THE MEHNDI OF JUDICIAL REVIEW IN SAME-SEX MARRIAGES: INFUSING THE HUES OF BASIC STRUCTURE ON THE JUDICIARY'S PALMS

Pratham Malhotra & Pravertna Sulakshya[*]

The recent legal vendetta of Supriya Chakraborty v. Union of India ('Supriya Chakraborty') yearns for the recognition of the right to marriage equality through a judicial reinterpretation of various personal and secular laws. Curiously, the respondents have argued that the Supreme Court's declaration on this matter would trespass into the realm of the Legislature, challenging the sacred principle of separation of powers and endangering the Constitution's Basic Structure. This essay contends that the respondents' argument bears considerable merit since the higher judiciary has defiantly stepped beyond its conventional boundaries, venturing into the domains traditionally reserved for the legislature and executive. Nevertheless, the quest for resolving India's separation of powers conundrum leads this essay to open the door to the Basic Structure doctrine's application to judicial review — an expansion of scope that neither defies nor eludes possibility — thanks to the Supreme Court's adept utilisation of the doctrine to review ordinary legislation and executive action. Building upon this, to counter the innate drawbacks of the traditional options available to the Supreme Court in Supriya Chakraborty, the essay proposes a balanced approach: blending the doctrine's application to Judicial Review with the finesse of dialogic constitutionalism.

TABLE OF CONTENTS

[*] 4th-year B.A. LL.B. (Hons.) students at the Rajiv Gandhi National University of Law, Punjab. The paper was awarded the 2nd prize for the sub-theme: Scope of Judicial Review, at the Nani A. Palkhivala Memorial Essay Competition, 2023, organised by WBNUJS, Kolkata, and Nani A. Palkhivala Memorial Trust, with support from the Tata Group. The panel of judges for the aforesaid sub-theme consisted of Justice M. R. Shah, Professor Upendra Baxi, Rohit De, and Saptarshi Mandal. All errors, if any, are solely attributable to the authors. The authors may be contacted at prathammalhotra20001@rgnul.ac.in and pravertnasulakshya20007@rgnul.ac.in, respectively, for any feedback or comments.

I. INTRODUCTION

Let your mind envision a gigantic ship known as the Indian Constitution. Picture that the ship was constructed with exceptional wooden planks imported from different nations and tailored to meet its Indian essentialities. The People chose the Parliament as its captain.[1] Over time, as certain planks deteriorated, Parliament replaced them with newer, progressive ones. However, surprisingly, the People threw away the 'modern ship's any ship without the old exotic planks stood unworthy of being titled as the 'original Indian Constitution'. The present conundrum of identity,[2] inspired by the Ship of Theseus Paradox,[3] is what the Basic Structure doctrine strives to settle.

Returning from the ship, the real-life Indian Constitution, too, comprises metaphoric wooden planks of its Preamble and 448 Articles. For social revolution,[4] the Parliament can make amendments (or replace these planks) by deriving its constituent power from Article 368.[5] However, such power brings along disbelief,[6] that it comes with no substantive limits.[7] Accordingly, ample occasions,[8] arose for the Parliament to brush aside fundamental rights in

[1] The Constitution of India, 1950, Preamble.

[2] *See* Chris Meyer, *Ship of Theseus: How to Solve the Ancient Paradox*, 2022, available at https://themindcollection.com/ship-of-theseus-identity-paradox/ (Last visited on July 4, 2023).

[3] *See generally* Bethany Williams, *The Ship of Theseus Though Experiment*, THE COLLECTOR, July 8, 2021, available at https://www.thecollector.com/the-ship-of-theseus/ (Last visited on July 4, 2023); *See also* Theodore Scaltsas, *The Ship of Theseus*, Vol. 40(3), OXFORD UNIVERSITY PRESS, 152-157 (1980).

[4] International IDEA**,** *Constitutional Amendment Procedures*, CONSTITUTION NET, September 29, 2014, available at https://constitutionnet.org/sites/default/files/constitutional_amendment_procedures.pdf (Last visited on July 4, 2023).

[5] The Constitution of India, 1950, Art. 368(1).

[6] *See* The Constitution of the Federal Republic of Germany, 1949, Art. 79(3) (Germany); The Constitution of the Italian Republic, 1947, Art. 139 (Italy); The Constitution of the United States, 1789, Art. 5 (The United States of America).

[7] Christopher J. Beshara, *Basic Structure Doctrines and the Problem of Democratic Subversion: Notes from India*, Vol. 48(2), VRÜ, 100 (2015).

[8] *See generally* The Constitution of India, 1950, Schedule IX, *inserted vide* The Constitution (First Amendment) Act, 1951 (w.e.f. June 18, 1951); The Constitution (Fourth Amendment) Act, 1954, Art. 31A; The Constitution (Twenty-Fourth Amendment) Act, 1971; The Constitution (Twenty-Fifth Amendment) Act, 1971.

pursuit of its socialist utopia until the head of a monastery in Kerala decided not to allow this to occur.[9] In the face of land reform laws impeding the management of religious property, his Holiness Sri Kesavananda Bharati chose to challenge not only the laws but also its impenetrable cloak of amendments,[10] and gave India its historic legal showdown etched as *Kesavananda Bharati* v. *State of Kerala* ('Kesavadanda').[11]

Penning down a mammoth seven hundred pages, the thirteen judge bench affirmed that the Parliament's amendment power was wide and unfettered, without being limited to Article 13 or fundamental rights,[12] insofar as it did not fundamentally destroy or alter the constitutional identity.[13] To oversimplify, there exists a foundational framework of interrelated and indispensable 'essential features',[14] that form the unified and organic basis[15] to the Constitution's 'basic structure', and any attempt to breach it shall stand unconstitutional. Among these essential features stood, *inter alia*, the supremacy of the Constitution, the sovereignty of the nation, parliamentary democracy, separation of powers, unity and integrity of the nation",[16] and chiefly, judicial review.[17] Furthermore, the doctrine sanctified, *inter alia*, three pivotal principles: *first*, the power to amend is not the constituent power itself, rather a mere division of such constituent power as derived from the Constitution.[18] Thus, the amending power becomes subject to the same constraints that the Constitution provides for law-making power as exercised by different organs of the State.[19] Correspondingly, *second*, the limiting of Parliament's amending power flows from the principle of separation of powers,— a constituted power—which "protects the constitution from moving along the spectrum towards authoritarianism than just protecting any single constitutional principle in isolation".[20] *Third*, and notably, 'judicial review' is an essential and indivisible component of the doctrine, whose absence would render it ineffective.[21] With these

[9] *See* State of Madras v. Champakam Dorairajan, 1951 SCC 351; Nick Robinson, *Expanding Judiciaries: Indian and the Rise of the Good Governance Court*, Vol. 8(1), WASH. U. GLOBAL STUD. L. REV., 28 (2009); *See also* I.C. Golak Nath v. State of Punjab, AIR 1967 SC 1643; R.C. Cooper v. Union of India, (1970) 1 SCC 248; Madhav Rao Scindia v. Union of India, (1971) 1 SCC 85.

[10] The Constitution (Twenty-Fourth Amendment) Act, 1971; The Constitution (Twenty-Fifth Amendment) Act, 1971; The Constitution (Twenty-Sixth Amendment) Act, 1971; The Constitution (Twenty-Ninth Amendment) Act, 1972.

[11] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225.

[12] *Id*., ¶494.

[13] *Id*., ¶1064.

[14] *See* Abdul Malek*, Vice and virtue of the Basic Structure Doctrine: a comparative analytic reconsideration of the Indian sub-continent's constitutional practices*, Vol. 43(1), COMMONW. LAW BULL., 50 (2017).

[15] *See also* HANS KELSEN, GENERAL THEORY OF LAW AND STATE, 110 (Routledge, 1945); HANS KELSEN, PURE THEORY OF LAW, 5 (University of California Press, 1967); Joseph Raz, *The Identity of Legal Systems*, Vol. 59(3), CALIF. L. REV., 795 (1971).

[16] *See* BESHARA, *supra* note 7, 114.

[17] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶1007.

[18] Virendra Kumar, *Basic Structure of the Indian Constitution: Doctrine of Constitutionally Controlled Governance [From Kesavananda Bharati to I.R. Coelho]*, Vol. 49(3), JILI, 372 (2007).

[19] *See* Siddharth Sijoria, *Implied Limitation on The Power Of Amendment: A Comparative Study Of Its Invocation In India, Colombia And Benin*, Vol. 6(1), COMP. CONST. L. & ADMIN. L.J., 89 (2021).

[20] David Landau, *Abusive Constitutionalism*, Vol. 47(189), U. CALIF. DAVIS, 253 (2013).

[21] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶1007.

three weavers at play, the fabric of the Constitution's basic structure has evolved in a multitude of decisions,[22] to become "an integral part of everyman's litigation strategy at the Supreme Court".[23]

In the contemporary zeitgeist, a similar strategy is poised to craft the fate of 135 million Indians —traversing from India's historical roots to its sociological dynamics,[24] administrative landscape,[25] and, unavoidably, its constitutional framework—[26] gaining attention in the name of the 'same-sex marriage controversy'. Culminating over 50 petitions, queer couples and individuals have called for a diverse array of requests, *inter alia*, seeking an inclusive interpretation of the term 'spouse' within the Special Marriage Act, 1954 to incorporate same-sex couples and a declaration thereupon.[27]

However, what raised eyebrows was the Attorney General's contention on behalf of the respondents that the Supreme Court stands devoid of the power to bestow recognition upon a 'distinct class of marriages', and that any judicial declaration on the subject shall violate the Basic Structure doctrine due to the separation of powers.[28] Curiously, what seems here like a simple play of the devil's advocate, is, in fact, a Pandora's box of several interesting questions: 'Can' the doctrine of Basic Structure be extended to test the validity of judicial review? Is there a need to expand the doctrine's scope, i.e., 'should' it apply to judicial review? Is there a threshold that, if crossed by the Constitutional Courts, would infringe upon separation of powers and violate the Basic Structure? Finally, 'how' does one apply the doctrine to its creator? This essay addresses these questions, with the core argument asserting that the solution to the separation of powers conundrum in India lies in applying the doctrine of Basic Structure to judicial review.

In that backdrop, Part II of the essay discusses the question of whether the Basic Structure doctrine 'can' apply to judicial review. In doing so, the essay explores whether the doctrine's reach has expanded from merely constitutional amendments to scrutinising ordinary legislations and Executive actions. Answering the aforementioned question in affirmative, it is

---

[22] *Id.*; Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159; Minerva Mills Ltd. v. Union of India, (1980) 2 SCC 591; Waman Rao v. Union of India, (1981) 2 SCC 362; Raghunathrao Ganpatrao v. Union of India, 1994 Supp (1) SCC 191; S.R. Bommai v. Union of India, (1994) 3 SCC 1; Maharao Sahib Shri Bhim Singh Ji v. Union of India, (1986) 4 SCC 615; *See also* M. Nagaraj v. Union of India, (2006) 8 SCC 212, ¶83; Ridwanul Hoque, *Constitutionalism and the Judiciary in Bangladesh* in COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA, 316 (2013).

[23] Satya Prateek, *Today's Promise, Tomorrow's Constitution: 'Basic Structure', Constitutional Transformations and the Future of Political Progress in India*, Vol. 1(3), NUJS L. REV., 476 (2008); *See* Delhi Juridical Service Association v. State of Gujarat, (1991) 4 SCC 406; Indra Sawhney v. Union of India, (1996) 6 SCC 506; Raghunathrao Ganpatrao v. Union of India, 1994 Supp (1) SCC 191.

[24] *See* Jaideep Singh Lalli, *The Paranoia of Former Judges Opposing Same-Sex Marriages on Civilisational Grounds*, THE WIRE, April 7, 2023, available at https://thewire.in/lgbtqia/former-judges-paranoia-same-sex-marriages (Last visited on July 6, 2023).

[25] *See* Rehan Mathur, *The Notice Regime under the Special Marriage Act*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 17, 2023, available at https://indconlawphil.wordpress.com/tag/same-sex-marriage/ (Last visited on July 6, 2023).

[26] Supriyo @ Supriya Chakraborty v. Union of India, W.P.(C)No.1011/2022 (S.C.) (Pending).

[27] *Id*.

[28] SUPREME COURT OBSERVER (Ajoy Karpuram & R. Sai Spandana), *Plea for Marriage Equality*, May 3, 2023, available at https://www.scobserver.in/reports/plea-for-marriage-equality-constitution-bench-day-7/ (Last visited on July 15, 2023); *Transcript of WP (Civil) 1011 of 2022 Hearing dated 03.05.2023*, May 3, 2023, at 29, available at https://www.scobserver.in/wp-content/uploads/2023/05/Arguments-Transcript-May-3rd.pdf (Last visited on July 16, 2023) ('Transcript, May 3, 2023'); *See also Transcript of WP (Civil) 1011 of 2022 Hearing dated 10.05.2023*, May 11, 2023, at 35, 37, available at https://main.sci.gov.in/pdf/LU/15052023_112003.pdf (Last visited on July 16, 2023) ('Transcript, May 10, 2023').

argued that a fresh expansion of its scope to encompass judicial review is both plausible and persuasive. Accordingly, Part III delves into whether the doctrine 'should' extend to judicial review, i.e, whether there is a need for such expansion of scope, it contends that the higher Judiciary has fearlessly transcended the conventional boundaries of its function, venturing into domains traditionally entrusted to the legislature and the executive, and imposing a weighty burden on the separation of powers. Thus, a necessity arises to craft a flexible solution with the assistance of the Basic Structure doctrine that allows the court to fulfill its functions while preserving constitutional harmony. Turning then to Part IV, the essay sheds light on the Supreme Court's conundrum in Supriya Chakraborty,[29] concerning the separation of powers and proposes a way forward by applying the Basic Structure doctrine to judicial review, complemented by dialogic constitutionalism.

II. BREAKING BOUNDARIES: UNRAVELING THE WIDENING APPLICATION OF THE BASIC STRUCTURE DOCTRINE

Time has witnessed a multitude of benches that were here today and gone tomorrow. Nonetheless, each left a legacy behind by sprinkling more 'basic elements' to the cake of 'basic structure', [30] making flexibility the hallmark of our Constitution.[31] Inferably, the capability of evolution works in a two-pronged manner. *First*, it is wide enough to accommodate newer elements since revolutions engulf unalterable constitutions,[32] and *second*, it is also progressive enough to turn the Constitutional wheel towards social transformation and exclude elements that were once sacrosanct.[33] Inevitably, the question of "how far can it stretch" was asked, leading to a new debate: Does the doctrine apply to ordinary legislation and executive action? The following discussion examines this question, whose answer shall forge the path for applying the doctrine to judicial review.

A. ORDINARY LAWS, EXTRAORDINARY PROTECTION

The 'ordinary' lawmaking power of the Parliament and State legislatures is generally subject to two broad limitations: *first,* the power must be exercised within their legislative competence, as specified in Chapter I, Part XI of the Constitution,[34] and *second,* the laws must not contravene Article 13(2), which prohibits the creation of laws that take away or abridge the Fundamental Rights. Despite that, determining whether the Basic Structure review would apply as an additional limitation has often been like a pendulum reflecting the Supreme Court's perspective. The oscillation first began with *Indira Gandhi* v. *Raj Narain*,[35] ('Election case'), in which the issue was whether the Election Laws (Amendment) Act, 1975 and the Representation of the People (Amendment) Act, 1974 were unconstitutional on the grounds that

[29] Supriyo @ Supriya Chakraborty v. Union of India, W.P.(C)No.1011/2022 (S.C.) (Pending).
[30] *See generally* Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225; Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159; Minerva Mills Ltd. v. Union of India, (1980) 2 SCC 591; Waman Rao v. Union of India, (1981) 2 SCC 362; Raghunathrao Ganpatrao v. Union of India, 1994 Supp (1) SCC 191; S. R. Bommai v. Union of India, (1994) 3 SCC 1; Maharao Sahib Shri Bhim Singh Ji v. Union of India and Others, (1986) 4 SCC 615.
[31] Zee Telefilms Ltd. v. Union of India, (2005) 4 SCC 649, 653, ¶93.
[32] V. R. Jayadevan, *Basic Structure Doctrine and its Widening Horizons*, Vol. 27(3-4), CULR, 367 (2003).
[33] Ankur Sood, *The Basic Structure Unbound*, Vol. 2, NUALS L. J., 149 (2008).
[34] The Constitution of India, 1950, Arts. 245, 246.
[35] Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159.

they damage or destroy the Basic Structure. A majority of 3:1 decided that the doctrine only applies to constitutional amendments, not ordinary legislation. Chandrachud J. argued that since there is a difference between the Parliament's constituent (higher) and legislative (lower) power, a limitation in the form of the Basic Structure doctrine that applies to the higher power will not operate on the lower power.[36] While Ray, C.J. was concerned with equating legislative measures with constitutional amendments,[37] Rai J. noted that an additional limitation on the lawmaking power of the Parliament "will mean rewriting the Constitution and robbing the legislature of acting within the framework of the Constitution".[38] Beg J.'s voice of dissent observed that the Basic Structure doctrine tests the validity of both ordinary laws and constitutional amendments as "ordinary lawmaking itself cannot go beyond the range of constituent power".[39] Subsequently, in *State of Karnataka* v. *Union of India*,[40] Beg J. reiterated his view in a somewhat roundabout manner without expressly overruling the Election case.[41]

Over the decades, the Supreme Court's *dicta* remained inconsistent. An array of rulings witnessed the utilisation of the Basic Structure doctrine to test the validity of ordinary laws.[42] Sabharwal C.J. speaking for the majority in *Kuldip Nayar* v. *Union of India,*[43] relied on the Election case and concluded that ordinary legislation does not answer to the test of Basic Structure.[44] Surprisingly, a year later, in *I.R. Coelho* v. *State of Tamil Nadu*,[45] Sabharwal C.J. led a nine-judge bench to a different conclusion that even though a legislation is added to the Ninth Schedule through a constitutional amendment, its provisions can still be challenged on the ground of destroying or damaging the Basic Structure if the fundamental rights affected are linked to the basic structure.[46] In tandem, the Supreme Court examined the provisions of the National Tax Tribunal Act, 2005 and found them unconstitutional due to their violation of the Basic Structure of the Constitution.[47] Most recently, the court in *Madras Bar Assn.* v. *Union of India*[48] ('Madras Bar Association') observed that a legislation can be declared unconstitutional if it violates the principle of separation of powers, which is an integral part of the Basic Structure.[49] Therefore, the Supreme Court appears more inclined towards the doctrine's applicability to ordinary legislation and has settled the position of law in that regard.[50]

---

[36] *Id*., ¶692; *But see* UPENDRA BAXI, THE INDIAN SUPREME COURT AND POLITICS, 62 (Eastern Book Company, 1980).
[37] Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159, ¶132.
[38] *Id*., ¶134.
[39] *Id*., ¶622.
[40] State of Karnataka v. Union of India, (1977) 4 SCC 608.
[41] *See* SUDHIR KRISHNASWAMY, DEMOCRACY AND CONSTITUTIONALISM IN INDIA: A STUDY OF THE BASIC STRUCTURE DOCTRINE, 64-66 (Oxford University Press, 2011).
[42] M. Ismail Faruqui v. Union of India, (1994) 6 SCC 360; G. C. Kanungo v. State of Orissa, (1995) 5 SCC 96; L. Chandra Kumar v. Union of India, 1997 (3) SCC 261; Indra Sawhney v. Union of India, (1996) 6 SCC 506; KT Plantations (P) Ltd. v. State of Karnataka (2011) 9 SCC 1; *See also* Supreme Court Advocates on Record Association v. Union of India, (2016) 5 SCC 1, ¶¶379, 381 (per Khehar J.).
[43] Kuldip Nayar v. Union of India, (2006) 7 SCC 1; *See also* Ashoka Kumar Thakur v. Union of India, (2008) 6 SCC 1.
[44] *Id*., ¶96.
[45] I.R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1.
[46] *Id*., ¶81 (per Sabharwal C.J.).
[47] Madras Bar Association v. Union of India, (2014) 10 SCC 1, ¶65.
[48] Madras Bar Association v. Union of India, (2022) 12 SCC 455.
[49] *Id*., ¶27.
[50] *See also* Sood, *supra* note 34, 157-158; Jayadevan, *supra* note 32, 357-360; Pathik Gandhi, *Basic Structure and Ordinary Laws (Analysis of the Election Case & the Coelho Case)*, Vol. 4(1), INDIAN J. CONST. L., 57 (2010); Anmol

B. THE EXECUTIVE AND THE BASIC STRUCTURE: A COLLISION COURSE

Unlike ordinary legislation, the Supreme Court has not extensively delved into the issue of the doctrine's applicability to executive actions. Nevertheless, the court has employed the doctrine to review such actions without explicitly exploring its widening scope. Tracing the same, Krishnaswamy has rightly concluded that the answer to the question of the doctrine's expansion to Executive actions is "an unambiguous yes".[51] Inaugurated in *S.R. Bommai* v. *Union of India*,[52] it was held that,[53] for Article 356, 'secularism', which according to the court, forms part of the Basic Structure,[54] can be used to determine whether the "Government of the State cannot be carried on in accordance with the provisions of this Constitution".[55] It was further held that the President's actions under Article 356 are amenable to judicial review since an arbitrary exercise of such power would counter 'federalism', which is an integral feature of the Basic Structure.[56]

In *B. R. Kapur* v. *State of Tamil Nadu*,[57] the Supreme Court examined the Governor's action under Article 164 of the Constitution in appointing a person convicted of a criminal offence as Chief Minister. Bharucha J., while relying on Kesavananda and *Minerva Mills* v. *Union of India*,[58] noted that "[n]othing can better demonstrate that it is permissible for the court to read limitations into the Constitution based on its language and scheme and its basic structure".[59] According to him, a Governor is sworn to protect and preserve the Constitution; thus, he cannot "in the exercise of his discretion or otherwise, do anything that is contrary to the Constitution and the laws".[60] Therefore, without outlining the basic features at stake, the court adopted an interpretation of Article 164 in consonance with the Basic Structure, suggesting that the doctrine may impose limits on executive acts.[61] Likewise, in *P. M. Bhargava* v. *University Grants Commission*,[62] the petitioners contended that the respondent's attempt to introduce courses on Vedic astrology in universities violates the principle of secularism, which forms a part of the Basic Structure.[63] Moreover, it is pertinent to note that the petitioners did not allege a breach of any statutory obligations. While disagreeing with the petitioner's argument, the court impliedly acknowledged the existence of the Basic Structure review of executive action without clarifying the extent and type of such review.[64]

Kohli, *A Natural Law Theory of Constitutional Legitimacy: The Basic Structure Doctrine and "Good Reasons for Action",* Vol. 5(2), CALJ, 28 (2021).

[51] KRISHNASWAMY, *supra* note 41, 68; *See also* S.P. SATHE, JUDICIAL ACTIVISM IN INDIA, 97 (Oxford University Press, 2002).

[52] S.R. Bommai v. Union of India, (1994) 3 SCC 1.

[53] *Id*., ¶¶146-8.

[54] *Id*., ¶¶78, 149, 170, 298.

[55] The Constitution of India, 1950, Art. 356.

[56] S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶112.

[57] B.R. Kapur v. State of Tamil Nadu, (2001) 7 SCC 231.

[58] Minerva Mills Ltd. v. Union of India, (1980) 2 SCC 591.

[59] B.R. Kapur v. State of Tamil Nadu, (2001) 7 SCC 231, ¶29.

[60] *Id*., ¶¶50-51, 59.

[61] KRISHNASWAMY, *supra* note 41, 94.

[62] P.M. Bhargava v. University Grants Commission, (2004) 6 SCC 661; *See also* KRISHNASWAMY, *supra* note 41, 93-101; Aruna Roy v. Union of India, (2002) 7 SCC 268; State of Karnataka v. Praveen Bhai Thogadia (Dr.), (2004) 4 SCC 684.

[63] P.M. Bhargava v. University Grants Commission, (2004) 6 SCC 661, ¶16.

[64] *See* KRISHNASWAMY, *supra* note 41, 98.

Building on the analysis, it becomes clear that the Supreme Court has extended the ambit of the Basic Structure doctrine beyond constitutional amendments to encompass ordinary legislations and executive actions, leading to the emergence of the Basic Structure review as an independent form of judicial review.[65] Therefore, applying the doctrine to judicial review through a further expansion of its scope is neither impermissible nor impossible. However, whether the doctrine *can* apply to judicial review differs from whether it *should*. With the former aspect untangled, the next part of this paper shall unravel the latter.

III. THE BASIC STRUCTURE DOCTRINE, JUDICIAL REVIEW, AND THE DELICATE EQUILIBRIUM OF SEPARATION OF POWERS

As expected, the proposition advocating for the application of the Basic Structure doctrine to judicial review is not mainstream.[66] It can be argued that the judiciary being the final arbiter of the Constitution,[67] and possessing superior legal prowess as compared to other branches, is unlikely to breach the norms that it has established.[68] However, to err is to human, and judges, despite their expertise, are not infallible.[69] Numerous eyebrow-raising judgments, as will be highlighted in this part, have substantiated the validity of concerns regarding the violation of the Basic Structure doctrine by Constitutional Courts, owing to non-observance of the limits set by the separation of powers doctrine— an integral part of the Basic Structure. Hence, it is evident that such concerns are not entirely unfounded irrespective of whether the violations are inadvertent or deliberate. In light of this context, this part delves into whether the Basic Structure doctrine 'should' apply to judicial review: primarily aiming to address apprehensions surrounding the infringement of the separation of powers doctrine resulting from instances of judicial overreach.

A. THE DEMOCRATIC TUG OF WAR: MODERN TRILEMMA OF SEPARATION OF POWERS IN INDIA

Once referred to as the most confusing constitutional and political thought,[70] a discussion on the doctrine of separation of powers cannot be undertaken without acknowledging Montesquieu, who famously argued that the powers of the executive, legislative and judicial organs must be kept separate.[71] The core principle underlying this doctrine necessitates the distribution of powers among the organs so that each organ can exercise a check over the actions of others, thereby ensuring a balance.[72] Although the Indian Constitution does not explicitly refer to the doctrine of separation of powers, the Supreme Court has held it to be an essential feature of the same.[73] According to the court, a model which does not recognise the doctrine in its "absolute

---

[65] *Id*., 83.
[66] *See generally* Sholab Arora, *Judicial Overreach and Basic Structure-I*, LAW AND OTHER THINGS, August 24, 2020, available at https://lawandotherthings.com/judicial-overreach-and-basic-structure-i/ (Last visited on July 8, 2023).
[67] S.R. Bommai v. Union of India, (1994) 3 SCC 1, ¶257; Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 SCC 481, ¶232; N. Kannadasan v. Ajoy Khose, (2009) 7 SCC 1, ¶47.
[68] *See* Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388, ¶7.
[69] *See* A.R. Antulay v. R.S. Nayak, (1988) 2 SCC 602, ¶104; HDFC Bank Ltd. v. Union of India, (2023) 5 SCC 627, ¶34; Asif Hameed v. State of J&K, 1989 Supp (2) SCC 364, ¶18.
[70] GEOFFREY MARSHALL, CONSTITUTIONAL THEORY, 97 (Oxford: Clarendon Press, 1971).
[71] CHARLES DE MONTESQUIEU, THE SPIRIT OF THE LAWS, 157 (1989).
[72] *See* Piotr Mikuli, *Separation of Powers* in MAX PLANCK ENCYCLOPEDIA OF COMPARATIVE CONSTITUTIONAL LAW, 2 (Oxford University Press, 2018).
[73] Bhim Singh v. Union of India and Ors., (2010) 5 SCC 538, ¶78.

rigidity",[74] seeks accountability between the organs,[75] allows overlap of functions,[76] but prohibits the delegation or usurpation of essential functions of an organ,[77] is recognised in India. A strict or complete separation of powers was also negated by the Constituent Assembly, which preferred a 'harmonious governmental structure',[78] which aimed to avoid conflicts between different branches of the government and establish inter-branch cooperation.

Significantly, the Supreme Court has repeatedly held the separation of powers to be a part of the inviolable basic structure of the Constitution.[79] In *Madras Bar Association* v. *Union of India*,[80] the court noted that judicial review, equality, rule of law, and separation of powers are part of the Basic Structure and are intimately connected.[81] Accordingly, a "violation of separation of powers would result in infringement of Article 14 of the Constitution".[82] It was further held that if a legislation violates this principle, it can be declared unconstitutional,[83] and hence, is evidence of the unparalleled importance of separation of powers in the Indian constitutional framework. Judges, not representing any constituency, possess the freedom to perform their constitutional role—safeguarding the Constitution through impartial judicial review without being influenced by external pressures. This independence allows the judiciary to check and restrain government actions, upholding the rule of law and constitutional legitimacy while refraining from encroaching on the distinct domains allocated to the legislature and executive.[84]

Therefore, to fulfill the ends of justice, the higher judiciary in India has forged for itself the 'one golden ring', granting its bearer the power of judicial review—a power that, as per the Supreme Court's own acknowledgement, "is perhaps the widest and the most extensive known to the world of law".[85] Moreover, the Judiciary has reserved for itself the right to determine the limits of the jurisdiction of other organs,[86] but it has done so while striking a note of caution—"[t]his great power must therefore be exercised by the Judiciary with the utmost humility and self-restraint".[87] Accordingly, while it is certain that such power is 'precious' to the Judiciary, its

---

[74] Ram Sahib Ram Jawaya Kapur v. State of Punjab, 1955 SCC OnLine SC 14, ¶12.
[75] Bhim Singh v. Union of India and Ors., (2010) 5 SCC 538, ¶78.
[76] *Id*., ¶59; Ruma Pal, *Separation of Powers* in THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION, 255 (Oxford University Press, 2016); H. M. SEERVAI, THE POSITION OF THE JUDICIARY UNDER THE CONSTITUTION OF INDIA, 81 (University of Bombay, 1970).
[77] Ram Sahib Ram Jawaya Kapur v. State of Punjab, 1955 SCC OnLine SC 14, ¶14; SATHE, *supra* note 51, 250; *See also* Delhi Laws Act, 1912, In Re, 1951 SCC 568, ¶112
[78] LOK SABHA SECRETARIAT, *Constituent Assembly Debates*, December 10, 1948, available at https://eparlib.nic.in/bitstream/123456789/762994/1/cad_10-12-1948.pdf. (Last visited on December 17, 2023).
[79] Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶292-293 (per Sikri, C.J.), 582 (per Shelat and Grover, JJ.);; Panipat Woollen and General Mills Co. Ltd. v. Union of India, (1986) 4 SCC 368, ¶9; State of Bihar v. Bal Mukund Sah, (2000) 4 SCC 640, ¶33; I. R. Coelho v. State of Tamil Nadu, (2007) 2 SCC 1, ¶129; Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159, ¶521; Mahmadhusen Abdulrahim Kalota Shaikh v. Union of India, (2009) 2 SCC 1, ¶70-71; State of West Bengal v. Committee for Protection of Democratic Rights, (2010) 3 SCC 571, ¶39; Bhim Singh v. Union of India, (2010) 5 SCC 538, ¶80; Madras Bar Association v. Union of India, (2022) 12 SCC 455, ¶27; Anoop Baranwal v. Union of India, 2023 SCC OnLine SC 216, ¶84.
[80] Madras Bar Association v. Union of India, (2022) 12 SCC 455.
[81] *Id.*, ¶27.
[82] *Id*.
[83] *Id*.
[84] *See* Dr. Ashwani Kumar v. Union of India, 2019 SCC Online SC 1144, ¶13.
[85] Union of India v. Raghubir Singh, (1989) 2 SCC 754, ¶7.
[86] State of Uttar Pradesh v. Jeet S. Bisht, (2007) 6 SCC 586, ¶46 (per Markandey J.).
[87] *Id*., ¶46 (per Markandey J.).

exercise without any restraint comes with a cost to the separation of powers. The essay argues that the higher judiciary struggles to draw a line between judicial overreach and active or essential judicial participation.

Simply put, judicial activism refers to "the process in which judiciary steps into the shoes of legislature and comes up with new rules and regulations that the legislature ought to have done earlier; stringent, neutral, unbiased observation of the laws made by legislature and suggesting amendments so as to make them more constitutionally compatible and egalitarian".[88] By providing an expansive interpretation of vital constitutional articles like Article 14, Article 19, Article 21, and Article 32, it contributes to preserving the essence of the Constitution. judicial activism, aimed at enhancing transparency and accountability in governance, is a proactive approach adopted by the judiciary in this regard. However, extreme forms of activism in terms of arbitrary, unreasonable and frequent interventions take the form of what is known as judicial overreach,[89] and often lead to the usurpation, encroachment, and chilling effect upon the functions of the legislative and executive branches, thus, transgressing the principle of separation of powers.

B. THE EVEREST OF JUDICIAL REVIEW: EXPLORING ITS EXPANDING SCOPE AND EFFECTS ON THE DOCTRINE OF SEPARATION OF POWERS

The Judiciary is the most assertive institution within India's governance structure.[90] As Prof. S. Dam has rightly put,[91] the courts have transformed from an institution primarily responsible for resolving conflicts between private entities to an institution actively striving to advance the ideals of socioeconomic and political justice,[92] as enshrined in the Preamble.[93] The mighty sword of judicial review is wielded to scrutinise the actions of the legislature and executive, to uphold fundamental rights, ensure compliance with constitutional limitations, and ultimately fortify the supremacy of the Constitution.[94] As the credibility of political leadership diminishes, individuals inevitably turn to exercise judicial power through tools such as "social action litigation" or "public interest litigation",[95] to seek refuge from the improper exercise of executive and legislative powers.[96]

In the words of Justice P.N. Bhagwati and C.J. Dias, aiming to secure 'justice for all' and to respond to the issue of numerous groups and sectors facing ongoing and systemic exploitation, injustice, and violence, the Supreme Court created a "uniquely Indian breed of public interest litigation, which was given the nomenclature 'social action litigation' ('SAL') by noted

---

[88] *See* B. Nagarathnam Reddy, *Judicial Activism vs Judicial Overreach in India*, Vol. 7(1), JGRA, 82 (2018).
[89] *Id*.
[90] *See* A.M. AHMADI, JUDICIAL PROCESS: SOCIAL LEGITIMACY AND INSTITUTIONAL VIABILITY, 5 (Eastern Book Company, 1996).
[91] Shubhankar Dam, *Lawmaking Beyond Lawmakers: The Little Right and the Great Wrong*, Vol. 13, TUL. J. INT'L & COMP. L., 111 (2005).
[92] *See* Lord Bingham of Cornhill, *Law Day Lecture*, SCC ONLINE, November 26, 2020, available at https://www.scconline.com/blog/post/2020/11/26/law-day-lecture†/ (Last visited on July 12, 2023).
[93] The Constitution of India, 1950, Preamble.
[94] S.P. Sathe, *Judicial Power: Scope and Legitimacy*, Vol. 40 INT. J. PUBLIC ADM., 332 (1994).
[95] *See generally* P.N. Bhagwati & C.J. Dias, *The Judiciary in India: A Hunger and Thirst for Justice*, Vol. 5(2), NUJS L. REV., 171 (2012); H.S. Mattewal, *Judiciary and the Government in the Ma'ing of Modern India*, Vol. 1, S.C.C., 17 (2002).
[96] Sathe, *supra* note 94, 332-333.

jurist, Upendra Baxi".[97] This approach necessitates judges to creatively utilise the power of judicial review, innovating tools, devising methods, and formulating strategies to deliver justice to socially and economically disadvantaged groups. Through inventive interpretation, the courts have facilitated the democratisation of remedies, extending justice to the common man and making the judicial process easily accessible to previously marginalised segments of the population.[98] Thus, the Supreme Court has extended the reach of the sword of judicial review through an activist interpretation of the Constitution, thereby expanding its jurisdiction and impact.[99] Furthermore, the court has recognised judicial review as part of the Basic Structure in a *catena* of judgements.[100]

While exploring the transformative role played by the Judiciary, Prof. Dam delineated three functional phases of social action litigation:[101] The *first* phase, characterised as the "creative" phase, witnessed the court interpreting constitutional provisions expansively, effectively establishing new rights such as the right to shelter,[102] right to work,[103] right to health,[104] right to privacy,[105] and the like. The *second phase*, known as the "lawmaking" phase, entailed the court engaging in legislative functions. *Lastly*, the court entered the "super-executive" phase, assuming a role in policy formulation and implementation, surpassing the traditional boundaries of its judicial mandate. The second and third phases have garnered significant controversy, raising debate and scrutiny. The essay shall now attempt to briefly analyse instances wherein the higher judiciary has assumed quasi-legislative and executive functions, thereby causing disturbance to the delicate equilibrium of separation of powers.

1. Redrawing the Lines: Examining the Higher Judiciary's Incursion into the Legislative and Executive Realms

In the higher judiciary's courtyard, judicial architects are wielding their gavels as brushes—drawing new contours of law, with judicial activism becoming their preferred painting style for actively participating in legislative roles or matters of policy issues.[106] As per the Supreme Court, a passive or negative role— where the court remains as a mere spectator or bystander[107] — can prove disastrous for a society pulsating with urges for social justice, and therefore, a more creative and positive stance must be taken.[108]

---

[97] Bhagwati, *supra* note 95, 173; *See also* Upendra Baxi*, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India,* Vol. 4(1), Third World Legal Studies, 108-111 (1985).
[98] *Id.*
[99] S.P. Sathe, *Legal Activism, Social Action and Government Lawlessness*, CULR, 60 (1987).
[100] Madras Bar Association v. Union of India, (2022) 12 SCC 455, ¶27; Bharati Reddy v. State of Karnataka, (2018) 12 SCC 61, ¶13; I.R. Coelho v. State of T.N., (2007) 2 SCC 1, ¶¶39-40, 107; L. Chandra Kumar v. Union of India, (1997) 3 SCC 261, ¶78; Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India, (1981) 1 SCC 568, ¶11; Maharashtra Chess Assn. v. Union of India, (2020) 13 SCC 285, ¶14; Brajendra Singh Yambem v. Union of India, (2016) 9 SCC 20, ¶48; Madras Bar Association v. Union of India, (2014) 10 SCC 1, ¶54.
[101] Dam, *supra* note 91, 115-116.
[102] U.P. Avas Evam Vikas Parishad v. Friends Coop. Housing Society Ltd., 1995 Supp (3) SCC 456.
[103] Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545.
[104] State Of Punjab v. Mohinder Singh Chawla, (1997) 2 SCC 83.
[105] Justice K.S. Puttaswamy (Retd.) v. Union of India, 2017 SCC OnLine SC 996.
[106] *See generally* Ravi P. Bhatia, *Evolution of Judicial Activism in India*, Vol. 45, Journal of the Indian Law Institute, 263 (2003).
[107] *See also* Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161, ¶14 (per Bhagwati J.).
[108] S.P. Gupta v. Union of India, 1981 Supp SCC 87, ¶27 (Per Bhagwati J.).

The presence of legislative gaps or vacuums have become a convenient canvas upon which the Judiciary paints its jurisprudence, with *Vishakha* v. *State of Rajasthan* ('Vishakha'),[109] as the *locus classicus*. In this case, the Supreme Court acknowledged the absence of domestic laws that formulate effective measures for preventing sexual harassment of women at workplaces.[110] To fill this gap, the court relied on international conventions and norms to uphold the "guarantee of gender equality, right to work with human dignity in Articles 14, 15, 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein" and formulated the widely known Vishakha guidelines.[111] Likewise, the court has attempted to fill the vacuum on several other occasions, including creating guidelines for the issuance of social status certificates;[112] procedure for inter-country adoption of Indian children;[113] guidelines on passive euthanasia,[114] which were later modified by a five-judge bench;[115] Delhi High Court's ('HC') directions regarding road safety;[116] and the latest judgement of the Supreme Court in *Anoop Baranwal* v. *Union of India*,[117] reigniting the debate,[118] and laying down guidelines for the selection process of Election Commissioner and Chief Election Commissioner. Additionally, Abeyratne and Misri contend that *T. N. Godavarman* v. *Union of India*,[119] highlights an extreme example of judicial overreach,[120] where the Supreme Court "took on the roles of policymaker, administrator, and interpreter",[121] aiming to protect Indian forests from exploitation.

Time and again, the higher judiciary has also demonstrated a keen interest in policymaking, often driven by public interest considerations and societal well-being. In *M.C. Mehta* v. *Union of India*,[122] concerns regarding vehicular air pollution led the Supreme Court to issue several orders that drastically modified Delhi's environmental policy, such as the order for conversion of the city bus fleet from diesel to CNG,[123] and the application of Euro-I and Euro-II

[109] Vishaka v. State of Rajasthan, (1997) 6 SCC 241; *see also* Vineet Narain v. Union of India, (1998) 1 SCC 226.
[110] *Id*., ¶7.
[111] *Id.*
[112] Kumari Mathuri Patil v. Addl. Commissioner, Tribal Development, (1994) 6 SCC 241.
[113] Lakshmi Kant Pandey v. Union of India, (1984) 2 SCC 244.
[114] Common Cause v. Union of India, (2018) 5 SCC 1.
[115] Common Cause v. Union of India, (2023) 10 SCC 321.
[116] Court on Its Own Motion v. Union of lndia, 2007 SCC OnLine Del 493.
[117] Anoop Baranwal v. Union of India, 2023 SCC OnLine SC 216.
[118] *See generally* Rushil Batra, *Decoding the Supreme Court's Election Commission Judgment – II: On the Separation of Powers [Guest Post]*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, March 4, 2023, available at https://indconlawphil.wordpress.com/2023/03/04/decoding-the-supreme-courts-election-commission-judgment-ii-on-the-separation-of-powers-guest-post/ (Last visited on July 13, 2023); Dr. Harish B. Narasappa, *Why the Supreme Court's ECI Verdict is Jurisprudentially Unsound*, THE LEAFLET, March 15, 2023, available at https://theleaflet.in/why-the-supreme-courts-eci-verdict-is-jurisprudentially-unsound/ (Last visited on July 13, 2023); Gautam Bhatia, *Decoding the Supreme Court's Election Commission Judgment*, THE WIRE, March 4, 2023, available at https://thewire.in/law/decoding-the-supreme-courts-election-commission-judgment (Last visited on July 14, 2023).
[119] T. N. Godavarman Thirumulpad v. Union of India, AIR 1997 SC 1228, ¶5-7.
[120] *Id*., 379-381; Rehan Abeyratne & Didon Misri, *Separation of Powers and the Potential for Constitutional Dialogue in India*, Vol. 5(2) J. INT'L & COMP. L., 374 (2018); Networking of Rivers, In Re (2004) 11 SCC 360.
[121] *Id*., 363, 374 (2018); *See also* SHYAM DIVAN & ARMIN ROSENCRANZ, ENVIRONMENTAL LAW AND POLICY IN INDIA: CASES, MATERIALS AND STATUTES, 304 (Oxford University Press, 2012); Armin Rosencranz, et al., *The Godavarman Case: The Indian Supreme Court's Breach of Constitutional Boundaries in Managing India's Forests*, Vol. 37(1), ELR, 10032-10033 (2007); THE HINDU (Jacob Koshy & Sobhana K. Nair), *Objections Overruled, Forest Bill Goes to House Unchanged*, July 9, 2023, available at https://www.thehindu.com/sci-tech/energy-and-environment/objections-unheeded-forest-bill-goes-to-house/article67061197.ece (Last visited on July 15, 2023).
[122] M.C. Mehta v. Union of India, (1998) 6 SCC 63.
[123] *Id*., ¶3.

norms.[124] The Supreme Court also addressed the menace of road accidents by issuing a directive to close liquor vendors within a 500-meter radius of the outer edge of national or state highways.[125] Lastly, the interventions of the Uttarakhand High Court,[126] and Allahabad High Court,[127] to improve the condition of government schools in their respective jurisdictions,[128] along with the recent directive from the Supreme Court to the Delhi Government seeking an affidavit disclosing the funds utilised for advertisements in light of the government's inability to contribute to the RRTS project,[129] stoke the fires of curiosity.

Reflecting upon the aforementioned verdicts, there remains no escape for from a compelling contention to emerge: the past few decades have indisputably been the era of expansion of the scope of judicial review, venturing into territories traditionally entrusted to the legislature and the executive. Instead of merely invalidating arbitrary or unlawful legislation and policies, the courts are now legislating and policymaking themselves. Nonetheless, while the ultimate aims and the outcomes of such usurpations are laudable, their inherent shortcomings and consequential impact on the separation of powers cannot be ignored.

2. THE GREAT JUDICIAL POWER GRAB: INVESTIGATING THE IMPACT

Flowing from the above discussion, this essay submits a three-pronged argument against acts of judicial overreach. *First,* such acts breach the established limits of separation of powers while disregarding the existing jurisprudence on judicial restraint. The essay contends that the higher Judiciary's approach in the mentioned cases, while being justified as an integral aspect of its function as a Constitutional Court, can be characterised as "judicial excessivism that flies in the face of the doctrine of separation of powers".[130] Through a series of judicial pronouncements, the Supreme Court has consistently stressed the significance of exercising judicial restraint, which mandates judges to decide cases within the confines of their authority. It has been firmly established that while the courts possess the authority to scrutinise the legality of legislation or government action, they are not to question the wisdom or weigh the merits and demerits of such measures.[131] Moreover, the courts cannot direct the Parliament or the executive to create or amend

---

[124] *Id*.
[125] State of T.N. v. K. Balu, (2017) 2 SCC 281, ¶¶29.5, 29.2
[126] Deepak Rana v. State of Uttarakhand, 2017 SCC OnLine Utt 760.
[127] Shiv Kumar Pathak v. State of Uttar Pradesh, 2015 SCC OnLine All 3902.
[128] *See* Abeyratne & Misri, *supra* note 120, 367-369.
[129] LIVE LAW (Sohini Chowdhury), *'You Have Funds For Advertisements, But Not For RRTS Project?' : Supreme Court Seeks Delhi Government's Ad Expenditure Details From 2020*, July 3, 2023, available at https://www.livelaw.in/top-stories/supreme-court-seeks-delhi-governments-ad-expenditure-details-since-2020-231739 (Last visited on July 12, 2023); *See also* Sohini Chowdhury, *'If ₹1100 Crores Can Be Spent For Ads In 3 Years, Contributions Can Be Made To Infra Projects': Supreme Court To Delhi Govt On Rapid Rail*, LIVE LAW, July 24, 2023, available at https://www.livelaw.in/top-stories/supreme-court-delhi-govt-arvind-kejriwal-ads-expenditure-rrts-project-233473 (Last visited on August 4, 2023).
[130] S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS, 242 (Oxford India Paperbacks, 2003); *But see* Upendra Baxi, *On the Shame of Not Being an Activist: Thoughts on Judicial Activism*, Vol. 11, INDIAN B. REV. 259, 265 (1984).
[131] Dr. Ashwani Kumar v. Union of India, 2019 SCC Online SC 1144, ¶¶13, 30; Kalpana Mehta v. Union of India, (2018) 7 SCC 1, ¶44; Census Commr. v. R. Krishnamurthy, (2015) 2 SCC 796, ¶33; M.P. Oil Extraction v. State of M.P., (1997) 7 SCC 592; Premium Granites v. State of T.N., (1994) 2 SCC 691; State of M.P. v. Narmada Bachao Andolan, (2011) 7 SCC 639; State of Punjab v. Ram Lubhaya Bagga, (1998) 4 SCC 117; State of H.P. v. Satpal Saini, (2017) 11 SCC 42, ¶6; Asif Hameed v. State of J&K, 1989 Supp (2) SCC 364, ¶19; Union of India v. M. Selvakumar, (2017) 3 SCC (L&S) 668; Ekta Shakti Foundation v. Government of NCT of Delhi, (2006) 10 SCC 337, ¶10.

a particular law or policy.[132] Accordingly, usurping the constitutionally assigned functions of the other two organs to create entirely new laws or policies through directions falls outside the purview of legitimate judicial authority.[133]

In *Dr. Ashwani Kumar* v. *Union of India*[134] ('Ashwani Kumar'), the Supreme Court cited numerous authorities on practising judicial restraint and refused to issue a direction to the Parliament to enact a legislation on custodial torture. It was observed that the Legislature is a "microcosm of the bigger social community possessing qualities of a democratic institution in terms of composition, diversity, and accountability".[135] The knowledge and wisdom of an individual judge or bench cannot equate with the representative nature and resources available to the Legislature to create laws.[136] Crucially, while the court acknowledged previous instances where the Judiciary has legislated beyond its traditional role, it rightly held that such guidelines or directions are to be issued only in extraordinary cases and on an interim basis, where the existing vacuum leads to gross fundamental rights violations that significantly outweigh concerns regarding Separation of Powers.[137] Thus, the only check upon the Judiciary's power lies in the "self-imposed discipline of exercising self-restraint".[138] However, the higher Judiciary's adherence to such precedents has been shaky. The absence of clear boundaries to its power enables the Judiciary to adapt its perspective on Separation of Powers based on the facts at hand, introducing an element of unpredictability and uncertainty into the legal system.[139]

Second, given the judiciary's inherent institutional limitations in engaging in legislative or administrative functions,[140] legislations and policies created by it are likely to be surrounded by a web of implementation issues. Such issues cast doubt on the 'effectiveness' of the court's measures, thereby raising questions such as why the court endeavours to promote rights if it cannot effectively facilitate their realisation.[141] For instance, in *Common Cause* v. *Union of India*,[142] the Supreme Court laid down guidelines about the legalisation of passive euthanasia and the enforcement of Advance Directives or living wills, which were to remain in force until the Parliament brought suitable legislation:[143] According to the court, an individual seeking euthanasia

---

[132] Suresh Seth v. Indore Municipal Corpn., (2005) 13 SCC 287; Dr. Ashwani Kumar v. Union of India, 2019 SCC Online SC 1144; Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187; V.K. Naswa v. Union of India, (2012) 2 SCC 542; State of H.P. v. Satpal Saini, (2017) 11 SCC 42, ¶6; Manoj Narula v. Union of India, (2014) 9 SCC 1; Mallikarjuna Rao v. State of A.P., (1990) 2 SCC 707; V.K. Sood v. Dept. of Civil Aviation, 1993 Supp (3) SCC 9; State of H.P. v. Parent of a Student of Medical College, (1985) 3 SCC 169, ¶4; Union of India v. Assn. for Democratic Reforms, (2002) 5 SCC 294, ¶19; Common Cause v. Union of India, (2017) 7 SCC 158, ¶18.

[133] *See* S. P. Sathe, *Judicial Activism: The Indian Experience*, Vol. 6, WASH. U. J. L. & POL'Y, 88-9 (2001).

[134] Dr. Ashwani Kumar v. Union of India, 2019 SCC Online SC 1144.

[135] *Id*., ¶26.

[136] *Id*.

[137] *Id*., ¶29; *See also* V.K. Naswa v. Union of India, (2012) 2 SCC 542; Divisional Manager, Aravali Golf Club v. Chander Hass, (2008) 1 SCC 683, ¶39; Aileen Kavanagh, *Judicial Restraint in the Pursuit of Justice*, Vol. 60, UTLJ, 23 (2009).

[138] *Id*., ¶13; Asif Hameed v. State of J&K, 1989 Supp (2) SCC 364, ¶18.

[139] *See* Nafiz Ahmed, *The Intrinsically Uncertain Doctrine of Basic Structure*, Vol. 14, WASH. U. JURISPRUDENCE REV. 307 (2022).

[140] *See* Sathe, *supra* note 133, 89.

[141] Hardik Choubey, *Guest Post: Constitutionally Obligatory Judicial Legislation*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 6, 2023, available at https://indconlawphil.wordpress.com/2023/05/06/guest-post-constitutionally-obligatory-judicial-legislation/ (Last visited on July 16, 2023).

[142] Common Cause v. Union of India, (2018) 5 SCC 1.

[143] *Id.,* ¶¶198-200.

was required to sign a living will in the presence of two witnesses, who were preferably independent. Additionally, the will must be countersigned by a Judicial Magistrate of First Class ('JMFC'). The treating physician was tasked with forming a board consisting of three expert medical practitioners from specific and diverse fields, each possessing a minimum of 20 years of experience. This board was responsible for determining whether the living will should be executed or not and if permission was granted by the medical board, the will was then submitted to the District Collector for approval. Following this, the Collector was required to assemble another medical board comprising three expert doctors, including the Chief District Medical Officer, and approval was only granted if this second board concurred with the findings of the hospital board. The final decision was then presented to the JMFC, who personally examined the patient before granting approval. In essence, this ruling established a comprehensive three-tiered process that must be followed before any decisions regarding the withholding or withdrawal of life-sustaining treatment can be made. Unexpectedly, the procedure devised by the court proved excessively intricate, time-consuming, and impracticable.[144] Thus, necessary amendments were sought to make the judgement 'workable,' leading to the modification of guidelines by a five-judge bench.[145]

Lastly, in the words of Yash Sinha, the ever-expanding scope of judicial review coupled with the Rajya Sabha's detachment from its constitutional objectives, diminishing its effectiveness as a Legislative-Executive watchdog— has resulted in a state of 'Constitutional Dysfunctionalism'.[146] Such a state arises when an institution either fails to fulfil its core functions within the established limits or significantly changes its functioning.[147] According to Sinha, the decline in institutional power of the Rajya Sabha has hindered its ability to effectively serve as a counter-majoritarian check on the Legislature-Executive, thereby paving the way for the Judiciary to rewrite its boundaries and transition to an "impermissible state of power."[148] In doing so, the courts encroach upon the domains of the other two organs and undertake tasks reserved for the representative institutions.

Conclusively, it is evident that judicial activism has now entrenched itself into the working of the Constitutional Courts. However, pertinently, judicial activism must not be conflated with governance by the Judiciary. Instead, it must operate within the well-defined boundaries of the judicial process.[149] As aptly emphasised by the Supreme Court, the principle of judicial restraint serves as a form of 'judicial respect' towards the other co-equal branches of government.[150] Its purpose is to minimise undue interference and promote stability, in contrast to the unpredictable outcomes associated with Judicial activism.[151] For instance, the Supreme Court in Ashwani Kumar refused to direct the Parliament to enact a stand-alone legislation on custodial

---

[144] *See* Anjali Gera, Bimla Sharma & Jayashree Sood, *Legal Issues in End-of-Life Care: Current Status in India and the Road Ahead*, Vol. 13, CURR. MED. RES. PRACT., 32 (2023); Sohini Chowdhury, *Passive Euthanasia : Doctors Body Tells Supreme Court About Practical Difficulties In "Living Will" Guidelines*, LIVE LAW, January 18, 2023, available at https://www.livelaw.in/top-stories/passive-euthanasia-doctors-body-tells-supreme-court-about-practical-difficulties-in-living-will-guidelines-219327 (Last visited on July 12, 2023).

[145] Common Cause v. Union of India, (2023) 10 SCC 321.

[146] Yash Sinha, *Constitutional Dysfunctionalism*, Vol. 14(4), NUJS L. REV. (2021).

[147] *Id*., 25; JACK M. BALKIN & SANFORD LEVINSON, DEMOCRACY AND DYSFUNCTION, 139-151 (University of Chicago Press, 2019).

[148] Sinha, *supra* note 146, 3.

[149] Sathe, *supra* note 133, 106.

[150] Divisional Manager, Aravali Golf Club v. Chander Hass, (2008) 1 SCC 683, ¶33.

[151] *Id*.

torture.[152] Likewise, the court in *Divisional Manager, Aravali Golf Club* v. *Chander Hass*,[153] held that it cannot direct the creation of posts, which is a prerogative of the legislative or executive authorities. It was observed that Judges must not try to run the government,[154] and instances of encroachment by the courts often elicit reactions from the other branches, leading to efforts aimed at curtailing the powers and independence of the Judiciary.[155] Nevertheless, the diminishing presence of judicial restraint has become a disconcerting trend, as encroachments by the judiciary are now often rationalised under the banner of Judicial Activism. Therefore, finding a balanced solution that nudges the higher Judiciary towards a route that preserves constitutional harmony is imperative. The solution, it appears, is more 'basic' than it may seem.

IV. BEYOND THE BINARY: ADVANCING THE CAUSE OF SAME-SEX MARRIAGES IN INDIA THROUGH THE BASIC STRUCTURE DOCTRINE AND DIALOGIC CONSTITUTIONALISM

A. JUDICIAL CROSSROADS OF MARRIAGE EQUALITY

Social realities are often a double-helix of dichotomy: while some social changes, like solo gamy and live-in relationships, get more readily accepted, others, such as the ongoing debate over same-sex marriage, ignite intense moral or conservative discussions. This debate was recently brought before the Supreme Court in Supriya Chakraborty. The petitioners passionately advocated for the recognition of marriage between any two individuals, regardless of their sexual orientation and gender identity, within the framework of the Special Marriage Act of 1954 the Hindu Marriage Act of 1955, and the Foreign Marriage Act of 1969. They asserted that members of the LGBTQIA+ community possess a fundamental 'right to marry,' rendering Section 4(c) of the SMA, which restricts marriage to a 'male' and a 'female,' as unconstitutional and discriminatory against same-sex couples.[156] Thus, the primary issue before the Supreme Court was whether the members of the LGBTQ+ community have a right to marry under the existing legal framework and if such right exists, whether the court can make a declaration to this effect.

Turning to the arguments of the Respondents, broadly, three argumentative gunshots echoed through the courtroom. *First,* they argued that recognising same-sex marriages, which were never expressly included in the SMA, would require the Supreme Court to interpret the law in a manner that introduces an alien intent, adding an entirely new dimension to the statute.[157] *Second,* the respondents implored the court not to impose societal changes solely through its declarations. They contended that when seeking a change in the law that profoundly impacts society, the society itself must be an active participant in the debate and decision-making process.[158] *Third*, the respondents favoured Robert J.'s dissent in *Obergefell* v. *Hodges*,[159] contending that the desired change in the matter must be brought forth by the Parliament through

[152] Dr. Ashwani Kumar v. Union of India, 2019 SCC Online SC 1144, ¶42.
[153] Divisional Manager, Aravali Golf Club v. Chander Hass, (2008) 1 SCC 683.
[154] *Id.,* ¶20.
[155] *Id*., ¶34.
[156] *Plea for Marriage Equality*, SUPREME COURT OBSERVER, July 5, 2023, available at https://www.scobserver.in/cases/plea-for-marriage-equality/ (Last visited on July 13, 2023).
[157] *See* Transcript, May 3, 2023, *supra* note 28, 25.
[158] *Id*., 43-44, 35-36.
[159] Obergefell v. Hodges, 576 U.S. 644 (2015) (Supreme Court of the U.S.A.).

legislation— giving it the opportunity to debate on the subject matter.[160] Accordingly, it was suggested that a declaration by court on this matter would amount to encroachment upon the legislative domain, thereby violating the Separation of Powers, Democracy and, the Basic Structure.[161] In essence, the respondents expressed their concern regarding the subversion of the democratic and political processes since, in their view, the petitioners were trying to "achieve through the courts what they could not achieve in Parliament".[162] The preceding part of this essay thoroughly examined the third aspect of the respondents' argument, demonstrating that their contentions hold considerable merit. Nonetheless, it must be clarified that the essay shall not examine whether the right to marriage equality exists in the present case and proceeds with the assumption that the court rules in favour of the petitioner in this regard.

Considering the above, this essay argues that in search for the balanced solution, the Supreme Court in Supriya Chakraborty may climb up on the train to remedy and land upon the following appeasing platforms:[163] station *one*, agreeing with the petitioners, the court can acknowledge a constitutional right to marriage equality and subsequently interpret the provisions of the SMA to include such a right. At station *two*, the court can alternatively sketch intricate guidelines or directions on LGBTQIA+ family law, bridging the current legislative gap until the Parliament acts. Though the aforementioned technique aligns with the court's customary practice, as noted previously, such an approach could prove audacious, breaching the Separation of Powers and, consequently, damaging the Basic Structure. The court in Ashwani Kumar has held that guidelines should be reserved only for extraordinary cases, where the magnitude of Fundamental Rights violations surpasses concerns over Separation of Powers,[164] such as in Vishakha, where the Fundamental Right of women to work with human dignity under Articles 14, 15, 19(1)(g), 21, and prevention of sexual harassment at workplace was at stake. In the instant case, persuading the court regarding the presence of Vishakha-like extraordinary circumstances may prove to be an uphill battle. Nonetheless, the Supreme Court, in *Common Cause* v. *Union of India*,[165] has rightly observed that "[a] perception, however strong, of the imminent need of the law engrafted in the Act and its beneficial effects on the citizenry of a democratic country, by itself, will not permit the court to overstep its jurisdiction".[166] Therefore, Judges must not develop new principles of law following their personal opinions, especially when the "society/legislators as a whole are unclear and substantially divided on the relevant issues".[167]

Furthering the route to station *three*, the court can merely declare the right to marry for the LGBTQIA+ community and entrust the task of law-making and implementation to the Parliament and Executive, respectively. However, it risks the widening of the right-remedy gap

---

[160] *See Transcript of WP (Civil) 1011 of 2022 Hearing dated 09.05.2023*, May 9, 2023, at 58-60, available at https://main.sci.gov.in/pdf/LU/15052023_111059.pdf (Last visited on July 16, 2023); Transcript, May 3, 2023, *supra* note 28, 37-38.

[161] Karpuram & Spandana, *supra* note 28; Transcript, May 3, 2023, *supra* note 28, 29, 35, 37.

[162] R. (Countryside Alliance) v. Attorney General, 2008 AC 719, ¶45 (Supreme Court of the UK); Dr. Ashwani Kumar v. Union of India, 2019 SCC Online SC 1144, ¶34.

[163] *See generally* Akshat Agarwal, *Marriage Equality at the Doors of the Indian Supreme Court*, VERFASSUNGSBLOG, May 24, 2023, available at https://verfassungsblog.de/marriage-equality-at-the-doors-of-the-indian-supreme-court/ (Last visited on July 12, 2023).

[164] Dr. Ashwani Kumar v. Union of India, 2019 SCC Online SC 1144, ¶29.

[165] Common Cause v. Union of India, (2017) 7 SCC 158.

[166] *Id*., ¶18.

[167] *See* Dr. Ashwani Kumar v. Union of India, 2019 SCC Online SC 1144, ¶26; *See also* State of H.P. v. Satpal Saini, (2017) 11 SCC 42, ¶12.

and may prove insufficient in checking Executive recalcitrance.[168] Therefore, at this terminus, the court rewards the petitioners with a "toothless fundamental right",[169] whose enforcement is vulnerable to potential Legislative and Executive roadblocks.[170]

In the final stretch, arrives station *four* of the suspended declaration of invalidity,[171] whereby the court declares that despite a law being violative of the Constitution, it remains enforced for a limited duration.[172] In the meantime, the political branches are bestowed with an opportunity to cure the defect, with any inaction giving automatic effect to the order.[173] However, such a remedy is perplexing for two prime reasons. *First*, it finds no documentation in the Indian Constitutional culture. Even with the buttress,[174] of various domestic,[175] and cross-border cases,[176] drawing parallels of possibility, notably, the former cases are not illustrative to direct infringements of fundamental rights.[177] Besides, the latter cases witness the remedy of declaration flowing expressly from their Constitution, unlike the Indian scenario. *Second*, even if interpreted liberally, the infancy of such methodology without answering anticipated concerns such as persistent violation of Fundamental rights during the suspension period,[178] underestimation of the curing time required by the legislature,[179] and unsuccessful remedies brought after a maliciously wide time frame,[180] are bound to be hours lost in limbo.

The above discussion unveils the dilemma faced by the Supreme Court, as each solution station has an inherent drawback. With the sensitivity of the controversy in mind, the court must tread cautiously to avoid legitimising judicial encroachments on legislative and executive domains. Thus, unearthing a balanced solution that ensures the preservation of the Separation of Powers and the delivery of a practical and satisfactory remedy to the petitioners is crucial.

---

[168] *See generally* Mihika Poddar & Bhavya Nahar, *'Continuing Mandamus' – A Judicial Innovation to Bridge the Right-Remedy Gap*, Vol. 10(3), NUJS L. REV., (2017).
[169] *See* SAMPAT JAIN, PUBLIC INTEREST LITIGATION, 342 (Deep & Deep Publications Pvt. Ltd., 2002); *Id*., 559.
[170] *See Id*., 561.
[171] *See* Transcript, May 3, 2023, *supra* note 28, 11-12; *See also*, Aishwarya Singh *et al.*, *A Pathway for the Supreme Court in Ensuring Marriage Equality*, THE WIRE, April 18, 2023, available at https://thewire.in/law/a-pathway-for-the-supreme-court-in-ensuring-marriage-equality (Last visited on July 13, 2023); Hari Kartik Ramesh, *The Equal Marriage Case and a Suspended Declaration of Invalidity*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 4, 2023, available at https://indconlawphil.wordpress.com/2023/05/04/guest-post-the-equal-marriage-case-and-a-suspended-declaration-of-invalidity/ (Last visited on July 14, 2023).
[172] In Re Manitoba Language Rights, [1985] 1 SCR 721, 19 DLR (4th) 1 (Supreme Court of Canada), ¶¶97-107; *See e.g.*, Minister of Home Affairs v. Fourie, 2006 (1) SA 524 (CC) (Constitutional Court of South Africa); *See also* Davy Lalor, *Ontario (Attorney General) V G and 'Principled' Remedial Discretion: Lessons for Ireland*, Vol. 5(2), IR. JUDIC. STUD. J. 55, 62-63 (2021).
[173] Kent Roach, *The Separation and Interconnection of Powers in Canada: The Role of Courts, the Executive and the Legislature in crafting Constitutional Remedies*, Vol. 5(2), JICL 315, 330 (2018); *See also* A. v. Governor of Arbour Hill [2006] 4 I.R. 88 (Supreme Court of Ireland).
[174] Singh, *supra* note 171; Ramesh, *supra* note 171.
[175] Sampath Kumar v. Union of India, (1987) 1 SCC 124; Indra Sawhney v. Union of India, (1996) 6 SCC 506; EPFO v. Sunil Kumar B., 2022 SCC OnLine SC 1521.
[176] Minister of Home Affairs v. Fourie, 2006 (1) SA 524 (CC) (Constitutional Court of South Africa); Hillary Goodridge v. Department of Public Health, 440 Mass. 309 (the Massachusetts Supreme Judicial Court).
[177] *See generally* Chintan Chandrachud, *Judicial Review in the Shadow of Remedies* in BALANCED CONSTITUTIONALISM: COURTS AND LEGISLATURES IN INDIA AND THE UNITED KINGDOM, 178-188 (2017).
[178] *See* Blake v. A.G., [1982] I.R. 117, 141-142 (Supreme Court of Ireland).
[179] Robert Leckey, *Assisted Dying, Suspended Declarations, and Dialogue's Time*, Vol. 69, UTLJ, 64-65 (2019).
[180] *See* Carter v. Canada (Attorney-General), [2015] 1 SCR 331 (Supreme Court of Canada).

B. PURSUING THE PATH TO BALANCE: HARNESSING THE CONSTITUTIONAL SHIELD OF BASIC STRUCTURE AND DIALOGIC CONSTITUTIONALISM

1. THE MISSING 'BASIC' PIECE

Unconventional yet potent, the key to India's Separation of Powers conundrum lies in applying the Basic Structure doctrine to Judicial Review. Such expansion serves three pivotal purposes: *First,* it operates as a stark reminder to the higher Judiciary that the protector and creator of the doctrine, too, can inadvertently harm it through unchecked encroachments on other organs' domains. By imposing a vital check on the excesses of Judicial activism, the doctrine stresses that any Judicial decision overstepping into legislative or executive realms— as discussed previously— violates the separation of powers and undermines the Basic Structure. Judicial Review, as a vital component of the Basic Structure, must not be used to harm another essential element, namely the separation of powers. Thus, the doctrine draws a clear boundary for the higher Judiciary's activist role, declaring that the court shall go thus far and no further, thereby preventing the stretching of the separation of powers to its breaking point.

Second, as argued before, the profound significance of Supreme Court judgments that have duly cautioned against overreaching has regrettably been relegated to mere words, lacking practical effect. The absence of an active constraint on the powers of the Supreme Court implies that the court possesses the discretion to either adhere to or disregard such judgments based on the prevailing facts and circumstances. However, applying the Basic Structure to judicial review presents a transformative opportunity to establish much-needed uniformity and boundaries, cementing the precedential value of those judgments. *Third,* such expansion of the doctrine's scope promotes equality between the three organs, as envisioned by the Supreme Court,[181] and offers an answer to the following question: If the doctrine can check the excesses of the Legislature and the Executive, then why shouldn't it be attentive to judicial overreach? Ultimately, the unstoppable force of Judicial Review finds its match in the constitutional shield of Basic Structure.[182]

To set the above proposition in motion, the Supreme Court must first embrace the doctrine's application to judicial review just as it birthed it— through a bold and decisive judicial pronouncement. Furthermore, in navigating this path, insights of the Supreme Court in *Rupa Ashok Hurra* v. *Ashok Hurra* must be considered,[183] where the court emphasised that writs of certiorari cannot be issued to coordinate or Superior Court, including the High Courts, since they "are not constituted as inferior courts in our constitutional scheme".[184] The court also observed that the higher Judiciary does fall within the definition of 'state' under Article 12.[185] In light of this, it is suggested that the Supreme Court must exercise its appellate and Review jurisdiction under Articles 132, 133, 134, 136 and 137 of the Constitution to hear any challenge against Judicial decisions on the ground of Basic structure violations. Moreover, as the Basic Structure doctrine finds its way into Judicial Review, the Constitutional Courts will undoubtedly exercise their powers with greater awareness from the outset. Yet, it is equally incumbent upon the other two organs to raise concerns regarding violations of the Basic Structure by Judicial decisions during

[181] Divisional Manager, Aravali Golf Club v. Chander Hass (2008) 1 SCC 683, ¶33.
[182] *See* Prateek, *supra* note 23, 476-477; Janhit Abhiyan v. Union of India, 2022 SCC Online SC 1540, ¶395.
[183] Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 SCC 388.
[184] *Id*., ¶7.
[185] *Id*.

appeal or review proceedings. Embracing this view establishes a robust balance between the three co-equal organs and nurtures the vital element of checking and balancing within the framework of the Separation of Powers.

2. DIALOGICAL DYNAMICS

Adding an extra layer of protection to the Basic Structure shield, dialogic constitutionalism further strengthens the constitutional fabric by not only bridging the right-remedy gap,[186] but also battling legislative and administrative laxity. Abeyratne and Misri have eloquently pointed out that a dialogic review envisions collaborative efforts of the institutional organs, aiming to address constitutional problems while leveraging their strengths and mitigating weaknesses.[187] Accordingly, under this model, the courts play a pivotal role by exposing rights violations yet wisely allowing the other two organs to craft appropriate remedies.[188] This roadway furthers the goals of democracy through a combination of constitutional collaboration and counter-balancing,[189] and avoids the challenge of the courts being perceived as counter-majoritarian.[190] Thus, broadly put, it refers to "a public and ongoing process of constitutional interpretation where issues of public or intersubjective morality are regularly debated among equals, in an inclusive discussion that embraces the different governmental branches and the people at large".[191] Championing a deliberative democracy, inter-organ equality, and inclusivity among diverse stakeholders,[192] this model of constitutionalism was first witnessed in Canada,[193] and has since spread its roots globally.[194]

Remarkably, dialogic constitutionalism has found the acknowledgement it deserves in India while being whispered in some instances and boldly proclaimed in others. The Supreme Court's *dictum* in Vishakha featured certain dialogical elements as the Union of India had consented to the guidelines through the solicitor general.[195] Likewise, the court, while modifying its previous guidelines on passive euthanasia, observed that ordinarily, it would not have considered such an application.[196] However, it was noticed that the Union had evolved its position to agree to certain changes sought by the applicants, thanks to "several rounds of discussions".[197] Thus, rather than asserting its authority to pass a legislation on the issue, the Legislature has opted

---

[186] *See generally* Grégoire C. N. Webber, *The Unfulfilled Potential of the Court and Legislature Dialogue*, Vol. 43(2), CJPS, 443 (2009); R. Gargarella, *"We the People" Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances*, Vol. 67(1), CLP, 1 (2014); Mark Tushnet, *Dialogic Judicial Review*, Vol. 61, ARK. L. REV., 205 (2009).
[187] Abeyratne & Misri, *supra* note 120, 377.
[188] *Id*.
[189] ALISON L YOUNG, DEMOCRATIC DIALOGUE AND THE CONSTITUTION, 115-116, 160, 171 (Oxford University Press, 2017).
[190] Abeyratne & Misri, *supra* note 120, 377.
[191] Roberto Gargarella, *Scope and Limits of Dialogic Constitutionalism* in DEMOCRATIZING CONSTITUTIONAL LAW: PERSPECTIVES ON LEGAL THEORY AND THE LEGITIMACY OF CONSTITUTIONALISM, 119, 122 (2016).
[192] *Id*., 122-123.
[193] *See* Peter W Hogg & Allison A. Bushell, *The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)*, Vol. 35(1), OSGOODE HALL L.J., 75 (1997).
[194] YOUNG, *supra* note 189, 3; *See e.g.*, The Human Rights Act 1998 (the U.K.); New Zealand Bill of Rights Act 1992 (New Zealand).
[195] Vishakha v. State of Rajasthan, (1997) 6 SCC 241, ¶9.
[196] Common Cause v. Union of India, (2023) 10 SCC 321, ¶5.
[197] *Id*.

for the Judiciary to fill the vacuum on issues it prefers not to handle[198]— leaving the matters to the 'wisdom of the court'.[199] Furthermore, during the second wave of the COVID-19 pandemic, the Supreme Court devised the concept of 'dialogic jurisdiction,' to provide various stakeholders with a forum "to raise constitutional grievances with respect to the management of the pandemic",[200] and to "conduct deliberations with the executive",[201] regarding its policies.[202]

Breaking new ground, the Supreme Court, guided by the visionary pen of Chief Justice D.Y. Chandrachud, expressly embraced a dialogical approach in the case of *Gujarat Urja Vikas Nigam Limited* v. *Amit Gupta*.[203] While examining the validity of *ipso facto* clauses in India, the court first acknowledged that there is no clear position of law in this regard.[204] It was further noted that separation of powers is a cardinal principle enshrined in the Constitution,[205] and judicial determination of this issue poses a myriad of complex questions, impacting several contracts that contain such clauses.[206] Therefore, the court held that rather than resolving the issue exhaustively in the present case, it must "appeal in earnest to the legislature to provide concrete guidance on this issue".[207] In doing so, the court highlighted the importance of "dialogical remedies",[208] and observed that instead of usurping the Legislature's role or simply sitting with folded hands, it could adopt a 'workable formula' and leave it to the Legislature to formulate a comprehensive solution.[209] Citing an illustration of such remedies, the court drew attention to its decision in *S. Sukumar* v. *ICAI*,[210] where the bench recommended that the Union should constitute a committee of experts to examine the issue and identify appropriate remedies through a dialogue with all the

[198] Surya Deva, *INDIA: Constitutional Courts as Positive Legislators: The Indian Experience* in CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS: A COMPARATIVE LAW STUDY, 587, 600-601 (2011); Choubey, *supra* note 141.
[199] *See, e.g.,* Navtej Singh Johar v. Union of India, (2018) 1 SCC 791, ¶36.
[200] In Re: Distribution of Essential Supplies and Services During Pandemic, (2021) SCC OnLine SC 411, ¶17.
[201] *Id*.
[202] *See generally* Debmalya Banerjee & Vardaan Wanchoo, *India; The Advent of Dialogic Jurisdiction*, MONDAQ, July 8, 2021, available at https://www.mondaq.com/india/constitutional--administrative-law/1089102/the-advent-of-dialogic-jurisdiction (Last visited on July 15, 2023); Guatam Bhatia, *Coronavirus and the Constitution – XXXVII: Dialogic Review and the Supreme Court (2)*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, June 3, 2021, available at https://indconlawphil.wordpress.com/2021/06/03/coronavirus-and-the-constitution-xxxvii-dialogic-review-and-the-supreme-court-2/ (Last visited on July 15, 2023); Gautam Bhatia, *Coronavirus and the Constitution – XXVIII: Dialogic Judicial Review in the Gujarat and Karnataka High Courts*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 24, 2020, available at https://indconlawphil.wordpress.com/2020/05/24/coronavirus-and-the-constitution-xxviii-dialogic-judicial-review-in-the-gujarat-and-karnataka-high-courts/ (Last visited on July 15, 2023); Aakanksha Saxena, *Coronavirus and the Constitution – XXXIII: N-95 Masks and the Bombay High Court's Dialogic Judicial Review [Guest Post]*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, June 28, 2020, available at https://indconlawphil.wordpress.com/2020/06/28/coronavirus-and-the-constitution-xxxiii-n-95-masks-and-the-bombay-high-courts-dialogic-judicial-review-guest-post/ (Last visited on July 15, 2023).
[203] Gujarat Urja Vikas Nigam Limited v. Amit Gupta, (2021) 7 SCC 209.
[204] *Id*., ¶141.
[205] *Id*., ¶142.
[206] *Id*., ¶145-148.
[207] *Id*., ¶149.
[208] *Id*., ¶179.
[209] *Id*., ¶181.
[210] S. Sukumar v. ICAI, (2018) 14 SCC 360.

stakeholders.[211] Ultimately, it was concluded that the court treads "the middle path between abdication and usurpation" through such inter-institutional dialogue.[212]

Given the foregoing, it is evident that the constitutional courts, while playing a dialogical role, use the resources at their disposal to act as a "mediator with power",[213] rather than an adjudicator[214]—to assist the conflicting parties in reaching an agreement but still being able to impose a legal resolution to the dispute.[215] Furthermore, this approach finds its perfect niche in scenarios where the court acknowledges the petitioners' rights, yet the optimal remedy necessitates the collaborative efforts of all organs to preserve the delicate balance of separation of powers. The Judiciary also has the option to utilise the procedural innovation of "continuing mandamus", which involves keeping a case pending instead of issuing a final judgment while actively engaging in a comprehensive social dialogue with all the relevant stakeholders.[216] Poddar and Nahar have rightly emphasised that in cases where a declaratory or mandatory judgement will have minimal effect, a continuing mandamus enables the court to nudge "public opinion sensitive governments" out of inertia and foster constitutional collaboration among all key actors.[217]

3. Fitting the missing piece into the Same-Sex Puzzle

With the innate drawbacks of the traditional options available to the Supreme Court in Supriya Chakraborty, as discussed previously in this part, a two-pronged strategy emerges as the way forward. By combining the application of the Basic Structure doctrine on judicial review with a resort to dialogical remedies, a seamless route is carved for the court to stride confidently in this case. The golden opportunity of addressing the respondent's contentions on basic structure violation through Separation of Powers can be seized by the court to expand the doctrine's scope to Judicial Review ingeniously. The court's acknowledgement of an inviolable limit to its power would justify its decision to abstain from judicial reinterpretation of the SMA or issuing detailed guidelines on the subject matter.

Furthermore, like an enchanting twist of fate or a serendipitous dance of luck, this case has already set the stage for a perfect Constitutional dialogue. The hearing on May 3, 2023 in Supriya Chakraborty began with the solicitor general informing the bench that upon deliberation with various union ministries, the creation of a committee led by a cabinet secretary is suggested—which aims to deal with administrative changes that alleviate the petitioner's concerns.[218] Acting as a mediator, D.Y. Chandrachud C.J., on behalf of the bench, asked the petitioners to submit a set of issues that the committee may address.[219] To further convince the petitioners not wholly in favour, the bench pointed out that based on the Union's submissions, there seems to be an acknowledgment of the LGBTQIA+ community's right to co-habit, beyond which the committee

---

[211] *Id*., ¶53.
[212] Gujarat Urja Vikas Nigam Limited v. Amit Gupta, (2021) 7 SCC 209, ¶181; O. Ferraz, *Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa* in Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa, 375, 393 (2013).
[213] Julio Ríos-Figueroa, Constitutional Courts as Mediators: Armed Conflict, Civil-Military Relations, and the Rule of Law in Latin America, 23 (Cambridge University Press, 2016).
[214] *See* Poddar & Nahar, *supra* note 168, 606.
[215] Ríos-Figueroa, *supra* note 213, 24.
[216] *See* Poddar & Nahar, *supra* note 168, 608.
[217] *Id*., 606.
[218] *See* Transcript, May 3, 2023, *supra* note 28, 2.
[219] *Id*.

would be tasked with resolving practical matters concerning bank accounts, insurance, housing, and the like.[220]

Moreover, the bench gave a mindful reminder to the petitioners that though the conceptual issue of the existence of the right to marry under the SMA would still be decided, a mere declaration of this right in itself would be insufficient without a robust statutory and regulatory framework, which lies within the purview of the other two organs.[221] Hence, the petitioners were strongly urged to consider the Union's proposal rather than pursuing an 'all or nothing' outlook.[222] Additionally, the bench aptly remarked that the present case warrants the resort to an incremental approach— meaning that even though the present conflict may not result in a substantial gain for the petitioners, it would act as a 'building block' for the future, with the court acting as a facilitator of progress.[223]

Thus, being cognizant of its limitations, the bench in Supriya Chakraborty has passionately endeavoured to strike a balanced solution through dialogue and collaboration, eschewing the imposition of remedies on the other organs. It is argued that with wisdom as its compass, the odds are in favour of the court steering the petitioners towards deliberations with the Union through the committee while allowing the Parliament to debate on the matter and pursuing similar formulas in search of an answer that achieves proper balance and harmony.

V. CONCLUSION

Acting as a catalyst of justice, the Judiciary has broadened the scope of Judicial Review by ingeniously crafting remedies through judicial lawmaking and policymaking. However, these creative endeavours trigger a chain reaction that undermines the delicate balance of the Separation of Powers and, in turn, the Basic Structure as noted in Part III of this essay. Since the Judiciary is the guardian of its own gateways through self-restraint, the ideal solution lies with the doctrine's application to Judicial Review itself. This way forward is achievable as the Supreme Court, through its *dicta,* has established the doctrine's elasticity, making it operate as an independent form of Judicial Review upon ordinary legislation and Executive actions.

The Supreme Court in Supriya Chakraborty faces the Separation of Powers conundrum, knowing it cannot tread fearlessly into the Legislative domain through a declaration. To achieve Constitutional harmony and balance, the court must extend the doctrine's application to Judicial Review, cementing much-needed uniformity and boundaries while guiding future benches for decades to come. Furthermore, dialogic constitutionalism holds the potential to give teeth to the petitioner's right to marry, ensuring its conversion from rhetoric to reality. It must be noted that the Supreme Court now leans heavily towards dialogical remedies that grant potent relief to the petitioners and safeguard the hallowed principle of Separation of Powers. It is worth mentioning here that D.Y. Chandrachud C.J. has consistently championed the cause of Dialogic Judicial Review, believing fervently that it can lead to practical solutions that promote harmony.[224]

---

[220] *See* Transcript, May 3, 2023, *supra* note 28, 5.
[221] *Id.*, 11.
[222] *Id*., 5, 12.
[223] *Id*., 9, 12.
[224] *See* Surat Parsi Panchayat Board v. Union of India, (2022) 4 SCC 534, ¶8; HINDUSTAN TIMES (Utpal Parashar), *Need deliberation, dialogue not grandstanding: CJI Chandrachud*, April 7, 2023, available at

Critics of this approach have argued that the invisibilisation of the LGBTQIA+ community in legislative spaces,[225] coupled with the domination of majoritarian social values in representative bodies like the Parliament,[226] hinders their capacity to address the concerns raised by the feeble voices of the minority. However, the critics must face the reality that though the Supreme Court can recognise the right to marry for the LGBTQIA+ community, the fruitification of that right is vastly dependent on the acts of the Legislature and the Executive.

As argued by the bench in Supriya Chakraborty, an incremental realisation of marriage equality fosters a broad social dialogue while preventing a disconnect between the law and society.[227] This gradual progression allows public opinion to adapt to significant social changes, ensuring that the expansion of rights is steady yet resilient, making them less susceptible to reversal in the future.[228] Furthermore, Reva Siegel has keenly remarked that the U.S. Supreme Court's decision in Obergefell was not solely a result of shifting public opinion.[229] Rather, the struggle over the courts was pivotal in transforming public sentiment and shaping fresh "constitutional understandings".[230] Hence, conflict can wield constructive power, and adjudication on such matters not only mirrors but also shapes public opinion.[231] Accordingly, from *NALSA* v. *Union of India*,[232] to the present dispute in Supriya Chakraborty, public perception towards the LGBTQIA+ community has radically transformed, with fifty-three percent of adult Indians now in support of the legalisation of same-sex marriages.[233]

The current case provides the Supreme Court with a significant chance to embark on its inaugural incremental journey, paving the path for future judicial actions— while bearing in mind that incrementalism need not be synonymous with gradualism as a series of successive cases might swiftly follow one another, enabling the evolution of the law in a matter of years, not decades.[234] To sum up, the roadway suggested by this essay is not a panacea. Yet, it stands tall as a guiding lighthouse when our constitutional courts confront complex issues, where one roadway jeopardises the Basic Structure through Separation of Powers while the other leaves the aggrieved with toothless fundamental rights. Integrating the Basic Structure doctrine into the fabric of Judicial Review, blended with dialogical remedies, carves an approach for the higher Judiciary to guard a society pulsating with urges for social justice without sacrificing its commitment to

---

https://www.hindustantimes.com/india-news/cji-stresses-on-constitutional-statesmanship-and-dialogue-between-judiciary-and-executive-for-nation-building-101680890342005.html (Last visited on July 13, 2023); LIVE LAW (Mehal Jain), *If The Dialogical Role Of Law Is Forsaken, Law Becomes A Diabolical Instrument: Chandrachud.J At IDIA Conference*, December 16, 2018, available at https://www.livelaw.in/if-the-dialogical-role-of-law-is-forsaken-law-becomes-a-diabolical-instrument-chandrachud-j-at-idia-conference/ (Last visited on July 13, 2023).

[225] Lalli, *supra* note 24.

[226] Venkatanarayanan S. & Abhiruchi Ranjan, *Same-Sex Marriage: The Court Must Not Follow The Doctrine Of 'Separate But Equal*, THE WIRE, June 18, 2023, available at https://thewire.in/lgbtqia/same-sex-marriage-the-court-must-not-follow-the-doctrine-of-separate-but-equal (Last visited on July 24, 2023).

[227] Singh, *supra* note 171.

[228] *Id*.

[229] Reva Siegel, *Community in Conflict: Same-Sex Marriage and Backlash*, Vol. 64, UCLA L. REV., 1730, 1744 (2017).

[230] *Id*.

[231] *Id*., 1744-1746.

[232] NALSA v. Union of India, (2014) SCC 438.

[233] Jacob Poushter, Sneha Gubbala & Christine Huang, *How people in 24 countries view same-sex marriage*, PEW RESEARCH CENTER, June 13, 2023, available at https://www.pewresearch.org/short-reads/2023/06/13/how-people-in-24-countries-view-same-sex-marriage/ (Last visited on July 21, 2023).

[234] Singh, *supra* note 171.

Separation of Powers. During these tempestuous times, the higher Judiciary must embrace that in the pursuit of justice and safeguarding of our constitutional fabric, the true strength lies not in the unchecked power of one but in the harmonious symphony of the three.