Dealing with Dialogue: The (Mis)Application of Dialogic Judicial Review in India & Comparative Constitutional Dialogue

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ABSTRACT

The thesis attempts to put forward a pragmatic understanding of dialogue theory in order to understand the relationship that the three branches can share with each other. It aims to highlight and clear the confusion stemming from the two diametrically opposite understandings of dialogue among academics and Courts, wherein Courts with a relatively weaker form of judicial review use the dialogue metaphor in its 'original understanding,' i.e., a constitutional dialogue between the Courts and the legislatures wherein the legislature usually has the final say in constitutional issues and the Courts, therefore, provide sufficient political and legal leeway to the political branches to come up with their own interpretative decisions even if it means overriding the judgement of the judiciary, whereas strong and active Courts in jurisdictions with strong-form judicial review use dialogue, usually in cases related to socio-economic rights, to garner more powers when it comes to policy matters. The thesis differentiates the two approaches by terming the latter '*dialogic jurisdiction*' and argues for the Courts to use it in a constrained manner. The thesis then makes an argument for rationalizing a form of '*constructive constitutional dialogue*' in a strong-form review country like India by highlighting that it has the normative potential to protect the rights of the citizens in a better manner and in a way which is digestible and palatable to both legal as well as political constitutionalists. In doing so, it engages in a discussion of the kind of experiences different jurisdictions, like Canada and several East-Asian countries, have had with constitutional dialogue. It also looks at same-sex marriage legalization in different jurisdictions to argue how constitutional dialogue can enhance the rights of the citizens in a manner that has both judicial backing and a democratic mandate. Therefore, the thesis argues for a culture of constructive constitutional dialogue in strong-form review systems by looking at how it can be realized in a Juristocratic country like India.

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All errors remain mine.

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I. INTRODUCTION

"[J]udges device catch-phrases devoid of legal meaning in order to describe concepts which they are unwilling or unable to define."[1]

The 'dialogue' theory to understand the judiciary-executive-legislative relationship has, over the years, witnessed many academics and judges burning the midnight oil trying to make sense of it. They have tried using the dialogic metaphor in their own way and according to their own understanding of what constitutes a 'dialogue' in order to describe the relationship that the three branches can share. However, courts (and academics) across the world, picking up from the catch-phrase of dialogue originally coined by academics, have used it in two *diametrically opposite ways*. Courts in jurisdictions with a relatively weaker form of judicial review have used the dialogue metaphor in its 'original understanding' for which it was coined, i.e., a constitutional dialogue between the Courts and the legislatures wherein the legislature usually has the final say in constitutional issues and the Courts, therefore, provide sufficient political and legal leeway to the political branches to come up with their own interpretative decisions even if it means overriding the judgement of the judiciary. Strong and active Courts in jurisdictions with strong-form judicial review, on the other hand, have used dialogue, usually in cases related to socio-economic rights, to garner more powers when it comes to policy matters. Dialogue has been used to justify an oversight mechanism in order to ensure compliance with court orders by state agencies in an endeavour to come up with the best policy solutions within the four walls of the courtroom.

[1] Lord Sumption, 'Anxious Scrutiny', Lecture at the Administrative Law Bar Association Annual Lecture (Nov. 4, 2014) 1. (transcript available at https://www.supremecourt.uk/docs/speech-141104.pdf)

This thesis investigates the experience of the Indian judiciary with the dialogic theory of judicial review and looks at the above-mentioned two differing approaches from a comparative perspective. It aims to fill in an academic gap in research related to comparative constitutional dialogue and argues that Courts can use the dialogue metaphor in two distinct ways depending on the jurisprudential and jurisdictional context. The thesis aims to kickstart a more *pragmatic understanding of the dialogue theory* in a way which can be rationalized by jurisdictions with varying standards of judicial review and take care of most of the criticism levied against it by eliminating the obvious confusion that stems from the two differing approaches having their roots in the same word ~ 'dialogue'. The thesis first attempts to cut the clutter in how academics and the courts have used the dialogic metaphor to act in two different ways. The thesis attempts to clear out the confusion regarding the metaphor dialogue by using correct terminology so that it provides guidance to not just the academics but also the Courts as well as to when they can employ the dialogue metaphor depending upon the fact-specific situation. It argues that how strong courts' use of dialogue in socio-economic rights rulings ('SERs') is best described as *dialogic jurisdiction* and is not the same as constitutional dialogue as commonly understood.

This thesis looks at the applicability of 'dialogic judicial review' in India in light of these two different approaches and interpretations regarding the metaphor 'dialogue' and attempts to rationalize a theory of dialogic judicial review which is palatable to both legal constitutionalists and political constitutionalists. Starting from the recent use of dialogue by the Supreme Court of India[2] to *self-empower* itself to act as an oversight institution on policy matters, the thesis looks at how the Court *has* dealt with dialogue and aims to provide a framework on how the Courts *should* deal with dialogue. It argues that the Court's usurpation of executive and legislative powers under the garb of dialogue in strong-form review systems is bound to create

[2] Hereinafter, 'SCI', 'the Court' or 'the Supreme Court'.

and has created significant tensions between the three branches. However, *dialogic jurisdiction*, even though prone to misuse by the Courts, can help the last-mile delivery of socio-economic rights at the doorsteps of the citizens by engaging in a dialogue with the executive. Therefore, the thesis makes a case for a *constrained* use of this dialogic jurisdiction. In contrast, however, the thesis also argues that when it comes to adjudicating upon issues involving serious legal, social, political and moral disagreement in society, the Courts, even in strong form review systems like India, should make use of 'constitutional dialogue' and give the legislature sufficient legislative and political leeway to respond to judicial decisions.

Using this as a starting point, the thesis aims to make a radical argument on having a robust system of 'constitutional dialogue' (the classical kind) in place between the different branches and attempts to theorize this constitutional dialogue in actual terms within the Indian constitutional and political context. Therefore, the departure point of the Indian Courts rendezvous with the metaphor 'dialogue' becomes crucial as it sets the ground for some context to the main argument that the thesis seeks to propose ~ *a system of constructive constitutional dialogue, if done right, with honest intentions & good-faith on the part of the different branches involved, can work in the Indian context to further entrench individual rights and help in a liberal and democratic understanding of the Constitution*. In other words, the thesis highlights the normative value of applying an inter-branch constitutional 'dialogue' model in India to better understand and protect rights[3] without weakening either the power of judicial review in India or disrespecting the democratic mandate. Therefore, I do not focus on the much-talked-about 'final-say' or 'last-word' debate in understanding constitutional dialogue but rather look

[3] See ALISON L. YOUNG, DEMOCRATIC DIALOGUE AND THE CONSTITUTION 31 (OUP 2017); For this argument in the context of supranational courts in Europe See Mark Dawson, *Constitutional Dialogue between Courts and Legislatures in the European Union: Prospects and Limits*, 19(2) EUR. PUB. L. 369 (2013); Matilda Gillis, *Can We Talk? The Application of the Public Law Democratic Dialogue Model to the Interactions between Domestic Legislatures and the European Courts*, 23(1) GERM. L. JOUR. 56 (2022)

at the *positive* normative potential it holds in rights enhancement. To not get into the last word debate is a conscious choice because, as Pitkin has said, "*no one has the last word because there is no last word*."[4]

I.I – Setting up the Context: Indian Courts and Their Experiments with 'Dialogue'

The concept of *'dialogic judicial review*' saw its entry into Indian jurisprudence when the Indian Courts during the COVID-19 pandemic called upon the executive to justify their policy choices related to the management of the pandemic in an open court. This '*implied*' dialogic jurisdiction taken by several High Courts in India was to be given an 'explicit' and definitive stamp of approval by SCI in April 2021 when, at the height of the disastrous second wave of the COVID-19 pandemic in India, it took upon itself to deal with matters pertaining to the *distribution of essential supplies and services during the pandemic* in light of the unprecedented humanitarian crisis ('essential supplies case'). The subject matter of this 'non-adversarial litigation' related to the supply of oxygen, essential drugs, the vaccination policy and the declaration of lockdowns. Much like other strong courts across the world, SCI used the dialogue theory in a manner that reinforced the self-empowerment of the Courts in policy issues dealing with socio-economic rights. Therefore, the metaphor 'dialogue' in this sense did not imply a conversation between the branches on the scope and limitations of constitutional rights as commonly understood, but instead, it made the judicial forum a site of 'dialogue' between relevant stakeholders, wherein the executive was called upon to explain its policies.

[4] Hannah Pitkin, *Obligation and Consent – II*, 60(1) AMER. POL. SCI. REV. 39, 52 (1960).

I.I.I – No Deference To Dialogue: Dialogic Judicial Review In India Pre-Essential Supplies Case

Before the *essential supplies* case, the Indian courts were suspicious of incorporating dialogic judicial review in India by *specifically* using the dialogic metaphor. No deference was given to incorporate in explicit terms a dialogic understanding of judicial review. The courts were sceptical of venturing into a standard of judicial review that had to be necessarily spelt out as dialogic in nature. Several High Court decisions succinctly convey the sceptical sentiments that Indian Courts held with regard to engaging in a dialogic jurisdiction.[5]

The High Court of Uttarakhand, in *Vipul Jain v. State of Uttarakhand*[6], engaged in a deeper discussion on dialogic judicial review while dealing with a Public Interest Litigation ('PIL') related to electoral malpractices. This was crucial as the High Court, in the context of a PIL, had acknowledged what the SCI was later going to understand as 'dialogic judicial review' in the *essential supplies* case, i.e., the judiciary as a forum for activists to espouse social causes in larger interests and inviting responses from State actors to this effect.[7] However, it also provided an important caveat in doing so ~ *the Courts, in acting as this dialogic forum, must not forget the limits beyond which they could not carry this dialogue forward*.[8] A crucial caveat that the SCI had seemed to forget and disregard a few years later.

[5] In Re Government of Andhra Pradesh, 2010 SCC OnLine AP 940 ¶1 (Rao J.) wherein the Andhra Pradesh High Court had stated that the standard of judicial review in the case was of neither of strict scrutiny nor was it dialogic in nature; Deepak Grewal v. Union of India, 2013 SCC OnLine Del 3820 *Id.* at ¶13 (Nandrajog J.) wherein the Delhi High Court rejected a dialogic standard of judicial review.
[6] 2019 SCC OnLine Utt 1024
[7] *Id.* at ¶66 (Ranganathan J.)
[8] *Id.*

I.I.II – The *Essential Supplies* Case & The Introduction Of Dialogic Judicial Review In India:

The Indian Courts during the COVID-19 pandemic showed a very liberal front in taking over a dialogic jurisdiction when it came to executive policy decisions related to the management of the pandemic. For example, two orders given by the Gujarat and Karnataka High Courts, respectively[9], at the very beginning of the pandemic in May 2020, related to the condition of the medical care in the state and transportation of migrant workers during the lockdown were termed as examples '*par excellence*' of the Courts engaging in dialogic judicial review.[10] Similarly, another Bombay High Court order related to the capping of prices for crucial components like personal protective equipment ('PPEs'), surgical masks, N-95 masks, gloves and hand sanitisers[11] was termed as '*another clear example of how constitutional courts ought to engage in judicial review by setting up an effective dialogue with the executive*'.[12] These three High Court orders, which until now were only deemed (wrongfully if not mischievously) as examples of dialogic judicial review in India by some academics, opened the windows of what was to come later next year during the second wave of the pandemic in India ~ the explicit inclusion of dialogic judicial review in Indian jurisprudence by the Supreme Court.

According to one scholar, the conduct of SCI in the *essential supplies* case was the introduction of 'dialogic judicial review' at the doors of SCI[13] , wherein the judicial forum became a site of

[9] Suo Motu v. State of Gujarat, 2021 SCC OnLine Guj 798; Mohd. Arif Jameel v. Union of India, 2020 SCC OnLine Kar 448

[10] Gautam Bhatia, *Coronavirus and the Constitution – XXVIII: Dialogic Judicial Review in the Gujarat and Karnataka High Courts*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (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/

[11] Sucheta Dalal v. State of Maharashtra, PIL-CJ-LD-VC-5-2020

[12] Aakanksha Saxena, *Coronavirus and the Constitution – XXXIII: N-95 Masks and the Bombay High Court's Dialogic Judicial Review*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (Jun. 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/

[13] Gautam Bhatia, *Coronavirus and the Constitution – XXXV: Dialogic Judicial Review in the Supreme Court*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (Apr. 28, 2021)

dialogue between the Courts, citizens and the government, wherein the government is called upon to justify or explain various governmental decisions before the judges in an open court in which the 'important shortcomings' are revealed with regard to the decision-making process which then possesses the possibility to be 'corrected' at this judicial site.[14] SCI later, in its order dated 30.04.2021, borrowed (if not lifted) this interpretation and specifically mentioned in the order that the Court was merely facilitating a 'dialogue' between the relevant stakeholders and did not wish to usurp the role of the executive and the legislature and that this '*bounded-deliberative approach*' was being taken so that the governments could justify the rationale behind their policy approach[15] and the Court could serve its '*dialogic role*'.[16] This dialogic role of the Supreme Court was further entrenched in Indian jurisprudence when the Supreme Court, in *Distribution of Essential Supplies and Services During Pandemic, In Re,*[17] held that the Court had assumed a '*dialogic jurisdiction*' by providing a forum for various stakeholders to raise constitutional grievances regarding the management of the pandemic wherein the executive was to justify its existing policies in an open court judicial process.[18] Therefore, the Court developed a new jurisprudential concept by way of which it became an institution other than the parliament which could scrutinize public policies of the executive in an open court under the umbrella of a dialogic jurisdiction.[19] In *Surat Parsi Panchayat Board v. Union of India*[20] , SCI proudly stated that this particular case reflected the potential of the dialogic process of judicial review

https://indconlawphil.wordpress.com/2021/04/28/coronavirus-and-the-constitution-xxxv-dialogic-judicial-review-in-the-supreme-court/

[14] *Id.*

[15] In Re: Distribution of Essential Supplies and Services During Pandemic, 2021 SCC OnLine SC 355 ¶7 (Chandrachud J.)

[16] *Id.* at ¶75 (Chandrachud J.)

[17] (2021) 7 SCC 772

[18] *Id.* at ¶19 (Chandrachud J.); Followed by different High Courts of India in COVID-19 related cases – See Dr. Mohammad Ajazur Rahman v. Union of India, 2021 SCC OnLine Del 3759 ¶13 (Patel C.J.); Halvi K.S. v. Union of India, 2021 SCC OnLine Ker 9914 ¶53 (Manikumar C.J.); Sanil Narayanan v. State of Kerala 2021 SCC OnLine Ker 11608 ¶14 (Kumar J.); John Jose v. Union of India, 2021 SCC OnLine Ker 12486 ¶13 (Manikumar C.J.)

[19] Vijay Kumar Singh, *A Prologue – Contemporary Issues in Law and Policy – Ten Major Reflections from 2021*, 6 UPES L. REV. 1, 7

[20] (2022) 4 SCC 534

to provide effective solutions and acceptable outcomes that promoted harmony.[21] The Court has, therefore, effectively carved a mechanism of what it calls 'dialogic judicial review' wherein they can hold an inquiry into how the executive performs in policy issues and encroach upon a space wherein the executive officers function within a discretionary power, a jurisdiction which, more than 200 years ago, the majority in *Marbury* explicitly rejected.[22] The thesis tries to make sense of this dialogic mess that the Court, nudged by academics, has put itself into and tries to chart a course for how the Courts should use dialogue in future jurisprudence.

I.II – The 'Basic Structure' of the Thesis:

The thesis is divided into six sections. The *first* section of the thesis, which is the introduction, sets out the context of the main argument that the thesis proposes to make on constitutional dialogue in India. The *second* section looks at the origins of 'constitutional dialogue' as a concept and dives deep into Canadian constitutional law to derive how the Canadian Courts have used and evolved over time and the rationale behind such characterization. The *third* section attempts to cut the clutter in the understanding of dialogue by differentiating how stronger Courts with strong forms of judicial review use dialogue in socio-economic rights cases and how Courts with comparatively weaker versions of judicial review use dialogue as a mechanism to engage in a conversation with the legislature. This section also focuses on the dialogic jurisdiction that the Courts in India have used increasingly, and why this kind of 'dialogue' is prone to misuse as it is not 'dialogic' in the sense that it is not a dialogue among equals but judicial diktats to the executive or the legislature, however it still has the potential in giving life to socio-economic rulings. The *fourth* section deals with how constitutional dialogue is needed to protect a Court that is accustomed to playing the role of a *Juristocrat*.

[21] *Id.* at ¶9 (Chandrachud J.)
[22] Marbury v. Madison, 5. U.S. 137, 170

This section takes examples from several East Asian countries to highlight that constitutional dialogue can work for the betterment of individual rights, especially in a hostile political setting, without undermining the authority of the Court. The *fifth* section lays out the framework of constitutional dialogue in practice in India and draws a map as to how one can make this constitutional dialogue work in a strong-form review country like India by using the paintbrush of Indian constitutional law as it stands today. It uses case studies of same-sex marriage legalization in various countries and the use of intermediate remedies to show how constitutional dialogue can engage in rights enhancement. The final section concludes by making a call to the courts to use the dialogic metaphor more circumspectly and according to context-specific situations. It also urges the branches in India to engage in constructive constitutional dialogue for the betterment of citizens' rights.

II. THE ORIGINS: DIALOGIC JUDICIAL REVIEW & THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

It is crucial to understand what one means by the phrase 'dialogic judicial review', and therefore, it is important to locate its origins. The concept is often traced to originate from Canadian constitutional law and, more specifically, from the interplay of S.1 (the reasonable limitation exception) and S.33 (the notwithstanding clause) of the Canadian Charter of Rights and Freedoms.[23] S.33 provides a legislative override that allows the Canadian legislature to at least have an avenue to have the final say over and above a court ruling when it comes to rights determination and constitutional interpretation. For example, the Courts rule upon a state action by considering whether the breach of a guaranteed right under the Charter is justified under S.1 or not; however, S.33 acts as an '*explicit fail-safe provision*'[24] wherein the parliament would have the option to override the Court's decision and justify the breach by kicking in the override clause. Peter Hogg & Allison Bushell were the first ones to attach a value judgement to this process by using the metaphor 'dialogue' in understanding this back and forth between the Courts and the legislature because of the fact that a judicial decision is open to reversal, modification or avoidance by the Legislature.[25] Since then, the dialogic metaphor has clouded how not only academics but also Courts view their relationship with other branches. The Supreme Court of Canada ('SCC') in *Vriend v. Alberta*[26] has also accepted the dialogue metaphor to describe the legislative response to judicial decisions in this kind of a '*dynamic interaction among the branches of governance*.'.[27]

[23] See Mark Tushnet, *Dialogic Judicial Review*, 61 ARK. L. REV. 205 (2009)
[24] Carissima Mathen, *Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on "Charter Dialogue Revisited*, 45(1) OSG. HALL L. JOUR. 125, 138 (2007)
[25] 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)* 35(1) OSG. HALL L. JOUR. 205, 209 (1997)
[26] Vriend v. Alberta [1998] 1 S.C.R. 493
[27] *Id.* at 562-67.

II.I – The 'Dialogic' Experience in Canada between the Legislature and Judiciary

Perhaps the success story of constitutional dialogue is, in one way or another, exemplified by the Canadian experience. The possibility of a dialogue has placed both the legislature and the judiciary in a constitutional equilibrium wherein the decisions of both branches can be duly responded to. Of course, judicial review, in its essence, resembles that the Courts respond to the legislature (S.1), but by way of the inclusion of S.33, it also signifies that in Canada the legislature is also competent enough to respond to courts' decisions in an exercise of constitutional dialogue.

Peter Hogg & Allison Bushell's two-part empirical study reveals that legislative response to court decisions invalidating a law for breach of the Charter has been high, i.e., in a majority of the cases, the legislature chose to respond to the court decisions either by repealing the invalidated law completely or more often than not substituting the old law with a new law taking into account the court's decision.[28] Emmett Macfarlane argues that the fact that the legislature in most cases does not depart from the essence of the Court's rulings and, in this sense, does not 'override' the judgement of the Court suggests that there occurs little '*genuine dialogue'* and therefore in practice supports judicial supremacy.[29] Dialogue is often criticised as ostensibly ending up with judicial supremacy.[30] However, this seems to be a rather narrow approach to dialogue, suggesting that genuine dialogue exists *only* if there is some disagreement and if the legislature asserts its own interpretation, which goes against the

[28] See Hogg & Bushell, *supra* Note 25; Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, *Charter Dialogue Revisited: Or "Much Ado About Metaphors"*, 45(1) OSG. HALL L. JOUR. 1, 54 (2007) ("Hogg et al.")
[29] Emmett Macfarlane, *Dialogue or compliance? Measuring legislatures' policy responses to court rulings on rights*, 34(1) INT'L POL. SCI. REV. 39 (2012)
[30] See Ming-Sung Kuo, *Discovering Sovereignty in Dialogue: Is Judicial Dialogue the Answer to Constitutional Conflict in the Pluralist Legal Landscape*, 26(2) CAND. JOUR. L. & JURIS 341 (2013); Ming-Sung Kuo, *In the Shadow of Judicial Supremacy: Putting the Idea of Judicial Dialogue in Its Place*, 29(1) RATIO JURIS 83 (2014)

decisions of the Court.[31] However, dialogue has usually occurred as a back-and-forth between the legislature and the Court with the aim of rights advancement, and even if the legislative responds in a manner in line with the Court's ruling, it is engaging in a dialogue about the meaning of the Constitution. This kind of dialogue does not, in any manner, suggest judicial supremacy. As Hogg & Bushell argue, an outcome of a dialogue can be an agreement among the participants involved as well and does not necessarily have to be a disagreement.[32]

The federal legislature has been wary of using the radical power of override under S. 33, and the provincial legislatures usually use it with circumspection. Most of the cases where the override power has been used have more to do with the unique federal structure that Canada possesses. The province of Québec has used the override clause the most number of times, especially immediately after the promulgation of the Charter.[33] A famous example of the provincial legislature using the override power is presented in the case of *Ford v. Québec*[34], wherein the SCC struck down the prohibition of the use of the English language in commercial signs as violative of freedom of expression. The Legislature of Québec, shortly after this judgement, passed Bill C-178[35], which reversed the supreme court ruling in *Ford* and re-enacted the provision by protecting it with the notwithstanding clause of S.33.

II.II – The 'Dialogic' Experience in Canada between the Executive and Judiciary

The constitutional mechanism put forth by the interplay of S.1 and S.33 of the Charter might lead to the assumption that this dialogue is restricted between only two branches – the

[31] For example, Manfredi and Kelly are of the view that an 'in-your-face' legislative replies constitute genuine dialogue. See Christopher P. Manfredi and James B. Kelly, *Six Degrees of Dialogue: A Response to Hogg and Bushell*, 37(3) OSG. HALL L. JOUR. 513, 520 (1999)
[32] Hogg et al., *supra* Note 28, at 98.
[33] Quebec had a blanket override to all new statutes between 1982 to 1987. Québec has used the override clause post this phase a total number 16 times.
[34] [1988] 2 S.C.R. 712
[35] S.Q. 1988, c. 54.

legislature and the judiciary. The classical understanding of dialogue also restricts it to the myopic understanding of judicial decisions and legislative responses. However, in order to tap into dialogue's full potential, it is essential to state that dialogue should be seen as 'inter-institutional' and not just between the judiciary and the legislature. That is why one must understand that dialogue also takes place between the government and the judiciary in a large number of cases. This dialogue is hard to characterize as it often happens at a lower level of abstraction than the legislative-judicial dialogue. It is more nuanced, long-drawn and sometimes situates itself within the legislative-judicial dialogue. The dialogic relationship between the executive and the courts in Canada is often seen in matters related to national security, wherein the executive replies to charter decisions are accorded the same level of respect and margin of appreciation as the legislative ones by the courts.[36] Judicial review through dialogue between Courts and the Executive in matters concerning national security is also prevalent in Israel, wherein it has also been called 'advisory dialogue'.[37]

II.III – Overriding Judicial Supremacy & Parliamentary Sovereignty – The Inherent Logic of the Override Clause

If one looks at the history of the Charter itself, it is clear that it has a strong element of *compromise* between the provinces and the federal government in its making. S.33 is a crucial testament to this compromise. Several provinces had apprehensions about the Charter on the grounds that it restricted the sovereignty of their legislatures. S.33 provides for a way in which not just the national legislature but the provincial legislatures as well can preserve at least some amount of sovereignty. Therefore, if one looks at the origins of this kind of a 'dialogic' judicial

[36] See Kent Roach, *Dialogue in Canada and the Dangers of Simplified Comparative Law and Populism, in* CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS 274-275 (Geoffrey Sigalet, Grégoire Webber and Rosalind Dixon eds. CUP 2019)
[37] See DAVID SCHARIA, JUDICIAL REVIEW OF NATIONAL SECURITY (OUP 2014)

review, it becomes clear that at its core, it confers on the legislatures to have the final say in constitutional interpretation as the national legislatures possess the capability of overriding courts' interpretation[38], therefore preferring a '*weaker form*' of judicial review.[39] This weak dialogic form is also seen in many other jurisdictions, including the United Kingdom and New Zealand, wherein parliamentary supremacy takes the driving seat in constitutional interpretation, as even though the Courts can declare laws as being incompatible with several rights, it cannot strike the laws down.[40] However, the Canadian case seems to be taking a middle path ~ an intermediate position between the *Marburyesque* model of constitutional adjudication, on the one hand, and a parliamentary-centric model, on the other hand.

The trend shows the government's reluctance to use the override clause, which also hints towards the fact governments would only use it if there are convincing reasons related to public policy which justify its use; otherwise, abusing this power would be inviting a constitutional minefield since it would generate a lot of political resistance. Therefore, S. 33 performs a '*signalling function*', i.e., it signals to the opposition parties, the civil society, the press, etc., that the proposed legislation may be inconsistent with the Charter according to the Government, and therefore it generates a debate on rights-issues outside the courtrooms.[41] Therefore, there is an inherent safety valve in the design of S.33 itself; it gives the legislature the power to override Courts' decisions, but it has a political cost that many legislatures and governments are not willing to take.

[38] See Rosalind Dixon, *A Democratic Theory of Constitutional Comparison*, 56 AM. J. COMP. L. 947 (2008)
[39] See MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008).
[40] See HUMAN RIGHTS ACT 1998 (U.K.), 1998, c. 42; NEW ZEALAND BILL OF RIGHTS ACT (N.Z.), 1990/109
[41] PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 39-9 (Thomson Carswell 2013)

Therefore, one may sense a tension between the Indian Supreme Court's conception of dialogic judicial review and the Canadian conception, especially considering that India, unlike other jurisdictions, has a much stronger version of judicial review wherein the Courts, in most cases, act as final arbiters of constitutional interpretation. It is this dichotomy that the next section attempts to dissect and provide some clarity with.

III. SHAPE-SHIFTING DIALOGUES: THE TWO (DIAMETRICALLY OPPOSITE) UNDERSTANDINGS OF DIALOGUE IN STRONG & WEAK-FORM JUDICIAL REVIEW SYSTEMS

To understand the difference between the state of constitutional dialogue and dialogic judicial review as understood by the SCI in India in the *essential supplies* case and the Canadian conception of dialogic judicial review as commonly understood in the majority of the academic literature and Canadian jurisprudence, it is crucial to differentiate the two versions in separate contexts to clear out a very understandable confusion. For example, in the Indian conception, the citizens take the forefront with the judiciary acting as a site of dialogue between the citizens, the court, the government and numerous other stakeholders like NGOs, wherein the burden lies on the executive to justify its policies, which a citizen may be aggrieved with. Therefore, it allows the judiciary in its 'dialogic role' to supervise executive policies effectively. Therefore, this conception makes the strong form of judicial review present in India even stronger as it allows the judiciary to, in a way, meddle and venture into explicit policy issues.

On the other hand, the Canadian conception, by default, envisages a weaker version as the dialogue is not between different stakeholders but the Courts and legislatures on matters related to constitutional interpretation, with some amount of deference given to the legislature. The confusion seems to stem from the kind of '*dialogic jurisdiction*' undertaken by Courts in strong-form review systems like India, South Africa and Latin America while adjudicating upon socio-economic rights and 'dialogic judicial review' or constitutional dialogue as seen usually in weak-form review systems like Canada wherein dialogue is the chosen metaphor to label a back and forth between the branches related to constitutional interpretation.

III.I – Cutting the Clutter: Differentiating the two versions of Dialogue

Academic literature on dialogue to understand the relationship between the Courts and Legislatures is cluttered with two different, diametrically opposite understandings of dialogue. It is crucial to cut this clutter, not so much for the sake of academia, but for how the Courts start using dialogue. Therefore, in order to clear the air of misunderstanding between the two conceptions, it is crucial to deploy correct terminology to address both conflicting versions of dialogue. The metaphor dialogue has been rationalized by strong and active courts around the world, including India, South Africa and some Courts in Latin America, to mean something totally different. These courts have often used the dialogue theory to engage in what has been 'dialogic judicial review', dialogic jurisdiction, 'dialogic justice', etc., to engage in a conversation with the political branches to further citizens' rights by making the Court a site of dialogue between various stakeholders to further rights of the citizens and make the executive answerable in the court of law. This is in line with the idea that judicial review of administrative action is often understood as promoting '*dialogical accountability*' by providing a mechanism for the executive to explain and justify its action.[42] The dialogue here is not necessarily a dialogue on constitutional issues between the Courts and the Legislature but a mechanism through which Courts encourage a kind of dialogical accountability from the Executive as their actions are judged through a dialogic process, with the Courts being a forum for enabling this dialogue.

Therefore, these courts have made use of dialogue in a diametrically opposite way when compared to the common-sensical understanding of the metaphor dialogue. It has been used to adopt dialogic responses to further their own powers in policy areas in order to render what's

[42] See Dean R. Knight, *Judicial Review as Dialogical Accountability: Aotearoa New Zealand's Supervisory Jurisdiction*, 17(3) INT'L CONST. L. JOUR. 295 (2023)

been called 'dialogic justice'.[43] Therefore, it needs to be understood that these Courts, while adjudicating upon socio-economic and environmental rights, have engaged in what can be called '*dialogic jurisdiction*' but not '*dialogic judicial review*'; similarly, the Canadian conception may be correctly termed as a dialogic judicial review or constitutional dialogue between the branches over constitutional interpretation.

It is easy to say that one must not get distracted by mere semantics and focus on the larger questions that emerge from this debate regarding the applicability of dialogue. As Hogg et al., who coined the term 'dialogue' while revisiting the Canadian Charter Dialogue, lament that one should not make "*much ado about metaphors*" but instead deal with the phenomenon's significance.[44] However, semantics and metaphors matter, especially when the Courts start mixing up what dialogue entails; then it's a cause of worry because some courts may use dialogue to gain more power, and some courts may use the same metaphor to give it up.

III.II – Dialogic Jurisdiction in India: Dialogue without Mentioning Dialogue

Indian courts have always liberally indulged in a *dialogic* jurisdiction without explicitly using the word 'dialogue'. This engagement of dialogic jurisdiction by the Courts is prevalent primarily when it comes to adjudicating upon the socio-economic rights of the citizens.[45] The Courts in India enter into a dialogue with several administrative authorities when it comes to the implementation of socio-economic rights. This conception of 'dialogue' in the Courts is aligned with SCI's conception of the judicial forum as being a site of dialogue between the

[43] Roberto Gargarella, *Constitutional Changes and Judicial Power in Latin America*, *in* LATIN AMERICA SINCE THE LEFT TURN (Tulia G. Falleti and Emilio A. Parado eds., 2018)
[44] Hogg et al., *supra* Note 28. For several alternative to replace the word "dialogue" including judicial deference and weak-form judicial review See Mathen, *supra* Note 24, at 129.
[45] See V.G. Shreeram, *Coronavirus and the Constitution – XXV: Socio-Economic Rights and the Shifting Standards of Review*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (May 9, 2020) https://indconlawphil.wordpress.com/2020/05/09/coronavirus-and-the-constitution-xxv-socio-economic-rights-and-the-shifting-standards-of-review-guest-post/

courts, citizens and the government and that this dialogue must necessarily include the 'public'.[46] In this manner, dialogic jurisdiction helps the citizens and stakeholders, along with non-judicial actors like societal groups, NGOs, etc., connect with the courts dynamically and reciprocally by engaging in public decision-making.[47]

This kind of dialogic jurisdiction already existed in Indian jurisprudence in the form of the novel writ remedy of '*continuing mandamus'* devised by SCI. By engaging in a 'continuing mandamus', the Courts, instead of ending the litigation by passing a final judgement, keep the case pending by "*entering into a dialogue with the political and administrative wing, prodding to alter government action, or inaction*".[48] Courts in a dialogic jurisdiction play two distinct but equally vital roles of being a speaker on the one hand and a facilitator on the other hand.[49] Indian Courts, in exercising the writ remedy of continuing mandamus, act as a 'facilitator' by involving all key actors and stakeholders involved.[50] The Supreme Court has used continuing mandamus quite liberally, especially in environmental cases.[51] Therefore, the Supreme Court, until the pandemic case, had the precedence of engaging in dialogue with the other branches without feeling the need to state that they were doing so explicitly.

[46] Hon'ble Chief Justice Catherine A. Fraser, *Constitutional Dialogues Between Courts and Legislatures: Can We Talk?*, 14(3) FORUM CONSTITUTIONNEL 7 (2005)
[47] Anne Meuwese & Marnix Snel, *'Constitutional Dialogue': An Overview*, 9(2) UTR. L. REV. 123, 132 (2013)
[48] Mihika Poddar & Bhavya Nahar, *Continuing Mandamus' – A Judicial Innovation to Bridge the Right-Remedy Gap*', 10 NUJS L. REV. 555 (2017) (emphasis supplied)
[49] Barry Friedman, *Dialogue and Judicial Review*, 91 MICH L. REV. 577, 668 (1993).
[50] Poddar & Nahar, *supra* Note 48, at 608.
[51] See Debadityo Sinha et al., *Courting the Environment: Implementation of Environmental Judgments*, VIDHI CENTRE FOR LEGAL POLICY (Apr. 2021) https://vidhilegalpolicy.in/wp-content/uploads/2021/04/Courting-the-Environment-Full-Report.pdf

III.III – Dialogic Jurisdiction: Comparative Perspectives

The court's rulings in socio-economic rights, in order for them to be effective, must be followed up on by state officials in depth in order to ensure the last-mile delivery of citizens' rights.[52] Sustained compliance with court orders by state agencies remains a significant issue, especially when court rulings meddle with broader policy issues.[53] Several strong and active courts other than India with a strong-form review system have devised novel ways to ensure compliance and follow-up on their orders. This kind of dialogic function of socio-economic rights adjudication is also highly prevalent in South Africa[54], exemplified by the landmark decision of the Constitutional Court of South Africa in the *Government of the Republic of South Africa v. Grootboom*[55] **,** which involved adjudicating upon housing rights. Even in Latin America, the Courts have used the dialogue metaphor in a similar manner in socio-economic rights rulings. Garavito, while answering questions related to compliance with court orders once they leave the courtrooms in Latin America, has argued that when the Courts engage in judicial activism when it comes to socio-economic rights rulings, Courts are engaging in what he calls '*dialogic judicial activism*' wherein the Court encourages participation, engagement and dialogue between state agencies and organizations to follow up on its decisions and thereby creates a strong monitoring process to oversee whether its decisions are being acted upon or not by the executive.[56] In a similar vein, Gargarella has stated that in order to enrich the deliberative process, judges, when enforcing social rights, can use a dialogic process which encourages a dialogue between the different branches and requires the political branches to "*give more*

[52] Mark A. Graber, *What's in Crisis? The Postwar Constitutional Paradigm, Transformative Constitutionalism, and the Fate of Constitutional Democracy*, *in* CONSTITUTIONAL DEMOCRACY IN CRISIS? 688 (Graber, Levinson & Tushnet eds., 2018)
[53] *Roberto Gargarella, Pilar Domingo and Theunis Roux, Courts, Rights and Social Transformation: Concluding Reflections, in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 255, 265 (Ashgate 2006)
[54] See Rosalind Dixon, *Creating dialogue about socioeconomic rights: Strong-form versus weak-form judicial review revisited*, 5(3) INT'L J. CONST. L. 391(2007).
[55] 2000 (11) BCLR 1169 (CC) (S. Afr.)
[56] See César Rodriguez-Garavito, *Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America*, 89(7) TEX. L. REV. 1669-1698 (2011)

explicit reasons as to why they have excluded or disregarded certain demands, they [Courts] could ask them to rethink or re-elaborate their reasoning, or they could order them to provide solutions to certain unresolved problems."[57]

III.IV – India's Dialogic Jurisdiction & Its Discontents

Courts often engage in what has been called '*helicopter judging*' in matters related to socio-economic rights and overprotect them by taking a highly paternalistic approach.[58] However, in most instances, SCI's dialogic jurisdiction in socio-economic rights remains 'dialogic' and 'deliberative' as opposed to becoming dictating.[59] Therefore, it has proved to be a novel, effective and, at times, needed remedy to ensure compliance with court orders so that they don't remain a dead letter by executive evasiveness. However, even though, *at its best*, the doctrine of continuing mandamus in some cases serves an important dialogic function which in turn facilitates compliance[60], as seen by the Court's approach in the ***PUCL*** case,[61] it can also, *at its worst*, lead to judicial overreach by the Courts which can undermine the role of the executive and instead harm governance as can be seen in the (in)famous ***Godavarman*** case[62], wherein the Courts effectively supervised the day-to-day administration of Indian forests.[63] Baxi has called such take-over of administration from the Executive's hands to judicial hands

[57] Roberto Gargarella, *Theories of Democracy, the Judiciary and Social Rights in* COURTS AND SOCIAL TRANSFORMATION IN NEW DEMOCRACIES: AN INSTITUTIONAL VOICE FOR THE POOR? 29 (Gargarella, Domingo & Roux eds., Ashgate 2006)
[58] Metaphor taken from 'helicopter parenting'. See Catarina Botelho, Aspirational Constitutionalism, Social Rights Prolixity and Judicial Activism: Trilogy or Trinity? 3(4) COMP. CONST. AND ADMN. L. JOUR. 62, 84 (2017)
[59] Arpita Sarkar, *Standard of Judicial Review with Respect to Socio-Economic Rights in India*, 2.2 J. IND. L. AND SOC. 293 (2010); Roberto Gargarella also writes how while exercising dialogic jurisdiction in cases related to socio-economic rights, the Courts should engage in a dialogue with the different branches rather than dictating specific solutions by directing orders. See Roberto Gargarella, *supra* Note 57, at 29.
[60] Poorvi Chitalkar & Varun Gauri, *India: Compliance with Orders on the Right to Food, in* SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 307-310 (Malcolm Langford, César Rodriguez-Garavito & Julieta Rossi eds., 2017)
[61] People's Union for Civil Liberties v. Union of India, (2007) 12 SCC 135
[62] Rehan Abeyratne & Didon Misri, *Separation of Powers and the Potential for Constitutional Dialogue in India*, 5(2) JOUR. INT'L COMP. L. 363, 375 (2018)
[63] T.N. Godavarman v. Union of India (2012) 4 SCC 362

as 'creeping jurisdiction'.[64] Such kind of continuous monitoring of the wisdom of executive policies is also a function appropriate and well suited more for the Parliament rather than the judiciary.[65] Even during the *essential supplies* case, SCI and some Indian High Courts had rightly been criticised for 'micro-managing' the day-to-day affairs of the executive and committing judicial overreach.[66] The Courts effectively took it upon themselves to become an oversight body above and beyond the executive under the garb of the metaphor 'dialogue'.

There are also supporters of this 'unconventional role' played by the judiciary, where this supposed role of the judiciary seems to go beyond its adversarial role and 'nudge' governments in decision-making with regard to purely executive policies.[67] However, as far as the constitutional balance between the three branches and separation of powers in India is concerned the overuse of this 'unconventional' approach might as well be *undesirable*. Dialogic jurisdiction should resemble more of a real dialogue with the other branches and less of judicial diktats with no mechanism for the other side to not only respond but *defer* as well. The *essential supplies* decision is a classic case of judicial 'self-empowerment', which expanded the court's power at the cost of other branches.[68] Only this time, self-empowerment was done under the dialogic veil.

[64] Upendra Baxi, Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, 4(6) THIRD WORLD LEGAL STUDIES 107, 122 (1985).
[65] Melvin R. Laird v. Arlo Tatum et al., 92 S.Ct. 2318, 2326
[66] S.N. Aggarwal, *Judicial overreach in times of Covid-19*, INDIAN EXPRESS (May 18, 2021) https://indianexpress.com/article/opinion/judicial-overreach-in-times-of-covid-19-7320256/
[67] See Ajoy Karpuram, Executive Silence and the Unconventional Role of the Judiciary, SUPREME COURT OBSERVER (Jun. 6, 2021) https://www.scobserver.in/journal/executive-silence-and-the-unconventional-role-of-the-judiciary/; Gautam Bhatia, *COVID-19 and Courts Symposium: India: Covid-19, the Executive, and the Judiciary*, OPINIOJURIS (Jul. 26, 2021) http://opiniojuris.org/2021/07/26/covid-19-and-courts-symposium-india-covid-19-the-executive-and-the-judiciary/; The 'nudge' metaphor comes from the 'nudge theory' proposed by Richard Thaler and Cass Sunstein. See RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS (Yale University Press 2008)
[68] Yvonne Tew, *Strategic Judicial Empowerment*, 71(3) AMER. JOUR. COMP. L. 1, 21 (2024)

Flowing from Indian courts' dialogic jurisdiction also emerges a series of criticisms faced by the Courts. *First*, one commentator equates the '*dialogic jurisdiction*' taken by SCI in the *essential supplies* case as akin to a '*diabolical jurisdiction*' amounting to judicial overreach, which can lead the country into a constitutional crisis.[69] In contrast, the Chief Justice of India states that when '*the dialogical role of law is forsaken, law becomes a diabolical instrument*'.[70] *Second*, that when a Court engages and injects itself into policy-making and governance, it makes itself *hyper-activist.*[71] This kind of extreme judicial intervention would mean the Indian Courts engaging in the practice of judicial policy-making and acting as a quasi-executive, which is highly undesirable.[72] *Third*, dialogic jurisdiction also strikes at the heart of the classic counter-majoritarian difficulty proposed by Alexander Bickel[73] as the non-elected Courts start self-empowering themselves to not only be the final arbiters on matters related to constitutional interpretation but also in matters related to policy-making.[74] Although the counter-majoritarian critique of the judiciary might have become weather-beaten[75], it still holds much support among legislatures around the world who wish to criticise the judiciary in either a manner to express displeasure towards their work *or* in an attempt to undermine and threaten them.

[69] '*Dialogical or Diabolical Jurisdiction? A step towards Constitutional crisis by Judicial Overreach*' LAWBEAT (Jun. 6, 2021) https://lawbeat.in/columns/dialogic-or-diabolic-jurisdiction-step-towards-constitutional-crisis-judicial-overreach/

[70] Mehal Jain, *If the Dialogical Role of Law is Forsaken, Law Becomes A Diabolical Instrument: Chandrachud J. At IDIA Conference*, LIVELAW (Dec. 16, 2018) https://www.livelaw.in/if-the-dialogical-role-of-law-is-forsaken-law-becomes-a-diabolical-instrument-chandrachud-j-at-idia-conference/

[71] ANIRUDH PRASAD & CHANDRASEN PRATAP SINGH, JUDICIAL POWER AND JUDICIAL REVIEW 815 (EBC 2012)

[72] See Abeyratne & Misri, *supra* Note 62, at 366-371.

[73] See ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (Yale University Press 1985)

[74] For an argument on how the concept of 'constitutional dialogue', which I propose in this thesis, is also not adequately equipped to overcome counter majoritarian difficulty See Leighton McDonald, *Rights, 'Dialogue' and Democratic Objections to Judicial Review*, 32(1) FED. L. REV. 1 (2004).

[75] For an argument on why Courts can be 'representative bodies' too and why judicial decisions are not necessarily counter-majoritarian but '*counter-legislative, counter-congressional, or counter-parliamentary*' See Luís Roberto Barroso and Aline Osorio, *Democracy, Political Crisis, and Constitutional Jurisdiction: The Leading Role of the Brazilian Supreme Court*, *in* JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS 176 (Christine Landfried ed., CUP 2019)

Judges using catch-phrases or indulging in exotic word-play by developing metaphors like 'dialogue' to aggrandize more power is hardly new; however, the way in which SCI has been using them lately poses a serious challenge to the harmony between the branches, with one commentator going to the extent of arguing that the Court is 'mutilating' the Constitution with exotic wordplay.[76] The wide-ranging power[77], coupled with judicial activism[78] and room for interpretational creativity[79], enables the SCI to turn activism into '*excessivism*' as it routinely aggrandizes its powers into those meant to be discharged by other co-ordinate branches.[80]

However, despite its criticisms and discontents, abandoning dialogic jurisdiction, which is aimed at ensuring compliance, is not the right way forward, especially in democracies wherein the judiciary is designed and bears a disproportionate burden to keep a check on the actions of the Executive. I argue that when it comes to strong Courts adjudicating upon socio-economic rights, the Courts should maintain self-restraint on its dialogic jurisdiction by engaging in it only when there are actual issues of sustained compliance of court orders required and not when the judiciary wants to play the role of a policymaker. Therefore, there is a need to have a constrained approach to dialogic jurisdiction. Over and above, as I continue my argument, strong courts should instead focus on using the dialogic metaphor and engage in a constitutional

[76] Ravi Shankar Jha, Mutilation of The Constitution With "Exotic Wordplay", LAWBEAT (Jun. 19, 2021) https://lawbeat.in/columns/mutilation-constitution-exotic-vocabulary

[77] See Peter Waldman, *Jurists' Prudence: India's Supreme Court Makes Rule of Law a Way of Governing,* WALL ST. J. (May 6, 1996); S.P. SATHE, JUDICIAL ACTIVISM IN INDIA: TRANSGRESSING BORDERS AND ENFORCING LIMITS 249 (Oxford University Press, 2002); Manoj Mate, *The Rise of Judicial Governance in the Supreme Court of India*, 33(1) B.U. INTL. L. J. (2015); Clark D. Cunningham, *'The World's Most Powerful Court: Finding the Roots of India's Public Interest Litigation Revolution in the Hussainara Khatoon Prisoners Case', in* LIBERTY, EQUALITY AND JUSTICE: STRUGGLES FOR A NEW SOCIAL ORDER 83 (S.P. Sathe & Sathya Narayan eds., 2003); V.A. Bobde, *'The Rise of Judicial Power' in* LAW AND JUSTICE 373 (Soli J. Sorabjee ed. 2003)

[78] For an account of the Supreme Court of India's increasing judicial activism See MARK TUSHNET & VICKI C. JACKSON, COMPARATIVE CONSTITUTIONAL LAW 641-662 (Foundation Press, 1999).

[79] Court has creatively devised several interpretative doctrines like the Basic Structure [Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225], Constitutional Morality [Manoj Narula v. Union of India, (2014) 9 SCC 1] & Manifest Arbitrariness [Shayara Bano v. Union of India, (2017) 9 SCC 1]

[80] S.P. Sathe *Judicial Activism: The Indian Experience,* 6(1) WASH. U. J. L. & POL'Y 29, 43 (2001)

conversation with the legislature when it comes to dealing with constitutional issues that involve serious legal, political, social, and moral disagreements.

III.V – Theorizing 'Constitutional Dialogue' in Strong-Form Review Systems – Caveats & Assumptions

At this juncture, sceptics might raise doubts as to the motivation behind theorizing a form of constitutional dialogue in India, which is often seen in countries with weak-form judicial review. It might seem as if this idea promotes a call for legislative supremacy by making the Courts weak. Therefore, it is important to provide further caveats to this radical idea of rationalizing constitutional dialogue with judicial review in India. *First*, I do not align with the recent view taken by the Vice-President of India that courts can't dilute 'parliamentary sovereignty'.[81] I, on the other hand, argue for 'constitutional supremacy', which infuses both judicial and legislative legitimacy in the process of constitutional review and rejects the extremes of judicial supremacy and parliamentary sovereignty[82], the latter of which the Vice President seems to be advocating for. *Second*, I do not argue that in order to have constitutional dialogue in India, one would have to 'weaken' the strong form of judicial review exercised in India. One can rationalize India's strong version as 'dialogic' wherein the judicial striking down of legislation or declaring unconstitutionality is justifiable on the condition that there is enough political and constitutional space given to the legislature to reconsider the issue and if it wants to override the same.[83] Louis Fisher, back in 1988, had attempted to rationalize a system of constitutional dialogue in a judicial supremacist country like the USA by propounding the theory of '*coordinate construction*' wherein all the three branches have both

[81] Sreeparna Chakrabarty, *Vice-President Jagdeep Dhankar says court can't dilute Parliament's sovereignty*, THE HINDU (January 11, 2023) https://www.thehindu.com/news/national/dhankar-says-sovereignty-of-parliament-cannot-be-compromised-rakes-up-njac-bill-again/article66364347.ece
[82] Kent Roach, *Dialogic Judicial Review and its Critics*, 23 SUP. CRT. L. REV. 49, 104 (2004) ("Roach II")
[83] Hogg et. al., *supra* Note 28, at 11.

the 'authority' as well as the 'competence' to interpret the Constitution '*not only before the Courts decide but afterwards as well*'.[84] Constitutional dialogue is also possible in strong-form review systems because *legislative engagement* on rights and constitutional-based issues in jurisdictions like India and the U.S. is more substantial when compared to weak-form review systems, as the legislators often go an extra mile to challenge the validity of Court decisions by discussing judicial reasoning to assess the validity.[85] Therefore, there is a possibility for constitutional dialogue to thrive and survive even in a country with a strong form of judicial review like India.

Swati Jhaveri has argued that it is 'impossible' to have such kind of dialogic judicial review in India as it has a strong form of judicial review and '*leaves no space for political reconsideration of the issues, especially as utilized in India with the basic features doctrine*.'[86] However, merely the fact that the Court exercises judicial review over constitutional amendments in India does not mean that the form of institutional dialogue that I seek to propose is blocked.[87] Law and Hsieh have argued that the basic structure doctrine was not only a result of a dialogic process between the Courts and the Legislature in India but can also arguably enhance constitutional dialogue '*by striking a balance between complete acquiescence and unconditional resistance*'.[88] While it is true that the basic-structure doctrine in India is creatively utilized by the judiciary to have the final say in constitutional interpretation and provides a judicial pushback to the legislature, it is important to understand that when it comes

[84] LOUIS FISHER, CONSTITUTIONAL DIALOGUES 231-232 (Princeton University Press 1988)
[85] Douglas Tomlinson, *Dialogue of the Deaf: A Comparative Legislative Analysis of Weak-Form Judicial Review*, 46 SETON HALL LEGIS. J. 1, 66-71 (2022)
[86] Swati Jhaveri, *Interrogating dialogic theories of judicial review*, 17(3) INT'L JOUR. CONST. L. 811, 832 (2019)
[87] Virgílio Afonso da Silva argues that this power vested with the Supreme Court of Brazil and Supreme Court of India indeed blocks this kind of a dialogue. See Virgílio Afonso da Silva, *'Beyond Europe and the United States: The Wide World of Judicial Review', in* COMPARATIVE JUDICIAL REVIEW 329 (Erin F. Delaney & Rosalind Dixon eds., 2018
[88] David S. Law and Hsiang-Yang Hsieh, *Judicial Review of Constitutional Amendments: Taiwan*, *in* CONSTITUTIONALISM IN CONTEXT 196 (David S. Law ed., CUP 2022)

to enforcement of constitutional rights and constitutional interpretation, courts just like the legislatures will be prone to failures[89] and therefore, the legislature and the executive must be ready to respond to Courts' decisions.[90]

[89] Dixon, *supra* Note 54, at 407.
[90] Beverley Mclachlin, *Judicial Power and Democracy*,12 SING. ACAD. L. JOUR. 311. 327 (2000)

IV. LESSONS FROM EAST ASIA: 'ABCD' ~ AUTHORITARIANISM, BACKSLIDING, COURTS & DIALOGUE

IV.I – Guarding the Guardians: Constitutional Dialogue as Protecting the *Juristocratic* Court

In the face of hyperactive and strong courts like the SCI, legislatures across jurisdictions would find a need to undermine them and limit them. Judiciaries across the world have often faced backlash with highly charged terms like '*judicial oligarchy*'[91], *judocracy*[92], *judgocracy*[93] or '*juristocracy*'[94] used to describe them or their style of functioning. These phrases also form a part of the usual populist rhetoric against the courts, which '*legitimises anti-judiciary attacks*'[95]

[91] Almost 200 years back, Thomas Jefferson raised his concern regarding judges as the ultimate arbiters of all constitutional questions, which he felt would place the citizens under the '*despotism of an oligarchy*' *see* 1 THE WRITINGS OF THOMAS JEFFERSON 160 (Paul L. Ford ed., 1892); During the *Lochner* Era in the U.S.A, the term 'judicial oligarchy' was widely used. See WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 (Princeton Legacy Press, 1994); GILBERT E. ROE, OUR JUDICIAL OLIGARCHY vi-vii & 17 (B.W. Huebsch, 1912); Alpheus Thomas Mason, *Politics and the Supreme Court: President Roosevelt's Proposal*, 85(7) UNI. PENN. L. REV. & AMER. L. REG. 659, 666 (1937). The usage of the term has also been frequent post the Lochner era to critique 'judicial activism' by the Court. See JOHN AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 13 (Cornell University Press 1984); See also Edward J. Erler, *Sowing the Wind: Judicial Oligarchy and the Legacy of Brown v. Board of Education*, 8 HARV. K. L. & PUB. POL'Y 399 (1985). Even in France, prior to the Constitution of the fifth republic in 1958, the traditional attitude towards judicial review was to view it as oligarchic because of the historical hostility towards judicial power stemming from the French Revolution. The French revolutionary leaders were hostile towards the *Noblesse de Robe* ~ the social class of the judiciary and in later years this anxiety was further aggravated by the Lochner era of the US Supreme Court making the French Constitution-makers vary of increasing any judicial powers. See STEVEN GOW CALABRESI, VOL. 2 THE HISTORY AND GROWTH OF JUDICIAL REVIEW: THE G-20 CIVIL LAW COUNTRIES 172 (OUP 2021); George D. Brown, *DeGaulle's Republic and the Rule of Law: Judicial Review and the Conseil d'Etat*, 46 BOST. UNIV. L. REV. (462, 463-465). In fact, during the 1946 constitutional debates in France one politician warned of a 'government by the judges' looking at the American experience during the Lochner era. See *Constitutional Committee of the Second Constituent Assembly, session of July 11, 1946, remarks of the chairman (André Philip) in* VON MEHREN, THE CIVIL LAW SYSTEM 162 (1957); Émile Boutmy had described that a power which is supposed to be supreme and vested in every government with regard to decision-making is in the American context '*a small oligarchy of nine irremovable judges*' See ÉMILE BOUTMY, STUDIES IN CONSTITUTIONAL LAW 117-118 (1891).

[92] SUDHANSHU RANJAN, JUSTICE, JUDOCRACY AND DEMOCRACY IN INDIA (Routledge 2016)

[93] V.R. Krishna Iyer, Quality of Justice is not strained, THE INDIAN EXPRESS (Nov. 27, 2003)

[94] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (Harvard University Press 2004); In the Indian context, Upendra Baxi has stated that the rise of Public Interest Litigation (or 'Social Action Litigation' as he likes to term it) in India leading to a 'rights revolution' is not 'Juristocracy' but rather it is an avatar of 'demosprudence'. See Upendra Baxi, *Convocation Address*, 5 NUJS L. REV. 163, 167 (2012) *citing* Lani Guinier, *The Supreme Court 2007: Foreword: Demosprudence through Dissent*, 22 HARV. L. REV. 4 (2007).

[95] WOJCIECH SADURSKI, A PANDEMIC OF POPULISTS 108-109 (CUP 2022)

by engaging in a myopic and narrow understanding of the 'true' will of the people.[96] For example, populists in Poland, by engaging in a false rhetoric of political constitutionalism, have often used the charge of 'Juristocracy' to capture and abuse the apex courts.[97] It has also been argued that a populist turn in politics in Canada may lead to increased use of the S. 33 override clause.[98]

However, Ginsburg has noted that by and large, Asian liberal democracies are no 'juristocracies' as the courts therein are situated in a "*rough balance with other institution*s" and, therefore, their power "*ebbs and flows in a kind of dialogic fashion*".[99] Therefore, the importance of constitutional dialogue in avoiding steering a country towards juristocracy is evident in East Asian jurisdictions. In dealing with rights issues, they tread their path carefully and in a dialogic manner. There has been growing academic chatter related to using constitutional dialogue and dialogic judicial review as a theory to understand the relationship between courts and legislature in East Asia[100], especially in issues related to moral disagreement in society.[101] The East Asian experience with regard to dialogic judicial review is extremely crucial to look at as it has become one of the most prominent features of East Asian constitutionalism[102], with several East Asian courts adopting it in practice.[103] The growth

[96] See Andrew Arato, *Populism, Constitutional Courts, and Civil Society, in* JUDICIAL POWER: HOW CONSTITUTIONAL COURTS AFFECT POLITICAL TRANSFORMATIONS 331-332 (Christine Landfried ed., Cambridge University Press, 2019); Pasquale argues that terming constitutional courts or the judiciary 'aristocratic' by their *very* institutional nature amounts to 'sheer rhetoric or populist anti-elitism'. See Pasquale Pasquino, *A Political Theory of Constitutional Democracy: On Legitimacy of Constitutional Courts in Stable Liberal Democracies, in* MORALITY, GOVERNANCE, AND SOCIAL INSTITUTIONS 209 (Thomas Christiano, Ingrid Creppell, Jack Knight eds., 2018)

[97] Aleksandra Kustra-Rogatka, *The Hypocrisy of Authoritarian Populism in Poland: Between the Façade Rhetoric of Political Constitutionalism and the Abuse of Apex Courts*, 19(1) EURO. CONST. L. REV. 25, 26 (2023)

[98] Roach, *supra* Note 36, at 268.

[99] Tom Ginsburg, *'East Asian constitutionalism in comparative perspective', in* CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY 36 (Albert H.Y. Chen ed. 2014)

[100] See PO JEN YAP, CONSTITUTIONAL DIALOGUE IN COMMON LAW ASIA (OUP 2015)

[101] SUNGMOON KIM, CONFUCIAN CONSTITUTIONALISM: DIGNITY, RIGHTS, AND DEMOCRACY 207-247 (OUP 2023)

[102] Chien-Chih Lin, *Dialogic judicial review and its problems in East Asia*, 17(2) INT'L JOUR. CONST. L. 701, 708 (2019)

[103] *Id.* at 713.

of dialogic judicial review is attributed to two interconnected factors: "*the persistence of authoritarian regimes*" and "*rampant political attack against the judiciary, even in democracies".*[104]

Sceptics again might raise questions as to why the dialogic experience in East-Asian countries with dominant party systems and authoritarian roots is relevant in the context of comparing it with the Indian model of judicial review. However, constitutional dialogue's normative appeal lies beyond political and institutional settings. Apart from better-protecting rights, it also protects the judiciary as an institution in light of democratic backsliding and authoritarianism. An overactive judiciary coupled with a strong majoritarian government would result in two situations ~ either the contestation between the political branches and the Courts leads to the subversion of the Court by the former through institutional means by weakening it, or the contestation leads to the judiciary in order to protect itself starts playing a subservient role and starts to abdicate its judicial role. SCI's usurpation of legislative and executive powers results in a situation wherein the citizens effectively get ruled by a '*bevy of platonic guardians*'.[105]

Constitutional dialogue appears to balance the pitfalls of both weak-form judicial review systems, which may promote electoral authoritarianism and strong-form review systems, which promote juristocracy.[106] Therefore, dialogic judicial review, by providing a fine balance between the British notion of parliamentary sovereignty and the American notion of judicial authority,[107] recognizes that the legislature is certainly not infallible, but neither are the judges

[104] *Id.* at 707.
[105] LEARNED HAND, THE BILL OF RIGHTS 73-74 (Harvard University Press, 1958)
[106] Mattias Kumm, Constitutional Courts and Legislatures – Institutional Terms of Engagement 1, CLR 55, 66 (2017)
[107] Paul C. Weiler, *Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights*, 60(2) DAL. REV. 205, 232 (1980).

some '*infallible Platonic guardians*'.[108] Therefore, the Courts should not be allowed to become '*infallible*' merely because they are the final arbiters on constitutional issues.[109] Constitutional dialogue would help a Court like SCI that is accustomed to playing the role of *Juristocrat* combat issues of judicial legitimacy, executive interference and legislative pushback and, at the same time, not completely abdicate its duty of being the guardian of the constitution as it is entrusted to stop the democratic erosion from taking place during such times of populism.[110] Dialogue can also be used as a strategic form of judicial resistance during interbranch conflicts in the context of democratic erosion and backsliding.[111] The examples and experiences of East-Asian Courts point us towards this truth.

IV.II – East-Asian Courts Experience with Delayed or Suspended Declaration of Invalidity

Yap has given six ways through which domestic courts in Asian common-law countries have engaged in dialogic judicial review.[112] However, he has called the Courts using *delayed declarations of invalidity* as the most dialogic in nature out of all of them.[113] Delayed or suspended declarations of invalidity are crucial mechanisms for the Court to initiate an active dialogue between itself and the legislature by giving the political branches the legislative space to decide on the best possible policy choices available for a constitutionally sound response to the Court's rights-based decision. Therefore, normatively, it provides for a rights-enhancement

[108] Roach II, *supra* Note 82, at 103-104.
[109] See Justice Robert Jackson's quote in Brown v. Allen, 344 U.S. 443 (1953) at 540 "We are not final because we are infallible, we are infallible only because we are final". See also B.N. KIRPAL ET. AL, 'SUPREME BUT NOT INFALLIBLE' (OUP 2004)
[110] David Prendergast, *The Judicial Role in Protecting Democracy from Populism*, 20 GERMAN L.J. 245, 247 (2019)
[111] Daniel Bogéa, '*Dialogue' as strategic judicial resistance? The rise and fall of 'preemptive dialogue' by the Brazilian Supreme Court*, 25(3) EUROPEAN POLITICS AND SOCIETY 574-596 (2023)
[112] Yap, *supra* Note 100, at 79-106.
[113] *Id.* at 104; See also Po Jen Yap, *Remedial Discretion and Dilemmas in Asia*, 69(1) UNI. TOR. LAW JOUR. 84-104 (2019)

solution wherein both branches are able to interact in decision-making. Courts in East Asia have used this intermediate remedy effectively and the end result has been to the benefit of progressive rights adjudication.

The judiciary in Hong Kong has been proactive in using such suspension of invalidity orders. For example, in *Leung Kwok Hung v. Chief Executive of the HKSAR*[114], in a matter related to the invalidation of a statutory provision which effectively allowed the Chief Executive powers of covert surveillance and interception whenever deemed necessary in the 'public interest', the Court of Appeal suspended the declaration of invalidity to give the political branch some space to come up with an appropriate response and also to ensure no legitimate surveillance activities were hindered in the meanwhile. The Court traced the source of this novel power of suspended declaration in the inherent jurisdiction of the Court itself.[115]

However, the decision given by the Hong Kong Court of First Instance in *Chan Kin Sum v. Secretary of Justice*[116] perhaps provides reinforcement to the argument that constitutional dialogue over and above can prove to protect rights in a much better manner as opposed to when done through solely legislative or judicial initiative alone. In this case, the Court found a blanket ban on prisoners' right to vote as being disproportionate and therefore unconstitutional; however, it suspended this invalidity by giving the legislature about seven months to correct this defect and '*work out a replacement arrangement*'.[117] The Court did not opine on what kind of restrictions may be constitutionally proportionate as it thought it was the job of the legislature to come up with the necessary reasonable restrictions on the prisoners' right to vote

[114] [2006] HKEC 816
[115] *Id.* at ¶35.
[116] [2009] HKEC 393
[117] *Id.* at ¶79.

as opposed to a blanket ban.[118] However, instead of coming up with any reasonable restrictions, the Legislative Council repealed *all* the restrictions in place. Therefore, constitutional dialogue herein was able to better protect the rights of the prisoners as the result of the dialogue was one that "*went beyond what was mandated in Chan Kin Sum*".[119]

When Courts delay declarations of invalidity, it is also an admission to the fact that the political branches are better placed to make decisions regarding the alternate policy choices available in the policy vacuum created by the judiciary on account of the declaration of invalidity. It is also an admission to the fact that the response of the political branches would be more compressive and holistic, addressing other issues over and above what had been litigated. This is highlighted by the decision in *W v. Registrar of Marriages*[120] wherein the Hong Kong Court of Final Appeal, in a matter related to the unconstitutionality of the bar for post-operative male-to-female transsexual persons of being able to marry as per their acquired gender, suspended the declaration of invalidity for one year[121] to provide time to the legislature to take a holistic look at this matter including considering reforms related to entitlement of benefits and pensions, succession, recognition of foreign gender change and marriage among many other things.[122]

IV.III – Dialogue by Self-Restraint: Initiating Public Dialogue for Legislative Action

A good example of the Courts being 'dialogic' purely by self-restraint can also be found in the same-sex marriage decision of the Taiwan Constitutional Court[123] wherein even though after

[118] *Id.*
[119] Yap, *supra* Note 100, at 103.
[120] [2013] 3 H.K.L.R.D. 90
[121] *Id.* at ¶150.
[122] *Id.* at ¶143.
[123] J.Y. Interpretation No. 748 (2017) (Taiwan)

championing same-sex marriage as a right, it was left upon the concerned authorities to bring about this change. The Legislature respectfully responded to the decision and reasoning of the Court and legalized same-sex marriage two years later, in 2019. Therefore, same-sex marriage was legalized in Taiwan both by judicial backing and the legislative mind. Several dialogic examples come from East Asia. The Courts in Singapore, in order to ensure that the political branches act within the remit of the constitution, adopt a 'dialogical' rather than 'confrontational' attitude with the other branches.[124] Another example of a Court balancing the accusation of judicial oligarchy and at the same time not giving way to parliamentary supremacy is the Singapore Court of Appeal's judgement in *Lim Meng Suang v. Attorney General*[125] relating to the constitutionality of S. 377A of the Penal Code criminalizing homosexual acts.[126] The Court, in this judgement, successfully avoided treading down the path of judicial oligarchy or Juristocracy and did not act as a 'mini legislature'.[127]

The East Asian experience with constitutional dialogue showcases how constitutional dialogue can also work even in the face of a hostile political climate marred by authoritarianism and dominant party systems. This is not to say that the Courts in India necessarily have to follow the jurisprudential choices made by Courts in East Asia and engage in an overly optimistic interpretation of leaving several constitutional matters to the 'good-faith' of the legislature. Rather, they just have to apply a little self-restraint and engage in a *strong-form review constitutional dialogu*e already present in the Indian constitutional landscape. Expecting self-restraint from Courts for the sake of constitutional dialogue might seem too optimistic and

[124] Thio Li-ann, '*We are feeling our way forward, step by step': The Continuing Singapore experiment in the construction of communitarian constitutionalism in the twenty-first century's first decade, in* CONSTITUTIONALISM IN ASIA IN THE EARLY TWENTY-FIRST CENTURY 285 (Albert H.Y. Chen ed. 2014)
[125] [2015] 1 SLR 26 (CA) [LMS/TEH].
[126] See Seow Hon Tan, *Between Judicial Oligarchy and Parliamentary Supremacy: Understanding the Court's Dilemma in Constitutional Judicial Review*, SING. J. L. STUD. 307, 354 (2016)
[127] *Id.* at 334.

naïve. However, in quite the *strongest-form review* system like India, the best hope of constitutional dialogue is an appeal to the Court to engage in self-restraint as that is the only restraint known to them.[128] The Canadian and Southeast Asian experience of Constitutional Dialogue vis-à-vis rights-adjudication hints that there may be merit in rationalizing the inter-branch relationship in dialogic terms in India. The next section looks at how Constitutional Dialogue can actually work in practice in India by looking at various avenues for this dialogue to take place in a strong-form review country like India.

[128] See United States v. Butler, 297 U.S. 1, 79 (1936) (Stone, J., dissenting); Trop v. Dulles, 356 U.S. 86, 119 (Frankfurter, J., dissenting)

V. CONSTRUING CONSTRUCTIVE CONSTITUTIONAL CONVERSATIONS: CONSTITUTIONAL DIALOGUE IN INDIA

Before engaging in the *uphill task* of rationalizing constitutional dialogue in India, it is pertinent to take into account the (growing) criticism and apprehensions against dialogic theories at the outset. The following sub-section discusses the inherent dangers of the dialogue theory and its drawbacks.

V.I – Dangers of Dialogue

Even though there have been diligent defenders of dialogue's normative value[129], dialogue has attracted growing distrust over the years, and scholars have been increasingly dismissive of it. There are a couple of common criticisms that are often levied against the conception of 'dialogue'. To begin with, while theorizing the balanced 'new model' of judicial review in the UK as opposed to the judicial supremacy of India, Chintan Chandrachud avoids using the phrase 'dialogic judicial review' as it is over-inclusive[130] primarily because technically, all systems effectively facilitate some form of dialogue between the branches. This criticism of the vagueness & over-inclusivity of the metaphor has been echoed by multiple authors.[131] Therefore, this '*inherent elasticity*' related to the definitional vagueness of dialogue as a theoretical concept and the '*resulting ubiquity of dialogue in practice*' has raised eyebrows over the resultant value of the theory itself both as an '*analytical concept or a normative*

[129] Yap, *supra* Note 100, at 7-30.
[130] CHINTAN CHANDRACHUD, BALANCED CONSTITUTIONALISM: COURTS AND LEGISLATURES IN INDIA AND THE UNITED KINGDOM 13 (OUP 2017)
[131] See STEPHEN GARDBAUM, THE NEW COMMONWEALTH MODEL OF CONSTITUTIONALISM: THEORY AND PRACTICE 15-16 & 120 (CUP 2013) arguing that 'there really is almost no *non-dialogic* judicial review anywhere' (emphasis in original); YVONNE TEW, CONSTITUTIONAL STATECRAFT IN ASIAN COURTS 128 (OUP 2020).

ideal'.[132] Questions have been raised as to the *reliability* of such a dialogic approach when it comes to decision-making, especially in 'large-scale political settings'.[133]

Roberto Gargarella has argued that the Rosey-eyed lens with which several scholars looked at the potential of dialogic constitutionalism doesn't paint an accurate picture of as the experience of dialogue, according to him, '*looks gloomier than imagined*'.[134] This is because the promise of dialogic constitutionalism itself is overly dependent on the 'good will and discretion' of the parties who are in charge of engaging in it.[135] Therefore, there is another criticism of dialogue that flows from this argument and needs to be addressed. The criticism is that it can be overly optimistic about the potential that it holds in furthering rights. It can often be the case that legislatures or the executive misuse the freedom and leeway given to them by the Courts and fail to exercise their responsibility to respond in a good-faith manner. Additionally, dialogue itself can become an excuse for courts to become more pliant and passive in the face of an authoritarian rule and hinder human rights by not protecting the rights of the petitioners well enough under the dialogic veil.[136] For example, Law & Hsieh argue that the dialogic label runs the risk of '*mistaking judicial passivity, cowardice, or self-preservation for a normative commitment to dialogue*'.[137] In such situations, the Courts may have to play the role of the interventionist again, and therefore, *absolute deference* to the legislature and the executive in this dialogue is undesirable, especially in a time of populist pushback of the judiciary wherein the other branches do not want to have a dialogic exchange in a bona fide manner.[138] Judicial

[132] Law and Hsieh, *supra* Note 88, at 212.
[133] Frederick Schauer, *Dialogue and Its Discontents, in* CONSTITUTIONAL DIALOGUE: RIGHTS, DEMOCRACY, INSTITUTIONS 435 (Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon eds., CUP 2019)
[134] Roberto Gargarella, *'We the People' Outside of the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances*, 67 CURRENT LEGAL PROBLEMS 1, 46 (2014)
[135] *Id.*
[136] See Bell E. Yosef, *A double edged sword: Constitutional dialogue confined*, 20(5) INT'L JOUR. CONST. L. 1820 (2023); See also Bell E. Yosef, *Constitutional Dialogue under Pressure: Constitutional Remedies in Israel as a Test Case*, 70 AMER. JOUR. COMP. L. 597 (2022)
[137] Law & Hsieh, *supra* Note 88, at 190.
[138] Roach, *supra* Note 36, at 305.

deference is certainly a 'passive virtue' to be displayed by good judges, as argued by Bickel[139]; however, excessive deference showed by the Courts to the elected branches '*in a routine fashion or for no good reason*' should be considered a vice.[140] Constitutional dialogue should not endorse or enable this vice.

Aileen Kavanagh perhaps has had the sharpest criticism of dialogue, arguing that it's a distorting and misleading metaphor in search of a theory[141] , and therefore, she has rather made a case for 'collaboration'.[142] However, I would counter-argue by saying that it's a theory visualized by a metaphor *in search of good practice*. Constitutional dialogue should not be looked at with a narrow lens of merely being a metaphor but also through the lens of hermeneutics of language and why it is important for creating constitutional meanings and experiences.[143] Fisher had argued that his theory of constitutional dialogue was more than a theory given the political system of modern democracies; it became a 'necessity'.[144] India finds itself in a position to look at rationalizing constitutional dialogue more as a necessity rather than a dangerous theory. Therefore, despite the criticisms levied against dialogic theories and the increasing distrust for them, the concept is worth holding on to, and it becomes necessary to conceptualize judicial-legislative-executive relationships in dialogic terms.

[139] See Alexander Bickel, *The Supreme Court 1960 Term – Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).
[140] Aileen Kavanagh, '*Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication', in* EXPOUNDING THE CONSTITUTION: ESSAYS IN CONSTITUTIONAL THEORY 215 (Grant Huscroft ed., CUP 2009)
[141] Aileen Kavanagh, *The Lure and Limits of Dialogue*, 66(1) UNI. TOR. L. JOUR. 83, 85 (2016)
[142] See AILEEN KAVANAGH, THE COLLABORATIVE CONSTITUTION (CUP 2023); Even Eoin Carolan has given a sharp critique of dialogue and made a case for abandoning it and adopt 'collaboration' as a model to understand legislative-judicial relations. See Eoin Carolan, *Dialogue isn't working: the case for collaboration as a model of legislative-judicial relations*, 36(2) LEGAL STUDIES 209 (2016)
[143] See Alun Gibbs, *End of the Conversation or Recasting Constitutional Dialogue*, 31 INT. J. SEMIOT LAW 127 (2018) arguing that Constitutional Dialogue continues to play an integral role if recast on these lines and why merely terming it as a metaphor robs it of its 'certain actuality'.
[144] Fisher, *supra* Note 84, at 234.

V.II – It takes two to tango – Construing the 'Constructive.'

A 'dialogue' can never be a one-way street. Therefore, even if dialogue as a theory might be normatively appealing, it can only work if there are two co-equal branches of the government who are willing to listen to each other and are "*mutually committed to such a collaborative discourse*".[145] In the context of adjudicating socio-economic rights, it has been argued that dialogic approaches by the Courts are unlikely to work well in developing countries because the "*intended recipient of the dialogue is unlikely to respond effectively*' due to '*systematic failures in legislative and bureaucratic politics*".[146] In a similar vein, it has been observed that the Indian parliament historically has either often not responded to the Courts wherein the latter has tried to engage in a dialogue or taken a lot of time to respond.[147] Therefore, dialogue that fosters respect for both the parties engaging in that dialogue and is efficient in effectively responding to one another becomes a prerequisite for successful dialogic rights adjudication.

The importance of 'dialogue' and the potential it holds to find a middle path between judicial supremacy vis-à-vis legislative supremacy has been recognised by the SCI itself in *Gujarat Urja Vikas Nigam Ltd. v. Amit Gupta*[148] , wherein it cited Meuwese and Snel's article on constitutional dialogue[149] to highlight that both the legislature and the judiciary should listen to each other's perspectives and engage in a conversation about the constitution.[150] SCI, in this case, explicitly understood how, by way of dialogical remedies and through making use of the "*instrumentality of an inter-institutional dialogue*", the Court can successfully "*tread the middle path between abdication and usurpation*".[151]

[145] Tew, *supra* Note 131, at 128.
[146] David Landau, *The Reality of Social Rights Enforcement*, 53(1) HARV. INT'L L. JOUR. 189, 192 (2012)
[147] Chandrachud, *supra* Note 130, at 182.
[148] (2021) 7 SCC 209
[149] See Meuwese & Snel, *supra* Note 47.
[150] Amit Gupta, *supra* Note 148, at ¶180 (Chandrachud J.); Meuwese & Snel, *supra* Note 47, at 128.
[151] *Id.* at ¶181 (Chandrachud J.). The Court borrows the phrase of "usurpation and abdication" from Octavia Luiz Motta Ferraz, *Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa*,

Constitutional adjudication does not happen only at the level of the constitutional courts. It happens at an inter-branch level wherein each branch proceeds to persuade the other by a '*virtuous process of principled reasoning*' that their manner of constitutional interpretation is the correct way.[152] The judiciary sure has a *legal veto* over legislation in terms of its wide power of judicial review; however, if it also starts exercising a kind of a *policy veto* and engages in judicial legislation[153] even *before* the legislature has had the space to consider the issue at hand, it thwarts dialogue before it even begins. When the Courts take it upon themselves to choose one policy preference over another according to what they think would better protect rights, they fail to remind themselves that the other two branches also engage in constitutional balancing without any prior prompting from the Courts; therefore, legislative and judicial behaviours cannot be dissociated but must be seen in tandem with each other.[154] When it comes to policy issues, the Indian Court often seems to be engaging in judicial mandates instead of judicial 'advice-giving', the latter of which means that judges merely recommend a course of action rather than mandating it in strict terms.[155] The type of constitutional dialogue that the thesis aims to theorize is a *constructive* one. This means that at the spectrum of judicial restraint, there is enough leeway given to legislative reconsideration of decisions, and at the spectrum of judicial activism or judicial initiative, there is a *judicial nudge* given to the legislature to take into consideration specific crucial rights-based issues. For example, in the

in TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA 393 (Oscar Vilhena Vieira, Upendra Baxi, Frans Viljoen eds., PULP, Pretoria 2013)

[152]Alec Stone Sweet*, Constitutional Dialogues: Protecting Human Rights in France, Germany, Italy and Spain, in* CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 26 (Sally J. Kenny, William M. Reisinger, John C. Reitz, Macmillan Press 1999)

[153] To see some examples of judicial legislation by the Indian Supreme Court and why it needs to exercise judicial self-restraint See Anurag K. Agarwal, *Judicial Legislation and Judicial Restraint*, 46(1) ECONOMIC AND POLITICAL WEEKLY 22-24 (2011).

[154] Sweet, *supra* Note 152, at 27; To see how dialogue in Canada also happens at an 'intra-branch level', i.e., within the Government to make sure that the government policy respects Charter rights in a fashion that it is more likely to be upheld by Courts See Hogg, *supra* Note 41, at 36-19 & 20; L.R. Sterling, *The Charter's Impact on the Legislative Process: Where the Real 'Dialogue' Takes Place*, 23 NAT. J. CON. L. 139 (2007).

[155] Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1710 (1998).

first instance, the Legislature might disagree with a Court decision and may pass a law which might not be in line with the decision; in the *second* instance, the judiciary can perform the role of a gap-filler when there is legislative lethargy and executive evasiveness on issues concerning citizens' rights. The Supreme Court has recently, in *Dr. Kavita Kamboj v. High Court of Punjab & Haryana,*[156] recognized how the Constitution calls for a "*constructive constitutional dialogue*" between the Governor of a state and the High Courts.[157] Each branch should be involved in interpreting the Constitution with due care and respect given by the other branches of each other's interpretations.[158]

V. III – Forums of Constitutional Dialogue in India

This subsection looks at how there are enough forums available to all the branches for engaging in a constitutional dialogue in a manner which is easier to incorporate in a strong-form judicial review country.

V.III.I – Dialogue as 'Gap-Filling' – Lethargic Legislature & Conversational Courts

The Indian Supreme Court can become a 'gap-filler' to fill the yawning gap inherent in several constitutional provisions due to legislative lethargy. For example, the Indian Supreme Court's recent decision in *Anoop Baranwal v. Union of India*[159] , wherein it engaged in a gap-filling exercise[160] to make the composition of the appointment process related to the Election Commissioner of India in line with several other democracies having more robust consultative

[156] 2024 SCC OnLine SC 254
[157] *Id.* at ¶62 (Chandrachud J.)
[158] See United States v. Nixon, 418 U.S. 683, 703 (1974).
[159] (2023) 6 SCC 161 ('Anoop Baranwal')
[160] See Gautam Bhatia, *Decoding the Supreme Court's Election Commission Judgement – I,* INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (Mar. 3, 2023) https://indconlawphil.wordpress.com/2023/03/03/decoding-the-supreme-courts-election-commission-judgment-i/

processes and departed from the bare text of the constitutional provision by interpreting it in a manner as to form a three-member committee including the Chief Justice of India for the appointment of CEC and other Election Commissioners. In doing so, it took note of the *causus omissus* in play and was self-aware enough to observe that '*the courts must not try to run a Government nor behave like emperors*'.[161] However, in a classic dialogic sense, it left upon the legislature to come up with a different appointment process with legislation or a constitutional amendment, as was the mandate in Art. 324 and, therefore, effectively stated that they were merely filling a gap in the Constitution for the time being. After this judgement, again in a classic dialogic manner, the legislature passed an Act in the Parliament that brought about a change in the law related to the appointment process of the Chief Election Commissioner and other Election Commissioners by removing the Chief Justice of India from the appointment procedure and instead involving the Leader of Opposition and the Union of Minister of Law along with the Prime Minister of India.[162]

Another classic example of Constitutional Dialogue in India would be the decision rendered in *Vishaka v. State of Rajasthan*,[163] wherein the Supreme Court devised several guidelines for sexual harassment in the workplace till the time the legislature came up with a statutory solution and then eight years later, the legislature devising a statute to address the concerns.[164] The *Vishaka* case is generally considered to be a classic example of how the court transformed itself into a dialogic forum and stepped into the shoes of the parliament by spearheading a '*judge-moderated debate between the citizen and the government*' in light of growing legislative

[161] Anoop Baranwal, *supra* Note 159, at ¶126 (Joseph J.)
[162] CHIEF ELECTION COMMISSIONER AND OTHER ELECTION COMMISSIONER (APPOINTMENT, CONDITIONS OF SERVICE AND TERM OF OFFICE) ACT, 2023 available at https://sansad.in/getFile/BillsTexts/RSBillTexts/PassedRajyaSabha/CRC-CEC-E12132023113818AM.pdf?source=legislation
[163] (1997) 6 SCC 241; See Abeyratne & Misri, *supra* Note 62, at 378-379.
[164] PROTECTION OF WOMEN FROM DOMESTIC VIOLENCE ACT, NO. 43 OF 2005 (Ind.)

lethargy.[165] Additionally, in *Laxmi Kant Pandey v. Union of India*[166], the Court, in light of the growing legislative gap on the issue of inter-country adoptions of children, laid down several guidelines guided by the best interests of the child and in line with international law to deal with the alleged malpractices and trafficking of children related to the adoption of Indian children by people living abroad.

V.III.II – Between Constitutional Amendments & The Basic Structure Doctrine

The Parliament can also respond to several judicial decisions by way of constitutional amendments, which is a relatively easier process than in other jurisdictions.[167] The relative ease of amending the constitution in response to judicial decisions is an important tool for a system of dialogic judicial review[168] , and it may seem as if India has a '*de-facto quasi-weak form of review*'[169] if one looks at the comparatively easier constitutional amendment procedure. However, the basic structure doctrine balances the situation. Nevertheless, if push comes to shove, the legislature has the option to amend the Constitution in response to a judicial decision. In fact, the legislature often exercises its powers to pass an act which effectively takes away the basis of certain judgements. For example, during the 1980s, when the Supreme Court passed the *Shah Bano*[170] judgement regarding the maintenance of Muslim women, the Parliament came up with *The Muslim Women (Protection of Rights and Divorce) Act 1986*, effectively diluting the judgement. The SCI has also recently, in *Madras Bar Association v.*

[165] Sinking parliamentary authority, KASHMIR MONITOR (Dec. 19, 2012)
[166] (1984) 2 SCC 244
[167] However, even in the U.S.A. which is supposed to have one of the most difficult and time-consuming constitutional amendment procedures, six amendments have directly reversed SCOTUS decisions. 11th Amendment as a response to Chisholm v. Georgia 2 U.S. (2 Dall.) 419 (1973); 13th, 14th and 15th Amendments to Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); 16th Amendment to Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1985), and 26th Amendment to Oregon v. Mitchell, 400 U.S. 112 (1970).
[168] Tushnet, *supra* Note 23, at 209.
[169] Mark Tushnet & Rosalind Dixon, *Weak-Form Review and Its Constitutional Relatives: An Asian Perspective, in* COMPARATIVE CONSTITUTIONAL LAW IN ASIA 108-113 (Rosalind Dixon & Tom Ginsburg eds., 2014)
[170] AIR 1985 SC 945

Union of India,[171] determined the contours of the permissibility of legislative override of judgements, which gives the legislature sufficient room to maneuver if it wishes to override a Court judgement as it allows the legislative act to nullify the effect of the judgement by removing the basis of that particular judgement.[172] However, the test of determining the validity of the legislative override is if it cures the defect pointed out in the judgement and if the basis of judgment which pointed out the defect in law is cured.[173] This is much like the usual dialogue which happens in Canada, wherein the Legislature responds to the Court's decision in line with the court's reasoning.

Additionally, the Indian Legislature can also make use of the (controversial) savings provision in Arts. 31A, B, and C in tandem with the Ninth Schedule to immunize certain legislation from constitutional review, much like the S.33 override clause in Canada. Even though eventually this mechanism is barred by the basic structure doctrine, nevertheless it provides a way in which the Legislature can choose to respond to the Court even in a strong form review system.[174]

V.III.III – Suspended Declarations of Invalidity & Same-Sex Marriage Litigations: Constitutional Dialogue in Action

The normative appeal of constitutional dialogue can be explained by looking at same-sex marriage litigations and the intermediate remedy of SDIs. It highlights how marriage equality as a goal can come to be a product of successful dialogue. This specific trajectory of looking at the legalization of same-sex marriages in different jurisdictions to underscore some of the

[171] (2022) 12 SCC 455; Also followed in Jaya Thakur v. Union of India, 2023 SCC OnLine SC 813 ¶114 (Gavai J.); NHPC Ltd. v. State of Himachal Pradesh Secretary, 2023 SCC OnLine SC 1137 ¶35-40 (Nagarathna J.)
[172] *Id.* at ¶50.1 (Rao J.)
[173] *Id.* at ¶50.2 (Rao J.)
[174] Chandrachud, *supra* Note 130, at 58.

success stories of constitutional dialogue becomes particularly crucial in the background of India's failed attempt at the legalization of same-sex marriages via the judicial process recently.[175]

Courts in India have always remained a bit hesitant when it comes to using intermediate remedies like SDIs due to 'textual' and 'institutional' constraints.[176] In the absence of any textual provisions resembling S. 172(1)(b(ii) of the South African Constitution which explicitly empowers the Court to suspend the declarations of invalidity by the Court 'for any period' in order 'to allow the competent authority to correct the defect'[177] or S.4(2) of the Human Rights Act, 1998 in the United Kingdom which empowers the Court to merely declare a declaration of incompatibility,[178] the Court has for the most part refrained from even considering such remedies. However, there have been numerous instances wherein SCI has indulged in providing remedies which effectively are in the nature of SDIs due to various reasons, including practicalities and to avoid chaos and confusion.[179] Intermediate or weak remedies can be rationalized in a strong-form judicial review system because even if, in essence, it is more respectful to the legislatures and follows a dialogic approach to constitutional adjudication, it still empowers the Courts with decisional supremacy, i.e., it does not give the legislature to resist or disagree with the Court's decision completely but simply provides it with a collaborative space to '*test the outer margins of obedience*'.[180] Therefore, intermediate

[175] Supriyo v. Union of India, 2023 INSC 920
[176] Chandrachud, *supra* Note 130, at 177-188.
[177] SOUTH AFR. CONST. S. 172(1)(b)(ii)
[178] HUM. RTS. ACT. S. 4(2)
[179] See, e.g., Indra Sawhney v. Union of India, 1992 Supp (3) SCC 217 ¶829 (Reddy J.), ¶242 (Pandian J.); S.P. Sampath Kumar v. Union of India (1987) 1 SCC 124; EPFO v. Sunil Kumar B. 2022 SCC OnLine SC 1521 ¶46(vii) (Bose J.); Kartar Singh v. State of Punjab, (1994) 3 SCC 569 ¶423 (Ramaswamy J. dissenting); See also Hari Kartik Ramesh, *The Equal Marriage Case and a Suspended Declaration of Invalidity*, CONSTITUTIONAL LAW AND PHILOSOPHY BLOG (May 4, 2023) https://indconlawphil.wordpress.com/2023/05/04/guest-post-the-equal-marriage-case-and-a-suspended-declaration-of-invalidity/
[180] Stephen Gardbaum, *What is judicial supremacy? in* COMPARATIVE CONSTITUTIONAL THEORY 37 (Gary Jacobsohn and Miguel Schor eds., 2018)

remedies like SDIs, on the one hand, promote constitutional dialogue and deference to the legislatures but also, at the same time, do not allow the judiciary to abdicate its role in the dialogue completely.

a) India: The Janus-Faced Nature of Constitutional Dialogue

The Indian experience of same-sex marriage legalization by reaching out to the Courts failed. The majority opinion of the Court observed that addressing a lot of the issues surrounding the litigation necessarily involved '*considering a range of policy choices, involving multiplicity of legislative architecture governing the regulations, guided by diverse interests and concerns*..'[181] and therefore took note of the fact that the Solicitor General of India had expressed the Union Government's position to a form a High-powered committee headed by the Union Cabinet Secretary to undertake a comprehensive examination of the several issues raised by the Petitioners and consequently make necessary recommendations.[182] The concurring opinion of J. Narasimha also stressed how the judiciary as a branch was not best suitable to capture the diverse policy and legislative considerations at hand since it required a '*deliberative and consultative exercise*' to which the legislature and executive were '*constitutionally suited, and tasked, to undertake*'.[183] As it is evident, this resembles one face of Constitutional dialogue, wherein the judiciary is self-aware of its own limits and powers and does not wish to aggrandize the powers reserved for other branches in light of an express commitment on the part of the Government to form a Committee which would deliberate upon several issues raised by the Petitioners. The Janus-face nature of dialogue is evident in the course taken by the SCI in this matter, as it rejected engaging in a strong-form review dialogue considering any kind of an intermediate remedy like SDI (where the scope of legislative

[181] Supriyo, *supra* Note 175, at ¶118 (Bhat J.)
[182] *Id.*
[183] Supriyo, *supra* Note 175, at ¶19 (Narasimha J.)

response is narrow)[184] and chose a course of action that resembles a weak-form review dialogue (where the scope of legislative or executive response is wider).

b) Canada: Constructive Constitutional Dialogue in Action in Weak-Form Review

Canada's road to same-sex marriage legalization represents a classic case of constructive constitutional dialogue in relation to SDI. Starting from the landmark decision of the Court of Appeal for Ontario in *Halpern v. Canada (A.G.)*[185] in the early 2000s, Courts in nine out of the thirteen provinces and territories in Canada had started holding that the common-law prohibition on same-sex marriage was violative of the Canadian Charter.[186] However, most of the courts, in doing so, suspended the declarations of invalidity for two years so that the federal government would have the space to make the necessary changes in law and address the issue nationally. The political and judicial process towards same-sex marriage legalization was happening simultaneously in a dialogic manner. After the *Halpern* decision, the Government came up with a draft bill to introduce legislation recognizing same-sex marriage and subsequently referred the bill to the Supreme Court to opine on its constitutionality who in turn confirmed the bill's constitutionality, affirmed federal jurisdiction over marriage and granted a constitutionally required exemption to religious institutions.[187] Advisory jurisdiction of Constitutional Courts, which is present in several modern-day Constitutions, is a mechanism through which formal dialogue can be initiated very clearly and through institutional means.

[184] Even though this was advocated by the Petitioners and several other numerous commentators. See Ramesh, *supra* Note 179; Jayna Kothari, *Why and how the Supreme Court should recognise same-sex marriage*, INDIAN EXPRESS (Dec. 7, 2022) https://indianexpress.com/article/opinion/columns/supreme-court-same-sex-marriage-lgbtq-8306871/; Aishwarya Singh, Rahul Bajaj and Tarunabh Khaitan, *A Pathway for the Supreme Court in Ensuring Equality*, THE WIRE (Apr. 18, 2023) https://thewire.in/law/a-pathway-for-the-supreme-court-in-ensuring-marriage-equality

[185] [2003] O.J. No. 2268

[186] Barbeau v. British Columbia (A.G.) 2003 BCCA 406; Hendricks & Leboeuf v. Quebec (A.G.); Dunbar & Edge v. Yukon, 2004 YKSC 54; Vogel v. Canada (A.G.), [2004] M.J. No. 418 (QL); Boutilier v. Nova Scotia (A.G.), [2004] N.S.J. No. 357 (QL); N.W. v. Canada (A.G.). 2004 SKQB 434; Pottle et al. v. Attorney General of Canada et al., 2004 O1T 3964; Harisson v. Canada (A.G.), [2005] N.B.J No. 257 (Q.L.).

[187] See Reference Re Same-Sex Marriage, [2004] 3 S.C.R. 698 (Can.)

Therefore, after the decision of the SCC affirming the bill's constitutionality, the Government passed Bill C-38, Civil Marriage Act, in July 2005, which legalized same-sex marriage across Canada. The trajectory of same-sex marriage in Canada not only highlights the merits of rights-based adjudication in a dialogic fashion but also highlights *first*, how federal courts can engage and initiate dialogue as well and *second*, how the Government, using the apex court's advisory jurisdiction, can initiate a formal dialogue.

c) South Africa: Constructive Constitutional Dialogue in Action in Strong-Form Review

In South Africa, the decision of the Constitutional Court in South Africa in *Minister of Home Affairs v. Fourie*[188] led to same-sex marriage legalization in a dialogic fashion through the constitutionally provided mechanism of SDIs in South Africa.[189] In this case, the common law definition of marriage, along with S. 30(1) of the Marriage Act, 1961, which provided for a heteronormative definition of marriage, was challenged by using the phrases 'man and woman' and 'wife or husband', respectively. The Court ruled in favour of the Petitioners and held that S.30(1) was unconstitutional because same-sex couples were excluded according to it. However, the majority opinion suspended the declaration of invalidity for a period of one year so that the legislature could cure the defect pointed out by the Court and come up with its own policy solution as it was the best suitable forum to do so.[190] The Court had stated that the failure to comply with the SDI within the specified time period would result in the word 'spouse' being read in place of wife (or husband) in S.30(1).[191] Interestingly, however, Justice O'Regan dissented with the majority in terms of the remedy of SDI, stating that in the present case, the legislative choice was much narrower[192] and that reading in an inclusive common law

[188] [2005] ZACC 19
[189] It is crucial to note that SCI in Supriyo had distinguished Fourie on the basis that the legal and constitutional regime in South Africa and India varies widely. Supriyo, *supra* Note 175, at ¶197.
[190] *Id.* at ¶132-153
[191] *Id.* at ¶158-159.
[192] *Id.* at ¶168.

definition of marriage was necessary to protect the rights of same-sex couples and give them immediate relief.[193] The parliament, just short of the one-year expiry and in a classic dialogic manner, passed the Civil Union Act 2006, which legalized same-sex marriage.

d) Colombia: Strong Courts, Weak Remedies, Stronger Rights

In order to look at how the Constitutional Court of Colombia ('CCC') came up with upholding same-sex marriage in a dialogic manner, it is crucial to briefly look at the Court's jurisprudential history vis-à-vis LGBTIQIA+ rights. The Court often gave progressive rulings like the 1994 ruling wherein the Court had stated that homosexuality should not be a factor of social discrimination.[194] However, despite such progressive rulings, the Court was not charitable to the cause of same-sex couples and was hesitant to recognise their rights.[195] Therefore, the same-sex marriage movement turned towards the political branches. However, a failed 2007 same-sex civil union bill in 2007 '*forced LGBTI organizations to reevaluate their strategies and to use their litigation experience to return to the friendlier arena of the Constitutional Court*'.[196]

A landmark breakthrough came in 2011 when the CCC in C-577 unanimously declared that excluding same-sex couples from the benefits that emerge from a legal marriage is unconstitutional due to the heteronormative definition of marriage and that same-sex couples should be treated on an equal pedestal as to their heterosexual counterparts.[197] However, instead of giving a judicial diktat in this regard, it asked Congress to debate over it and come

[193] *Id.* at ¶169-173.
[194] See Constitutional Court of Colombia, Decision T-097/94 and T-539/94.
[195] See Constitutional Court of Colombia, Decision SU-623/01; Constitutional Court of Colombia, Decision C-098/96; Constitutional Court of Colombia, Decision T-349/06; Constitutional Court of Colombia, Decision T-999/00.
[196] Camila Gianella and Bruce M. Wilson, *LGBTI rights, in* THE LATIN AMERICA CASEBOOK: COURTS, CONSTITUTIONS, AND RIGHTS 70 (Juan F. Gonzalez-Bertomeu and Roberto Gargarella eds., Routledge 2016)
[197] Constitutional Court of Colombia, Decision C-577/11

up with orderly legislation within two years which rectifies the protection deficit faced by same-sex couples, failing which at the lapse of the period of two years, same-sex couples would be permitted to register their partnership by a notary or a judge. Therefore, in this manner, the Court played the role of an 'order-instructor'.[198] The Court's decision, however, met with stern opposition from several state offices, especially the Inspector General.[199] The Congress in Colombia did not act upon it amid severe opposition, and therefore, from 20 June 2013, same-sex couple partnerships were recognized by way of a notary officer or judge in the absence of legislation. However, after giving sufficient time to Congress to pass a law and it failing to do so, the CCC in 2016 again in SU-214/16 granted the right to marriage to same-sex couples and held that every partnership post 20 June 2013, as per its earlier ruling in C/577/2011 could be legally valid to be considered as marriage.[200]

V.III.III.I – Responding to Quibbles: SDIs, Dialogue & Rights-Enhancement

There have been critics of Courts using intermediate remedies like SDIs and of looking at same-sex marriage legalization in dialogic terms. For example, Brenda Cossman has argued that the story of same-sex marriage litigation in Canada should not be looked at as a story of dialogue between the Courts and the Legislature but rather as a story of '*contestation within the Government itself*'.[201] Additionally, the liberal use of SDIs as a remedy by the SCC without following the guidelines laid down in *Schachter v. Canada*[202] in ordering SDIs has also been criticized due to the harm it imposes on rightsholders and due to the availability of the

[198] Maximiliano Campana & Juan Marco Vaggione, *Courts and Same-Sex Marriage in Latin-America, in* OXFORD RESEARCH ENCYCLOPEDIAS: POLITICS (OUP 2021) https://doi.org/10.1093/acrefore/9780190228637.013.1189
[199] See Maurico Albarracín & Julieta Lemaitre, *The Crusade against Same-Sex Marriage in Colombia*, 8(1), RELIGION & GENDER 32-49 (2018)
[200] Constitutional Court of Colombia, Decision SU-214/16
[201] Brenda Cossman, *Same-Sex Marriage Beyond Charter Dialogue: Charter Cases and Contestation within Government*, 69(2) UNI. TOR. L. JOUR. 183 (2019)
[202] [1992] 2 S.C.R. 679, 719

notwithstanding clause.[203] However, central to constitutional dialogue's normative appeal is that it protects rights in a manner which respects the judicial and legislative roles in discerning constitutional intent; SDIs are perhaps the highest form of dialogue which can be rationalized in a strong-form review system. Granted that the suspended declaration effectively also grants a continuation of an unconstitutional state of affairs for the time prescribed, but this is a small price to pay for a judicial remedy which is eventually going to get materialized and given shape, form and life to by the political branches.

Sceptics might also argue that since the Colombian Congress failed to respond to the Court in an adequate manner as the Taiwanese legislature did, the Colombian case if anything, signifies the pitfalls of constitutional dialogue. However, dialogue should be looked at holistically; intermediate remedies give the Courts a mechanism to foster dialogue and engage in rights interpretations, taking the legislature together. However, this does not imply that if the legislature does not respond in good faith (or, as in this case, does not respond at all), the Courts do not enforce their ruling. Intermediate remedies just allow the Courts to give political space or leeway to the representative branches to come up with a solution in line with the Court's decision.

[203] Emmett Macfarlane, *Dialogue, Remedies, and Positive Rights: Carter v Canada as Microcosm for Past and Future Issues Under the Charter of Rights and Freedoms*, 49(1) OTTAWA L. REV. 109, 116-120 (2017); See Sujit Choudhry and Kent Roach, *Putting the Past behind Us?* 21 SUP. CT. L. REV. (2d) 205 (2003); Bruce Ryder, *Suspending the Charter*, 21 SUP. CT. L. REV. (2d) 267 (2003).

VI. CONCLUDING THOUGHTS: FROM JUDICIAL MONOLOGUES (AND LEGISLATIVE LETHARGY) TO CONSTITUTIONAL DIALOGUES

The thesis has argued for a pragmatic understanding of dialogue. Even though it advocates for a constrained use of strong-form dialogic jurisdiction to oversee policy issues and compliance with court orders, it nevertheless argues for rationalizing constitutional dialogue in strong-form review systems to further the rights of the citizens, which are backed by not only judicial logic but also democratic mandate. Judicial review, especially when it comes to constitutional issues regarding the conception of new rights, would inevitably include issues that would have high political subjectivity apart from legal ambivalence and, sometimes, moral disagreement, as in the case of marriage equality. The very nature of constitutional adjudication is to adjudicate upon '*competing visions of social and political life*'[204] , and an inter-branch dialogue is better suited to adjudicate upon the '*competing moral maps*'[205] of the society. Constitutional dialogue would make way for political discussion and engagement regarding rights by creating a space for political & thereby, legislative reconsideration of several issues pronounced by the Court, acknowledging the *Waldronian* truth that trusting the legislative majority would be no less principled than trusting the majority of three to five people in the Supreme Court.[206]

The process of interpreting the Constitution must be interactive in nature, and the Courts cannot device fancy theories of judicial review to render their voice as the sole and final one in the dialogue.[207] Therefore, a 'dialogic' approach to judicial review should mean that the judiciary

[204] Patrick Macklem, *Constitutional Ideologies*, 20 OTTAWA L. REV. 117, 121 (1988); See also Fisher, *supra* Note 84 at 5.
[205] Danny Nicol, *Law and Politics after the Human Rights Act*, PUBLIC LAW 722, 742 (2006)
[206] See JEREMY WALDRON, LAW AND DISAGREEMENT 248 (OUP 2004); Seyla Benhabib, *Dialogic constitutionalism and judicial review*, 9(3) GLOBAL CONSTITUTIONALISM 506, 510 (2020).
[207] See Friedman, *supra* Note 49, at 658.

does not have an *outright monopoly* when it comes to constitutional issues,[208] let alone having an *implicit monopoly* on policy or legislative decisions. The dialogue between the Courts and Parliament should be "*about the nature of Indian polity, about the very idea of Constitution*", and this must continue to involve the citizens as well.[209] The Court has to maintain a continuing '*Socratic colloquy*' with the other branches and with the society at large, as Bickel argued.[210] After all, the constitutional principle is "*evolved conversationally, not perfected unilaterally*".[211] As was the sentiment in mid-nineteenth century America during the (in)famous *Dred Scott* era, there ought not to exist any aristocracy surrounding Constitutional interpretation because the Constitution is *everybody's business*.[212]

Lastly, however, it is important not to let this site of dialogue become a site of confrontation between the respective stakeholder branches. After all, as put down by Prof. Upendra Baxi, "*when the dialogue degenerates into a confrontation for sheer power, whether at the initiative of Court or Parliament, the constitutional vision will perish*,"[213] and therefore, in order for constitutional supremacy to survive, we must first need the constitutional vision to thrive.

[208] For how dialogue theories stress on the fact that the judiciary both as an empirical and normative matter should not have a monopoly on constitutional interpretation See Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71(3) BROOK. L. REV. (2006)
[209] Upendra Baxi, *Some Reflections on the Nature of Constituent Power, in* INDIAN CONSTITUTION: TRENDS AND ISSUES 124 (Rajeev Dhavan & Alice Jacob eds., 1978)
[210] Bickel, *supra* Note 73, at 71-72 & 240.
[211] *Id.* at 244
[212] See HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION OF THE CONSTITUTION 6 (Knopf 1975)
[213] Baxi, *supra* Note 209, at 124.

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