Rethinking Judicial Independence in India and Sri Lanka

Rehan ABEYRATNE*
Jindal Global Law School, Haryana, India
rabeyratne@jgu.edu.in

Abstract
The traditional narrative of judicial independence in India and Sri Lanka goes like this. The Indian Constitution established a strong and independent judiciary, which has become one of the most powerful in the world. By contrast, judicial independence was never entrenched in Sri Lanka due to insufficient constitutional safeguards and political interference. This paper seeks to challenge this narrative. It argues that despite important structural differences, India and Sri Lanka have followed similar judicial paths since the 1970s. Both judiciaries relaxed procedural requirements to allow sweeping public interest litigation; defined secularism and regulated religious practices in line with the dominant religious tradition; and largely deferred to the executive on the scope and necessity of emergency regulations. This remarkable convergence in jurisprudence demonstrates that (1) the Sri Lankan Supreme Court is more rights-protective and (2) its Indian counterpart is less willing to assert its independence on controversial issues than traditionally understood.

In January 2013, the Chief Justice of Sri Lanka, Shirani Bandaranayake was impeached and removed from office by President Rajapaksa. This occurred immediately after Ms. Bandaranayake authored a landmark judgment against the government. Her impeachment brought into sharp relief Sri Lanka’s long-standing lack of judicial independence, which has significantly worsened in the past decade.

In February 2012, the Indian Supreme Court held that the Constitution of India (1950) (Indian Constitution) provides a justiciable “right to sleep” within the right to * A.B. (Brown University); J.D. (Harvard Law School). Associate Professor of Law and Executive Director, Centre for Public Interest Law, Jindal Global Law School. I wish to thank Professor Andrew Harding and the Centre for Asian Legal Studies at the National University of Singapore for inviting me to present this paper at the 2013 Young Scholars Workshop. I also thank other participants at the Workshop for their constructive comments, Rohan Alva, Ananda Burra, Sujit Choudhry, Rohit De, Prashant Iyengar, Mathew John, Anna Lamut, Sarbani Sen, Arun Thiruvengadam, Deepika Udagama, Ashwini Vasanthakumar and Asanga Welikala offered helpful guidance and suggestions along the way and I am very grateful to them all. Finally, I thank V. Balaji, Rohan Krishnan, Didon Misri, Nisha Raman, and Shivangi Sud for excellent research assistance.

life in Article 21. This judgment marked thirty years of “activist” jurisprudence through which the Indian Supreme Court has transformed into a significant policymaking institution that has encroached upon legislative and executive authority.

These recent events confirm the traditional narrative of judicial independence in Sri Lanka vis-à-vis India. It can be summed up as follows. The framers of the Indian Constitution set forth an independent judiciary that has grown in stature and influence since independence. Today, it is widely considered one of the most powerful high courts in the world. By contrast, though the Sri Lankan judiciary had some structural independence in 1948, it has grown weaker due to constitutional amendments and political interference, culminating in the recent impeachment of Chief Justice Bandaranayake.

The traditional narrative stems from important differences in the adoption and structure of the two countries’ constitutions. The Indian Independence Movement was a broad-based, protracted struggle that culminated in a rights-protective Constitution with an independent judiciary, empowered to undertake judicial review. In the 1960s and 1970s, through a series of cases including Golaknath and Keshavananda Bharati, the Supreme Court increased its power vis-à-vis the other branches of government. Meanwhile, Sri Lanka did not experience a painful struggle for independence, which meant that no cohesive national identity existed when the country moved towards self-government. Sri Lanka (then Ceylon) adopted the Ceylon Constitution Order in Council 1946 (Soulbury Constitution) in 1948, which was drafted under the advice of British government officials and scholars, and retained the British Monarch as the head of state. It instituted Westminster-style Parliamentary democracy—a majoritarian system with few veto points and independent checks that allowed identity politics to mobilise towards the parochial and discriminatory policies of the Sinhala-Buddhist majority. Since Sri Lanka declared itself a republic in 1972, it has adopted constitutions that reflected not the collective identity of a country that had overcome colonial rule, but the ethnocentric aspirations of the majority. Judicial independence, on this
account, has decreased over time in Sri Lanka with changes in constitutional structure that have weakened the judiciary as an institution.

This paper seeks to challenge this conventional view by arguing that the Sri Lankan judiciary, particularly its Supreme Court, has been able to retain more independence than expected given its institutional context and Sri Lanka’s political history. The paper takes a bird’s eye view of constitutional history and Supreme Court jurisprudence in India and Sri Lanka. Since readers will likely be more familiar with the Indian case law and literature, the paper devotes more attention to Sri Lanka. However, it does not purport to offer a comprehensive overview of political or judicial developments in either country. It aims instead to provide a more nuanced understanding of each judiciary’s independence by closely examining case law on three different issues: fundamental rights, religious practice, and emergency measures. These issues were selected not only because they are common to the jurisprudence of both countries, but also because they reflect a range of challenges that often confront courts in new and emerging democracies.

When examining the case law, it becomes clear that India and Sri Lanka have faced these challenges in similar ways. The Supreme Courts of both countries relaxed procedural requirements to allow sweeping public interest litigation on behalf of poor and marginalised groups; defined secularism and regulated religious freedom in line with the dominant religious tradition of each country; and generally deferred to the executive on the scope and necessity of emergency regulations. This remarkable convergence in jurisprudence belies the traditional narrative and demonstrates (1) that the Sri Lankan Supreme Court is more rights-protective and (2) that its Indian counterpart is less willing to assert its independence on controversial issues than is generally perceived. The paper therefore seeks to shift attention away from the structural and institutional differences between the two judiciaries to focus on significant legal judgments.

This paper has six parts. Part I overviews the literature on judicial independence, highlighting some of its limitations when applied to new and emerging democracies. Part II sets forth the traditional narrative, focusing on the processes of constitutional adoption in India and Sri Lanka and subsequent structural changes that affected the institutional independence of both judiciaries. Parts III, IV, and V call this narrative into question by highlighting the strong convergence in constitutional doctrine between the two countries. They focus, respectively, on apex court jurisprudence in the areas of fundamental rights, secularism and the regulation of religion, and emergency powers. Part VI offers some preliminary thoughts on how to explain these jurisprudential similarities between India and Sri Lanka and how judicial independence should be studied in new democracies, particularly in post-colonial contexts.

I. THEORIES OF JUDICIAL INDEPENDENCE

Judicial independence is a complex and contested term. Scholars have defined it in at least three different ways and offer a range of prescriptions for how both judges and judicial institutions can remain independent of undue influence. This section sets forth
the major theories of judicial independence and explains why decisional judicial independence – an independent judiciary produces decisions that do not consistently favor particularly groups or interests – is most apposite for this paper. A caveat before we proceed: this is not intended to be a comprehensive literature review, but rather aims to lay the groundwork for what is to follow. In short, scholarship in this area is largely focused on institutional judicial independence rather than on the decisional independence of courts in cases. Institutional analyses tend also to focus on the United States and other Western democracies and therefore do not clearly translate to new and emerging democracies.

In *Politicized Justice in Emerging Democracies*, Maria Popova usefully distinguishes among three definitions of judicial independence. First, there is “institutional” judicial independence, where the focus is insulating the judiciary from political and/or public influence. On this view, the more institutional safeguards that limit outside influence, the greater the independence of the judiciary. Institutional theories of judicial independence often focus on the separation of powers, seeking to limit the ability of political actors to, *inter alia*, appoint and remove judges from office. Much scholarship on judicial independence focuses on constitutional structure and institutional design – attributes that are easily identified and measured. As Popova notes, however, this sort of analysis relies on the assumption that institutional safeguards actually prevent external influence and, further, that such insulation will lead to independent outcomes and therefore strengthen the rule of law. There is much evidence, particularly from developing countries, that casts doubt on these assumptions. Moreover, institutional analyses tend to focus on the United States or other Western democracies, which focus on particular institutional arrangements and


12. See, for example, Ferejohn, *supra* note 10 at 7 (analyzing how the American judiciary remains dependent on other branches of government).


take for granted the proper working of political institutions.\textsuperscript{15} As a result, their conclusions cannot be easily applied to new and emerging democracies.\textsuperscript{16}

Second, studies of judicial independence may focus on the behaviour of individual judges and attempt to measure the degree to which their decisions are made independently of the interests of powerful actors, particularly those who could take retributive measures against individual judges or judicial institutions.\textsuperscript{17} “Behavioral” judicial independence allows for cross-country comparisons with respect to the percentage of judges that both believe and actually do decide cases independently.\textsuperscript{18} However, this definition is problematic for several reasons. First, the internal feeling of independence does not always accompany independent judicial acts. Second, there is no reliable data on how judges really feel. It is difficult to distinguish between a judge’s true interpretation of the law and that which is influenced by external sources affecting her judgment. Finally, even if it were possible to determine how judges really feel, there is evidence showing that their interpretation of the law is influenced by personal and ideological preferences that are often subconscious.\textsuperscript{19}

The third definition of judicial independence focuses on judicial outcomes. “Decisional” judicial independence occurs when “no actor can consistently secure judgments that are in line with his or her preferences.”\textsuperscript{20} This requires careful study of legal cases, rather than institutional or behavioural analysis.\textsuperscript{21} Judicial independence is higher when fewer actors influence the outcome of cases and when that influence is only felt in a small number of cases. The advantage of this definition vis-à-vis the others is that decisional judicial independence is “a necessary component of the rule of law.”\textsuperscript{22} This is because it measures judicial results (case outcomes) rather than structural safeguards or processes of judicial decision-making. The rule of law requires equal protection and consistent application of the laws, which would be undermined if legal judgments favored particular individuals or interests.

As Popova points out, however, there are drawbacks to this definition as well. For instance, even if certain actors regularly obtain favorable judgments, judicial independence might not be threatened.\textsuperscript{23} The winning side may be represented by more


\textsuperscript{16} See, for example, Kaufman, supra note 10 at 19 (arguing that persevering the judiciary as a separate branch of government, limited to hearing “cases” and “controversies” as per Article III of the U.S. Constitution, is crucial to judicial independence); David P. CURRIE, “Separating Judicial Power” (1998) 61 Law and Contemporary Problems 7 (tracing judicial independence from Britain to the United States, with references to Germany).

\textsuperscript{17} Popova, supra note 3 at 16.

\textsuperscript{18} See, for example, Theodore L. BECKER, Comparative Judicial Politics: The Political Functioning of Courts (Chicago: Rand McNally, 1970).

\textsuperscript{19} Popova, supra note 3 at 16–17.

\textsuperscript{20} Ibid. at 18.

\textsuperscript{21} See Widner and Scher, supra note 14 at 235 (defining judicial independence as “freedom from partisan influence in particular cases); Jackson, supra note 11 at 20 (“At its core, the idea of judicial independence goes to the nature of the decisions judges make in adjudicating the cases before them: Judges are supposed to be independent ... of human pressures.”).

\textsuperscript{22} Popova, supra note 3 at 19.

\textsuperscript{23} Ibid. at 18.
capable attorneys, have stronger legal arguments, or regularly appear before judges that favor those arguments. Several cases must therefore be examined to identify whether any actor or interest is consistently prevailing in similar cases. This would strongly indicate a lack of decisional independence.

This paper therefore examines a range of cases from Indian and Sri Lankan courts to determine the extent to which each judiciary has remained independent of undue influence, particularly from government actors, but also from powerful religious and ethnic interests. The next section, however, sets forth the traditional view of judicial independence in India and Sri Lanka, which rests heavily on structural and institutional factors. It therefore exaggerates the disparity between the two judiciaries and obscures important parallels in the case law.

II. CONSTITUTIONAL STRUCTURE AND JUDICIAL INDEPENDENCE – THE TRADITIONAL VIEW

This section examines the processes of constitutional adoption in both India and Sri Lanka and subsequent structural changes that impacted institutional judicial independence. The traditional narrative – that India’s judiciary was originally more independent and has achieved greater independence over time vis-à-vis Sri Lanka’s judiciary – emerges from this analysis.

A. Framing the Indian Constitution

India adopted a republican Constitution in 1950 following a long independence struggle and more than three years of deliberation by its Constituent Assembly. While the Indian judiciary has grown in stature and influence since independence, the framers of the Indian Constitution originally designed a robust institution, empowered to undertake a strong form of judicial review, grant a range of constitutional remedies, and protect against political interference through adverse judicial selection. As Granville Austin noted, “The [Constituent] Assembly went to great lengths to ensure that the courts would be independent, devoting more hours of debate to this subject than to almost any other aspect.”

When the Fundamental Rights Sub-Committee of the Constituent Assembly drafted a set of fundamental rights, which became Part III of the Constitution, its members, including K.M. Munshi, B.R. Ambedkar, and A.K. Iyer, pushed strongly for constitutional remedies, such as writ jurisdiction for the courts, to be included as well.

Part III of the Indian Constitution sets forth a comprehensive set of fundamental rights, including the rights to life, liberty, and equality. Article 13 of the Constitution declares void any laws that contravene fundamental rights. Articles 32 and 226 empower the Supreme Court and High Courts, respectively, to grant various writs

---

24. Ibid. at 18–19.
25. Austin, supra note 5 at 164.
26. Ibid. at 67.
27. Constitution of India (1950), arts. 14, 19 and 21 [Indian Constitution].
(including habeas corpus, mandamus, and quo warranto) to enforce fundamental rights on behalf of Indian citizens. Read together, these three provisions also allow the courts to hold statutes unconstitutional if they contravene fundamental rights. For these reasons, Ambedkar referred to Article 32 as the heart and soul of the Constitution.28

The Indian Constitution also includes a number of provisions to ensure judicial independence and to empower the judiciary to govern itself.29 Article 124(2) sought to insulate courts from political interference by dividing the judicial appointment power between the executive and the Chief Justice. Article 50 expresses a general commitment to the separation of powers, declaring, “The State shall take steps to separate the judiciary from the executive in the public services of the State.” Article 136 allows the Supreme Court to “grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.” Article 226 gives High Courts the same authority over inferior courts within its regional jurisdiction. The Supreme Court is also empowered to punish offenders for contempt of itself or of other courts under Article 129.

In sum, India’s Constitution set in place an institutionally independent judiciary in 1950. Before the advent of public interest litigation or the basic structure doctrine, the Indian judiciary had the jurisdiction to enforce fundamental rights against the state, hold statutes unconstitutional, preside over a broad docket, and largely administer itself.

B. Sri Lanka’s Post-Independence Constitution

While India in the late 1940s was a revolutionary (and often violent) place, Sri Lanka was “an oasis of stability, peace and order.”30 Dubbed the “model colony”, Sri Lanka attracted praise for its “sensible national leadership” and smooth transition from colonialism to self-government.31 This transition was uneventful because, unlike India’s, it did not culminate in a complete separation from British rule. Ceylon was granted full dominion status in 1948, meaning that it could practice self-government while still recognizing the British monarch as its head of state.32

In February 1944, Ceylonese leaders, assisted by British constitutional scholar Sir Ivor Jennings, sent a “Minister’s Draft Constitution” to the British Government. It set forth a Westminster scheme of government with two major limitations on parliamentary power to assuage minority concerns. First, it proposed weighted representation in the predominantly Tamil Northern and Eastern provinces, to give the Tamil minority a greater presence in Parliament. Second, it prohibited the passage of discriminatory legislation by ordinary legislative means.33

In response to the Ministers’ Draft Constitution, the British Government appointed a Commission, headed by Lord Soulbury, to consider constitutional reforms in Ceylon. The Commission visited the island from December 1944 to April 1945 for consultations with all major stakeholders. During this process, it was clear that the Soulbury Commission was attentive to minority concerns. It reported, for instance, “the relations of the minorities…with the Sinhalese majority present the most difficult of the many problems involved in the reform of the Constitution of Ceylon.”

Still, the Soulbury Commission was reluctant to incorporate a Bill of Rights into Ceylon’s new constitution. When it was finally enacted, the Soulbury Constitution set forth limited individual – and communal – rights in Section 29(2), which prohibited Parliament from enacting laws that interfered with the free exercise of religion or discriminated in favor or against a particular community or religious group.

With respect to institutional structure, the Soulbury Constitution included two changes to the Minister’s Draft Constitution to limit majoritarian excess: (1) it set forth a bicameral legislature, comprising a House of Representatives and Senate, where fifteen out of thirty senators would be chosen by the Crown-appointed Governor-General; and (2), it reserved important powers, such as control over defense and foreign affairs, to the Governor-General. The Governor-General was also granted the sole power to appoint the Chief Justice and puisne judges of the Supreme Court. Other minority safeguards were included in Sections 55(1) and 60(1), which established, respectively, an independent Judicial Services Commission to appoint judges (except those on the Supreme Court) and a Public Service Commission to appoint, transfer, discipline and remove civil service officers. Thus, the judiciary and civil service were to be independent of political influence under the Soulbury Constitution.

However, Sri Lanka’s demographic composition made minority groups skeptical of these limited safeguards. In 1946, the (predominantly Buddhist) Sinhala community comprised 70.8 percent of the population, dwarfing the (mostly Hindu) Tamil community (21.6 percent; 11 percent “Sri Lankan Tamil”, 10.6 percent “Indian Tamil”) and Others including the Muslim (“Moor”) and Burgher communities (11.1 percent). The noted Tamil lawyer, G.G. Ponnambalam, articulated clearly the widespread concern among minority groups in Sri Lanka that a strongly majoritarian system of government would permanently entrench a Sinhala-Buddhist majority in political power. He suggested a power sharing arrangement in which minorities would be guaranteed fifty percent of the seats in Parliament.

The Soulbury Commission rejected these demands and, as a result, Sections 41 and 42 of the Soulbury Constitution designated electoral districts for the House of Representatives primarily on the basis of population rather than by ethnicity.
In sum, the Soulbury Constitution instituted Westminster-style parliamentary democracy in Ceylon, with a bicameral legislature comprising a House of Representatives and Senate, and a Governor-General as the Head of State. Executive power was vested in a Governor-General, appointed by the Crown, and empowered, *inter alia*, to dissolve parliament, fill vacancies in the Senate, and appoint Supreme Court judges. The judiciary therefore retained independence from the political system and, through Section 29, had limited authority to hold discriminatory laws unconstitutional.

The drafters of the Soulbury Constitution sought to insulate the judiciary from political interference by setting forth a secular, non-sectarian Constitution with an apolitical executive. In practice, however, the Soulbury Constitution was not so effective. Its majoritarian structure and limited scheme of individual rights were swept aside by a rising tide of Sinhala-Buddhist nationalism that dominated electoral politics after independence, leading to constraints on judicial review, politicized judicial appointments, and recriminations against “disloyal” judges.

C. The Struggle for Judicial Independence

1. Basic structure and judicial appointments in India

Following the adoption of the Indian Constitution in 1950, the principal conflict between the judiciary and elected branches concerned the power to amend the Constitution. Article 368 of the Indian Constitution grants Parliament the authority to amend the Constitution through a two-thirds majority in each house. The original understanding, confirmed in *Shankari Prasad v. Union of India*, was that Parliament may amend the Constitution as it sees fit – even if such amendments violate fundamental rights – as long as it complied with the procedural requirements in Article 368. However, in a series of cases beginning in 1965, the Court cast doubt upon this original understanding and eventually rejected it.

In the 1970s, Prime Minister Indira Gandhi made concerted efforts to limit the Supreme Court’s authority. She won reelection in 1971 by a landslide margin as a result of India’s victory against Pakistan in the Bangladesh Liberation War and Mrs. Gandhi’s open campaign against the Supreme Court. She positioned herself as a representative of the poor, promising greater socioeconomic justice that the Court had hitherto prevented.

41. For a comprehensive overview of these cases and the surrounding political context, see Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (New Delhi: Oxford University Press, 1999).
44. Mate, *supra* note 42 at 182.
The Gandhi government, with the backing of a strong Parliamentary majority, instituted some “radical” amendments to the Constitution. On November 5, 1971, the Twenty-Fourth Amendment came into effect. It brought about changes in both Articles 13 and 368 that reinstated parliamentary supremacy on constitutional amendments. The new Article 13(4) provided, “Nothing in this article shall apply to any amendment of this Constitution made under article 368.” The explanatory note in the margin of Article 368 was changed from “Procedure for Amendment to the Constitution to “Power of Parliament to amend the Constitution and procedure thereof” (emphasis added). Additionally, Article 368(1) was altered to say, “Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.”

This Amendment along with two others that insulated certain land reform laws from judicial review were challenged in Kesavananda Bharati v. Union of India. The Supreme Court’s judgment in this case, issued after months of deliberation by a thirteen-judge panel, was articulated in eleven separate opinions. It is one of the longest and most complex judicial opinions ever issued, consisting of six majority, four minority and three cross-bench opinions that total more than 1,000 pages. From this judicial thicket emerged several important legal rulings. For our purposes, the most important holding was that constitutional amendments are invalid if they violate the Constitution’s “basic structure.” Justice Khanna, widely believed to have authored the definitive “majority” opinion, focused on the text of Article 368, including the phrases “this Constitution” and “the Constitution shall stand amended.” In his view, these terms pointed towards a core Constitutional identity that limited Parliament from altering certain aspects of the Constitution or from abrogating the Constitution altogether.

The Court also provided some guidance as to which aspects of the Constitution fit within this un-amendable “basic structure.” Chief Justice Sikri listed five essential features. In a recent, exhaustive study of the basic structure doctrine, Sudhir Krishnaswamy endorsed a similar list of basic features – secularism, democracy, rule of law, federalism, and the independence of the judiciary – and suggested that two additional features (socialism and equality) could also be included. Looking at this broad – and potentially expanding – list of constitutional tenets that are immune from legislative amendment, and the fact that judicial independence is part of the

45. Austin, supra note 41 at 234–57.
47. See Krishnaswamy, supra note 46 at 26–27.
“basic structure”, it is clear that the judiciary prevailed over the legislature and executive in this battle for supremacy.

Following the Keshavananda judgment, Prime Minister Indira Gandhi sought to alter the composition of the Supreme Court bench.52 The day after the judgment’s release, Mrs. Gandhi went against the tradition of seniority in judicial appointments, and recommended the pro-government Justice A.N. Ray ahead of three more senior justices (Shelat, Hegde, and Grover) who had formed part of the Keshavananda majority.53 A few years later, when Justice Ray was retiring, Mrs. Gandhi passed over Justice Khanna, who had opposed a number of her administration’s initiatives, for the pro-government nominee, Justice Beg. In this period, Mrs. Gandhi’s administration also punitively transferred judges from one High Court to another for ruling against government programs.54

However, the Supreme Court has since regained control over the appointments process. Article 124(2) of the Constitution grants the President authority to appoint Supreme Court justices, but requires that the Chief Justice of India also be consulted. In a series of cases between 1982 and 1999, known as the “Judges’ Cases”, the Court has gradually shifted this power in favor of the judiciary. S.P. Gupta v. Union of India (the First Judges’ Case) involved the transfer of High Court judges and held that in cases of disagreement between the President and the Chief Justice on these matters, the President’s view prevails.55

In 1994, the Court revised this understanding in the Second Judges’ Case, by instituting a system of “participatory consultation” for judicial appointments that would involve not only the President and the Chief Justice, but also the senior justices of the Supreme Court and the affected High Court.56 However, this decision did not make clear whose opinion carried most weight in the consultation. This was finally clarified in the Third Judges’ Case, which prescribed a consultative process that involves the President, the Chief Justice, and the next four most senior justices, and vests the final appointment power in the hands of a majority of justices, not the President.57 Thus, as with the basic structure doctrine, the Court eventually prevailed on the issue of judicial appointments with the advent of this “collegium” process.58

53. See Austin, supra note 41 at 278–83.
55. S.P. Gupta v. Union of India, AIR 1982 SC 149; Neuborne, supra note 52 at 484.
56. Advocates-on-Record Ass’n v. Union of India, AIR 1994 SC 268.
57. See Neuborne, supra note 52 at 484.
58. In 2014, the new BJP-led government raised the issue of judicial appointments once again. In 2015, India will likely adopt the 121st Amendment to its Constitution, which will replace the collegium with a National Judicial Appointments Commission. The Commission shall comprise the Chief Justice of the Supreme Court, two other senior Supreme Court justices, the Union Minister of Law and Justice, and two eminent persons appointed by a committee that includes the Chief Justice, the Prime Minister, and the Leader of the Opposition. See The Constitution (One Hundred and Twenty-First Amendment) Bill, 2014, Bill No. 97-C of 2014, online: PRS Legislative Research <http://www.prsindia.org/uploads/media/constitution%202012/121st%20Bill%20as%20passed%20by%20LS.pdf>. 
2. Retrenchment in Sri Lanka: Sinhala-Buddhist nationalism and the adoption of republican constitutions

(a) The rise of a Sinhala-Buddhist majority: In Sri Lanka, the Soulbury Constitution met with strong opposition from both minority groups and the Sinhala-Buddhist majority. The Tamil leadership, in particular, became frustrated with its inability to curb ethnocentric policies, while segments of the Sinhala community resented its secular and liberal nature that did not recognise the rising tide of Sinhala-Buddhist nationalism.

This failure can be attributed, in large part, to the drafting of the Soulbury Constitution. The Minister’s Draft Constitution, which formed the basis of this Constitution, was essentially the product of a few influential politicians, including D.S. Senanayake (who later became Ceylon’s first Prime Minister) and his principal advisor, Sir Ivor Jennings.59 This group was reluctant to deviate too far from British constitutional norms and therefore did not, for instance, grant minorities disproportionate representation in parliament. They were also unwilling to include a comprehensive bill of rights, settling instead for the minimal Section 29, which itself contained significant limitations.60

Moreover, as A.J. Wilson put it, the “unexpressed premise” of the Soulbury Constitution “was a consociational agreement between the English-educated elites of all the island’s principal groups” to formulate national policy cooperatively and continue the tradition of good governance established under the “model colony”.61 Founded on an idealistic notion of “civic nationalism”, this agreement depended heavily on “D.S. Senanayake’s enormous personal prestige and consummate statecraft to make it viable.”62 When Senanayake died in 1952 – only four years after independence – this civic nationalism had not been institutionally entrenched, leaving a political vacuum that opportunistic politicians would exploit for their own electoral gain.63

In the 1950s, S.W.R.D. Bandaranaike formed the Sri Lanka Freedom Party (SLFP), which had a leftist, grassroots base among the Sinhala middle and lower classes, while also appealing to the Buddhist religious community.64 Despite their strength in numbers, the Sinhala-Buddhist community perceived itself as a beleaguered majority at the time of independence – this community was underrepresented in government service and the elite professions (medicine, law, engineering) – and wanted greater recognition for its language and historical legacy as the final bastion of Theravada Buddhism in South Asia.65

Bandaranaike was elected Prime Minister in 1956, after campaigning on a “Sinhala-only” platform, in which he promised to make Sinhala the sole national

59. See Welikala, supra note 33 at 152.
60. Section 29(2), for instance, shielded from judicial review any law concerning citizenship. See Mudanayake v. Sivagnanasunderam, (1952) 53 NLR 25 (upholding the Citizenship Act of 1948 that disenfranchised the “Indian Tamil” community);
64. Ibid. at 72.
65. See ibid. at 25–26; De Silva, Whirlwind, supra note 31 at 8.
language of Sri Lanka. Shortly thereafter, his government passed the *Official Language Act*, No. 33 proclaiming “the Sinhala Language as the One Official Language of Ceylon”.66

This Act served as more than a symbolic paean to the Sinhala language: it was designed to reduce the number of Tamils in Sri Lankan government and in white-collar jobs, which became more competitive after independence.67 Sinhala became the official working language of government, communications between government and the public, and the civil service entrance exam.68 As a result, Tamil representation suffered across the board. In 1956, Tamils constituted 30 percent of the Ceylon Administrative Service, 50 percent of the clerical service, 60 percent of engineers and doctors, and 40 percent of the armed forces, even though they numbered only 13 percent of the overall population.69 In 1970, Tamil representation had declined to 5 percent, 5 percent, 10 percent, 1 percent, and 5 percent respectively.70

In response to Tamil protests, Mr. Bandaranaike’s government negotiated with S. Chelvanayakam, the leader of the Federal Party (the largest Tamil political party), a set of institutional arrangements to safeguard Tamil interests.71 These included the *Tamil Language (Special Provisions) Act*, No. 28 of 1958, which allowed the Tamil language to be used in schools, universities, public service examinations and for administrative purposes in the Northern and Eastern Provinces. However, some Tamil leaders were not satisfied, viewing this as a condescending, token gesture.72 This Act also enraged Sinhala-Buddhist nationalists, and led to Mr. Bandaranaike’s assassination in 1959 by a Buddhist monk.73

Mr. Bandaranaike’s wife, Sirimavo Bandaranaike, became Prime Minister following his death. After her husband paid the ultimate price for making concessions to the Tamil minority, Mrs. Banadaranaike reinforced his Sinhala-only policy. In 1961, for instance, her government passed the Language of Courts Act to make Sinhala the sole official language of the courts.74 In 1970, Mrs. Bandaranaike’s coalition won a second term in a landslide election (116 out of 157 elected seats) and set about institutionalizing pro-Sinhala policies through a new Constitution.75

(b) *The formation and structure of the 1972 Constitution*: With a strong electoral majority behind her, Mrs. Bandaranaike convened a Constituent Assembly to draft a Constitution. However, this Assembly merely consisted of existing members of the

---


68. *Ibid*.

69. Ibid.

70. *Ibid*.


72. *Ibid*.

73. *Ibid*.

74. Ibid. at 21.

75. See Cooray, *supra* note 7 at 232–33.
House of Representatives – an arrangement that clearly favored the Sinhala-Buddhist majority, particularly Mrs. Bandaranaike’s coalition.\footnote{Ibid. at 243–47.}

This Constitution of the Republic of Sri Lanka (1972 Constitution) terminated the country’s British dominion status and created a “Republic of Sri Lanka” that would be a “Unitary State”.\footnote{Constitution of the Republic of Sri Lanka (1972), art. 2.} It proclaimed Buddhism as the religion with “foremost place” that the state must “protect and foster” and gave constitutional status to the Sinhala-only policy by declaring Sinhala the “Official Language of Sri Lanka.”\footnote{Ibid., art. 6, 7.}

It also altered the structure of government to weaken the original separation of powers scheme. While the Soulbury Constitution set forth a bicameral legislature and vested executive power in a crown-appointed Governor-General, the 1972 Constitution instituted a unicameral National State Assembly, which would then appoint a President to head the executive branch of government.\footnote{Ibid., c. VIII.} Judicial review was entrusted solely to a Constitutional Court that was asked to review proposed laws in the abstract (not when cases were brought before it) and advise the National State Assembly within two weeks if these laws might be incompatible with the Constitution.\footnote{Ibid., arts. 51–52.} If the Court declared a law incompatible, the Assembly could nonetheless enact it with the support of two-thirds of its members.\footnote{Ibid., arts. 51–52.} Together, these provisions allowed the majority in the National State Assembly to pass legislation without any meaningful checks. Thus, the 1972 Constitution, both symbolically and functionally, represented the victory of the majority’s ethnocentric aspirations.\footnote{See Coomaraswamy, supra note 8 at 128–130; Neil DEVOTTA, “Control Democracy, Institutional Decay and the Quest for Eelam: Explaining Ethnic Conflict in Sri Lanka” (2000) 73 Pacific Affairs 55 at 59.}

The 1972 Constitution also embodied Sri Lanka’s commitment to greater rights protection and socioeconomic justice. It granted citizens a full scheme of individual rights under Chapter VI including, \textit{inter alia}, prohibitions on discrimination, arbitrary deprivations of life, liberty, and security of person. It also included rights to equal protection of the law, and the freedom of speech, assembly, religion, and movement. Moreover, much like India’s Constitution, the 1972 Constitution set forth “Principles of State Policy” – non-justiciable policy prescriptions to guide the state towards fulfilling its socialistic aims.

However, there were some important limitations on the enforcement of fundamental rights. Article 18(2) stated that fundamental rights could be restricted in the interest of “national unity and integrity, national security, national economy, public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others or giving effect to the Principles of State Policy.” While the exceptions for public health and national security are not unusual – Article 12(3) of the \textit{International Covenant on Civil and Political Rights} contains the
identical language – the 1972 Constitution includes additional exceptions for “national unity and integrity”, “national economy”, and “Principles of State Policy.”

(c) The Second Republic and further challenges to judicial independence: Significant constitutional amendments in 1977 arguably created a “Second Republic” and further eroded judicial independence.83 These amendments were adopted by the administration of Prime Minister (and later President) J.R. Jayawardenene, whose United National Party (UNP) claimed more than two-thirds of the National Assembly Seats in the 1977 election.84 For the most part, restrictions on judicial review from the 1972 Constitution were left unchanged. For instance, Article 80 of the 1978 Constitution prevents judicial review of enacted laws; it only permits the judiciary to review proposed legislation in the abstract within one week of being placed on Parliament’s official agenda. And, under Article 84, bills inconsistent with the Constitution can nonetheless be enacted by a two-thirds majority in Parliament.

The Constitution of the Democratic Socialist Republic of Sri Lanka (1978 Constitution) draws from the American and French constitutional traditions to institute a powerful executive presidency.85 While the Soulbury Constitution allowed the Governor-General to appoint Supreme Court judges, the 1978 Constitution vests this power in the President.86 The President, unlike the Governor-General, is directly elected for a six-year term and, since the passage of the Eighteenth Amendment in 2010, has no term limits.87

More perniciously, the Eighteenth Amendment repealed some important constraints on executive power. It rendered a number of independent commissions “independent” in name only. For instance, it allows the President to appoint the Chairman and members of the following commissions: the Police Commission, Human Rights Commission, Election Commission Permanent Commission to Investigate Allegations of Bribery and Corruption, Finance Commission, and the Delimitation Commission.88 Thus, a President who serves for multiple terms can pack the judiciary and these commissions with individuals who are receptive to his or her policy agenda and are unlikely to exercise independent review of those policies.

These structural changes have facilitated the rise of an increasingly authoritarian and unaccountable executive in Sri Lanka.89 Presidents have misused their authority to harass and intimidate judges, which has further undermined judicial independence.

84. DeVotta, supra note 63 at 148.
87. See Rohan EDRISINHA and Aruni JAYAKODY, eds., The Eighteenth Amendment to the Constitution: Substance and Process (Colombo: Centre for Policy Alternatives, 2011).
88. Ibid.
89. See Edrisinha, supra note 85 at 30–35.
Under President Jayawardene, for instance, Supreme Court judges’ homes were attacked and other judges were locked out of their chambers when they ruled against the government. President Jayawardene’s regime also tried to impeach the Chief Justice for referring to matters of public interest in a public speech – a harbinger of Chief Justice Bandaranayake’s impeachment and removal from office in 2013.

Thus we have the traditional narrative: by the 1980s, India and Sri Lanka had progressed along very different constitutional paths. India’s Constitution set in place an institutionally independent Supreme Court in 1950, which grew in authority and influence following its confrontation with the Gandhi Administration. By contrast, the Sri Lankan judiciary maintained a degree of institutional independence under the Soulbury Constitution, but could only enforce a limited scheme of rights. While the republican Constitutions set forth more comprehensive fundamental rights, they have also strongly constrained judicial review and, particularly since 1978, have seen the politicisation of judicial appointments and undue political interference in judicial decision-making.

The following three sections, however, seek to demonstrate that despite these structural and institutional differences, the two apex courts have delivered remarkably similar judgments in three disparate areas of the law. These sections will shift the analysis from institutional judicial independence to decisional judicial independence, and will therefore focus on legal judgments over a range of cases.

III. FUNDAMENTAL RIGHTS LITIGATION: INNOVATIVE SOLUTIONS TO PRESSING SOCIOECONOMIC ISSUES

Since the 1980s, the Indian Supreme Court has undergone a remarkable transformation. It changed from a conservative, formalistic institution into one that has, in Upendra Baxi’s words, started “taking suffering seriously” to become a more populist and rights-protective court. What is less known, however, is that the Sri Lankan Supreme Court has followed a similar path, adopting many of the same procedural and substantive changes that have enabled its Indian counterpart to become known as “the most powerful court in the world.”

By analyzing some landmark fundamental rights cases from each jurisdiction, this section will reveal the strong doctrinal convergence between the two apex courts.


93. Robinson, supra note 8 at 105.
A. Public Interest Litigation in India

Public interest litigation in India arose after the excesses of the “Emergency” (1975–77), when Prime Minister Gandhi suspended habeas corpus, limited the freedom of press, and curtailed a number of other individual rights. The Supreme Court was heavily criticised for failing to protect individual liberties in this era. In the early 1980s, in response to detailed reporting from a reinvigorated press on state abuses of fundamental rights – and perhaps to assuage their consciences – a few Supreme Court judges revolutionised the Court’s procedural and substantive approaches to fundamental rights.

Procedurally, the Court adopted a series of innovations under the aegis of “public interest litigation” (PIL). The liberalisation of locus standi (or standing) rules is likely the most significant innovation. Early Supreme Court jurisprudence mandated that for petitioners to have standing to file writ petitions under Article 32, they must show that an impugned law directly harmed them. However, the Court departed from these early precedents in the 1980s. This process began in the First Judges’ Case, where the Court conferred standing on a group of senior advocates who challenged various government policies that interfered with the judiciary’s independence. Writing for the majority, Justice Bhagwati – a principal architect of the PIL revolution – held that traditional standing doctrine had to make way for more flexible procedures; specifically, “any member of the public” can maintain a petition under Article 32 on behalf of a “person or determinate class of persons (who) is by reason of poverty, helplessness or disability or socially or economically disadvantaged position, unable to approach the Court for relief.”

More procedural innovations followed in Bandhua Mukti Morcha v. Union of India. Through a process that would become known as “epistolary jurisdiction,” a three-judge Supreme Court bench initiated a PIL in response to a letter they received from an NGO urging the Court to end the practice of bonded labor. The Morcha case also saw the Supreme Court, through Justice Bhagwati, announce that PIL petitions are actually in the government’s interest. He wrote, “The Government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether the poor and the down-trodden are getting their social and economic entitlements.” In this non-adversarial spirit, the Court appointed two advocates and a doctor as “special commissioners” to investigate the living and working conditions of

95. Baxi, supra note 92 at 113–16.
98. S.P. Gupta v. Union of India, AIR 1982 SC 149.
99. Ibid. at para. 17.
100. Bandhua Mukti Morcha v. Union of India, 1984 SCR (2) 67 [Morcha].
101. Baxi, supra note 92 at 118.
102. Ibid. at 102.
bonded laborers and report their findings to the Court.\textsuperscript{103} The Court also adopted a doctrine known as continuing mandamus,\textsuperscript{104} which permits judges to issue interim orders periodically to ensure that government officials comply with their rulings.\textsuperscript{105}

PIL was accompanied by an important substantive change in the law that allows courts to enforce the Directive Principles of State Policy in Part IV of the Indian Constitution. While these Principles are explicitly non-justiciable,\textsuperscript{106} the Supreme Court has held that they can be read into – and give fuller meaning to – fundamental rights. In particular, the Court has held that Article 21’s guarantee of the right to life confers a broader right to “live with dignity.” The Court first made this pronouncement in \textit{Francis Coralie Mullin v. Union Territory of Delhi}.\textsuperscript{107} In this case, petitioner challenged the lawfulness of his detention by Delhi authorities, as he was prevented from meeting his family and lawyer.\textsuperscript{108} Though petitioner’s claim was framed narrowly, the Supreme Court, led once again by Justice Bhagwati, issued a broad ruling on the meaning of Article 21. According to Bhagwati:

[t]he right to life enshrined in Article 21 cannot be restricted to mere animal existence. It means something much more than just physical survival…it must...include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.\textsuperscript{109}

Following \textit{Francis Coralie}, the Supreme Court has ruled in a series of cases that rights to food, shelter, and education, among others, constitute part of a dignified life and are protected under Article 21.\textsuperscript{110}

All told, the Indian Supreme Court, chastened by the Emergency, has emerged as the champion of fundamental rights; it not only enforces civil and political rights, but has carved out a policymaking role for itself on questions of social justice (the Directive Principles) that were originally outside its ambit. Today, the Court may accept petitions alleging a wide range of fundamental rights violations, filed on behalf of large affected populations, and enforce its judgments on a continuous basis.

\section*{B. Sri Lanka’s (Quieter) Fundamental Rights Revolution}

Despite restrictions on judicial review, the Sri Lankan judiciary has expanded its role in fundamental rights litigation. As in India, the Sri Lankan Supreme Court has relaxed standing requirements and moved towards enforcing the Directive Principles of State Policy.

\begin{itemize}
\item\textsuperscript{103} \textit{Morcha, supra} note 100 at 105.
\item\textsuperscript{104} \textit{Ibid.} at 71.
\item\textsuperscript{105} Mate, \textit{supra} note 42 at 196–200.
\item\textsuperscript{106} \textit{Indian Constitution, supra} note 27, art. 37.
\item\textsuperscript{107} \textit{Francis Coralie Mullin v. Union Territory of Delhi}, 1981 SCR (2) 516.
\item\textsuperscript{108} \textit{Ibid.} at 520–23.
\item\textsuperscript{109} \textit{Ibid.} at 528–29.
\end{itemize}
Article 126 of the 1978 Constitution confers on the Supreme Court exclusive jurisdiction to adjudicate fundamental rights violations. Like Article 32 of the Indian Constitution, Article 126 empowers the Supreme Court to issue various writs (habeas corpus, certiorari, mandamus, etc.) in the exercise of this jurisdiction, and to “to grant such relief or make such directions as it may deem just and equitable.” Over time, the Sri Lankan Supreme Court has relaxed its procedures to hear writ petitions filed in the public interest. In Wijesiri v. Sirewardena, the petitioner, a Member of Parliament, filed a petition on behalf of 53 candidates who were selected for appointment to Grade II Class II of the Sri Lanka Administrative Service. Their letters of appointment were not issued by the respondent, the Secretary of the Ministry of Public Administration. The petitioner therefore asked the Court to issue a writ of mandamus to compel the respondent to confirm these appointments.

On the question of standing, the Court of Appeal had drawn on traditional doctrine to rule that a petitioner must make two showings: (i) that he has some interest over and above the interests of the community as a whole or the class of the community to which he belongs; and (ii) that even where he comes forward in the public interest he must be able to show some personal interest in the matter. The Court of Appeal held that the Petitioner failed to make either showing, but the Supreme Court disagreed. It found that the petitioner was acting in good faith on behalf of the public and, more importantly, stated that this should be adequate for the purposes of standing. Justice Wimalaratne’s majority opinion noted:

[to restrict Mandamus to cases of personal legal right would in effect make it a private law remedy... But the first requirement ought, in my view, to be satisfied and it is satisfied if the applicant can show a genuine interest in the matter complained of, and that he comes before Court as a public spirited citizen concerned to see that the law is obeyed in the interest of all, and not merely as a busy body perhaps with a view to gain cheap publicity.]

Nonetheless, the Court dismissed the petition, holding that Article 55(5) of the 1978 Constitution – which explicitly bars judicial review of matters concerning the appointment of public officers – precluded the Court from ruling on this issue. The Court noted, however, that this case might have been decided differently if it was filed under Article 126, alleging fundamental rights violations.

This dicta in Wijesiri set the stage for loosening standing requirements under Article 126. In Bulankulama v. Secretary, Ministry of Industrial Development, the Government of Sri Lanka and Freeport MacMoran Resource Partners (an American company) entered a joint venture to manufacture phosphate fertiliser. The phosphate would be mined from a deposit located near the village of Eppawela in the North Central Province of Sri Lanka. The petitioners, local residents who farmed

---

112. Ibid.
113. Ibid.
114. Ibid.
nearby land, claimed that this project threatened their livelihoods and the surrounding environment. They filed a petition under Article 126 alleging that the project violated their right to equality under Article 12(1), their right to engage in any occupation, profession, trade, business, or enterprise under Article 14(1)(g), and their right to freedom of movement under Article 14(1)(h) of the Constitution.\textsuperscript{116}

In response, the government conceded that the mineral resources of Sri Lanka constitute part of the “national wealth” of the country, but claimed that the government itself, not the Court, was “the trustee” of these resources, and that the petition should be dismissed since petitioners did not have standing to argue on behalf of the public.\textsuperscript{117} Justice Amerasinghe, writing for the Court, dismissed this argument, stating “the petitioners, as individual citizens, have a Constitutional right...to be before this Court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka.” Justice Amerasinghe went on to make clear that fundamental rights litigation is an effective means to hold the government accountable as the trustee of Sri Lanka’s natural resources for future generations. He noted:

[S]uch collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners Fundamental Rights ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and accountability, in the best interest of the people in Sri Lanka, including the petitioners, and future generations of Sri Lankans, become relevant.\textsuperscript{118}

The Sri Lankan Supreme Court has also adopted substantive changes in its fundamental rights jurisprudence. First, it has moved towards enforcing Directive Principles of State Policy. Like Part IV of the Indian Constitution, Article 27 of the 1978 Constitution sets forth a list of Directive Principles, while Article 29 prohibits their enforcement in any court or tribunal. While the Supreme Court has not (yet) directly enforced these Principles or read them into fundamental rights, it has held that the state is required to implement the principles through legislation.\textsuperscript{119} This implies that citizens may bring constitutional challenges against laws that pertain to subjects covered by the Directive Principles (such as socioeconomic justice), but disregard or fail to meet the standards therein. In \textit{Environmental Foundation Limited et al. v. The Attorney General (Nawimana Case)}, petitioners, a group of villagers affected by a quarry-blasting operation, filed a petition under Article 126 alleging several violations of fundamental rights, as well as violations of the Directive Principles.\textsuperscript{120} The case was settled out of court through mediation, but the fact that Directive Principles were invoked to buttress petitioners’ arguments suggests they play a role – albeit a less central role than in India – in fundamental rights litigation.

\textsuperscript{116} Ibid.
\textsuperscript{117} Ibid.
\textsuperscript{118} Ibid.
\textsuperscript{119} \textit{In re Thirteenth Amendment to the Constitution and the Provincial Councils Bill}, [1987] 2 SriLR 312.
\textsuperscript{120} \textit{Environmental Foundation Limited et al. v. The Attorney General (Nawimana Case)}, [1994] 1(1) SAELR 17.
A second and more important development is the expansion of the right to equality under Article 12(1). In the vein of Bulankulama, the Sri Lankan Supreme Court has generally been very receptive to public interest litigation filed on behalf of environmental NGOs.\(^{121}\) It has also allowed third-party standing in cases challenging the validity of an election,\(^ {122}\) the sale of shares of a publicly owned company,\(^ {123}\) and land acquisitions for private use.\(^ {124}\) Despite their disparate subject matter, many of these cases centre on Article 12(1) violations. This is due to an expansion in the meaning of the right to equality since the early 1990s. As Deepika Udagama has explained, the Sri Lankan Supreme Court moved from a narrow definition of equality under the traditional “reasonable classification” doctrine to “one that champions sweeping administrative justice.”\(^ {125}\) It followed the Indian Supreme Court’s judgments in Maneka Gandhi and Ajay Hasia, which held that arbitrary legislative or executive action constituted a violation of the right to equality under Article 14 of the Indian Constitution.\(^ {126}\)

Thus, much as the Indian Supreme Court has utilised Article 21 to expand its scope of review, the Sri Lankan Supreme Court today uses Article 12(1) as a far-reaching tool to weigh-in on the constitutionality of legislative and executive action. This is a remarkable development in light of Sri Lanka’s constitutional structure, which, unlike India’s, places serious constraints on judicial review. That Sri Lanka’s Supreme Court could nonetheless expand the scope and impact of its rights-based jurisprudence challenges the traditional view of judicial independence in Sri Lanka and casts the 1972 and 1978 Constitutions in a more positive light. Despite restrictions on the judiciary, these Constitutions set forth comprehensive schemes of fundamental rights and directive principles that enabled such jurisprudential developments.

### IV. SECULARISM AND THE REGULATION OF RELIGIOUS PRACTICE: THE CREEPING INFLUENCE OF ETHNO-RELIGIOUS NATIONALISM

While the Indian and Sri Lankan judiciaries have asserted their independence in the realm of fundamental rights, both have struggled to maintain a neutral or consistent

---


definition of secularism in the face of rising religious nationalism in their respective countries. Two trends in the Indian and Sri Lankan courts are particularly noteworthy: (1) they have defined “secular” in a manner that privileges (often parochial conceptions of) Hinduism and Buddhism, respectively; and (2) limited the practice of religious conversion, which disproportionately burdens minority religions that, unlike Hinduism and Buddhism, engage in proselytisation.

A. Defining Secularism and the Regulation of Religious Practice in India

As Chief Justice Sikri announced in *Keshavananda*, secularism is part of the “basic structure” of the Indian Constitution.127 This is borne out by the Constitution’s text. Article 25 guarantees the freedom of religious belief and practice, while Article 26 allows religious groups to establish and maintain places of worship, as well as to manage their own affairs. The Constitution also prohibits levying taxes or spending public funds to promote or maintain any religion or religious educational institution.128

The Indian Supreme Court has issued a number of rulings on the meaning of secularism and religious freedom under the Constitution. While a study of the Court’s vast jurisprudence on religion is beyond the scope of this paper,129 it is clear that the Supreme Court has struggled to uphold constitutionally mandated secularism in response to growing Hindu nationalism that has infiltrated political and social life.130

The Supreme Court has become entangled in the thorny issue of what practices and beliefs constitute Hinduism and, even more controversially, has distinguished between “genuine” and false (or disingenuous) conceptions of Hinduism. In *Shastri Yagnapurashdasji v. Muldas Bhundardas Vaisya* (the *Satsang* case), petitioners challenged a 1947 Bombay law that opened Hindu temples to untouchables.131 The petitioners were members of the Satsangi sect, who sought an exemption from this law by declaring that they were not Hindu. In an opinion authored by Chief Justice Gajendragadkar, the Supreme Court dismissed their claim and, in doing so, set out to explain “what are the distinctive features of Hindu religion.”132 The Court examined the teachings and history of the Satsangi sect and found that its tenets were identical to those of Hinduism and that its creator was simply one of many reformers of the Hindu religion, not the founder of a separate faith.133 In keeping with the Chief Justice’s

132. Ibid. at 1127.
strong, reformist views, the Court adopted a very progressive view of Hinduism. It noted that while Hinduism is almost “impossible” to define, it should be thought of as a “way of life” that is tolerant, inclusive, and universalist in nature.

Thus, a tension emerged in the Court’s judgment: it held that while the Satsangs were Hindu for the purposes of the relevant law, the sect’s practices ran counter to the proper understanding of Hinduism. Later in the Satsang judgment, the Court put forth a stronger, more essentialist notion of Hinduism that exacerbated this tension. It stated that “[t]he satsangi’s [petitioners’] apprehension about the pollution of the temple is founded on superstition, ignorance, and complete misunderstanding of the true teachings of Hinduism.” This statement seems to conflict with the Constitution’s mandate in Article 26(b) that religious denominations have the right to manage their own affairs. In a dark irony, the Court went from noting how difficult Hinduism was to define, to forcefully defending and imposing a certain definition of the religion on a group that averred it was not Hindu.

The Court in the Satsang case arguably acted with noble intentions to prevent this sect from evading reform. However, it also opened the door for future judicial interventions on the meaning of Hinduism, leading to judgments that are increasingly convoluted and difficult to square with the Constitution’s text. As Marc Galanter has pointed out, the Court could have avoided trying to define Hinduism and simply disposed of this case per Article 25(b) of the Constitution, which permits state regulation aimed at “social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.”

The Hindutva cases of the 1990s saw the Court embracing a more problematic definition of Hinduism and, in the process, a skewed definition of secularism. These cases arose in response to challenges filed under Section 123(3) of the Representation of the People Act (RPA). This provision bars political candidates from engaging in any appeal to their religion, race, caste, community, or language to further their prospects for election, or to prejudice the electoral prospects of other candidates. In the late 1980s and early 1990s, candidates from various right wing, Hindu political parties (including the RSS and Shiv Sena) relied heavily on the notion of Hindutva to advance their political agendas. The Hindutva ideology conceives of Hindus as not merely a religious group but a distinct race with a singular, deep-rooted connection to the Indian subcontinent. Hindutva called for policies that would promote the superiority of the “Hindu race” at the expense of minorities like Muslims and Christians, who were deemed outsiders that could not be trusted to fully assimilate into the Hindu way of life.

---

136. Mehta, supra note 133 at 325.
137. Ibid. at 326.
139. Representation of the People Act, 1951, s. 123(3), India AIR Manual.
141. Ibid. at 131–33.
More broadly, this ideology represented an attack on Nehruvian precepts of secularism and tolerance – represented in the Satsang judgment – that right-wing leaders denounced as elitist notions of a Western-educated ruling class who were out of touch with ordinary Indians.  

The issue before the Supreme Court in the Hindutva cases was whether evoking Hindutva constituted an appeal to religion and was therefore illegal under Section 123(3) of the RPA. The principal opinion was delivered by Justice Verma in Prabhoo v. Prabhakar Kasinath Kunte et al. The respondents in this case, Dr. Prabhoo, the mayor of Bombay, and Bal Thackeray, the founder and leader of the Maharashtra-based Shiv Sena Party, argued that Hindutva had no particular religious affiliation but rather represented Indian culture. Justice Verma essentially endorsed this definition, stating that Hindutva is best described as “a way of life or state of mind and it is not to be equated with, or understood as religious Hindu fundamentalism.” He also stressed that terms such as Hinduism and Hindutva are difficult to define and must not be limited to “strict Hindu religious practices unrelated to the culture and ethos of the people of India.” Thus, the Court held that invocations of Hindutva are not appeals to religion under Section 123(3) per se and that alleged violations of this provision must be decided on a case-to-case basis.

In calling Hindutva “a way of life”, Justice Verma echoes Chief Justice Gajendragadkar in the Satsang case, but he subverts that judgment by equating Hindutva with Hinduism and defining secularism in a manner that is sympathetic to the ethnocentric claims of the Hindu Right. His opinion is particularly troubling in light of the Court’s prior judgment in S.R. Bommai v. Union of India, in which the Court underscored the importance of secularism in India’s constitutional framework. In that case, the President of India had declared a state of emergency in four states due to communal violence following the destruction of a mosque in Ayodhya by Hindu mobs. The mosque, Babri Masjid, stood where there was once a Hindu temple venerating the birthplace of the Hindu deity Ram. The Supreme Court in Bommai upheld the constitutionality of this Presidential declaration and, in the process, strongly condemned the Hindutva movement as antithetical to precepts of secularism and democracy. However, in the Hindutva cases, the Court did not follow Bommai. In fact, Justice Verma instructed the attorneys not to argue Bommai on the basis that it was not relevant to the proper interpretation of the RPA.

---

144. Ibid. at 7.
145. Ibid. at 22.
146. Ibid. at 24.
150. Ibid.
151. Ibid. at 175.
152. See Jacobsohn, supra note 129 at 198–99.
The result is a confused doctrine – one that recognises secularism as part of the Constitution’s basic structure, but allows appeals to communalism and religious fundamentalism as consistent with that principle.

Indian courts have also ruled that various Hindu symbols and rituals are secular for constitutional purposes. These cases build on the Supreme Court’s judgment in Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt (the Shirur Mutt case), which established that while the Constitution protects the freedom to engage in acts of religious worship, it only protects those acts that are “essential” to a particular religion.\(^{153}\) In Rajesh Himmnatlal Solanki v. Union of India (the Bhoomi Pujan case), the High Court of Gujarat had to determine the constitutionality of a religious ceremony used for a public purpose.\(^{154}\) The ceremony at issue, Bhoomi Pujan, is a Hindu ritual ordinarily performed before the construction of a new building. In this case, the ceremony was performed prior to the opening of a new courthouse. The issue was whether performing a Hindu ritual to consecrate a government building violated the guarantee of secularism located, \textit{inter alia}, in Articles 25 and 26 of the Constitution.\(^{155}\)

Writing for the Court, Justice Patel relied on dicta in Bommai to declare that “secularism in the Constitution is not anti God”; rather, it “teaches spirit of tolerance, catholicity of outlook, respect for each other’s faith and willingness to abide by rules of self-discipline.”\(^{156}\) Then, using the “essential practice” test laid out in the Shirur Mutt case, Justice Patel found that the Bhoomi Pujan ceremony was secular in the broader sense that it comported with “\textit{dharma}” – a Hindu concept connoting duties performed in the broader public interest that uphold societal stability and promote general wellbeing.\(^{157}\) According to the Court, the real essence of dharma applies to adherents of all religions (Hindus, Muslims, Christians, Parsis, etc.), under the broad principles of “\textit{Vasudeva Kutumbakam}” and “\textit{Sarve Jana Sukhino Bhavantu}”, which mean “welfare to everybody” and “hurt to none”, respectively.\(^{158}\)

Thus, the High Court of Gujarat not only echoes the Supreme Court’s decision in the Satsang case by defining certain tenets of Hinduism, but goes further to declare that a Hindu concept (\textit{dharma}) applies to all religions and does so using ancient Hindu proverbs, expressed in Sanskrit. This judgment is striking in its use of Hindu concepts to define what constitutes a secular ceremony. Perhaps even more startling is Justice Patel’s apparent lack of awareness of how Hinduism informs his reasoning and his universalist approach to religion, which is then articulated in the language of secularism.

In a similar vein, the Supreme Court has held that the “\textit{Om}” symbol – which Hindus believe represents the sound of universal creation – is not a religious symbol,\(^ {159}\) and


\(^{154}\) Writ Petition (PIL) No. 2 of 2011, High Court of Gujarat, 10/02/2011.

\(^{155}\) \textit{Ibid.}, para. 5.

\(^{156}\) \textit{Ibid.}, para. 7.

\(^{157}\) \textit{Ibid.}, paras. 11–17.

\(^{158}\) \textit{Ibid.}, paras. 15–17.

\(^{159}\) Mehta, \textit{supra} note 133 at 336.
that schools and universities which offer Sanskrit language classes, but not Persian or Arabic, comport with the constitutional principle of secularism.\textsuperscript{160} These judgments are not especially problematic \textit{per se}, but when read in conjunction with the \textit{Bhoomi Pujan} and \textit{Hindutva} cases, they provide further evidence of the infiltration of Hindu tradition and practice into the definition of “secularism.”

Another worrying aspect of the Supreme Court’s jurisprudence on religious worship concerns the constitutionality of so-called anti-conversion laws – laws that prevent proselytizing faiths from converting members of other religions. The leading case on this issue is \textit{Rev. Stainislaus v. State of Madhya Pradesh}.\textsuperscript{161} A Catholic priest who had been convicted of forcible conversion in Madhya Pradesh challenged the state law on the grounds that it violated the freedom of religious practice under Article 25 of the Constitution.\textsuperscript{162} The Supreme Court dismissed his claim by relying on a prior case that had distinguished between “conversion and propagation simply for ‘the edification of others.’”\textsuperscript{163} Thus, the Supreme Court held that while transmitting or spreading the tenets of a particular religious faith is acceptable, conversion violates the freedom of conscience guaranteed to all Indian citizens.\textsuperscript{164} This distinction makes little sense, since the very act of communicating religious beliefs may have the effect of convincing others to convert to that religion. Whether conversion actually occurs depends on a number of factors, including the speaker’s skill and conviction, as well as the listener’s willingness to receive new articles of faith.

The broader issue with the Court’s decision in \textit{Stainislaus} is that it once again favors Hinduism. Since Hindus do not engage in proselytisation and, as members of the majority faith, are the likely targets of Christian (or Muslim) conversion attempts, \textit{Stainislaus} places a disproportionate burden on the practice of minority religions and appears to protect Hinduism from their incursions.

\textbf{B. Religion in Sri Lanka: The Preeminence of Buddhism and Following India’s Lead on Anti-Conversion Laws}

The Sri Lankan Supreme Court’s jurisprudence on religion follows India’s quite closely, both in terms of defining secularism in a manner that favors the majority faith (Buddhism) and upholding anti-conversion laws. As a preliminary matter, though, recall that Sri Lanka’s Constitution does not enshrine the principle of secularism as clearly as India’s. Article 9 of the 1978 Constitution guarantees Buddhism the “foremost place” and the Sri Lankan state is obligated “to protect and foster the Buddha Sasana [religion], while assuring to all religions the rights granted by Articles 10 and 14(1)(e).” Article 10 protects the right to freedom of religion, including the right to “adopt or choose” a religion of one’s choice; Article 14(1)(e) provides for the freedom to “manifest” one’s religious beliefs through “worship, observance, practice or teaching.”

\textsuperscript{160.} Santosh Kumar \textit{v. The Secretary, Ministry of Human Resources Development}, \textit{AIR} 1995 SC 293.
\textsuperscript{162.} \textit{Ibid.} at 614.
Despite the preeminence of Buddhism in the Sri Lankan constitutional scheme, the Supreme Court has declared that Sri Lanka is a secular state.\(^\text{165}\) As in the Indian context, however, the Sri Lankan Supreme Court’s treatment of secularism is schizophrenic and often favors the majority (Buddhist) faith. Two cases are illustrative on this point. The first case involves a proposed bill setting forth the “Nineteenth Amendment to the Constitution” that would officially make Buddhism the state religion of Sri Lanka.\(^\text{166}\) Exercising its limited, abstract power of judicial review, a unanimous Supreme Court held that this would be unconstitutional. The Court stressed that while Article 9 confers special constitutional status to the Buddhist faith, this Bill would violate various fundamental rights of non-Buddhist Sri Lankans, including the freedom of religious belief and practice as well as the right to equality under Article 12.\(^\text{167}\) Yet, as Deepika Udagama has pointed out, the language of the Bill is remarkably similar to Article 9; it provides that the state “shall foster, protect, patronise the *Buddha Sasana* and promote good understanding and harmony among the followers of other forms for worship…”\(^\text{168}\) In effect, the Court was able to state its commitment to secularism without really altering the status quo.

In the second case, the Court proved willing to uphold restrictions on a minority faith and defined “secular” in a manner that favored Buddhism. In *Kapuwatta Mohideen Jumma Mosque v. OIC Weligama*, the petitioners were trustees of a Mosque, who claimed their right to equality under Article 12(1) of the 1978 Constitution was violated when police had refused to issue them a loudspeaker permit to broadcast their prayers.\(^\text{169}\) Attorney Seneka Weeraratne joined the case on behalf of local residents, who alleged Article 12(1) violations on the grounds that the Mosque’s call to prayer caused serious noise pollution and interfered with their quiet enjoyment of property.\(^\text{170}\) The Supreme Court was therefore asked to adjudicate between competing right to equality claims.

The Court held in favor of the local residents. Chief Justice Sarath Silva, writing for the Court, began his opinion by stressing the harmful effects of noise pollution from which the public is protected by various statutes and environmental regulations.\(^\text{171}\) The Chief Justice then set out to prove that a restriction on Muslim religious practices that produce noise pollution would not be incompatible with secularism. He began by affirming that Sri Lanka “is a secular State. In terms of Article 3 of the Constitution, Sovereignty is in the People at common devoid of any divisions based on perceptions of race religion language and the like.”\(^\text{172}\)

---

170. *Ibid*.
171. *Ibid*.
172. *Ibid*. 
Chief Justice Silva principally relied on two cases in his analysis. First, he quoted a Sri Lankan precedent from the colonial era, *Marshall v. Gunaratne Unnanse*, in which the Supreme Court had upheld the conviction of the principal trustee of a Buddhist vihare (temple) for disturbing his neighbors during a loud, nighttime religious ceremony. In that case, Chief Justice Bonser stated, “No religious body, whether Buddhist, or Protestant or Catholic, is entitled to commit a public nuisance.” Second, he quoted from an Indian Supreme Court precedent that arrived at the same conclusion. It stated, “Undisputedly no religion prescribes that prayers should be performed by disturbing the peace of others.” The Indian case involved a Christian church that, *inter alia*, used drums and recited prayers over loudspeakers.

Chief Justice Silva seems to have chosen these precedents to show (1) that restricting religious practices that cause noise pollution is not limited to minority faiths and (2) that such restrictions are not unique to Sri Lanka. However, on closer inspection, his analysis fails to make either showing. The *Marshall* opinion was penned in 1895 by a British Chief Justice long before Sri Lanka became an independent republic whose Constitution gave Buddhism the “foremost place.” Meanwhile, the Indian case involved practices (the use of drums and loudspeakers) that are not central to the Christian faith. In contrast, it is the regular practice of Mosques to broadcast the call to prayer over loudspeakers and therefore likely a greater affront to the freedom of religious practice to ban loudspeakers in this context.

The Chief Justice then undermined his analysis further by quoting a Buddhist teaching on the proper practice of religious worship. According to Buddhist scholar Piyadassi Thero in *The Buddha’s Ancient Path*, the benefit of prayer only results:

> by listening intelligently and confidently to paritta sayings [Buddhist verses] because of the power of concentration that comes into being through attending whole-heartedly to the truth of the sayings... Blaring forth the sacred suttas [teachings] and disturbing the stillness of the environment, forcing it on ears of persons who do not invite such chant is the antithesis of the Buddha’s teaching.

The Chief Justice does not explain this quote, but the implication is clear: the Mosque should practice Islam in a quieter, more contemplative manner, just as the Buddha prescribed. Thus, much like the *Bhoomi Pujan* case from Gujarat, the Court here draws from the country’s majority faith to define the contours of constitutional religious practice and then imposes that definition on a minority faith. In both judgments, the justices seemed unable to grasp the extent to which tenets of Hinduism and Buddhism, respectively, affected their reasoning and the case outcomes.

The Sri Lankan Supreme Court has also drawn from Indian case law on the issue of anti-conversion laws. In three recent cases, the Sri Lankan Supreme Court upheld

---

constitutional challenges to bills seeking to incorporate Christian charities. The petitioners in each case claimed that establishing these charitable organisations would encourage religious conversions and therefore impinge upon the religious freedom of non-Christians.

Chief Justice Sarath Silva wrote the opinion of the Court in the first two cases. He distinguished between Article 14(1)(c), which protects the right to practice religion in association with others, and Article 14(1)(g) that protects the right to engage in an occupation, trade, etc. According to the Chief Justice, the latter right is not related to religious freedom and does not deserve constitutional protection, especially since the charity would violate others’ right to freedom of thought, conscience and religion under Article 10. In the second case, petitioners pointed out that a number of Buddhist, Muslim, and Hindu organisations had been incorporated by Acts of Parliament, even when those bodies had engaged in charitable activities not limited to adherents of their own faith. The Chief Justice dismissed this argument, stating (quite disingenuously) that the Court does not examine the validity of past legislation in exercising judicial review.

These judgments are very problematic. They discriminate against the Christian minority on two tenuous premises that are not substantiated with any evidence: (1) that charitable activities will necessarily lead to conversion and violate the rights of non-Christians; and (2), that such activities do not fall within the ambit of religious freedom. Missing once again from the Chief Justice’s opinions is any recognition that certain practices that are not central to the Buddhist faith may nonetheless be vital to the practice of other religions.

The third judgment in this line of cases, *Menzingen*, held that incorporating a Christian charity would not only violate the rights of non-Christians to religious freedom under Article 10, but would also infringe upon the special status of Buddhism under Article 9. The Court here relied substantially on the Indian Supreme Court’s *Stainislaus* judgment, which differentiated between the constitutionally protected practice of transmitting or spreading religious beliefs and the unprotected practice of conversion. *Menzingen* stressed that while the Indian Constitution protects the right “to propagate” religion, the 1978 Sri Lankan Constitution does not. Article 9 of the 1978 Constitution also requires the state “to protect and foster the Buddhist sasana” – a provision that finds no analog in the Indian Constitution.

The *Menzingen* judgment was the first to invoke Article 9 since Buddhism was given special constitutional protection in 1972. The implication of the judgment appears

---

177. *In re Christian Sahanye Doratuwa Prayer Centre (Incorporation) Bill* (SC Special Determination No. 2/2001); *In re New Wine Harvest Ministries (Incorporation) Bill* (SC Special Determination No. 2/2003); *Provincial of the Teaching Sisters of the Holy Cross of the Third Order of St. Francis in Menzingen of Sri Lanka* SC Special Determination No. 19/2003) [*Menzingen*].

178. See *Udagama*, supra note 168 at 165–66.


180. *Ibid.* at 166. *Udagama* points out that the Chief Justice is the chief patron of a prominent Buddhist temple and regularly appears on television to discuss Buddhist philosophy.


to be that because limits on conversion have been upheld in India, where secularism receives greater constitutional protection, such limits must also be constitutional in Sri Lanka.\textsuperscript{184} The \textit{Meninzen} judgment is therefore perhaps truer to the constitutional text than its Indian counterpart, \textit{Stainislaus}.\textsuperscript{185} More broadly, however, a Supreme Court judgment ruling that Christian charities violate the “foremost place” of Buddhism under the Constitution is a troubling development for secularism and religious freedom in Sri Lanka.

Thus, the Supreme Courts of India and Sri Lanka have moved towards defining secularism and regulating religious practice in line with the dominant religious tradition in each country. In both countries, this evolution has occurred against the backdrop of rising religious nationalism, which indicates the influence of political mobilisation on judicial decision-making.

V. DEFFERENCE TO THE EXECUTIVE: EMERGENCY REGULATIONS AND RESTRICTIONS ON JUDICIAL REVIEW

Both India and Sri Lanka have encountered periods of emergency rule in their independent histories. While India’s “Emergency” lasted for only two years, it continues to have anti-terror laws in force that curtail fundamental rights and grant immunity to government officials and military personnel. Meanwhile, Sri Lanka has been trapped in an almost permanent state of emergency since 1971, which has granted essentially authoritarian powers to the President and further limited the scope of judicial review. In both countries, the courts have been unable or unwilling to provide an effective check on executive authority during periods of emergency.

A. Emergency Rule (1975–77) and Anti-Terror Laws India

1. The Emergency

The Emergency (1975–77) is usually characterised as the nadir of Indian democracy.\textsuperscript{186} In this period, Indira Gandhi’s regime suspended habeas corpus and suppressed basic civil liberties, including freedom of the press.\textsuperscript{187} It also promulgated a series of constitutional amendments, including the \textit{Forty-Second Amendment} that, \textit{inter alia}, limited the scope of judicial review.\textsuperscript{188} Though these drastic measures were ostensibly adopted to maintain public order and security, their real purpose was to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{185} See Rev. \textit{Stainislaus v. State of Madhya Pradesh}, supra note 161.
\item \textsuperscript{186} See Austin, supra note 41 at 388–90.
\item \textsuperscript{188} Ibid.
\end{itemize}
\end{footnotesize}
suppress political opposition and advance Mrs. Gandhi’s social agenda – a fact that she later admitted.189

The Supreme Court failed to stand up to the Gandhi regime during this era.190 In A.D.M. Jabalpur v. Shiv Kant Shukla (the Habeas Corpus case), the Supreme Court was asked to issue writs of habeas corpus to remove petitioners from government detention.191 The petitioners included a number of opposition leaders, who had been detained pursuant to the 1971 Maintenance of Internal Security Act (MISA). This Act enabled law enforcement agencies to undertake preventative detention as well as searches, seizures and arrests without warrants. However, by a 4–1 majority, the Court did not question the legality of MISA. It held instead that the President could deny political detainees all access to the courts during a presidentially declared emergency.192 Justice Khanna wrote (a now famous) dissent in which he declared that “detention without trial is an anathema to all those who love personal liberty.”193

Mrs. Gandhi decided to end the Emergency in 1977 and call for elections. The opposing Janata Party won a landslide victory and went about restoring democratic government. The new government repealed Emergency era laws that restricted civil liberties, such as MISA, and overturned the Gandhi regime’s controversial constitutional amendments.194 It is important to note here that the Supreme Court did not act to protect fundamental rights during the Emergency and played no significant role in bringing that dark era to an end.

2. Recent anti-terror laws
The Indian Supreme Court has been similarly reluctant to question the constitutionality of recent anti-terror legislation. In 1985, Parliament passed the Terrorist and Disruptive Activities (Prevention) Act (TADA).195 This Act was enacted in the wake of Indira Gandhi’s assassination in 1984 and was originally set to expire after two years; however, it was reauthorised several times before finally expiring in 1995.196 Like MISA, TADA allowed for preventative detention, but also introduced new crimes and criminal procedures to permit law enforcement agencies to better combat terrorism.197

Though intended to curb terrorism, TADA became notorious for its misuse. In 1987, the Punjab director-general of police essentially admitted that the police

---

192. Ibid. Justice Bhagwati, who later led the PIL revolution, was in the majority.
193. Austin, supra note 41 at 341.
194. See ibid. at 393–430.
frequently used TADA as a preventive detention tool to keep detainees in custody for longer than would otherwise be legal. Yet, in Kartar Singh v. State of Punjab (1994), the Supreme Court largely upheld TADA even though it acknowledged the “sheer misuse and abuse of the Act by the police.” The Court struck down a provision that made witness identifications based on photographs admissible as evidence; it also required the government to prove “knowledge” on the part of the defendant for the crime of “abetting” a terrorist act. Other controversial procedures, like the admission of confessions to the police, were upheld, albeit with modest procedural safeguards.

TADA was finally allowed to lapse in 1995, largely due to public outrage. But following the 9/11 attacks in the United States, the Indian government enacted the Prevention of Terrorism Act (POTA), which reauthorised many of the provisions in TADA and imposed some new restrictions on individual liberties. POTA allowed government officials, particularly within state governments and local police forces, to arbitrarily arrest and detain religious, caste, and political minorities.

Despite its misuse, the Supreme Court largely upheld POTA’s constitutionality in People’s Union for Civil Liberties v. Union of India (2004). The Court permitted, inter alia, provisions authorizing confessions to the police and identifying witnesses through photographs. It did note, however, that the “mere expression of opinion or expression of moral support [for terrorism] per se does not tantamount to a breach of Section 21 of POTA.”

As with TADA, opposition from lawyers and human rights groups led to POTA’s repeal in 2004, after the liberal United Progressive Alliance (UPA) came to power following an election campaign that criticised POTA’s misuse. Yet, in 2009, the UPA government passed amendments to the preexisting Unlawful Activities (Prevention) Act (UAPA), which reinstated many of POTA’s more controversial elements. The UAPA remains in force today despite strong evidence that it continues the legacy of TADA and POTA in authorizing false arrests and arbitrary detention as well as imposing an overbroad definition of terrorism and a presumption of guilt on defendants. Given the Indian Supreme Court’s previous judgments on emergency and anti-terror legislation, it is unlikely to strike down this law or impose any meaningful limitations on its enforcement.

198. Kalhan et al., supra note 196 at 148.
200. Kalhan et al., supra note 196 at 149.
201. Mohapatra, supra note 197 at 332.
203. See Kalhan et al., supra note 196 at 173–98.
204. People’s Union for Civil Liberties v. Union of India, AIR 2004 SC 456. Section 21 defines terrorism in the statute.
205. Kalhan et al., supra note 196 at 152–54.
B. **The Permanent State of Emergency in Sri Lanka**

Since 1971, a state of emergency has been in place almost continuously in Sri Lanka, which has allowed the President to effectively rule by decree.\(^{208}\) Article 15 of the 1978 Constitution allows restrictions on fundamental rights in the interest of national security. Article 155 declares the constitutionality of the Public Security Ordinance (PSO), which was first instituted by the British in 1947 and later amended by Mrs. Bandaranaike’s government to limit parliamentary review of executive acts, prohibit judicial review, and suspend fundamental rights.\(^{209}\) Article 155 also stipulates the procedures to be followed during an emergency. It provides that a state of emergency exists with a Presidential declaration, which then triggers the operation of the PSO.\(^{210}\) Under the PSO, the President may promulgate emergency regulations that override ordinary laws, but not the Constitution.\(^{211}\) Article 155(6) of the Constitution requires Parliament to approve any state of emergency that lasts longer than 14 days. However, the Constitution and the PSO grant the judiciary no authority in this area.

In a series of cases in the early 1980s, the Supreme Court gave the President broad discretion to issue and administer emergency regulations.\(^{212}\) In *Yasapala v. Wickremasinghe and Others* (1984), it held that the judiciary could not question the President’s grounds for declaring a state of emergency.\(^{213}\) Meanwhile, in *Janatha Finance and Investments v. Liyanage and Others* (1983), the Court ruled that it could find emergency regulations unconstitutional if they were issued in bad faith or were found to be unreasonable. Under this deferential standard, the petitioner had the burden to prove such bad faith or unreasonableness in the conduct of government officials.

In the late 1980s and 1990s, however, the Supreme Court invalidated a few emergency regulations and recognised a broader array of fundamental rights, such as the rights to information and to dissent within the right of free expression.\(^{214}\) As discussed earlier, much like its Indian counterpart, the Court in this period liberalised its procedural requirements. For instance, it began to allow detainees in executive custody to file informal writ petitions (usually hand-written letters) challenging the basis of their detention, and to allow third parties to file petitions on behalf of disadvantaged or aggrieved persons.\(^{215}\)

One notable case from this period is *Joseph Perera v. Attorney General* – the first instance of the Supreme Court striking down an emergency regulation.\(^{216}\) The petitioners in this case argued that an emergency regulation violated their right to free expression by prohibiting the distribution of posters, handbills, and leaflets without


\(^{209}\) Coomaraswamy, *supra* note 8 at 132.

\(^{210}\) *Sri Lankan Constitution* (1978), *supra* note 86, art. 155(1), (3).

\(^{211}\) *Public Security Ordinance No. 25 of 1947* (as amended), Part II.


\(^{213}\) *Yasapala v. Wickremasinghe and Others*, (1980) 1 FRD 143.

\(^{214}\) Udagama, *supra* note 91 at 288–93.

\(^{215}\) *Ibid.* at 288–89.

police permission. The Court agreed with petitioners, holding that this regulation was overbroad and violated the freedom of expression and equality. The Court held that “the President’s legislative power of making emergency regulations is not unlimited.”

In particular, the President may not issue regulations that restrict fundamental rights beyond the restrictions enumerated in Article 15 of the Constitution. The Court then stated, expressing a similar sentiment to Justice Khanna’s famous dissent in the Indian Habeas Corpus case, that unchecked executive power is “the antithesis of equality before law.” Any limitations on fundamental rights must have a rational nexus to the state’s objective in order to be constitutionally valid.

In subsequent cases, the Court struck down an emergency regulation on the basis that it violated the right to equality and extended protections available to individuals arrested under ordinary criminal law to those held in preventative detention under emergency regulations. Thus, the Sri Lankan Supreme Court has provided some check on executive power in the emergency context.

Yet, despite these efforts, the Sri Lankan judiciary has not effectively limited the state’s emergency powers. This is because Sri Lanka has been in an almost permanent state of emergency since the 1970s, in large part due to the protracted civil war between the government and LTTE from 1983–2009. The most recent emergency regulations were allowed to expire in 2011, but other emergency-like measures have not been lifted. The most controversial of these laws is the Prevention of Terrorism Act (PTA) of 1979. While initially passed as a temporary measure, it was made permanent in 1982 and remains in force today. The PTA empowers the police, inter alia, to detain individuals for three days without judicial supervision if there is reasonable suspicion that they committed a crime. It also permits the government to preventatively detain individuals in three-month intervals, up to 18 months, without judicial review. As with the PSO, and the various Indian anti-terror laws, officials acting “in good faith” under the PTA are immune from judicial review. Moreover, detention and restriction orders issued by the Defence Secretary are considered final and may not be challenged in Court. Thus, as long as the PTA remains in force, Sri Lanka effectively remains in a state of emergency with limited judicial review of executive action.

VI. CONCLUSION – MOVING PAST THE TRADITIONAL NARRATIVE TO FOCUS ON JUDICIAL DECISIONS

The traditional narrative of judicial independence in India and Sri Lanka can be stated as follows. While India emerged from a long nationalist struggle to adopt a
Constitution with robust judicial review and a comprehensive scheme of fundamental rights, Sri Lanka adopted a minimalistic Constitution in the Westminster mold, with limited powers vested in the judiciary. The Indian Supreme Court was therefore designed to be more institutionally independent than its Sri Lankan counterpart. The two countries then progressed in opposite directions over the past half-century – India towards greater judicial independence and influence and Sri Lanka towards authoritarian rule, erosion in the separation of powers, and an emasculated judiciary. This narrative derives from an institutional understanding of judicial independence, which assumes that judicial independence increases with greater structural safeguards insulating the judiciary from outside influence.

This paper has advanced a decisional approach to judicial independence. By juxtaposing landmark cases from each jurisdiction with the other, we gain a clearer and more granulated view of judicial independence in both countries. Since the 1980s, remarkably similar judgments have emerged from the two judiciaries in three important areas. Both Supreme Courts have enabled sweeping fundamental rights litigation; defined secularism and regulated religious practice to favor the majority religion; and largely deferred to the executive on emergency regulations.

What accounts for such jurisprudential convergence? The similarities in case law between India and Sri Lanka show the two countries grappling with similar political and socioeconomic issues that confront many post-colonial democracies. Public interest litigation, with an expanded judicial role, has been adopted in both countries to alleviate chronic poverty and socioeconomic inequality. There also appears to be a regional migration of constitutional doctrine. Indeed, much of the procedural and substantive evolution in the law that accompanied the PIL revolution in India migrated to Sri Lanka. This includes relaxed standing requirements and a willingness to read directive principles into fundamental rights. This speaks to the prominence of the Indian judgments in this area and indicates that India’s hegemonic position in South Asia exerts a strong influence on its neighbors, despite fundamental structural differences. It also indicates how, in line with other new and emerging democracies, the judiciaries in both countries have grown in stature since the 1980s to become prominent public institutions involved in controversial policy questions.

The Sri Lankan Supreme Court has also drawn on Indian case law in its religion jurisprudence, particularly on the issue of anti-conversion laws. In this context, similar political issues underlie the judgments of both apex courts. Both have been influenced by the rise of ethno-religious nationalism, as their recent decisions have adopted conceptions of secularism that favor the dominant religious tradition of each country and disproportionately burden minority faiths. This hints at a broader problem in South Asia – that constitutional guarantees of secularism in public life have done little

---

to limit or discourage religious extremism. In fact, the Indian and Sri Lankan experiences show that liberal constitutionalism, with its professed neutrality towards religion, has galvanized Hindu and Sinhala-Buddhist nationalists, respectively. A common rallying cry among these groups is that liberal secularism is elitist, foreign, and not sufficiently accommodating to the majority faith. This may support the view that ‘secularism’ as a constitutional mandate has been ineffective in South Asia and should be replaced with alternative, endogenous mechanisms to promote inter-religious harmony.\textsuperscript{226}

Meanwhile, with regard to emergency powers, both apex courts have acted in line with judiciaries around the world by exercising minimal (or cautious) review of executive regulations. Both countries have recently adopted anti-terror laws as part of the global trend towards increased emergency regulations following the 9/11 attacks.\textsuperscript{227} In this context, the convergence in doctrine is likely due to general considerations rather than any region-specific rationale emerging from historical or political context. Courts around the world tend to defer to the executive on questions of national security and much of the executive decision-making during emergency periods is extra-constitutional and therefore not subject to judicial review.\textsuperscript{228} Thus, the fact that the Sri Lankan judiciary has imposed some limits on the executive in this realm is noteworthy, particularly given the Indian judiciary’s almost complete deference.

What do these similarities in case law mean for accounts of judicial independence in each country? This strong convergence in jurisprudence over the past 30 years calls for a reevaluation of the traditional narrative. This paper has sought to contest this narrative by shifting the focus from broad institutional and structural analyses to the judicial output of the two apex courts. Judicial independence, on this account, occurs when courts issue judgments that do not consistently favor particular individuals or interests. This means, most obviously, that judicial decisions should not consistently reflect the will or preferences of government officials, but it also applies to powerful religious and ethnic interests. Thus, the Indian and Sri Lankan Supreme Courts have achieved substantial independence in the realm of fundamental rights, but not in the other two areas, where they have quite consistently ruled in ways that privilege or favor the dominant religious community or the government.

To conclude, this analysis yields two important points about how judicial independence in new and emerging democracies should be studied. First, there is value in a comparative study of decisional judicial independence. This paper demonstrates how courts can produce similar outcomes, despite vastly different structural and institutional conditions. Moreover, the fact that the Indian and Sri Lankan judiciaries are more independent in some areas than in others indicates regional and developmental similarities between the two countries that would not be evident in single-country studies. A second and related point is that judicial


\textsuperscript{228} See \textit{ibid}. 
independence should not be conceived in general terms, but studied on a subject-specific basis. This will account for court docket variation and political differences between countries that are beyond judicial control. The greater incidence of emergency periods – and cases – in Sri Lanka vis-à-vis India illustrates this well. It would be misleading to cast the Sri Lankan judiciary as lacking any real independence simply because a greater share of its history and docket have been shaped by emergency measures.

In this light, the Sri Lankan Supreme Court is cast more favorably in relation to its Indian counterpart. Given the turbulent political history in which the Sri Lankan Supreme Court has operated since the 1940s – including a near-constant state of emergency since 1971 – it has retained more independence than is generally recognized. To be sure, the Court has not been an effective bulwark against increasingly authoritarian rule and has not done much to safeguard the rights of the Tamil community and other minority groups. But the image of the Court that emerges from this analysis is not totally bleak. As Deepika Udagama put it, “[f]or the most part, the Court displayed an inherent conservatism on issues that contested majoritarianism, but on occasion it did assert its defense of basic legal freedoms.”

Its jurisprudence, particularly in the realm of fundamental rights, reveals an institution that has, quite remarkably, survived and retained some independence in very trying circumstances.

The Indian Supreme Court, in contrast, perhaps receives too much attention for its accomplishments on fundamental rights. It has been dubbed “the most powerful court in the world” and is renowned (or, for some, notorious) for its strong policymaking role, particularly in its Article 21 and Article 32 jurisprudence. It is not clear why it has developed the reputation as an unusually powerful court per se. Perhaps the prevailing zeitgeist in both the Indian and comparative constitutional law literature, which skews heavily towards rights-based jurisprudence, has inflated perceptions of the Court’s overall authority. While the Court has certainly amassed much authority in this area, it has also benefitted from India’s (mostly) peaceful and democratic post-independence history. When we look at the jurisprudence more holistically, taking into account judgments on religion and emergency regulations, it becomes clear that the Indian judiciary is not as willing to assert its independence as has been traditionally understood.

---

229. Udagama, supra note 91 at 242.
231. See Choudhry, supra note 67 at 581.