THE ROLE OF JUDICIAL REVIEW AND THE BASIC STRUCTURE DOCTRINE IN ADDRESSING MARRIAGE EQUALITY AND THE SEPARATION OF POWERS IN INDIA

Dr. Shashank Misra, Dewan Law College, Meerut

ABSTRACT

In the most recent case, "*Supriya Chakraborty v. Union of India"*, the petitioner argues for rereading several personal and secular laws by seeking court recognition of the right to marriage equality. The respondents say that any Supreme Court decision on this matter will enter the legislative domain, violating the separation of powers concept and maybe endangering the basic structure of the Constitution. This paper supports the respondents' point of view by arguing that the court has exceeded accepted limits by invading spheres traditionally assigned to the legislative and government. Using the Basic Structure idea in judicial review—a measure that, although ambitious, is neither unworkable nor incompatible with constitutional values—the paper investigates how India's separation of powers might be addressed. Examining customary law and executive activities, the Supreme Court has essentially used this principle to show that its application might settle the question in Supriya Chakraborty. The paper supports a mixed approach to solve the flaws in existing judicial systems. This approach would combine the ideas of dialogic constitutionalism with the Basic Structure concept in judicial review to emphasise the need for conversation among the court, legislative, and executive, so offering a more cooperative framework for handling constitutional conflicts.

Keywords: Marriage Equality, Judicial Reinterpretation, Personal Laws, Secular Laws, Separation of Powers, Basic Structure Doctrine, Judicial Review, Dialogic Constitutionalism, Supreme Court, Constitutionalism, Legislative Domain, Executive Action, Separation of Powers Conundrum.

1. Introduction

See the Indian Constitution as a great ship built from fine hardwood planks imported from many countries, each chosen to meet India's particular needs.[1] The metaphorical captain of this ship, guiding its direction, is Parliament.[2] Parliament replaced some planks—symbolizing parts of the Constitution—with more modern, progressive substitutes when they degraded over time. Still, the people of India argued that eliminating any original clause would prevent the document from being accepted as the "*Indian Constitution*" as a whole.[3] This identification challenge is similar to the Ship of Theseus Paradox; the basic structure idea was developed to address this issue.

Like a ship, the Indian Constitution consists of symbolic planks: the Preamble and Article 448.[4] Article 368 grants the Parliament the power to modify the Constitution, enabling effective social reforms.[5] However, this power raised questions since it seemed to let Parliament change the Constitution without much restriction.[6] This problem became most clear when Parliament tried to evade fundamental rights in pursuit of a socialist ideology, therefore generating significant legal conflicts.[7] Leading a monastery in Kerala, Sri Kesavananda Bharati developed an intense fight against changes affecting religious property laws.[8] Emerging as a turning point in Indian legal history, the case "*Kesavananda Bharati v. State of Kerala"* ("*Kesavananda*") saw the Supreme Court, through a historic 13-judge bench, decide that although Parliament has great ability to change the Constitution, such power is not unqualified.[9] The Court decided that

[1] The Constitution of India, 1950, Preamble.
[2] Chris Meyer, *Ship of Theseus: How to Solve the Ancient Paradox*, 2022, available at https://themindcollection.com/ship-of-theseus-identity-paradox/ (last visited July 4, 2023).
[3] See generally Bethany Williams, *The Ship of Theseus Thought Experiment*, *THE COLLECTOR*, July 8, 2021, available at https://www.thecollector.com/the-ship-of-theseus/ (last visited 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, Sept. 29, 2014, available at https://constitutionnet.org/sites/default/files/constitutional_amendment_procedures.pdf (last visited 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 by 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.
[9] See State of Madras v. Champakam Dorairajan, 1951 SCC 351; Nick Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court*, Vol. 8(1), WASH. U. GLOBAL STUD. L. REV., 28 (2009); see also I.C. Golaknath 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.

Parliament's amendment powers could not destroy or change the Constitution's "*basic structure*."[10] The Court defined this "*basic structure*" as a set of fundamental characteristics comprising constitutional supremacy, national sovereignty, parliamentary democracy, separation of powers, national unity and integrity, and court review.[11] These qualities are the core of the Constitution's identity; any attempt to undermine them would be illegal.[12]

As the Supreme Court puts it, the Basic Structure theory holds three fundamental ideas.[13] Changing the Constitution does not equal component power; rather, it is a division of that authority derived from the Constitution.[14] The authority to change has to follow the same restrictions controlling the legislative process for other governmental bodies.[15] The concept of separation of powers, which protects the Constitution from straying toward authoritarianism rather than only preserving particular fundamental values in isolation, shapes the limitation on Parliament's amending ability.[16] Thirdly, and most importantly, the theory consists of court review as a basic and natural component.[17] The idea would lose its potency in the absence of court review. Supported by three guiding ideas, the Basic Structure concept has developed through multiple court decisions into a basic component of litigation strategy at the Supreme Court.[18] In contemporary legal conflicts, it has affected the conversation on several topics, most importantly the ongoing "*same-sex marriage controversy*" in India.[19] Aiming to widen the term of "*spouse*" within the Special Marriage Act, 1954, this issue involves more than 50 petitions from LGBT couples and others.[20] Representing the respondents, the Attorney General made a noteworthy argument asserting that the Supreme Court has jurisdiction to recognise a "*distinct class of marriages*."[21] He maintained that any court ruling on this matter would violate the idea

[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, at 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.

of the Basic Structure by so compromising the division of powers.[22]

This reasoning begs many interesting questions.[23] Can the Basic Structure idea help to assess the validity of judicial review? Should its relevance extend to include judicial review? Does a limit exist beyond which constitutional courts will violate the Basic Structure and compromise the separation of powers? Moreover, how should the idea be used with reference to the court itself as its source? This paper attempts to answer these questions by arguing that the Basic Structure idea applied to judicial review offers the means to solve India's separation of powers dilemma.[24] The paper's second part examines whether the Basic Structure theory fits judicial review.[25] This part looks at whether, in addition to constitutional amendments, the doctrine's reach now includes the evaluation of regular legislation and executive actions.[26] The paper argues that extending the Basic Structure theory to include judicial review marks a new stage in its application and is both realistic and convincing.[27] Part III then examines whether the theory applies to judicial review and assesses whether such an expansion is necessary. The claim is that the higher court is progressively straying from its traditional purview and into areas traditionally assigned to the legislative and government. This development highlights the need for a flexible strategy since it seriously strains the separation of powers.[28] The paper suggests that applying the Basic Structure idea in court review could help to find a solution that lets the court carry out its duties while maintaining constitutional balance.[29] Part IV finally

[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, Apr. 7, 2023, available at https://thewire.in/lgbtqia/former-judges-paranoia-same-sex-marriages (last visited 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 July 6, 2023).

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

[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 July 15, 2023); Transcript of W.P. (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 July 16, 2023); see also Transcript of W.P. (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 July 16, 2023).

[29] *Supra* note 26.

addresses the Supreme Court's challenges on the separation of powers in Supriya Chakraborty. Together with dialogic constitutionalism, which promotes ongoing interaction among the court, legislature, and administration to preserve constitutional equilibrium, it points a road by which the Basic Structure doctrine should be applied in judicial review.

2. Basic Boundaries: Unravelling the Widening Application of the Basic Structure Doctrine

Many Supreme Court benches throughout history have improved the interpretation of the Constitution by adding more "*basic elements*" into the fundamental concept of its "*basic structure*."[30] The ability of the Constitution to evolve serves two purposes: it can include fresh elements to fit a changing society, as revolutions usually call for the modification of once unchangeable constitutions[31], and it can also help social transformation by eliminating elements once judged unchangeable.[32] This forces the important question about the degree of interpretation of the Constitution, which leads to the debate on whether the Basic Structure theory should apply to both regular legislation and constitutional amendments, as well as executive activities.[33] This debate examines the issue since the answer will determine whether the idea might be extended to judicial review. [34] Usually, Parliament's and state legislatures' legislative authority is limited in two respects: first, by the need to operate within their designated legislative jurisdiction, as defined in Chapter I, Part XI of the Constitution; second, by the restriction established by Article 13(2), which forbids the enactment of laws that reduce or violate Fundamental Rights.[35] Notwithstanding these limitations, one wonders whether the Basic Structure theory could further constrain regular legislation.

The Supreme Court has had changing opinions on this question.[36] Originally, the debate surfaced in "*Indira Gandhi v. Raj Narain"*, sometimes known as the Election case, where the

[30] 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.
[36] 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.).

Court was charged with deciding whether the Representation of the People (Amendment) Act, 1974, and the Election Laws (Amendment) Act, 1975, were constitutional on grounds they compromised the Basic Structure of the Constitution. The majority of the Court (3:1) decided that regular legislation is not covered by the Basic Structure idea; only constitutional amendments apply there.[37] In his dissent, Justice Chandrachud argued that although Parliament's legislative (inferior) and constituent (superior) powers differ; hence, any limitations placed on the superior power—the authority to change the Constitution—do not extend to the inferior power—the legislative authority to enact ordinary laws.[38] Chief Justice Ray voiced concern about the likelihood of confusing legislative acts with constitutional changes.[39] On the other hand, Justice Rai said that restricting Parliament's legislative power would essentially be changing the Constitution and impede the legislative process within the stated constitutional bounds.[40] Dissinctly disagreeing, Justice Beg suggested that the Basic Structure idea should cover both regular legislation and constitutional amendments since regular lawmaking should not exceed the boundaries of constituent power.[41] Justice Beg then validated this point of view in "*State of Karnataka v. Union of India"* by subtly restating his earlier view without clearly reversing the Election case.[42]

Over the years, the Supreme Court has taken several stances on this matter. The Basic Structure hypothesis has been applied by the Court in several decisions assessing the validity of common laws. Chief Justice Sabharwal, leading the majority in "*Kuldip Nayar v. Union of India"*[43], cited the Election case to find that common law is free from the Basic Structure test.[44] Nonetheless, just one year later, in "*I.R. Coelho v. State of Tamil Nadu"*[45], Chief Justice Sabharwal presided over a nine-judge bench that reached a different conclusion, deciding that legislation incorporated into the Ninth Schedule based on constitutional amendment may still be challenged if it compromises the Basic Structure, particularly when fundamental rights linked with the Basic Structure are compromised.[46] clauses of the National Tax Tribunal Act,

[37] See Sudhir Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine*, 64-66 (Oxford University Press, 2011).
[38] *Id*., ¶ 692; but see Upendra Baxi, *The Indian Supreme Court and Politics*, 62 (Eastern Book Company, 1980).
[39] Indira Nehru Gandhi v. Raj Narain, (1975) 2 SCC 159, ¶ 132.
[40] *Id*., ¶ 134.
[41] *Id.,* ¶ 622.
[42] State of Karnataka v. Union of India, (1977) 4 SCC 608.
[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.).

2005, were declared void by the Supreme Court on the grounds that the Basic Structure of the Constitution was violated.[47] The Court decided in the *Madras Bar Association. v. Union of India*[48] that laws can be declared unconstitutional should they violate the basic concept of separation of powers, a pillar of the Basic Structure.[49] Clarifying the legal position on this matter, the Supreme Court seems to have leaned toward appreciating the applicability of the Basic Structure theory to regular legislation.[50]

Unlike its examination of ordinary legislation, the Supreme Court has not closely examined the applicability of the Basic Structure theory to executive actions. Still, the Court has used the theory to assess executive decisions without squarely challenging the expanding limits of the doctrine. In his research, Krishnaswamy unequivocally shows that the Basic Structure idea fits executive acts with a strong "yes." 1951 First established in "S.R. Bommai v. Union of India"[51]*, where the Court decided that Article 356's principle of "secularism"—recognised as part of the Basic Structure—could be used to evaluate whether a state's government was running in line with constitutional provisions.*[52] *The Court decided that the President's actions under Article 356 fit for judicial examination since any arbitrary use of this power would compromise "federalism,*[53]*" a pillar of the Basic Structure.*[54] *Examining the Governor's actions under Article 164*[55]*—more especially, the appointment of a person found guilty of a criminal charge as Chief Minister—the Court looked to "B. R. Kapur v. State of Tamil Nadu."*[56] *Regarding "Kesavananda" and "Minerva Mills v. Union of India"*[57]*, Justice Bharucha underlined how the Court might restrict the Constitution obtained from its language, structure*[58]*, and Basic Structure doctrine.*[59] *He said that the Governor is obliged to respect the Constitution and so cannot act in a way that violates the law or the document.*[60] *The Court read*

[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, at 157-158; Jayadevan, *supra* note 32, at 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 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, at 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.,* ¶¶ 146-148.
[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.

Article 164 in line with the Basic Structure, implying that the doctrine might limit executive actions.[61] *The petitioners in "P. M. Bhargava v. University Grants Commission*[62]*" argued that adding courses on Vedic astrology was against the Basic Structure's fundamental secularism tenet.*[63] *This also shows how the Court applies the Basic Structure idea in assessing executive actions, verifying that the theory can restrict such actions.*

The case's petitioners did not claim any breach of any statutory obligation. Though it denied the petitioners' claim, the Court implicitly approved the Basic Structure review of presidential actions but did not specify the exact extent or type of the review relevant.[64] *This suggests that the Supreme Court has steadily expanded the Basic Structure theory's reach to include constitutional changes, common legislation, and executive actions. This development has created the Basic Structure review as a special kind of court review.*[65] *Thus, it is neither forbidden nor unrealistic to apply the Basic Structure theory to judicial review by additional enlargement. Still, whether the theory fits judicial review differs from the viability question. After the last problem is fixed, the next part of this talk will look at the need for such a tool.*

3. The Basic Structure Doctrine, Judicial Review, And The Delicate Equilibrium of Separation of Powers

The application of Basic Structure theory to judicial review is not a commonly accepted viewpoint.[66] The court, as the supreme authority on constitutional matters and possessing legal expertise greater than that of other governmental branches, is often expected to adhere to the constitutional standards it has established.[67] Judges, although they are proficient and experienced, are not infallible.[68] Several controversial rulings have raised concerns over the violation of the Basic Structure theory[69] by Constitutional Courts, chiefly due to a neglect of the constraints imposed by the separation of powers—a principle fundamental to the Basic

[61] P.M. Bhargava v. University Grants Commission, (2004) 6 SCC 661; see also Krishnaswamy, *supra* note 41, at 93-101; Aruna Roy v. Union of India, (2002) 7 SCC 268; State of Karnataka v. Praveen Bhai Thogadia (Dr.), (2004) 4 SCC 684.
[62] Krishnaswamy, *supra* note 41, at 94.
[63] Id., at 83.
[64] *Id.*
[65] *Id.*
[66] Sholab Arora, Judicial Overreach and Basic Structure-I, LAW AND OTHER THINGS, Aug. 24, 2020, https://lawandotherthings.com/judicial-overreach-and-basic-structure-i/ (last visited July 8, 2023).
[67] S.R. Bommai v. Union of India, (1994) 3 S.C.C. 1, ¶ 257; Supreme Court of India v. Subhash Chandra Agarwal, (2020) 5 S.C.C. 481, ¶ 232; N. Kannadasan v. Ajoy Khose, (2009) 7 S.C.C. 1, ¶ 47.
[68] Rupa Ashok Hurra v. Ashok Hurra, (2002) 4 S.C.C. 388, ¶ 7.
[69] A.R. Antulay v. R.S. Nayak, (1988) 2 S.C.C. 602, ¶ 104; HDFC Bank Ltd. v. Union of India, (2023) 5 S.C.C. 627, ¶ 34; Asif Hameed v. State of J&K, (1989) Supp. (2) S.C.C. 364, ¶ 18.

Structure.[70] These concerns highlight that such transgressions, whether intentional or unintentional, hold validity.[71] Thus, the question arises regarding the relevance of the Basic Structure theory to judicial review, highlighting the necessity to address apprehensions of judicial overreach that could infringe upon the separation of powers.[72] An examination of the concept of separation of powers, formerly considered a complex constitutional and political topic, requires the incorporation of Montesquieu.[73] Montesquieu contended that the executive, legislative, and judicial powers must be separate.[74] The core tenet of this concept is the division of powers among several government bodies, allowing each body to oversee the actions of the others and thereby maintain balance.[75] The Indian Constitution does not explicitly articulate the separation of powers; yet, the Supreme Court has recognized it as a basic principle.[76] The Court has clarified that the Indian model does not need "*absolute rigidity*" in separation but supports responsibility across branches, allows overlapping functions, and forbids any branch from delegating or usurping essential functions.[77] The Constituent Assembly supported this strategy, promoting a "*harmonious governmental framework*" designed to alleviate tensions and enhance collaboration among governmental entities.[78]

The Supreme Court has consistently upheld that the division of powers is a crucial component of the Constitution's foundational structure.[79] In "*Madras Bar Association v. Union of India"*[80], the Court emphasized that judicial review, equality, the rule of law, and the separation of powers

[70] GEOFFREY MARSHALL, *CONSTITUTIONAL THEORY* 97 (Oxford: Clarendon Press, 1971).
[71] CHARLES DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (1989).
[72] 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 S.C.C. 538, ¶ 78.
[74] Ram Sahib Ram Jawaya Kapur v. State of Punjab, 1955 S.C.C. OnLine S.C. 14, ¶ 12.
[75] Bhim Singh v. Union of India and Ors., (2010) 5 S.C.C. 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 S.C.C. OnLine S.C. 14, ¶ 14; SATHE, supra note 51, at 250; Delhi Laws Act, 1912, In Re, 1951 S.C.C. 568, ¶ 112.
[78] LOK SABHA SECRETARIAT, Constituent Assembly Debates, Dec. 10, 1948, https://eparlib.nic.in/bitstream/123456789/762994/1/cad_10-12-1948.pdf (last visited Dec. 17, 2023).
[79] Kesavananda Bharati v. State of Kerala, (1973) 4 S.C.C. 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 S.C.C. 368, ¶ 9; State of Bihar v. Bal Mukund Sah, (2000) 4 S.C.C. 640, ¶ 33; I.R. Coelho v. State of Tamil Nadu, (2007) 2 S.C.C. 1, ¶ 129; Indira Nehru Gandhi v. Raj Narain, (1975) 2 S.C.C. 159, ¶ 521; Mahmadhusen Abdulrahim Kalota Shaikh v. Union of India, (2009) 2 S.C.C. 1, ¶¶ 70-71; State of West Bengal v. Committee for Protection of Democratic Rights, (2010) 3 S.C.C. 571, ¶ 39; Bhim Singh v. Union of India, (2010) 5 S.C.C. 538, ¶ 80; Madras Bar Association v. Union of India, (2022) 12 S.C.C. 455, ¶ 27; Anoop Baranwal v. Union of India, 2023 S.C.C. OnLine S.C. 216, ¶ 84.
[80] Madras Bar Association v. Union of India, (2022) 12 S.C.C. 455.

are interrelated elements of the Basic Structure.[81] A violation of the separation of powers would thus infringe upon Article 14 of the Constitution, which guarantees equality before the law.[82] Legislation that violates this principle may be considered unconstitutional, hence underscoring the critical importance of the separation of powers within India's constitutional framework.[83] Judges, devoid of representation from any specific constituency, have the independence to fulfil their constitutional duties impartially, safeguarding the Constitution through objective judicial review, free from external influences.[84] This autonomy enables the judiciary to operate as a counterbalance to governmental actions, maintaining the rule of law and constitutional integrity while recognizing the distinct roles of the legislature and the executive.[85] In this context, the Indian higher court wields significant judicial review authority, which the Supreme Court has described as "*perhaps the widest and most extensive known to the world of law*."[86] The judiciary maintains the capacity to define the jurisdictional limits of other governmental branches, albeit it acknowledges that this power must be exercised with significant prudence.[87] The Court has underscored that this jurisdiction must be wielded with "*utmost humility and self-restraint*."[88] While judicial review is considered a vital tool for the court, its indiscriminate application may threaten the separation of powers.[89] Thus, the higher judiciary has the challenge of distinguishing between judicial overreach and necessary judicial involvement.

Judicial activism refers to the judiciary's intervention in functions typically assigned to the legislative branch.[90] The process involves creating new statutes for government enactment, accompanied by a thorough and impartial review of existing laws to suggest amendments that better conform with constitutional principles and promote equality. Judicial activism protects the Constitution's core principles by offering broad interpretations of vital constitutional provisions, including Articles 14, 19, 21, and 32. The judiciary implements a proactive approach to improve transparency and accountability in government. Excessive judicial activism, characterised by arbitrary, improper, or frequent interventions, constitutes judicial overreach. This overreach may lead to the court encroaching upon the activities of the

[81] *Id*., ¶ 27.
[82] *Id*.
[83] *Id*.
[84] Dr. Ashwani Kumar v. Union of India, 2019 S.C.C. OnLine S.C. 1144, ¶ 13.
[85] Union of India v. Raghubir Singh, (1989) 2 S.C.C. 754, ¶ 7.
[86] State of Uttar Pradesh v. Jeet S. Bisht, (2007) 6 S.C.C. 586, ¶ 46 (per Markandey, J.).
[87] *Id*., ¶ 46 (per Markandey, J.).
[88] B. Nagarathnam Reddy, Judicial Activism vs Judicial Overreach in India, Vol. 7(1), J.G.R.A., 82 (2018).
[89] *Id*.
[90] A.M. AHMADI, *JUDICIAL PROCESS: SOCIAL LEGITIMACY AND INSTITUTIONAL VIABILITY* 5 (Eastern Book Company, 1996).

legislative and executive branches, thereby violating the principle of separation of powers. The judiciary in India is one of the most powerful bodies within the nation's governance framework. Professor S. Dam asserts that courts have evolved from simply resolving conflicts between private parties to actively promoting the ideas of socioeconomic and political equity, as defined in the Preamble to the Constitution.[91] The court employs judicial review to examine the actions of the legislature and administration, protecting fundamental rights, maintaining constitutional limits, and ensuring the supremacy of the Constitution.[92] As the confidence of political leaders' wanes, citizens often turn to the judiciary through mechanisms like "*social action litigation*" or "*public interest litigation*" to seek redress against improper actions by the executive or legislative branches.[93]

Justice P.N. Bhagwati and Chief Justice C.J. Dias underscored that, in response to the persistent exploitation, injustice, and violence faced by many groups, the Supreme Court instituted a distinctive kind of public interest litigation known as "*social action litigation*" (SAL).[94] The term was coined by the eminent jurist Upendra Baxi.[95] SAL empowers judges to creatively utilise judicial review to design new tools, methodologies, and strategies for delivering justice to socially and economically disadvantaged individuals.[96] The courts have democratized access to justice by innovative interpretations, enabling enhanced access to the judicial system for historically marginalised individuals.[97] The Supreme Court has expanded the parameters of judicial review by embracing a proactive stance on constitutional interpretation, thus augmenting its jurisdiction and influence.[98] Furthermore, judicial review has been recognised as an essential element of the Constitution's Basic Structure in other landmark rulings.[99] Professor S. Dam has outlined three distinct phases of social action litigation, illustrating the

[91] Lord Bingham of Cornhill, Law Day Lecture, S.C.C. ONLINE, Nov. 26, 2020, https://www.scconline.com/blog/post/2020/11/26/law-day-lecture/ (last visited July 12, 2023).
[92] The Constitution of India, 1950, Preamble.
[93] S.P. Sathe, Judicial Power: Scope and Legitimacy, Vol. 40 INT. J. PUB. ADM., 332 (1994).
[94] 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 Making of Modern India, Vol. 1, S.C.C., 17 (2002).
[95] Sathe, supra note 94, at 332-333.
[96] Bhagwati, supra note 95, at 173; Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, Vol. 4(1), THIRD WORLD LEGAL STUDIES, 108-111 (1985).
[97] *Id*.
[98] S.P. Sathe, Legal Activism, Social Action and Government Lawlessness, CULR, 60 (1987).
[99] Madras Bar Association v. Union of India, (2022) 12 S.C.C. 455, ¶ 27; Bharati Reddy v. State of Karnataka, (2018) 12 S.C.C. 61, ¶ 13; I.R. Coelho v. State of T.N., (2007) 2 S.C.C. 1, ¶¶ 39-40, 107; L. Chandra Kumar v. Union of India, (1997) 3 S.C.C. 261, ¶ 78; Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India, (1981) 1 S.C.C. 568, ¶ 11; Maharashtra Chess Assn. v. Union of India, (2020) 13 S.C.C. 285, ¶ 14; Brajendra Singh Yambem v. Union of India, (2016) 9 S.C.C. 20, ¶ 48; Madras Bar Association v. Union of India, (2014) 10 S.C.C. 1, ¶ 54.

judiciary's changing role.[100] The initial phase, termed the "*creative*" phase, entailed the Court's expansive interpretation of constitutional provisions, so establishing new rights such as the right to shelter, the right to labour, the right to health, and the right to privacy.[101] The second phase, designated as the "*lawmaking*" phase, involved the Court performing tasks often attributed to the legislature.[102] The final phase, known as the "*super-executive*" phase, had the Court taking on tasks related to policy creation and execution, exceeding its traditional judicial functions.[103] The second and third phases have sparked considerable debate, raising concerns about their impact on the balance of power among the branches of government.[104] This essay will analyse specific instances where the judiciary has assumed quasi-legislative and executive functions, potentially compromising the separation of powers.[105]

Judicial architects at India's Supreme Court are increasingly employing their judicial authority to create new legal standards, with judicial activism being the preferred approach for tackling legislative and policy matters.[106] The Supreme Court has emphasised that a passive court, which merely observes without engaging, can be detrimental in a community striving for social fairness.[107] As a result, the Court has adopted a more inventive and proactive strategy. Legislative deficiencies have enabled judicial intervention, often utilising its own interpretations to amend these inadequacies. An exemplary case of this manner is "*Vishakha v. State of Rajasthan"*[108], wherein the Court acknowledged the absence of domestic legislation to prevent sexual harassment of women in the workplace.[109] The Court cited international treaties and constitutional clauses related to gender equality and human dignity—namely Articles 14, 15, 19(1)(g), and 21—to establish the *Vishakha* guidelines, a crucial legal framework aimed at addressing sexual harassment in the workplace.[110] The Court has implemented similar actions to address other legal shortcomings[111], such as developing procedures for issuing social status certificates, establishing guidelines for international adoption, and creating a protocol for

[100] Dam, supra note 91, at 115-116.
[101] U.P. Avas Evam Vikas Parishad v. Friends Coop. Housing Society Ltd., 1995 Supp. (3) S.C.C. 456.
[102] Olga Tellis v. Bombay Municipal Corporation, (1985) 3 S.C.C. 545.
[103] State of Punjab v. Mohinder Singh Chawla, (1997) 2 S.C.C. 83.
[104] Justice K.S. Puttaswamy (Retd.) v. Union of India, 2017 S.C.C. OnLine S.C. 996.
[105] Ravi P. Bhatia, Evolution of Judicial Activism in India, Vol. 45, J. OF THE INDIAN LAW INSTITUTE, 263 (2003).
[106] Bandhua Mukti Morcha v. Union of India, (1984) 3 S.C.C. 161, ¶ 14 (per Bhagwati, J.).
[107] S.P. Gupta v. Union of India, 1981 Supp. S.C.C. 87, ¶ 27 (per Bhagwati, J.).
[108] Vishaka v. State of Rajasthan, (1997) 6 S.C.C. 241; Vineet Narain v. Union of India, (1998) 1 S.C.C. 226.
[109] *Id*., ¶ 7.
[110] *Id*.
[111] Common Cause v. Union of India, (2018) 5 S.C.C. 1; Common Cause v. Union of India, (2023) 10 S.C.C. 321; Court on Its Own Motion v. Union of India, 2007 S.C.C. OnLine Del 493.

passive euthanasia[112], which was later revised by a five-judge panel.[113] The Delhi High Court has intervened in road safety matters, and the recent judgment in "*Anoop Baranwal v. Union of India"*[114] has reignited discourse by instituting regulations for the selection process of Election Commissioners and the Chief Election Commissioner. Furthermore, scholars like Abeyratne and Misri have cited "*T. N. Godavarman v. Union of India"*[115] illustrates judicial overreach, as the Court assumed the roles of policymaker, administrator, and interpreter in its efforts to protect Indian forests from exploitation.[116]

The higher judiciary has consistently demonstrated a significant interest in policymaking, often driven by considerations of public interest and societal welfare.[117] In "*M.C. Mehta v. Union of India"*[118], the Supreme Court scrutinised matters related to vehicular air pollution in Delhi, leading to significant alterations in the city's environmental policy.[119] The amendments encompassed mandates to convert the city's bus fleet from diesel to CNG[120] and the implementation of Euro-I and Euro-II emission standards.[121] The Court instituted steps to reduce road accidents by requiring the closure of liquor vendors within a 500-meter radius of national and state highways.[122] Similarly, efforts by the Uttarakhand and Allahabad High Courts aimed to improve the quality of government schools under their jurisdictions.[123] The Supreme Court recently directed the Delhi Government to submit an affidavit detailing

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[112] Rushil Batra, *Decoding the Supreme Court's Election Commission Judgment – II: On the Separation of Powers* [Guest Post], INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, Mar. 4, 2023, https://indconlawphil.wordpress.com/2023/03/04/decoding-the-supreme-courts-election-commission-judgment-ii-on-the-separation-of-powers-guest-post/ (last visited July 13, 2023); Dr. Harish B. Narasappa, Why the Supreme Court's ECI Verdict Is Jurisprudentially Unsound, THE LEAFLET, Mar. 15, 2023, https://theleaflet.in/why-the-supreme-courts-eci-verdict-is-jurisprudentially-unsound/ (last visited July 13, 2023); Gautam Bhatia, Decoding the Supreme Court's Election Commission Judgment, THE WIRE, Mar. 4, 2023, https://thewire.in/law/decoding-the-supreme-courts-election-commission-judgment (last visited July 14, 2023).
[113] Kumari Mathuri Patil v. Addl. Commissioner, Tribal Development, (1994) 6 S.C.C. 241.
[114] Lakshmi Kant Pandey v. Union of India, (1984) 2 S.C.C. 244.
[115] Anoop Baranwal v. Union of India, 2023 S.C.C. OnLine S.C. 216.
[116] T.N. Godavarman Thirumulpad v. Union of India, A.I.R. 1997 S.C. 1228, ¶¶ 5-7.
[117] *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 S.C.C. 360; □ Id., at 363, 374 (2018); 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); Jacob Koshy & Sobhana K. Nair, Objections Overruled, Forest Bill Goes to House Unchanged, THE HINDU, July 9, 2023, https://www.thehindu.com/sci-tech/energy-and-environment/objections-unheeded-forest-bill-goes-to-house/article67061197.ece (last visited July 15, 2023).
[118] M.C. Mehta v. Union of India, (1998) 6 S.C.C. 63.
[119] *Id.,* ¶ 3.
[120] *Id.*
[121] State of T.N. v. K. Balu, (2017) 2 S.C.C. 281, ¶¶ 29.5, 29.2.
[122] Deepak Rana v. State of Uttarakhand, 2017 S.C.C. Online Utt 760.
[123] Shiv Kumar Pathak v. State of Uttar Pradesh, 2015 S.C.C. Online All 3902.

expenditures on advertisements, particularly in light of the government's failure to contribute to the Regional Rapid Transit System (RRTS) project.[124] These instances demonstrate an increasing tendency for the court to intervene in matters once overseen by the legislature and government, therefore expanding the parameters of judicial review. Judicial organisations are no longer limited to annulling arbitrary or unlawful statutes; they are now actively engaged in creating laws and policies.

While the aims and outcomes of such interventions may seem advantageous, particularly for public welfare, the impact on the separation of powers must not be overlooked. The essay presents a threefold argument against judicial overreach. Initially, such interventions violate the established limits of the separation of powers, disregarding the principle of judicial restraint. The interventions of the higher judiciary in certain circumstances, while perhaps legitimate as a function of its role as a Constitutional Court, may be regarded as "*judicial excessivism*" that undermines the principle of separation of powers. The Supreme Court has always emphasised the need for judicial restraint, requiring justices to make decisions within the limits of their authority. The courts can evaluate the legality of laws and governmental activities; nevertheless, they are not permitted to judge these measures' wisdom or merits. The judiciary does not possess the power to compel Parliament or the government to create or amend specific laws or policies. Consequently, when the judiciary promulgates whole new laws or policies by directives, it exceeds the legitimate confines of its authority.

In "*Dr. Ashwani Kumar v. Union of India"*[125], the Supreme Court reaffirmed the principle of judicial restraint, citing various precedents and refusing to mandate Parliament to enact legislation on custodial torture. The Court noted that the legislature functions as a "*microcosm of the larger social community*," reflecting the democratic principles of representation, diversity, and accountability. The competence of an individual judge or panel cannot be equated with the legislative body's capacity to formulate laws. The Court acknowledged that the judiciary has sometimes overstepped its traditional role, yet clarified that such actions must be confined to extraordinary situations and provisional measures, particularly in significant

[124] Abeyratne & Misri, supra note 117, at 367-369.

[125] Dr. Ashwani Kumar v. Union of India, 2019 S.C.C. OnLine S.C. 1144, ¶¶ 13, 30; Kalpana Mehta v. Union of India, (2018) 7 S.C.C. 1, ¶ 44; Census Commr. v. R. Krishnamurthy, (2015) 2 S.C.C. 796, ¶ 33; M.P. Oil Extraction v. State of M.P., (1997) 7 S.C.C. 592; Premium Granites v. State of T.N., (1994) 2 S.C.C. 691; State of M.P. v. Narmada Bachao Andolan, (2011) 7 S.C.C. 639; State of Punjab v. Ram Lubhaya Bagga, (1998) 4 S.C.C. 117; State of H.P. v. Satpal Saini, (2017) 11 S.C.C. 42, ¶ 6; Asif Hameed v. State of J&K, (1989) Supp. (2) S.C.C. 364, ¶ 19; Union of India v. M. Selvakumar, (2017) 3 S.C.C. (L&S) 668; Ekta Shakti Foundation v. Government of NCT of Delhi, (2006) 10 S.C.C. 337, ¶ 10.

violations of fundamental rights that outweigh concerns regarding the separation of powers. The only limitation on the judiciary's power is the "*self-imposed discipline of exercising self-restraint*."[126] Nevertheless, the superior judiciary has not consistently adhered to this principle. The lack of clear limits on judicial authority allows the judiciary to alter its position on the separation of powers according to the specific circumstances of a case, so introducing a degree of unpredictability and uncertainty into the legal system.[127] The judiciary faces inherent institutional limitations in performing legislative or administrative functions, leading to challenges in executing the court's policies and laws.[128] Such considerations often doubt the "effectiveness" of the court's actions and prompt questions about its role in promoting rights when it lacks the capacity to ensure their effective implementation.[129] In "*Common Cause v. Union of India"*[130], the Supreme Court established conditions for the sanctioning of passive euthanasia and the execution of Advance Directives or living wills. These directives were meant to remain valid until Parliament adopted appropriate legislation.[131]

The court outlined a detailed, multi-step process for implementing these directives. An individual requesting euthanasia was required to create a living will in the presence of two disinterested witnesses. This requires countersignature by a Judicial Magistrate of First Class (JMFC).[132] The attending physician was responsible for convening a panel of three experienced medical professionals, each possessing at least 20 years of experience, to assess the implementation of the living will. Following board approval, the decision was communicated to the District Collector, who would subsequently assemble a second medical board. The JMFC

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

[127] 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, https://www.livelaw.in/top-stories/supreme-court-seeks-delhi-governments-ad-expenditure-details-since-2020-231739 (last visited July 12, 2023); 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, https://www.livelaw.in/top-stories/supreme-court-delhi-govt-arvind-kejriwal-ads-expenditure-rrts-project-233473 (last visited Aug. 4, 2023).

[128] S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 242 (Oxford India Paperbacks, 2003); see also Upendra Baxi, On the Shame of Not Being an Activist: Thoughts on Judicial Activism, Vol. 11, INDIAN B. REV. 259, 265 (1984).

[129] S.P. Sathe, Judicial Activism: The Indian Experience, Vol. 6, WASH. U. J. L. & POL'Y, 88-89 (2001).

[130] Dr. Ashwani Kumar v. Union of India, 2019 S.C.C. OnLine S.C. 1144.

[131] *Id*., ¶ 26.

[132] *Id*.

will provide the final judgment after a personal patient assessment.[133] This tripartite approach aimed to regulate decision-making about discontinuing life-sustaining treatment. Nevertheless, the method was deemed excessively intricate, time-consuming, and unworkable.[134] As a result, amendments were solicited to improve the regulations' applicability, leading to their alteration by a panel of five judges.[135] This incident demonstrates that judicial participation in legislative or administrative matters, despite good intentions, may encounter significant practical challenges.[136] Yash Sinha asserts that the broadening scope of judicial review and the Rajya Sabha's failure to fulfil its constitutional duties have led to a condition called *"Constitutional Dysfunctionalism*."[137] This term signifies a situation when an institution either fails to fulfil its core obligations within established boundaries or significantly alters its operations.[138]

Sinha contends that the diminishing authority of the Rajya Sabha has compromised its role as a counter-majoritarian protection against the legislative and executive branches, hence allowing the judiciary to expand its power in constitutionally inappropriate ways.[139] In doing so, the judiciary encroaches upon the responsibilities of the legislative and executive branches, doing functions that these representative entities should handle.[140] Judicial activism has clearly become a crucial element in the functioning of constitutional courts. It is essential to differentiate judicial activism from judicial governance. Judicial activism should be confined to the judicial process and avoid intruding into the spheres allocated to the legislature or executive.[141] The Supreme Court has emphasised that judicial restraint respects the other co-equal branches of government, aiming to reduce unjustified involvement and maintain stability,

[133] *Id*., ¶ 29; V.K. Naswa v. Union of India, (2012) 2 S.C.C. 542; Divisional Manager, Aravali Golf Club v. Chander Hass, (2008) 1 S.C.C. 683, ¶ 39; Aileen Kavanagh, Judicial Restraint in the Pursuit of Justice, Vol. 60, UTLJ, 23 (2009).
[134] *Id*., ¶ 13; Asif Hameed v. State of J&K, (1989) Supp. (2) S.C.C. 364, ¶ 18.
[135] Nafiz Ahmed, The Intrinsically Uncertain Doctrine of Basic Structure, Vol. 14, WASH. U. JURISPRUDENCE REV. 307 (2022).
[136] Sathe, supra note 128, at 89.
[137] Hardik Choubey*, Guest Post: Constitutionally Obligatory Judicial Legislation*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, May 6, 2023, https://indconlawphil.wordpress.com/2023/05/06/guest-post-constitutionally-obligatory-judicial-legislation/ (last visited July 16, 2023).
[138] Common Cause v. Union of India, (2018) 5 S.C.C. 1.
[139] *Id*., ¶¶ 198-200.
[140] 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, Jan. 18, 2023, https://www.livelaw.in/top-stories/passive-euthanasia-doctors-body-tells-supreme-court-about-practical-difficulties-in-living-will-guidelines-219327 (last visited July 12, 2023).
[141] Common Cause v. Union of India, (2023) 10 S.C.C. 321.

in contrast to the unpredictable outcomes of judicial activism.[142] In *Ashwani Kumar*,[143] The Court refused to compel Parliament to enact distinct legislation concerning custodial torture.[144] In "*Divisional Manager, Aravali Golf Club v. Chander Hass."*[145] The Court concluded that it did not possess the jurisdiction to compel the creation of positions, a duty assigned to the legislative or executive branches.[146] Judges should refrain from assuming governing powers.[147] Judicial encroachments often provoke responses from other branches, which may seek to limit the power and independence of the court.[148] Nevertheless, the diminishment of judicial constraint has surfaced as a concerning trend, with judicial overreach being justified as judicial activism.[149] The objective is to provide a balanced approach that guides the higher judiciary while preserving constitutional consistency.[150] Achieving this equilibrium may, in reality, be less intricate than it appears.[151]

4. Beyond The Binary: Advancing The Cause of Same-Sex Marriages In India Through The Basic Structure Doctrine and Dialogic Constitutionalism

Social reality often shows a complicated mix of oppositions: some social changes, like solo gamy and cohabitation, are progressively embraced while others, like the ongoing debate on same-sex marriage, inspire strong moral or conservative opposition.[152] Recently, Supriya Chakraborty brought this problem before the Supreme Court. Under the terms of the Special Marriage Act (SMA) of 1954, the Hindu Marriage Act of 1955, and the Foreign Marriage Act of 1969, the petitioners fervently argued for the legal acceptance of weddings between any two persons, regardless of their sexual orientation or gender identification.[153] The petitioners said that members of the LGBTQIA+ community have an inherent "*right to marry*," so challenging the constitutionality of Section 4(c) of the SMA, which limits marriage to a "*male*" and a "*female*." They claimed that this clause discriminates against same-sex couples and ought to

[142] Yash Sinha, Constitutional Dysfunctionalism, Vol. 14(4), NUJS L. REV. (2021).
[143] *Id.,* at 25; JACK M. BALKIN & SANFORD LEVINSON, DEMOCRACY AND DYSFUNCTION 139-151 (University of Chicago Press, 2019).
[144] Sinha, supra note 142, at 3.
[145] Divisional Manager, Aravali Golf Club v. Chander Hass, (2008) 1 S.C.C. 683, ¶ 33.
[146] Sathe, supra note 128, at 106.
[147] *Id.*
[148] Dr. Ashwani Kumar v. Union of India, 2019 S.C.C. OnLine S.C. 1144, ¶ 42.
[149] Divisional Manager, Aravali Golf Club v. Chander Hass, (2008) 1 S.C.C. 683.
[150] *Id*., ¶ 20.
[151] *Id.,* ¶ 34
[152] *Plea for Marriage Equality*, SUPREME COURT OBSERVER, July 5, 2023, https://www.scobserver.in/cases/plea-for-marriage-equality/ (last visited July 13, 2023).
[153] See *Transcript*, May 3, 2023, supra note 28, at 25.

be considered unconstitutional. Whether members of the LGBTQ+ community have the right to marry under the current legal framework, and if so, whether the Supreme Court could declare this right confirmed, was the main issue before it. The responders stated three main reasons.[154] Initially, they argued that recognising same-sex marriages, which were not specifically covered by the SMA, would force the Supreme Court to interpret the law in a way that adds a completely different and foreign objective, therefore radically changing the legislation. The respondents then begged the court not to implement societal changes based just on court rulings. The respondents said that society has to participate actively in the debate and decision-making process when advocating for a legislative modification with major social consequences. Moreover, they supported Justice Robert's dissenting view in *Obergefell v. Hodges*, arguing that any change on this matter should come from the government through legislative debate and laws.[155] They contended that a court ruling on this issue would violate the Basic Structure of the Constitution, Democracy, and Separation of Powers, therefore invading the legislative domain.[156]

The respondents revealed great concerns about the likely degradation of democratic and political procedures. The petitioners were seen as attempting to "*accomplish through the judiciary what they could not secure in Parliament*." The third point put out by the respondents was thoroughly analysed in the previous sections of the discourse, therefore supporting their great relevance.[157] To be clear, the present study assumes that the court will decide in favour of the petitioners in this regard; it does not seek to prove the presence of the right to marital equality in this instance.[158] This assumption drives the study to show that the Supreme Court in *Supriya Chakraborty* might use a cautious approach in offering a remedy.[159] This would cover investigating several possible answers.[160] First, at "*station one*," the court might agree with the petitioners, noting a constitutional right to marital equality, and then read the Special Marriage Act's (SMA) requirements to cover this right. Second, at "*station two*," the court

[154] *Id*., at 43-44, 35-36.
[155] *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Supreme Court of the U.S.A.).
[156] See *Transcript of WP (Civil) 1011 of 2022 Hearing dated 09.05.2023*, May 9, 2023, at 58-60, https://main.sci.gov.in/pdf/LU/15052023_111059.pdf (last visited July 16, 2023); *Transcript*, May 3, 2023, supra note 28, at 37-38.
[157] Karpuram & Spandana, supra note 28; *Transcript*, May 3, 2023, supra note 28, at 29, 35, 37.
[158] See generally Akshat Agarwal, *Marriage Equality at the Doors of the Indian Supreme Court*, VERFASSUNGSBLOG, May 24, 2023, https://verfassungsblog.de/marriage-equality-at-the-doors-of-the-indian-supreme-court/ (last visited July 12, 2023).
[159] *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.
[160] *Dr. Ashwani Kumar v. Union of India*, 2019 SCC Online SC 1144, ¶ 29.

might consider publishing thorough guidelines or policies about LGBTQIA+ family law. Until Parliament passes appropriate legislation, this approach would temporarily fill in the statutory hole. This strategy fits the court's usual approach; however, it could be seen as audacious, perhaps violating the Separation of Powers principle and compromising the Constitution's Basic Structure.

The *Ashwani Kumar*[161] court decided that only exceptional circumstances in which abuses of Fundamental Rights are so severe that they exceed issues of the Separation of Powers should be the basis for the issuing of guidelines. *Vishakha* is a prime example of such an extraordinary situation; the court intervened to protect women's Fundamental Rights to work with dignity and to fight occupational sexual harassment. In this case, convincing the court that similar unexpected events are present could prove somewhat difficult. Moreover, the Supreme Court rightly underlined in *Common Cause v. Union of India* that a strong sense of the need for legislation does not by itself justify court overreach.[162] Judges have to refrain from developing fresh legal doctrines based on personal beliefs, particularly in cases when legislators or society are divided on the matter.[163] The court may choose station three in the next step, so as to respect the right of the LGBTQIA+ community to be married, and so assigning the burden of developing and implementing the necessary laws to Parliament and the Executive.[164] This strategy runs the danger of widening the right-remedy gap and might not work against Executive opposition. As so, it might provide petitioners a "*toothless fundamental right*," whose execution may be hampered by challenges from both the Legislature and the Executive.[165]

In the last phase, station four presents the idea of the suspended declaration of invalidity[166], whereby the court recognises a law's constitutional violation yet permits its continuous execution for a designated period.[167] This interval allows the political branches to rectify the

[161] 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.
[162] *Common Cause v. Union of India*, (2017) 7 SCC 158.
[163] Id., ¶ 18.
[164] See generally Mihika Poddar & Bhavya Nahar, '*Continuing Mandamus*' – A Judicial Innovation to Bridge the Right-Remedy Gap, Vol. 10(3), NUJS L. REV., (2017).
[165] See *SAMPAT JAIN, PUBLIC INTEREST LITIGATION* 342 (Deep & Deep Publications Pvt. Ltd., 2002); Id., at 559.
[166] See Id., at 561.
[167] See *Transcript*, May 3, 2023, supra note 28, at 11-12; See also Aishwarya Singh et al., *A Pathway for the Supreme Court in Ensuring Marriage Equality*, THE WIRE, April 18, 2023, https://thewire.in/law/a-pathway-for-the-supreme-court-in-ensuring-marriage-equality (last visited July 13, 2023); Hari Kartik Ramesh, *The Equal Marriage Case and a Suspended Declaration of Invalidity*, INDIAN CONSTITUTIONAL LAW AND

law, and should they neglect to do so, the court's directive is automatically enacted. Two main issues are thus generated. It first lacks a basis in Indian constitutional practice.[168] Though they can be supported by instances from many domestic and international cases, these usually do not directly address infringement of fundamental rights. Moreover, the cures in both situations clearly come from their distinct constitutions, a feature absent in the Indian setting.[169] Second, this system is still developing with great challenges, even with a thorough understanding. Concerns include ongoing abuses of Fundamental Rights during the suspension period, possible underestimating of the time needed for legislative action, and the possibility of inadequate remedies should a too long delay.[170] This strategy could thus lead to a longer period of ambiguity, thereby unresolved the problem. The previous speech shows the Supreme Court's situation when every viable solution to the problem has inherent drawbacks.[171] The court has to use caution to stop the validation of judicial intrusion into the legislative and executive branches, given the divisive character of the matter. Finding a fair conclusion that preserves the Separation of Powers and provides a suitable and pragmatic fix for the petitioners is absolutely essential.[172] Resolving this difficulty requires the application of the Basic Structure concept to Judicial Review, a unique but successful approach within India's constitutional framework.

The Basic Structure approach achieves three main goals. First of all, it warns the higher Judiciary that, even if it is the custodian and creator of the idea, it has to use prudence to prevent weakening it by unbridled invasions into other political agencies.[173] According to the theory, any court decision invading the legislative or executive spheres would violate the separation of powers and compromise the Basic Structure of the Constitution. Although a basic component

PHILOSOPHY, May 4, 2023, https://indconlawphil.wordpress.com/2023/05/04/guest-post-the-equal-marriage-case-and-a-suspended-declaration-of-invalidity/ (last visited July 14, 2023).

[168] *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).

[169] 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).

[170] Singh, supra note 171; Ramesh, supra note 171.

[171] *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.

[172] *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).

[173] 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).

of the Basic Structure, judicial review should not be used in a way that compromises other essential characteristics, particularly the division of powers.[174] Declaring that the court's authority is limited, this clearly sets a clear limit on the active participation of the court, therefore preserving the separation of powers beyond its constraints. Second, as already mentioned, the key Supreme Court decisions cautioning against judicial overreach have sadly been rendered useless, more than just rhetoric with no real result.[175] Lack of an active constraint on the Supreme Court's authority enables the court to use discretion in following or rejecting decisions depending on the specific facts and circumstances involved. The absence of a legally enforceable limit reduces these decisions' pragmatic impact, depriving the judicial branch of clear control over its excesses.[176] Using the Basic Structure theory in judicial review offers a great chance to establish necessary consistency and limitations in court decision-making, therefore preserving the precedential importance of important verdicts.[177] The development of the theory satisfies a third important goal: promoting equality among the three arms of government, a notion the Supreme Court often emphasises.[178] This begs a fundamental issue: why should the doctrine not likewise reduce court overreach if it can sufficiently control the excesses of the Legislature and the Executive? In this sense, the constitutional protection of the Basic Structure offsets the power of Judicial Review.

Starting this shift, the Supreme Court must first accept the application of the Basic Structure theory to judicial review, reflecting how it first adopted the concept, via a forceful and unambiguous judicial proclamation. In this regard, one should pay attention to the Supreme Court's opinions in *Rupa Ashok Hurra v. Ashok Hurra*.[179] In this instance, the court declared that since the higher Judiciary is covered under Article 12 and writs of certiorari cannot be issued to coordinate or superior courts, including High Courts, as they *"are not constituted as inferior courts in our constitutional framework*."[180] Therefore, it is suggested that under Articles 132, 133, 134, 136, and 137 of the Constitution, the Supreme Court should exercise its appellate and review power to adjudicate any objections to judicial decisions premised on infringements of the Basic Structure.[181] By including the Basic Structure theory in Judicial

[174] See *Blake v. A.G.*, [1982] I.R. 117, 141-142 (Supreme Court of Ireland).
[175] Robert Leckey, *Assisted Dying, Suspended Declarations, and Dialogue's Time*, Vol. 69, UTLJ, 64-65 (2019).
[176] See *Carter v. Canada (Attorney-General)*, [2015] 1 SCR 331 (Supreme Court of Canada).
[177] *Divisional Manager, Aravali Golf Club v. Chander Hass*, (2008) 1 SCC 683, ¶ 33.
[178] See Prateek, supra note 23, 476-477; *Janhit Abhiyan v. Union of India*, 2022 SCC Online SC 1540, ¶ 395.
[179] *Rupa Ashok Hurra v. Ashok Hurra*, (2002) 4 SCC 388.
[180] Id., ¶ 7.
[181] Id.

Review, Constitutional Courts are supposed to use their authority from the start with more understanding and care.[182] The other two branches of government—the Legislature and the Executive—also have a great need to voice worries about court decisions during appeal or review procedures violating the Basic Structure.[183] This approach ensures a fair interaction among the three co-equal components of government, therefore enhancing the necessary function of checks and balances within the Separation of Powers system.[184] Through strengthening the constitutional framework, dialogic constitutionalism supports the Basic Structure theory.[185] It not only solves the differences in suitable treatments but also helps to reduce administrative and legislative inefficiencies.[186] Abeyratne and Misri have effectively highlighted that a dialogic review involves a collaborative approach between the branches of government, aiming to resolve constitutional issues by using the strengths of each organ while mitigating their weaknesses.[187]

Under this model, courts play a crucial role in identifying rights violations, but allow the other branches to propose and implement suitable remedies.[188] This approach advances democratic principles by promoting constitutional collaboration and balancing powers[189], and helps prevent courts from being seen as unduly counter-majoritarian.190 In essence, dialogic constitutionalism is "*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*."[190] This model advocates for deliberative democracy[191], equality among the branches of government, and inclusivity from various stakeholders.[192] First recognized in Canada,[193] dialogic

[182] 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).
[183] Abeyratne & Misri, supra note 120, at 377.
[184] Id.
[185] ALISON L YOUNG, *DEMOCRATIC DIALOGUE AND THE CONSTITUTION*, 115-116, 160, 171 (Oxford University Press, 2017).
[186] Abeyratne & Misri, supra note 120, at 377.
[187] Roberto Gargarella, *Scope and Limits of Dialogic Constitutionalism* in *DEMOCRATIZING CONSTITUTIONAL LAW: PERSPECTIVES ON LEGAL THEORY AND THE LEGITIMACY OF CONSTITUTIONALISM*, 119, 122 (2016).
[188] Id., at 122-123.
[189] 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).
[190] YOUNG, supra note 189, at 3; See e.g., *The Human Rights Act 1998* (the U.K.); *New Zealand Bill of Rights Act 1992* (New Zealand).
[191] *Vishakha v. State of Rajasthan*, (1997) 6 SCC 241, ¶ 9.
[192] *Common Cause v. Union of India*, (2023) 10 SCC 321, ¶ 5.
[193] Id.

constitutionalism has since gained global traction.[194] The concept of dialogic constitutionalism has had different degrees of acceptance in India, from overt affirmations to implicit acknowledgement.[195] One notable event is the Supreme Court's ruling in *Vishakha*, which combined dialogical elements, since the Union of India approved the rules through its solicitor general. Similarly, the court stated that it would usually not have considered such an application when it changed its previous instructions on passive euthanasia, therefore highlighting dialogic aspects in its approach.[196]

After several meetings, the Union changed its stance to allow particular adjustments requested by the applicants. This development highlights the growing inclination of the Legislature to withdraw and let the "*wisdom of the court*" handle issues it prefers to avoid instead of claiming legislative authority.[197] Moreover, the Supreme Court developed the concept of "*dialogic jurisdiction*" in the second wave of the COVID-19 outbreak. This approach was developed to provide a stage for several parties to voice constitutional concerns about pandemic control. It also allowed talks on its policies with the executive.[198] Under Chief Justice D.Y. Chandrachud, the Supreme Court especially embraced this creative approach in the case of *Gujarat Urja Vikas Nigam Limited v. Amit Gupta*. In this case, the court first acknowledged at first the lack of a clear legal stance regarding the legality of ipso facto clauses in India.[199] The court underlined that the separation of powers is a basic element of the Constitution and that judicial participation in this regard would raise complex issues, especially considering its consequences on many contracts with such clauses.[200] Therefore, the court decided it would "*appeal in*

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[194] 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.

[195] See, e.g., *Navtej Singh Johar v. Union of India*, (2018) 1 SCC 791, ¶ 36.

[196] *In Re: Distribution of Essential Supplies and Services During Pandemic*, (2021) SCC OnLine SC 411, ¶ 17.

[197] Id.

[198] See generally Debmalya Banerjee & Vardaan Wanchoo, *India; The Advent of Dialogic Jurisdiction*, MONDAQ, July 8, 2021, https://www.mondaq.com/india/constitutional--administrative-law/1089102/the-advent-of-dialogic-jurisdiction (last visited 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, https://indconlawphil.wordpress.com/2021/06/03/coronavirus-and-the-constitution-xxxvii-dialogic-review-and-the-supreme-court-2/ (last visited 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, https://indconlawphil.wordpress.com/2020/05/24/coronavirus-and-the-constitution-xxviii-dialogic-judicial-review-in-the-gujarat-and-karnataka-high-courts/ (last visited 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, 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 July 15, 2023).

[199] *Gujarat Urja Vikas Nigam Limited v. Amit Gupta*, (2021) 7 SCC 209.

[200] Id., ¶ 141.

earnest to the legislature to provide concrete guidance on this issue," rather than completely resolving the matter.[201] The court underlined the need for "*dialogical remedies*" and noted that the Judiciary might apply a "*workable formula*" and let the Legislature create a complete remedy instead of presuming the Legislature's obligations or inaction.[202] The court consulted S. The case of *Sukumar v. ICAI* shows the advice for the Union to create a committee of specialists to look into the situation and enable talks with all relevant parties. By encouraging inter-institutional communication, the court found at last that it had "*the middle path between abdication and usurpation*."[203]

Though playing a dialogical role, the constitutional courts function more as "*mediators with power*" than as traditional adjudicators. Their purpose is to help the conflicting parties come to an agreement while keeping their power to legally execute a verdict upon demand.[204] When the court notes the rights of the petitioners but decides that the best remedy calls for the cooperative efforts of all arms of government to maintain the balance of separation of powers, this approach is particularly useful.[205]

By means of the procedural innovation of "*continuous mandamus*," which lets a case remain open without a definitive ruling, the Judiciary can encourage an ongoing conversation with all relevant parties while simultaneously allowing a case to remain open. As Poddar and Nahar point out, continuing mandamus provides a means for the court to compel "*public opinion sensitive governments*" to overcome inertia, so improving constitutional cooperation among all main players in cases when a declaratory or mandatory judgment would have limited effect. Given the inherent limitations of traditional treatments available to the Supreme Court in the Supriya Chakraborty case, a bifurcated strategy seems to be the best line of action.[206] The court can carefully handle this by combining the Basic Structure idea in judicial review with dialogical remedies. Examining the respondent's core structural violations under the framework of the Separation of Powers would help the court to strategically widen the applicability of the doctrine by addressing her issues.[207] The court can justify its decision to refrain from judicially reinterpreting the Special Marriage Act (SMA) or offering thorough

[201] Id., ¶ 142.
[202] Id., ¶¶ 145-148.
[203] Id., ¶ 149.
[204] Id., ¶ 179.
[205] Id., ¶ 181.
[206] *S. Sukumar v. ICAI*, (2018) 14 SCC 360.
[207] Id., ¶ 53.

instructions on the matter by realising a clear and unquestionable limit to its power.[208] The issue offers a unique chance for cooperation among the many agencies of government and lays the basis for an ideal constitutional debate.

Following deliberations with several union ministries, Solicitor General Supriya Chakraborty told the bench at the May 3, 2023, hearing that a proposal comprising a committee headed by a cabinet secretary had been put forward. Administrative changes aiming at addressing the issues raised by the petitioners will be handled by this committee.[209] Chief Justice D.Y. Chandrachud, representing the bench, asked in his capacity as a mediator that the petitioners send a list of problems the committee ought to review. The bench underlined that, based on Union's filings, there appeared to be recognition of the LGBTQIA+ community's right to cohabitate, so helping to further convince the petitioners who were not entirely supportive of the idea.[210] The committee would then focus on attending to pragmatic issues related to housing, insurance, banking, and similar subjects.[211] The bench further advised the petitioners that, although the issue of the right to marry under the Special Marriage Act (SMA) remains to be decided, a mere declaration of this right would be inadequate without a comprehensive statutory and regulatory framework.[212] The Legislative and the Executive respectively control this structure. As so, the petitioners were advised to assess the Union's offer rather than take a "*all or nothing*" posture.[213] Moreover, the bench underlined the need for a slow approach, suggesting that although the present situation might not give the petitioners any clear benefits right now, it could serve as a "*building block*" for future developments with the court helping the process of small changes.[214] The court in Supriya Chakraborty has admitted its limitations and worked to reach a just conclusion by means of discussion and cooperation, therefore avoiding the imposition of remedies on other spheres of government.[215] According to the court's approach, while allowing Parliament to reflect on the matter, it is more likely to efficiently enable the petitioners' participation in talks with the Union by means of the

[208] *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).
[209] *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).
[210] See Poddar & Nahar, supra note 168, at 606.
[211] RÍOS-FIGUEROA, supra note 213, at 24.
[212] See Poddar & Nahar, supra note 168, at 608.
[213] Id., at 606.
[214] See *Transcript*, May 3, 2023, supra note 28, at 2.
[215] Id.

proposed committee, if prudence guides its activities.[216] This process could produce a solution that maintains constitutional balance and balances the interests of all the parties.[217]

5. Conclusion

Through creative formulation of remedies via judicial lawmaking and policymaking, the Judiciary has expanded the boundaries of Judicial Review. Still, these activities could upset the delicate balance of the Separation of Powers, therefore affecting the Basic Structure as already noted. Given that the Judiciary protects its own authority by self-restraint, applying the Basic Structure idea in connection with Judicial Review seems to be the most efficient approach. This approach is practical since the Supreme Court has already shown the flexibility of the doctrine, allowing it to operate as a separate type of Judicial Review over normal legislation and Executive acts. The Supreme Court challenges itself in negotiating the Separation of Powers in Supriya Chakraborty. A declaration cannot allow the court to enter the Legislative sphere. The Basic Structure hypothesis must include Judicial Review to preserve Constitutional harmony and equilibrium, ensuring consistency and defining clear limits, and providing guidance for later courts. Furthermore, dialogic constitutionalism offers a means to realize the right to marriage of the petitioners, therefore converting abstract rights into practical outcomes. The Supreme Court has gradually embraced dialogical remedies, therefore giving petitioners an efficient remedy while maintaining the fundamental Separation of Powers principle. Strongly supporting Dialogic Judicial Review, Chief Justice D.Y. Chandrachud has said that it has the ability to produce sensible remedies advancing unity. Critics argue that the lack of visibility of the LGBTQIA+ community in legislative venues, combined with the predominance of majoritarian ideas in institutions like Parliament, limits their ability to solve problems of this oppressed group. Although the Supreme Court can uphold the right to marry for the LGBTQIA+ population, critics have to admit that the actualization of that right mostly depends on the acts of the Legislature and the Executive.

The bench in Supriya Chakraborty noted that the gradual acceptance of marital equality encourages great public debate, therefore preventing a conflict between law and society. This incremental approach guarantees that the increase of rights is steady and strong, therefore reducing their sensitivity to future retraction and allowing public opinion to adjust to significant

[216] See *Transcript*, May 3, 2023, supra note 28, at 5.
[217] Id., at 5, 9, 11, 12.

social changes. Reva Siegel has pointed out that the Obergefell decision of the U.S. Supreme Court reflected not only shifting public opinion. In 1929, the dispute among the judges greatly shaped public opinion and created fresh "*constitutional interpretations*." Therefore, conflict can be good; the resolution of such issues not only reflects public opinion but also shapes it. As seen in *NALSA v. Union of India*, with fifty-three per cent of adult Indians now supporting the legalisation of same-sex weddings, popular opinions of the LGBTQIA+ community have fundamentally changed in the present instance of Supriya Chakraborty. This case presents the Supreme Court with a great opportunity to start its slow development, therefore laying a basis for later court decisions. Incrementalism does not define slow development; rather, a succession of events can help the law evolve in a few years rather than over decades. In essence, the suggested strategy serves as a guiding concept for constitutional courts handling difficult problems rather than a perfect solution. Maintaining the Separation of Powers helps to protect the Basic Structure and guarantees that fundamental rights remain operational simultaneously. The Judiciary can uphold its respect for the Separation of Powers while safeguarding a society aiming for social justice by including the Basic Structure theory into Judicial Review and using dialogical remedies. The real strength of the Judiciary in trying circumstances is the cooperative synergy of the three branches of government, not in unbridled power.