing these functions.

Unlike matters within its ordinary appellate jurisdiction, which are heard by division benches of two judges, matters of constitutional importance in India are generally heard by a Constitutional Bench consisting of five or more judges. Decisions are made by simple majority on a five-judge bench, and the concurrence of at least three judges constitutes the law.⁵ This practice—where the view of a numerical majority prevails over that of a minority—is termed “judicial majoritarianism” (JM). This article qualitatively analyzes JM by asking why it is accepted without question in Indian judicial discourse when majoritarianism in electoral and legislative contexts is often treated with suspicion. The article first explicates this apparent dichotomy and then challenges it.

In undertaking this inquiry, the authors draw on Jeremy Waldron, who questioned majority decision-making in judicial review in the United States, arguing that if JM were indefensible, judicial review itself would lack justification.⁶ Guha Krishnamurthi et al. responded by arguing, first, that Waldron erred in equating courts with legislatures, since courts employ JM to arrive at the “right answer,” and second, that neither the instrumentalist nor non-instrumentalist defenses of judicial review undermine JM.⁷

Responding to Krishnamurthi et al., Waldron argued that majoritarianism as a decision-making method is so pervasive that its application in courts goes

¹ See J.S. MILL, ON LIBERTY (1859) (arguing that the “will of the people” in practice means the will of the majority, which may oppress minorities, and that minorities therefore require protection).

² See Pratap Bhanu Mehta, *India’s Unlikely Democracy: The Rise of Judicial Sovereignty*, 18 J. Democracy 70 (2007) (discussing the growing role of India’s courts in the country’s political life and its implications). See also S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL’Y 29 (2001) (analyzing the development of judicial activism in India).

³ Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1348 (2006) (arguing against judicial review of legislations on two grounds, subject to specified institutional conditions).

⁴ See Pratap Bhanu Mehta, *The Indian Supreme Court and the Art of Democratic Positioning*, in UNSTABLE CONSTITUTIONALISM: LAW AND POLITICS IN SOUTH ASIA 233 (Mark Tushnet & Madhav Khosla eds., 2015).

⁵ India Const. art. 145, cl. 5.

⁶ Waldron, *supra* note 3, at 1392.

⁷ Guha Krishnamurthi et al., *An Elementary Defence of Judicial Majoritarianism*, 88 TEX. L. REV. 33, 37–8 (2009).

largely unquestioned.⁸ In this account, discussions of the higher judiciary in the United States assume JM rather than justify it.⁹ Although Waldron's critique is framed generally, it remains closely tied to the debate over judicial review.¹⁰ Similarly, Krishnamurthi's response to Waldron too remains situated within that debate.¹¹

This article diverges from that discourse for two primary reasons. First, unlike in the United States, the Indian constitutional framework expressly provides for JM. Article 145(5) of the Constitution requires that the judgments be delivered with the concurrence of a majority of the judges hearing the case.¹² The article therefore examines the legislative history of Article 145(5) and the debates, if any, in the Constituent Assembly to determine whether JM was consciously justified or, instead, as in the United States, assumed to be self-evident.

Second, regardless of the judicial review context in which Waldron and Krishnamurthi situate their arguments, the pervasiveness of JM warrants broader examination. As Waldron himself notes, "the failure to explain why courts use majoritarian decision-making would not undermine judicial review. It only leaves you with a puzzle."¹³ Judicial review concerns review of legislative, executive, and administrative action. The jurisdiction of the Supreme Court of India—and the operation of JM within it—extends well beyond that domain.

For example, the Supreme Court's original jurisdiction encompasses disputes between the Government of India and one or more states, or between states, involving substantial questions of law or fact.¹⁴ The Court also exercises review jurisdiction under Article 137 of the Constitution. Further, under Article 145(3), a Constitution Bench is required where a "substantial question of law as to the interpretation of the Constitution" arises, or where the President refers a question of law or fact that has either arisen or is likely to arise. These matters need not involve review of legislative or executive action.

In *Kaushal Kishore v. State of Uttar Pradesh*,¹⁵ for instance, a five-judge Constitution Bench considered a positive obligation to protect the fundamental rights to freedom of speech and expression and to life and personal liberty against violations by private actors. The case did not involve traditional judicial review of legislation or executive action. Although Waldron and Krishnamurthi focused on JM in the context of judicial review—likely reflecting

⁸ Jeremy Waldron, *Five to Four: Why Do Bare Majorities Rule on Court?*, 123 YALE L.J. 1692, 1691–701 (2014) (discussing judicial majoritarianism in the American context).

⁹ *Id.* at 1694–1701.

¹⁰ *Id.* at 1691–2.

¹¹ Guha Krishnamurthi, *For Judicial Majoritarianism*, 22 U. PA. J. CONST. L. 1201, 1203–8 (2020).

¹² India Const. art. 145, cl. 5.

¹³ Waldron, *supra* note 8.

¹⁴ India Const. art. 131.

¹⁵ (2023) 4 SCC 1.

the predominance of that function in the United States—the debate over JM warrants independent examination.

This article also diverges from prior scholarship in its methodological approach. Existing discussions often assess JM by comparing it with alternative decision-making rules. Waldron questions its obviousness by reference to coin tosses and supermajority rules.¹⁶ Krishnamurthi examines the supermajority rules, one-directional supermajorities, and panel-majority decisions.¹⁷ Such comparisons, however, risk assuming that JM is justified unless a superior alternative is demonstrated. This places other alternatives at a normative disadvantage.

Comparative analysis should follow, not precede, a principled evaluation of JM itself. Accordingly, this article adopts a three-pronged inquiry. First, JM's apparent obviousness must be independently questioned—on grounds of legitimacy, efficiency, fairness, epistemic value, and internal consistency—without reference to alternative rules. Second, alternative decision-making rules should be evaluated independently of JM. Third, only then should a comparative analysis occur.

This article is exploratory and limits itself to the first prong. The relative underdevelopment of academic and policy discourse on JM—particularly in the Indian context—necessitates foundational debate proceeding to systematic comparison (second and third prongs). The focus here, therefore, is on critically assessing the justifications offered for JM and identifying structural weaknesses in its operation within the Supreme Court of India.

As is discussed later, existing scholarship defending JM in courts often relies on the utilitarian logic of majoritarianism without articulating a principled foundation. This article therefore examines the philosophical justifications offered for JM in the Indian context and argues that they are either inadequate or flawed.

2. The justifications of judicial majoritarianism: A critique

Proponents of JM advance several justifications for majority decision-making grounded in pragmatic considerations such as efficiency and low decisions costs. This section argues that where questions about judicial practice implicate the legitimacy of the institution itself, such practices must be defended on principled—not merely pragmatic—grounds. The unexamined incorporation of Article 145(5) of the Constitution, which institutionalized JM as the decision rule of the Supreme Court without apparent consideration of alternatives, provides additional reason to scrutinize the practice.

¹⁶ Waldron, *supra* note 8, at 1710–12.

¹⁷ Krishnamurthi, *supra* note 11, at 1240–51.

Moreover, when a minority opinion is later upheld, concerns arise about a decisional methodology grounded in numerical head-counting rather than qualitative assessment of reasoning. Finally, the claim that the weight of numbers reinforces the validity of an argument is examined through the Supreme Court's decision in *M/S Trimurthi Fragrances (P) Ltd. v. Government of N.C.T. of Delhi*.¹⁸

2.1. Pragmatic justifications and the need for a principled approach

The Supreme Court, as the final interpreter of the Constitution and the ultimate appellate authority, commands deference because of its perceived legitimacy both as a constitutional institution and as the constitution's guardian. That legitimacy, however, may be undermined where there is uncertainty about the normative foundations of its decision-making procedures.¹⁹ Accordingly, the philosophical justification for JM warrants examination, as it bears directly on the institutional legitimacy of the Court.

Majoritarian decision-making has historical antecedents traceable to medieval canon law—*maior vel sanior pars*—under which the majority (*maior pars*) generally prevailed.²⁰ Commentators have traced the development of majority rule from its unstructured use in Athens²¹ to its institutionalization in canon law. Its modern acceptance is often associated with Locke's and Grotius's natural law theories,²² and majority rule became embedded in eighteenth-century political theory, shaping later political institutions.²³ Beyond the circular claim that majority rule is justified because the majority endorses it, however, systematic defenses remain limited.²⁴

In India, judicial decision-making practices were influenced by English models. Like the doctrine of precedent, majority decision-making also found its place in the Indian Constitution, the roots of which can be traced

¹⁸ *Trimurthi Fragrances (P) Ltd. v. State (NCT of Delhi)*, 2022 SCC OnLine SC 1247.

¹⁹ See *Loya Case the Tipping Point, Four SC Judges Say Democracy Is in Danger*, THE WIRE (Jan. 12, 2018), <https://thewire.in/law/sc-justices-hold-historic-press-conference-triggered-judge-loya-case>. See also Michael Safi, *India's Top Judges Issue Unprecedented Warning over Integrity of Supreme Court*, THE GUARDIAN (Jan. 12, 2018), www.theguardian.com/world/2018/jan/12/india-supreme-court-judges-integrity-dipak-misra (reporting that on January 12, 2018, four senior Supreme Court justices—Chelamshewar, Ranjan Gogoi, Kurian Joseph, and Madan Lokur—held an unprecedented press conference raising concerns about Chief Justice Dipak Misra's exercise of authority as “Master of the Roster”).

²⁰ Philippe Urfalino, *The Conditions for Majoritarian Obligation: Majority Rule and Deliberative Body*, 11 J. INST. STUD. 62, 67–70 (2015).

²¹ John Gilbert Heinberg, *Theories of Majority Rule*, 26 AM. POL. SCI. REV. 452 (1932) (noting that Aristotle used the concept to describe government conducted by the many poor rather than the few rich).

²² *Id.* at 458–9.

²³ *Id.* at 463.

²⁴ *Id.*

back to the Greco-Roman traditions and canon law.²⁵ Yet its incorporation into judicial institutions in the form of JM appears to have been driven largely by pragmatic considerations. The assumption that JM is self-evident necessitates a closer scrutiny,²⁶ particularly where it is treated as the endpoint of the institutional evolution, not unlike the treatment of the liberal democratic order of human society in Francis Fukuyama's *The End of History and the Last Man*.²⁷ The continued reliance on a medieval decisional method—without sustained normative examination—deserves reevaluation.

This inquiry has practical implications. The history of the Supreme Court includes multiple instances in which a minority opinion in one case was later upheld by a larger bench. For instance, Justice Fazl Ali's dissent in *A.K. Gopalan v. State of Madras*²⁸ was later vindicated in *Maneka Gandhi v. Union of India*,²⁹ contributing to the expansion of the scope of Article 21 and the insertion of the “due process” standard in the law.³⁰ Similarly, Justice Subba Rao's dissent in *Kharak Singh v. State of U.P.*³¹ was later affirmed in *K.S. Puttaswamy v. Union of India*,³² which recognized the right to privacy was a fundamental right. Every such instance invites the question of why quantitative head-counting prevails over qualitative evaluation. Notably, *maior vel sanior pars* contemplated that the “saner part” (*sanior pars*) might prevail where warranted.³³ The process involved not merely counting votes but weighing them according to the authority of the voter based on their intellectual and moral prestige. Similarly, references here to qualitative evaluation should therefore be understood as exploring whether judicial opinions can be

²⁵ *Id.* at 452.

²⁶ See Krishnamurthi et al., *supra* note 7. See also Krishnamurthi, *supra* note 11.

²⁷ FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

²⁸ *A.K. Gopalan v. State of Madras*, (1950) S.C.R. 88 (Fazl Ali, J., dissenting) (in a challenge to the Preventive Detention Act IV of 1950, contending that fundamental rights do not operate in isolated silos but must be interpreted together, and articulating an integrated approach to rights later adopted in Indian constitutional jurisdiction, though rejected by the majority at the time).

²⁹ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248 (SC) (overruling *A.K. Gopalan* and adopting Justice Fazl Ali's earlier dissent, holding the scope of “personal liberty” under Article 21 is expansive and that Articles 21, 19, and 14 must be read together).

³⁰ Constituent Assembly Debates, Vol. I (Dec. 9–23, 1946) (discussing whether the right to life and personal liberty should be subject to “due process” and explaining the decision to adopt the phrase “procedure established by law” to limit judicial discretion).

³¹ *Kharak Singh v. State of U.P.*, 1962 SCC OnLine SC 10, paras. 27–28 (Subba Rao, J., dissenting) (in a case concerning police surveillance and domiciliary visits, arguing that the Indian Constitution “does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty”).

³² *K.S. Puttaswamy v. Union of India*, (2017) 10 SCC 1 (holding that the right to privacy is a fundamental right under the Indian Constitution and overturning the *Kharak Singh* case insofar as it rejected privacy as part of personal liberty, thereby adopting the position advanced in Justice Subba Rao's dissent).

³³ Urfalino, *supra* note 22.

evaluated on the strength of reasoning (their “weight”), rather than numeral superiority alone (“head-counting”).

If majoritarianism in legislative and electoral contexts cannot be justified on principled grounds, its application adjudication should not be presumed to be unassailable either. Proponents of JM distinguish it from electoral majoritarianism, arguing that judges act on legal knowledge and experience rather than partisan self-interest.³⁴ On this view, the absence of partisan incentives renders JM morally defensible. The assumption of judicial neutrality forms a central pillar of JM’s justification.

However, the established jurisprudence emanating from the realist movement³⁵ and later the critical legal studies movement³⁶ uncovers the illusion that the language of judicial decision-making is solely the language of logic. These movements unravel the subjective bias in the decision-making of judges by recognizing the existence of certain “illusive factors.”³⁷ These are extra-legal factors, including prejudices, to which judges may be subject—consciously or subconsciously—and which affect their decisions. Thus, the realist movement counters the very core of the philosophical justification of JM by challenging the pristineness that the proponents of JM attach to judicial decision-making. When such a challenge is mounted against the non-partisanship of judges, who are said to be affected by conscious and subconscious prejudices, the superstructure of JM that stands on such an assumption of objectivity comes to be challenged by corollary. Therefore, the question that arises is why the judiciary employs the same principle of majority when it was itself conceived to check the defects arising from the very perverseness of that principle.

In India, majoritarianism in courts is defended by alluding to Article 145(5) of the Constitution, which expressly provides for it. However, as the torch-bearing article that provides the basis for JM in the Indian Constitution, it appears that it did not undergo the discussion or deliberation that an article of such importance should have seen. It was a mere adaptation by the members of the Constituent Assembly from section 214 of the Government of India Act, 1935,³⁸ which was seen as part of the inheritance of the robust judicial system from the British—an adoption that was not to be tinkered with.

Ideally, the benches must be constituted in such a way that they reflect a diversity of opinion, at its colloquial best, with each judge armed with

³⁴ See Krishnamurthi, *supra* note 11.

³⁵ See Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934) (examining the jurisprudential foundations of American legal realism).

³⁶ See J. Stuart Russel, *Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy*, 18 OTTAWA L. REV. 1 (1986) (describing the core principles and historical development of the Critical Legal Studies movement).

³⁷ J. G. RIDALL, *JURISPRUDENCE* ch. 16, at 230 (2d ed. 1999).

³⁸ Government of India Act 1935, 26 Geo. 5 & 1 Edw. 8 c. 2, § 214 (U.K.).

expertise acquired from years of training, experience, and research. In India, the Chief Justice of India, in his power as the “master of the roster,” strives to constitute such a diverse bench.³⁹ However, in perceiving such an enterprise to organize diversity, one is immediately forced to question whether it is self-contradictory to first arrange for a bench that represents diversity and later disregard a major part of that diversity by holding only the majority’s opinion as the law. A truly diverse bench can be achieved through a procedure by which the minority’s opinion can find significance in the decision-making.

Without attributing significance to minority opinions, a diverse bench risks becoming a mere symbolic gesture, lacking true engagement with the diversity of perspectives. For instance, Justice Dipankar Dutta, in *Aligarh Muslim University v. Naresh Agarwal*,⁴⁰ lamented that the Indian Supreme Court lacked a democratic forum for the “give and take” of ideas. The judges, because of the immense workload, are unable to constructively discuss the rival contentions together. The lack of discussion among the Supreme Court judges essentially means that the lived experiences of judges from diverse backgrounds take a backseat, effectively diluting the claim of diversity. Further, this apprehension is not a one-off instance; it was previously highlighted in *Kesavananda Bharati v. Union of India* by Justice Y.V. Chandrachud, who noted that because of the impending retirement of Chief Justice S.M. Sikri, the Bench did not have time to exchange drafts and understand each other’s views.⁴¹ Thus, in India, owing to multiple factors, including a backlog of cases, as will also be showcased further in this article, the idea of deliberation within the Constitution Bench becomes debatable. Lastly, unlike practices in various international commercial and investment tribunals, where it is the norm for the majority to provide reasons as to why it disagrees with the minority, the Indian Supreme Court has not institutionalized such a practice. Engaging with the minority means producing a culture of justification—including providing reasons why the minority is incorrect as per the majority. It is only with such engagement that the majority gains firm ground for emphasizing that the law propounded by it becomes the law of the land.⁴²

Nevertheless, it may be argued by the proponents of JM that even when it is agreed that a decision rule must respect diverse opinions, the manner

³⁹ Utkarsh Anand, *Collegium Aims for a Diverse Bench, to Make SC “People-Centric”*: CJI Chandrachud, HINDUSTANTIMES (Sept. 17, 2024), www.hindustantimes.com/india-news/supreme-court-collegium-emphasizes-diversity-in-appointing-judges-says-chief-justice-chandrachud-101692729573967.html.

⁴⁰ *Aligarh Muslim Univ. v. Naresh Agarwal*, 2024 SCC OnLine SC 3213 (articulating parameters for determining the minority status of an educational institution).

⁴¹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 960.

⁴² *Aligarh Muslim Univ. v. Naresh Agarwal*, 2024 SCC OnLine SC 3213 (Datta, J., concurring).

of arriving at a set of opinions that stand for the whole must still be premised on JM. However, as mentioned earlier, this paper aims to question the rationale behind JM being the norm for deciding which set of opinions should stand for the whole. This endeavor became pertinent in light of the fact that alternatives to JM were never discussed or even considered by the Constituent Assembly, thus uncovering an assumption of obviousness that gives JM a gospel-truth-like status in the jurisprudence of decision-making when, in reality, it lacks both moral and legal consideration. A mere reference to the provision in the Constitution cannot be said to be an adequate defense of the practice of JM.

Further, it is often proffered by proponents of JM that the “weight of numbers is ... the best available proxy for the validity of argument,”⁴³ meaning that the best argument is the one that convinces the greatest number of judges. However, this argument can be analyzed and countered by considering the Supreme Court of India’s judgment in *M/S Trimurthi Fragrances (P) Ltd. v. Government of N.C.T. of Delhi*.⁴⁴

2.2. The Supreme Court’s pragmatism in *Trimurthi*

The Supreme Court of India in *Trimurthi*

⁴⁵ was called upon to decide an important question of law that had a bearing on the connected question of whether a cumulative minority of two benches can overrule a cumulative majority.⁴⁶ An illustration of such a situation is where a five-judge bench, holding perspective X to be correct by a five-to-zero majority, comes to be overruled by a seven-judge bench holding perspective Y to be correct by a five-to-two majority, with the minority agreeing with perspective X. Thus, perspective Y becomes the law of the land while garnering the support of only five judges, while perspective X is subsumed into irrelevance despite garnering the cumulative support of seven politically equal judges, albeit over two benches (we refer to this majority obtained by counting judges’ opinions between two benches with different numerical strength as “vertical majority”).

The Supreme Court held that the majority decision of a bench of larger strength would prevail over the decision of a bench of lesser strength, irrespective of the number of judges constituting the majority. The Court attributed this decision to Article 145(5) of the Constitution⁴⁷—without

⁴³ Roderick M. Hills Jr., *Are Judges Really More Principled than Voters?*, 37 U. S.F. L. REV. 37, 58–9 (2002) (examining the motivations and incentives that guide judges, and their implications for judicial decision-making).

⁴⁴ *Trimurthi Fragrances (P) Ltd. v. State (NCT of Delhi)*, 2022 SCC OnLine SC 1247 (addressing a tax dispute between state authorities and clarifying that a decision of a bench of greater strength prevails over that of a bench of lesser strength, irrespective of the size of the majority in the earlier case).

⁴⁵ *Id.*

⁴⁶ *Id.* paras. 18–19.

⁴⁷ India Const. art. 145, cl. 5.

adverting to the lack of discussion and deliberation on the provision in the Constituent Assembly. Further, the Court did not go into the jurisprudential and philosophical aspects of the seminal issue, which is inextricably connected with the perceived legitimacy of such decisions. Instead, the Court invoked the doctrine of *stare decisis* to support its decision by stating that:

The principle of *stare decisis* operates both vertically—in the sense that decisions of appellate courts in the superior vertical hierarchy bind tribunals and courts lower in the hierarchy, and horizontally—in the sense that a larger Bench formation ruling, would be binding and prevail upon the ruling of a smaller Bench formation. The logic in this stems from the *raison d'être* for the doctrine of precedents i.e., stability in the law.⁴⁸

The Supreme Court, in essence, refused to undertake a deeper analysis of the issue, which necessitated two major prudential inquiries. First, in supporting its decision, the Court was required to elaborate on the jurisprudential grounds for its decision rather than mechanically attributing it to constitutional provisions and procedural rules of the Court. Second, the argument of stability and efficiency premised on the doctrine of *stare decisis* also required jurisprudential and philosophical elaboration. The lack of discussion raises pertinent questions regarding the assumption underlying the Court's reasoning—namely, does JM really guarantee stability in the law; is JM really the most efficient method of judicial decision-making; and is JM really the best way to arrive at the “correct” decision?

3. Waldron's critique in the Indian context

The questions regarding JM raised above are not novel to the academic discourse and were previously raised by Jeremy Waldron in his seminal piece, “Five to Four: Why Do Bare Majorities Rule on Courts?,” albeit in a different context.⁴⁹ Waldron found merit in questioning the obviousness that had come to be associated with JM. He highlighted the fallacy of majoritarian decision-making in constitutional courts, which were themselves conceived to cure the defects of political majoritarianism.⁵⁰ He elucidated how the demand for an explicit justificatory argument for JM is connected with the issue of the legitimacy of constitutional courts.⁵¹ He further explained how the notorious absence of jurisprudential roots for JM in any legal theory undercuts our understanding of these institutions.⁵²

⁴⁸ *Trimurthi Fragrances (P) Ltd. v. State (NCT of Delhi)*, 2022 SCC OnLine SC 1247, para. 18.

⁴⁹ See Waldron, *supra* note 8.

⁵⁰ *Id.* at 1694–701.

⁵¹ *Id.* at 1701–5.

⁵² *Id.* at 1705–10.

However, Waldron's pursuit of justifications for JM was limited to the American Supreme Court and was substantially devoted to the legal concerns arising from JM, as well as the absence of any legal foundations for JM in the United States. In that context, arguments concerning the political appointment of judges leading to bare-majority see-saws on the same issues supplemented his general arguments against majority decision-making in the US Supreme Court. The validity of these arguments remains to be tested in other jurisdictions where, for example, judicial appointments may not be political. The Indian context provides a fertile ground for such examination.

Within this context, Waldron's general arguments against JM take on additional complexity in the Indian Supreme Court—not only for the reasons noted above but also because of the hierarchy of benches⁵³ and the existence of a constitutional provision mandating JM.⁵⁴ This article contextualizes the rationales considered by Jeremy Waldron on the grounds of epistemic worth, efficiency, and fairness from an Indian perspective, with reference to judicial decisions and constitutional provisions. In addition, the article examines the logic of JM on the grounds of legitimacy and inconsistency.

3.1. Arguments against epistemic worth

This section examines whether JM provides a reliable epistemic method for reaching correct decisions in the Indian Supreme Court. It evaluates whether Article 145(5), relied upon by the Supreme Court in *Trimurthi*, is sufficient to justify JM on epistemic grounds.

Scholars of constitutional law often suggest that constitutional provisions command respect because of both the stature of their framers and the deliberative processes through which they were adopted.⁵⁵ The reasoning in *Trimurthi* appears to assume such deference with respect to Article 145(5).⁵⁶ Yet whether that provision merits such reliance requires further examination.

The legislative history of Article 145(5) can be instrumental in such a determination, inasmuch as deliberations by the Constituent Assembly are conspicuous only in their absence. Article 145(5) was a product of transplantation from section 214 of the Government of India Act, 1935, by the

⁵³ See *Trimurthi Fragrances (P) Ltd. v. State (NCT of Delhi)*, 2022 SCC OnLine SC 1247.

⁵⁴ India Const. art. 145, cl. 5.

⁵⁵ See FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY* 125–7 (1999) (examining the democratic legitimacy of judicial resolution of major socio-political questions, such as affirmative action, abortion rights, campaign finance reform, and arguing that a legal system's legitimacy renders it respect-worthy and provides a rationale for accepting state coercion). See also Jack M. Balkin, *Respect-Worthy: Frank Michelman and the Legitimate Constitution*, 39 *TULSA L. REV.* 485 (2004) (analyzing Michelman's account of constitutional legitimacy).

⁵⁶ *Trimurthi Fragrances (P) Ltd. v. State (NCT of Delhi)*, 2022 SCC OnLine SC 1247, para. 19.

members of the Constituent Assembly.⁵⁷ The Assembly members largely debated the pith and substance of provisions that were later incorporated as Article 145(1), (3), and (4).⁵⁸ These clauses dealt largely with the concurrence of the President or the legislature regarding the rule-making power of the Court (clause 1);⁵⁹ the reference of a substantial issue of constitutional law to a larger bench in the event that the Court is satisfied of its existence in any matter before it under its appellate jurisdiction (clause 3);⁶⁰ and the delivery of opinions in open court (clause 4).⁶¹ However, there exists no record of any debate in the Constituent Assembly regarding the incorporation of clause 5, which provides that no judgment or opinion shall be delivered by the Supreme Court without the concurrence of a majority of the judges present at the hearing.

The absence of this debate can perhaps be explained through the reliance placed by the Constituent Assembly on the already established framework of the Government of India Act, 1935,⁶² which inspired several provisions in the current Indian Constitution. This framework was provided by the British Government through the Third India Round Table Conference in 1932, which itself lacked debate and deliberation on the issue concerned.⁶³ The Constituent Assembly appears to have frittered away the opportunity to debate the philosophical justifications of JM,⁶⁴ and thus the colonial imprecation of JM in the Indian Constitution has gone unquestioned to date.

This lack of discussion by the members of the Constituent Assembly can be attributed to two possible reasons: (i) that it was seen as part of the inheritance of a robust judicial system from the British that was not to be tinkered with; or (ii) as Waldron pointed out, that the use of JM for decision-making struck the Assembly members as so obvious that they simply assumed its validity and incorporated it. It can be logically deduced that both reasons for the lack of discussion on the adoption of Article 145(5) are corollary to the presumed correctness of majority decision-making. Any criticism of such presumption is eventually speciously countered by the presumption itself. In essence, when one poses the question “why and how is majority

⁵⁷ Constituent Assembly Debates, Vol. VIII, art. 121, paras. 8.99.152–8.99.198 (June 6, 1949), www.constitutionofindia.net/debates/06-jun-1949/#104960.

⁵⁸ *Id.* paras. 8.99.153–8.99.169.

⁵⁹ *Id.* paras. 8.99.153–8.99.161.

⁶⁰ *Id.* para. 8.99.162.

⁶¹ *Id.* paras. 8.99.167–8.99.19.

⁶² Government of India Act, 1935, 26 Geo. 5 & 1 Edw. 8 c. 2 (U.K.).

⁶³ Secretary of State for India, Proposals for Indian Constitutional Reform, 1933, Cmd. 4268, at 76–9 (U.K.) (publishing the recommendations of the Third Round Table Conference (Nov. 17–Dec. 24, 1932), convened after dissatisfaction with the Simon Commission report); Joint Select Committee on Indian Constitutional Reform, Report, 1934, Cmd. 4557, at 193–5 (U.K.) (analyzing the White Paper’s recommendations and proposing draft legislation that ultimately became the Government of India Act 1935, 26 Geo. 5 & 1 Edw. 8 c. 2 (U.K.)).

⁶⁴ India Const. art. 145, cl. 5.

decision-making correct?,” the only reply it receives is “because it is the majority,” irrespective of the fact that such an answer fails to take into account that a question on the rationale of a practice cannot be answered by the mere fact of that practice. What is being questioned is not the existence of the practice but rather its synchronization with the objectives of the institution in which it is being employed. In any case, the presumption of the correctness of decision-making by majorities in the judiciary needs rationalization, and until then, the provision cannot be used as the sole justification for the anomalies in the procedure of the Court, as was done in *Trimurthi*.

Waldron, in his piece, also argues against the epistemic worth of bare majorities by questioning the opinions of the majorities in such cases. This is because judges are experts armed with years of experience in the field of law, and each has a higher probability of getting a question of law “right” than “wrong.” Minority opinions in bare-majority cases cannot be treated as aberrations, as in the case of overwhelming majorities, and thereby be omitted from consideration.⁶⁵ Certainly, in a verdict with a five-to-four majority, one cannot consider the opinion of four justices to be mistaken in law simply because one more justice voted for the contrary view. Further, disagreement between pundits of law cannot be solved by a numerical imposition of the majority with only one additional expert agreeing with their opinion.

In India, unlike in countries where cases are heard *en banc*, the judges who sit on a particular case are selected by the Chief Justice of India in his role as the “Master of the Roster.” Thus, bare majorities in the Indian context become even more unreliable because of the lingering question whether, had the bench been constituted with only one different judge, the decision could have turned the other way. One of the most prominent examples that raises questions against bare majorities in India is *Kesavananda Bharati v. State of Kerala*,⁶⁶ which remains under criticism from various quarters in India. The landmark case dealt with defining Parliament’s power to amend the Constitution. The judgment gave birth to the doctrine of basic structure, whereby Parliament could amend the Constitution so long as any such amendment did not alter the very essence of the Constitution forming its basic

⁶⁵ Waldron, *supra* note 8, at 1713.

⁶⁶ In *Kesavananda Bharati v. State of Kerala*, the Supreme Court considered the validity of the Kerala Land Reforms Act, which imposed limits on land ownership and provided for acquisition and redistribution of excess land. The petitioner, Sri Kesavananda Bharti, head of Edneer Mutt, a religious organization, challenged the Act as well as the Twenty-Fourth, Twenty-Fifth, and Twenty-Ninth Constitutional Amendments, which expanded Parliament’s amending power and curtailed aspects of judicial review and fundamental rights protection. In its landmark decision, a thirteen-judge bench held that Parliament’s power to amend the Constitution extends to all provisions but is subject to the limitation that it cannot alter the “basic structure” of the Constitution. The Court upheld the Twenty-Fourth and Twenty-Ninth Amendments in their entirety, and partially invalidated the Twenty-Fifth Amendment, thereby articulating what has come to be known as the “Basic Structure Doctrine.” *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

structure.⁶⁷ However, despite this authoritative pronouncement by a thirteen-judge bench of the Supreme Court, the Basic Structure Doctrine has since received criticism, especially from the executive and the legislature.⁶⁸ These aspersions against one of the most important cases to have been heard by the largest bench in Indian history cast doubt on the epistemic worth of bare-majority decisions in India. It raises the question whether, if the judgment had been decided by a supermajority, it would have been more immune to criticism later. Can one of the aspersions by critics be that six constitutionally equal judges believed that the basic structure doctrine was incorrect?

The replies to both the questions raised above by proponents of JM, foremost among them being Guha Krishnamurthi, would be an emphatic “no.”⁶⁹ In his paper “For Judicial Majoritarianism,” Krishnamurthi compares JM (or “MD,” as he terms it) with other alternatives, such as unanimous or supermajority agreements, on the basis of seven virtues: first, completeness, or how often the alternative resolves the case; second, epistemic worth, i.e., the proportion of cases correctly resolved by the alternative over the total number of cases resolved by the alternatives, along with whether there is enough flexibility to reverse bad decisions; third, stability, meaning how stable the decisions of the court are by virtue of the alternative; fourth, efficiency, i.e., judicial resources utilized by a particular alternative; fifth, representational fairness through neutrality of judges in deciding cases; sixth, management of judicial authority, or the ability of the alternative to adequately manage judicial authority; and lastly, legitimacy, i.e., the perception of the court by the public at large.⁷⁰ Analyzing JM in light of its virtues relative to alternative default rules, Krishnamurthi concludes that a presumption exists in favor of JM being more correct even when resorting to it is “non-ideal.”

While such a comparison can be assailed on the grounds that it is merely a utilitarian analysis of relative costs and efficiency—and that these metrics should be irrelevant in the quest for “truth and justice”⁷¹—a more qualitative ground of disagreement lies in its failure to justify the epistemic worth underlying JM in terms of the questions raised in this section. Krishnamurthi explicates the epistemic worth of JM in its ability to reach a correct decision, if one exists for a legal problem, through an epistemically sound process that avoids voting paradoxes. However, the rejection by the Indian Supreme Court of the application of “vertical majority” intuitively leads one to question the

⁶⁷ *Id.*

⁶⁸ M.K. Venu, *What Is the Basic Structure of Jagdeep Dhankhar?*, THE WIRE (Jan. 14, 2023), <https://thewire.in/rights/what-is-the-basic-structure-of-jagdeep-dhankhar>.

⁶⁹ Krishnamurthi, *supra* note 11.

⁷⁰ *Id.* 1253–7.

⁷¹ MICHAEL SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* (2012).

Court's adjudicatory process on all the criteria of epistemic worth as provided by Krishnamurthi. If majority underscores the epistemic worth or correctness of a decision, then there remains no strong epistemic justification for rejecting the vertical majority, as decided by the Supreme Court in *Trimurthi*. Since, as per proponents of JM, majoritarianism is the best way to reach the correct decision, a higher number of judges in favor of a perspective—even across different benches—would translate to a higher probability of arriving at the correct decision.

The paradox of rejecting a vertical majority while employing the same principle for decision-making within the bench becomes apparent in the Indian context, given that the decision is premised on the subjective satisfaction of individual judges on that particular bench. This could perhaps be rationalized, as has been attempted by proponents of JM, where judges sit en banc. However, in the Indian context, where smaller coordinate benches of varying strengths are tasked with decision-making, the ability to reach a “correct decision” would depend upon the composition of the bench rather than an “epistemically sound process” mandating JM.

It is also noteworthy that Guha Krishnamurthi himself compares JM in courts that sit en banc with JM applied in panel majority decision (PMD) courts where a subset of a larger number of judges sit together for adjudication, and the numerical majority between them decides the case. The Indian Supreme Court is an example of a PMD, as described by Krishnamurthi. He holds JM in PMD to be relatively inefficient, unstable, incorrect, and lacking epistemic worth in comparison to JM in en banc courts. Considering this, the application of JM in the Indian context is amenable to questions even by proponents of JM. Ronald Dworkin, speaking in the American context, noted that judicial review cannot be allowed to check the decision of the highest appellate court, because if that were allowed, the court would not be the highest.⁷² The Indian Supreme Court, as envisaged by the original Constitution of 1950, consisted of a Chief Justice and seven puisne judges who sat en banc to hear cases presented before them. However, with the increase in the number of cases, the number of judges in the Supreme Court was gradually increased, resulting in cases being heard in smaller benches of two and three judges, with larger benches of five or more judges being constituted to settle contentious issues. Presently, there are thirty-four justices in the Supreme Court, including the Chief Justice of India. The Court no longer sits en banc, and for constitutional matters a quorum of five judges is preferred.

However, by increasing the number of judges without reviewing the procedural propriety and soundness of the decision-making process, an

⁷² RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1997).

inadvertent error crept into the decision-making process of the Court. In allowing judicial review of the decisions of a smaller bench by a larger one, a hierarchical structure within a “community of equals” in the apex court of the country was created. This allowed for numerical analysis of the Court’s decisions—such as in *Trimurthi*—to challenge the epistemic worth of decisions made by the Supreme Court on the grounds of “inconsistency in procedure,” which will be discussed in the next section.

3.2. Arguments of inconsistency

Much like the arguments relating to epistemic worth, arguments of inconsistency too follow from the claim made by proponents of JM that “weight of numbers is ... the best available proxy for the validity of argument,”⁷³ meaning thereby that the best argument is the one that convinces the greatest number of judges. Rick Hills, while justifying JM, puts forward the thesis that since judges are equals of each other in learning and experience, it is the argument that persuades the largest number of adherents that is the best argument.⁷⁴ Thus, counting heads as a decision-making procedure in the judiciary is justified by validating the number of votes it is able to garner. However, when this justification materializes in application through Supreme Court procedure, it presents an anomaly.

The Supreme Court of India in *Trimurthi Fragrances (P) Ltd. v. Government of NCT of Delhi* faced the Frankenstein’s monster that was in the making, as the number of judges appointed to the bench had been increased mechanically, allowing a sort of hierarchy within the Supreme Court without any accompanying procedural soundness. As detailed above, the Court decided that the judgment of a larger bench would be binding and prevail upon the ruling of a smaller bench, irrespective of the number of judges constituting the minority in the larger bench.⁷⁵

The stance of the Court was bolstered by reference to Article 145(5), which states that the concurrence of a majority of the judges at “the hearing” will be considered the judgment of the Court. However, it is pertinent to note that at the time of the framing of Article 145(5), the Court used to sit en banc, and the constitutional provision was limited to that extent.⁷⁶ The Constituent Assembly did not—and could not—foresee the anomaly that emanated from having an explicit provision for JM in the Constitution that was applicable only horizontally, in the context of a hierarchical structure later created, thereby posing questions about the vertical application of JM within that hierarchy.

⁷³ Hills Jr., *supra* note 47.

⁷⁴ *Id.*

⁷⁵ *Trimurthi Fragrances (P) Ltd. v. State (NCT of Delhi)*, 2022 SCC OnLine SC 1247, para. 10.

⁷⁶ *History*, SUP. CT. OF INDIA, <https://main.sci.gov.in/history> (last visited Jan. 20, 2024).

The Court in *Trimurthi* failed to address the philosophical challenges raised by the problem of vertical application of JM, especially when the application of the same for decision-making within the bench was considered by the Court to be obvious. Such a vertical application of the doctrine of concurrence of a majority can be understood with reference to *Sabhajit Tewary v. Union of India*,⁷⁷ which was later overruled by *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*.⁷⁸ In both cases, the nucleus of the matter was whether the Council of Scientific and Industrial Research falls within the contours of Article 12, i.e., whether CSIR is an “authority” for the purposes of that provision. In *Sabhajit Tewary*,⁷⁹ the Court answered this in the negative with a five-to-zero verdict. Subsequently, in *Pradeep Kumar Biswas*,⁸⁰ the Court changed its position and answered the question in the affirmative with a five-to-two verdict.

Sabhajit Tewary was a unanimous five-judge judgment of the Supreme Court which was overruled by *Pradeep Kumar Biswas* with a five-to-two majority. Such an overruling invites the criticism that if the best argument is in fact the one agreed upon by a majority of judges, then the ratio of *Sabhajit Tewary* should have held ground. This argument rests on the fact that the position in *Sabhajit Tewary* was essentially agreed upon by seven equally placed judges—five judges who initially pronounced the decision and two judges who dissented in *Pradeep Kumar Biswas*. While this article does not advocate the application of a vertical majority, this scenario renders the entire decisional methodology that serves as the bedrock of judicial adjudication by the Supreme Court open to question. In addition, the inconsistency introduced by such decision-making processes raises serious reservations about the philosophical foundations of JM in courts.

What perturbed the Court in *Trimurthi* was the application of the assumed obviousness of the doctrine of JM in a non-conventional vertical manner. To resolve this, it had to reconcile the differences arising out of accepting JM within the bench while rejecting it in its vertical application.⁸¹ In bringing about such reconciliation, it invoked the doctrine of

⁷⁷ In *Sabhajit Tewary v. Union of India*, the petitioner, a stenographer employed by the Council of Scientific and Industrial Research (CSIR), challenged certain communications relating to his remuneration as discriminatory and violating Articles 14 and 16 of the Constitution. The case turned on whether CSIR qualified as an “authority” within the meaning of Article 12, such that its actions would be subject to constitutional scrutiny. The Supreme Court held that CSIR was not an authority under Article 12 and therefore was not amenable to challenge under the fundamental rights provisions. *Sabhajit Tewary v. Union of India*, (1975) 1 SCC 485.

⁷⁸ *Pradeep Kumar Biswas v. Indian Inst. of Chemical Biology*, (2002) 5 SCC 111 (overruling *Sabhajit Tewary* and holding that CSIR is an “authority” within the meaning of Article 12).

⁷⁹ *Sabhajit Tewary*, (1975) 1 SCC 485.

⁸⁰ *Pradeep Kumar Biswas*, (2002) 5 SCC 111.

⁸¹ *Trimurthi Fragrances (P) Ltd. v. State (NCT of Delhi)*, 2022 SCC OnLine SC 1247, paras. 18–19.

stare decisis and the general stability attributed to it in order to defend its paradoxical decision of accepting JM horizontally while negating its application vertically. The use of these general explanations by the Court bolsters Waldron's observation that opposition to JM is often countered by retreating to the view that it is justified on grounds of efficiency and stability.⁸²

Accordingly, proponents of JM, such as Krishnamurthi, argue that JM is inherently virtuous due to its completeness, flexibility, neutrality, and efficiency, and that it is relatively superior to alternatives such as supermajority or consensus-based decision-making.⁸³ However, by deeming JM's vertical application unmeritorious, the Court opened the door to questioning the broader efficacy of JM in delivering the "correct decision."

This article aligns with the Supreme Court's stance on the vertical application of JM between benches of varying strength but contends that this critique should also extend to JM's horizontal application within a single bench. The glaring inconsistency in the application of JM—a principle deemed inherently virtuous—raises the question whether a higher normative principle is at play. It is only deference to such a principle that allows a rational mind to overlook a vertical majority of similarly placed judges in different benches of the same court while permitting JM horizontally.

This observation necessitates exploration of a higher moral principle guiding such adjudication, implying that JM may not represent the "evolutionary end of judicial adjudication," as its proponents and the Supreme Court appear to suggest. Moreover, the reverence for JM, rooted in its presumed efficiency, warrants scrutiny, leading to the next section.

3.3. Arguments against efficiency

The proponents of JM argue that "it lowers decision costs compared with any other method; it is decisive; and it is easy to apply."⁸⁴ However, decisional efficacy cannot be judged from the lens of decision costs alone; rather, it should be judged by the cost incurred by the impact that the judgment has on society. Even if a decisional methodology is efficient and thereby more cost-effective, its relative net cost to society could be much greater if it is inconsistent in arriving at the "correct" decision. Waldron makes a similar argument in his piece, where he states that even coin-tossing as a decisional methodology could be employed by courts if efficiency and lower decision costs were the only criteria.⁸⁵ However, the proponents of JM are quick to dismiss this alternative of coin-tossing by describing it as

⁸² Waldron, *supra* note 8, at 1710.

⁸³ Krishnamurthi, *supra* note 11.

⁸⁴ *Id.* at 1710–12.

⁸⁵ *Id.* at 1710–11.

“ludicrously unfair,” while defending JM with the very same arguments.⁸⁶ Thus, through this comparison, Waldron highlights the existence of additional virtues, beyond efficiency or quantitative assessment, that are paramount when adjudicating the propriety of any procedure.

The hidden social and economic costs of a flawed decisional procedure can be illustrated through recent decisions of the Supreme Court. While some of these decisions emanate from division benches of the Supreme Court, where questions of JM do not arise, their engagement with issues of commercial law makes it easier to estimate and quantify the losses incurred through “incorrect” legal opinions. The issue the Court faced in the following example was whether government dues can be considered secured dues, if explicitly mentioned in a statute, so that they may be accorded priority over others during resolution under the Insolvency and Bankruptcy Code.⁸⁷

Within one year, through different benches, the Supreme Court shifted its position on this question of law three times. In August 2022, a three-judge bench in *Sundaresh Bhatt, Liquidator of ABG Shipyard v. Central Board of Indirect Taxes*⁸⁸ held that governmental dues would be disposed of according to the priority rule itself and would not be considered secured dues, despite the Customs Act providing a first charge for dues under it. Just a month later, a two-judge bench in *State Tax Officer v. Rainbow Papers*⁸⁹ declared that any amount payable by the dealer to the government constituted a first charge on its property. This resulted in the complete derailment of the IBC regime in India, as the equivalence between statutory dues and dues owed to financial creditors led to disincentivizing secured financial creditors from initiating Corporate Insolvency Resolution Proceedings (CIRP) on their own motion. Additionally, lower authorities began seeking affidavits from Resolution Professionals requiring explanations as to why the judgment in *Rainbow Papers* did not apply to them. Apart from significantly increasing legal costs and regulatory uncertainty, this also had serious repercussions for the success, fate, and future of the Code. Consequently, this judgment was heavily criticized by the legal community and academia for deviating from explicit statutory provisions. Finally, a mere nine months after the *Rainbow Papers* case, the Supreme Court again changed its stance through a two-judge bench in *Paschimanchal Vidyut Vitran Nigam v. Raman*

⁸⁶ *Id.* at 1710.

⁸⁷ Insolvency and Bankruptcy Code, No. 31 of 2016 (India).

⁸⁸ *Sundaresh Bhatt, Liquidator of ABG Shipyard Liquidator v. Central Board of Indirect Taxes & Customs*, (2023) 1 SCC 472 (holding that the priority waterfall under Insolvency and Bankruptcy Code, 2016, applies to government dues in liquidation proceedings).

⁸⁹ *State Tax Officer (1) v. Rainbow Papers Ltd.*, 2022 SCC OnLine SC 1162 (holding that statutory tax dues constitute a first charge on the property of the dealer and must be treated as secured claims in insolvency proceedings).

Ispat Pvt. Ltd.,⁹⁰ criticizing *Rainbow Papers* and holding that government dues remain government dues and cannot have the priority of a secured creditor.

It is important to highlight that such repugnancy in decisions of different benches of the Supreme Court is, regrettably, a recurrent theme, as exemplified by the slew of judgments concerning essential religious practices.⁹¹ To further illustrate, in 2021, a three-judge bench of the Supreme Court of India in *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*

⁹² dealt with the validity of an unstamped arbitration agreement. The Court overturned its decisions in *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*⁹³ and *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*,⁹⁴ both of which had held such agreements invalid. The matter was referred to a larger bench of five judges, and on April 25, 2023, in *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*,⁹⁵ the Court held the unstamped arbitration agreement invalid by a bare three-to-two majority. However, judicial inconsistency continued when, in September 2023, another five-judge bench⁹⁶ of the Supreme Court dealing with the same issue took note of the *N.N. Global* judgment⁹⁷ and decided to reconsider it, referring it to a larger bench of seven judges. Finally, in *Interplay Between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899*,⁹⁸ the Supreme Court, less than a year later, again changed its stance and held that unstamped arbitration agreements are not void *ab initio*, since stamping is a curable defect.

Another instance of duplication of effort and shifting positions by different benches within a short span of time can be found in the three-judge bench decision in *Vijay Madanlal Chowdhary v. Union of India*,⁹⁹ where the

⁹⁰ *Paschimanchal Vidyut Vitran Nigam Ltd. v. Raman Ispat (P) Ltd.*, 2023 SCC OnLine SC 842 (clarifying that government dues do not enjoy the status of secured creditors under the Insolvency and Bankruptcy Code and resolving the inconsistency created by *Rainbow Papers*).

⁹¹ See also *Commr., Hindu Religious Endowments v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005 (articulating essential religious practices test under Articles 25 and 26); *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay*, 1962 Supp (2) SCR 496 (applying the essential religious practices test and holding that the Bombay Prevention of Excommunication Act, 1949, violated the rights of the Dawoodi Bohra Community under Articles 25 and 26); *Seshammal v. State of T.N.*, (1972) 2 SCC 11 (holding that the appointment of an *archak* was not an essential religious practice and therefore could be regulated by statute); *Shayara Bano v. Union of India*, (2017) 9 SCC 1 (holding that the practice of triple talaq was not an essential religious practice protected under Article 25).

⁹² *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*, (2021) 4 SCC 379.

⁹³ *SMS Tea Estates (P) Ltd. v. Chandmari Tea Co. (P) Ltd.*, (2011) 14 SCC 66.

⁹⁴ *Garware Wall Ropes Ltd. v. Coastal Marine Constructions & Engg. Ltd.*, (2019) 9 SCC 209.

⁹⁵ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*, (2023) 7 SCC 1.

⁹⁶ *Bhaskar Raju & Brothers v. Dharmaratnakara Rai Bahadur Arcot Narainswamy Mudaliar Chattram Other Charities*, 2023 SCC OnLine SC 1303.

⁹⁷ *N.N. Global Mercantile (P) Ltd. v. Indo Unique Flame Ltd.*, (2023) 7 SCC 1.

⁹⁸ *In re Interplay between Arbitration Agreements under A&C Act, 1996 & Stamp Act, 1899*, (2024) 6 SCC 1.

⁹⁹ *Vijay Madanlal Chowdhary v. Union of India* (2023) 12 SCC 1.

Supreme Court upheld the constitutionality of several provisions of the Prevention of Money Laundering Act, 2002 on July 27, 2022. Almost immediately, a different three-judge bench of the Supreme Court, headed by the Chief Justice, noted in a judgment delivered on August 23, 2022, that the *Vijay Madanlal Chowdhary* judgment left scope for arbitrary application and required further elaboration of its ratio.¹⁰⁰ Consequently, on August 25, 2022, the Supreme Court agreed to review the *Vijay Madanlal Chowdhary* judgment in *Karti P. Chidambaram v. Directorate of Enforcement*,¹⁰¹ accepting that at least two issues raised in the review petition required consideration. The review petition remains pending before the Supreme Court at the time of drafting this article.

The vertical hierarchy within the Supreme Court results in the replication of efforts by different benches without any authoritative judgment resolving the issue conclusively. Repugnancy between different benches is resolved by constituting a larger bench in review, which again applies JM to reach finality. The problems with such a defective procedure, which promotes duplication of effort, are evident, and its cascading effects are tangible. In view of such problems, the procedure can hardly be termed efficient. The philosophical justifications for JM must account for such grave and destabilizing lapses in procedure.

Proponents of JM circularly justify it by arguing that JM is the most efficient procedure because it provides stability in law, and conversely, that stability in law is attributable to the efficiency that JM brings. However, when an issue traverses such uncertainty between different benches before reaching settlement, it is futile to resort once again to a quantitative measure such as JM to resolve the issue, rather than adopting a more qualitative assessment. Thus, there can be no presumption of efficiency with respect to JM; it requires further rationalization to settle its legitimacy in India.

3.4. Arguments against legitimacy

Guha Krishnamurthi discusses the importance of the legitimacy of courts as key to their ability to function and explains legitimacy as understood from the viewpoint of the officials of the system itself, the parties, and the public at large.¹⁰² Essentially, the legitimacy of any institution is assessed by how perceivers, both internal and external, view it and whether they consider the institution worthy of their moral, reason-based support.¹⁰³ Later, he establishes the legitimacy of courts that follow the procedure of JM in his

¹⁰⁰ Union of India v. M/s Ganpati Dealcom Pvt. Ltd, 2023 SCC OnLine SC 339.

¹⁰¹ Karti P. Chidambaram v. Directorate of Enforcement 2022 SCC OnLine 1084.

¹⁰² Krishnamurthi, *supra* note 11, at 1221.

¹⁰³ *Id.*

article through virtues such as completeness, stability, epistemic worth, efficiency, and so on.

Such virtues can be considered additional arguments to bolster the case for JM only when its legitimacy is duly established. However, in India, owing to the horizontal application of JM for decision-making and the rejection of its vertical application, a conundrum emerges that questions the very soundness of JM, rendering such additional virtues in the Indian context irrelevant. The conundrum is most succinctly articulated by Justice Madan B. Lokur in *Supreme Court Advocates-on-Record Assn. v. Union of India*.

¹⁰⁴ He challenges the correctness of the law as determined by the current Supreme Court procedure by observing that:

[T]he unanimous decision of 9 learned Judges in the Third Judges case can be overruled by 6 learned Judges in a Bench of 11 learned Judges, with 5 of them taking a different view, bringing the total tally of Judges having one view to 14 and having another view to 6, with the view of the 6 learned Judges being taken as the law!¹⁰⁵

As the final interpreter of the Indian Constitution, the Supreme Court decides important questions of law that not only have precedential value but also have the potential to change the law of the land. It is essential that its decisions be above criticism on grounds of procedural irregularities, lest its legitimacy come under question. From a perceiver's viewpoint, however, it is paradoxical that the logic for JM is upheld for decision-making within the bench but repudiated in its vertical application. This anomaly adds vigor to the demand for philosophical justifications from proponents of JM regarding its applicability.

Another manner in which questions of legitimacy arise concerns judicial independence from executive interference. The Constitution makers of India, following the system of checks and balances in the constitutional design, might initially have agreed upon Article 145(5) as a more convenient and manifest method of judicial review for easily overturning arbitrary legislation. It is argued that it would be easier to reach the threshold of a simple majority than alternatives such as a supermajority or consensus decision in overturning legislation in a system where the executive appoints judges. As Eric Yik Him Chan notes in his thesis "Judicial Review and Supermajority Voting Rules,"¹⁰⁶ supermajority rules in judicial review are

¹⁰⁴ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 1 (four-to-one decision striking down the Constitution (Ninety-Ninth Amendment) Act, 2014, and the National Judicial Appointments Commission Act, 2014, which sought to replace the collegium system for judicial appointments with the National Judicial Appointments Committee (NJAC) and to expand the executive's role in appointments, holding that the measures violated the basic structure of the Constitution, including the principles of separation of powers and judicial independence).

¹⁰⁵ *Id.* para. 669.

¹⁰⁶ Eric Yik Him Chan, *Judicial Review and Supermajority Voting Rules* (2019) (LLM Thesis, Univ.H.K.), <https://bidenwhitehouse.archives.gov/wp-content/uploads/2021/09/Professor-David->

often used as a tool by the executive to tame courts and can therefore be perceived as problematic. In his thesis, he proceeds on the presupposition that there are only two methods of judicial appointment in the world: judges are appointed by the executive, or they are appointed by the executive subject to legislative approval.

The situation, however, is different in the Indian context. Article 124(2) vests the power of appointment of Supreme Court judges in the President, after consultation with judges of the Supreme Court. Consequently, a controversy arose regarding the nature and extent of the “consultation” required by the provision. The controversy was significant insofar as the interpretation of the phrase determined the extent of control exercised by the executive in the appointment of judges. This question was substantially addressed in two cases. First, *S.P. Gupta v. Union of India*

¹⁰⁷ dealt with defining the control that could be exercised by the President in appointing judges to the Supreme Court. In effect, the essential question was whether the President was bound by the consultation with the Supreme Court, and the Court answered in the negative. Subsequently, in *Advocates-on-Record Assn. v. Union of India*,¹⁰⁸ the Supreme Court changed its position and held that the President was bound by the Supreme Court’s consultation regarding judicial appointments, thereby giving birth to the Collegium System and granting primacy in the appointment of Supreme Court judges to the Court itself, with four senior-most judges constituting the collegium.¹⁰⁹

Thus, within such a system, where the judges of the Supreme Court themselves effectively select future judges, the justification for having an easier threshold for judicial review—one that the founding fathers might have contemplated—is rendered redundant.¹¹⁰ Considering the novel system put in place for judicial appointments in India, where executive influence over judicial appointments is sought to be negated, the challenge to the legitimacy of JM becomes even stronger.

[Law-appendix.pdf](#) (attempting to formulate a theory of supermajority rules in judicial review).

¹⁰⁷ *S.P. Gupta v. Union of India*, 1981 Supp SCC 87 (holding that in judicial appointments the opinion of the Chief Justice of India did not have primacy and that the executive was not bound by it).

¹⁰⁸ *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441 (holding, by a nine-judge bench, that in judicial appointments the opinion of the Chief Justice of India has primacy, thereby overruling *Gupta*, 1981 Supp SCC 87, and establishing the collegium system requiring consultation with the two senior-most judges of the Supreme Court).

¹⁰⁹ *See, e.g., S.P. Gupta v. Union of India*, 1981 Supp SCC 87; *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441. *See also* *Supreme Court Advocates-on-Record Assn. v. Union of India*, (2016) 5 SCC 1 (striking down the Ninety-Ninth Constitutional Amendment Act, 2014 and the National Judicial Appointments Commission Act, 2014, and reaffirming the primacy of the collegium system; clarifying that the collegium comprises the Chief Justice of India and the four senior-most judges of the Court).

¹¹⁰ *See* *Supreme Court Advocates-on-Record Assn. v. Union of India*, (1993) 4 SCC 441.

Inasmuch as only those procedures that are considered fair are also considered legitimate, aspects relating to the perceived fairness of JM are interconnected with the qualitative dimensions of legitimacy, as opposed to the institutional or formalistic aspects discussed above. These qualitative aspects are addressed in the following section.

3.5. Arguments against fairness

The Supreme Court in *Trimurthi* held that unanimity in a given bench of five judges cannot per se be a strong or compelling reason to doubt the legitimacy of a larger bench ruling that might contain a narrow majority (for instance, a four-to-three vote).¹¹¹ The reason for the same, as stated earlier, stems from the *raison d'être* of the doctrine of precedents, which is stability in the law, and is applicable even horizontally between benches of varying sizes in the Supreme Court.

The Supreme Court has also previously held that the Constituent Assembly, through the doctrine of *stare decisis*, sought to characterize “the decision of this Court as final, conclusive and binding inter partes and also binding on all.”¹¹² However, the Court also noted that the Constitution confers a power of review of the judgment of this Court through Articles 137 and 145 of the Constitution, if the judgment shocks the conscience of any reasonable person.¹¹³ It can be inferred that reasonableness is a pertinent exception carved out by the founding fathers in the applicability of the doctrine of *stare decisis*. Notwithstanding that the Constituent Assembly could not have imagined a vertically hierarchical structure in the Supreme Court raising questions regarding the vertical application of JM, the unreasonableness in allowing a split, four-to-three judgment to overrule a unanimous five-judge verdict can be conceived of as an exception to the doctrine of *stare decisis*, where such doctrine, along with its virtues such as finality and stability, loses its applicability.

Further, in his separate concurring opinion in *Trimurthi*, Justice Hemant Gupta remarked that benches with higher numerical strength owe their greater binding authority to the collective deliberations and discussions in which they engage prior to delivering their judgment.¹¹⁴ This is perhaps another justification on which the procedure for arriving at the correct

¹¹¹ *Trimurthi Fragrances (P) Ltd. v. State (NCT of Delhi)*, 2022 SCC OnLine SC 1247.

¹¹² *Dr. Shah Faesal & Ors. v. Union of India*, (2020) 3 S.C.R. 1115. See also *Constituent Assembly Debates*, Vol. VIII, Art. 117 (May 16–June 16, 1949).

¹¹³ *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388 (Banarjee, J., concurring) (five-judge Constitution Bench recognizing the “curative petition” as a final remedy to reconsider dismissal of a review petition; holding that such petitions are maintainable only in rare circumstances to prevent gross miscarriages of justice. Justice Banarjee, concurring, observed that although Supreme Court decisions are final, Articles 137 and 145 of the Constitution confer the review power, and that the Court retains inherent authority to reconsider a judgment where bias or manifest injustice shocks the conscience).

¹¹⁴ *Trimurthi Fragrances (P) Ltd. v. State (NCT of Delhi)*, 2022 SCC OnLine SC 1247, paras. 8–9.

decision in the Indian Supreme Court is said to be procedurally sound and fair.

In light of Justice Hemant Gupta's opinion, it becomes pertinent to note that the proponents of JM, in consonance with his opinion, make a twofold argument in favor of the fairness of JM. First, as discussed in an earlier section of this article, they highlight the need to agree upon a decision rule that respects diversity and ultimately lets some set of opinions stand for the whole. Second, they remark that obeisance to the decision flowing from that decision rule is legally and logically cogent, considering its refinement through deliberation.

The article is in consonance with the first prong of the proponents' argument in its affirmation of deliberative discourse and respect for diverse opinions. The agreement, however, ends there. There certainly is a need to agree upon a decision rule that respects diversity; however, to say that JM must ultimately let some set of opinions stand for the whole would be contradictory to the very contours of respect for diversity, inasmuch as it renders any deliberative discourse carried out in the name of respect for diverse opinions otiose. For fairness to be encapsulated in a decision, what must be reached through such a decision rule is a decision that not only respects diverse opinions but is reflective of them. Mere existence of diversity of opinions cannot in itself be sufficient proof that a majority opinion reflects that diversity. In other words, the constitution of a diverse bench cannot in itself imply or result in a majority opinion that reflects that diversity. At the very least, the effect of diversity on the bench must be expressed in the form of reasoned decisions backed by deliberative discourse addressing the reasons for the majority view's divergence from the minority view.

The second prong of the argument rests upon an assumption of deliberative discourse among judges by proponents of JM. Going beyond formal debate and deliberation, they rely upon supposed informal deliberation to prove the existence of deliberative discourse. Essentially, this means that in the case of a bench consisting of a larger number of judges, the judgment is the result of a supposed deliberation consisting of a plurality of opinions, and that the decision of the majority is reached despite such deliberation with diverging views. This implies that the majority remained unconvinced by the opposing arguments and that their view ultimately prevailed. Accordingly, a majority opinion delivered in the face of such disagreement within a larger bench is said to have greater binding authority.

However, such an assumed generalization is contradicted by two arguments. First, neither the Constitution of India nor the Supreme Court Rules contain any provision mandating judges to conduct or engage in any form of deliberation among themselves before reaching a conclusion and delivering a judgment. Second, this generalized assumption can be challenged in light of the fact that, as of July 31, 2024, a total of 83,300 cases were pending before the Indian

Supreme Court, which averages nearly 2450 cases per judge when the Court operates at its maximum strength of thirty-four judges.¹¹⁵ In contrast to the US Supreme Court, where on a typical day only two cases are heard,¹¹⁶ a Supreme Court judge in India must hear approximately seventy cases per day.¹¹⁷ Whether it is humanly possible to engage in substantive deliberation in light of such workload and pendency is questionable.

Justice Y.V. Chandrachud, delivering his judgment in *Kesavananda Bharati v. State of Kerala*,¹¹⁸ admitted the insufficiency of time for the judges to exchange drafts and understand each other's views because of the impending retirement of Chief Justice S.M. Sikri.¹¹⁹ The lack of joint deliberation and discussion in one of the largest benches ever constituted calls into question the assumption that such deliberations in larger benches necessarily result in greater binding authority.

Jeremy Waldron, in his work, speaks of the twin role of maintaining the continuing legitimacy of courts in terms of fairness: first, so that decisions made under their auspices can mobilize sufficient support to garner acceptance; and second, to reconcile the losing party to the decision that has been made.¹²⁰ Proponents of JM likewise argue that decision-making is based on convincing a larger number of judges, but that such a majority represents not self-interest but opinions grounded in sound legal knowledge.¹²¹ This seemingly adds credibility to the procedure by attaching to it the value of fairness, thereby enabling it to garner acceptability even from litigants on the losing side of a judgment.

However, as illustrated in *Sabhajit Tewary* discussed in the section on inconsistency, it is difficult to conceive that a litigant would not perceive unfairness in being on the losing side of a judgment despite convincing an overall greater number of equally placed justices.¹²² Further, even accepting the claims made by proponents of JM, it is difficult to describe as legitimate a decision that assumes the force of law where a total of seven learned judges who shared a particular view on a matter of fact and law are overruled by five learned judges. Obeisance to a judgment should not be sought merely

¹¹⁵ Gauri Kashyap, *80,221 Cases Pending in the Supreme Court in January 2024*, SUP. CT. OBSERVER (Feb. 3, 2024), www.scobserver.in/journal/80221-cases-pending-in-the-supreme-court-in-january-2024/.

¹¹⁶ *Supreme Court Procedures*, U.S. COURTS, www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1 (last visited Feb. 17, 2026). *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225.

¹¹⁷ Harsh Anand, *Judicial Efficiency: Beyond Working Hours and Vacations*, LIVE LAW (May 24, 2024), www.livelaw.in/lawschool/articles/judicial-efficiency-beyond-working-hours-and-vacations-supreme-court-258847.

¹¹⁸ *Kesavananda Bharati*, (1973) 4 SCC 225.

¹¹⁹ *Id.* at 960.

¹²⁰ Waldron, *supra* note 8, at 1706–7.

¹²¹ *Id.* at 1709.

¹²² *Sabhajit Tewary v. Union of India*, (1975) 1 SCC 485.

by reference to articles of the Constitution. Legitimacy does not rest solely on what the framers of a law intended and declared but is equally rooted in procedural fairness. *Lex iniusta non est lex*.

4. Conclusion

The article endeavors to contribute to the contemporary discourse on the practice of JM in India. Relying on Waldron's framework in such an analysis, it can be inferred from the arguments that, much like in the context of the US Supreme Court, the unquestioned application of JM in the Indian context raises core philosophical contradictions and leads to more jurisprudential problems than JM helps resolve. At the same time, it can also be seen that questioning JM in the Indian context is arguably more complex than Waldron's questioning of JM in the American context, given the ready adoption of Article 145(5) by the Constituent Assembly, combined with other factors such as non-political judicial appointments and judicial decisions on the vertical and horizontal application of stare decisis. Even though the undeliberated affirmation of JM by the Constitution of India on grounds of obviousness initially deterred scholars of constitutional law from questioning it, subsequent demands for justifications of JM were also warded off by the Supreme Court without much jurisprudential discussion, as can be gauged from the *Trimurthi* case.

It would be a great disservice at best, and lethargic at the very least, to buy into the idea of the obviousness of JM without first questioning what makes it obvious. Given this, the authors, engaging in an exploratory exercise, find that questioning the assumptions underlying JM highlights several major infirmities and lacunae. The arguments discussed above seek to highlight inconsistencies introduced by the nondiscursive adoption of JM, as well as the attempted rationalization of JM in the *Trimurthi* case.

Far from securing legitimacy for judicial decisions in India, the rationalization of the process of JM horizontally, i.e., within the bench, while rejecting its applicability vertically, i.e., where a larger bench overrules a smaller bench, appears to undermine that legitimacy. The same also affects fairness, inasmuch as a bench with a four-to-three majority supporting perspective *X* can overrule a bench with a five-to-zero majority supporting perspective *Y*, despite more judges agreeing with the so-called "minority" view both horizontally and vertically. The epistemic worth of JM is also questionable inasmuch as it was never debated or deliberated in the Constituent Assembly. Moreover, even if one assumes that all judges, as experts, have a greater probability of getting a question of law right than wrong and therefore that even bare majorities must rule, that assumption becomes unreliable in the Indian context, given that benches are constituted by the Chief Justice as the "Master of the Roster," leading to the question whether, had the bench been constituted differently even by one judge, the outcome might have differed.

Given that the Indian Supreme Court does not sit en banc but instead as coordinate benches of varying strengths, the argument that JM removes the possibility of inconsistencies also becomes inapplicable. It follows that varying decisions over time not only negatively impact efficiency in decision-making but also lead to hidden social and economic costs. Finally, the inconsistencies highlighted in the article raise questions not only regarding the procedural correctness of the processes adopted by the Supreme Court in India but also regarding their jurisprudential soundness, inasmuch as decision-making risks becoming a game of numbers that favors pedantic obeisance to constitutional propriety over representation and inclusivity in decision-making.