DIALOGUE OVER DOMINANCE: ALTERNATIVE PERSPECTIVES ON SRI LANKA'S FUTURE BILL OF RIGHTS

CPA Working Papers on Constitutional Reform No. 6, September 2016

Michael Mendis

About the author: Michael Mendis is a Researcher at the Centre for Policy Alternatives (CPA).

The Centre for Policy Alternatives (CPA) was formed in the firm belief that there is an urgent need to strengthen institution- and capacity-building for good governance and conflict transformation in Sri Lanka and that non-partisan civil society groups have an important and constructive contribution to make to this process. The primary role envisaged for the Centre in the field of public policy is a pro-active and interventionary one, aimed at the dissemination and advocacy of policy alternatives for non-violent conflict resolution and democratic governance. Accordingly, the work of the Centre involves a major research component through which the policy alternatives advocated are identified and developed.

This Working Paper is available for free download from www.constitutionalreforms.org. If cited or quoted, reference should be made to the Centre for Policy Alternatives, the name(s) of the author(s), the title and the number of the Working Paper.

© Centre for Policy Alternatives and the author(s)

INTRODUCTION

In the wake of the drive for constitutional reforms this year, revisions to the current framework of judicial review of legislation (JRL) has gained widespread support, and the Public Representations Committee on Constitutional Reforms (PRC) has recommended their adoption in its report to the Constitutional Assembly.[1]

The report endorses the view that judicial review of legislation is essential to the supremacy of the constitution.[2] It recommends that the judiciary should "have the authority to go through and pronounce whether the provisions of laws passed by Parliament or other legislative bodies are valid or not."[3] The Committee does not delve into further detail on its concept of JRL; this is understandable. However, their language nevertheless lends itself to a reading of JRL that rather bluntly equates that concept with the power of courts to invalidate laws for unconstitutionality. To this extent, the PRC Report omits to recognise that different forms of review exist under different constitutional systems[4], and that not all of them contemplate courts wielding this absolute and final of invalidating laws permanently. But the PRC's reading of judicial review is not wholly incongruous with the wider Sri Lankan scholarship on constitutionalism. The direct equation of judicial invalidation with judicial review of legislation has often found expression in Sri Lanka as a "well-established principle of constitutionalism," which posits that "entrenching fundamental rights in a supreme constitution *requires* all ordinary laws and governmental conduct to be consistent with the constitution, and further that any inconsistency *must be judicially reviewable at any time* and *be struck down where necessary*."[5]

This equation of judicial review with judicial invalidation is often termed a 'necessary implication' or a 'logical consequence' of constitutionalising human rights. But that characterisation misses the complexity of the debates surrounding judicial review of

---

[1] Public Representations Committee on Constitutional Reform, *Report on Public Representations on Constitutional Reform* (May 2016), pp. 28, 139. (Hereinafter, PRC Report)

[2] *ibid.*, p. 139: "...[T]he concept of supremacy of the Constitution can be ensured if and only when judicial review of laws passed by the legislatures is available."

[3] *ibid.*, p. 28-29.

[4] "There are a variety of practices all over the world that could be grouped under the general heading of judicial review of legislation. They may be distinguished along several dimensions. The most important difference is between what I shall call strong judicial review and weak judicial review." Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 YALE LAW JOURNAL 1346, 1354.

[5] Rohan Edrisinha & Asanga Welikala, 'GSP Plus and the ICCPR: A Critical Appraisal of the Official Position of Sri Lanka in Respect of Compliance Requirements' in *GSP+ and Sri Lanka: Economic, Labour and Human Rights Issues* (Centre for Policy Alternatives and Friedrich Ebert Stiftung 2008), p. 105. Compare with *Marbury* v. *Madison* 5 U.S. 137, 177 (1803): "Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void. This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society."

legislation.[6] On one side, those advocating it are hard pressed to justify the legitimacy of unelected judges interfering with the legislative outcomes yielded by a democratic process of law-making. On the other, those detracting from it face difficulties dealing with the majority-privileging and rights-oppressing consequences arising from their position. These conflicting positions have yielded, in parliamentary sovereignty and judicial supremacy, two diametrically extreme constitutional traditions purporting to "settle" the issue.[7] Of the two, it is the latter approach that corresponds with vesting courts with the ultimate power to invalidate rights-inconsistent laws, which I refer to in this paper as "strong form judicial review"[8], in recognition of the existence of other approaches to judicial supervision of legislation that do not contemplate a finalistic power of judicial invalidation. It is worth describing such alternative approaches to judicial review as occupying a place in a spectrum where parliamentary sovereignty and judicial supremacy (or strong form judicial review) are the two extremes.[9] This would indicate a multiplicity of options in dealing with the debate at hand. It recommends, for Sri Lanka, too, a more cautious conceptualisation of the role of the judiciary vis-à-vis the constitutional guarantee of human rights, moving beyond the false dichotomy between parliamentary sovereignty and judicial supremacy. Here, it is important to note that the relationship between a given approach to judicial review and the country in which that approach operates is also influenced by the democratic culture prevailing in that country. These variations in democratic cultures counsel against the direct importation of a particular concept of judicial review to a new setting. As Mauro Cappelletti points out, one must be—

> "—very sceptical about the possibility of drawing an abstract line to determine how far judicial review can legitimately go. The solution to the 'mighty problem,' and to the host of questions, doubts, and challenges that are connected to the phenomenon of judicial review, can only be a relative solution, determined by contingent variables such as a given society's history and traditions, the particular demands and aspirations of that society, its political structures and processes, and *the kind of judges it has produced*."[10]

It is in this spirit that I approach a discussion of judicial review for Sri Lanka, particularly in thinking of alternative approaches to "enforce" the fundamental rights to be recognised in the new constitution. Acknowledging that strong form judicial review captures the zeitgeist of the present moment of constitutional reforms, I precede my main discussion, in section two, with a critique of that concept, outlining the main dialectical tensions implicit in it. Against that backdrop, in section three, I discuss two alternative models of

---

[6] See, for instance, a vast body of scholarship cited by Barry Friedman in 'The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy' (1998) 73 NEW YORK UNIVERSITY LAW REVIEW 333, 334-35.

[7] Janet L. Hiebert, 'Parliament and the Human Rights Act: Can the JCHR help facilitate a culture of rights?' (2006) 4(1) INT'L.J. CON. LAW 1, 4.

[8] Mark Tushnet, 'Dialogic Judicial Review' (2009) 61 ARK. L. REV. 205, 206. See also, *supra* note 4.

[9] Tushnet

[10] Cappalletti, *supra* note 22, pp. 410-13. Emphasis added, though without a hint of irony.

judicial review that I argue share closer ties with Sri Lanka's own constitutional history, at least in comparison to strong form judicial review. In section four, I present an outline of an alternative model of review that synthesises these two approaches to produce a unique and complex mechanism, hopefully suited to local experiences. Section five will conclude.

1. THE DIALECTICAL TENSIONS IN STRONG FORM JUDICIAL REVIEW

It is said that strong form judicial review originated in the United States.[11] Though a judicial power to invalidate laws is not explicit in the U.S. constitution, the U.S. Supreme Court confirmed its availability in the famous case of *Marbury* v. *Madison.*[12] In that case, then Chief Justice John Marshall concluded that the judicial invalidation of unconstitutional laws was the syllogistic result of a number of constitutionalist premises preceding it.[13] In order to facilitate the critique of strong form judicial review that is to follow, I paraphrase these premises in two parts, though they are discussed by White more elaborately and sequentially: first, Chief Justice Marshall observed that the invalidity of laws inconsistent with the constitution was a necessary consequence of enshrining limits on legislative powers in a fundamental law:

> "Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void. This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society."[14]

Second, because "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[15] the determination of a law's inconsistency with the constitution was, for Marshall, invariably the power of the judiciary. Accordingly, upon an interpretation by judges that a given law is inconsistent with the constitution, they must consider it invalid and, on that basis, refuse to apply it.

---

[11] Tom Ginsburg & Mila Versteeg, 'Why Do Countries Adopt Constitutional Review' 30(3) JOURNAL OF LAW, ECONOMICS AND ORGANIZATION 587, 590: "[Judicial] review originated in the American colonial charters and state constitutions, which were used by colonial judges to disapply laws even before the establishment of the federal government. The U.S. Constitution is not explicit about whether federal courts have the power to strike down statutes incompatible with the Constitution, but many scholars believe that the founding fathers assumed this would be the case. Indeed, Alexander Hamilton (1788) famously devoted much of Federalist 78 to justifying the practice. After *Marbury* v. *Madison*, 5 U.S. 137 (1803), there was no doubt..."

[12] *Supra*, note 5.

[13] See G.E. White, 'The Constitutional Journey of "Marbury v. Madison"' (2003) 89(6) VIRGINIA LAW REVIEW 1463, pp. 1476-84.

[14] *Marbury*, *supra* note 5, p. 177.

[15] *ibid.*

As far as the power of constitutional interpretation is concerned, this holding resulted in firmly establishing courts above other organs of government.[16] (Even where certain types of questions, such as political questions and questions involving executive discretion, were clearly excluded from judicial review[17], the determination whether a particular case fell within those categories was still necessarily for the courts to decide.[18]) Furthermore, short of a constitutional amendment brought about by the political organs through a rather arduous process, only judges could overrule their own constitutional interpretations; thus, a particular interpretation of the constitution announced by the U.S. Supreme Court is, for most intents and purposes, final and irreversible.

1.1.1. The Counter-Majoritarian Difficulty

Being final and immune from legislative reversal, judicial decisions on constitutional interpretations significantly limit the ability of political arms of government to influence interpretations of constitutional rights. For this reason, the U.S. approach to judicial review is characterised by judicial supremacy[19], which gives way to a problem termed the "the counter-majoritarian difficulty"[20]. This is where critics of judicial supremacy challenge the legitimacy of judicial interpretations of human rights that dominate over those of the political arms of government with finality.

The starting premise of that critique is the claim that, even in a democratic society that is imagined to be genuinely committed to protecting human rights norms, there will inevitably be strong but sincere disagreements among different members of society, when applying those norms to concrete cases. This is because the broad and normative language that human rights are often couched in, even in a constitutionalised bill of rights, consists in an "open texture"[21] that precludes single correct answers in specific instances

---

[16] White, *supra* note 13, p. 1481: "[Marshall] was not simply saying that the courts could pass on the constitutionality of congressional legislation. He was saying that the judiciary's interpretations of the Constitution would control those of other branches. The only justification Marshall gave for that conclusion was that the essential function of courts was to declare the law."

[17] *Marbury*, *supra* note 5, p. 170: "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court."

[18] White, *supra* note 13, p. 1483.

[19] *ibid.*, p. 1481.

[20] Attributed to Alexander M. Bickel *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill 1962), p. 16: "The root difficulty is that judicial review is a counter-majoritarian force in our system." In outlining the main contours of this problem, I rely heavily on Waldron, *supra* note 4. Though I limit my discussion of the counter-majoritarian difficulty as it applies in a human rights context (following Waldron's example), it could even apply to other areas of constitutional law. See Waldron, pp. 1357-58: "Though philosophical defenses of the practice are often couched in terms of the judiciary's particular adeptness at dealing with propositions about rights, in reality that argument is subordinate to a defense of the structural role the courts must play in upholding the rules of the Constitution. Sometimes these two defenses are consistent; other times, they come apart. For example, textualism may seem appropriate for structural issues, but it can easily be made to seem an inappropriate basis for thinking about rights, even when the rights are embodied in an authoritative text."

[21] Rosalind Dixon, 'The Supreme Court of Canada, Charter Dialogue and Deference' (2009) 47 OSGOODE HALL

of application.[22] This problem is further complicated in the modern approach to human rights, where reasonable restriction of human rights by governments are explicitly permitted. It is nearly impossible, within such frameworks, to separate constitutional questions from political ones, and allocate them to the judicial and legislative powers of government, respectively.[23]

In such instances of sincere disagreement, a *legislative act* choosing one course of state action over others is meant to settle the issue for the time being, with the possibility of reversing it in the future through the same process always left open. For critics of strong form judicial review, this approach to dealing with human rights issues has a claim to legitimacy because, *in a context where there are no single correct answers*, a democratic process based on representativeness and political equality is the most appropriate means to settle them. For them, there is a problem of legitimacy in courts second-guessing the outcomes of this democratic process because, in holding irreversibly either with or against a law's consistency with human rights, courts raise one side of a human rights disagreement, over others, to the status of constitutional law. In doing so, they undermine, first, the *process* generally agreed to by members of society as the suitable method to deal with such disagreements and, second, the representativeness and political equality that legitimises that process. In short, the finalistic disposition of human rights disagreements by unelected judges renders the entire democratic process that preceded it hollow and illusory.

However, it is important to distinguish this criticism from the proposition, perhaps commonly held[24], that the voting majority is entitled to rule tyrannically over individuals and minorities simply on the claim that *any* decision produced by a democratic process is inherently legitimate. The counter-majoritarian criticism of judicial review assumes that the society engaging itself in a democratic process is generally (and genuinely) committed to human rights as normative propositions from the outset.[25] Thus, even a

---

LAW JOURNAL 235, 237: "Rights guarantees are open-ended and permit multiple reasonable interpretations—there is no objectively ascertainable, 'correct' interpretation." Also, see Waldron, pp. 1357-58: "Though philosophical defenses of [judicialising constitutional interpretation] are often couched in terms of the judiciary's particular adeptness at dealing with propositions about rights, in reality that argument is subordinate to a defense of the structural role the courts must play in upholding the rules of the Constitution. Sometimes these two defenses are consistent; other times, they come apart. For example, textualism may seem appropriate for structural issues, but it can easily be made to seem an inappropriate basis for thinking about rights, even when the rights are embodied in an authoritative text."

[22] Mauro Cappelletti, 'The "Mighty Problem" of Judicial Review and the Contribution of Constitutional Analysis' (1979-80) 53 S. CAL. L. REV. 409, pp. 409-10: "...these questions turn on the [mighty problem] of the role and democratic legitimacy of relatively unaccountable individuals (the judges) and groups (the judiciary) pouring their own hierarchies of values or 'personal predilections' into the relatively empty boxes of such vague concepts as liberty, equality, reasonableness, fairness, and due process." (Internal footnotes omitted.)

[23] In Canada, the applicability of the political question doctrine was rejected on similar reasoning. See, John Claydon, 'The Use of International Human Rights Law to Interpret Canada's Charter of Rights and Freedoms' (1986-87) 2 CONN. J. INT'L L. 349, pp. 354-55.

[24] See, *infra*, text accompanying note 108.

[25] Such an assumption raises valid questions on its utility in the real-world application of human rights. These will be

legislative majority is bound by its own commitment to human rights. Nonetheless, the question remains whether a particular legislative settlement of a human rights dispute can be dispositively termed a "violation" when members of society are disagreed as to the content and consequences of human rights norms, particularly when they are sincerely committed to human rights at a normative level. It is in such contexts of genuine disagreements that critics of judicial review are against judicial decisions superseding, with *finality*, the decisions of an otherwise democratic process.[26]

1.1.2. The Need to Defuse Majoritarian Tyranny

The counterpoint to the counter-majoritarian difficulty is indeed the majoritarian tyranny implicit in the idea of a democratic process with no judicial oversight. The counter-majoritarian analysis, as paraphrased above, rests on the central assumption that the society in question is genuinely committed to human rights. Such a commitment should translate, at the very least, to the existence of a majority of voters in that society, who, in electing and de-electing their political representatives in the legislature, will be dispassionate and unbiased, and will prioritise human rights principles over their own personal policy preferences. This assumption appears utopian—especially to the extent that it is blind, first, to the discriminatory tendencies most human beings are inherently susceptible to and, second, to the political incentives that exist in any society for self-interested politicians to catalyse among voters feelings of fear, resentment, hatred etc. against their fellow citizens.

Further, a purely democratic outcome relies, for its claims to legitimacy, on the political equality and representativeness of its process; the democratic process is appropriate to settle questions of human rights because it includes a deliberative stage in which everybody is given the opportunity to have their views represented, and to persuade their fellows to see their side of the disagreement. Yet, there are valid questions on the representativeness and political equality of most real-word democracies, and the Sri Lankan experience demonstrates this point for our purposes. The PRC reports that, "Submissions were made before the Committee by Malayaha (Up-Country) Tamils from Nuwara Eliya, Badulla, Kandy, Ratnapura, Kegalle, Moneragala, Vavuniya, Killinochchi, Colombo and, Malays, Burghers, the Portuguese speaking Burgher community of Batticaloa, Ādivāsis, groups in Moneragala, Badulla and Batticaloa, Telugu speaking communities, Malayali groups, communities of African descent in Puttalam and religious minority groups."[27] It is reasonably doubtful whether all these communal identities can be represented adequately in Parliament, no matter which electoral system is adopted by the next constitution. Moreover, in some cases, it is the very identity of a particular group

dealt with below.

[26] For a fuller account of the argument that I have just paraphrased, see, Waldron, *supra* note 4.

[27] PRC Report, *supra* note 1, p. 92. There is no doubt that all these ethnic identities are not meaningfully represented in Parliament.

that insidiously excludes them from mainstream politics.[28] Even if members of such groups are entitled to vote, and even if they do, the political system has no incentive to recognise their interests, or pursue advocacy on behalf of them, when "larger minorities" clamour for and secure the limited resources available at the level of setting the political agenda. Thus, these communities and groups have a larger burden thrust upon them to seek reforms protecting their rights politically, casting serious doubts on the assumed political equality of the democratic system. Except to the extent that, under a constitutionally entrenched bill of rights, legislators are obliged to defend the rights of *all* citizens, and not merely those of their own constituencies, this argument in favour of tempering the political process through judicial review is convincing.

Indeed, the counter-majoritarian critique of judicial review must not be taken as implying that the judiciary has no role to play in developing the human rights framework. Conceptually, human rights include a significant degree of individualist considerations; after all, human rights protect the individual against the abuses of the state, and courts provide an ideal forum for individuals to come in direct contact with the state and hold its agents accountable to the constitution. There are institutional guarantees of independence meant to protect judges, allowing them to deal with human rights claims more freely than politicians, removed from the political pressures of the day. Judges are also steeped professionally in a tradition of dispassionate, structured analysis that allows them to remain more impartial than politicians, facilitating the incorporation of individualistic concerns to the legislative process without prejudice. Moreover, unlike in the political arms of government, courts are possessed of procedures designed to enable the separation of fact from misconception, allowing possibilities to counterbalance political rhetoric with relevant factual considerations missed or obfuscated in the political process. Courts are egalitarian to the extent that *anyone* aggrieved by a perceived human rights violation may seek the justice of the judiciary (without prejudice to the success of their petition). Thus, the counter-majoritarian criticism is not against judicial participation in human rights protection, but in the *finality* that attaches to judicial decisions within some approaches to judicial review.

1.1.3. Polarity Between Organs of State

The supremacy of judicial decisions, resulting from their finality and irreversibility, is said to exert a polarising effect on the relationship between political organs of state and the judiciary.[29]

---

[28] See, for example, 'Submissions to the PRC on LGBTIQA interests', p. 5: "This is the cycle of violence against LGBTQIA people. Like colonisation that assumed other non-white nations to be 'uncivilised'. Like slavery, where African bodies were treated as objects on the claim their Blackness meant they had no soul. Sri Lankan LGBTQIA men, women and gender non-identifying persons, too, are oppressed, by a democratic system designed to exclude us, on the claim that we are 'against the order of nature'."

[29] Priyanga Hettiarachi, 'Some Things Borrowed, Some Things New: An Overview of Judicial Review of Legislation Under the Charter of Human Rights and Responsibilities' (2007) 7(1) OXFORD UNIVERSITY COMMONWEALTH LAW JOURNAL 61, p. 63-64.

For instance, it is possible that judicial invalidation would, instead of resolving a conflict between an interested majority and a minority in danger of oppression by it, exacerbate that problem. A judgment setting aside a discriminatory, albeit populist law (or a series of such judgments over time) could galvanise support, in a moment of constitution-amending retaliation, to abolish judicial review of legislation altogether.[30] This is, admittedly, a rather extreme prognosis. Alternatively, it may still be the case that unpopular judicial decisions would adversely politicise the process of appointing superior court judges in the Constitutional Council, thereby weakening their credibility. (In the Constitutional Council, partisan members currently outnumber non-partisan actors.[31]) In the United States, for example, where the procedures stipulated for amending the constitution are so onerous that they are considered virtually impossible to surmount[32], the Supreme Court is currently being held hostage by one political party in a desperate attempt to replace a recently deceased Justice with a successor that is amenable to their own conservative ideologies.[33] In any case, partisan influences control apex judicial appointments to such an extent that empirical data demonstrate considerable ideological links between the voting patterns of Justices and the party of the President who nominated them.[34]

Proponents of strong form judicial review also assume, too generously, that judges are invariably rights-friendly in disposing of cases. However, for as many cases that settled contentious issues in favour of the oppressed segments of society, such as, in the U.S., judgments guaranteeing the rights of women[35], African-Americans[36] and LGBT people[37], there are also judgments that struck down socially progressive labour reforms[38] and campaign finance laws[39] that had been brought about to protect the rights of ordinary American citizens. Thus, even in the United States, criticism of judicial review vacillates between both the liberal and conservative camps—depending on which wing of the

[30] This is within the experience of Sri Lankan constitutional history. See, generally, Asanga Welikala, 'The Failure of Jennings' Constitutional Experiment in Ceylon: How 'Procedural Entrenchment' led to Constitutional Revolution' in Asanga Welikala (ed.) *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (Centre for Policy Alternatives 2012).

[31] Constitution of Sri Lanka (1978), Article 41A(1).

[32] Dixon, *supra* note 21, p. 238.

[33] 'Obama Chooses Merrick Garland for Supreme Court' *The New York Times* (16 March 2016); 'John Roberts Criticized Supreme Court Confirmation Process' *The New York Times* (21 March 2016)

[34] Jeffrey A. Segal, Lee Epstein, Charles M. Cameron, and Harold J. Spaeth, 'Ideological Values and the Votes of U.S. Supreme Court Justices Revisited' (1995) 57(3) THE JOURNAL OF POLITICS 812

[35] *Roe* v. *Wade* 410 U.S. 113 (1973)

[36] *Brown* v. *Board of Education* 347 U.S. 483 (1954)

[37] *Lawrence* v. *Texas* 539 U.S. 558 (2003)

[38] *Lochner* v. *New York* 198 U.S. 45 (1905)

[39] *Citizens United* v. *Federal Elections Commission* 558 U.S. 310 (2010)

Supreme Court controls the majority at a given time.[40]

Legislation offending human rights, at least, can be reformed or repealed through a process of concerted civic engagement. Judicial decisions, on the other hand, bind future courts in ways that are far more difficult to reverse. This reality should reinforce the need to protect the democratic scope of human rights reform: strong form judicial review carries with it the implicit risk of disenfranchising voters seeking to substantially transform social situations through peaceful and democratic means. In this connection, it is important to note that the democratic will of the people is an important aspect of their right to self-determination.[41] The legitimate and well-meaning efforts of public-spirited advocates can be thwarted by judges who are constrained by established modes of thinking, particularly as institutionalised through the doctrine of binding precedent.

2. APPROACHES TO JUDICIAL REVIEW OF LEGISLATION

As stated at the outset, between parliamentary sovereignty and judicial supremacy, alternative approaches have emerged that seek to straddle the dialectical tensions implicit in judicial review with more subtlety; while navigating the pitfalls of judicial supremacy, they also secure the benefits of judicial insights into legislation within a broader human rights framework.

2.1. Judicial Review as 'Dialogue': Constitutionalism in the Commonwealth

The relatively new model of judicial review variously called "Commonwealth constitutionalism"[42], "dialogic judicial review"[43] or "weak-form judicial review"[44] mediates the dialectical tensions discussed above by incorporating judicial review into a broader "dialogic" framework, where a combination of specific legislative and judicial powers are deployed to facilitate a sequential engagement among organs of state on the requirements of the bill of rights they *all* operate under.

---

[40] Barry Friedman, 'The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part V' (2002) 112 THE YALE LAW JOURNAL 153, 156.

[41] Waldron, *supra* note 4, p. 1353.

[42] Rosalind Dixon, 'Weak-Form Judicial Review and American Exceptionalism' (2012) 32(3) OXFORD JOURNAL OF LEGAL STUDIES 487

[43] P.W. Hogg & A.A. Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35(1) OSGOODE HALL LAW JOURNAL 75 (hereinafter, Hogg & Bushell).

[44] Tushnet, *supra* note 8; see also, Mark Tushnet *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press 2008).

Dialogic review is considered as having emerged in the late twentieth century; the human rights achievements of that era exerted considerable pressures on proponents of traditional parliamentary sovereignty to rethink their insistence on absolute freedom for deliberative decision-making, and to provide safeguards against majoritarian violations of human rights.[45] The resultant systems of judicial review signify the negotiation between each state's commitment to human rights obligations and its adherence to the political idea that parliament is, as the representative voice of the People, supreme.[46]

This is achieved by treating "the people, legislatures, executives, and the courts in *conversation*. … The conversation ends when the participant whose decisions have normative finality signals that the conversation is over, at least for a while."[47] Indeed, all systems of judicial review are arguably dialogic, though it is the case that some are less conducive to dialogue than others, by virtue of the disproportionate power they afford one organ to end the conversation to the detriment of other organs' views on a given matter. In strong form judicial review, that organ is the Supreme Court, whose decisions are final and binding on the legislature and executive until the Court itself reverses them. In the general Sri Lankan practice of judicial review, that organ is Parliament, where a Bill that successfully avoids judicial review before its enactment is valid until subsequent repeal by Parliament, remaining immune from courts' ability to weigh in on its validity during its period in force.[48]

The salient features of such a system can be deduced from the comparison of different systems of dialogic review found in Canada, New Zealand, the Australian Province of Victoria and the United Kingdom.

The first such feature of a dialogic system is the incorporation of a general rights-restriction mechanism, which recognises that human rights are not absolute, and that conflicts between different rights, as well as conflicts between rights and other collective

---

[45] Hiebert, *supra* note 7, pp. 3-10; *cf.* Peggy Ducoulombier, 'Rebalancing the Power between the Executive and the Parliament: The Experience of the French Constitutional Reform' (2010) PUBLIC LAW 688, p. 702: "In modern Parliamentary regimes, the fundamental element is not any more the organic separation of powers between the legislature and the executive but *the political balance of power between the majority and the minority.*"

[46] For instance, Hiebert collates a number of remarks made regarding the dialogic system found in the UK Human Rights Act, as follows: "The HRA has been characterized … as a hybrid constitutional model, straddling two rival theories: parliamentary sovereignty and judicial supremacy. As Jeffrey Goldsworthy suggests, 'this hybrid model offers the possibility of a compromise that combines the best features of both the traditional models, by conferring on courts constitutional responsibility to review the consistency of legislation with protected rights, while preserving the authority of legislatures to have the last word.' Similarly, Stephen Gardbaum characterizes the HRA as a variant of a 'Commonwealth model' that seeks to develop a 'coherent middle ground between fundamental rights protection and legislative supremacy.'" See, Hiebert, *supra* note 7, p. 4.

[47] Tushnet, *supra* note 8, p. 34.

[48] Constitution of Sri Lanka (1978), Article 80(3). But see an interesting anomaly in a line of cases beginning with S.C. Reference 03/2008, where the Supreme Court has authorised a discretion for lower courts to not apply a statutory minimum sentence (validly) enacted in 1995, on the basis that statutory minimum sentences violate the separation of powers as well as fundamental rights.

interests need to be balanced appropriately. See, for example, the words of Lord Steyn, commenting on the European Convention of Human Rights, the restriction clauses of which had been absorbed to UK law through the HRA:

> "[The framers of the European Convention on Human Rights] realized only too well that a single-minded concentration on the pursuit of fundamental rights of individuals to the exclusion of the interests of the wider public might be subversive of the ideal of tolerant European democracies. The fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights. The direct lineage of this ancient idea is clear: the convention is the direct descendant of the Universal Declaration of Human Rights which in Art. 29 expressly recognized the duties of everyone to the community and the limitation on rights in order to secure and protect respect for the rights of others."[49]

A general restrictions clause operates on all organs of government equally, and assists in ensuring the proportionality of laws restricting rights, by providing an analytical framework geared to balance individual rights with other rights or with the interests of the collective. The Canadian Charter of Rights and Freedoms[50], the New Zealand Bill of Rights Act of 1990[51], Victoria Charter of Human Rights and Responsibilities Act 2006[52], and the UK Human Rights Act of 1998[53], all provide mechanisms for reasonable restrictions of rights.[54]

Given that dialogic models envisage human rights protection as a *collaborative effort* between all organs of government, political review of legislation is an intrinsic aspect of such models. Political review requires, through the mechanism of ministerial statements of compatibility (UKHRA, s.19; Victorian Charter, s.28; Canada's Department of Justice Act, s.4) or certification of the Attorney-General (NZBORA, s.7), that proponents of new legislative bills in the legislature either affirm the compatibility of the law they are proposing with human rights, or explain the need to enact a law that is incompatible with human rights. In the UK, an additional mechanism of political review exists in the form of the Joint Committee on Human Rights, which is a permanent parliamentary committee composed of members from both houses of parliament, who engage with proponents of new bills on human rights issues relevant to their proposed bills and reports to Parliament on their findings and recommendations.[55] As Hiebert points out, "Underlying this concept was the intent to influence bureaucratic, governmental and parliamentary behaviour. The process of evaluating proposed Bills was intended to make public and

---

[49] *Brown* v. *Stott* [2003] 1 A.C. 681, 707, *per* Lord Steyn.

[50] Canada Act 1982, Schedule B, Part I (hereinafter, Canadian Charter)

[51] Hereinafter, NZBORA.

[52] Hereinafter, Victorian Charter.

[53] Hereinafter, UKHRA.

[54] See, Canadian Charter, s.1; NZBORA, s.5; Victorian Charter, s.7(2); UKHRA, Schedule 1.

[55] See, Hiebert, *supra* note 7, pp. 14-23.

political officials more conscious of how proposed legislation would affect rights, so that this knowledge would constrain and influence their decisions."[56] In the process of political review, legislators are invariably made aware of and familiar with the body of judicial work relevant to the subject matter under consideration. (However, statements of compatibility do not bind courts.)

Though the legislature is obliged to adhere to the standards implicit in the general restrictions clause's analytical framework, that obligation does not necessarily result in the judicial power to invalidate laws inconsistent with it. With the exception of Canada, all the dialogic systems examined in this paper preclude judicial invalidation of laws on human rights grounds.

The Canadian constitution, while generally requiring courts to invalidate unconstitutional laws[57], specifically restricts that power as regards rights-inconsistent laws: if a law is declared invalid on the basis of a rights violation, s.33 of the Canadian Charter provides the legislature with an option to override that invalidation, simply by re-enacting the impugned law through an ordinary majority, but this time with a new clause affirming the statute's validity "notwithstanding" its inconsistency with the Charter.[58] In turn, this legislative power is limited by an automatic sunset rule of five-years, at the end of which the law becomes susceptible again to judicial invalidation. Upon expiration, the notwithstanding clause can be renewed again for another five years, and so on, every five years, or be allowed to lapse.[59] Relatedly, legislatures can also include a "notwithstanding clause" the first time a Bill is enacted as law, in anticipation of future invalidation by courts. The five-year sunset rule applies to such "anticipatory" notwithstanding clauses as well.[60] Given that a five-year period will always include an election, "notwithstanding clauses" can always be reformed politically as a matter of advocacy.[61]

Though courts are empowered to strike laws down in Canada (subject to override), they still prefer, if possible and on their own volition, to rely on canons of interpretation to "save" the law from invalidation by, for example, reading down the law.[62] In the UK, New

---

[56] Janet L. Hiebert, 'Rights-Vetting in New Zealand and Canada: Same Idea, Different Outcomes' (2005) 3 NZJPIL 63, 66.

[57] Constitution (Canada), s.52(1).

[58] However, specified rights exist in the Charter that cannot be overridden through this process. They are ss.3-6 (voting and mobility), 16-23 (language), and 28 (sexual equality). See, Hogg & Bushell, *supra* note 43, p. 83.

[59] See, Canadian Charter, ss.33(1), 33(3), and 33(5), respectively.

[60] Hogg & Bushell, *supra* note 43, p. 84.

[61] *ibid*.

[62] "Reading down is the technique of statutory interpretation by which a court will prefer the interpretation of a statute that does not offend the constitution over an interpretation that would offend the constitution." P.W. Hogg, A.A. Bushell Thornton & W.K. Wright, 'Charter Dialogue Revisited: Or "Much Ado About Metaphors"' (2007) 45(1) OSGOODE HALL LAW JOURNAL 1, p. 10 (hereinafter, Hogg et al 2007).

Zealand, and Victoria, where courts are absolutely precluded from invalidation[63], the human rights instruments specifically require courts to prefer, where possible, interpretations of statutes that are compatible with human rights. In the UK, s.3 of the HRA provides that laws "must be read and given effect in a way which is compatible with the Convention rights … [s]o far as it is possible". The NZBORA, under s.6, provides that, "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning." The Victorian Charter provides for a similar possibility, except that it requires the *purpose* of the enactment to be given precedence over an alternative, rights-consistent interpretation.[64]

In the event a statute incompatible with human rights cannot be saved through reinterpretation, the UKHRA and the Victorian Charter, while prohibiting *invalidation*, contain explicit provisions for the award of declaratory relief. Such relief is termed Declarations of Incompatibility and Declarations of Inconsistent Interpretation in the UK and Victoria, respectively.[65] In New Zealand, the NZBORA does not expressly provide this sort of relief. It also explicitly precludes judicial invalidation.[66] However, in 2015, the High Court of New Zealand held in *Taylor* v. *Attorney-General*[67] that the prohibition of judicial invalidation did not preclude the court from making a declaration of incompatibility as a judicial remedy, even in the absence of an explicit provision recognising such a remedy in their human rights instrument.

In *Taylor*, the court was confronted with a law banning *all* inmates of prisons from voting in general elections. Before the law's enactment, the Attorney-General had formally communicated to the New Zealand Parliament that it appeared inconsistent with the NZBORA. In the judicial proceedings in *Taylor*, the Attorney-General did not dispute the petitioner's claim of the law's inconsistency (though he defended the government on other grounds).[68] Since the court was explicitly prohibited from invalidating the law, the petitioner sought, in lieu of invalidation, a declaration by the court that the law was inconsistent with his rights guaranteed under the NZBORA.[69] The court, distinguishing between *invalidating* a law from formally indicating its inconsistency with the Bill, awarded the relief sought. In the process, the court explained the significance of a judicial

[63] See, UKHRA, ss.3(2) and 4(6); NZBORA, s.4; Victorian Charter, s.29.

[64] Victorian Charter, s.32: "So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

[65] See, UKHRA, s.4 and Victorian Charter, s.36.

[66] NZBORA, s.4.

[67] [2015] NZHC 1706. Discussed in more detail below.

[68] In fact, the Attorney-General had advised Parliament, before the law was enacted, that in his view the Bill appeared to be inconsistent with the NZBORA. See, *ibid.*, ¶ 12. The AG is obligated, under s.7 of the NZBORA, to bring to Parliament's attention of any provision in a proposed Bill that appears to be inconsistent with any of the rights and freedoms contained in the NZBORA.

[69] *ibid.*, ¶ 3, and ¶¶ 36-37.

remedy in the form of a declaration of inconsistency: "The Attorney [General] advises the House [at the pre-enactment stage] on whether the Bill *appears* to be inconsistent with a right guaranteed by the Bill of Rights. The Court's role *is* to determine whether the legislation is in breach … When reporting under s 7, the Attorney's responsibility is to Parliament. When determining questions of public law, *this Court's responsibility is to all New Zealanders*."[70]

Thus, dialogic systems contrast with both strong-form judicial review and traditional parliamentary supremacy. In those systems, only one organ is viewed as entitled to finality on an issue, which results in either a counter-majoritarian problem, or a problem of tyrannical majoritarianism. Dialogic judicial review, by segmenting the deliberative process into "sequels", where legislatures and courts engage each other one after the other, opens a more discursive space in which human rights considerations may be injected into law-making processes, whilst eliminating the risk of power struggles and conflicts between the different organs of state.

> "Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard *the relationship between the Court and the competent legislative body as a dialogue*. In that case, the judicial decision causes a public debate in which human rights values play *a more prominent* role than they would if there had been *no judicial decision*. The legislative body is in a position to devise a response that is properly respectful of the human rights values that have been identified by the Court…"[71]

Accordingly, dialogic constitutionalism may be roughly summarised as follows. When a democratic state commits itself to protecting human rights, while also insisting on the relative supremacy of its legislature, a generally stated rights-restriction mechanism indicates the boundaries the government must observe in exercising its power to represent the will of the majority. Even if such legislatures are theoretically only accountable to those who elect them, democratic ideals still accommodate the contributions of other institutions, especially of the courts, which are taken as guiding the legislature in the "correct" direction (constitutionally) on the subject of protecting human rights. This does not necessarily mean the legislature is compelled to adhere to such guidance; it does, however, mean that legislatures will no longer be able to legislate outside a rights-conscious environment.[72] In any case, even judicial declarations on Parliament's obligations, even without binding Parliament, still constitute powerful tools in human rights advocacy.

---

[70] *ibid.*, ¶¶ 77(c)-77(d).

[71] Hogg & Bushell, *supra* note 43, pp. 79-80.

[72] See the comments made by Rt. Hon. Jack Straw MP, Home Secretary at the time of UKHRA's promulgation: "The development of [a human rights] culture is partly about developing a sense inside government … about those who have authority … about the way in which they should exercise that authority and that when they justify acts which are coercive … by reference to the public interest they really do mean the wider public interest rather than simply their convenience or the convenience of government." Joint Committee On Human Rights, *Minutes of Evidence*, (12 March 2001), H.L. 66-I, H.C. 332-I, at question 17.

2.2. The Judge as 'Pointsman': Pre-enactment Review in Sri Lanka

Despite being the first constitution since independence to explicitly[73] recognise some form of judicial supervision of the constitution, the 1972 constitution earns the ire of contemporary constitutional scholars for having *abolished* judicial review of legislation, and replacing it with a system of pre-enactment review of legislative bills.[74] This nearly uniform criticism came, arguably, at the expense of recognising that the 1972 system (and by extension the 1978 system) adhered to a constitutional philosophy distinct from the one rooted in strong form judicial review. In fact, the 1972 scheme reflected more the theory adopted in France (specifically under its fifth republican constitution of 1958):

> "[P]ost-Revolution France has consistently shown a rigid anti-judicial-review approach. This attitude had found its conceptualization in Montesquieu's description of the judges as the mere 'mouths of the law,' 'inanimate beings' whose only task should be to apply blindly, automatically, and uncreatively the supreme will of the popular legislature. This concept—the French version of 'separation of powers' which is miles away from the 'checks and balances' version which has prevailed in the United States—was translated into legislative language in article 5 of the *Code Napoléon*. It has since represented a basic tenet of political and constitutional philosophy in France and, through French influence, in the rest of continental Europe, well into [the 20th] century."[75]

Based on this Montesquieuan suspicion of unelected, "elite" judges, the 1958 constitution of France originally recognised only a very limited form of judicial review, where the *Conseil Constitutionnel* was established to control legislative transgressions into *executive* power through a mechanism of pre-promulgation review.[76] Much of this limited system still obtained in France during the drafting process of the 1972 constitution (it has since evolved substantially, however[77]). Though not without its flaws, this approach to judicial review nevertheless accords *more* power to courts than does the "American" system, in

---

[73] Asanga Welikala, "Specialist in Omniscience'? Nationalism, Constitutionalism, and Sir Ivor Jennings' Engagement with Ceylon' in Harshan Kumarasingham (ed.) *Constitution-making in Asia: Decolonisation and State-building in the Aftermath of the British Empire* (Routledge 2016).

[74] Rohan Edrisinha & N. Selvakkumaran, 'Constitutional Change in Sri Lanka since Independence' (1990) 13 SRI LANKA J.S.S. 79, 88; see also, M.J.A. Cooray, 'Three Models of Constitutional Litigation: Lessons from Sri Lanka' (1992) 21 ANGLO-AM. L. REV. 430, 438.

[75] Cappalletti, *supra* note 22, p. 413; *cf.* the attitude of the proponents of the 1972 Constitution, as reflected in the following statement by Dr. Felix Dias Bandaranaike, "We are trying to say that nobody should be higher than the elected representatives of the people, nor should any person not elected by the people have the right to throw out the decisions of the people elected by the people," cited in Edrisinha & Selvakkumaran, *supra* note 74, p. 87.

[76] Marie-Claire Ponthereau & Fabrice Hourquebie, 'The French *Conseil Constitutionnel*: An Evolving Form of Constitutional Justice' (2008) 3 J. COMP. L. 269, 271. Pre-promulgation review is a slight variant of pre-enactment review; the key distinction is in the fact that, under pre-promulgation review, a law becomes subject to review *after* it is approved by the legislature, but *before* the President assents to its promulgation as law. By contrast, pre-enactment review contemplates judicial scrutiny after a Bill has been placed on the assembly agenda, but before it is taken up for the second-reading. As has been pointed out elsewhere, this mechanism excluded from judicial scrutiny any amendments effected to a Bill at the committee stage of its consideration in the assembly. See, Edrisinha & Welikala, *supra* note 5, pp. 106-7.

[77] Ponthereau & Hourquebie, *supra* note 76, *id.*

at least two ways. First, under pre-promulgation review, courts are afforded the power to scrutinise a proposed law in the abstract, i.e. in the absence of concrete facts disclosed in a contentious proceeding between two or more disputing parties. Abstract review allows courts far more leeway to critically compare abstract legal provisions with even more abstract normative principles, usually to the detriment of the proposed legislation. Indeed, the U.S. Supreme Court refuses routinely to entertain cases not disclosing a "legal dispute", on the basis that it is jurisdictionally *limited* to hear only "cases and controversies":

> "The judicial power of the United States … is not an unconditioned authority to determine the constitutionality of legislative or executive acts. The power to declare the rights of individuals and to measure the authority of governments … is *legitimate only in the last resort*, and as a necessity in the determination of real, earnest and vital controversy. Otherwise, the power is not judicial..."[78]

Secondly (and flowing from the first point above), pre-promulgation review affords courts a legislative role that is arguably at odds with the common conceptualisation of judicial review as a constituent element of a system of "checks and balances."[79] Tom Ginsburg explains the "legislative" scope of pre-promulgation review with reference, again, to the French *Conseil Constitutionnel*:

> "The French system of pre-promulgation abstract review highlights the lawmaking function, since the *Conseil's* declarations of unconstitutionality almost always lead to revision and resubmission of the legislation to conform with the constitutional dictates of the *Conseil*. Stone Sweet observed that this type of review turns the *Conseil* into a specialized third chamber of the legislature."[80]

While the republican constitutions broadened the scope of the judicial role in the ways shown above, it also restricted legislative power (perhaps, correspondingly) in some aspects. For instance, the 1972 and 1978 constitutions abolished the concept of implied constitutional amendment[81], which had been read into the 1946 Constitution as an aspect of the doctrine of parliamentary sovereignty[82]. Here, any law that is substantively contrary to the constitution's provisions is interpreted as having impliedly amended it

---

[78] *Valley Forge Christian College* v. *Americans United For Separation Of Church and State, Inc., Et Al.* 454 U.S. 464, 471 (1982) (emphasis added; internal quotes and citations omitted). Furthermore, the U.S. Supreme Court routinely prefers, by force of established judicial precedent, to invalidate an unconstitutional application of a law as opposed to the law on its face. See, Alex Kreit, 'Making Sense of Facial and As-Applied Challenges' (2010) 18 WM. & MARY BILL RTS. J. 657. This distinction is impossible to draw in the context of pre-enactment review, indicating the comparative broadness of judicial power in that system.

[79] *Supra*, text accompanying note 5. In the same essay, the authors also contend that the abstract scope of pre-enactment review *impedes* the judiciary's ability to act as a check against legislative excesses.

[80] Tom Ginsburg, 'Beyond Judicial Review: Anciliary Powers to Constitutional Courts' in Tom Ginsburg & Robert A. Kagan (eds.) *Institutions & Public Law: Comparative Approaches* (Peter Lang 2005), p. 227-28. Internal citations omitted.

[81] Constitution of Sri Lanka (1972), Section 51(4): "No provision in any law shall have the legal effect of repealing or amending any provision of the Constitution by implication."

[82] M.J.A. Cooray, *supra* note 74, pp. 431-32.

provided the law had been passed with the "constitution-amending power" of a two-thirds majority (if it had not, courts were empowered to invalidate it).[83] By contrast, the 1972 and 1978 constitutions abolish the concept of implied amendment and replace it with mechanisms for the express amendment and express override of the constitution.[84] The requirement that the constitution may only be amended expressly, even when the legislature otherwise consists a two-thirds majority in support of the legislation, arguably dilutes the previous position that *any law* passed through the "constitution-amending" power of the legislature would result in a constitutional amendment. The same argument applies as regards laws purporting to override the constitution. It must be borne in mind, here, that the judiciary, vested with exclusive jurisdiction in constitutional interpretation[85], is afforded a clear role to play in the legislative process through the device of pre-enactment review. In fact, a considerable body of case law demonstrates the modest success of this system, where judicial determinations of certain Bills' unconstitutionality resulted in their revision before enactment. Moreover, I argue that as the effect of the requirement that the legislature may only amend or override the constitution expressly, courts are obliged (or, indeed, empowered) to interpret all ordinary laws consistently with the legislature's constitutional obligations to the extent textually possible; and where it is not, that courts are empowered, short of invalidating the law, to give effect to it under protest (as it were), by accompanying such enforcement with a declaration of unconstitutionality.[86]

The theory of constitutionalism underpinning this system is explained with reference to the metaphor of a "pointsman", where a judge is seen as pointing the direction in which a legislature must go to exercise its constitutional powers as well as its constitution-making powers:

> "…any unconstitutionality – even on content – can be analysed as a lack of competence of the ordinary legislator … only the constitution-making power could make the decisions which were quashed by the judge. Therefore, the constitutional

[83] *ibid.*: "A legislative provision incompatible with the Constitution was tantamount to an implied constitutional amendment and could have no legal effect unless it had been passed in accordance with the procedure prescribed for constitutional amendment."

[84] Constitution of Sri Lanka (1972), Section 51(4): "No provision in any law shall have the legal effect of repealing or amending any provision of the Constitution by implication."; Constitution of Sri Lanka (1978), Article 82(1): "No Bill for the amendment of any provision of the Constitution shall be placed on the Order Paper of Parliament, unless the provision to be repealed, altered or added, and consequential amendments, if any, are expressly specified in the Bill and is described in the long title thereof as being an Act for the amendment of the Constitution."

[85] Constitution of Sri Lanka (1978), Article 125(1): "The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution…"

[86] This argument is based on a reading of the judicial power of the People protected under Article 4(c), the all-encompassing obligation on organs of government to protect the fundamental rights of the People under Article 4(d), and a restricted reading of Articles 16(1) and 80(3) that distinguishes between judicial invalidation and a declaration of unconstitutionality. This analysis was developed in detail in an as yet unpublished paper commissioned by the Centre for Policy Alternatives and authored by me, titled, 'Liberty, Morality and Proportionality: Judicial Remedies against Sections 365 and 365A of the Sri Lankan Penal Code' (unpublished draft) (October 2015).

> judge can only indicate which way ought to be taken at an unclear juncture: legislative or constitutional procedure. The powers that are instituted by the constitution (*pouvoirs constitués*) have to follow the will of the constitution making power (*pouvoir constituant*). Thus, the Council *never goes against general will and the will of the nation's representatives*."[87]

This metaphor, when applied even to Sri Lanka's system of pre-enactment review, conceptualises the judge as a pointsman: pre-enactment review results in a stipulation of which decision-threshold is required of the assembly (i.e. simple majority, or two-thirds majority or two-thirds majority with a referendum) in order to enact a law. Thus, within the constitutional philosophy the two republican constitutions appear to adhere to, the manner in which the role of judges is conceived may appear *absurd* from an American perspective, but that fact alone does not negate the clear role the judiciary is afforded to review proposed legislation and interpret enacted legislation. Indeed, though the weakening of the judiciary in the years following 1972 is a historical fact.[88] But, to the extent that those weaknesses were the result of a constitutional structure larger than the system of pre-enactment review,[89] they cannot be dispositive in assessing pre-enactment review as a system for the judicial supervision of the constitution. More relevantly to the direction of this paper, those weaknesses do not automatically validate strong form judicial review as the valid and legitimate response to our constitutional experiences.

3. A DIALOGIC APPROACH TO SRI LANKA'S FUTURE BILL OF RIGHTS

In this section, I explore an approach in which the 'dialogue' and 'pointsman' models may perhaps be combined. The argument is that, to the extent that the judiciary's voice is unequivocally recognised to weigh in on laws' rights-consistency, and to the extent that courts hold the power to determine the decision-threshold required of the assembly to restrict certain aspects of fundamental rights, it is unnecessary to attach finality to their decisions. Doing so would leave open the possibility of attacks on the legitimacy of the courts' constitutional powers, and would distract from the need to transform the political

---

[87] Marie-Claire Ponthoreau & Jacques Ziller, 'The Experience of the French Conseil Constitutionnel: Political and Social Context and Current Legal-Theoretical Debates' in Wojciech Sadurski (ed.) *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Springer Science & Business Media 2002), pp. 138-39.

[88] See, for example, Edrisinha & Selvakkumaran, *supra* note 74.

[89] I refer to the weak guarantees for the independence of the judiciary, the mechanism to enact urgent bills, state-of-emergency mechanisms that suspended parts of the constitution, the time-bars imposed on the pre-enactment review mechanism, the electoral system that returned super majorities to the legislature (diluting the prohibitive effects of the two-thirds majority requirement), the concentration of executive power in the President (under the 1978 constitution) and a host on other institutional weaknesses. See, Radhika Coomaraswamy, 'The 1972 Republican Constitution in the Postcolonial Constitutional Evolution of Sri Lanka' in Asanga Welikala (ed.) *The Sri Lankan Republic at 40: Reflections on Constitutional History, Theory and Practice* (Centre for Policy Alternatives 2012), pp. 134-37. I would also, tentatively, add to this list the persistent academic criticism of the extant system of judicial review through a particularly judicial-supremacist prism—but for the lack of empirical data to substantiate such a claim.

organs of government into entities more amenable to human rights consciousness.

3.1. General Restrictions Clause

The human rights framework is premised prominently on the idea that a bill of rights reflects, at the most general level, an obligation on the state to balance competing interests proportionately.[90] This is facilitated through an analytical framework of reasonableness that ensures all the factors relevant to striking this balance are taken into consideration. Such factors include the human rights sought to be restricted by the state in a given instance, the reasons that justify such restriction, the procedure through which such restriction is carried out, and the scope of the restriction in terms of its proportionality to the rights affected by it, etc.[91] As mentioned earlier, the Canadian Charter, the Victorian Charter, and the NZBORA, all provide mechanisms for the reasonable restrictions of rights.[92] In broad terms, these restrictions-clauses reflect, in one way or the other, the three-pronged test of reasonable restrictions found in international human rights law.[93] This test requires that any restriction of a human right by the state must (a) be prescribed by law; (b) pursue a legitimate state aim; and (c) be necessary in a democratic society. These requirements are cumulative, meaning that the failure of any restriction to meet any one of these criteria results in a violation of a human right. Any restriction that satisfies all three of these criteria is deemed reasonable and therefore permissible. Article 15 of the current constitution of Sri Lanka generally reflects this three-pronged test.[94] In the United States, where no general restrictions clause exists, judge-made law has developed the approach to justifying reasonable restrictions, in piecemeal fashion, and can be identified as the "tiered scrutiny" approach.[95] This approach has significant differences from the three-pronged approach of international law, but some aspects of it are useful to introduce further clarity to the latter approach, and will be discussed presently (albeit briefly).

The three-pronged test can be explained in two components. The first, embodied in the "prescribed by law" criterion, focuses on the legality of a restriction: restrictions must always emanate from the authority of the legislature, whether directly or as delegated legislation. Furthermore, a law restricting rights must substantively reflect rule-of-law values, such as "foreseeability" (or non-vagueness) and "accessibility".[96] The second

---

[90] *Brown* v. *Stott*, *supra* note 49.

[91] Hogg & Bushell, *supra* note 43, pp. 84-85.

[92] See, Canadian Charter, s.1; NZBORA, s.5; Victorian Charter, s.7(2).

[93] See, *Sunila Abeysekera* v. *Ariya Rubasinghe* (2000) 1 SLR 314.

[94] *ibid.*

[95] See, *generally*, Stephen A. Siegel, 'The Origin of the Compelling State Interest Test and Strict Scrutiny', 48 AM. J. LEGAL HIST. 355 (2006)

[96] *Sunday Times* v. *The United Kingdom (No. 1)* App. No. 6538/74 (ECtHR, 26 April 1979), ¶49: "In the Court's opinion, the following are two of the requirements that flow from the expression 'prescribed by law'. Firstly, the law

component focuses on the proportionality of a restriction, and is encompassed in the "legitimate state aim" and "necessary in a democratic society" requirements. Here, restrictions must be justified firstly on the basis of their purpose, i.e. that they can be rationally related to a state interest explicitly recognised in the constitution as legitimate (such as national security, public order, etc.); secondly, it must be justified in terms of the means through which the identified end is pursued—that it is formulated in a manner that respects the right being restricted, that it is not wanton in the burden imposed on the individuals affected by the restriction, that less restrictive means were considered, etc.

Naturally, proportionality is the main locus of the balancing exercising described above as implicit in a rights-restriction clause. However, to be consistent with the *purpose* of proportionality, due weight must be given to the right being restricted in a given instance, recognising that this varies based on the circumstance. The value of certain rights cannot be adequately protected by a restriction that could also be compelling in its own terms. For instance, though the interest of preventing an extremist attack on innocent civilians is an important interest of the state, this still does not justify the torture of individuals already in the custody of the state. Similarly, while maintaining public morale in a time of national crisis is an important governmental interest, this would not justify the censorship of political commentary. Thus, the balancing exercise yields the appropriate result only if the state adequately recognises the value of the right being curtailed; the weight given to a right correspondingly restricts or relaxes the analysis of the proportionality of the measure curtailing its enjoyment. However, the three-part test does not conceptually incorporate any criteria that control this aspect of the balancing exercise. In the European Court of Human Rights, this need is served through the doctrine of margin of appreciation, where more important rights narrows the scope of the European Court's deference to the State party's need to restrict it, and vice versa. For a number of reasons, this approach is not tenable in domestic applications.[97] Instead, I argue that the basis for the tiered scrutiny approach in the United States, particularly as applied in their Due Process Clause jurisprudence, provides better conceptual guidelines on how a constitution should delineate the state's analysis of proportionality in Sri Lanka.

In the United States, in the absence of a general restrictions clause, the Supreme Court recognised the reasonable restrictions of constitutional rights as a necessary implication

must be adequately accessible: *the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case*. Secondly, a norm cannot be regarded as a 'law' unless *it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*."

[97] The margin of appreciation is the product of the principle of subsidiarity governing the supranational scope of Strasbourg supervision. Yuval Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?' (2005) 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 907, 912. Implementing the doctrine in a domestic setting, by a domestic court, in the course of enforcing a "home grown" bill of rights against its coequal organs of state, is bound to be conceptually anomalous.

of the legislative power of Congress. Initially, the only requirement for a law restricting a constitutional right to survive was that "it rest[ed] upon some rational basis within the knowledge and experience of the legislators"[98]. However, the idea that some rights in the constitution amounted to "fundamental" guarantees and that the restriction of those guarantees called for more "exacting judicial scrutiny"[99] gained currency within the Supreme Court, over time. Consequently, a tiered structure of scrutiny emerged, where restrictions of fundamental guarantees were tested against "strict scrutiny" and restrictions of other, non-fundamental guarantees faced "minimal scrutiny". Strict scrutiny required that a restriction is *narrowly tailored* and pursues a *compelling state interest*, whereas minimum scrutiny was satisfied when a restriction *rationally pursued* a *legitimate purpose*. Both these tests distinguish between the *means* and *ends* of a restriction, and require strong justifications for both when a fundamental guarantee is engaged, but allowed more relaxed justifications when non-fundamental guarantees were engaged.[100]

As is already implicit, the choice of which test should be applied in a given case hinges on the question whether the claimed rights-based interest being restricted by the state amounts to a fundamental guarantee or not. Under the Due Process Clauses, which protects the liberty of the American people, the question whether a given liberty interest was "fundamental" or not was answered, initially, by Justices asking whether it was "deeply rooted in [their] Nation's history and tradition".[101] However, this test eventually came to be criticised as "[confirming] the importance of interests already protected by a majority…"[102], defeating some claimed liberty interests almost by default, despite other factors supporting their normative strength.[103] The "national roots" test came to be supplemented by another, which asked whether a claimed liberty interest was "implicit in the concept of ordered liberty," to the extent that "neither liberty nor justice would exist if it were sacrificed."[104] If the answer were in the affirmative, strict scrutiny would be engaged. If not, minimal scrutiny would be engaged.[105]

Along the lines of this approach, if certain normative criteria is explicitly provided in the constitution, in language that appeals to the sources of human rights principles and their legitimacy, language that appeals to the connection between fundamental aspects of a given human right and the inherent dignity of human beings, for instance, this could

---

[98] *United States* v. *Carolene Products Co.* 304 U.S. 144, 152-53 (1938).

[99] *ibid.*, footnote 4.

[100] Siegel, *supra* note 95, pp. 358-61.

[101] *Moore* v. *East Cleveland* 431 U.S. 494, 503 (1977).

[102] *Michael H.* v. *Gerald D.* 491 U.S. 110, 141 (1989).

[103] See, for example, *Lawrence* v. *Texas*, *supra* note 37, and compare it with *Bowers* v. *Hardwick* 478 U.S. 186 (1986), which the former case overruled.

[104] Originally suggested in *Palko* v. *Connecticut* 302 U. S. 319, 325, 326 (1937), and developed in subsequent cases.

[105] I avoid, for the sake of simplicity, the discussion of the intermediate levels of scrutiny.

provide a basis on which to identify a "fundamental core" for each human right in the bill of rights. This would allow the general restrictions clause to differentiate the terms of proportionality applicable to core interests of a right from those applying to the general aspects of the same right. Incorporating, specifically, the language of strict scrutiny within this framework (as applicable to core interests) would ensure that state actors—especially judges—have less leeway when balancing them against state interests. Doing so would perhaps be prudent, given the weak culture of human rights that arguably exists in Sri Lanka.

3.2. Political Review of Proposed Legislation

The adoption of a bill of rights in a "supreme law" constitution results in the infusion of the standards discussed above into the Rule of Law, rendering them applicable equally to all organs of government. That this includes the political branches of government—despite the prevalent emphasis on *judicial* review of legislation—ought to go without saying. Indeed, the foremost requirement for permissible restrictions of human rights (as seen in the established normative framework) is that they should be "prescribed by law", which ensures that a restriction of a human right is, at a minimum, always the product of those procedures provided by the constitution for democratic law-making.[106] The development of a higher level of human rights "consciousness", which should be a clear purpose of any modern bill of rights, requires the creation of institutions that catalyse such consciousness within the political branches.[107] In fact, the disproportionate emphasis on *judicial* review of legislation, particularly by strong-formists, as well as the commonplace reference to apex courts as the "*last* bastion" of justice, lends credence to the idea that legislators, as elected officials, are entitled to plenary legislative powers[108]—except to the extent their acts may stand invalidated in court *after the fact*. The same narrative also implies that legislators need only consider the constitutional consistency of their acts as a matter of strategy, to avoid judicial invalidation, and not as the result of an important obligation on their part to protect, promote and advance the human rights of all the people they represent. This attitude significantly affects any national discourse on human rights, where legislators consider human rights only as an afterthought to their general and plenary power to make laws, and the true evolution of human rights principles is an unfortunate distraction suffered at the insistence of courts, if at all. Indeed, it may be the case, within this understanding of the state's division of labour for protecting human rights, that the legislature comes to see itself as the defender of only the collective's interests, i.e. the interests of the voting majority, as pitted against the defenders of individual rights, i.e. courts. It requires little imagination, at this point in the analysis, to picture the polarity that would characterise the relationship between

[106] See, Toby Mendel, 'Restricting Freedom of Expression: Standards and Principles' (Centre for Law and Democracy n.p.d.) pp. 9-13. Available at: http://bit.ly/tobymendel_pbl (accessed 14 July 2016).

[107] See text at note 72, *supra*.

[108] See, *supra*, text accompanying note 24.

Parliament and the courts, and the feelings of disenfranchisement it would engender within the average voter.

Inasmuch as advancing human rights within society and fostering human rights "consciousness" within government are concerned, it is better to conceive a bill of rights as mandating a synthesis between "political review of legislation" and "judicial review of legislation", where neither the legislature nor the judiciary is afforded predominance over the other, and where both organs are expected to engage each other in an on-going dialogue on how the state ought to act in protecting and advancing the human rights of the people.

At the level of the political arms of government, a key institution to foster legislative consciousness of human rights is that of the Statement of Compatibility. This is where proponents of new legislation are required to place in Parliament an official statement on the compatibility of their proposed legislation with the human rights norms of the constitution. For example, s.19 of the UKHRA requires the Minister of the Crown in charge of a proposed bill to either "make a statement to the effect that in his view the provisions of the Bill are compatible with [human rights]"[109], or "make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill"[110].

In addition, the legislature will need the assistance of auxiliary consultations to meet constitutional standards. Whether it comes as certification from the Attorney General, the Legal Draftsperson, or a Parliamentary Committee; as an intervention by the National Human Rights Commission; as scrutiny by the upper house; or as a combination of these institutions remains to be decided. It may not be necessary to "constitutionalise" such mechanisms; they may be legislated upon subsequently, provided the constitutional text leaves open their possibility. These consultations need not bind the legislature, but their contributions to the promotion and advancement of human rights must come to be regarded with the highest political esteem possible.

3.3. Judicial Review of Legislation

Once legislation is enacted, however, all persons must be given the means, under the constitution, to invoke the judicial power of the People, to scrutinise the consistency of any legislative act with their human rights recognised in the bill of rights.

In considering the merits of the application, courts must be explicitly obliged to interpret all written laws compatibly with fundamental rights, and invalidate any laws that are

[109] HRA, s.19(1)(a).

[110] HRA, s.19(1)(b).

found to be beyond remedial interpretation.

The legislature may only preclude courts from these obligations of invalidation and re-interpretation by overriding the bill of rights explicitly. However, in doing so, the legislature must be restricted by differentiated decision rules (i.e. whether an override is enacted through simple majority, two-thirds majority or a higher majority), based on whether the rights being overridden engage strict scrutiny or minimal scrutiny.

In the case a restriction that is required to survive strict scrutiny fails to do so, the restriction may only be enacted through an override if such override is enacted through a broader consensus within the legislature, i.e. a two-thirds majority (or an even higher threshold). If the restrictions on the rights being overridden only engage minimal scrutiny, the override may be enacted through a simple majority. It must be borne in mind that override is only necessary if Parliament anticipates, or the court has already held, that a given restriction of a right *fails* the relevant level of scrutiny applied. Needless to say, it is unnecessary to resort to override if a given restriction is permissible under the level of scrutiny engaged by it. In all cases, the validity of an override clause should be time-barred, following a period that is equal to the constitutionally stipulated duration for the term of Parliament.

The differentiated decision thresholds applicable to override clauses allow courts to scrutinise the validity of a law even when it contains an override clause. This precludes inordinate judicial deference in such cases. Moreover, even where an override clause is valid, and the enforcement of an impermissible restriction is constitutionally impelled, courts should be obliged to formally recognise the impact of the law upon the citizen who invoked the court's jurisdiction, by issuing on behalf of them, a declaration of inconsistent interpretation.

4. CONCLUSION

The overarching theme in this paper was to expand the understanding of judicial review. Beyond judicial supervision of legislative acts, human rights frameworks must embrace a broad concept of human rights review. Once the relativity of human rights norms is accepted, it becomes clear that both the judicial and legislative processes have crucial contributions to make in the overall process of protecting human rights, and the wisdom of one should not legitimately substitute the other's.

To this end, I have advocated a general analytical framework that identifies the key normative values in the constitution itself, and creates a framework of dialogue around it that facilitates a sharing of judgments between the legislature and the judiciary. If it is said that such a framework sacrifices, if temporarily, the immediate vindication of human rights violations, this would be countered with reference to the range of devices

recommended in the framework to temper the relative superiority of the legislature in making laws reflecting the general will. Legislators will no longer be able to ignore human rights norms or pay lip service to them; they stand to be scrutinised by a specialised body of their own peers at the pre-enactment stage; upon enactment, the interpretation of the law becomes the sole provenance of the judiciary, and laws inconsistent with rights will, as a first step, face invalidation.

Even if the legislature is theoretically allowed the power to override rights requirements, to do so, they must conform to the normative evaluations of human rights handed down by courts. These evaluations also translate to a direct restriction of the legislative power, in sometimes requiring a broader legislative consensus in support of legislation that seeks to override judicial orders. Even where the legislature overcomes these constitutional hurdles, a popular debate is forced on a law overriding human rights by the stipulation that its period of validity will always include a general election. In addition to this, during the pendency of a particular override provision, an aggrieved party is allowed to obtain, on their behalf, a declaration by courts affirming the undue restriction of their rights by the government, which they may in turn use as a tool of advocacy both within the plain of civic engagement, as well as in the international arena.

Thus, the proposed framework seeks to substitute the unhelpful, unproductive polarity and conflict between organs of state that stand to emerge through strong form judicial review with a far more robust framework of engagement where political actors, too, will be compelled to adopt the language of human rights. In a context where Sri Lanka has experienced, in the past forty-odd years, the evils of an "over-mighty legislature" as well as an "over-mighty executive", it would appear prudent to avoid the creation of yet another over-mighty organ of state, and facilitate, in its stead, a structure in which all organs of state may cooperate with each other coequally.