

# Changing Dynamics of Constitutionalism: South Asia's Tryst with Constitution

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**ABSTRACT:** The prevailing view of the constitutional framework in South Asia is seen as secondary and subsidiary to developed constitutional systems worldwide. Meanwhile, South Asian countries have merely re-produced the constitutional framework of developed nations. The emergence and development of South Asian constitutionalism present a range of perspectives and methodological approaches that contribute to comparative constitutional law scholarship in South Asia. The overt attention toward the Western notion of liberalism has often led to an incomplete and unclear approach to South Asian constitutionalism. The paper aimed to explore the elements of South Asian constitutionalism alongside underlying socio-economic and political discourse surrounding its contemporary understanding. It also analyzed the role of courts in affirming and transforming South Asian constitutionalism. Instead of reviving interest in South Asia and Third World Approach to International Law, this paper showed that it is only practical and pragmatic to study constitutionalism with specific reference to the modern discourse of democracy, judicial review, separation of power, and human rights enshrined in their respective constitutions. In terms of its emergence from the colonial history and other prevalent forms of distinct cultural, social, and political practices, South Asia presented a heterogeneous experience in the light of recognition and enforcement of socio-economic rights and transformations and deviations from its past experiences.

**KEYWORDS:** Comparative Constitutional Law, Constitutionalism, South Asia.



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## I. INTRODUCTION

The term constitutionalism represents the idea of limited government.<sup>1</sup> Today, the dominance of Western liberal philosophy underlying constitutionalism in comparative constitutional law is questionable.<sup>2</sup> Scholars have voiced the need to undertake country-specific studies and analyzes focusing on unique historical, cultural, social, economic, and political factors pre-existing in a country.<sup>3</sup> Studies focusing on the historical, social, and cultural institutional setup in South Asian countries are inadequate and divergent in their approach.<sup>4</sup> The complexities which Asian constitutionalism represents arise from the history based on colonialism, communism, evolution, and revolution.

After World War II, an enhanced interest and revived awakening towards the constitution-building processes had flourished worldwide.<sup>5</sup> Constitution-making incorporated constitutionalism tacitly, and irrespective of the unique conditions pre-existent in these nations, there was a desire to adopt the Western liberal philosophy dominating the sphere of constitutional studies. However, the working of these newly drafted constitutions proved difficult and posed novel changes unique to the specific countries. Similarly, South Asian countries faced challenges in mirroring the sentiments projected by Western liberal philosophers in

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<sup>1</sup> For a detailed discussion, see, Jeremy Waldron, *Constitutionalism: A Skeptical View* (Scholarship@Georgetown Law, 2010). Douglas Sturm, "Constitutionalism: A Critical Appreciation and an Extension of the Political Theory of C.H McIlwain" (1969) 54:125 *Minn Law Rev* 216–244. Also see, KN Llewellyn, "The Constitution as an Institution" (1934) 14:1 *Columbia Law Review* 108–130 at 116 & 117.

<sup>2</sup> Albert HY Chen, "Pathways of Western liberal constitutional development in Asia: A comparative study of five major nations" (2010) 8:4 *Int J Const Law* 849–884. Also see David Landau & Rosalind Dixon, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford Scholarship Online, 2021).

<sup>3</sup> Mark Tushnet, "Varieties of Constitutionalism" (2016) 14:1 *International Journal of Constitutional Law* 1–5.

<sup>4</sup> Pranoto Iskandar, "Indigenizing Constitutionalism: A Critical Reading of Asian Constitutionalism" (2018) 5:1 *Indonesian Journal of International and Comparative Law* 3–42. Also see Chen, *supra* note 2.

<sup>5</sup> Jon Elster, "Forces and Mechanisms in the Constitution-Making Process" (1995) 45:2 *Duke Law Journal* 368–9.

maintaining a constitutional threshold domestically.<sup>6</sup> In the past few decades, there has been tremendous change in South Asia, whether with altering constitutions, ascertaining individual rights, or enhancing the judicial role in maintaining the constitutional balance.<sup>7</sup> However, the South Asia projects have raised innumerable questions on constitutionalism in the region. Therefore, to counter the prevailing view that South Asian countries, in the light of underlying vulnerabilities and inequalities, have a fragile constitutional system compared to other established constitutional frameworks worldwide, this study establishes and reaffirms a contrary view.

It is beyond the scope of the paper to focus on the idea of the constitution or discuss in detail the constitutional making process historically in South Asian countries. Instead, this paper aimed to explore establishing constitutionalism through analyzing the constitutional provisions alongside underlying socio-economic and political discourse surrounding its contemporary understanding. It also analyzed judicial approaches to strengthen constitutionalism in South Asian countries that focus on India, Sri Lanka, Nepal, Pakistan, and Bangladesh. These countries have distinct cultures and have fostered the oldest civilizations. South Asia has been perceived as a center of emerging economies with common indicators of colonialism, political instability, and socio-cultural and institutional similarities.

The background presented above reflects the relevance of constitutionalism in South Asian countries by drawing requisite parallels from the Western notion of liberal constitutionalism. Therefore, this paper deals with two main parts of the discussion. The first part explores the elements of Asian constitutionalism in underlying historical, political, social, economic, and cultural discourse on its contemporary understanding. The second part analyzes the role of courts in affirming and transforming constitutionalism in South Asia.

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<sup>6</sup> Landau & Dixon, *supra* note 2.

<sup>7</sup> Björn Dressel & Marco Bünthe, “Constitutional Politics in Southeast Asia: From Contestation to Constitutionalism?” (2014) 36:1 Contemporary Southeast Asia 1–22.

## II. METHODS

Taking inspiration from the ideals of scholars who believe in the notion of varieties of constitutionalism, this paper explored constitutionalism with specific reference to modern discourse in the light of issues on democracy, judicial review, separation of power, and human rights enshrined in the national constitutions of India, Sri Lanka, Nepal, Pakistan, and Bangladesh. Once identified, the next step was to translate it into practice by understanding the judicial approach and subsequent historical, political, social, cultural, and economic development. This paper adopted the qualitative analysis of the above-described problem, lacing it with an empirical analysis of the available literature and instances that support the existence of constitutionalism in South Asia. The research attempted to critique the dominance of Western liberal philosophy in the area of comparative constitutional law by focusing on the revived need to undertake country-specific constitutional analysis. The doctrinal analysis focalized on identifying the contextual problem and derived argumentative support through a collection of secondary sources for theoretical constitutional law from different schools of thought.

## III. CONSTITUTIONALISM IN SOUTH ASIA

The term "constitutionalism" presupposes different meanings in different settings.<sup>8</sup> Roger Scruton defined constitutionalism as the government channeled through and limited by a constitution.<sup>9</sup> According to McIlwain, constitutionalism has one essential quality: a legal limitation on government.<sup>10</sup> De Smith asserted the statement as follows:

"Idea of constitutionalism involves the proposition that rules shall bound the exercise of governmental power, rules prescribing the procedure according to which legislative and executive acts are to be performed and delimiting their permissible content—Constitutionalism

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<sup>8</sup> Waldron, *supra* note 1.

<sup>9</sup> Roger Scruton, *A Dictionary of Political Thought* (London: Palgrave Macmillan, 1982).

<sup>10</sup> C H McIlwain, *Constitutionalism Ancient and Modern* (Ithaca: Cornell University Press, 1940).

becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass there is significant room for the enjoyment of individual liberty."<sup>11</sup>

Colonization, a common factor in South Asian countries, led to the drafting of the constitutions of these countries, which marked their transition to democracy.<sup>12</sup> The constitutions of South Asian countries are either foundational or transformative, duly reflected through their historical transitions.<sup>13</sup> For instance, constitution-making was undertaken as an outcome of the revolution in India and Pakistan, negotiations in the case of Sri Lanka, violent dismemberment in Bangladesh and to an extent in Nepal, royal determination in the case of Bhutan, internal political arrangement in the Maldives, and executive-driven in Afghanistan.<sup>14</sup> Certain factors that affected constitution-making in these countries were political, social, and economic, driven by internal and external influences.<sup>15</sup> The constitutional development in these countries has been far less stable and uniform in reality.<sup>16</sup> These conflicts, tensions, and instability make the South Asian experience unique and diversified, marred with internal and external challenges.<sup>17</sup> Despite these challenges and instability, these countries have undeniably garnered global attention for their tremendous growth potential. These countries have undertaken the developments in the

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<sup>11</sup> Stanley A De Smith, *The New Commonwealth and Its Constitutions* (London: Stevens, 1964) at 106.

<sup>12</sup> DJ Galligan & M Versteeg, eds, *Social and Political Foundations of Constitutions* (Cambridge: Cambridge University Press, 2014).

<sup>13</sup> H Kumarasingham, "Written Differently: A Survey of Commonwealth Constitutional History in the Age of Decolonisation" (2018) 46:5 *Journal of Imperial and Commonwealth History* 874–908.

<sup>14</sup> Kevin YL Tan & Ridwanul Hoque, eds, *South Asian Constitutional Founding: Beyond History* (Hart Publishing, 2021).

<sup>15</sup> See, H Kumarasingham, *Constitution-Making in Asia: Decolonisation and State-Building in the Aftermath of the British Empire* (London: Routledge, 2016). Also see, Kevin Y.L. Tan & Ridwanul Hoque, *supra* note 14.

<sup>16</sup> Sunil Khilnani, Vikram Raghavan & Arun K Thiruvengadam, eds, *Comparative Constitutionalism in South Asia* (Oxford University Press, 2013).

<sup>17</sup> Mark Tushnet & Madhav Khosla, *Unstable Constitutionalism Law and Politics in South Asia* (Cambridge: Cambridge University Press, 2015).

past few decades to overcome the struggles underlying their socio-economic development, making this study all the more critical in the contemporary sphere.

### *A. India*

The Indian Constitution, establishing one of the largest democracies in the world. It enjoys a special place in South Asia and prominently discussed in the cross-border scholarship. The terms democracy, socialism, secularism, sovereign, republic, equality, and justice are mentioned in the Preamble of the Indian Constitution.<sup>18</sup> The Indian Constitution proclaims India as an independent state and its framers made sure to establish the aversions and the aspirations on which the Indian Constitution was based,<sup>19</sup> in addition to its adoption in the name of "We the People of India."<sup>20</sup>

The struggle for freedom followed the years of colonial rule, which finally resulted in the Indian Independence Act of 1947.<sup>21</sup> The Constituent Assembly undertook the task of framing the Indian Constitution under the mandate of the Indian Independence Act of 1947. The Constituent Assembly adopted the final draft of this document in its final session on November 26, 1949.<sup>22</sup> The Indian Constitution adopts certain fundamental constitutional norms and principles such as the rule of law, separation of powers, and federalism. It also contains provisions relating to fundamental rights, directive principles of state policy, and the establishment of

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<sup>18</sup> The Constitution of India, Preamble.

<sup>19</sup> See generally, WAJ Archibald, *Outlines of Indian Constitutional History London (British period)* (London: P.S. King & Son Ltd, 1926); AB Keith, *A Constitutional History of India 1600–1935* (Pacific Publication: Pacific Publication, 1937); MP Singh, *Outlines of Indian Legal and Constitutional History*, 8th edn ed (Universal Law Publishing, 2006).

<sup>20</sup> The Constitution of India, Preamble. (We, The People of India, having solemnly resolved to constitute India into a Sovereign, Socialist, Secular, Democratic, Republic and to secure to all its citizens).

<sup>21</sup> For a detailed discussion, see Keith, *supra* note 19.

<sup>22</sup> Arun K Thiruvengadam, Kevin Y L Tan, & Ridwanul Hoque, "India's Constitutional Founding: An Enriching but Mixed Legacy" in *Constitutional Foundings in South Asia* (Hart Publishing, 2021).10-11.

constitutional courts, namely the Supreme Court and High Courts.<sup>23</sup> However, the Indian Constitution and institutions have often been criticized for the non-fulfillment of constitutionally ordained social and economic justice goals.<sup>24</sup> Several decades after independence, the concept of welfare in India is still at a primary level, with vast sections of its population not having access to basic social goods such as education, water, health, and social security.<sup>25</sup> In the first 50 years after independence, the state did not achieve the end goals of welfarism. Progress on these welfare goals has been slow even with neoliberalism despite enacting specific welfare laws.<sup>26</sup>

India currently witnesses ample instances where liberalism is under threat globally. In such a scenario, India presents ample examples of instability. It has garnered international attention, whether it was the imposition of an emergency by former Prime Minister Indira Gandhi or the vehement actions of current Prime Minister Modi. Many strands of the founding vision and aspirations have taken root in the constitutional system. Meanwhile, citizens and constitutional institutions face various social, political, and economic challenges that impede fulfilling constitutionally ordained aspirations and goals.<sup>27</sup>

### *B. Sri Lanka*

The constitutional provisions in both the Republican Constitutions of Sri Lanka (of 1972 and 1978), which accord to Buddhism, the religion of the

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<sup>23</sup> *Ibid.* Also see, U Mehta, “Constitutionalism” in *Oxford Companion to Politics in India* (New Delhi: Oxford University Press, 2011) 16. BS Rao, *The Framing of India’s Constitution* (Universal Law Publishing, 1967).

<sup>24</sup> Dreze & A Sen, *India: An Uncertain Glory and Its Contradictions* (London: Penguin, 2014).

<sup>25</sup> *Ibid.*

<sup>26</sup> Sanjay Ruparelia, “Modi’s Saffron Democracy”, *Dissent* (2019), online: <<https://www.dissentmagazine.org/article/modis-saffron-democracy>>. AP Chatterji, TB Hansen & C Jaffrelot, *Majoritarian State: How Hindu Nationalism is Changing India* (New Delhi: Harper Collins, 2019). KS Komireddy, *Malevolent Republic: A Short History of the New India* (Chennai: Context, 2019).

<sup>27</sup> Bidyut Chakrabarty, *Indian Politics and Society Since Independence* (Canada & U. S. A: Routledge, 2008).

bulk of majority Sinhalese, have been a sensitive issue among minority groups and have certainly added to a larger sense of grievance arising from other issues. Since 1978, constitutionalism has been at the center of discourse in Sri Lanka.<sup>28</sup> The 1978 Constitution adopts the Westminster model and the executive presidential system. Article 3 affirms sovereignty, whereas Article 4 provides separation of power by defining limits of powers in each branch of government.<sup>29</sup> Sri Lanka's civil war ended in May 2009, with the comprehensive defeat by the Sri Lankan government of Tamil-armed secessionism. It led to a widespread expectation of a comprehensive post-war reconstruction and reconciliation program. However, due to political and social instability, the efforts had been frustrated.<sup>30</sup>

The dominating religious affiliation reflected in the Ceylonese politics in the 1970s accelerated the ethno-religious violence and discrimination against the Tamil minority.<sup>31</sup> It subsequently led to a civil war between the state and the extra-constitutional Tamil nationalism of the Liberation Tigers of Tamil Eelam (LTTE) from the 1970s to 2009.<sup>32</sup> Communal representation and what would become communal domination by the Sinhalese majority framed constitutional evolution in Ceylon in its transition from colony to internal self-government to Dominion to Republic.<sup>33</sup>

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<sup>28</sup> HM Zafrullah, *Sri Lanka's Hybrid Presidential and Parliamentary System & Separation of Powers Doctrine* (Malaysia: University of Malaya Press, 1981).

<sup>29</sup> R Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007) at 4-5.

<sup>30</sup> R Edrisinha & A Jayakody, eds, *The Eighteenth Amendment to the Constitution: Substance and Process* (Colombo: CPA, 2011).

<sup>31</sup> ARM Imtiyaz & Ben Stavis, "Ethno-Political Conflict in Sri-Lanka" (2008) 25:2 J Third World Stud 135-52. Also see, Ahilan Kadirgamar, "Polarization, Civil War, and Persistent Majoritarianism in Sri Lanka", *Carnegie Endow Int Peace* (18 August 2020), online: <<https://carnegieendowment.org/2020/08/18/polarization-civil-war-and-persistent-majoritarianism-in-sri-lanka-pub-82437>>.

<sup>32</sup> Roshan de Silva Wijeyeratne, *Nation, Constitutionalism and Buddhism in Sri Lanka* (London: Routledge, 2014) at 135-192.

<sup>33</sup> Roshan de Silva Wijeyeratne, "Dominion Status, and Compromised Foundations: The Soulbury Constitution and Sinhalese Buddhist Nationalist Responses to the Founding of Ceylonese State, 1931-1956" in *Constitutional Foundings in South Asia* (Hart Publishing, 2021) at 10-11.

The political instability in Sri Lanka has reduced constitutionalism discourse in a state of flux. Sri Lanka's political crisis brings forth the issues surrounding constitutional interpretation. The 2018 incident where President Sirisena's decision to remove Prime Minister Ranil Wickremasinghe from office, appoint a new Prime Minister, and subsequent decision to dissolve Parliament are political applications of constitutional provisions. Therefore, they carry an inherent risk of prompting competing interpretations in situations of power struggle.<sup>34</sup> It led to immediate citizen protests while people challenged the President's conduct during the constitutional coup through petitions and letters.<sup>35</sup> When the President dissolved the Parliament due to the constitutional violation, people sought an election commission and the Supreme Court to uphold the Constitution. It continued while the Supreme Court restored the status quo and invalidated the President's action, and refused to recognize the appointment of a Prime Minister who did not command the majority in the Parliament.<sup>36</sup>

Former President Mahinda Rajapaksa amended the Constitution, removed the President's limited term, and strengthened the President's power to make appointments to the judiciary and independent commissions. The recent 19<sup>th</sup> Amendment reintroduced presidential term limitations. However, the 20<sup>th</sup> Amendment reverses everything proposed by the 19<sup>th</sup> amendment except the bar on the presidency and term limits.<sup>37</sup> Political instability, economic disparities, corruption, lack of transparency, coups,

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<sup>34</sup> Asanga Welikala, "Constitutional Reforms in Sri Lanka – More Drift?" (2019) 108:6 Round Table: The Commonwealth Journal of International Affairs 605–612.

<sup>35</sup> Binendri Perera, "People's Movements as a Strand of Popular Constitutionalism: Driving Forces, Distinctive Features, and Dilemmas" (2020) 29:2 Washington International Law Journal 341.

<sup>36</sup> Supreme Court of the Democratic Socialist Republic of Sri Lanka, 13/12/2018, "R. Sampanthan et. al. v Attorney-General," SC FR Application No. 351/2018 (Sri Lanka); Sri Lanka Supreme Court Says Rajapaksa Is Still Prevented from Acting as PM, ASIAN TRIBUNE.

<sup>37</sup> Nirupama Subramanian, "Explained: Sri Lanka's coming constitutional changes and why its Tamil polity is worried", *Indian Express* (13 September 2020), online: <<https://indianexpress.com/article/explained/sri-lankas-constitutional-changes-and-why-its-tamil-polity-is-worried-6585419/>>.

and religious intolerance are particular challenges that dominate Sri Lanka's tryst with constitutionalism.

### *C. Nepal*

Nepal has a distinct cultural and political history appended since its existence. It has a distinct blend of common law, civil law, and Hindu law.<sup>38</sup> In 1948, Nepal promulgated its first constitution, the Government of Nepal Act. The demand for democracy encouraged to have the Government of Nepal Act of 1951. It continued up to 1959 prior to being replaced with a parliamentary constitution. Again, in 1990, there was a demand for democracy, which led to the enactment of a democratic constitution.<sup>39</sup> The upheaval continued between 1990 and 2014, leading to the adoption of the 2015 Constitution, which established a republican form of government.<sup>40</sup> The new constitution proposed federalism and secularism and enumerated human rights.<sup>41</sup>

In practice, there has been a considerable gap between the constitutional order and political process in Nepal. The new constitution brought about a beacon of hope by establishing democracy, declaring the constitution as the fundamental law, and reposing trust in the Supreme Court as the final arbiter of the constitution, exercising the power of judicial review, thereby limiting the powers of each branch of government.<sup>42</sup> The 2015 Constitution builds on fundamental core constitutional values and norms and offers the Nepali people the promise of a constitutional system that might work. In this sense, the 2015 Constitution is both revolutionary and foundational. Nepal is yet experimenting with its Constitution promulgated in 2015.

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<sup>38</sup> Surya P Subedi, *Human Rights and Constitutionalism in Nepal* (2019).

<sup>39</sup> *Ibid.*

<sup>40</sup> D Adhikari, *Nepal's Road to Federalism: From the Perspective of Grassroots Democracy* (Kathmandu: RTI International, 2020).

<sup>41</sup> The Constitution of Nepal 2015 was promulgated on 20 September 2015.

<sup>42</sup> S Bhandari, *Self-Determination & Constitution Making in Nepal* (London: Springer, 2014).

### *D. Bangladesh*

The Constituent Assembly adopted the Constitution of Bangladesh on November 4, 1972. It was established by those who liberated the country from Pakistan in a war of independence. It is a revolutionary document, but its democratic foundation is rooted in the local specificities and moored in the people's lived experiences in the pre-1971 period that raised aspirations for liberal democracy.<sup>43</sup>

The declaration of independence triggered the constitution-making process.<sup>44</sup> Bangladesh, which existed as East Pakistan earlier, emerged as an independent sovereign nation on March 26, 1971, when its independence was declared by its founding leader Sheikh Mujibur Rahman.<sup>45</sup> Following this declaration, Bangladesh endured a brutal nine-month war that saw one of the worst genocides globally.<sup>46</sup>

The Proclamation of Independence legitimized Bangladesh's independence based on the legitimate right of self-determination of the people of Bangladesh. It declared that it would accept all legal obligations arising from its statehood and comply with the United Nations Charter. After the Proclamation of Independence, the first interim Constitution was set up to be drafted. The Proclamation drew its legitimacy from the 'constituent people.'<sup>47</sup> The following constituent instrument was the Provisional Constitution of Bangladesh Order.

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<sup>43</sup> A F Huq, "Constitution-making in Bangladesh" (1973) 46:1 *Pacific Affairs* 59–76. K Hossain, *Bangladesh: Quest for Freedom and Justice* (Dhaka: University Press Limited, 2013).

<sup>44</sup> SR Chowdhury, *The Genesis of Bangladesh*, 4th edn ed (New Delhi: Asia Publishing House, 1972) publisher-place: Daccapublisher: Zahiruddin Mahmud Inside Library; K Ahmad, *A Socio-Political History of Bengal and the Birth of Bangladesh*, 4th ed (Dacca: Zahiruddin Mahmud Inside Library, 1975).

<sup>45</sup> Baxter, *Bangladesh: A New Nation in an Old Setting* (Boulder, Colorado: Westview Press, 1984); R Sisson & LE Rose, *War, and Secession: Pakistan, India, and the Creation of Bangladesh* (Berkeley, CA: University of California Press, 1990).

<sup>46</sup> AK Blood, *The Cruel Birth of Bangladesh: The Memoirs of an American Diplomat* (Dhaka: University Press Limited, 2002).

<sup>47</sup> M E Haque, "Formation of the Constitution and the Legal System in Bangladesh: From 1971 to 1972: A Critical Legal Analysis" (2016) 27:1 *Dhaka University Law Journal* 41–56.

Bangladesh's founding Constitution was enacted by the 'Constituent Assembly of Bangladesh' (CAB), the legal formation of which was *sui generis*.<sup>48</sup> It derived its existence from the Proclamation of Independence of April 10, 1971, which drew its legitimacy from those 'elected representatives of the people of Bangladesh' who were victorious in the 1970–1971 elections and who constituted themselves into the Constituent Assembly. Notably, the Proclamation established CAB retrospectively, dating it from the day of independence.<sup>49</sup>

At the core of Bangladesh's constitutional order lie certain basic normative principles. These include constitutional supremacy, popular sovereignty, a responsible government, periodic elections based on universal adult franchise, judicial independence, public participation, and social inclusion.<sup>50</sup> The Constitution provided a parliamentary democracy based on direct elections and 'universal franchise,' where the executive 'would be collectively responsible to Parliament.'<sup>51</sup> Apart from participatory democracy, another aspect that 'engaged the most significant amount of attention in the formulation of detailed provisions of the Constitution was attaining a social and economic system that would end exploitation and inequality in society.'<sup>52</sup> The Constitution had an enforceable Bill of Rights and a group of judicially unenforceable social rights in the form of fundamental principles of state policy that were the basis of all state actions. It established a unitary, two-tiered Supreme Court with a strong form of judicial review power to check the legality of government actions and laws and enforce fundamental constitutional rights.<sup>53</sup> All its 'basic features' seem to be based on the overarching principle of democracy that

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<sup>48</sup> K. Hossain, *supra* note 43.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> Ridwanul Hoque, "Eternal Provisions in the Constitution of Bangladesh: A Constitution Once and For All?" in *Unamendable Constitution? Unamendability in Constitutional Democracy* (Cham: Springer, 2018) 195.

<sup>52</sup> Shah Alam, "The State-Religion Amendment to the Constitution of Bangladesh: A Critique" (1991) 24:2 *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* 209–225.

<sup>53</sup> Ridwanul Hoque, "Constitutional Positioning of the Supreme Court of Bangladesh" in *Supreme Court Day Book* (Dhaka: Supreme Court of Bangladesh, 2018) at 284–304.

would end exploitation and inequality in society. The Preamble of the Constitution of Bangladesh reflects people's aspirations; nationality, socialism, democracy, and secularism. Even though the Constitution embraced rule-of-law ethos, it was insufficiently inclusive as several non-Bengali Adivasi (indigenous/aboriginal) communities were not included.<sup>54</sup>

Even though democracy, the rule of law, and sovereignty have been underlying constitutional principles, democracy has had a chequered history in Bangladesh. The constitution-making in Bangladesh was largely participatory and inclusive. Commitments toward the fulfillment of international commitments and entrenched of the bill of rights have proved highly pivotal in shaping the constitutional dynamics of the country. After the Constitution's founding, its transformative aspirations for a democracy based on the higher values of social justice, the rule of law, and popular sovereignty have primarily remained unfulfilled.

### *E. Pakistan*

The Indian Independence Act 1947 granted Dominion status to both India and Pakistan.<sup>55</sup> The founding constitution of Pakistan was enacted after a lapse of nearly eight years following the partition of British India.<sup>56</sup> The founding constitution established a democracy alongside assuring fundamental rights to the citizens and the power of judicial review.<sup>57</sup> However, the constitution was short-lived, followed by an interim constitution in 1962. Operational till 1969, it aimed at establishing a strong

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<sup>54</sup> Ridwanul Hoque, "Inclusive Constitutionalism and the Indigenous People of the Chittagong Hill Tracts in Bangladesh" in *Indian Yearbook of Comparative Law 2016* (New Delhi: Oxford University Press, 2017) at 217-248.

<sup>55</sup> Zubair Abbasi, "Islamic Constitutionalism in Pakistan: Is it Theocratic?", *Islam Law Blog* (13 August 2020), online: <<https://islamiclaw.blog/2020/08/13/islamic-constitutionalism-in-pakistan-is-it-theocratic/>>.

<sup>56</sup> Rainer Grote & Tilmann Röder, *Constitutionalism in Islamic Countries: Between Upheaval and Continuity* (Oxford: Oxford University Press, 2012) at 15-16.

<sup>57</sup> Jeffrey A Redding, "Constitutionalizing Islam: Theory and Pakistan" (2003) 44:3 *Virginia Journal of Intational Law* 759-828; Matthew J Nelson, "Islamic Law in an Islamic State: What Role for Parliament" in *Constitutional Writing, Religion and Democracy* (Cambridge: Cambridge University Press, 2017) 235.

President and indirect election, which the 1973 Constitution again succeeded.<sup>58</sup>

Constitutionalism in Pakistan has faced many challenges from various power holders who asserted their understanding by using constitutional mechanisms to serve best and protect their interests and ideologies.<sup>59</sup> In Pakistan, the courts initially agitated for the constitution. Subsequently, it upheld the executive above the Parliament, placing the state over and above the constitution. During this process, the doctrine of state necessity and tacit acceptance of the military's constitutional engineering often led to diarchic arrangements for sharing power by "presidentializing" the parliamentary system.<sup>60</sup>

The founding Constitution adopted in 1956 declared Pakistan as an "Islamic Republic" in which the sovereignty belonged to Allah and was to be exercised by the people through their elected representatives.<sup>61</sup> The 1956 Constitution vested the Parliament with authority to test laws against Islamic injunctions with the assistance of an advisory council. The framers of the constitution rejected the proposal to vest the authority to exercise "Islamic judicial review" with the Supreme Court.<sup>62</sup> This model also continued under the 1962 Constitution. Even the 1973 Constitution adopted originally instituted the Council of Islamic Ideology only as an advisory body to ensure the conformity of laws to the injunctions of Islam.<sup>63</sup> Article 5(2) of the 1973 Constitution establishes compulsory

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<sup>58</sup> Syed Jaffar Ahmed, *Constitutionalism: Theory and Issues from Pakistan's Perspective* (2017).

<sup>59</sup> Mohammad Waseem, "Constitutionalism and Extra-Constitutionalism in Pakistan" in *Unstable Constitutionalism: Law and Politics in South Asia* Mark Tushnet Madhav Khosla (Cambridge: Cambridge University Press, 2015).

<sup>60</sup> Mohammad Waseem, "Constitutionalism in Pakistan: The Changing Patterns of Diarchy" in *Conflict, Power, and the Landscape of Constitutionalism* (London: Routledge, 2008) 223.

<sup>61</sup> Mushtaq Ahmed, *Government and Politics in Pakistan* (Karachi: Space Publishers, 1970).

<sup>62</sup> Hamza Alavi, "Authoritarianism and Legitimation of State Power in Pakistan" in *Postcolonial State South Asia* (London: Harvester-Wheatsheaf, 1990).

<sup>63</sup> Hamza Alavi, *Constitutional Changes and the Dynamics of Political Development in Pakistan* (London: Institute of Commonwealth Studies, University of London, 1973).

obedience to the constitution and law as an inviolable obligation of every citizen. However, there are instances of indifference towards the sanctity of the constitution in practice.<sup>64</sup> Hence, constitutionalism in its own right has been subjected to occasional judicial reviews.

The power-wielding bureaucratic apparatus first ruled the country under the constitutional "cover" for a decade. However, it gradually lost the initiative to the army at the top of the state's decision-making framework.<sup>65</sup> The army leadership, in turn, took up an ambitious project of constitutional engineering through the 1962 Constitution, the 1985 18<sup>th</sup> Amendment, and the 2003 17<sup>th</sup> Amendment, essentially centralizing power and presidentializing the form of government. Correspondingly, the elected political leadership retaliated in the form of the 1973 Constitution, the 1997 13<sup>th</sup> Amendment, the 2010 18<sup>th</sup> Amendment, and the 21<sup>st</sup> Amendment to restore parliamentarianism and expand the mechanism for exercise of state authority in the provinces.<sup>66</sup>

Pakistan's experience of incorporating Islam into its constitutional setup illustrates the flexibility of Islamic constitutionalism. Islam neither prescribes nor proscribes a particular constitutional model for the political organization of the Muslim community. Islamic constitutionalism is based on the concepts of consultation (*shūrā*), consent (*bay'a*), and public interest (*maṣlaḥa*), which are fluid enough to accommodate a wide variety of governmental models.<sup>67</sup>

The dichotomy between state elite and political elite has been more so apparent in the constitutional history of Pakistan. It reflects through the institutional imbalance between the state apparatuses of the army and bureaucracy. The judiciary is a maverick partner on the one hand and Parliament and political parties on the other.<sup>68</sup> Hence, constitutionalism in Pakistan remains an epitome of an unresolved conflict among rival contenders for power.

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<sup>64</sup> Syed Jaffar Ahmed, *supra* note 58.

<sup>65</sup> Alavi, *supra* note 62 at 65-66.

<sup>66</sup> Keith Callard, *Pakistan: A Political Study* (London: Allen & Unwin, 1958) at 285.

<sup>67</sup> Zubair Abbasi, *supra* note 55.

<sup>68</sup> Mohammad Waseem, *supra* note 59 at 223-4.

## IV. JUDICIAL APPROACH IN SOUTH ASIAN COUNTRIES

### *A. India*

The British common law system has hugely influenced India in South Asian Countries. Judicial independence has been at the core of the democratic landscape of India. B. R Ambedkar considered being India's constitutional architect remarked.<sup>69</sup> Indian constitutional courts have had an enormous impact on the creation of new rights and in upholding liberal constitutionalism. The judiciary in India has been labeled as an "activist" judiciary. However, scholars who criticize the activist role of the judiciary have also rightly appreciated the role of the Supreme Court in ensuring the guarantee of fundamental rights.<sup>70</sup> The basic structure doctrine and emphasis on the rule of law, separation of power, democracy, secularism, and federalism have immensely changed the landscape of constitutional law in the country.<sup>71</sup> The advent of Public Interest Litigation, writ remedies, expansive interpretation of Article 21, reservation policies, holistic reading of fundamental rights, and directive principles of state policies have immensely contributed to the affirmation of constitutionalism and have strengthened the concept of justice in the Indian constitutional framework.<sup>72</sup>

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<sup>69</sup> "There can be no difference of opinion in the House that our judiciary must both be independent of the executive and must also be competent in itself and the question is how these two objects could be secured." B. R. Ambedkar, VIII Constituent Assembly Debates 258 (May 24, 1949).

<sup>70</sup> Shylashri Shankar, Descriptive Overview of Indian Constitution and the Supreme Court of India in Oscar Vilhena Vieira, Upendra Baxi, & Frans Viljoen, *Transformative constitutionalism: comparing the apex courts of Brazil, India and South Africa* (Pretoria University Law Press, 2013) at 105-134.

<sup>71</sup> Kesavananda Bharati v. State of Kerala, AIR 1973 SC 1461. Also see, Indira Gandhi v. Raj Narain, AIR 1975 S.C. 2299. Also See, I.R Coelho v. State of Tamil Nadu, AIR 2007 SC 861.

<sup>72</sup> Maneka Gandhi v. Union of India, A.I.R. 1978 S.C. 597, S.P Gupta v. Union of India, AIR 1982 SC 149, Minerva Mills v. Union of India, AIR 1980 SC 1789, M.H. Hoskot v. the State of Maharashtra, A.I.R. 1978 S.C. 1549, Nilabeti Behera v. the State of Orissa, A.I.R. 1993 S.C. 1960, Jolly George Varghese v. Bank of Cochin, A.I.R. 1980 S.C. 475, Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180, Rudul Shah v. the State of Bihar, AIR 1983 SC 1086, R.L.E.K v. the State of UP, AIR 1985 SC 652.

In India, the Supreme Court has presumed the role of guardian, protector, and defender of the Constitution.<sup>73</sup> Certain decisions of the Supreme Court have acted as a positive catalyst to bring forward, affirm and realize the aspirational goals of the people of the country.<sup>74</sup> In the case of *NALSA v. Union of India*,<sup>75</sup> the Supreme Court recognized the issues faced by the transgender community, upheld their right to self-determination, and guaranteed and affirmed their rights under Articles 14, 19, and 21 of the Indian Constitution. In another case on the decriminalization of S. 377 of the Indian Penal Code, the Supreme Court of India decriminalized voluntary sexual intercourse among the same-sex couple.

In the *Indian Young Lawyers Association v. the State of Kerala*, the Supreme Court heard the issue of prohibition imposed on women of menstruating age from entering the temple premises. It struck down the prohibition on entry in Sabarimala Temple in Kerala as being violative of the fundamental rights of women.<sup>76</sup> In the judgment, Justice D.Y. Chandrachud highlighted the vision of the Indian Constitution as being transformative while setting up institutions of governance and granting the promise and fulfillment of full citizenship to those who are deprived and marginalized.<sup>77</sup> In *Justice K S Puttaswamy v. Union of India*, the Court affirmed the right to privacy as a fundamental right, explaining the tenets of the principle of proportionality and its applicability in India.<sup>78</sup> In *Harsh Mander v. Union of India*, the Delhi High Court declared several provisions of the Anti-Beggary Act unconstitutional.<sup>79</sup> Thus, the Supreme Court has played a pivotal role in establishing and expanding jurisprudence related to human dignity, gender justice, environmental justice, affirmative action, and education, among

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<sup>73</sup> *State of Madras v. V G Row*, AIR 1952 SC 196

<sup>74</sup> *Justice K S Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

<sup>75</sup> *NALSA v. Union of India*, AIR 2014 SC 1863 (India).

<sup>76</sup> *Indian Young Lawyers Association v. the State of Kerala*, 2018 SCC Online SC 1690 (India).

<sup>77</sup> *Ibid.*

<sup>78</sup> *Justice K S Puttaswamy v. Union of India*, (2017) 10 SCC 1 (India).

<sup>79</sup> *Harsh Mander v. Union of India*, 2018 SCC OnLine Del 10427 (India).

other fundamental rights and freedoms guaranteed in the Indian Constitution.<sup>80</sup>

### B. Pakistan

Pakistan is mostly represented by its apparent tensions between civilian and military rule, which has shaped the history of the country. Because of undergoing constitutional instability for a long, it has been defined by extra-constitutional pressures on its formal constitutional system. Pakistan's past constitutional history outlines the nature of the judicialization of politics that the country has witnessed.<sup>81</sup> Regime legitimization through judicial endorsement in the wake of direct martial rule has been often cited as an example of judicialization of politics in Pakistan.<sup>82</sup> Unstable constitutionalism and an undesirable judicialization of politics have been its unavoidable outcomes.<sup>83</sup>

The judiciary in Pakistan has undergone huge turmoil and has seen different phases of judicial acquiescence, judicial activism, and judicial restraint. The significance of judicial independence is embedded in the

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<sup>80</sup> Also see cases like *B K Pavitra v. Union of India*, (2017) 4 SCC 620 (India), *Gita Hariharan v. RBI, Writ Petition (C) No. 1016 of 1991* (India), *M C Mehta v. Union of India*, AIR 1987 SC 1086 (India), *Vellore Citizens Welfare Forum v. Union of India*, AIR 1996 SC 2715 (India), *Unnikrishnan v. State of Andhra Pradesh*, AIR 1993 SC 217 (India), *Madhu Kishwar v. the State of Bihar*, (1986) 5 SCC 125 (India), *Common Cause v. Union of India*, 1996 (4) SCC 33 (India).

<sup>81</sup> For more discussion see, Osama Siddique, "The Judicialization of Politics in Pakistan: The Supreme Court after the Lawyers' Movement" in *Unstable Const Law Polit South Asia* (Cambridge: Cambridge University Press, 2015).

<sup>82</sup> Tayyab Mahmud, *Jurisprudence of Successful Treason: Coup d'Etat & Common Law*, 27 *Cornell International Law Journal* 49 (Winter) (1994).

<sup>83</sup> Moeen H Cheema, "The 'Chaudhry Court': Deconstructing the "Judicialization of Politics" (2016) 25:3 *Washington International Law Journal* 447. Also see, Osama Siddique, *supra* note 81. However, the term "Chaudhry Court" is befitting for two reasons: (1) the most important judgments from this era always involved benches led by Justice Chaudhry and share several common characteristics in terms of ideologies, methods, arguments, and outcomes; and (2) despite the controversial and complex issues involving mega-politics adjudicated by the Court during this period, its judgments are unusual for a near absence of any dissenting notes. On major matters, the Chaudhry Court essentially operated as a monolith.

Constitution of Pakistan, with the Preamble proclaiming, "...the independence of the judiciary shall be fully secured."<sup>84</sup>

In *Muhammad Aslam Awan v. Federation of Pakistan*, the Court stated as follows:

"Judicial independence both of the individual Judge and the Judiciary as an institution is essential so that those who bring their causes/cases before the Judges and the public, in general, have confidence that their cases would be decided justly and by law... The fundamental rights guaranteed under the Constitution cannot be secured unless Judiciary is independent because the enforcement of these rights has been left to Judiciary in terms of Articles 184(3) and 199 of the Constitution and the relevant law."<sup>85</sup>

Recently, the issue of judicial grandeur came to the limelight when Justice Qazi Faez Isa wrote a 28-page dissenting note. It was in continuation of an order passed on February 11, 2021, by the five-judge bench of the Supreme Court of Pakistan headed by Chief Justice, Gulzar Ahmed, barring Justice Isa from hearing cases involving the Prime Minister of Pakistan, Imran Khan.<sup>86</sup> Justice Isa, in his dissent, observed that "most resilient and finest institutions were those where candor, transparency and legitimate dissent existed," adding that executive transgressions if remain unchecked, judges being restrained, then ultimately, the citizens will suffer.<sup>87</sup> Justice Isa has been undergoing trial for misconduct on non-declaration of offshore properties; a journalist highlighted this matter in 2019.<sup>88</sup> Then, the Supreme Court of Pakistan laid down guidelines explaining how judges

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<sup>84</sup> Islamic Republic of Pakistan Constitution, Preamble.

<sup>85</sup> Muhammad Aslam Awan v. Federation of Pakistan, 2014 SCMR 1289.

<sup>86</sup> Hasnaat Malik, "Isa writes dissenting note to SC's Feb 11 order", *Express Trib* (21 February 2021), online: <<https://tribune.com.pk/story/2285367/isa-writes-dissenting-note-to-scs-feb-11-order>>.

<sup>87</sup> *Ibid.*

<sup>88</sup> Justice Qazi Faez Isa and others v. The President of Pakistan and others, Constitution Petition No.17 & 19 Of 2019 & C.M.A. No.7417 Of 2019 In Const. P. 19 Of 2019 & Constitution Petitions No.20-30, 32 & 34 Of 2019.

ought to act if they are called to review a majority judgment.<sup>89</sup> While dealing with matters of constitutional importance to review matters in the Justice Isa case, Zulfikar Ali Bhutto case, and Panama gate case, the guidelines issued provide that any judge hearing a review should show restraint and maintain judicial dignity. Notably, it was when they had already expressed an opposite view in the original matter, emphasizing the presence of minority judges in the review petition, subject to their availability.<sup>90</sup>

There has been a history of judicial affirmations in Pakistan, whereby the judges have aimed to establish a duty on the judiciary to uphold the constitutional principles, implement principles of Islam, and thus establish liberty, equality, tolerance, and social justice.<sup>91</sup> Justice A R Cornelius's historic dissent in *Maulvi Tamizuddin Khan v. Federation of Pakistan* stands in the face of judicial courage in the history of Pakistan, wherein he negated the applicability of the doctrine of necessity to validate military coups.<sup>92</sup> Similarly, Justice Munir in *Jibendra Kishore v. Province of East Pakistan* stood in affirmation for providing relief to minorities against discriminatory practices by the government.<sup>93</sup> However, there are certainly complex issues with exercising judicial power in Pakistan, even on its face. The first is the lack of heterogeneity and diversity in the court's composition. The second is the over-judicialization of politics. In addition, courts are equally conscious of their image in public if they side with the political parties.

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<sup>89</sup> Hasnaat Malik, "SC offers guidelines for dissenting judges", *Express Trib* (23 February 2021), online: <<https://tribune.com.pk/story/2285701/sc-offers-guidelines-for-dissenting-judges>>.

<sup>90</sup> *Ibid.*

<sup>91</sup> Alvin R Cornelius, *Law and Judiciary in Pakistan* (Lahore Law Times Publications, 1981) at 10.

<sup>92</sup> *Maulvi Tamizuddin Khan v. Federation of Pakistan*, [1955] PLD Sindh 96 (Pak.). Also see *Usif Patel and Two Others v. The Crown*, [1955] PLD Federal Court 387 (Pak.).

<sup>93</sup> *Jibendra Kishore v. Province of East Pakistan*, 1957 PLD 9.

### *C. Nepal*

Nation-building in Nepal has been considered difficult because of political aspirations, its constitutional history post-monarchic state, and complications relating to constitutionalism.<sup>94</sup> The Preamble of the Constitution of Nepal lays down a commitment to having an independent, impartial, and competent judiciary and the rule of law.<sup>95</sup> Supreme Court of Nepal in *Bharatmani Jungam & others v. Office of the President & others* took up the task of ordaining the formation and adoption of the new Constitution.<sup>96</sup> The judiciary in Nepal has played an essential role in affirming economic, social, and cultural rights by acknowledging the justiciability of the right to food security and food sovereignty, education, employment, health, reproductive health, and right to a healthy environment.<sup>97</sup>

However, under the new constitution and the political influences, the debate surrounding independence and accountability does arise.<sup>98</sup> In one of the notable opinions, Justice Regmi held that government should form a special investigating team in consultation with the office of the Attorney General or immediately initiate the investigation of alleged extra-judicial killing by the Centra Investigation Bureau as per Section 12 of the Penal

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<sup>94</sup> See generally, Zhu G & Kouruntakis, “The Role of the Judiciary and the Supreme Court in the Constitution-Making Process: The Case of Nepal” (2009) 55:1 *Stanford Journal of International Law* 69–82.

<sup>95</sup> Nepal Constitution 2015, Preamble.

<sup>96</sup> *Bharatmani Jungam & others v. Office of the President & others* [Supreme Court] Nov. 25, 2011, Writ No. 68- ws-0014, 4–5.

<sup>97</sup> *Madhav Kumar Basnet and others v. Government of Nepal*, WN 069-WS-0057, 2014; See also, *Suman Adhikari & others v. Office of the Prime Minister*, NKP 2074 BS (2015). *Prakashmani Sharma v. Nepal Government*, SCN, Writ No. 064 (2009). *Prem Bahadur Khadka v. Nepal Government of Nepal*, WN 2064/0719 (2008). *Women for Human Rights, Single-women Group and Lili Thapa v. Prime Minister and Office of Council of Ministers*, NKP, 2062 BS (2005). *Reena Bajracharya and Others v. Royal Nepal Corporations, Cabinet Secretariat and Others*, NKP 2057 BS 376 (2002).

<sup>98</sup> See generally, David Pimentel, “Judicial Independence at Crossroads: Grappling with Ideology and History in the New Nepali Constitution” (2011) 21:2 *Indiana International Comparative Law Review*.

Code.<sup>99</sup> In November 2020, the five judges of the constitutional bench refused to issue an interim order challenging the Nepal Communist Party Vice Chair Bamdev Gautam's appointment to the National Assembly. However, one of the judges, Justice Ishwar Prasad Khatriwada, gave a dissenting opinion and contested the appointment of Bamdev Gautam to the National Assembly.<sup>100</sup> The politicization of the court in Nepal and the transition subsequent has not been peaceful.

There have been illustrations on the excessive interference of the executive and legislature over the judiciary body, leading to the state of a constitutional crisis. When Justice Karki prosecuted three former Chiefs of Nepal Police on a corruption charge, she was charged on the grounds of biasness, and an impeachment motion was brought against her. Similar kinds of instances have been noted to weaken the judicial system and further the interest of the elites.<sup>101</sup> Thus, Nepal has a long way ahead to achieve the goals of judicial independence and judicial impartiality. Only the value of judicial power can be fully realized without the fear of facing huge opposition from the legislature and executive bodies.

#### *D. Bangladesh*

Bangladesh is perceived as an unstable democracy. For almost the majority of its existence, it has been under military-autocratic and nearly autocratic regimes.<sup>102</sup> The Constitution of Bangladesh affirms a democratic form of governance and establishes constitutional supremacy, judicial review, judicial independence, and enumerates certain rights.<sup>103</sup> In Bangladesh,

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<sup>99</sup> Sunil Ranjan Singh v. Government of Nepal and others (067-wo-1043).

<sup>100</sup> Adv Dinesh Tripathi v. Office of the President and others (077-cc-003). Ram Kumar Kamat, "Path to NA, Cabinet cleared for Gautam", *The Himalayan* (12 November 2020), online: <<https://thehimalayantimes.com/nepal/path-to-na-cabinet-cleared-for-gautam>>.

<sup>101</sup> Ram Kumar Bhandari, "Nepal: Politicisation of the Supreme Court and its Impact on Justice Process in Transition", *Justiceinfo.net* (22 May 2017), online: <<https://www.justiceinfo.net/en/33394-nepal-politicisation-of-the-supreme-court-and-its-impact-on-justice-process-in-transition.html>>.

<sup>102</sup> Osama Siddique, *supra* note 81.

<sup>103</sup> The People's Republic of Bangladesh, Constitution.

judicialization of politics has recently embraced the phase of unprincipled and unpragmatic judicial intrusion into "mega-politics."<sup>104</sup> There are various illustrations of judicial involvement in political issues.<sup>105</sup> However, in one of the dissenting opinions about the validity of the Thirteenth Amendment, Justice Ali held it to be valid and not violative of the basic structure of the Constitution of Bangladesh on the grounds of the republican and democratic structures of the state.<sup>106</sup>

Judicial opinions, especially the dissenting ones depending upon the country's political climate, are generally not a norm. There has been high intolerance for those who dissent, including the judiciary, civil society, and bureaucracy.<sup>107</sup> Thus, there is a need for structured augmentation and institutional freedom to a judicial role in Bangladesh in light of such constitutional instability.

#### *E. Sri Lanka*

The Government of Sri Lanka has transformed the civic space, leading to the curtailment of freedom of speech and expression.<sup>108</sup> Even the judiciary has been targeted in government-sanctioned abuses. International human rights watchdogs like Amnesty International have also expressed their concern about the status of the rule of law and the "political victimization" undertaken by the government under the leadership of Gotabaya

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<sup>104</sup> Ran Hirschl, "The Judicialization of Mega-Politics and the Rise of Political Courts" (2008) 11 Annual Review of Political Science 93–118.

<sup>105</sup> Mosharraf Hossain v. Bangladesh, (2004) 56 DLR (AD) 13. Dr. Mohiuddin Farooque v. Bangladesh, (1998) 50 DLR (HCD) 84, 97. Also see Siddique Ahmed v. Government of Bangladesh and others, (2013) 65 DLR (AD), Abdul Mannan Khan v. Bangladesh, (2012) 64 DLR (AD) 1, Saleem Ullah v. Bangladesh, (2005) 57 DLR (HCD) 171.

<sup>106</sup> Abdul Manan Khan v. Government of Bangladesh, (2012) 64 DLR (AD)1, 472.

<sup>107</sup> Md Rizwanul Islam, "The Lack of Dissent in Judgments", *Dly Star* (10 October 2017), online: <<https://www.thedailystar.net/law-our-rights/the-lack-dissent-judgments-1474249>>.

<sup>108</sup> See generally, MJA Cooray, *Judicial Role under the Constitutions of Ceylon/Sri Lanka An Historical and Comparative Study* University of London, 1982).

Rajapaksa.<sup>109</sup> There has also been huge political interference against those charged with prosecuting serious human rights violations. The courts in Sri Lanka have been struggling to maintain their independence.<sup>110</sup>

Various factors emerged with judicial independence in Sri Lanka. Firstly, the appointment process is highly political and manipulated. In 1988, a seven-year junior judge was preferred as a Chief Justice because the President was not in favor of the senior-most judge due to his opinions.<sup>111</sup> Secondly, such influenced and manipulated appointments of Chief Justice leads to curtailment and control of the exercise of judicial power by other judges.<sup>112</sup> As remarked during the tenure of Chief Justice Silva, there were far fewer dissenting opinions.<sup>113</sup> Also, the impeachment of Chief Justice Shirani Bandaranayake accorded support to eroding democratic institutions in Sri Lanka.<sup>114</sup> Failing judicial standards in Sri Lanka results from institutional breakdown and failure of political will. Until the political influences are minimized, the judiciary's role in the sphere of constitutional structure will remain disputed.

## V. CONCLUSION

The establishment of constitutionalism dependent on varying factors raises a pertinent question of whether having a constitution satisfies constitutionalism. South Asia countries have had a troubled history

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<sup>109</sup> Lakshman Marasinghe, *The Evolution of Constitutional Governance in Sri Lanka*, (Colombo: Vijitha Yapa Publications, 2007). Also see, LJM Cooray, *Constitutional Government in Sri Lanka 1796-1977* (Ph.D Thesis, University of Colombo, 1984).

<sup>110</sup> See generally, Marasinghe, *Constitutionalism: A Broader Perspective* (Colombo, 2004). Also see HL Silva, *Sri Lanka: A Nation in Conflict: Threats to Sovereignty, Territorial Integrity, Democratic Governance and Peace* (Visidunu Prakashakayo, 2012).

<sup>111</sup> J Wickramaratne, *Fundamental Rights in Sri Lanka* (Stamford Lake Publication, 2012).

<sup>112</sup> See generally, Victor Ivan, *An Unfinished Struggle: An Investigative Exposure of Sri Lanka's Judiciary and the Chief Justice* (Maharagama, 2007).

<sup>113</sup> Kishali Pinto-Jayawardena & Lisa Kois, "Sri Lanka: The Right Not to be Tortured: A Critical Analysis of the Judicial Response" (2009) 9 Colombo. Also see, *Weerawansa v. Attorney General*, [2000] 1 LRC 407.

<sup>114</sup> Rohini Hensman, "Independent Judiciary and Rule of Law: Demolished in Sri Lanka" (2013) 48:9 Economic and Political Weekly 16-19.

regarding colonialism, communism, and religious-based distinctions. However, by adopting the Western concept of liberalism, these countries undertook the task of constitution-making to establish stability. For instance, since its inception, India has proclaimed itself a democratic, secular, and federal state, but democracy and secularism can be brought to question. The constitution-making process in countries like Bangladesh, Pakistan, Nepal, and Sri Lanka was undertaken in a state of turmoil. Constitutional instability has always been problematic, especially in these selected countries, with political power struggles dominating the field of constitutional interpretation. India has grappled with its share of issues surrounding constitutional interpretation yet presents stability in the sense of having a constitution that has continued to date being perceived as the fundamental law of the land. The integration of South Asia is vital for regional stability, and despite their distinct history and political experiences, they have shared constitutional experiences.

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## COMPETING INTERESTS

The authors declared that they have no competing interests.

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