



A CONSTITUTIONAL COURT FOR SRI LANKA? PERCEPTIONS, POTENTIAL & PITFALLS

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INTRODUCTION

In a recent Working Paper for the Centre for Policy Alternatives (CPA), Dr Nihal Jayawickrama makes the following astute observation regarding the possibility of creating a Constitutional Court for Sri Lanka:

*The proposal to establish a Constitutional Court, at the apex of our judicial system, may well serve as a catalyst for change, but only if it is realistically constituted and its establishment is accompanied by vitally necessary reforms in respect of the language of the law and in establishing judicial accountability. One immediate consequence of the establishment of a Constitutional Court will also be to enable the other superior and first instance courts to focus entirely on civil, commercial and criminal litigation. That task will, of course, need to be facilitated by long overdue structural and systemic reforms, responsibilities which neither the Ministry of Justice, nor the Judiciary, has so far demonstrated any inclination to undertake.*¹

This Working Paper seeks to take Dr Jayawickrama's insightful paper as its starting point, to expand on significant issues raised in that paper, and to raise additional questions. The overall aim is to encourage reflection on three inter-related overarching questions: What, overall, do we expect a constitutional court to do that an alternative (e.g. reform of the Supreme Court) could not achieve? What powers and jurisdiction would a constitutional court have? Considering experiences in other countries, what possible pitfalls need to be considered? The fundamental message of this paper is to guard against expecting too much from a constitutional court, and that the potential of any constitutional court would lie in the details of not only whether Sri Lanka provides fertile soil for such an institution and how it is constructed, but also unknown factors such as whether judges on a constitutional court would take an assertive approach. This analysis draws on broad comparative research in the author's forthcoming book, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (Cambridge University Press).

The Paper contains five parts. The first part briefly analyses perceptions of the prevalence and fundamental purpose of constitutional courts worldwide. The second part examines the potential of a constitutional court for Sri Lanka, in light of comparative examples of constitutional courts worldwide and the particularities of the Sri Lankan context. Building on the second part, the third part turns to the importance of design options and practical questions, namely, the possible composition and powers of a Sri Lankan Constitutional Court, and the key question of who would have standing before the Court. The fourth part considers key possible pitfalls of establishing a constitutional court, including the potential for such a court to become unduly burdened, the possibility of creating tensions within the judiciary, and overall, the potential for disappointment if the court does not function effectively to drive positive change in Sri Lanka. First, the paper sets out a number of remarks and definitions to aid the reader.

¹ N. Jayawickrama, 'Establishing a Constitutional Court: The Impediments Ahead', CPA Working Papers on Constitutional Reform No. 13, January 2017, 5.

POINTS OF ORIENTATION

The following preliminary points may help to orient the reader.

A common law perspective

The first important point is that Ireland, where the author hails from, was, like Sri Lanka, formerly part of the British Empire. Ireland's constitutional structure and legal system, like Sri Lanka's, is strongly rooted in the British tradition.

If Sri Lanka is an example of what Harshan Kumarasingham calls 'Eastminster'²—i.e., the operation of Britain's Westminster constitutional model in formerly British Asia—Ireland is an odd *sui generis* example of that model to the West of Westminster. In many ways Ireland's post-independence constitutions of 1922 and 1937 read as the workings of the unentrenched British Constitution reduced to written form, both in the structures of government (with president and Senate replacing the monarch and House of Lords) and the guarantee of a range of civil and political rights, including jury trial and the right to liberty. However, a highly significant departure from the British tradition of parliamentary supremacy, introduced in 1922, is the empowerment of the superior courts to invalidate legislation incompatible with the constitutional text.

Although this paper is inevitably written from an outsider's perspective, both Ireland and Sri Lanka share many fundamental similarities in their constitutional histories and traditions, and this paper is approached with the sympathy and understanding of an author from a 'cousin' constitutional system. That said, they are distant cousins, with key differences in Sri Lanka including the adoption of a strong presidential system (replacing the previous system of parliamentary supremacy) and the mixed record of judicial independence. Regarding the courts, in Sri Lanka the Supreme Court alone has jurisdiction concerning constitutional questions,³ while in Ireland constitutional questions can be treated by three courts: the High Court at first instance, the Court of Appeal, and the Supreme Court as the final court of appeal (but only if the Supreme Court is satisfied that the decision involves "a matter of general public importance", or that an appeal is necessary "in the interests of justice"⁴).

A broad comparative approach

The above notwithstanding, this paper does not focus strongly on common law jurisdictions in its comparative approach. This is for two reasons. First, Dr Jayawickrama's paper already provides a highly useful conspectus of relevant common law experiences.

² H. Kumarasingham, 'Eastminster – Decolonisation and State-Building in British Asia' in H. Kumarasingham (ed.), *Constitution-Making in Asia – Decolonisation and State-Building in the Aftermath of the British Empire* (London, Routledge, 2016).

³ See 'Constitutional history of Sri Lanka' ConstitutionNet <http://bit.ly/2n2Zy6l>.

⁴ Article 34.5.3°, Constitution of Ireland. Under Article 34.5.4° the Supreme Court can hear an appeal directly from the High Court if the Supreme Court "is satisfied that there are exceptional circumstances warranting a direct appeal to it", on the basis that the case involves a matter of general public importance, or is in the interests of justice.

Second is that the majority of constitutional courts are found in states belonging to the civil law tradition, such as Germany, Italy, Hungary, Colombia, Brazil, and Turkey (South Africa is the most notable exception) and a focus on these states provides useful insights.

A sensitivity to context

While taking a broad comparative approach, and coming from the perspective of an outsider, the author has taken every effort to ensure that the discussion herein is acutely sensitive to the history, development, and nature of the Sri Lankan constitutional system. This is vital in order to avoid an approach that proposes ‘one-size-fits-all’ solutions or vaunts one empirical model above all others in considering the potential for a constitutional court in Sri Lanka.

In this connection, the author has taken note of the following key aspects of the Sri Lankan context, many of which are addressed at length in Dr Jayawickrama’s paper and a more recent CPA paper by Dr Asanga Welikala:⁵

- (a) The Sirisena-Wickremesinghe government has stated the drafting of a new democratic constitution to be a key priority, in line with its election pledges;⁶
- (b) This democratic constitution will take priority over other election pledges, such as the establishment of war crimes accountability mechanisms such as the Judicial Mechanism and the Truth-Seeking Commission;⁷
- (c) However, the constitutional reform process is not happening within the context of a clear democratic revolution, the potential for achieving key reforms is unclear (e.g. on abolishing the presidency and a devolution settlement for the state), and overall there is no consensus or shared vision across Sri Lankan society for the State’s future;⁸
- (d) Sri Lanka has previously had a robust judiciary with the capacity and willingness to uphold the rule of law, but judicial independence and that capacity has been eroded since the 1970s in particular;⁹
- (e) The Sri Lankan legal system suffers serious structural and systemic deficiencies, including problems occasioned by the transition from English to Sinhala and Tamil as the legal language of the lower courts;¹⁰
- (f) The Sri Lankan judiciary face significant challenges, including enormous backlogs in the appellate courts, problems related to legal language, and corruption and unethical judicial behaviour in an atmosphere lacking accountability.¹¹

⁵ A. Welikala, ‘The Idea of Constitutional Incrementalism’ CPA Working Papers on Constitutional Reform No.14, January 2017.

⁶ P.K. Balachandran, ‘Sri Lanka to prioritize constitutional reform over accountability mechanisms’, ConstitutionNet 9 February <http://bit.ly/2nzOYpi>.

⁷ Ibid.

⁸ Welikala, ‘The Idea of Constitutional Incrementalism’ (n 5) 3–5.

⁹ Jayawickrama, ‘Establishing a Constitutional Court’ (n 1) 2–6.

¹⁰ Ibid. 14–17.

¹¹ Ibid. 5, 14–17, 17–19.

DEFINING OUR TERMS

For the purposes of clarity, it is worthwhile to define our terms, specifically ‘constitutional court’ and ‘supreme court’. Both types of court are empowered to exercise strong judicial review—i.e. the power to invalidate laws enacted by a representative legislature—but how each type of court does so differs in significant aspects. The most fundamental typology is the distinction between supreme courts in the ‘American’ mould (hereinafter, ‘supreme courts’) and ‘European’ constitutional courts based on the principles elaborated by the Austrian legal philosopher Hans Kelsen in the 1920s (hereinafter, ‘constitutional courts’).¹²

Typically, the term ‘constitutional court’ denotes a decision-making institution which is separate from the ordinary judiciary, and which has the final, and usually exclusive, say on the interpretation of the constitution, as well as the constitutional validity of laws and State action. The term ‘supreme court’, by contrast, denotes a judicial institution at the apex of the ordinary judiciary, which operates both as the final interpreter of the constitution and constitutional validity of laws and State action, as well as the final court of appeal concerning various non-constitutional matters.

Review can be decentralised or centralised. Ordinary courts in decentralised ‘American’ systems are empowered to disapply laws deemed unconstitutional while the supreme court enjoys the exclusive power to strike down laws.¹³ However, this is evidently not a universal model: as discussed above in Ireland and Sri Lanka, for instance, lower courts have no power to address constitutional matters. In ‘Kelsenian’-style systems with constitutional courts review is centralised, the constitutional court enjoys a monopoly on questions of constitutionality, and the court tends to deal exclusively with constitutional matters.

In ‘American’ systems constitutional questions only come before the supreme court as part of a concrete case, whereas constitutional courts can often perform abstract review of laws as well as concrete review. Abstract review may be *a priori* (before a Bill is promulgated as law) or *a posteriori* (after a Bill becomes law).

It is important to recognise that this typology does not capture the diversity and complexity of courts in regions such as Latin America, which defy traditional taxonomies by mixing decentralised review with centralised review, through the creation of novel constitutional review mechanisms that do not exist in other world regions, and with review powers in some states shared between supreme courts and constitutional courts.¹⁴

¹² The wide variety of systems of strong judicial review worldwide is presented by e.g. A. Mavčič, *The Constitutional Review* (Bookworld Publications, 2001); and A. Harding, P. Leyland and T. Groppi, ‘Constitutional Courts: Forms, Functions and Practice in Comparative Perspective’ in A. Harding and P. Leyland (eds.), *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill Publishing, 2009).

¹³ In the US system the Supreme Court technically does not ‘invalidate’ laws, but the effect of a finding of unconstitutionality is to bar the application of the law, leading to a very similar result.

¹⁴ J. Frosini and L. Pegoraro, ‘Constitutional Courts in Latin America: A Testing Ground for New Parameters of Classification?’ in Harding and Leyland (eds.), *Constitutional Courts* (n 12).

PERCEPTIONS OF CONSTITUTIONAL COURTS

This section briefly addresses two important issues. First, just how prevalent are constitutional courts in democracies worldwide? Second, why have constitutional courts become such a popular institution in recent decades?

Prevalence

Dr Jayawickrama in his paper states:

*Today, a Constitutional Court is a feature common to nearly all contemporary constitutions, whether in Europe, East Asia, Africa, Latin America or in the Russian Federation.*¹⁵

It is certainly true that, since the establishment (or re-establishment) of constitutional courts in Austria, Germany and Italy between 1945 and 1956, this institution has become a global phenomenon. The spread of constitutional courts began in earnest with the start of the so-called ‘third wave of democratisation’ in the early 1970s, bringing transitions to electoral democracy in Portugal and Spain (and later Greece), Latin America and Asia, Central and Eastern Europe, Russia, and African states from the late 1970s to the 1990s. Indeed, the phenomenon is also known as the “third wave of constitutional justice”.¹⁶ A striking aspect is the influence of Germany’s Constitutional Court as a model, which, as Tom Ginsburg notes, is “arguably the most influential court outside the US in terms of its institutional structure and jurisprudence.”¹⁷ In many cases the institutional model of the Court was directly emulated (e.g. in Spain, South Korea, many Central and Eastern European states, and Russia¹⁸) or indirectly replicated (e.g. Indonesia and Thailand, taking the South Korean Constitutional Court as a template¹⁹).

As Sujit Choudhry has observed, a constitutional court is now “an expected component of new democracies”.²⁰ Constitutional courts have become a highly popular institutional form for strong judicial review in new constitutions of the post-war era,²¹ especially in Europe, where among the European Union’s 28 Member States alone, 16

¹⁵ Jayawickrama, ‘Establishing a Constitutional Court’ (n 1) 6.

¹⁶ The second wave of constitutional justice corresponds to the post-war second wave of democratisation, with the establishment of constitutional courts in Germany and Italy. The first wave of constitutional justice preceded the first wave of democratisation, dating to the establishment in 1920 of the constitutional courts of Austria and Czechoslovakia. See e.g. F. Biagi, ‘The Constitutional Courts as the Guardians of “Substantive” Transitions: The Cases of Italy, Spain and the Czech Republic’, VIIIth World Congress of the International Association of Constitutional Law, Mexico City, 6-10 December 2010, p.3.

¹⁷ T. Ginsburg, ‘The Global Spread of Constitutional Review’ in A. Caldeira, R.D. Kelemen and K.E. Whittington (eds.), *The Oxford Handbook of Law and Politics* (Oxford University Press, 2008) 85–6.

¹⁸ D.P. Kommers, J.E. Finn and G.J. Jacobsohn, *American Constitutional Law: Essays, Cases, and Comparative Notes*, Vol. 1 (Rowman & Littlefield, 2009) 71.

¹⁹ See A. Harding and P. Nicholson (eds.), *New Courts in Asia* (Routledge, 2011) Chapters 7–8.

²⁰ S. Choudhry, *Constitutional Courts After the Arab Spring* (Center for Constitutional Transitions at NYU Law, International IDEA, 2014) 16 www.idea.int/sites/default/files/publications/constitutional-courts-after-the-arab-spring.pdf.

²¹ A. Stone Sweet, ‘Constitutions and Judicial Power’ in D. Caramani (ed.), *Comparative Politics* (3rd edn, Oxford University Press, 2014) 160.

have constitutional courts.²² Globally, the constitutional courts of Germany, and after 1989, those of Hungary, South Africa and Colombia, have garnered significant attention from lawyers and policymakers alike due to the way in which they carved out a much more expansive role for themselves in governance, especially regarding constraint of political power and the protection of fundamental rights.

However, it is important to emphasise that outside Europe, the clear majority of democracies that have emerged worldwide since the 1970s have *not* opted for this model. This is true of Latin America, Africa, and Asia, despite the misleading impression given by the fact that, with the exception of the Indian Supreme Court, the most well-known courts in each region are all constitutional courts (those of Colombia, South Africa, and South Korea). In these regions, instead of establishing a constitutional court, many states after authoritarian rule or conflict have preferred to retain the existing supreme court (e.g. Philippines, Uruguay, Bolivia), or to reform it by installing a new constitutional chamber (e.g. Costa Rica, Estonia, Nepal), adding new powers or changing its jurisdiction (e.g. Brazil), or simply purging its authoritarian-era membership (e.g. Argentina).

Indeed, looking across ‘third wave’ and younger democracies outside Europe, there are only rare geographical clusters of constitutional courts (e.g. in East Asia²³ or West Africa²⁴). For instance, in very recent constitutional reform processes, although a Constitutional Court is envisaged in the Tunisian Constitution of 2014 (but not yet established), the drafters of Nepal’s 2015 Constitution ultimately opted to establish a constitutional chamber in the existing Supreme Court, while the drafters of Kenya’s 2010 Constitution opted to establish a new Supreme Court, with broad jurisdiction over both constitutional and non-constitutional matters, rather than create a constitutional court.²⁵ This is an important point to bear in mind, as it guards against any view that a constitutional court is the only judicial reform option for Sri Lanka.

Purpose

There are various possible reasons why constitutional courts have become so popular. For lawyers, a “powerful confluence of forces”²⁶ is presented as supporting the establishment of such a body, which include both functional and symbolic reasons, such as:

- (a) The need for legal certainty and efficiency in a new constitutional order;²⁷
- (b) The need for a court untainted by links to the previous authoritarian regime;

²² These are Austria, Bulgaria, Croatia, Czech Republic, Estonia, Germany, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia.

²³ Indonesia, Mongolia, and South Korea.

²⁴ Niger, Senegal, and Sierra Leone.

²⁵ See more details in the author’s report, *The Judiciary and Constitutional Transitions* (International IDEA and International Development Law Organization, 2016) 13–14.

²⁶ D. Horowitz, ‘Constitutional Courts: A Primer for Decision Makers’ in L. Diamond and M. Plattner (eds.), *Democracy: A Reader* (Johns Hopkins University Press, 2009) 184.

²⁷ See e.g. Chapter 2, V. Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press, 2009).

- (c) Concerns that existing supreme courts will not act to support democratic institutions and values;
- (d) The need for a more efficient method of ascertaining the constitutionality of laws and State action (by permitting such matters to be addressed at first instance rather than on appeal);
- (e) A superior capacity to address political questions;
- (f) The need to insulate the ordinary judiciary from politicisation; and
- (g) The symbolic importance of more clearly indicating that the state is committed to the rule of law and rupture with the authoritarian past.²⁸

The enduring perception of a constitutional court's capacity to deliver these goods has raised it to a pre-eminent design option among many scholars, constitution-makers, and policymakers.

Scholars such as Tom Ginsburg speak of fundamental contextual drivers for the establishment of constitutional courts, with the dominant thesis being 'political insurance'.²⁹ This theory suggests that where the degree of power among political actors is uncertain they tend to pursue institutional configurations that disperse power and to construct bulwarks against the abuse of executive or state power in the new democratic regime. This is to 'insure' against the loss of power, both immediate (especially for authoritarian actors in the initial transition) and in the future (through electoral losses and rotations of power) by entrenching the constitutional bargain struck in the move from authoritarian to democratic rule.³⁰ Samuel Issacharoff goes so far as to deem these courts as "integral structural parts of the moment of original constitutional creation", which imposes a duty on such courts, not to simply guard the original pact, but to "reinforce the functioning of democracy more broadly".³¹ This view of design tends to characterise constitutional courts as essential to 'completing' the constitution incrementally after its adoption, by resolving matters deliberately fudged in the constitutional text, and to keep democratic development 'on track'.

Other theories suggest alternative reasons for the growing popularity of constitutional courts, such as a post-war rights-based popular demand for limiting majoritarian democracy ('ideational' theory), the need for such an institution in federal states ('multi-level governance' theory), and the emulation or adoption of constitutional models through the influence of foreign legal systems, the desire to attract foreign investment, or to gain acceptance or legitimacy on the international stage ('diffusion' theory).³² Some research, on states such as Indonesia, simply suggests that political

²⁸ Choudhry, *Constitutional Courts* (n 20) 19–20.

²⁹ See e.g. T. Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003).

³⁰ Issacharoff provides a useful summary in S. Issacharoff, 'Constitutional Courts and Democratic Hedging' (2011) 99 *Georgetown Law Journal* 961, 985–6.

³¹ *Ibid.* 986. See also S. Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press, 2015) 225.

³² T. Ginsburg and M. Versteeg, 'Why Do Countries Adopt Constitutional Review?', (2014) 30 *Journal of Law, Economics and Organization* 587.

actors believed that they would be able to control the new institution.³³ Under Galligan and Versteeg's view of a constitution as a useful coordinating mechanism to ensure effective government,³⁴ a constitutional court may simply be viewed as central to its success in this regard. Wider international trends and political considerations also appear important. As one group of scholars put it:

*Why have constitutional courts become so popular? The appeal is partly practical. Many countries have come to see judicial review as a mechanism for protecting democracy and human rights. The appeal is also political: In an era when appeals to many other forms of political legitimacy, such as communism and organic statism, have lost their attraction, the forms of constitutional democracy have become common currency.*³⁵

In Central and Eastern Europe in particular, Lach and Sadurski suggest the dominant mood was to avoid experiments, with the slogan of a "return to normalcy" indicating that "a 'normal' democratic system incorporates concentrated and centralised constitutional review best exemplified by German, Italian, Spanish and other (but not all) continental European constitutional courts."³⁶ As former President of the Hungarian Constitutional Court László Sólyom observed in 2003, the "very existence" of such courts "obviously served as a 'trade mark', or as a proof, of the democratic character of the respective country".³⁷ In all likelihood the establishment of a constitutional court in states worldwide has been motivated by a mixture of all of these reasons.

THE POTENTIAL OF A CONSTITUTIONAL COURT

What, overall, do we expect a constitutional court to achieve in Sri Lanka? This section considers this question in a broad-brush analysis of the Sri Lankan context and comparative experiences.

Factors supporting the establishment of a constitutional court in Sri Lanka

A number of factors in Sri Lanka support the establishment of a constitutional court, and suggest that it may be a viable institution.

The most important is the ongoing constitution-drafting process, which, though troubled, unclear in its trajectory, and falling short of a 'rupture' with the old order, appears to seek to re-entrench and strengthen democratic values after a long period of strongman government and conflict. As discussed above, a constitutional court could

³³ See, e.g. Hendrianto, 'Institutional Choice and the New Indonesian Constitutional Court' in Harding and Nicholson (eds.), *New Courts in Asia* (n 19).

³⁴ See D. Galligan and M. Versteeg, 'Theoretical Perspectives on the Social and Political Foundations of Constitutions' in D. Galligan and M. Versteeg (eds.), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 23ff.

³⁵ Kommers, Finn and Jacobsohn, *American Constitutional Law* (n 18) 24.

³⁶ K. Lach and W. Sadurski, 'Constitutional Courts of Central and Eastern Europe: Between Adolescence and Maturity' in Harding and Leyland (eds.), *Constitutional Courts* (n 12) 69.

³⁷ L. Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary' (2003) 18 *International Sociology* 133, 134.

provide a court without links to the previous regime, and help to mark a form of departure from that regime. On a functional level, such a court could provide a more efficient method of ascertaining the constitutionality of laws and State action (by permitting such matters to be addressed by a court dedicated exclusively to constitutional review), and achieve more effective handling of difficult political questions. A constitutional court, if appropriately constituted (see below) could obviate concerns that existing superior courts will not act to support renascent democratic institutions and values, and provide a central force in driving positive reform in the State.

The latter point above is particular pressing given Dr Jayawickrama's discussion of an erosion of judicial integrity, a lack of accountability, and corruption within the Sri Lankan judiciary, including highly questionable decisions by the existing Supreme Court that have validated undemocratic and unconstitutional practices.³⁸ A new institution, in the form of a constitutional court, may be the most effective and quickest way of ensuring adequate judicial guardianship of the new democratic constitution.

Sri Lanka also has the advantage of being able to draw on its constitutional history in building a constitutional court. Dr Jayawickrama in his paper refers, for instance, to the quarter-century experience of strong judicial review (i.e. the power to assess the constitutional validity of laws and State action) and judicial commitment to the rule of law under the 1946 Constitution,³⁹ and posits the short-lived Court of Appeal established in 1971 as a potential model to draw on in designing a constitutional court today. Many other states with constitutional courts have lacked this advantage. For example, the idea of a constitutional court was so alien to Mongolian legal culture that its name (*Tsets*) was borrowed from the word for a judge in traditional wrestling.⁴⁰ The "narrative of continuity"⁴¹ governing Sri Lanka's current constitutional reform process could be an advantage, allowing a constitutional court to reach back to islands of good adjudication in the past. That said, it is also important to avoid the trap of undue 'constitutional nostalgia'; i.e. viewing previous Sri Lankan courts with rose-tinted glasses and setting this as a benchmark for a new constitutional court, or tying it too closely to the adjudicative frameworks of the past.

Common perceptions of the capacities of constitutional courts

There is a strong tendency among scholars and policymakers to overestimate and overstate the capacities of constitutional courts to act as engines of transformation by guarding the Constitution, the rule of law, democracy, and human rights.

The expectations placed on constitutional courts in young democracies (as well as long-established democracies) have become increasingly burdensome. The range and nature of matters on which courts are designed or expected to adjudicate has become

³⁸ Jayawickrama, 'Establishing a Constitutional Court' (n 1) 17–19.

³⁹ *Ibid.* 11

⁴⁰ T. Ginsburg, 'Constitutional Courts in East Asia: Understanding Variation' in Harding and Leyland (eds.), *Constitutional Courts* (n 12) 304.

⁴¹ Welikala, 'The Idea of Constitutional Incrementalism' (n 5) 12. We see this process in other courts, such as the Brazilian Supreme Court's citation of robust judgments handed down during previous democratic period's in the State's history. See T.G. Daly, *The Alchemists: Questioning Our Faith in Courts as Democracy-Builders* (Cambridge University Press, forthcoming) Chapter Five.

increasingly vast, going far beyond the familiar functions clarifying the omissions and ambiguities in the Constitution, vindicating fundamental rights, and—an issue that is not focused on in Dr Jayawickrama’s paper—adjudicating on separation of powers disputes (and federal issues in many states).

In many states courts have been endowed with additional formal powers, compared to the German constitutional court for instance. These include the power to address not only the validity of enacted legislation, but also ‘legislative omission’, where the legislature has left ‘gaps’ in the legal order by failing to enact legislation or adequate legislation (e.g. Poland),⁴² to assess the constitutionality of international treaties (e.g. Tunisia), and to monitor the legislative process as virtual ‘third chambers’ of parliament (e.g. Hungary). Constitutional courts are also increasingly endowed with the power to issue advisory opinions as well as binding judgments (e.g. South Africa, Benin).⁴³ Some constitutional courts have developed the power to hold public hearings concerning specific cases, at which political, civil society and expert actors can deliberate (e.g. Colombia).⁴⁴ We increasingly see courts viewed as ‘positive’ legislators as well as merely ‘negative’ legislators.⁴⁵

A particularly difficult burden is the increasing requirement on courts to adjudicate on social and economic rights (including fully justiciable rights in a growing number of states), with a wide range of such rights in the Portuguese Constitution of 1976, Latin American constitutions (e.g. Brazil), most post-Communist states, the totemic South African Constitution of 1996, and, more recently, the ambitious ‘transformational’ constitutions adopted in states such as Kenya, Nepal, and Zimbabwe since 2010. This is discussed at more length at pp.28–29 below.

Other challenges, which are particularly pressing in young, restored, and post-conflict democracies, arise from the constitutional court’s role in addressing ‘transitional justice’ questions, such as assessing the validity of amnesty laws or the validity of trials of former regime officials, and assessing the constitutionality of laws passed by the previous regime. Increasingly, courts are also called on to assess the very constitutionality of constitutional amendments. These all place a heavy burden on a constitutional court in a state which has adopted a new democratic constitution after a period of undemocratic rule or conflict.

In many states (both mature democracies and younger democracies), adjudication by constitutional courts has started to expand beyond purely legal matters, and policy matters, to matters of ‘pure’ politics, encompassing the constitutionality of convictions for crimes against humanity, macroeconomic policy, and foreign policy.⁴⁶ Other expansive perceptions of constitutional courts’ roles, which can be gleaned from existing

⁴² A useful summary is found in K.B. Brown and DV Snyder, *General Reports of the XVIIIth Congress of the International Academy of Comparative Law* (Springer, 2011) 560ff.

⁴³ See A.K. Abebe and C.M. Fombad, ‘The Advisory Jurisdiction of Constitutional Courts in Sub-Saharan Africa’ (2013-2014) 46 *George Washington International Law Review* 55.

⁴⁴ See M.J Cepeda-Espinosa, ‘Readings on the Colombian Constitutional Court (13 February 2012) <http://bit.ly/2nzOrE3>.

⁴⁵ See generally, AR Brewer-Carías (ed.), *Constitutional Courts as Positive Legislators: A Comparative Law Study* (Cambridge University Press, 2013).

⁴⁶ R. Hirschl, ‘The New Constitutionalism and the Judicialization of Pure Politics Worldwide’ (2006-2007) 75 *Fordham Law Review* 721.

scholarship on the role of courts in democracy-building in post-authoritarian states, include: delivering on the transformational promises of the new constitution;⁴⁷ fostering a new legal and political culture wedded to democratic constitutionalism;⁴⁸ providing a focal point for ‘a new rhetoric of state legitimacy, one based on respect for democratic values and rights’;⁴⁹ and educating the citizenry on ideals of representative democratic government, thereby ensuring the informed citizenry on which the principle of popular sovereignty rests.⁵⁰

Avoiding inflated expectations: Comparative experiences

Clearly, the expanding raft of expectations and tasks placed on constitutional courts in post-authoritarian and post-conflict settings would be difficult for any institution to meet. This is especially so for a new constitutional court established under a new democratic constitution, which in its early years will be not only carrying out the functions assigned to it, but also building itself as an institution, in terms of practicalities (e.g. drawing up its rules of court), jurisdiction (e.g. interpreting the extent of its powers of review under the Constitution), and its place within the overall political system (namely, attempting to carve out a meaningful role for itself in governance, and to achieve the respect, obedience, and cooperation of other organs of State).

With the above in mind, it is vitally important to be realistic about the prospects of a constitutional court in Sri Lanka. It is true that constitutional courts worldwide are “consequential courts”, in the sense that they can have a real impact on governance: vindicating free speech and freedom of assembly; upholding due process rights; protecting the separation of State powers in the constitutional text; curtailing misuse of presidential decree powers and emergency powers; blocking presidential attempts to remove term-limits, shaping the constitutional framework; and acting visibly to uphold the rule of law.⁵¹

However, cautionary tales abound. The Hungarian and Russian constitutional courts of the 1990s are commonly viewed as having acted too assertively and having overplayed their hands, which led to a curtailment of their powers. The Hungarian court, which had been highly active in vindicating fundamental rights, invalidating rafts of Communist-era and newly-passed undemocratic laws, and inserting itself into the legislative process, was diminished in the late 1990s through refusal to appoint assertive judges for a second term, and later, curtailment of its jurisdiction by a new Basic Law of

⁴⁷ See O. Vilhena Vieira, F. Viljoen and U. Baxi (eds.), *Transformative Constitutionalism: Comparing the Apex Courts of Brazil, India and South Africa* (Pretoria University Law Press, 2013).

⁴⁸ See e.g. D. Grimm, ‘Constitutional Adjudication and Democracy’ in D. Fairgrieve (ed.), *Judicial Review in International Perspective*, Vol. 2 (Kluwer Law International, 2000) 142: “The independent judiciary may protect them by helping gradually to develop among citizens and legislators liberty-protecting habits based in part upon their expectation that liberty-infringing laws will turn out not to be laws.”

⁴⁹ A. Stone, ‘Constitutional Courts’ in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 827.

⁵⁰ See I. Stotzky, ‘The Tradition of Constitutional Adjudication’ in I. Stotzky (ed.), *Transition to Democracy in Latin America: The Role of the Judiciary* (Westview Press, 1993) 349.

⁵¹ See e.g. D. Kapiszewski, G. Silverstein and R.A. Kagan (eds.), *Consequential Courts: Judicial Roles in Global Perspective* (Cambridge University Press, 2013); W. Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer, 2008); and S. Gloppen, R. Gargerella and E. Skaar (eds.), *Democratization and the Judiciary: The Accountability Function of Courts in New Democracies* (Routledge, 2004).

2012 and annulment of all of its decisions prior to March 2013.⁵² The Russian Court's challenging of President Yeltsin's suspension of parliament by decree led to its dissolution in 1993, and when reanimated, it chose to focus mainly on rights matters.⁵³

A closer look at the commonly perceived 'successful' constitutional courts of Germany, South Africa and Colombia also reveals a more nuanced reality. The Federal Constitutional Court of Germany made a big impact from its establishment in 1951, and is often credited as one of the main institutions to help build West Germany's post-war democracy, not least by strongly vindicating key democratic rights such as free speech and freedom of assembly, addressing the validity of Nazi-era laws, and shaping the electoral system, especially the legal framework governing political parties.⁵⁴

However, while the Court no doubt played a significant role, it enjoyed very significant advantages that have been often absent in other states: a "rapid and robust economic revival";⁵⁵ direct oversight by Allied powers in the early years; a clear commitment to democratic governance by the main political forces; successive governments' strong desire to rehabilitate the state in the international arena and bind it to a coalition of Western liberal democracies;⁵⁶ a functioning competitive electoral system; and strong public support for the Court at critical junctures (although a lot of its work went unnoticed);⁵⁷ and a legal tradition that had long placed binding law at the very centre of governance (the Nazi era excepted). In addition, nuanced recent analyses of the Court⁵⁸ show that it took decades for the German public to view the Court as a guardian of fundamental rights and democracy, and the Court also issued some very poor judgments in the 1960s and 1970s, for instance; failing to censure the State for intimidation of the leading *Der Spiegel* newspaper, and upholding sweeping surveillance powers enacted by the State.⁵⁹

The Colombian and South African constitutional courts, similarly, can lay claim to a very significant and innovative jurisprudence on fundamental rights (including civil and political rights, and social and economic rights), and on separation of powers issues and guarding democratic values. However, neither court has been able to fully drive positive change on its own: despite the assertiveness of the Colombian Court, the political system has not changed its bad habits of failing to respond to the demands of significant swathes

⁵² See K.L. Scheppele, 'Democracy by Judiciary (Or Why Courts Can Sometimes Be More Democratic than Parliaments)' in W. Sadurski, M. Krygier and A. Czarnota (eds.), *Rethinking the Rule of Law in Post-Communist Europe: Past Legacies, Institutional Innovations, and Constitutional Discourses* (Central European University Press, 2005); and K.L. Scheppele, 'Understanding Hungary's Constitutional Revolution' in A. von Bogdandy and P. Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Bloomsbury Publishing, 2015).

⁵³ See K.L. Scheppele, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe' (2006) 154 *University of Pennsylvania Law Review* 1757, 1791ff.

⁵⁴ See e.g. J. Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court, 1951-2001* (Oxford University Press, 2015) Chapters 1-3.

⁵⁵ D.P. Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany* (1st edn, Duke University Press, 1989) 292.

⁵⁶ Collings, *Democracy's Guardians* (n 54) 3.

⁵⁷ *Ibid.* Chapters 1-2.

⁵⁸ See Collings, *ibid.* and M. Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford University Press, 2015).

⁵⁹ The *Spiegel* judgment 20 BVerfGE 162 (1966); and the *Emergency Laws* judgment 30 BVerfGE 1 (1970). See Collings, *Democracy's Guardians* (n 54) 80-103.

of the electorate and the public remains disillusioned by the nature and pace of change.⁶⁰ In South Africa, although the Constitutional Court has rightly garnered attention for its commitment to the democratic Constitution—as seen in its recent damning judgment in the *Nkandla* corruption case against President Jacob Zuma, holding that he had violated the Constitution by failing to repay government money spent on his private residence⁶¹—the Court has also been strongly criticised for some decisions; for example, for upholding the constitutionality of a ban on ‘floor-crossing’ by politicians (i.e. defecting to another party while retaining one’s seat), which was viewed as a prerequisite to fragmenting the ANC party’s dominance and ensuring meaningful multi-party competition,⁶² and for taking a less robust approach to upholding social and economic rights than other courts, such as the Colombian Constitutional Court.⁶³

It is important, too, to note that all of these courts have faced very significant opposition, intimidation, and sustained attacks by governments and political figures since their inception (although attacks against the German Court are now very rare, it faced fierce political opposition in its early decades).⁶⁴ The German and Colombian courts have been lucky in enjoying significant public support, which has allowed them to weather attacks.⁶⁵ By contrast, the South African Constitutional Court did not enjoy widespread public support for its first decade and has had to tread carefully in a political environment dominated by the increasingly populist ANC party.⁶⁶ It is also important to note that most constitutional courts worldwide occupy a middle ground between the likes of the ‘successful’ Colombian Court and the ‘failed’ Russian Court. From Latvia to South Korea to Senegal most constitutional courts make a contribution to democratic governance, but it is often not dramatic, and it is not possible to categorically state that an appropriately reformed or reconstituted supreme court could not achieve the same results (discussed on p.31 below). Success must be seen in relative terms.

Overall, the observation that constitutional adjudication in Central and Eastern Europe (where most states contain constitutional courts) has been “a mixed bag of undoubtedly courageous and democracy-strengthening decisions as well as of decisions which seem like a set-back to these values”⁶⁷ appears to be universally applicable across world regions. It reflects a more general tendency to expect too much of courts. In Latin America, which includes states with constitutional courts and supreme courts, although there is a sense that “there have been remarkable advances in the consolidation of the

⁶⁰ See Daly, *The Judiciary and Constitutional Transitions* (n 25) 27.

⁶¹ *Economic Freedom Fighters v. Speaker of the National Assembly and Others; Democratic Alliance v. Speaker of the National Assembly and Others* [2016] ZACC 11.

⁶² *Ibid.* 351–64.

⁶³ See U. Baxi, ‘Preliminary Notes on Transformative Constitutionalism’ in Vilheira, Viljoen and Baxi (eds.), *Transformative Constitutionalism* (n 47) 46.

⁶⁴ See Collings, *Democracy’s Guardians* (n 54) 15–26; R Rodríguez-Raga, ‘Strategic Deference in the Colombian Constitutional Court, 1992–2006’ in G. Helmke and J. Ríos-Figueroa (eds.), *Courts in Latin America* (Cambridge University Press, 2011) 85–6; and S. Gardbaum, ‘Are Strong Constitutional Courts Always a Good Thing for New Democracies?’ (2015) 53 *Columbia Journal of Transnational Law* 285, 288

⁶⁵ See Collings, *Democracy’s Guardians* (n 54) Chapters 1 and 2; and S. Issacharoff, ‘The Democratic Risk to Democratic Transitions’, (2013) NYU Public Law and Legal Theory Working Papers, Paper 418, 17.

⁶⁶ See T. Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press, 2013).

⁶⁷ Lach and Sadurski, ‘Constitutional Courts’ (n 36) 79.

rule of law and constitutionalism”,⁶⁸ there remains a palpable air of disappointment that judges are not “blazing the way to robust constitutional democracy in the way many hoped they might.”⁶⁹

Key factors that could hinder a constitutional court in Sri Lanka

The clear message from the above is that context is crucial in assessing the potential of a constitutional court to act effectively. A number of key contextual factors in Sri Lanka could hinder the functioning of a constitutional court. Retention of the hyper-presidential system, in particular, would tend to leave little institutional space for a separate site of constitutional power, and even its replacement may not fully do away with political habits developed over decades in a system which has hoarded excessive power at one site. Failure to resolve the federal-unitary question could leave such a court in the impossible position of calibrating the balance of power between Sinhala and Tamil nationalists, and deciding on highly difficult political disputes best left to the arena of politics. More generally, alongside the discussion above concerning the tendency to overstate the capacities of constitutional courts, Dr Welikala’s strong argument—that the best approach in the current climate of faltering reform is to embrace “constitutional incrementalism” rather than dramatic change⁷⁰—should colour our expectations of what a constitutional could achieve, especially in its early years.

COMPOSITION, POWERS, AND STANDING

Continuing the discussion of the potential of a constitutional court for Sri Lanka, this section turns from the broader considerations above to more specific practical questions concerning how such a court might function. The section follows up on questions raised in Dr Jayawickrama’s paper regarding three key design issues: composition, powers, and standing.

Composition

The possible composition could become the most vexed question surrounding a constitutional court for Sri Lanka. The following issues appear particularly pressing.

(i) Fixed term or permanent appointment?

In his paper, Dr Jayawickrama appears to envisage appointment of constitutional court judges for a fixed-term of possibly five years.⁷¹ Whether judges are appointed for a fixed-term or permanently is a significant question. On a comparative basis it is common for constitutional court judges to be appointed for a single fixed-term or a renewable fixed-term, whereas supreme court judges tend to be appointed for a permanent tenure. On a practical basis, fixed terms can make agreement concerning judicial appointments easier

⁶⁸ J Couso, ‘Models of Democracy and Models of Constitutionalism: The Case of Chile’s Constitutional Court, 1970-2010’ (2010-2011) 89 *Texas Law Review* 1517, 1520.

⁶⁹ Kapiszewski, Silverstein and Kagan (eds.), *Consequential Courts* (n 51) 1.

⁷⁰ Welikala, ‘The Idea of Constitutional Incrementalism’ (n 5).

⁷¹ Jayawickrama, ‘Establishing a Constitutional Court’ (n 1) 13.

to achieve. However, fixed terms, if not staggered, can lead to significant jurisprudential shifts in the court upon renewal of its membership. Fixed terms can also lead to manipulation, as seen in Hungary, where the government refused to renew judges of the 'first' Constitutional Court for a second term, seemingly due to unhappiness at their assertiveness.⁷²

(ii) Inclusion of foreign judges

Drawing on the experience of the Hong Kong Final Court of Appeal, which contains judges from Hong Kong and other common law jurisdictions, Dr Jayawickrama in his paper suggests that the composition of a Constitutional Court of Sri Lanka might take a similar approach:

*If the Hong Kong model is adopted for the Constitutional Court of Sri Lanka, the participation of foreign judges conversant with the common law, as well as the international law of human rights, drawn from jurisdictions such as Canada, South Africa and India, will undoubtedly enhance the credibility of the highest court in a country that is projected to be the commercial hub of South Asia.*⁷³

It may be noted also that the inclusion of judges from foreign jurisdictions has been used in jurisdictions outside the common law world, especially post-conflict jurisdictions, such as Bosnia-Herzegovina and Kosovo. However, three key points might be raised here. First is the practical sticking point that the current Sri Lankan government does not appear to be too keen on the inclusion of foreign judges on judicial bodies.⁷⁴ Calls for inclusion of foreign judges on the war crime accountability bodies such as the Judicial Mechanism, have been rebuffed on the basis that this would require a change to Sri Lanka's legislation concerning the judiciary.⁷⁵ It is worth noting that political opposition to the presence of foreign judges on the Constitutional Court has also recently hardened in states such as Bosnia-Herzegovina.⁷⁶

Second, there are significant functional questions such as how many foreign judges would be involved (one sits on the Hong Kong Final Court of Appeal, while three sit on the Constitutional Courts of Bosnia-Herzegovina and Kosovo); whether they would sit on every case (in Bosnia-Herzegovina and Kosovo they sit on every case, whereas in Hong Kong they sit only on selected cases); what their terms of office would be; and enduring questions concerning how well such judges can understand the local context and whether they might be too deferential to local judges; and how the presence of such judges could in fact cut against the court's legitimacy.⁷⁷ Training, 'team-building', and public information campaigns clarifying their role would be key issues to consider here.

⁷² Scheppele, 'Democracy by Judiciary' (n 52) 53-4.

⁷³ Jayawickrama, 'Establishing a Constitutional Court' (n 1) 13-14.

⁷⁴ Balachandran (n 6) states: "The Sirisena-Wickremesinghe government has been consistently saying that it may use foreign expertise in forensics, but will not accept foreign judges."

⁷⁵ Ibid.

⁷⁶ D. Kovacevic, 'Bosnian Serbs Threaten Showdown over Foreign Judges' Balkan Insight 20 December 2016 <http://bit.ly/2gY1g3h>.

⁷⁷ For a lucid treatment of all of these questions, see S.N.M. Young and Y. Ghai (eds.), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2013).

Third is the question of where such foreign judges might come from. As well as jurisdictions such as Canada, South Africa and India, judges from common law jurisdictions in Ireland, the UK, and other Asian and African common law systems might be considered. Indeed, Jayawickrama cites courts in Tanzania, Zambia, and Zimbabwe in his paper, and former judges of the African Court of Human and People's Rights from common law systems may be considered.⁷⁸ There might also be merit in considering the inclusion of a foreign judge (or judges) from a civil law state, who has significant knowledge of the operation of the constitutional court in his or her state. However, this may be a step too far for the current government and raises the risks surrounding lack of understanding of the local context and legal system.

(iii) Inclusion of academics

Dr Jayawickrama also suggests the possibility of including academics in the membership of a Sri Lankan constitutional court. This may be a less problematic way of addressing the lack of knowledge of international human rights law, and suitable comparative law, among the existing Sri Lankan judiciary (see further discussion below at pp.30–31).

(iv) Representation of minorities or nations

Another significant question is the possible formal allocation of places to minority or national communities on a constitutional court for Sri Lanka. This comes to the fore in the context of the Tamil National Alliance (TNA)'s calls for devolution and a power-sharing settlement,⁷⁹ but would remain an issue—perhaps even more so—if the current unitary form of the state is retained. In other post-conflict states such as Bosnia-Herzegovina specific allocation of seats on the Constitutional Court has been used to accord recognition to the three principal peoples within that state. In the United Kingdom the developing devolution settlements in Scotland, Wales, and Northern Ireland have led to an expectation that each nation in the kingdom is represented adequately on the Court.⁸⁰ However, the risk of such an approach is that the Court is not viewed as a united body, but as a 'quasi-parliament' with separate factions, and with members considering the needs of their own community rather than the needs of Sri Lanka as a whole.

Powers and jurisdiction

As discussed above, the range and nature of the powers conferred on constitutional courts worldwide varies, but virtually all constitutional courts share the core power to invalidate legislation deemed incompatible with the Constitution.

(i) The power to strike down laws

Leading scholars count the competence to review legislation as the most crucial power of the courts.⁸¹ However, some scholars, such as Stephen Gardbaum, have recently argued

⁷⁸ By way of example, Justice Augustino Ramadhani, former president of the African Court on Human and Peoples' Rights, hails from Tanzania and is also a former Chief Justice of Tanzania.

⁷⁹ See Welikala, 'The Idea of Constitutional Incrementalism' (n 5) 8–9.

⁸⁰ See e.g. O Bowcott, 'Call for Welsh representative on UK supreme court' *The Guardian* 27 March 2012 <http://bit.ly/2nRDF81>.

⁸¹ Lach and Sadurski, 'Constitutional Courts' (n 36) 53.

that this power raises the possibility of tensions and conflict between the courts and the representative branches of government, thus endangering judicial independence.⁸² While this is often true, some tension or conflict is unavoidable in a system with strong judicial review and only the most quiescent court could escape political censure. Even then, Latin American scholars in particular tend to contest the value of caution and restraint, suggesting that strategic deferential behaviour in order to develop judicial power can be quite costly for courts, leading to perceptions that the court is partisan or reluctant to protect fundamental rights, and thereby hampering rather than furthering institution-building.⁸³ Although systems of weak judicial review function rather well in states such as the UK and New Zealand, strong judicial review appears to be a crucial power in any state attempting to achieve a more democratic system of government, by allowing the courts to forcefully block laws that cut against fundamental rights and the separation of powers in particular. That said, it is a power that must be wielded with care.

(ii) The power to suspend a declaration of invalidity

In its simplest form, the power to declare a law unconstitutional, in the sense of never having been a valid law enacted under the Constitution, with *ex tunc* as well as *ex nunc* effects, is the ‘nuclear option’ for a constitutional court. Many constitutional courts now have the power to modulate the effect of their decisions. Dr Jayawickrama points to the South African Constitutional Court’s power under Article 172 of the Constitution to suspend the declaration of invalidity of a law “for any period and on any conditions, to allow the competent authority to correct the defect”.⁸⁴ It is also possible to do so in states such as Canada, and scholars proposing its adoption in Ireland argue that it holds out the possibility for a more “carefully calibrated” response to unconstitutional laws where their immediate invalidation would entail unpalatable consequences for legal continuity, and which leaves the choice of remedying the issue with the State organs most suited to the task.⁸⁵

(iii) Particularly problematic powers

Dr Jayawickrama’s view of abstract judicial review of Bills as “intrinsically flawed”⁸⁶ finds ample support in existing analyses of constitutional courts. The power of abstract review of the constitutionality of Bills is viewed as tending to ‘politicise’ the court’s work, requiring it to effectively act as a third legislative chamber when opposition politicians seek review to frustrate the government’s legislative agenda, as seen in Romania, among other states.⁸⁷ On a practical level, abstract review is a particularly tricky task. In the common law world the author’s years at the Supreme Court of Ireland, which is empowered to conduct abstract review of the constitutionality of Bills exclusively when requested to do so by the President before he or she signs it into law,⁸⁸ left him in no doubt as to the burden such review places on a court, requiring the contemplation of an

⁸² Gardbaum, ‘Strong Constitutional Courts’ (n 64).

⁸³ See e.g. J. Couso and L. Hilbink, ‘From Quietism to Incipient Activism: The Institutional and Ideological Roots of Rights Adjudication in Chile’ in Helmke and Ríos-Figueroa (eds.), *Courts in Latin America* (n 64).

⁸⁴ Jayawickrama, ‘Establishing a Constitutional Court’ (n 1) 12.

⁸⁵ See E. Carolan, ‘The relationship between judicial remedies and the separation of powers: collaborative constitutionalism and the suspended declaration of invalidity’ (2011) 46 *Irish Jurist* 180.

⁸⁶ *Ibid.* 11. He uses the term “anticipatory review” rather than “abstract review”.

⁸⁷ Lach and Sadurski, ‘Constitutional Courts’ (n 36) 69.

⁸⁸ Article 26, Constitution of Ireland.

array of hypotheticals and no full certainty as to how a Bill would be implemented in practice.

Comparative analysis also cautions against any urge to accord an expansive role to a constitutional court in directly addressing political criminality and corruption. For instance, the 1988 Federal Constitution of Brazil, as well as reforming the Supreme Federal Court to operate more akin to a constitutional court in many respects, also made it a first instance criminal trial court for holders of high office. That jurisdiction has placed the Court in a highly difficult position, required to address large-scale scandals such as the so-called *mensalão* political scandal concerning illegal vote-buying in Congress (which almost toppled President Lula da Silva's government). The Court's raft of guilty verdicts represented for some a positive sign of judicial independence; for others, a negative politicisation of the Court and unwarranted increase in its powers.⁸⁹

(iv) The impossibility of predicting how a court would use its powers

In many ways it can be hard to predict what a new court will do with its powers. The Hungarian Constitutional Court of the 1990s made more expansive use of its power to address 'legislative omission', for instance, than the Brazilian Supreme Court did with a similar power.⁹⁰ Indeed, the range of powers accorded to a court does not appear to be a particularly important factor in predicting whether a court will engage in assertive action.⁹¹ Some courts with a large number of powers on paper, such as those in Ecuador and Venezuela, have been less effective than those with comparatively few powers, such as the Constitutional Tribunal of Spain or the Taiwanese Constitutional Court (a.k.a. the "Council of Grand Justices"). The Indonesian Constitutional Court has been much more assertive than political powers expected, or even designed it, to be. While this may have paid dividends for matters such as rights protection, it raises clear legitimacy issues as to whether the Court has exceeded its mandate.⁹²

Standing

Standing is a central issue to consider in the design of a constitutional court. In particular, Dr Jayawickrama's paper appears to take the position that individuals would have standing before such a court, where he states:

If the Constitution is supreme, as it should be, a citizen should be able to question the validity of any executive or legislative act (and that includes an act that is claimed to infringe a fundamental right) on the ground of inconsistency with any provision of the Constitution. It was possible to do so for 25 years under the 1946 Constitution.

⁸⁹ See e.g. C.M. Barbosa, 'The Brazilian Supreme Court: Between Activism and Judicial Responsibility' *International Journal of Constitutional Law Blog* 25 December 2012 <http://bit.ly/2nF3j0r>.

⁹⁰ Sadurski, *Rights Before Courts* (n 51) 19; and D. Kapiszewski, 'How Courts Work: Institutions, Culture and the Brazilian *Supremo Tribunal Federal*' in J. Couso, A. Huneeus and R. Sieder (eds.), *Cultures of Legality: Judicialization and Political Activism in Latin America* (Cambridge Studies in Law and Society, 2010) 72-3.

⁹¹ See generally Harding and Leyland (eds.), *Constitutional Courts* (n 12).

⁹² See Hendrianto, 'New Indonesian Constitutional Court' (n 33); and T. Roux, 'The South African Constitutional Court's Democratic Rights Jurisprudence: A Response to Samuel Issacharoff' (2014) 5 *Constitutional Court Review* 33, 49.

Lach and Sadurski identify “a clear correlation between the existence of an activist and powerful constitutional court and the availability of a direct complaint procedure”.⁹³ Similarly, the very open access to the Hungarian and Colombian constitutional courts, through an *actio popularis* mechanism, is viewed as a factor that has driven their unusually assertive jurisprudence.⁹⁴

(i) The spread of direct individual access

It is worth noting that until recent decades, direct individual access to the highest court was not a default design choice. In the 1960s, although direct individual access was relatively common in Latin America⁹⁵ it was a rarity in other world regions, including Europe. In European systems with constitutional courts, solely Austria and Germany had such a mechanism. In systems without provision for direct access, violations of individual rights could be addressed solely through indirect means, i.e. by other State actors (e.g. MPs or an ombudsman) bringing cases to the constitutional court.⁹⁶ In systems without concentrated constitutional review by a constitutional court, where the supreme court acts as the final constitutional authority (e.g. Ireland, US), individual access was, and still is, generally only possible on appeal.

Since the 1970s, and especially after the fall of Communist regimes from 1989 onwards, direct individual application systems have proliferated worldwide, to the extent that it is now present in over 40 states.⁹⁷ In Central and Eastern Europe, adoption of the system was encouraged by international actors such as the Council of Europe’s think-tank, the Venice Commission.⁹⁸ Introduction of individual access is currently being discussed in various countries which do not allow direct access by individuals to the Constitutional Court (e.g. Italy, Lithuania).⁹⁹

(ii) Direct individual access models worldwide

Various models of direct access exist, which range across open, intermediate, and restricted access. At one extreme is the highly open mechanism of *actio popularis*, found in Colombia and Hungary (before its removal by a new Basic Law in 2012), which permits an individual to seek abstract constitutionality review of an enacted law in the public interest, without any requirement to prove a personal interest in the case or personal damage. Intermediate models include: the individual suggestion, by which an individual

⁹³ Lach and Sadurski, ‘Constitutional Courts’ (n 36) 63.

⁹⁴ See A. Jakab and P. Sonnevend, ‘Continuity with Deficiencies: The New Basic Law of Hungary’ (2013) 1 *European Constitutional Law Review* 102, 122; and M.J. Cepeda-Espinosa, ‘Judicial Activism in a Violent Context: The Origin, Role, and Impact of the Colombian Constitutional Court’ (2004) 3 *Washington University Global Studies Law Review* 529, 553.

⁹⁵ See G. Gentili, ‘A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court’ (2010-2011) 29 *Penn State International Law Review* 705, 710-711.

⁹⁶ *Ibid.*

⁹⁷ H. Ekinci and M. Sağlam, *Individual Application to the Turkish Constitutional Court* (Constitutional Court of Turkey, 2015) p1 (hereinafter, ‘TCC Individual Application Guide’) 2.

⁹⁸ Gentili, ‘A Comparative Perspective on Direct Access’ (n 95) 708-709.

⁹⁹ See Gentili, *ibid.*; and D. Pūraitė-Andrikienė, ‘Individualus Konstitucinis Skundas kaip Veiksmingas Žmogaus Teisių Apsaugos ir Konstitucionalizmo Plėtros Instrumentas’ (2015) *Teisė* 96 (Eng. Individual Constitutional Complaint as an Effective Instrument for the Protection of Human Rights and Development of Constitutionalism).

can request the constitutional court to conduct review of the constitutionality of a norm, but leaving the decision with the court as to whether to conduct review; and the *quasi actio popularis*, where an applicant need not be directly affected by a norm but must challenge it within the context of a concrete case; and direct individual complaints with relatively open admissibility criteria. At the opposite extreme to *actio popularis* are relatively circumscribed direct individual complaint procedures where strict admissibility criteria mean that a small percentage of individual applications are deemed admissible (e.g. the German system, discussed below).

Actio popularis is rare worldwide, as it operates with no filter for applications and presents the clear risk of overburdening the constitutional court and permitting ill-founded, irrelevant and vexatious applications to the court. In Europe the Council of Europe's Venice Commission¹⁰⁰ has repeatedly observed that the key challenge in designing a system of direct individual access to the constitutional court is to ensure that the procedure provides an effective remedy for rights violations, while preventing the court from being overwhelmed, thus reducing its overall effectiveness.¹⁰¹ For this reason, it has previously recommended the removal of the *actio popularis* procedure in certain states (e.g. Montenegro).¹⁰² Individual suggestion systems are also rare. For example, in the Council of Europe's 47 member states it is confined to a small minority of states (Albania, Hungary, Poland, Montenegro and Serbia).¹⁰³ *Quasi actio popularis* is also uncommon (found in e.g. Greece), but has the advantage, in comparison to full *actio popularis*, of setting down admissibility criteria which reduce the potential of the mechanism to overburden the constitutional court or expose it to abusive complaints.¹⁰⁴

As regards direct individual complaint systems, Central and Eastern Europe states present one clear model. Gentili sets out the common features of direct individual complaint as follows:

- (a) The requirement that an aggrieved party exhaust all available legal remedies before filing a complaint with the Constitutional Court;
- (b) The right of an individual (in some jurisdictions) to file for recourse against acts or actions of private entities (natural and legal persons), provided they exercise public authority (generally, the acts that can be challenged for violation of constitutionally protected rights are those of public powers);
- (c) The possibility to challenge not only statutes but also regulations, administrative acts, and more rarely, judicial decisions;
- (d) The individual complaint's use for challenging solely acts, and not omissions, of public powers;
- (e) The right (now in most countries) of legal persons, like natural persons, to file a direct individual complaint with the Court;

¹⁰⁰ The official name is the Commission for Democracy Through Law: see www.venice.coe.int.

¹⁰¹ See Venice Commission, *Study on Individual Access to Constitutional Justice* (17-18 December 2010) CDL-AD(2010)039rev. 58ff.

¹⁰² Venice Commission, *Opinion on the Draft Law on the Constitutional Court of Montenegro* (17-18 October 2008) CDL-AD(2008)030.

¹⁰³ Venice Commission, *Study on Individual Access* (n 101) 21.

¹⁰⁴ *Ibid.* 22.

- (f) The practice of allowing a direct individual complaint only for actions of public powers that have already occurred or legal enactments already in effect;
- (g) The declaration by the Constitutional Court that a constitutional right has been violated with declarations of unconstitutionality of the act or action at issue with *erga omnes* effects;
- (h) The establishment (in some countries) of statutes of limitations for the exercise of the [direct individual complaint].¹⁰⁵

However, direct individual complaint mechanisms differ as to the nature of review conducted by the constitutional court under an individual complaint, and as to the admissibility criteria in place to filter applications. Some systems permit solely a challenge against the constitutionality of a statutory act, which does not extend to rights violations which may result from the implementation of that act (e.g. Russia, Romania). Other systems permit a fuller version of constitutional control, which permits the court to address violations arising from unconstitutional acts based on the implementation of constitutional statutory acts: this includes individual administrative acts and judicial decisions.¹⁰⁶ The Venice Commission strongly supports this fuller form of constitutional control, on the basis that it provides more comprehensive protection of individual rights.¹⁰⁷

ADDITIONAL POSSIBLE PITFALLS

A number of possible pitfalls related to the establishment of a constitutional court have already been noted, including the potential difficulties of deciding on the composition of such a court, and the risks of issues such as abstract review and *actio popularis*. This section considers other pitfalls in more detail.

An Excessive Docket

Dr Jayawickrama in his CPA paper expresses some confidence (albeit highly qualified) that a constitutional court's power to assess the constitutionality of legislation, following its enactment, would not necessarily lead to an unduly heavy docket:

If more attention is paid to the drafting of Bills (than is evident today) by trained, professional legal draftsmen (whom we appear to lack today), it is very unlikely that the ex post facto review of legislation will have any adverse impact on the workload of the judiciary. During 25 years when the courts of Ceylon exercised that jurisdiction, the only Bills that were challenged were those relating to citizenship, the official language, and the exercise of judicial power.¹⁰⁸

¹⁰⁵ Gentili, 'A Comparative Perspective on Direct Access' (n 95) 727. This is almost a verbatim quotation of Gentili's text, but has been slightly altered.

¹⁰⁶ Venice Commission, *Study on Individual Access* (n 101) 22–23.

¹⁰⁷ Ibid. 23.

¹⁰⁸ Jayawickrama, 'Establishing a Constitutional Court' (n 1) 12.

However, comparative experience suggests that even in states with high quality legislative drafters, the right of individual access alone can lead to a very significant docket for the constitutional court. The examples of Germany, Spain, and Turkey are illuminating.

The German system (*Verfassungsbeschwerde*) governed by Article 93(4a) of the Basic Law, has developed since 1951 into the main avenue of recourse to the Federal Constitutional Court, and the Court has developed restrictive admissibility criteria to avoid becoming overburdened. Applications are screened by a unit of the Court (*Kammer*, or chamber), and applicants must exhaust all other remedies, have a direct personal interest in the case, and file an application within a prescribed time-limit. However, the Constitutional Court also requires that an application will only be deemed admissible if it has “fundamental constitutional significance” and where the complainant may suffer “especially grave disadvantage as a result of refusal to decide on the complaint.”¹⁰⁹ This sets a high bar for applicants, meaning that only the most significant violations raising novel constitutional questions will be heard, and has ensured that only 1% of all applications come before the Court for a full hearing. Individuals may be fined for filing applications lacking the basic requirements for admissibility. Yet, the Court still receives some 6,000 individual applications annually.¹¹⁰

By contrast, the Spanish direct complaint system (*recurso de amparo*) introduced by Article 53 of the 1978 Constitution has a more ‘open’ design. It permits applications to the Constitutional Court by any natural or legal person with a “legitimate interest” (“*interés legítimo*”) concerning violation of constitutional rights in Articles 14–30 of the Constitution (which includes civil and political rights, as well as some social rights, e.g. to education, to strike) by an act or omission of a public authority, particularly legislative enactments, judicial decisions and administrative decisions. From the introduction of the procedure, an increasing volume of applications (the majority concerning the right to effective protection from judges in Article 24) began to have significant negative effects on the functioning of the Court. As a solution, the procedure was reformed in order to emphasise its subsidiary nature and to rebalance responsibility for individual rights violations toward the ordinary courts. In a similar manner to the German procedure applications are now considered inadmissible unless the applicant can establish the “significant constitutional relevance” of the case, meaning that only a small minority of applications are deemed admissible. The time-limit for making an application has also been reduced to 30 days.¹¹¹

Turkey provides a contemporary example. Turkey’s system of direct individual access may be viewed as a generally successful *via media* between the two extremes of direct access above. In particular, it has eschewed options with the clearest potential to overburden the court, such as *actio popularis*, *quasi actio popularis* or individual suggestion. Turkey also did not take the option of extending the scope of individual applications to ‘legislative omission’, by which an individual can challenge gaps in legislative frameworks or failure to legislate in specified areas (found in e.g. Hungary, Poland, Slovenia). Within the category of direct complaint mechanisms the Turkish system might be thought to rest somewhere on the spectrum between the relatively

¹⁰⁹ Gentili, ‘A Comparative Perspective on Direct Access’ (n 95) 719-720.

¹¹⁰ See the factsheet on the website of the Federal Constitutional Court: <http://bit.ly/2mELpJM>.

¹¹¹ Gentili, ‘A Comparative Perspective on Direct Access’ (n 95) 721-723.

unrestricted original Spanish direct complaint system and the more restricted German direct complaint procedure. The Turkish system sets down generally clear admissibility criteria, the central requirement being that the applicant must establish that he or she has been 'directly affected' by challenged procedure, act or failure to act. The Court has taken some time to make use of an additional admissibility criterion of 'constitutional significance' to filter cases.

This carefully crafted procedure has not, however, prevented an alarming rise in the Court's docket, to over 100,000 cases, risking paralysis of the Court given that it is capable of dealing with about 20,000 cases annually.¹¹² Evidently, this appears to stem in many ways from the multi-faceted democratic and security crisis facing the State, including the activities of multiple terrorist groups and the government's removal of tens of thousands of judges, soldiers, public servants, and academics from their posts following the attempted military *coup d'état* of 15 July 2016, which is seen as having spurred 60,000 applications by mid-December 2016.¹¹³ Nonetheless, it remains a useful additional cautionary example.

A more general point to make is that the more powers and functions accorded to a constitutional court, the larger its docket will tend to be. The tendency toward maximalism in contemporary constitution-drafting should be resisted in this regard, and a clear 'business case' should be made for each and every power conferred on a constitutional court.

Tensions between a Constitutional Court and the Supreme Court

In his CPA paper Dr Jayawickrama rightly states:

*A Constitutional Court and a Supreme Court form complementary systems of judicial control. They are different in their composition, their functions, and the effects of the decisions taken. [...] The Constitutional Court does not review decisions of the original or appellate courts, but may do so if a question of great general or public importance arises in the proceedings of any such court. It is a specialized court whose fields of competence are distinct from those of the ordinary courts.*¹¹⁴

However, it is important to recognise that, in various systems, there can be a tense or even an antagonistic relationship between the Constitutional Court and the Supreme Court, as well as the ordinary courts more generally—an issue which is garnering increasing attention.¹¹⁵ A recent comparative article, citing Tom Ginsburg and Lech Garlicki, observes:

[S]kirmishes between constitutional courts and other high courts have occurred not only in established democracies, such as France, Germany, Italy, and Belgium,

¹¹² See N. Alçı, 'The ECHR plays devil's advocate' Daily Sabah 8 March 2017 <http://bit.ly/2mF16AH>.

¹¹³ 'Turkey's high court receives 60,000 applications since July 15 coup attempt: Top Judge' Hürriyet Daily News 19 December 2016 <http://bit.ly/2nFor6P>.

¹¹⁴ Jayawickrama, 'Establishing a Constitutional Court' (n 1) 6.

¹¹⁵ See, in particular, a recent article: Chien-Chih Lin and Ching-Fang Hsu, 'An Inter-Court Struggle for Judicial Supremacy' (2016) 11(2) *University of Pennsylvania Asian Law Review* 294.

but also in young democracies and semi-authoritarian regimes, including Colombia, the Czech Republic, Poland, Hungary, Spain, Romania, South Korea, Taiwan, Thailand, and Russia. It is therefore plausible to assume that “[s]ystems that divide legal authority between a constitutional court and a supreme court face coordination problems when allocating jurisdiction and resolving inconsistencies in rulings.” In other words, “the presence of tensions among the highest courts is systemic in nature.”¹¹⁶

Assuming, for the purpose of this paper, that a constitutional court for Sri Lanka would be established as an additional court, not as a replacement for the existing Supreme Court, this is a significant issue. The very existence of a constitutional court tends to raise the potential for tension with the other highest courts in the state, as it places one court as the ultimate arbiter of constitutional meaning, which can easily lead it into territory considered the domain of these other courts. For this reason, the first European experiments with concentrated constitutional control by a constitutional court, in the early twentieth century, restricted it to abstract review of the constitutionality of laws, which maintained a relatively clear division of responsibilities between the constitutional court and the ordinary courts.

As Lech Garlicki observes, mechanisms for direct individual access to the constitutional court in particular, first introduced in Austria, constitute a “radical departure” from this neat separation of jurisdictions and often lie at the root of many of the tensions between constitutional courts and other superior courts.¹¹⁷ Systems of direct individual access heighten jurisdictional tension by expanding the jurisdictional territory of the constitutional court and inviting the court to become involved in the adjudication of cases before ordinary courts, particularly by reviewing the constitutionality of judicial decisions, as individual applications spur a ‘constitutionalisation’ of various branches of the law (e.g. criminal procedure and family law). A simple division of jurisdictional competences between the constitutional court and other courts is usually difficult to forge, and the tension between pervasive constitutional control and the integrity of discrete spheres of law must be managed.

For instance, in Germany, although the Federal Constitutional Court has long been “visibly striving” to avoid presenting itself as a “super appeal court”,¹¹⁸ the Court is often claimed to be acting in this way.¹¹⁹ A more contemporary development is again found in Turkey, where attempts to introduce the individual application procedure (finally introduced in 2012) met with strong resistance from the high courts. Concerns regarding possible inter-court tensions appear to explain the approach taken in the Law establishing the Turkish procedure for direct individual complaints. As noted in the Venice Commission’s Opinion concerning the Law:

¹¹⁶ Ibid. 296–297. Footnotes omitted.

¹¹⁷ See L. Garlicki, ‘Constitutional Courts versus Supreme Courts’ (2007) 5(1) *International Journal of Constitutional Law* 44, 46.

¹¹⁸ See F.I. Michelman, ‘The interplay of constitutional and ordinary jurisdiction’ in T. Ginsburg and R. Dixon, *Comparative Constitutional Law* (Edward Elgar Publishing, 2011) 290.

¹¹⁹ See e.g. C. Gomille, ‘The Federal Constitutional Court of Germany – a “super-appellate court” in civil law cases?’ (2014) 6 *Ritsumeikan Law Review* 161.

*Article 49.6 tries to delimit the spheres of the Constitutional Court and the ordinary courts by limiting the former to the determination of a violation of a human right. While this general rule is certainly useful, the border between the courts will have to be determined over time through case-law of the Constitutional Court in specific matters...*¹²⁰

The resistance of the Turkish high courts may also explain certain other features of the Law establishing the individual petition system, including the Constitutional Court's inability to annul a court decision made in violation of an individual right, and the lack of clarity concerning the effect of a Constitutional Court judgment addressed to a particular ordinary court on similar cases pending before the ordinary courts. A 2015 judgment of the Constitutional Court provides an example of the inevitable clashes occurring.¹²¹ In that judgment, the Court held that the applicant's right to a fair trial had been violated due to the Supreme Court's failure to provide adequate reasoning for its decision concerning the applicant, and set out guidelines for the elements that judgments of the ordinary court should contain.¹²² Such decisions clearly trench upon the autonomy of the other high courts, but are often unavoidable if sufficient protection is to be provided to individual rights.

However, even where individual access is not permitted, as in Italy, significant antagonism is still found. Indeed, the Constitutional Court of Italy, which began operating in 1956 (eight years after the adoption of the new Constitution in 1948), was stymied by the opposition of the ordinary courts, which were jealous of the new institution.¹²³ The Court today has an enduringly difficult relationship with the Court of Cassation, Council of State and other ordinary courts, which are resistant to adhering to its judgments.¹²⁴

In short, even the most sensitively designed constitutional court for Sri Lanka may well generate tensions and jurisdictional clashes within the judiciary, and it is important to factor in this strong possibility in considering the viability and effectiveness of such a court. Effective management of such tensions is a matter not only of appropriate constitutional design, but also of so-called "judicial diplomacy"; requiring all courts in the system to reach out to one another, attempt to seek smooth running of the judicial system, approach matters in a spirit of comity, and to organise and engage in practical face-to-face meetings on a regular basis.

The Risk of justiciable social and economic rights

As the authors of a recent CPA paper note, there is as yet no consensus on the inclusion of social and economic rights in the new Sri Lankan Constitution, despite the inclusion of a raft of such rights in both the Draft Constitution of 2000 and the Draft Bill of Rights of

¹²⁰ Venice Commission, Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey (Law No. 6216) CDL-REF(2011)047 (30 March 2011) 15.

¹²¹ Application No. 2013/1015, 8 April 2015.

¹²² The requirements are: (i) the court must outline the material facts on which its overall decision is based; (ii) it must indicate the reasons and legal basis for the decision; and (iii) it must demonstrate a logical connection between the material facts and the decision.

¹²³ M.E. de Franciscis & R Zannini, 'Judicial Policy-Making in Italy: The Constitutional Court' in M. Volcansek (ed.), *Judicial Politics and Policy-Making in Western Europe* (Cass, 1992) 69–70.

¹²⁴ See T Groppi, 'The Italian Constitutional Court: Towards a 'Multilevel System' of Constitutional Review?' (2010) 4 *Indian Journal of Constitutional Law* 1.

2006.¹²⁵ The authors of that paper conclude that justiciable rights should be included in the new constitutional text:

*Sri Lanka should take the bold step of including a set of directly enforceable economic and social rights in its new constitution and buttress this with a constitutional remedy that will allow both victims and public interest petitioners to seek relief where these rights are violated.*¹²⁶

However, despite the increasing tendency toward enshrinement of justiciable social and economic rights in new democratic constitutions—often urged by international actors¹²⁷—many scholars now sound strong notes of caution concerning the capacity of courts to deliver on the promises of social justice and social transformation that such rights embody. For instance, the Brazilian scholar Octavio Ferraz argues that the recognition of justiciable social and economic rights places a court in an “intractable dilemma”: it can either robustly vindicate such rights when requested by applicants, and face accusations of “illegitimately and incompetently overstepping the boundaries of judicial power”, or take a more cautious approach and face the charge that it has failed to fulfil its role as ‘guardian of the constitution’.¹²⁸

Not only does robust social rights jurisprudence appear to provoke increased political attacks on courts; in addition, focused as it usually is on individual cases it can do more harm than good, by leading to irrational resource allocation, creating distortions in slim state budgets, and adversely affecting public spending in areas which are not litigated; thereby threatening to undermine the democratic project of the constitution as a whole. Time and again, courts have been shown to have limited capacity to protect vulnerable sectors of the population: for example, Romanian Constitutional Court’s invalidation of laws aimed at cutting pensions in 2010 simply led to the alternative of a general value added tax increase for the entire population.¹²⁹ Such rights are also prone to ‘capture’ and can easily come to offend the basic principle of equality. Indeed, as Ferraz has observed, health litigation in Brazil has become a middle-class phenomenon, facilitated by greater access to justice in the more prosperous areas of the country, thus exacerbating rather than alleviating severe social inequalities.¹³⁰

In state after state, the conclusion has been reached that, regardless of whether a court has taken a deferential or assertive approach, it cannot itself bring about social transformation—rather, it can achieve only modest improvements at the margins, and

¹²⁵ M. Gomez, C. Hartnett and D. Samararatne, ‘Constitutionalizing Economic and Social Rights in Sri Lanka’, CPA Working Papers on Constitutional Reform No.7, September 2016, 4.

¹²⁶ *Ibid.* 37.

¹²⁷ See, for instance, the International Commission of Jurists (ICJ) analysis of drafts of the draft Libyan Constitution in 2015: ‘The Draft Constitution should...be reformed to expand the provisions relating to economic, social and cultural rights.’ ICJ, *The Draft Libyan Constitution: Procedural Deficiencies, Substantive Flaws* (December 2015) <http://bit.ly/2mFcexq>.

¹²⁸ O.L.M. Ferraz, ‘Between Usurpation and Abdication? The Right to Health in the Courts of Brazil and South Africa’ in Vilheira, Viljoen and Baxi (eds.), *Transformative Constitutionalism* (n 47) 378–379.

¹²⁹ Gardbaum, ‘Strong Constitutional Courts’ (n 64) 298.

¹³⁰ See Ferraz, ‘Between Usurpation and Abdication?’ *ibid.* 396; and O. Ferraz, ‘Harming the Poor Through Social Rights Litigation: Lessons from Brazil’ (2011) 89(7) *Texas Law Review* 1643.

often at the high cost of antagonising political powers beyond the limits of their willingness to acquiesce to judicial authority.¹³¹

This is not to deny arguments by scholars such as Jeff King that courts are capable of providing a useful means of advancing social justice, under certain conditions.¹³² However, his particular prescriptions appear most relevant to adjudication in mature democracies, as part of the overall constitutional ‘fine-tuning’ role that constitutional courts play in such states, in a context where they enjoy considerable institutional security (although he does suggest that South Africa might come within his framework). As King himself emphasises from the outset: “any theory of judging...must fit with the institutional and political constraints under which [courts] operate”.¹³³ Indeed, it appears that what he deems good arguments against fully justiciable social and economic rights—concerns regarding democratic legitimacy, the need for a polycentric approach that avoids according decisions to a single institution, questions of judicial expertise, the need for flexibility, and doubts as to why we should look to courts first¹³⁴—all take on a particular added edge in the context of a state crafting a new democratic constitution.

In sum, accompanying the risk of greater clashes between a constitutional court and the political powers, is the risk that a Constitution enshrining justiciable social and economic rights would place expectations on the constitutional court that it simply cannot meet, thereby harming its reputation and legitimacy in the eyes of the public, as well as the standing and legitimacy of the Constitution itself. Clearly, this issue brings us into wider constitutional design questions that need to be considered in the overall constitution-drafting process.

Overlooking issues beyond rights

It is understandable to focus on rights issues when contemplating the creation of a constitutional court. Adequate protection of fundamental rights, including minority rights, now lies at the heart of what we expect from a well-functioning State. However, it is important not to overlook the various other issues on which a constitutional court is called to adjudicate, not least ‘structural’ issues such as vindication and calibration of the separation of powers and curtailment of acts in excess of any one governmental branch’s jurisdiction. In addition, in Sri Lanka, delays in establishing war crimes accountability mechanisms, such as the Judicial Mechanism and the Truth-Seeking Commission, could lead applicants to seek redress through the constitutional court. Some values that may be included in the Constitution, such as peace or devolved government, may even be perceived as cutting against rights, by, for instance, by overriding claims for a punitive approach to previous rights abuses, or the right to complete political equality of all citizens.¹³⁵ A constitutional court, to a much greater extent than an international human

¹³¹ See e.g. R. Gargarella, P. Domingo and T. Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (Ashgate, 2006); Sadurski, *Rights Before Courts* (n 51) 283–287; and Daly, *The Judiciary and Constitutional Transitions* (n 25) 23–28.

¹³² J. King, *Judging Social Rights* (Cambridge University Press, 2012).

¹³³ *Ibid.* 1.

¹³⁴ *Ibid.* 5–6.

¹³⁵ See e.g. a forthcoming article: J. Sapiano, ‘Courting Peace: Judicial Review and Peace Jurisprudence’ *Global Constitutionalism* (forthcoming, 2017).

rights court (e.g. the Inter-American Court of Human Rights) is required to balance rights claims against contravening constitutional interests, principles and values.

Isolation and international ‘judicial dialogue’

The problems arising from Sri Lanka’s legal language from English to Sinhalese and Tamil are recounted by Dr Jayawickrama.

The immediate, and most serious, impediment to the establishment of a credible Constitutional Court in Sri Lanka today is the astonishing lack of awareness, among both lawyers and judges, of developments in constitutional and human rights jurisprudence beyond the shores of Sri Lanka. An examination of judgments of the Supreme Court in the past decade or so indicate that many judges and lawyers are quite unfamiliar with the jurisprudence of the UN Human Rights Committee, the European Court of Human Rights, the Inter-American Court of Human Rights, or indeed, the relevant judgments of superior courts of even other Commonwealth countries, except perhaps India. This may be due to the lack of access to the relevant law reports, or, more seriously, the lack of familiarity with the language of the law and legal literature.¹³⁶

It is worthwhile to expand on his comments. A number of additional problems arise regarding the possible obstacles to constitutional court judges engaging in international ‘judicial dialogue’; that is, awareness of and citation of foreign and international courts (and quasi-judicial bodies). The first is that even significant knowledge of other common law jurisdictions may be insufficient to obtain adequate comparative knowledge of constitutional courts in other states. As discussed above, most constitutional courts are found in states belonging to the civil law tradition (e.g. Germany, Colombia, Senegal, South Korea). It is of course natural for common lawyers to look to other common law courts, but the differences between the functions and operation of supreme courts and constitutional courts means that significant comparative capacity would be needed to both design a constitutional court for Sri Lanka and for such a court to obtain enough guidance from other jurisdictions in addressing difficult questions that come before it. Looking to the Constitutional Court of South Africa cannot be the only option.

Of course, courts worldwide have been significantly influenced by the Indian Supreme Court—seen, for instance, in the influence of the Supreme Court’s ‘basic structure’ doctrine,¹³⁷ which asserts the Court’s power to assess the validity of constitutional amendments, in the jurisprudence of the Colombian, Belizean, and Tanzanian courts.¹³⁸ However, the German influence on the case-law of constitutional courts worldwide is pervasive; seen in everything from the virtually global adoption of some form of proportionality review, to the principle of ‘social minimum’ in Colombian jurisprudence, which sets a base-line for a dignified existence in the framework of a social state, to the approach of the Brazilian Supreme Court (which operates much like a constitutional court in many respects) to authoritarian-era laws.¹³⁹ If a constitutional

¹³⁶ Jayawickrama, ‘Establishing a Constitutional Court’ 14.

¹³⁷ Set out in *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225.

¹³⁸ See e.g. Colón-Ríos, ‘A New Typology’ 145–6; and the Tanzanian High Court’s judgment in *Mtikila v. Attorney General*, Civil Case No. 5 of 1993 (24 October 1994).

¹³⁹ Discussed in Daly, *The Alchemists* (n 41) Chapter Five.

court is created for Sri Lanka, it would operate much more effectively if it can draw on such experience. Indeed, Johanna Kalb has argued that constitutional courts in young or fragile democracies engage in 'strategic' citation of the case-law of foreign constitutional courts and international courts (especially regional human rights courts) to bolster their adjudicative role.¹⁴⁰

Overlooking alternative court reform options

It is also crucial to avoid framing the choice as a false binary between retaining the existing Supreme Court or establishing a constitutional court. As discussed on p.8 above there are other design options, such as creating a new supreme court, or a new constitutional chamber within the Supreme Court.

The new assertiveness of the Mexican Supreme Court in the past decade shows that a Supreme Court long viewed as a quiescent institution can be reinvigorated by key reforms. The Court's 'awakening' was spurred through three inter-related structural and institutional developments: a raft of fundamental constitutional reforms in 1994, which restructured the judiciary and rendered it more capable of independent judgments; the advent of a competitive electoral system in 2000 when the long-dominant PRI party lost its first elections since 1917; and progressive judicial leadership.¹⁴¹

The constitutional chambers of the Estonian and Costa Rican Supreme Courts are also generally assessed as effective institutions and may prove to be good case-studies for this design option. Regarding the Costa Rican chamber (*Sala Constitucional*), established in 1989, it has been said:

*This new Chamber of the Supreme Court and its enabling laws resulted in a metamorphosis of superior court behavior from excessive deference and inaction to becoming one of the most assertive courts in the Americas.*¹⁴²

There are also alternative ways to address issues such as judicial corruption. Kenya's new Constitution of 2010, for instance, not only established a new Supreme Court but also introduced targeted measures aimed at enhancing judicial integrity and rooting out corruption in the judiciary, including a new independent Judicial Service Commission to oversee the appointments process and a vetting process for the entire judiciary (Sixth Schedule, Article 23), which proceeded in stages (from the higher courts downwards), and was conducted by a nine-member vetting board comprising three Kenyan lawyers (Kenyan judges were excluded), three individuals from Kenyan civil society, and three highly respected non-Kenyan Commonwealth judges with a distinguished record.¹⁴³

¹⁴⁰ J. Kalb, 'The Judicial Role in New Democracies: A Strategic Account of Comparative Citation' (2013) 38 *Yale Journal of International Law* 423.

¹⁴¹ M. Castillejos-Aragón, 'The Transformation of the Mexican Supreme Court' in Kapiszewski, Silverstein and Kagan (eds.), *Consequential Courts* (n 51) 139–140.

¹⁴² B. Wilson, 'Constitutional Rights in the Age of Assertive Superior Courts: An Evaluation of Costa Rica's Constitutional Chamber of the Supreme Court' (2012) 48 *Willamette Law Review* 451, 451.

¹⁴³ These processes are described in more detail in the author's report for International IDEA, *The Judiciary and Constitutional Transitions* (n 25) 13–14.

CONCLUSION: PROCEEDING WITH CAUTION

Writing back in July 2016, Dr Welikala had the following to say:

[T]he restricted nature of the [constitutional reform] process has cut down the space for critical thinking and debate even within the pro-reform political space. For example, the full implications of constitutionalising socio-economic rights or strong-form constitutional review in the context of local conditions as well as comparative experiences and alternative institutional models have not been adequately debated. Instead, they are likely to be included because of their popularity. The fear of anti-reform forces using viewpoints critical of the elite consensus on these issues in strategic or tactical ways has been such that the drivers of the process have been extremely reluctant to allow free and open debate on them. Instead, political leaders rely almost exclusively on the confidential advice of trusted confidants and advisors, which, while no doubt of high quality, is not the same thing as open debate in a constitution-making process. While the unprincipled character of the political opposition that induces this attitude is very real, the failure to consider the fullest legal, political, and economic implications of such wide-ranging changes such as justiciable socio-economic rights and comprehensive constitutional review could store up problems for the future, which may cause implementation difficulties that could potentially undermine the legitimacy of the constitution.¹⁴⁴

This paper further serves to underscore the need for widespread discussion and reflection on the precise functioning and implications of, and trade-offs related to, key constitutional design options, as well as the need for a holistic approach that appreciates that individual constitutional design options have very significant implications for other design options. Although it is evidently impossible to address every potential question regarding the potential establishment of a constitutional court for Sri Lanka, this paper has attempted to spur and aid debate by encouraging reflection on a number of pressing matters that need to be considered, not least what such a court is expected to achieve, precisely how it would fit into the existing institutional framework, and the possible pitfalls associated with setting up such a court. It is intended to provide a useful companion piece to the previous paper by Dr Jayawickrama, and it underscores his observation that the potential for an effective constitutional court largely hinges on the achievement of wider structural and systemic reform.

It is important to emphasise once again that it is not fully possible to engineer a successful constitutional court. Many factors—such as how the judges on the court would conceive of and go about their roles—cannot be fully predicted in advance. However, it is possible—and important—to avoid engineering failure and there is clear merit in a ‘lessons learned’ approach that gleans cautionary guidance from the experiences of other states. In seeking to consider further the possibilities surrounding court reform there is a raft of organisations and sources which may be called in aid, including European bodies with significant expertise on constitutional courts, such as the Venice Commission.¹⁴⁵

¹⁴⁴ Asanga Welikala, ‘Sri Lanka’s search for constitutional consensus amid social and political divisions’ ConstitutionNet 19 July 2016 <http://bit.ly/2mWDvNK>.

¹⁴⁵ See www.venice.coe.int.

Regarding accountability and corruption, as well as drawing on international judicial ethics standards, the Council of Europe's anti-corruption body (GRECO) has been active in elaborating more detailed frameworks for addressing this challenge.¹⁴⁶

That said, as Ken Kersch has observed: “[a]s much as we may look abroad, the debate is still, in the final analysis, on our own terms.”¹⁴⁷ A constitutional court can only work properly if it has the potential to fit within Sri Lanka's existing system, and is designed to target the precise needs of Sri Lanka's governance system, legal culture, and society. As Welikala observes, the societal consensus regarding the more negative aspects of the Rajapaksa regime cannot hide a lack of overall consensus concerning a collective identity and future for Sri Lanka,¹⁴⁸ and this could leave a constitutional court in a difficult position, without a clear ‘mission’, and required to mediate an unclear transition from the previous dispensation to a new dispensation in an overall atmosphere of continuity. That said, the clearer ‘democratic revolution’ narrative in states such as post-Nazi Germany or post-Franco Spain can easily be overstated and tends to give way to a partial and contested reform trajectory when you look at the details. In Sri Lanka, a constitutional court, which characteristically has to reconcile the tensions between majoritarianism and counter-majoritarianism, might be viewed as acting a unifying force of sorts, if it can provide an additional forum for working through the serious and multi-stranded lack of consensus on foundational issues. However, this cannot be assumed and hinges on a variety of factors including the court's membership, adjudicative capabilities, and whether political actors take a ‘good faith’ approach to the court's functioning.

A final, related, point is that, although constitutional incrementalism can provide a useful approach by consciously avoiding clear-cut decisions on contentious questions and embracing creative ambiguity in the constitutional text,¹⁴⁹ a constitutional court should not be used as a mental ‘get out clause’ during the constitution-drafting process, or left with the task of making sense of a text containing too many fudges. Nor should it be viewed as a form of ‘short-cut’ to better governance, as a way of avoiding the need to tackle fundamental political questions and reforms, or—by those seeking more dramatic reform—as capable of achieving such reform ‘through the back door’ or bearing the full symbolic weight of a break from the past.¹⁵⁰ This appears to chime strongly with Welikala's concerns, especially where he urges transferring the arena of acute contestation concerning the vision of the state from the constitutional to the political realm, and notes the failure of legalism thus far to address the deficiencies of Sri Lanka's entrenched political order.¹⁵¹ As regards a constitutional court, serious thought has to be given to how such a court would operate without taking undue constitutional oxygen from democratic deliberation; seen by some as a problem in Germany, for instance.¹⁵² In short, open reflection, realism, and resonance with reality should be the watchwords as the discussion of this constitutional reform option continues.

¹⁴⁶ The Group of States Against Corruption (GRECO): <http://www.coe.int/en/web/greco/home>.

¹⁴⁷ K. Kersch, ‘New Legal Transnationalism, the Globalized Judiciary, and the Rule of Law’ (2005) 4 *Washington University Global Studies Law Review* 345.

¹⁴⁸ Welikala, ‘The Idea of Constitutional Incrementalism’ (n 5) 4.

¹⁴⁹ *Ibid.* 15.

¹⁵⁰ Indeed, this is one of the factors that left the Hungarian Constitutional Court in a difficult position.

¹⁵¹ Welikala, ‘The Idea of Constitutional Incrementalism’ (n 5) 20–22.

¹⁵² Collings summarises the concerns of Habermas, for instance, as: “Policy came from Bonn; values from [the Constitutional Court in] Karlsruhe; but what came from the People?” Collings, *Democracy's Guardians* (n 54) 61.