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RESEARCH ARTICLE

Global constitutionalism reconfigured through a regional lens

Rehan Abeyratne

Faculty of Law, Chinese University of Hong Kong; Faculty of Law, Monash University
Email: rabeyratne@cuhk.edu.hk

Abstract

This article examines how global constitutional norms are received and reconfigured by South Asian judiciaries. It makes two central claims. First, it argues that India, as the largest state in the region, acts as a filter through which Bangladesh and Sri Lanka receive both structural and rights-based global norms. Second, it contends that Bangladeshi and Sri Lankan courts adopt distinct approaches to the Indian case law. While Bangladesh mostly converges with the Indian jurisprudence, Sri Lanka engages with it but does not wholly adopt its conclusions. The article puts forward a preliminary explanation for these distinct approaches based on differences in the constitutional structures and political histories of Bangladesh and Sri Lanka vis-à-vis India.

Keywords: Bangladesh; basic structure; constitutional migration global constitutionalism; public interest litigation (PIL); South Asia; Sri Lanka

I. Introduction

The rise of global constitutionalism following World War II has been well documented and critiqued in existing scholarship.[1] Scholars have charted how constitutional ideas have migrated (or have served as negative models) around the world, particularly at the level of constitutional design.[2] There is also a vast, related literature on the spread of constitutional judicial review[3] and the growth in the number of rights protected by domestic constitutions.[4]

[1]M Rosenfeld, 'Is Global Constitutionalism Meaningful or Desirable?' (2014) 25 *European Journal of International Law* 177.

[2]See, for example, S Choudhry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, Cambridge, 2009); DS Law and M Versteeg, 'The Declining Influence of the United States Constitution' (2012) 87 *NYU Law Review* 762; KL Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models' (2003) 1 *International Journal of Constitutional Law* 296.

[3]See, for example, R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, Cambridge, MA, 2004); S Gardbaum; 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707; T Ginsburg, 'The Global Spread of Constitutional Review' in KE Whittington, RD Keleman and GA Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford University Press, Oxford, 2008); T Ginsburg and M Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2013) 30 *Journal of Law, Economics, and Organization* 587.

[4]DS Law and M Versteeg (2011) 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163; Z Elkins, T Ginsburg and B Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54 *Harvard International Law Journal* 61.

This article seeks to analyse how global constitutionalism has been received and reconfigured by courts in three South Asian countries: India, Bangladesh and Sri Lanka. India, as the dominant state and regional hegemon, has served as a filter through which Bangladeshi and Sri Lankan courts have encountered a range of global constitutional norms on both structural and rights-based questions of law. The article makes two broad claims about this phenomenon. First, it argues that a model of regional constitutionalism has developed in which the Indian Supreme Court does the work of translating global constitutional norms for the South Asian context. The reconfigured norms then migrate to India's neighbours. While this mechanism does not operate across the entire spectrum of constitutional law, it is evident in at least two significant areas. In both – unconstitutional constitutional amendments and public interest litigation – the Indian Supreme Court ostensibly developed indigenous jurisprudence, which then migrated to Bangladesh and Sri Lanka. However, the influence of global constitutionalism is clear in the 'original' Indian case law, even if it remains unacknowledged.

Second, the article contends that the Bangladeshi and Sri Lankan judiciaries, led by their Supreme Courts, adopt distinct approaches to the Indian jurisprudence. These approaches fit within the models Vicki Jackson put forward to describe the relationship between domestic constitutional law and transnational sources: convergence, resistance and engagement.[5] In the convergence model, transnational norms and principles of international law are incorporated into national constitutions.[6] The Constitution of the Netherlands, for instance, provides that treaty provisions and resolutions by international institutions are legally binding and that domestic regulations that contravene these international legal sources shall be disapplied.[7] In a less direct and binding form, convergence may take place through judicial review, as domestic judges incorporate 'generic' constitutional law into their legal systems.[8] By contrast, the resistance model views national constitutions as a bulwark against the incursions of foreign or international law. The late Justice Antonin Scalia of the US Supreme Court championed this view with particular force.[9] Finally, the engagement model charts a middle ground between convergence and resistance. Its proponents neither view international and foreign law as binding nor see them as unworthy or inappropriate sources on which to rely. Instead, as Jackson puts it, 'transnational sources are seen as interlocutors, offering a way of testing understanding of one's own traditions and possibilities by examining them in the reflection of others'.[10] *Marbury v Madison* – perhaps the most famous constitutional law case of all – engages with British materials in this way to differentiate the American Constitution from its progenitor and to justify the practice of judicial review.[11]

In the South Asian context, the Bangladesh Supreme Court has largely accepted global norms through the Indian filter without much pushback or even reflection. As a result,

[5]VC Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 *Harvard Law Review* 109.

[6]On the forms and limits of convergence, see R Dixon and E Posner, 'The Limits of Constitutional Convergence' (2010–11) 11 *Chicago Journal of International Law* 400.

[7]Constitution of the Netherlands (2008), Arts 93–94.

[8]See DS Law, 'Generic Constitutional Law' (2005) 89 *Minnesota Law Review* 652.

[9]See N Dorsen, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3(4) *International Journal of Constitutional Law* 519.

[10]Jackson (n 5) 114.

[11]Ibid; *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

Bangladesh's constitutional jurisprudence on the basic structure doctrine and public interest litigation mostly *converges* with India's. Sri Lanka, meanwhile, has been more cautious in adopting global constitutionalism through an Indian lens. The Supreme Court of Sri Lanka *engages* with Indian judgments without fully accepting their conclusions, and sometimes arrives at different outcomes. Thus, while the Sri Lankan Supreme Court has discussed the basic structure doctrine and adopted aspects of India's public interest jurisprudence, it has resisted convergence with Indian constitutional law.

The final part of the article seeks to provisionally explain why the Sri Lankan and Bangladeshi apex courts have adopted these distinct approaches. Structural differences between these courts, born out of textual differences in the constitutions of the two countries, likely play a role. The Bangladesh Constitution (1972) resembles the Indian Constitution (1950) to a great extent, with entrenched judicial review powers and strong protections for judicial independence. Given these similarities, it is not surprising that Bangladeshi Supreme Court justices are willing to follow in the footsteps of their Indian counterparts.[12] The Sri Lankan Constitution (1978), however, lacks such protections for the judiciary and sharply curtails judicial review. Sri Lanka's political history – including its fraught foreign policy relationship with India – may also limit the degree to which its courts wish to emulate developments in India law.

Two points on methodology before I proceed. First, in tracing the migration of constitutional norms from India to Bangladesh and Sri Lanka, I do not claim that apex court judges in these three countries are engaged in a 'judicial dialogue'.[13] The term implies a two-way conversation. However, in this model of regional constitutionalism, norms travel in one direction – from India to its smaller, less influential neighbours. Moreover, studies of judicial dialogue generally rely on judicial citations of foreign law or networking among judges to substantiate their claims.[14] This article takes a different approach. It aims to carefully delineate how, and to what extent, select constitutional norms have migrated within South Asia. Neither citations nor informal judicial interactions are the focus of this endeavour.

Second, on case selection, the three jurisdictions share regional proximity along with cultural and historical similarities. They all experienced long periods of British colonial rule and today have common law legal systems. While India and Bangladesh were ruled together until 1947, Sri Lanka was ruled as a separate Crown colony from the early nineteenth century until 1948. Partly as a result of this colonial discontinuity, Sri Lanka has a distinct post-colonial constitutional and political trajectory from the countries emerging out of British India.[15] Choosing Sri Lanka instead of Pakistan, which was also part of British India until 1947, is therefore advantageous. This case selection enables a

[12]Dixon and Posner (n 6) 411–13, arguing that convergence through 'learning' is most likely between states with 'similar demographic and social conditions', where one state self-consciously adopts another state's constitutional norms that produce 'better outcome[s]'.

[13]AM Slaughter, 'A Typology of Transjudicial Communication' (1994) 29 *University of Richmond Law Review* 99.

[14]Ibid; AM Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191. For a comprehensive and critical treatment of this concept, see DS Law and WC Chang, 'The Limits of Global Judicial Dialogue' (2011) 86 *Washington Law Review* 523.

[15]For more on Sri Lanka's distinct political and constitutional history, see R Abeyratne, 'Uncertain Sovereignty: Ceylon as a Dominion 1948–1972' (2019) 17(4) *International Journal of Constitutional Law* 1258; R Abeyratne, 'Rethinking Judicial Independence in India and Sri Lanka' (2015) 10 *Asian Journal of Comparative Law* 99.

comparative analysis of constitutional structure and political history to explain the divergence between Bangladesh and Sri Lanka in their adoption *vel non* of global constitutional norms through an Indian lens.[16]

II. Basic structure

The basic structure doctrine – a judicial creation permitting courts to invalidate duly enacted constitutional amendments – is a mainstay of constitutional adjudication in South Asia.[17] Originally adopted by the Indian Supreme Court in *Kesavananda Bharati v State of Kerala* (1973),[18] basic structure review migrated to Bangladesh in *Anwar Hossain Chowdhury v Bangladesh* (1989).[19] The Sri Lankan Supreme Court, meanwhile, held that the basic structure doctrine did not apply to the Constitution of Sri Lanka in the *Thirteenth Amendment Case* (1987).[20] Since then, it has accepted that certain constitutional provisions, while not entrenched, nonetheless require a referendum to be amended. This suggests that the Sri Lankan Supreme Court's engagement with Indian law led it to adopt implied limitations on constitutional amendments.

Origins of the basic structure doctrine

Although the Indian Supreme Court first articulated the basic structure doctrine in its present form, the notion that core aspects of a constitution may not be amended is of a much older vintage. Yaniv Roznai has traced the origins of explicitly unamendable constitutional provisions to the American and French Revolutions. The Enlightenment-era French theorist Emmanuel Joseph Sièyes was particularly influential in the theoretical grounding of the concept. Sièyes distinguished between the all-powerful *constituent* power that creates the constitution and the lesser, *constituted* power, which operates under the aegis of the constitution.[21] Building on this insight more than 100 years later, the German theorist Carl Schmitt posited that a constitution's core identity – representing the fundamental decisions of the constituent power – could not be destroyed or removed by amendments.[22]

The Indian Supreme Court in *Kesavananda* was influenced by German constitutional thought. Article 79(3) of the German Basic Law (1949) protects human dignity, basic institutional principles and the division of the Federation into *Lander* from

[16]See R Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2005) 53 *American Journal of Comparative Law* 125, 133–34, explaining that in the 'most similar cases' approach to small-N, qualitative studies, researchers should compare cases that are matched on 'variables or potential explanations that are not central to the study, but vary in the values on key independent or dependent variables'.

[17]The term 'basic structure' was introduced in *Kesavananda* and refers to the most essential parts of a constitution that are immune from amendment. Outside South Asia, the judicial practice of invalidating amendments is generally known as the 'unconstitutional constitutional amendments doctrine'. See Y Roznai, 'Unconstitutional Constitutional Amendments: The Migration and Success of a Constitutional Idea' (2013) 61 *American Journal of Comparative Law* 657.

[18]*Kesavananda Bharati v State of Kerala* (1973) SCC 225.

[19](1989) 41 DLR (AD) 1.

[20]*In Re The Thirteenth Amendment* [1987] 2 Sri LR 312.

[21]EJ Sièyes, 'What is the Third Estate?' in OW Lembcke and F Weber (eds), *Emmanuel Joseph Sièyes: The Essential Political Writings* (Brill 2014) 118–34.

[22]C Schmitt, *Constitutional Theory*, J Seitzer trans (Duke University Press, Durham, NC, 2008).

amendment.[23] Dieter Conrad, a German scholar from the University of Heidelberg, gave an influential lecture at the Banaras Hindu University Law Faculty in 1965 on 'Implied Limitations on the Amending Power'.[24] The talk drew insights from the Nazi era to argue that constitutional amendments could not be used to destroy or abrogate the existing constitution or any of its core elements.[25] Conrad's arguments influenced Chief Justice Subba Rao,[26] who authored the majority opinion in *Golak Nath v Punjab* (1967) – the judgment in which the Indian Supreme Court first declared that constitutional amendments could be held unconstitutional.[27] In that case, the court ruled that three amendments were unconstitutional for violating fundamental rights under Article 13 of the Constitution. However, it lessened the impact of the judgment by clarifying that the ruling would only apply to future constitutional amendments.[28]

The Indian Parliament responded by enacting the Twenty-Fourth Amendment (1971), which effectively overruled *Golak Nath* by asserting that parliament had plenary power to amend the Constitution, including fundamental rights provisions. This case set the stage for *Kesavananda* (1973), which is arguably the most significant judgment in Indian constitutional law. Perhaps surprisingly, *Kesavananda* upheld the Twenty-Fourth Amendment in its entirety. But the court issued two other rulings that were more significant.[29] First, it overruled *Golak Nath*. Constitutional amendments, the court ruled, could not violate fundamental rights because Article 13 of the Constitution provided only that ordinary legislative acts were subject to fundamental rights review. Second, the court held that constitutional amendments could still be *ultra vires* if they violated the Constitution's 'basic structure'. Justice Khanna's majority opinion focused on the phrases 'this Constitution' and 'the Constitution shall stand amended' in Article 368.[30] These terms suggested that the existence of a core constitutional identity that Parliament could not alter through amendments. Chief Justice Sikri identified five aspects of the Constitution that were immune from amendment: secularism, democracy, the rule of law, federalism and the independence of the judiciary.[31] This is a non-exhaustive list, and the Supreme Court has expanded the scope of basic structure review in 'common law' fashion on a case-by-case basis.[32]

In its basic structure jurisprudence, the Indian Supreme Court has both followed and contributed to the global trend of immunizing certain aspects of a constitution from amendment. Using a data set of 742 world constitutions enacted from 1789 to 2015, Roznai has shown that recent constitutions are more likely to include parts that cannot be amended.[33] Some 17 per cent of the world's constitutions from 1789 to 1944 and 27 per cent of constitutions from 1945 to 1988 included unamendable

[23]Roznai (n 17) 668.

[24]M Mate, 'Priests in the Temple of Justice' in TC Halliday (eds), *Fates of British Liberalism in the Post-Colony: The Politics of the Legal Complex* (Cambridge University Press, New York, 2012) 119.

[25]Ibid 120.

[26]Ibid.

[27]*Golak Nath v Punjab* (1967) 2 SCR 762.

[28]*Golak Nath*, 2 SCR at 764.

[29]S Krishnaswamy, *Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine* (Oxford University Press, New Delhi, 2009) 26–27.

[30]*Kesavananda* (n 18) 768.

[31]Ibid 366.

[32]Y Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, Oxford, 2017) 44.

[33]Ibid 20–21.

provisions.[34] However, for constitutions enacted between 1989 and 2015, that figure increased to 54 per cent.[35] Meanwhile, following India's lead, Taiwan, Kenya, Colombia, Peru and Belize, among others, have adopted judicial doctrines akin to the basic structure doctrine, while many other countries' judiciaries have considered or discussed it.[36]

Basic structure in Bangladesh

The influence of the Indian basic structure jurisprudence is most apparent in Bangladesh. The Bangladesh Supreme Court Appellate Division[37] first recognized the basic structure doctrine in *Anwar Hossain* Chowdhury *v Bangladesh* (1989).[38] The case concerned the constitutionality of the Eighth Amendment to the Constitution, which sought to formalize a proclamation from the previous martial law period (1982–86). The Eighth Amendment established six additional permanent benches of the Supreme Court's High Court Division, each with exclusive jurisdiction over a designated area. This structural change had the effect of weakening the High Court Division, which was previously a unitary court based in Dhaka.[39]

In *Anwar Hossain*, the Appellate Division limited the amendment power in much the same manner as *Kesavananda*. Justice Chowdhury, who wrote the main opinion, held that constitutional amendments could not be used to destroy the Constitution itself or any of its core elements. As he put it, 'The structural pillars of Parliament and Judiciary are basic and fundamental. It is inconceivable that by its amending power the Parliament can deprive itself wholly or partly of the plenary legislative power over the entire Republic.'[40] Similarly, the creation of new High Court division benches 'destroyed' the 'basic structural pillar, that is [the] judiciary'.[41] The Chief Justice further emphasized that it was the province of the judiciary to hold amendments unconstitutional if they violated the basic structure. He said, 'Now if any law is inconsistent with the Constitution … it is obviously only the judiciary which can make such declaration. Hence the Constitutional Scheme if followed carefully reveals that these *basic features are unamendable and unalterable.*'[42]

In a concurring opinion, Justice Ahmed similarly concluded that the additional judicial benches had 'broken the "oneness" of the High Court Division and thereby damaged [the] basic structure … as such, it is void'.[43] Justice Ahmed expressly referred to Indian materials in his analysis, including the *Golak Nath* and *Kesavananda* judgments as well as HM Seervai's landmark treatise on the *Constitutional Law of India*.[44]

The Bangladesh Supreme Court's use of the basic structure doctrine since *Anwar Hossain* has also mirrored the Indian jurisprudence in important respects. In particular,

[34]Ibid

[35]Ibid 21.

[36]Ibid 47–69.

[37]The Bangladesh Supreme Court is divided between the High Court Division and Appellate Division. The latter has the power of final adjudication.

[38](1989) 41 DLR (AD) 1.

[39]PJ Yap, *Courts and Democracies in Asia* (Cambridge University Press, Cambridge, 2017) 160.

[40](1989) 41 DLR (AD) 1 [293].

[41]Ibid [295].

[42]Ibid [294] (emphasis added).

[43]Ibid [419].

[44]Ibid [350–368]; HM Seervai, *Constitutional Law of India*, 4th edn (Universal Law Publishing, Delhi, 2005).

the court has defended its terrain and its independence from political inference, just like its Indian counterpart. For instance, the Indian Supreme Court in 2015 invalidated a constitutional amendment that sought to implement a National Judicial Appointments Commission (NJAC) to handle appointments to the higher judiciary.[45] The NJAC would have displaced the existing 'collegium' system – a judicial creation through which senior judges have the final word on appointments. The Indian Supreme Court held the NJAC unconstitutional, *inter alia*, for violating judicial independence – a pillar of the basic structure – by placing the judicial appointment power outside the sole control of the judiciary.[46]

Along similar lines, in 2017 the Appellate Division of the Bangladesh Supreme Court held the Sixteenth Amendment to the Bangladesh Constitution unconstitutional for violating judicial independence.[47] The Sixteenth Amendment restored a provision from the original Constitution of 1972 that permitted a two-thirds majority of parliament to remove judges for 'misbehaviour or incapacity'.[48] It replaced the Supreme Judicial Council, which – like the collegium in India – gave select judges the power of judicial removal. The Sixteenth Amendment judgment, however, is more structurally and legally defensible than the NJAC Judgment.[49] For one thing, in India judges would have constituted half of the NJAC's members; the Sixteenth Amendment in Bangladesh removed judges from the process entirely. This amendment was therefore worrisome for democracy in Bangladesh, which has experienced periods of martial law and regular political interference with the judiciary.[50] Further, Bangladesh had entrenched the basic structure doctrine into its constitutional text through the Fifteenth Amendment.[51] This amendment made the Constitution's preamble, fundamental rights, fundamental principles of state policy, and 'provisions of articles relating to the basic structures' immune from amendment.[52] The Fifteenth Amendment also retained the Supreme Judicial Council to handle judicial removals,[53] which provided the Council greater legitimacy than the Indian collegium, which was never entrenched through a constitutional amendment.

In sum, Bangladesh has mostly converged with India's basic structure jurisprudence. Its Supreme Court has invoked the doctrine regularly to strike down amendments that run afoul of the core elements of the Constitution, particularly with respect to judicial independence.

Basic structure in Sri Lanka

The Sri Lankan basic structure jurisprudence exhibits a more cautious approach to the Indian case law. The Supreme Court of Sri Lanka first considered whether the 1978 Constitution contained an unamendable basic structure in the *Thirteenth Amendment*

[45] *Supreme Court Advocates-on-Record Association v Union of India*, (2016) 4 SCC 1.

[46] R Abeyratne, 'Upholding Judicial Supremacy: The NJAC Judgment in Comparative Perspective' (2017) 49 *George Washington International Law Review* 569, 570.

[47] *Bangladesh v Asaduzzaman Siddiqui*, Civil Appeal No. 6 of 2017 (AD).

[48] Constitution (Sixteenth Amendment) Act 2014 (Act XIII of 2014).

[49] For a detailed comparative analysis of these judgments, see PJ Yap and R Abeyratne, 'Judicial Self-Dealing and Unconstitutional Constitutional Amendments in South Asia' *International Journal of Constitutional Law* (forthcoming).

[50] Yap (n 39) 157.

[51] Constitution (Fifteenth Amendment) Act 2011 (Act XIV of 2011).

[52] Ibid Art 7B.

[53] Ibid Art 96.

Case (1987).[54] The proposed Thirteenth Amendment would have devolved significant powers to provincial councils, thereby weakening the central government. This amendment was challenged, *inter alia*, on the grounds that it violated the sovereignty of the people as protected in Articles 3 and 4 of the Constitution, the unitary state (Article 2) and Article 83.[55] The latter lists several entrenched provisions that may only be amended by a two-thirds majority in parliament followed by a public referendum.[56] Articles 2 and 3 of the Constitution were among those listed in Article 83. Since the Thirteenth Amendment affected these provisions, petitioners argued that the Thirteenth Amendment must be subjected to a referendum.[57]

The Thirteenth Amendment further sought to add entrenched provisions to Article 83, which petitioners argued was unconstitutional. They contended, relying on *Kesavananda*, that Article 83 constituted part of the Constitution's basic structure, and was therefore unamendable.[58] A divided Supreme Court rejected this argument. The majority noted that the amendment provision in the Indian Constitution (Article 368) was significantly different from that in the Sri Lankan Constitution (Article 82).[59] Article 368 does not define or delimit the term 'amendment', which the majority noted was crucial in the *Kesavananda* judgment. As Justice Khanna wrote in that case:

> The word 'amendment' postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form.[60]

In other words, because Article 368 is silent on whether an amendment can replace or repeal the existing Constitution, the court read implied limitations into that provision to prevent amendments from being used destructively. By contrast, Article 82(7) of the Sri Lankan Constitution expressly defines amendment to encompass 'repeal, alteration, and addition'. Therefore, according to the majority in the *Thirteenth Amendment Case*, there was no scope for implied limitations. As the majority put it, 'If the Constitution contemplates the repeal of any provision or provisions of the entire Constitution, there is no basis for the contention that some provisions which reflect fundamental principles or incorporate basic features are immune from amendment.'[61] Thus, they made clear, 'we do not agree with the contention that some provisions of the Constitution … are unamendable'.[62]

In 2002, the Supreme Court revisited this issue. The case concerned the constitutionality of the proposed Nineteenth Amendment to the Constitution. Among other things, this would have limited the President of Sri Lanka's power to dissolve parliament.[63]

[54] *In Re The Thirteenth Amendment* (n 20)

[55] Ibid 316–17.

[56] Constitution of Sri Lanka (1978), art 83. Under Article 82, all other parts of the Constitution can be amended by a two-thirds majority in parliament.

[57] *In Re The Thirteenth Amendment* (n 20) 317.

[58] Ibid 329.

[59] Ibid.

[60] *Kesavananda* (n 18) 767.

[61] *In Re The Thirteenth Amendment* (n 20) 329–30.

[62] Ibid 330.

[63] *In Re the Nineteenth Amendment* [2002] 3 Sri LR 85.

Petitioners argued that this new scheme would violate Article 3 of the Constitution when read together with Article 4(b).[64] Article 3, which places sovereignty in the Sri Lankan people, is an entrenched clause listed in Article 82. It can therefore only be amended with the support of a two-thirds majority in parliament and a public referendum. Article 4, which lays out the separation of powers scheme in the Constitution, is not an entrenched clause. Article 4(b) provides that, 'The executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People.'[65] The court held that a transfer of the president's powers to parliament – which the Nineteenth Amendment would have effectuated – would constitute an 'alienation of sovereignty which is inconsistent with Article 3 read together with Article 4 of the Constitution'.[66] As such, the court concluded that the Nineteenth Amendment must be subject to a public referendum for approval as required by Article 83.[67] The court, in effect, gave Article 4 entrenched status, making it much more difficult to amend.

In 2016, the Supreme Court once again considered the constitutionality of the Nineteenth Amendment and conferred this higher status on Article 4 more explicitly. Petitioners argued that the proposed amendment altered the 'basic structure' of the Constitution by 'diminishing the final discretionary authority of the President' in violation of Articles 3 and 4.[68] The court initially conceded that the 'Sovereign people have not chosen to entrench Article 4 … and not all violations of Article 4 will necessarily result in a violation of Article 3'.[69] Nonetheless, the court held that the Nineteenth Amendment sufficiently altered the exercise of the president's executive power under Article 4 that some of its provisions 'require the approval of the People at a Referendum in terms of … Article 83 of the Constitution'.[70]

In sum, the Indian Supreme Court reconfigured the norm of unconstitutional constitutional amendments into the judicial doctrine of basic structure. The Bangladesh Supreme Court adopted basic structure review in *Anwar Hossain* (1989) and has deployed it regularly and with vigour ever since. The Sri Lankan Supreme Court, meanwhile, has engaged with Indian basic structure jurisprudence, but has not converged with Indian constitutional law in the manner of the Bangladesh Supreme Court. While the basic structure doctrine was explicitly rejected in the *Thirteenth Amendment Case*, the Sri Lankan Supreme Court enforced an implied limitation on amendments to executive power in its two Nineteenth Amendment judgments. The court did not declare any parts of the Sri Lankan Constitution unamendable, but it placed a thumb on the scale against structural changes to the presidency by subjecting the Nineteenth Amendment to the additional requirement of a public referendum.

III. Public Interest Litigation

Public interest litigation (PIL) refers to a series of procedural innovations initiated by the Indian Supreme Court in the late 1970s and 1980s. PIL moved away from the traditional

[64]Ibid 94.
[65]Constitution of Sri Lanka (1978) Art 4(b).
[66]*In Re the Nineteenth Amendment* (n 63) 98.
[67]Ibid 115.
[68]*In Re the Nineteenth Amendment*, SD Nos 4–19/2015 (3 May 2016) p 5.
[69]Ibid 6.
[70]Ibid 17.

Anglo-American model in which lawsuits were winner-take-all contests between two parties (or interests), where the judge acted as a passive referee and the courts focused on providing compensation for past wrongs.[71] Under the PIL paradigm, lawsuits would involve several affected individuals or groups, judges would assume an active role in shaping litigation and courts would order various forms of relief in addition to compensation, including prospective relief that would be monitored and re-evaluated over many years.[72]

Yet, despite claims of indigeneity,[73] PIL was influenced by global norms – particularly developments in the United States. The term 'public interest litigation' was originally coined to describe the constitutional litigation pursued by social movements in the United States.[74] Abram Chayes, writing in the 1970s, described this new form of litigation in strikingly similar terms to PIL in India. He said:

> The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders - masters, experts, and oversight personnel.[75]

More broadly, Duncan Kennedy describes 'three globalizations of law and legal thought', which include 'the rise of classical legal thought' (1850–1914), 'socially oriented legal thought' (1900–68) and a third phase (1945–2000).[76] The third phase is characterized, among other things, by powerful constitutional courts exercising judicial review on both structural and rights-based disputes, as well as a thriving NGO sector.[77] The growth in the prestige and jurisdiction of the Indian Supreme Court and the non-profits that developed around PIL in India fit within this global trend. Further, as Kennedy notes, 'the influence of the United States is manifest'.[78]

This part focuses on the adoption of liberal *locus standi* (or standing) rules in the pre-trial stage of PIL. This is the aspect of PIL that migrated most clearly from India to Bangladesh, and to some extent Sri Lanka.

[71]CD Cunningham, 'Public Interest Litigation in Indian Supreme Court: A Study in the Light of American Experience' (1987) 29 *Journal of the Indian Law Institute* 494.

[72]See P Singh, 'Human Rights Protection Through Public Interest Litigation'(1999) 45 *Indian Journal of Public Administration* 731; U Baxi, 'The Avatars of Indian Judicial Activism: Explorations in the Geographies of (in)justice' in SK Verma and K Kusum (eds), *Fifty Years of the Supreme Court of India: Its Grasp and Reach* (Oxford University Press, New Delhi, 2000).

[73]PN Bhagwati, *My Tryst with Justice* (Universal Law Publishing, Delhi, 2013) 71 ('It would not be presumptuous on my part to say that my response to [deeply-rooted problems in India] … was almost unique in the history of the development of law and judicial process').

[74]U Baxi, 'Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India' (1985) 4 *Third World Legal Studies* 107, 108–09.

[75]A Chayes, 'The Role of the Judge in Public Law Litigation' (1976) 89 *Harvard Law Review* 1281, 1284.

[76]D Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000' in DM Trubek and A Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, Cambridge, 2006) 19, 21.

[77]Ibid 68.

[78]Ibid.

PIL in India

In India, public interest litigation (PIL) began in earnest in the early 1980s. The Indian press emerged from the restrictive Emergency era (1975–77) to publish detailed reports of state violations of fundamental rights.[79] In response – and perhaps to compensate for their silence during the Emergency – Supreme Court justices assumed a more significant role in holding the state accountable for such violations.[80] A fundamental change therefore occurred in the Indian judiciary: the courts took on an active role in promoting justice alongside investigative reporters, social activists and public-spirited lawyers.[81] The Supreme Court facilitated this process by instituting procedural changes that allowed – even encouraged – NGOs and concerned citizens to file writ petitions on behalf of disadvantaged groups to hold the government accountable for large-scale violations of fundamental rights.

This was arguably the most significant innovation in the pre-trial stage. The Indian Supreme Court's early cases imposed strict standing requirements that permitted only individuals directly affected by an impugned law to file petitions under Articles 32 and 226 of the Constitution. However, these Articles do not require such a formalistic approach to standing. They establish the individual right to petition the Supreme Court and High Courts, respectively, via 'appropriate proceedings' to enforce fundamental rights.[82]

The court's interpretation of 'appropriate proceedings' would shift over time towards more relaxed standing rules. Justices PN Bhagwati and VR Krishna Iyer were the principal architects of this shift.[83] In *Mumbai Kamgar Sabha v Abdulbhai Faizullabhai* (1976), Justice Iyer signalled that the court would alter its standing requirements to advance the public interest. He wrote that, 'Public interest is promoted by a spacious construction of *locus standi* in our socio-economic circumstances and conceptual latitudinarianism permits taking liberties with individualisation of the right to invoke the higher courts where the remedy is shared by a considerable number, particularly when they are weaker.'[84] A few years later, in *Fertiliser Corporation Kamgar Union v Union of India* (1981),[85] Chief Justice Chandrachud's majority opinion hewed to the traditional view that standing under Article 32 should remain primarily with those individuals whose rights had been directly affected. But Justice Iyer, joined by Justice Bhagwati, wrote a concurring opinion that advocated for a more functional approach. As he put it, 'locus standi must be liberalised to meet the challenges' facing a developing country like India.[86]

This approach would later prevail in *SP Gupta v Union of India* (1982).[87] In this case, the petitioners filed a writ petition alleging several claims of government interference with

[79]Baxi (n 74) 114–16.

[80]Ibid. In a recent revisionist account of the origins of PIL, Anuj Bhuwania argues that the Supreme Court used PIL to further the agenda that Prime Minister Indira Gandhi sought to impose during the Emergency, rather than as a means of resistance against the government. See A Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India* (Cambridge University Press, Delhi, 2017) 25–35.

[81]P Singh, 'Enforcing Social Rights Through Public Interest Litigation: An Overview of the Indian Experience' in S Deva (ed), *Socio-Economic Rights in Emerging Free Markets: Comparative Insights from India and China* (Routledge, Oxford, 2015).

[82]Constitution of India Arts 32, 226.

[83]S Deva, 'Public Interest Litigation in India: A Critical Review' (2009) 28 *Civil Justice Quarterly* 19, 23.

[84]*Mumbai Kamgar Sabha v Abdulbhai Faizullabhai* (1976) 3 SCC 832, 837–38.

[85]*Fertiliser Corporation Kamgar Union v Union of India* (1981) 1 SCC 568.

[86]Ibid 584 (Krishna Iyer J. concurring).

[87]*SP Gupta v Union of India* (1982) SCC (Supp) 87.

the judiciary. One challenge involved a policy granting judges short-term appointments to the higher judiciary, which petitioners claimed had perverse effects on judicial independence. The Indian government objected on standing grounds. Because petitioners were not the judges themselves, the government argued that they had not been directly injured by this policy and therefore lacked standing to file a petition under Article 32.

The court rejected this argument in a majority opinion written by Justice Bhagwati. According to Bhagwati, traditional standing rules were no longer appropriate, as they developed 'when private law dominated the legal scene and public law had not yet been born'.[88] 'Public law' here probably refers to the landmark cases of *Maneka Gandhi* and *Francis Coralie* – Justice Bhagwati wrote the majority opinion in both cases – that transformed the meaning of the right to life and liberty in Article 21 of the Constitution to take socioeconomic conditions into account.[89] Thus, to adapt to this new era of public law, the court rejected the traditional view of standing and recognized the right of any member of the public to petition for the redress of a wrong to a 'person or to a determinate class of persons … [who] by reason of poverty, helplessness or disability or socially or economically disadvantaged position' cannot approach the court themselves.[90] From initially requiring direct injury to petition the court under Article 32, *SP Gupta* created 'representative standing', which empowered public-spirited citizens and groups to approach the court in the interests of those unable to petition the court themselves.

By adopting looser standing rules, the court enabled the public to hold authorities accountable to the judiciary and not simply to the 'sweet will' of the authorities themselves.[91] The notion of 'representative standing' has become the norm in PIL cases – lawyers, medical practitioners, journalists and NGOs have filed writ petitions alleging fundamental rights violations on behalf of disadvantaged groups.[92] Moreover, the Supreme Court has appointed *amicus curiae* to represent the interests raised in a PIL if the petitioner fails to act in good faith or does not want to pursue the litigation further.[93] The court has even initiated PIL proceedings on its own (*suo motu*) authority when the need arises.[94] As a result, the Indian judiciary today can hear a substantially higher number of fundamental rights cases, affecting larger communities, than it could before 1980. Judges also have far greater authority to initiate, mould, and expand litigation as they see fit to hold government authorities accountable.

PIL in Bangladesh

Bangladeshi courts were initially reluctant to adopt PIL.[95] As late as 1991, Justice Mustafa Kamal of the Supreme Court Appellate Division observed that the Bangladesh Constitution required 'the petitioner seeking enforcement of a fundamental right' to be a

[88]Ibid 205.

[89]R Abeyratne, 'Socioeconomic Rights in the Indian Constitution: Toward a Broader Conception of Legitimacy' (2014) 39 *Brooklyn Journal of International Law* 1, 34–42.

[90]*SP Gupta* (n 87) 210.

[91]Ibid 212.

[92]AH Desai and S Muralidhar, 'Public Interest Litigation: Potential and Problems' in BN Kirpal, AH Desai, G Subramanium, R Dhavan and R Ramachandran (eds), *Supreme but Not Infallible: Essays in Honour of the Supreme Court of India* (Oxford University Press, New Delhi, 2000) 163.

[93]See, for example, *Sheela Barse v Union of India* (1988) 4 SCC 226.

[94]See, for example, *In Re: Networking of Rivers*, Writ Petition (Civil) No. 512 of 2002.

[95]R Hoque, *Judicial Activism in Bangladesh: A Golden Mean Approach* (Cambridge Scholars Publishing, Newcastle, 2011) 140–41.

'person aggrieved'.[96] It further noted that the Bangladesh Constitution was not 'at *pari materia* with the Indian Constitution on this point', as the rise of PIL in India was 'facilitated by the absence of any constitutional provisions as to who can apply for a writ'.[97]

The Appellate Division finally agreed to relax standing rules and initiate PIL in Bangladesh six years later in *Mohiuddin Farooque v Bangladesh* (1997).[98] The petitioner, who was Secretary-General of the Bangladesh Environmental Lawyers Association (BELA), filed a writ petition under Article 102 of the Constitution, claiming that a government flood-control plan adversely affected the 'life, property, livelihood, vocation and environmental security of more than a million people'.[99] Justice Mustafa Kamal, who had previously observed that standing could only be conferred to aggrieved parties, authored the majority opinion. In this case, he adopted a broad interpretation of Article 102, echoing the Indian Supreme Court on Article 32. Article 102 permits the High Court Division of the Bangladesh Supreme Court to issue directions or orders 'as may be appropriate for the enforcement of any of the fundamental rights' in the Constitution.[100] While Justice Kamal made clear that traditional standing rules applied 'as far as individual rights and individual infractions thereof are concerned', a different standard applied to large-scale rights violations.[101] As he put it:

> Insofar as [a writ petition] … concerns public wrong or public injury or invasion of fundamental rights of an indeterminate number of people, any member of the public, being a citizen, suffering the common injury or common invasion … or any citizen or an indigenous association … espousing that particular cause is a person aggrieved and has the right to invoke the jurisdiction under Article 102.[102]

It appears that the Indian jurisprudence played a role in Justice Kamal's reversal on this point. In his opinion, he discussed early Indian PIL judgments authored by Justices Bhagwati and Krishna Iyer, including *SP Gupta* and *Fertiliser Corporation Kamgar Union*.[103] As Ridwanul Hoque noted, Justice Kamal's description of PIL echoes Justice Bhagwati in particular and 'tellingly indicate[s] that Bangladeshi judges began to learn from their brethren in the neighbouring jurisdiction'.[104]

As with the basic structure doctrine, the Bangladeshi PIL jurisprudence mainly converges with that of India.[105] The Bangladesh Supreme Court has intervened to protect slum-dwellers from eviction;[106] to force the government to limit industrial

[96] *Bangladesh Sangbadpatra Parishad v Bangladesh* (1991) DLR (AD) 126, 127–28.
[97] Ibid.
[98] *Mohiuddin Farooque v Bangladesh* (1997) 26 CLC (AD) [505].
[99] Ibid [20].
[100] Bangladesh Constitution (1972) Art 102(1).
[101] *Mohiuddin Farooque* (n 98) [48].
[102] Ibid.
[103] Ibid [81–83].
[104] Hoque (n 95) 142–43.
[105] One notable exception is that Bangladeshi courts have not used the non-justiciable Fundamental Principles of State Policy in the Constitution to aid in the interpretation of fundamental rights to the degree that the Indian Supreme Court has with the Directive Principles of State Policy in the Indian Constitution. See MJA Chowdhury, *An Introduction to the Constitutional Law of Bangladesh*, 3rd edn (Book Zone, Chittagong, 2017) 135–50.
[106] *Ain-o-Salish Kendro v Bangladesh* (1999) 18 BLD (HCD) 488.

pollution;[107] to issue protective injunctions against measures that would result in environmental degradation;[108] and to release several thousand prisoners awaiting trial from jail.[109] All these cases had clear antecedents in India,[110] including landmark cases on the rights of slum dwellers[111] and the right to liberty in the context of unlawful detention.[112] Further, the court in *BNWLA v Bangladesh* (2009)[113] drew from the Convention on the Elimination of Discrimination Against Women (CEDAW) to adopt sexual harassment guidelines, just as the Indian Supreme Court did in *Vishaka v Rajasthan* (1997).[114]

The Bangladesh Supreme Court has also followed its Indian counterpart by taking on cases *suo motu* (on its own authority). The first reported case of this kind, *State v Deputy Commissioner, Satkhira*,[115] was initiated by Justice MM Hoque of the High Court Division, who ordered an illegally held detainee to be freed upon learning of his condition in a newspaper report.[116] This is analogous to 'epistolary jurisdiction' in India, where judges initiated PILs in response to letters or news articles.[117] For instance, *Hussainara Khatoon v State of Bihar* (1980) reached the Indian Supreme Court due to a series of articles published in the Indian Express newspapers.[118] These articles revealed that prisoners had been kept in state custody awaiting trial for so long that in many cases the detention period was longer than the expected criminal sentence. The court, led by Justice Bhagwati, held that this practice violated the right to a speedy trial guaranteed by Article 21 of the Constitution and urged the central and state governments to adopt comprehensive legal services for indigent criminal defendants.[119]

The ad hoc and unpredictable nature of this expanded jurisdiction permits judges to initiate PILs in line with their preferences. Thus, *suo motu* actions have been criticized in Bangladesh along the same lines as in India: for their radical departure from procedural rules and the strain they place on the rule of law.[120] Nonetheless, the Bangladesh Supreme Court has continued to exercise *suo motu* jurisdiction to, among other things, release children from prolonged juvenile detention[121] and to award monetary compensation to the family of a wrongful death victim.[122]

[107] *Dr Mohiuddin Farooque v Bangladesh* (2003) 55 DLR (HCD) 69.
[108] See, for example, *Khushi Kabir v Bangladesh* WP No 4685 of 2003.
[109] *BLAST v Bangladesh* (2007) 57 DLR (HCD) 11.
[110] Several PILs have been decided on issues of pollution and the right to clean environment in India, including *MC Mehta v Union of India,* (1997) 2 SCC 353 (*Taj Mahal Pollution Case*); *MC Mehta v Union of India,* WP (Civil) No 13029/1985 (*Delhi Vehicular Pollution Case*); and *Almitra H Patel v Union of India,* (1998) 2 SCC 416 (solid waste management).
[111] *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.
[112] *Rudul Sah v Bihar* (1983) 4 SCC 141.
[113] *BNWLA v Bangladesh* (2009) 29 BLD 415.
[114] *Vishaka v Rajasthan* (1997) 6 SCC 241.
[115] *State v Deputy Commissioner, Satkhira* (1993) 45 DLR (HCD) 643.
[116] Hoque (n 95) 152.
[117] Baxi (n 74) 118.
[118] AIR 1979 SC 1369.
[119] Ibid.
[120] Hoque (n 95) 155–57; Bhuwania (n 80) 43–44.
[121] *Editor, Daily Prothom Alo v Bangladesh* (2003) 11 BLT (HCD) 281.
[122] *Md. Rustom Ali v State* (2017) 5 CLR (AD) 154.

PIL in Sri Lanka

Sri Lanka has relaxed standing rules and adopted its own, limited version of public interest litigation. Article 126 of the 1978 Constitution confers exclusive jurisdiction on the Supreme Court to hear fundamental rights claims,[123] permits 'any person' to petition the court for the redress of fundamental rights violations[124] and empowers the court to 'grant such relief or make such directions as it may deem just and equitable'.[125] While this provision may seem analogous to Article 32 in the Indian Constitution, the Sri Lankan Supreme Court is more constrained than its Indian counterpart for two reasons. First, Article 80(3) of the Sri Lankan Constitution provides that, 'Where a Bill becomes law … no court or tribunal shall inquire into, pronounce upon or in any manner call in question, the validity of such Act on any ground whatsoever.'[126] In other words, judicial review of legislation is barred; courts may only judge the constitutionality of proposed Bills in the abstract. By contrast, Article 13 of the Indian Constitution makes clear that no law may violate fundamental rights, and the Supreme Court and High Courts may strike down unconstitutional legislation.[127] Second, Article 17 of the Sri Lankan Constitution provides that, 'Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement … of a fundamental right to which such person is entitled.'[128] Meanwhile, Article 32 of the Indian Constitution generally confers a 'right to move the Supreme Court by appropriate proceedings' without specifying that the individual affected must be the petitioner.[129] This provides the Indian Supreme Court greater flexibility to relax standing requirements and loosen other procedures in its PIL jurisdiction.

Despite the added constraints in the Sri Lankan context, the Supreme Court has been willing to hear writ petitions filed on behalf of affected persons or groups. In *Wijesiri v Siriwardene* (1982), a member of parliament filed a petition for a writ of mandamus to compel the secretary of the Ministry of Public Administration to issue letters of appointment to a group of civil servants who had been promoted to a higher grade.[130] The Court of Appeal initially dismissed the petition for lack of standing. The petitioner, after all, had no personal interest in the matter, and the Court of Appeal further held that he was not acting in the public interest. The Supreme Court, however, disagreed on this point. The majority opinion made it clear that to 'restrict mandamus to cases of personal legal right would in effect make it a private law remedy'.[131] The majority went on to observe that standing would be proper 'if the applicant can show a genuine interest in the matter complained of and … he comes before Court as a public spirited citizen … not merely as a busy body perhaps with a view to gain cheap publicity'.[132] The court also suggested that the petitioner might have prevailed if the case had been filed under Article 126 of the Constitution, alleging fundamental rights violations.[133] All these remarks, though, were

[123]Constitution of Sri Lanka (1978), art 126(1).
[124]Ibid Art 126(2).
[125]Ibid Art 126(4).
[126]Ibid Art 80(3).
[127]Constitution of India Arts 13, 32, 226.
[128]Constitution of Sri Lanka (1978) Art 17 (emphasis added).
[129]Constitution of India Art 32.
[130]*Wijesiri v Siriwardene* [1982] 1 Sri LR 171, 172.
[131]Ibid 175.
[132]Ibid.
[133]Ibid 178.

merely obiter. The Supreme Court dismissed the petition on the grounds that Article 55(5) of the Constitution barred judicial review on matters relating to the appointment of public officers.[134]

Almost two decades later, the Supreme Court permitted public-spirited citizens to file a petition under Article 126 to prevent a large-scale mining operation in the *Eppawela Case* (2000).[135] Petitioners were residents of Eppawela village, whose land would be affected by a joint phosphate mining venture between the Government of Sri Lanka and an American company. They claimed that this venture would violate their rights to equality, to engage in any occupation, trade and so on, and their freedom of movement under Articles 12(1), 14(1)(g) and 14(1)(h) of the Constitution, respectively.[136] They further argued that they were acting in the public interest, as the mining project was projected to displace 2,600 families (12,000 people) from their homes.[137] The government responded that it was the trustee of the public resources at issue and that petitioners lacked standing to bring this case in the public interest. The Supreme Court, led by Justice Amerasinghe, disagreed. Although he did not directly contradict the government's claim that it was the sole trustee of public resources, Justice Amerasinghe noted that Article 3 of the Constitution places sovereignty in the people and that the court had the sole authority to decide this case under Article 126. As to standing, he made the following remarks:

> [P]etitioners, as individual citizens, have a Constitutional right given by Article 17 read with Articles 12 and 14 and Article 126 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 – rights they share with the people of Sri Lanka.[138]

Thus the petitioners' standing was grounded in their individual right to approach the court to obtain redress for fundamental rights violations under Articles 17 and 126. In this sense, the *Eppawela Case* did not adopt citizen standing – where any public-spirited citizen or NGO could file a PIL on behalf of affected persons or groups – in the vein of the Indian Supreme Court. Still, this was a landmark judgment, as the court held that the petitioners' rights under Articles 12 and 14 'were in imminent danger of being infringed' and ordered an environmental impact assessment to be carried out before the mining operation could proceed.[139]

In *Azath Salley v Colombo Municipal Council* (2009), the court heard a petition filed under Article 126 of the Constitution by a former deputy mayor of Colombo on behalf of himself and all Colombo residents.[140] He argued that the Municipal Council had violated their right to equality under Article 12 by failing to remove unauthorized advertisements erected around the city. The court relied on the *Eppawela Case* to hold that Article 126 'must be given [a] broad and expansive interpretation … in line with the developments that had taken place in the area of Public Law'.[141] It also cited with approval the

[134]Ibid 178–79.

[135]*Bulankulama v Secretary, Ministry of Industrial Development (Eppawela Case)* [2000] 3 Sri LR 243 (2000).

[136]Ibid 252.

[137]Ibid 262.

[138]Ibid 258.

[139]Ibid 320.

[140]*Azath Salley v Colombo Municipal Council* [2009] 1 Sri LR 365, 368.

[141]Ibid 382–85.

landmark Indian judgments in *SP Gupta* and *Bandhua Mukti Morcha*, noting that the 'time is opportune to forge and adopt a liberal interpretation' of Article 126 to make 'fundamental rights more meaningful for the majority of the people'.[142] The populist tone of the majority opinion drew inspiration from Justice Bhagwati, whose florid rhetoric in defence of PIL in India was quoted at length.[143]

More recently, however, the Sri Lankan Supreme Court has scaled back its broad assertions of standing and distanced itself from the Indian PIL jurisprudence.[144] In *Ceylon Electricity Board Accountants' Association v Minister of Power and Energy* (2016), the Supreme Court rejected on standing grounds a petition filed under Article 126 by a trade union.[145] Writing for the court, Chief Justice Sripavan stressed the importance of Article 17 in the Sri Lankan Constitution, which gives standing to individuals whose fundamental rights have been violated. He further noted, 'I am firmly of the view that an interpretation of Article 126(2) should not be guided by the interpretation of given to Article 32 of the Indian Constitution as there is a fundamental difference in the conceptual structure of the said two Articles.'[146] The Chief Justice further observed that the court had 'in certain circumstances allowed a public spirited individual or social action group' to file a PIL on behalf of those who are unable to approach the court 'by reason of poverty or disability or socially or economically disadvantaged position'.[147] But he reiterated that the court 'must be careful' to limit PIL to cases of genuine need, and this petition filed by the Ceylon Electricity Board Accountants' Association was neither in the public interest nor filed on behalf of disadvantaged persons.[148]

Overall, as with basic structure, the Indian Supreme Court adapted a global norm for the South Asian context in the peculiar form of PIL. In Bangladesh, the Indian approach has been adopted wholesale. Bangladesh Supreme Court justices may have even amassed more authority than their Indian peers in the realm of *suo motu* jurisdiction. The Sri Lankan Supreme Court has engaged with, and to some extent has accepted, the Indian approach to relaxed standing rules within PIL. However, it has resisted full convergence with the Indian model by maintaining that individuals petitioning the court alleging fundamental rights violations have a personal stake in the matter even if their petitions raise broader public concerns.

IV. Accounting for the different approaches

The preceding sections have established that the Bangladeshi and Sri Lankan judiciaries have adopted distinct approaches to the Indian jurisprudence on unconstitutional constitutional amendments and PIL. While Bangladesh has mostly converged with India in its approach to and adoption of these norms, Sri Lanka has not done so. Rather, the Sri Lankan Supreme Court has engaged with Indian basic structure and PIL jurisprudence to find some implied limitations on constitutional amendment and to loosen standing rules in specific contexts.

[142]Ibid 377–78.
[143]Ibid 378–79.
[144]D Samararatne, 'Judicial Borrowing and Creeping Influences: Indian Jurisprudence in Sri Lankan Public Law' (2018) 2(3) *Indian Law Review* 205, 216–17.
[145]SC FR No. 18/2015 (3 May 2016).
[146]Ibid 13–14.
[147]Ibid 14.
[148]Ibid 14-15.

What accounts for this divergence? As discussed, the Constitution of Bangladesh (1972) shares similarities with the Indian Constitution, including similar provisions on the judicial enforcement of fundamental rights. Further, the Fifteenth Amendment to the Bangladesh Constitution explicitly inserted the basic structure doctrine into the constitutional text. As a result, the notion that certain parts of the Constitution are unamendable is more entrenched in Bangladesh than it is even in India. The Constitution of Sri Lanka (1978), meanwhile, permits only abstract review of pending legislation and specifies that only individuals whose own fundamental rights have been violated may apply to the Supreme Court for relief. Further, the basic structure doctrine has not been entrenched through judicial decisions in Sri Lanka, much less by a constitutional amendment.

Sri Lanka has also had a more turbulent political history than its neighbours over the past several decades. While Bangladesh has experienced bouts of martial law,[149] Sri Lanka has experienced more years under authoritarianism and emergency rule than under democratic government since independence from the British in 1948.[150] This is due in large part to a protracted civil war between the Sri Lankan government and the Liberation Tigers of Tamil Eelam (LTTE) from the mid-1980s to 2009.[151] Such persistent instability and authoritarian rule are not conducive to expansive judicial decision-making in the vein of the Indian judiciary.

Moreover, India's involvement in the civil war – and Sri Lankan affairs generally – has not been well received by the Sri Lankan public. While India's history of intervention in Bangladesh is also deeply problematic, particularly with respect to its role in the 1971 Bangladesh Liberation War,[152] relations between the two countries and their respective publics had improved by the 1980s. India's foreign policy in the 1980s sought to assert regional hegemony, particularly when minorities with which it had 'some ethnic affinities' were under threat.[153] India initially adopted a Janus-faced policy towards the Sri Lankan civil war, in which it publicly supported the government while the South Indian state of Tamil Nadu, which felt an affinity to the beleaguered Sri Lankan Tamil community, aided the LTTE.[154] In 1987, the two countries signed the Indo-Lanka Peace Accord under which India agreed to provide troops to the Sri Lankan government when requested in return for Sri Lanka reasserting its policy of non-alignment.[155] In practice, this meant giving up its security and military arrangements with Pakistan, the People's Republic of China, Israel and the United States – arrangements born out of Sri Lanka's 'frustration with India's role in arming and harboring … militants'.[156]

[149]Bangladesh was under martial law from 1975 to 1979 and from 1982 to 1986, while emergency rule has been declared four times, resulting in the suspension of fundamental rights. See Yap (n 39) 157.

[150]R Coomaraswamy and C de los Reyes, 'Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience' (2004) 2(2) *International Journal of Constitutional Law* 272; A Welikala, *A State of Permanent Crisis: Constitutional Government, Fundamental Rights and States of Emergency in Sri Lanka* (Centre for Policy Alternatives, Colombo, 2008).

[151]SR Ratner, 'Accountability and Sri Lankan Civil War' (2012) 106 *American Journal of International Law* 795.

[152]See GJ Bass, *The Blood Telegram: India's Secret War in East Pakistan* (Random House, Delhi, 2014).

[153]S Krishna, 'India and Sri Lanka: A Fatal Convergence' (1992) 15 *Studies in Conflict and Terrorism* 267, 272.

[154]RM Gunewardene, 'Indo-Sri Lanka Accord: Intervention by Invitation or Forced Intervention?' (1991) 16 *North Carolina Journal of International Law and Commercial Regulation* 211, 213.

[155]ML Marasinghe, 'Ethnics Politics and Constitutional Reform: The Indo-Sri Lankan Accord' (1988) 37 *International and Comparative Law Quarterly* 551, 565–71.

[156]RR Premdas and SWR de A Samarasinghe, 'Sri Lanka's Ethnic Conflict: The Indo-Lanka Peace Accord' (1988) 28(6) *Asian Survey* 676, 682–84.

The Accord would prove disastrous. India's three-year military intervention (1987–90), which peaked at 70,000 troops in Sri Lanka, failed to defeat the LTTE, alienated the Tamil population in the north of the island and 'was regarded as an alien occupational force' by the majority Sinhalese community.[157] Indeed, the 'speedy removal' of Indian troops became the central plank in R Premadasa's successful campaign for the Sri Lankan presidency in 1989.[158] After assuming the position, Premadasa, in an ironic twist, joined with the LTTE to demand that India withdraw its troops.

Thus, while the Indian Supreme Court was in its most creative and influential phase in the late 1980s to early 1990s, the Sri Lankan public's view of India was at a nadir. While one cannot directly link public sentiment to the judicial approach adopted by the Sri Lankan Supreme Court, it may well have played a role in the reluctance of Sri Lankan judges to allow 'big brother' India's influence to seep into its constitutional jurisprudence.[159]

This political history must be viewed in conjunction with the constitutional text and the limited power of judicial review vested in the Sri Lankan Supreme Court vis-à-vis the higher judiciaries of India and Bangladesh. Together, these factors at least provisionally explain why Sri Lanka, compared with Bangladesh, has been more resistant to Indian constitutional jurisprudence.

V. Conclusion

This article has traced how the basic structure doctrine and PIL have migrated from India to Sri Lanka and Bangladesh. It has argued that the Indian jurisprudence reflects a context-specific reconfiguration of global constitutional norms on unconstitutional constitutional amendments and fundamental rights litigation. It has further argued that Bangladesh and Sri Lankan courts have adopted distinct approaches to the Indian jurisprudence in these two areas. Drawing on Vicki Jackson's models on the relationship between domestic constitutional law and international legal sources, the article has shown that Bangladesh best fits within the convergence model and Sri Lanka within the engagement model. The Bangladesh Supreme Court's judgments on basic structure and public interest litigation (PIL) largely mirror their Indian counterparts, both in the doctrinal moves undertaken and the subject matter considered. The Sri Lankan Supreme Court references and reflects upon the Indian case law in these areas, but has not arrived at the same outcomes. The court has not adopted the basic structure doctrine or PIL in their fully fledged forms; instead, it has developed a limited doctrine of unamendability and relaxed standing rules only in limited circumstances. Finally, the article put forth a provisional explanation for these distinct approches: namely, that they arose from differences between Bangladesh and Sri Lanka in constitutional text, judicial structure and political history.

To conclude, scholarship in recent years has highlighted the limits of global constitutionalism (and studies thereof) in an increasingly complex and interdisciplinary world,[160]

[157]Krishna (n 153) 276.

[158]Ibid.

[159]Ibid 276 (noting that Sri Lankan 'public opinion held that the accord was a sellout and that 'big brother' India had secured one third the island for one-tenth the population').

[160]See P Zumbansen, 'Comparative, Global, and Transnational Constitutionalism: The Emergence of a Transnational Legal-Pluralist Order' (2012) 1 *Global Constitutionalism* 16.

as well as the contested nature of ostensibly global norms.[161] The study of regional constitutionalism advanced here – which seeks to integrate political history and international relations with more granular legal analysis – may therefore be useful beyond the South Asian context. While a broader exploration of this phenomenon is beyond the scope of this article, regional constitutionalism may be developing in Sub-Saharan Africa and Latin America, with South Africa and Colombia, respectively, filling the hegemonic, translational role that India occupies in South Asia.[162]

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[161]See, for example, R Albert, M Nakashidze and T Olcay, 'The Formalist Resistance to Unconstitutional Constitutional Amendments' (2019) 70 *Hastings Law Journal* 639.

[162]See JM Isanga, 'African Judicial Review, the Use of Comparative Jurisprudence, and the Judicialization of Politics' (2017) 49 *George Washington International Law Review* 749, 764–79, arguing that while the South African Constitutional Court does not rely much on other African courts, its jurisprudence is influential in those courts' judicial review; C Bernal, 'The Constitutional Protection of Economic and Social Rights in Latin America' in R Dixon and T Ginsburg (eds), *Comparative Constitutional Law in Latin America* (Edward Elgar, Cheltenham, 2017) 338–39, noting 'the beginning of a practice of intra-regional migration of constitutional ideas' and that the 'innovative conceptual and methodological tools' of the Colombian Constitutional Court have been adopted by judges across Latin America.

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