



## **A RIGHTS-BASED APPROACH TO LIMITATION CLAUSES IN THE SRI LANKAN CONSTITUTION**

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## 1. Introduction

The idea that rights have limits has become a recognisable feature of the modern human rights canon. These limits often find their roots in classical liberal thought, which prescribes that interference with rights is justified only to protect the rights of others or to further certain legitimate public policy objectives related to the rights of others. Thus international human rights instruments and modern constitutions tend to include among their catalogues of rights not only defined limits on the scope of rights, but also the explicit grounds on which rights may be lawfully restricted. Defining the nature and scope of rights limitations is thus an important task for constitution-makers. In light of the ongoing constitutional reform initiative in Sri Lanka, reformers are no doubt confronted with this important task.

This Working Paper attempts to grapple with the question of how to set out the parameters of rights restrictions in human rights law including the fundamental rights chapter of the Sri Lankan constitution. It is presented in three sections. The first briefly discusses the philosophical and jurisprudential bases for limiting rights by investigating the literature on the subject. It sets out to establish the underlying normative features of limitation clauses. The second section delves into the terminology used in legal instruments, including international and regional human rights treaties and certain national constitutions in their framing of limitation clauses. It then analyses the existing framework of the Sri Lankan constitution and discusses some of the inherent dangers within this framework. The final section presents an argument for a fresh approach to designing and interpreting limitation clauses. This section contends that all restrictions on individual rights must be necessarily rooted in the 'rights and freedoms of others'. This paper accordingly advances a 'rights-based' approach to limitation clauses, which it argues ought to be adopted in reforming Sri Lanka's new fundamental rights chapter.

It is noted that certain aspects of the broader discussion on restricting rights are not dealt with in this paper. These aspects include the general limitations applicable to economic, social, and cultural rights (e.g., the availability of resources), and the derogation of certain rights in times of emergency.<sup>1</sup> Hence the scope of the article is confined to an examination of limitation clauses that deal specifically with civil and political rights.

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<sup>1</sup> On this latter set of issues, see e.g., Asanga Welikala, '*States of Emergency: Issues for Constitutional Design*', CPA Working Papers on Constitutional Reform No.5, August 2016, available at: <http://www.cpalanka.org/wp-content/uploads/2016/08/States-of-Emergency-Working-Paper-5.pdf>.

## 2. The Norms that Govern Rights Restrictions

At least two normative strands of thought govern the restriction of rights. The first directly involves ‘the rights and freedoms of others’. The second is based on a broader ‘democratic’ approach, which can include other related values such as ‘secularism’ and ‘neutrality’. This ‘democratic’ approach is occasionally extended to justify rights restrictions on the basis of economic expedience and cultural relativism. This section briefly discusses each strand and attempts to set out a case for prioritising one strand over the other – an argument developed further in the final section of this paper.

### 2.1 *The rights and freedoms of others*

Classical liberal thinkers including John Stuart Mill have offered a framework of rights that minimises state interference with individual liberty. Mill posits that the “only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”<sup>2</sup> Richard Posner in his seminal work *Sex and Reason*,<sup>3</sup> reiterates the now famous words ‘your rights end where his nose begins’ to sum up Mill’s position. According to Posner, “government interference with adult consensual activities is unjustified unless it can be shown to be necessary for the protection of the liberty or property of other persons.”<sup>4</sup>

This normative approach may be deconstructed further to reveal at its core the idea that all human beings are of inherent equal moral worth. Since all individuals have equal moral worth, individual liberty can be legitimately checked to accommodate the liberty of others. Therefore, despite the fact that individuals are ‘infinitely important’, they “cannot be allowed to exercise their freedom of choice in an unrestrained manner.”<sup>5</sup> The fact that all individuals have the same inherent moral worth as each other accordingly creates “a built-in restraint on a given person’s choices and actions.”<sup>6</sup>

This line of reasoning is also consistent with Isaiah Berlin’s articulation of ‘negative liberty’. According to Berlin, ‘negative liberty’ involves answering the question: “What is the area within which the subject – a person or group of persons – is or should be left to do or be what he is able to do or be, without interference by other persons?”<sup>7</sup> This conception can very well be the basis for defining the scope of rights such as the freedom from torture and from arbitrary arrest or detention. Such rights are considered basic to an individual’s bodily integrity. Other rights such as the freedom

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<sup>2</sup> John Stuart Mill, *On Liberty* (1859), at 13.

<sup>3</sup> Richard A. Posner, *Sex and Reason* (Harvard University Press 1992), at 3.

<sup>4</sup> *Ibid.*

<sup>5</sup> John Montgomery, ‘Human dignity in birth and death: A question of values’ (1994) 7(2) *International Journal of Value-Based Management* 147 at 154.

<sup>6</sup> *Ibid.*

<sup>7</sup> Isaiah Berlin, ‘Two Concepts of Liberty’ in Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press 1969), at 2.

of expression, the freedom of thought, conscience, and religion, including the freedom to manifest one's religion or beliefs, the freedom of movement, and the freedom of association could also be articulated as corollaries of this negative conception of liberty. Certain rights, such as the right to be free from torture, or to freedom of thought, conscience, and religion, are 'absolute' based on liberal deontological grounds, and cannot be subject to restrictions.<sup>8</sup> By contrast, other rights such as the freedom of expression and the freedom to manifest one's religion or beliefs may be subject to certain limitations, where such limitations are needed to protect the rights and freedoms of others. A classic example of such a limitation is hate speech legislation. In this case, the individual freedom to express any view or opinion is restricted where such view or opinion is intended to incite violence against another individual or group. On the one hand, it is possible to argue that the freedom of expression is inherently limited to exclude hate speech from its scope. This argument suggests that the restriction on hate speech is not a restriction on the freedom of expression simply because it was never part of that freedom in the first place. On the other, it could be argued that the freedom of expression entails all expression, and that the prohibition of hate speech amounts to a legitimate restriction on such expression. Accordingly, the freedom of expression can be restricted on the grounds of equality and personal security of others. Whichever approach one takes, it is the harm that hate speech causes to others that justifies its exclusion from the protected realm of free expression.

As discussed in section 3 of this paper, below, this basis for limiting rights is well recognised in international and domestic law. The most common terminology used in this context is 'the rights and freedoms of others'. Hence a classical liberal conception of rights (and their limits) is the normative starting point for justifying the restriction of certain rights.

## ***2.2 The democratic case for limiting rights***

Berlin offers another conception of liberty – 'positive liberty', which may be useful in understanding how limits on rights can be based on grounds other than the individual rights and freedoms of others. Positive liberty involves answering the question: "What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?"<sup>9</sup> This conception relates to the idea of 'self mastery', which involves the ability to choose who should govern the society of which one is part.<sup>10</sup> It could accordingly lead to notions of citizenship and democratic governance, and could very well form the basis of restricting certain negative liberties. The question remains whether such an abstract basis alone, i.e. reliance on 'democratic aims' without necessarily establishing a strong nexus to the rights and freedoms of others, suffices to justify limiting rights.

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<sup>8</sup> For a fruitful discussion on the deontological basis for the freedom from torture see Oren Gross, *The Prohibition on Torture and the Limits of Law in Torture* (Oxford University Press 2004)

<sup>9</sup> Berlin, *op. cit.* at 2.

<sup>10</sup> *Ibid.* 2.

Scholars such as Stephen Gardbaum have advanced precisely this sort of basis for limiting rights. Gardbaum argues that legitimate state interests may justify the restriction of rights in at least two specific contexts. First, an override power can be justified if it results in “superior policy outcomes or superior outcomes in particular cases.”<sup>11</sup> He offers as an example the reference to ‘national security alarms’ and ‘emergencies’ as situations in which rights may be overridden. Second, a limited override power can be justified on the basis that it “enhances citizen self-government within a system of constitutionalised rights.”<sup>12</sup> Gardbaum argues that constitutional rights contemplate ‘limits on ordinary majoritarian decisionmaking’ but do not necessarily require that the particular limit take the form of judicial review through which rights ‘trump’ state interests.<sup>13</sup> He instead suggests that constitutional rights be conceived as ‘shields’ (rather than trumps), which “acknowledges the democratic weight attaching to other competing claims asserted by the majoritarian institutions.”<sup>14</sup> He accordingly concludes that a state must have a specific limited power to override a right “in the face of conflicting non-rights claims.”<sup>15</sup>

Berlin cautions against the tendency for a positive conception of liberty to become prescriptive in terms of how people should behave – degenerating into paternalism, collective control, and forms of ‘discipline’ imposed on individuals.<sup>16</sup> Hence the pursuit to safeguard the conditions in which positive liberty can be exercised could paradoxically lead to the unjustified denial of negative liberty. This caution is certainly valid in the context of the democratic case for limiting rights. It underscores the inherent dangers in articulating a rights conception that permits non-rights claims to potentially override rights. These dangers are discussed further in the next section, specifically in the context of the terminology used in international and regional human rights instruments and modern constitutions.

### 3. Limitation Clauses in Legal Instruments

Limitation clauses can be found in a range of laws, treaties and constitutions dealing with rights. Many of these clauses have common features that, in certain ways, build on the theoretical bases for restricting rights discussed in the preceding section. This section discusses some of these common features and, in their light, examines the existing fundamental rights chapter of the Sri Lankan constitution.

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<sup>11</sup> Stephen Gardbaum, ‘Limiting Constitutional Rights’ (2007) 54 *UCLA Law Review* 789, at 816.

<sup>12</sup> *Ibid.* at 817.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* at 818.

<sup>15</sup> *Ibid.* at 819.

<sup>16</sup> Berlin, *op. cit.* at 24.

### **3.1. The ICCPR and the Siracusa Principles**

At the international level, the International Covenant on Civil and Political Rights (ICCPR) stands out as the key legal instrument that recognises a wide range of civil and political rights. Many of these rights are subject to specific restrictions contained in limitation clauses. The precise interpretation of these limitation clauses is usually the domain of the United Nations Human Rights Committee through its General Comments and individual communications procedure. While the Committee has not produced a specific General Comment on the question of limitations, it has commented on the nature and scope of specific limitation clauses relevant to certain rights.<sup>17</sup>

The ICCPR contains several grounds on which certain enumerated rights may be limited. For instance, article 12 of the Covenant guarantees the right to ‘liberty of movement and freedom to choose [a] residence.’ This right may not be subject to restrictions ‘except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others.’<sup>18</sup> Moreover, the restrictions must be consistent with the other rights recognised in the Covenant.<sup>19</sup> Article 18 recognises the right to freedom of thought, conscience and religion, including the right to manifest one’s religion or beliefs. The right of manifestation may be subject ‘only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.’<sup>20</sup> Article 19(2) of the Covenant recognises the freedom of expression. This freedom may be subject only to restrictions as are provided by law and are necessary for ‘respect of the rights or reputations of others’, or ‘the protection of national security or of public order (*ordre public*), or of public health or morals.’<sup>21</sup> Hence the basic grounds on which rights may be restricted under the Covenant appear to be precise and exhaustive.

Meanwhile, the 1985 Siracusa Principles on the Limitation and Derogation Provisions in the ICCPR<sup>22</sup> offer a useful framework for the interpretation of limitation clauses in the ICCPR. The main features of these Principles warrant further discussion, as they

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<sup>17</sup> For example, General Comment No. 22 – Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993 CCPR/C/21/Rev.1/Add.4 and General Comment No. 34 – Article 19 (Freedoms of opinion and expression), 12 September 2011, CCPR/C/GC/34.

<sup>18</sup> International Covenant on Civil and Political Rights, GA res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), article 12(3).

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* at article 18(3).

<sup>21</sup> *Ibid.* at article 19(3). It is noted that articles 21 and 22, which recognise the right to peaceful assembly and the right to freedom of association respectively, contain the following limitation grounds: national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

<sup>22</sup> United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985).

set out the broad parameters within which limitations are permissible under international human rights law.

At the outset, the Principles clearly stipulate that the rights guaranteed by the Covenant could only be restricted on grounds contained in the Covenant itself. Moreover, the scope of the limitation must not be interpreted so as to ‘jeopardize the essence of the right concerned’ and should be ‘interpreted strictly and in favour of the rights at issue’.<sup>23</sup> It is also reiterated that all limitation clauses should be provided for by law.<sup>24</sup> In terms of application, the Principles stipulate that limitations should not be applied in an arbitrary or discriminatory manner.<sup>25</sup> Moreover, each limitation must be ‘subject to the possibility of challenge to and remedy against its abusive application’.<sup>26</sup>

The Principles also provide a useful framework for interpreting the term ‘necessary’, which is a general condition applicable to a number of limitation clauses in the Covenant. The Principles stipulate that whenever a limitation is required to be ‘necessary’, it implies that the limitation is ‘based on one of the grounds justifying limitations recognised by the relevant article of the Covenant’; ‘responds to a pressing public or social need’; ‘pursues a legitimate aim’, and ‘is proportionate to that aim’.<sup>27</sup> It also specifies that the necessity of the limitation should be made on ‘objective considerations’.<sup>28</sup> Finally, the Principles impose on the state concerned a duty of using ‘no more restrictive means than are required for the achievement of the purpose of the limitation’ and a burden of justifying the limitation.<sup>29</sup> Hence the Principles have made a vital contribution in terms of defining the permissible scope of limitation clauses under the ICCPR.

### **3.2 European discourse**

The overarching normative framework offered by the Siracusa Principles is similar to the framework developed by the European Court of Human Rights (ECtHR) through its jurisprudence. This discourse has given rise to the formulation and use of the ‘proportionality test’, which defines the permissible scope of rights restrictions under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The test entails four limbs: that the restriction (1) is prescribed by law; (2) furthers a legitimate state interest; (3) is necessary within a democratic society i.e. the absence of a less intrusive yet equally effective alternative; and (4) is proportional on a balancing of harms.<sup>30</sup>

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<sup>23</sup> *Ibid.* at para.I(A)(2) and (3).

<sup>24</sup> *Ibid.* at para.I(A)(5).

<sup>25</sup> *Ibid.* at para.I(A)(7) and (9).

<sup>26</sup> *Ibid.* at para.I(A)(8).

<sup>27</sup> *Ibid.* at para.I(A)(10).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* at para.I(A)(11) and (12).

<sup>30</sup> See *Lustig-Prean and Beckett v. United Kingdom* (2000) 29 EHRR 548. Also see Mattias Kumm, ‘Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality



The Convention does, however, add certain further dimensions to the framework offered by the Siracusa Principles. On the one hand, it limits the notion of ‘necessity’ to what is ‘necessary in a democratic society’.<sup>31</sup> This added dimension infuses democratic principles into the notion of necessity and prescribes the nature of the decision-making structures that determine the appropriateness of a rights restriction. On the other hand, the ECtHR has extended the general framework on proportionality to set out a further doctrine that affords a ‘margin of appreciation’ to states in determining the appropriateness of rights restrictions.<sup>32</sup> Although this doctrine may have value in a regional context where the Court is somewhat removed from the intricacies of national contexts, its application has been somewhat problematic. The doctrine has encouraged the Court to be overly deferential towards states, and has entrenched the political leeway that states enjoy in terms of determining rights restrictions. The following examples illustrate this problem.

In *Leyla Şahin v. Turkey* (2007)<sup>33</sup> the ECtHR upheld Turkey’s decision to ban the Islamic headscarf on university premises citing Turkey’s social and historical context, and contemporary values of ‘secularism’. Admittedly, the Court based some of its reasoning on the rights and freedoms of others. However, the Court did not adequately explain which rights or interests were being advanced by the ban.<sup>34</sup> This case illustrates the inherent dangers that must be confronted when permitting states to cite abstract principles in justifying restrictions on rights.

In *Ebrahimian v. France* (2015),<sup>35</sup> the ECtHR was faced with a challenge to restrictions on religious expression in the broader public service. The expression once again involved the wearing of the Islamic headscarf, but the case was outside the educational context that the Court had considered in the *Şahin* case. Interestingly, the French authorities offered ‘secularism’ and ‘religious neutrality’ as “broad and abstract” grounds for the imposed restrictions on religious freedom.<sup>36</sup> As suggested by Ronan McCrea, such justifications compelled the Court to examine whether the

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Requirement’ in Stanley Paulson & George Pavlakos (eds.) *Law, Rights, Discourse: Themes of the Work of Robert Alexy* (Hart Publishing 2007) at 140. Kumm suggests: ‘The four-prong structure of proportionality analysis provides little more than a structure which functions as a checklist for the individually necessary and collectively sufficient conditions that determine whether the reason that can be marshalled to justify an infringement of a right are good reasons under the circumstances.’

<sup>31</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), articles 8(2), 9(2) and 10(2).

<sup>32</sup> See Yutaka Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002). The author defines the margin of appreciation as “the latitude a government enjoys in evaluating factual situations and in applying provisions enumerated in international human rights treaties” (at 2). Also see *Handyside v. The United Kingdom* (1976) 1 EHRR 373.

<sup>33</sup> (2007) 44 EHRR 5.

<sup>34</sup> Nicholas Gibson, ‘Faith in the Courts: Religious Dress and Human Rights’ (2007) 66 *Cambridge Law Journal* 657, at 670.

<sup>35</sup> [2015] ECHR 1041.

<sup>36</sup> See Ronan McCrea, ‘Secularism before the Strasbourg Court: Abstract Constitutional Principles as a Basis for Limiting Rights’ (2016) 79(4) *Modern Law Review* 678, at 691.

Convention could “accommodate a secularism whose aims and justifications go beyond the protection of the fundamental rights of others and focus on more abstract goals such as state neutrality and avoiding religious competition for state power.”<sup>37</sup> The Court considered two schools of thought when evaluating the legitimacy of the rights restrictions at stake. On the one hand, the restriction could be justified based on the impact that the restricted religious expression might have on the rights of others. For instance, the state may determine that religious neutrality in the public service is necessary to avoid coercing citizens to follow a particular faith, thereby safeguarding the equal status of their own religions. On the other, secularism might be canvassed as a justification for limiting religious expression because it is seen as important “for a religiously diverse population to share state institutions”.<sup>38</sup> No fundamental rights are directly at stake under this latter approach. Instead, a general state interest is put forward as grounds for restricting the rights concerned. While the Court concluded that the restrictions were justified, Judge O’Leary disagreed with the rest of the Court on its acceptance of purely abstract principles as justifying the rights restriction. He rightly warned that “allowing abstract principles to qualify rights brings significant dangers of restriction of fundamental rights on vague and potentially limitless grounds”.<sup>39</sup> Such problems – encountered in arguably one of the more progressive jurisdictions of the world – ought to prompt careful reflection on Sri Lanka’s own constitutional framework.

### **3.3 The Sri Lankan constitutional framework**

The fundamental rights chapter in Sri Lanka’s constitution contains a list of civil and political rights alongside certain specific grounds on which they could be restricted by law.<sup>40</sup>

The right to be presumed innocent until proven guilty, and the right not to be subjected to retroactive criminal legislation, guaranteed under articles 13(5) and (6) respectively, may be restricted on the grounds of ‘national security’.<sup>41</sup> The freedom of expression guaranteed under article 14(1)(a) may be restricted in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.<sup>42</sup> The freedom of peaceful assembly guaranteed under article 14(1)(b) may be restricted in the interests of racial and

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<sup>37</sup> *Ibid.* at 691-692.

<sup>38</sup> *Ibid.* at 696.

<sup>39</sup> [2015] ECHR 1041, concurring opinion of Judge O’Leary cited in McCrea *op. cit.* at 704.

<sup>40</sup> It is noted that apart from the specific limitation grounds contained in the fundamental rights chapter of the Sri Lankan constitution, article 16 provides: ‘All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of [the fundamental rights chapter].’ Hence any law that preceded the promulgation of the 1978 Constitution continues to be valid notwithstanding inconsistency with an enumerated right. For example, the Third Schedule to the Land Development Ordinance No. 19 of 1935 discriminates on the grounds of sex by affording preference to male heirs. The provisions of the Ordinance, however, are protected by article 16 notwithstanding inconsistency with article 12(2) of the constitution.

<sup>41</sup> Constitution of Sri Lanka, Article 15(1).

<sup>42</sup> *Ibid.* Article 15(2).

religious harmony.<sup>43</sup> The freedom of association guaranteed under article 14(1)(c) may be restricted in the interests of racial and religious harmony or national economy.<sup>44</sup> The freedom to engage in a lawful occupation, profession, trade, business or enterprise guaranteed under article 14(1)(g) may be restricted in the interests of national economy or in relation to:

(a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise and the licensing and disciplinary control of the person entitled to such fundamental right; and

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.<sup>45</sup>

Moreover, the freedom of movement guaranteed under article 14(1)(h) may be restricted in the interests of 'national economy'.<sup>46</sup> Meanwhile, article 15(7) offers a broader basis for restricting the right to equality and non-discrimination guaranteed under article 12, the freedom from arbitrary arrest, detention and punishment guaranteed under article 13(1) and (2), and all rights listed above guaranteed under article 14 of the constitution. Article 15(7) specifies that these rights may be restricted by law in the interests of 'national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.' It also specifies that 'law' includes 'regulations made under the law for the time being relating to public security'.

The Nineteenth Amendment to the Constitution added a new right to the fundamental rights chapter – 'the right of access to any information as provided for by law, being information that is required for the exercise or protection of a citizen's right'.<sup>47</sup> Grounds for restricting this particular right were also added and framed in the following terms:

No restrictions shall be placed on the right declared and recognized by this Article, other than such restrictions prescribed by law as are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals and of the reputation or the rights of others, privacy, prevention of contempt of court,

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<sup>43</sup> *Ibid.* Article 15(3).

<sup>44</sup> *Ibid.* Article 15(4).

<sup>45</sup> *Ibid.* Article 15(5).

<sup>46</sup> *Ibid.* Article 15(6).

<sup>47</sup> *Ibid.* Article 14A(1).

protection of parliamentary privilege, for preventing the disclosure of information communicated in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>48</sup>

The legal framework for the restriction of rights under the Sri Lankan constitution appears to include a number of features worth discussing further. At the outset, the general terminology used in article 15 of the constitution is deeply problematic, as it fails to include any normative conditions in terms of the circumstances in which laws restricting rights can be enacted. In essence, there is no inclusion of the word 'necessary' as evident in the ICCPR and the ECHR. Moreover, despite borrowing terminology from the Indian constitution in articulating certain rights restrictions, article 15 does not include the terms 'reasonable restriction' – a condition included in the limitation clauses contained in the fundamental rights chapter of the Indian constitution.<sup>49</sup> A similar condition is included in section 36(1) of the South African constitution, which reads:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is *reasonable and justifiable* in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors...(emphasis added).

The lack of conditions such as 'necessity', 'reasonableness' or 'justifiability' in article 15 of the Sri Lankan constitution has provided the state unwarranted space to 'legally' restrict individual rights. The plethora of abstract interests – the kind Judge O'Leary warns us about – including 'national economy', 'racial and religious harmony' and 'the general welfare of a democratic society' then become overbroad and subject to abuse. As will be discovered later in this section, even interests such as 'national security', over which there is some definitional clarity,<sup>50</sup> have been extended to an absurd level of abstraction in Sri Lanka.

The general absence of conditions and the tendency for abstraction are compounded by the fact that the Sri Lankan constitution offers no meaningful avenue for judicial review of legislation. Article 121 of the constitution provides citizens with an opportunity to challenge the constitutionality of a Bill, provided the petition is submitted to the Supreme Court within one week of the Bill being placed on the Order Paper of Parliament. Even if the Supreme Court were to hold that the Bill was

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<sup>48</sup> *Ibid.* Article 14A(2). See further, Gehan Gunatilleke, 'The Freedom of Information as a Fundamental Rights' in Asanga Welikala (Ed.) (2016) *The Nineteenth Amendment to the Constitution: Content and Context* (Centre for Policy Alternatives): Ch.8, available at: <http://constitutionalreforms.org/the-nineteenth-amendment-to-the-constitution-content-and-context>.

<sup>49</sup> The Constitution of India, Part III.

<sup>50</sup> See Siracusa Principles, *op. cit.* para.I(B)(29). According to the Principles, 'national security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence *against force or threat of force*' (emphasis added).

inconsistent with certain fundamental rights, the most it could recommend under article 123 is that the Bill be enacted with a two-thirds majority in Parliament, or in some cases, following a referendum. Where the Bill is in fact enacted with such a special majority (and where required, a referendum), it becomes law notwithstanding any inconsistency with fundamental rights.

The weak framework on judicial review of legislation has made meaningful scrutiny of laws that limit fundamental rights improbable. The enactment of the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979 (PTA) perfectly illustrates the incredible danger inherent within this framework. When the Bill was tabled in Parliament, it was described as ‘urgent in the national interest’.<sup>51</sup> Its enactment was hence expedited under article 122 of the constitution, which required the Supreme Court to determine the constitutionality of the Bill within twenty-four hours.<sup>52</sup> Moreover, when the Bill was referred to the Supreme Court, the Court was informed that the Cabinet had decided to pass the Bill with a two-thirds majority.<sup>53</sup> It is noted that any inconsistency with an ‘entrenched’<sup>54</sup> provision of the constitution would have required the Bill to be enacted after it is referred to the people in a referendum, in addition to the requirement of a two-thirds majority in Parliament.<sup>55</sup> Apart from articles 10 and 11, which respectively guarantee the freedom of thought, conscience, and religion, and the freedom from torture, no provisions of the fundamental rights chapter, including article 13, are entrenched. Hence only a two-thirds majority in Parliament is required to enact legislation that restricts such rights.

A number of features of the Prevention of Terrorism Bill were clearly inconsistent with certain rights guaranteed under article 13 of the constitution. For instance, section 16 provided that statements made by a suspect to an officer not below the rank of Assistant Superintendent of Police were admissible as evidence against the suspect. An alarming feature of the section was the fact that it placed on the suspect (as opposed to the prosecutor) the burden of proving the involuntariness of such a confession. Moreover, section 9 of the Prevention of Terrorism Bill authorised the administrative detention of a suspect for a period up to eighteen months. The legal sanction of such detention has raised serious concerns. For example, the UN Human Rights Committee later observed that such detention without charge or trial violates articles 9 and 14 of the ICCPR.<sup>56</sup> Thus the Bill’s patent inconsistency with article 13 of the constitution including the right to the presumption of innocence and the freedom

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<sup>51</sup> See Kishali Pinto-Jayawardena, Jayantha de Almeida Gunaratne and Gehan Gunatilleke, *The Judicial Mind: Responding to the Protection of Minority Rights* (Law & Society Trust 2014), at 194.

<sup>52</sup> It is noted that article 122 was repealed through the Nineteenth Amendment to the Constitution.

<sup>53</sup> S.C. S.D No. 7/79, decided on 17 July 1979.

<sup>54</sup> The term ‘entrenched’ is used to connote the fact that certain provisions of the constitution cannot be amended or repealed without a special majority and a referendum. According to article 83 of the constitution, articles 1, 2, 3, 6, 7, 8, 9, 10, 11 and 83 are entrenched.

<sup>55</sup> Article 83 of the Constitution of Sri Lanka.

<sup>56</sup> United Nations Human Rights Committee, *Concluding observations on the fifth periodic report of Sri Lanka*, 21 November 2014, CCPR/C/LKA/CO/5, at para.11.

from arbitrary arrest and detention was not subject to judicial scrutiny. Kishali Pinto-Jayawardena *et al* offer the following analysis on the matter:

[T]he Court did not have to decide whether or not [the Bill was inconsistent with] Articles 12(1), 13(1) and 13(2), permitted by Article 15(7). The only question before Court was whether the Bill was inconsistent with any entrenched provisions of the Constitution. In answering this question, the Court determined that the Bill did not require a referendum...as it was of the view that the Bill did not repeal or amend any entrenched provision in the Constitution. The PTA, passed with minimal fuss, was to become one of the most draconian pieces of legislation to be passed by a Sri Lankan legislature.<sup>57</sup>

The PTA remains on the statute books and has survived decades of criticism, particularly in light of the incredible limitations it places on certain fundamental rights. The law captures the serious problem in the general constitutional framework within which the Sri Lankan state could restrict rights by law.

A notable exception to this general trend is perhaps the Supreme Court determination on the Prohibition of Forcible Conversion of Religion Bill of 2004. The Bill sought to make the 'unethical' religious conversion of persons a punishable offence. The Supreme Court found that the Bill was inconsistent with article 10 of the constitution, which guarantees the freedom of thought, conscience, and religion, and article 14(1)(e), which guarantees the freedom to manifest a religion or belief in worship, observance, practice and teaching.<sup>58</sup> This case stands as one of the rare examples in which the Supreme Court read article 15(7) to conclude that the proposed limitation on the rights concerned was impermissible.<sup>59</sup> Yet the approach of the Court remained conservative, as it observed that a slight refinement to the Bill could address the inconsistency with articles 10 and 14(1)(e). It observed that the inclusion of the words 'for the purpose of converting a person from one religion to another' next to the term 'allurement' would have cured the unconstitutionality of the Bill.<sup>60</sup> Fortunately, the Bill was subsequently shelved by the government during the negotiations that took place between inter-faith groups to revise it.

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<sup>57</sup> Pinto-Jayawardena *et al. op. cit.* at 195.

<sup>58</sup> *Prohibition of Forcible Conversion*, S.C Determination No. 4/2004.

<sup>59</sup> By contrast, in the case concerning the *Provincial of the Teaching Sisters of the Holy Cross of the Third Order of Saint Francis in Menzingen of Sri Lanka (Incorporation)* S.C. Special Determination No. 19/2003, the Supreme Court held that Buddhism's foremost place under article 9 of the constitution restricted the rights of individuals from minority religions to propagate their faith. The Court held that article 14(1)(e) did not contain an explicit right to propagate a religion. It accordingly concluded that any Bill that enabled the propagation of a minority religion through material incentives undermined the purpose of article 9, and could be passed only with a special majority in Parliament and referendum.

<sup>60</sup> *Ibid.* See section 8(a) of the Prohibition of Forcible Conversion of Religion Bill of 2004. The term 'allurement' is defined as 'any gift or gratification whether in cash or kind; grant of any material benefit, whether monetary or otherwise; grant of employment or grant of promotion in employment.'

Meanwhile, unlike article 15, article 14A(2) of the constitution includes certain conditions that narrow the scope for the state to restrict fundamental rights – in this case, the right to access information guaranteed by article 14A(1). Apart from the fact that the restriction must be prescribed by law and be in pursuance of a specific interest, such as national security, article 14A(2) stipulates that the restriction be ‘necessary in a democratic society’. This additional condition is reminiscent of the limitation clauses of the ECHR. Despite this progressive feature, the Supreme Court’s interpretation of article 14A(2) has been a cause for concern.

The Supreme Court recently interpreted article 14A(2) in the context of the constitutional challenge of the Right to Information Bill of 2015.<sup>61</sup> One of the petitioners challenging the Bill argued that the restriction contained in clause 5(1)(c) of the Bill was outside the permissible grounds listed in article 14A(2). Clause 5(1)(c) sought to restrict access to information where the information could cause ‘serious prejudice to the economy of Sri Lanka’. The challenge appeared to have some *prima facie* merit, as article 14A(2) makes no reference whatsoever to economic matters. Yet the Court offered a peculiar interpretation of the terms ‘national security’ – which is one of the grounds contained in article 14A(2) – to include the ‘economic interests’ of the state. The Sri Lankan state cited a certain Indian Supreme Court judgment to argue that the terms ‘national security’ could encompass matters outside ‘military security’.<sup>62</sup> On the one hand, the judgment appears to have been taken out of context. The Indian Supreme Court considered the question of whether natural justice principles were dispensable in situations where national security was threatened. It opined that it is “difficult to define in exact terms as to what is national security”, and that the terms generally includes “socio-political stability, territorial integrity, economic solidarity and strength, ecological balance, cultural cohesiveness, [and] external peace.”<sup>63</sup> It accordingly observed that the matter of national security is not a question of law but a matter of policy, best determined by the executive branch of government.<sup>64</sup> Hence the Indian Supreme Court was not seeking to expand the definition of the terms ‘national security’, but was only pointing out that the executive is best placed to determine when national security was threatened. This judgment scarcely suffices to support a proposition that the statutory definition of ‘national security’ could be expanded to include the economic interests of the state.

On the other hand, such expansion appears to be wholly inconsistent with the international interpretation of the terms ‘national security’. For instance, the Siracusa Principles clearly insist that ‘national security’ contemplates ‘force or threat of force’.<sup>65</sup> Yet the Court accepted an exceedingly abstract notion of ‘national security’ and opined that details of entering into overseas trade agreements were ‘part and

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<sup>61</sup> S.C. (S.D.) No.22 of 2016.

<sup>62</sup> *Ibid.* at 8. See *Ex-Armymen's Protection Services Private Limited vs. Union of India and others* (2014) No.2876/141.

<sup>63</sup> (2014) No.2876/141, at para.15.

<sup>64</sup> *Ibid.* at para.16, citing Lord Hoffman in *Secretary of State for the Home Department v. Rehman* (2003) 1 AC 153.

<sup>65</sup> Siracusa Principles, *op. cit.* para.I(B)(29).

parcel' of the interests of national security.<sup>66</sup> It accordingly held that the impugned section of the proposed Bill was not inconsistent with article 14A(2).

The jurisprudence of the Supreme Court of Sri Lanka over the last thirty-seven years demonstrates certain critical weaknesses in the constitutional framework pertaining to limitation clauses. First, the clauses themselves lack certain internationally recognised conditions that define and narrow the scope of rights restrictions. Second, the lack of meaningful avenues for judicial review of legislation has made judicial intervention mostly superficial, particularly when non-entrenched fundamental rights are at stake. Third, even when judicial scrutiny is appropriately invoked, the approach of the courts has been conservative and overly deferential towards the state's interests. Given the context of such conservatism, a radical departure from the general approach to defining limitation clauses is worth considering.

#### **4. Grounding Limitation Clauses in the Rights and Freedoms of Others**

The foregoing discussion leads us to consider two important observations. First, the general international framework on limitation clauses has permitted the restriction of rights on the basis of highly abstract state interests. This tendency has facilitated a steady departure from the classical liberal basis for restricting rights, i.e., 'rights and freedoms of others' to more abstract bases, such as 'democracy' and 'secularism'.<sup>67</sup> To put it in terms of Berlin's two concepts of liberty, this tendency has seen a prioritisation of 'positive liberty' over 'negative liberty'. The tendency is certainly evident in the European context, where the margin of appreciation doctrine has facilitated judicial deference to abstract state interests such as 'secularism' without sufficient scrutiny.

Second, the general weakness in how limitation clauses are designed and interpreted appears to be accentuated in the Sri Lankan context due to an even weaker constitutional framework and a highly deferential judiciary. Sri Lanka appears to be a classic example of just how dire the situation might become if the existing normative deficiencies in the discourse on limitation clauses are permitted to play out in conservative national contexts. This section accordingly proposes a radical departure from the existing framework and the adoption of a 'rights-based' approach to

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<sup>66</sup> *Ibid.* at 10.

<sup>67</sup> It is noted that not all rights restrictions on the basis of 'the rights and freedoms of others' flow from classical liberal thought. For instance, substantive equality, which imposes positive duties on the state to ensure *de facto* equality, has served to justify unequal treatment of some for the benefit of historically marginalised groups. See Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008), at 178. Thus, in a limited sense, the doctrine of substantive equality justifies the restriction of one group's right to non-discrimination in order to further the substantive equality of another group. This doctrine, however, does not invoke constitutional or statutory limitation clauses. Hence it is not dealt with in this particular paper.



limitation clauses. A rights-based approach to limitation clauses simply requires lawmakers and courts to consider and prioritise the question: what rights or freedoms would be protected or promoted as a result of applying a limitation clause? Hence a rights-based approach is important both in the design and interpretation of limitation clauses.

On the question of design, lawmakers – and in Sri Lanka’s case, constitutional reformers – must consider the precise terminology to be included in legal and constitutional texts in order to prompt a rights-based interpretation of limitation clauses. Thus textual design is important to ensuring a rights-based approach. At least three textual features are worth considering.

First, abstract state interests that are difficult to substantiate without a high level of deference to state authorities ought not to be included in the constitutional text. In this context, it may be inappropriate to retain grounds such as ‘racial or religious harmony’ or ‘the just requirements of the general welfare of a democratic society’, which appear to be broader than more established grounds such as ‘public order’ or ‘public health’. The specific grounds included in the ICCPR ought to guide reformers in this regard.

At this juncture, ‘grounds’ for limiting rights ought to be distinguished from ‘conditions’ for limiting rights. Lawmakers ought to avoid including imprecise terminology such as ‘general welfare’, when setting out the grounds for limiting rights. However, including such terminology when defining the conditions upon which rights could be limited may be appropriate. In both cases, the aim is simply to confine the scope of the rights restriction – either by precisely and narrowly defining the grounds on which a right could be limited, or by imposing a broad condition that must be met in order to limit a right.

Second, as explained above, certain additional overarching conditions ought to be added to the general condition that requires all restrictions to be ‘prescribed by law’. In this respect, the terms ‘necessary in a democratic society’ should be included to narrowly set out the circumstances in which a restriction could be introduced by law. Such terminology is clearly included in the ICCPR and has already been included in article 14A(2) of the Sri Lankan constitution. However, as evident in the European context, this terminology alone may be inadequate to check the tendency of courts to be deferential towards state authorities. Thus a further condition ought to be considered based on the formulation included in section 36 of the South African constitution. The terms ‘necessary in a democratic society’ should accordingly be followed by the words ‘based on human dignity, equality and freedom’ to add a further condition that entrenches the primacy of rights and freedoms in all contexts. The use of terminology already included in existing international and domestic rights instruments of course brings with it the ability to rely on comparative jurisprudence as an interpretational aid.

Finally, courts must have clear authority to review laws in terms of their consistency with fundamental rights provisions. In the event that a law is deemed inconsistent with a fundamental rights provision, the law ought to be struck down and removed from the statute books unless amended to cure such inconsistency. Neither a special majority in Parliament nor any ultra-majoritarian mechanism ought to cure such inconsistency. Such an overarching framework that removes abstraction, introduces precise conditions, and entrenches the normative primacy of fundamental rights may encourage future courts to adopt a rights-based approach when interpreting limitation clauses.

At the interpretational level, a rights-based approach to limitation clauses simply requires courts to include an additional limb to the usual tests they apply when adjudicating on rights restrictions. This additional limb would ask the same question referenced above: what rights or freedoms would be protected or promoted as a result of the limitation clause under consideration? If the rights restriction is based on an interest that does not protect or promote any right, but is of a purely abstract nature, this approach requires that the restriction be struck down. In essence, the approach would apply the normative filter of ‘the rights and freedoms of others’ to every rights restriction. An illustration may serve to clarify the practical application of this approach.

The ECtHR usually applies the four-pronged test of proportionality to determine the permissibility of a rights restriction under the ECHR. It is noted that the interpretational parameters applicable to supranational bodies such as the ECtHR are not always comparable to national courts. However, the Court’s jurisprudence with respect to the proportionality test may be useful to illustrate the potential features of a rights-based approach to limitation clauses. In the *Şahin* case for instance, the proportionality test was applied to substantiate the Court’s finding that Turkey’s ban of the Islamic headscarf was justified. The ban was prescribed by law and in pursuance of a legitimate state interest – the maintenance of secularism and protecting the rights and freedoms of others. The applicant in the matter did not contest the legitimacy of the state interest, so the matter was “not at issue between the parties”.<sup>68</sup> Hence the Court chose not to consider that particular aspect of the test. Yet the majority opinion of the Court focused almost entirely on the state interest of secularism and afforded “a very high degree of deference to state authorities” in the process.<sup>69</sup> Carolyn Evans rightly observes that the Court’s ostensible approach ultimately “degraded” the notion of human rights.<sup>70</sup>

In the process of focusing almost exclusively on the abstract grounds of secularism, the Court in *Şahin* failed to meaningfully analyse how wearing the headscarf might have infringed on the rights and freedoms of others. A rights-based approach to

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<sup>68</sup> (2007) 44 EHRR 5, at para.99.

<sup>69</sup> Carolyn Evans, ‘The ‘Islamic Scarf’ in the European Court of Human Rights’ (2006) 7(1) *Melbourne Journal of International Law* 52, at 57.

<sup>70</sup> *Ibid.* at 73.

interpreting article 9(2) of the ECHR would have involved precisely that sort of scrutiny. The dissenting opinion of Judge Tulkens in fact ventures into this domain. He observes that the restriction might have been justified on the grounds that it infringes upon the rights and freedoms of others, “if the headscarf the applicant wore as a religious symbol had been ostentatious or aggressive or was used to exert pressure, to provoke a reaction, to proselytise or to spread propaganda and undermined – or was liable to undermine – the convictions of others.”<sup>71</sup>

The ECtHR’s reasoning in *Dahlab v. Switzerland* (2001)<sup>72</sup> – another case involving the Islamic headscarf – meanwhile illustrates the potential of the rights-based approach. In this case, the applicant, a primary school teacher, was instructed by the school administration to refrain from wearing the headscarf. When she challenged the decision, the ECtHR reasoned that wearing a headscarf might have a ‘proselytising effect’ on the applicant’s young pupils – aged between four and eight. The ECtHR declared the application inadmissible and upheld the ban on the basis that the state could – in this instance – legitimately restrict the applicant’s rights under article 9 of the Convention. Admittedly, the Court did not make the legitimacy of the restriction contingent on its nexus to the rights and freedoms of others. To that extent, *Dahlab* is not an instance of the Court adopting a rights-based approach to adjudicating on limitation clauses. But the case appears to demonstrate some potential in introducing an additional limb to the proportionality test – a limb that can steer courts away from deference to purely abstract state interests.

It is, however, necessary to clarify that abstract interests such as ‘democracy’ and ‘secularism’ need not be automatically expunged in the course of adopting a rights-based approach. These interests are certainly prone to abuse and ought not to be explicitly included in a list of grounds for limiting rights. Yet abstract state interests may be considered in the course of rights adjudication when ‘the rights and freedoms of others’ is presented as the basis for limiting rights. Such interests could be accommodated, provided a genuine nexus between the proffered interests and the rights and freedoms of others could be demonstrated. What constitutes a genuine nexus warrants further consideration. One approach may be to insist on a rational nexus between the proffered state interest and the rights and freedoms of others. Courts – particularly in the United States – have grown accustomed to applying rationality tests in a variety of contexts including in the adjudication of rights.<sup>73</sup> Sri Lankan courts have also adopted this test albeit less frequently. For example, in the context of assessing the validity of an emergency regulation that restricted the freedom of speech and expression, the Supreme Court in *Joseph Perera v. The Attorney General*<sup>74</sup> held:

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<sup>71</sup> (2007) 44 EHRR 5, dissenting opinion of Judge Tulkens, at para.8.

<sup>72</sup> 42393/98 – Admissibility Decision (2001) ECHR 899.

<sup>73</sup> See *Romer v. Evans* 517 U.S. 620 (1996), *Village of Willowbrook v. Olech* 528 U.S. 562 (2000) and *Lawrence v. Texas* 539 U.S. 558 (2003).

<sup>74</sup> [1987] 1 Sri.L.R. 199.

[I]t is competent to the court to question the necessity of the Emergency Regulation and whether there is a proximate or rational nexus between the restriction imposed on a citizen's fundamental right by emergency regulation and the object sought to be achieved by the regulation.<sup>75</sup>

The Court accordingly applied a rational nexus test to determine whether the restriction imposed was rationally related to the objective sought. A similar rational nexus test could be adapted to advance a rights-based approach to limitation clauses. The test could form part of the aforementioned additional limb of a proportionality test, i.e., the assessment of whether the rights restriction, as applied, advances the rights and freedoms of others. When invoked in a particular case, statutorily listed grounds such as 'national security', 'public order' and 'public health' could be assessed in terms of their rational nexus to the rights and freedoms of others in the given circumstances. The test may also be applied in cases where the state does not rely on such listed grounds, but instead relies on abstract interests such as 'secularism'. The test may then be applied to assess whether a rights restriction on the basis of the abstract state interest is rationally related to the advancement of the rights and freedoms of others.

A rights-based view of secularism has been advanced within the American conversation on the separation of church and state.<sup>76</sup> Several scholars have in fact emphasised the nexus between secularism and the rights and freedoms of others. Ronald Dworkin for instance suggests that state endorsement of a faith results in the failure to demonstrate equal concern for all citizens and amounts to the violation of each individual's right to equal respect.<sup>77</sup> Meanwhile, Christopher Eisgruber and Lawrence Sager contend that the state's symbolic endorsement of a particular faith results in disparagement to individuals of other faiths.<sup>78</sup> Moreover, Martha Nussbaum claims that the state's duty to maintain religious neutrality is based on the need to ensure that no individual from any faith would "suffer from a sense of exclusion".<sup>79</sup> Hence a rights-based approach does not require the re-writing of limitation clauses to simply retain a catchall ground for restricting rights, i.e., 'the protection of the rights and freedoms of others'. Instead, it entails consistency in how we interpret the grounds on which we restrict rights. In the case of secularism, it would come down to the difference between a justification that is rationally related to the rights and freedoms of others and the more abstract justification accepted by the ECtHR in *Şahin* and *Ebrahimian*.

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<sup>75</sup> *Ibid.* at 217.

<sup>76</sup> McCrea, *op. cit.* at 697.

<sup>77</sup> Ronald Dworkin, *Religion without God* (Harvard University Press, 2013).

<sup>78</sup> Christopher Eisgruber & Lawrence Sager, *Religious Freedom and the Constitution* (Harvard University Press 2007).

<sup>79</sup> Martha Nussbaum, *Political Emotions: Why Love Matters for Justice* (Harvard University Press 2013) at 5-7, cited in McCrea, *op. cit.* at 697.

What then would a rights-based approach to limitation clauses look like in the context of the Sri Lankan constitution? This question may be approached in the context of the ongoing constitutional reform process in Sri Lanka. In late 2015, a Public Representations Committee on Constitutional Reform was appointed to consult the public and receive representations on constitutional reform. Naturally, the Committee considered representations on fundamental rights.<sup>80</sup> The final report of the Committee was published in May 2016. Disappointingly, the report fails to address the question of limitation clauses in a meaningful manner. In fact the report contains no examination of article 15 of the present constitution whatsoever. However, two positive aspects of the report ought to be noted. First, the report acknowledges the danger in suppressing rights on the grounds of ‘national security’ and recommends that ‘restrictions on fundamental rights should be minimised as far as possible’.<sup>81</sup> Second, when expanding on the existing rights pertaining to trade unions, it specifies that any restriction on such rights must be ‘necessary in a democratic society for the protection of racial or religious harmony or for the purpose of securing due recognition and respect for the rights and freedoms of others’.<sup>82</sup> Hence two important principles are acknowledged in the Report. The first is that the grounds for restricting rights must be minimised; the second is that conditions such as ‘necessity’ must be included when formulating limitation clauses. Both these principles can be useful in enunciating a rights-based approach to limitation clauses in a reformed Sri Lankan constitution.

A rights-based approach to limitation clauses lies in a combination of textual design and judicial interpretation. On the one hand, the text of the constitution must narrowly and precisely set out the scope for limiting rights. This may be best achieved through the framing of precise grounds and overarching conditions. On the other hand, judges ought to interpret the grounds on which rights are restricted in light of their nexus to the rights and freedoms of others. Courts could apply an expanded proportionality test to ensure that each rights restriction is in some way rationally related to the rights and freedoms of others. This combination of design and interpretation may be key to ensuring a rights-based approach to limitation clauses in Sri Lanka’s future constitutional jurisprudence. .

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<sup>80</sup> Public Representations Committee on Constitutional Reform, *Report on Public Representations on Constitutional Reform* (May 2016).

<sup>81</sup> *Ibid.* at 127.

<sup>82</sup> *Ibid.* at 105.

## 5. Conclusion

At the heart of a liberal conception of rights lies the idea that all human beings are of equal moral worth. This fundamental idea has given rise to a sound normative basis on which certain individual rights may be legitimately restricted in order to protect and promote the rights and freedoms of others. Such legitimate restrictions are generally encapsulated in the limitation clauses of international and regional human rights treaties and national constitutions.

This paper has attempted to deconstruct certain international, regional, and national discourses on limitation clauses. In the process, it has expressed concern over a tendency among courts – including those generally considered to be progressive – to permit highly abstract bases on which individual civil and political rights may be lawfully restricted. This tendency has undermined the primacy of rights and has encouraged inappropriate judicial deference when abstract state interests are proffered.

Meanwhile, in Sri Lanka's case, laws purporting to advance state interests have restricted fundamental rights too easily. Moreover, the constitutional framework pertaining to judicial review has rendered constitutional safeguards superficial. Laws that are inconsistent with fundamental rights can either escape judicial scrutiny or be enacted through special majorities in Parliament. Even standard limitation grounds such as 'national security' have been stretched to absurd extents of abstraction to accommodate state interests.

In view of these serious weaknesses in the existing normative framework on rights restrictions, this paper has proposed a rights-based approach to designing and interpreting limitation clauses. Such an approach advances the view that all limitation clauses should be grounded in the rights and freedoms of others – both in terms of their textual design and their interpretation by courts. The paper signals the potential of this approach by pointing to outlier opinions of the ECtHR, where the proportionality test has focused heavily on the rights and freedoms of others. The paper accordingly recommends that courts introduce an additional limb to existing judicial tests to formally ensure that each restriction has some rational nexus to the protection or promotion of the rights and freedoms of others. Meanwhile, the potential of this approach is further buttressed by scholarly work on rights-based readings of abstract state interests such as 'secularism'. Hence judges may already have the scholastic tools needed to read the 'rights and freedoms of others' into the abstract state interests that are generally presented as justifications for limiting rights. The ultimate aim of this approach must be to ensure that the design and interpretation of limitation clauses uncompromisingly prioritise rights holders over all other state interests.

The reformers of the Sri Lankan constitution have a unique opportunity to refine the course of rights jurisprudence in the country. They have an opportunity to design

limitation clauses in sharper and more precise terms, thereby narrowing the scope for abuse, and advancing the primacy of rights. They also have an opportunity to remove from the constitution all means through which abstract state interests might trump individual rights. Reformers should accordingly create the necessary textual conditions for future courts to adopt a rights-based approach to limitation clauses. It is this liberal vision of rights – a return to that simple canon ‘your rights end where mine begin’ – that a reformed Sri Lankan constitution must set out to achieve.