ABHANDLUNGEN / ARTICLES

Unenumerated Constitutional Rights: Diluting the Separation of Powers Objection

By *Gauri Pillai*[*]

Abstract: When courts are faced with claims for unenumerated constitutional rights, it is very common for them to state that the separation of powers requires them to stay away from recognising such rights. I scrutinise the validity of this argument through a close study of *Supriyo Chakraborty v Union of India* (2024). In *Supriyo* the Indian Supreme Court refused to recognise the unenumerated constitutional right to marry because such court action was seen as violating the separation of powers. I argue that this reading of separation of powers understands the doctrine as being driven by a singular value: that of maintaining institutional specialisation of State branches. While important, this reading causes separation of powers disputes to become turf demarcation exercises, entirely obscuring rights. It thus takes away from a second key value underpinning the doctrine: its role in preserving rights and protecting rights-holders. When rights preservation is reinstated as a value driving the doctrine, court action to recognise and protect unenumerated constitutional rights – including the right to marry – is no longer inconsistent with the separation of powers. Nor is it a carefully regulated exception it. Rather, it is part and parcel of the doctrine, an essential facet of its demands. Yet, authorising all forms of court action in the name of protecting rights with no institutional constraints whatsoever brings risks of its own. Thus, both the value of rights preservation and that of maintaining institutional specialisation ought to be simultaneously maintained within the separation of powers assessment. For this, rights preservation and democratic protection need to be understood as multi-institutional, collaborative constitutional enterprises, with each State institution contributing in light of its distinct skills. Several parts of the *Supriyo* dicta, beyond its conclusions on the right to marry, reflect this understanding. Overall, they demonstrate how the Court could have recognised a constitutional right to marry while also respecting the institutional skills of different State branches. The separation of powers objec-

* Lecturer in Law, University of Bristol Law School, England, Email: gauri.pillai@bristol.ac.uk. I am thankful to the participants at the World Comparative Law Network, Humboldt University, Berlin (July 2024) for their comments on an earlier version of this article. I am also thankful to the peer-reviewers for their insightful observations. Any errors remain mine alone.

tion to court action recognising and protecting unenumerated constitutional rights – as deployed in *Supriyo* – is therefore diluted.
Keywords: Separation of Powers; Courts; Legislature; Same-Sex Marriage

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A. Introduction

Constitutions are written at specific points in time. Most constitutions list rights. The listed rights are those that enjoy salience at the moment of constitutional drafting. However, things evolve. New interests emerge. Or age-old interests begin to attract legal attention. Either way, claims are made for rights not expressly listed in the constitution. These rights are commonly called unenumerated rights. Demands for these rights are often made before courts. Courts are asked to read these rights into rights already existing within constitutional texts.

This ask has been, and continues to remain, very controversial globally. For some, the fear is that in recognising a right that has not been expressly provided for by the constitution, the unelected court is replacing the democratically elected parliament and dictating State policy.[1] For others, this is not just a question of democratic illegitimacy. It also raises issues of institutional competence. Courts, they argue, do not have the institutional skills to decide what State policy should be. Yet, in granting recognition to an unenumerated right, this is precisely what courts do.[2] There exists a collective shorthand for these arguments. In recognising unenumerated constitutional rights, courts violate the separation of powers.

Strangely, separation of powers arguments have not enjoyed much salience in India when it comes to unenumerated constitutional rights. The Indian Supreme Court has recognised many such rights by reading them into existing constitutional rights, particularly the right to life and personal liberty under Article 21.[3] The rights to health,[4] housing,[5] education,[6] food,[7] privacy,[8] dignity,[9] and reproductive autonomy[10] – to name a few –

1 Giving an account of these arguments, see *Randy Barnett*, Who's Afraid of Unenumerated Rights, Journal of Constitutional Law 9 (2006), pp. 1-22.

2 Giving an account of these arguments, see *Nicola Daley*, Unenumerated Rights Reconsidered, Galway Student Law Review 3 (2007), p. 226.

3 *Anup Surendranath*, Life and Personal Liberty, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu Mehta (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016, p. 756.

4 *Paschim Banga Khet Mazdoor Samity v State of West Bengal* AIR 1996 SC 2426.

5 *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180.

6 *Unnikrishnan v State of Andhra Pradesh* AIR 1993 SC 2187.

7 *People's Union for Civil Liberties v Union of India* AIR 1982 SC 1473.

8 *KS Puttaswamy v Union of India* (2017) 10 SCC 1 ('*Puttaswamy*').

9 *Francis Coralie Mullin v Union of India* (1981) 1 SCC 608.

10 *Suchitra Srivastava v Chandigarh Administration* (2009) 9 SCC 1.

were recognised in India through this route without facing separation of powers obstacles. Tellingly, separation of powers arguments were not even considered by the Court in these cases.

Yet, separation of powers lies at the heart of the Indian Supreme Court's recent decision in *Supriyo Chakraborty v Union of India* ('*Supriyo*').[11] *Supriyo* was a case about same-sex marriage. In *Supriyo*, the petitioners argued that the Court ought to recognise the unenumerated constitutional right to marry, such that the exclusion of same-sex couples from the Special Marriage Act 1954 was unconstitutional. The respondents vehemently opposed this claim. They argued:

> *"The court cannot create substantive rights and obligations to fill a legislative vacuum because it would amount to judicial legislation…These are established parameters of separation of powers and must be respected".*[12]

The Court agreed with the respondents. The five-judge bench unanimously decided not to recognise the unenumerated right to marry on separation of powers of grounds.

As I was reading *Supriyo*, I recalled a constitutional law module I had taught on the separation of powers. We were discussing Bilchitz and Landau's writing on the evolution of the doctrine in the Global South.[13] The text contained a line which raised many questions, both in my mind and amongst the students. 'The separation of powers doctrine', Bilchitz and Landau pointed out, 'has often become an end in itself without having strong regard to the underpinning values and purposes that it is meant to realize'.[14] What does it mean, we wondered, for separation of powers to be means to an end? And what are the ends the doctrine seeks to preserve? After a stimulating discussion, but without arriving at many answers, we moved on; there was much else left to cover. But the line the stayed with me.

Reading *Supriyo* brought the line back to life. Did Bilchitz and Landau's provocation – that the separation of powers ought to be treated as means to certain ends, as a mechanism to achieve given values – a stance seemingly supported by other constitutional theorists,[15] challenge the Court's reasoning and conclusion in *Supriyo*? This time, I resolved to find

11 *Supriyo Chakraborty v Union of India* 2023 INSC 920 ('*Supriyo*').

12 Submissions by Advocate Kapil Sibal, recorded in Ibid., para. 43 (m) (Chandrachud J.).

13 *David Landau / David Bilchitz*, The evolution of separation of powers in the global south and global north, in: David Landau / David Bilchitz (eds.), The Evolution of the Separation of Powers: Between the Global North and the Global South, Cheltenham 2018.

14 Ibid., p. 2.

15 *Aziz Huq / John Michaels*, The Cycles of Separation-of-Powers Jurisprudence, The Yale Law Journal 126 (2016), p. 382; *Bruce Peabody / John Nugent*, Toward a Unifying Theory of the Separation of Powers, American University Law Review 53 (2003) p. 2; *Rebecca Brown*, Separated Powers and Ordered Liberty University of Pennsylvania Law Review 139 (1991), p. 1515; *Adam Carrington*, Constructed for Liberty: Justice Clarence Thomas's Understanding of Separation of Powers, American Political Thought 5 (2016), p. 661; *Matthew Lawrence*, Subordination and Separation of Powers, The Yale Law Journal 131 (2022), p. 94; *Eoin Carolan*, The New Separation of Powers: A Theory of the Modern State, Oxford 2009, p. 2.

an answer. I studied the ends the separation of powers claims to achieve, the values driving the doctrine. To my surprise, I realised that the doctrine is regarded as a means to preserve rights and protect rights-holders.[16] This brought with it a curious paradox. If rights preservation is a value driving the doctrine, how can court action to recognise and protect the unenumerated constitutional right to marry be a violation of the separation of powers? Is not the court advancing the purpose behind the doctrine rather than detracting from it?

My task here is to unravel this paradox. For this, I read *Supriyo* alongside the vast literature on the separation of powers. I find that the most common reading of separation of powers sees the key motivating purpose behind the doctrine as maintaining the institutional specialisation of State branches such that each branch makes decisions that they are 'structurally well-suited to achieve'.[17] While important, this reading poses the risk of separation of powers disputes becoming turf demarcation exercises where the sole focus of the doctrine is delineating (with precision) the special skills of each institution to, in turn, determine whether the task in question falls within the identified skill set or not. Under this reading, rights are irrelevant to the separation of powers assessment (section B).

I find that this reading of the doctrine animated the *Supriyo* Court's understanding of the separation of powers. I trace the Court's inclination to prioritise the value of maintaining institutional specialisation at three interlinked stages of adjudication: in deciding the Court's jurisdiction, in rejecting the right to marry and in shaping appropriate remedies. I conclude that the Court denied the existence of a right to marry and shied away from designing remedies because it understood separation of powers as intending *solely* to maintain institutional specialisation (section C).

Now, I bring back my earlier finding. That the separation of powers is *also* means to preserve rights and protect rights-holders. I argue that when rights preservation is centred as a value driving the doctrine, court action to recognise and protect the unenumerated constitutional right to marry is no longer inconsistent with the separation of powers. Nor is it a carefully regulated exception to it. Rather, it is part and parcel of the doctrine, an essential facet of its demands. The *Supriyo* Court's claim that the separation of powers requires it to stay out of protecting the right to marry therefore does not hold water (section D).

That said, the Court was justified in paying attention to its institutional limitations. Court action in the name of protecting rights with no institutional constraints whatsoever is risky. If so, both the value of maintaining institutional specialisation and that of rights preservation ought to be simultaneously maintained within the separation of powers exercise. What would this look like? I find answers within other parts of the *Supriyo* dicta, beyond its holdings on the constitutional right to marry. I conclude that when rights preservation and democracy protection are seen as multi-institutional, collaborative constitutional enterprises, courts can recognise unenumerated constitutional rights while also respecting

16 See section D.

17 *Nick Barber*, Principles of Constitutionalism, Oxford 2018, p. 54.

the distinct institutional skills of other State branches (section E). So modified, separation of powers arguments would lead the *Supriyo* Court to recognising the right to marry. Presenting *Supriyo* as my test case, I therefore dilute the separation of powers objection to the judicial recognition of unenumerated constitutional rights.

B. Maintaining Institutional Specialisation

The most common reading of separation of powers sees the doctrine as being centrally concerned with maintaining institutional specialisation amongst State branches, resulting in efficient government. That is, the separation of powers aims to ensure that power is not divided at random amongst branches of the State. Rather, the branches are matched to the tasks they are 'structurally well-suited to achieve'.[18] The structural fit is decided based on institutional features such as:

> *"the composition and skills of an institution…the knowledge and experience of the actors within it…the scope of the institution's information-gathering powers…some bodies are better than others at gathering different types of information…the manner of the institution's decision-making process; some issues may lend themselves well to expert decision-making, others will be better allocated to amateur processes which have the virtues of openness and inclusivity…[and] the vulnerability of the institution to outside pressures".*[19]

Following this allocation of 'function to form'[20] (also called 'purpose interrelation'),[21] the separation of powers typically allocates the task of deciding the broad direction of laws for the polity to the legislature. This guarantees democratic deliberation amongst representatives who serve as conduits to diverse public opinion. They are accountable to the electorate and responsive to its wishes, which, in turn, serves as an effective guide for broad policy formulation.

However, legislators are rarely experts. They are most likely amateurs or bureaucrats before whom expert opinion is tested. The separation of powers thus vests the task of formulating specialised opinion and crafting detailed rules in the executive, comprising of members with technical capacity, knowledge, and merit. In controlling the police and the army, the executive is also able to exercise force, rendering effective decisions by other

18 *Barber*, note 17, p. 54; *William Eskridge*, Relationships between Formalism and Functionalism in Separation of Powers Cases, Harvard Journal of Law and Policy 22 (1999), p. 383; *Dimitrios Kyritsis*, Where Our Protection Lies: Separation of Powers and Constitutional Review, Oxford 2017, p. 211; *John F. Manning*, Separation of Powers as Ordinary Interpretation, Harvard Law Review 124 (2011), p. 1944.

19 *Nick Barber*, Prelude to the Separation of Powers, The Cambridge Law Journal 60 (2001) p. 72 (emphasis added).

20 Ibid., p. 73.

21 *Kyritsis*, note 18, p. 42.

branches. Moreover, executive decision-making is usually speedy, enabling quick responses where necessary.

Following a similar rationale, separation of powers gives the judiciary the responsibility of adjudicating legal disputes. Judges are legal experts with factual, evidentiary and forensic skills, adept at surmising the applicable law and evaluating its application within individual cases. Constitutional systems also generally guarantee judicial independence from individual parties to the dispute, electoral politics and from other branches. This ensures that judicial decision-making is, at least in theory, impartial, capable of resisting political pressure and performing inter-branch supervision.

This reading of the separation of powers has many benefits. In matching institutional roles to institutional features, it offers a 'principled starting point' to begin the process of delineating the roles of State branches.[22] This task has been described as one of the most 'intractable puzzles of constitutional law'[23] because of the 'unconvincing, inauthoritative, and ever-shifting'[24] criteria usually employed in line-drawing. The reading thus does away with (some of) the 'indeterminacy'[25] and 'extraordinary confusion'[26] that has plagued the separation of powers for decades, causing many to dismiss the doctrine as 'increasingly obsolete and incoherent' and in a state of 'deep crisis',[27] fostering 'deep ambivalence' and 'widespread disillusionment'[28] about its value for modern government[29] and it's very legal and constitutional status.[30]

This reading of separation of powers also recognises how different State branches can work together to ensure good governance. A well-functioning State needs "healthy opposition' and creative constitutional tension between branches of government'.[31] Dividing power based on institutional specialisation guarantees this. The institutional features of each branch 'embodied in the procedures of the different agencies, and in the representation of varying interests in the separate branches' promises 'different sets of values',[32] enabling

22 *Aileen Kavanagh*, The Constitutional Separation of Powers, in: David Dyzenhaus / Malcolm Thorburn (eds.), Philosophical Foundations of Constitutional Law, Oxford 2016, p. 234.

23 *Gary Lawson*, The Rise and Rise of the Administrative State, Harvard Law Review 107 (1994) p. 1238.

24 *Carolan*, note 15, p. 24.

25 *Daniel Maldonado*, The conceptual architecture of the principle of separation of powers, in: David Bilchitz / David Landau (eds.), The Evolution of the Separation of Powers, London 2018, p. 149.

26 *Maurice J. C. Vile*, Constitutionalism and the Separation of Powers, Oxford 1967, p. 2.

27 Ibid.

28 *Kavanagh*, note 22, p. 238.

29 *Eric Posner / Adrian Vermeule*, The Executive Unbound: After the Madisonian Republic, Oxford 2010.

30 *Manning*, note 18, pp. 1939, 1944-45.

31 *Aileen Kavanagh*, Collaborative Constitutionalism, Cambridge 2023, p. 106.

32 *Vile*, note 26, p. 16.

each branch to bring a 'distinct role morality'[33] to the process of governance. Each branch thus presents different 'constituent perspectives',[34] identifies 'different features of the problem as salient', proposes 'different solutions' and brings something 'potentially unique to the resolution' of governance problems.[35] This provides 'numerous opportunities to revisit entrenched positions', slows down policymaking, negotiates interbranch compromise, and adds overall value to the 'ultimate products of government'.[36]

However, reading the separation of powers as means to maintain institutional specialisation alone also presents a real and pressing danger. Because the separation of powers is seen as being concerned centrally with ensuring that the institution with the appropriate skill makes the relevant decision, disputes involving the doctrine invariably become turf demarcation exercises. Within this reading, the sole focus of the doctrine is delineating with precision the special skills of each institution in light of its structural features to, in turn, determine whether the task in question falls within the identified skill set or not. The doctrine is thus ultimately concerned *only* with differentiating the turf of each branch and protecting it from invasion by other branches. As long as this task is carried out, the demands of the doctrine are *fully* satisfied. Under this formulation, rights-holders are completely obscured. They are nowhere in sight. The separation of powers assessment is wholly unconcerned with its implications on them.

It is this reading of the doctrine that dominated the Indian Supreme Court's understanding of the separation of powers in *Supriyo*. I trace the reading across the three consecutive stages of the adjudication: in deciding the Court's jurisdiction to hear the case, in assessing whether there is a constitutional right to marry, and in determining the Court's capacity to offer meaningful remedies. Note that all five judges of the *Supriyo* Court arrived at the same conclusion on these three points. They also agreed that unlike same-sex couples, transgender couples do have a right to marry because their right has been statutorily recognised. The judges however disagreed on whether a constitutional right to union exists, requiring the State to legally recognise a 'bouquet of entitlements'.[37] They also disagreed about the constitutionality of adoption regulations which excluded queer couples. While the majority (3 judges) held against a right to union and in favour of the adoption regulations, the minority (2 judges) recognised a right to union and read down the adoption regulations to make them constitutionally compliant.

33 *Michael Foran*, Rights, Common Good, and the Separation of Powers, Modern Law Review 86 (2023), p. 617; *Kyritsis*, note 18, p. 40.

34 *Carolan*, note 15, p. 129.

35 *Tara Ginnane*, Separation of Powers: Legitimacy not Liberty, Polity 53 (2021), p. 144.

36 *Peabody / Nugent*, note 15, pp. 24-26.

37 Supriyo, note 11, para 223 (Chandrachud J.).

C. Separation of Powers in *Supriyo*

I. Jurisdiction

Supriyo was a writ petition filed under Article 32 of the Constitution of India, challenging, amongst other legislation, the Special Marriage Act 1954 for excluding same-sex couples from its scope. The Respondents in *Supriyo* contested the Supreme Court's jurisdiction to hear the petition. Relying on the structural differences in capacity between the legislature and the judiciary, they argued that the Court should not decide the case. Whether legal recognition should be granted to same-sex marriage ought to be decided by the people's representatives in the Parliament. In deciding the issue one way or the other, the Court would pre-empt deliberation and debate.[38]

The Court swiftly rejected these claims, holding that separation of powers 'certainly does not operate as a bar against judicial review'.[39] In fact,

> *"judicial review promotes the separation of powers by seeing to it that no organ acts in excess of its constitutional mandate. It ensures that each organ acts within the bounds of its remit".*[40]

Judicial review is thus a form of check and balances. Check and balances guarantee 'limits on government power', with each branch monitoring the other to ensure that no branch 'exceeds its authority or invades another's sphere'.[41] In this way, they put in place a system of 'governmental insurance'[42] where the 'exercise of power by any one power-holder…[is] balanced and checked by the exercise of power by other power-holders'.[43] Check and balances – including through judicial review – therefore maintain and complement the separation of powers and are 'axiomatic' to it.[44]

This extended to judicial review of legislative and executive action on rights grounds. For the *Supriyo* Court,

> *"the Constitution demands that this Court conduct judicial review and enforce the fundamental rights of the people*[45]*…Judicial review is all about adjudicating the validity of legislative or executive action (or inaction) on the anvil of the fundamental*

38 Ibid., para. 59 (Chandrachud J.).

39 Ibid., para. 67 (Chandrachud J.).

40 Ibid., para. 67 (Chandrachud J.).

41 *Nancy Kassop*, The Constitutional Check and Balances that Neither Check Nor Balance, in: Michael Genovese / Lori Cox Han (eds.), The Presidency and the Challenge of Democracy, Berlin 2006, p. 73.

42 Ibid.

43 *Jeremy Waldron*, Separation of Powers in Thought and Practice, Boston College Law Review 54 (2013), p. 433.

44 *Kavanagh*, note 31, p. 106.

45 *Supriyo*, note 11, para. 67 (Chandrachud J.).

> *freedoms incorporated in Part III*[46] *…The doctrine of separation of powers cannot, therefore, stand in the way of this Court issuing directions, orders, or writs for the enforcement of fundamental rights".*[47]

Concluding that it has the institutional capacity to review legislation for rights compliance, the Court dismissed the separation of powers objection to its jurisdiction.

II. Right-Duty

However, the same did not hold true for the next two stages. In deciding that there did not exist a constitutional right to marry, the Court was driven by two arguments, the second of which was based on its firm belief that recognising such a right fell outside its institutional capacity and within the turf of other State branches.

The Court's first argument was that the interest in marriage was not fundamental enough to be elevated to the status of a constitutional right. For Justice Bhat, who wrote the majority opinion, the 'fundamental importance of marriage remains that it is based on *personal preference* and confers social status. Importance of something to an individual does not *per se* justify considering it a fundamental right, even if that preference enjoys popular acceptance or support'.[48] For Justice Chandrachud, who wrote the dissent, the significance of marriage came not from its alliance with core constitutional values but from the benefits accorded to marital status by State regulation: 'Marriage may not have attained the social and legal significance it currently has if the State had not regulated it through law'.[49] The judges also drew support from the fact that previous decisions of the Supreme Court had not recognised marriage as a fundamental right.[50] While they protected the right to marry a person of one's choice,[51] a right to marry *simpliciter* was not part of Indian constitutional jurisprudence.

At the outset, it is unclear why the interest in marriage is not important enough to achieve the status of a fundamental right. Marriage is a deeply personal, intimate choice. For some, it is an expression and celebration of their love and commitment to their partners. For others, it is a necessary condition to be able to build a relationship and start a family within India's social context where unmarried couples and children born outside marriage are subject to intense social stigma. So understood, marriage easily meets the criteria on the basis of which several other unenumerated rights – such as the right to privacy[52] or the

46 Ibid., para. 68 (Chandrachud J.).

47 Ibid., para. 67 (Chandrachud J.) (emphasis added).

48 Ibid., para. 49 (Bhat J.) (emphasis in original).

49 Ibid., para. 183 (Chandrachud J.).

50 Ibid., para. 175-6 (Chandrachud J.)., Ibid., para. 50 (Bhat J.).

51 *Shafin Jahan v Asokan KM* AIRONLINE 2018 SC 1136; *Shakti Vahini v Union of India* AIR 2018 SC 1601.

52 *Puttaswamy*, note 8.

right to reproductive autonomy[53] – have been accepted as fundamental rights. It 'protects for the individual a zone of choice and self-determination…[recognizing] the ability of each individual to make choices and to take decisions governing matters intimate and personal'.[54] These decisions, including the marriage decision, present, 'profound questions of identity, agency, self-determination and the right to make an informed choice'.[55] The Court was well aware of this disparity. As Justice Chandrachud himself admitted,

> *"The Constitution does not expressly recognize a fundamental right to marry. Yet it cannot be gainsaid that many of our constitutional values, including the right to life and personal liberty may comprehend the values which a marital relationship entails."*[56]

Thus, that the interest in marriage is not important enough to be a fundamental right was not the Court's main argument, or its strongest one. Instead, the Court's primary justification for denying constitutional status to the right to marry was that the institutional considerations underlying the separation of powers barred it from recognising the right. The Court reasoned that reading in a right to marry into the Constitution would necessarily require the Court to place a positive duty on the State to set up an institution of marriage for same-sex couples:

> *"The petitioners seek that the Court recognise the right to marry as a fundamental right. As explained above, this would mean that even if Parliament and the State legislatures have not created an institution of marriage in exercise of their powers under Entry 5 of the Concurrent list, they would be obligated to create an institution because of the positive postulate encompassed in the right to marry."*[57]

This 'weigh[ed]'…heavily' on the court's mind because 'the creation of the institution…here depend[ed] on state action, which is sought to be compelled through the agency of this court'.[58] For the Court, in asking the State to design an institution of marriage for same-sex couples, 'the doctrine of separation of powers [would be] violated…[because] the direction in effect, [would be] to amend existing statutory frameworks, if not to legislate afresh'.[59] In exercising its power of judicial review, the Court refused to 'enter upon the legislative domain…by issuing directions which for all intents and purposes would amount to enacting law or framing policy'.[60] The Court also repeatedly emphasised that the

53 *X v NCT Delhi* AIR 2022 SC 4917 ('*X v NCT*').

54 *Puttaswamy*, note 8, para. 168 (Chandrchud J.) (emphasis added).

55 *ABC v State of Maharashtra* WP No. 1357/2023 (Bombay High Court, 20 January 2023), para. 32.

56 *Supriyo*, note 11, para. 185 (Chandrachud J.) (emphasis added).

57 Ibid., para. 182 (Chandrachud J.) (emphasis added).

58 Ibid., para. 47 (Bhat J.).

59 Ibid., para. 17 (Narasimha J.).

60 Ibid., para. 69 (Chandrachud J.).

'legislature [was the] democratically elected body…mandated to carry out the will of the people', not the Court.[61]

The complex nature of the positive duty that would flow from a right to marry also contributed to the Court's reticence to recognise the right. The Court drew attention to the 'intractable difficulties in *creating, through judicial diktat*, a civil right to marry':[62]

> *"Ordering a social institution or re-arranging existing social structures, by creating an entirely new kind of parallel framework for non-heterosexual couples, would require conception of an entirely different code, and a new universe of rights and obligations. This would entail fashioning a regime of state registration, of marriage between non-heterosexual couples; the conditions for a valid matrimonial relationship amongst them, spelling out eligibility conditions, such as minimum age, relationships which fall within "prohibited degrees"; grounds for divorce, right to maintenance, alimony, etc."*[63]

In other words,

> *"the creation of social institutions and consequent re-ordering of societal relationships are 'polycentric decisions', which have 'multiplicity of variable and interlocking factors, decisions on each one of which presupposes a decision on all others', decisions that cannot be rendered by one stroke of the judicial gavel."*[64]

Thus, in essence, *because* it could not require the State to set up an institution of marriage for same-sex couples, the Court concluded that it *also* could not recognise the prior fundamental right to marry from which such duty would emerge: 'The content of the right claimed by the Petitioners is such that it clearly places positive legislative obligations on the State, and therefore, cannot be acceded to'.[65] The Court's decision to reject the existence of a constitutional right to marry thus hinged entirely on the need to maintain institutional specialisation as required by the doctrine of separation of powers: 'courts may not exercise [the] power [of judicial review] to make decisions for which they are ill equipped. This Court is not equipped to recognize the right of queer persons to marry'.[66]

III. Right-Remedy

A similar concern underlay the Court's decision-making at the third, remedial stage. The Court was clear that striking down the SMA as unconstitutional for excluding same-sex

61 Ibid., para. 69 (Chandrachud J.).
62 Ibid., para. 69 (Bhat J.) (emphasis in original).
63 Ibid., para. 69 (Bhat J.) (emphasis in original).
64 Ibid., para. 14 (Narasimha J.); Ibid., para. 54 (Bhat J.) (emphasis in original).
65 Ibid., para. 14 (Narasimha J.) (emphasis added).
66 Ibid., para. 203 (Chandrachud J.) (emphasis added).

couples would be foolhardy as it would deny the benefit of the progressive legislation to heterosexual couples from different religions and castes.[67] The alternative remedy suggested by the petitioners was reading the SMA to make it gender neutral by replacing gender specific words or pronouns with gender neutral ones. For the Court, such a remedy could not be granted because of the 'constitution's entrenchment of separation of powers'.[68] The remedy 'would in effect be entering into the realm of the legislature',[69] especially because the entitlements attached to marriage are spread across a 'spider's web of legislations and regulations' such that altering the scope of marriage under the SMA could have a 'cascading effect across…disparate laws':[70]

> *The Court is not equipped to undertake an exercise of such wide amplitude because of its institutional limitations. This Court would in effect be redrafting the law(s) in the garb of reading words into the provisions. It is trite law that judicial legislation is impermissible.*[71]

The Court especially saw the remedy as requiring a 'range of policy choices, involving multiplicity of legislative architecture governing the regulations' to be considered, 'guided by diverse interests and concerns - many of them possibly coalescing'.[72] In other words, the reform needed was too complex to be 'captured and evaluated within a singular judicial proceeding', instead requiring a 'deliberative and consultative exercise, which the legislature and executive are constitutionally suited, and tasked, to undertake'.[73] After all, it is the Parliament who has 'access to varied sources of information and represents in itself a diversity of viewpoints in the polity'[74] and therefore it should be the Parliament who 'engage[s] in democratic decision-making and settle[s] upon a suitable course of action'.[75] While the Court's powers of judicial review are expansive, the

> *"breadth of this power is restrained by the awareness that it is in essence judicial. The court may feel the wisdom of a measure or norm that is lacking; nevertheless, its role is not to venture into functions which the constitution has authorised other departments and organs to discharge".*[76]

67 Ibid., para. 209 (Chandrachud J.); Ibid., para. 18 (Kaul J.).
68 Ibid., para. 138 (Bhat J.).
69 Ibid., para. 208 (Chandrachud J.) (emphasis added).
70 Ibid., para. 17 (Kaul J.).
71 Ibid., para. 208 (Chandrachud J.) (emphasis added).
72 Ibid., para. 118 (Bhat J.).
73 Ibid., para. 19 (Narasimha J.).
74 Ibid., para. 208 (Chandrachud J.).
75 Ibid., para. 210 (Chandrachud J.).
76 Ibid., para. 136 (Bhat J.) (emphasis in original).

Thus, just like the Court's institutional limitations in imposing the appropriate positive duty on the State drove it to deny constitutional recognition to the right to marry, the Court's 'limited institutional capacity'[77] to design necessary remedies cemented its conclusion to deny the right to marry: 'The realization of a right is effectuated when there is a remedy available to enforce it…Absent the grant of remedies, the formulation of doctrines is no more than judicial platitude.[78]

Underlying the Court's decision across all three stages was an understanding of the separation of powers as key to maintaining institutional specialisation amongst branches. For the Court, *this* was what separation of powers was meant to achieve, and this was what the Court was required to protect in applying the doctrine. At the first stage of deciding jurisdiction, the Court saw itself as possessing the institutional capacity to conduct judicial review. However, at the second stage of determining the existence of a constitutional right to marry, the Court decided that its institutional capacity fell far short. The structural features of the judiciary did not support the recognition of such a right as it would require the imposition of polycentric positive duties on the State and the designing of complex remedies, both of which existed outside the 'judicial' nature of the Court's capacity. For the Court, these tasks were much better suited to decision-making by other State branches, especially the legislative branch which offered representation to diverse groups of the policy and was thus an ideal forum for consultation and deliberation.

The Court's consistent emphasis on the doctrine as a means to maintain institutional specialisation caused its separation of powers assessment to quickly become a turf demarcation exercise. As is evident across the decisions of all five judges, the Court's main concern was delineating, with care, the judicial and legislative turfs – or 'domains'[79] – based on the skills possessed by each branch in light of its structural features. For instance, the Court concluded that the judiciary has the relevant legal skill (and constitutional authority) to conduct review of legislation on rights grounds while the legislature, in light of its composition and direct accountability to the electorate, is better able to decide the shape of the civil right to marry. Once such delineation was complete, the Court simply did its best to stay out of the legislative turf. This was the *sole* parameter on the basis of which the Court adjudicated whether there ought to be a constitutional right to marry. The implications for rights-holders – same-sex couples, already stigmatised on account of their sexuality and further marginalised by the law excluding them from an important social institutional like marriage – were largely missing within this separation of powers assessment. Of course, the Court did acknowledge their disadvantage:

77 Ibid., para. 18 (Kaul J.).

78 Ibid., para. 333 (Chandrachud J.).

79 Ibid., para. 67 (Chandrachud J.); Ibid., para. 18 (Kaul J.).

> *"This court is alive to the feelings of being left out, experienced by the queer community*[80]*…The feeling of exclusion that comes with this status quo, is undoubtedly one which furthers the feeling of exclusion on a daily basis, in society for members of the queer community".*[81]

However, the Court's bottom line was clear. The separation of powers, and its focus on maintaining institutional specialisation, demanded that the Court stay out of recognising a constitutional right to marry, *irrespective* of what it meant for queer couples:

> *"addressing [the] concerns [of the queer community] would require a comprehensive study…involving a multidisciplinary approach and polycentric resolution, for which the court is not an appropriate forum".*[82]

D. Rights Preservation

This reading of separation of powers would have been entirely acceptable had the sole purpose of the doctrine been to ensure that governance decisions are made by State branches best suited to make them. In that case, the marginalisation of the rights-holder would have been an unfortunate byproduct of the doctrine, a consequence that would have to be borne if separation of powers had to be guaranteed. However, this is not the case. Separation of powers is *not* driven solely by the value of maintaining institutional specialisation. Rather, across contexts, it is, and has historically been, *also* means to preserve rights and protect rights-holders.

From the time of Montesquieu and Madison, to whom the origins of the doctrine are commonly attributed, the separation of powers has sought to divide power amongst branches of the State to avoid excessive concentration of power in the hands of one branch alone:[83]

> *"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny*[84]*…when legislative*

80 Ibid., para. 149 (xiii) (Bhat J.).

81 Ibid., para. 147 (Bhat J.).

82 Ibid., para. 149(xiii) (Bhat J.) (emphasis added).

83 *Waldron*, note 43, pp. 433, 437; *Steven Calabresi / Mark Berghausen / Skylar Albertson*, The Rise and the Fall of Separation of Powers, Northwestern University Law 106 (2012), p. 533; *Huq / Michaels*, note 15, p. 382; *Luca Pietro Vanoni*, New Challenges to the Separation of Powers: The Role of Constitutional Courts, in: Antonia Baraggia / Cristina Fasone / Luca Vanoni (eds.), New Challenges to the Separation of Powers: Dividing Power, Cheltenham 2020, p. 49.

84 *James Madison*, The Federalist Papers: No. 47 (1 February 1778) https://avalon.law.yale.edu/18th_century/fed47.asp ('Federalist 47') (emphasis added) (last accessed on 7 May 2025).

> *power is united with executive power in a single person or in a single body of the magistracy, there is no liberty".*[85]

In contrast, dividing power reduces the possibility of 'authoritarianism'[86] and dilutes the State's ability to violate rights.[87] In separating law makers from law enforcers and interpreters, the doctrine also does away with 'partiality and self-interest'[88] which would otherwise 'dramatically diminish' the value of constitutional rights:'[89]

> *"Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator. Were it joined to the executive power the judge might behave with all the violence of an oppressor."*[90]

Separating power also brings with it greater accountability. It creates 'multiple centres of recourse' to which citizens can appeal to satisfy their rights,[91] such that if one branch makes a rights-eroding error, other branches exist to offer them rights-protective remedies.[92] And, the division of power raises 'transaction costs' of enacting new rules: 'requiring the agreement of multiple institutions makes it less likely that the government will intrude upon

85 *Montesquieu*, The Spirit of the Laws, in: Anne Cohler / Basia Miller / Harold Stone (eds.), Cambridge Texts in the History of Political Thought, Cambridge 1989, p. 157 (emphasis added).

86 *Arianna Vedaschi*, Introduction to Part III: Separation of Powers in Times of Crisis, in: Antonia Baraggia / Cristina Fasone / Luca P. Vanoni (eds.), Cheltenham 2020, p. 166; *Landau / Bilchitz*, note 13, p. 1; *Kavanagh*, note 22, p. 221.

87 *Maldonado*, note 25, p. 145; *Andrew Hessick*, Standing, Injury in Facts and Private Rights, Cornell Law Review 93 (2008), p. 318; *Vile*, note 26, p. 13; *Waldron*, note 43, p. 439; *Peabody / Nugent*, note 15, p. 12; *William B. Gwyn*, The Separation of Powers and Modern Forms of Democratic Governance, in: Robert Goldwin / Art Kaufman (eds.), Separation of Powers: Does It Still Work?, American Enterprise Institute for Policy Research 1986, pp. 65-66; *Kent Barnett*, Standing for (and up to) Separation of Powers, Indiana Law Journal 91 (2016), p. 58; *T.R.S Allan*, Law, Liberty and Justice: The Legal Foundations of British Constitutionalism, Oxford 1994.

88 *Carolan*, note 15, pp. 27-28.

89 *Brown*, note 15, p. 1514.

90 Madison, Federalist No. 47, note 84; See also *John Locke*, Second Treatise of Government, Hackett Publishing Company 1980, sec. 143: "[I]t may be too great a temptation to human frailty . . . for the same Persons who have the power of making Laws, to have also in their hands the power to execute them, whereby they may exempt themselves from Obedience to the Laws they make, and suit the Law, both in its making and execution, to their own private advantage."; see also *Montesquieu*, note 85, p. 157: "Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator."

91 *Waldron*, note 43, p. 439; *Martin Flaherty*, The Most Dangerous Branch, The Yale Law Journal 105 (1996) p. 1730; *Huq / Michaels*, note 15, p. 385; *Eoin Carolan*, Revitalising the social foundations of the separation of powers?, in: Antonia Baraggia / Cristina Fasone / Luca P. Vanoni (eds.), Cheltenham 2020, p. 26.

92 *Barber*, note 17, p. 72.

individual liberties'.[93] This is especially so when the branches are intentionally varied, with members of each chosen in a different way and representing a different sets of interest. This 'complexity and diversity' makes friction likely. The 'friction, in its turn, protects liberty' (or rights more generally).[94]

The separation of powers thus is, and has always been, means to preserve rights and protect rights-holders. It is 'inextricably linked' to the 'enhancement'[95] of guaranteed rights, an 'indispensable correlative' of these rights[96] and a 'bulwark of liberty' without which rights are 'nothing but paper'.[97] In constructing its reading of separation of powers around the value of maintaining institutional specialisation alone, *Supriyo* missed out on capturing this second value driving the doctrine. The Court's reading of separation of powers was therefore truncated and imbalanced. It amplified one aspect of the doctrine and diminished the other. The imbalance requires correction. Rights preservation should be reinstated as a key value driving the separation of powers: 'the protection of individual rights…should be an explicit factor in the analysis of structural issues and should provide an animating principle for the jurisprudence of separation of powers'.[98]

Typically, the separation of powers preserves rights by ensuring that State branches do not overstep their boundaries to usurp power from another branch and concentrate power in themselves. This is evident within Montesquieu and Madison's call to 'give one power a ballast…to put it in a position to resist another',[99] such that the constituent parts of government 'may, by their mutual relations, be the means of keeping each other

93 *Jonathan Macey*, How Separation of Powers Protects Individual Liberties, Rutgers Law Review 41 (1989), p. 814 (emphasis added); *Kate Andrias*, Separations of Wealth: Inequality and the Erosion of Checks and Balances, Journal of Constitutional Law 18 (2015), p. 485; *Daryl Levinson / Richard Pildes*, Separation of Parties, not Powers, Harvard Law Review 119 (2006), p. 27 ('The cardinal virtue of the Madisonian separation of powers is supposed to be that, by raising the transaction costs of governance, it preserves liberty and prevents tyranny').

94 *Barber*, note 17, p. 52; *Eric Barendt*, An Introduction to Constitutional Law, Oxford 1998; *Jiří Baroš / Pavel Dufek / David Kosař*, Unpacking the separation of powers, in: Antonia Baraggia / Cristina Fasone / Luca P. Vanoni (eds.), Cheltenham 2020, p. 127.

95 *Bruce Ackerman*, The New Separation of Powers Harvard Law Review 113 (2000), p. 640.

96 *Brown*, note 15, p. 1539.

97 *Richard Murphy*, Book Review: The Constitution as Political Structure, Constitutional Commentary 13 (1996), p. 343; *Ron Merkel*, Separation of Powers - A Bulwark for Liberty and a Rights Culture, Saskatchewan Law Review 69 (2006), p. 129; *Dennis LaGory*, Federalism, Separation of Powers, and Individual Liberties, Vanderbilt Law Review 40 (1987), p. 1353; *David Lewittes*, Constitutional Separation of War Powers: Protecting Public and Private Liberty, Brooklyn Law Review 57 (1992), p. 1083; *Martin Feigenbaum*, The Preservation of Individual Liberty Through the Separation of Powers and Federalism: Reflections on the Shaping of Constitutional Immortality, Emory Law Journal 37 (1988), p. 613; *Carrington*, note 15, p. 661.

98 *Brown*, note 15, p. 1516 (emphasis added).

99 Montesquieu, note 85, Book V, ch. 14.

in their proper places'.[100] Here, the primary threat to rights is seen as coming from an all-too-powerful State and the demand is therefore for power to be divided. However, this point of view assumes that rights and a strong State are 'inevitably opposed' to one another.[101] It advances an 'essentially negative view of political liberty, one too concerned with the view of freedom as absence of restraint, rather than with a more positive approach to freedom'.[102] It creates 'so much friction' that State action becomes 'extremely difficult', preventing 'the state from protecting its citizens'[103] and gumming up the 'government to liberty's detriment'.[104]

Fortunately, this 'unattractive account' of the State and rights[105] is no longer dominant within constitutional theory and practice in India. It has been replaced by the clear acceptance that positive State action is required for meaningful rights protection.[106] Rights are seen as 'achieved through state action, not against it'.[107] As Justice Chandrachud himself recognised in *Supriyo*,

> *"Fundamental rights consist of both negative and positive postulates preventing the State from interfering with the rights of the citizens and creating conditions for the exercise of such rights respectively. This understanding of fundamental rights is unique to Indian constitutional jurisprudence.[108] Fundamental rights are not merely a restraint on the power of the State but provisions which promote and safeguard the interests of the citizens. They require the State to restrain its exercise of power and create conducive conditions for the exercise of rights. If such a positive obligation is not read into the State's power, then the rights which are guaranteed by the Constitution would become a dead letter."*[109]

With this fundamental shift in the understanding of rights and the nature of the State, I argue, a parallel shift ought to be triggered in the reading of separation of powers. Under

100 *James Madison*, 'The Federalist Papers: No. 51' (8 February 1778) https://avalon.law.yale.edu/18th_century/fed51.asp (last accessed on 8 August 2024).

101 *Barber*, Principles of Constitutionalism, note 17, p. 53

102 *Vile*, note 26, p. 15.

103 *Barber*, Principles of Constitutionalism, note 9, p. 17; *Foran*, note 33, p. 616; *Ginnane*, note 35, p. 139; *Paolo Sandro*, The Making of Constitutional Democracy: From Creation to Application of Law, London 2022, p. 243.

104 *Ginnane*, note 35, p. 137.

105 *Barber*, note 17, p. 51.

106 For instance, see *Henry Shue*, Basic Rights: Subsistence, Affluence, and US Foreign Policy, Princeton 1996; *Sandra Fredman*, Comparative Human Rights Law, Oxford 2018.

107 *Christoph Möllers*, The Separation of Powers, in: Roger Masterman / Robert Schultze (eds.), The Cambridge Companion to Comparative Constitutional Law, Cambridge 2019, p. 245 (emphasis added).

108 *Supriyo*, note 11, para. 157 (Chandrachud J.).

109 Ibid., para. 158 (Chandrachud J.) (emphasis added), a stance supported by earlier cases like *Puttaswamy*, note 8, para. 140 (Chandrachud J.); *X v NCT*, note 53, paras. 130, 133.

this reading, the separation of powers requires not just State inaction to guarantee rights protection. It also calls for different forms of State action. That is, rights are protected not just by dividing power up amongst branches and keeping them in check to ensure that they do not usurp power from the other. Rights are also protected by State branches acting *to* guarantee rights.

The judiciary is one such branch of the State. When the separation of powers is understood as the means to maintain institutional specialisation alone, court action to recognise and protect unenumerated rights – like the right to marry – is typically seen as infringing on the legislative turf and therefore inconsistent with separation of powers. *Supriyo* epitomises this impulse. Alternatively, and at best, such court action is seen as an exception to the separation of powers. While the separation of powers normally calls for court inaction with respect to unenumerated rights, in special situations of political dysfunction[110] or when the State has obstructed political change by suppressing citizen voices (for instance through restrictions on speech or voting) and hindering minority participation,[111] the doctrine is relaxed and rendered flexible to permit court action. However, when rights preservation is reinstated as a value driving the separation of powers, court action to recognise and protect unenumerated rights – like the right to marry – no longer detracts from the doctrine. Nor is it just a carefully regulated exception to it. Rather, it is consistent with the doctrine, part and parcel of what it demands.

In formulating the three categories – court action as inconsistent with separation of powers, court action as an exception to separation of powers, and court action as part and parcel of separation of powers – I draw inspiration from another area of Indian constitutional jurisprudence: the Supreme Court's holdings on affirmative action. Under Articles 15(1) and 16(1), the Indian Constitution commands that the State shall not discriminate against its citizens on the basis of certain listed grounds while under Articles 15(3)-(4) and 16(4)-(5), the Constitution allows the State to enact certain forms of affirmative action for members of disadvantaged groups. The relationship between the two sets of clauses has been the subject of fierce constitutional debate in India. Going simply by the text of the Constitution, affirmative action is not inconsistent with the demand for equality, such that if equality is to be protected, affirmative action would always have to be outlawed. Had the relationship been one of pure inconsistency, the Constitution would not have explicitly provided for equality and affirmative action side-by-side. So, inconsistency can be safely set aside. The Supreme Court initially read the affirmative action clauses as exceptions to the equality

110 *David Landau*, Institutional failure and intertemporal theories of judicial role in the global south, in: David Bilchitz / David Landau, The Evolution of the Separation of Powers, Cheltenham 2020, pp. 40-45.

111 For instance, *John Hart Ely*, Democracy and Distrust: A Theory of Judicial Review, Cambridge MA 1980, pp. 105-179; Dixon develops Ely's representation reinforcement theory of judicial review, see *Rosalind Dixon*, Responsive Judicial Review: Democracy and Dysfunction in the Modern Age, Oxford 2023.

clause, such that the equality norm required all groups be treated identically[112] but some forms of differential treatment through affirmative action was permitted to redress group disadvantage.[113] Affirmative action was thus on principle understood as taking away from equality but was justified in light of its specific constitutional purpose. However, with time, the Court adopted a different reading of the two clauses. It read the affirmative action clauses as part and parcel of the equality clause such that affirmative action did not detract from equality but rather helped achieve its aims.[114] This altered understanding emerged from a new equality norm which no longer demanded identical treatment of similar persons in the name of equality. Rather, it sought to redress historic disadvantage,[115] shifting how affirmative action was conceived. If the very purpose of the equality clause was to redress disadvantage, affirmative action – which did exactly that – could no longer be an exception to equality. Rather, it became part and parcel of the equality clause.

Let us now bring these three categories to *Supriyo*. As we saw in section C, *Supriyo* understood court action to recognise and protect the unenumerated constitutional right to marry as being inconsistent with the separation of powers. It was against the dominant separation of powers norm, which sought to maintain the institutional specialisation of branches. Judicial intervention was thus simply not allowed. One way the Court could have intervened would have been to construct its intervention to recognise and protect the right to marry as an exception to separation of powers. While normally the doctrine demands that the court stay away from such action so as to respect the institutional capacities of other State branches, in certain exceptional situations – such as political dysfunction or obstructed political participation (such as of sexual minorities) – the doctrine permits court intervention. This interpretative manoeuvre would have allowed for the recognition of a constitutional right to marry but would have retained the norm: that the separation of powers is meant simply to maintain institutional specialisation.

What if the norm is instead recast? If rights preservation is reinstated as a value driving the doctrine? If the separation of powers is also means to preserve rights, then judicial action to recognise and protect the unenumerated constitutional right to marry – which does exactly that – would no longer be inconsistent with the doctrine, nor a carefully regulated

112 This equality norm is also called 'formal equality': *Catherine MacKinnon*, Sex equality under the Constitution of India: Problems, prospects, and ''personal laws'', International Journal of Constitutional Law 4 (2006), p. 181.

113 *General Manager, Southern Railway v Rangachari* AIR 1962 SC 36*; M.R. Balaji v State of Mysore* AIR 1963 SC 649.

114 *State of Kerala v N.M. Thomas* AIR 1976 SC 490*; Indra Sawhney v Union of India* AIR 1993 SC 477.

115 This equality norm is called substantive equality: *Indra Jaising*, Gender Justice and the Supreme Court, in: BN Kirpal et al. (eds.), Essays in Honor of the Supreme Court of India, Oxford 2000, p. 293; *Ratna Kapur / Brenda Cossman*, On women, equality and the Constitution: Through the Looking Glass of Feminism, in :Nivedita Menon (ed.), Gender and Politics in India, Oxford 1999, p. 200; *Sandra Fredman*, Substantive Equality Revisited, International Journal of Constitutional Law 14 (2016), p. 729.

exception to it. Rather, it would be part and parcel of the doctrine. So understood, the separation of powers would not ask courts to stay out of protecting the unenumerated right to marry. Rather, it would invite courts in and support the role of courts. It would transform judicial intervention from an outlaw (not allowed) or an outlier (an exception) to an essential feature of the doctrine. Within this frame, the most common threshold objection to courts protecting unenumerated constitutional rights, including the right to marry – that the separation of powers requires the judiciary to keep away – is dissolved. Judicial intervention is certainly allowed. And in some cases – such as where the majoritarian political process is hostile to the claims of some groups, discussed below – it might even be required.

Strictly speaking, even when maintaining institutional specialisation is the only value at play, an argument for court intervention could be made by showing that courts too have the institutional capacity to protect the right to marry, just in ways that are different from the Parliament (something the *Supriyo* Court refused to acknowledge). Courts have the legal and technical capacity to creatively interpret constitutional rights in light of precedent. Being outside of electoral politics, courts also offer a unique form of deliberative and democratic space. I consider these arguments in greater detail below. However, the difficulty with this claim is that the value of maintaining institutional specialisation inherently downplays the role of courts and emphasises the place of political branches in relation to the right to marry. This is possibly because of right's contentious political nature, which all judges repeatedly pointed to in *Supriyo* in anointing the Parliament as the appropriate institutional forum for recognising the right. A case for court intervention therefore needs to stand on a stronger values-based footing, one that will dilute the dominance of the Parliament and carve out space for courts. The value of rights preservation performs this role.

E. Modified Separation of Powers in Supriyo

Reinstating rights does not mean that the value of maintaining institutional specialisation plays no part within the separation of powers assessment. That courts have carte blanche when it comes to rights protection, such that all forms of court action in the name of protecting rights is justified. When courts act to preserve rights entirely mindless of institutional limitations, their actions often threaten rights themselves. The work of Octavio Ferraz in the context of right to health litigation in Brazil demonstrates this risk well.[116] Ferraz shows how judicial intervention to recognise and enforce the right to health of an individual citizen without altering the background political economy (including patenting regimes) – a task outside the institutional capacity of courts – has only worsened health

116 *Octavio Ferraz*, Health as a Human Right: the Politics and Judicialisation of Health in Brazil, Cambridge 2021.

inequalities in Brazil.[117] Anuj Bhuwania's ground-breaking work on the public interest litigations in India documents another variant of this same concern. Bhuwania skilfully shows how the 'teleological'[118] focus on rights has led to a 'new kind of judicial process' in India which is 'entirely court led and managed' with 'no institutional control…except such self-control that the court wished to exercise'.[119] While public interest litigation originated with an intent to preserve rights, it eventually morphed into a 'dangerous farce',[120] a means to target the most vulnerable rights-holders living on the 'margins of legality' who became 'collateral damage' in the courts' endeavour to find 'neat solutions to the problems of the city'.[121] Bhuwania therefore urges us to 'think in terms of institutional consequences'[122] while adjudicating rights.

This is an important call to heed. The risks posed by forms of court action that shun institutional considerations are significant. Therefore, it is not my claim that rights preservation ought to be the sole value driving the separation of powers exercise. Rather, I argue that rights preservation should co-exist alongside the value of maintaining institutional specialisation in guiding how separation of powers is understood and applied. The problem with *Supriyo* was therefore not that it paid attention to institutional capacities but that it paid attention *only* to institutional capacities. It did not recognise rights preservation as a value driving the separation of powers. Modifying *Supriyo's* understanding of the doctrine would therefore involve bringing its attention to the value of rights preservation as well rather than removing its focus on institutional capacities. The task of the Court would then be to carry out a separation of powers assessment that simultaneously protects both values.

To guarantee the value of rights preservation, the Court would intervene to recognise and protect the unenumerated constitutional right to marry. It would not keep away on separation of powers grounds. Yet the Court's intervention would simultaneously respect its own institutional capacity and that of other State branches. In other words, while the value of rights preservation makes space for court action in relation to the right to marry, the value of maintaining institutional specialisation prescribes the forms of (and limits on) such action. For insights on what this could look like in practice, we fortunately don't have to venture too far. Other parts of the *Supriyo* dicta, beyond the Court's holdings on the constitutional right to marry, indicate how courts can protect rights while also simultaneously respecting the institutional strengths and limitations of State branches.

117 See also *Amy Kapczynski*, The Right to Medicines in an Age of Neoliberalism, Humanity (2019), pp. 79-107.

118 *Anuj Bhuwania*, Courting the People: Public Interest Litigation in Post-Emergency India, Cambridge 2017, p. 136.

119 Ibid., p. 8.

120 Ibid., p.12.

121 Ibid., p. 9.

122 Ibid., p.136.

Recall that there were two main objections posed by the *Supriyo* Court to recognising a right to marry. *First*, that the very act of the Court requiring the State to put in place an institution of marriage for same-sex couples would violate the separation of powers because it would amount to the Court asking the State to legislate. Whether this institution should exist for queer couples in the first place is something the Parliament should decide after consulting diverse stakeholders. It is not the unelected Court to determine. *Second*, the innate complexity of the duties flowing from the right to marry and the remedies required to effectuate the right concerned the Court. Giving substantive content to the right to marry – and its corresponding duties – is polycentric, requiring a range of policy choices which the Court would be obligated dictate: 'The court would have to fashion a parallel legal regime, comprising of defined entitlements and obligations'.[123] The Court rightly held that designing such a regime fell outside its institutional capacity.

Other parts of the *Supriyo* dicta however reveal that the Court's concerns can be addressed in a way which does not sacrifice rights but respects institutional capacity. Let's start with the second objection first. While Justice Chandrachud's dissent refused to recognise a constitutional right to marry, it did grant recognition to a constitutional right to union, another unenumerated right: 'The state has an obligation to recognize same-sex unions and grant them benefit under law'.[124] Justice Chandrachud dismissed the concern that recognising such a right – and the corresponding State duty– would require the *Court* to give substantive shape and content to both, designing the legal regime supporting them. He instead passed the responsibility of this complex task to a State Committee comprising of members of the queer community and experts with domain knowledge in dealing with the social, psychological, and emotional needs of persons belonging to this community. He required that before finalising its decision, the Committee 'conduct wide stakeholder consultation amongst persons belonging to the queer community, including persons belonging to marginalized groups and with the governments of the States and Union Territories'.[125] The recommendations of the Committee, Justice Chandrachud declared, 'shall be implemented' at the Union and State levels.[126]

It is unclear why the same analysis could not have applied to the right to marry. Why the right could not have been recognised without placing on the Court the responsibility to design the legal institution. What makes the unenumerated right to union different from the unenumerated right to marry? Justice Chandrachud does not provide us an answer, which is where the majority took issue with his reasoning. Justice Bhat and Justice Nariman both held that recognising an unenumerated right to union fell prey to the same institutional concerns as recognising the right to marry: 'in positively mandating the State…grant recog-

123 *Supriyo*, note 11, para. 145 (Bhat J.) (emphasis added).

124 Ibid., para. 340(i) (Chandrachud J.).

125 Ibid., para. 340(s) (Chandrachud J.).

126 Ibid., para. 340(s) (Chandrachud J.); Ibid., para. 11 (Kaul J.).

nition or legal status to 'unions' from which benefits will flow…the doctrine of separation of powers is violated'.[127] The *Supriyo* majority therefore refused to sanctify to both rights.

However, Justice Bhat did, to some extent, follow Justice Chandrachud's lead. Justice Bhat found that the State's exclusion of same-sex couples from the SMA (and related legislation) had an adverse discriminatory impact on them and violated Article 15 of the Constitution. Recognising this violation, he argued, was 'this court's obligation, falling within its remit':[128] 'this discriminatory impact cannot be ignored by the State; the State has a legitimate interest necessitating action'.[129] Note the mandatory language, repeatedly found across Justice Bhat's decision: 'the State has to address and eliminate…the consequences[s] of the non-recognition of queer unions…through appropriate mitigating measures'.[130] The violation being of an explicitly listed right (Article 15) and not an unenumerated one, placing this duty on the State arguably raised less institutional concerns. Even so, after holding that the State *has to* take action to protect the rights of same-sex couples against discrimination, Justice Bhat rightly brought institutional considerations back into the picture:

> *"The form of [State] action – whether it will be by enacting a new umbrella legislation, amendments to existing statutes, rules, and regulations that as of now, disentitle a same-sex partner from benefits accruing to a 'spouse' (or 'family' as defined in the heteronormative sense), etc.– are policy decisions left to the realm of the legislature and executive[131]…this court cannot within the judicial framework engage in this complex task."*[132]

The requisite decisions were thus left to be taken by the appropriate State branches after undertaking 'wide scale public consultation [and] consensus building' to 'reflect the will of people'.[133] For this purpose, Justice Bhat secured the agreement of the Union Government that a High Powered Committee chaired by the Union Cabinet Secretary would be set up.[134] Justice Bhat also required that the State take action with 'expedition because inaction will result in injustice and unfairness'.[135]

A common theme is now visible. Both judges found that a constitutional right was implicated and violated: the (unenumerated) right to union for Justice Chandrachud and the (enumerated) Article 15 for Justice Bhat. However, the judges did not assume the whole

127 Ibid., para. 17 (Narasimha J.); see also paras. 52-70 (Bhat J.).
128 Ibid., para. 148 (Bhat J.).
129 Ibid., para. 148 (Bhat J.) (emphasis added).
130 Ibid., para. 132 (Bhat J.) (emphasis added).
131 Ibid., para. 148 (Bhat J.) (emphasis in original).
132 Ibid., para. 149 (vii) (Bhat J.).
133 Ibid., para. 148 (Bhat J.).
134 Ibid., para. 149 (vii) (Bhat J.).
135 Ibid., para. 149 (vii) (Bhat J.).

responsibility of preserving these rights onto themselves. They did not see rights preservation as the 'solitary domain' of courts.[136] Rather, preserving rights was understood as a multi-institutional, collaborative, constitutional enterprise.[137] The judges did what courts are adept at doing in light of their distinct legal skills. They located the right within the Constitution, assessed its possible violation, and indicated corresponding State duties. Then they stopped, recognising that the capacity of courts to protect rights has inherent limits. Due to courts' necessarily piecemeal law-making tools, they find it difficult to effectively conceptualise more forward-looking, holistic policy and legislative frameworks. At this point, the judges made way for other State branches and *their* distinct institutional skills. They 'reached out to their partners in the collaborative scheme, imploring them to remedy the problem comprehensively and democratically, as only the government and legislature can'.[138] They recommended that State Committees be set up to determine the broader and more nuanced contours of the policy after widespread consultations. And they required that this be done quickly.

Applying the same approach to the constitutional right to marry, the *Supriyo* Court could have drawn a distinction between recognising a right and requiring the State to protect it *and* the task of giving shape to the State's duty and designing the legal regime supporting it. While the former fell within the institutional capacity of the Court, the latter could have been handed over to the other State branches. So understood, the Court would *not* have to 'fashion a parallel legal regime, comprising of defined entitlements and obligations' to effectuate the right to marry,[139] a major factor deterring it from recognising the right to marry. Instead, this would be the responsibility of the Court's partners within the multi-institutional, collaborative constitutional enterprise of rights protection.

This approach would transform *Supriyo's* separation of powers assessment. No longer would the sole focus of the Court be on maintaining the institutional specialisation of State branches, with separation of powers becoming a turf demarcation exercise leading ultimately to the marginalisation of rights. Rights preservation would instead be reinstated as a core value driving the separation of powers exercise. At the same time, the Court would not have the power to do as it pleases in the name of protecting rights, with no form of institutional control. Rather, rights would be protected precisely by tapping into the distinct institutional roles of the branches, so that each branch does its part while supporting other branches in their own roles. Both values driving the separation of powers doctrine would therefore be simultaneously maintained.

136 *Kavanagh*, note 31, p. 9.

137 *Christoph Möllers*, The Three Branches: A Comparative Model of Separation of Powers, Oxford 2013, pp. 106-108; *Kavanagh*, note 31, pp. 1-9; *Kyritsis*, note 18, pp. 121-214; *Maldonado*, note 25, p. 154; *Foran*, note 33, p. 604; *Baroš / Dufek / Kosař*, note 94, p. 129.

138 *Kavanagh*, note 31, p. 329.

139 *Supriyo*, note 11, para. 145 (Bhat J.).

Let us now return to *Supriyo's* first objection to recognising the unenumerated right to marry. That even if the other State branches decide the shape of the State's duties and design the appropriate legal regime as suggested above, in its very demand that the State set up the institution of marriage for same-sex couples, the Court is asking the State to legislate on an issue that the State should democratically decide through voting in the Parliament. Put simply, even if the Court did not shape/design the institution of civil marriage, in requiring the State to set it up, the Court would violate the separation of powers. Here, the concern is not with the Court's lack of technical capacity to craft a spider-web of legislation on marriage but its apparent democratic deficit, as it – unlike the Parliament – does not represent the people who ought to decide whether same-sex couples should be allowed to marry or not. As Counsel for one of the Respondent's argued, 'A judicial sanctioned legal recognition of non-heterosexual union would be a colonial top-down imposition of morality. Such an approach would diminish democratic voices in the process'.[140] The Parliament's evident democratic credentials and the Court's ostensible lack of them therefore became a key institutional consideration configuring the Court's separation of powers assessment.

This holding however turns on the notion of democracy at play. Of course, democracy can be understood simplistically as majoritarian decision-making, such that whatever the majority decides is the democratically optimal answer and any deviation from it would take away from democratic politics. However, as Justice Chandrachud himself recognised in *Supriyo*, this is a 'narrow definition of democracy' understood solely as the electorate mandate of the majority.[141] He made this observation made while dismissing the Respondent's objections to the Court's jurisdiction on ground that judicial review of legislation is anti-democratic and therefore violates the separation of powers:

> *"Electoral democracy – the process of elections based on the principle of 'one person one vote' where all citizens who have the capacity to make rational decisions (which the law assumes are those who have crossed the age of eighteen) contribute towards collective decision making is a cardinal element of constitutional democracy. Yet the Constitution does not confine the universe of a constitutional democracy to an electoral democracy. Other institutions of governance have critical roles and functions in enhancing the values of constitutional democracy."*[142]

140 Submissions of Advocate Sai Deepak, recorded in Ibid., para. 50(1) (Chandrachud J.) (emphasis added).

141 Ibid., para. 77 (Chandrachud J.), a point of view endorsed by many democratic theorists such as *Gerry Mackie*, Deliberation and Voting Entwined, in: Andre Bachtiger et al. (eds.), The Oxford Handbook of Deliberative Democracy, Oxford 2018, p. 218; *Tom Christiano,* Democracy, in: Edward N. Zalta (ed.), Stanford Encyclopedia of Philosophy Archive, Stanford 2018; *Amy Gutmann,* Democracy, in: Robert Goodin et al. (eds.), A Companion to Contemporary Political Philosophy, Hoboken 2007, p. 521 ('Majoritarian decision making may be a presumptive means of democratic rule, but it cannot be a sufficient democratic standard;); *Melissa Murray / Katharine Shaw*, Dobbs and Democracy Harvard Law Review 134 (2024), pp. 760-76.

142 *Supriyo*, note 11, para. 78 (Chandrachud J.) (emphasis added).

This includes courts, which can be 'democracy-enabling' rather than 'democracy-disabling':[143]

> *"Courts contribute to the democratic process while deciding an issue based on competing constitutional values, or when persons who are unable to exercise their constitutional rights through the political process knock on its doors. For instance, members of marginalized communities who are excluded from the political process because of the structural imbalance of power can approach the court through its writ jurisdiction to seek the enforcement of their rights."*[144]

Extend this more substantive understanding of democracy to the actual exercise of the power of judicial review. When democracy is understood substantively, the Court's action in protecting the unenumerated constitutional right to marry and requiring the State to set up the institution of civil marriage is much less antagonistic to democracy. While it may not be democratic in the majoritarian decision-making sense, it is democratic in an alternate, 'bottom-up' sense.[145] Due to courts' distinctive institutional features – set out in section B – courts are 'differently open' from representative bodies like the Parliament. They employ different methods of factfinding, legal argument and reasoning and bear the responsibility of providing the public with reasons for their holdings.[146] Groups 'marginalized in democratic politics may [therefore] find that courts provide *alternative fora*…strengthen[ing] the groups' ability to communicate in democratic politics'.[147] Their turn to courts introduces previously sidelined voices and claims into societal deliberations, injects new agendas, and reshapes democratic norms. This then could initiate rights-protective shifts within the legislature, opening 'channels of communication across institutional domains'.[148] Courts could thus 'articulate and enforce rights in ways that reshape politics'.[149]

Had the *Supriyo* Court recognised same-sex couples' constitutional right to marry, it might have had this effect. The majoritarian political process is hostile to the claims and concerns of same-sex couples, both because they are a numerical minority and due to the stigma around these relationships. They therefore require the assistance of a State branch not governed by majoritarian democratic politics – the Court – to insert their claims into the political agenda through judicial recognition of their right to marry. Once this is done, the shaping of the institution of civil marriage for same-sex couples goes back to electoral democracy through the legislature. Each fora thus promotes democracy in the way that best

143 Ibid., para. 79 (Chandrachud J.).

144 Ibid., para. 80 (Chandrachud J.) (emphasis added).

145 *Douglas NeJaime / Reva Siegel*, Answering the Lochner Objection: Substantive Due Process and the Role of Courts in a Democracy, New York University Law Review 96 (2021), p. 1908.

146 Ibid., p. 1954.

147 Ibid., p. 1911.

148 Ibid., p. 1951.

149 Ibid., p. 1956.

exemplifies its structural features. That is, democracy protection, like rights preservation, implicates several State institutions.

Reinstating the value of rights preservation therefore does not mean that the value of maintaining institutional specialisation is discarded as a focus of the separation of powers doctrine. Rather, the dual values underlying the separation of powers exercise can be simultaneously maintained by treating rights preservation and democracy protection as multi-institutional, collaborative constitutional enterprises. Rights are preserved and democracy is protected precisely by tapping into the distinctive institutional skills of each State branch. So understood, the *Supriyo* Court's claim that the separation of powers requires it to stay away from recognising a constitutional right to marry loses its power. I show how *Supriyo* could have recognised the right to marry while also respecting its partner State branches. Both actions are consistent with, and sometimes even called for, by the doctrine of separation of powers.

F. Conclusion

My central contribution has been to dilute the separation of powers objection to the judicial recognition of unenumerated constitutional rights. *Supriyo's* turn to this objection mirrors a common trend within the adjudication of the constitutional right to same-sex marriage across contexts.[150] It also extends beyond same-sex marriage to other unenumerated rights like the right to abortion[151] or socio-economic rights.[152]

At the first stage, my arguments here are diagnostic. They distil that which is at play when courts refuse to act to recognise and protect unenumerated constitutional rights citing the separation of powers. I show – convincingly, I hope – that these arguments are typically built on a singular conception of the doctrine: the separation of powers as means to maintain institutional specialisation, whether it be technical capacity or democracy legitimacy. At the second stage, my arguments are disruptive. They dispute this dominant trend within constitutional theory and practice. I trace how the separation of powers has a second core purpose, one that is just as important as ensuring that the right branch makes the right decision. The doctrine is means to preserve rights and protect rights-holders. So understood, court intervention to recognise and protect unenumerated constitutional rights is no longer inconsistent with the doctrine or an exception to it. It is part and parcel of the doctrine, an essential facet to satisfy its demands. At the third and final stage, my arguments are dialogic. They recognise the importance of retaining the value of maintaining institutional specialisation alongside the value of rights preservation. And they show, drawing on other

150 *Lynn Wardle*, The Judicial Imposition of Same-Sex Marriage: The Boundaries of Judicial Legitimacy and Legitimate Redefinition of Marriage, Washburn Law Journal 50 (2011), p. 79.

151 *Dobbs v Jackson Women's Health Organisation* 142 S. Ct. 2228 (2022).

152 *Jeff King*, Judging Social Rights, Cambridge 2012.

parts of the *Supriyo* dicta, how the two values can be brought into conversation with one another, such that both their impulses can be preserved.

On the one hand, I was heartened that I was able to draw support for my arguments from within *Supriyo* itself, just parts outside of the Court's observations on the right to marry. But on the other, it made me wonder why the right to marry was treated differently from the right to union by Justice Chandrachud. There does not seem to be any constitutional or legal reasons for doing so, a point noted by the majority. Was it then driven by political considerations and deference to the Executive? We will never know for sure, but what I have done here is to show that Justice Chandrachud's conclusions on the two rights are driven by two different conceptions of the separation of powers. One sees the doctrine as means to maintain institutional specialisation *alone* and is thus reductive. The other brings both relevant values into the separation of powers assessment and is thus better aligned with the doctrine's aims. Separation of powers objections to courts recognising unenumerated constitutional rights are typically based on the first conception. It would do us well to remember that there is an alternate conception on offer: one that is more consistent with what the separation of powers seeks to do *and* one that the Supreme Court itself seems to draw on sometimes. Separation of powers *simpliciter* can therefore no longer be used as a convenient, seemingly neutral constitutional facade for courts to hide behind when they want to stay out of the fray and avoid conflict with other State branches about politically unpopular rights (like the right to same-sex marriage).[153]

In India, this conclusion assumes special significance at a moment where commentators are increasingly calling out the Indian Supreme Court for its pro-Executive slant.[154] It is only telling that separation of powers arguments that have not really enjoyed much salience amongst the Court in relation to other unenumerated rights have suddenly emerged as the primary obstacle to recognising a right to marry. If the shift in *Supriyo* is indicative of a wider, upcoming trend in Indian constitutional law – one reminiscent of India's global counterparts – it is then an appropriate moment to diffuse the power of these objections by proposing a different conception of separation of powers. A conception that promotes the dual values of rights preservation and maintaining institutional specialisation and thus designs a blueprint for court intervention that protects rights while simultaneously respecting institutional capacity.

153 Ahdout terms this phenomenon 'separation of powers avoidance', see *ZP Ahdout*, Separation-of-Powers Avoidance, Yale Law Journal 132 (2023), p. 2360.

154 *Gautam Bhatia*, Unsealed Covers: A Decade of the Constitution, the Courts, and the State, New York 2023; *Nandini Sundar*, The Supreme Court in Modi's India, Journal of Right-Wing Studies 1 (2023), pp. 106-144.