# ADOPTING WEAK-FORM REVIEW IN INDIA: AN INVITATION TO A NEW CONSTITUTIONALISM

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**Abstract**

*In systems of judicial supremacy judicial review implies the displacement of legislative or executive decisions. This results in what is called "the counter-majoritarian difficulty". The counter-majoritarian difficulty highlights the problem of unelected judges exercising exclusive, or near-exclusive, dominion over decisions that ought to be made by democratically elected branches of the State – namely, the legislature. In addressing the counter-majoritarian difficulty, I examine what Mark Tushnet had referred to as the "weak-form" system of judicial review. The focus of this article is on rights review and on a single jurisdiction – India. My effort is to argue for weak-form review in India as a system that breaks away from the traditional contrasts between legislative and judicial supremacy, and which better protects rights by reallocating powers between the legislatures and the courts. This article begins with an introduction to weak-form review. I proceed to the opening section of my analysis where I detail the evolution of judicial review in India and justify its present avatar as "strong"; this justification is in response to a scholarly position which holds that Indian judicial review, though strong in design, is, in practice, a "partial substitute" of weak-form review. In the second section, divided into four subthemes, I explore arguments made for weak-form review; in the same vein, I address concerns that are commonly placed against it. In the final section, I summarise and conclude.*

*Keywords: Judicial Review, Weak-Form Review, Constitutional Law, Comparative Constitutional Law, India.*

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## 1. Introduction

Judicial review implies the displacement of legislative or executive decisions. Those decisions, as Mark Tushnet explains, "can often plausibly be described as reflecting the views of a nation's majority as expressed through voting; and constitutional court judges are typically, at most, indirectly responsible to the electorate".[1] These notions result in what Alexander Bickel had popularly called "the counter-majoritarian difficulty".[2] The counter-majoritarian difficulty arises in countries whose judicial review system gives the judiciary the "final word" on the constitutional validity of legislation. It highlights the problem of unelected judges exercising exclusive, or near-exclusive, dominion over decisions that ought to be made by democratically elected branches of the State – namely, the legislature. The problem is couched on a range of issues which are explored later in this article. The chief among these are (a) the lack of democratic legitimacy backing judicial judgements, (b) the absence of diverse public representation in making these judgements, and (c) the emphasis on legal or judicial devices to resolve issues that are often best solved along with broader approaches, which judges are not necessarily trained to appreciate (e.g. political, policy, ethical, moral and cultural considerations, to name a few).

In addressing the counter-majoritarian difficulty, comparative legal scholars have turned their attention in recent years to constitutional developments in the United Kingdom, New Zealand and Canada.[3] These countries embody systems of judicial review which Tushnet had famously described as "weak-form".[4] This phrase is contrasted with "strong-form" review associated with the United States – i.e. wherein the judiciary is granted the "final word" on the constitutionality of legislations. As Stephen Gardbaum describes it, weak-form review (or the "new Commonwealth model", as he calls it) "decouples judicial review from judicial supremacy by empowering the legislature to have the final word".[5] The essential characteristics of weak-form review are three-fold:

> (1) a legalised bill or charter of rights; (2) some form of enhanced judicial power to enforce these rights by assessing legislation (as well as other governmental acts) for consistency with them that goes beyond traditional presumptions and ordinary modes of statutory interpretation; and (3), most distinctively, notwithstanding this judicial role, a formal legislative power to

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1 M. Tushnet, *The structures of constitutional review and some implications for substantive constitutional law*, 40, 56 in *Advanced Introduction to Comparative Constitutional Law* (M. Tushnet, 2nd ed., 2018).

2 A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 16-17 (2nd ed., 1986). ("[J]udicial review is a counter-majoritarian force in our system… [W]hen the Supreme Court declares unconstitutional a legislative act… it thwarts the will of representatives of the actual people of here and now…").

3 See M. Tushnet, *The Rise of Weak-form Judicial Review*, 321, 327-30 in *Comparative Constitutional Law*, (Tom Ginsburg & Rosalind Dixon, 1st ed., 2011) (for Tushnet's summary of weak-form review provisions in these three jurisdictions).

4 M. Tushnet, *Alternative Forms of Judicial Review*, 101 Michigan Law Review, 2781, 2781-2802 (2003).

5 S. Gardbaum, *Reassessing the new Commonwealth model of constitutionalism*, 8 International Journal of Constitutional Law, 169, 171-5 (2010).

> have the final word on what the law of the land is by ordinary vote.[6]

The first two features set weak-form review apart from traditional Westminster-style Parliamentary supremacy, and the third from judicial supremacy.

Taking note of the inter-institutional dialogue present in weak-form review, some commentators have added the "dialogic" quality as among its distinct features.[7] This attribution is unnecessary and "overinclusive".[8] It does not sufficiently distinguish weak-form review from other forms of judicial review. Even in strong-from review systems, the legislature has the opportunity to respond to judicial pronouncements by passing amendments. As Aileen Kavanagh explains, "… these forms of inter-institutional dialogue occur in both strong-form and weak-form systems. Therefore, 'dialogue' is not a distinctive marker of 'weak-form systems.' Rather, it is something both systems have in common."[9] The dialogue, however, is distinct in weak-form review in that it ultimately culminates in the legislative final word.

The focus of this article is on a single jurisdiction – India. My effort is to present a case for adopting a system of weak-form review in India. In the opening section of my analysis, I detail the evolution of judicial review in India and justify its present avatar as "strong"; this justification is in response to a scholarly position which holds that Indian judicial review, though strong in design, is, in practice, a "partial substitute" of weak-form review. In the second section, divided into four subthemes, I explore arguments made for weak-form review; in the same vein, I address concerns that are commonly placed against it. In the final section, I summarise and conclude.

Two clarifications must be made at the outset. First, by "judicial review", I refer to review of legislation and *not* executive actions. Second, my focus is on rights review and not on broader aspects of constitutional review. My aim is to examine a new model of constitutionalism for India, in this limited context, that breaks away from traditional contrasts between legislative and judicial supremacy, and which better protects rights by reallocating powers between the legislatures and the courts. Moreover, weak-from review, as the examples of the U.K., New Zealand and Canada demonstrate, refers, to the instance of rights review.

## 2. The Indian Context

The aftermath of World War II witnessed a host of new constitutions adopt American-style strong-form judicial review.[10] The constitution of India, enacted in January 1950, was one instance designed in this trend.[11] Unlike the United States

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6 Ibid., at 171.

7 Supra 5, at 179-81 (for an overview of this scholarly position).

8 Ibid., at 181.

9 A. Kavanagh, *What's so weak about "weak-form review"? The case of the UK Human Rights Act*, 13 International Journal of Constitutional Law, 1008, 1035-6 (2015).

10 Supra 4, at 2784.

11 D. D. Basu, *Introduction to the Constitution of India*, 87-9 (22nd ed., 2015).

constitution, the power of rights-based judicial review is expressly stated in Article 13 of the Indian constitution. Clause (1) of the provision states those laws in force immediately before the enactment of the constitution, to the extent that it contravenes the constitutionally guaranteed fundamental rights, shall be void. Clause (2) provides that the state shall not make any law that contravenes the chapter on fundamental rights; to the extent such a law does, it shall be void.

The Supreme Court of India ("SCI") began on a positivist note, inspired by the traditions of British courts.[12] In *A. K. Gopalan v. State of Madras*[13] – the first rights dispute before the SCI – it declined to liberally interpret Article 21, the right to life and personal liberty. This was a matter involving Mr. Gopalan, a communist leader, who had been detained under a preventive detention law. The court deferred to Parliament and refused to grant Mr. Gopalan relief. The SCI continued to display judicial restraint on matters pertaining to personal liberty and economic regulation. This was necessitated, S. P. Sathe argues, by the need to aid a newly formed welfare state in its nation-building efforts.[14]

Judicial deference, however, was not total in this period. The SCI clashed with Parliament, for instance, on the scope of the right to property. Parliament's efforts to introduce radical changes in property relations were met with a court that thwarted this agenda by interpreting property rights expansively.[15] From the 1960s onwards, the SCI began to pronounce its strength in expanded terms. In *Sakal Newspapers (Private) Ltd. India*,[16] it struck down a law, which regulated the number of pages and the space and price for advertisements of a newspaper, as violating the freedom of press embodied in Article 19(1)(a). The SCI became bolder in *Golaknath v. State of Punjab*[17] where it ruled that constitutional amendments could not abridge or take away fundamental rights.

In these early decades, India's Parliament featured majority governments that could easily respond to adverse judicial decisions by enacting constitutional amendments.[18] The property decisions of the first decade-and-a-half since 1950, therefore, were set aside through the First, Fourth and Seventh constitutional amendments, and *Golaknath*'s ruling was reversed by the Twenty-Fourth constitutional amendment which explicitly gave Parliament unfettered amending power.[19]

The nature of Parliamentary response manifest in the initial decades of India's nationhood is arguably what led Mark Tushnet and Rosalind Dixon to conclude that the Indian instance of judicial review is distinct from traditional strong-form review. They

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12 S. P. Sathe, *Judicial Activism: The Indian Experience*, 6 Washington University Journal of Law & Policy, 29, 40 (2001).

13 A.K. Gopalan v. State of Madras, AIR 1950 SC 27.

14 Supra 12, at 40-1.

15 See J. Singh, *(Un)Constituting Property The Deconstruction of the 'Right to Property' in India,* Working Paper Series, Centre for the Study of Law and Governance, 9-13, Working Paper Number CSLG/WP/05, Jawaharlal Nehru University (2012 Reprint) (for an overview of clashes between Parliament and the SCI on the scope of the right to property).

16 Sakal Papers Pvt. Ltd. v. Union of India, AIR 1962 SC 305.

17 Golaknath v. State of Punjab, AIR 1967 SC 1643.

18 Article 368 of the constitution provides that a constitutional amendment can be affected merely by a majority vote of two-thirds of Parliamentarians present and voting.

19 See supra 15 and infra 22, respectively.

claim that the strong-form aspect of Indian-style judicial review is "weakened" by its constitution's relatively easy amendment procedures.[20] The Indian Parliament could respond, and has responded, to judicial invalidations of statutes with relative ease. The 101 amendments that feature in the constitution, to date, support this claim.[21]

Tushnet and Dixon's observation is compelling. However, a closer look at the Indian context today renders their position outdated.[22] The excesses of the political Emergency imposed by Prime Minister Indira Gandhi in 1975, and the SCI's "dismal performance in protecting civil rights" during this period, prompted the judiciary to adopt a more "activist" stance.[23] This was an act of atonement, so to speak, an attempt to set-aside its prior pusillanimity. As Sathe observes, "if the Court had envisioned a more positive role for itself in Indian democracy… it could no longer continue to adopt a positivistic role while interpreting other provisions of the Constitution."[24] Indian judicial review which, till this period was a partial substitute to a weak-form system, was metamorphosing into a substantially strong court.

## 3. The Strong Character of the Indian Judiciary

The "metric of strength" in a judicial review system, to use Kavanagh's phrase and reasoning, is "multi-dimensional".[25] Beyond formal design, it can be influenced by several factors that include the constitutional and political culture of a society. It appears insufficient that the ease of amendment procedures and the sheer number of constitutional amendments, in themselves, should characterise the Indian instance as a variant of weak-form review. My argument is based on the following reasons:

First, as Pratap Bhanu Mehta notes, where the SCI's judgement – particularly on rights matters – is sufficiently "popular", politicians may "perceive that there will be a

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20 M. Tushnet & R. Dixon, *Weak-form review and its constitutional relatives: An Asian perspective*, 102, 108-12 in *Comparative Constitutional Law in Asia* (T. Ginsburg and R. Dixon, 2014) (The Indian Constitution's amendment rule, stated in Article 368, is simple: amendments can be adopted by a majority vote in each House of Parliament); also see supra 1, at 61 (Tushnet explains how "easy amendment rules" and weak-form review are "partial substitutes"); D.D. Basu, *Commentary on the Constitution of India*, vol. 14 (T.S. Doabia and M.L. Singhal, 9th ed, 2017), ("Though the Constitution of India is a written one and also federal in character,—in the matter of amendment, it has sought to avoid the difficult processes laid down by the American and Australian Constitutions. As has been pointed out at the outset, our Constitution is partly flexible and partly rigid, and a large number of provisions of the Constitution are open to amendment by the Union Parliament in the ordinary process of legislation outside Article 368.").

21 Contrast this figure with that of the Constitution of the United States, which features just 27 amendments since the Constitution's enactment in 1787.

22 See supra 12, at 30-109 (for an overview of case law that shows how the SCI began to assert its "strength" more emphatically from the late 1960s onwards till it achieved its present 21st century strong-form avatar. Sathe, it should be noted, describes judicial strength with the phrase "judicial activism").

23 A. Chandrachud, *Due Process of Law*, 3 (2012).

24 Supra 12, at 50.

25 Supra 9, at 1041.

political penalty involved in overturning a court intervention."[26] Legislative caution, in this way, disincentivises Parliament from enacting a constitutional amendment to the contrary. This is possibly why the State has not pushed for an amendment to invalidate the SCI's recent verdict which upheld privacy as a fundamental right under the constitution.[27] This is despite the government's vehement opposition against upholding the right to privacy under Article 21.[28] The State's deference to the SCI on similar "sensitive" matters was further evidenced in its leaving the constitutionality of Section 377 of the Indian Penal Code, which criminalises homosexual intercourse, "to the wisdom of the court".[29] The court, in such circumstances, normally enjoys the final word.

*Second*, the "basic structure doctrine", introduced by the SCI in *Kesavanada Bharti v. State of Kerala*,[30] and developed in subsequent case law,[31] allows the SCI to invalidate constitutional amendments which *it* finds are in conflict with the (judicially determined) basic features of the constitution. On this instance, Indian-style judicial review certainly acquires a "strong" form.

There is arguably more to be said about the SCI's positioning in India's democratic context that renders it *effectively* "strong". Mehta notes that "… in carving out a role for itself, the Indian Supreme Court is looking outward to a concept of public legitimacy – as it were – rather than inward to the text of the law or upward to a self-evident provision of the constitution".[32] Mehta's argument is that the SCI, over the years, has turned more towards notions of "public reason" and public acceptability, than to normative theories of judicial legitimacy, to justify its actions. He clarifies that "this does not suggest that it dispenses with the law or the constitution; rather, it must deploy them in ways that it believes will command democratic legitimacy".[33] Couched on public popularity, as Mehta previously observes,[34] the SCI's decisions are met with legislative circumspection and a reluctance from Parliament to combat the judiciary. In these circumstances, the SCI has acquired a remarkably activist character. The extent of the powers it has given unto itself can be seen, most obviously, in its relatively recent "interpretations" of Article 21. The guarantees of "life" and "liberty" have been stretched far beyond the provision's text to include the right to livelihood, shelter, cultural heritage, health and medical aid, privacy, and so on.[35] More significantly, even a concept like the

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26 P. B. Mehta, *The Indian Supreme Court and the Art of Democratic Positioning*, 233, 244 in *Unstable Constitutionalism: Law and Politics in South Asia*, (2015).

27 K.S. Puttaswamy v. Union of India, (2014) 6 SCC 433.

28 PTI, *As right to privacy is multifaceted, it can't be treated as a fundamental right, Centre tells SC*, The Hindu (27/7/2017), https://www.thehindu.com/news/national/right-to-privacy-not-fundamental-right-centre-tells-sc/article19369385.ece , last seen on 2/08/2018.

29 K. Rajagopal, *Gay sex: Centre leaves it to wisdom of SC to decide on constitutionality of Section 377 IPC*, The Hindu (11/7/2018), https://www.thehindu.com/news/national/sc-hearing-on-section-377/article24387288.ece , last seen on 2/08/2018.

30 (1973) 4 SCC 225.

31 See M. Khosla, *Constitutional Amendment*, 232, 232-250 in *The Oxford Handbook of the Indian Constitution*, (S. Choudhry, M. Khosla, et al, 2016).

32 Supra 26, at 245.

33 Ibid.

34 Supra 26.

35 See A. Surendranath, *Life and Personal Liberty*, 756, 756-776 in *The Oxford Handbook of the Indian Constitution*, 756-776 (S. Choudhry, M. Khosla, et al, 2016) (for an overview of SCI decisions which have read social-welfare entitlements into Article 21).

basic structure is an expression of such activism. Though the doctrine was, and remains, widely celebrated in India's public domain, nowhere does the text of the constitution strictly legitimise it. Indeed, as Mehta observes, "it seems that nothing is beyond the scope of its [the SCI's] power and jurisdiction".[36]

To view India's higher judiciary as "strong" only in *design*, or in a limited sense, therefore, is problematic. When a constitutional amendment is made in response to a judicial invalidation, the possibility of interpreting it as violative of the "basic structure" – even when such an effort would involve strained interpretation – does not evade the SCI. After all, the basic structure doctrine is itself abstract and its scope is far from defined. The SCI has periodically demonstrated its willingness to engage in strained or doctrinally unclear interpretations, so long as it believes it enjoys public acceptance.[37]

My argument in this paper, therefore, is presented not only against the apparently strong-form *design* of Indian-style judicial review. It is also in response to the "strength", manifest in *judicial practice*, that gives the SCI effective powers in claiming the final word.

The next section of this paper examines arguments for weak-form review; in the same vein, it addresses concerns that are commonly placed against it.

## 4. The Case for Weak-Form Review

In systems that feature weak-form review, the counter-majoritarian difficulty is turned into "an institutional version of reasonable disagreement over the proper specification of abstractly defined values".[38] In the ultimate course of rights adjudication, why must the "reasonable" view of the legislature prevail over the judiciary's? In this section, I will explore this question. The various defences for weak-form review are presented here under four thematic subsections.

### 4.1. *A "Ground-Up" Discourse on Rights*

An apprehension that may come to mind is whether Parliament is indeed capable of mature and serious deliberation on rights. In India, this view is understandable given

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36 Supra 26, at 233.

37 See M. Khosla, *The Ninth Schedule Decision: Time to Define the Constitution's Basic Structure*, 42 Economic and Political Weekly, 3203, 3203-3204 (2007) (Using I.R. Coelho v. State of Tamil Nadu, (1999) 7 SCC 580, as an example, Khosla observes: "Judges evaluate and determine whether the basic structure is violated on a case-by-case basis. There is no defined category and the list of items that form part of the basic structure has been expanding since the pronouncement of the doctrine. While past cases have meant that an inclusive list of some sort is existent, there is no exhaustive formulation. This places a powerful weapon in the hands of the judiciary that enables it to not only review legislative and executive actions, but also to do so without criterion."); See generally A. Bhuwania, *Courting the People: Public Interest Litigation in Post-Emergency India*, (2017).

38 Supra 1, at 58.

the dwindling levels of productivity an average Parliamentary session features.[39] In the Budget Session of 2018, the Lok Sabha (i.e. the Lower House) functioned for an average of 21% of its scheduled time and the Rajya Sabha (the Upper House) for 27%.[40] Within these brackets, only 1% and 6% of time, respectively, in the Lok Sabha and Rajya Sabha, was spent on productive legislative deliberation.[41] In fact, PRS Legislative Research has confirmed that this session witnessed the "lowest number of discussions on matters of public importance since 2014."[42] It follows that the judiciary, which is typically understood to function without disruptions, and within the rigorous idiom of legal reasoning, is better placed to have the ultimate word on rights.[43]

The present judicial review regime in India has created its own political imperatives. These emphasise, and even empower, the judicial role in rights deliberations in a manner that they do not for Parliament. As Gardbaum points out, "where legislatures never have final responsibility for rights, and, even more, where (as often happens) courts do not take legislative considerations seriously in their own deliberations, there is an understandable tendency to leave matters of constitutionality to the judiciary and for the legislatures to spend their time on matters they do decide."[44] The absence of authoritative legislative input into rights discourse arguably *disincentivises* Parliament from approaching it with the rigour it demands.

The benefit of weak-form review systems, continues Gardbaum, is that "it has greater potential to actively involve all three branches of government in rights review and to create a broader rights consciousness among the citizenry".[45] This results in what Grant Huscroft terms as a "ground-up" culture of rights, as opposed to a "top-down" one.[46] When Parliament is empowered with the definitive word on rights, the public eye will necessarily shift towards it. The responsibility this calls for will compel Parliament, and its subcommittees, to devote greater and more sustained attention to rights deliberations.

Jeremy Waldron takes the example of the U.K. to show the quality a Parliamentary debate can acquire under a "ground-up" culture. He cites a debate in the House of Commons on the Medical Termination of Pregnancy Bill from 1966:

> This was a bill proposing to liberalize abortion law. The second reading debate on that bill is as fine an example of a political

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39 *Vital Stats: Performance of Parliament during the 15th Lok Sabha,* PRS Legislative Research, available at http://www.prsindia.org/administrator/uploads/general/1393227842~~Vital%20Stats%20-%20Performance%20of%2015th%20Lok%20Sabha.pdf , last seen on 4/08/2018 ("Productivity of the 15th Lok Sabha has been the worst in the last fifty years").

40 *Vital Stats: Parliament functioning in Budget Session 2018,* , PRS Legislative Research, available at http://www.prsindia.org/uploads/media/Budget%202018/Vital%20Stats%20-%20Budget%20Session%202018.pdf , last seen on 4/08/2018.

41 Ibid.

42 Ibid.

43 See J. K. Krishnan, *Scholarly Discourse, Public Perceptions, and the Cementing of Norms: The Case of the Indian Supreme Court and a Plea for Research*, Articles by Maurer Faculty (2007), https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1311&context=facpub, last seen on 4/08/2018.

44 Supra 5, at 173.

45 Ibid., at 175.

46 G. Huscroft, *Constitutionalism from the Top Down*, 45 Osgoode Hall Law Journal, 91 (2007).

> institution grappling with moral issues as you could hope to find. It is a sustained debate — about one hundred pages in Hansard — and it involved pro-life Labour people and pro-choice Labour people, pro-life Conservatives and pro-choice Conservatives, talking through and focusing on all of the questions that need to be addressed when abortion is being debated. They debated the questions passionately, but also thoroughly and honorably, with attention to the rights, principles, and pragmatic issues on both sides. It was a debate that in the end the supporters of the bill won; the pro-choice faction prevailed. One remarkable thing was that everyone who participated in the debate, even the pro-life MPs (when they saw which way the vote was going to go), paid tribute to the respectfulness with which their positions had been listened to and heard in that discussion. Think about that: How many times have we ever heard anybody on the pro-life side pay tribute to the attention and respectfulness with which her position was discussed, say, by the Supreme Court in Roe v. Wade?[47]

In sharp contrast to the above example is the Indian Parliament's engagement with an equally contentious and morally important rights issue – i.e. affirmative action. The government of Prime Minister V. P. Singh sought to introduce, in 1990, the recommendations of the Report of the Backward Classes Commission (i.e. the Mandal Commission Report).[48] The commission recommended a greater level of caste-based reservations in a wide sphere of activities.[49] This move was met with violent and widespread student protests across India,[50] and those opposing the move believed that it would further entrench casteism in the country.[51] The SCI, in *Indra Sawhney v. Union of India*,[52] had ruled that caste-based reservations for promotional posts in public employment are invalid. In 1995, union Parliament sought to reverse this decision through a constitutional amendment that inserts a new provision – Article 16 (4A) – into the chapter on fundamental rights.

The 1995 amendment was whisked through a single-day session of the Lok Sabha and passed with 319 votes and just one dissenting vote.[53] Matters moved more hastily in the Rajya Sabha, where the Bill was passed with 126 votes (to Nil), on the very same day it was passed in the Lok Sabha, and with absolutely no discussion on its contents or implications.[54] Rajeev Dhavan draws attention to the more disturbing fact that the 1995

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47 J. Waldron, *The Core of the Case against Judicial Review*, 115 The Yale Law Journal Company, Inc., 1346, 1384-1385 (2006).

48 Mandal Commission Report, *Report of the Backward Classes Commission*, (Government of India Press) (1981).

49 See D. Kumar, *The Affirmative Action Debate in India*, 32 Asian Survey, 290, 290-302 (1992).

50 See *Mandal report touches a peculiar chord among youth*, India Today (31/10/1990), https://www.indiatoday.in/magazine/special-report/story/19901031-mandal-report-touches-a-peculiar-chord-among-youth-813187-1990-10-31 , last seen on 22/08/2018.

51 Supra 49.

52 Indra Sawhney v. Union of India, AIR 1993 SC 447.

53 See M. Godbole, *India's Parliamentary Democracy on Trial*, 127-9 (2011) (for a general commentary on these proceedings).

54 Ibid.

instance was only the beginning of a larger trend that characterised Parliamentary debates (or the lack thereof) on reservations right until 2007.[55]

Hastiness or casualness in Parliamentary deliberation is certainly not exceptional in modern day India. Madhav Godbole, cites a host of instances since the 1970s that prove these attributes to be more everyday than otherwise.[56] A ground-up culture – in the limited, but crucial, realm of rights at least – will arguably create a more serious and sustained approach to Parliamentary business, which India presently lacks.

Waldron's example of the U.K. is one instance of the institutional quality a ground-up culture encourages. Canada, another weak-form review system, hints at its effects on the broader citizenry. Under Section 33 of the Canadian Charter of Rights and Freedoms, the judiciary is empowered to strike-down legislation that is incompatible with the Charter rights. The legislature, in response, can declare, by a vote of an ordinary majority, for a renewable duration of five-years, that the statute "shall operate notwithstanding a [rights] provision included in Section 2 or Sections 7 to 15 of this Charter". The five-year renewability provision makes the government's enacted position, on a judicial declaration on rights, a potential electoral question. As Tushnet puts it, "[t]he five-year 'sunset' period ensures that an election intervene between initial enactment and renewal, thereby increasing the likelihood that legislative responsibility will be enforced through political accountability."[57] As the opposition and government battle-out their rights positions in public, the broader citizenry is encouraged to develop a greater rights consciousness. The "ground-up" discourse, in this case, transforms from one which only involves the three branches of government, to include the citizenry as well.

The important outcomes in a "ground-up" culture cannot be emphasised enough. In his classic paper, *The Core Case Against Judicial Review*,[58] Waldron puts forth a comprehensive argument against judicial supremacy. Waldron rightly cautions that a weak-form review system will function optimally only if four pre-conditions are met:

> We are to imagine a society with (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law; (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what its implications are) among the members of the society who are committed to the idea of rights.[59]

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55 R. Dhavan, *Reserved! – How Parliament Debated Reservations: 1995-2007*, (2008).
56 Supra 53, at 39-141 (see particularly, 101-4).
57 Supra 3, at 325.
58 Supra 47.
59 Ibid, at 1360.

Waldron's four conditions rest on the political and constitutional culture of a society. These address not just the three branches of government, but also the citizenry. Understandably, students of Indian public life will be quick, and correct, to conclude that India, presently, does not satisfy Waldron's lofty conditions. However, the "ground-up" culture, which is a by-product of the weak-form review system, is, interestingly, the very factor than enables its effective operation. By turning to weak-form review, India can work with the ground-up possibilities embedded in it to create the constitutional culture required for the system to operate. Of course, the establishment of such a culture might take several years, and much will also depend on the effectiveness with which institutions and citizens adapt to weak-form review. But this is hardly a reason to discard the argument for weak-form review; like any constitutional experiment of this magnitude, its promise can only be presented in likelihoods, strong likelihoods, and not in guarantees. The mechanics of weak-form review offer a compelling and organic possibility of developing a ground-up constitutional culture, which the present regime simply does not.

This being said, Waldron's third condition does raise some genuine concern in the Indian context. Since democracy is organised on majoritarian terms, will minority rights and concerns be pushed to the margins in a weak-form review system? This question is addressed in the last thematic subtheme of this part.

### 4.2. *The Legitimacy and Breadth of Rights Deliberations*

Judicial reasoning on rights is centred on a Bill of Rights – Part III of the constitution, in the Indian context. Indeed, the presence of a Bill of Rights comes with its attendant benefits. It offers a "valuable way of rendering rights and their limits more concrete and specific, of mooring potentially abstract or hypothetical issues in reality."[60] Further, compared to common law liberties embedded in the Westminster-style system, a charter of rights is relatively less vague in determining the existence and content of an entitlement.[61] However, judicial reasoning on rights is extremely limited.

The words in a Bill of Rights may not be constructed keeping in mind the nature of rights disputes. Even if they do, they may feature rights-disagreements that existed at the time of the charter's framing which need not exist in the same form today. The apparent emphasis on "procedural due process" in the text of Article 21 is a case in point. Constitutional Advisor, B. N. Rau, recommended against a substantive due-process clause based on the influences he had received from his travels in the United States – namely from American Supreme Court Justice Felix Frankfurter.[62] His recommendation was debated and eventually accepted by the Constituent Assembly. Less than three decades after the constitution's enactment, the SCI recognised the need for a substantive due-process clause. It then proceeded to "read into" Article 21 a guarantee to that effect which the provision did not explicitly state.[63]

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60 Supra 5, at 174.

61 Ibid.

62 G. Austin, *The Indian Constitution: Cornerstone of a Nation*, 129-30 (2016).

63 See A. Chandrachud, *Due Process*, 777, 777-93 in *The Oxford Handbook of the Indian Constitution* (S. Choudhry, M. Khosla, et al, 2016).

Moreover, reliance on a Bill of Rights in systems of judicial supremacy results in a certain rigid textualism. "Judicial supremacy, with its associated tendency towards exclusivity and monologue in rights reasoning, is especially problematic in the inevitable real-world context of reasonable disagreement – among judges, between courts and legislatures, and among citizens – regarding the meaning, scope, application and permissible limits on the relatively abstract text of a bill of rights."[64] While this fact is problematic, it is understandable. Waldron rightly points out that the legitimacy of the judicial process relies on authoritative texts of law.[65] Judges, therefore, are naturally meant to anchor their positions in a charter of rights, its words, and the precedents that guide the manner in which it must be read.

In systems of weak-form review, deliberations on rights are widened. In Parliamentary debates, the judicial or legal interpretations of a court are considered against broader moral, cultural, political and policy questions. As Gardbaum points out, the legitimacy of Parliamentary reasoning does not rest on textual reliance on a Bill of Rights.[66] A weak-form review system "helps to resolve the well-known problems of (a) the over-legalisation or judicialization of principled public discourse, and (b) the legislative and popular deliberation that has long been identified as a major cost of constitutionalisation."[67]

Michael Moore expresses his preference for judicial reasoning in separate terms: "judges are better positioned for… moral insight than are legislatures because judges have moral thought experiments presented to them every day [sic] with the kind of detail and concrete involvement needed for moral insight."[68] Waldron persuasively counters this view on two grounds. First, by the time a case reaches the higher appellate levels of litigation, "almost all trace of the original flesh-and-blood right holders has vanished, and argument, such as it is revolves around the abstract issue of the right in dispute."[69] Second, the legislative process is more open to moral deliberation and broader engagement with interested parties. This is achieved through Parliamentary debates, committee enquiries, lobbying and hearings.[70]

Weak-form review systems, however, acknowledge the advantages of judicial reasoning. As Tushnet notes, where an outdated statute exists in the books, the legislative urgency to update or remove the law may not exist.[71] This is possibly because the outdated law may cause harm to relatively few people.[72] Further, Parliament may inadvertently include in a legislation, provisions that are unconstitutional. The unconstitutionality of such provisions may not be apparent to the law's drafters. A judicial decree has the benefit of drawing the legislature's attention to these matters, thereby "shifting the burden of legislative inertia".[73] Experience in the U.K. shows that quite often Parliament does agree

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64 Supra 5, at 173.
65 Supra 47, at 1381-2.
66 Supra 5, at 173-4.
67 Ibid.
68 M. S. Moore, *Natural Law Theory: Contemporary Essays*, 188, 230 (1992).
69 Supra 47, at 1379-80.
70 Ibid.
71 Supra 1, at 59.
72 Ibid.
73 Ibid.

with the judiciary on its decrees regarding outdated or unconstitutional provisions, and proceeds to make necessary amends.[74]

A weak-form review system, as can be seen, attempts to blend the best of judicial and parliamentary reasoning to widen discourses on rights. This "widening" is achieved by removing the final word on rights from the judiciary and allowing Parliament to respond within its broader, extra-legal idiom of deliberation.

The greater legitimacy of legislative decision-making procedures is another reason to empower Parliament with the final word. In both legislative and judicial decision-making processes, conclusions are arrived at through majority decision (MD) – i.e. in cases involving a bench of over one judge. Legislators are elected to Parliament through popular elections (one form of MD) and their decisions are enacted by an MD among their number. "The theory is that together these provide a reasonable approximation of the use of MD as a decision-procedure among the citizenry as a whole (and so a reasonable approximation of the application of the values underlying MD to the citizenry as a whole)."[75] Contrast this with the judicial use of MD. Judges, needless to say, are not democratically appointed. There is no reason, in terms of procedural and democratic legitimacy, for judicial decisions to prevail over its legislative counterpart.

### 4.3. *Securing Judicial Independence*

In an excellent study of six jurisdictions – Hungary, South Africa, Romania, Egypt, Sri Lanka and Turkey – Gardbaum shows that "strong courts" can be detrimental for the independence of judiciaries in new and transitional democracies.[76] Judicial independence can be thought of in two terms. First, is in the freedom from government control or influence in judicial decision-making. Second, is in the absence of prejudice, partisanship and partiality in judicial decisions. Both aspects of judicial independence, Gardbaum argues, are under threat when courts exercise strong-form review in new or transitional democracies.[77]

In the inaugural or transitional years of a nation, each branch of government will be vying for dominion over power. A judiciary that exercises strong-form review in such scenarios runs the risk of placing itself against the State as an "adversary". This confrontation inevitably leads to interference by the executive or legislature with the judiciary. Attempts are likely to be made by politicians to control judicial appointments, for instance, or to make these appointments for political purposes. This ultimately was the case in the six countries Gardbaum studies,[78] and it is a sorry eventuality in which the judiciary must necessarily share blame. As Gardbaum explains:

> …just as judicial independence is not equivalent to and does not require full autonomy from the other branches of government, so too it is not equivalent to and does not require judicial supremacy

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74 Ibid.
75 Supra 47, at 1388.
76 S. Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?*, 53 *Columbia Journal of Transnational Law*, 285, 285-320 (2015).
77 Ibid, at 305-6.
78 Ibid, at 294-303.

> over them. In other words, although there is no single model for ensuring judicial independence, there may be a single model for endangering it in the particular context of new and transitional democracies.[79]

The SCI was alive to the dangers of strong-form review during the early years of the Indian republic. B. Sen recalls that "[t]he Supreme Court's inclination towards upholding the constitutional validity of legislations… ensured a harmonious relationship between the three organs of State – the Executive, the Legislature and the Judiciary – which was so vital for the survival of an independent judiciary in the formative years."[80]

The view that India remains a young country might be debatable. However, India arguably is a "transitional" democracy – i.e. from the perspective of its judiciary's current strong-form avatar. Of the jurisdictions Gardbaum studies, each featured sufficient legislative majorities that could effectively weaken their activist courts.[81] His study of Hungary is particularly instructive.[82] The Hungarian Constitutional Court was activist right since its creation in 1990.[83] However, for more than a decade, the Hungarian government only held a plurality in Parliament, and not a majority of seats.[84] Only in 2012, on being elected with a sufficient majority, could Prime Minister Viktor Orban finally and weaken judicial power through a series of constitutional amendments.[85] In India, the post-Emergency character of judicial activism – starting with the SCI's watershed ruling in *Menaka Gandhi v. Union of India*[86] – coincided with the formation of the country's first coalition government – i.e. the Janata government.[87] The emergence of Public Interest Litigation in the early 1980s – which rendered the courts even more "strong" – was followed by a more entrenched spell of coalition governments from the late 1980s onwards.[88] It is a well-studied fact that coalition governments find it relatively difficult to muster legislative majorities to overturn adverse judicial verdicts.[89] The waning-away of single party dominance in Parliament from the late 1970s onwards arguably weakened the legislative power required to "correct" an activist judiciary. The "transition" to a stronger, more activist, SCI was accompanied by a Parliament whose powers of response were steadily being "diffused" by coalition alliances.[90]

Therefore, like in Hungary's example above, it is no coincidence that the very first act of a government with full-majority in Parliament in twenty years was to enact a Judicial Appointment's Bill to heighten executive input into judicial appointments.[91] In the period of the same government, it is also no coincidence that four of the senior most

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79 Ibid, at 306.
80 B. Sen, *Six Decades of Law, Politics and Diplomacy: Some Reminiscences and Reflections*, 92 (2016).
81 Supra 76, at 294-303.
82 Ibid, at 295-7.
83 Ibid.
84 Ibid.
85 Ibid.
86 Menaka Gandhi v. Union of India, AIR 1978 SC 597.
87 See supra 12, at 43-51, 63-86.
88 Ibid., at 63-86.
89 Supra 1, at 58-60.
90 Supra 14, at 102.
91 Supra 26, at 240.

judges of the SCI – i.e. after the Chief Justice – chose to come out in public, in an unprecedented fashion, to allege executive meddling with the higher judiciary.[92]

The link seen between strong-form review and judicial independence in this section is useful. The threats faced by judicial independence in India today can arguably be related to the confrontational posturing of the SCI contra the legislature and executive. A turn towards weak-form review, therefore, will, possibly, secure the health of the Indian judiciary, as much as it will the quality of rights discourse among the legislature, and citizenry at large.

### 4.4. *The Tyranny of the Majority*

Since democracy is organised on majoritarian terms, will minority rights and concerns be pushed to the margins in a weak-form review system? This concern is typically expressed under the phrase "the *tyranny of the majority*".

Waldron approaches this question with two useful terminologies. He describes decision-makers in the legislative process as "decisional" minority and majority and "topical" minority and majority.[93] The former refers to those members of the legislature whose decision *determines* the rights matter in question. The latter refers to those whose rights are *at stake* in the decision. Membership of the decisional majority may coincide with those of the topical majority, and vice-versa, in the case of topical majorities and minorities.

Injustice, or tyranny, explains Waldron, can be established if two facts exist: "(1) that the decision really was wrong and tyrannical in its implications for rights of those affected; and (2) that I was a member of the topical minority whose rights were adversely affected by this wrong decision."[94] This categorisation is useful as it places the word "tyranny" in its correct context. Merely because a minority point of view is rejected, it does not become tyrannical.

Tyranny, as classified above, exists as real possibilities, particularly in India whose population is fractured on lines of religion, language, class and caste. Waldron, however, in his "core case", refers to a society which fulfils the four criteria necessary for a system of weak-form review.[95] Tyranny is unlikely to take place where his third criterion is found to exist – i.e. a society which embodies a commitment to rights, particularly towards those of minorities.[96] India, as we have acknowledged, is yet to fully show that it satisfies Waldron's four criteria. However, it is important to recall our previous discussion on the "ground-up" discourses weak-form review instils. The majoritarian tyranny such a system may embolden is accompanied by the strong likelihood that the Indian citizenry will be more alive to questions of rights. Rights, here, will play a definitive role in whom the electorate returns to political office. Political

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92 '*Democracy is in danger,'* Scroll.in (13/01/2018), https://scroll.in/video/864863/democracy-is-in-danger-watch-the-historic-press-conference-held-by-four-supreme-court-judges , last seen on 5/08/2018.

93 Supra 47, at 1397.

94 Ibid.

95 Supra 59.

96 Supra 47, at 1398-1400.

parties will be compelled to argue their positions on rights in the public domain and eschew – to a relative degree at least – reliance on vague promises like those of "development". In a multi-party system like India's – where multiple constituencies and ideas vie for influence in the public domain – the discourse on rights promises to be vibrant and complex. And in such a scenario, there is no evidence to the claim that majorities will frequently attempt to subordinate the interests of minorities. Indeed, under the present regime itself, there are those in the majority that may support affirmative action, as there are those in the minority who may not. Similarly, some members of religious or tribal minorities might endorse a Uniform Civil Code, as there may be those in the majority who wish to retain official recognition of personal laws.

The weak-form review procedures in the U.K. and New Zealand require the minister concerned (i.e. whose ministry introduces a Bill in Parliament) or the Attorney General, respectively, to make a statement in the House as to a Bill's compatibility with rights statutes. Further, in the U.K., the Parliamentary Joint Committee on Human Rights is tasked with the responsibility of scrutinising every Bill against the Human Rights Act, 1998 ("HRA"). The government, even a majoritarian one, bears the burden of establishing that a law it wishes to pass is compatible with rights. The legislative caution applied on rights matters is evident in the U.K., especially when Parliament responds to a judicial Declaration of Incompatibility (DOI).[97] Out of 21 DOIs, Parliament or the government have almost always responded by remedying the rights violations mentioned in them.[98] In fact, scholars like Kavanagh view such legislative deference as characterising the U.K. system as more "strong" than "weak": [99]

> …there is multiple sources of political pressure on the U.K. Government to comply with declarations of incompatibility. Not only is there the problem of adverse publicity attracted by a judicial ruling declaring that legislation violates rights, these rulings are often seized upon by Opposition MPs to galvanize opposition to the Government's policy within Parliament.[100]

Governments, therefore, are likely to be very cautious in promoting tyrannical laws; the act of justifying a manifestly tyrannical law in public arguably comes with its political costs. The theoretical possibility of majoritarian tyranny, therefore, can be countered with alternate possibilities. The proof of the pudding is in the eating. Only by implementing a system of weak-form review and giving it time to adjust to the country's political context, can one confirm its true implications.

On a final note, it is problematic to characterise decisions by legislative or popular majorities as particularly tyrannical. Courts can also be tyrannical in their decisions and

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97 Note that the first effort of the judiciary in the U.K., vide Section 3 of the HRA, is to interpret the rights-incompatible statute so as to render it compatible with Convention rights – i.e. of the European Convention on Human Rights as manifest in the HRA. Should such a rights-consistent interpretation not be possible, Section 6 of the HRA requires the judiciary to issue what is called a "Declaration of Incompatibility" (DOI). A DOI, unlike the parallel provision on this subject in Canada, does *not* affect the validity of the contested legislation.

98 Supra 9, at 1025.

99 See supra 9.

100 Ibid, at 1024-5.

they too express their verdicts in the language of majorities. As Waldron puts it, "tyranny is tyranny irrespective of how (and among whom) the tyrannical decision is made".[101] Also, the majoritarian quality of a legislative decision is relatively mitigated by the fact that "there was at least one non-tyrannical thing about the decision: It was not made in a way that tyrannically excluded certain people from participation as equals."[102]

## 5. Conclusion

There exists a broad consensus in Canada, New Zealand and the U.K. over the success of weak-form review.[103] The view in the U.K. is that "there is now greater rights consciousness than before – among citizens, courts, Parliament and the government – and the rights that exist are generally better and more widely known and understood than under the pre-HRA regime of common law rights as supplemented by various specific statutory provisions."[104]

The constitutional cultures in these countries vary significantly from that of India's. However, there is no compelling reason I can think of that denies India the possibility of successfully implementing, and reaping the benefits of, a weak-form review system (i.e. in the limited context of fundamental rights compliance review of legislation).

I began this article by introducing the concept of weak-form review. Before delving into my main argument – i.e. developing a case for weak-form review in India – I had to justify the Indian instance as one that was "strong". The need for this arises as there is a scholarly position which holds that Indian judicial review, though strong in design, is, in practice, a variant of weak-form review. In the second section of this article, I divided the defence for weak-form review into four subthemes. The first subtheme explored the "ground-up" culture a weak-form review system creates in a democratic society. This culture, I argued, will heighten legislative activity and render Parliament more careful and serious in deciding on rights matters. It was also found that the "ground-up" culture, a by-product of the weak-form review system, is also the very factor than enables its effective existence. The second sub-theme looked at the superiority of rights reasoning in a weak-form review system. The possibility of legal as well as extra-legal deliberations on rights, the absence of rigid textualism in considering rights questions, greater representation of various interested parties in rights discussions and the superior democratic legitimacy of legislative decision-making were among the benefits that were found to attend weak-form review. The third subtheme examined the relationship between judicial independence and weak-form review – particularly in fledgling and transitional democracies. This logic was found to resonate with the Indian context. An argument was therefore made that judicial independence is better secured in systems of weak-form review than it is in those where the judiciary takes a more confrontational posture towards the other branches of government. The final subtheme examined the very real possibility of a weak-form review system in India descending into majoritarian

101 Ibid, at 1396.
102 Ibid.
103 Supra 5, at178-198.
104 Ibid, at 198.

tyranny. The word "tyranny" was defined and placed in context. While the theoretical possibility of majoritarian tyranny was acknowledged, it was also countered with alternate possibilities. It became clear, thereafter, that only by implementing a system of weak-form review and giving it time to adjust to the country's political context, can one confirm its true implications.

To discuss the possibility of weak-form review in India is a mammoth task. Not only does it involve building a case for the system – which this article has modestly attempted to do – but it also requires careful consideration of the *form* weak-from review will take in India, and the manner in which it will be implemented. For instance, what will the language of judicial review reform be? What must be done to ensure that the system functions as it must both in design and practice? Must courts be given an "interpretive" mandate like they are in New Zealand and the U.K., or an "overriding" mandate as in the case of Canada. In other words, must the decoupling of judicial review from judicial supremacy, take the form of the courts "interpreting" statutes, to the extent possible, in a way compatible with rights, or should the courts have the power to invalidate a rights-inconsistent statute (subject, of course, to a legislative "override" as is the case in Canada). Also, what will be the precise nature of Parliamentary scrutiny over rights? Will there be a special Parliamentary committee appointed to aid Parliament in this process? What will the role of the Attorney General be? More broadly, what will be the fate of existing rights jurisprudence in India? What will become of the Basic Structure Doctrine? Should weak-form review be implemented, can such structural change take place through the regular constitutional amendment procedure or does a new constituent body need to be convened? Finally, will a possible turn to weak-form review be temporary (i.e. experimental)? If so, how much time to test the waters must the system receive? Five years? Ten years? These questions are crucial and considering them, in turn, can result in a series of new articles.

Of course, it is entirely possible that weak-form review may never succeed in this country. One can never be certain of this, however, without giving the system a chance.

The proof of the pudding, one repeats, is in the eating. This paper, therefore, serves as an invitation to an experiment – one that is arguably as promising as it is risky.